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FREE SPEECH (1949-1952): SLOGANS V. STATES' RIGHTS

HENRY M. KITTLESON AND J. ALLEN SMITH

*"It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards."**

The decisions of the last three terms of the United States Supreme Court indicate confusion in the solution of free speech cases. Admittedly many problems are involved in any situation important enough to reach the Supreme Court, but the justices seem unable to form a strong and clearly oriented coalition to solve, by the application of readily understood doctrines and practices, a variety of important questions. Can a person express himself unrestrained by state and federal officials and, if so, to what degree? Is the protection of speech more sacred at one level of government than at the other, equally sacred at both, or, as some observers are suggesting, sacred at neither? Is the protection of speech more jealously guarded than other civil liberties, such as privacy; and, perhaps more remotely, are personal liberties entitled to more protection than property rights?[1]

During this period the Court decided seventeen cases involving in whole or substantial part the question of free speech;[2] and in these

*Jackson, J., dissenting in Kunz v. New York, 340 U.S. 290, 309 (1951).

[1]FREUND, ON UNDERSTANDING THE SUPREME COURT, c. 1 (1949), is an excellent study posing these and other questions; see Smith, Book Review, 3 U. OF FLA. L. REV. 267 (1950). The problem of the "double standard" is analyzed in Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533 (1951). Learned Hand, in *Chief Justice Stone's Conception of the Judicial Function,* 46 COL. L. REV. 696, especially at 698 (1946), questions the propriety of treating property rights as inferior to personal rights even if such a distinction between the rights can be made. For Learned Hand's early view on speech see Masses Pub. Co. v. Patten, 244 Fed. 535 (S.D.N.Y. 1917), *rev'd,* 245 Fed. 102 (2d Cir. 1917). For his later and more conservative view see United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).

[2]Although this article touches on freedom of press and mentions such cases as Breard v. Alexandria, 341 U.S. 622 (1951), and Near v. Minnesota, 283 U.S. 697

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judgments the justices filed more than fifty opinions. Only five of these decisions were unanimous, and to only one opinion did all of the justices sitting subscribe. Such divergence recalls the quip of John Stuart Mill: "The practical question, where to place the limit—how to make the fitting adjustment between individual independence and social control — is a subject on which nearly everything remains to be done."[3]

This paper limits its glances principally to those cases decided within the past three years.[4] To attempt to restate free speech systematically from the Alien and Sedition Acts of 1798 to the latest alleged aggression of a Jehovah's Witness would be unprofitable and stale. Entire books fill this need.[5] Excellent articles contain periodic summings up;[6] other studies exhaust single concepts.[7] Moreover, three

(1931), the thesis is limited to speech. See Richardson, *Freedom of Expression and the Function of the Courts,* 65 HARV. L. REV. 1, n.1 (1951), in which the author in a similar study sees no difference in speech or press. But see Jackson, J., dissenting in Kunz v. New York, 340 U.S. 290, 307 (1951), to the effect that precedents on prior restraint of the press "cannot reasonably be transposed to the street-meeting field." Religion, an equally important field, was recently exhaustively treated by Lake in *Freedom to Worship Curiously,* 1 U. OF FLA. L. REV. 203 (1948). The major development since that time is Zorach v. Clauson, 72 Sup. Ct. 679 (1952), which qualifies McCollum v. Board of Education, 333 U.S. 203 (1948), and in which the New York "released time" program for religious instructions is upheld.

[3]Mill, *Essay on Liberty,* in THE MODERN READERS' SERIES 8 (1926).

[4]Professor Chafee considers that a new period in free speech began in 1945, which period he calls the Period of Renewed Struggle and Subtle Suppressions; see *Thirty-five Years with Freedom of Speech,* a lecture delivered at Columbia University March 12, 1952. Terminiello v. Chicago, 337 U.S. 1 (1949), matches any case in protecting free speech; it may be called the high-water mark, rivaling the theoretical *tour de force* of Rutledge, J., in Thomas v. Collins, 323 U.S. 516 (1945). It seems more appropriate to consider the 1948-1949 term as the dividing point, since the demises of Murphy and Rutledge, JJ., concurred at that time. See Mendelson, *Clear and Present Danger—from Schenck to Dennis,* 52 COL. L. REV. 313, 320 (1952), in which the period July 1949, is described as closing the mature Roosevelt Court.

[5]*E.g.,* CHAFEE, FREE SPEECH IN THE UNITED STATES (1941), GOVERNMENT AND MASS COMMUNICATIONS (1947); MEIKLEJOHN, FREE SPEECH (1948).

[6]Especially helpful are Corwin, *Freedom of Speech and Press under the First Amendment: A Resume,* 30 YALE L.J. 48 (1920); Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533 (1951); Goodrich, *Does the Constitution Protect Free Speech?,* 19 MICH. L. REV. 487 (1921); Murphy, *Free Speech and the Interest in Local Law and Order,* 1 J. PUB. LAW 40 (1952).

[7]*E.g.,* Antieu, *The Rule of Clear and Present Danger: Scope of its Applicability,* 48 MICH. L. REV. 811 (1950); Boudin, *"Seditious Doctrines" and the "Clear and*

years are sufficient for scope: the recent opinions contain everything from a Jefferson letter to Abigail Adams to internal dissensions over the correct exegesis of selected quotations from Holmes.

PICKETING

An approximate degree of harmony among the justices is apparent in situations involving picketing that is lacking in other cases concerned with speech. Perhaps this relative absence of discord results from a recognition by several justices, particularly Mr. Justice Frankfurter, that *vis-a-vis* speech, picketing — to borrow Professor Freund's phrase — is a hybrid.[8] To a considerable extent the Court still explains its behavior on the verbal level of *Thornhill v. Alabama*[9] and *Giboney v. Empire Storage and Ice Company*.[10] Frankfurter, however, is taking the initiative in developing a new rule. His famous decision in the *Ritter's Cafe* case,[11] in which he began to assert his leadership in this field only two years after *Thornhill*, should by now be included as the third of the most significant three holdings.

Thornhill gave rise to the notion that picketing is speech and is therefore protected by the Fourteenth Amendment against infringement by the states.[12] *Giboney* unanimously issued forth the proposi-

Present Danger" Rule, 38 VA. L. REV. 143, 315 (1952); Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919); Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952); Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951); Daykin, *The Employer's Right of Free Speech under the Taft-Hartley Act*, 37 IOWA L. REV. 212 (1952); Frank, *The United States Supreme Court: 1950-51*, 19 U. OF CHI. L. REV. 165 (1952); Gorfinkel and Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475 (1951); Meiklejohn, *The First Amendment and Evils that Congress Has a Right to Prevent*, 26 IND. L.J. 477 (1951); Mendelson, *supra* note 4; Nathanson, *The Communist Trial and the Clear-and-Present-Danger Test*, 63 HARV. L. REV. 1167 (1950); Rehmus, *Picketing and Freedom of Speech*, 30 ORE. L. REV. 115 (1951); Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COL. L. REV. 727 (1942); Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950).

[8]Quoted in International Brotherhood v. Hanke, 339 U.S. 470, 474 (1950), from FREUND, UNDERSTANDING THE SUPREME COURT 18 (1949). *See* Hughes v. Superior Court, 339 U.S. 460, 464 (1950).

[9]310 U.S. 88 (1940).

[10]336 U.S. 490 (1949).

[11]Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942).

[12]Murphy, J., wrote the opinion for a nearly unanimous Court; only McReynolds, J., dissented, without opinion. An earlier Brandeis dictum led the way, Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937); see discussion in Cox, *supra* note 7, at 592, n.77; 2 U. OF FLA. L. REV. 153 (1949).

tion that even peaceful picketing will not be protected if it is part of an illegal act.[13] The problem then becomes one of definition and presumption. How far can the states — and Congress — go in defining illegal acts?

In *Ritter's Cafe* the Court upheld the right of a state to control industrial disputes in a reasonable manner, even when the control limits peaceful picketing.[14] This decision brought a dissent from Mr. Justice Black, who felt that peaceful picketing should not be subjected to regulation, however reasonable, unless, as he later added in *Giboney,* the picketing is directed toward the breach of a well-established law.[15] The Frankfurter approach proceeds on an *ad hoc* basis. The state has great power to say what is legal and what is illegal; these declarations can come from either the legislature or the state judiciary. The United States Supreme Court will weigh the balance between this state

[13]A state statute outlawed combinations in restraint of trade and provided criminal penalties. Pickets were successfully enjoined from attempts to force ice distributors from selling ice to nonunion peddlers. See the discussion by Frank, *The United States Supreme Court: 1948-49,* 17 U. OF CHI. L. REV. 1, 406 (1949), in which he succinctly points out that *Giboney* limits the object for which one may picket, not how one pickets. For an interesting early discussion in the area left between *Thornhill* and *Giboney* see Note, 16 U. OF CHI. L. REV. 701 (1949). Florida has a decision in line with *Giboney,* Local Union No. 519 v. Robertson, 44 So.2d 899 (1950).

[14]Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942), a 5-4 decision, sustained a narrowly drawn injunction. Ritter hired a contractor to erect a building; nonunion men were employed. In protest, the union picketed a cafe owned by Ritter in another part of town; the cafe had no connection with the building under construction. The state court held that the picketing violated the state anti-trust law. A year before, in AFL v. Swing, 312 U.S. 321 (1941), Frankfurter, J., had condemned as a free-speech abridgement a similar state court injunction. In *Swing* there was no employer-employee dispute; the pickets were not employees. The purpose of the picketing was to unionize the shop. The state court had enjoined the picketing on the basis that there was no labor dispute. Since the *Ritter* picketing was peaceful and sought to force no violation of the law, the injunction obviously imposed a restriction that would not have been permitted under *Thornhill. Ritter* expressly refused to remove picketing from free speech; yet in Stapleton v. Mitchell, 60 F. Supp. 51, 59 (D. Kan. 1945), a federal district judge observed, ". . . the 'clear and present danger test' as applied to peaceful picketing in the *Thornhill* case gave way to the 'reasonable basis' test in the *Ritter* case." *Cf.* dissenting opinion of Reed, J., in *Ritter,* 315 U.S. 722, 738 (1942): "Until today, orderly, regulated picketing has been within the protection of the Fourteenth Amendment."

