

The Praxis of Coercion by American Presidents in Times of Crisis

Mark Goodman, Mississippi State University

In 1862, Abraham Lincoln declared martial law, a bad tendency tactic, to silence anti-war critics. Over 50 years later, President Woodrow Wilson asked Congress to pass a bad tendency law, the Espionage Act of 1917, to control dissent as the country entered World War I. In 2001, President George W. Bush pushed for passage of the Patriot Act, a new bad tendency law, as he rallied the nation behind the cause of national security three days after September 11.

A review of these three case studies reveals four trends: 1) The initial purpose of the law metamorphoses into new uses not intended by Congress when writing the law; 2) Bad tendency, as a governmental response, creates a public perception of action in a time of public fear; 3) Little evidence exists that attempts to control dissent lead to substantial gains in national security; 4) Bad tendency tends to be a self-fulfilling prophecy.

In our three case studies, the president blended legitimate national security concerns into governmental searches for people whose dissenting beliefs might lead to armed rebellion or even terrorism. The tension between free speech and national security existed during the Civil War, but the best intellectual consideration of the free speech issues began with U.S. Supreme Court Justice Oliver Wendell Holmes. Holmes originally argued that free speech should be censored *if* the tendency of the speech, *if* the natural result of the speech, would be to cause harm to the nation or to society. However, Holmes was convinced to reconsider. He realized that opinions/beliefs did not equate with behavior. Holmes and his colleague Louis Brandeis eventually led the U.S. Supreme Court to decide that only behaviors should be punished, just as the Court had ruled after the Civil War.

Bad tendency is the praxis of coercion. In his *Prison Notebooks*, Antonio Gramsci describes two processes of societal dominance by the political state: hegemony and coercion. This paper is interested in how the United States government used *coercion* on three different occasions to silence its critics in a time when its presidents contended that the fate of the nation rested in the balance.

Sidel (2004, 9) lists six historic periods of censorship in U.S. history. Only three of these periods are included in this hegemonic analysis because they are examples of the executive branch of government coercing compliance through the policies of the president. Lincoln's Executive Order No. I, Wilson's Espionage Act, and Bush's Patriot Act are case studies in how the executive branch used the power of the state to coerce agreement with the actions of the president during wartime. In all three cases, various governmental mechanisms reformed and restricted the normal hegemonic processes to achieve the goal of national security by limiting opposition to the government's war efforts. In effect, this paper argues that Lincoln, Wilson, and Bush decided that the social debate of the hegemonic process controlled by private enterprise was too chaotic for times of national danger. To bring the nation together, the state required limited free speech. Bad tendency provided a legal mechanism to privilege some voices and eliminate dissent from the hegemonic process.

This paper is not attempting to write the history of September 11th. Nor, is this paper an attempt to rewrite the history of Lincoln's General Order or the Espionage Act. Scholars have discussed in many books and articles the reasons for and interpretations of these two cases of censorship. The arguments in this paper rely heavily on the excellent work by Rehnquist on free speech issues of the Civil War and on Rabban for his historical interpretations

of the Espionage Act because both writers approached the topics from a free speech perspective. Our contribution is to bring their historical writings into a paradigm when paired with events of September 11th and the Patriot Act.

Rabban (1997) explains that bad tendency gained legal stature in three U.S. Supreme Court decisions written by Justice Oliver Wendell Holmes at the close of World War I and the beginning of the Red Scare. Holmes, however, refuted his own logic in later court dissents, arguing for a new standard called clear and present danger (8). This paper brings bad tendency and clear and present danger up to date by considering the Patriot Act as an example of social control. This argument contends that the Patriot Act permits people to be investigated under a bad tendency standard. The fear of investigation will silence some voices and the government can hope to collect enough evidence to prove that other dissenters can be arrested because they are clear and present dangers.

Hegemony

Gramsci's concept of hegemony is complex, as the following review of the literature indicates. A simplified overview may help clarify hegemony positions. Gramsci views power as a give-and-take. Usually, corporations create products and advertise them in the media. Consumers express agreement/disagreement by buying/not buying the products and selecting the media programming they watch. Consumers do not control the cultural agenda, but they do control how they react to what they are offered. Metaphorically, people have to order from the restaurant's menu, but they can choose what they want off the menu. To continue the metaphor, in times of crisis, Lincoln, Wilson, and Bush told the public they could only order from the lunch specials. Anyone who wanted to order something else was a potential threat. The government used its power--coercion--to force menu compliance.

In this paper we are interested in those times when normal hegemonic processes are not permitted by the state to operate. In times of crisis, Gramsci argues that the state takes over control of the hegemonic process from private hands, permitting the state to use its apparatuses for "coercive power" (1971, 12). Instead of allowing the masses to spontaneously consent to the ideology, the state uses the law to enforce discipline (Crehan 2002, 102; Gramsci 1971, 12).

