

WHAT DOES THE FIRST AMENDMENT MEAN?

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THE FIRST AMENDMENT to the Constitution is, I believe, the most significant political statement which we Americans have made. And yet, just because it is so fundamental and revolutionary, its words are strangely confusing and paradoxical. By contrast with older forms of governing, the Amendment declares that the people of the United States are to be free—free from certain forms of governmental control, free to govern themselves in ways which they may choose, free to control those governing bodies which they have established as their agents. But the words “free” and “government,” when used in such statements as these, are torn away from their earlier meanings. “Freedom,” after the Constitution was adopted, did not mean what it had meant before. Nor did “government.” And, for that reason, the interpretation of the Amendment is constantly involved in deep and perplexing ambiguity. The Amendment means, I am sure, what it says. But there is a sense in which it does not say what it means. At any rate, it does not say it to us unless we practice eternal vigilance in the criticism of our words and meanings. And, in that situation, the task of interpreting the Amendment, of discovering and formulating what its meaning is, what it has become, belongs primarily to the Supreme Court of the United States.

It is the purpose of this paper to ask whether, under the strains of world war and domestic conflict, recent opinions of the Court have cleared away confusion and error about our freedom or have increased those evils. And, as a representative instance under that general inquiry, we will examine specifically the concurring opinion of Mr. Justice Frankfurter in *Dennis v. United States*.¹

I

As the opinion opens, it defines the crime of which Mr. Dennis and his associates were convicted. It was, we are told, a “conspiracy” to “promote” an “advocacy.” And that advocacy “was to be a rule of action, by language reasonably calculated to incite persons to such action, and was intended to cause the overthrow of the Government by force and violence as soon as circumstances permit.”² The constitutional issue before the Court arose from the fact that the Smith Act had declared such advocacy to be criminal.³ The question involved was, therefore, that of the constitutionality of the relevant sections of that act.

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¹ 341 U.S. 494 (1951).

² *Ibid.*, at 518.

³ 54 Stat. 671 (1940), 18 U.S.C.A. §2385 (1951).

It was necessary to decide whether, in view of the First Amendment and of related provisions of the Constitution, Congress has the authority to abridge advocacy which, in this enactment, it claims to exercise.

This paper does not intend to discuss the verdict in the *Dennis* case. Nor will it consider the opinion with respect to matters of legal process or precedent. Since the writer is, in the field of the law, an untutored layman, he is keenly aware of the apparent rashness, and even impropriety, of his engaging in such procedures. But that appearance may be somewhat cleared away if we note the limits which this argument sets itself. We shall be dealing, primarily, with sections one and four of the opinion. And those sections, as we consider them, speak not so much of legal process as of legal philosophy, that is, of underlying political and social theory. They pronounce judgments upon intellectual issues which have to do with fundamental principles of our common life. They speak gravely and authoritatively about the nature of logical reasoning. They define, directly or by implication, the values and aims of a civilized society. And these pronouncements are used to give basis and justification for the more strictly legal assertions of the other sections of the opinion. By the use of them there is constructed an interpretation of the First Amendment which, to the writer of this paper, seems radically false and harmful. It is that interpretation with which we are concerned—rather than with its application in a specific case. I am not asking, "Was Mr. Dennis properly convicted?" but rather, "Does the First Amendment mean what the opinion which joined in his conviction takes it to mean?"

At this point it should be noted that the opinion is not unique in its resort to extra-legal theorizing. Many recent rulings about the First Amendment have been based on highly questionable and sharply conflicting views of underlying theory. For example, as one reads the definition of the crime of Mr. Dennis as given above, with its easy transition from the charge of "advocacy of revolution" to that of "incitement to revolution," one's mind goes back inevitably to the striking and inaccurate statement of Mr. Justice Holmes that "Every idea is an incitement."⁴ That assertion, when taken seriously, means that every idea is within the reach of legislative control. And with that dictum accepted, the essential meaning of the First Amendment is undermined and swept away. The question whether or not a given idea is criminal is thus made one of "proximity and degree." And the measuring of proximity and degree is assigned to the legislative body. By means of such ill-considered pronouncements as these, the many opinions of the Court have taken on a curious irresponsibility, a tragic vagueness and inaccuracy. There is desperate need that the Court, as it determines the theory and practice of our political freedom, should define much more accurately, and with more careful consideration, what is that "Freedom" which the First Amendment intends to secure. This article is, therefore, in its deeper intention, an appeal to the Court to clarify, for itself and for the people whom it serves, the most significant principle of our American plan of government. We cannot practice freedom unless we know what freedom is.

⁴ *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

II

As we prepare to discuss the opinion, it seems essential that, following its lead, we take note of some difficulties in language by which interpretations of the First Amendment are constantly beset.

