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The Clear and Present Danger Doctrine

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THE CLEAR AND PRESENT DANGER DOCTRINE

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Like so many judicial utterances that aptly and dramatically express a thought, the phrase 'clear and present danger' has become a bon mot, used over and over by judges and the public alike. Inartificially, the idea that freedom of speech must not be curbed unless a clear and present danger so demands has been hailed as a basic American constitutional doctrine. But to find out how it is actually useful as a legal principle in deciding a case, we go to the United States Supreme Court decisions which either quote the words or cite the case from where it stems. And here we discover that nearly all these cases contain dissenting opinions, that in many the citation is found in the dissent, and that in a goodly number both the majority and the minority either referred to or based themselves on the doctrine! Faced with so much conflict and uncertainty, we should reappraise the doctrine and try to discern its present limits of application.

The phrase was first enunciated by Oliver Wendell Holmes on March 3, 1919, in his opinion for a unanimous court in Schenck v. U.S., 249 U.S. 47, when he wrote, speaking of the power of the Government to limit the freedom of expression by an individual: "The question in each 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."

This phrase has become a determinant wherever the protection of the First Amendment of the Federal Constitution is claimed. The Amendment in unqualified terms prohibits Congress from making any law i.e. prohibiting the free exercise of religion, abridging freedom of speech and press or the right of peacable assembly. An "abridgment" can occur by a previous restraint on speech, as well as by the threat of subsequen punishment for what was said. Thus the Bill of Rights extended the old Blackstonian doctrine that a "freeman has the undoubted right to lay what sentiments he has before the public, but if he publishes what is improper, mischievous, and illegal, he must take the consequences

of his own temerity." The lack of qualification did broaden the idea of freedom of utterance in America. But on the other hand, the right has never been an absolute one, nor has it been unconditionally protected from prior restraint. The operation of some common law rules and the exercise of important Federal and State powers in some respect and to some degree invade the individual's right to express his thoughts at will. Like all human activities, those protected by the First Amendment must be weighted according to their impression and effect on relations between people, and at times may be subordinated for the good of all. The rule laid down by Holmes provided a possible test for the extent of permissible deprivation of these rights.

The setting in which the doctrine was announced was a prosecution under the 1917 Espionage Act for conspiracy to influence persons subject to the Draft Act to obstruct the draft. Defendant had circulated literature asking the draftees to disobey the draft. The Act was held not violative of the First Amendment, and sustainable under the war power, as it was time freedom of speech - which is not absolute - could be restrained in the interest of the National safety. The decision could have tested on this alone, but Holmes went further to announce the proposition that there must be a clear danger and a present danger of the substantive evil being brought about by the words spoken before the Government can exercise its power to proscribe and punish. As this test was "not absolutely necessary to the decision of this case (which apparently fell within the limits set by the test), we may suppose that the remark was simply "magnificent dictum." Thus the question of raising this phrase to the dignity of a test of constitutionality is left to later cases.

Two important questions arise on a reading of the Schenck case. Holmes spoke of "circumstances" in which words would become culpable. What such circumstances could be, has been a major source of contention. They vary in degree with each of the types of situations to which the Schenck test has been applied. The other problem is whether the doctrine actually sets absolute limits either to permissible deprivation or to permissible speech, or whether it is only an approximate description of the areas free from Governmental control. A review of the major

United States Supreme Court cases dealing with the doctrine is here necessary.

The first few cases reiterating the doctrine arose under the same law, the Espionage Act, and on similar facts. In Frohwerk v. U.S., 249 U.S. 206, the defendant published literature denouncing the war effort, and in Debs v. U.S., 249 U.S. 211, the defendant made speeches declaring himself opposed to all war, including the present one, and urged opposition to recruiting. Holmes, speaking for the court in both cases, disposed of them on the basis of the Schenck decision, handed down only seven days earlier. A visible change occured by November of that year, when the opinion in Abrams v. U.S., 40 S. Ct. 17, was announced. Here conviction was had under the same Act and on similar grounds. The majority held the Schenck test applicable in affirming the conviction. Justices Holmes and Brandeis dissented on their view of the facts, although they reasserted the Schenck doctrine. They held that the intent of the defendant here was to prevent interference with the Russian revolution, thus was not necessarily obstructive to the war in which the United States was engaged, and consequently would not produce present danger of the substantive evil punished by the statute.

