# Freedom of Speech and the Constitutional Tension Method

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In his 1925 dissent in *Gitlow v New York*, Justice Holmes wrote:

> 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.[1]

This is a remarkable thing to say. To borrow a phrase from Catharine MacKinnon, ours is a "country that is supposedly not constitutionally neutral" with regard to matters such as proletarian dictatorship.[2] People who advocate dictatorship are seeking to subvert the foundations of our Constitution, the very Constitution they invoke as their shield.

The Constitution is aimed at protecting and furthering certain values. Free speech is one of them, but so too are democracy, private property, equality, religious tolerance, and the power of the federal government to wage war effectively. For each of these values, one can reasonably ask: When the exercise of one constitutional right—freedom of speech—threatens to harm another constitutional value, why should freedom of speech necessarily prevail? Why, for instance, should the right of Communists to speak trump the preservation of the many values, including the freedom of speech itself, that Communists would surely destroy if they came to power?[3]

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1. 268 US 652, 673 (1925).

2. Catharine A. MacKinnon, *Only Words* 86 (Harvard, 1993). MacKinnon was writing about equality, but her argument seems equally applicable to democracy, a value that's of at least the same constitutional standing as equality.

3. Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U Chi L Rev 173, 186-89 (1956). See also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 31 (1971).

The existence of alternatives to punishing speech—punishing bad conduct or responding with counterspeech—doesn't answer this question. These alternatives may diminish the harm the speech inflicts, but they don't eliminate it. If, for example, I argue to people

I call this mode of argument—identifying certain values that the Constitution protects and suggesting that the Constitution's free speech guarantee must sometimes yield to these values—the constitutional tension method. It's not the approach the Supreme Court generally uses today,[4] but it's one that comes naturally when interpreting a constitution such as ours. In fact, it has been applied many times in our history by adherents of very different judicial movements.[5] The modern arguments that the Fourteenth Amendment's equal protection guarantee justifies restrictions of bigoted and pornographic speech are the most recent examples of this approach;[6] but the constitutional tension method has a distinguished history dating back to the founding of our nation, and numbering among its adherents such luminaries as Justices Frankfurter and Jackson.

In this article, I intend to briefly sketch the history of the constitutional tension method and the results that judges have reached with it. Based on that history, I'll try to respond to those who call for a renewed focus on the supposed tension between free speech and other constitutional provisions, especially the Equal Protection Clause.[7]

One can argue long and hard about the theoretical merits of the constitutional tension method in general, or of any proposal, such as the proposals to restrict bigoted speech, in particular. Others have already done so, at least with regard to the hate speech debate, and I don't want to repeat their arguments here.[8] Ultimately, however, many people make up their minds

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that bombing draft offices (or abortion clinics) is good behavior, and 90% of those people hear your urgings to the contrary and refuse to adopt my views, that still leaves the 10% as potential bombers. Similarly, even if Communist advocacy won't lead to a successful revolution, but only occasional riots or terrorism, isn't that harm enough?

The same goes for speech that interferes with the war effort. In the words of Judge Learned Hand, "[D]issension within a country is a high source of comfort and assistance to its enemies; the least intimation of it they seize upon with jubilation. There cannot be the slightest question of the mischievous effects of such agitation upon the success of the national project." *Masses Pub. Co. v Patten*, 244 F 535, 539 (S D NY 1917).

4. See text accompanying note 74; but see also note 80, describing a few recent Supreme Court decisions that seem to, in narrow contexts, use constitutional tension reasoning.

5. For an excellent discussion of past academic commentary which applied the same method, see Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 Vand L Rev 349, 366-72 (1995). Some of Professor Graber's points are similar to mine; I first saw a draft of that article shortly after I finished writing this one (in late 1994).

6. Not all the advocates of banning hate speech use constitutional tension arguments, and those who do make other arguments in addition. This article focuses only on constitutional tension arguments, and leaves the other points to others. See, for example, the sources cited in note 8.

7. My argument would apply equally to those who justify speech restrictions by reference to the Sixth Amendment, to the Due Process Clause right to abortion, or to other provisions. I focus on the equality arguments largely because they are the ones most commonly made in recent years.

8. See, for example, Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60

about such matters not on the level of constitutional theory, but in response to the likely practical results. Cautious people contemplating the proposals for balancing equality concerns with speech concerns—even those who sympathize in principle with these proposals—may well wonder what the proposals' long-term implications will be. If courts adopt a constitutional tension approach, will they stop at racist, sexist, and religiously bigoted speech? Or is it more likely that they'll take the approach further?[9]

Any answer to these questions will always be speculative, but history can inform our speculation. The constitutional tension method has a track record. Judges have used it for over two hundred years in grappling with speech that endangers constitutional values. It might be helpful to look back on the results they reached, and to think about what would happen if the method were endorsed by courts today. If one believes, as I do, that the past record of the constitutional tension method is unfortunate, then perhaps we should think twice about resurrecting it for the future.

## I. The Constitutional Tension Method in Its Infancy

The earliest reported federal free speech case is *Case of Fries*,[10] a 1799 district court case in which Supreme Court Justice Iredell presided over a prosecution under the now notorious Alien and Sedition Acts. The defendant had led a tax rebellion in western Pennsylvania. At the time of the rebellion, the nation was only fifteen years old, and the Constitution was in its first decade. Even small revolts can be serious threats to young nations, but the rebellion was suppressed and Fries was tried for treason and, most relevant to our discussion, for sedition—for allegedly spreading falsehoods that disparaged the federal government.

"The liberty of the press," Justice Iredell instructed the jury, "is indeed, valuable—long may it preserve its lustre!"[11] But "falsehoods . . . which are intended to destroy confidence in government, and thus induce disobedience to every act of it" necessarily have to be punishable.[12] The nation's short history had shown as much:

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U Cin L Rev 1 (1991); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L J 484, 498; Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 Const Comm 29 (1995). Professor Curtis's article, like this one, takes a historical view more than a theoretical one, focusing on past free speech controversies as one place to look for guidance about the practical consequences of various constitutional approaches. In some sense, Professor Curtis's article, Professor Graber's, cited in note 5, and mine are all parts of this larger project.

