

Table 5-1 Legal Standards Used in Cases Advocating Lawless Action

Standard	Major Proponents	Example
Clear and Present Danger Test “Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”	Holmes, Brandeis	<i>Schenck v. United States</i> , 1919
Bad Tendency Test Do the words have a tendency to bring about something evil?	Clarke, Sanford	<i>Abrams v. United States</i> , 1919
Preferred Freedoms “There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.”	Douglas, Stone, Rutledge	<i>United States v. Carolene Products</i> , 1938; <i>Thomas v. Collins</i> , 1945
Absolute Freedoms “The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing values of speech against silence.”	Black, Douglas	Never adopted. See Douglas's dissent in <i>Dennis v. United States</i> , 1951; Douglas and Black dissenting in <i>Roth v. United States</i> , 1957
Ad Hoc Balancing “On a case by case basis, the government's interest in regulation is weighed against the individual's interest in expression. Because the legislative process naturally involves a consideration of a wide range of societal interests, the courts normally defer to the government and presume that the regulation is valid.”	Frankfurter, Harlan	Frankfurter's concurrence in <i>Kovacs v. Cooper</i> , 1949; Harlan's opinion in <i>Barenblatt v. United States</i> , 1959
Clear and Probable Danger “Whether the gravity of the ‘evil,’ discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid danger.”	Vinson	<i>Dennis v. United States</i> , 1951
Brandenburg Test To punish speech that advocates the “use of force or of a law violation,” the advocacy must be “directed to inciting or producing imminent lawless action” and it is “likely to incite or produce such action.”	Fortas, Brennan	<i>Brandenburg v. Ohio</i> (1969)