In the Abrams dissent, Holmes developed the basis for his doctrine further: "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate 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."

The case of Schaeffer v. U.S., 40 S. CT. 259, showed a clearer break with the majority of the court. Here a conviction under the Espionage Act for publishing false reports and editorials to promote the success of the enemies of the United States was upheld. Again the dissent disagreed on the inferences from the facts. Brandeis maintained that though the U.S. had a right to punish in a proper case, under the "rule of reason" of the Schenck case, no jury could here have found that the publication "would obstruct recruiting" or "would promote

the success of the enemies," and thus there would be no present danger. The same division of the court decided Pierce v. U.S. 40 S. Ct. 205, where distribution of pamphlets to cause insubordination and disloyalty in the armed forces was held punishable under the Espionage Act. The majority held that it was a question for the jury, whether defendant's printed words would as a proximate result produce material interference with the armed forces. But again Brandeis maintained that there was no present danger, as the purpose of the pamphlets was only to gain members for the Socialist party, and as they were not distributed to any members of the armed forces.

If both the majority of the court and the dissents in the above cases relied on the Schenck doctrine, how were the different conclusions possible? The confusion stems from the fact that the doctrine was in effect a mere dictum in the Schenck case. That in reality it was not there relied on, nor in the next two cases, is evident from the opinions of Holmes in the three cases. They do not discuss in detail the circumstances in which the prohibited words were uttered, nor whether the words under those circumstances created a substantial and immediate probability of the evil to be prevented. The overpowering shadow of the war then in progress seems to have satisfied the test of "proximity and degree." These decisions were handed down shortly after the firing ceased. But the interval of one year after the Armistice may have produced a reexamination of their position by Holmes and Brandeis, and a determination that an inquiry into the special facts of each case should henceforth be had to show whether the deprivation of freedom of speech was so vitally necessary that the case should be upheld. The majority, on the other hand, continued to make the existence of the state of war, thus of "circumstances" in a larger sense, the basis for the application of the restrictive statute. Thus though they professed to follow the Schenck doctrine, it was not strictly applied in its literal meaning. In analysing the later cases we must inquire into which meaning was given to it.

We can here pause to consider what might have been the intention of Justice Holmes as to the scope of the doctrine. Certainly, if we accept the doctrine as actually applied in the Schenck case, it does not present an exclusive limit of permissible deprivation. In that case the actual proximity of the act to the possible result or the degree of effect on such possible

result was not looked into, and the conviction was sustained on the ground that "when a nation is at war, many things that might be said in time of peace are such a hindrance to its efforts . . . that no court could regard them as protected by any Constitutional right." Thus the "clear and present danger" may not be the exclusive limit to Governmental restriction of speech, which in time of National emergency may thus be further restricted. But Holmes's and Brandeis's later position in their dissents reveal that the *real* meaning was the *literal* meaning of the phrase. This suggests that even though a state of war existed and the Government was constitutionally authorized to protect its military operations, it is still a primary question of fact whether the speech of the defendant was remote or proximate, or substantial or inconsequential, in tending to produce the result to be avoided. Under this interpretation, the "clear and present danger" rule may have been intended as a real measure of protection of the right of free speech, and as a limit beyond which it could not be infringed on by Governmental action. Of course, this meaning was only presented in dissenting opinions, and whether the court would make it its own was left to later cases.

