

CLEAR AND PRESENT DEMOCRATIC DANGERS: “DON’T TOUCH MY JUNK”

*Gene R. Nichol**

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I. INTRODUCTION

I’m delighted to be here in Lubbock, here at Texas Tech. There are several reasons for that.

First, unlike any of these other characters, I’m an actual Texan. And I include Scot Powe in that disclaimer. I know Professor Powe has lived here a long time, but he’s no Texan. It would take more than just a few decades to bring about that particular transformation. And, besides, he lives in Austin, and they don’t know much about Texas over in Travis County.

My younger brother is a graduate of this law school. So, this isn’t my first trip to Lubbock. I do remember coming out with him during his first year, and we were both treated to our inaugural West Texas dust storm, putting wet towels around doors and windows. Our parents were dust bowl kids, and we both thought we had returned rather forcefully to our roots.

I also, way back in the day, was a ne’er-do-well football player at Oklahoma State. There have been some pretty good football games between Tech and Oklahoma State. I went back to Stillwater for some purpose four or five years ago, and they took me to the Tech–OSU game. The Cowboys won, and I was, of course, glad about it. The score was, I think, 93–89. If you like offensive football it is a pretty good place to watch.

And it’s nice to be on this panel (and program) with old friends—some of whom I haven’t seen in a very long time. All of whom, I should say at the outset, are real First Amendment people, unlike myself. I protested this to Professor Loewy, who put these discussions together. He explained it was no problem; all would be fine. This was his way of saying that he has known me for a long time, and I sound about the same whether I know what I’m talking

* Boyd Tinsley Distinguished Professor of Law and Director, Center on Poverty, Work and Opportunity, University of North Carolina. This Essay is based on the author’s participation in the 2011 Criminal Law Symposium: *Criminal Law and the First Amendment*, held at Texas Tech University School of Law on April 8, 2011.

about or not. That character flaw arises apparently after a second law school deanship.

You will be relieved to hear, perhaps, that I am going to address this morning's topic—you might reasonably think I'm stalling—but is, or should, *Brandenburg* be seen as good law in our post-9/11 world?¹ I'm inclined to say “sure” and sit down. In part, that's because I think most of us assume *Brandenburg* augurs a fairly stout regime of free expression while, admittedly, we may not be certain what it actually means. As Judge Luddig concluded some years ago: “[W]e believe the district court's specific misreading of *Brandenburg* was plainly in error, [but] we cannot fault the district court for its confusion over the opinion in that case. The short per curiam opinion in *Brandenburg* is, by any measure, elliptical.”²

This statement could refer, I've thought, to either of two secondary meanings of that word “elliptical”: “of, [or] relating to, . . . [an] extreme economy of speech or writing” or “relating to deliberate obscurity [in literary style].”³ “[T]he constitutional guarantees of free speech and free press,” the decision teaches, “do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴ *Brandenburg* does not, I would think, clarify how “imminence” and “likelihood” are to be measured.⁵ Do they vary—like earlier versions of the clear and present danger test—with the gravity of the purported harm?⁶ Or is the linkage and the immediacy demanded steadfast and unwavering? And I don't think Chief Justice Roberts's opinion for the majority last year in *Holder v. Humanitarian Law Project* provides any helpful tightening or precision on this front.⁷ Probably, instead, it achieves the contrary in its stated “deference” to both executive and legislative judgments in “[the] sensitive and weighty interests of national security and foreign affairs.”⁸

But, to my point, these uncertainties do not invalidate the conclusion that Brother Chemerinsky has reached: that *Brandenburg* “seems to be the Supreme Court's most speech [securing] formulation of [the] incitement test.”⁹ Or, as

1. See generally *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam) (reflecting on *Brandenburg*'s requirement that a conviction for incitement through speech demonstrates imminent harm, the likelihood of producing illegal action, and an intent to cause imminent illegality).

2. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 264 (4th Cir. 1997).

3. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 404 (9th ed. 1985), available at <http://www.merriam-webster.com/dictionary/elliptical>.

4. *Brandenburg*, 395 U.S. at 447.

5. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1029-30 (4th ed. 2011).

6. *Id.* at 1022.

7. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

8. *Id.* at 2727.

9. CHEMERINSKY, *supra* note 5, at 1029.

Gerald Gunther phrased it three decades ago, “*Brandenburg* is the most speech-protective standard yet evolved by the [United States] Supreme Court.”¹⁰

So, given this, and given the challenges of modern terrorism, and the present and any foreseeable make-up of the United States Supreme Court, I take it that the actual question posed by this panel is whether the *Brandenburg* standard should be markedly eased. And, as I suggested, for me, the answer to that is no.

That is not, in my case, because I don’t believe durable and acceptable lines can be drawn concerning expression. Regardless of the strength of the *Brandenburg* test, for example, hard issues lie at the intersection of advocacy and acts.¹¹ And, it is not true, as some, or many, might think, that a regime of free speech will fall if we try to distinguish between core political and social expression¹² and a manual setting forth, in great detail, how to carry out a contract killing.¹³ I’m also convinced that an effective constitutional system can distinguish, and in our case must distinguish, between essential political expression and the huge sums of money now spent to dominate our political process. To conclude otherwise—with *Citizens United*¹⁴ and the upcoming Arizona public funding case, *McComish*¹⁵—is to claim that the world’s greatest democracy is simply helpless against the scourge of cash-register politics.

We craft complex, multi-faceted, and frequently incomprehensible lines now on abortion rights,¹⁶ guns,¹⁷ takings,¹⁸ interstate commerce,¹⁹ religious

10. Gerald Gunther, *Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975); see also KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 206-08 (1989) (discussing the *Brandenburg* test and its protection of speech).

11. See CHERMERINSKY, *supra* note 5, at 1032-33; *Holder*, 130 S. Ct. at 2712 (congressional prohibition of “material support” for purported terrorist organizations).

12. See Nat’l Broad. Co. v. Niemi, 434 U.S. 1354, 1354-57 (1978); *Waller v. Osborne*, 763 F. Supp. 1144, 1150-53 (M.D. Ga. 1991).

13. See *Rice v. Paladin Enters., Inc.* 128 F.3d 233, 239-42 (4th Cir. 1997).

14. *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (holding that corporations can engage in unlimited independent expenditures to affect candidate election outcomes—rendering campaign contribution limits useless).

15. *McComish v. Bennett*, 131 S. Ct. 2806 (2011) (holding an Arizona statute that allowed matching through public funds for state political-office candidates violated the First Amendment). At the time of the Criminal Law Symposium, the Court had heard oral argument on *McComish*, but the case had not yet been decided.

16. Compare *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003), with *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding a state partial-birth abortion ban statute invalid).

17. See *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (discussing the right to bear arms).

18. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (holding that a temporary denial of develop is not a per se taking of property); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (utilizing a complex balancing test in takings case).

19. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding criminalizing home-grown marijuana did not violate the Commerce Clause); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act as noneconomic).

liberty,²⁰ sexual orientation,²¹ affirmative action,²² separation of powers,²³ standing,²⁴ and dozens of other fronts.²⁵ We are not required to completely abandon judgment and to pretend we cannot sensibly tell the difference between murder manuals and political pamphleteers.

The thrust of *Brandenburg*, though, remains an important one. Not only is that, perhaps obviously, if paradoxically, because the right to advocate lawlessness is one of the essential safeguards of freedom.²⁶ As even quite conservative jurists have put it:

[I]n a society of laws, one of the most indispensable [liberties] is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.²⁷

But beyond the clear link to protest, *Brandenburg*'s psychology, at its core, is perhaps our most visible and acculturated push back against the perennial, unyielding, eternal, and inevitably human pressure of the ins—whoever they might be—to set the rules of expression to favor themselves and their interests and to burden or handicap their critics and adversaries, including (maybe especially), the extreme, the marginalized, and the despised.²⁸

I make no claim to ingenious insight concerning *Brandenburg*'s ultimate interpretation and implementation. But I want to conclude by focusing briefly on two episodes: one from the period giving birth to a bolstered clear and present danger test and, at the other end of the time spectrum, one from recent months and weeks. Both remind, even if somewhat over-simply, that these

20. See *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that religious marker on state government grounds did not violate the Establishment Clause); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (discussing the constitutionality of various public religious displays).

21. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating anti-gay statute without ascertainable standard of review).

22. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (discussing use of race to achieve integration of public schools); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (discussing use of race in admissions at university level).

23. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (formal review in separation of powers); *Morrison v. Olson*, 487 U.S. 654 (1988) (functional review in separation of powers decision).

24. See *Ne. Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993) (standing allowed in equality case without injury); *Allen v. Wright*, 468 U.S. 737 (1984) (concrete injury demanded in equality action).

25. See *Saenz v. Roe*, 526 U.S. 489 (1999) (right to travel as a privileges and immunities issue). *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (right to travel as an equal protection question). Enough . . .

26. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

27. *Id.*

28. See generally ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO THE PRESENT*, at ix (1978) (illustrating various points in American history when "political repression has had a number of important effects upon American life").

tensions—the notion that spirited criticism is crucial, but perhaps a little less important when it’s directed at me—have always been with us and always will be.

To hint at the sentiment, I am reminded of something I once heard Lowell Weicker, former U.S. Senator and Governor of Connecticut, say. After Weicker had advocated the establishment of an income tax in Connecticut, he said something to this effect: I’ve always been a First Amendment absolutist. I just never assumed that it would take the form of 50,000 outside my house screaming, “you asshole, you asshole” at me.²⁹

II. GENE DEBS AND WOODROW WILSON

But I mention first the *Debs* case, where Eugene Debs was sentenced to three concurrent ten-year terms in federal prison for a speech he delivered June 16, 1918, in Canton, Ohio.³⁰ The oration occurred, of course, during World War I, which President Wilson had recently announced necessary “to make democracy safe in the world.”³¹

Debs began by mocking Wilson, saying the whole nation had come to realize “it is extremely dangerous to exercise the constitutional right of free speech in a country fighting to make democracy safe in the world.”³² He added:

I must be . . . prudent, as to what I say . . . [and] how I say it. I may not be able to say all I think; but I am not going to say anything that I do not think. I would rather a thousand times be a free soul in jail than to be a sycophant and coward in the streets.³³

Debs declared himself unafraid—perhaps wrongly—of the United States Supreme Court, that “body of corporation lawyers”³⁴ (sound familiar, current?). “Who appoints our federal judges? The people? In all the history of the country, the working class have never named a federal judge. . . . The corporations and trusts dictate their appointment.”³⁵ He then, famously, told the huge throng they were “fit for something better than slavery and cannon

29. See Maxlongstreet, *My Political Hero: Lowell Weicker*, DAILY KOS (June 16, 2006, 6:35 PM), <http://www.dailykos.com/story/2006/06/16/219598/-My-political-hero:-Lowell-Weicker>.

30. See *Debs v. United States*, 249 U.S. 211, 212-17 (1919). The Supreme Court affirmed the conviction of Eugene Debs, who had been sentenced to ten years for violating the 1917 Espionage Act. *Id.* at 216-17. Justice Holmes concluded for the Court that Debs’s speech was unprotected under the First Amendment if “one purpose of the speech, whether incidental or not . . . , was to oppose [the war,] . . . and if, in all the circumstances, that would be its probable effect[.]” *Id.* at 214-15.

31. WRITINGS OF EUGENE V DEBS: A COLLECTION OF ESSAYS BY AMERICA’S MOST FAMOUS SOCIALIST 113 (2009) [hereinafter WRITINGS OF DEBS].

32. *Id.* at 113.

33. *Id.* at 114.

34. *Id.* at 123; see also ERNEST FREEBERG, *DEMOCRACY’S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT* 134-35 (2008) (illustrating Debs’s fearless demeanor).

35. WRITINGS OF DEBS, *supra* note 31, at 123.

fodder.”³⁶ “Do not worry over the charge of treason to your masters Be true to yourself and you cannot be a traitor to any good cause on earth.”³⁷ Finally, he spat:

They have always taught and trained you to believe it to be your patriotic duty to go to war and to have yourselves slaughtered at their command. But . . . the people[] have never had a voice in declaring war [T]he working class who fight all the battles, . . . who freely shed their blood and furnish the corpses, have never yet had a voice in either declaring war or making peace.³⁸

It is hard not to like Gene Debs.