First of all, it must be recognized that the text of the Amendment is, with respect to its meaning, partial and incomplete. It specifies five types of laws which the legislature may not enact. But it does not give the positive reasons which justify that limitation of jurisdiction. Congress, it is said, may not abridge the freedom of religion, speech, press, peaceable assembly, or petition. But the purposes of our American plan of government, which make necessary that hemming in of the legislative branch, are not stated in the Amendment's words. To find them, we must go to the Preamble of the Constitution, to other sections which deal with the constitutional powers of the people and of the Congress, to the debates which surrounded the establishing of the government, to the later debates which have taken place, or are now going on, in our society. In a word, we must determine, as accurately as we can, what are those "blessings of liberty" which we intend to secure to ourselves and our posterity, and what are the provisions which the Constitution has made in their behalf.

We must also note that, though the intention of the Amendment is sharp and resolute, the sentence which expresses that intention is awkward and ill-constructed. Evidently, it was hard to write and is, therefore, hard to interpret. Within its meaning are summed up centuries of social passion and intellectual controversy, in this country and in others. As one reads it, one feels that its writers could not agree, either within themselves or with each other, upon a single formula which would define for them the paradoxical relation between free men and their legislative agents. Apparently, all that they could make their words do was to link together five separate demands which had been sharpened by ages of conflict and were being popularly urged in the name of the "Freedom of the People." And yet, those demands were, and were felt to be, varied forms of a single demand. They were attempts to express, each in its own way, the revolutionary idea which, in the slowly advancing fight for freedom, has given to the American experiment in self-government its dominating significance for the modern world.

More immediately serious, however, than the difficulties of the original sentence is the use of a title which, by its inaccuracy, has caused incalculable trouble in legal and nonlegal discussions of the First Amendment. I refer to the general custom of using the phrase, "Free Speech" or "Freedom of Speech" to cover, by inclusion and exclusion, the scope of the amendment as a whole. Endless illustrations of this usage are to be found in the utterances of the courts, as well as in the critical studies of those utterances. For example, Professor Zechariah Chafee's general treatise on the Amendment has chapters or sections on Deportations, The Red Flag Salute, The Newspaper Gag Law, Freedom of Assembly, Books and Plays, Government Control of Education, and so on. But all these are covered by the heading, "Free Speech in the United States." And

the book which reports my own slight study, I regret to say, follows the same habit. That book is deeply concerned with the freedom of religion, speech, press, assembly, and petition, as well as of other activities of thought and expression. But it was named "Free Speech and its Relation to Self-Government." These titles are obviously inaccurate and misleading. The phrase, "Freedom of Speech," is both too narrow and too wide in scope to indicate the Amendment's purpose. Many activities of belief and communication, whose freedom the amendment protects, are not "forms of speech." And, on the other hand, there are many "forms of speech" for whose freedom the amendment has no concern. And, as we shall see in the opinion under discussion, these inaccuracies of reference cause serious confusion in the interpretation of that Freedom X—the freedom to which the Amendment does refer. The primary essential of a consideration of that freedom is that we recognize that we are not talking about the freedom of "Speech."

As pointing the way toward such a recognition I venture the preliminary suggestion that the prize of victory which our forefathers won when the First Amendment was adopted was not the unlimited right of the people to "speak." It was the unlimited right of "Religious and Political Freedom"—whatever those words may be found to mean. The governments which the freedom-seeking rebels had known in the past, in this country and elsewhere, had imposed upon the people religious and political orthodoxy. They had given official status to certain sets of ideas and had denied it to others. And, in the latter case, they had proceeded to inflict upon those who held or uttered those ideas various forms of disapproval, of punishment, of repression. And, further, this discriminating action was justified chiefly on the ground that heterodox ideas and utterances were dangerous to the welfare of the nation, to the security of the government. It was that discrimination and that appeal to "security" which a rebellious people challenged and defied. And with the adoption of the Amendment, the people, on paper at least, had won. Under the new Constitution, the people, now a corporate body of self-governing citizens, forbade their legislative agents to use, for the protection of the nation, any limitation of the religious or political freedom of the people from whom their legislative authority was derived.

III

Before attempting to criticize the argument of the opinion, it seems necessary to question the definition of the constitutional issue which is given in its early paragraphs. That definition represents two vital interests of the nation as being, on occasion, in conflict with one another. On the one hand, there is the "all-embracing power and duty of self-preservation";⁵ on the other hand, the interest in those freedoms which are protected by the First Amendment. And further, the opinion argues, since on occasion these two interests may clash, it is obvious that the government of the United States must have authority to measure their conflicting values, to decide which of them shall, on such an occasion, give way.

One may question the assumption that there is fundamentally a conflict be-

⁵ 341 U.S. 494, 520 (1951).

tween the security of the nation and the freedom of the people. The First Amendment seems to mean that freedom creates security rather than destroys it. But however that may be, it seems impossible to question the assertion that, for whatever reasons may seem to it valid, the government has authority to do what it will with the First Amendment. That enactment exists only by the will of that government. And there can be no doubt that the creator may, as its judgment dictates, maintain or change or destroy that which it has created. The opinion cites, from the records of the Supreme Court, a number of rulings which give authority to that conclusion. One of the more clear-cut of these reads as follows:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain those ends nearly all other considerations are to be subordinated. It matters not in what form such aggression comes. . . . The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth.⁶

Let it be agreed, then, that the government of the United States has authority to modify or to annul the First Amendment, in whatever measure, and in whatever manner, it may choose. But from that statement it does not follow that Congress has the same authority. Congress is not the government. And, in its disposal of its powers through the Constitution, the government has reserved powers as well as delegated them. The fact of governmental power is not, then, a proof of congressional power. And for that reason, the authorities cited by the opinion are not relevant to the point at issue. In a word, the question before us is not, "Has the government of the United States authority to nullify the First Amendment, wholly or in part?" Our very different question is, "Has Congress that authority?"