9. Compare Alex Kozinski and Eugene Volokh, *A Penumbra Too Far*, 106 Harv L Rev 1639, 1653-56 (1993); Eugene Volokh, *How Harassment Law Restricts Speech*, 47 Rutgers L Rev 563, 575-76 (1995).

10. 9 F Cas 826 (D Penn 1799).

11. *Fries*, 9 F Cas at 838.

12. Id at 839.

> [T]he government had been vilely misrepresented, and made to appear to [the people] in a character directly the reverse of what they deserved. In consequence of such misrepresentations, a civil war had nearly desolated our country, and a certain expense of near two millions of dollars was actually incurred, which might be deemed the price of libels.[13]

Moreover, Iredell continued, these libels subverted the very constitutional structure of the republic:

> The necessity [of punishing libels in a republic is], I conceive[,] greater [than in a monarchy] because in a republic more is dependent on the good opinion of the people for its support, as they are, directly or indirectly, the origin of all authority, which of course must receive its bias from them. Take away from a republic the confidence of the people, and the whole fabric crumbles into dust.[14]

Improper speech endangered even the freedom of speech itself by creating pressure for censorship: "[T]o censure the licentiousness is to maintain the liberty of the press."[15] It therefore had to be the case that "the disseminating, or making public, of bad sentiments, destructive of the ends of society" could legitimately be made a crime.[16]

The structure of Iredell's argument is noteworthy. Important as freedom of speech was, he argued, surely it couldn't extend to speech that caused real danger to the paramount constitutional value of republican government.[17] The exemption of such speech from the constitutional guarantee wasn't mere formalism. Rather, the exemption reflected a judgment that while freedom of speech is a valuable protection of free government, certain kinds of speech were themselves subversive of free government.[18]

This approach of balancing free speech against other constitutional values can be found in other opinions throughout the 1800s and early 1900s. In *State*

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13. Id at 838.
14. Id at 839.
15. Id at 838.
16. Id at 839.
17. Following modern usage, I use "freedom of speech" as shorthand for both the freedom of speech and the freedom of the press.
18. Likewise, the court in *Respublica v Dennie*, 4 Yeates 267, 271 (Penn 1805), concluded that speech which is "aimed at the independence of the United States, the constitution thereof, or of this state" was unprotected. Speech that was "deliberately designed to unloosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power, by the known constituted authorities," the court argued, was outside the state free speech guarantee because it was "subversive of all government and good order" and tended to lead to "anarchy, sedition, and civil war." Id at 270. The speech at issue was, curiously, a diatribe criticizing democracy.

*ex rel. Liversey v Judge of Civ. Dist. Ct.*,[19] for instance, the Louisiana Supreme Court concluded that the Louisiana Constitution's free press clause prevented courts from enjoining libels. The dissent disagreed:

> Provisions of equal sacredness and magnitude [to the free press provision] loudly proclaim that all courts shall be open, that every person shall be entitled to claim protection for life, liberty, property, reputation and for all rights, and shall have adequate remedy by due process of law, and justice administered without denial or unreasonable delay. A suppression of either of those inalienable rights, would be an arrogation of powers intentionally denied and withheld, and a despotic annihilation of the palladium of American security and independence.[20]

Likewise, in *Dailey v Superior Court*,[21] a majority of the California Supreme Court annulled an order enjoining the performance of a play based on a pending criminal case. The dissent, however, argued that protecting free speech here would undermine other values of constitutional dimension:

> All the provisions of the constitution must be construed together, and effect given, when possible, to each. The [state free speech clause] is to be construed in view of that large and important part of the constitution by which a judicial department of the government is created, and all the usual and necessary powers of courts given to the tribunals established under it. One of the most essential of these powers of a court is to protect itself against unlawful intrusion upon its orderly conduct of business, and to insure litigants in a pending proceeding the free and unembarrassed administration of justice.[22]

Thus, when the United States Supreme Court first started hearing a substantial number of free speech cases in the 1910s and early 1920s, it was natural for the constitutional tension method to appear there too. The first

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19. 34 La Ann 741 (1882).

20. *Liversey*, 34 La Ann at 750 (Bermudez dissenting). See also *Fisher v Patterson*, 14 Ohio 418, 426-27 (1846), where the court argued that "juries should rightly regard such abuse of the press [defamation] as endangering our free institutions" because, "[w]hen defamation shall become so common that men cease to be sensitive of character, it will be evidence of that insensibility which precedes the dissolution of the social tie." Leaving libels unpunished, the court concluded, "will cast a dark shade over the blessed principle of self-government."

21. 112 Cal 94, 44 P 458 (1896).

22. *Dailey*, 44 P at 460 (McFarland dissenting). See also *Cooper v People ex rel. Wyatt*, 13 Colo 337, 366, 22 P 790, 799 (1889), in which, affirming a contempt conviction for publishing matter relating to pending prosecution, the court reasoned: "Parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence and control judicial action?"

free speech case in which Holmes and Brandeis dissented, *Toledo Newspaper Co. v United States*, is a good example.[23] In 1913, Toledo enacted an ordinance limiting fares on the city-franchised railway to three cents. The railway's creditors sued in federal court, claiming the law was confiscatory. While the case was pending, the Toledo News-Bee published articles backing the ordinance and casting aspersions on the judge's neutrality. The judge held the newspaper in contempt, on the theory that the articles would lead the public to doubt the court's impartiality and would ultimately induce people to disregard any order the court might render.