The preceding cases have dealt only with Federal statutes and the question of their applicability to the defendant. The next case before the high court involving the doctrine, Gilbert v. Minnesota, 41 S. Ct. 125, indicated an extension of the test into two new areas, the acts of states and defenses to status per se. Here a state status punishing the uttering of words in a public meeting to discourage enlistments in the armed forces and a conviction under it were upheld. Though the Schenck case was cited, the decision was on the basis of the state's police power to preserve the peace and its interest in a national war. Brandeis, dissenting, denied that the police power of the state, exercised in peace and war, could curb freedom of speech to an extent only reserved to Congress in time of war, the war power justifying the restriction in averting present danger in war time. He considered the guaranties of the First Amendment to be privileges of national citizenship, which could not be abridged by the states. But Holmes concurred in the result. His reason for this may be found by pointing to his opinion in Fox v. Washington, 236 U.S. 273, (1915), upholding a state statute outlawing

the willful publishing of any incitement to the commission of any crime. He held that act to be a justifiable deprivation of liberty consistent with due process. The state here had reasonably drawn the line of permissible behavior short of the encouragement of manifest disrespect for law, i.e. overt breaches and technically criminal acts. Thus Holmes insisted on a narrow construction of the statute, and as such upheld it. But here only the 14th Amendment was the basis for objection, and at that time the positive prohibitions of the First Amendment were not thought to be implied in the Due Process Clause of the 14th. Not until the Gitlow case, 45 S. Ct. 625, was the Bill of Rights interpreted as a measure of "due process" and thus as an inhibition on state action.

Gitlow v. New York also upheld a state law prohibiting certain utterances entirely. Here the New York Criminal Anarchy Act was sustained on the state's right to preserve itself, unqualifiedly held to be superior to freedom of speech. The majority distinguished the Schenck case by differentiating statutes proscribing speech per se and statutes prohibiting certain acts tending to bring about a substantive evil. They said the Schenck doctrine was intended to apply only in the second type of cases, where the "acts" consist of speech. There an original showing must be made in each case that the speech is in fact dangerous, while in the former type the tendency to produce the evil is immaterial. The only showing here would be that the words actually fall within the forbidden area of speech. If so, they were punishable, as long as the state had the power to pass such a statute. This distinction was vigorously attacked by Holmes and Brandeis as fatuous and unwarranted by the positive language of the First Amendment, which the majority had implied to be applicable in determining the scope of the Due Process Clause. The "danger" test should be an original question in each case where utterances are held culpable. But Holmes' misapprehension in his dissent was his expressed assumption that the law had been settled on that point, when in fact the majority of the court, as pointed out above, refused to interpret his doctrine at face value. His view of the test was not adopted by the court until 1937.

No further light was shed on the doctrine by Whitney v. California, 47 S. Ct. 641, where the court held the California Criminal Syndicalism Act well within

the decision of the Gitlow case. Holmes and Brandeis reiterated that though a statute may be constitutional per se, it may still be challenged as invalidly applied, But they concurred in the result, because they found evidence of a conspiracy, and the defendant did not claim invalidity of application under the circumstances. The Schenck case was next cited in Near v. Minnesota, 283 U.S. 697, for the proposition that the imposition of previous restraint on speech was not absolutely forbidden, but is allowable in exceptional cases, such as in war time. However, the test was not a feature of that case, which overthrew a statute prohibiting scandalous publications on the ground that its necessary effect was to impose censorship on criticism of public officers. The case held freedom of the press to be guaranteed by the 14th Amendment.

If the doctrine was ever to become a test of constitutionality, its limits and operation could not be discerned until a conviction was actually held unconstitutional by the Supreme Court on those grounds. This occurred in Herndon v. Lowry, 57 S. Ct. 738, (1937), where the prophet finally came into his own two years after his death. Though by a narrow margin of one vote, the court held the Georgia Anti-Insurrection Statute (penalizing any attempt by persuasion or otherwise to induce others to join in any combined resistance to lawful authority of the state) inapplicable to a case where the defendant solicited memberships for the Communist Party. Mr. Justice Roberts here applied the Schenck test in its literal meaning, saying that there is no such proximity between an insurrection and the mere procurement of members to a party, some of the tenets of which may be "lawful, others, as may be assumed, unlawful" by "ultimate resort to violence at some indefinite future time." The decision then also held the statute invalid on its face for furnishing too indefinite a standard for guilt.