IV

Within the general scope of that constitutional issue, the *Dennis* case brought before the Court the specific question, "Has Congress authority to restrict the freedom of the 'advocacy of revolution?'" The federal legislature had claimed that authority when, in the words of the Smith Act, it had said:

It shall be unlawful for any person . . . (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence, or to be or to become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.⁷

The opinion which we are to discuss supports that claim. It notes the fact that the claim seems, at least, to violate the First Amendment, if that amendment be read literally. But the Amendment, it insists, should not be read literally. To this effect, it says:

⁶ The Chinese Exclusion Case, 130 U.S. 581, 606 (1889), quoted at 341 U.S. 494, 519-20 (1951).

⁷ 54 Stat. 671 (1940), 18 U.S.C.A. §2385 (1951).

The language of the First Amendment is to be read, not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use but what was in their minds which they conveyed. Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid.⁸

With the first of those three statements it would be hard to quarrel. Words, as found one by one in a dictionary, make sense. But they do not make sentences. And the First Amendment is a sentence. The second statement is, also, clearly valid, though it makes the questionable suggestion that Madison and Hamilton, as they explained the Constitution, did not succeed in saying what was "in their minds." The last statement is, I think, hopelessly vitiated by its use of the phrase "Free Speech" to indicate the scope of the First Amendment. It is clearly true that many "abuses of expression" may be suppressed without violation of the religious or political freedom of the speaker. But that statement is irrelevant for our argument unless it is shown that the advocacy of revolution is one of those abuses. Can that be shown? The opinion contends that it can. This article will contend that it cannot.

V

The thesis that the legislature has the authority to abridge the freedom of the advocacy of revolution is phrased by the opinion in the form of a question and answer, as follows:

The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?⁹

The opinion's answer to that question is a decided, "No." The notion that the people of the United States are assured of unlimited political freedom is, we are told, an "engaging" one. But, for the sober purposes of the law, it cannot be maintained. Congress is empowered, on occasions to be determined at its own discretion, to abridge such freedoms as those of speech and of assembly, to "make exceptions" to the First Amendment. The answer of this article to the same question is an equally decided, "Yes." The First Amendment, we shall argue, is not "open to exceptions." And to say that a given act of the legislature restricts any one of the freedoms over which the Amendment stands guard does "dispose of the matter." Such an act is unconstitutional.

With the field of conflict thus outlined, we may now proceed to consider specific issues within it, one by one. The *Dennis* case, it should be noted, does not raise questions of religious freedom. Our argument, therefore, will deal only with political problems.

VI

"Not what words did Madison and Hamilton use, but what was in their minds which they conveyed." In that sentence, the opinion summons, to sup-

⁸ 341 U.S. 494, 523 (1951).

⁹ *Ibid.*, at 520-21.

port its thesis, the two chief writers of that interpretation of the Constitution which is given by the "Federalist." My own reading of that interpretation, however, seems to show that, at the two essential points, Madison and Hamilton are witnesses *against* the opinion, rather than *for* it. We must now argue that case.

First of all, what are the two conflicting views concerning the "political right" of the people of the United States to "advocate the overthrow of the government by force and violence?" The opinion says:

Of course, no government can recognize a "right" of revolution or a "right" to incite revolution if the incitement has no other purpose or effect.¹⁰

What considerations or arguments are "in the mind" of the writer of that sentence, covered by the phrase, "of course," we are not told. It stands as an unexplained assertion.

The "Federalist," on the other hand, is equally insistent, but more explanatory, on the opposite side of the issue. It finds, as basic features of our American plan of government, not only the right to "advocate revolution," but also, the right of "revolution" itself. This second assertion is not relevant to our present argument, but since it throws light on the right of advocacy, we must briefly note what Madison and Hamilton say about it.

By contrast with the "of course" of the opinion, they staunchly support the assertion of the Declaration of Independence when it says:

[W]henever any form of government becomes destructive of these ends (for which it was instituted) it is the right of the people to alter or to abolish it and to institute new government, laying its foundations on such principles and organizing its powers in such form, as to them shall most likely to effect their safety and happiness.

In a number of passages, that right of revolt is reasserted by the Federalist debaters. And in one of these, Hamilton goes so far as to declare that it is an important advantage of the proposed federal union that it provides an easier and more secure road for revolutionary action than is available in the smaller units of the separate states. His plea reads, in part, as follows:

If the representatives of the people betray their constituents, there is no resource left but in the exertion of that original right of self-defence which is paramount to all positive forms of government, and which against the usurpations of their national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual State. . . . The smaller the extent of the territory, the more difficult will it be for the people to form a regular or systematic plan of opposition, and the more easy will it be to defeat their early efforts. . . . How wise will it be in them by cherishing the union to preserve to themselves *an advantage which can never be too highly prized.*¹¹

As Hamilton thus advises the people to treasure and maintain that "right" of revolution "which can never be too highly prized," what was "in his mind"? There can be little doubt that he would agree with the opinion's declaration

¹⁰ Ibid., at 549.