The Supreme Court upheld the contempt citation. The argument that the newspaper was protected by the Free Press Clause, the Court said, "involves . . . the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends."[24] The News-Bee's free press claim wasn't just in tension with significant government interests; it also conflicted with the foundations of the Free Press Clause itself. "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."[25]

The Court continued to use this approach in the World War I cases that followed. In *Schaefer v United States*, a 1918 case involving a newspaper that allegedly printed false war reports, the Court marveled at the "curious spectacle . . . presented" by a First Amendment challenge to the Espionage Act.[26] Under the newspaper's argument, the Court said, the Constitution, "that great ordinance of government and orderly liberty[,] was 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."[27] The Constitution "empowered Congress to declare war and war is waged with armies."[28] Surely it was senseless to argue that under the same Constitution "their [the armies'] formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority."[29] The Court repeated this

23. 247 US 402 (1918). Holmes and Brandeis dissented in this case, as they did in *Abrams v United States*, 250 US 616 (1919), on statutory grounds rather than constitutional ones, but as in *Abrams*, their reading of the statute seems to reflect a greater solicitude for free speech than the Court's reading.

24. *Toledo Newspaper*, 247 US at 419.

25. Id.

26. 251 US 466, 477 (1920).

27. *Schaefer*, 251 US at 477.

28. Id.

29. Id.

argument in 1920 in *Gilbert v Minnesota*,[30] and in 1931 in *United States v Macintosh*.[31]

In a similar vein, the Court in *United States ex rel. Milwaukee Social Democratic Pub. Co. v Burleson*, again rebuffed a constitutional challenge by appealing to the constitutional structure:

> Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it.[32]

And *Gitlow v New York* made the same point: Statements which "necessarily imply the use of force and violence" are "in their essential nature . . . inherently unlawful in a constitutional government of law and order."[33] "[T]he punishment of those who publish articles which tend to destroy organized society [is] essential to the security of freedom and the stability of the state."[34]

Note the recurring theme: It is true that the Constitution protects freedom of speech. But the Constitution also embodies other, equally important, values—that the government be a government of laws, that it be able to wage wars effectively, that it be changed only through peaceful means. When speech detracts from these ends, the free speech guarantee may have to yield to the needs of the rest of the constitutional structure.

It's easy, of course, to disagree with the specific results reached in these cases. Indeed, Holmes and Brandeis persuasively argued that, in at least some of the cases, the possible harm caused by the speech was at most speculative.[35] Holmes and Brandeis may also have been right to suggest that some of the values the majority opinions stressed might suffer more from suppression of speech than they would from toleration of speech.

But the Holmes and Brandeis positions on this weren't unassailable. Even if the harm threatened by the speech was uncertain and remote, there's nothing

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30. 254 US 325, 333 (1920) (Discouraging enlistment in World War I "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.").

31. 283 US 605, 622 (1931) (stressing that the Constitution itself creates Congress' war power, and therefore "[t]o the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances").

32. 255 US 407, 414 (1921).

33. 268 US 652, 666 (1925).

34. *Gitlow*, 268 US at 668.

35. See *Abrams*, 250 US at 629 (Holmes dissenting); *Schaefer*, 251 US at 486 (Brandeis dissenting).

obviously illegitimate about protecting against remote harms as well as against clear and present ones. Outside the free speech context, legislatures protect against remote harms all the time. As the *Gitlow* majority put it, the danger of speech that "threaten[s] breaches of the peace and ultimate revolution" is still "real and substantial" even though "the effect of a given utterance cannot be accurately foreseen."[36] "A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."[37] Why is it unreasonable for a state to "seek[] to extinguish the spark without waiting until it has enkindled the flame," to "suppress the threatened danger in its incipiency"?[38]

Holmes and Brandeis's arguments are ultimately not attempts to pragmatically balance the important interest in free speech against the equally important interest in avoiding revolution. They don't rest on provable factual assertions about the likely effectiveness or ineffectiveness of subversive advocacy. Rather, they are based on a judgment about, in Holmes's words, "the theory of our Constitution": That even speech which might risk endangering our most basic values is entitled to be heard, and even to be considered as a possible truth.[39]

The Holmes and Brandeis dissents make sense only if one *rejects* the premises of the constitutional tension method. Within the method, it is definitely *not* the meaning of free speech that advocacy of dictatorship should "be given [its] chance and have [its] way."[40] Nor is it necessary to test thoughts subversive of the constitutional structure "in the competition of the market."[41] Under the constitutional tension vision, the government—to borrow another point from Professor MacKinnon—may legitimately "assume that the idea of [liberal democracy] is true. The [Constitution] has already decided that."[42] Giving people a chance to accept proletarian dictatorship would just risk a sacrifice of all constitutional values in order to further a single one. If one accepts the constitutional tension method, then the worst one can say about the 1910s and 1920s majorities is that they misguessed just how dangerous the speech involved was.

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36. *Gitlow*, 268 US at 669.

37. Id.

38. Id. See also John H. Wigmore, Abrams v. U.S.: *Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 Ill L Rev 539 (1920).

39. *Abrams*, 250 US at 630 (Holmes dissenting).

40. *Gitlow*, 268 US at 673.

41. *Abrams*, 250 US at 630 (Holmes dissenting).

42. MacKinnon, *Only Words* at 107 (cited in note 2). Again, the original quote refers to the idea of equality rather than of liberal democracy and the legal equality guarantee rather than the Constitution as a whole, but MacKinnon's argument applies as well to democracy as it does to equality.

