

LIBERTY UNDER THE FOURTEENTH AMENDMENT

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I. GITLOW VS. NEW YORK

When the Supreme Court in *Gitlow v. New York* said:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States,¹

it was announcing, with extraordinary brevity, a view which it had more than once rejected in the past. The enlargement of the Fourteenth Amendment which has resulted from this single sentence has already profoundly increased the liberty of the individual, at the expense of the powers of the states; and the full extent of the effect produced is not yet, after seventeen years, visible. The circumstances which in 1925 induced and indeed compelled the Court to effect a constitutional reform of so great magnitude, and with a history so long and so uniformly unfortunate, deserve examination.

A. Madison's Amendment and the Bill of Rights

The effort to protect freedom of speech and of the press from impairment by the states had, in fact, commenced before the adoption of the First Amendment. Madison's draft of the Bill of Rights, submitted to the First Congress on June 8, 1789, included the following: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”² He urged, “I cannot see any reason against obtaining even a double security on these points * * * because * * * the State Governments are as liable to attack these invaluable privileges as the General Government is * * *”; and later, in debate on August 17, 1789, said that he “conceived this to be the most valuable amendment in the whole list.” The Amend-

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1. (1925) 268 U. S. 652, 666. The opinion is by Mr. Justice Sanford.

2. Ann. Cong. 1st Cong., 1st Sess., House of Rep., June 8, 1789 (1 Gales, Debates and Proceedings (1834), 452.)

ment, as subsequently modified in the House to include freedom of speech,³ was passed by the House, but rejected by the Senate, the House later concurring.⁴

The exclusion was deliberate, and the intention of Congress must have been quite clear, both from that and because the Bill of Rights in terms restricted only the federal government. But the vitality of the idea, notwithstanding these considerations, was so great as to suggest that it was an essential part of our constitutional scheme. Commencing in 1833,⁵ the contention that the first Ten Amendments restricted the powers of the states was repeatedly pressed upon the Court, and uniformly rejected by it.⁶

3. As passed by the House the Amendment read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State." Ann. Cong., supra note 2, August 17, 1789. While the Amendment went beyond the "freedom of speech and of the press" of the Gitlow case, its limits, in its final form, are not so far from those since developed by the Court. See *Palko v. Connecticut* (1937) 302 U. S. 319, 324-325, and discussion under II, *infra*.

For a reference to contemporary newspaper publications favoring the Amendment, see Warren, *History of the Federal Judiciary Act of 1789* (1924) 37 Harv. L. Rev. 49, 121.

4. See Warren, *The New "Liberty" under the Fourteenth Amendment* (1926) 39 Harv. L. Rev. 431, 433-435. In dealing with the cases prior to 1926, I am under the heaviest obligation to this article.

5. *Barron v. Baltimore* (U. S. 1883) 7 Pet. 243.

6. In *Barron v. Baltimore* (U. S. 1883) 7 Pet. 243, and *Withers v. Buckley* (U. S. 1857) 20 How. 84, the protection of the Fifth Amendment was denied to a deprivation of property by a state. In *Lessee of Livingston v. Moore* (U. S. 1833) 7 Pet. 469, 551-552, the Court remarked that the Seventh (trial by jury in civil actions) and Ninth Amendments did not apply to state legislation; in *Permoli v. New Orleans* (U. S. 1845) 3 How. 589, 609, it was held that the First Amendment imposed no inhibition on the states with respect to religious liberty; in *Fox v. Ohio* (U. S. 1847) 5 How. 410, the double jeopardy provision of the Fifth Amendment was held not to restrict a state; in *Smith v. Maryland* (U. S. 1855) 13 How. 71, the prohibition of the Fourth Amendment against the issuance of warrants except upon probable cause was held not to apply to a warrant issued by a state. In *Pervear v. Massachusetts* (U. S. 1866) 5 Wall. 475, the provision of the Eighth Amendment prohibiting cruel and unusual punishment was held not to apply to state legislation. These were all the decisions prior to the adoption of the Fourteenth Amendment in 1868 (*Pervear v. Massachusetts*, supra, was decided while the Amendment was under submission to the states for ratification). In *Twitchell v. Pennsylvania* (U. S. 1869) 7 Wall. 321, the Sixth Amendment was held not to apply to the states. See also *United States v. Cruikshank* (1876) 92 U. S. 542, 552-3, where the First Amendment (here the right peaceably to assemble) and the Second Amendment (the right to keep and bear arms) were said not to limit the powers of the states. None of these cases dealt with freedom of speech or of the press. Nevertheless the earlier opinions, notably Chief Justice Marshall's in *Barron v. Baltimore*, supra, and Justice Daniel's in *Fox v.*

B. *The Privileges and Immunities Clause*

The Fourteenth Amendment⁷ became a part of the Constitution in 1868. With its adoption a different and more persuasive contention became available, and was soon urged upon the Court, side by side with the effort to have the Bill of Rights construed as limiting the powers of the states, which continued, unabated either by invariable defeat in the Court or by the fact that the new Amendment had opened a more promising avenue of attack.⁸ It was first urged that the privileges and immunities clause of the Fourteenth Amendment protected against state abridgment a considerable variety of individual rights, derived from state constitutions or state laws, many of these being identical with rights which were protected by the Bill of Rights against federal impairment. The Fourteenth Amendment first came before the Court in the *Slaughter House Cases*,⁹ where the meaning of the "privileges or immunities of citizens of the United States" which no state law might now abridge, provoked a wide diversity of

Ohio, *supra*, and in *Withers v. Buckley*, *supra*, were so emphatic and rested upon so broad a foundation that it seems certain that freedom of speech would have met the same fate, if the question had been presented. Cf. Mr. Justice Butler, dissenting in *Near v. Minnesota* (1931) 283 U. S. 697, 723-724.

7. The relevant portion is the second sentence of Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law * * *."

8. As late as 1913 the effort (uncoupled with the Fourteenth Amendment) was still being made and still receiving short shrift from the Court. *Ensign v. Pennsylvania* (1913) 227 U. S. 592. See also Warren, *supra* note 4, at 436: "Apparently the Bar was not even then [1857] discouraged from attempting to overturn Marshall's decision [*Barron v. Baltimore* (U. S. 1833) 7 Pet. 243]; for the point was again raised in a Pennsylvania case, in 1869, on which occasion, Chief Justice Chase said that it was 'no longer subject of discussion.' It was raised again in 1876, when Chief Justice Waite said: 'It is now too late to question the correctness of this construction.' In spite of this emphatic language, counsel for defendants, whether by reason of ignorance, incorrigible optimism, or desire for delay, continued to urge (chiefly in murder and other criminal cases), that the Federal Bill of Rights applied to State Legislation. In at least twenty cases between 1877 and 1907, the Court was required to rule upon this point and to reaffirm Marshall's decision of 1833, in opinions in which it asserted that the doctrine had been 'held over and over again,' 'elementary,' 'well established' 'so frequently held, as not to warrant the citation of many authorities.'"

In my view, the persistence of the effort was not so much due to the considerations mentioned by Mr. Warren, as to the belief, impossible to substantiate but nevertheless profound, that the Constitution could not have left these fundamental and vital liberties wholly unprotected against state abridgment.

9. (U. S. 1873) 16 Wall. 36.

opinion. The decision itself dealt simply with the constitutionality of a Louisiana statute establishing a monopoly in the business of maintaining yards, landing places and slaughter-houses for stock, within a limited area, the facilities being open to the public and the charges for their use being fixed by law. The majority considered that this statute did not deprive butchers of the right to labor in their occupation or seriously interfere with their business, since it did not, as claimed, "prevent the butcher from doing his own slaughtering." No liberty recognized by the Bill of Rights was involved in the case. But the opinions (there were four) went far afield. Mr. Justice Miller, speaking for the majority, excluded the privileges and immunities "belonging to the citizen of the State as such," from the protection of the Amendment. He declined to define the federal privileges and immunities which were within the protection "until some case involving those privileges may make it necessary to do so"; but he did list some examples of such rights, including "the right to peaceably assemble and petition for redress of grievances." Mr. Justice Field, dissenting (with whom Chief Justice Chase and Justices Swayne and Bradley concurred), considered that the privileges protected were "fundamental privileges," "those which of right belong to the citizens of all free governments." Mr. Justice Bradley, dissenting separately, went further and was specific: he defined them to include the rights guaranteed by the Bill of Rights, many of which, including those guaranteed by the First Amendment, he enumerated.¹⁰

The wide scope of the opinions in the *Slaughter House Cases* and the variety of the views expressed resulted in renewed efforts to induce the Court to extend and clarify its interpretation of the privileges and immunities clause.¹¹ Three years later, in *Walker v. Sauvinet*,¹² although the point had not been specifically raised, the Court briefly said, without consideration of the question, that the right to trial by jury in suits at common law, guaranteed by

10. Two years earlier Judge Woods (later a Justice of the Supreme Court) had held that freedom of speech and the right peaceably to assemble were privileges and immunities within the protection of the 14th Amendment and had expressed the view that all the rights guaranteed by the Bill of Rights were likewise so protected. *United States v. Hall* (C. C. S. D. Ala. 1871) Fed. Cas. 15, 282. The decision is not mentioned in the *Slaughter-House Cases*.

11. See Warren, *supra* note 4, 437-438.

12. (1876) 92 U. S. 90.

the Seventh Amendment, was not "a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge." Justices Clifford and Field dissented without opinion. Also in 1876, in *United States v. Cruikshank*,¹³ a Reconstruction case, it was urged, apparently in reliance upon Mr. Justice Miller's *dictum* in the *Slaughter House Cases*, that the right of peaceable assembly was within the protection of the clause. The Court said that "the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government," was within the protection of the clause; but it held the indictment to be defective, since the offense, as there stated, could have been made out by showing "that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever." And in 1886, in *Presser v. Illinois*,¹⁴ the Court affirmed a conviction under an Illinois statute prohibiting any persons other than the regular organized militia from associating and drilling or parading with arms, which statute, it had been claimed, violated the Second Amendment and also the privileges and immunities clause of the Fourteenth. The Court said that the states could not, even aside from the Second Amendment, "prohibit the people from keeping and bearing arms," but held that the statute clearly did not have this effect.

In *Spies v. Illinois*,¹⁵ it was claimed, for the first time, that while the Bill of Rights limited only the Federal Government, nevertheless so far as it declared or recognized "rights of persons," these rights were protected against state abridgment by the privileges and immunities clause. Specifically, the protection

13. (1876) 92 U. S. 542.

14. (1886) 116 U. S. 252. The Court also considered that the statute did not violate the right peaceably to assemble, as defined in *United States v. Cruikshank* (1876) 92 U. S. 542. The opinion is by Mr. Justice Woods, who had, fifteen years earlier, decided *United States v. Hall* (C. C. S. D. Ala. 1871) Fed. Cas. 15, 282. Mr. Warren (*supra* note 4, at 459) considers *Presser v. Illinois*, *supra*, to be a decision that the right to keep and bear arms is not one of the "privileges and immunities," but I cannot so regard it.

In connection with the consideration of "liberty," *infra*, it may be noted that the Court in *Presser v. Illinois* (*supra* at 268), said that the argument that the statute amounted to a deprivation "of either life, liberty or property without due process of law * * * is so clearly untenable as to require no discussion."

15. (1887) 123 U. S. 131.

was claimed for rights under the Fourth (security against unreasonable searches and seizures), Fifth (privilege against self-incrimination), and Sixth (right to jury trial) Amendments. But the Court again avoided a decision, holding that these federal questions did not appear on the face of the state court record.¹⁶ Similarly, in *O'Neil v. Vermont*,¹⁷ where it was contended that the prohibition of the Eighth Amendment against cruel and unusual punishment was now a privilege or immunity protected by the clause, the Court held that this question was not before it on the record, and did not consider it; but Mr. Justice Field and Mr. Justice Harlan, dissenting separately, each very vigorously expressed the view that not only this right but all of the rights guaranteed by the Bill of Rights were "privileges or immunities" which the Fourteenth Amendment forbade a state to abridge.

In *Maxwell v. Dow*¹⁸ the Court for the first time¹⁹ dealt squarely with the question. There it was again argued that all of the rights guaranteed by the Bill of Rights were privileges or immunities protected by the Fourteenth Amendment. The Court, in a careful opinion,²⁰ held that neither the grand jury indictment guaranteed by the first clause of the Fifth Amendment nor the right to jury trial guaranteed by the Sixth Amendment was within the protection, Mr. Justice Harlan dissenting vigorously.

In 1907 the Court for the first time was confronted, in *Patterson v. Colorado*,²¹ with the claim that freedom of the press was protected by the Fourteenth Amendment against state abridg-

16. For a contemporary discussion of this case, disposing rather too easily of the claim advanced, see Dunbar, *The Anarchists' Case* (1887) 1 Harv. L. Rev. 307.

17. (1892) 144 U. S. 323.

18. (1900) 176 U. S. 581.

19. Two earlier decisions had dealt rather inconclusively with a New York statute which it was claimed imposed cruel and unusual punishment in violation of the Eighth Amendment. In re Kemmler (1890) 136 U. S. 436; *McElvaine v. Brush* (1891) 142 U. S. 155. I cannot see that they hold, either singly or conjunctively, any more than that the statute did not inflict cruel and unusual punishment, but Mr. Warren (*supra* note 4, at 439, 459) places a broader interpretation on them.

20. The Court apparently desired to limit its decision to the points before it. It said [(1900) 176 U. S. 581] at 597-598: "* * * the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first Eight Amendments to the Federal Constitution."

21. (1907) 205 U. S. 454.

ment.²² Patterson had been convicted of contempt of court for the publication of certain articles and a cartoon reflecting upon the Supreme Court of Colorado. Mr. Justice Holmes, speaking for the Court, said: "We leave undecided the question whether there is to be found in the 14th Amendment a prohibition similar to that in the First,"²³ and affirmed the conviction upon the ground that freedom of the press did not include immunity from subsequent punishment. Mr. Justice Harlan, in a notable dissenting opinion, held that the freedom of speech and of the press guaranteed by the First Amendment were privileges or immunities which no state could abridge.²⁴

A year later, in *Twining v. New Jersey*,²⁵ Mr. Justice Moody, for the Court, held that the privilege against self-incrimination, guaranteed by the Fifth Amendment, was not protected by the privileges and immunities clause against state abridgment, remarking that *Maxwell v. Dow*, *supra*, had determined that the clause "did not forbid the States to abridge the personal rights enumerated in the first eight Amendments * * *."²⁶ Mr. Justice Harlan again dissented.²⁷ In *Gilbert v. Minnesota*²⁸ in 1920, the point was not considered by the Court; but Mr. Justice Brandeis, dissenting, said that a state law abridging freedom of speech "affects rights, privileges and immunities of one who is a citizen of the United States * * * These are rights which are guaranteed protection by the Federal Constitution * * *."

Upon this front no battle had yet been won, but the struggle

22. The claim was apparently to the protection of the Amendment generally, and not to the privileges and immunities clause specifically. The Court remarked (id. at 461-462): "* * * it is easier to refer to the Constitution generally for the supposed right than to point to the clause from which it springs."

23. (1907) 205 U. S. 454, 462.

24. Id. at 463.

25. (1908) 211 U. S. 78.

26. Id. at 99.

27. See in particular id. at 124-125: "I am of the opinion that, as immunity from self-incrimination was recognized in the 5th Amendment of the Constitution, and placed beyond violation by any Federal Agency, it should be deemed one of the immunities of citizens of the United States which the 14th Amendment, in express terms, forbids any state from abridging,—as much so, for instance, as the right of free speech (Amend. I), or the exemption from cruel or unusual punishments (Amend. VIII), or the exemption from being put twice in jeopardy of life or limb for the same offense (Amend. V), or the exemption from unreasonable searches, and seizures of one's person, house, papers, or effects (Amend. IV)."

28. 254 U. S. 325, 336.

can hardly have appeared to be without hope.²⁹ All that had so far been decided—each time over a powerful dissent—was that the requirement of a grand jury indictment and the privilege against self-incrimination, contained in the Fifth Amendment, the right to trial by jury in all criminal prosecutions, guaranteed by the Sixth, and the right to trial by jury in suits at common law, guaranteed by the Seventh,³⁰ were not among the “privileges or immunities” which were no longer subject to state abridgment. The *dicta* in the *Slaughter House Cases*³¹ and in *United States v. Cruikshank*³² regarding the right of peaceable assembly had been often quoted, but never repudiated; and in *Patterson v. Colorado*³³ the Court had been careful to leave undecided the question with respect to freedom of the press. The profound feeling that the liberties guaranteed by the Bill of Rights must somehow have constitutional protection against state invasion was not only so persistent, but so explosive in its force (as some of the dissenting opinions mentioned above indicate) that ultimately protection for these rights might conceivably have been obtained by means of the privileges and immunities clause,³⁴ if

29. But cf. Warren, *supra* note 4, at 439.

30. Possibly also the prohibition of the Eighth Amendment against cruel and unusual punishment. See note 19, *supra*.

31. (U. S. 1873) 16 Wall. 36.

32. (1876) 92 U. S. 542.

33. (1907) 205 U. S. 454.

34. While this is conceivable, it does not, in the light of later cases, appear probable. There was, of course, no need to continue the struggle under the privileges and immunities clause, so far as freedom of speech was concerned, once *Gitlow v. New York* (1925) 268 U. S. 652, established that these rights were adequately protected by the due process clause. Other rights guaranteed by the Bill of Rights might also be taken, by analogy, to have perhaps a better claim to protection as “liberty,” than as “privileges or immunities.” In *Hamilton v. University of California* (1934) 293 U. S. 245, where it was contended that compulsory military training, which did violence to the religious convictions of certain students, not only deprived them of their religious liberty without due process of law, but abridged their privileges and immunities, the Court said (at 261): “The only ‘immunity’ claimed by these students is freedom from obligation to comply with the rule prescribing military training. But that ‘immunity’ cannot be regarded as not within, or as distinguishable from, the ‘liberty’ of which they claim to have been deprived by the enforcement of the regents’ order. If the regents’ order is not repugnant to the due process clause, then it does not violate the privileges and immunities clause. Therefore we need only decide whether by state action the ‘liberty’ of these students has been infringed.” And in *Colgate v. Harvey* (1935) 296 U. S. 404, 433, the Court, dealing with a state income tax law, said: “The right of a citizen of the United States resident in one state to contract in another may be a liberty safeguarded by the due process of law clause, and at the same time, none the less, a privilege protected by the privileges and immunities clause of the 14th Amendment. In

protection for freedom of the press had not soon been obtained in *Gitlow v. New York*³⁵ under the succeeding clause of the Fourteenth Amendment.

