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POST-WAR PROTECTION OF FREEDOM OF OPINION
A Study of Supreme Court Attitudes
RAYMON T. JOHNSON*

Introduction
The English struggle to vindicate the rights of the individual from Magna Carta in 1215 through and beyond the Bill of Rights of 1689 was not without influence in shaping the American conception of personal liberty. It would be error to assume, however, that such influence was of a controlling character. The inhabitants of the New World were more influenced by environment than they were impressed by history. Pioneer conditions, reacting upon a middle-class people, produced a point of view unhampered by conventions and unfettered by traditions. The American people were ideally conditioned to respond to the eighteenth century philosophy of natural rights.

This response found expression in the Declaration of Independence wherein "self-evident" truths, "created equal," "unalienable rights," "Life, Liberty and the pursuit of happiness" and other magic phrases were marshalled to impress the "opinions of mankind." That the opinions of mankind were profoundly affected by this revolutionary challenge to the existing political order is the uncontroverted conclusion of history. This vital document ushered in a new era of expanding personal liberty.

The outbreak of the World War, however, marked the end of this era in which more peoples had achieved some decent measure of individual freedom than in any other period that has been recorded. Since that time the world has been subject to political and economic distractions of an unprecedented nature. Much that had been gained seems definitely lost. The prospect that the pendulum of liberty will continue on the back-swing appears increasingly likely. In an interrelated world it is difficult for a particular country to run counter to the orbital course of events. The purpose of this study is to examine the attitude of the Supreme Court in handling the delicate problem of freedom of individual opinion during this post-war period of social, economic and political upheaval. It is hoped that the examination will accurately reflect the extent to which the First and Fourteenth Amend-

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ments create a zone of constitutional immunity for the protection of this fundamental right from governmental invasion.

**War-Time Espionage Act**

Freedom of discussion and privilege of debate are indispensable requisites to the orderly functioning of democratic institutions. Without them there could be no crystallization of opinion to chart the course of responsible government. The first provision of the Federal Bill of Rights was designed to safeguard freedom of speech, press and assembly from restrictions by the National Government. In 1917 Congress passed the Espionage Act, making it criminal to obstruct or conspire to obstruct the recruiting and enlistment service of the United States. During the war numerous convictions were procured under this Act and several of them were reviewed by the Supreme Court in cases disposed of by that tribunal soon after the cessation of hostilities.

In March, 1919, the Court decided the Schenck, Frohwerk, and Debs cases, upholding convictions under the Espionage Act. All three decisions were by a unanimous Court and the opinion in each case was written by Mr. Justice Holmes. In the Schenck case the Secretary of the Socialist party and other defendants had been convicted for circulating leaflets attacking the Conscription Act. The leaflets stated that conscription was the worst form of despotism and that a conscript was little better than a convict. While advising people not to submit to intimidation, the documents merely advocated peaceful agitation for the repeal of the Conscription Act. In the opinion of Mr. Justice Holmes it was said:

"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 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

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5Italics supplied.
fight and that no Court could regard them as protected by any constitutional right. 6

In the Frohwerk case Mr. Justice Holmes disposed of the free-speech defense by observing that

"... so far as the language of the articles goes there is not much to choose between expressions to be found in them and those before us in Schenck v. United States." 7

He followed this by the "little breath enough to kindle a flame" argument that appears quite judicial under circumstances of excitement but which seems less convincing when considered in the light of more settled conditions.

The conviction of Eugene Debs was upheld on the basis of the evidence contained in a speech delivered by him in Canton, Ohio on June 16, 1918. Debs admitted the obstruction of war effort but contended that the Espionage Act was unconstitutional as being in conflict with the First Amendment. In his trial Debs had addressed the jury in his own behalf in these words:

"I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone." 8

To the argument that the Act was unconstitutional as being an invasion of the right of free speech, Mr. Justice Holmes bluntly responded:

"Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained." 9

These, and other cases, 10 upholding the application of the Espionage Act make it clear that the Supreme Court offers little protection to

