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## BOWING OUT "CLEAR AND PRESENT DANGER"

"EVERY institution," wrote Emerson, "is the lengthened shadow of one man." The observation is nowhere borne out more strikingly than in judicial doctrines, which often exert an influence truly institutional in scope. An outstanding example in the field of American public law is Chief Justice Marshall's famous dictum that "the power to tax is the power to destroy."<sup>1</sup> Reflecting the lesson that Marshall drew from his experience as a young soldier under a government whose activities were repeatedly balked by local selfishness, this dictum came ultimately, through his dominant agency, to furnish the core of an important chapter of our constitutional law. A comparable instance in recent times is afforded by Justice Holmes' personal responsibility for the "clear and present danger" formula, a formula which illustrates a facet of its distinguished author's education and habit of mind.

Mr. Biddle tells in his little book on Holmes how, when the Justice was a lad, his father, the once celebrated "Autocrat of the Breakfast Table," was accustomed to reward "Wendell" with an extra dab of marmalade "for saying

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<sup>1</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579 (U.S. 1819).

what the Governor [the Autocrat] thought was worth saying. . . ."<sup>2</sup> The result of this matutinal drill in the making of bright remarks was a pronounced turn for epigram, which sometimes indeed took on the more portentous tone of oracle. Was the "clear and present danger" formula, we may ask, one of Holmes' more fortunate or one of his less fortunate ventures in epigram-making? As we shall see, the Justice himself appeared at first to take his brain-child very casually, until, as we may surmise, somebody alerted him to its possibilities, thereby converting a biographical detail into constitutional history.

### I.

As it finally matured into a doctrine of constitutional law, the "clear and present danger" formula became a measure of legislative power in the choice of values which may be protected against unrestricted speech and publication. Before an utterance could be punished by government, it must have occurred in such circumstances or have been of such a nature as (1) to create a "clear and present danger" that (2) it would bring about "substantive evils" within the constitutional power of government in the United States to combat; and on both these points the Supreme Court of the United States was, by virtue of the protection which is today thrown about freedom of speech and press by the First and Fourteenth Amendments, the final judge.

The phrase "clear and present danger" first appeared in Holmes' opinion for a unanimous Court in *Schenck v. United States*,<sup>3</sup> which was decided March 3, 1919. Four years prior the same Justice had written the opinion, also for a unanimous Court, in *Fox v. Washington*,<sup>4</sup> where the question at issue was the constitutionality of a Washington statute which made it unlawful to publish or circulate any matter

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<sup>2</sup> BIDDLE, MR. JUSTICE HOLMES 27 (1942).

<sup>3</sup> 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

<sup>4</sup> 236 U.S. 273, 35 S. Ct. 383, 59 L. Ed. 573 (1915).

"advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime. . . ." <sup>5</sup> The defendant had been convicted of publishing an article which was sharply critical of those who opposed nudism. According to Justice Holmes, this article "by indirection but unmistakably . . . encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury so found." <sup>6</sup> Stating further that "We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of the law," <sup>7</sup> he brushed aside the argument that it infringed the constitutional guarantee of freedom of speech. Nothing was said about the degree of danger that breach of the law would result from the publication; nor was the question raised whether appearance in public in a decent minimum of clothing is a "substantive" value which government in the United States is entitled to protect. The plain implication is that incitement to crime or encouragement thereof is sufficient, without reference to its actual consequences. <sup>8</sup>

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<sup>5</sup> As quoted in *id.*, 236 U.S. at 275.

<sup>6</sup> *Id.*, 236 U.S. at 277.

<sup>7</sup> *Ibid.*

<sup>8</sup> In *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890), the question at issue was the constitutionality of a statute of the Territory of Idaho, providing that "no person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persons to become bigamists or polygamists or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust or profit within this Territory."

A unanimous Court held this enactment to be within the legislative powers which Congress had conferred on the Territory and not to be open to any constitutional objection. Said Justice Field for the Court:

"Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more

Did the Court, or did Justice Holmes himself, intend to depart from these *Fox* views in the *Schenck* case? Read out of context, the following passage,<sup>9</sup> in which the words "clear and present danger" were first used, suggests an affirmative answer:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

Reading these sentences, however, in light of the facts of the case and of other portions of the same opinion, we reach a different conclusion, as did the overwhelming majority of the Court itself as soon as its doing so became determinative. Defendants in *Schenck* had been convicted

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general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." 133 U.S. at 341-2.

There was no talk about the necessity for showing that the prohibited teaching, counselling, advising, etc., must be shown to have occurred in circumstances creating a "clear and present danger" of its being followed; or of monogamy being a value which government in the United States is authorized to protect.

<sup>9</sup> 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919). It should be observed in passing that advocates of "clear and present danger" always quote the part about "shouting fire in a theatre," but usually omit the reference to the *Gompers* case where speech was held restrainable in enforcement of an anti-labor injunction.

of a conspiracy to violate the Espionage Act of 1917<sup>10</sup> by attempting to cause insubordination in the armed forces and to obstruct recruiting. Pursuant to that conspiracy they had mailed to members of the armed forces circulars which criticized conscription in strong language and exhorted readers to assert and support their rights. Apparently these circulars did not in express terms counsel insubordination or obstruction to recruiting, nor was that result proved. Indeed, so far as the opinion discloses, no evidence was presented as to their possible or probable effect apart from their contents and the fact of their publication. This circumstance, however, did not trouble Justice Holmes who disposed of the point by saying:<sup>11</sup>

Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.