## II. The Method in Maturity: Frankfurter and Jackson

The 1930s and the 1940s saw the Court's general rejection of the earlier majority opinions and acceptance of the Holmes and Brandeis dissents. Even speech that, if believed, might tend to undermine other aspects of the constitutional structure became protected. But as the Court became more aggressive in striking down laws on free speech grounds, the constitutional tension method reawakened and acquired two of its most distinguished advocates, Justices Frankfurter and Jackson.[43]

A good example of this is Frankfurter's dissent in *Bridges v California*,[44] where the Court held that courts generally may not hold speakers in contempt for commenting on pending litigation. Frankfurter disagreed:

> 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 encounter claims on behalf of liberties no less precious.[45]

"A trial is not a 'free trade in ideas,'" Frankfurter argued, "nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'"[46] "Freedom of expression can hardly carry implications that nullify the [Constitutional] guarantees of impartial trials," guarantees which Frankfurter saw as central to constitutional democracy.[47]

Likewise, Jackson's dissent in *Terminiello v City of Chicago*,[48] which Frankfurter endorsed,[49] argued that the government must be allowed to

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43. I speak throughout of a constitutional tension method, not a constitutional tension school. Frankfurter and Jackson probably didn't set out to follow the earlier cases, and the body of their First Amendment opinions includes many arguments besides the constitutional tension arguments. My claim is simply that they used the constitutional tension style of argumentation and seemed to be swayed by constitutional tension considerations.

44. 314 US 252 (1941).

45. *Bridges*, 314 US at 282 (Frankfurter dissenting) (citation omitted).

46. Id at 283 (Frankfurter dissenting).

47. Id at 284 (Frankfurter dissenting). See also *Pennekamp v Florida*, 328 US 331, 353, 355 (1946) (Frankfurter concurring):

> [The exercise of free speech] must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution. When those other attributes of a democracy are threatened by speech, the Constitution does not deny power to the States to curb it . . . . The independence of the judiciary is no less a means to the end of a free society [than is the freedom of the press], and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective.

48. 337 US 1, 13 (1949).

49. *Terminiello*, 337 US at 12 (Frankfurter dissenting).

restrict speech that could lead to mob violence, even when the speaker isn't intentionally trying to incite the violence. Without such a power, not only order, but constitutional liberties—including the freedom of speech—would suffer:

> In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence . . . . We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty and that the factions engaged in this battle [Fascists and Communists] are not interested permanently in either.[50]

Shortly afterwards, in *Kunz v New York*, Jackson, dissenting alone, suggested that religious freedom concerns should also be weighed against the free speech interest.[51] The government, Jackson argued, must have the power to repress public attacks on Catholicism and Judaism:

> Is official action the only source of interference with religious freedom? Does the Jew, for example, have the benefit of these freedoms when, lawfully going about, he and his children are pointed out as "Christ-killers" to gatherings on public property by a religious sectarian sponsored by a police bodyguard? We should weigh the value of insulting speech against its potentiality for harm. Is the Court, when declaring Kunz has the *right* he asserts, serving the great end for which the First Amendment stands?[52]

Moreover, as the *Kunz* dissent showed, Jackson was willing to consider private action, including private speech, as a potential interference with others' constitutional rights. Under this view, people on the street corner who insult religion do more than just interfere with public order or offend passers-by; they "interfer[e] with [the pedestrians'] religious freedom."[53] Jehovah's Witnesses, who proselytize door-to-door, often stridently condemning Catholicism, do not merely intrude on householders' privacy, but also tread on the householders' "religious liberty."[54] As Jackson said a year after *Kunz*, in *American Comm. Ass'n v Douds*, "[a] catalogue of rights was placed in our

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50. Id at 36-37 (Jackson dissenting).

51. 340 US 290, 295 (1951) (Jackson dissenting).

52. *Kunz*, 340 US at 302 (Jackson dissenting) (emphasis in original).

53. Id.

54. *Douglas v City of Jeannette*, 319 US 157, 181-82 (1943) (Jackson dissenting); id at 177 (Jackson dissenting) (describing the Witnesses' conduct as an interference with the householders' "exercise of their own faith in peace"); see also id at 180 (stressing that the proselytizers were insulting Catholicism); *American Comm. Ass'n v Douds*, 339 US 382, 444 (1950) (Jackson concurring in part and dissenting in part) ("I have pointed out [in *Douglas*] that men cannot enjoy their right to personal freedom if fanatical masses, whatever their mission, can strangle individual thoughts and invade personal privacy").

Constitution . . . to protect the individual in his individuality, and neither statutes which put those rights at the mercy of officials nor judicial decisions which put them at the mercy of the mob are consistent with its text or its spirit."[55]

Frankfurter's and Jackson's views were thus already well developed when they wrote their concurrences in *Dennis v United States*.[56] *Dennis* involved the prosecution of various Communist Party leaders for conspiring to advocate the overthrow of the United States government. The defendants weren't charged with violent conduct or with an attempt to overthrow the government.[57] Nor were they charged with conspiring to do violent acts.[58] They were accused of advocating, teaching, and organizing a group intended to advocate and teach a particular, singularly repugnant, philosophy.[59]

All three of the opinions favoring affirmance—the plurality opinion, Frankfurter's concurrence and Jackson's concurrence—stressed the danger of Communist advocacy of violent revolution. This wasn't a hard danger to show. The late 1940s saw Communism take over China and Eastern Europe. Much of the cause in Eastern Europe was the presence of the Soviet Army, but, as Justice Jackson pointed out, Communists also took advantage of existing democratic structures. In Czechoslovakia, for instance, "the Communist Party during its preparatory stage claimed and received protection for its freedoms of speech, press, and assembly," but used these freedoms to subvert the political system and usher in a dictatorship.[60] And even in the Western democracies, Communist Party members were being used as tools of the Soviet Union.[61]

Communism didn't seem likely to prevail in the United States, but, as the plurality pointed out, even unsuccessful attempts at revolution or at inciting revolution can cause grave harm.[62] "[T]he inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned" exacerbated the danger.[63] "If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."[64]

And, as Frankfurter noted, the interests jeopardized by Communist advocacy were not simply compelling; they were constitutional in dimension. "[T]he

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55. *Douds*, 339 US at 444 (Jackson concurring in part and dissenting in part).