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8As quoted in 249 U. S. 211, 214, 39 S. Ct. 252, 253 (1919).
10See Sugarman v. United States, 249 U. S. 182, 39 S. Ct. 191 (1919) where Mr. Justice Brandeis, speaking for a unanimous Court, was of the opinion that the assertion of the free-speech defense in the case did not present any substantial constitutional question. See, also, Abrams v. United States, 250 U. S. 616, 40 S. Ct. 17 (1919) in which Mr. Justice Holmes and Mr. Justice Brandeis dissented on the ground that the case departed from the clear and present danger test of the Schenck case. For an interesting discussion of the Abrams case, see Chafee, A Contemporary State Trial (1920) 33 Harv. L. Rev. 747 and see (1921) 35 Harv. L. Rev. 9 for a further treatment of the case by the same author. Two other cases upholding the Espionage Act, Schaefer v. United States, 251 U. S. 466, 40 S. Ct. 259 (1920) and Pierce v. United...
the free expression of critical opinion in time of war. Even as qualified by the *clear and present danger* test laid down by Mr. Justice Holmes in the *Schenck* case, it is quite obvious that the decisions sanction the virtual extinguishment of free discussion. To remonstrate against war and decry bloodshed must be regarded as peace-time privileges rather than war-time rights. When the whole energy of a people is directed to the accomplishment of a vital purpose, the customary protection of individual opinion is promptly and decisively interned. There is no zone of immunity for the protection of minority opinion under the abnormal conditions of war.

*Peace-Time Subversive Activities*

Whatever may be the justification for war-time suppression of opinion, it would seem that the peace-time approach should evidence greater toleration. It is to be recalled, however, that the “Red scare” which followed the war was of unparalleled dimensions. Under older Anarchy statutes or more recent Syndicalism statutes, many States made a concerted effort to stamp out subversive movements regarded as dangerous to the existing political order. One of the most significant cases decided by the Supreme Court was that of *Gitlow v. New York*,\(^{11}\) in which the defendant had been convicted in New York for the crime of criminal anarchy under a statute which penalized *language* advocating or advising the overthrow of organized government. The defendant had circulated “The Left Wing Manifesto” which proclaimed that

“Revolutionary Socialism does not propose to ‘capture’ the bourgeois parliamentary state, but to conquer and destroy it.”

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\(^{11}\)252 U. S. 259, 40 S. Ct. 205 (1920) elicited dissents by Mr. Justice Holmes and Mr. Justice Brandeis because it was felt that the majority had, again, departed from the *clear and present danger* test of the Schenck case. In the case of *Gilbert v. State of Minnesota*, 254 U. S. 325, 41 S. Ct. 125 (1920), upholding a conviction under a State statute which made it unlawful to interfere with the enlistment in the military forces of the United States, Mr. Justice Holmes concurred in the result, Mr. Chief Justice White dissented on the ground that Congress had occupied the whole field by statute, and Mr. Justice Brandeis dissented on the basis of the *clear and present danger* test. In *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 41 S. Ct. 352 (1921) the Supreme Court upheld the exclusion from the second class mailing privileges of a newspaper published in violation of the Espionage Act. The decision in the latter case has been generally criticized. See (1921) 21 Col. L. Rev. 715: “... the relator, if entitled to the use of the mails at all, was entitled to the second class privilege. ...” Note, also, the dissenting opinions of Mr. Justice Brandeis and Mr. Justice Holmes in the case.

\(^{268}\)268 U. S. 652, 45 S. Ct. 625 (1925).
In upholding the conviction the Supreme Court, speaking through Mr. Justice Sanford, admitted that

"There was no evidence of any effect resulting from the publication and circulation of the Manifesto."12

The Court distinguished the Schenck case on the basis that the Espionage cases dealt with acts, the punishment for which necessitated a judicial appraisal of the danger to be apprehended from the commission of the acts. The Gitlow case, it was said, involved words with respect to the use of which the legislature had already found the existence of danger. In this connection Mr. Justice Holmes registered a dissent, in which Mr. Justice Brandeis concurred, which relied upon the clear and present danger test of the Schenck case.

The Supreme Court in the Gitlow case reached one conclusion, however, that served to clarify a point that had been, theretofore, obscure—the relationship between the First and Fourteenth Amendments. The majority opinion declared:

"For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."13

The Court dismissed a statement to the contrary in Prudential Ins. Co. v. Cheek,14 as not determinative of the question. While one may fail to be impressed by the narrow distinction15 drawn between the prohibited acts of the Schenck case and the proscribed words of the Gitlow case as a means of avoiding judicial determination of clear and present danger, the dictum in the latter case that unwarranted restriction of opinion by a State violates the Fourteenth Amendment represents an unqualified advance.16 The long-range protection inherent in the latter position embodies the prospect of ultimate good.

