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THE IRRELEVANCE OF THE CONSTITUTION: THE FIRST AMENDMENT'S FREEDOM OF SPEECH AND FREEDOM OF PRESS CLAUSES

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The general proposition of this Article is that the American Constitution has become irrelevant to the creation and recreation of that body of legal doctrine which we have come to know as constitutional law. More particularly, it deals with the rules purportedly derived from the language of the first amendment to the Constitution, which is concerned with freedom of speech and the press. It will readily be seen, I submit, that although the constitutional language was promulgated in the eighteenth century, the governing principles are purely of twentieth century manufacture, beginning about the third decade of this century and formulated and reformulated thereafter but not before.

In 1791, the first Congress' Bill of Rights became effective as the first ten amendments to the four-year old Constitution. The first of these amendments provided, in part, that "Congress shall make no law. . .abridging the

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freedom of speech, or of the press. . . ."¹ There was a basic ambiguity in the words "abridging the freedom of speech, or of the press." However, there was no ambiguity in the language with which the amendment opened: "Congress shall make no law. . . ." It is a matter of speculation why the constitutional restraint was limited to Congress. It might have been that the framers of the amendment were of the eighteenth century view that of the three branches of the national government, only Congress could enact rules of behavior for Americans; that the roles of the executive and the judiciary were limited to the effectuation of the rules created by the legislative branch; and, therefore, that there need be no fear that the second and third branches would, in the absence of legislation which was forbidden, infringe the liberties sought to be protected by the constitutional provision.

A second hypothesis goes back to the original contest over the omission of a bill of rights when the 1787 document was formulated and offered for ratification. As Hamilton made clear in his 84th *Federalist*, the argument of the sponsors of the new Constitution was that the national government had no authority except that which was specifically granted to it and that a series of negatives on powers that were not granted, such as a bill of rights must be, would only give rise to the inference that the national government did have some authority in those very areas that were limited by the provisions of a bill of rights.² The anti-Federalists, with some prescience—and perhaps with more honesty than the Federalists—predicted that the specific powers put in the hands of the national legislature would, indeed, be extended by inferences, especially those to be drawn from that clause of article I which provided that: "The Congress shall have Power. . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."³ Their fears on this score were realized when John Marshall announced in *McCulloch v. Maryland*,⁴ in adoption of a position earlier stated by Hamilton,⁵ that the word "necessary" meant only "useful" and the word "proper" meant only "convenient."⁶

It has been assumed, therefore, that the first amendment was a provision that underlined the lack of power in Congress to exceed the enumerated powers given to it by the first article, lest Congress assume that regulation of speech or press could be appropriate means to the effectuation of its enumerated powers. The necessary and proper clause conferred no similar authority on the executive or judicial branches and, it might have been thought, that the insistent negative need not be addressed to them. The

1. U.S. CONST. amend. 1.

2. THE FEDERALIST No. 84 (A. Hamilton) 156 (E. Bourke ed. 1901).

3. U.S. CONST. art. I, § 8, cl. 18.

4. 17 U.S. (4 Wheat.) 316 (1819). See G. GUNTHER, JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND (1969).

5. See S. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON ch. 8 (1964).

6. 17 U.S. (4 Wheat.) at 413-20.

authors of the first amendment apparently did not foresee that executive and judicial power were more expansive without the necessary and proper clause than the legislative power was with it.

It was clear that the inhibition on the power of Congress contained in the first amendment left the state governments unfettered in their power to deal with speech and press. Thus, as Leonard Levy has told us, in the tradition of Professor Corwin, "the primary purpose of the First Amendment was to reserve to the states an exclusive legislative authority in the field of speech and press."⁷ In 1925, however, the provisions of the first amendment were held to be also a limitation on the states because of the enactment of the fourteenth amendment. In *Gitlow v. New York*,⁸ the Court pronounced its *ipse dixit*: "[f]or present purposes we may and do assume that freedom of speech and freedom of the press. . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Just three years earlier, the same Court had equally cavalierly announced that the Constitution "imposes upon the States no obligation to confer upon those within their jurisdiction. . . the right of free speech. . . ."⁹ Whoever looks to the history of the formulation of the fourteenth amendment will search hard and long without success for any indication that protection of free speech or free press was to be effected by the promulgation of the due process clause of the fourteenth amendment. Clearly, it had not been considered a part of the same language in the fifth amendment.¹⁰