Gramsci describes the process of hegemony as one in which the entities that control production receive "spontaneous consent" from the masses because the masses buy into the social life created as a result of the production (1971, 12), leading to a degree of social harmony (Condit, 1994, 208). Mediated knowledge creates class consciousness (Dines and Humez 1995; Butsch 1995; Sholle 1988; Newcomb and Hirsch 2000; Gitlin 2000; Lull 2003) based on consumptive power (Hearn and Roseneil 1999; Baudrillard 2001). Gramsci's argument is that the capitalist audiences substantially give their consent to those who profit from capitalism, explains Ives (2004, 123). In the context of the paper, this process of class identification and consumption is important because Bush used coercion against those defined by his administration as terrorists, while most Americans participated in the hegemonic process of consumption.

In the hegemonic process of consumption, the state, e.g., the political entity, maintains social and political control at the behest of the civil society. Gramsci's concept of power is somewhat unique. Control does not rest in the hands of the government or the politicians that compose the political entity. Rather, government and politicians serve a society's economic interests. Business controls the government and the government ensures that the process of consumption continues to be profitable. While it is just one application of Gramsci's theory, the loose lending policies preceding the home mortgage crisis in 2008 demonstrated the ability of Wall Street interests to use the

federal government to create profitable economic conditions. Advertising cheap home loans attracted many new home buyers to apply for loans.

Generally, civil society encourages, and the state permits, a vibrant marketplace of ideas, which includes negotiated and oppositional voices (Hall 1993, 102). The end result, writes Gramsci (1992, 126), is that people join “particular alliances,” reflecting their position in the capitalist structure. Or as Buttigieg explains, the hegemonic process includes those that support the civil society and those who are in opposition to it (2005, 38; see also Cloud, 1996, 119; Wuthnow, 1992, 150). The marketplace creates the illusion of shared power (Jameson, 1988, 61; Crehan, 2002, 146) within the hegemonic process without threatening the security of either the civil society or the state. However, in our three case studies, Lincoln, Wilson, and Bush, maintained the illusion of shared power for the majority while they relied upon the mechanisms of the state to suppress a minority labeled as the enemy.

To justify its new coercive authority, the state relies upon what Gramsci calls “political intellectuals” (1971, 15-16). In this paper the primary source of political intellectualism comes from the justices of the U.S. Supreme Court. Justices Taney and Davis perform the function during the Civil War. Justice Holmes writes the legal framework for both bad tendency and clear and present danger, the legal justifications for censorship in the United States. Finally, Chief Justice Rehnquist performs the function of political intellectual and historian. Justice Holmes writes the case law that provides moral justification for the state’s new authority over the culture by arguing that the new authority is a logical progression from the circumstances, i.e., the crisis (Gramsci 1971, 181-182).

During times of coercion, a particular group claims dominant authority over other groups. Independent groups join the dominant authority in times of crisis, creating a narrow-thinking cultural consensus. “[T]he state is seen as the organ of one particular group, destined to create favorable conditions for the latter’s maximum expansion,” explains Gramsci (1971, 182). Any remaining oppositional groups are forced out of the now united hegemony and can even be outlawed. In the examples we use from American history, bad tendency is the mechanism used by the state to accomplish its goals to reduce the marketplace and achieve a high level of ideological agreement.

Coercion and Bad Tendency

Ives (2004) believes that one of Gramsci’s major contributions was his discussion “of the complex relationships between coercion and consent in democratic capitalist societies” (64). Ives continues: “He was continually perceptive about how the possibility or threat of coercion and subtle uses of it are often integral to shaping and organizing consent” (64). One of the tensions inherent within hegemony is the state’s desire to use coercion to force agreement with the state’s need for political agreement by relying upon the hegemonic process to lead the masses to agreeing with the state (122). Specifically, the state usually influences the hegemonic process by controlling language, explains Ives (124). When the state cannot control the discussion by using the more passive processes of hegemony, the state may turn to direct use of its police power to force compliance by silencing speakers through fear of arrest or by arresting them. To Gitlin, hegemony and coercion are on a continuum from the presentation of common sense (i.e., controlling language) to tyranny (2000, 575). As Gramsci points out, the ruling group uses the law to “create a social conformism...” (1971, 195).

Bad tendency is the praxis of common sense. Common sense is the shared belief system of the people, explains Gramsci, and includes “the entire system of beliefs, superstitions, opinions, ways of seeing things and of

acting which are collectively bundled together under the name of ‘folklore’” (1971, 323). Common sense is derived from the teachings of the intellectuals, who are responsible for organizing and disseminating ideas within a culture (1971, 75).

We argue that bad tendency allows the state to negotiate a place on the continuum that permits agreement of the majority while suppressing the minority through tyranny of the government. This process works because the state convinces the majority that it is only common sense to silence a minority that threatens the security of the state. In short, the majority can continue within the hegemonic process because their views are consistent with the dominant ideology of the state. Those whose views are outside of the dominant ideology must be silenced to preserve the state. As a result, the hegemonic process is narrowed to a dominant ideology. Members of the minority usually acquiesce to state authority, keeping their opposition out of the marketplace. In times of crisis, those who insist on expressing their opposition to the state have sometimes been investigated and arrested.