The Gitlow case was followed by that of Whitney v. California17 in

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12268 U. S. 652, 656, 45 S. Ct. 625, 626 (1925).
13268 U. S. 652, 666, 45 S. Ct. 625, 690 (1925).
14268 U. S. 530, 543, 42 S. Ct. 516, 522 (1922).
15See (1928) 41 Harv. L. Rev. 525, 527 expressing the view that the Gitlow case seriously modified the clear and present danger test of the Schenck case.
16But see Warren, The New Liberty Under the 14th Amendment (1926) 39 Harv. L. Rev. 431, 464: "Is it, or is it not, a good thing that the legislation enacted by each State to meet local conditions and to regulate local relations should be standardized, by being forced to comply to a new definition of 'liberty' applied to every State by the judicial branch of the National Government?"
17274 U. S. 357, 47 S. Ct. 641 (1927).
1927 in which the Court upheld a conviction under the California Criminal Syndicalism Act for participation in the organization of the Communist Labor Party in that state. The organization was found to be one which advocated force and violence in the attainment of its objectives. In upholding the constitutionality of the statute, the majority, through Mr. Justice Sanford, declared:

"The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear."18

Mr. Justice Brandeis, with whom Mr. Justice Holmes joined, concurred in the result only because the defendant had not properly raised the issue of "present danger." On the merits, Mr. Justice Brandeis broke through the crust of judicial calm to proclaim:

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.... Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution."19

On the same day that the Whitney case was decided the Court, in the case of Fiske v. Kansas,20 unanimously reversed a conviction under the Kansas Syndicalism statute. The only evidence of the violation of the Act was that the defendant had circulated the preamble to the Constitution of the I. W. W. which advocated the abolition of the "wage system" but in which no reference to force or violence was discovered. The Syndicalism Act was not held unconstitutional but the application of the statute to a defendant, against whom the evidence was unconvincing, was held to be in violation of the Fourteenth Amendment. The dictum in the Gitlow case that freedom of speech was a right protected by the Fourteenth Amendment against infringement by a State had now become the basis of actual decision.

Again, in Stromberg v. California,21 the Court reversed a conviction based upon the violation of a statute, one section of which made it a crime to display the red flag as an emblem of opposition to or-
ganized government. In the trial of the defendant, a nineteen year old girl, the California court had instructed the jury that any one section of the statute was enough to sustain the conviction. While not condemning the statute as a whole, the Supreme Court held the "red flag" section to be unconstitutional in that it was vague and indefinite. Mr. Justice McReynolds and Mr. Justice Butler dissented on the ground that the conviction should be upheld under the other sections of the statute. It would appear that the Court, in the early thirties, was beginning to adopt a more tolerant outlook in the handling of such cases. The Stromberg decision prompted the remark in one of the law reviews of California that

"The case is of interest in showing the more liberal attitude recently developed in the United States Supreme Court."22

In 1937 the Supreme Court decided the case of De Jonge v. Oregon.23 In that case the accused had been convicted under the Oregon Syndicalism statute and sentenced to seven years imprisonment for assisting in the conduct of a public meeting, otherwise lawful, which was held under the auspices of the Communist Party. The Court (Mr. Justice Stone not participating) unanimously concluded that the conviction should be set aside. In the opinion of Mr. Chief Justice Hughes it was pointed out that

"Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the 14th Amendment of the Federal Constitution. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."24

The Court was of opinion that a meeting was not unlawful merely because it was held under the auspices of the Communist Party. It is to be noted that freedom of assembly, for the first time, was brought within the protection of the Fourteenth Amendment. In this connection it has been observed that

"Extension of the due process clause to include the right of peaceable assembly practically completes the Supreme Court's transcription of the personal liberties of the First Amendment into the Fourteenth."25

In Herndon v. Lowry26 the defendant, Angelo Herndon, a negro,

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had been sent from Kentucky to Atlanta, Georgia to persuade negroes to join the Communist Party. He held three meetings and was arrested. In his room was found a great bulk of radical Communist literature, but there was no proof he had circulated any of the material. He was convicted of an attempt to incite to insurrection under a statute, the pertinent section of which, defined the offense in these words:

"Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

The conviction of the defendant was affirmed by the State court which held that the statute applied whether or not immediate violence was threatened.

In a habeas corpus proceeding which reached the Supreme Court it was decided that the Georgia statute, as construed and applied, was so vague and uncertain as to violate the Fourteenth Amendment. Speaking for the majority, Mr. Justice Roberts declared:

"The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

On the issue of the statute's vagueness, Mr. Justice Van Devanter voiced a dissent which was joined in by Justices McReynolds, Sutherland and Butler. In view of the Court's five-to-four division on the issue of vagueness, the decision all the more demonstrates the willingness of the Court's majority to bring conduct involving freedom of speech within the protection of the constitutional guarantees. The case would seem to be but another manifestation of that growing liberality of attitude to which previous reference has been made.