[15]315 U.S. 722, 729 (1942).

power and individual liberty; it will not consider the process as an "exercise in absolutes"[16] but will apply to each new set of circumstances the closest factual situation already adjudicated.

One recent case, *Cole v. Arkansas*,[17] involved actual violence and concerted efforts to bring about violence. Consequently, it was clearly outside the protection of *Thornhill;* and the Court unanimously denied relief to the disputant, who had been jailed for his reprehensible conduct toward fellow workers who refused to strike.[18] The case is one of slight importance, and then largely for what Mr. Justice Jackson calls its "curiously involved history." The major issue concerned the old problem of allegation and proof: was the defendant convicted under the portion of the statute that he allegedly violated?[19] The litigation extended over three years, and although the Court upheld the state it did so only after a searing examination. *Cole* indicates that despite retrenchment in other cases from the position, developed also in *Thornhill,* that a statute abridging speech, including picketing, must be valid on its face, the Court is not yet ready to return to the language of the parent case, *Gitlow v. New York*: ". . . every presumption [must] be indulged in favor of the validity of the statute."[20]

Four other cases conveniently hang together, since despite special elements in each case all involve peaceful picketing. Three of them arose from state courts, and Frankfurter applied his balance-of-interest theory for a majority of the Court in two and for a plurality in the third. Interestingly enough, the problem of racial discrimination entered this arena, which usually involves conflicting economic values. A group, banded together in a political organization known as the

[16]See Frankfurter, J., in Hood & Sons v. DuMond, 316 U.S. 525, 564 (1949) (dissenting opinion).

[17]338 U.S. 345 (1949).

[18]*Id.* at 352, n.3: "Q. What happened after Louis Jones gave the signal and said 'Come on, boys'? A. They flew up like blackbirds and came fighting."

[19]The conviction was reversed in the Supreme Court of Arkansas; a second conviction, affirmed by the same court, was reversed by the United States Supreme Court on certiorari, since it appeared that the conviction was based on a provision of the statute for which violation Cole had not been tried. A further interpretation by the state court was sustained by the United States Supreme Court; see 338 U.S. 345, 346 (1949).

[20]268 U.S. 652 (1925). In Thornhill v. Alabama, 310 U.S. 88, 89 (1940), the Court stated: "Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permis-

Progressive Citizens of America, sought through picketing to induce a grocer to hire Negro clerks in proportion to the number of Negro customers. Under the California holdings this activity involves racial discrimination, in this instance against the whites, and is illegal. In *Hughes v. Superior Court*[21] the United States Supreme Court, with three justices concurring, sustained the right of the California court to declare that its public policy opposes racial discrimination and that even peaceful picketing cannot be utilized to hamper this policy.

The three justices, Black, Reed, and Minton, who merely concurred in this race-picketing case dissented the same day in a situation that to their taste was too far removed from *Giboney*. A used-car dealer, who employed only himself and his family, successfully enjoined union pickets attempting to force him to abide by union practices. Since the Washington court announced that the public policy of the state favored small business and self-employed entrepreneurs, the United States Supreme Court, in *International Brotherhood v. Hanke*,[22] sustained the injunction. The dissenters and the majority differ fundamentally in degree only. Mindful that public policy is an unruly horse, they divide on how firmly to apply the bit.[23]

The one case that arose under federal law involved a violation of the anti-secondary boycott provisions of the Taft-Hartley Act.[24] Six justices sustained an injunction against a union agent who picketed a construction job on which a sub-contractor employed nonunion electricians. Three justices dissented, apparently on the basis of statutory interpretation.[25] Mr. Justice Burton, who wrote the majority opinion, emphasized that, since the states may limit picketing, Congress

sible conduct and warns against transgression." *Thornhill* further relied to a considerable extent on the doctrine of clear and present danger, discussed *infra* p. 241.

[21]339 U.S. 460 (1950). The three concurring justices did not accept the balancing-of-interests theory; they merely cited Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[22]339 U.S. 470 (1950).

[23]For the proposition that legislatures and courts should be restrained in projecting their own ideas under the guise of public policy, with the result that their predilections control constitutional rights, see Note, 26 NOTRE DAME LAW. 664 (1951). But see Rehmus, *Picketing and Freedom of Speech*, 30 ORE. L. REV. 115 (1951).

[24]International Brotherhood, Elec. Workers v. NLRB, 341 U.S. 694 (1951).

[25]Reed, Jackson, and Douglas, JJ. *Cf.* the dissenting opinion in NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951); also see Local 74 v. NLRB, 341 U.S. 707 (1951), decided the same day. Douglas, J., did not participate in the picketing cases arising in state courts.

may do likewise; he made no attempt to distinguish the First and Fourteenth Amendments.[26]

These observations illustrate a trend: the Court in judging peaceful picketing cases is rejecting free speech standards. When picketing is involved there is no talk of clear and present danger, the hallmark of orthodox speech cases.[27] Unfortunately, too much still remains of *Thornhill,* too little clarification of *Giboney,* and perhaps too little implementation of *Ritter's Cafe;* but, since most picketing involves a conflict between management and labor for economic benefits, Frankfurter may well succeed in his efforts to sever this problem from those conflicts that are essentially concerned with the communication of ideas for the benefit of public enlightenment.

NONPROTECTED SPEECH

If the Court waters down *Thornhill,* a majority still finds much comfort in other language left by Mr. Justice Murphy:[28]

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Murphy probably intended that these words be referred to sparingly,[29] but they are freely quoted to limit speech in a variety of contexts.

Beauharnais v. Illinois[30] is an outstanding example of the use of these words to establish a new and controlling principle in delineating the area of protected speech. The case sustains the constitutionality

[26]341 U.S. 694, 705 (1951). See Cole v. Arkansas, 338 U.S. 345 (1949), for a contrast in the presumption of statutory validity.

[27]The doctrine of clear and present danger is discussed *infra,* p. 240.

[28]Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); *cf.* Chase, J., concurring in United States v. Dennis, 183 F.2d 201, 236 (2d Cir. 1951).

[29]Black, J., concurring in Beauharnais v. Illinois, 72 Sup. Ct. 725, 739 (1952), states: "The Chaplinsky Case makes no such broad inroads on First Amendment freedoms. Nothing Mr. Justice Murphy wrote for the Court in that case or in any other case justifies any such inference."

[30]72 Sup. Ct. 725 (1952).

of group-libel statutes, which are attempts by legislatures to control tirades against groups, classes, religions, races, and societies that if made against individuals would be libelous and punishable.[31] Ordinary libel, of course, protects only the individual. Competent scholars who have inquired into the merits of these statutes generally doubt their wisdom.[32] Indeed, the few group-libel statutes on the books have not met with marked success,[33] and one state court has declared its version essentially unconstitutional.[34] To our present inquiry, however, *Beauharnais* is important because of the general discussion and development of the problem of speech found in the five opinions filed in the case.

The majority, again led by Mr. Justice Frankfurter, and including the Chief Justice and Justices Burton, Clark and Minton, relied on the Murphy quotation and sustained the statute:[35]

> "Libellous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

Not all of the justices, however, were content to rely on this young doctrine of nonprotected speech. Mr. Justice Jackson found that he was able to reach the same result through applying the traditional clear and present danger test; and, although in the particular case

[31]ILL. STAT. ANN. c. 38, §471 (Smith-Hurd Supp. 1951) provides: "It shall be unlawful for any person . . . to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place . . . any lithograph, moving picture, play, drama or sketch, which . . . portrays depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color, creed, or religion [and] which . . . exposes the citizens . . . to contempt, derision, or obloquy or which is productive of breach of the peace or riots."

[32]Riesman, *supra* note 7; Tanenhaus, *supra* note 7; Note, 61 YALE L.J. 252 (1952), but see 254, n.9, 255, n.14.

[33]Note, 61 YALE 252, 255 (1952).

[34]State v. Klapprott, 127 N.J.L. 395, 22 A.2d 877 (Sup. Ct. 1941).

[35]72 Sup. Ct. 725, 735 (1952). The "speech" was actually a handbill inviting two million signatures for a petition to the mayor and city council of Chicago. The problem is the old one of forming boundaries between white and Negro neighborhoods, Shelley v. Kraemer, 334 U.S. 1 (1948).

he found that Illinois had provided inadequate defenses for persons accused of violating the statute, he envisioned that state government could protect groups under statutes that broadened the defense. His reasoning, of course, would necessitate reversing each conviction lacking full evidence that the words used by the offender created a clear and present danger of injuring groups.[36] With the majority of the Court the showing of injury is not a necessary element.

Justices Black and Douglas arrived at an opposite conclusion. They pointed out that group libel has never been within the scope of prohibited speech as measured by the First Amendment; they relied on those cases that apply the guarantees of the First Amendment via the Fourteenth Amendment; and they concluded that the conviction, which appeared to them to be a denial of the right to petition rather than a problem in group libel, ought to be reversed. They have reaffirmed their belief in unfettered speech except under the most compelling circumstances.[37]

These views present a dichotomy. Some varieties of speech are not types of "free" speech at all; these accordingly are not constitutionally protected. The remaining varieties are tested by clear and present danger rules, which vary in definition in different cliques of justices, and are constitutional in accordance with the outcome of the test.