This opinion is notable for two propositions, which may now be considered corollaries of the Schenck doctrine as applied here. It indicated some requirements for the constitutionality of a statute effecting a right guaranteed by the First Amendment. For example, statute to curb speech willfully interfering, proximately and substantially, with a vital and well defined governmental activity, or speech

having a "dangerous tendency" to subvert the government, have been upheld. Such statutes had to describe and define the proscribed utterance carefully and adequately and require a narrow intent directed against the vital object to be protected. Such intent may be inferred from time, place, and circumstances.

The second proposition was the holding that "the power of the state to abridge freedom of speech and of assembly is the exception rather than the rule. The limitation upon individual liberty must have appropriate relation to the safety of the state." This pronouncement is important, as it limits the rule which had been followed up to the time of the Gitlow and Whitney cases. The opinion in the former case declared: "Every presumption is to be indulged in favor of the validity of the statute." This doctrine is the usual presumption in deciding whether a statute is a reasonable means of achieving its lawful purpose, upon an attack under the Due Process Clause. But it was only logical that the court should adopt this exception to the presumption, when it required more than mere "reasonableness" in upholding statutes affecting freedom of speech. To the effect that this was in consonance with Holmes' view and to show the theoretical basis for the new rule, a passage of Mr. Justice Frankfurter, concurring in Kovacs v. Cooper, 69 S. Ct., 448, is enlightening:

> "The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes. The philosophy of his opinions on that subject arose from a deep awareness of the extent to which sociological conclusions are conditioned on time and circumstances. Because of this awareness, Mr. Justice Holmes seldom felt justified in opposing his own opinion to economic views which the legislature embodied in law. But since he also realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truths by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable condition of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which

derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics."

With the Lowry case then, the "clear and present danger" doctrine had "arrived" as the rule of the Supreme Court. Its application was, according to its literal meaning rather than its early application. But the majority so holding was narrow, and the issue of its application was not laid at rest. In fact, the court has, since 1937, split more bitterly than before. In the cases following, we shall not concern ourselves so much with the types of cases to which the rule is relevant (i.e. what would actually constitute a "substantive evil)", but rather, how far the Court has gone in applying the rule. Has it been extended or restricted?

The suggestion in the Lowry case as to narrowness in drafting and construction of statutes affecting freedom or speech was followed in Thornhill v. Alabama, 310 U.S. 88, and Carlson v. California, 60 S. Ct. 746, in which the Schenck doctrine was applied in cases of industrial disputes. The decisions declared a statute prohibiting going near a place of business to induce others not to deal with such business, and a statute prohibiting the carrying of signes in picketing, unconstitutional as an unwarranted restriction of the liberty of discussion of public issues. The statutes were too sweeping in scope, and thus void on their face, "under circumstances presenting no clear and present danger of substantive evil within the allowable area of state control." Thus where a statute is so drawn as to cover a multitude of situations which would fall outside the "clear and present danger" area, the court now committed itself to the invalidation of the entire statute. But what would the holding be as to the validity of such a statute, where the facts of the case before the court would satisfy the "clear and present danger" test?

On this point, a clue was given in Milk Wagon drivers Union v. Meadowmoor Dairies, Inc., 61 S. Ct. 552, in which an injunction of picketing was upheld in its entirety, where the strike was set against a background of violence. Here the right to picket as a right of free speech was in effect limited to peaceful picketing. But the majority did not mention the

Schenck test, and the minority disagreed in its interpretation of the facts, finding no clear and present danger of continued violence to warrant an entire proscription of picketing as such. Thus, though limiting the effect of the Thornhill case as to picketing, this case does not clarify further the extent of the Schenck doctrine.