56. 341 US 494 (1951); 341 US 494, 517 (1951) (Frankfurter concurring); 341 US 494, 561 (1951) (Jackson concurring).

57. *Dennis*, 341 US at 561 (Jackson concurring).

58. Id.

59. Id.

60. Id at 566 (Jackson concurring).

61. Id at 548 (Frankfurter concurring).

62. *Dennis*, 341 US at 509.

63. Id at 511.

64. Id.

plain fact" was "that the interest in speech, profoundly important as it is, is no more conclusive . . . than other attributes of democracy."[65] Jackson also took care to repeat his position that even private advocacy can interfere with individuals' constitutional rights:

> When our constitutional provisions were written, the chief forces recognized as antagonists in the struggle between authority and liberty were the Government on the one hand and the individual citizen on the other. It was thought that if the state could be kept in its place the individual could take care of himself. [But today,] [t]otalitarian groups . . . [have] perfected the technique of creating private paramilitary organizations to coerce [through speech] both the public government and its citizens.[66]

Finally, Frankfurter added one more ingredient: "Not every type of speech occupies the same position on the scale of values."[67] Just as obscenity, profanity, libel, and fighting words are not entitled to First Amendment protection, "[o]n any scale of values which we have hitherto recognized" advocacy of forcible and violent overthrow of the government "ranks low."[68]

True, Frankfurter admitted, some speech not far removed from advocacy of overthrow—exchange of ideas about Communism, rather than advocacy of revolution—is more valuable;[69] and, "[s]uppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed."[70] But that the distinction between unprotected advocacy and protected exchange of ideas "could be used unreasonably by those in power against hostile or unorthodox views does not negate the fact that it may be used reasonably against an organization wielding the power of the centrally controlled international Communist movement."[71]

## III. The Method in Decline

This, then, was the constitutional tension vision at its zenith. Suppressing speech jeopardizes constitutional values; but allowing certain kinds of speech jeopardizes other constitutional values—democracy, effective waging of war, fair administration of justice, free exercise of religion, even free speech itself. Only a "careful weighing of conflicting interests"[72] can decide the case. And because the interests involved are all of constitutional dimension, and thus of equal dignity, there's no reason why the freedom of speech should always (or

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65. Id at 544 (Frankfurter concurring).
66. Id at 577 (Jackson concurring).
67. Id at 544 (Frankfurter concurring).
68. Id at 545 (Frankfurter concurring).
69. Id.
70. Id at 549 (Frankfurter concurring).
71. Id at 546 (Frankfurter concurring).
72. *Dennis*, 341 US at 542 (Frankfurter concurring).

even usually) prevail.

But reasonable as the constitutional tension approach may be, it isn't ineluctably mandated by the constitutional structure. One doesn't have to read the various constitutional provisions as setting up abstract values, values which may be in tension with one another.

Instead, one can read them—and the constitutional text seems to support this reading—as simply creating particular government powers or disabilities. And while speech can undermine broadly defined constitutional values, it 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, or the President's position as Commander-in-Chief. 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]."[73]

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. This doesn't mean protection for speech must be absolute; we can still conclude that some forms of speech are so dangerous that they have to be punished. But because we are no longer balancing constitutional interests of equal stature, we can set the threshold of harm (or of its imminence) at a higher level.

This scheme is the basis of today's First Amendment jurisprudence, under which content-based speech restrictions—even restrictions on speech that genuinely harms important interests—are generally unconstitutional.[74] *Dennis* proved to be the high-water mark of the constitutional tension approach—as Laurence Tribe put it, "the temporary eclipse" of the more speech-protective Holmes/Brandeis tradition.[75] The Court ultimately sided with Holmes and Brandeis rather than Frankfurter and Jackson. Agreeing with Holmes, the Court concluded that the "theory of our Constitution"[76] is that the government must be agnostic as to political truth.[77] With Holmes, it accepted that

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73. Id at 520 (Frankfurter concurring).

74. See, for example, *Brandenburg v Ohio*, 395 US 444, 447 (1969) (per curiam) (striking down law which forbade advocacy and assembly for the purpose of advocacy of violence as a means of accomplishing industrial or political reform).

75. Laurence Tribe, *American Constitutional Law* 846 (Foundation, 2d ed 1988). In 1957, the Court reinterpreted *Dennis* as applying only to incitement to action. The Smith Act, the Court held, does not "prohibit advocacy and teaching of forcible overthrow as an abstract principle," regardless of whether it undermines democratic institutions. *Yates v United States*, 354 US 298, 318 (1957). Prosecutions of Communist Party officials continued, as did other disabilities imposed on Communists, but the Court, with Chief Justice Warren and Justice Brennan joining Justices Black and Douglas, continued to chip away at the Communist advocacy exception. The *Dennis* rule was at most maintained, sometimes contracted, but never expanded.

76. *Abrams*, 250 US at 630 (Holmes dissenting).

77. Compare *Police Department v Mosley*, 408 US 92, 95 (1972); *Brandenburg*, 395

even "the beliefs expressed in proletarian dictatorship"[78] are entitled to compete in the marketplace of ideas.[79]

The constitutional tension position is that the Constitution itself defines certain kinds of political truth, and that speech which interferes with the implementation of this truth may be suppressed; that Communist speech, which is profoundly inconsistent with democracy, private property, and individual liberty—all crucial constitutional values—has no rights in our national marketplace. The Court has rejected this view.[80] This rejection is what

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US at 447-48.

78. *Gitlow*, 268 US at 673 (Holmes dissenting).