The clear and present danger doctrine, so often interpreted, stretched, compressed, and twisted since Holmes gave it birth in a famous 1919 opinion,[38] can be conveniently restated. It arose in a federal case in which the Court unanimously felt that, despite the absolute prohibition in the Constitution against acts of Congress in abridgement of speech,[39] some outer limit could nevertheless be set by Congress to protect the general community and to restrain[40] un-

[36]72 Sup. Ct. 725, 746 (1952). Reed and Douglas, JJ., also dissented at p. 741 on grounds discussed *infra* p. 240.

[37]72 Sup. Ct. 725, 736 (1952).

[38]Schenck v. United States, 249 U.S. 47 (1919).

[39]U.S. CONST. Amend. I, "Congress shall make no law . . . abridging the freedom of speech . . . ."

[40]No serious writer today questions that some limitation can be placed on speech. The writer espousing the most libertarian views is Professor Meiklejohn, but even he concedes that some speech, such as libel and slander, may be regulated, FREE SPEECH 18 (1948). See Chafee, *Thirty-five Years with Freedom of Speech, supra* note 4, who states that Meikeljohn would maintain "complete immunity of all speech on public questions . . . ."

toward individuals. Holmes gave a rule to define that outer limit:[41]

> "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."

In 1925, in a far-reaching opinion, the Court asserted the principle that free speech is protected by the Fourteenth Amendment. The case, *Gitlow v. New York*,[42] stated that the Supreme Court would, in appropriate cases, limit the attempts of state governments to control speech. The Court has consistently reaffirmed this power despite a marked inconsistency in the application of it. In fact, the Court on occasion makes a field day of declaring unconstitutional state acts aimed at speech and communication;[43] and yet at other times, such as the present, it shows considerable restraint.[44] To understand the assumption by the Court of this additional power of review as late as 1925 requires a study of the tragic, tortured, melancholy, and inconsistent history of the Fourteenth Amendment. A partial sketch suffices here.[45]

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[41]Schenck v. United States, 249 U.S. 47, 52 (1919). Professor Chafee declares, *supra* note 40, that the acceptance of this test by the Court constituted "Holmes' inestimable service to free speech." But see Frankfurter, J., concurring in Pennekamp v. Florida," 328 U.S. 331, 353 (1946): "'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context."

[42]268 U.S. 652 (1925).

[43]The earliest occasions occurred during the coalition of Hughes, C.J., and Holmes, Brandeis, Stone, and Roberts, JJ. See Frank, Book Review, 1 J. PUB. LAW 138, 139 (1952), and cases cited therein. Later instances arose with the victories of Black, Douglas, Murphy, and Rutledge, JJ., joined on occasion by Jackson, J., as in Thomas v. Collins, 323 U.S. 516 (1945); by Vinson, C.J., as in Saia v. New York, 334 U.S. 558 (1948); or by Reed, J., as in Terminiello v. Chicago, 337 U. S. 1 (1949).

[44]See Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951), for general discussion and copious citations leading to an explanation of and apology for the present-day refusal by the Court vigorously to strike down state and federal statutes. An interesting aside is the fact that the author was Frankfurter's law clerk.

[45]For a standard account of the adoption of this amendment see FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

The Winding Path of the Fourteenth Amendment

Early after the War between the States and the imposition of the Fourteenth Amendment upon the seceding states as a condition precedent to their re-entry into the Union, Mr. Justice Miller wrote the majority opinion in the *Slaughter-House Cases.*[46] The import of the decisions in those cases led him to state: "No questions so far reaching and pervading in their consequences . . . have been before this court during the official life of any of its present members."[47] Further, he believed that the Amendment would be called into question only to protect members of the Negro race.[48]

With this limited estimate of the nature and seriousness of the Amendment, the Court put it to rest by construing it into almost meaningless phraseology.[49] At the time, the opinion was generally greeted as a buttress for states' rights.[50] The perennial Federalist was, of course, unhappy.[51] Years later, lawyers were able, through a technical tour de force, to persuade the Court to enlarge the concept of the Amendment. By a process similar to that of shifting gears, the Justices concluded that the *Slaughter-House Cases* applied only to the privileges and immunities clause of the Fourteenth Amendment, and that the due process clause meant something else altogether![52]

This something else was first interpreted to permit the Court to invade the province of the states and to strike down attempts of state governments to regulate economic and social conditions.[53] Later

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[46]16 Wall. 36 (U.S. 1873).

[47]*Id.* at 67.

[48]*Id.* at 81.

[49]In brief, the Court listed a few privileges and immunities of citizens of the United States, such as the right to go from one part of the country to another, Crandall v. Nevada, 6 Wall. 35 (U.S. 1868), and implied that this is all that was meant by the entire amendment. The case was largely argued in terms of privileges and immunities and not in terms of the succeeding phrase that speaks of the deprivation of life, liberty, or property without due process of law. For a short, able treatment of this entire problem see FAIRMAN, AMERICAN CONSTITUTIONAL DECISIONS 306-324 (1950).

[50]WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 532 (1947).

[51]*Id.* at 539.

[52]See Warren, *The New "Liberty" under the Fourteenth Amendment,* 39 HARV. L. REV. 431 (1926).

[53]*E.g.,* Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

the Court extended its power to strike down state attempts to regulate civil liberties.[54] In an about-face during the New Deal the Court essentially surrendered its power to annul state activity in the economic and social sphere[55] when not affected by the commerce clause.[56] In the field of civil liberties, however, the Court, like the caissons, keeps rolling along.[57]

This new phase of judicial review led lawyers to ask which of the civil liberties are protected against state interference and to what degree this protection extends. There are, basically, two answers. One recurrent but always minority solution is that the Bill of Rights should be substituted for the words "due process";[58] the Court should protect the individual against the activity of his state government, in-

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[54]*E.g.*, Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931).

[55]West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). Professor Shulman early suggested that the Court might properly review civil liberty cases and leave to the legislatures and Congress the regulation of economic matters, Comment, 41 YALE L.J. 262 (1931). This view was given the most explicit expression on the Court by Stone, J.; see United States v. Carolene Prod. Co., 304 U.S. 144, 152, n.4 (1938); Braden, *The Search for Objectivity in Constitutional Law,* 57 YALE L.J. 571, 579-593 (1948); Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases,* 41 COL. L. REV. 1160 (1941).

[56]Hood v. DuMond, 336 U.S. 525 (1949) (state cannot control competition by denying milk facilities to a distributor engaged in interstate commerce, even in the absence of Congressional regulation); Amalgamated Ass'n v. Wisconsin Emplym't Rel. Bd., 340 U.S. 383 (1951) (preempted by federal statute); see 5 U. OF FLA. L. REV. 205 (1952).

[57]Even here the Court is slowing down. See Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952); Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1. (1951). But the Court has not reversed itself, and statutes still fall, Burstyn, Inc. v. Wilson, 72 Sup. Ct. 777 (1952) (censorship of motion pictures prohibited); McCollum v. Board of Educ., 333 U.S. 203 (1948) (restriction on freedom of religion). *But cf.* Zorach v. Clauson, 72 Sup. Ct. 679 (1952); Kunz v. New York, 340 U.S. 290 (1951) (restriction on speech); Winters v. New York, 333 U.S. 507 (1948) (restriction on press).

[58]Black and Douglas, JJ., concurring in Beauharnais v. Illinois, 72 Sup. Ct. 725, 736 (1952): "And we have held in a number of prior cases that the Fourteenth Amendment makes the specific prohibitions of the First Amendment equally applicable to the states." See Black, J., dissenting in Adamson v. California, 332 U.S. 46, 68 (1947); *cf.* dissenting opinion of Murphy, J., *id.* at 123. This problem is thoroughly considered by Fairman and Morrison in *Does the Fourteenth Amendment Incorporate the Bill of Rights?,* 2 STAN. L. REV. 5 (1949).

cluding his judiciary, to the exact extent that it protects him against Congressional activity. In other words, the Court should see to it that a person is not convicted in the county courthouse for an offense for which, by virtue of the Bill of Rights, he could not be convicted in the federal building.[59]

The prevailing view, however, found expression in 1947 in a full opinion with the usual acrid dissents.[60] The Court decided that the due process clause does not protect individuals unless the states violate notions "implicit in the concept of ordered liberty."[61] These notions may or may not correspond to those liberties protected by the first eight amendments; they are judged on such frequently uttered but rarely explained standards as "reasonableness," "weighing of interests," and similarity to past adjudications.[62]

Returning more specifically to the problem of free speech, the Court under the guidance of Chief Justice Hughes agreed that free speech is one of those notions "implicit in the concept of ordered liberty."[63] Indeed, all of the rights of the First Amendment enjoy that status.[64] One difficulty still remains: granting that free speech is protected by the Fourteenth Amendment as a right implicit in the con-

[59]In Adamson v. California, 332 U.S. 46 (1947), the Court held that a conviction that would have violated the Fifth Amendment if done by the Federal Government did not violate the Fourteenth Amendment when done by a state; in Wolf v. Colorado, 338 U.S. 25 (1949), the Court permitted evidence to be introduced in a state case that would have violated the Fourth Amendment as applied in Weeks v. United States, 232 U.S. 383 (1914). See Bartley, *Federal Review of State Criminal Appeals*, 5 U. OF FLA. L. REV. 119 (1952).

[60]Adamson v. California, 332 U.S. 46 (1947). The case could have been decided on the authority of Twining v. New Jersey, 211 U.S. 78 (1908).