Before considering the twentieth century formulations of the first amendment, it is helpful to return to the original language and the ambiguity referred to earlier. The constitutional language, it will be recalled, is that "Congress shall make no law. . . abridging the freedom of speech, or of the press. . . ." It did not say "abridging speech or press" but rather "the freedom of speech, or of the press." Obviously, the language can be read, as many would now read it, as a total ban on any inhibition of speech or press. Mr. Justice Black, for example, found no difficulty in that construction.¹¹ But most, and not least those contemporary with the promulgation of the amendment, thought that it was a ban only on infringement of that freedom of speech and press already defined by the English Constitution. That is, the freedom to speak and to publish which Americans enjoyed in 1791—and only that freedom—were not subject to limitation by Congress.

7. Levy, *Liberty and the First Amendment: 1790-1800*, 68 AM. HIST. REV. 22, 30 (1962); accord, Corwin, *Freedom of Speech And Press Under The First Amendment: A Resume*, 30 YALE L.J. 48 (1920).

8. 268 U.S. 652, 666 (1925).

9. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 538 (1922).

10. See Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926).

11. See Snowiss, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187, 191-92, 227-37.

I return for an example of the problem to Hamilton's 84th *Federalist*, where he said:

What signifies a declaration, that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.¹²

Not strangely, however, Alexander Hamilton, an advocate for a publisher client caught in the toils of the libel law, was able to define the meaning of "freedom of the press." In his argument in *People v. Croswell*,¹³ in 1804, he said: "[t]he liberty of the press consisted in publishing with impunity, truth with good motives, and for justifiable ends, whether it related to men or to measures."¹⁴ That was too broad a freedom to be accepted by the court before which he appeared,¹⁵ but it became a standard definition until it was thought too narrow.

It is clear that the most widespread definition of the concept of freedom of speech and press at the time of the adoption of the first amendment was Blackstone's.

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry liberty of private sentiment is still left; the

12. THE FEDERALIST No. 84 (A. Hamilton) 156-57 (E. Bourke ed. 1901).

13. 3 Johns. 337 (Sup. Ct. N.Y. 1804). See C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 101-08 (1964).

14. 3 Johns. at 352.

15. *Id.* at 393-94. The court affirmed the trial court by a divided vote, but sentence was never imposed on Croswell. See C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 106 (1964).

disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects.¹⁶

To most of us today, this, like Hamilton's definition, sounds too restrictive of the liberty we cherish. Yet, it must be noted that none less than Mr. Justice Holmes would seem to have endorsed this meaning for the first amendment in 1907 when he wrote in *Patterson v. Colorado*.¹⁷ *Patterson* was decided fifteen years before the Court first announced that the inhibition on interference with speech or press was not a part of the fourteenth amendment and then reversed itself but three years later. Holmes said:

We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgement on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.¹⁸

This, then, was the original and limited meaning of the words of the first amendment concerning freedom of speech and press prior to the post-World War I period, when the Court began to create and recreate its own versions of the first amendment. For, as Mr. Justice Holmes remarked in *Patterson*, "[t]here is no constitutional right to have all general propositions of law once adopted remain unchanged."¹⁹ Holmes was certainly among the first to abandon the rationale of the first amendment that he had announced in *Patterson*.

As with all hard questions, the Supreme Court has tended to seek solution for problems of freedom of speech by invocation of magic phrases rather than hard rationalizations, if not by way of resolving the issues then by way of covering them up. Thus, the constitutional law of free speech has been full of more or less meaningless epigrams: "clear and present danger;" "fundamental freedoms;" "chilling effects;" "market place of ideas;" "commercial speech;" "seditious libel;" "the public forum;" the "central meaning of the first amendment;" "redeeming social value." The list is almost limitless. Many times Mr. Justice Holmes thought it appropriate to remind us of

16. 4 W. BALCKSTONE, COMMENTARIES *151-52.