¹¹ Hamilton, Madison, and Jay, *The Federalist or the New Constitution*, XXVIII, 135-36 (Everyman's Library, 1911). (Emphasis added.)

that the right to revolt is not "political," that no government can "recognize" it. We shall not find that right established either by constitutional provision or by legislative enactment. But that the right exists and is a basic feature of our plan of government, Hamilton is equally certain and emphatic. What he is here saying is that, if a government exists by the consent of its citizens, there is implicit in it an "original" and "prepolitical" right without which the structure of consent would be meaningless. The Declaration of Independence is, for him, valid. If the grounds of consent are destroyed, the obligations of consent are destroyed with them. The opinion is, therefore, wrong. At this point its witnesses give evidence, not for it, but against it. It must be added to round out the picture, however, that whenever citizens abandon "political" methods and resort to force, the government which they attack has an equally original and valid "right" to repel the attack by use of its own force.

But, second, Madison and Hamilton are both convinced that the right to advocate revolution, as contrasted with the right to actively engage in it, is clearly "political," and gives expression to a valid constitutional principle upon which the structure of political freedom rests. That principle which, in the judgment of the "Federalist," runs through the Constitution, is explicitly stated by the First Amendment. What it says is that a government is maintained by the free consent of its citizens only so long as the choice whether or not it shall be maintained is recognized as an open choice, which the people may debate and decide, with conflicting advocacies, whenever they may choose. If the time or the occasion should ever come—as by the decisions of our courts it seems now to have come—when the people of this nation are prevented by their subordinate agencies from considering and advocating and deciding whether or not to maintain the present form of our government, then, in the opinion of the "Federalist," that form of government has already ceased to exist. In that case, we have come to the absurdity of declaring that a man who believes that fundamental constitutional change is needed for the sake of the general welfare is, thereby, shown to be disloyal to the nation. As Madison and Hamilton wrote their "Federalist" arguments, they were meeting the onslaughts of critics who passionately condemned the proposed Constitution and were doing everything in their power to defeat it. And as against those onslaughts, though they themselves had many objections to the new plan, they fought back with equally spirited counter-advocacy. And that method of counter-advocacy is still available to our government as it meets the attacks of those who would seek to destroy its present form and put another in its place. But to make the advocacy of revolution a criminal offense, as the Smith Act does, is to violate the basic principle of political freedom which the "Federalist" explains and defends. At this point, neither in written words nor in the ideas underlying those words, do Madison and Hamilton give support to the opinion which has summoned them to testify in its behalf.

VII

Our argument now turns from the more limited issue of the right to advocate revolution to the broader question of the authority of the legislature to abridge

in any way the political freedom of the people. As we seek to discover what Madison and Hamilton are saying on that issue, it must be remembered that one of the most serious criticisms of their new plan was that it did not include a bill of rights. It was, therefore, charged that the plan had not made adequate provision for the defense of popular rights against the repressive power of the government.

In Number 84, Hamilton answers that complaint. The proposals of the convention, he declares, have done far more for the freedom of the people than could have been done by appending a bill of rights to a constitution which, having neglected those rights, had need of such an appendage. The new plan, he says, has no such need. The defense of the people against the legislature is embedded into the very structure of the Constitution itself. One of his statements on this point reads:

The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, a BILL OF RIGHTS. . . . Is it one purpose of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention, comprehending various precautions for the public security, which are not to be found in any of the State constitutions. Is it another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights it is absurd to allege that it is not to be found in the work of the convention.¹²

With hard and sober logic, Hamilton proceeds to argue, both in theory and in practice, the validity of that assertion. As to theory, he says:

"We, the People of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution of the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of the State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.¹³

Having thus announced the basic intention of the new plan to protect the "political privileges" of the people from interference by the other branches of the government, Madison and Hamilton go on to show, point by point, how that intention is to be realized. Our political privileges, they tell us, are of two kinds. First, "We, the People," must be recognized as having all political authority. This means that other governing bodies have powers only insofar as those powers are delegated to them by us. And, second, the people, as electors (Article I, Section 2), play an active and dominant part in the administration of the government. In both those relationships, the "Federalist" declares, the citizens, as the sovereign power, must be kept free from any dependence on their representatives. And, since it is the legislature which, in actual fact, chiefly threatens to

¹² *Ibid.*, LXXXIV, at 440-41.

¹³ *Ibid.*, LXXXIV, at 439.

usurp the authority of the people,¹⁴ the argument relates in great detail the constitutional devices by which such legislative usurpation is to be prevented.