[61]Palko v. Connecticut, 302 U.S. 319, 324 (1937). This phrase by Mr. Justice Cardozo has become nearly as troublesome as the phrase "clear and present danger." See Black, J., dissenting in Adamson v. California, 332 U.S. 46, 68 (1947).

[62]United States v. Rabinowitz, 339 U.S. 56 (1950) (search without warrant deemed reasonable); Wolf v. Colorado, 338 U.S. 25 (1949) (evidence admissible despite unreasonable search); Harris v. United States, 331 U.S. 145 (1947) (search without warrant deemed reasonable under facts shown); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (cruel and unjust punishment); Betts v. Brady, 316 U.S. 455 (1942) (counsel not necessary in every trial).

[63]Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931).

[64]Thomas v. Collins, 323 U.S. 516 (1945) (speech and assembly); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (religion); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Grosjean v. American Press Co., 297 U.S. 233 (1936) (press); Stromberg v. California, 283 U.S. 359 (1931) (speech).

cept of ordered liberty, is this free speech exactly the same as the free speech protected by the First Amendment? As is to be expected, the justices disagree on the answer. Jackson in *Beauharnais* said no; Black and Douglas said yes; and the others on that occasion chose not to commit themselves.

To recapitulate, the *Beauharnais* decision, despite dissent and concurrence, decided that the problem was not a free speech case at all. Group libel is not entitled to constitutional protection.

Unlike libel, sacrilegious speech is protected speech, to be limited, if at all, by the clear and present danger rule. This spring the Court reversed itself to declare that, since movies constitute a great medium of communication, their display to the public demands the fundamental protection accorded older forms of speech.[65] By implication, it suggests that obscene films will receive no protection at all. The rationale also permits the conclusion that libelous films or "fighting words" films are unprotected forms of communication.[66]

Loose Drafting of Prohibitions

Even in those cases not substantially within the ambit of constitutional protection, the Court may demand that governing bodies seeking to regulate speech do so through statutes, regulations, or customs that are artistically drawn or enunciated. The vagueness of the statute in *Beauharnais* caused Mr. Justice Reed to dissent, since the statute there in part permitted convictions of all persons who portray the "lack of virtue" in others or who expose others to "derision" or "obloquy."[67] He found it difficult to determine whether the conviction was under a valid or an invalid portion of the statute.[68]

These procedural safeguards provide the defense of prior restraint.

[65]Burstyn, Inc. v. Wilson, 72 Sup. Ct. 777 (1952) (state attempt to ban sacrilegious movies), *overruling* Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915); *see* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). In Gelling v. Texas, 72 Sup. Ct. 1002 (1952), in a memorandum decision citing the *Burstyn* case, the Court struck down a city ordinance giving a board of censors power to ban any movie "prejudicial to the best interests of the people."

[66]See especially Reed, J., concurring in Burstyn, Inc. v. Wilson, 72 Sup. Ct. 777, 783 (1952).

[67]72 Sup. Ct. 725, 741 (1952). Douglas, J., joined in this dissent. *Cf.* Terminiello v. Chicago, 337 U.S. 1 (1949), for a charge to a jury held to be too broad.

[68]*Cf.* Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940); see Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1951); Note, 61 HARV. L. REV. 1208 (1948).

Recently a city asserted its authority to prevent a group of Jehovah's Witnesses from using a public park for a religious meeting. The city had enacted no ordinance on the subject, but custom had long dictated that persons wishing to speak in the park obtain permission from the city authorities.[69] Similarly, in another case New York City officials denied permission to a preacher to speak in Columbus Circle, since the city fathers suspected that he would continue, as he had done in the past, to rail against other religious groups and thereby cause an unseemly incident.[70] Without elaborate opinions, the Court, through the chief justice, reversed the two convictions for the reason that police cannot arbitrarily place prior restraint on speech. Even though the Court will allow the authorities to prohibit some types of speech altogether as well as to limit public speech to specified times and places, some questions must be answered in order to decide (1) whether the type of speech is nonprotected speech; (2) whether the type of speech is protected generally but in the particular instance not protected; or (3) whether the type of speech is protected generally and in the particular instance protected.[71] Someone must hear the speech or judge its limitation in terms of a "clearly drawn, narrowly limited" statute.

Clear and Present Danger

A table conveniently depicts a simple analysis:[72]

[69]Niemotko v. Maryland, 340 U.S. 268 (1951).

[70]Kunz v. New York, 340 U.S. 290 (1951).

[71]Jackson, J., in Kunz v. New York questions the propriety of presuming the invalidity of state statutes and the validity of federal statutes. He contends also that prior restraint is not an absolute defense. See Freund, *supra* note 67, Part I. In Geuss v. Pennsylvania, 72 Sup. Ct. 360 (1952), the Court reaffirmed the authority of Kovacs v. Cooper, 336 U.S. 77 (1949). A group of Jehovah's Witnesses had been fined for violating an ordinance prohibiting the use of sound amplifying equipment in the business district. The United States Supreme Court dismissed the appeal for want of a substantial federal question, Douglas, J., dissenting. The *Kovacs* ordinance, which prohibited "loud and raucous" noise from amplifiers, was adjudged a "narrowly drawn" regulation. The ordinance involved in the *Geuss* case outlawed all use of sound equipment in the downtown area. A new twist in the captive audience problem arose in Public Utilities Comm'n v. Pollack, 72 Sup. Ct. 813 (1952), which sustained the practice of furnishing radio broadcasts on streetcars and city buses. The captive audience idea underlies in part the religious cases, Zorach v. Clauson, 72 Sup. Ct. 679 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948).

[72]Professor Frank has popularized the use of tables. See his series *The United*

TABLE I

A - Nonprotected Speech		B - Protected Speech	
Type	*Defense*	*Type*	*Defense*
Libel, obscenities, fighting words	Poorly-drawn statute, prior restraint, arbitrary action	All speech not in A, excluding picketing	No clear and present danger

The discussion so far has probed only those cases involving picketing, which is not reflected in the table, and the growing body of decisions that fall within part A of this device. It is obvious that this table does nothing more than emphasize two different kinds of speech. Type B, to be presently considered, includes all speech cases that are judged by the clear and present danger doctrine, which unfortunately shows itself to be more poetic than precise.[73]

It is not necessary to review all the opinions employing this phrase in order to conclude that the words "clear and present danger" have been subjected to two markedly different interpretations. One view employs the phrase to include the idea that speech—indeed communication—is in a preferred position in the hierarchy of constitutional values. It should, therefore, be abridged under the most serious and urgent circumstances only.[74]

States Supreme Court, 19 U. OF CHI. L. REV. 165 (1952) (1950 term), 18 U. OF CHI. L. REV. 1 (1950) (1949 term), and earlier articles in the series. See also Frank, *Court and Constitution: The Passive Period,* 4 VAND. L. REV. 400 (1951); Note, 65 HARV. L. REV. 107, 178 (1951). But see Smith, Book Review, 3 U. OF FLA. L. REV. 267 (1950).

[73]Jackson, J., concurring in Dennis v. United States, 341 U.S. 494, 568 (1951), warned against ensnarling the Government in a "judge-made verbal trap"; the Chief Justice, in the same opinion, stated that he has shown "the indeterminate standard the phrase necessarily connotes," *id.* at 516. Frankfurter, J., found the phrase "not a substitute for the weighing of values," *id.* at 543. See CARDOZO, *Law and Literature,* in SELECTED WRITINGS 338, 347 (1947).

[74]*See* Kovacs v. Cooper, 336 U.S. 77, 88 (1949); Saia v. New York, 334 U.S. 558, 561 (1948); Thomas v. Collins, 323 U.S. 516, 530 (1945); West Va. State Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Bridges v. California, 314 U.S. 252, 262 (1941); Schneider v. Irvington, 308 U.S. 147, 161 (1939). The notion of preferred position first appeared in a footnote to United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938): "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 Consti-

The second and recently prevailing interpretation is evidenced in *Feiner v. New York.*[75] A young college student, who espoused the views of the Progressive Party, made a street-corner address in which he used violent language to criticize local and national officials. He also stated, "The Negroes don't have equal rights; they should rise up in arms and fight for their rights." Members of the crowd pushed and shoved; one listener threatened to snatch the speaker from the platform; and the police after warning him to desist finally arrested him.

It is interesting to note that Mr. Justice Frankfurter, who led the majority in the picketing cases and in *Beauharnais,* had to content himself with a concurrence.[76] The chief justice wrote the majority opinion and affirmed the conviction.[77] Substantially, the argument is that a riot constitutes an evil that the state can prevent; that the speech by the college boy created a clear and present danger that a riot might occur; and that consequently the city and the state did not infringe the Fourteenth Amendment in punishing the student for speaking as he did. Whatever else this interpretation may be, it is clearly something other than the preferred-position doctrine.

Although in *Feiner* Mr. Justice Black makes no direct reference to the clear and present danger test, he closely adheres to the preferred-position interpretation of the rule and is disheartened to see the phrase applied to so trivial an incident. He states bluntly that the student was punished for expressing unpopular views and that the opinion of the majority in refusing to scrutinize the findings of fact in these cases opens the way to allow police officers virtually unsupervised discretion to stop speeches.[78] Justices Douglas and Minton,

tution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." The phrase "preferred position" was first used in the dissent of Chief Justice Stone in Jones v. Opelika, 316 U.S. 584, 600, 608 (1942), *judgment vacated,* 319 U.S. 103 (1943). The last victory for the doctrine was Terminiello v. Chicago, 337 U.S. 1 (1949), although the decision actually turned on a narrower point. See the dissent of Frankfurter, J., *id.* at 8. The most recent statement of the phrase appears in the dissent of Douglas, J., in Beauharnais v. Illinois, 72 Sup. Ct. 725, 745 (1952).