17. 205 U.S. 454 (1907).

18. *Id.* at 462 (citations omitted)(emphasis in original).

19. *Id.* at 461.

the difficulties created by reliance on such formulae. Once, in a speech entitled "Law in Science and Science in Law," he opened with these words:

The law of fashion is a law of life. The crest of the wave of human interest is always moving, and it is enough to know that the depth was greatest in respect of a certain feature or style in literature or music or painting a hundred years ago to be sure that at that point it no longer is so profound. I should draw the conclusion that artists and poets, instead of troubling themselves about the eternal, had better be satisfied if they can stir the feelings of a generation, but that is not my theme. It is more to my point to mention that what I have said about art is true within the limits of the possible in matters of the intellect.²⁰

And I would add, in matters of constitutional law as well. "[B]ut that it not my theme."²¹ I mean rather to quote his proposition in the same talk:

My object is not so much to point out what seem to me to be fallacies in particular cases as to enforce by various examples and in various applications the need of scrutinizing the reasons for the rules which we follow, and of not being contented with hollow forms of words merely because they have been used very often and have been repeated from one end of the Union to the other. We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.²²

For most of its history, the constitutional protection of freedom of speech and press has been thought to be a necessary means to the end of preserving democracy or self-government.²³ Today it is suggested that freedom of speech and press is an end in itself.²⁴ On the latter ground, of course, no governmental inhibition of speech or press can be tolerated.²⁵ The older view was stated by Mr. Justice Cardozo in an opinion that has long since been rejected by the Court in all its other parts, that free speech is "the matrix, the indispensable condition, of nearly every other form of freedom."²⁶ This understanding is still vulnerable to another of Mr. Justice Holmes's observations: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law."²⁷

20. O. HOLMES, COLLECTED LEGAL PAPERS 210 (1920).

21. *Id.*

22. *Id.* at 238.

23. See generally A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

24. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576-79 (1978).

25. See, e.g., Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

26. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

27. *Lochner v. New York*, 198 U.S. 45, 76 (1905)(dissenting opinion).

Nevertheless, it is to Holmes that we owe the general proposition that, despite the persistent criticism of contemporary liberals, has remained a great force for the resolution of first amendment cases and controversies.²⁸ The reduction of the principle to the phrase "clear and present danger" ignores the highly persuasive rhetoric with which the standard was framed in dissent in *Abrams v. United States*:²⁹

I do not doubt for a moment that by 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. . . . 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.

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. . . . 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."³⁰

The proposition that truth must prevail over falsehood is derived from John Milton's rhetorical question, "who ever knew Truth put to the worse,

28. Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

29. 250 U.S. 616 (1919). The origins of the doctrine were not in *Abrams* but in *Schenck*. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). But, as Harold Laski wrote to Holmes about *Abrams*, "that amongst the many opinions of yours I have read, none seems to me superior either in nobility or outlook, in dignity or phrasing, and in that quality the French call *justesse*, as this dissent. . . ." 1 HOLMES-LASKI LETTERS 220 (M. Howe ed. 1953).

30. 250 U.S. at 627-31 (dissenting opinion).

in a free and open encounter?"³¹ This is a naiveté difficult to accept in the light of modern experience. And, in any event, truth is a highly discounted value in modern Supreme Court free-speech principles.³² Equally dubious, and more important for our immediate purposes, is Holmes's proposition that his newly created concept somehow was to be found within the words of the first amendment.

The primary point to be made, however, is that the formula yielded no decisions, for as Mr. Justice Brandeis wrote, with Holmes's concurrence in 1927, in *Whitney v. California*,³³

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 abridgement of free speech and assembly as the means of protection.³⁴

What was true in 1927 remains true more than half a century later. What the clear and present danger test did was to transfer legislative function, in the balancing of competing social interests, to the judiciary. Thus, ten years before the Smith Act Communist cases came to the Supreme Court, Professor Herbert Wechsler recognized that the doctrine only substituted a degree of judicial discretion for legislative discretion, a degree of judicial judgment for legislative judgment, a degree of judicial predilections for legislative predilections:

The use to which freedom is put must threaten social interests; the danger inherent in the threat must not be outweighed by an affirmative good which the behavior entails. In short, what the clear and present danger test can do, and all it can do, is to require an extended judicial review in the fullest legislative sense of the competing values which the particular situation presents. And the scope of that judicial review may be limited by what is in effect a presumption of validity, or a deference to legislative judgment, at least where the legislation condemns specific doctrine or specifically described types of meetings.³⁵

Surely Wechsler's evaluation was ratified by the Supreme Court's decision in *Dennis v. United States*,³⁶ where the Court divided so thoroughly both about the meaning of the clear and present danger test and the proper mode for its application.³⁷ It is not evident whether *Dennis* should be re-

31. J. MILTON, *AREOPAGITICA* 74 (E. Arber ed. 1868).

32. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 525 (1964).

33. 274 U.S. 357 (1927).

34. *Id.* at 374 (Brandeis, J., concurring).

35. Wechsler, *Symposium on Civil Liberties*, 9 AM. L. SCH. REV. 881, 887 (1941).

36. 341 U.S. 494 (1951).

37. In part, the issue was reminiscent of the early libel cases, where the question was whether the issue of truth was to be submitted to the jury. *See, e.g.*, *People v. Croswell*, 3 Johns. 337 (Sup. Ct. N.Y. 1804). In *Dennis*, it was whether the questions stated to be judicially

garded as the last breath of the clear and present danger test or merely the beginning of its transmutation.³⁸ The majority of the Court, speaking through Chief Justice Vinson, and particularly the concurring opinions of Justices Frankfurter and Jackson, still indulged a presumption of validity for the legislative judgment. This conception of the relative functions of the legislature and the judiciary, however, was certainly dying in the fifties and was buried in the sixties and seventies. If the clear and present danger test was thought to have included deference to the legislature, as it seemed to do in suggesting that the judgment as to the evil to be abated belonged to it, then clear and present danger is now shopworn and useless, for it no longer conforms to the judiciary's notions about the lack of limits on its own authority.

The change was brought about, in part, because the free speech problems after *Dennis* did not center on revolutionaries wedded to an ideology attached to a foreign power. The reform movements—reform is so much softer a word than revolution—were primarily of a domestic nature. They were less ideological than pragmatic, the objectives were less totalitarian and more humane, and, in large part, they were made up of groups that had the wholehearted sympathy of most of the Justices, which was not the case with the Smith Act prosecutions of Nazis and Communists. Moreover, the issues tended not to be merely issues of speech and advocacy, but of speech combined with action, and particularly of speech combined with assembly. And so, while the words and intentions of the framers of the Constitution remained the same, the problems were different, and the Court chose to rewrite the Constitution in terms of the new problems.

Once again the Court has effected its amendments to the Constitution not in terms of reasons but in terms of slogans. Perhaps this may be attributed to the *zeitgeist*, for as Professor John Wain has said of our times³⁹ “[a]n age that puts its trust in the ordering intellect will distrust and underplay the instincts. An age like ours which worships the instinctual will become anti-rational. It is no accident that our age has seen reason and lucidity sink to their lowest levels of esteem since man came down from the trees.” In another passage in the same book, he wrote “there is a deeper form of cant, the habitual use of misleading language which arises partly from a wish to deceive others and partly from a deeper need to deceive ourselves.”⁴⁰ It would be harsh to speak of the Supreme Court's free speech vocabulary as cant, but it would be impossible to speak of it as reason.

The late Harry Kalven, whose judgment on this subject I esteem more than I do any other person's, and who certainly was a friend of an expansive

undefined by Brandeis in *Whitney* should be answered by judge or jury. See text accompanying note 32 *supra*.