As they thus argue the dependence of the legislature upon the will of the people, Madison and Hamilton are not denying that the legislative and executive agents of the people have authority to enact and to enforce laws which the people must obey. They are too shrewd and practical to entertain that absurdity. They know that the people who govern are also governed. But what they do insist upon is that if men are to live as free citizens they must, as governors, exercise an effective control over those who make the laws which they must obey. That double doctrine is summed up in the words:

It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government; and, whatever may be the forms of the Constitution, units all power in the same hands.¹⁵

How then, more specifically, is the legislature kept in proper dependence on the people? In general outline, the arrangements for that purpose are as follows:

1. The representatives are elected by direct vote of the people.¹⁶

2. Elections of representatives are for limited terms, and those terms are brief enough to insure active and continuous control.¹⁷

3. The powers delegated to Congress are, in all cases, specific and limited. There is no delegation of general legislative power. The suggestion that Article I, Section 8 authorizes Congress to exercise powers not specifically delegated is, we are told, clearly invalid. One of the statements to that effect reads as follows:

The plan of the Convention declares that the power of Congress or, in other words, of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.¹⁸

4. To the three restrictions upon legislative authority thus ordained, there is added, as final guarantee of citizen freedom, the provision that these restrictions cannot be changed by any subordinate branch of the government, nor by all of them acting together. Such action can be taken only by the people in such ways as they may determine.¹⁹

The significance of these arrangements is made even more clear, in its bearing on the First Amendment, by Hamilton's discussion of the "liberty of the press" as a special case under the general rule. That liberty, he insists, is fully secured without the help of a bill of rights. To this effect he argues:

For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when

¹⁴ *Ibid.*, XLVIII, at 253.

¹⁵ *Ibid.*, LXXI, at 366.

¹⁶ *Ibid.*, XXXIX, at 191.

¹⁷ *Ibid.*, LII, at 269.

¹⁸ *Ibid.*, LXXXIII, at 424-25.

¹⁹ *Ibid.*, LXXXVIII, at 399.

no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.²⁰

Here, in unqualified terms, is Hamilton's answer to the question asked by the opinion: "The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?"

The opinion answers, "No." Hamilton answers, "Yes"—even though the First Amendment has not yet been written. The Constitution, he is saying, does not establish a legislative power to restrict political freedom, in any of its forms. There is, then, no such power.

As we feel the driving force of these provisions for the defense of freedom, we must remember that Madison and Hamilton, as they advocate them, are not predicting that, under the Constitution, the freedom of the people will never again be invaded by lawmakers, presidents, justices, or even by the people themselves. Human nature they know to be weak of will and often self-contradictory. Especially, they are not sure that the people will have the capacity upon which the success of such a plan of self-government depends.²¹ And they have the same doubt of the intelligence and integrity of the agents of the people. Human beings, holding office or not holding office, have violated, and will continue to violate, the intentions of the Constitution. But that is not to say, as the opinion does, that the Constitution gives authority for such violations. The two chief witnesses—may I say it again?—whom the opinion summons to give evidence in support of its thesis, give direct evidence against it.

VIII

As we now leave behind the opinion's appeal to what was "in the minds" of Madison and Hamilton, we shall find it following three other lines of argumentation. The first of these lays a basis for saying that the "freedom of advocacy" is subject to legislative limitation by trying to show that all the provision of the First Amendment are open to exceptions. That conclusion is stated in the following sentence: "Free speech is subject to the prohibition of those abuses of expression which a civilized society may forbid."²² As we proceed to discuss that statement, it is important to recall the ambiguities which arise from the use of the phrase, "free speech," to indicate the scope of the First Amendment. No one doubts that, under the Constitution, many abuses of expression are subject to prohibition. We might even say that all forms of speech are, in some respects, open to government control. In that sense, we can say that if there were a principle of "free speech," as such, it would obviously be open to exceptions. But the First Amendment, as already noted, does not protect speech. It protects political freedom, in speech or wherever else it may be threatened. And, because of

²⁰ *Ibid.*, LXXXIV, at 439.

²¹ *Ibid.*, LXXI, at 365.

²² 341 U.S. 494, 523 (1951).

its confusion at this point, the opinion, we shall find, fails to establish its conclusion.

The argument about exceptions rests on two Supreme Court decisions: *Robertson v. Baldwin*,²³ rendered in 1897, and *Frohwerk v. United States*,²⁴ decided in 1919. The second of these depends upon the first, but also, as we shall see, contradicts it at the crucial point in the argument.

The *Robertson* statement, as quoted in the *Dennis* opinion, reads as follows:

"The law is perfectly well settled," this Court said over fifty years ago, "that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intent of disregarding the exceptions which continued to be recognized as if they had been formally expressed."²⁵

A further explanatory sentence, not quoted by the opinion, follows at this point. It says:

Thus the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemies, or indecent articles, or other publications injurious to public morals or private reputation.²⁶

In comment on these rulings, the opinion says:

That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years. See, e.g., *Gompers v. United States*, 233 U.S. 604, 610. Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.²⁷

The *Frohwerk* reference, taken from the well-known words of Mr. Justice Holmes, reads as follows:

[T]he First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity to every possible use of language. *Robertson v. Baldwin*, 165 U.S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech.²⁸

The disputed assertion of the *Robertson* ruling, which is accepted by the opinion as the "authentic view," is that when abuses of expression are suppressed,

²³ 165 U.S. 275 (1897).