C. Due Process and Liberty

This third front, on which the struggle had already commenced, was the due process clause.³⁶ As is well known, this can

such case he may invoke either or both." However, Mr. Justice Stone's dissent in *Colgate v. Harvey*, supra at 444, should be noted: "* * * even those basic privileges and immunities secured against federal infringement by the first eight amendments have been held not to be protected from state action by the privileges and immunities clause."

Two years later in *Palko v. Connecticut* (1937) 302 U. S. 319, 329, the claim was made that the right against double jeopardy (guaranteed by the Fifth Amendment) was protected under the privileges and immunities clause, but the Court, through Mr. Justice Cardozo, said that "Maxwell v. Dow gives all the answer that is necessary" to this argument.

Notwithstanding all this, in *Hague v. C. I. O.* (1939) 307 U. S. 496, three members of the Court (Justices Roberts and Black, with whom Chief Justice Hughes apparently concurred), for reasons which their opinion does not make clear, undertook to protect the rights of freedom of speech and of peaceable assembly (sought to be exercised in order to give information regarding, and to discuss, the National Labor Relations Act) against invasion by a Jersey City ordinance, as privileges and immunities (citing the dicta of the Slaughter House Cases (U. S. 1873) 16 Wall. 36, and *United States v. Cruikshank* (1876) 92 U. S. 542), rather than as liberty under the due process clause. Mr. Justice Stone, in an opinion joined in by Mr. Justice Reed, concurred in the protection, but placed it upon the ground that it had "been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the 14th Amendment. * * * It has never been held that either is a privilege or an immunity peculiar to the citizenship of the United States, to which alone the privileges and immunities clause refers * * * and neither can be brought within the protection of that clause without enlarging the category of privileges and immunities of United States citizenship as it has hitherto been defined." *Hague v. C. I. O.*, supra, at 519. He pointed out (at 520-521 footnote), that "of the fifty or more cases" brought to the Court since the adoption of the Fourteenth Amendment, in which state statutes had been assailed as violating the privileges and immunities clause, in only one (*Colgate v. Harvey*) had the Court held that a privilege or immunity had been infringed. Cf. *Chambers v. Florida* (1940) 309 U. S. 227, 235-36, footnote, where, a year later, Mr. Justice Black, speaking for a unanimous court, said: "* * * There has been a current of opinion—which this Court has declined to adopt in many previous cases—that the 14th Amendment was intended to make secure against state invasion all the right, privileges and immunities protected from Federal violation by the Bill of Rights (Amendments 1 to 8)."

35. (1925) 268 U. S. 652.

36. The privileges and immunities clause was in terms an absolute bar to abridgment, as was the First Amendment; but the prohibition against state deprivation of life, liberty or property is subject to the qualification, "without due process of law." Cf. Mr. Justice Sutherland, dissenting, in *Associated Press v. National Labor Relations Board* (1937) 301 U. S. 103, 185.

be traced, by way of the Fifth Amendment, and the state constitutions adopted between 1780 and 1789, to Magna Charta, if not beyond.³⁷ It seems clear that in 1789 "liberty," in the Fifth Amendment, meant no more than freedom from physical restraint of the person.³⁸ It is significant that between 1789 and the adoption of the Fourteenth Amendment in 1868, the Supreme Court had no occasion to define the meaning of the word as used in the Fifth Amendment. During this period the state courts had in a few instances dealt with the "liberty" secured by the due process clauses of the state constitutions, but apparently in only one of these cases had it then been given a broader meaning than restraint of the person.³⁹

But very early after the adoption of the Fourteenth Amendment there were intimations that "liberty" might no longer be so rigidly confined. In the *Slaughter House Cases* Mr. Justice Bradley, dissenting, had said:

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property.⁴⁰

In 1884 Mr. Justice Bradley again expressed this view in *Butchers' Union Slaughter-House Etc. Company v. Crescent City Live Stock Company*⁴¹ in an opinion concurring in the result. Justices Harlan and Woods concurred in this opinion. In 1888 Mr. Justice Harlan, speaking for the Court in *Powell v. Pennsylvania*,⁴² held that a Pennsylvania statute regulating the manufacture and sale of oleomargarine was not inconsistent with

37. See Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions which Protect "Life, Liberty and Property"* (1891) 4 Harv. L. Rev. 365, 368-374.

38. See Shattuck, *supra* note 37, at 375-378; Warren, *supra* note 4, at 441.

39. The exception was a case in which a state prohibition law was held invalid as an invasion of liberty, the Indiana Supreme Court saying that "the right of liberty and pursuing happiness secured by the constitution" embraced the individual's right to select what he would eat and drink, "in short, his beverages * * *." *Herman v. State* (1855) 8 Ind. 545, 558; see Warren, *supra* note 4, at 443-444. But this may have come within "pursuing happiness" rather than "liberty."

40. (U. S. 1873) 16 Wall. 36, 122.

41. (1884) 111 U. S. 746, 765.

42. (1888) 127 U. S. 678.

the Fourteenth Amendment, but said, as *dictum*, that the right to "enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property," was an essential part of the "rights of liberty and property, as guaranteed by the Fourteenth Amendment." Mr. Justice Field, dissenting, said:

By "liberty," as thus used, is meant something more than freedom from physical restraint or imprisonment. It means freedom not merely to go wherever one may choose, but to do such acts as he may judge best for his interests not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment.⁴³

And in 1897, *Allgeyer v. Louisiana*⁴⁴ at last enlarged the meaning of "liberty" as used in the Fourteenth Amendment by holding that it included the liberty of a citizen of a state to contract outside the state for insurance on his property therein, of which liberty state legislation could not deprive him. Mr. Justice Peckham, speaking for a unanimous Court, quoted and adopted the concurring opinion of Mr. Justice Bradley in the *Butchers' Union* case, *supra*, and Mr. Justice Harlan's *dictum* in *Powell v. Pennsylvania, supra*, saying: "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto."⁴⁵

Broadening Concept of Liberty. Thus "liberty of contract" was brought within the "liberty" protected by the Fourteenth Amendment. For the first time, the Court had now held that that liberty meant something more than freedom from physical restraint. However insecure the foundation of "liberty of contract" then was, it became buttressed and established beyond dispute by succeeding cases.⁴⁶ The full expanse of the new right

43. *Id.* at 692-693.

44. 165 U. S. 578.

45. *Id.* at 591.

46. *Lochner v. New York* (1905) 198 U. S. 45; *Coppage v. Kansas* (1915) 236 U. S. 1. See also *McLean v. Arkansas* (1909) 211 U. S. 539; *Chicago B. & Q. Ry. v. McGuire* (1911) 219 U. S. 549. In three cases very shortly following *Allgeyer v. Louisiana* (1897) 165 U. S. 578, the Court expressed its approval of the new doctrine. See *Holden v. Hardy* (1898) 169 U. S. 366, 391; *Williams v. Fears* (1900) 179 U. S. 270, 274; *Booth v. Illinois* (1902) 184 U. S. 425.

was perhaps not at first realized; but, as violations of it, in *Lochner v. New York*,⁴⁷ in 1905, the Court struck down a New York statute limiting hours of employment in bakeries to sixty a week, and in *Coppage v. Kansas*,⁴⁸ in 1915, a Kansas statute prohibiting employers from requiring employees to agree not to join a labor union, as a condition of employment. And in 1908, in *Adair v. United States*,⁴⁹ the Court held unconstitutional an act of Congress prohibiting interstate carriers from discharging employees because of membership in a labor union, upon the ground that it invaded the liberty of contract which was included in the "personal liberty" guaranteed by the Fifth Amendment. The rights which were held to be invaded by these statutes might perhaps have been afforded protection more reasonably as property than as liberty,⁵⁰ but in each case the Court was careful to describe the right as "liberty."⁵¹ In all three cases there were dissents (notably by Mr. Justice Holmes), but not upon the ground that the right in question was not included in the "liberty" guaranteed by the Amendment.

Also resting on *Allgeyer v. Louisiana*⁵² for support was *Adams v. Tanner*,⁵³ where the Court held that a Washington statute prohibiting the charging of fees by employment agencies was an unconstitutional restriction of the "liberty * * * guaranteed by the 14th Amendment, to engage in a useful business."

It was not until after *Lochner v. New York*⁵⁴ that the claim was made that freedom of expression, or any of the other rights guaranteed by the Bill of Rights, were included in the "liberty" protected by the Fourteenth Amendment. The due process clause was identical in the Fourteenth and in the Fifth Amendments, and it had early been suggested that in the latter "liberty" could hardly be interpreted as embracing such rights, because of their

47. 198 U. S. 45. The Court said (at 56): "Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."

48. 236 U. S. 1.

49. 208 U. S. 161.

50. Cf. Warren, *supra* note 4, at 449.

51. In *Adair v. United States* (1908) 208 U. S. 161 and in *Coppage v. Kansas* (1915) 236 U. S. 1 the Court said that the right was also entitled to protection as a property right.

52. (1897) 165 U. S. 578.

53. (1917) 244 U. S. 590, 597. Cf. *Truax v. Raich* (1915) 239 U. S. 33 (equal protection of the laws).

54. (1905) 198 U. S. 45.

specific guarantee (unqualified by "without due process of law")⁵⁵ in the other Amendments contained in the Bill of Rights.⁵⁶ But when in 1907 the contention was advanced on behalf of freedom of the press, in *Patterson v. Colorado*,⁵⁷ Mr. Justice Holmes, as noted above, said simply that the Court left it undecided. However, Mr. Justice Harlan, whose dissent here upon the privileges and immunities point has been referred to above, went on to say:

I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press.⁵⁸

55. See note 36, supra.

56. In 1891. *Shattuck*, supra note 37, at 381.

57. 205 U. S. 454.

58. *Id.* at 465. Since the state constitutions as a rule contained an express guarantee of freedom of speech equivalent to that of the First Amendment, as well as a due process clause equivalent to that of the Fourteenth Amendment, the question of the inclusion of freedom of speech within "liberty" was hardly required to be decided by the state courts. Nevertheless the Supreme Court of Missouri had, twelve years earlier, expressed the view that freedom of speech was embraced in the liberty "guaranteed by the 14th Amendment as well as by Section 30, Article 2 of the Constitution of Missouri." *State v. Julow* (1895) 129 Mo. 163, 172-173, 31 S. W. 781, 29 L. R. A. 257. Here the court, through Judge Sherwood, said: "These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil, and political; in short, all that makes life worth living; and of none of these liberties can anyone be deprived, except by due process of law." And in *Marx & Haas Clothing Co. v. Watson* (1902) 168 Mo. 133, 67 S. W. 391, 394, the court, again through Judge Sherwood, after referring to the guaranty of freedom of speech contained in Section 14 of Article 2 of the Missouri Constitution, said: "Nor is it to be forgotten that the right of free speech is also impliedly guaranteed in another section of the Bill of Rights, Section 30, to-wit: 'That no person shall be deprived of life, liberty or property without due process of law.' In other words, *free speech* is as an inevitable concomitant and adjuvant of *personal liberty*, as necessary to the latter's existence, as *vital air* to the lungs, or *locomotion* to the body."

It is worth noting that the dictum in *State v. Julow*, supra, was made following the holding unconstitutional of a Missouri statute prohibiting employers from contracting with, or compelling, employees to withdraw

Mr. Justice Harlan had no later occasion to elaborate this bold statement, but in two dissenting opinions in the following year he developed his view of the scope of "liberty," as including other rights. In *Berea College v. Kentucky*,⁵⁹ dealing with a statute prohibiting the teaching of white and negro pupils in the same school, he said: "But even if such right [the right to impart instruction] be not strictly a property right, it is, beyond question, part of one's liberty, as guaranteed against hostile State action by the Constitution of the United States * * * the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty * * *."⁶⁰ And in *Twining v. New Jersey*,⁶¹ after saying that the privilege against self-incrimination was within the protection of the privileges and immunities clause,⁶² he added that it was also "a part of the liberty guaranteed by the 14th Amendment against hostile State action."⁶³ When, in 1915,⁶⁴ in *Fox v. Washington*,⁶⁵ it was expressly urged that freedom of the press was within the liberty protected by the due process clause, the Court was able to dispose of the case by a unanimous opinion, without consideration of the point.

Freedom of Speech as Liberty—Prelude to Gitlow v. New York. In 1920 with these decisions and dissents as its background *Gilbert v. Minnesota*⁶⁶ came before the Court. Gilbert, during the first World War, had vigorously denounced American participation in the war. The Court affirmed his conviction under a state statute prohibiting advocacy or teaching which interfered

from or refrain from joining a labor union, substantially similar to the Kansas statute which was struck down in *Coppage v. Kansas* (1915) 236 U. S. 1. In *Marx & Haas Clothing Co. v. Watson*, supra, the statement came in connection with the holding that an injunction against the distribution of circulars by a boycotting labor union was a violation of the freedom of expression guaranteed by Section 14, Article 2, and also, as the court said, by Section 30.

59. (1908) 211 U. S. 45.

60. Id. at 67-68.

61. (1908) 211 U. S. 78.

62. See note 27, supra.

63. (1908) 211 U. S. 78, 121.

64. Mr. Justice Harlan died in 1911.

65. 236 U. S. 273. This dealt with a nudist publication, which, as the Court found, advocated disregard of laws against indecent exposure, and thus violated a state statute prohibiting publications which encouraged the commission of crime or disrespect for law.

66. 254 U. S. 325.

with or discouraged enlistment in the military or naval service, but again, as in *Patterson v. Colorado*,⁶⁷ it passed over the question of the protection of freedom of speech by the Fourteenth Amendment, saying: "But without so deciding, or considering the freedom asserted, as guaranteed or secured * * * by the Constitution of the United States * * *, we pass immediately to the contention, and for the purpose of this case may concede it; that is, concede that the asserted freedom is natural and inherent, but it is not absolute,—it is subject to restriction and limitation."⁶⁸ Mr. Justice Brandeis, who had become a member of the court in 1916, dissented in a famous passage:

As the Minnesota statute is, in my opinion, invalid, because it interferes with Federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the 14th Amendment. But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union (*Coppage v. Kansas*), the right of a business man to conduct a private employment agency (*Adams v. Tanner*), or to contract outside the state for insurance of his property (*Allgeyer v. Louisiana*), although the legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the 14th Amendment includes only liberty to acquire and to enjoy property.⁶⁹

The corrosive force of this lay in the contrast between the expansion of liberty so as to strike down, as violations of liberty of contract, the social legislation of *Coppage v. Kansas*⁷⁰ and similar cases, and the failure to make an expansion, certainly no greater, to protect freedom of speech. It was true that the Court had never yet refused to take the latter step, but this was the third time that, offered an opportunity to do so, it had avoided the issue. Mr. Justice Brandeis' attack was perhaps premised upon the results reached in the liberty of contract cases,⁷¹ as

67. (1907) 205 U. S. 454.

68. 245 U. S. 325, 332. Cf. Chafee, *Free Speech in the United States* (1941) 294-295.

69. 254 U. S. 325, 343.

70. (1915) 236 U. S. 1.

71. He had dissented in *Adams v. Tanner* (1917) 244 U. S. 590.

well as upon the failure to protect freedom of speech; and the Court might conceivably have met him by repudiating these extreme results, or even by narrowing liberty to its historical limit of freedom from bodily restraint. But, apart from the social and economic views held by the Court's majority, to take this course would have necessitated overruling a great body of law which had now been built up, not only in the federal courts but in the state courts. Certainly the protection of freedom of speech required the overruling of no earlier decision; and the very care with which decision had been avoided would seem to indicate that the Court had been a little shaken by Mr. Justice Harlan's dissent in *Patterson v. Colorado*.⁷² The contrast, having now been bluntly pointed out, could not be long ignored, and *Gitlow v. New York*⁷³ thus became inevitable.⁷⁴

True, two years later, in *Prudential Insurance Company v. Cheek*,⁷⁵ the Court, through Mr. Justice Pitney, said: "* * * the Constitution of the United States imposes upon the states no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence * * *. As we have stated, neither the 14th Amendment nor any other provision of the Constitution of the United States imposes upon the states any restriction about 'freedom of speech' or the 'liberty of silence.'" But this *dictum* was merely an impatient exclamation,⁷⁶ and

72. (1907) 305 U. S. 454.

73. (1925) 268 U. S. 652.

74. *Id.* at 672, for Mr. Justice Holmes' dissent: "The general principle of free speech, it seems to me, must be taken to be included in the 14th Amendment, in view of the scope that has been given to the word 'liberty' as there used." See also *Near v. Minnesota* (1931) 283 U. S. 697, 707, where the Court through Chief Justice Hughes, referring to *Gitlow v. New York*, said, "It has been found impossible" to conclude that freedom of speech and of the press, "this essential personal liberty of the citizen," was not within the liberty safeguarded by the Fourteenth Amendment. Cf. *State v. Julow* (1895) 129 Mo. 163, 31 S. W. 781 (note 58, *supra*), where the freedom of speech dictum was made in a decision that social legislation of the *Coppage v. Kansas* type was unconstitutional as a deprivation of liberty of contract—as if to balance the holding. Also cf. *Shattuck* (writing before *Allgeyer v. Louisiana*), *supra* note 37, at 392.

75. (1922) 259 U. S. 530, 538, 543, 27 A. L. R. 27, 34, 36. Here the Missouri service letter statute (now R. S. Mo. 1939 §5064) was held constitutional. The Missouri Supreme Court had held it violated neither the right of free speech guaranteed by the state constitution nor the liberty of contract guaranteed by the Fourteenth Amendment. *Cheek v. Prudential Insurance Co.* (1916) (not officially reported), 192 S. W. 387, L. R. A. 1918 A 166. In the United States Supreme Court no contention with respect to freedom of speech was made, but the liberty of contract point was still pressed.

76. He was referring to the decisions of three state courts that similar statutes violated the freedom of speech guaranteed by state constitutions.

Mr. Justice Brandeis did not even trouble to record his disagreement. That the Court was moving to the inevitable conclusion was indicated by *Meyer v. Nebraska*,⁷⁷ where it held that a state statute prohibiting the teaching of any language other than English in the first eight grades of school was an unconstitutional deprivation of liberty;⁷⁸ and by *Pierce v. Society of Sisters*,⁷⁹ in 1925, where the Court said, by way of *dictum*, that an Oregon statute requiring all children from the age of eight to sixteen years to attend public schools, violated the liberty of parents to direct the upbringing and education of their children.