When he was sentenced, Debs told the trial judge “[t]he Espionage Act was . . . in flagrant conflict with the democratic principles and with the spirit of free institutions.”³⁹ He reported “that 5 percent of Americans owned two-thirds of the nation’s wealth, while the 65 percent who made up the working class owned only 5 percent [of the wealth].”⁴⁰ (Here, too, the more things change, the more they stay the same.)⁴¹

When Justice Holmes’s opinion easily, and unanimously, affirmed Debs’s conviction under the most lenient of First Amendment standards,⁴² the *Washington Post* and the *New York Times* gushed with praise.⁴³ Debs taunted Holmes “to do [his] worst.”⁴⁴ “I am not concerned . . . with what those be-powdered, be-wigged corporation attorneys at Washington do.”⁴⁵

Holmes initially dismissed the strong criticism of Zechariah Chafee, The New Republic, John Reed, Bob LaFollette, Carl Sandburg, and, eventually, Charles Evans Hughes as just “a lot of jaw about free speech.”⁴⁶ But as debate raged in the country over political prisoners, the Palmer Raids, and the odd

36. *Id.* at 135 (“You need to know that you were not created to work and produce and impoverish yourself to enrich an idle exploiter. You need to know that you have a mind to improve, a soul to develop, and a manhood to sustain.”).

37. *Id.* at 146.

38. *Id.* at 128-29.

39. FREEBERG, *supra* note 34, at 106 (internal quotation marks omitted).

40. *Id.*

41. See Gene Nichol, *Wages, Work, Privilege and Legal Education*, 5 HARV. L. & POL’Y REV. 1, 2-8 (2011) (outlining present economic inequality).

42. See *Debs v. United States*, 249 U.S. 211, 212-13 (1910). Holmes concluded Debs’s true, but unspoken, aim was to “obstruct the recruiting service,” and the determination was “too well established and too manifestly good sense to need citation of the books.” *Id.* at 213, 216.

43. See FREEBERG, *supra* note 34, at 131. The *Washington Post* praised a conviction that put an end to “Debsism,” which constituted revolutionary talk and contempt for government. See *id.* The *New York Times* agreed with the Court’s rejection of the notion that “the government had no power to defend itself against unbridled speech, even though that speech might lead to the Government’s own destruction.” See *id.*

44. *Id.* at 134.

45. *Id.* (internal quotation marks omitted). Debs noted “great issues are not decided by the courts, but by the people. . . . [T]he final resort is the people, and that court will be heard from in due time.” *Id.* at 147.

46. *Id.* at 220-26.

presidential campaign of “Convict No. 9653,” Holmes reconsidered.⁴⁷ He offered in an eloquent, if futile, dissent in the *Abrams* case that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the . . . pressing purposes of the law that an immediate check is required to save the country.”⁴⁸ Holmes thus gave the clear and present danger notion a second birthing.⁴⁹ Meanwhile, Wilson grew more adamant that the thousands, like Debs, arrested under the Espionage Act had never been sanctioned for their ideas.⁵⁰ Speech was not constitutionally protected, apparently, if it made it harder to achieve the President’s agenda.⁵¹ Wilson’s liberalism offered Debs no quarter.

III. WIKILEAKS AND SECRETARY CLINTON

Fast forward then to our day. In February 2011, Secretary of State Clinton gave what was meant to be, and may well be, a path-breaking speech at the Newseum in D.C., unfolding a dramatic new American commitment to international Internet freedom.⁵² Clinton envisioned “an emerging ‘global community’ empowered by the transparency” and immediate dissemination of the Internet.⁵³ Drawing parallels to FDR’s “Four Freedoms” speech, she emphasized the Web’s crucial and developing role in cracking corrupt, autocratic regimes across the globe.⁵⁴ She unsurprisingly chided China, Saudi Arabia, Vietnam, North Korea, and Iran for seeking to restrict Web freedom.⁵⁵ She hailed the remarkable courage of protesters during last year’s Iranian presidential election as she announced a new State Department program to support and develop technologies to open information doors worldwide.⁵⁶ Clinton ended aloft: “[L]et us recommit ourselves to this cause[] . . . [and] make these technologies a force for real progress the world over. And let us go forward together to champion these freedoms for our time, for our young people who deserve every opportunity we can give them.”⁵⁷

47. *See id.* at 222, 250.