1862

Abraham Lincoln suspended the right of habeas corpus, applying the presidential order to citizens who resisted the draft, performed disloyal practices, interfered with enlistment, or gave aid or comfort to the enemy. Executive Order No. I, Relating to Political Prisoners (1862), gave military officers the right to arrest people and hold them without trial. According to Rehnquist, Secretary of State William H. Seward ordered about 900 arrests and Secretary of War Edwin Stanton arrested another 13,000 during the Civil War (1998, 49).

In his analysis of Executive Order No. I, Rehnquist notes that Lincoln violated the Constitution by suspending habeas corpus.¹ Rehnquist argues that the Constitution gives Congress, not the president, the right to suspend habeas corpus, a point made by Lincoln’s contemporary, Chief Justice of the Supreme Court Roger Taney (a contemporary intellectual). In addition, civilian courts, not military courts, should have tried civilians, argues Rehnquist, since the court system remained functional (41).

Rehnquist analyzed the case of Lamdin Milligan, a Confederate sympathizer who was arrested for trying to free Confederate prisoners and seize Union guns in the summer of 1864. A military court ordered him hanged, but the war ended in time for his case to go to the U.S. Supreme Court before the sentence could be carried out. In *Ex Parte Milligan* (1866) the Supreme Court threw out Milligan’s conviction, saying he should have been tried for the crime in state court. Writing for the court, Justice Davis argued:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under circumstances. Such a doctrine leads directly to anarchism or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence... (Rehnquist 1998, 129).

At his military trial, anti-war statements made by Milligan in Fort Wayne, Indiana, were admitted as evidence against him. “Milligan’s speech at Fort Wayne should not have been admitted against him because it was nothing more than entirely permissible criticism of the Lincoln administration’s decision to make war against the Confederate states,” writes Rehnquist (102). The military court convicted Milligan for his anti-war opinions because he could have potentially acted upon his beliefs, resulting in negative consequences.

Milligan was not the only person arrested for being a potential threat to the Union. Neely points out that 81.6% of the arrests under Executive Order No. I were of people who lived in either Confederate States or Border

States (1982, 14). Most of the arrests were based on “skimpy evidence” and were a “catch-all solution for problems no one dreamed would arise...” (14-15). Neely argues the arrests were politically safe since Lincoln arrested people in Border States: “Examining the reasons for the arrests gives further cause to appreciate their lack of impact on Lincoln political fortunes...” (16).

Milligan and most of those arrested by the military did not represent direct threats to either Union armies or the federal government. However, the Lincoln administration decided it was easier to make arrests based on potential threats than to make convictions based on actions. In the words of Justice Davis, “Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration” (Rehnquist 1998, 131). Rehnquist notes that *Milligan* is “justly celebrated for its rejection of the government’s position that the Bill of Rights has no application in wartime” (137).

Using Executive Order No. I, Lincoln removed political opponents and those who spoke out against the war and its course. As a result, Lincoln narrowed the hegemonic process in the Border States by removing the negative voices--i.e., pro-Confederacy--from the marketplace. Military coercion justified by security concerns paid political dividends.

1917

After declaring war on Germany on April 6, 1917, Woodrow Wilson signed the Espionage Act of 1917 on June 15 with the intent of restricting free speech, according to Geoffrey Stone (2005). Wilson told Congress that disloyalty “was not a subject on which there was room for ... debate” (Stone 2005, 137). Wilson proposed federal legislation that would have made any speech illegal if it had a tendency to result in disloyalty or to hinder the war effort. Historian Christopher Andrew argues that Wilson’s concerns of espionage had some degree of validity since German agents blew up U.S. installations even before the war began. Andrew describes Wilson as “shaken” by Justice Department reports. Wilson wrote one advisor, “I am sure that the country is honey-combed with German intrigue and infested with German spies” (Andrew 1995, 34).

Congress balked at Wilson’s original bill because of its broad free speech implications, but did agree to rather loose language in the Espionage Act of 1917 (Rehnquist 1998, 173-174). “Congress intended the act to have more limited focus” than Wilson asked for, writes Stone (146). The Espionage Act made it illegal to promote the success of enemies of the United States and to interfere with the war effort or the draft. To Stone, the court system ignored congressional intent to only prosecute real threats to the war effort and, instead, state and federal judges prosecuted people that might represent a threat: “Most judges during the war were determined to impose severe sentences on those charged with disloyalty, and no details of legislative interpretation or appeals to the First Amendment would stand in the way” (170).

Herman Dierkes of Ohio was convicted for saying, “I would rather serve a term in the penitentiary than wear a uniform in Wilson’s Wall Street War” (*Dierkes v. U.S.*, 274 F. 77, 1921). Tony Tachin and Fred Fedodoff of New Jersey were arrested for arguing that this war was for capitalism (*State v. Tachin*, 93 N.J.L. 485, 1919). Jack Diamond was charged in New Mexico for incitement to revolution because he supported the Industrial Workers of the World (I.W.W.) (*State v. Diamond*, 27 N. M. 477, 1921). As Preston points out, the government targeted I.W.W. members throughout the war (1963, 88-151). Polenberg contends that Debs was only one of the radical leaders

targeted, citing the arrests of John Reed, Abraham Shiplacoff, and Rose Pastor Stokes as other examples (1987, 85). Altogether, about 6,000 war opponents were arrested during the war (*New York Times* 1918).²

