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CONSTITUTIONAL FREE SPEECH
v.
STATE POLICE POWER

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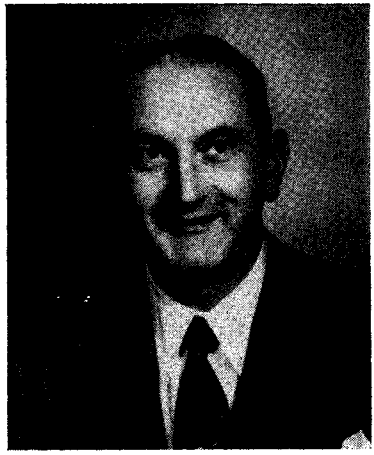

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Article I of the Amendments to the Constitution of the United States provides that, "Congress shall make no law . . . abridging the freedom of speech." Generally, the First Amendment requires that one be permitted to believe what he will and to advocate what he will unless there is a "clear and present danger" that a substantial public evil will result therefrom.[1] The states, on the other hand, by virtue of the "police power" doctrine have the inherent right to preserve their own sovereignty.[2] Our studied inquiry here is as to which shall give way when a clash occurs between an individual asserting his constitutional right of "freedom of speech" and a state asserting its right to act for the common weal of its citizens under its internal police powers. From the variegated court precedents set forth in this paper, our further effort will be to attempt to set forth guiding formulae for the courts in their role as supreme judicial arbiters in the constant struggle between the contestants of constitutional free speech and state police power.

[1] Schenck v. United States, 249 U. S. 47 (1919).
[2] New York v. Miln, 11 Pet. (U. S.) 138 (1837).

In view of the immensity of the subject, the direct and circumscribed area of this paper will be limited to the states of California and New York. Obliquely, we will refer to legislation and cases of other states, in addition to decisions of the United States Supreme Court. On warrantable occasions, statutes and ordinances will be set forth, and pertinent portions of noteworthy opinions will be quoted verbatim.

It is well to note at this point that the line of demarcation that exists between the Federal guarantee of free speech and the State's police power is not a clearly defined one. In fact, it would be more appropriate to state that the line is a very nebulous one wherein the courts have constantly found themselves figuratively situated between "Scylla and Charybdis." In this struggle, many strong majority opinions are written; but very rarely without equally vigorous dissenting ones.

The earliest attempt to invoke the aid of the Supreme Court of the United States against state action in suppressing free speech was brought about in the case of *Patterson v. Colorado*,[3] wherein it was charged that certain articles and a cartoon that were published reflected upon the motives and the conduct of the Supreme Court of Colorado in cases still pending and were intended to embarrass the Court in the impartial administration of justice. The Supreme Court of the United States, speaking through Mr. Justice Holmes, held that this was purely a matter of local law with which the Court would not interfere.

The next attempt took place in the case of *Mutual Film Corporation v. Industrial Commissioner of Ohio*,[4] wherein the complainant was engaged in the business of purchasing, selling and leasing of motion picture films. Under an Ohio statute, complainant was compelled to submit his films for approval to the board of censors. Despite the contention of complainant that the statute violated the First and Fourteenth Amendment of the Constitution, the Supreme Court of the United States sustained the State's contention that it was engaged in a valid exercise of its police power.

In *Fox v. State of Washington*,[5] defendant was convicted of the crime of editing printed matter tending to encourage and advocate disrespect for law contrary to a Washington statute. The article entitled "The Nude and the Prudes" advocated the right to bathe in the nude and to boycott those who interfered with this right. In sustaining the conviction, the Supreme Court of the United States held that it had nothing to do with the wisdom of the state act and the prosecution of the defendant thereunder. It stated that it was only concerned whether the staute was repugnant to the Constitution of the United States.

In *Gilbert v. Minnesota*,[6] the defendant was convicted of violating a Minnesota statute which made it unlawful to interfere with or discourage the enlistment of men in the military forces. The United States was then at war with Germany when the de-

[3] 205 U. S. 454 (1907).
[4] 236 U. S. 230 (1915).
[5] 236 U. S. 273 (1915).
[6] 254 U. S. 325 (1920).

fendant used disparaging language to discourage enlistment in the armed forces. Again, the Supreme Court of the United States held that the statute was valid, as the state under its "police power" had the power to preserve its internal peace. In a notable dissenting opinion, Justice Brandeis brought to light for the first time, the novel idea that freedom of speech under the First Amendment is protected under the Fourteenth Amendment against abridgment by the states. Concretely, the liberty of speech is a type of freedom which under the Fourteenth Amendment no state may abridge.