[75]340 U.S. 315 (1951).

[76]See the wry article by Rodell, *The Supreme Court is Standing Pat,* The New Republic, Dec. 19, 1949, p. 13: ". . . with Frankfurter so busy preserving for posterity the precise pattern of his thinking processes in special concurrences and separate dissents . . . ."

[77]Reed, Jackson, Burton, and Clark, JJ., joined in the opinion of the Court.

[78]340 U.S. 315, 321 (1951).

however, in an opinion by the former, accept clear and present danger as a test and find it wanting when applied to the facts. They suggest with Black that the main fault may be with the police, who have a duty to protect speakers.[79] The contrast between their opinion and that of Mr. Justice Frankfurter is marked. Justices Black, Douglas, and Minton adhere to preferred-position dialectics; in his concurrence Frankfurter does not rely on clear and present danger language at all. He suggests that the New York Court of Appeals is competent to handle the facts,[80] that its opinion should be accorded considerable weight, and that the United States Supreme Court should not overturn "a fair appraisal of facts made by State Courts in the light of their knowledge of local conditions."[81]

It is the difference in rationale between the Vinson and Frankfurter opinions that gives trouble. The former clings to clear and present danger language but so limits it as to arrive at the same conclusions as the latter, who rejects the rule and relies on a theory of balance of interests, with a presumption in favor of state acts and decrees.[82] It is perhaps this very difficulty that has led the Court, in three years, to mention the phrase in only four of seventeen cases;[83] and of these four cases only two have definitely turned on clear and present danger.[84]

National Defense

The greatest impact on the law of free speech during the past three years has resulted from decisions that involved the problem of

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[79]*Id.* at 329.

[80]The New York Court of Appeals unanimously affirmed the conviction, People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950).

[81]340 U.S. 268, 287 (1951).

[82]The unlikelihood of a merger of the two views in the near future is indicated, in part, by the persistence that Reed, J., shows in scrutinizing statutes and in presuming their invalidity in state contexts. See his dissent in Beauharnais v. Illinois, 72 Sup. Ct. 725, 741 (1952).

[83]Beauharnais v. Illinois, 72 Sup. Ct. 725 (1952); Dennis v. United States, 341 U.S. 494 (1951); Feiner v. New York, 340 U.S. 315 (1951); American Communications Ass'n CIO v. Douds, 339 U.S. 382 (1950).

[84]Dennis v. United States, 341 U.S. 494 (1951); Feiner v. New York, 340 U.S. 315 (1951). In American Communications Ass'n CIO v. Douds, 339 U.S. 382, 393 (1950), certain language suggests the influence of clear and present danger as interpreted by Vinson in *Feiner;* see United States v. Dennis, 183 F.2d 201, 211 (1950), for an analysis of the *Douds* case by Judge Hand.

the Communist Party.[85] They presented themselves in varying contexts. Of these, only one was actually concerned with a criminal prosecution.[86] In four other situations the Court passed on attempts by federal, state, and local governments to purge Communist Party members from public payrolls.[87] The deportation of an alien for past Communist membership introduced a more specialized problem and opened for discussion conflicting attitudes toward immigrants.[88] Finally the Court reviewed an aspect of the President's Employees' Loyalty Program and for the first time faced the problem whether the restrictions of the First Amendment are applicable to the executive branch of the Federal Government as well as to Congress.[89] Few doubt the grave danger of world Communism; the question is whether the means used to restrain subversion are constitutional.

The big case is *Dennis v. United States.*[90] It lasted for months on end, tested the temper of a distinguished district judge,[91] invited long opinions by a court of appeals presided over by Chief Judge Learned Hand, and finally reached the United States Supreme Court. In all of these forums the judges upheld the conviction of eleven Communist Party leaders accused of conspiring to teach the overthrow of government by force and violence.[92]

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[85]See SALVADORI, THE RISE OF MODERN COMMUNISM (1952); Note, 1 STAN. L. REV. 85 (1948). *Cf.* statement in the House of Commons by Winston Churchill on the desirability of free speech despite the language of the "Red" Dean of Canterbury, N.Y. Times, July 20, 1952, Sec. 4, p. 2E, col. 6. See also the statement of the immunity granted Jacques Duclos, officer of the French Communist Party, N.Y. Times, July 6, 1952, Sec. 4, p. 2E, col. 7.

[86]Dennis v. United States, 341 U.S. 494 (1951).

[87]These regulations require that certain groups of persons take anti-Communist oaths and disclose affiliations, past and present, with organizations advocating violent overthrow of government. Adler v. Board of Educ., 72 Sup. Ct. 380 (1952) (school teachers); Garner v. Board of Public Works, 341 U.S. 716 (1951) (city employees); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (election candidates); American Communications Ass'n CIO v. Douds, 339 U.S. 382 (1950) (labor union officials).

[88]Harisiades v. Shaughnessy, 72 Sup. Ct. 512 (1952).

[89]Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

[90]341 U.S. 494 (1951).

[91]United States v. Sacher, 182 F.2d 416 (2d Cir. 1951), *aff'd,* Sacher v. United States, 72 Sup. Ct. 451 (1952) (lawyers for the eleven Communists held in contempt).

[92]The nine-month long trial was presided over by Judge Harold Medina, then judge in the Federal District Court for the Southern District of New York. The

Congress just prior to World War II enacted the law under which these Communists were put in jail,[93] in an effort to gear America to protect herself against Communists and Fascists. Similar statutes are sanctioned by history. The Alien and Sedition Acts of 1798 were attempts by men of great rectitude such as John Adams to protect the nation against the excesses of the French Revolution, but their constitutionality is doubtful.[94] In any event, these statutes did not reach the United States Supreme Court, since the election of Thomas Jefferson to the presidency in 1800 caused their lapse.[95] In this connection it is interesting to note Jefferson's personal view: the suppression of speech although not available to the Federal Government should nevertheless be available to the states. The problem to him was less one of liberty than the allocation of public power.[96]

After the rise of the Jeffersonians the Federal Government left

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United States Court of Appeals unanimously affirmed the convictions, although its members differed on the applicability of the clear and present danger rule, United States v. Dennis, 183 F.2d 201 (2d Cir. 1950). Chief Judge Hand and Judge Swan took the view explained *infra*, p. 250. Judge Chase, concurring, asserted that the *Gitlow* majority is law; that the statute "prohibits only the expression of one belief, viz., that action should be taken to overthrow the government by force"; that such an expression is not protected by the First Amendment, *id.* at 235.

[93]Smith Act, 18 U.S.C. §2385 (Supp. 1951), enacted June 28, 1940. Only §§2 and 3 of the Act were applicable: one forbids the "teaching and advocacy" of the overthrow of the United States Government by force and violence, the other outlaws any attempt or conspiracy to teach or advocate violent overthrow. The indictment charged in part that the defendants "did conspire . . . to organize the Communist Party of the United States of America, a . . . group . . . of persons who teach and advocate the overthrow . . . of the Government . . . by force and violence, and . . . to advocate and teach the duty and necessity of overthrowing . . . the Government . . . ." N.Y. Times, Oct. 14, 1949, p. 13, col. 1. The Dennis prosecution was only the second under the statutory provisions involved. The first prosecution, that of the Minnesota Trotskyites, was not passed upon by the United States Supreme Court, Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943). The trial took place several months before the United States entered World War II. Socialist Workers' Party leaders in Minneapolis were convicted for conspiracy to advocate overthrow of government and insubordination in the armed forces, a charge fully supported by the evidence. The Court of Appeals relied on Gitlow v. New York, 268 U.S. 652 (1925).

[94]See Jackson, J., dissenting in Beauharnais v. Illinois, 72 Sup. Ct. 725, 747 (1952).

[95]The entire problem is ably discussed in MILLER, CRISIS IN FREEDOM (1951).

[96]See discussion of the Virginia and Kentucky Resolves, MILLER, CRISIS OF FREEDOM 169 (1951).

radicals essentially alone[97] until it joined with state governments during World War I to enforce laws against spies and malefactors.[98] Later, in the twenties, both levels of government acted to subdue Bolshevists.[99] *Schenck v. United States,*[100] the federal case, and *Gitlow v. New York,*[101] the state case, invite re-examination. In both cases all of the justices recognized that state and federal governments can, at least under certain conditions, limit speech. Holmes and Brandeis wished to apply the clear and present danger test to both situations. A unanimous Court in *Schenck* agreed to this proposition, but found that measured by it the speakers could still be convicted. In *Gitlow,* however, the application of the rule, as Holmes illustrated in his dissent, required the reversal of the conviction; consequently, the Court rejected the rule as applicable to the Gitlow type of situation, drew a fine distinction between *Gitlow* and *Schenck,*[102] and upheld

[97]This does not take into account a brief interlude of Civil War excesses; see *Ex parte* Milligan, 4 Wall. 2 (U.S. 1866).

[98]The Espionage Act of June 15, 1917, prohibiting conspiracies and attempts to obstruct recruiting and enlistment, gave rise to a number of federal prosecutions, including Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919). The only case arising under the Espionage Act during World War II to reach the Supreme Court was Hartzel v. United States, 322 U.S. 680 (1944).

[99]The two landmark cases that sustained state convictions under statutes outlawing advocacy of violent overthrow are Gitlow v. New York, 268 U.S. 652 (1925), and Whitney v. California, 274 U.S. 357 (1927). *But cf.* Stromberg v. California, 283 U.S. 359 (1931); Fiske v. Kansas, 274 U.S. 380 (1927). Congress, however, rejected all proposed peacetime sedition laws; federal suppression was restricted to deportation and censorship in the customs; see CHAFEE, FREE SPEECH IN THE UNITED STATES 169, 442 (1941).