The government's case against Jacob Frohwerk typifies the type of justice existing in the espionage cases. Frohwerk was a reporter for *Missouri Staats Zeitung*, a two-person German language newspaper in Kansas City. In 1917, Frohwerk went to the local U.S. Justice Department office to translate his anti-war articles (Fisher 1981). Those editorials criticized President Woodrow Wilson for involving American soldiers in a war being fought against the "superior" armies of Germany to further Great Britain's imperialistic goals and Wall Street greed. Specifically, Frohwerk's articles (Frohwerk Indictment, 4-26) claimed that Wall Street financiers forced the United States into war to protect its financial interest in England. According to one article, "that a few men and corporations might amass unprecedented fortunes we sold our honor, our very soul." Therefore, wrote Frohwerk, "We say ... cease fire." Frohwerk wrote thirteen articles between July 6 and December 7, 1917 that sought "to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States," violating the Espionage Act of 1917 (Frohwerk Indictment, 4-26). Joseph D. Shewalter (1921), identified as a former judge and candidate for the U.S. Senate, spent four hours arguing a motion before U.S. District Judge Frank A. Youmans, claiming the arrest was unconstitutional because the Espionage Act was unconstitutional.³ Shewalter, seizing an opportunity for fame, described the case in a letter as "the most important question ever before the [U.S. Supreme] Court." When Shewalter finally finished, Youmans left the bench, returning in five minutes with his 25-page opinion denying the Frohwerk motion. The judge asked for Frohwerk's plea. Frohwerk refused to enter one, claiming that the jury should be quashed (Indictment, 84). Entering a plea of not guilty for Frohwerk, Youmans immediately began the trial.

Frohwerk's indictment centered on thirteen articles (Frohwerk v. U.S., 249 U.S. 204, 1919). The prosecution dropped one count since one article was a reprint from a Grand Army of the Republic publication. Two statements by the prosecutors summed up their case. Assistant U.S. Attorney Samuel Hargus told the jury, "the propaganda of publications of this kind is far more dangerous than swords or guns in the hands of those who conduct them" (*Kansas City Times* 1918). Frohwerk's role was particularly troubling, according to prosecutor and state senator Francis M. Wilson, because he had come to the U.S. from Prussia to escape oppression:

No man who has enjoyed the liberty of this country has a right to oppose the nation in its war aims and the sooner we scotch these internal enemies the sooner will those who are serving for us in France know that the nation is whole heartedly backing them up with all of its man power and all of its resources (*Kansas City Times* 1918).

Frohwerk's jury "scotched" the internal enemies in only three minutes, and, as jury foreman Bedford Hudson explained, the "government presented a clean-cut, convincing case, and the jury had nothing to quibble about" (*Kansas City Times* 1918).

In 1919, three espionage cases made it to the U.S. Supreme Court. Frohwerk's prosecution (*Frohwerk v. U.S.*) was heard with two other espionage act convictions. Charles Schenck (*Schenck v. U.S.*) was a Socialist in New York City who had mailed leaflets advocating resistance to the draft. However, the central figure in the government prosecutions was Eugene Debs (*Debs v. U.S.*). Debs ran for president on the Socialist ticket in 1912, collecting six percent of the vote.⁴ It is logical supposition that the administration of President Woodrow Wilson feared Debs would organize opposition to the war. Unfortunately for Schenck and Frohwerk, their cases reached the Supreme

Court when Debs's conviction was being appealed on First Amendment grounds. Justice Holmes wrote the three decisions in 1919, issuing them within days of each other.

In *Schenck*, Holmes developed the principles he would use in the other two cases. *Frohwerk* spelled out the free speech concept of bad tendency in more specific terms. Holmes dismissed Debs's free speech rights by citing the precedence of *Schenck* and *Frohwerk*. Smith (2003) contends that Holmes held a narrow view of the First Amendment in cases he wrote as a Massachusetts judge, dismissing First Amendment arguments in several cases: "Holmes's crafting of the opinion in *Schenck* was constrained both by Supreme Court precedent in earlier cases and by his own judicial career" (21-22).

The criticism of Holmes's rulings first came from Ernst Freund. Freund criticized Holmes for the logic used in the three cases (1919, 13-15). These decisions made speech punishable, according to Freund, if a jury could conceive of a possibility that a negative consequence could be the result of the speech. Such a guideline would leave agitators "subject to a jury's guessing at motive, tendency and possible effect, making the right of free speech a precarious gift" (14).

Harvard Law Professor Zechariah Chafee (1920) also criticized the decision. Rabban (1997) argues that Chafee marshaled his arguments to induce Holmes and Justice Louis Brandeis to reinterpret the precedence laid down in *Schenck*, *Frohwerk*, and *Debs*. Chafee incorrectly interpreted First Amendment precedence existing before the Espionage Act cases and then offered to Holmes and Brandeis a new interpretation of the clear and present danger language set out in *Schenck* (Rabbin, 7-8). Rabban points out that the court had accepted "bad tendency" restrictions on free speech since the Civil War (3). The bad tendency standard did not require the speech to be the cause of a bad effect on society, only that the potential for a negative consequence existed because of the speech, explains Rabban. The crime could be an indirect result of the speech, if the result that occurred was "the natural and reasonable effect of what was said" (276).