Such then is the early background of the clash between the individual's right of freedom of speech under the First Amendment and the States' assertion of police power under Justice Taney's opinion in the *Miln* case.[7] Obviously the aforementioned early cases indicate a certain studied aloofness on the part of the Supreme Court which obliquely suggests that it would be inclined to permit a gnawing away of the individual's freedom of speech under the First Amendment when opposed by the States' cry of "internal police power." The matter, however, does not rest here as we shall further see in the workings of the judicial processes in subsequent cases that came before the courts in the states of California and New York; and which in many instances were taken up before the highest tribunal of the land.

CALIFORNIA

In *re Hartman*,[8] petitioners were convicted of violating a Los Angeles ordinance which made it unlawful to display or have in one's possession within the City of Los Angeles, any flag, insignia or emblem whatsoever representative of any nation, sovereignty or society which espoused principles or theories of government antagonistic to the Constitution and Laws of the United States.

In reversing the lower court and discharging the petitioners from custody, the Supreme Court of California held that the ordinance was invalid as it deprived petitioners of their constitutional right to join an organization advocating peaceable changes in our laws or form of government, and their right to adopt and display an emblem or insignia signifying such purpose.

In *Whitney v. People of the State of California*, the defendant

[7] Footnote 2, supra.
[8] 182 Cal. 447 (1920).

was convicted of violating the California Criminal Syndicalism Act[9] in that she did willfully and feloniously organize and assist in organizing and knowingly became a member of a group assembled to advocate, teach and aid in the overthrow of the government by force and violence and establishment of a working class government. The facts show that the defendant, a woman nearing sixty, a Wellesley graduate long distinguished in philanthropic causes, became a member of the Communist Labor Party of California and took an active part in its proceedings. She was elected an alternate member of the State Executive Committee and attended its meetings. Defendant contended that it was not her intention that the Communist Labor Party be an instrument of terror and violence; that all intemperate policies were adopted over her protest, and that her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. She maintained that the proceedings amounted to a denial of due process and equal protection under the Fourteenth Amendment and that therefore the statute was repugnant to the Federal Constitution.

The judgment of conviction was affirmed by the District Court of Appeal.[10] In sustaining the conviction, the Supreme Court of the United States held[11] that the act was sufficiently clear to satisfy the requirements of due process and did not in any way violate the equal protection clause as it affected all alike who came within its terms and did the things prohibited. The Court said:

> "We cannot hold, that as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state."

In a dissenting opinion by Mr. Justice Brandeis on the basis of which the Governor of California pardoned Miss Whitney shortly thereafter, the memorable language there used is here quoted for its poignancy and terseness:

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

[9] Deering's Calif. Gen. Laws, Act 8428, Stats. 1919, p. 281.
[10] 57 Cal. App. 449 (1922).
[11] 274 U. S. 357 (1927).

> if authority is to be reconciled with freedom. Such in my opinion is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

Although Miss Whitney was not exonerated by the Supreme Court, a blow was struck for freedom of speech in that Justice Brandeis' view of the limited powers of state legislatures to curtail free speech was adopted by the majority as opposed to their former indications in the case of *Gitlow v. People of the State of New York.*[12]

On February 3d, 1930, President Hoover appointed Charles Evans Hughes as Chief Justice of the United States to fill the vacancy created by the resignation of Chief Justice Taft. Soon thereafter a new trend toward the question of freedom of speech became astonishingly clear. For what had formerly been the isolated views of Justice Holmes and Justice Brandeis were becoming the views of the majority of the Supreme Court. The case of *Stromberg v. California*[13] became the starting point of this new trend.

In that case, the defendant was charged under a California penal statute[14] with displaying a red flag in a meeting place as

[12] 268 U. S. 652 (1925).
[13] 283 U. S. 359 (1931).
[11] Penal Code, Sec. 403-a, Deering's Penal Code of California.

a sign, symbol or emblem of opposition to organized government; or, as an invitation or stimulus to anarchistic action; or, as an aid to propaganda of a seditious character. These three purposes were alleged conjunctively in the information. The facts show that defendant was a member of the Young Communist League, an organization affiliated with the Communist Party. The charge against her concerned a daily ceremony at a children's camp in which defendant supervised and directed the children in a raised red flag ceremony, the flag being a reproduction of the flag of Soviet Russia. In the ceremony a pledge to the "worker's red flag," was recited.

The defendant contended that under the Fourteenth Amendment the statute was invalid as being an unwarranted limitation on the right of free speech.