Gitlow v. New York. One week after this case the Court decided *Gitlow v. New York*,⁸⁰ which it had had under consideration for more than two years.⁸¹ Gitlow had taken part in the publication of a "Left-Wing Manifesto," and had thereafter been convicted under a New York statute prohibiting the advocacy of criminal anarchy. The Court's assumption that freedom of speech and of the press "are among the fundamental personal rights and 'liberties' protected by the due process clause" preceded its holding that nevertheless a state might punish those who abused the freedom by utterances which "imperil its own existence as a constitutional state," and that the New York statute here was not an arbitrary or unreasonable exercise of the state's police power.⁸² The "For present purposes we may and do assume" was not much more than an affirmative phrasing of the "We leave undecided" of *Patterson v. Colorado*⁸³ and the

Wallace v. Georgia C. & N. Ry. (1893) 94 Ga. 732, 22 S. E. 579; Atchison T. & S. F. Ry. v. Brown (1909) 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247; St. Louis S. W. Ry. v. Griffin (1914) 106 Tex. 477, 171 S. W. 703, L. R. A. 1917 B 1108.

77. (1923) 262 U. S. 390. Note especially the broad language of Mr. Justice McReynolds' opinion, at 399: "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

78. At the same time as *Meyer v. Nebraska* (1923) 262 U. S. 390, the Court decided *Bartels v. Iowa* (1923) 262 U. S. 404, to the same effect.

79. (1925) 268 U. S. 510, 534-535.

80. (1925) 268 U. S. 652.

81. The case was first argued April 12, 1923, was reargued November 23, 1923, and was decided June 8, 1925.

82. Cf. Chafee, *op. cit. supra*, note 68, at 318-325.

83. (1907) 205 U. S. 454.

"But without so deciding * * * we * * * for the purpose of this case may concede" of *Gilbert v. Minnesota*.⁸⁴ In each case the purpose was to demonstrate that no violation of freedom of expression had occurred, even if the accused was entitled to the protection afforded by the freedom. Patterson's conviction was affirmed, Gilbert's conviction was affirmed, and so was Gitlow's. The Court's consideration of the question was limited to the sentence which has been quoted at the commencement of this article and to the brief additional statement that it did not "regard the incidental statement in *Prudential Insurance Company v. Cheek* * * * as determinative of this question."⁸⁵ But actually, as succeeding cases demonstrated, this was the final victory. Mr. Justice Holmes (whose well known aversion to restriction of the powers of the states warred, in these cases, with his attachment to freedom of speech) acquiesced with equal brevity, and Mr. Justice Brandeis was content to join in his opinion.⁸⁶ In this discreet fashion the new liberty arrived.

Thus, with the adventitious aid of the Fourteenth Amendment and of the broad concept of liberty of contract developed under it, Madison's view, after a century of struggle, at last prevailed. The effort to protect the liberties guaranteed by the Bill of Rights by construing the Amendments as in themselves restrictions upon the states had failed; the effort to protect them by means of the privileges or immunities clause had been on the whole unsuccessful; but protection for freedom of speech and of the press had finally been won, as "liberty" under the due process clause.

II. THE NEW LIBERTY

A. *Establishment*

The new concept was not warmly welcomed.⁸⁷ For one thing, the importance of the victory, or indeed that victory had been

84. (1920) 254 U. S. 325.

85. (1925) 268 U. S. 652, 666.

86. Mr. Justice Holmes' language is given in note 74, *supra*. He dissented upon the ground that the clear and present danger rule should have been applied to the facts.

87. The most discerning contemporary comment was highly critical. See Warren, *supra* note 4. Comment in (1925) 14 Cal. L. Rev. 54, (1925) 25 Col. L. Rev. 966, and (1925) 35 Yale L. J. 108, made no reference to the enlargement of "liberty," dealing only with the clear and present danger point. Comment in (1925) 20 Ill. L. Rev. 399, (1925) 24 Mich. L. Rev. 187, and (1925) 4 Neb. L. Bull. 166, also dealt chiefly with clear and present

won at all, was hardly apparent from the Court's opinion, and for another it was utterly overshadowed by the clear and present danger point upon which Justices Holmes and Brandeis dissented. It was six years before it became apparent that *Gitlow v. New York*⁸⁸ was to be taken as firmly establishing the new rule. In 1927 the question was again before the Court in *Whitney v. California*,⁸⁹ and in *Fiske v. Kansas*,⁹⁰ but the majority opinions, (by Mr. Justice Sanford in both cases)⁹¹ took the protection of freedom of speech by the Fourteenth Amendment for granted, and did not discuss it.⁹² Mr. Justice Brandeis' concurring opinion in *Whitney v. California*⁹³ is, however, to be noted, as is also the fact that *Fiske v. Kansas*⁹⁴ was the first successful invocation of freedom of speech in the Supreme Court. But in 1931 it became clear that the liberty had been established. In *Stromberg v. California*⁹⁵ the Court, through Chief Justice Hughes, reversed

danger, and regarded the enlargement of liberty as not yet established, but as something that the Court had assumed, without so holding. The same view was taken in (1927) 14 Va. L. Rev. 49. For a subsequent reply to Warren, see (1926) 20 Ill. L. Rev. 809. Cf. Frankfurter, A Study in the Federal Judiciary System (1926) 39 Harv. L. Rev. 1046, 1050-1051 (citing Warren).

88. (1925) 268 U. S. 652.

89. 274 U. S. 357.

90. 274 U. S. 380.

91. Mr. Justice Sanford had written the opinion in *Gitlow v. New York* (1925) 268 U. S. 652.

92. In *Whitney v. California* (1927) 274 U. S. 357, 371, the conviction of Anita Whitney under the California Syndicalism Act, for organizing, being a member of, and assembling with the Communist Labor Party, was affirmed, the Court saying that "the freedom of speech which is secured by the Constitution does not confer an absolute right to speak" and that the act was not an arbitrary or unreasonable exercise of the state's police power, "unwarrantably infringing any right of free speech, assembly or association." In *Fiske v. Kansas* (1927) 274 U. S. 380, 387, a conviction under a similar Kansas statute was reversed, because the Court found that the printed matter which defendant had circulated lacked the advocacy of crime, violence or unlawful methods which had been present in the *Gitlow* case, and that the statute, as thus applied, unwarrantably infringed the defendant's liberty "in violation of the due process clause of the 14th Amendment." For comment on *Whitney v. California*, supra, see Powell, *The Supreme Court and State Police Power, 1922-1930* (1932) 57, 74 (reprinted from 17-18 Va. L. Rev.); Chafee, op. cit. supra, note 68, at 343; note (1927) 14 Va. L. Rev. 49.

93. (1927) 274 U. S. 357. He said (at 373): "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the 14th Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term 'liberty' are protected by the Federal Constitution from invasion by the states. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights."

94. (1927) 274 U. S. 380.

95. 283 U. S. 359.

a conviction under the California Red Flag law, holding that the law was "repugnant to the guaranty of liberty contained in the 14th Amendment." As to this guaranty the Court spoke with finality: "It has been determined that the conception of liberty under the due process clause of the 14th Amendment embraces the right of free speech."⁹⁶ Mr. Justice Butler, dissenting, protested that the Court was not "called on to decide" the question;⁹⁷ but when, a month later, Chief Justice Hughes in *Near v. Minnesota*⁹⁸ said, "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by State action,"⁹⁹ Mr. Justice Butler agreed, saying "That question has been finally answered in the affirmative."¹⁰⁰ The decisions of the ten years since have fully confirmed this. As Mr. Justice Frankfurter said, at the 1941-1942 term of Court, in *Bridges v. California*:

In a series of opinions as uncompromising as any in its history, this Court has settled that the fullest opportunities for free discussion are "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment," protected against attempted invasion by the States.¹⁰¹

B. Scope of the New Liberty

The scope of the liberty¹⁰² so protected has, with succeeding cases, become to some extent defined. *Gitlow v. New York*¹⁰³ had referred only to freedom of speech and of the press, but Mr. Charles Warren had promptly observed that if this was to be included within liberty, then other rights guaranteed by the Bill of Rights had at least an equal claim to inclusion.¹⁰⁴ He argued

96. *Id.* at 368. The *Gitlow*, *Whitney*, and *Fiske* cases were the authorities cited for this.

97. (1931) 283 U. S. 359, 376. He added: "Cf. *Prudential Insurance Co. v. Cheek*" (1922) 259 U. S. 530, 27 A. L. R. 27, and the three later cases.

98. (1931) 283 U. S. 697, 707, 723-724. For comment on this, see Chafee, *op. cit. supra*, note 68, at 375.

99. (1931) 283 U. S. 697, 707.

100. *Id.* at 723.

101. (1941) 62 S. Ct. 190, 203.

102. It may be noted that the word "liberty" is nowhere used in the Bill of Rights (aside from the due process clause of the Fifth Amendment), that "freedom" appears only in "freedom of speech" in the First Amendment, and that "free" appears only in the First Amendment ("free exercise" of religion) and in the Second ("a free State").

103. (1925) 268 U. S. 652.

104. Warren, *supra* note 4, 458-461. Cf. Shattuck, *supra* note 37, at 392. See also Powell, *op. cit. supra*, note 92 at 52: "It is no longer worth while

that historically freedom of speech was not as "fundamental" as most of the other rights guaranteed in the Bill of Rights, since, prior to the First Amendment, "while no State had in its Bill of Rights a declaration of right to freedom of speech, practically every State had a declaration of right to freedom of religion, of right to keep and bear arms, of right to be free from unreasonable search and seizure, and of right to jury trial."¹⁰⁵

Religious Freedom. But as the matter has so far developed, the Court, while by no means confining the protection to freedom of speech and of the press, has taken a different view. The First Amendment protects three rights from abridgment by the Federal Government: religious freedom,¹⁰⁶ freedom of speech and of the press, and the right of peaceable assembly. If the contemporary evaluation of the relative importance of these liberties is to be determined by the order in which they are enumerated in the Bill of Rights, then it is to be observed that freedom of religion was placed first, ahead even of freedom of speech. Even before *Gitlow v. New York*¹⁰⁷ the inclusion of religious freedom within the liberty protected by the due process clause had had the support of the broad language of Mr. Justice Harlan's dissenting opinion in *Berea College v. Kentucky*,¹⁰⁸ and of the *dictum* in *Meyer v. Nebraska*,¹⁰⁹ and no more than this has often enough been regarded as respectable authority for the enunciation of constitutional principles in this field. The inclusion of the closely allied right of freedom of expression in the concept of liberty had now been established beyond dispute. Yet the Court, in spite of these considerations, proceeded with a curious caution when it came to the protection of religious freedom. In *Hamilton v. University of California*¹¹⁰ a California statute requiring all students at the state university to take a course in military science and tactics was attacked, on behalf of students who held,

to spend time in considering whether there are liberties not within the assumed contemplation of the official progenitors of the 14th Amendment." Cf. also Mr. Justice Harlan's dissent in *Twining v. New Jersey* (1908) 211 U. S. 78, supra note 27, dealing with the privileges and immunities clause.

105. *Id.* at 461.

106. The exact language as to this is: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

107. (1925) 268 U. S. 652.

108. (1908) 211 U. S. 45.

109. (1923) 262 U. S. 390, supra note 77.

110. (1934) 293 U. S. 245.

as a part of their religious belief, that military training was immoral and contrary to the precepts of Christianity.¹¹¹ It was urged that this requirement deprived them of the religious liberty safeguarded by the due process clause.¹¹² The Court, while it said that the liberty protected by the due process clause undoubtedly "does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines"¹¹³ on which these students based their objections to compulsory military training,¹¹⁴ held that they were not deprived of this liberty by the statute. Mr. Justice Cardozo, concurring, said: "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states."¹¹⁵ In this restrained expression, oddly like the language used in *Gitlow v. New York*,¹¹⁶ Justices Brandeis and Stone concurred.

In 1937 Mr. Justice Sutherland, dissenting, in a case where invasion by the Federal Government of freedom of speech and of the press was claimed, remarked: "'Liberty' is a word of wide meaning, and, without more, would have included the various liberties guaranteed by the First Amendment."¹¹⁷ A little later, in *Palko v. Connecticut*,¹¹⁸ the Court, through Mr. Justice Cardozo, said, as *dictum*, that "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes * * * the free exercise of religion * * *." In 1938, in *Lovell v. Griffin*,¹¹⁹ the distribution of religious tracts regarding the gospel of the "Kingdom of Jehovah," without the license which a city ordinance required (the distributor believing that application for a license was forbidden by Jehovah's commandment), was claimed to be protected by the clause, both

111. They were members of the Methodist Episcopal Church, which had previously protested against the requirement on several occasions.

112. It was also urged that it violated the privileges and immunities clause. See note 34, *supra*.

113. *Hamilton v. University of California* (1934) 293 U. S. 245, 262.

114. As authority for this the Court cited *Meyer v. Nebraska* (1923) 262 U. S. 390, *Pierce v. Society of Sisters* (1925) 268 U. S. 510, *Stromberg v. California* (1931) 283 U. S. 359, and *Near v. Minnesota* (1931) 283 U. S. 697. The last three of these cases had not even indulged in dicta with reference to religious freedom.

115. (1934) 293 U. S. 245, 265.

116. (1925) 268 U. S. 652.

117. *Associated Press v. N. L. R. B.* (1937) 301 U. S. 103, 134.

118. (1937) 302 U. S. 319, 324.

119. (1938) 303 U. S. 444.

as an exercise of religious freedom and of the freedom of the press; but the Court, holding the ordinance invalid as an invasion of freedom of the press, did not consider the question of religious freedom. In like manner, in *Schneider v. Irvington*,¹²⁰ where the enforcement against a number of Jehovah's Witnesses of an ordinance prohibiting the unlicensed distribution of circulars, was claimed to violate both religious liberty and freedom of expression, the Court held that the ordinance was a deprivation of freedom of speech and of the press, but said nothing with regard to the invasion of religious liberty.

It was not until 1940 that the question was actually decided. In *Cantwell v. Connecticut*,¹²¹ a statute prohibiting the unlicensed solicitation of funds for religious causes was attacked by members of Jehovah's Witnesses who had engaged in such solicitation on a New Haven street. The attack was again based upon invasion both of religious freedom and of freedom of expression. The Court was now ready to deal squarely with the question. It held that the statute, as here construed and applied, amounted to a censorship of religion, and was a deprivation of the liberty guaranteed by the Fourteenth Amendment. Through Mr. Justice Roberts, the Court said:

The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment * * * Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. * * * the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.¹²²

Two weeks later, in *Minersville School District v. Gobitis*,¹²³ a school board regulation requiring all children to participate in saluting the flag and in reciting a pledge of allegiance, was held not to be a deprivation of religious liberty, in the case of children (affiliated with Jehovah's Witnesses) who, as the Court found, refused to participate, in the conscientious belief that this was forbidden by command of scripture. Mr. Justice Frankfurter,

120. (1939) 308 U. S. 147.

121. 310 U. S. 296, 128 A. L. R. 1352. For comment on this see Chafee, *op. cit. supra*, note 68 at 404. Cf. *Ex parte Williams* (1940) 345 Mo. 1121, 139 S. W. (2d) 485.

122. (1940) 310 U. S. 296, 303.

123. (1940) 310 U. S. 586.

speaking for the Court, said that the religious liberty protected by the Constitution had never excluded legislation of general scope, not directed against doctrinal loyalties or particular sects; but he emphatically reaffirmed the inclusion of religious freedom in the protection of the due process clause. In two recent cases involving Jehovah's Witnesses, *Cox v. New Hampshire*,¹²⁴ and *Chaplinsky v. New Hampshire*,¹²⁵ the Court has held that statutes (to which the New Hampshire court had given a limited construction) requiring a license for a parade in a public street, and prohibiting addressing persons on a public street derisively or offensively, do not invade religious freedom, but inclusion of this freedom within the "liberty" of the due process clause was, in the latter case, carefully affirmed.

The "equal rights of conscience" which Madison had sought to protect against state abridgment have thus finally attained protection (at least to the extent of freedom from censorship), by virtue of *Cantwell v. Connecticut*,¹²⁶ which remains the only holding—the only instance in which the protection has actually been given. The Court's slow progress to this result, commencing with the *dictum* in the *Hamilton* case, *supra*, (to which three justices agreed only as an assumption for the purposes of the case), and followed by its avoidance of consideration of the question, in *Lovell v. Griffin*¹²⁷ and *Schneider v. Irvington*,¹²⁸ is reminiscent of the manner in which freedom of speech was brought within the concept of liberty. No one expects the Court to function as rapidly as a constitutional convention, but still one might have thought that, freedom of expression having been recognized to be an essential part of liberty, the inclusion of religious freedom would have presented no great difficulty. It may be suggested that the *Lovell* and *Schneider* cases indicate no more than the reluctance to decide a question until it has to be decided, which usually is the part of wisdom; but, on the whole, it must be said that in none of these cases has the Court (with the exception of Mr. Justice Stone) as yet displayed the burning zeal to protect the freedom, which it had earlier shown in dealing with freedom of speech and of the press.

124. (1941) 312 U. S. 569.

125. (1942) 62 S. Ct. 766.

126. (1940) 310 U. S. 296. See note 121 *supra*.

127. (1938) 303 U. S. 444.

128. (1939) 308 U. S. 147.

Of the seven cases in which protection for the free exercise of religion has been sought, the Court in four has held that the state action complained of was not an invasion of the freedom. While the two New Hampshire cases may be explained by the limited construction placed upon the statutes, the other two cases are worth examination. *Hamilton v. University of California*¹²⁹ and *Minersville School District v. Gobitis*¹³⁰ are essentially similar, although the latter includes one element not present in the former case. In each a requirement of general application directed against no particular sect—in the one case military training, in the other the flag salute and pledge of allegiance—did violence to the religious beliefs of some of the students to whom it was applied. In neither case does the Court appear to have given too much recognition to the fact that “the free exercise of” religion guaranteed by the First Amendment, by its very nature imperatively requires the translation of the religious belief into action or non-action. In both of these cases the belief required non-action; in neither did this non-action directly infringe upon the rights of any other person. The consideration to be balanced against the abridgment of freedom of religion was, therefore, (aside from one of limited force, that discipline might be impaired if the requirements were not universally enforced), simply the advantage to be gained by compelling a few students to receive military education and by compelling a few children to salute the flag and recite a pledge of allegiance. The interests of the state which might thus be served seem too slight to justify the abridgment. Hamilton, with his conscientious belief that military training was immoral and contrary to Christianity, is not likely to have distinguished himself in the course when compelled to take it, nor are the Gobitis children likely to have developed patriotism by being forced to engage in a daily salute and recital. And, as Mr. Justice Stone observed in the *Gobitis* case, “there are other ways to teach loyalty and patriotism.”¹³¹

The fact that in the *Hamilton* and *Gobitis* cases the restrictions

129. (1934) 293 U. S. 245.