[100]249 U.S. 47 (1919), affirming the conviction under federal law of a group of radicals for conspiring to cause insubordination in the armed forces and to obstruct recruiting. *Schenck* was the first important free speech case decided by the United States Supreme Court.

[101]268 U.S. 652 (1925), affirming a conviction under a state anti-anarchist statute for circulating writings urging the necessity of militant revolutionary socialism. There was no evidence that anyone was actuated by the publications. The statute was similar to the Smith Act, upon which were based the convictions in Dennis v. United States, 341 U.S. 494 (1951). The Smith Act goes further, however, in that it makes conspiracy to advocate violent overthrow of government a criminal offense.

[102]In *Schenck* the defendant had used specific language; a statute forbade inciting insubordination in the armed forces; the connection between the language and the insubordination could be tested by the phrase "clear and present danger."

the conviction on the ground that a state can suppress speech as long as the regulation is "reasonable."

Under the chief justiceship of Hughes the Court, for the first time, began to strike down statutes that regulated speech and press.[103] Although it declared no federal regulation invalid as an abridgement of speech, the implication of the cases involving state regulations clearly suggested that federal restrictions would be tested similarly. From these and later cases the doctrine of preferred position emerged.[104] It expresses itself in a two-fold manner: (a) statutes regulating speech will be carefully searched for invalidity rather than presumed to be valid as in the *Gitlow* case; (b) if the statute or regulation survives the presumption of invalidity, the speaker is nevertheless free to talk unless his words create a clear and present danger.

Against this background it is desirable for the sake of clarity to analyze the various opinions in *Dennis*. The decision soundly jarred the clear and present danger test. Although during the past three terms the justices have used the phrase in only four cases,[105] the

The *Schenck* restriction on speech was tested under the First Amendment; that in *Gitlow* under the Fourteenth Amendment. In *Gitlow* the statute prohibited the language itself; consequently, the Court reasoned, the clear and present danger test was inapplicable, since the state can reasonably prohibit language that might tend to cause violent overthrow of the government. This distinction is accepted by Vinson, C.J., in Dennis v. United States, 341 U.S. 494, 506 (1951). For a discussion of the respective powers of federal and state governments to punish crime and suppress violence, see Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule*, 38 VA. L. REV. 143, 149 (1952).

[103]Stromberg v. California, 283 U.S. 359 (1931) (display of red flag as symbol of opposition to organized government); Near v. Minnesota, 283 U.S. 697 (1931) (scandalous newspaper articles); DeJonge v. Oregon, 299 U.S. 353 (1937); Lovell v. Griffin, 303 U.S. 444 (1938) (distribution of handbills); Schneider v. Irvington, 308 U.S. 147 (1939) (door-to-door solicitation).

[104]See note 74 *supra*.

[105]Beauharnais v. Illinois, 72 Sup. Ct. 725 (1952) (group libel); Dennis v. United States, 341 U.S. 494 (1951) (Communist conspiracy); Feiner v. New York, 340 U.S. 315 (1951) (street-corner speech); American Communications Ass'n CIO v. Douds, 339 U.S. 382 (1950) (non-Communist oath). Cases not using the phrase: Burstyn, Inc. v. Wilson, 72 Sup. Ct. 777 (1952) (movie censorship); Harisiades v. Shaughnessy, 72 Sup. Ct. 512 (1952) (alien deportation); Adler v. Board of Educ., 72 Sup. Ct. 380 (1952) (school teacher's non-Communist oath); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (subversive organization listing by attorney general); Garner v. Board of Public Works, 341 U.S. 716 (1951) (city employees' non-Communist oath); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (election candidates' non-Communist disclosure); Breard v. Alexandria, 341 U.S. 622 (1951) (ordinance prohibiting door-to-door solicitation); Niemotko v.

rule has doubtless been a brooding omnipresence in their minds; and in *Dennis* all five opinions, representing the eight participating justices, attempted to cope with and accepted, rejected, or modified the concept. The final result indicates that, concerning this test, something new has been added or much has been taken away.

The Chief Justice, for a plurality of the Court, emphasizes first the conceded power of Congress to prohibit acts intended to overthrow the Government by force and violence. He underscores the purpose of the statute: it is not to prohibit change but to require that the change be made through constitutional procedures. The target of the prohibition is not discussion but advocacy of a serious evil. Overlooking the difficulty of this dichotomy,[106] he attempts, secondly, to calibrate the clear and present danger slide rule for use in the case at hand. Drawing on six overthrow-by-violence cases from the past, including *Schenck,* he discovers that in each of these situations the defendants were guilty of overt acts and that the difference between the majority and the minority views arose over the quantum of evidence necessary to show a clear and present danger to the safety of the Government.[107] In three of these cases Holmes and Brandeis dissented, and the Chief Justice seeks to minimize these dissents as differing only in degree and not involving any divergence of principle. He further argues that the greater menace of Communist Party tactics today lessens still more the slight differences in the opinions of more than twenty years ago. Thirdly, having committed himself to follow the general learning of the rule, he feels obliged to explain his divergence from it; for, since no one suggests that the activity of the eleven Communist Party members posed an imminent danger — as distinct from probable danger — of overthrow

Maryland, 340 U.S. 268 (1951) (Bible talks in city parks); Kunz v. New York, 340 U.S. 290 (1951) (street-corner speech); Hughes v. Superior Ct., 339 U.S. 460 (1950) (picketing); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950) (picketing); Building Serv. Employees Union v. Gazzam, 339 U.S. 532 (1950) (picketing); Cole v. Arkansas, 338 U.S. 345 (1949) (picketing). Jackson, J., dissenting in Kunz v. New York, *supra* at 300, thought it "peculiar that today's opinion makes no reference to the 'clear and present danger' test."

[106]One writer criticizes the Court's attempt "to make constitutional protection as large as discussion but not as large as advocacy." Antieu, *Dennis v. United States—Precedent, Principle or Perversion?,* 5 VAND. L. REV. 141, 148 (1952). *Cf.* Holmes, ". . . the only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." Gitlow v. New York, 268 U.S. 652, 673 (1925).

[107]See cases cited note 98 *supra.*

of the United States Government,[108] a strict application of the rule to the facts logically demands acquittal.

The Chief Justice therefore responds with the most law-changing paragraph in the opinion; in it he adopts the interpretation of the Court of Appeals by Chief Judge Learned Hand. Courts must ". . . ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[109] This statement of the text, as one commentator puts it, produces what may be called a "perhaps and probable" test.[110] As a logical result of this viewpoint, persons advocating ideas that may lead to unlawful acts can apparently be placed in jail prior to the time their advocacies indicate success. The United States will not wait until revolutionary dynamite is ready to explode before it snuffs out the fuse. And all of this is explained within the framework of the clear and present danger rule, which has turned out to be anything but a semantic strait jacket![111]

The verbose concurrence of Mr. Justice Frankfurter has been dubbed "symptomatic of the intellectual liberal in our times, torn between opposing absolutes."[112] Boiled down, it is the same position he took in *Feiner* when a state rather than a federal regulation was involved. He argues that the First Amendment does not prohibit a balancing of competing interests; primary responsibility for adjusting these interests belongs to Congress; the right of a government to maintain its existence, an important aspect of sovereignty, is the stronger of the competing interests. Consequently, since Congress has not acted unreasonably, the Court should not intervene. He is consistent here with his concern to balance interests in picketing cases, breach of peace cases, or, for that matter, interstate commerce cases.[113] Further, his opinion reflects admirable frankness in refusing

[108]See Douglas, J., dissenting in Dennis v. United States, 341 U.S. 494, 581 (1951). The Government admitted at argument that the traditional application of clear and present danger would call for reversal, 19 U.S.L. WEEK 3166 (1951); Note 65 HARV. L. REV. 107, 130 (1950).

[109]Dennis v. United States, 341 U.S. 494, 510 (1951).

[110]Antieu, *Dennis v. United States—Precedent, Principle or Perversion?*, 5 VAND. L. REV. 141, 143 (1952).

[111]The phrase "semantic straitjacket" was coined by Vinson, C.J., in Dennis v. United States, 341 U.S. 494, 508 (1951).

[112]Frank, *The United States Supreme Court: 1950-51*, 19 U. OF CHI. L. REV. 165, 223 (1952).

[113]See Frankfurter, J., dissenting in Hood & Sons v. DuMond, 336 U.S. 525, 564 (1949).

to rewrite the clear and present danger rule to cover an entertainable probability. His concurrence closely resembles the opinion of the majority of the Court in *Gitlow*. It was from this reasoning that Holmes and Brandeis dissented; it was the avoidance of this reasoning that in part caused Chief Justice Vinson to recast the law.

Indeed, the Frankfurter concurrence in *Dennis* and the opinion of the Chief Justice raise the question why the *Dennis* case was not decided on the basis of *Gitlow*. Professor Corwin suggests that the long opinions and rationalizations result from the desire of the Court to treat an important problem with deference.[114] Another view might be that the Court considered much of *Gitlow* overruled *sub silentio* to make way for the emergence of the Holmes dissent, and thought it better to start again from scratch. In fact, the attempt of the Chief Justice to explain the difference between the Holmes dissent and the present holding buttresses the notion that the *Gitlow* majority is no longer persuasive and that the *Gitlow* dissent is law, at least as recast by Judge Hand.