In Hague v. Committee for Industrial Organization the long-standing dispute between Mayor Hague of Jersey City and the C. I. O. was finally passed on by the Supreme Court in reviewing an injunction.

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restraining the continuance of interference by the city officials with the constitutional rights of the protesting parties. The bill alleged that under ordinances of Jersey City these parties had been denied the right to use public buildings, streets and parks for lawful assemblies and had been prevented from circulating leaflets and pamphlets in public places. It was claimed that the conduct of the city officials had been discriminatory and amounted to unconstitutional interference with freedom of speech and assembly.

In upholding the rights of speech and assembly the majority could find no common ground of reason to sustain the decision. The opinion of Mr. Justice Roberts, in which Mr. Justice Black concurred, stated:

"... it is clear that the right peaceably to assemble and to discuss these topics [National legislation], and to communicate respecting them, whether orally or in writing, is a privilege inherent in the citizenship of the United States which the [Fourteenth] Amendment protects."

In resorting to the privileges and immunities clause of the Fourteenth Amendment, as a source of constitutional right, Mr. Justice Roberts put the protection on an exceedingly narrow basis. This clause is a protection to citizens only and with respect to those rights which grow out of Federal citizenship. Does the opinion imply that an assembly to discuss State legislation would not be protected? Does the opinion lead to the inference that non-citizens have no right to assemble to discuss anything? If such conceivable doctrine be not unsound, it is at least unfortunate.

In a separate opinion, concurred in by Mr. Justice Reed, it was stated by Mr. Justice Stone:

"It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. ... It has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers. ..."

The logic of this position commends itself more than does that employed by Mr. Justice Roberts. The due process clause is a living, growing and vital source of protection. The privileges and immunities clause is restrictive in application and all but judicially decadent. Its

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\[^{307}\text{U. S. 496, 512, 59 S. Ct. 954, 962 (1939).}\]
\[^{320}\text{U. S. 496, 519, 59 S. Ct. 954, 965 (1939).}\]
resurrection for this purpose is of dubious value. One is constrained to agree with the comment that

"... it is regrettable that in a case of such public notoriety the Court did not invoke squarely the established doctrines for the defense of civil liberties."\textsuperscript{33}

The Court's handling of this highly controversial case is, to say the least, both disappointing and confusing. The positions taken by the individual members of the Court may be summarized as follows:

Mr. Justice Roberts (Mr. Justice Black concurring) held that the rights were protected by the privileges and immunities clause of the Fourteenth Amendment.

Mr. Justice Stone (Mr. Justice Reed concurring) held that the rights were protected by the due process clause of the Fourteenth Amendment.

Mr. Chief Justice Hughes concurred with Mr. Justice Roberts "on the merits."

Mr. Justice Frankfurter and Mr. Justice Douglas did not participate in the hearing or the determination of the case.

Mr. Justice McReynolds and Mr. Justice Butler wrote dissenting opinions.

It is to be noted that the maximum strength mustered for any one of the positions assumed does not represent more than one-third of the Court's membership. One naturally regrets that in a case of this importance the reasoning was so indecisive. It is difficult to deduce any settled principle from this discordant medley of concurrence and dissent. In result, only, can the case be regarded as satisfactory.

Freedom of the Press

Within two weeks of the 1931 decision of the \textit{Stromberg} case,\textsuperscript{34} in which the Supreme Court had given evidence of a new liberality of opinion in reversing a conviction under the California "red flag" statute, the case of \textit{Near v. Minnesota}\textsuperscript{35} was disposed of by the Court. This decision, involving the freedom of the press, provided still more striking evidence of a judicial intent to safeguard the free expression of opinion. A Minnesota statute\textsuperscript{36} of 1925 provided for the abatement of malicious, scandalous and defamatory newspapers and periodicals as public nuisances. The defendant, whose past conduct had been decidedly unsavory, made an unprincipled and defamatory attack upon

\begin{footnotesize}
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\item[(33)](1939) 39 Col. L. Rev. 1237, 1244.
\item[(34)]Supra. n. 21.
\item[(35)]283 U. S. 697, 51 S. Ct. 625 (1931).
\item[(36)]Chap. 285, Session Laws of Minn., 1925.
\end{itemize}
\end{footnotesize}
public officials in the Saturday Press. He was enjoined under the statute from continuing the publication of the newspaper because of its scurrilous and defamatory content. The Supreme Court pronounced the statute unconstitutional because its application and enforcement embodied "the essence of censorship." 37

In the majority opinion, written by Mr. Chief Justice Hughes, it was stated:

"The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." 38

The belief that the proper remedy was to be found in the application of the libel laws was thus expressed:

"The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." 39

That the decision was, in no sense, predicated upon the justifiable quality of the defendant's conduct appeared obvious from the following excerpt from the opinion:

"We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication." 40

Mr. Justice Butler (speaking also for Justices Van Devanter, McReynolds and Sutherland) gave expression to this pointed dissent:

"It is well known, as found by the state Supreme Court, that

existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of the press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.”