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

49. Holmes argued in *Abrams*: “Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.” *Id.* at 628.

50. *See* FREEBERG, *supra* note 34, at 183-88.

51. *See id.* at 187.

52. *See* Sec’y of State Hillary Rodham Clinton, *Remarks on Internet Freedom*, U.S. DEP’T OF STATE (Jan. 21, 2010), <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

53. Jason Linkins, *Hillary Clinton’s Evolving Take on ‘Internet Freedom,’* HUFFINGTON POST (Dec. 7, 2010, 12:06 PM), www.huffingtonpost.com/2010/07/hillary-clinton-internet-freedom_n_793144.html?

54. *See* Clinton, *supra* note 52.

55. *See id.*

56. *See id.*

57. *Id.* (“We want to put these tools in the hands of people who will use them to advance democracy and human rights, to fight climate change and epidemics, to build global support for President Obama’s goal of a

Pundits, of course, were unable to resist the irony that, at roughly the same moment five miles away, government lawyers were seeking the Twitter records of purported WikiLeaks collaborators, reportedly as part of the Obama Administration's "active, ongoing criminal investigation" into WikiLeaks and Julian Assange.⁵⁸ The perpetrators were said to have released some 76,000 classified U.S. documents about the war in Afghanistan, roughly 400,000 documents about Iraq, and nearly 2,000 diplomatic cables.⁵⁹ Some of the most powerful newspapers in the world collaborated, and many of the world's most powerful leaders were unamused.⁶⁰ Attorney General Eric Holder announced that the Justice Department was investigating the disclosures to see if charges could be filed: "Let me be very clear, . . . [t]o the extent that we can find anybody who was involved in the breaking of American law, . . . they will be held responsible."⁶¹ Members of Congress variously called for federal prosecution,⁶² for expansion of the Espionage Act, and for the enactment of new laws against the publication of government secrets.⁶³

Secretary Clinton herself had also condemned WikiLeaks saying: "[T]his disclosure is not just an attack on America's foreign policy interests. It is an attack on the international community—the alliances and partnerships, the

world without nuclear weapons, to encourage sustainable economic development that lifts the people at the bottom up.").

58. Ellen Nakashima & Jerry Markon, *WikiLeaks Founder Could Be Charged Under Espionage Act*, WASH. POST (Nov. 30, 2010, 12:13 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html>; see *Hillary Clinton's Speech: Shades of Hypocrisy on Internet Freedom*, PEOPLE'S FORUM ONLINE (Feb. 17, 2011) (on file with author) ("[A]fter the WikiLeaks affair it is harder for the United States to so readily moraliz[e]. . . . The internet has hummed with criticism about US double standards."); Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. TIMES (Dec. 7, 2010), <http://www.nytimes.com/2010/12/08/world/08leak.html>; Kim Zetter, *Report: Federal Grand Jury Considering Charges Against WikiLeaks' Assange*, WIRED (Dec. 13, 2010, 2:28 PM), <http://www.wired.com/threatlevel/2010/12/assange-grand-jury/>.

59. *How Many Documents Has WikiLeaks Published?*, NPR (Dec. 28, 2010), <http://www.npr.org/2010/12/28/132416904/how-many-documents-has-wikileaks-published>; Noam N. Levey & Jennifer Martinez, *WikiLeaks Emerges as Powerful Online Whistle-blower*, L.A. TIMES (July 27, 2010), <http://articles.latimes.com/2010/jul/27/world/la-fg-wikileaks-20100727>.

60. Noam Cohen, *A Renegade Site, Now Working With the News Media*, N.Y. TIMES (Aug. 1, 2010), <http://www.nytimes.com/2010/08/02/business/media/02link.html>; see also N.Y. TIMES, *OPEN SECRETS: WIKILEAKS, WAR AND AMERICAN DIPLOMACY* (Alexander Star ed., 2011).