There is a third possibility, however, namely, that the Court may recognize that *Gitlow* is applicable, if at all, to state activity and cannot be applied mechanically to permit restrictions in the federal field. In *Beauharnais,* for example, Mr. Justice Jackson envisaged a vast variety of situations that could be limited by state action and only a few by Congress. He spoke tellingly of the limitations that Holmes placed upon his own rule of clear and present danger to the effect that a distinction might properly be drawn between an attempted abridgment of speech by a state government and an attempted abridgment by Congress.[115] In other words, *Gitlow* may do for state courts; the acceleration of Communism since 1925 might, were Holmes living, persuade him to join the *Gitlow* majority to solve a 1952 situation; but the Smith Act is federal legislation and should be interpreted by a strict application of the First Amendment.

In concurring in *Dennis,* however, Mr. Justice Jackson does not rely on his *Beauharnais* preoccupation with federal and state power; instead he flatly rejects the clear and present danger test for use in all Communist conspiracy cases. In terms of Table I he places Communist conspiracy in the slot of nonprotected speech. He leaves clear

[114]Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952).

[115]72 Sup. Ct. 725, 752 (1952) (dissenting opinion). See Brandeis, J., concurring in Whitney v. California, 274 U.S. 357, 374 (1927).

and present danger language for use "in the kind of case for which it was devised,"[116] such as a hot-headed speech on a street corner, a red-banner parade, flag-salute refusals, or the circulation of a few incendiary pamphlets. To sustain the conviction of the Communist Party conspirators he would rely on the law of conspiracy, which alone can be a crime apart from the consummation of its purposes. A crime in and of itself pre-empts the application of clear and present danger considerations. To bolster this technical demonstration is the earthy realization that Communists, like wayward children, cannot expect the prizes if they will not play the game.

Mr. Justice Jackson drew a majority over to his view on Communism in the context of resident aliens. In *Harisiades v. Shaughnessy*[117] he rejects any assumption that the denial of the right to teach violent overthrow is also a denial of free speech. In admitting that it is no small task to draw the line at which advocacy of political methods shades into incitement to violence, he argues that the Court must nevertheless make that distinction. Obviously referring to the preferred-position view of Justices Black and Douglas, he finds it equally undesirable to permit incitement to violent overthrow until it seems certain of immediate success.

Accepting in this one instance these views, the majority realizes that the problem involves an alien, not a citizen. Since the Court has consistently indicated that Congress can place any limitation it pleases on the entry of aliens,[118] Congress can certainly deport Communist aliens. Much of the Jackson language in *Harisiades* can be taken as pure garnishment; much, however, must mean that singly or in groups Communist speech officially advocating violent over-

[116]341 U.S. 494, 568 (1951) (concurring opinion).

[117]72 Sup. Ct. 512 (1952). An alien, thirty years a resident of the United States, was ordered deported for Communist Party membership which had terminated prior to 1940. The Government made no effort to show any present or contemplated danger from his activities; the majority of the Court, however, found no violation of freedom of expression. Douglas, J., joined by Black, J., conceded in dissent that there would be no objection to deportation if a hearing showed the alien to be dangerous and hostile to the United States Government, but he pointed out that Congress did not proceed by that standard.

[118]Chae Chan Ping v. United States, 130 U.S. 581 (1889) (Chinese exclusion); see Boudin, *The Settler within Our Gates,* 26 N.Y.U.L. REV. 266 (1951). Murphy, J., concurring in Bridges v. Wixon, 326 U.S. 135, 166 (1945), asserted that the clear and present danger doctrine applies to deportation proceedings notwithstanding the fact that the United States may deny entry without being compelled to justify the exclusion.

throw of any other type of government is ipso facto outside all legal protection and is unprotected speech.

Justices Black and Douglas, dissenting in *Dennis,* lash out in righteous indignation against the complete rejection of the preferred-position doctrine and mutilation of the clear and present danger rule.[119] Stressing that the Court has just affirmed the convictions of persons who had said and written nothing but who had planned to talk at a later date, the two dissenters charge that the Court has abandoned all principles of free speech. Douglas, in lawyerlike fashion, marshals the facts and precedents to urge that the conviction fail. He recognizes that freedom to speak is not absolute and that Congress can prevent seditious conduct, but he finds neither a clear and present danger as Holmes defined it nor any conspiracy for the present overthrow of the United States Government. Both dissenters imply an awareness of the sheer hopelessness of an immediate return to those older opinions that captured the language and substance of the Holmes-Brandeis position; but in concluding passages each Justice reaffirms his faith, refuses to recant, and — as the senior justice puts it — hopes that "this or some other Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[120]

Taken as a whole, the case is a self-imposed limitation on judicial review. During his tenure as chief justice Marshall once wrote that it is emphatically the province and duty of the judiciary to say what the law is; but, concerning free speech cases, *Dennis* holds that the law is whatever Congress says it is, as long as Congress is reasonable. The decision has been assailed as a restriction unprecedented in the United States on the right to hold opinions and express them — "a disaster in the history of democracy."[121]

The limitation of speech in *Dennis* was foreshadowed by *American Communications Association CIO v. Douds,*[122] which, however,

[119]341 U.S. 494, 579 (1951); see note 108 *supra.*

[120]341 U.S. 494, 581 (1951) (dissenting opinion).

[121]Frank, *The United States Supreme Court: 1950-51,* 19 U. OF CHI. L. REV. 165, 189 (1952).

[122]339 U.S. 382 (1950). The statutory provision requires the filing of a non-Communist affidavit by officers of any union wishing to utilize the facilities of the National Labor Relations Board. The legislative objective is the prevention of political strikes instigated by Communist infiltrators into union leadership. The means to the end is the withholding of governmental privileges from Communist-led unions.

is almost a subject unto itself. In brief, *Douds* held that labor unions cannot share in the benefits of favorable labor legislation if they maintain Communist Party officers; that Congress can regulate commerce even though to some degree this regulation affects speech. Although the act of Congress imposes no punishment and does not in fact directly limit speech, the result of the decision causes Communist labor union leaders to lose their jobs because of their beliefs. In a more important sense, *Douds* illustrates a growing body of doctrines and practices that indirectly limit speech. Another example of these indirect restraints is the attempt by state governments to insure that their schools are free from Communist Party teachers[123] and that their city employees have no subversive affiliations.[124] The rationale of these cases is that the problem is not one of speech at all; it smacks somewhat of the old Holmesian maxim that no man has a constitutional right to be a policeman.[125]

In one other instance, *Joint Anti-Fascist Refugee Committee v. McGrath*,[126] the Federal Government sought to limit indirectly free speech, or, more specifically, freedom of belief. Here, however, the Court timorously invalidated actions of the attorney general, who in response to Congressional demands had compiled a list of dangerous organizations as an aid in hiring and firing subversive bureaucrats. Several organizations on this list complained that not only were they denied a hearing but that publication in effect punished their members for political beliefs.

The Court split badly. Only one opinion, Reed's dissent, got as many as three votes. Together with Vinson and Minton, he denied completely the allegations of the organizations, and particularly stated that no free speech issue was apparent. Burton, joined by Douglas, sustained an injunction in favor of the organization and read the

[123]Adler v. Board of Educ., 72 Sup. Ct. 380 (1952), upheld a law disqualifying from school employment any person who advocates or is a member of an organization which advocates violent overthrow of government. Black, in dissent, said despairingly, "This is another of those . . . enactments . . . which make it dangerous to think or say anything except what a transient majority happen to approve at the moment . . . ." *Id.* at 387.

[124]Garner v. Board of Public Works, 341 U.S. 716 (1951). An ordinance requires every city employee to swear that since a date five years prior to the effective date of the ordinance he has neither espoused forceful overthrow of government nor affiliated with a group advocating such aims. *Accord,* Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

[125]McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

[126]341 U.S. 123 (1951).

Court a lesson in pleading. He argued that the attorney general by his demurrer admitted the allegations that the organizations were blameless. Of course, the listing of admittedly innocent organizations is beyond the scope of the power conferred upon the attorney general by the appropriate executive order. Although not accepting this reasoning, Frankfurter and Jackson, in separate concurrences, asserted that these listings violate the due process clause of the Fifth Amendment in that the organizations were placed on the list without a fair hearing. Black, with indirect support from a separate opinion by Douglas, considered the case in free speech terms and, as had Judge Edgerton in the court of appeals,[127] concluded that the executive branch abridged speech, since the First Amendment despite its language applies not only to Congress but to all branches of the Federal Government.

It was therefore an unusual coalition that on sundry grounds reversed the executive. The thought, however, that the Court was tightening its control over civil liberties perished with a subsequent case,[128] decided 4-4 without opinion, upholding the entire loyalty program, of which the listing by the attorney general is a part.

The most unusual twist in this field of indirect limitations on speech came last year in *Breard v. Alexandria,*[129] which distinguished to death a similar 1943 adjudication.[130] In the earlier case Mr. Justice Black, for a Court including such well-known adherents to the preferred-position doctrine as Stone, Douglas, Murphy, and Rutledge, ruled invalid as an invasion of free speech and press an ordinance prohibiting door-to-door solicitation without prior consent of the occupant. The facts of the 1943 decision involved Jehovah's Witnesses who were seeking to distribute religious handbills. Reed dissented, with Roberts and Jackson, on the ground that no invasion of free speech or press was discernible; ideas could still be expressed elsewhere without violating the privacy of the home. In *Breard* Reed was able to get a majority composed of himself, Jackson, Frankfurter,

[127]177 F.2d 79, 84 (D.C. Cir. 1949) (dissenting opinion). United Public Workers v. Mitchell, 330 U.S. 75, 94 (1947), implies that the First Amendment forbids not only Congress but all branches of the Federal Government to abridge free speech.

[128]Bailey v. Richardson, 341 U.S. 918 (1951) (dismissal of government employee on grounds of disloyalty sustained).

[129]341 U.S. 622 (1951), 5 U. OF FLA. L. REV. 196 (1952). An ordinance forbade solicitors to approach homes unless invited. Defendant was a magazine subscription salesman.