79. Compare *Lamont v Postmaster General*, 381 US 301 (1965).

80. In a few very narrow contexts, modern Court decisions have used constitutional tension reasoning (in my view, unsoundly):

1. In *Nebraska Press Ass'n v Stuart*, 427 US 539 (1976), the Court held that the Sixth Amendment fair trial guarantee could sometimes justify restrictions on press reports about a criminal case. Nonetheless, though the Court pointed to the tension between the two constitutional clauses, see id at 547, 551, 561, it's hard to say that it genuinely balanced the two interests. To the extent any balancing took place, it was distinctly with a thumb on the First Amendment side of the scales; in Laurence Tribe's words, the case "announced a virtual bar to prior restraints on reporting of news about crime." Tribe, *Constitutional Law* at 858-59 (cited in note 75). This seems also to have been the view of Justice White, who provided the fifth vote for the majority, but who concluded "that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable." *Stuart*, 427 US at 570-71 (White concurring). See also id at 571 (Powell concurring) (stressing "the unique burden that rests upon the party . . . who undertakes to show the necessity for prior restraint on pretrial publicity").

2. The plurality opinion in *Burson v Freeman*, 112 S Ct 1846, 1858 (1992), upheld a ban on political speech within 100 feet of polling places, in part on the grounds that "the exercise of free speech rights [near polling places] conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud." See also *Simon & Schuster, Inc. v New York Crime Victims Bd.*, 112 S Ct 501, 514 (1992) (Kennedy concurring) (suggesting an absolute bar on content-based speech restrictions except in cases where another constitutional right must be accommodated). The opinion commanded only four votes (including Justice Kennedy's).

3. Several cases involving religious speech on government property have said that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." See *Capitol Square Review and Advisory Board v Pinette*, 115 S Ct 2440, 2446 (1995); *Rosenberger v University of Virginia*, 115 S Ct 2510, 2522-23 (1995); *Lamb's Chapel v Center Moriches Union Free School Dist.*, 113 S Ct 2141, 2148 (1993); *Widmar v Vincent*, 454 US 263, 271 (1981). All these cases have struck down the speech restrictions, concluding that the speech in question was genuinely private and didn't actually violate the Establishment Clause. In *Pinette*, however, the concurring opinions suggested that in some narrow situations even private religious speech in public places might be restricted because of Establishment Clause concerns. *Pinette*, 115 S Ct at 2459 (Souter concurring in part and concurring in the judgment); id at 2454 (O'Connor concurring in part and concurring in the judgment). Only a four-Justice plurality would have held that the Free Speech Clause can't be trumped by the Establishment Clause. Id at 2448-49.

It's far from clear to me that the Free Speech Clause and the Establishment Clause

keeps the government from banning Communist advocacy, expression of support for draft resisters,[81] and the rap star Ice-T's controversial song *Cop Killer*.[82] And it's also what keeps the government from banning advocacy of racism, sexism, and the like.

## IV. The Method Rediscovered

Recent years have seen many arguments that free speech rights must sometimes yield to the equality values embodied in the Fourteenth Amendment.[83] These arguments often make powerful, common-sense points.

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are ever actually in conflict, and it's also far from clear why, in such a conflict, the Free Speech Clause must give way to the Establishment Clause and not vice-versa. But in any event, as with the jury trial-free speech tension, the asserted tension between free speech and the Establishment Clause covers an extremely narrow area. Certainly it's never been suggested that all speech which tends to undercut Establishment Clause values—for instance, speech that condemns atheists or condemns certain religions or even urges religious discrimination—should be prohibitable on Establishment Clause grounds.

My colleague Julian Eule has thoughtfully argued that *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990), can also be seen as a constitutional tension case: "[T]he Court now seems prepared to recognize that when government seeks to promote speaker diversity there are First Amendment values on *both* sides of the equation." Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 Sup Ct Rev 105, 130 (emphasis in original); see also *First Natl Bank of Boston v Bellotti*, 435 US 765, 803-04 (1978) (White dissenting). The Court, however, didn't explicitly endorse this position, and for the reasons I give in the text, I'm happy that it didn't.

81. Compare *Bond v Floyd*, 385 US 116 (1966) with *Gilbert*, 254 US 325 and *Debs v United States*, 249 US 211 (1919).

82. But see David Crump, *Camouflaged Incitement*, 29 Ga L Rev 1, 76-78 (1994) (suggesting that songs like *Cop Killer* should be unprotected); Chuck Philips, *North Steamed at Ice T; He Wants Time Warner to Face Sedition Charges Over Rap Song*, LA Times D1 (July 2, 1992) (describing Lt. Col. Oliver North's suggestions to the same effect).

83. See, for example, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in Mari J. Matsuda, et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 17, 24-25 (Westview, 1993) (harm caused by speech is of "constitutional dimensions"); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in Matsuda, et al, *Words That Wound* 53, 61 (When "individual racist acts [are viewed] as part of a totality . . . white 'supremacists' conduct or speech is forbidden by the equal protection clause."); MacKinnon, *Only Words* at 71 (cited in note 2) ("The upheaval that produced the Reconstruction Amendments . . . move[d] the ground under the expressive freedom, setting new limits and mandating new extensions."); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw U L Rev 343, 346 (1991) (suggesting that one may ask whether speech may be restricted "to protect core values emanating from the Thirteenth and Fourteenth Amendments"); Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 St John's L Rev 119, 162 (1991) (A proposed "equality-based theory of the first amendment [which] permits government regulation of some categories of racist speech . . . is strengthened and sharpened by the Fourteenth Amendment's protection of equality."); Brian Owsley, *Racist Speech and "Reasonable People": A Proposal for a Tort Remedy*, 24 Colum Hum Rts L Rev 323, 324 (1993) ("The Fourteenth Amendment must

They persuasively show that bigoted speech can indeed cause substantial harm to important interests. They show that these interests, especially the interest in equality, are themselves rooted in the Constitution. They forcefully suggest that bigoted speech itself interferes with people's constitutional rights: When speech helps construct a bigoted society, they argue, it interferes with individual rights to equal protection;[84] when bigoted speech causes people to fall silent or devalues their voices in the marketplace of ideas, it interferes with its victims' own free speech rights.[85] They point out that bigoted ideas are evil. And they ask why, when values of constitutional magnitude collide, free speech should always prevail.