Rabban contends that congress relied upon bad tendency in crafting the Espionage Act⁵ (Act of June 15, 1917), which made it illegal for anyone to obstruct, or attempt to obstruct, recruiting efforts, the draft, or the activities of the U.S. military. The act's language encompasses many potential actions: conveying false information, interfering with the success, promoting the enemy, insubordination, disloyalty, and mutiny. The language restricts discussions of the war effort: the military, the navy, recruiting, enlistment, and duty. Only a criticism of the most innocuous war-time activities could not be construed to be a violation of the law. Put into practice by federal agents, judges, and juries, the intent required no action at all, only the voicing of anti-war opinions. From the perspective of its enforcers, why would anyone state an anti-war opinion if the intent was not to have someone act upon the opinion? If someone would potentially act, then the speaker violated the law.

To Rabban, such language (258) reflects congressional intent to silence radicals like Eugene Debs (272) during the war through an application of bad tendency. Few congressmen or jury members were going to offer sympathy to Schenck, a leader in the Socialist Party who had mailed leaflets to potential Army recruits, or Frohwerk, active in the German-American Alliance and writer for an anti-war, German-language newspaper. The oral arguments of the U.S. attorneys before the Supreme Court support Rabban's contention. The government argued that "[w]hen the tendency of the words used, rather than the particular words themselves, constitute the gist of the offense, it is sufficient for the indictment to charge this general tendency, without detailing the particular words"

(276). If bad tendency was not allowed, the government attorneys told the court, the government could not punish those whose speech led to anti-war efforts as long as they concealed their true meaning in their speech. Holmes would accept this argument in *Frohwerk*, stating that “intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it” (249 U.S. 204, 209). Since Frohwerk wanted to hinder the war effort, the fact that he failed to do such is not evidence of his innocence, explained Holmes, only his inability to carry out his plan (249 U.S. 204, 209). Through such logic, explains Rabban, Holmes reduced the free speech issues to bad tendency, allowing him to focus the decisions in *Schenck*, *Frohwerk*, and *Debs* on the criminal actions of the defendants, i.e., the obstruction charges (279-282).

Rabban argues that Chafee believed the bad tendency standard went too far in restricting free speech. From Chafee’s perspective, Holmes created a logic loophole in *Schenck* (Rabban 302). In *Schenck*, Holmes used his famous metaphor of yelling fire in the crowded theater as a justification for clear and present danger restrictions (249 U.S. 47, 52). In the crowded theatre analogy, the speech and the danger were in proximity to each other. In the cases against Debs, Schenck, and Frohwerk, there was neither actual harm nor close proximity. Holmes had misapplied his own reasoning to the facts of the case. Instead, Holmes applied a different line of logic, one in which clear and present danger (actual harm and close proximity) was synonymous with bad tendency (potential harm and no proximity) (Rabban 286).

Rabban argues that Chafee identified Holmes’s error in logic but made the argument in his law review article that Holmes drew a distinction between the two (316-325). Rabban believes that Holmes read Chafee’s argument and saw his error. He sought to correct the logic error in the next case. Holmes’s—qua Chafee’s—clear and present danger standard became a measure of proximity and harm in *Abrams v. U.S.* The bad tendency standard (Did the speech have the potential to have a harmful effect on society?) evolved into a clear and present danger standard (Did the speech occur at a time and in a context where the likelihood existed that actions harmful to the government would occur?).

The *Frohwerk* decision, however, stood in the way of Chafee’s explanation of what Holmes meant by clear and present danger (Berns 1957, 49; Rabban 1997, 325). No evidence was ever presented that Jacob Frohwerk’s writings occurred either in a context or at a time when his articles obstructed the actions of the military. Even Holmes recognized this point, noting that the lack of a bill of exceptions caused him “anxiety” (249 U.S. 204, 206) and that the court record was inadequate to determine if the articles had caused obstruction (249 U.S. 204, 209). The bad tendency approach, however, gave Holmes an out:

But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out (249 U.S. 204, 209).

By November, Holmes and colleague Louis Brandeis dissented when Justice John Clarke and other members of the U.S. Supreme Court upheld the conviction of Jacob Abrams (*Abrams v. U. S.*, 1919). Abrams and other self-proclaimed “rebels, revolutionists and anarchists” distributed 5000 pamphlets in New York City (250 U.S. 616, 617-618). Statements published in the pamphlets, “The hypocrisy of the United States and Her Allies” and “Revolutionists Unite for Action,” called President Wilson a “coward” and “hypocrite” for sending troops to Russia

to help those Russian soldiers in opposition to Lenin's government formed after the successful Bolshevik Revolution (250 U.S. 616, 619-620). In this case, Holmes split from the majority, laying out the new clear and present danger standard in a dissent. Abrams was convicted for his political views, Justice Holmes argued, not for the crime (250 U.S. 616, 630). Instead of being illegal, Abrams's opinions should have been presented and argued in the marketplace of ideas. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market..." argued Holmes (250 U.S. 616, 630).