²⁵ 341 U.S. 494, 524 (1951).

²⁴ 249 U.S. 204 (1919).

²⁶ *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

²⁷ 341 U.S. 494, 524-25 (1951).

²⁸ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

exceptions are thereby made to the First Amendment. It is that assertion which this article now seeks to refute. Suppressions of political freedom, we agree, would constitute exceptions to the Amendment, but not suppressions of abuses, as the term is here used. In support of that statement, we shall now quote *Frohwerk* against *Robertson*.

First of all, then, what are the abuses to which the opinion refers? They have often been listed by the courts, in many vague and varying ways. The *Robertson* opinion speaks of some of them as "the publication of libels, blasphemies, or indecent articles, or other publications injurious to public morals or private reputation." To this list, the *Frohwerk* statement adds "the counselling of a murder." The opinion in *Schenk v. United States*²⁹ spoke of the act of "falsely shouting fire in a theater and causing a panic." "Offensive" and "provocative" remarks have often been denied immunity. Contempt of court may be a punishable offense. Speech causing a riot or inciting to it has been held to justify police interference. The list might be extended indefinitely. And, as the opinion suggests, the items listed are not easily classified except as abuses. And yet, in the midst of this complexity, the clear fact stands out that many forms of speech, on the ground that they are abuses of expression, may be restrained and punished. And it is agreed, also, that the First Amendment raises no objection to such action.

But now, on what ground is this silence of the Amendment interpreted as an acknowledgment on its part that exceptions may be made to its principle? The only major premise which could sustain that inference would be the assertion that the Amendment intends to protect "all uses of language" as such. If that were true, then any authorized suppression of any language would properly be called an exception to it. But the *Frohwerk* ruling saves us from that absurdity. The words of Justice Holmes are here clear and decisive. The Amendment, we are told, "cannot have been, and obviously was not, intended to give immunity to every possible use of language." That being true, no abridgment of a use of language is, as such, a violation of the Amendment's intention. It is only the allowing of the limitation of political freedom which would constitute an exception to it. The point here at issue may seem merely verbal, but it lies at the very source of those misunderstandings through which our guaranties of freedom have been swept away. It is that confusion which has enabled our courts to argue that, since this or that form of communication may be limited for "nuisance" reasons, it may likewise be limited for "political" reasons. At this point, an illustration may, perhaps, help us toward greater clarity.

If I say generally and without qualification that "All dogs are black," what facts would require me to acknowledge an exception to my assertion? Let us suppose that, having committed myself to that universal remark about dogs, I encounter a cat which, being yellow, is non-black. Have I then found a negative instance—an exception—which destroys the universality of my principle? To say that would be nonsense. I was not talking about cats, but about dogs. If my

²⁹ 249 U.S. 47, 52 (1919).

assertion had been, "All domestic animals are black," the appearance of the cat would have forced the making of the exception. But my principle was not so wide as that. I was not talking about "all domestic animals," but about "all dogs." And, in just the same way, the First Amendment does not talk about "all uses of language." Its purpose is much narrower—as well as wider—than that. It provides a guaranty for the political freedom of the sovereign people of the United States. And to that guaranty the evidence offered by the opinion has shown no "exceptions."

As we leave this point, it is at least interesting to note the distinction between the suppression of *abuses* and the suppression of *freedom*, as it appears in the *Dennis* case. The defendants there were not accused of blasphemy or indecency. Their meetings for "conspiracy" were not found to be "riotous" assemblies. Nor—as contrasted with some of their lawyers—were they even charged with contempt of court. The accusation was that of the "advocacy of revolution." And the constitutional issue was whether or not a conviction on that accusation was an invasion of the authority of the people of the United States to engage freely in the administration of their government. With respect to that issue, the opinion's argument about exceptions has, so far as I can see, no relevance whatever. One cannot argue from the suppression of indecency to the suppression of political freedom.

IX

The opinion has, however, another line of argument to show that the First Amendment is, in general, open to exceptions. It is stated in negative rather than positive terms. And it is based neither on the text of the Constitution nor on judicial interpretations of that text, but solely on the opinion's own extra-legal theorizing about the methods and results of human reasoning. As against the assertion that the First Amendment is an "absolute" statement, which admits of no exceptions, the opinion declares that no rule, whether within the Constitution or outside of it, can be, in that sense, "absolute." That conclusion, already quoted, is stated as follows: "Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."³⁰

Since that statement, in order to serve its purpose, must be itself an "absolute," we might say of it that, if it is true, it proves itself to be false. If, however, we seek for a more serious line of refutation, we are met by the disturbing fact that no reasons are offered in its support. It is stated merely as if it were an accepted dictum. By this lack of opposing arguments, a critic is driven to a "practical" rather than a "theoretical" reply. We must try, by an *ad hominem* argument, to show that the opinion's dictum does not work.

If it be true, as the opinion tells us, that absolute rules have no proper part in the meaning of the Constitution, then it follows that the writer of the opinion must suffer his own condemnation. For example, when the First Amendment's protection of the freedom of religion was in question in *McCollum v. Board of*

³⁰ 341 U.S. 494, 524 (1951).