And he later added:<sup>12</sup> "If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime." In the final analysis the doctrine announced in the *Schenck* case is indistinguishable from that presented in *Fox*.

Within the next two weeks, two more convictions under the Espionage Act were also unanimously upheld in opinions written by Justice Holmes. These two pronouncements went far to dispel whatever impression may have been created by the earlier opinion that there is a constitutional requirement that "clear and present danger" of some "substantive evil" be proved where intent to incite a crime is found to exist. In *Frohwerk v. United States*,<sup>13</sup> the defendant was

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<sup>10</sup> 40 STAT. 217 (1917). This statute is now substantially embodied in 18 U.S.C. § 793 (Supp. 1951).

<sup>11</sup> 249 U.S. 47, 51, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

<sup>12</sup> *Id.*, 249 U.S. at 52.

<sup>13</sup> 249 U.S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919).

convicted of conspiring to violate the Espionage Act and of attempting to cause disloyalty, mutiny and refusal of duty in the armed forces by the publication of twelve newspaper articles criticizing this country's entry into the war and the conscription of men for service overseas. The claim of privilege under the First Amendment Justice Holmes brusquely rejected:<sup>14</sup>

With regard to that argument we think it necessary to add to what has been said in *Schenck v. United States* . . . only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

Of significance, too, in view of some things said later in the *Dennis* case,<sup>15</sup> is the following passage from the same opinion:<sup>16</sup>

It is said that the first count is bad because it does not allege the means by which the conspiracy was to be carried out. But a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose. That purpose could be accomplished or aided by persuasion as well as by false statements, and there was no need to allege that false reports were intended to be made, or made. It is argued that there is no sufficient allegation of intent, but intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it.

On the same day Justice Holmes also delivered the opinion in *Debs v. United States*,<sup>17</sup> sustaining a conviction for the same kind of offense. The charge arose out of a speech delivered by the defendant in which he extolled socialism and criticized the participation of the United States in

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<sup>14</sup> *Id.*, 249 U.S. at 206.

<sup>15</sup> *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

<sup>16</sup> *Frohwerk v. United States*, 249 U.S. 204, 209, 39 S. Ct. 249, 63 L. Ed. 561 (1919).

<sup>17</sup> 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919).

World War I. As in the preceding cases there was no explicit exhortation to any criminal offense. The principal points at issue concerned the weight and admissibility of evidence bearing upon the unlawful intent of Debs' address. The Court held <sup>18</sup> that the jury was warranted

. . . in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

In short, we find three cases, decided within a period of two weeks, in which convictions for violation of the Espionage Act were unanimously sustained for utterances of such general nature that they might all have borne innocent interpretations if made in other circumstances, but which were deemed to be unlawful because the circumstances warranted the finding that their probable and intended effect would be to obstruct the war effort. Furthermore, in the last two of these three cases we hear not a word about "clear and present danger."

Eight months later, however, the apparently forgotten phrase leaps suddenly into prominence in the dissenting opinion of Justice Holmes for himself and Justice Brandeis in *Abrams v. United States*.<sup>19</sup> The defendants were Russian sympathizers who called upon workers to stop producing munitions which, they asserted, were being used against Russia as well as Germany. The majority held that even though defendants' primary purpose was to prevent injury to the Russian cause, they were accountable for the easily foreseeable effects which their utterances were likely to produce in the way of obstructing the war effort against Germany.

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<sup>18</sup> *Id.*, 249 U.S. at 214-5.

<sup>19</sup> 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

The intention of Justice Holmes' dissent is ambiguous. At first he seemed to be basing his case on the statute alone. Thus he said: <sup>20</sup>

I am aware of course that the word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. . . . But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. . . . It seems to me that this statute must be taken to use its words in a strict and accurate sense.

But he soon transferred the discussion to the First Amendment, as to the bearing of which on the case he wrote: <sup>21</sup>

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . . It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable.

And being now in the full flood of composition, the Justice concluded his opinion with an appeal to history, as follows: <sup>22</sup>

Persecution for the expression of opinions seems to me perfectly logical. . . . But when men have realized that time

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<sup>20</sup> *Id.*, 250 U.S. at 626-7.

<sup>21</sup> *Id.*, 250 U.S. at 627-8.

<sup>22</sup> *Id.*, 250 U.S. at 630.

has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Certain questions arise: Did Justice Holmes, when he spoke of "persuasion to murder," mean successful persuasion? This is obviously something quite different from the "counselling of murder" which he said, in his *Frohwerk* opinion, that Hamilton and Madison never supposed could not be constitutionally punished. And was it his intention to assert it as a rule of constitutional law that the Court should disallow any act of Congress which is interpretable as punishing utterances that do not in its opinion produce a "clear and present danger" to an interest which it thinks of sufficient importance to deserve such protection? If so, how could he have said the *Frohwerk* and *Debs* cases were in his opinion correctly decided? And what did he mean by his suggestion that utterances which have "the quality of an attempt," to wit, of acts done for the purpose of committing a crime, but falling short of it, may be constitutionally punished? Was the suggestion intended to narrow still further the category of constitutionally restrainable utterances?