In his dissent, Justice Holmes attempted to clarify clear and present danger. Justice Holmes said Congress could not forbid the effort to change minds, which is what the pamphlets represented to Holmes. The secret publishing of a "silly leaflet" did not constitute an "immediate danger" nor did it hinder the armies of the United States (250 U.S. 616, 628). In fact, people could oppose troops in Russia and retain their support for the war effort against Germany (250 U.S. 616, 628). As Holmes argued in his dissent, "the United States constitutionally may punish speech that produced or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent" (250 U.S. 616, 627). Justice Holmes agreed that such power is greater in times of war than peace, but "the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion..." (250 U.S. 616, 628). Congress cannot forbid the effort to change minds. To Justice Holmes, convicting Abrams represented an effort to limit expression because the majority loathed the message.

After *Abrams*, Holmes and Brandeis continued to refute the bad tendency logic and push for clear and present danger (*Pierce v. U.S.* 1920; *Gilow v. New York* 1925; *Whitney v. California*, 1927). Their fellow justices continued to argue that bad tendency better protected the nation. What began as an effort by the court to protect the nation during World War I evolved in the 1920s into a federal and state effort to eliminate radical political thought with the blessing of the Supreme Court. In 1931, the Supreme Court abandoned bad tendency for clear and present danger in *Near v. Minnesota*.

In effect, the U.S. Supreme Court, particularly Justice Holmes in *Schenck*, *Frohwerk*, and *Debs*, served the interest of the State. President Wilson wanted to silence some voices, particularly those of Debs, socialists, and other radicals, and justified his infringement of free speech as national security. However, Wilson needed support for his justification. Intellectuals play the role of the justifiers, according to Gramsci:

The intellectuals have the function of organizing the social hegemony of a group and that group's domination of the state; in other words, they have the function of organizing the consent that comes from the prestige attached to the function in the world of production and the apparatus of coercion for those groups who do not 'consent' either actively or passively or for those moments of crisis of command and leadership when spontaneous consent undergoes a crisis (1996, 200-201).

Holmes legally justified Wilson's political objectives. Wilson wanted voices silenced; Holmes legally defined suppressing free speech as protecting national security and justifiable by declaring that the government had the constitutional authority because the country was at war. Wilson wanted people like Debs jailed, and Holmes provided the intellectual framework that justified the arrests within the dominant ideology.

In making dissent illegal, Wilson and Holmes placed the state in charge of the hegemonic discussion of the war and its execution. The American people and business could continue to negotiate on a consumer level within the

hegemonic process during the war, but Americans were limited to speech about the war that would not have a bad tendency, i.e., speech that supported Wilson and the war effort. By limiting the hegemonic process with the help of Holmes and the Supreme Court, Wilson used the power of the state to coerce compliance to his dominant war ideology.

Wilson's stated purpose of national security served no clear national security interest, at least in the cases of *Schenck* and *Frohwerk*. One could perhaps argue that Debs would have become the leader of opposition to the war, providing a rallying point around which perhaps thousands or millions of Americans would have expressed their opposition to the war. However, bad tendency, as applied during World War I, is less of a national security issue than an attempt by Wilson to create the illusion of a false consciousness of support for the war. By silencing critics, Wilson created the impression that Americans supported the war and his leadership of it.

The Patriot Act

On September 11, 2001, Al Qaeda attacked America. The news coverage told Americans the attackers were radicals, anti-Western, anti-Christian, and from the Middle East. Americans on September 11 perhaps understood for the first time the level of the enemy's hatred of the U.S. In his address to Congress and the American people on September 20, 2001, President George Bush stated the us-versus-them attitude of many Americans: "Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists." According to Reuters/Zogby polls conducted after September 11, 2001, nearly 80% of Americans supported the president. To fight this enemy, the Bush Administration pushed for and received quick passage of the Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001).

In addition to enforcing the provisions of the Patriot Act, the Bush Administration has used other laws and administrative orders to "fight terrorism." For example, the Bush Administration tapped phone lines, monitored Internet communications and banking transactions, and examined personal phone records without search warrants (McGee 2002; Eggen 2002; McCullagh 2005; Gellman 2005; Risen and Lichtblau 2005; Lichtblau and Risen 2005; Hauser 2005; Cauley 2006; Gellman, Blustein, and Linzer 2006; Lichtblau and Risen 2006; Meyer and Miller 2006; Page 2006; Westhead 2006; Brownstein and Reynolds 2006; Miller 2006; Leichtblau and Shane 2006; Bergman, Lichtblau, Shane, and Van Natta 2006; Aversa 2006; Reuters, 2006; Johnston and Lipton 2007).