Without detracting from the force of the dissenting argument it would appear nevertheless true that “previous restraint” embraces the prospect of great abuse. The balance of social interest would seem to favor the majority position. That the laws of libel are not wholly efficacious in dealing with a “program for oppression, blackmail or extortion” may be admitted. The appraisal of doctrine, however, must proceed with a view to ultimate advantage. This advantage seems furthered by absence of “previous restraint.” That a less-favored position is an unconstitutional one requires explanation. In view of our constitutional history, the specific restrictions of the First Amendment and the expanding protection accorded to freedom of speech and of the press under the due process clause of the Fourteenth Amendment, might it not be suggested that legislation impinging upon these basic immunities should be stripped of its presumptive validity? Such suggestion would afford a justification for the Near decision that would otherwise require more extended reasoning.

The decision in Grosjean v. American Press Co.42 in 1936 was by a unanimous Court. Suit had been brought by nine publishers of Louisiana newspapers to enjoin the enforcement of a Louisiana statute of 1934 levying a two per cent license tax on the gross receipts from advertising in papers with a circulation of more than twenty thousand copies per week. In holding the statute unconstitutional as in conflict with the due process clause of the Fourteenth Amendment, the Court, speaking through Mr. Justice Sutherland, said:

“The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in vir-

4283 U. S. 697, 737, 51 St. Ct. 625, 698 (1931).
42297 U. S. 293, 56 S. Ct. 444 (1936).
tue of the constitutional guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.”

The Court pointed out that by placing the decision on the due process clause it was unnecessary to determine whether the statute denied the equal protection of the laws.

In this case the Court quite obviously looked behind the scenes to discover in the Louisiana political situation a ruthless attempt to throttle freedom of expression in opposition to the controlling political regime of the State. The unanimous quality of the declaration served notice to political machines that devious attacks upon the freedom of the press would meet with judicial resistance. The decision fortified the “no censorship” position which had been taken in the Near case.

In Associated Press v. Labor Board, the Court in 1937 rendered another five-to-four decision on the issue of freedom of the press. The four dissenting Justices were the same who dissented in the Near case. This time, however, the dissenters came to the defense of the press whereas in the Near case they were found on the other side. The issue in the case was whether the National Labor Relations Board could compel the Associated Press to reinstate a discharged editorial writer with back pay. After holding that Congress had the power to regulate the business of the Associated Press under its control of interstate commerce, the majority held that the application of the National Labor Relations Act was not in violation of the constitutional rights protected by the First Amendment and that the reinstatement order of the Labor Board was valid.

The majority opinion, written by Mr. Justice Roberts, called attention to the fact that

"The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.”

The Court indicated that the right to discharge such employee was unlimited except for his labor union activities.

4"301 U. S. 103, 57 S. Ct. 650 (1937).
Mr. Justice Sutherland, with whom Justices Van Devanter, McReynolds and Butler agreed, entered a stirring dissent. He said:

"No one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight."\(^{46}\)

One wonders why this solicitude for the press might not have found expression in the *Near* case. The dissent remarked on the difference of status between an editorial writer and one employed in the mechanical and purely clerical work of the press. The "halt at the threshold" argument was effectively employed against incipient invasion of constitutional right.

The dissenting opinion ended on a note of high emotional quality:

"Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plentitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."\(^{47}\)

Would there be those uncharitable enough to harbor the suspicion that this lyrical passage from the pen of the gifted Justice was inspired not only by love of the press but also by a lack of regard for the practices of the Labor Board? Valid arguments may, of course, be advanced in behalf of both majority and minority positions. The protection of the Labor Board might better have been directed to the safeguarding of the rights of the more ordinary group of employees without being extended to members of the staff who might occupy positions more intimately connected with possible matters of policy and management. When one considers the extent to which the press, in many lands, has been subject to governmental interference, no suggestion of debatable encroachment by administrative boards should merit judicial indulgence. For an administrative ruling to invade the editorial room and directly affect its personnel may offer prospect of mischief that will outweigh the meager gain to labor which the case represents.