130. (1940) 310 U. S. 586.

131. *Id.* at 603. In *Schneider v. Irvington* (1939) 308 U. S. 147, six months earlier, the Court had indicated that the existence of other non-abridging means of attaining the end sought by the state might be sufficient to deprive the state of power to resort to a means which abridged freedom of speech and of the press.

were non-discriminatory, and applied to all religious sects alike, is not of so much consequence, for any restriction may be in terms non-discriminatory, but actually a discrimination against a single sect whose beliefs or activities are in conflict with it. If these decisions are to be supported at all, it seems that they might better have been placed upon the ground that, since under *Pierce v. Society of Sisters*¹³² the attendance of the students at the University of California and of the children at the public schools of Minersville, Pennsylvania, could not have been compelled, they might have avoided the requirement by going elsewhere; although this is open to the objection that in actual fact it might have been impossible for them to have obtained an equivalent education elsewhere.

In addition, it should be noted that the *Gobitis* decision involved something which was not present in the *Hamilton* case—a compulsion to express a belief, even though the expression violated religious convictions. As to that, Mr. Justice Stone, dissenting, observed that “the very essence of the liberty” which is guaranteed “is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion.”¹³³ He considered that if the guaranty of freedom of religion was to have any meaning it must be “deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.”¹³⁴ In this aspect, the right here involved would appear to be another and more sharply cut facet of what Mr. Justice Pitney, in *Prudential Insurance Company v. Cheek*,¹³⁵ had referred to as the “liberty of silence.”

One is struck by the fact that in the religious freedom cases Jehovah's Witnesses appear to be cast for the role played by Communists in the early case dealing with freedom of speech. But the Court has not displayed the same acute concern for them, nor the same emotional attachment to the freedom. In *Cantwell v. Connecticut*¹³⁶ there was measured and capable intellectual

132. (1925) 268 U. S. 510.

133. (1940) 310 U. S. 586, 604.

134. *Ibid.*

135. (1922) 259 U. S. 530. See notes 75 and 76 *supra*.

136. (1940) 310 U. S. 296.

consideration; but that was a simple enough case, once the Court took the view that the power to grant or withhold a license was discretionary. In the *Gobitis* case Mr. Justice Frankfurter seems to be approximately at the same point where Mr. Justice Roberts was in the *Cantwell* case. It is significant that there has been no suggestion that the clear and present danger rule¹³⁷ is to be applied to the abridgment of religious freedom,¹³⁸ although, since *Herndon v. Lowry*,¹³⁹ that has been taken as the measuring rod for permissible limitation of freedom of expression, to the great advantage of that freedom. However, Mr. Justice Frankfurter's *dictum* in *Minersville School District v. Gobitis*¹⁴⁰ that "because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith"¹⁴¹—an expression to which too much weight was not given in the decision of the case, but which is nevertheless destined often to be quoted to the Court—together with Mr. Justice Stone's expression in the same case, that legislation repressing religious freedom "must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities,"¹⁴² may in time become the foundation for something approaching the clear and present danger test, or at least for a more careful examination of deprivations of religious freedom.¹⁴³

137. Discussed *infra* under III.

138. In *Cantwell v. Connecticut* (1940) 310 U. S. 296, it was not applied to the licensing statute, but it was applied to the count which charged inciting a breach of the peace. The conviction on the latter count was reversed primarily on the ground that it invaded freedom of speech, although the Court mentioned religious freedom incidentally.

139. (1937) 301 U. S. 242.

140. (1940) 310 U. S. 586.

141. *Id.* at 594. Read in its context, Mr. Justice Frankfurter's expression appears to spring from intellectual appraisal rather than from emotional attachment. In *Bridges v. California* (1941) 62 S. Ct. 190, 203, dissenting, he remarked that "judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government," and in his address at the Amherst College Commencement, June, 1940 (43 Harv. Alumni Bulletin 84), he said: "I suppose an unconscious reason for the attachment of judges to freedom of speech is that they have so little of it." This has a core of literal truth. Of course judges have never been restrained in the free exercise of religion.

142. (1940) 310 U. S. 586, 607.

143. Cf. Mr. Justice Frankfurter in the *Gobitis* case, *id.* at 595: "Nor does the freedom of speech assured by due process move in a more absolute circle of immunity than that enjoyed by religious freedom."

From the point of view of development of the freedom, it is unfortunate that the exercise of religion is, now at least, possessed of no economic implications and of few political ones. It is idle to speculate on the development which might ensue were organized labor to evolve a religion of its own—preferably an eccentric one. But as it is, it is evident that Jehovah's Witnesses are serving a useful purpose. No instrumentality of state government is likely to abuse the religious freedom of well-established churches, such as the Episcopalian, Catholic, Presbyterian, Jewish, or Baptist; and the *Hamilton* case, which dealt with Methodists, is exceptional. A new sect, entertaining, as Mr. Justice Stone described it in the *Gobitis* case, "a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern,"¹⁴⁴ is much more likely to run afoul of the law. The beliefs of Jehovah's Witnesses, precisely because they run counter to those of the great majority, may very well perform a constitutional service by accelerating the frequency with which the Court is obliged to consider religious liberty, and thus compelling more rapid development of the full extent of the freedom.

Recent Developments in Religious Freedom. Since the preceding paragraphs were written emphasis has been added to them by *Jones v. Opelika*,¹⁴⁵ the last decision of the 1941-1942 term. In this 5-to-4 decision the Court affirmed the convictions of members of Jehovah's Witnesses, under ordinances of Opelika, Alabama, Fort Smith, Arkansas, and Casa Grande, Arizona, for distributing religious literature without a license. The ordinances required the payment of flat license fees, in amounts which, as applied to the operations of this sect, were in effect prohibitive.¹⁴⁶ The distributors were ministers who went through the streets and from house to house in the usual way, playing phonograph records, offering religious pamphlets and books for sale at a nominal price (two for five cents for the pamphlets, twenty-five

144. (1940) 310 U. S. 586, 606.

145. 62 S. Ct. 1231.

146. The ordinances applied in terms to book agents, peddlers, and itinerant salesmen of all sorts. The Opelika ordinance required payment of a 50-cent "issuance fee," plus \$10 a year for book agents, and \$5 a year for transient distributors; the Fort Smith tax was \$2.50 a day, \$10 a week, or \$25 a month; and the Casa Grande tax was \$25 a quarter (in a town of less than 1000 adults).

cents for the books), but giving them away in some cases where the recipient was unable or unwilling to pay. The Court, through Mr. Justice Reed, held that the ordinances as here applied did not abridge either freedom of the press or the free exercise of religion. It indulged religious freedom to the extent of some kind words, but said that the taxes were general and non-discriminatory,¹⁴⁷ and firmly shut its eyes to their prohibitive amount. In order to uphold the ordinances, the Court was obliged to regard them as regulatory, although the state courts had considered them to be revenue measures, and although when applied to Jehovah's Witnesses they became prohibitive. It was obliged also to regard Jehovah's Witnesses as subjected only to "a reasonable fee for their money-making activities," and to view the sales of literature "as partaking more of commercial than of religious or educational transactions," although the funds collected were used for the support of the church, and no one derived a profit from either the publication or the distribution of the literature. The Opelika ordinance, in addition, provided discretionary power to revoke the license (without refund of the fee paid); but the Court was able, by a heroic effort, to reconcile this with *Cantwell v. Connecticut*.¹⁴⁸

As observed above, a defense (although I think not a valid one) may be made for the results of the *Hamilton* and *Gobitis* cases; but for *Jones v. Opelika*¹⁴⁹ there is nothing to be said. There was nothing to be balanced against the freedom except the tax revenue, which, even if it were a proper object to be placed in the scales,¹⁵⁰ was here non-existent, because the taxes were greater than could have been paid. Nevertheless *Jones v. Opelika, supra*, in the long run will mark an advance for the liberty, because of the dissenting opinions. With Mr. Chief Justice Stone now stand Justices Black, Douglas and Murphy. All four concurred in the separate dissenting opinions of the Chief Justice and of Mr. Justice Murphy, which seem calculated to have a profound effect in the development of the freedom. The

147. In view of the Court's reliance in the *Hamilton*, *Gobitis*, and *Jones* cases, on the "non-discriminatory" character of the state action, it would seem worth while to demolish this point, once for all, in the next case that arises.

148. (1940) 310 U. S. 296.

149. (1942) 62 S. Ct. 1231.

150. The four dissenting justices considered that it was not.

Chief Justice, after commenting on the "questions which have been studiously left unanswered" by the majority opinion, and pointing out that a flat tax of this kind, if applied to interstate commerce, would be an unconstitutional burden, said that the First Amendment was "not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out," but that, on the contrary, the commands of the First and Fourteenth Amendments

extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it. * * * The taxes are insupportable either as a tax on the dissemination of ideas or as a tax on the collection of funds for religious purposes. For on its face a flat license tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws. * * * It seems fairly obvious that if the present taxes, laid in small communities upon peripatetic religious propagandists, are to be sustained, a way has been found for the effective suppression of speech and press and religion despite constitutional guaranties. The very taxes now before us are better adapted to that end than were the stamp taxes which so successfully curtailed the dissemination of ideas by eighteenth century newspapers and pamphleteers, and which were a moving cause of the American Revolution.¹⁵¹

Mr. Justice Murphy, after observing that "the most tyrannical government is powerless to control the inward workings of the mind," but that "even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message to others by speech and writing," said:

Important as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many individuals—the right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living creature. * * *

The mind rebels at the thought that a minister of any of the old established churches could be made to pay fees to the community before entering the pulpit. These taxes on petitioners' efforts to preach the "news of the Kingdom" should be struck down because they burden petitioners' right to

151. *Jones v. Opelika* (1942) 62 S. Ct. 1231, 1245.

worship the Deity in their own fashion and to spread the gospel as they understand it.¹⁵²

And, with a candor which has not been too frequent in this field, Justices Black, Douglas and Murphy jointly said:

The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District v. Gobitis* took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided.¹⁵³

The Right of Assembly. The third right guaranteed by the First Amendment is the right "peaceably to assemble, and to petition the government for a redress of grievances." As the cases illustrate, the right is often so intertwined with the right of free speech as to be inseparable from it. In 1937, in *De Jonge v. Oregon*,¹⁵⁴ the Court reversed a conviction, under the Oregon Criminal Syndicalism Law, for having assisted in the conduct of a public meeting called by the Communist party, an organization advocating criminal syndicalism. The indictment did not charge that there was any such advocacy at the meeting. The Court, through Chief Justice Hughes, reasoning from the decisions which had established freedom of speech and of the press as within the protection of the due process clause, held that the right of peaceable assembly, "a right cognate to those of free speech and free press and * * * equally fundamental," could not be denied "without violating those fundamental principles of liberty and justice which * * * the Fourteenth Amendment embodies in the general terms of its due process clause."¹⁵⁵ Three months later, in *Herndon v. Lowry*,¹⁵⁶ the Court, through Mr. Justice Roberts, reversed the conviction, under a Georgia statute, of a Negro Communist, a paid organizer for the party, who had called and attended public meetings for the purpose of recruiting members. The Court held that the statute, as here construed and

152. *Id.* at 4470.

153. *Id.* at 4468.

154. (1937) 299 U. S. 353. For comment, see Chafee, *op. cit. supra*, note 68, at 384-388; (1937) 50 Harv. L. Rev. 689.

155. *DeJonge v. Oregon* (1937) 299 U. S. 353, 364.

156. (1937) 301 U. S. 242, 259.

applied, "unreasonably limits freedom of speech and freedom of assembly and violates the Fourteenth Amendment." Still later in the same year, in *Palko v. Connecticut*,¹⁵⁷ Mr. Justice Cardozo included in his catalog of the rights protected by the due process clause, "the right of peaceable assembly, without which speech would be unduly trammelled." And in 1939, in *Hague v. C. I. O.*,¹⁵⁸ the Court again held that "freedom of speech and of assembly" could not be abridged by state action, the purpose of the assembly there being to communicate information regarding the National Labor Relations Act.¹⁵⁹ The inclusion of the right within "lib-

157. (1937) 302 U. S. 319.

158. 307 U. S. 496.

159. Whether the right guaranteed by this clause of the First Amendment is single, or whether the comma breaks it into two: a right to assemble for any purpose, and a right to petition for redress of grievances, in an assembly or out of it—has not always been clear. In *United States v. Cruikshank* (1876) 92 U. S. 542, dealing with the privileges and immunities clause, the Court held that the right was single: a right to assemble "for the purpose of" petitioning—although it gave to the qualifying phrase the broader meaning of petitioning Congress not only for a redress of grievances, but "for anything else connected with the powers or the duties of the National Government." The meetings in *DeJonge v. Oregon* (1937) 299 U. S. 353, and in *Herndon v. Lowry* (1937) 301 U. S. 242, would hardly have met this qualification; but in neither case did the Court mention it. In *Hague v. C. I. O.* (1939) 307 U. S. 496, however, the three justices who held that the right was safeguarded as a "privilege or immunity" (see note 34, supra) cited this paragraph from *United States v. Cruikshank* (1876) 92 U. S. 542, and dwelt upon the fact that the purpose of the meetings was to discuss the National Labor Relations Act. Justices Stone and Reed, who protected the right as "liberty," considered that the purpose of the meetings was to organize labor unions, rather than to discuss the Act of Congress. To say, however, as they did and as Chief Justice Hughes had earlier said in *DeJonge v. Oregon* (1937) 299 U. S. 353, that the protection extends to an assembly for "any lawful purpose," begs the question of what purposes may by state action be made unlawful. In consideration of *Hague v. C. I. O.* (1939) 307 U. S. 496, as well as of *United States v. Cruikshank* (1876) 92 U. S. 542, it should be noted that the privileges and immunities clause protects only the privileges and immunities of citizens of the United States, whereas the due process clause protects liberty without regard to citizenship, and the First Amendment guarantees "the right of the people peaceably to assemble." It therefore makes a difference whether the right is protected as a privilege or immunity, or as liberty.

In *Bridges v. California* (1941) 62 S. Ct. 190, 201, where a labor leader had sent a telegram to the Secretary of Labor, denouncing the decree of a California court and threatening to call a strike, five justices apparently regarded this as an exercise of "the right to petition to a duly accredited representative of the United States government, a right protected by the First Amendment." This recognition of the right of petition, exercised independently of any assembly, would give the clause what seems to be a more reasonable meaning, and would free the right of assembly from any qualification as to the purpose of the assembly. Presumably two rights, each broad and independent of the other, have now been accorded recognition by these cases, and included within liberty.

erty" in these cases followed, naturally and without question, from the inclusion of freedom of speech.

Right of Counsel. Even before *De Jonge v. Oregon*¹⁶⁰ and *Cantwell v. Connecticut*¹⁶¹ had completed the inclusion within liberty of the rights guaranteed by the First Amendment, the Court had extended the protection of the due process clause against invasion by the states, to another right guaranteed by the Bill of Rights. In 1932, in *Powell v. Alabama*,¹⁶² it held that the right of the accused in criminal prosecutions "to have the Assistance of Counsel for his defense," guaranteed by the Sixth Amendment, was protected by the due process clause against denial by a state court. Here the Court did not speak of the right as an essential part of liberty, but rather as an essential part of procedural due process, although in doing so it encountered difficulty with its earlier decision in *Hurtado v. California*.¹⁶³ The Court, however, was careful to base its decision in part upon the protection of freedom of speech and of the press, which had then been established by *Near v. Minnesota*¹⁶⁴ and earlier cases; and it added that "the fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " was one of the compelling considerations in determining whether it was "embraced within the due process clause of the 14th Amendment." The Court may have felt that it was difficult to bring this right within a reasonable definition of liberty; and if it was held to be included in "due process," there was no need to make the effort. But Mr. Justice Cardozo's statement (in *Palko v. Connecticut*¹⁶⁵ five years later) that in *Powell v. Alabama*¹⁶⁶ the right to counsel had "been found to be implicit in the concept of ordered liberty"

160. (1937) 299 U. S. 353.

161. (1940) 310 U. S. 296. See note 121, supra.

162. (1932) 287 U. S. 45. For comment see (1933) 18 ST. LOUIS LAW REVIEW 161.

163. (1884) 110 U. S. 516. The case held that due process of law did not require an indictment by a grand jury in a murder prosecution, since the Fifth Amendment had contained, first, an explicit guarantee of this right, and, second, a due process clause; while the Fourteenth Amendment, the due process clause of which was to be given the same construction as the clause in the Fifth Amendment, omitted the explicit requirement of a grand jury indictment. Mr. Justice Harlan dissented.

164. (1931) 283 U. S. 697.

165. (1937) 302 U. S. 319.

166. (1932) 287 U. S. 45.

was essentially true; and there can be no doubt that the decision was aided by *Gitlow v. New York*.¹⁶⁷ Later cases had accepted *Powell v. Alabama*¹⁶⁸ without question,¹⁶⁹ although there was no later holding; but the Court has recently, in *Betts v. Brady*,¹⁷⁰ substantially limited the scope of the right.

Confrontation and Self-incrimination. Two years after *Powell v. Alabama*¹⁷¹ the Court, in *Snyder v. Massachusetts*¹⁷² dealt inconclusively with another right guaranteed by the Sixth Amendment—the right of the accused to be confronted with the witnesses against him. But the Court's handling of self-incrimination has been much more decisive. In 1936, in *Brown v. Missis-*

167. (1925) 268 U. S. 652.

168. (1932) 287 U. S. 45.

169. See *Grosjean v. American Press Co.* (1936) 297 U. S. 233, 243-244; *Palko v. Connecticut* (1937) 302 U. S. 319, 324-325; *Avery v. Alabama* (1940) 308 U. S. 444 (which speaks of the "peculiar sacredness" of the right); *Glasser v. United States* (1942), 62 S. Ct. 457. (Commented on in (1942) 27 WASHINGTON U. LAW QUARTERLY 581. Cf. *Smith v. O'Grady* (1941) 312 U. S. 329.