This approach—consideration of other constitutional values, a stress on the fact that our nation "is supposedly not constitutionally neutral" with regard to the goals that some speakers advocate,[86] and the assertion that some ideologies are therefore of lower value than others—is quintessentially the constitutional tension approach. Its reasoning tracks the reasoning of past constitutional tension opinions, and indeed its results mirror those that Justices Frankfurter and Jackson urged in the past.[87] And both its reasoning and its results radically diverge from those of the Black/Douglas/Brennan method, which the Court has largely adopted today: A method that renounces the valuing of ideas, and insists on protecting even speech which can cause grievous harm to interests of constitutional magnitude.

Of course, one can't hold those who employ the constitutional tension method today responsible for the views of those who employed the method in the past. But when one listens to today's proposals for the balancing of free speech against other constitutional values, or to any proposals for allowing

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be used to counteract the existing disproportionate emphasis on the First Amendment.").

84. Lawrence, *If He Hollers Let Him Go*, at 72-76 (cited in note 83); MacKinnon, *Only Words* at 85 (cited in note 2).

85. Lawrence, *If He Hollers Let Him Go*, at 76-79 (cited in note 83); MacKinnon, *Only Words* at 9 (cited in note 2).

86. MacKinnon, *Only Words* at 86 (cited in note 2). MacKinnon made this observation while criticizing the Court for applying the same rules to *Brandenburg*, 395 US 444, which involved speech by the Ku Klux Klan, and *NAACP v Claiborne Hardware Co.*, 458 US 886 (1982), which involved speech by the NAACP. "Suppressed entirely in the piously evenhanded treatment of the Klan and the boycotters . . . was the fact that the Klan was promoting inequality and the civil rights leaders were resisting it, in a country that is supposedly not constitutionally neutral on the subject."

87. Justice Frankfurter, after all, wrote the majority opinion in *Beauharnais v Illinois*, 343 US 250 (1952), which upheld a law barring certain statements hostile to a race or a religion; and though Justice Jackson dissented in *Beauharnais*, he agreed that some such laws could be constitutional. Id at 299 (Jackson dissenting). *Beauharnais* is now widely regarded as no longer being good law. See Tribe, *American Constitutional Law* at 926 (cited in note 75). And both MacKinnon and Matsuda quote approvingly from Jackson's dissent in *Kunz v New York*. See MacKinnon, *Only Words* at 83 (cited in note 2); Matsuda, *Public Response to Racist Speech*, at 46 n 61 (cited in note 83).

more speech restrictions, one should ask what such proposals will lead to. If a court accepts this approach in one case, what will happen in the cases to follow?

If we want to know the answer to this question, past constitutional tension opinions may give us valuable clues. The Court, after all, isn't staffed with Matsudas or Lawrences or MacKinnons. A majority of the Justices today seem closer in outlook to Frankfurter or Jackson, and perhaps even to some of the Justices in the 1910s and 1920s majorities. And there's no reason to think this will change radically any time soon.

One might argue, of course, that the Court should apply the constitutional tension approach only to the narrow area of bigoted speech, and keep a more speech-protective scheme for other areas, such as televised violence, apologism for rioters and looters,[88] or songs that seem to advocate the killing of policemen.[89] But the logic of the constitutional tension approach would apply equally to all speech. Equality is an important constitutional value, but there are other values "no less precious."[90] I can't see why the Court would, or logically could, draw a line at speech which disserves equality and not, say, speech which disserves democracy.

The possible limiting principles some have suggested strike me as thin reeds. Professor Matsuda, for example, suggests that her approach should only be followed for speech that "human experience, our only source of collective knowledge," has condemned as wrong.[91] She argues that "the wrongness of the doctrine of racial supremacy" is universally accepted.[92] In her view, "[t]here is no nation left on this planet that submits as its national self-expression the view that Hitler was right."[93] "Marxist speech, however, is not universally condemned. . . . [I]t is impossible to achieve world consensus either for or against this political view. Marxists teach in universities."[94]

But it may be worth noting here that Professor Matsuda's article was printed in August 1989, shortly before the fall of Communism in Europe and Soviet Asia. Today, the list of countries that accept Communism as their

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88. See Thomas D. Elias, *TV and Radio Stations Should Be Stripped of Their Licenses If They Aren't More Responsible in Covering Civil Unrest*, LA Daily J at 6 (Jan 26, 1993) (analogizing "irresponsible" coverage of the L.A. riots to "shouting 'fire' in a crowded theater"); see also Susan Carpenter McMillan, *Both Pro-Life and Pro-Choice Bear Responsibility*, LA Times B7 (Jan 5, 1995) (arguing that "[t]he inexcusable tolerance of the Los Angeles riots and constant threats of 'no justice, no peace' may have had a link to the beating of Reginald Denny").

89. See Crump, 29 Ga L Rev at 76-78 (cited in note 82); Philips, LA Times at D1 (cited in note 82).

90. *Bridges*, 314 US at 282 (Frankfurter dissenting) (suggesting that the right to a fair trial is "no less precious" than the right to free speech).

91. Matsuda, *Public Response to Racist Speech*, at 37 (cited in note 83).

92. Id.

93. Id.

94. Id.

"national self-expression" is down to Communist China, North Korea, Vietnam, Cuba, and perhaps a few others.[95] And in any event, it seems odd to care what tyrannical regimes accept as their self-expression. Is it really national self-expression or just the self-expression of the ruling junta? If one focuses on the self-expression of the countries whose citizens actually are permitted to express their political preferences, then Communism has been condemned by our collective knowledge for many decades—far longer than racism.

The suggestion that the free speech principle should be trumped by the equality guarantee only when the speech "is directed against the least powerful segments of our community," and not when it "criticiz[es] the powerful institutions that govern our lives," seems to me equally unpromising.[96] I suppose one could argue that, as a moral principle, the First Amendment should be read as giving extra protection to groups that seem to need protection most.[97] But will our political and judicial systems really be willing to use this as a stopping point?