The cases of Pennekamp v. Florida, 66 S. Ct. 1029, and Craig v. Harney, 67 S. Ct. 1249, must be considered together with Bridges v. California, 62 S. Ct. 190. They were all contempt citations issued by state courts for publishing comments on cases then pending in court. Defendants were a labor leader, who stated in a telegram that a certain decision would result in a strike, and newspaper publishers, who printed editorials imputing partisanship to the judge, calling for high sentences for convicted defendants, belittling the judge, and commenting unfavorably on the judge's disposition of cases. The Bridges case first introduced the Schenck test into this type of case, displacing the earlier rule that a "reasonable tendency" must be shown that the words used would interfere with the orderly administration of justice. Mr. Justice Black spoke of the Schenck test as a rule affording "practical guidance." Then, by this test, the words published were held to be not a substantial threat to administration of justice by intimidation of the judge, upon the preconception that a "a lack of firmness, wisdom or honor" must not be imputed to the judge. But what circumstances would actually present a clear and present danger to warrant contempt for comment made outside the courtroom was not indicated, except that the opinion in the Craig case called for an appraisal of the words in the setting of the news articles both preceding and following it and in the light of community environment prevailing at the time. But it stated that "the law of contempt is not made for the protection of judges sensitive to winds of public opinion," and thus in effect creates a deterrent, if not a material restriction, to the use of the contempt power. The conflict in the court as to the Schenck test generally is indicated by Mr. Justice Frankfurter's attack on its use here, in his dissent in the Craig case: "The opinions of Mr. Justice Holmes contain not the remotest hint that the Due Process Clause withdrew from the states the power to base a finding of contempt on publication aimed at a particular outcome of a matter awaiting adjudication . . . .

(thus the doctrine would become) merely a phrase for covering up a novel, iron constitutional doctrine." Strictly, however, the difference in opinion rests on divergent views of the facts, although a deeper conflict as to the limits of the doctrine is expressed, which will be dealt with.

Chaplinsky v. New Hampshire, 62 S. Ct. 766, though not directly citing the Schenck doctrine, serves to illustrate, in the words of Mr. Justice Murphy, that allowing the broadest scope to the First Amendment, "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." Included here are lewd, obscene, profane, libelous, and "insulting" or "fighting" words - those which by mere utterance inflict injury or tend to incite an immediate breach of the peace. Their social value is so slight as a step to truth as to be outweighed by the value of order and morality. These types of restrictions, it may be noted, are not inconsistent with the Schenck doctrine nor do they extend its limits of permissible proscription of speech. These classes of speech have always been considered such immediate inroads on elementary interests of decency, morality, and peacefulness to be subject to prohibition. Put there is emphasis on "narrowness" of these classes of speech, and the necessity for drafting the statute accordingly.

In line with the Court's application of the Schenck doctrine since the Lowry case, it restated the requirements for conviction under the Espionage Act of 1917 in the decision of Hartzel v. U.S., 64 S. Ct. 1233. It applied a subjective test and an objective test: 1) a narrow specific intent, which is provable from the words used and the circumstances; 2) activities creating a clear and present danger of bringing about the evil. Then the court inquired into the circumstances of this particu lar case, deciding that there was a reasonable doubt of the defendant's specific intent to cause insubordination in the armed forces. However, the dissent found such criminal intent.

The literal application of the Schenck doctrine was adhered to in Thomas v. Collins, 65 S. Ct. 315, where a State law requiring registration of persons soliciting members for labor unions was held inapplicable. A labor leader here made a speech, in which he extended a general

invitation to join and also a specific invitation to one person. Though the statute was defended as a legitimate licensing requirement of a profession, the court found that under the Schenck test that defense could not be applied here. Mr. Justice Rutledge held that lawful assemblies, involving no grave and immediate danger, are not instruments of harm, thus requiring no previous identification of speakers. This is in accord with De Jonge v. Oregon, 299 U.S. 353, holding that the right of assembly cannot itself be made a crime.