170. (1942) 62 S. Ct. 1252. Here the trial court had refused to appoint counsel for an accused, without funds, who had requested such appointment. The accused thereupon tried his own case, was convicted of robbery and sentenced to eight years in prison. The Court, through Mr. Justice Roberts, affirmed the conviction, holding that *Powell v. Alabama* (1932) 287 U. S. 45, had not established the right to such appointment except in a particular case where a fair trial could not be had without it. It admitted that the broader right was guaranteed by the Sixth Amendment in federal prosecutions; and indeed the contrast with so recent a decision as *Glasser v. United States* (1942) 62 S. Ct. 457, 86 L. Ed. 405 (note 169, supra) is shocking. Upon the facts as stated in the opinion there appears to be no basis for distinguishing *Betts v. Brady* supra, and *Powell v. Alabama* (1932) 287 U. S. 45, except (1) the fact that here the accused was white, there a Negro, and (2) the severity of the punishment assessed in *Powell v. Alabama*, supra. Even upon the "fair trial" basis, the decision seems indefensible, in the light of the dissenting opinion of Mr. Justice Black (in which Justices Douglas and Murphy concurred).

The following expression in the dissenting opinion should be noted: "I believe that the Fourteenth Amendment made the Sixth applicable to the states. But this view, although often urged in dissents, has never been accepted by a majority of this Court and is not accepted today. A statement of the grounds supporting it is, therefore, unnecessary at this time." *Betts v. Brady*, supra, at 1262.

171. (1932) 287 U. S. 45.

172. (1934) 291 U. S. 97. The Court, through Mr. Justice Cardozo, affirmed a conviction for murder, where the accused had been denied the right to be present at a view to which the jury had been taken, saying (at 106), with regard to the constitutional right: "For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held." But Mr. Justice Roberts, in a dissenting opinion in which Justices Brandeis, Sutherland, and Butler concurred, said (at 131): "* * * it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule."

issippi,¹⁷³ it reversed a conviction which rested upon a confession extorted by brutality and violence, holding that the use of such a confession was a denial of due process. In 1940, in *Chambers v. Florida*¹⁷⁴ it held that use of a confession obtained by questioning over a period of five days was a denial of due process. From that it was but a short step to *Lisenba v. California*,¹⁷⁵ a case dealing with the confession of an accomplice, where Mr. Justice Roberts, speaking for the Court, said, as *dictum*, that "The concept of due process would void a trial in which, by threats or promises * * * a defendant was induced to testify against himself."¹⁷⁶ This is not far removed, if it is removed at all, from the privilege against self-incrimination which is guaranteed by the Fifth Amendment, although the Court often says in these cases¹⁷⁷ that the privilege against self-incrimination is not here involved.

Other Liberties Protected in Criminal Prosecutions. The acute concern to protect the rights of the accused against state deprivation, shown in these cases, has also been evidenced in others. In *Mooney v. Holohan*,¹⁷⁸ it was said, as *dictum*, that if a state contrived a conviction by the presentation of perjured testimony, that was a denial of due process; in *Smith v. O'Grady*,¹⁷⁹ that a conviction on a plea of guilty, made because of a promise of

173. 297 U. S. 278.

174. (1940) 309 U. S. 227. For Comment see (1940) 25 WASHINGTON U. LAW QUARTERLY 478. In *Grosjean v. American Press Co.* (1936) 297 U. S. 233, 243-244, the Court said that "in *Powell v. Alabama* * * * we concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

175. (1941) 62 S. Ct. 280. The intervening cases were *White v. Texas* (1940) 310 U. S. 530, and three "memoranda cases": *Canty v. Alabama* (1940) 309 U. S. 629, *Lomax v. Texas* (1941) 313 U. S. 544, and *Vernon v. Alabama* (1941) 313 U. S. 547.

The most recent case is *Ward v. Texas* (1942) 62 S. Ct. 1139, 1143, where the Court said, through Mr. Justice Byrnes, that it had set aside convictions "based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened by mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal * * * The use of a confession obtained under such circumstances is a denial of due process * * *."

176. (1941) 62 S. Ct. 289, 290.

177. E. g., in *Brown v. Mississippi* (1936) 297 U. S. 278, 285.

178. (1935) 294 U. S. 103.

179. (1941) 312 U. S. 329.

leniency, was lacking in due process; and in *Lisenba v. California*,¹⁸⁰ although the conviction was affirmed (Justices Black and Douglas dissenting), the process of "independent examination of the record" was carried to such a length that the Court felt compelled to discuss at length a great number of incidents, including the production of snakes at the trial. Later at the 1941-1942 term of Court, in *Hysler v. Florida*,¹⁸¹ the Court affirmed a conviction for murder, which was attacked as a denial of due process on the ground that two accomplices had testified falsely, unknown to the prosecution; but Justices Black, Douglas and Murphy dissented sharply. The litigation provoked by the Court's extreme language in some of these cases was evidently sufficient to induce Mr. Justice Roberts, in *Lisenba v. California*, to formulate a rule containing some qualifications:

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial.¹⁸²

The Court's reluctance to take into consideration the inclusion of a particular right in the Bill of Rights, in determining whether the same right is included in the concept of a fair trial (hence in "the concept of due process, and so in that of liberty") has already been noted. In *Palko v. Connecticut*,¹⁸³ where a Connecticut statute, permitting the state to appeal in a criminal prosecution, was attacked as in violation of the Fourteenth Amendment, the Court simply held that it was not; and was careful to refrain from deciding either that the statute did not subject the accused to the double jeopardy prohibited by the Fifth Amendment,¹⁸⁴ or that a state might subject an accused to such double jeopardy.¹⁸⁵ Mr. Justice Cardozo's high eloquence here is a con-

180. (1941) 62 S. Ct. 280.

181. (1942) 62 S. Ct. 688.

182. (1941) 62 S. Ct. 280, 290.

183. (1937) 302 U. S. 319. For comment see (1938) 23 WASHINGTON U. LAW QUARTERLY 439.

184. *Palko v. Connecticut* (1937) 302 U. S. 319, 322: "We do not find it profitable to mark the precise limits of double jeopardy in Federal prosecutions." The Court then cited *Kepner v. United States* (1904) 195 U. S. 100, in which Justices Holmes, White, and McKenna had considered that granting a new trial upon the government's appeal did not amount to double jeopardy.

185. *Palko v. Connecticut* (1937) U. S. 319, 328: "What the answer would have to be if the State were permitted after a trial free from error

tinuing force in the development of freedom of speech; but the ambiguity of the decision itself is not helpful.¹⁸⁶ And however true it may be that the inclusion of a particular right in liberty is not for the reason that the right was included in the Bill of Rights, it is disturbing to feel that Mr. Justice Cardozo suggests (here, as in the *Snyder* case) that the inclusion in liberty is rather in spite of the earlier guaranty.¹⁸⁷

The "Court's Bill of Rights" for Criminal Prosecutions. The third right which Madison in 1789 sought to protect against state invasion dealt, as do these cases, with criminal prosecutions. His proposal was confined to the right of trial by jury in such cases; it did not extend to the right to the aid of counsel, to the privilege against self-incrimination, nor to any other of the rights guaranteed by the Bill of Rights with respect to such prosecutions. He may have considered that as against the states, guarantees of these other rights were not required; or that they could not be obtained; or, conceivably, that some of them were implicit in the guarantee of "trial by jury." But the due process clause of the Fourteenth Amendment, as the Court has now established, goes beyond Madison's amendment, and the ultimate limits of liberty¹⁸⁸ and due process have not yet been determined. It is

to try the accused over again or to bring another case against him, we have no occasion to consider."

186. The case resembled *Snyder v. Massachusetts* (1934) 291 U. S. 97, in that it dealt with the trial by a New England court of an accused who was—so far as appears—white. Palko, on trial for murder, was found guilty of second degree murder and sentenced to life imprisonment. Upon the state's appeal (two of the three grounds for which were the trial court's exclusion of testimony as to a confession and of testimony to impeach Palko's credibility upon his cross-examination) a new trial resulted and upon this trial Palko was found guilty of first degree murder and sentenced to death. The "independent examination of the record" which the Court made in *Powell v. Alabama* (1932) 287 U. S. 45, *Brown v. Mississippi* (1936) 297 U. S. 278, and succeeding cases might very well have saved Palko's life if it had been undertaken here, for the confession can hardly be taken as an exercise of pure free will, and it appears to have been obtained under at least one of the circumstances stated in *Ward v. Texas* (1942) 62 S. Ct. 1139 (note 175 supra) to be sufficient ground for setting aside the conviction. See *State v. Palko* (1936) 121 Conn. 669, 679-681.

187. Note in both cases the vast array of illustrative dicta, resting upon decisions which were long prior to *Gitlow v. New York*, and many of which were very limited in their consideration of the question.

188. In the Palko case, supra note 183, the Court said that the rights established by *Powell v. Alabama* (1932) 287 U. S. 45, *Brown v. Mississippi* (1936) 297 U. S. 278, and *Mooney v. Holohan* (1934) 294 U. S. 103 were fundamental and implicit in the concept of liberty; it distinguished *Snyder v. Massachusetts* (1934) 291 U. S. 97. No other case in this field had then (1937) been decided.

now apparent that the Court is working out, laboriously and piece-meal, its own bill of rights for criminal prosecutions; for Mr. Justice Roberts' rule must inevitably become in time a code of well-defined prohibitions against state action, instead of a general requirement of a "fair trial." And it seems highly desirable that this crystallizing process should be accelerated as much as possible.¹⁸⁹

For present purposes we may assume that the Court is more competent to frame a bill of rights for the twentieth century than were Madison and his colleagues in 1789; but it is still not clear why the Court should not accept the aid which would result from taking into account to some degree—however slight—the guaranty of particular rights by the Bill of Rights.¹⁹⁰ The process need not impede the inclusion of other rights, not so guaranteed, if that has been the deterrent. The Court might, in the interest of obtaining a fair trial for an accused, very well give more consideration than it has in the past to such guarantees as those of the Fourth Amendment (against unreasonable searches and seizures and the issuance of warrants except upon probable cause), those of the Fifth (against double jeopardy and self-incrimination), the five rights guaranteed by the Sixth (to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the adverse witnesses, to compulsory process for obtaining favorable witnesses, and to the assistance of counsel), and perhaps also to the prohibitions of the Eighth Amendment. Some of these rights are certainly within the most conservative conception of due process; the denial of others obviously is inconsistent

189. The "fair trial" rule, with its concomitant "independent examination of the record," places upon the Court a burden which in the past it has not always been able to sustain; and it is hardly likely to be more successful in the future. Cf. Mr. Justice Black's reference, in his dissenting opinion in *Betts v. Brady* (1942) 62 S. Ct. 1252, to "the prevailing view of due process * * *, a view which gives this Court such vast supervisory powers that I am not prepared to accept it without grave doubts." In addition, the use of the general concept opens the door to arbitrary and purely subjective judgment, unrestrained by any rule; it leaves all state courts uncertain of their powers; and it deprives persons accused of crime of any assurance regarding their rights. It has never been suggested until now that Madison would have done better to compress the Fourth and Sixth Amendments, as well as a large part of the Fifth, into the brief requirement of a "fair trial."

190. As the four dissenting justices did in *Snyder v. Massachusetts* (1934) 291 U. S. 97, 128-131.

with "a fair trial." By putting them out of mind the Court makes needless difficulty for itself; for these guarantees were devoted to the same end as Mr. Justice Roberts' rule, and, by being specific, were a long step toward attaining it. And there is no apparent reason for a lower standard of justice in state courts than in federal courts.

The rights mentioned above, together with the First Amendment rights, are the greater substance of the Bill of Rights. As to the other amendments, it is not likely that the Third (quartering of soldiers) will be invoked against a state; nor is it likely that the requirement of the Seventh (of trial by jury in civil causes) will ever be applied to state courts, not only because too many decisions stand in the way, but because, in modern conceptions, the requirement would hamper rather than aid the administration of justice. And the qualification as to the purpose¹⁹¹ of the right to keep and bear arms (guaranteed by the Second Amendment) would seem to make it unlikely, though not quite inconceivable, that the Court will again be asked to protect that right against state violation.

C. Effects of the New Liberty

In the seventeen years since *Gitlow v. New York*¹⁹² the new liberty has thus grown to include all of the rights guaranteed by the First Amendment, the right to the assistance of counsel in criminal prosecutions, guaranteed by the Sixth (though this has recently been placed in a dubious position), and the general concept of "a fair trial" in such cases, from which concept specific rights are already evolving. To this extent the liberty of the individual has so far been enlarged, at the expense of the powers of the states. Madison's argument that "the State Governments are as liable to attack these invaluable privileges as the General Government is" has been demonstrated true. It is apparent now that individual liberty has indeed more to fear from the states than from the Federal Government, and more from the states' municipalities than from the states themselves; for except in time of war, abridgment of freedom of speech and of religious freedom comes, not from Washington but from nearer home—sometimes from state statutes, but more often from city or

191. See *United States v. Miller* (1939) 307 U. S. 174.

192. (1925) 268 U. S. 652.

county ordinances, regulations of a school board or of a state university, decrees or judgments of a court. Commencing with *Gitlow v. New York*,¹⁹³ the Court has had presented to it no less than thirty-two times the claim that state action had denied a right guaranteed by the First Amendment; whereas in the same seventeen-year period a similar claim appears to have been made only three times with respect to federal action.¹⁹⁴ It is evident that protection of the freedoms against state action has immediately vitalized them into safeguards of great practical importance, affording the protection where it is needed rather than where it is seldom required.

But the effect of the new liberty has not been confined to the situations in which it operates. The frequency with which the Court has had to consider the freedoms, in enforcing them against the states, has developed and expanded them so as to

193. *Ibid.*

194. In the text of this section there are mentioned seventeen cases where the claim was made with respect to state action. Of these *Schneider v. Irvington* (1939) 308 U. S. 147 embraced four independent cases, *Bridges v. California* (1941) 62 S. Ct. 190 embraced two independent cases, and *Jones v. Opelika* (1942) 62 S. Ct. 1231, three, making a total of twenty-three. The remaining nine are *Grosjean v. American Press Co.* (1936) 297 U. S. 233 (state license tax on newspapers held to abridge freedom of the press); *Thornhill v. Alabama* (1940) 310 U. S. 88 (statute prohibiting picketing held to abridge freedom of speech); *Carlson v. California* (1940) 310 U. S. 106 (county ordinance prohibiting picketing held to have abridged freedom of speech); *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.* (1941) 312 U. S. 287 (injunction against picketing held not to infringe freedom of speech); *American Federation of Labor v. Swing* (1941) 312 U. S. 321 (injunction against peaceful picketing held to abridge freedom of speech); *Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board* (1942) 62 S. Ct. 706 (order of board prohibiting picketing other than peaceful held not to abridge freedom of speech); *Bakery & Pastry Drivers v. Wohl* (1942) 62 S. Ct. 816 (injunction against peaceful picketing held to abridge freedom of speech); *Carpenters & Joiners Union v. Ritter's Cafe* (1942) 62 S. Ct. 807 (injunction against secondary picketing held not to infringe freedom of speech); and *Valentine v. Chestensen* (1942) 62 S. Ct. 920 (ordinance prohibiting distribution of advertising matter in streets held not to infringe freedom of speech or of the press).

The three cases in which the same claim was made with respect to federal action are *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks* (1930) 281 U. S. 548 (Railway Labor Act held not to infringe freedom of speech), *Associated Press v. National Labor Relations Board* (1937) 301 U. S. 103 (National Labor Relations Act held not to abridge freedom of the press), and *National Labor Relations Board v. Virginia Electric & Power Co.* (1941) 62 S. Ct. 344 (order of N. L. R. B. held to abridge freedom of speech unless supported by evidence of related coercion). For comment on the last case see Note (1942) 27 WASHINGTON U. LAW QUARTERLY 242.

In both computations memoranda cases have been excluded.

result in a new vitality for the rights, and this vitality will necessarily persist with equal force when subsequently the freedoms are enforced against the federal government. *Cantwell v. Connecticut*¹⁹⁵ has taken freedom of religion beyond the possibility of discretionary licensing, if that should be attempted by the federal government. *Powell v. Alabama*¹⁹⁶ (before it was vitiated by *Betts v. Brady*¹⁹⁷) gave the right to the assistance of counsel, in federal prosecutions, more vitality than it ever had had before.¹⁹⁸ Freedom of expression affords instances of such expansion in the clear and present danger rule (discussed at III *infra*), and in the extension of freedom of the press from its historical limit of immunity from previous restraint, to include also freedom from subsequent punishment, which followed from *Near v. Minnesota* in 1931.¹⁹⁹ Some of the measures which the federal government is now, in the exercise of the war power, taking against seditious publications and speakers,²⁰⁰ will in time reach the Court, and when they do will have to contend against a freedom of expression which has been substantially enlarged since the Espionage Act cases of the first World War.

It should be observed also that the new liberty is establishing a considerable degree of uniformity throughout the United States for the freedoms to which it extends. While the state constitutions have safeguards, not always identical, for freedom of speech and of the press, the cases discussed show abundantly that these provisions, even when they are couched in identical language, are capable of a wide variance in construction.²⁰¹ But,

195. (1940) 310 U. S. 296.

196. (1932) 287 U. S. 45.

197. (1942) 62 S. Ct. 1252.

198. See *Glasser v. United States* (1942) 62 S. Ct. 457; *Johnson v. Zerbst* (1938) 304 U. S. 458.

199. See *Bridges v. California* (1941) 62 S. Ct. 190; *Chaplinsky v. New Hampshire* (1942) 62 S. Ct. 766; *Chafee*, op. cit. supra, note 68, at 10-12, 378-379. As late as 1907, Mr. Justice Holmes, in *Patterson v. Colorado* (1907) 205 U. S. 454, had not hesitated to base the Court's decision upon the ground that the freedom extended only to the prevention of previous restraints, not to the prevention of punishment after publication. In *Schenck v. United States* (1919) 249 U. S. 47, he retreated from this position.

200. See Charles G. Ross, in *St. Louis Post-Dispatch*, May 10, 1942, p. 1: 1, for discussion of steps taken to bar five publications from the mails, and of several indictments under the Espionage Act. See also (1942) 10 *Int. Jurid. Assoc. Bull.* 113, 114.