Coming then to the hortatory portion of the opinion — that concerning "fighting faiths" — did Justice Holmes mean that faiths are entitled to survive only so long as they don't fight, and that "the ultimate good desired" has always prevailed of its own inherent qualities without anybody fighting for it? And if so, how does this teaching square with the belief expressed by its author elsewhere that the "proximate test of excellence" is "correspondence to the actual equilibrium of forces in the community — that

is, conformity to the wishes of the dominant power"? <sup>23</sup> The answer is perhaps supplied in the following passage from the same Justice's dissent in the *Gitlow* case,<sup>24</sup> five years later: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

In short, the "ultimate good desired" and the triumph of destiny are one and the same thing, and the function of freedom of speech is to forward this triumph, not to block it, although just why destiny needs an assist does not quite appear. That the Constitution is an "experiment" need not be questioned; unquestionable too is the fact that its maintenance has not been achieved without a certain amount of fighting at times, in some of which the youthful Holmes himself bore a gallant part.

It should be noted that in his correspondence with Sir Frederick Pollock about *Abrams*, Holmes justified his dissent solely by reference to his reading of the word "intent" as used in the statute.<sup>25</sup> As to the "clear and present danger" formula he said not a word.

Between *Abrams* and Justice Holmes' retirement from the Bench, twelve years elapsed. In this interval he succeeded in enrolling only one other Justice under his banner, his fellow Bostonian and fellow graduate from Harvard Law School, Justice Brandeis, whose initial contribution to the discussion occurs in 1920 in connection with *Schaefer v. United States*.<sup>26</sup> Sustaining here a conviction based upon the publication of a series of newspaper articles which criticized the Government in its conduct of the war,

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<sup>23</sup> HOLMES, COLLECTED LEGAL PAPERS 258 (1920).

<sup>24</sup> *Gitlow v. New York*, 268 U.S. 652, 673, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

<sup>25</sup> 2 HOLMES-POLLOCK LETTERS 29-45 (Howe ed. 1941).

<sup>26</sup> 251 U.S. 466, 40 S. Ct. 259, 64 L. Ed. 360 (1920).

the majority used language quite similar to that employed by Holmes in the *Schenck* case. With respect to the contents of the articles, the Court, speaking by Justice McKenna, chanted the following answer: <sup>27</sup>

Coarse indeed, this was, and vulgar to us; but it was expected to produce, and it may be did produce, a different effect upon its readers. To them its derisive contempt may have been truly descriptive of American feebleness and inability to combat Germany's prowess, and thereby chill and check the ardency of patriotism and make it despair of success, and in hopelessness relax energy both in preparation and action. If it and the other articles . . . had not that purpose, what purpose had they? . . . Their effect or the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offense — their "intent" and "attempt," for those are the words of the law — and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny.

Justice Brandeis' *riposte* for himself and Holmes is launched from the latter's dictum in *Schenck*. This is asserted to be a "rule of reason" and the measure, as "declared by a unanimous Court," of the power of Congress to "interfere with free speech." The opinion continues: <sup>28</sup>

Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this court, one of degree; and because it is a question of degree the field in which the jury may exercise its judgment is necessarily a wide one. But its field is not unlimited. The

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<sup>27</sup> *Id.*, 251 U.S. at 478-9.

<sup>28</sup> *Id.*, 251 U.S. at 482-3.

trial provided for is one by judge *and* jury, and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and, if he fails to do so, it is the duty of the appellate court to correct the error. In my opinion, no jury acting in calmness could reasonably say that any of the publications set forth in the indictment was of such a character or was made under such circumstances as to create a clear and present danger, either that they would obstruct recruiting or that they would promote the success of the enemies of the United States.

What follows is a critical examination of the incriminating documents which seems to prove their gross misuse by the prosecution, effected with the aid and consent of the trial court. The necessity of invoking the "clear and present danger" formula to meet this situation is, however, left obscure. Justice Clarke also dissented, but on the ground that the proceedings constituted "a case of flagrant mistrial." He refused to concede that "the disposition of this case involves a great peril either to the maintenance of law and order and governmental authority on one hand, or to the freedom of the press on the other."<sup>29</sup>

## II.

In 1925 occurred *Gitlow v. New York*,<sup>30</sup> a pivotal case for two reasons. In the first place, the Court adopted, as it had in the *Fox* case, the assumption that the Fourteenth Amendment was intended to render the restraints imposed by the First Amendment on Congress available also against the states so far as freedom of speech and press are concerned. In the second place, the case involved the first peacetime prosecution for criminal anarchy. The New York criminal anarchy statute made it a felony for any person to

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<sup>29</sup> *Id.*, 251 U.S. at 501.

<sup>30</sup> 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force and violence. The defendant had participated in the publication of a left wing manifesto advocating "revolutionary mass action" for the purpose of conquering and destroying the parliamentary State and establishing Communism in its place. Since, according to the majority opinion, there was no evidence of any effect resulting from the publication and circulation of the manifesto, the jury's verdict of guilty imported a finding that the defendant had acted with unlawful intent in teaching and advocating unlawful acts for the purpose of overthrowing the government. So interpreted and applied, the statute was sustained by the Court, seven to two. Said Justice Sanford for the majority: <sup>31</sup>

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

The Court accepted the soundness of the rule that a state, in the exercise of its police power, may punish one who abuses the freedom of speech by utterances tending to corrupt public morals, incite to crime or disturb the peace.<sup>32</sup> All the more then may it punish utterances endangering the foundations of organized government: <sup>33</sup>

It [freedom of speech and press] does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. . . . And a State may

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<sup>31</sup> *Id.*, 268 U.S. at 666.

<sup>32</sup> *Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879 (1907); *Robertson v. Baldwin*, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897).