In 1938 the Supreme Court announced its decision in the case of

\(^{46}\) 301 U. S. 103, 135, 57 S. Ct. 650, 657 (1937).

\(^{47}\) 301 U. S. 103, 141, 57 S. Ct. 650, 659 (1937).
Lovell v. City of Griffin. A city ordinance forbade as a nuisance the distribution, by hand or otherwise, of literature of any kind without first obtaining written permission from the City Manager. The defendant was convicted of violation of the ordinance in distributing religious tracts. The Court was of the unanimous opinion, Mr. Justice Cardozo not participating, that the ordinance violated due process by invading freedom of the press.

In the opinion of Mr. Chief Justice Hughes it was again pointed out that

"Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." This position, dating from the Gitlow pronouncement in 1925, has become a judicial commonplace. Not so commonplace, however, is the idea that such handbill regulations impinge upon freedom of the press. The opinion explained that

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

It is doubtful whether the legal profession anticipated this ruling. The case provides evidence of an intent on the part of the Court to keep open the channels of information. In the light of such purpose the decision is highly significant. One practical aspect of the holding is indicated in this comment:

"The instant case holding that handbills merit the same protection as newspapers is of practical importance to minority groups which might otherwise be materially hampered in advocating their doctrines. The language of many municipal ordinances will no doubt need revision in the light of this opinion."

That there is need for revising the language of existing handbill
ordinances is evidenced by the opinion handed down by the Supreme Court in November of the past year. Convictions under four different handbill ordinances were reversed in this one opinion. The ordinances held to be invalid were those of Irvington, New Jersey; Los Angeles, California; Milwaukee, Wisconsin; and Worcester, Massachusetts. Mr. Justice Roberts, speaking for a unanimous Court, stated in his opinion:

"Four cases are here, each of which presents the question whether regulations embodied in a municipal ordinance abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution." He concluded that

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion."

The Court, in protecting the rights of pamphleteers, in viewing the problem in a realistic way. It is concerned with the circulation of "information and opinion." It is not to be supposed that the Court is throwing the cloak of immunity around advertising dodgers or commercial solicitation. Ordinances designed to prevent the littering of streets and the annoyance of householders, however, must not be employed to curtail the constitutional right of religious, political and economic groups to disseminate information and opinion favorable to their cause. Democratic institutions thrive on liberty and languish from its restraint. Events may prove that the typewriter is mightier than the tank and that the mimeograph will become the symbol of a changing order. The Supreme Court gives them judicial blessing and safeguards them from the doctrine of "previous restraint."

Pursuit of Learning

No examination of freedom of opinion should fail to take into account the freedom of teaching and learning identified with educational practice. For the State to maintain a system of public education is a commendable effort of government and one of its recognized responsi-
bilities. For designing agencies to undermine freedom of instruction, however, is little better than contributing to the delinquency of the young. The whole character of a people can be changed in a relatively short time by any government that is accorded full and unrestricted control over the developing mind of youth. No weapon for standardized mass-thinking and the elimination of individualized opinion is so powerful as a unified, State-dominated system of instruction. When the brain is saturated with the compulsory doctrines of State, a whole population may be made the unsuspecting victims of seduced opinion. In the interest of avoiding the prospect of standardization that is inherent in State-provided education, the integrity of private schools should be scrupulously respected. This is a matter that should be accorded unrelaxed attention.

The Supreme Court has, on occasion, exercised restraint upon legislative efforts designed to curtail the independence of private instruction. In 1923 the Court decided the case of *Meyer v. Nebraska*, pronouncing unconstitutional a Nebraska statute, one section of which prohibited the teaching of any language, other than English, to a child who had not passed the eighth grade. The statute, by its terms, applied to private, denominational, parochial or public schools. The defendant, a teacher in a parochial school, was convicted for teaching German to a child of ten who had not passed the required grade. In condemning the application of the statute to private schools, Mr. Justice McReynolds stated in the majority opinion:

"That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. . . . We are constrained to conclude that the statute is arbitrary and without reasonable relation to any end within the competency of the State."{78}

Mr. Justice Holmes, with whom Mr. Justice Sutherland agreed, expressed the opinion in *Bartels v. Iowa*, disposing of a similar statute, that

"Youth is the time when familiarity with a language is established. . . . I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school."{80}

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{78}262 U. S. 390, 43 S. Ct. 625 (1923).

{79}262 U. S. 390, 401, 403, 43 S. Ct. 625, 627, 628 (1923).

{80}262 U. S. 404, 43 S. Ct. 628 (1923).