61. Mark Landler & J. David Goodman, *Clinton Says U.S. Diplomacy Will Survive 'Attack'*, N.Y. TIMES (Nov. 29, 2010), <http://www.nytimes.com/2010/11/30/world/30reax.html>.

62. See Dianne Feinstein, *Opinion, Prosecute Assange Under the Espionage Act*, WALL ST. J. (Dec. 7, 2010), <http://online.wsj.com/article/SB10001424052748703989004575653280626335258.html>; Rep. Dan Lungren, *WikiLeaks Actions Are Damaging and Should Be Prosecuted*, THE HILL (Dec. 1, 2010, 4:23 PM), <http://thehill.com/blogs/congress-blog/technology/131481-wikileaks-actions-are-damaging-and-should-be-prosecuted-rep-dan-lungren>; Michael O'Brien, *Graham: Prosecute WikiLeaks*, THE HILL (July 28, 2010, 12:47 PM), <http://thehill.com/blogs/blog-briefing-room/news/111413-graham-prosecute-wikileaks>.

63. See Gautham Nagesh, *Rep. King Introduces Anti-WikiLeaks Bill*, THE HILL (Dec. 9, 2010, 2:42 PM), <http://thehill.com/blogs/hillicon-valley/technology/132939-rep-king-introduces-anti-wikileaks-bill-in-the-house>; Kevin Poulson, *Lieberman Introduces Anti-WikiLeaks Legislation*, WIRED (Dec. 2, 2010, 6:32 PM), <http://www.wired.com/threatlevel/2010/12/shield/>. But see Jack Goldsmith, *Opinion, Why the U.S. Shouldn't Try Julian Assange*, WASH. POST (Feb. 11, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021006324.html>.

conversations and negotiations, that safeguard global security and advance economic prosperity.”⁶⁴

As one modestly sarcastic commentator summarized it, Clinton had effectively said:

We need to put these tools in the hands of people around the world who will use them to advance democracy and human rights, fight climate change and epidemics, [and] build global support for President Obama’s goal of a world without nuclear weapons And if you want to bring down the Iranian regime on Twitter, that would be fine, too. . . . [B]ut don’t touch *my* junk.⁶⁵

IV. CONCLUSION

I don’t mean to hit the Secretary of State hard on this.⁶⁶ My point, rather, is that this is the way, ever, of the world—even for folks who regard themselves as progressives, like Wilson and Clinton. So long as that remains true and so long as those in power use the levers of authority to further their prospects and to hamper their adversaries, the occasionally tough medicine of *Brandenburg v. Ohio* has a crucial role to play.⁶⁷ Here’s hoping it is with us for a long while.

64. Sec’y of State Hillary Rodham Clinton, *Remarks to the Press on Release of Purportedly Confidential Documents by Wikileaks*, U.S. DEP’T OF STATE (Nov. 29, 2010), <http://www.state.gov/secretary/rm/2010/11/152078.htm>.

65. Linkins, *supra* note 53 (“The most generous take on the matter is to say that circa January of this year, Clinton hadn’t yet imagined how an organization like WikiLeaks might fit into [her] overall philosophy.”).

66. See Rebecca MacKinnon, Response in *Questions for Secretary Clinton Concerning “Internet Freedom,”* BERKMAN CTR. FOR INTERNET & SOC’Y AT HARVARD UNIV. (Feb. 15, 2011), www.cyber.law.harvard.edu/node/6630. Rebecca MacKinnon noted:

Given that no case has yet been brought in any court against Wikileaks for publication of the diplomatic cables, if the U.S. Secretary of State makes a statement claiming that Wikileaks had no right to do what it did—despite the fact that numerous [F]irst [A]mendment scholars believe there is no legal case against Wikileaks—isn’t that a message to the world that the U.S. executive branch seeks to weaken the [F]irst [A]mendment, does not respect rule of law, separation of powers, or the fundamental principle of our legal system that everybody is innocent until proven guilty?

Id.

67. See Jonathan Peters, *WikiLeaks, the First Amendment, and the Press*, HARV. L. & POL’Y REV. (Apr. 18, 2011, 12:26 PM), <http://hlpronline.com/2011/04/wikileaks-the-first-amendment-and-the-press/>.