<sup>33</sup> *Gitlow v. New York*, 268 U.S. 652, 668, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. . . . In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.

Justice Sanford pointed out that the state, by enacting the statute, had determined that utterances advocating the overthrow of organized government by force and violence are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized under the police power. That determination, he added, "must be given great weight. Every presumption is to be indulged in favor of the validity of the statute."<sup>34</sup> He then continued:<sup>35</sup>

That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency.

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<sup>34</sup> *Ibid.* The Court also cited as authority *Mugler v. Kansas*, 123 U.S. 623 8 S. Ct. 273, 31 L. Ed. 205 (1887).

<sup>35</sup> 268 U.S. 652, 669, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

Moreover, the statute's validity being settled,<sup>36</sup>

. . . it may be applied to every utterance — not too trivial to be beneath the notice of the law — which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. . . . In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

The *Schenck* case Justice Sanford distinguished with the assertion that its "general statement" concerning "clear and present danger" had been intended to apply only to cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and had no application where the legislative body itself had "previously determined the danger of substantive evil arising from utterances of a specified character."<sup>37</sup>

Speaking for himself and Justice Brandeis, Justice Holmes dissented in an opinion of which the following passage is the material one:<sup>38</sup>

If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But

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<sup>36</sup> *Id.*, 268 U.S. at 670.

<sup>37</sup> *Id.*, 268 U.S. at 671.

<sup>38</sup> *Id.*, 268 U.S. at 673.

whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.

One comment is quite inevitable. The assertion that "every idea is an incitement" is manifestly irrelevant to the question whether incitement in the sense of an utterance counselling or encouraging the commission of a crime may be punished by the state. It is in fact no better than a pun, which another master of oracular discourse, the late Dr. Samuel Johnson, pronounced "the lowest form of wit." Certainly it is not impressive when appearing in the context of a judicial opinion, even as exhortation.

And again we find Justice Holmes singularly reticent on the subject of "clear and present danger" when discussing the case with Sir Frederick Pollock. In a letter written a week before the opinion was announced Holmes confessed: <sup>39</sup>

I am bothered by a case in which conscience and judgment are a little in doubt concerning the constitutionality under the 14th amendment of a State law punishing the publication of a manifesto advocating the forcible overthrow of government. . . . Such is the effect of putting a doubt into words that I turned aside from this letter and wrote my views which are now waiting to go to the printer. The theme is one on which I have written majority and minority opinions heretofore and to which I thought I could add about ten words to what I have said before.

His next letter to Pollock underscored the fact that his dissent was prompted largely by the impression that the publication was utterly futile. "My last performance during the term," he wrote, "was a dissent (in which Brandeis joined) in favor of the rights of an anarchist (so-called) to talk drool in favor of the proletarian dictatorship." <sup>40</sup> "Drool" — the publication was intrinsically contemptible, and beneath the notice of the law. Evidently "*de minimis*," not "clear and present danger," was the root-stem of this

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<sup>39</sup> 2 HOLMES-POLLOCK LETTERS 162 (Howe ed. 1941).

<sup>40</sup> *Id.* at 163.

dissent. Justice Stone, consistent champion of personal liberty, joined in the judgment of the Court.

Two years later occurred *Whitney v. California*.<sup>41</sup> Here the defendant had been found guilty of violating the California Criminal Syndicalism Act by wilfully assisting in organizing and becoming a member of a group organized to "advocate, teach or aid and abet criminal syndicalism."<sup>42</sup> It was not denied that the evidence warranted the jury in finding that the accused assisted in organizing the Communist Labor Party of California and that this party was organized to advocate and abet criminal syndicalism. She insisted, however, that the conviction was invalid because there was no showing of a specific intent on her part to join in the forbidden purpose. Holding that this was a question of fact foreclosed by the verdict of the jury, and consequently not open to review, the Supreme Court sustained the conviction. Its decision was unanimous, but Justice Brandeis wrote a separate concurring opinion in which Justice Holmes joined. A material passage reads as follows:<sup>43</sup>

Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

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<sup>41</sup> 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927).

<sup>42</sup> As quoted in *id.*, 274 U.S. at 360.

<sup>43</sup> *Id.*, 274 U.S. at 376.

It is somewhat hazardous to assess this collocation of sentences for its bearing on the topic here under discussion, but apparently there are two ideas present: First, that there is a "wide difference between advocacy and incitement" — that is, of or to illegal action — a proposition for which not one iota of supporting authority is offered and which is refuted again and again by the *usus loquendi* of the Court in the entire line of decisions reviewed above; secondly, that no utterance which the Court chooses to label "advocacy" may be constitutionally punished unless it was of immediate serious violence or unless the utterer was known to have a predilection for violence.

The opinion then proceeds: <sup>44</sup>

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Indulging the assumption that this passage was not written merely as exhortation, but with the serious intention of proposing a rule of constitutional law, we may well ask what it means? Apparently, it means that the ultimate test of the constitutionality of legislation restricting freedom of utterance is whether there is still sufficient time to educate the utterers out of their mistaken frame of mind, and the final say on this necessarily recondite matter rests with the Supreme Court!

Four years later, in *Stromberg v. California*,<sup>45</sup> both Justices Holmes and Brandeis joined in a decision which held the California Red Flag Law unconstitutional in so far as it prohibited display of such a flag as a symbol of peaceful

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<sup>44</sup> *Id.*, 274 U.S. at 377.