The Appellate Court expressed doubt as to the validity of the first clause of the statute stating that "opposition to organized government" is a vague clause and might be construed as lawful opposition, but held them as disjunctive and separable and upheld the statute as to the other two clauses. It sustained the conviction.[15]

On appeal, the United States Supreme Court reversed[16] the California court and held that the first clause, condemning display of a flag "as a sign, symbol or emblem of opposition to organized government," construed by the state court as possibly including peaceful and orderly opposition to government by legal means and within constitutional limitations, was unconstitutional. The Supreme Court said:

> "Free political discussion to the end that the government may be responsive to the will of the people is a fundamental principle of our constitutional system. A statute which upon its face and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

It is interesting to note that the implications of this decision extend beyond the precise issue of red flags, banners or emblems. If anything, the holding here pointed out that the constitutional

[15] 62 Cal. App. 788 (1930).
[16] Footnote 13, supra.

guarantee extends beyond freedom of speech in a narrow sense. Not of less importance, the decision points out that a criminal statute may be unconstitutional for indefiniteness, which is a frequent charactertistic of sedition laws.[17]

In *People v. Anderson*,[18] the defendants were criminally charged with willfully and unlawfully assembling for the purpose of disturbing the public peace in violation of the California Penal Code.[19] The facts show that an organization holding communist doctrines and known as the Trades Union Unity League called a demonstration against unemployment. One, Olson, was making a speech. He was told to disperse. He refused and kept on speaking, telling the police officer the streets were public. In spite of forcible resistance, defendants were arrested. While the arrest was being made, the crowd was shouting, "Don't arrest our speakers." The crowds overflowed into the street and were blocking traffic.

In sustaining the conviction, the District Court of Appeal said:

> "Although public speaking is not prohibited, standing or congregating in the streets in such manner as to block traffic is prohibited by city ordinances. While a speaker

[17] A statute making it criminal to be a "gangster" was subsequently invalidated for vagueness—Lanzetta v. New Jersey, 306 U. S. 451 (1939).
[18] 117 Cal. App. 767 (1931).
[19] Penal Code, Sec. 416, Deering's Penal Code of California.

> who is not himself obstructing traffic may not always be criminally responsible for such obstruction created by his hearers, yet when he refuses to move on request and insists on holding his meeting at a place where his hearers are blocking traffic, as in this case, he becomes at least an aider and abetter, and a principal in the offense."

Local ordinances prohibiting free speech when the police power function of preserving public order is imperiled did not stop at this point. In 1936, the City of Los Angeles passed an ordinance prohibiting the distribution of handbills or any other printed matter calculated to attract public attention. The ordinance[20] reads as follows:

> "No person shall distribute any handbill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet poster, sticker, banner, notice or other written or printed matter calculated to attract attention of the public."

In *Kim v. Young*,[21] the defendants were convicted of distributing handbills which bore a notice of meeting to be held under the auspices of "Friends of the Lincoln Brigade." The Supreme Court of California upheld the conviction of the defendants for violating the above mentioned ordinance.

On appeal to the Supreme Court of the United States,[22] the conviction was reversed and the ordinance was declared invalid. The Court said:

> ". . . the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect to cleanliness of the streets does not justify an exertion of the police power whcih invades the free communication of information and opinion secured by the Constitution."

The decision in the Handbill Cases[23] thus made the constitu-

[20] Municipal Code of the City of Los Angeles, Sec. 28.01.
[21] 33 Cal. App. 2d 747 (1938).
[22] Schneider v. State, 308 U. S. 147 (1939), with which are grouped Young v. California, Snyder v. Milwaukee and Nichols v. Massachusetts and referred to as the Handbill Cases. See also Lovell v. Griffin, 303 U. S. 444 (1938); rev'g. 55 Ga. App. 609 (1937); and Martin v. Struthers, 319 U. S. 141 (1943).
[23] Ibid.

tional protection against ordinances much wider than it had been. It might be argued that this decision will make it rather difficult for a city to frame an ordinance to keep its streets clean; but perhaps this does not really matter when we think of all the present litter which lies outside the scope of such handbill ordinances—cigarette wrappers, matchcards, newspapers. . . .[24]

What about ordinances supressing the house to house canvassing of ideas? Important as it might seem to expose citizens to novel views, it might validly be argued that it is more important that a man not be denied the right to shut himself up from hearing uninvited strangers expound unwanted dogmas.[25] Unfortunately, the social interest aspect of freedom of the home is weighed rather lightly in the Handbill Cases[26] and *Cantwell v. Connecticut.*[27] In these cases, although the Supreme Court does not undertake to frame the ideal ordinance, it nevertheless suggests a broad and important guiding principle, to-wit, that the police power must not serve as a disguise for the suppression of unpopular persons and ideas.