Education,³¹ he took his stand squarely on the absoluteness of the principle of separation of church and state. "Released time" statutes, he said, are unconstitutional because, in them, "we find that the basic constitutional principle of absolute separation is violated."³² And, as against the making of exceptions to that principle he quoted, with enthusiastic approval, the saying of Elihu Root:

It is not a question of religion, or of creed, or of party: it is a question of declaring and maintaining the great American principle of eternal separation between Church and State.³³

To this he adds in summary:

We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the State and religion is best for the state and best for religion."³⁴

Those statements, coming from a mind unusually free from the habits of "absolutism," in the objectionable sense, have more than "an engaging ring of universality." They are genuine "absolutes," which admit of no exception. One wonders why, if they are valid for the protection of religion, they are not valid for the other provisions of the Amendment.

In the same way, the *Dennis* opinion itself, in its own argument, pours out upon its reader a flood of absolutes. This is done chiefly in connection with the statement that, while the courts cannot challenge the substantive wisdom of the legislature as it abridges the freedom of advocacy, they are responsible for keeping suppression within prescribed procedural limits. That statement is specified in such principles as the following:³⁵

1. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.
2. We are to determine whether a statute is sufficiently definite to meet the constitutional requirements of due process, and whether it respects the safeguards against "undue concentration of authority" secured by separation of power.
3. We must assume fairness of procedure, allowing full scope of governmental discretion, but mindful of its impact on individuals in the context of the problem involved.
4. And, of course, the proceedings in a particular case before us must have the warrant of substantial proof.
5. Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us.

Every one of those principles is, in form of statement, identical with the First Amendment. Are they, then, open to exceptions? They are all, like the Amendment, open to modification or repeal, and they are, all alike, filled with words hard to define and shifting in meaning from case to case. Such phrases as "reasonable basis," "sufficiently definite," "undue concentration of authority," or "fairness of procedure," and so on, will plunge any court into differences of in-

³¹ 333 U.S. 203 (1947).

³² *Ibid.*, at 231.

³⁴ *Ibid.*, at 232.

³³ *Ibid.*, at 219.

³⁵ 341 U.S. 494, 525-26 (1951).

terpretation and hence, into oppositions of verdict. But to say that is very different from saying that they are open to exceptions. This latter statement would mean that a court might determine that a legal proceeding is unfair, without reasonable basis, or lacking in substantial proof, and yet give to the proceeding its constitutional approval. But to say that would be to reduce the "universal" provisions of the Constitution to what Justice Harlan has called a "nullity." A universal statement which is not universal says nothing at all. If the opinion is right at this point, the First Amendment should not have been written. And the opinion, it must be said, as it justifies the conviction of Mr. Dennis, speaks as if it had not been written.

X

The opinion has, however, another line of inference which is even more disastrous in its implications than those already considered. It is taken from the first sentence, already quoted, from the *Robertson v. Baldwin* opinion, which reads:

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors. . . .³⁶

In comment on that statement, the opinion says:

That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years.³⁷

Was the First Amendment "inherited from our English ancestors?" Is it true that the Constitution of the United States "laid down no novel principles of government?" As a layman gathers courage to challenge the "authentic view" that the American Revolution secured for our citizens no guaranties or immunities which had not previously been won, he can find several sources of encouragement and support.

First, it is worthy of note that the *Robertson* decision itself was accompanied by a ringing dissent from Mr. Justice Harlan. His disagreement took the form of an explicit rejection of the principle which the majority declared to be "perfectly well settled." Justice Harlan was arguing the question whether the constitutional prohibition of involuntary servitude is absolute or open to exceptions. And in proof of its absoluteness, he said:

Nor, I submit, is any light thrown upon the present question by the history of legislation in Great Britain. The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States.³⁸

In support of that opinion he then calls upon James Bryce who, in his "American Commonwealth," tells how fundamentally the principles of the Constitution have departed from the principles of the British system. Parliament, according to Bryce, could do whatever it chose to do; its power was unlimited. It could,

³⁶ 165 U.S. 275, 281 (1897). ³⁷ 341 U.S. 494, 524 (1951). ³⁸ 165 U.S. 275, 296 (1897).

Bryce says, " 'abolish when it pleases every institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself.' " ³⁹

By contrast with this original and unlimited authority of the British legislature, Justice Harlan insists that the powers of the American Congress are subordinate, as well as limited and specific. The distinctive feature of our Constitution, he declares, is that it is established, not by the legislature, but by the people. And he sums up this contrast in the words:

No such powers have been given to or can be exercised by any legislative body under the American system. Absolute, arbitrary power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person. ⁴⁰

And finally, summing up the theory of his dissent, he deploras a decision in which

the clear reading of a constitutional provision relating to the liberty of man is departed from in deference to what is called usage which has existed, for the most part, in monarchical and despotic governments. ⁴¹

In those statements Justice Harlan is proclaiming the "novelty" of those revolutionary principles by means of which the new plan of government displaced the earlier British and American procedures. And—if we may turn back for a moment to the "Federalist"—Madison and Hamilton, as they advocated the new Constitution, had issued the same proclamation. In Number 14, Madison writes:

Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment, have been numbered among the melancholy victims of misguided councils, must at best have been labouring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of government which have no model on the face of the globe. ⁴²

As the "Federalist" makes these sweeping claims to novelty, it is not denying in toto the assertion that the principles of the Bill of Rights are "inherited from our English ancestors." It would never have occurred to Madison or Hamilton to question the fact that such rights as habeas corpus, due process, fair trial, security from unreasonable searches and seizures, freedom from excessive punishments, and so on, had long been fought for in Britain and the Colonies, and

³⁹ *Ibid.*, at 297.