<sup>45</sup> 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931).

and orderly opposition to government by legal means and within constitutional limitations, but expressly found the statute valid in prohibiting display of a red flag as a stimulus to anarchistic action or as an aid to propaganda which amounted to advocacy of force or violence in overthrowing the government of a state. During the same period two other state court convictions for subversive utterances were reversed for lack of evidence proving that the defendant had actually advocated criminal conduct to effect industrial or political change.<sup>46</sup> But after the *Whitney* case, no talk about "clear and present danger" was heard for a full decade.

### III.

The formula achieved a second resurrection in 1937, in *Herndon v. Lowry*,<sup>47</sup> and at last in a majority opinion! The role which it played on this occasion was, however, a minor and quite dispensable one. Here a conviction under a state statute for an attempt to "incite insurrection" was reversed by a closely divided Court, on the ground that as construed by the state courts the act set up an unascertainable standard of guilt and thereby offended the Due Process Clause of the Fourteenth Amendment. Said Justice Roberts:<sup>48</sup>

The Act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function.

Nor was any specified conduct or utterance of the accused made an offense. In short, the "clear and present danger" formula is one of several elements which, independently of

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<sup>46</sup> *De Jonge v. Oregon*, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937); *Fiske v. Kansas*, 274 U.S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927).

<sup>47</sup> 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

<sup>48</sup> *Id.*, 301 U.S. at 261.

each other, will satisfy the constitutional requirement of certainty in defining an offense. In his 1951 Oliver Wendell Holmes Lectures at Harvard Law School,<sup>49</sup> former Justice Roberts does not mention *Herndon v. Lowry*.

Nevertheless, beginning with *Thornhill v. Alabama*,<sup>50</sup> decided in 1940, a majority of the Court frequently invoked the "clear and present danger" formula in nullifying state action, in fields unrelated to the advocacy of forbidden conduct: *e.g.*, laws prohibiting picketing, restricting the use of public places for propagating religious beliefs,<sup>51</sup> or requiring registration of labor organizers,<sup>52</sup> and judgments imposing sentences for contempt of court for criticism of judicial action.<sup>53</sup> The interest of these cases in the present connection is twofold: first, in many of them the Court reversed convictions on the ground that the interest which the state was endeavoring to protect was "too insubstantial to warrant restriction of speech,"<sup>54</sup> thus suggesting the converse tactic employed by the Chief Justice in his opinions in *American Communications Assn. v. Douds*<sup>55</sup> and in the *Dennis* case;<sup>56</sup> and secondly, they show a widening rift among the Justices touching the scope and constitutional basis of the "clear and present danger" doctrine prior to the case of the Eleven Communists.

This diversity of opinion among the Justices concerned the following three closely related topics: first, the restrictive force of the test; second, the constitutional status of freedom of speech and press; third, the kind of speech which

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<sup>49</sup> ROBERTS, *THE COURT AND THE CONSTITUTION* (1951).

<sup>50</sup> 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

<sup>51</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

<sup>52</sup> *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

<sup>53</sup> *Craig v. Harney*, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946); *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941).

<sup>54</sup> *Dennis v. United States*, 341 U.S. 494, 508, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

<sup>55</sup> 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

<sup>56</sup> *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

the Constitution is concerned to protect. On the first point the following passage from Justice Black's opinion in *Bridges v. California* is pertinent: <sup>57</sup>

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

With this should be compared the following words from Justice Frankfurter's concurring opinion in *Pennekamp v. Florida*,<sup>58</sup> which involved an issue closely related to the one dealt with in the *Bridges* case: <sup>59</sup>

"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. In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution. When those other attributes of a democracy are threatened by speech, the Constitution does not deny power to the States to curb it.

The second question, in more definite terms, is whether freedom of speech and press occupies a "preferred position" in the constitutional hierarchy of values so that legislation restrictive of it is presumptively unconstitutional. An important contribution to the affirmative view on this point is the following dictum written by Justice Cardozo in 1937: <sup>60</sup>

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<sup>57</sup> 314 U.S. 252, 263, 62 S. Ct. 190, 86 L. Ed. 192 (1941).

<sup>58</sup> 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946).

<sup>59</sup> *Id.*, 328 U.S. at 353.

<sup>60</sup> *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

. . . one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. . . . So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.

Touching on the same subject a few months later, Chief Justice Stone suggested a narrow scope for the operation of the presumption of constitutionality when legislation appears to be within a specific prohibition of the Constitution, "such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."<sup>61</sup> Developing this theme, the Chief Justice continued:<sup>62</sup>

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

But the most confident assertion of this position occurs in Justice Rutledge's opinion for a sharply divided Court in *Thomas v. Collins*, where it is said:<sup>63</sup>

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the

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<sup>61</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

<sup>62</sup> *Ibid.*

<sup>63</sup> 323 U.S. 516, 529-30, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

character of the right, not of the limitation, which determines what standard governs the choice. . . .

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

This was 1945. Four years later a majority of the Court, in sustaining a local ordinance, endorsed a considerably less latitudinarian appraisal of freedom of speech and press.<sup>64</sup> Thus while alluding to "the preferred position of freedom of speech in a society that cherishes liberty for all," Justice Reed went on to say that this "does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."<sup>65</sup> And Justice Frankfurter flatly denied the propriety of the phrase "preferred position," saying:<sup>66</sup>

This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity. It is not the first time in the history of constitutional adjudication that such a doctrinaire attitude has disregarded the admonition most to be observed in exercising the Court's reviewing power over legislation, "that it is *a constitution* we are expounding," *M'Culloch v. Maryland*, 4 Wheat. 316, 407. I say the phrase is mischievous because it radiates a constitutional doctrine without avowing it. Clarity and candor in these matters, so as to avoid gliding unwittingly into error,

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<sup>64</sup> *Kovacs v. Cooper*, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949).