That the "clear and present danger" test is applicable to protect freedom of religion was held in West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, where a compulsory flag salute for school children, carrying penalties for disobedience, was overturned as violative of the 14th Amendment. Mr. Justice Murphy here said that, where the flag salute is regarded as contrary to a religious obligation, it is a restriction on religious freedom, which includes "the right to speak and to refrain from speaking." Mr. Justice Jackson reiterated the doctrine: "Freedom of speech and religion may not be infringed upon such slender grounds" (i.e. simply a "rational basis" for regulation, which usually satisfies due process). "They are susceptible to restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." Thus the literal basis of the Schenck doctrine was affirmed. Mr. Justice Frankfurter again dissented strongly on theory, but disagreed on the merits, because he could not see any suppression of or curb on any belief. On the ground of the Barnette case, the court held a conviction for teaching or dissemination of literature "reasonably tending to create an attitude of stubborn refusal to salute, honor, or respect the national and state flags" void. Thus the state law punishing the teaching of disloyalty to the national and state governments was inapplicable. Taylor v. Mississippi, 63 S. Ct. 1200.

The converse right to propagate one's religious beliefs was held in Martin v. City of Struthers, 63 S. Ct. 862, to have a higher dignity than municipal or personal convenience. Here an ordinance completely prohibited distribution of handbills to residences. As the First Amendment has been held to include the right to circulate literature (Lowell v. Griffin, 303 U.S. 444), an absolute prohibition of such circulation to residences in a city was held to transgress the permis-

sible bounds of "regulation" of such circulation in the interest of public order. This ruling was carried further in Marsh v. Alabama, 66 S. Ct. 276, to apply to a company town, where religious preaching had been forbidden. Mr. Justice Reed, dissenting in both cases, thought the restriction to be merely a permissible regulation under the police power, not materially invading the area of free speech. Whether this rule would be carried to the extent that one may now remain on private property against the will of the owner, so long as the only objection to his remaining there is his right to spread his religious views, (as feared by Reed) is doubtful. Although both majority and dissent are phrased in general terms, there may in fact have been some degree of dedication to public use in the streets of a company town, and thus the application of the case could be limited to public or quasi-public places. It is certainly not applicable to a private dwelling.

These cases concerned the validity of the application of a law in a particular case. Taking the Schenck test as a point of departure, the Court has invalidated statutes going so clearly beyond the bounds of any clear and present danger of substantive evil that their necessary operation would involve prior restraints on speech in practice, even though the Court later could hold the statute inapplicable to a particular situation. Such a clear case was Thornhill v. Alabama. But the last two cases considered were not so clear, and in Kovacs v. Cooper, 69 S. Ct. 448, a boundary line was approached - and crossed. The schism is indicated by the fact that the division in the Court was five to four, that five opinions were written, and that no more than three Justices joined in any one opinion. Here a conviction under a municipal ordinance prohibiting the use of sound trucks or other instruments "making loud and raucous noises" was upheld, as a reasonable exercise of police power. The use of such devices was thought to involve limitation on speech only incidentally. Mr. Justice Reed said that such exercise of free speech may be "controlled" in the interest of public order, and that even an absolute prohibition in a limited area (city) was proper control. Mr. Justice Black, dissenting, maintained that "there is no more reason for wholly prohibiting one useful instrument of communication than another," although the use of such instruments could be reasonably controlled. The minority protested that the conviction was not for making "noises" but for operating a sound truck, without any finding as t

"noises", and thus completely inhibited one means of expressing opinion. This opinion came at the heels of Saia v. New York, 68 S. Ct. 1148, where a prohibition of sound trucks except with a permit of the police chief was invalidated as a previous restraint on speech!