{81}262 U. S. 404, 412, 43 S. Ct. 628, 630 (1923).
This rivulet of argument, happily, found its way into the sea of dissent. In view of the fact that nearly one-half of the States had adopted statutes of this type, it is evident that a concerted effort had been made to bring private instruction within the ambit of public control. For the Supreme Court to declare such statutes an arbitrary invasion of the freedom of instruction came as a shock to the groups that had instigated the legislative crusade. Mr. Justice Holmes' penchant for upholding legislation placed him in the dubious company of professional patriots. Mr. Justice Sutherland's position does not merit the charity of this explanation.

In the case of Pierce v. Society of Sisters, in 1925, the Court passed upon the validity of an Oregon statute that made compulsory the attendance in public schools of all children between ages eight to sixteen. Private schools had secured temporary restraining orders preventing the enforcement of the statute. Attorneys representing the State of Oregon advanced this argument to sustain the validity of the legislation:

"At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?"

It is to be noted that what counsel feared was the economic "isms" likely to be propagated by the sinister "ists." The Court, however, unanimously rejected this attenuated method of forestalling objectionable doctrine. In an opinion by Mr. Justice McReynolds it was pointedly remarked:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The statute was held to be in violation of the due process clause of

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the Fourteenth Amendment. No one should ignore the significant character of this decision. The Pierce case, coupled with the Meyer holding, effectively checked the drive to control the freedom of private instruction. That the State may establish certain standards of curriculum and qualification for teachers in private schools admitting children of compulsory school age, is readily conceded. The theory, however, that private education may be changed into education that is virtually public, or that school-age children may be withdrawn from private schools by State decree, has been decisively repudiated. Had the Supreme Court resolved this issue to the contrary, it is difficult to determine where the zeal for uniformity would have stopped.

This judicial determination to safeguard the freedom of private instruction was reaffirmed in the later case of Farrington v. Tokushige in which the Court concluded that Hawaiian legislation, which attempted the minute regulation of the numerous foreign language schools of that territory, was unconstitutional. Reliance was placed upon the Meyer and Pierce cases as authority for the conclusion. Since the issue arose in Federal territory, the decision was based upon the restraint of the Fifth rather than the Fourteenth Amendment. It is obvious, therefore, that both State and Federal agencies of government are subject to pronounced constitutional limitations in the attempted interference with the operation of private schools.

It is not without significance that the Supreme Court has found occasion to say a word about the conduct of State-supported instruction. In the case of Missouri v. Canada the Court gave warning against discriminations by the States in the management of public institutions of learning. In that case it was declared that the denial of admission to a negro citizen who wished to enroll in the law department of the State university denied the equal protection of the laws. While segregation of the white from other races is permitted, the State is under the constitutional obligation to provide separate facilities to the excluded race. In the absence of separate facilities, the Court concluded that all qualified citizens had equal right of admission to the instruction provided by the State. This indicates an intention to keep open the channels of public instruction to the extent that a qualified citizen may have that equal access to learning which will contribute to the cultivation of enlightened opinion.

In view of these cases it must be said that the Supreme Court has

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exercised its judicial power to safeguard fundamental rights incident to the pursuit of learning. It is reasonable to suppose that the Court has not exhausted the scope of protection in this regard. What the Court has already done constitutes a genuine contribution to the safeguarding of instructional freedom.

Summary and Conclusion

It is hoped that this examination has served to indicate the post-war attitude of the Supreme Court toward freedom of opinion. It appears that this attitude has been, on the whole, one of surprising liberality. It is to be admitted that the handling of the Espionage cases, growing out of the war, provided little evidence of impending liberalism in this particular. It is likewise true that the “Red scare” led to unfortunate decisions in the Gitlow and Whitney cases in 1925 and 1927 respectively. It is to be observed, however, that these two cases marked the end of the Supreme Court's willingness to sustain legislation designed to restrict the free expression of opinion.

For almost fifteen years the Court has pursued an unbroken course of extending judicial protection to freedom of speech, press and assembly. In the Fiske case a member of the I.W.W. was protected against the application of the Kansas Syndicalism Act. The “red flag” statute of California was held invalid in the Stromberg decision. In the case of De Jonge v. Oregon the right of peaceable assembly was vindicated. The court granted habeas corpus in the Herndon case to safeguard the freedom of speech of a negro communist. Though the reasoning seems unsatisfactory, the Hague controversy resulted in an injunction to prevent interference with the constitutional rights of members of the C. I. O.