The Patriot Act permits the government to investigate an individual if that person meets the law's standards of bad tendency. The purpose of the investigations is to determine if the individual presents a clear and present danger. The clear and present danger standard is evident in several provisions of the act. Section 807 spells out the actions congress believes constitute a clear and present danger. These activities include killing federal employees, murder of foreign officials, hostage taking, destruction of buildings or property, assassination of the President, terrorist acts on mass transportation systems, attacks on national defense installations, attacks on shipping, foreign attacks on Americans, use of weapons of mass destruction, or harboring terrorists (115 STAT. 379). Section 2702 uses the language of clear and present danger doctrine (115 STAT. 285), specifically allowing communication companies to provide customer information to police if there is an "immediate danger of death or serious physical injury" to a third party.

Other provisions of the Patriot Act permit an investigation of an individual based on bad tendency concepts. Section 501 provides the FBI with access to business records that include “books, records, papers, documents, and other items” if the FBI is protecting against international terrorism (115 STAT. 287). This section does not require evidence of a clear and present danger to begin an investigation, but only of the potential that the individual may support terrorism. This is a 21st Century version of bad tendency since actions are not required to begin an investigation, only support for causes that the FBI believes may be linked to terrorism. Similarly, under Section 806, the federal government can seize assets if the FBI proves that the person supports terrorism (115 STAT. 378). The person does not have to be a terrorist or perform an act of terrorism to violate Section 806.

In a handful of cases, the government claimed a clear and present danger existed, and some people were charged (Bernstein and Rashbaum 2005; Baker and Rashbaum 2006; Blankinship 2006; Drew and Lichtblau 2006; Higgins 2006; Shane and Zarate 2006). Few American citizens knew if they were considered potential sparks in the tinder box since the Bush Administration claimed all investigations must remain secret to protect national security (Lewis 2006; Savage 2006; Shane 2006).

Chang argues that the “vague and expansive terms” in the Patriot Act allow the government to investigate and gather intelligence on political groups opposed to the Bush administration (2002, 44; see also Dempsey and Cole 2002, 153). “In its rush to pass a piece of antiterrorism legislation,” explains Chang, “Congress failed to exact from the administration, in exchange, a showing that these highly intrusive tools are actually needed to combat terrorism and that the administration can be trusted not to abuse them” (p. 48).

Sidel (2004) criticizes the Patriot Act because “[l]aw enforcement authorities may now obtain information without showing a reasonable suspicion of criminal activity or ‘probable cause’ under the Fourth Amendment to the Constitution” (p. 8). Abele (2005) notes that the Federal Intelligence Surveillance Act required probable cause to begin an investigation, but the Patriot Act’s standard for investigation becomes suspicion. The goal of the Surveillance Act was to investigate criminal activity, explains Abele. The goal of the Patriot Act is information gathering without judicial oversight (23).

The Patriot Act is more than just an anti-terrorist piece of legislation. From a hegemonic perspective, the Patriot Act is a governmental tool used for coercion. From the perspective of limiting free speech, the Patriot Act is the means by which the government could control the hegemonic processes existing within the marketplace of ideas. The Patriot Act removes voices from the marketplace in much the same way that Lincoln’s Executive Order No. 1 quieted the voice of Southern secessionists in the North and The Espionage Act criminalized the speech of Schenk, Frohwerk, and Debs.

In a capitalist culture, Gramsci says, power usually rests in the hands of the capitalists. The capitalists assert their authority by controlling the topics placed within the cultural agenda. Those topics focus on the latest consumer products and how those products fulfill the needs of the consumers. However, Gramsci notes that there are times when leaders of the state create a political consensus for coercion. The Patriot Act and related anti-terrorist activities by the federal government are examples of state coercion.

Numerous American citizens and people of Islamic faith were caught in the federal government’s drive to identify its enemies. Some people were investigated, others were deported, and a few went to prison. Many associated with radical Islam in America were detained or investigated in the days after the September 11, 2001

attacks (Eggen 2005, "Report: Witnesses were held illegally"; Peterson 2005). From the hegemonic perspective, what is even more important than the number of arrests is the number of people in the Islamic community who are afraid to return to their homelands for fear they will be placed on a watch list (Lichtblau and Risen 2005; MacFarquhar 2006; Stolberg 2006). Donations to some charities or Islamic organizations could place a person on the watch list. Electronic communication with people on the watch list could be the basis of federal investigations (Chang 2002, 46, 54). A librarian who sued the FBI to prevent disclosure of library records could not provide details of the FBI's request for records without violating the Patriot Act (Eggen 2005, "Library challenges FBI request"). Since the investigations and the watch lists were secret, people in the Islamic community could not know if their actions were sparking an investigation. In effect, it would be reasonable to presume that most people in the United States that supported the cause of radical Islamic groups would chose silence over support. In addition, those believers in Islam who did not support radical religious views would also fear federal attention because of their interests in family, friends, and the cultural aspects of Islam. The only way to be safe was to limit their speech to topics and ideas that would not bring scrutiny of the federal government to bear on their affairs. By controlling the hegemonic process, the Bush Administration could silence the voices of radical Islam and limit the discussion in all of Islamic culture in the U.S. Silencing or limiting Islamic voices and ideas in the marketplace is the praxis of bad tendency. The state has assumed power over that portion of the marketplace of ideas where the enemies of the United States practiced their ideology.