[130]Martin v. City of Struthers, 319 U.S. 141 (1943).

and three Truman appointees to reverse essentially the older Black opinion. Actually, the opinion did not gainsay the right of persons to distribute religious tracts without prior permission from each householder, but it clearly upheld city ordinances that prohibit newspaper and magazine vendors from house-to-house soliciting.[131] Chief Justice Vinson, in his preoccupation with interstate commerce,[132] found that the regulation was an undue burden on it; but Justices Black and Douglas, true to form — and, in this case, precedent — found at least an indirect limitation on freedom of expression.

State and Federal Distinctions

Table II sets out the number of times the Court during the past three terms sustained restrictions on speech; the number of times it refused to sustain a restriction; and the nature, federal or state, of the restriction adjudicated.[133]

TABLE II

TOTAL (17 cases)		STATE REGULATIONS (12 cases)		FED. REGULATIONS (5 cases)	
Sustained	Not Sustained	Sustained	Not Sustained	Sustained	Not Sustained
13	4	9	3	4	1

This comparative nudity of numbers contrasted with the diverse

[131]The Florida Court considered the problem one of private rather than public nuisance, of tort rather than criminal law, and declared a similar ordinance violative of the Florida Constitution, Prior v. White, 132 Fla. 1, 180 So. 347 (1938).

[132]*Cf.* American Communications Ass'n CIO v. Douds, 339 U.S. 382 (1950).

[133]The following cases were not included in this table but are possibly pertinent to the free speech problem: Public Util. Comm'n v. Pollak, 72 Sup. Ct. 813 (1952) (transit radio); Geuss v. Pennsylvania, 72 Sup. Ct. 360 (1952) (sound truck); Bailey v. Richardson, 341 U.S. 918 (1951) (government loyalty program); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (non-Communist oath); Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (contempt). In these cases the Court denied certiorari, dismissed appeal, or did not develop speech issues in the opinion; the balance of figures is not altered by these omissions. See Harper, *What the Supreme Court Did Not Do During the 1950 Term,* 100 U. of Pa. L. Rev. 354 (1951).

rationalizations of the several opinions indicates a wide area of agreement and a reasonable fellowship in judgment; the Court struck down regulations in only four cases.[134]

TABLE III

	Sustaining Regulation	Not Sustaining Regulation	Sustaining State Regulation	Not Sustaining State Regulation	Sustaining Federal Regulation	Not Sustaining Federal Regulation
Vinson	13	4	8	4	5	0
Burton	12	4	8	4	4	1
Clark	11	3	9	3	2	0
Minton	11	5	7	5	4	0
Reed	11	6	7	5	4	1
Jackson	11	6	9	3	2	3
Frankfurter	10	7	7	5	3	2
Black	4	13	3	9	1	4
Douglas	0	12	0	8	0	4

Table III more truly suggests the present state of confusion. Douglas, for example, voted in no instance to uphold regulations of speech; the chief justice voted for them on three fourths of the ballots.

But, even so, charts do not tell the whole story;[135] they eliminate the seething resentments, the bitter debates, the hackneyed norms and the search for new ones that characterize the struggle. "All declare for liberty and proceed to disagree among themselves as to its

[134]Burstyn, Inc. v. Wilson, 72 Sup. Ct. 777 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951). The language in the majority opinions in the last of these cases suggests that the regulating authorities can still achieve their wishes by drafting a better statute, and the *Burstyn* case forebodes no major reinforcement to the deteriorating armor of free speech. See note 65 *supra.*

[135]*E.g.*, Jackson, J., dissenting in Beauharnais v. Illinois, 72 Sup. Ct. 725, 746

true meaning."[136] In drawing conclusions the student must depend on enlightened guesses and subjective surmises, of which we offer three:

1. Although old phrases may remain, three problems heretofore treated as speech problems will in actuality be treated as problems unto themselves: (a) picketing; (b) nonprotected speech, such as libel, group libel, violence, obscenity; (c) indirect limitations, such as right to employment, right to labor legislation benefits, rights of resident aliens.
2. In the cases still to be treated as free speech problems, the clear and present danger test will be ornamental rather than basic to the decision; the preferred position thesis will not be employed in the majority of opinions; and, although the new doctrine that must ultimately emerge to explain the recent cases is not yet clearly apparent, the Court will allow wide power to the states and to Congress to pass "reasonable" legislation for the control of speech.
3. The Court in speech contexts will probe federal restrictions and state restrictions with essentially the same standards.

Some writers find that the present Court is retreating in its defense of civil liberty;[137] one or two writers accept the cases, more or less willingly, as understandable and not necessarily unfortunate.[138] Divergence of view depends on the predilection of the observer as to the function of the Supreme Court. The essential role of the Court, we submit, is that of umpire to the federal system.[139] We give content to this figure of speech – drawn by Professor Braden largely to illustrate the commerce clause – in a due process context.

Specifically, this function suggests that the Court review a state

(1952), voted not to sustain the regulation but on grounds easily curable by the regulating authorities. It might have been more accurate to place his vote as one sustaining the regulation.

[136]Reed, J., in Breard v. Alexandria, 341 U.S. 622, 625 (1951).

[137]Frank, *The United States Supreme Court*, 19 U. OF CHI. L. REV. 165 (1952); Murphy, *Free Speech and the Interest in Local Law and Order*, 1 J. PUB. L. 40 (1952).

[138]*E.g.*, Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952); Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

[139]See Braden, *Umpire to the Federal System*, 10 U. OF CHI. L. REV. 27 (1942).

regulation as a problem in the allocation of power and invalidate it only if the state has acted arbitrarily or unreasonably. Similar tests used by the Court to judge the regulations of states in the field of interstate commerce, when permissible, or state regulation of its economy as limited by the due process clause should be followed in speech cases. Other issues, such as public order against personal liberty and privacy against free speech, should be left to the state courts.[140]

The Frankfurter solution logically follows as the best one offered by members of the Court as pertains to state regulation of speech. His view, as well as the results, but not the reasoning, of those justices who still adhere to clear and present danger language but reject the preferred position interpretation,[141] permits a maximization of power at the state level and a minimization of supervision by the federal judiciary; accordingly it supports a national tradition of variety rather than similarity, diversity rather than uniformity. Under these holdings the Court does not say, as it did in 1922, ". . . neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes any restrictions about 'freedom of speech' . . ."[142] but it reaches almost that point. In effect the Court is saying

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[140]The eminent scholar Charles Warren, writing in 1926, foresaw a danger to the federal system arising from the *Gitlow* dictum, which siphoned the First Amendment speech guaranty into the Fourteenth Amendment. "One may well view with some apprehension the field of interference with State legislation which a logical extension of the *Gitlow* case doctrine must inevitably lead the Court. For, if as now assumed, the right of freedom of speech contained in the First Amendment to the Federal Constitution is a part of a person's 'liberty' protected against State legislation by the Fourteenth Amendment, then the right of free exercise of his religion contained in the First Amendment must be also a part of a person's 'liberty,' similarly protected against State action. And on this ground, the United States Supreme Court may be called upon to pass on State laws as to religion and religious sects—a subject which, of all others, ought to be purely the concern of the State and its own people, and in no wise subject to interference by the National Government . . . . [T]he simple word 'liberty' will have become a tremendous engine for attack on State legislation—an engine which could not have been conceived possible by the framers of the first Ten Amendments or by the framers of the Fourteenth Amendment itself . . . ." Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 458, 462 (1926).

[141]The use of the term "preferred position" by a justice does not necessarily mean that he adheres to it. See Reed, J., in Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

[142]Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

that it will not limit the states except for unreasonable and arbitrary action. More precise it will not be, but the shift is plain.

In the federal sphere the Frankfurter solution, which makes little distinction between a state law and an act of Congress, is not persuasive, though predominant. Unless judicial review is to be abandoned, the Court has a duty to construe federal regulations in the same manner that the state courts construe state regulations. In judging Congressional acts the question of allocating power would seldom arise.[143] Indeed, the Supreme Court has a higher obligation, in view of the First Amendment. It is the rejection of responsibility by the Court that leads to *Dennis,* a decision that is objectionable in that it bypasses the First Amendment, overlooks an early lesson in history, and disregards the learning of former justices as expressed in the clear and present danger rule. It is small consolation that at least two voices demurred. Ironically, the result of the moment could have and perhaps should have been obtained by state action.

One author insists that the states will not adequately safeguard free speech and that the Supreme Court must therefore jump into the breach.[144] Although one might reply that *Dennis* is harsher than *Feiner,* it is true that much work needs to be done by state bars and benches and other powerful institutions[145] to insure greater safeguards to this historic right. Courageous men and women should assert the right of free speech in their individual stations. These considerations, however, raise different questions altogether, to be dealt with at other times and places. As the deacon said of the preacher who left the customary general exhortation to righteousness in order to discuss the evils within his congregation, "He done quit preachin' and gone to mindin' other folks' business."

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[143]A power problem might present itself in a context such as American Communications Ass'n CIO v. Douds, 339 U.S. 382 (1950), in which the restriction on expression depends on the grant of power to Congress to regulate interstate commerce. A different factual situation might raise the question whether the speaker is in interstate commerce and under federal authority. Another aspect of federal allocation of power is that among branches of the Federal Government, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); see especially Edgerton, J., dissenting in the Court of Appeals, 177 F.2d 79, 87 (D.C. Cir. 1949).

[144]Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms,* 4 VAND. L. REV. 620, 642 (1951); *cf.* Bartley, *Federal Review of State Criminal Proceedings,* 5 U. OF FLA. L. REV. 119 (1952).

[145]See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 219 (1943).