Protecting the least powerful segments of our community is clearly an important goal. But so are protecting police officers' rights to life and merchants' rights not to have their stores looted and burned by rioters or revolutionaries. I find it hard to imagine a Supreme Court—again, not a court filled with Matsudas—that will allow speech restrictions aimed at preventing the subordination of minorities, but disallow speech restrictions aimed at preventing the murder of policemen.

Neither, in my view, is bigoted speech distinguishable from other forms of speech on the grounds that it silences people, discredits speakers that deserve to be heard, or somehow injures the marketplace of ideas.[98] Lots of speech has these effects. For example, public demands for the resignation of television

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95. Of course, some countries might accept a very weak version of Marxism, so under Matsuda's approach, advocacy of that version would remain protected. But so long as outright Communism is universally rejected, Communist advocacy would remain restrictable.

96. Mari J. Matsuda, et al, *Introduction*, in Matsuda, et al, *Words That Wound*, 10 (cited in note 83). Compare MacKinnon, *Only Words* at 103 (cited in note 2) (praising the Supreme Court of Canada's recognition that a speech restriction "was not big bad state power jumping on poor powerless individual citizen, but a law passed to stand behind a comparatively powerless group in its social fight for equality against socially powerful and exploitative groups").

97. There would, of course, be unpleasant judgment calls involved in such a standard. Say someone alleges that Hollywood disserves the country because it's heavily influenced by Jews. As a Jew, I'd hate to see the case which decides whether Jews are among "the least powerful segments of our community," or whether instead the speech must be protected because Hollywood is a "powerful institutio[n] that govern[s] our lives." See Matsuda, et al, *Introduction*, at 10 (cited in note 96).

98. Compare Lawrence, *If He Hollers Let Him Go*, at 77, 79 (cited in note 83) (describing racist speech as "an epidemic that distorts the marketplace of ideas and renders it dysfunctional," and arguing that it "coercively silenc[es] members of those groups who are its targets").

commentators who say offensive things are actually *intended* to silence people, but surely such demands are nonetheless constitutionally protected.[99] Likewise, lots of speech discredits worthy speakers, and virtually every form of advocacy will be seen by some as polluting the marketplace of ideas with pernicious falsehoods.

Perhaps these effects should indeed be weighed in the balance for all forms of speech. Under the constitutional tension method, this might in fact happen. My only concern is that once we begin considering these factors, the constitutional tension opinions of the past may turn into accurate predictors of what the law could become.

## Conclusion: Judging the Method Today

"There is in every constitutional doctrine we devise," Professor Matsuda says, "the danger of misuse."[100] But, she suggests, this ought not paralyze us. "We owe [those harmed by bigoted speech] a more thoughtful analysis than absolutism. At the least, before we abandon the task of devising a legal response to racist speech, we should consider concretely the options available to us."[101] Professor MacKinnon goes further: The slippery slope concern is "a largely phony scruple."[102]

Of course, I can't object to a call for more thoughtful analysis, and it's certainly easy to overstate the slipperiness of slopes. Constitutional law is full of slippery slopes down which we, fortunately, haven't slipped. Maybe we should have more faith in the sound discretion of the judiciary. To quote the Court in *Douds*, the first case in which the Court upheld a restriction on Communist advocacy, the answer to slippery-slope arguments—if you lose one protection, others will follow—may just be that "that result does not follow

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99. See James Warren, *Andy Rooney Suspended, But Denies Racist Comment*, Chi Trib Sec 1 at 3 (Feb 9, 1992) (describing CBS's suspension of *60 Minutes* commentator Andy Rooney for allegedly making a racist comment); Jerry Berger, *Kennedy Decries Reagan Civil Rights Policies*, UPI, Jan 18, 1988, *available in* LEXIS, News Library, UPI File (describing CBS's firing of Jimmy "The Greek" Snyder on similar grounds).

100. Matsuda, *Public Response to Racist Speech*, at 50 (cited in note 83).

101. Id. Compare *Beauharnais*, 343 US at 263 ("Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel.").

102. MacKinnon, *Only Words* at 102 (cited in note 2). See also *State v Chandler*, 2 Harr 553, 575 (Del 1837) (upholding a blasphemy law on the grounds that blasphemy has a tendency to lead to breaches of the peace) ("But it has been said that it is dangerous to entrust any tribunal with power to judge of the mere tendency of actors or words. . . . We answer that this argument proves merely that this, like all other human power, may be abused. But to prove that power may be abused, is not to prove that power does not exist. The same kind of reasoning would break down every useful institution of man.").

'while this Court sits.'"[103] And perhaps Frankfurter was right in his opinion the following year in *Dennis*, when he said that "[t]he demands of free speech in a democratic society," as well as the demands of countervailing constitutional values, "are better served by candid and informed weighing of the competing interests . . . than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."[104]

But remembering the track record of the constitutional tension tradition is an indispensable part of "consider[ing] concretely the options available."[105] The past is certainly not a perfect predictor of the future, but it's one of the few we have.

The basic method at the heart of the proposals I've discussed has been tried before. If we want to consider the method seriously, we should ask ourselves what we think of the results it led to. And, if we conclude, as I do, that the results were unsatisfactory, that they allowed far too much suppression of speech, then we should think twice about implementing a similar approach today.

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103. 339 US at 410 (quoting *Panhandle Oil Co. v Mississippi ex rel. Knox*, 277 US 218, 223 (1928) (Holmes dissenting)). But see *Barenblatt v United States*, 360 US 109, 152-53 (1959) (Black dissenting) (suggesting that the Court had indeed slipped far).

104. 341 US at 524-25 (Frankfurter concurring).

105. Matsuda, *Public Response to Racist Speech*, at 50 (cited in note 83).