⁴⁰ *Ibid.*, at 296.

⁴¹ *Ibid.*, at 302.

⁴² *Federalist*, op. cit. supra note 11, XIV, at 66.

in some measure, won. With regard to these victories which affected the "personal and private concerns" of the people, as they submitted to being governed, it could fairly be said that, though higher levels had now been reached, no "novel principles had been laid down." But, as distinguished from these "private rights" of the "governed" people, the citizens of the new "representative republic" were to have "political privileges," whose establishment had a wholly different character. Those citizens were to govern themselves as men had not governed themselves before. They were to have both "ultimate" and "immediate" authority in the "structure and administration of the government." They were no longer to beg for rights, to fight for them, or to wring them as concessions from a sovereign king, parliament, governor, or council, who ruled over them. They themselves were now the sovereign sources of all governing power. The legislature, the executive, and the judiciary were their agents, commissioned, in specified ways, to do their will. And with that acquisition of sovereign power, the people had acquired also a new political freedom—the freedom to govern the nation—which they had not had before. No revolutionary transfer of authority in the history of mankind surpasses in novelty or in importance, that achievement of the body politic which we call, "We, the People of the United States." To miss its novelty is to miss the meaning, not only of the First Amendment, but of the Constitution as a whole. Our political freedom guaranteed by the Amendment consists in the fact that "We" have decided that as we go about the business of governing the nation, that governing shall not, on any grounds, be deprived of its freedom by action of any subordinate branch of our government.

The position just taken is summed up by Hamilton in two brilliant sentences, already quoted, when he says:

It is one thing to be subject to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government, and whatever may be the forms of the Constitution, unites all power in the same hands.⁴³

Here then is Hamilton's formulation of the meaning of the First Amendment, of the nature of our political freedom. "The governing people," he says, shall not "be dependent on the legislative body." That formulation of the meaning of freedom has two advantages over the "awkward and ill-constructed" sentence which seeks to express the same meaning in the Bill of Rights. First, it states a constitutional principle, instead of merely listing five distinct issues under it. Second, it finds that principle in the Constitution, not merely as given by an appended sentence, but so woven into its structure as to give life and significance to the document as a whole. If Hamilton is right, as I think he is, then he is saying to the writer of the concurring opinion in the *Dennis* case something like this: "Your theoretical, extralegal argument is not simply attacking the absoluteness of a single formula, not merely trying to prove it open to exceptions. You are

⁴³ *Ibid.*, LXXI, at 366. See page 470 *supra*.

denying the fundamental achievement of the American plan of government—denying not only its novelty but also its validity.”

XI

What, then, is the summing up of the whole matter? It can, I think, be simply stated. The Constitution of the United States, as it was adopted and as it now stands, does not give equal status to the duty of self-preservation and the duty of maintaining Political Freedom. On the contrary, our “experiment” in self-government makes that freedom an absolute, while self-preservation is a conditional and relative consequence of it. It expresses the decision of the American people to establish and maintain freedom, and then watch what happens. And that decision is founded, not in idle dreaming, but in sober thinking and bitter experience. Underlying it is the strong conviction that, whatever may be the balance of immediate gains and losses, the progress of political freedom gives better assurance of national security than does any program of political repression and enslavement. And thus far in our history, that conviction has been justified both by the consequences of our disloyalties to the program and by those of our loyalties to it. Our only serious danger today is that of losing faith—of abandoning, through lack of nerve, the most novel, the most significant political principle which history records.

And second, it must be said that, if the experiment in “Government by the People” is found to be a failure and should, therefore, be abandoned, neither the legislature nor the judiciary has authority to make that change. As against such legislative or judicial usurpation, I appeal once more to the words already quoted in part from Justice Harlan’s dissent:

It is a very serious matter when a judicial tribunal, by the construction of an Act of Congress, defeats the expressed will of the legislative branch of the government. It is a still more serious matter when the clear reading of a constitutional provision relating to the liberty of man is departed from in deference to what is called usage which has existed, for the most part, under monarchical and despotic governments.⁴⁴

And in the same vein, may I add as final summary, that I find it hard to understand how my good friend, the Justice who so steadfastly guards from usurpation the constitutional authority of the legislature, can so easily overrule the authority of the Constitution itself, can substitute for its wisdom the wisdom of the Court of which he is a member. To do that is, as Justice Harlan says, a violation of “the injunctions of the supreme law of the land.”

⁴⁴ 154 U.S. 275, 302 (1897). See page 477 *supra*.