38. See note 27 *supra*.

39. J. WAIN, *SAMUEL JOHNSON* 157 (1974).

40. *Id.* at 247.

free-speech doctrine as well as of its judicial expositors, once wrote "[i]ndeed, it would not be a bad summary of the last three decades of First Amendment issues in the Court to say simply: Jehovah's Witnesses, Communists, Negroes."⁴¹ He wrote in 1965, in the midst of the great new changes in constitutional doctrine:

As we try to fit the results of these cases into the existing legal framework, we have an acute sense of history repeating itself albeit with a new twist. The great civil liberties issues of the postwar decade centered on the national efforts to curb the domestic communist conspiracy. It is not entirely poetry to say that the NAACP is from the standpoint of the beleaguered South a second domestic conspiracy aiming at a revolution. And the Southern states have responded to the challenge by seeking to adapt the legal methods used to fight communism. Thus far the tactic has been highly unsuccessful. There is, therefore, little suspense in the story we are about to tell; the outcome is wholly predictable. The Court will protect the NAACP.⁴²

The reason for abandonment of clear and present danger in favor of less euphonic slogans is that the clientele of the first amendment changed; it was no longer the communist conspiracy but the beneficiaries of the Court's own 1954 Emancipation Proclamation. To resort once again to Kalven's language:

One of the most distinctive features of the Negro revolution has been its almost military assault on the Constitution via the strategy of its systematic litigation. In brief, by forcing its controversies into court, it has accelerated mightily the evolving of legal doctrine defining Negro rights. Thus the first great step in the movement has been the effort to make the United States Supreme Court confront the Negro's constitutional claims and grievances and give the Negro his constitutional due. There has been much speculation in the philosophy of law about the sources of legal growth; here, however, the stimulus is clear. Here there has been no waiting for the random and mysterious process by which controversies are finally brought to the Court; there has been rather a marshaling of cases, a timing of litigation, a forced feeding of legal growth. This has been a brilliant use of democratic *legal* process, and its success has been deservedly spectacular. I am old-fashioned enough to read the development, not as political pressure on the Court which then as a political institution responded, but rather as a strategy to trap democracy in its own decencies. The Negro rights in an important sense were always there. What was needed was a strategy for bringing them to light. The agency responsible for this remarkable development and use of law has been the NAACP.⁴³

41. H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 135-36 (1965).

42. *Id.* at 65-66.

43. *Id.* at 66-67.

It was as a result of this "forced feeding" that the Court produced a *paté* that is the new meaning of the first amendment. It was primarily in the area of protest as protected speech that the Court's new doctrines, if they could be called that, developed. The conception of the right of access to the "public forum" is a creature of the black litigation described by Kalven.⁴⁴ So, too, is the first amendment right of silence.⁴⁵ Even the concept of "the central meaning of the first amendment" as protection for seditious libel owes its creation to what Kalven called the Negro Revolution, although here it was the other side that mistakenly invoked the judicial authority.⁴⁶

By no means *all* of the expanded protection of the first amendment derived from the movement for Negro rights. The Court was equally concerned about protestors against the Vietnam war and extended the mantle of the first amendment to nonverbal expression, labelled "symbolic speech."⁴⁷ It was in this area that Mr. Justice Black left his liberal colleagues on the ground that the first amendment protected speech and the press but not conduct.⁴⁸

If these new labels were not enough, the Court indulged not a presumption of validity for legislative judgment, but rather a presumption of invalidity, theoretically subject to rebuttal, sometimes covered by a determination that the statute was overbroad or vague in attempting to meet the governmental needs.⁴⁹ Thus, without affording any new reasoned principles, the Court established new modes for keeping within its control the question when legislative or executive action, or even lower court judicial action, violates the personal predilections of at least five of nine Justices.

Certainly it must be acknowledged as true that until the Negro Revolution, street demonstrators—especially those vilifying Negroes and Jews—received little protection from the Court. The Constitution did not protect that form of speech combined with action that threatened violence or constituted group libel.⁵⁰ It was only when the Negroes and the anti-Vietnam war movements used the streets for demonstrations that the streets

44. See *Grayned v. Rockford*, 408 U.S. 104 (1972); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Stone, note 17 *supra*.

45. E.g., *Gibson v. Florida Legis. Investigating Comm.*, 372 U.S. 539 (1963); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

46. *New York Times Co. v. Sullivan*, 376 U.S. 525 (1964); see Kalven, *The New York Times Case: A Note On "The Central Meaning Of The First Amendment,"* 1964 SUP. CT. REV. 191.

47. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (United States flag with peace symbol attached); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning).

48. See H. BLACK, *A CONSTITUTIONAL FAITH* 53-63 (1969).

49. See *United States v. Robel*, 389 U.S. 258 (1967); Gunther, *Reflections on Robel: It's Not What the Court Did But The Way That It Did It*, 20 STAN. L. REV. 1140 (1968).

50. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Feiner v. New York*, 340 U.S. 315, 326-27 (1951) (Black, J., dissenting). But see *Terminiello v. Chicago*, 337 U.S. 1 (1949).

became constitutionally sanctioned public forms.⁵¹ The change in doctrine, however, was not limited to the protection of demonstrators that the Court admired. The shift has brought with it protection for the Ku Klux Klan and the Nazis as well as the fighters for minority rights.⁵²

It may well be that the protection of the movement for Negro rights was mandated by moral considerations, by judicial predilection for the causes of anti-majoritarian interests. But it is difficult to find warrant in the Constitution itself. Once again, it must be said, that the Court did not enforce the Constitution. Instead, it amended it—as it has so frequently done—in response to a “higher law,” to an ethical imperative that outweighs the Constitution on the scales of justice.⁵³

The point of this is not that the decisions have been good or bad, but that there is no reason to think that they derive from the Constitution. The only cases that can be said to rest either on the language of the Constitution or the original intention of its framers are those that continue to adhere to the Blackstonian notion of “prior restraint.”⁵⁴

The essential difficulty with unprincipled decisions is that they tend to be evanescent. Like the first little pig’s house of straw, they are subject to being levelled by new winds. And, indeed, there is much complaint from those who applauded the flimsy structure erected by the Warren Court about the rejections by newer Justices who can find no obstacles to their own predilections in the earlier decisions.⁵⁵

There may be some solace for all of use in the advice tendered by Learned Hand, one of the wisest of judges ever to sit on the federal bench, that our freedoms are too precious to be left entirely in the hands of our black-robed governors. He concluded an address on the independence of the judiciary with the following remarks. They also conclude this paper, for they cannot be improved.

And so, to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word

51. See, e.g., *Hess v. Indiana*, 414 U.S. 105 (1973); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

52. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Cf. *National Soc. Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (reversing refusal of stay of injunction against march of neo-nazi on procedural grounds).

53. Compare the now pervasive argument that equality rather than freedom is the requirement of a “just constitution” and that it is the Court’s duty to enforce the “just constitution” rather than the written Constitution.” See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971); C. FRIED, *AN ANATOMY OF VALUES* (1970); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

54. E.g., *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

55. See generally TRIBE, *supra* note 24, ch. 12.

in those basic conflicts of "right and wrong—between those endless jar justice resides." You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual. If you ask me how such a temper and such a faith are bred and fostered, I cannot answer. They are the last flowers of civilization, delicate and easily overrun by the weeds of our sinful human nature; we may even now be witnessing their uprooting and disappearance until in the progress of the ages their seeds can once more find some friendly soil. But I am satisfied that they must have the vigor within themselves to withstand the winds and weather of an indifferent and ruthless world; and that it is idle to seek shelter for them in a courtroom. Men must take that temper and that faith with them into the field, into the market-place, into the factory, into the council-room, into their homes; they cannot be imposed; they must be lived. Words will not express them; arguments will not clarify them; decisions will not maintain them. They are the fruit of the wisdom that comes of trial and a pure heart; no one can possess them who has not stood in awe before the spectacle of this mysterious Universe; no one can possess them whom that spectacle has not purged through pity and through fear—pity for the pride and folly which inexorably enmesh men in toils of their own contriving; fear, because that same pride and that same folly lie deep in the recesses of his own soul.⁵⁶

56. Address by Learned Hand, "The Contribution of an Independent Judiciary to Civilization," Anniversary Celebration of The Supreme Judicial Court of Massachusetts (Nov. 21, 1942), reprinted in L. HAND, *THE SPIRIT OF LIBERTY* 164-65 (3d ed. 1963).