201. Cf. Mr. Justice Butler, dissenting, in *Near v. Minnesota* (1931) 283 U. S. 697, 723: "Up to that time [1868] the right [of free speech and

since *Gitlow v. New York*,²⁰² liberty has begun to have the same meaning, without degree or difference, in every state in the union. The standard applied is now identical everywhere. And the enlargement of the freedoms which has resulted from their protection by the Fourteenth Amendment accentuates this uniformity. The field in which governmental action, whether federal or state, may constitutionally operate to restrict freedom of the press, for example, lies somewhere between zero and the line established in the cases following *Gitlow v. New York*.²⁰³ Each time the outer limit of this field is compressed, as by the clear and present danger rule, or by the bar against subsequent punishment, the field is accordingly narrowed; and not only the freedom, but also its uniformity throughout the states, becomes correspondingly greater. There is no perceptible advantage in having identical statutes held, in Georgia, Kansas and Texas, to be unconstitutional deprivations of free speech, and in Missouri not to be.²⁰⁴ The United States has now so shrunk, as a result of the development of transit and communications, that it is becoming increasingly difficult to view diversities of this kind with the equanimity, if not affection, with which they were once regarded.²⁰⁵ It would, indeed, be surprising if it should be considered that uniformity in these fundamental matters is not advantageous, when for a long time past uniformity in many fields of state statute law and state common law has been so arduously sought. Not simply because the same motion pictures are everywhere exhibited,²⁰⁶ because the same newspaper circulates in many states, because a single radio program is heard throughout the country, is less diversity in the exercise of these freedoms desirable; there is a greater national interest involved.

free press] was safeguarded solely by the constitutions and laws of the States and, it may be added, they operated adequately to protect it."

202. (1925) 268 U. S. 652.

203. *Ibid.*

204. See note 76, *supra*.

205. See *Missouri v. Lewis* (1880) 101 U. S. 22, 31.

206. State censorship of motion pictures, upheld in *Mutual Film Corp. v. Industrial Commission of Ohio* (1915) 236 U. S. 230, and *Mutual Film Corp. v. Hodges* (1915) 236 U. S. 248, would seem to be now open to attack. Cf. Chafee, *op. cit. supra*, note 68, at 540-548.

III. CLEAR AND PRESENT DANGER

A. *Origin*

The clear and present danger rule was born in a *dictum*, grew and was nourished in a series of dissents, and arrived at last as a holding in the full flower of its maturity. Except for the accident of birth, it is a product of the new liberty, for these cases were the soil in which it grew. The rule had its genesis in the first of the Espionage Act cases to reach the Court, *Schenck v. United States*.²⁰⁷ There Mr. Justice Holmes, speaking for the Court, said (as *dictum*, for the conviction was affirmed):

The question in every case is 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 the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.²⁰⁸

In the 130 years since the First Amendment was written, the Court had never before determined the test by which the limits of free speech might be fixed.²⁰⁹ The Court therefore was unbound by precedent when the first Espionage Act prosecution reached it, and it chanced that the opinion then was written by Mr. Justice Holmes. To this the *dictum* may be attributed, for upon consideration, when it made a difference in the result, a majority of the Court were unwilling to accept the test. An earlier opinion by Mr. Justice Holmes, in *Fox v. Washington*,²¹⁰ had perhaps foreshadowed the rule; but there is persuasive evidence that he derived it from a test for the degree of prox-

207. (1919) 249 U. S. 47.

208. *Id.* at 52.

209. In *Patterson v. Colorado* (1907) 205 U. S. 454, it had avoided the necessity of consideration by holding that freedom of the press did not include immunity from subsequent punishment. In *Toledo Newspaper Co. v. United States* (1918) 247 U. S. 402, 419, it had similarly avoided consideration by holding that the freedom did not include immunity from punishment for publications which obstructed the court.

When the first Espionage Act prosecutions arose, the fact that the Court had never construed the Amendment left a free field to the District Courts and Circuit Courts of Appeal, and as a result various tests were in 1917 and 1918 used by them, including that of direct advocacy of resistance to law, superseded later by one of "indirect tendency." See Note, *The Present Status of Freedom of Speech under the Federal Constitution* (1928) 41 Harv. L. Rev. 525, 526. See also Chafee, *op. cit. supra*, note 68, at 42-67.

210. (1915) 236 U. S. 273, 277.

imity to the completed crime, required for a common-law attempt, which he had developed over a long period of time.²¹¹

Thomas Jefferson, in the preamble to the Virginia Statute for Establishing Religious Freedom, wrote, in 1785, that:

* * * to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; * * * it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.²¹²

Notwithstanding this often quoted statement, which was the reaction to the sedition prosecutions of the eighteenth century,²¹³ and notwithstanding also the illuminating experience of the Alien and Sedition Laws of 1798,²¹⁴ the test with which the clear and present danger rule had to struggle for survival, and which it has now supplanted, was one of "dangerous tendency," differing little, if at all, from the "ill tendency" which Jefferson had condemned. The struggle did not commence at once, for in *Frohwerk v. United States*²¹⁵ and *Debs v. United States*,²¹⁶ both decided a week after *Schenck v. United States*,²¹⁷ the Court, still speaking

211. See Hall, *The Substantive Law of Crimes, 1887-1936* (1937) 50 Harv. L. Rev. 616, 621, note: "The development of this doctrine in Mr. Justice Holmes' mind may be traced through nearly forty years. It is suggested in Holmes, *The Common Law* (1881) 68-69, and was applied while he was on the Supreme Judicial Court of Massachusetts in *Commonwealth v. Kennedy* (1897) 170 Mass. 18, 48 N. E. 770, and *Commonwealth v. Peaslee* (1901) 177 Mass. 267, 59 N. E. 55. It is reiterated in *Swift & Co. v. United States* (1905) 196 U. S. 375, where a 'dangerous probability' that the result will happen is required for an attempt conviction."

212. Act of Dec. 26, 1785, 12 Hening's Statutes at Large of Virginia (1823), c. 34, p. 85. An account of the history of this Act, which was closely related to the subsequent guarantee of religious freedom in the First Amendment, is contained in *United States v. Reynolds* (1878) 98 U. S. 145. In this case, the Court, dealing for the first time with the scope of religious freedom, held that an act of Congress prohibiting polygamy in the territories did not infringe the free exercise of religion by Mormons in the Territory of Utah.

213. See Chafee, *op. cit. supra*, note 68, at 28-29.

214. Cf. Mr. Justice Holmes, dissenting, in *Abrams v. United States* (1919) 250 U. S. 616, 630. See Chafee, *op. cit. supra*, note 68, at 27-28.

215. (1919) 249 U. S. 204.

216. (1919) 249 U. S. 211.

217. (1919) 249 U. S. 47.

through Mr. Justice Holmes, unanimously affirmed two more convictions under the Espionage Act, remarking in the *Frohwerk* case that "neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder * * * would be an unconstitutional interference with free speech."²¹⁸ Neither opinion made any reference to the clear and present danger rule. Although there are some inconsistent expressions in *Debs v. United States*,²¹⁹ it is hardly to be supposed that Mr. Justice Holmes would have, in this casual fashion, modified the rule a week after he had first enunciated it.

B. Struggle for Survival

The Espionage Cases. But with the affirmance of these convictions, the Court's unanimity disappeared. Eight months later, in *Abrams v. United States*.²²⁰ the Court, through Mr. Justice Clarke, affirmed another conviction, without discussion of the test to be applied.²²¹ Mr. Justice Holmes dissented (Mr. Justice Brandeis concurring), saying that only "speech that produces or is intended to produce a clear and imminent danger"²²² of "substantive evils," may constitutionally be punished; that "it is only the present danger of immediate evil or an intent to bring it about"²²³ that warrants the suppression of free speech; that persecution for the expression of opinions seemed to him perfectly logical, "if you have no doubt of your premises or your power and want a certain result with all your heart;" but that, when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate

218. (1919) 249 U. S. 204, 206.

219. (1919) 249 U. S. 211. At 216 the Court approved, by implication, a charge to the jury which had required a "natural tendency and reasonably probable effect" to obstruct recruiting. Mr. Justice Holmes also (at 215) spoke of "the natural and intended effect" of the speech, "its probable effect." The use of "intended" may have resulted from the Espionage Act's requirement of intent. See note 225 infra.

220. (1919) 250 U. S. 616. For comment, see Chafee, op. cit. supra, note 68, 108-140.

221. (1919) 250 U. S. 616, 623-624, the Court said that "the plain purpose" of the propaganda was to excite "disaffection, sedition, riots, and as they hoped, revolution, * * * for the purpose of embarrassing and, if possible, defeating the military plans of the government," and that the language was "obviously intended to provoke and to encourage resistance to the United States in the war."

222. *Abrams v. United States* (1919) 250 U. S. 616, 627.

223. *Id.* at 628.

good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think 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 lawful and pressing purposes of the law that an immediate check is required to save the country. * * * Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech."²²⁴

It will be observed that Mr. Justice Holmes had, in the first two statements quoted, added to the rule the alternative of "intent"²²⁵—an alternative which would vitiate it—but that in his final passage he omitted this. The final paragraph (which is as eloquent and persuasive a defense of the rule as has yet been made) also contains, in the words "pressing" and "emergency," some indication that the phrase "substantive evils" was on the way to becoming "substantial evils."

This case was followed by *Schaefer v. United States*²²⁶ where the Court, through Mr. Justice McKenna, again affirmed convictions under the Espionage Act, saying briefly that "the tendency of the articles and their efficacy were enough for offense."²²⁷ Justices Brandeis and Holmes dissented as to the convictions of some of the defendants, on the ground that the clear and present danger rule had not been met.²²⁸ The rule, Mr. Justice Brandeis said, is "a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-

224. Id. at 630-631.

225. The inclusion of intent as an alternative may perhaps have resulted from the fact that these passages immediately followed his discussion of the "intent" which the Espionage Act made a necessary element of the crime. Cf. the use of "intended" in *Debs v. United States* (1919) 249 U. S. 211.

226. (1920) 251 U. S. 466.

227. Id. at 479.

228. Id. at 482-483. Mr. Justice Clarke dissented on other grounds.

meaning majorities, and from abuse by irresponsible, fanatical minorities."²²⁹

A week later, in *Pierce v. United States*,²³⁰ the Court, through Mr. Justice Pitney, again affirmed convictions under the Act, without discussion of the constitutional question. But in the Court's opinion the word "tendency," which had made its first appearance in *Schaefer v. United States*, again was used.²³¹ Mr. Justice Brandeis again dissented (with Mr. Justice Holmes' concurrence) remarking that one question to be determined was whether the words met the clear and present danger test.²³²

This was the last of the Espionage Act cases,²³³ but the Court almost immediately had the question before it again. In *Gilbert v. Minnesota*,²³⁴ the Court, affirming a conviction under state statute, cited all the Espionage Act decisions, but referred neither to the clear and present danger rule nor to any other test. Mr. Justice Brandeis, dissenting,²³⁵ again referred to the "clear and present danger" which might justify the suppression of divergent opinion "because the emergency does not permit reliance upon the slower conquest of error by truth."²³⁶

Limited Application of the Rule—Gitlow v. New York. Up to this point the majority had studiously avoided any reference to the rule in which (as *dictum*) they had incautiously acquiesced in the *Schenck* case.²³⁷ Perhaps bearing in mind Jefferson's words and the other considerations which have been mentioned, they had used almost as great care to avoid reliance upon ill or

229. Id. at 482.

230. (1920) 252 U. S. 239.

231. (1920) 251 U. S. 466, 250: "at least the jury fairly might believe that, under the circumstances existing, it would have a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces."

232. Id. at 255. In this case, as in the preceding one, Mr. Justice Brandeis stated the rule in the terms of *Schenck v. United States* (1919) 249, U. S. 47, omitting the alternative of "intent."

233. There was one later case, *Milwaukee Publishing Company v. Burleson* (1921) 255 U. S. 407; but this dealt with the use of the mails, and neither the majority opinion nor the separate dissenting opinions of Justices Brandeis and Holmes touched on clear and present danger.

234. (1920) 254 U. S. 325. The case is discussed under I, *supra*.

235. Mr. Justice Holmes concurred in the result, without opinion. Chief Justice White dissented separately.

236. *Gilbert v. Minnesota* (1920) 254 U. S. 325, 338.

237. Mr. Justice Brandeis, in *Schaefer v. United States* (1920) 251 U. S. 466, had referred to the rule in the *Schenck* case as the declaration of "a unanimous court."

dangerous tendency.²³⁸ But now, in *Gitlow v. New York*,²³⁹ the struggle between the two rules could no longer be suppressed. Mr. Justice Sanford, for the majority, faced it squarely, using the words "tendency" and "tend" without hesitation, and saying that the "general statement in the Schenck Case" of the clear and present danger rule "was manifestly intended, as shown by the context," to apply only to words used to bring about a result prohibited by law, not to words which were themselves expressly prohibited by statute.²⁴⁰ Mr. Justice Holmes (with whom Mr. Justice Brandeis concurred), dissenting, said that the "criterion sanctioned by the full court" in the *Schenck* case should be applied, and that here there was "no present danger of an attempt to overthrow the government by force * * *"²⁴¹

The limited application permitted to the rule by the majority in *Gitlow v. New York*²⁴² was, as the opinion indicates, not intended to mean that the legislature could punish the use of any words whatever; it was really not much more than a statement of the doctrine, familiar in other fields of constitutional law, that the determination of the legislature must be given "great weight," and was valid unless it was "arbitrary or unreasonable."²⁴³ The Court made this clear in the next cases to come before it,

238. Although in both the Schaefer and Pierce opinions the word "tendency" had crept in.

239. (1925) 268 U. S. 652. See I, supra. For contemporary comment, see note 87, supra.

240. *Gitlow v. New York* (1925) 268 U. S. 652, 671. The Court said that the clear and present danger rule "has no application to * * * [cases] where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

241. *Id.* at 672-673. See Chafee, op. cit. supra, note 68, at 322-324; Note (1928) 41 Harv. L. Rev. 525, 527.

242. (1925) 268 U. S. 652.

243. This simply postponed the test, since one was still required to determine what was "arbitrary or unreasonable." As to this, the Court did not speak with certainty, although the opinion definitely excludes clear and present danger from the possibilities. *Id.* at 669, the Court said: "It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency." From this and other expressions, it would seem that the Court considered that the legislature was not acting arbitrarily or unreasonably if it forbade utterances because of their dangerous tendency.

*Whitney v. California*²⁴⁴ and *Fiske v. Kansas*.²⁴⁵ In *Whitney v. California*²⁴⁶ the majority said plainly (but as *dictum*) that while the determination of the legislatures must be given great weight, and every presumption indulged in favor of the statute's validity, the statute might still be invalid if, as applied, it was unreasonable or arbitrary, "unwarrantably infringing any right of free speech * * *." In *Fiske v. Kansas*,²⁴⁷ decided on the same day, the Court reversed the conviction and held that a Kansas statute, as there applied, was arbitrary and unreasonable. Mr. Justice Brandeis, in *Whitney v. California*,²⁴⁸ replied with vigor to the majority opinion in *Gitlow v. New York*,²⁴⁹ reiterating (in a concurring opinion in which Mr. Justice Holmes joined) "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State may constitutionally seek to prevent, has been settled."²⁵⁰ He added that the legislature must decide whether a danger exists which calls for a particular protective measure, but that "the enactment of the statute cannot alone establish the facts which are essential to its validity;" and that the Court had

not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection.²⁵¹

As to these questions, Mr. Justice Brandeis observed that fear of serious injury could not alone justify suppression of free speech: there must be reasonable ground for such fear, reasonable ground for believing that the danger apprehended was imminent and that the evil was a serious one. He thought that only an emergency could justify repression, since if there was "time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be

244. (1927) 274 U. S. 357. See note 92, *supra*.

245. (1927) 274 U. S. 380. See note 92, *supra*; Note (1928) 41 Harv. L. Rev. 525, 527-528.

246. (1927) 274 U. S. 357.

247. (1927) 274 U. S. 380.

248. (1927) 274 U. S. 357.

249. (1925) 268 U. S. 652.

250. (1927) 274 U. S. 357, 373, citing the Schenck case.

251. *Id.* at 374.

applied is more speech, not enforced silence."²⁵² And even imminent danger could not justify repression, he considered, unless the evil apprehended was "relatively serious," for prohibition of free speech was a measure too stringent to be appropriate as the means for averting "a relatively trivial harm to society," and a police measure might be unconstitutional "merely because the remedy, although effective as means of protection, is unduly harsh or oppressive."²⁵³ In a passage to which some recent decisions have given relevance, Mr. Justice Brandeis said that even "the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression."²⁵⁴ In every case where the right of free speech was claimed to have been invaded, it must remain open to a defendant, he declared, to question whether there actually was at the time a clear danger, whether the danger was imminent, and whether the evil apprehended was "one so substantial as to justify the stringent restriction interposed by the legislature," whose declaration "creates merely a rebuttable presumption that these conditions have been satisfied."²⁵⁵

This was the last contribution to the rule to be made by either Mr. Justice Brandeis or Mr. Justice Holmes. At the time the future of the rule seemed dark,²⁵⁶ but now, when it has been adopted by the full Court and is being frequently applied, the importance of Mr. Justice Brandeis' brilliant elaboration here is evident. Mr. Justice Holmes had originated the rule and in *Abrams v. United States*²⁵⁷ had made a statement of the reasons for it, so moving that it cannot be forgotten. Mr. Justice Brandeis, apparently realizing at once the full possibilities of the new doctrine, had, by his persistent advocacy of it, aided in keeping it alive, and had now, by detailed development, eliminated most of its weaknesses and rendered it a formidable instrument for the protection of free speech. While in this last statement of the rule Mr. Justice Brandeis had included the alternative of intent (apparently with deliberation,²⁵⁸ but certainly without explana-

252. *Id.* at 377.

253. *Id.* at 377.

254. *Id.* at 378.

255. *Id.* at 379.

256. See Powell, *op. cit. supra*, note 92, at 54. Cf. (1928) 41 Harv. L. Rev. 525, 528.

257. (1919) 250 U. S. 616.