<sup>65</sup> *Id.*, 336 U.S. at 88.

<sup>66</sup> *Id.*, 336 U.S. at 90.

make it appropriate to trace the history of the phrase "preferred position."

— which Justice Frankfurter then proceeded to do.

The third question concerns the quality and purpose of the speech which the Constitution aims to protect. In 1949 Justice Douglas, speaking for a sharply divided Court, returned the following robustious answer to this question: <sup>67</sup>

. . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance, or unrest.

But early in 1951 Justice Jackson, in a dissenting opinion, urged the Court to review its entire position in the light of the proposition that "the purpose of constitutional protection of freedom of speech is to foster peaceful interchange of all manner of thoughts, information and ideas," and that "its policy is rooted in faith in the force of reason." <sup>68</sup> He considered that the Court had been striking blindly at permit systems which indirectly may affect First Amendment freedoms. He said: <sup>69</sup>

Cities throughout the country have adopted permit requirements to control private activities on public streets and for other purposes. The universality of this type of regulation demonstrates a need and indicates widespread opinion in the profession that it is not necessarily incompatible with our constitutional freedoms. Is everybody out of step but this Court?

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<sup>67</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

<sup>68</sup> *Kunz v. New York*, 340 U.S. 290, 295, 302, 71 S. Ct. 312, 95 L. Ed. 280 (1951).

<sup>69</sup> *Id.*, 340 U.S. at 305-6.

He was of the opinion that the Court was assuming a hypercritical position in invalidating local laws for want of standards when the Court itself had set down no particular standard. He would leave a large measure of discretion to the local community or state in dealing with speech which is outside the immunity of the Constitution. He also "venture[d] to predict" that the Court "will not apply, to federal statutes the standard that they are unconstitutional if it is possible that they may be unconstitutionally applied,"<sup>70</sup> — a prophecy soon verified by event.

#### IV.

The immediate precursors of the *Dennis* case are two cases decided under the Taft-Hartley Act<sup>71</sup> a year earlier. That law requires, as a condition of a union's utilizing the opportunities afforded by the Act, each of its officers to file an affidavit with the National Labor Relations Board (1) that he is not a member of the Communist Party or affiliated with such party, and (2) that he does not believe in, and is not a member of any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. In *American Communications Association v. Douds*,<sup>72</sup> five of the six Justices participating sustained the first requirement and an evenly divided Court sustained the second against the objection that the Act exceeded the power of Congress over interstate commerce and infringed freedom of speech and the rights of petition and assembly. And in *Osman v. Douds*<sup>73</sup> the same result was reached by a Court in which only Justice Clark did not participate. In the end only Justice Black condemned the first requirement while the Court

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<sup>70</sup> *Id.*, 340 U.S. at 304.

<sup>71</sup> 61 STAT. 146 (1947), 29 U.S.C. § 159 (h) (Supp. 1951).

<sup>72</sup> 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

<sup>73</sup> 339 U.S. 846, 70 S. Ct. 901, 94 L. Ed. 1328 (1950).

was evenly divided as to the second. In the course of his opinion for the controlling wing of the Court in the *American Communications* case, Chief Justice Vinson said: <sup>74</sup>

. . . the attempt to apply the term, "clear and present danger," as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea.

The question with which the Court was dealing, he asserted, was not the same one that Justices Holmes and Brandeis had considered in terms of "clear and present danger," since the Government's interest in *American Communications* was in protecting the free flow of commerce from what Congress considered to be substantial evils of conduct rather than in preventing dissemination of Communist doctrine or the holding of particular beliefs because of a fear that unlawful conduct might result therefrom.<sup>75</sup> Applying that distinction, the Chief Justice recited: <sup>76</sup>

The contention of petitioner . . . that this Court must find that political strikes create a clear and present danger to the security of the Nation or of widespread industrial strife in order to sustain § 9(h) similarly misconceives the purpose that phrase was intended to serve. In that view, not the relative certainty that evil conduct will result from speech in the immediate future, but the extent and gravity of the substantive evil must be measured by the "test" laid down in the *Schenck* case.

In thus balancing the gravity of the interest protected by legislation from harmful speech against the demands of the "clear and present danger" rule, the Court paved a feasible way for its decision a year later in *Dennis v. United States*.<sup>77</sup>

And undoubtedly it was Chief Justice Vinson's initial inclination, in his opinion for himself and Justices Reed, Burton and Minton, to rest decision in *Dennis* on a like

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<sup>74</sup> *American Communications Assn. v. Douds*, 339 U.S. 382, 394, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

<sup>75</sup> *Id.*, 339 U.S. at 396.

<sup>76</sup> *Id.*, 339 U.S. at 397.

<sup>77</sup> 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

calculation. Thus emphasizing the substantial character of the Government's interest in preventing its own overthrow by force, he said this was the ultimate value of any society, for if a society cannot protect itself from internal attack, "it must follow that no subordinate value can be protected."<sup>78</sup> The opinion continues:<sup>79</sup>

If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.