For the past decade the Supreme Court has been unquestionably diligent in preserving the freedom of the press. In the Near case the doctrine of “previous restraint” was condemned. A tax, designed to limit newspaper circulation, was held unconstitutional in the Grosjean appeal. The five-to-four decision, disallowing the free-press defense in the Associated Press case, was complicated by protection-to-labor considerations and is generally defended by professed liberals. The handbill cases unqualifiedly extended freedom of the press to embrace pamphlets and circulars disseminating matters of opinion.

Since 1923 the integrity of private instruction has received repeated judicial support. The Meyer case struck down the Nebraska language law as applied to private schools. Compulsory attendance upon public
schools was denied validity in the *Pierce* case. Legislation interfering with the management of private schools in Hawaii was declared unconstitutional in the *Farrington* case, while *Missouri v. Canada* prohibited discrimination in the treatment of citizens qualified to attend State-supported institutions.

It is submitted that these cases reflect a settled determination on the part of the Court to safeguard freedom of opinion. The Fourteenth Amendment, in particular, has been given an ever-widening application. This steady advance holds the promise of still more extended protection. The social implications of the present judicial attitude are apparent. Minority groups are freed from many restrictive practices previously common. Those who subscribe to the paradox of restraint as a means to freedom are naturally disappointed. Those who believe that the last word is never said in the everlasting search for social betterment may take heart.

Unless the right of free speech and press protects unpopular opinion the constitutional safeguard is a delusion. One does not need the protection of the Constitution to endorse the Ten Commandments or to advocate the Golden Rule. When a group program goes beyond the expression of opinion and takes the form of overt acts directed to the immediate purpose of force and violence, the right of government to protect itself from threatened danger cannot be denied. The enjoyment of all rights is subject to the rule of reason. The advantages inherent in social stability are obvious but the dangers inherent in social stagnation are equally apparent. Only a warped philosophy could regard an imprisoned mind and a silenced tongue as societal assets.

The history of American political development reveals the fear of oppressive government at every step. The specific safeguards embodied in both Federal and State Bills of Rights reflect the purpose of the American people to be free from arbitrary restraints upon freedom of opinion. The safeguarding of this purpose is a high judicial task, in the performance of which the Supreme Court is no longer faltering. The course which is being pursued by the Court merits the support of those who have faith in the ultimate value of truth.

Impressed with the necessity of keeping open the channels of free opinion, the writer takes occasion to reiterate the thought he expressed in connection with the *Near* case—that, in the vindication of these basic rights specifically safeguarded from governmental interference, the customary presumption of validity be withheld from encroaching legislation. The burden of explanation should be placed upon government
to justify the necessity for any direct invasion of this zone of constitutional immunity. In practice, the Court seems to be drifting in this direction. Indeed, the very latest decisions by the Court in the *Thornhill v. Alabama* and *Carlson v. California* cases, handed down on April 22, 1940, indicate that no real presumption of validity is accorded to legislative limitations upon freedom of discussion. In both cases, anti-picketing legislation was declared to be an unconstitutional interference with the free expression of opinion. Speaking through Mr. Justice Murphy, with only Mr. Justice McReynolds dissenting, the Court declared in the former case:

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

The fact that picketing involves the prospect of personal violence and public disturbance provoked no comment concerning presumptive validity. In most of the cases dealing with the safeguarding of free opinion one finds judicial silence in this respect. An outright declaration that such presumptions no longer obtain where legislation attempts to restrict the area of free discussion would serve to clarify the judicial attitude.

The final place to be occupied by the Supreme Court in our constitutional system is not certain. Grave social and economic problems press for solution. The limit to legitimate governmental activity and regulation has perhaps not been reached. Suggested remedies for economic ills are subject to an understandable difference of opinion and provide the occasion for justifiable debate. Experimentation should be permitted a wide latitude, unhampered by judicial restraint. Restrictive decisions by the Supreme Court in this field no longer merit the support of the American people. After all, the Supreme Court is not a negative Congress, to debate the wisdom of method.

In safeguarding the more basic rights of free speech, press and opinion, however, the Court is charged with a responsibility which it should not shirk. This is not a field for reasonable debate. The democratic way of life calls for the unrestricted interplay of individual thought. To place legislative restrictions upon free discussion is to jeopardize the orderly processes of social change. The attitude of the Court for

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60 S. Ct. 736 (1940).
60 S. Ct. 746 (1940).
60 S. Ct. 736, 744 (1940).
the past several years leads to the belief that judicial protection will continue. To fortify that protection by putting the burden on government to justify an impinging course should be the next step in the defense of the constitutional right to freedom of opinion.