The line drawn, where validity of statutes per se is in issue, is thus much more vaccilating than where the applicability of statutes to particular cases is to be decided. The question posed after our consideration of the Lowry case received one possible answer in Terminiello v. Chicago, 69 S. Ct. 894. The defendant had made an inflammatory speech in a situation where the tension between his listeners and an unfriendly crowd had reached proportions of a riot. He was convicted of disorderly conduct, which an ordinance defined as "making, aiding . . a breach of the peace . . . " Breach of the peace was defined in the court's charge as behavior which "stirs the public to anger, invites disputes, brings about a condition of unrest, or creates a disturbance." Mr. Justice Douglas held that the acceptance of this definition by the state Supreme Court made it part of the ordinance. He said the exercise of free speech in a free society may legitimately have the results of the first three parts of the definition, and an inhibition of such exercise makes the ordinance void in part. As the charge to the jury did not permit severance of the void parts from the valid parts, it would be impossible to determine on which of them the general verdict rested. In such a manner the ordinance could not be applied to the defendant. The case was decided by a narrow margin. Mr. Justice Jackson, in a strong dissent, declared: "Rioting is a substantive evil . . . The evidence proves beyond dispute that danger of rioting and violence in response to this speech was clear, present, and immediate." As the majority did not rule on the merits, we have here a case where a statute as construed was held to be an inhibition of free speech in its application even though the facts of the case presumably satisfied the "clear and present danger" test. The technical correctness of the majority may be assumed. This was a matter of statutory construction and of the application of the construed provision to the case. Thus this decision does not give a strong answer to our previous question. What would be the result if the position taken here would be carried forward to a case in which a statute were attacked on its face for possible unconstitutional application in an obvious case of clear and present danger? Such an application would create the anomaly

of a defendant going free, though guilty under an applicable part of a statute and on the Constitutional test, merely because of the possibility of another, unconstitutional interpretation of the statute being applied in a different case, even though the Constitutional question could still be raised in such other case! Of course, the contrary question then is, why should the Court not overrule a statute it finds unconstitutional whenever such a statute is presented to it for justification of a conviction? Perhaps a remedy can be found in a policy against excessive technicality in applying a test of constitutionality apart from the facts of the case.

However, it is not our purpose to suggest possible future tendencies, but only to attempt an assessment of the present standing of the doctrine. It is evident that in the 30 years "clear and present danger" has been the ostensible rule of the Court, and the 12 years it has been the real rule, the Court has hardly been able to agree on any of the issues it raises. Thus it is of little use to make generalizations. As to what "circumstances" would justify inroads on freedom of speech, it could be said that where the "substantive evil" is less than the national safety or the existence of our form of government, the Court is far less ready to uphold a restriction on speech even when the danger of bringing about such evil is immenent. This is indicated in the cases involving contempt of Court, labor disputes, and religious liberty. There the freedom of speech, press, and religion are held of much higher order than the interests which interfere with them. Where a threat to existence of the government itself is concerned, hardly any cases since the period before the Lowry case have dealt with what degree of peril the situation must present to authorize restriction of speech. Thus whether the attitude of the Court in the earlier decisions will govern, or a modification thereof, is an open question. Where the constitutionality of statutes per se is involved, the tendency of the Court is similar. It will look to the importance of the interest protected, and the degree of danger required will vary accordingly. It is possible that in this phase the doctrine has been broadened, as suggested in the Terminiello case, for when a statute is cut down, any possible constitutional parts often fall with the rest of it for want of severability.

Thus we see that the limits of the doctrine are still in process of formulation. To date a summation

of the decisions have shown a tendency to set up a positive barrier against most encroachments on the liberties protected by the First Amendment. But the issues are far from being settled. As we must conclude by finding disunion, not only on the Court's application of the doctrine to facts, but also on a possible basic approach, no clearer conception of this conflict can be conveyed than by quoting the protagonists of these views. Mr. Justice Frankfurter in the Meadowmoor Dairies case: "Freedom of speech . . . cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence." Mr. Justice Black in the same case: "I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests, and without which it could not continue to endure as conceived and planned . . . the states should be left wholly free to govern within the ambit of their powers . . . But this Court has long since committed itself to the doctrine that a state cannot, through any agency, either wholly remove or partially whittle away the vital individual freedoms guaranteed by the First Amendment." The divergent conclusions are indicated by the following quotations. Mr. Justice Frankfurter in the Barnette case: "(Holmes did not enunciate) a formal rule that there could be no restriction on free speech, nor compulsion where conscience balks, unless imminent danger would thereby be wrought to our institutions and our Government." Mr. Justice Black in Bridges v. California: "What emerges . . . is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high, before utterances can be punished. (The cases applying it do not) mark the furthermost constitutional boundaries of protected expression, nor do we here."