The Chief Justice concluded this part of his opinion by quoting from Chief Judge Learned Hand's opinion for the circuit court of appeals in the same case, as follows:<sup>80</sup> " 'In each case [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.' " On this he commented:<sup>81</sup>

We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other

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<sup>78</sup> *Id.*, 341 U.S. at 509.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Id.*, 341 U.S. at 510.

<sup>81</sup> *Ibid.*

we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significance. More we cannot expect from words.

That is to say, if the evil legislated against is serious enough, advocacy of it does not, in order to be punishable, have to be attended by a "clear and present danger" of success.

But at this point the Chief Justice, as if recoiling from this abrupt dismissal of the "clear and present danger" formula, makes a last-moment effort to rescue the babe that he has so incontinently tossed out with the bath, stating that the Court was in accord with the circuit court, which affirmed a finding by the trial court that the requisite danger actually existed, and noting particularly that the "highly organized conspiracy . . . coupled with the inflammable nature of world conditions . . . convince us that their convictions were justified on this score."<sup>82</sup>

His final position seems to be that the question is one for judicial discretion, unbound by formulas, for he recites:<sup>83</sup>

When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts.

In short, "clear and present danger" is informed that *the Court, not it, is on top*.

Justice Frankfurter's lengthy concurring opinion premises the "right of a government to maintain its existence — self-preservation . . . [as] the most pervasive aspect of sovereignty."<sup>84</sup> At the same time he admitted that there are competing interests to be assessed, but asked which agency of government is to do the job:<sup>85</sup>

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<sup>82</sup> *Id.*, 341 U.S. at 511.

<sup>83</sup> *Id.*, 341 U.S. at 513.

<sup>84</sup> *Id.*, 341 U.S. at 519.

<sup>85</sup> *Id.*, 341 U.S. at 525.

Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.

But a difficulty seems to exist in the "clear and present danger" doctrine, for Justice Frankfurter admitted that defendants' argument could not be met by reinterpreting the phrase. He also was of the opinion that defendants' argument could not be met by citing isolated cases, but that their convictions should "be tested against the entire body of our relevant decisions."<sup>86</sup>

Turning then to an examination of the cases he exclaims at last: "I must leave to others the ungrateful task of trying to reconcile all these decisions."<sup>87</sup> The nearest precedent was the *Gitlow* case. Here "we put our respect for the legislative judgment in terms which, if they were accepted here, would make decision easy. . . . But it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision."<sup>88</sup> He concludes with a homily on the limitations which the nature of judicial power imposes on the power of judicial review:<sup>89</sup>

To make validity of legislation depend on judicial reading of events still in the womb of time — a forecast, that is, of

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<sup>86</sup> *Id.*, 341 U.S. at 528.

<sup>87</sup> *Id.*, 341 U.S. at 539.

<sup>88</sup> *Id.*, 341 U.S. at 541.

<sup>89</sup> *Id.*, 341 U.S. at 551-2.

the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations — is to charge the judiciary with duties beyond its equipment. We do not expect courts to pronounce historic verdicts on bygone events. Even historians have conflicting views to this day on the origins and conduct of the French Revolution. . . . It is as absurd to be confident that we can measure the present clash of forces and their outcome as to ask us to read history still enveloped in clouds of controversy.

Not without some justification has Justice Frankfurter's opinion been called "an interesting study in ambivalence."<sup>90</sup>

Justice Jackson's opinion underscores the conspiratorial element of the case, and is flat-footed in rejecting the "clear and present danger" formula for this type of case. He writes:<sup>91</sup>

The test applies and has meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime but to which such tendency is sought to be attributed by construction or by implication from external circumstances. The formula in such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave. But its recent expansion has extended, in particular to Communists, unprecedented immunities. Unless we are to hold our Government captive in a judge-made verbal trap, we must approach the problem of a well-organized, nationwide conspiracy, such as I have described, as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason.

He emphasizes that the Constitution does not make conspiracy a civil right and that the Court has consistently refused to do so on previous occasions and should so continue, whether the conspiracy be one to disturb interstate commerce or to undermine the Government. He disposes of the

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<sup>90</sup> Woolsey, *The Supreme Court: 1951-52*, *Fortune*, Oct. 1951, p. 119, 162.

<sup>91</sup> *Dennis v. United States*, 341 U.S. 494, 568, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

dissenters' contention that some overt act was necessary to support the convictions in the following words: <sup>92</sup>

. . . no overt act is or need be required. The Court, in anti-trust cases, early upheld the power of Congress to adopt the ancient common law that makes conspiracy itself a crime. Through Mr. Justice Holmes, it said: "Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing — that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." . . . It is not to be supposed that the power of Congress to protect the Nation's existence is more limited than its power to protect interstate commerce.

I do not suggest that Congress could punish conspiracy to advocate something, the doing of which it may not punish. Advocacy or exposition of the doctrine of communal property ownership, or any political philosophy unassociated with advocacy of its imposition by force or seizure of government by unlawful means could not be reached through conspiracy prosecution. But it is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.

It would be "weird legal reasoning," he opined, for the Court to hold that conspiracy is one crime and its consummation another and then further hold that "Congress could punish the one only if there was 'clear and present danger' of the second." <sup>93</sup>

The dissenting opinions of Justices Black and Douglas indicate that they would not only apply the "clear and present danger" test to this type of case, but that they would give it the same broad reach which they had claimed for it in cases where the speech involved was not intended to induce violation of law. Justice Black reiterates his previously expressed opinion that: <sup>94</sup>

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<sup>92</sup> *Id.*, 341 U.S. at 574-5.