Meanwhile, most Americans continued to operate in a marketplace that remained focused on consumption and entertainment. Few consumers experienced changes in their positions within the dominant ideology or the hegemonic marketplace because the power of the state focused on Islam. Few Americans were concerned if Islamic Americans lost some of their civil liberties, if it meant America was safer than before September 11. After the Twin Towers attack, Heymann (2003) argues that the Bush Administration needed domestic political support. He explains:

[The Bush Administration] relied on public fears and the resulting demands for vigorous, unified leadership to corral the Congress. Its insistence on the importance of secrecy, and therefore the impropriety of oversight, helped. Its political posture was always aggressive, for the administration trusted that the American people would not demand greater deference to allies or to domestic civil liberties (17).

When no new attacks on American soil occurred, Americans could remain focused on their economic and consumer interests, trusting the Bush Administration to identify the enemies of the state and of democracy. Americans did not fear a loss of personal liberties because any loss was insignificant and meant greater national security. Polls conducted in November 2001 indicate that Americans were ready to trade civil liberties for national security, according to Schulz (2003). Schulz cites the following poll numbers: 68% supported wiretaps, 57% intercepting mail, 58% detainment without charges, 43% suppressing free speech (7). What made a loss of civil liberties politically acceptable, argues Heyman (2003), was that the people losing their liberties were "limited to discrete groups to which most [Americans] do not belong" (2003, 93). As a result, few Americans were concerned about the arrests after September 11. Dempsey and Cole said the government detained 1,200 people in its investigation of September 11 attacks; one person was charged and ten or twelve were Al Qaeda members (2002, 149).

From a hegemonic viewpoint, 1,200 people were investigated in the wake of September 11 under the suspicions of bad tendency, and only one presented a clear and present danger (Dempsey and Cole 2002, 149). Thousands of people feared federal investigation; millions of people politically supported the government limiting everyone's civil liberties. The Bush Administration used that political support to expand from a war in Afghanistan clearly linked to the September 11 attacks into a war in Iraq that the American people were told was part of the war on terrorism. Before his second term ended, Bush faced more ideological confrontations in Lebanon, Iran, and North Korea, all tied loosely to terrorism. In effect, by limiting the hegemonic marketplace, Bush controlled the discussion of the war and terrorism between September 11, 2001 and 2006 when American voters reasserted their voice into the marketplace in the congressional elections.

Discussion

Bad tendency is a mechanism for the United States government to use as an instrument for achieving ideological coercion. Those who disagree with the president and the majority are silenced, and, if they insist on being heard, the dissenters are arrested or investigated. By controlling hegemonic processes, the president is allowed to present issues as good versus evil, us versus them, union versus confederacy, pro-American versus pro-German, and patriotic America versus Islamic radicalism. Instead of American citizens analyzing the war effort and policies of the president, their focus is on illusive domestic enemies—Southern conspirators, German sympathizers, and cells of Islamic jihadists. If the enemy is found, then governmental suppression is justified; if the enemy cannot be identified, then more governmental suppression is needed to find the enemy. By silencing opponents, the public is told, the war effort would be furthered.

From an historical perspective, the practice of bad tendency appears much differently. Democracy depends on the participation of its citizens in debates of public issues, particularly in times of national crisis and war when the executive branch is most likely to seek to control the hegemonic process. “As one looks back at the previous periods when rights were systematically violated, it is difficult to discern any resulting gain for national security,” argues Neier (2004, 32). He continues: “While Americans rightly celebrate our tradition of freedom, it is useful to recall that it is a tradition that has been sustained only because those committed to it have periodically fought back and overcome the forces in American society that—pretending to speak in the name of patriotism—would take the country in the opposite direction” (32).

Instead, when bad tendency becomes praxis of state coercion, the state is reluctant to give up its enemies. The coercive state will use the laws against new enemies. The Espionage Act was passed in 1917 as a war measure. Schenck, Debs, and Frohwerk faced prosecution for their opinions of World War I. The Espionage Act made Abrams a criminal when the act was re-interpreted to cover American intervention in the Russian Civil War. Whitney (274 U.S. 357) and Gitlow were convicted when the espionage laws were applied to those who held radical political views.

The Patriot Act began as anti-terrorism law. The law and presidential orders eventually evolved into a domestic spying operation run by the political state. The domestic spying operations expanded from searches for Al Qaeda members into tests of loyalty focused on the wars in Afghanistan and Iraq.

These three historical examples of bad tendency warn that when the state uses coercion to silence the voices of its enemies, freedom becomes the enemy of hegemony.

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¹ U.S. Const., art I, § 9, cl. 2: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Note: Congress later passed a law suspending habeas corpus.

² In 2006, Governor Brian Schweitzer pardoned 78 persons convicted of sedition in Montana between 1918-1919 (<http://www.seditionproject.net/>).

³ According to the indictment, Kansas City judges of German descent were removed from the case and Frank A. Youmans of the western district of Arkansas was assigned to the case (Frohwerk Indictment, 71).

⁴ In 1920, Debs received 912,302 votes while incarcerated at Atlanta Federal Prison.

⁵ Act of June 15, 1917, ch. 30, title I, §3, 40 Stat. 219:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.