258. See notes 219, 225, and 232, *supra*.

tion), he had also elaborated each of the components of the rule to a degree which Mr. Justice Holmes could hardly have contemplated, eight years earlier; and "substantive evils" had now become "substantial evils," and indeed more than that, for there must be more than violence or destruction of property.²⁵⁹ The rule originally had been simply a rule of criminal law (all of these cases were criminal prosecutions), but this development transformed it immediately into a constitutional principle of the highest importance, in which was foreshadowed the balance of social interests which quite recently has become explicit in the rule.²⁶⁰

For ten years after *Whitney v. California*²⁶¹ the Court made no reference to clear and present danger, perhaps because of the tendency (which has already been observed) to let this rule slumber when it is not required. During this period four cases involving freedom of speech or of the press were decided, *Stromberg v. California*,²⁶² *Near v. Minnesota*,²⁶³ *Grosjean v. American Press Company*²⁶⁴ and *DeJonge v. Oregon*,²⁶⁵ but in each of these cases the Court protected the freedom against abridgment by state statutes, without consideration of the test to be applied²⁶⁶

But in 1937, a few months after *DeJonge v. Oregon*,²⁶⁷ the Court decided *Herndon v. Lowry*.²⁶⁸ Here the appellant, a Negro Communist, was sentenced to imprisonment for eighteen to

259. Although these are certainly substantive evils which the state, in the language of the rule as stated in the Schenck case, "has a right to prevent."

260. See *Thornhill v. Alabama* (1940) 310 U. S. 88, 105.

261. (1927) 274 U. S. 357.

262. (1931) 283 U. S. 359.

263. (1931) 283 U. S. 697.

264. (1936) 297 U. S. 233.

265. (1937) 299 U. S. 353. For comment on this case, advocating the clear and present danger rule, but regarding it as rejected, see (1937) 50 *Harv. L. Rev.* 689.

266. However, in *Near v. Minnesota* (1931) 283 U. S. 697, dealing with a Minnesota statute providing for the suppression, as a public nuisance, of a periodical which published scandalous matter, the Court, in reversing a judgment which enjoined continued publication, refused to accept the dangerous tendency doctrine. See at 721-722: "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime." The Court then cited Madison's views in opposition to the prohibition of discussions having a "tendency and effect" to "excite unfavorable sentiments against those who administer the government."

267. 299 U. S. 353.

268. 301 U. S. 242. For Comment see (1937) 50 *Harv. L. Rev.* 1313. The case is discussed under II, *supra*.

twenty years, for violation of a Georgia statute prohibiting attempts to induce insurrection, including the circulation of pamphlets for that purpose. He appears to have had an eminently fair trial, and he was well represented by counsel; but the Supreme Court of Georgia, following *Gitlow v. New York*²⁶⁹ faithfully, had applied the dangerous tendency rule to affirm his conviction. Nothing short of clear and present danger could have saved him, and indeed so firm a friend of freedom of speech as Mr. Zechariah Chafee appears to consider that even that was hardly enough, upon the facts.²⁷⁰ Mr. Justice Roberts, for the five-to-four majority,²⁷¹ reversed the conviction, saying briefly, without reference to any authority, that under the statute, as construed, the judge and jury could not appraise "the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function."²⁷² He followed this by discussion and rejection of the dangerous tendency rule; and added that "the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government," that "The judgment of the legislature is not unfettered," and that the "limitation upon individual liberty must have appropriate relation to the safety of the state."²⁷³ Mr. Justice Brandeis, perhaps content to go one step at a time, concurred in this opinion, without hazarding a separate one.

It will be noted that nothing was said regarding the alternative of intent, which here might have made the result more difficult to attain.²⁷⁴ It should be observed also that the Court here was dealing not only with the right of free speech, but also with the right "peaceably to assemble," and that the application of clear and present danger extended to both.

269. (1925) 268 U. S. 652.

270. Chafee, *op. cit. supra*, note 68, at 397-398.

271. The others were Chief Justice Hughes and Justices Brandeis, Stone and Cardozo. Of the five, only Justices Brandeis and Stone had been members of the Court when *Whitney v. California* (1927) 274 U. S. 357, was decided.

272. *Herndon v. Lowry* (1937) 301 U. S. 242, 261.

273. *Id.* at 258. The reversal was also based upon the view that the statute as construed and applied was too vague and indefinite to provide a reasonably ascertainable standard of guilt.

274. *Cf.* Mr. Justice Van Devanter's dissenting opinion, *id.* at 264, and especially at 277.

C. Complete Acceptance—Thornhill v. Alabama

The rule²⁷⁵ was not used by the Court in protecting freedom of speech or press in three cases²⁷⁶ in 1938 and 1939. In 1940, however, *Thornhill v. Alabama*²⁷⁷—a decision of great importance—made it clear that the rule had the support of virtually the full Court, as then constituted.²⁷⁸ Mr. Justice Murphy, reversing a conviction under a statute prohibiting picketing, said that “the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution,”²⁷⁹ and that abridgment of the freedom of such discussion could be justified “only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.”²⁸⁰ The danger of injury to an industrial concern was, he held, “neither so serious nor so imminent as to justify” suppression of freedom of discussion.²⁸¹ And the Court now added to the rule, in terms, the balance of social interests which Mr. Justice Brandeis in the *Whitney* case had approached.²⁸²

275. While *Herndon v. Lowry* (1937) 301 U. S. 242, was a holding for clear and present danger, the character of the opinion, the fact that only a bare majority had acquiesced in it, and the great change in the composition of the Court which now ensued, still left the position of the rule in some doubt.

276. *Lovell v. Griffin* (1938) 303 U. S. 444; *Hague v. C. I. O.* (1939) 307 U. S. 497 (see note 34, supra); and *Schneider v. Irvington* (1939) 308 U. S. 147. These cases are discussed above under II.

277. (1940) 310 U. S. 88. For comment, see Note (1941) 41 Col. L. Rev. 99.

278. Mr. Justice McReynolds, who, alone of the four dissenting justices in *Herndon v. Lowry* (1937) 301 U. S. 242, was still a member of the Court, dissented without opinion.

279. *Thornhill v. Alabama* (1940) 310 U. S. 88, 102.

280. *Id.* at 104-105. As authority he cited, not *Herndon v. Lowry* (1937) 301 U. S. 242, but Mr. Justice Holmes' opinions in the *Schenck* and *Abrams* cases, this language being taken from the latter.

281. It had been urged that the purpose of the statute was to protect the community from violence and breaches of the peace, “the concomitants of picketing,” but as to this the Court said that “no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent,” in the activities of every picket, and that it was “not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation * * *” *Thornhill v. Alabama* (1940) 310 U. S. 88, 105.

282. *Thornhill v. Alabama* (1940) 310 U. S. 88, 105. The Court said that the statute here did not “evidence any such care in balancing these interests against the interests of the community and that of the individual in freedom of discussion on matters of public concern.”

To regard this element of balance as a development of the rule, instead

On the same day the Court followed the *Thornhill* case in *Carlson v. California*.²⁸³ Through Mr. Justice Murphy it invalidated a county ordinance prohibiting picketing (including the carrying of signs and banners), again applying the clear and present danger rule.

Four weeks later, in *Cantwell v. Connecticut*²⁸⁴ Mr. Justice Roberts, for a Court which was now unanimous, applied the clear and present danger rule to reverse a conviction of the common law offense of inciting a breach of the peace,²⁸⁵ based upon playing a phonograph record upon the street. The Court said that although the contents of the record "not unnaturally aroused animosity," in the absence of a statute "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State,"²⁸⁶ there was "no such clear and present menace to public peace and order" as to justify abridgment of the freedom.²⁸⁷ For authority, the Court said: "Compare *Schenck v. United States*, *Herndon v. Lowry*, *Thornhill v. Alabama*."²⁸⁸

The Peaceful Picketing Cases. Less than a year after *Thornhill v. Alabama*,²⁸⁹ the Court entered upon a series of five cases involving peaceful picketing. *Milk Wagon Drivers Union v. Meadowmoor Dairies*²⁹⁰ divided the Court sharply. Mr. Justice Frankfurter, for the six justices composing the majority, affirmed the reversal, by the Supreme Court of Illinois, of a decree permitting peaceful picketing. While reaffirming the *Thornhill* case,²⁹¹ he said that a state could nevertheless enjoin "acts of

of as a limitation upon it, of course presupposes that in the balancing great weight will be given to freedom of speech.

283. (1940) 310 U. S. 106.

284. (1940) 310 U. S. 296. The case is considered under II, supra.

285. A conviction on another count was reversed on the ground that it invaded the free exercise of religion, but in connection with this there was no reference to clear and present danger.

286. *Cantwell v. Connecticut* (1940) 310 U. S. 246, 311. The Court said (at 308) that such a statutory declaration "would weigh heavily in any challenge of the law as infringing constitutional limitations."

287. *Cantwell v. Connecticut* (1940) 310 U. S. 296, 311, the Court said also that a state could not unduly suppress "free communication of views, religious or other * * *."

288. *Cantwell v. Connecticut* (1940) 310 U. S. 296 established—if there was any question regarding it—that the Fourteenth Amendment prohibited abridgment of freedom of speech by a state court, as well as by state legislation.

289. (1940) 310 U. S. 88.

290. (1941) 312 U. S. 287. For Comment, see (1941) 41 Col. L. Rev. 727; (1941) 54 Harv. L. Rev. 1064.

291. This, he said, was "precisely the kind of situation which the Thorn-

picketing in themselves peaceful," when, as here, they were "enmeshed with contemporaneously violent conduct;" that the guaranty of free speech was based upon "faith in the power of an appeal to reason" by all peaceful means and was given a "generous scope" in order to avert "force and explosions," but that "utterance in a context of violence" could "lose its significance as an appeal to reason and become part of an instrument of force;" and that such utterance "was not meant to be sheltered by the Constitution."²⁹² Mr. Justice Black, dissenting for himself and Mr. Justice Douglas, remarked that the injunction banned the discussion of "matters of public concern," within the "area" declared by the *Thornhill* case to be protected by the First Amendment; and considered that application of the clear and present danger rule (which Mr. Justice Frankfurter had not mentioned) invalidated it.²⁹³ Mr. Justice Reed, dissenting separately, said that the Court had now determined that "where there is a background of violence, and inferentially * * * where there is a reasonable fear of violence," freedom of speech might be withdrawn; that the remedy for the "fear engendered by past misconduct" lay "in the maintenance of order, not in denial of free speech;" and that "free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury."²⁹⁴

hill opinion excluded from its scope." *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U. S. 287, 297.

292. He added that the injunction was justified "only so long as it counteracts a continuing intimidation," and that it might be modified or vacated when this ceased.

It has been suggested that the decision is in conflict with *Near v. Minnesota* (1931) 283 U. S. 697, which held that prior misconduct did not justify restraint. But there seem to be distinctions, both in the seriousness of the evils and in the likelihood of their continuance.

293. *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U. S. 287. At 313 he said that the record failed to show "such imminent, clear and present danger" as to justify abridgment. At 316-317: "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the Illinois courts to prevent or punish is obvious." As authority, there were cited not only Mr. Justice Holmes' opinions in the *Schenck* and *Abrams* cases, and the recent holdings, but also, for the first time, the dissenting opinions in the *Schaefer*, *Pierce*, and *Gitlow* cases, and Mr. Justice Brandeis' opinion in the *Whitney* case.

294. *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U. S. 287, 320. As authority, he cited *Thornhill v. Alabama* (1940) 310 U. S. 88.

On the same day as the *Meadowmoor* case, in *American Federation of Labor v. Swing*,²⁹⁵ the Court, again through Mr. Justice Frankfurter, held that freedom of speech was infringed by the injunction of a state court against peaceful picketing "conducted by strangers to the employer." It considered that the "right of free communication" could not be "mutilated" by denying it to a union which had unsuccessfully attempted to unionize a business, even though there was no controversy between the employer and his own employees.²⁹⁶ Clear and present danger was not mentioned. This case was followed by *Hotel and Restaurant Employees' Alliance v. Wisconsin Employment Relations Board*,²⁹⁷ where the Court simply held that an order of the Board, and the statute under which this was made, as construed by the state court, permitted peaceful picketing, and therefore left freedom of speech unimpaired. A little later, in *Bakery and Pastry Drivers v. Wohl*,²⁹⁸ the Court, through Mr. Justice Jackson, held that peaceful picketing of peddlers,²⁹⁹ having no employees, by a union seeking to compel them to employ relief drivers,³⁰⁰ might not be enjoined, saying that it could "perceive no substantive evil of such magnitude as to mark a limit to the right of free speech."³⁰¹ Mr. Justice Douglas (speaking for Justices Black and Murphy also) concurred separately, laying emphasis on the clear and present danger rule (as stated in *Thornhill v. Alabama*³⁰²).

The last of these cases, *Carpenters & Joiners Union v. Ritter's Cafe*,³⁰³ was decided the same day as the *Wohl* case. Here the Court, once more through Mr. Justice Frankfurter, affirmed a

295. (1941) 312 U. S. 321. For Comment, see (1941) 54 Harv. L. Rev. 1066.

296. Justices Black and Douglas concurred in the result. Mr. Justice Roberts dissented, without opinion.

297. (1942) 62 S. Ct. 706.

298. (1942) 62 S. Ct. 816.

299. Carried out by picketing both the bakeries from whom they bought their products, and the customers to whom they sold.

300. The peddlers averaged approximately thirty-two dollars per week, out of which they had to absorb credit losses and maintain delivery trucks. The union demanded that they hire relief drivers, at nine dollars per day, for one day a week.

301. It added that, while a state was not required to "tolerate in all places and under all circumstances even peaceful picketing by an individual," here it was "practically impossible" for the union to make known its grievances by other means, and that the picketing could have "slight, if any, repercussions upon the interests of strangers to the issue."

302. (1900) 310 U. S. 88.

303. (1942) 62 S. Ct. 807.

Texas decree enjoining peaceful picketing. Carpenters' and painters' unions had picketed Ritter's restaurant, although there was no controversy between Ritter and his employees or their union, solely because Ritter had contracted for the erection of a building (wholly unconnected with the restaurant and a mile and a half way from it) and his contractor had then employed non-union carpenters and painters. The decree permitted picketing at the building under construction. The Court held that while peaceful picketing might "be a phase of the constitutional right of free utterance," that did not imply that it could not be confined to "the area of the industry" within which the dispute arose. The state, Mr. Justice Frankfurter said, could constitutionally prohibit "conscription of neutrals," in these circumstances.³⁰⁴ Mr. Justice Black (in whose dissenting opinion Justices Douglas and Murphy concurred) urged that the *Thornhill* case had established that "injury to a particular person's business * * * was insufficient to justify curtailment of free expression."³⁰⁵ Mr. Justice Reed, dissenting separately, pointed out that the result was inconsistent with the *Wohl* case, and said that "until today orderly, regulated picketing has been within the protection of the Fourteenth Amendment," that "in balancing social advantages it has been felt that the preservation of free speech in labor disputes was more important than the freedom of enterprise from the burdens of the picket line."³⁰⁶

The Bridges Case. Shortly before the last three cases were decided, the Court, in *Bridges v. California*,³⁰⁷ a five-to-four decision, gave clear and present danger detailed consideration. Mr. Justice Black, for the majority, applied the test to convictions of contempt of court, based upon newspaper editorials and a telegram which referred to causes then pending. For the first time, Mr. Justice Brandeis' opinion in *Whitney v. California*³⁰⁸ was quoted³⁰⁹ and applied. Mr. Justice Black said that "what finally

304. Again Mr. Justice Frankfurter made no mention of clear and present danger, but his opinion is not inconsistent with it.

305. *Carpenters and Joiners Union v. Ritter's Cafe* (1942) 62 S. Ct. 807, 810.

306. *Id.* at 815. He added that while the Court had limited its holding "to the peculiar circumstances" of the case, "all decisions necessarily are so limited, but from the decisions rules are drawn."

307. (1941) 62 S. Ct. 190. For comment, see Radin, *Freedom of Speech and Contempt of Court* (1942) 36 Ill. L. Rev. 599.

308. (1927) 274 U. S. 357.

309. The statement that the likelihood of some violence or of destruction of property was not enough to justify suppression, was omitted. It could

emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."³¹⁰ "Those cases," he added, "do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights," for the First Amendment unequivocally "prohibits any law abridging freedom of speech or of the press," and "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."³¹¹ "History," he said, "affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case."³¹² The utterances here were then appraised to determine to what extent the substantive evils of "disrespect for the judiciary" and "disorderly and unfair administration of justice" were likely consequences, and "whether the degree of likelihood was sufficient to justify summary punishment." Upon this appraisal, the Court found no clear and present danger of the evils, sufficient to outweigh the advantage of liberty of expression.³¹³

in any event have had no application to the facts of this case. The alternative of intent, which might have been relevant, was also omitted.

310. (1941) 62 S. Ct. 190, 194.

311. *Ibid.*

312. *Id.* at 196.

313. As to one editorial, Mr. Justice Black said that "the basis for punishing the publication as contempt was by the trial court said to be its 'inherent tendency' and by the Supreme Court its 'reasonable tendency' to interfere with the orderly administration of justice" in a pending case; that "in accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression"; but that "even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here." *Id.* at 198.

The California court, deciding these cases after *Herndon v. Lowry* (1937) 301 U. S. 242, had had clear and present danger urged on it, but had deliberately rejected the test in favor of "reasonable tendency." *Bridges v. Superior Court* (1939) 14 Cal. (2d) 464, 94 P. (2d) 983; *Times-Mirror Co. v. Superior Court* (1940) 15 Cal. (2d) 99, 98 P. (2d) 1029.

Mr. Justice Black observed that the "practical result of the decisions below" was to discourage public expression perhaps more effectively than a "deliberate statutory scheme of censorship" would have done, for under a legislative specification of the prohibitions one "might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case." *Bridges v. California* (1941) 62 S. Ct. 190, 196-197.