<sup>93</sup> *Id.*, 341 U.S. at 576.

<sup>94</sup> *Id.*, 341 U.S. at 580.

At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthestmost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Bridges v. California*, 314 U.S. 252, 263. [Justice Black is here quoting Justice Black.]

And Justice Douglas italicized Justice Brandeis' dictum in the *Whitney* case: "*If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*"<sup>95</sup> The answer is that education had not in fact prevented the formation of the conspiracy for which the eleven defendants were convicted. If that be deemed a danger at all, it was certainly a "clear and present" one. Both dissenters, in fact, ignore the conspiracy element, although Justice Holmes had not done so in *Frohwerk*, nor had Justice Brandeis in *Whitney*.

### Conclusion

"It is one of the misfortunes of the law," wrote Justice Holmes in 1912, "that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."<sup>96</sup> No better confirmation of this observation could be asked than that which is afforded by the remarkable extension of the influence of the "clear and present danger" formula both with courts and commentators in the decade just ended. To sum up the history reviewed above: The phrase had its origin in 1919 in a dictum tossed off by Holmes himself in an opinion sustaining a conviction under the Espionage Act of 1917,<sup>97</sup> but was soon thereafter in-

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<sup>95</sup> *Id.*, 341 U.S. at 586.

<sup>96</sup> *Hyde v. United States*, 225 U.S. 347, 390, 32 S. Ct. 793, 56 L. Ed. 1114 (1912).

<sup>97</sup> 40 STAT. 217 (1917).

voked by its author and by Justice Brandeis in opinions dissenting from similar judgments. Not till nearly twenty years later, and after Holmes' death, did the formula find its way into a majority opinion of the Court<sup>98</sup> which reversed a judgment of conviction, and here it was invoked against the application of the statute to the facts of the case, not directly against the statute itself. Frequent repetition since 1940 in cases presenting problems entirely different from those raised by espionage and criminal anarchy statutes, or by incitements to breach of the law, had, however, by 1951, established the authority of this cliché so firmly that in *Dennis v. United States* five Justices of the Court wrote separate opinions variously construing it, three conceding its application in some sense or other. What effect does the judgment in *Dennis*, considered in the light shed by these opinions, have on the formula? How far does *Dennis* go in supplying the analysis that Justice Holmes would presumably have welcomed, or otherwise?

The writer of this article is inclined to the opinion that the Court would have done quite as well to have based its holding in *Dennis* on the *Gitlow* case, as the Solicitor General invited it to do. As the preceding pages amply demonstrate, not a single precedent would have had to be overturned to reach such a result. Furthermore, the Chief Justice's acceptance<sup>99</sup> of the explanation given by the Court in *Gitlow* of the reason why the "clear and present danger" formula had appeared in the *Schenck* case, smoothed the way to an unqualified reiteration of the *Gitlow* decision, which had had the support of seven of the nine Justices. That this course was not adopted was due in part, no doubt, to the fact that "the Case of the Eleven Communists" had

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<sup>98</sup> *Herndon v. Lowry*, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

<sup>99</sup> *Dennis v. United States*, 341 U.S. 494, 505-6, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

been inflated by propaganda far beyond its strictly legal significance, and to the feeling of the Court, in consequence, that it must deal with the case at respectful length, and of course "significantly." But an even more important factor may have been the Court's habitual reluctance to cast aside at one fell swoop any formula or doctrine which lends its umpirage support and promises it an available "out" against undesired legislation — *i.e.*, undesired by the Court. It prefers the tactics of the rear guard action to those of outright retreat.

Taken, then, in the context of the opinions which support it, what conclusions does the decision suggest as to the future of "clear and present danger"? The outstanding result of the holding, undoubtedly, is that of *a declaration of independence by the Court from the tyranny of a phrase*. As expounded in the dissenting opinions of Justices Black and Douglas, the "clear and present danger" formula is a kind of slide rule whereby all cases involving the issue of free speech simply decide themselves automatically. By treating the formula as authorizing it to weigh the substantive good protected by a statute against the "clear and present danger" requirement, the Court rids itself of this absurd "heads-off" automatism and converts the rule, for the first time, into a real "rule of reason."

At the same time, the range of the rule's applicability has undoubtedly been curtailed, though just how greatly is not at present altogether apparent. It can be safely said that never again will the rule be successfully invoked in behalf of persons shown to have conspired to incite to a breach of federal law. On the other hand, as Justice Jackson suggests in effect, the "clear and present danger" test may still be applicable: (1) in cases essentially trivial; (2) in cases where the intent of the speaker is lawful, but circumstances create a danger of violence or other substantive evils

which government has a right to prevent; (3) in cases where the speech is ambiguous and the evil purpose of the speaker can be reasonably inferred only from the "clear and present danger" of evil which the utterance engenders. But the common law, properly charged, would probably do just as well in such cases without any assistance from the formula.

Moreover, the vast majority of such cases arise under state and municipal legislation. Indeed, since the Court is apt to favor easily discernible boundaries, "clear and present danger" may "just fade away" in the field of congressional power. Such a result could be justified both on logical and on practical grounds. Thus it would take account of the well recognized rule of legal interpretation that the general yields to the specific. From this point of view it may well be held that freedom of speech and press stand in a different relation to enumerated powers of Congress than they do to the vague, undefined residual powers of the states. And that the protection of the larger interests of our ever more closely integrated society gravitates more and more to the National Government is a proposition that nobody is apt to contest.

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