Mr. Justice Frankfurter (with whom concurred Chief Justice Stone and Justices Roberts and Byrnes)³¹⁴ dissented in this case, saying that the utterances here were not, historically, exercises of the freedom guaranteed by the First Amendment, that "the Bill of Rights is not self-destructive," and that "freedom of expression can hardly carry implications that nullify the guarantees of impartial trials."³¹⁵ Exercise of the contempt power was justified, he considered, if a publication constituted a threat to "the impartial disposition" of a pending cause, "calculated to create an atmospheric pressure incompatible with rational, impartial adjudication"; but "to interfere with justice it need not succeed."³¹⁶ As to the test to determine this, Mr. Justice Frankfurter said: "It was urged before us that the words 'reasonable tendency' had a fatal pervasiveness, and that their replacement by 'clear and present danger' was required to state a constitutionally permissible rule of law. * * * The Constitution does not require replacement of an historic test by a phrase which first gained currency on March 3, 1919."³¹⁷ He added that "clear and present danger" was "merely a justification for curbing utterance that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment. The literal difference between it and 'reasonable tendency' is not of constitutional dimension."³¹⁸ Here, he continued, "the substantive evil to be eliminated is interference with impartial adjudication. To determine what interferences may be made the basis for contempt tenders precisely the same kind of issues as that to which the 'clear and present danger' test gives rise * * *. The question always is—was there a real and sub-

314. Of these four, only Mr. Justice Roberts (in *Herndon v. Lowry* (1937) 301 U. S. 242, and *Cantwell v. Connecticut* (1940) 310 U. S. 296) has written opinions approving clear and present danger. All five of the majority have made use of the rule, although the use of it by Mr. Justice Reed (in the *Meadowmoor* case) and by Mr. Justice Jackson (in the *Wohl* case) was not in complete terms.

315. *Bridges v. California* (1942) 62 S. Ct. 190, 204.

316. *Id.* at 208. He added: "As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed."

317. *Id.* at 209. The date of *Schenck v. United States*.

318. *Id.* at 210. Mr. Radin considers that the minority opinion supports the "reasonable tendency" rule. See Radin, *op. cit. supra*, note 307, at 603. But it does not appear that Mr. Justice Frankfurter went so far; he said that "reasonable tendency" might constitutionally be used by a state, but there is no expression of preference as between it and clear and present danger. Cf. (1942) 10 *Int. Jurid. Assoc. Bull.* 115, 118.

stantial threat * * * close and direct," to the impartial decision of a particular case immediately pending. The minority concluded that here there were such threats.³¹⁹

Progress of the Rule. The progress of the rule, from the bare statement in *Thornhill v. Alabama*,³²⁰ to the inclusion in *Bridges v. California*³²¹ of most of Mr. Justice Brandeis' final elaboration, has been gradual but rapid. It was made possible by the frequency with which during this twenty-month period the Court had to consider freedom of expression, but the progress itself has been largely due to Mr. Justice Black's increasing apprecia-

319. *Bridges v. California* (1942) 62 S. Ct. 190, 210. It was unnecessary to balance the evil against abridgment of the freedom, under Mr. Justice Frankfurter's view that utterances such as these were not an exercise of free speech or freedom of the press, historically. (Cf. Radin, *op. cit. supra*, note 307, 613, suggesting that it would be difficult to establish that the framers of the First Amendment meant to exclude such utterances).

Another point made by Mr. Justice Frankfurter: That one of the petitioners was an alien and one a corporation (Cf. *Pierce v. Society of Sisters* (1925) 268 U. S. 510, 535).

The effect of *Bridges v. California supra*, in state courts was immediate. In *Graham v. Jones* (La., 1942), 7 So. (2d) 688, the Supreme Court of Louisiana, reversing rules for contempt which had been instituted against New Orleans newspapers, said that the editorials which constituted the contempt indisputably "tended materially to affect the orderly administration of justice" in a cause then pending, that they were clearly "contempts of this Court" and that if it were not for the repudiation by *Bridges v. California* of the reasonable tendency rule and the overruling, in effect, of the jurisprudence, refusing to extend the constitutional protection of liberty of the press and freedom of speech to such acts, it would have been the duty of the court to punish the contempts. *Bridges v. California*, the court added, not only required a clear and present danger that a publication out of court would influence the decision in a pending case, but went further, for the evil must be "extremely serious" and the "degree of imminence extremely high." "We cannot truthfully say," the court continued, "that the result of the publications here was to create a clear and present danger of substantive evils," for, "although the obvious purpose of the editorials was to force a decision by this court in accordance with" the writers' desires, "there never was any clear and present danger that their purpose could or would be accomplished."

While *Bridges v. California supra*, was awaiting decision clear and present danger was urged upon the Supreme Court of Missouri as a bar to the punishment of a newspaper for contempt for the publication of editorials and a cartoon critical of a judge. This court, however, deciding in advance of *Bridges v. California, supra*, was able to discharge the alleged contemnors without mention of the test. It did point out that "a balance" between freedom of the press and "other social interests such as the preservation of order and the right of litigants to a fair trial" must be struck. *State ex rel. Pulitzer Publishing Company v. Coleman* (1941) 347 Mo. 1238, 152 S. W. (2d) 640. For comment on this case, see Goldstein, *Contempt of Court and the Press in Missouri* (1942) 7 Mo. L. Rev. 229; (1941) 26 WASHINGTON U. LAW QUARTERLY 564.

320. (1940) 310 U. S. 88.

321. (1942) 62 S. Ct. 190.

tion of the rule's possibilities. Abandonment of the alternative of intent must be regarded as deliberate. The Court has also, it appears, been unwilling to accept the most extreme of Mr. Justice Brandeis' postulates—that even clear and present danger of "some violence" or of "destruction of property" is not enough to justify suppression of the freedom—for this has been consistently omitted, even in a case such as the *Meadowmoor* case.³²² The balancing of social interests, first explicitly announced in the *Thornhill* case, has in the later cases not always been performed as consciously or as carefully as might be desired; it is of course dangerous unless adequate weight is attached to the freedom. But Mr. Justice Black's treatment of clear and present danger, in the *Bridges* case, as simply a minimum compulsion, which by no means marks the furthestmost constitutional boundary of protected expression, seems to leave ample room for further development.

Scope of the Rule. While in *Schenck v. United States*³²³ Mr. Justice Holmes—and in later cases both he and Mr. Justice Brandeis—said that clear and present danger was the test "in every case," all of the cases in which they spoke of the rule (and, for that matter, *Herndon v. Lowry*³²⁴ also) had two common elements: they dealt with (1) the suppression (2) of utterances which were essentially political (by socialists, communists, syndicalists or plain pro-Germans). From this it might have been argued that the rule was to be applied only "in every case" having one or other or perhaps both of these characteristics. The recent decisions seem to indicate that the Court regards the rule as applicable only to the outright suppression of speech³²⁵—not to the licensing, or taxing, or otherwise burdening of it. The Court has at any rate refrained from referring to the rule in any case of this latter class,³²⁶ even though in some of these the

322. Where it might have lent support to Mr. Justice Black's conclusion.

323. (1919) 249 U. S. 47.

324. (1937) 301 U. S. 242.

325. Although Mr. Justice Brandeis, in the *Whitney* case, spoke of it as applying to "restriction" as well as to "suppression."

326. Including not only *Lovell v. Griffin* (1938) 303 U. S. 444, and *Schneider v. Irvington* (1939) 308 U. S. 147 (the *Irvington* ordinance), which were decided before the *Thornhill* case (see notes 275 and 276 *supra*), but also such later cases as *Cox v. New Hampshire* (1941) 312 U. S. 569, and *Jones v. Opelika* (1942) 62 S. Ct. 1231, in both of which freedom of expression was denied protection. Perhaps it should be noted that in the *Jones* case Mr. Justice Reed, for the majority, said that the only allowable

restraint appeared to amount, in effect, to an absolute prohibition. Such cases, although they require one additional appraisal (the extent of the restraint), would seem capable of being fitted into the rule.

The Court has not, however, hesitated to extend the rule to utterances of a non-political character. *Thornhill v. Alabama*³²⁷ and the cases following it applied the rule to picketing which was in no sense political; *Cantwell v. Connecticut*³²⁸ applied it to religious utterances; and *Bridges v. California*³²⁹ applied it to utterances which, while perhaps in one sense political, were still quite different from those in the earlier cases.

But the Court, in applying the rule to utterances in one of these new fields—peaceful picketing—has unfortunately been tempted to support the extension by saying that “in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.”³³⁰ While this expression was well-intended, being used to support the freedom in the particular case, it seems to be inherently dangerous; for the statement that there are areas protected by the Constitution assumes that there are also areas which are not.³³¹ The First Amendment protects all speech, not simply

interferences with freedom of expression are “those appropriate to the maintenance of a civilized society,” and that in determining what limitations may be permitted “under such an abstract test” the courts are to be “guided by the experience of the past, the needs of revenue for law enforcement, the requirements and capacities of police protection, the dangers of disorder and other pertinent factors.” But this is not clear and present danger.

327. (1940) 310 U. S. 88.

328. (1940) 310 U. S. 296.

329. (1941) 62 S. Ct. 190.

330. This was first used in *Thornhill v. Alabama* (1940) 310 U. S. 88, 102, where it was preceded by a sentence which, to an extent, qualified it (“Freedom of discussion * * * must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period”). But when later repeated or paraphrased (in *Carlson v. California* (1940) 310 U. S. 106, 113; by Mr. Justice Black in *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U. S. 287, 303; by Mr. Justice Douglas in *Bakery and Pastry Drivers v. Wohl* (1942) 62 S. Ct. 816; and by Justices Black and Reed in *Carpenters & Joiners Union v. Ritter's Cafe* (1942) 62 S. Ct. 807), the qualifying sentence was omitted. Mr. Justice Frankfurter, who has spoken for the Court in four picketing cases, has carefully avoided this language.

331. This talk of areas stems only from *Thornhill v. Alabama* (1940) 310 U. S. 88. In *Lovell v. Griffin* (1938) 303 U. S. 444, and in *Schneider v. Irvington* (1939) 308 U. S. 147, the ordinances held to be an invalid invasion of the freedom related to the distribution of literature or handbills

some speech, or speech on such topics as a majority of the Court may from time to time regard with favor. The nature of the utterance cannot be a condition of the constitutional protection; it is time enough to appraise the social value when the Court reaches the stage of balancing that against the clear and present danger of threatened evil.³³² The extent to which the Court has permitted itself to think in terms of "areas" is evident in the recent case of *Valentine v. Chrestensen*,³³³ where the Court, through Mr. Justice Roberts, reversing an injunction against enforcement of a New York ordinance absolutely prohibiting the distribution of advertising matter on the streets, said that while it had "unequivocally held" that the streets were "proper places for the exercise of the freedom of communicating information and disseminating opinion" and that this privilege might not be unduly burdened or proscribed, nevertheless the Court was "equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."³³⁴ The Court can hardly mean to say that "commercial advertising" is wholly outside the protection of the First Amendment. It should have deferred consideration of the nature of the literature until it struck a balance, and even then it would be difficult to obtain support for the view that commercial advertising is wholly without social value.³³⁵

Application of the Rule to Freedom of Assembly and Religion. Mr. Justice Brandeis in *Whitney v. California*³³⁶ applied clear and present danger to abridgment of the right "peaceably to assemble," as well as of freedom of speech, and the majority made a similar application in *Herndon v. Lowry*.³³⁷ This seems to have

of any kind, and the latter decision protected literature on a wide variety of subjects.

332. When the attempt is made, it is extraordinarily difficult to find any speech in which there may not, under given circumstances, be social value—and from this test neither profanity nor Mr. Justice Holmes' rather overworked "cry of fire in a crowded theatre" (*Schenck v. United States* (1919) 249 U. S. 47, 52; cf. Chafee, op. cit. supra, note 68, at 15) need be barred.

333. (1942) 62 S. Ct. 920.

334. *Id.* at 921.

335. The decision itself may be right, although this cannot be discovered from the Court's opinion. See *Chrestensen v. Valentine* (C. C. A. 2, 1941) 122 F. (2d) 511, particularly the dissenting opinion of Judge Frank. It may be suggested that picketing, as in the *Swing* case, may be actuated primarily by the profit motive (of the union), as much as any other advertising.

336. (1927) 274 U. S. 357, 374, 378-379.

337. (1937) 301 U. S. 242.

been settled. But the Court has been unwilling to apply the rule to abridgment of the free exercise of religion—although freedom of speech is as closely allied with this right as with freedom of assembly, and although the dangerous tendency rule was applied historically to both freedoms alike.³³⁸ Clear and present danger would apparently have produced a different result in *Hamilton v. University of California*,³³⁹ and in *Minersville School District v. Gobitis*,³⁴⁰ (in both of which there was complete suppression of religious freedom without corresponding suppression of freedom of speech.)³⁴¹ However, the recent weakening of the authority of the *Gobitis* case³⁴² may perhaps presage the ultimate extension of the rule to abridgment of the free exercise of religion.

CONCLUSION

The "legislative determination," which was so nearly fatal to the rule in *Gitlow v. New York*,³⁴³ was apparently only scotched by Mr. Justice Brandeis,³⁴⁴ not killed. In *Cantwell v. Connecticut*³⁴⁵ and elsewhere the Court has been betrayed, by the absence of any legislation, into unfortunately broad *dicta* regarding what the effect of such legislation might have been. This language is perhaps not to be taken at its face value,³⁴⁶ but if it should again

338. Jefferson's denunciation of it occurs in the Virginia Statute for Religious Freedom.

339. (1934) 293 U. S. 245.

340. (1940) 310 U. S. 586. See, Compulsory Flag Salutes and Religious Freedom, Note, (1938) 51 Harv. L. Rev. 1418, 1422, written in advance of the *Gobitis* decision, but taking it for granted that clear and present danger was to be applied.

341. Except that in the *Gobitis* case there was invasion of the "freedom of silence."

342. By the repudiation of it by Justices Black, Douglas, and Murphy, in *Jones v. Opelika* (1942) 62 S. Ct. 1231. See *supra* under II.

343. (1925) 268 U. S. 652.

344. *Whitney v. California* (1927) 274 U. S. 357, 374.

345. (1940) 310 U. S. 296, 307-308: "Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations," quoted by Mr. Justice Black in *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U. S. 287, 306, and in *Bridges v. California* (1941) 62 S. Ct. 190, 192. See also Mr. Justice Black, in the *Bridges* case *supra*, at 193: "The judgments below * * * do not come to us encased in the armor wrought by prior legislative deliberation."

346. The Court has usually quoted also the sentence from *Schneider v. Irvington* (1939) 308 U. S. 147, 161: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify" abridgment of freedom of speech. In *Bridges v. California* (1941) 62 S. Ct. 190, Mr. Justice Black seems to include this in the clear and present danger rule.

develop into a presumption that the statute is valid (as in the *Gitlow* case), then it might be shortly answered that from the First Amendment there arises a presumption of the right of speech to protection, and that the constitutional presumption, at the least, cancels the statutory.³⁴⁷

Clear and present danger fits well enough into our constitutional scheme. Certainly no liberty guaranteed by any amendment other than the First may be abridged simply because of a speculative "tendency" that its exercise may be harmful to the state.³⁴⁸ But one cannot speak with equal certainty regarding the absolute merit of the rule in its present state of development. "Clear," "present," "imminent," "serious," "substantial" are all words of emphasis, but the future tense is implicit in the word "danger." The new rule modified "dangerous tendency," adding a different emphasis, using a new accent; but it is still essentially a subjective test;³⁴⁹ indeed, the Court is now required to appraise, with no fixed objective standard, not only the danger and the evil, but the social value of the utterance. The picketing cases have been stated in some detail in order that the wide differences possible in such subjective appraisals may be apparent.³⁵⁰ In "a question of degree," emphasis is important; but it may not be enough. Because they saw the rule's inherent weak-

347. Cf. Chief Justice Stone in *United States v. Carolene Products Co.* (1938) 304 U. S. 144, 152. "There may be 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, which are deemed equally specific when held to be embraced within the Fourteenth." Cf. also his dissenting opinion in *Minersville School District v. Gobitis* (1940) 310 U. S. 586, 604-605.

See also Mr. Justice Frankfurter, in *Bridges v. California* (1941) 62 S. Ct. 190, 208: "When a substantial claim of an abridgment of these liberties is advanced, the presumption of validity that belongs to an exercise of state power must not be allowed to impair such a liberty * * *" Cf. Frankfurter and Landis, *A Study in the Federal Judicial System* (1927) 40 Harv. L. Rev. 1110, 1123-1125.

348. Cf. *West Coast Hotel Co. v. Parrish* (1937) 300 U. S. 379, for the test for abridgment of liberty of contract; for state abridgment of the rights guaranteed by the Thirteenth Amendment, cf. the writer's Note, *Civil Conscription in the United States* (1917) 30 Harv. L. Rev. 265, and Chafee, *op. cit. supra*, note 68, at 32-33; cf. Warren, *supra* note 4, at 463-464, for due process generally.

349. See Mr. Justice Frankfurter's dissenting opinion in *Bridges v. California* (1941) 62 S. Ct. 190; cf. Powell, *op. cit. supra*, note 92, at 74: "We may wonder, too, whether the present-danger test which the minority sought to establish is one that could be applied with anything approaching factual accuracy by an appellate court."

350. Cf. Chafee, *op. cit. supra*, note 68, at 436n: "The majority [in the *Meadowmoor* case] merely took a different view of the facts."

ness, Mr. Justice Holmes, and in particular Mr. Justice Brandeis, made every effort to strengthen it—efforts which, though bold and ingenious, were only partially successful. The difficulty is inherent in the punishment of words before they have caused—and when they may never cause—evil.

It is true that thus far the rule has worked well to protect freedom of expression. Indeed, commencing with *Herndon v. Lowry*,³⁵¹ in every case where the rule has been mentioned by the majority, the freedom has been maintained.³⁵² On the other hand, in cases such as *Milk Wagon Drivers Union v. Meadowmoor Dairies*³⁵³ and *Carpenters' & Joiners Union v. Ritter's Cafe*,³⁵⁴ the rule has been stated by a minority seeking to protect the liberty, and the majority opinion has been studiously silent as to it. The mere statement of the rule has, so far, been an influence in advancing freedom of speech. But this is likely to be true more often when the rule is new, before its emphasis has been blunted, its accents blurred, than later, when it has become simply an habitual formula. The cases now arising under the Espionage Act may very well determine the future of clear and present danger; the rule may be abandoned, modified, or expanded, and if the latter course should be taken it is remotely possible that a means may be found to embody in it some objective term. But, viewed as of today, clear and present danger while it has become a formidable weapon for the defense of freedom of speech and of the press, appears likely to remain formidable only so long as it is wielded by a willing arm.

351. (1937) 301 U. S. 242.

352. With perhaps one exception, all of these cases seem to have been decided rightly, either in terms of clear and present danger or otherwise. The exception is the Wohl case, which, though decided by a unanimous court, seems in need of limitation; indeed, this process may have already begun, as Mr. Justice Reed suggested in the Ritter's Cafe case.

353. (1941) 312 U. S. 287.

354. (1942) 62 S. Ct. 807.

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