The final noteworthy case of important in California which involved a clash between Federal free speech and State police power is the case of *Bridges v. California.*[28] In that case, petitioner, a labor leader, was adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles. The facts show that while a motion for a new trial was pending in a case involving a dispute between an A. F. of L. union and a C. I. O. union of which Bridges was an officer, he caused to be published a telegram which he had sent to the Secretary of Labor. The telegram referred to the Judge's decision as "outrageous," stated that attempted enforcement would tie up the port of Los Angeles and involve the entire Pacific Coast, and concluded with the announcement that the C. I. O. union representing twelve thousand members "did not intend to allow state courts to override the majority vote of its members in choosing its officers and to override the National Labor Relations Board."

Petitioner challenged the state's action as an abridgement of freedom of speech and of the press. The Superior Court overruled this contention and the Supreme Court of California affirmed,[29] stating that in so far as this punishment constituted a restriction on liberty of expression, the public interest in that liberty was properly subordinated to the public interest in judicial impartiality and decorum.

In reversing the Supreme Court of California, the Supreme Court of the United States, speaking through Mr. Justice Black, stated:

"What finally emerges from the "clear and present

[24] Chafee, Free Speech in the United States 406 (1948).
[25] Cantwell v. Connecticut, 310 U. S. 296 (1940); but compare Breard v. City of Alexandria, 341 U. S. 622 (1951), where the Court upheld a municipal ordinance aimed at preventing door-to-door solicitation by itinerant salesmen.
[26] Footnote 22, supra.
[27] Footnote 25, supra.
[28] 314 U. S. 252 (1941).
[29] Bridges v. Superior Court, 14 Cal. 2d 464 (1940).

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

How far may one then go in commenting on judicial proceedings? Succinctly stated, the Supreme Court has ruled that punishment by contempt violates the free speech guarantees of the First and Fourteenth Amendments unless the publication constitutes a clear and present danger to a fair adjudication of pending cases.[30]

NEW YORK

In *People v. Most*,[31] defendant was indicted for participating in an unlawful assembly in violation of the New York Penal Law[32] prohibiting assemblies tending toward a breach of peace.

[30] See also Pennekamp v. Florida, 328 U. S. 331 (1946), and Craig v. Harney, 331 U. S. 367 (1947).
[31] 128 N. Y. 108 (1891); see also People v. Johnson, 62 N. Y. S. 2d 449 (1946) and People v. Most, 171 N. Y. 423 (1902).
[32] Sec. 2092 subd. 3.

The meeting took place on the day after the hanging of the Chicago anarchists. It was attended by more than eighty people in sympathy with the defendant who openly avowed that he was an anarchist. When the defendant entered the hall he was greeted with "here comes our leader, Father Most." He then started to speak and the following are among his utterances:

> "Brother anarchists, . . . the day of revolution will come soon. First of all will be Grinnel; then comes Judge Gary; then the Supreme Court of Illinois; then the highest murderers of the land, the Supreme Court of the United States. . . . I again urge you to arm yourselves, as the day of revolution is not far off; and when it comes see that you are ready to resist and kill those hirelings of capitalists."

To all this the audience exhibited its warm approval by constant cheers.

The Court held that the evidence was sufficient to show that there was the requisite concurrence of the statutory number of three or more persons, to have the case go to the jury. The Court further held that the evidence was sufficient to warrant a finding by the jury that these utterances were used and understood as threats within the provisions of the third subdivision of the statute dealing with breaches of peace.

In *Gitlow v. People of the State of New York,* defendant was indicted and convicted of the crime of criminal anarchy as defined by the New York Penal Law.[33] Judgment was affirmed by the Appellate Division.[34] The New York Court of Appeals also affirmed,[35] expressly repudiating the test laid down by the Supreme Court of the United States in the *Schenck* case under the Espionage Act,[36] that words are punishable only when their nature and surrounding circumstances created "a clear and present danger" of wrongful acts. The facts showed that the defendant was a member of the left wing section of the Socialist Party which adopted the "Left Wing Manifesto" which was published in "Revolutionary Age," the official organ of the Left Wing. A perusal of the manifesto showed that it advocated mass industrial revolt, developing into mass political strikes for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a revolutionary dictatorship, a system of Communist Socialism. It referred to recent strikes in Seattle and Winnipeg as instances of new revolutionary action. The defendant as business manager of the publication arranged for its printing and distribution and was responsible for its circulation. The defendant contended that as there was no evidence of any concrete result flowing from the publication of the manifesto, he was being penalized for a mere utterance in violation of his rights under the First and Fourteenth Amendments.

In sustaining the conviction, the Supreme Court of the United

[33] Sec. 160 and 161.
[34] 195 App. Div. 773, 187 N. Y. S. 783 (1921).
[35] 234 N. Y. 132, 539 (1922).
[36] Footnote 1, supra.

States,[37] speaking through Mr. Justice Sanford, held that the New York Penal Statute[38] was not violative of the constitutional guaranty of the freedom of speech or press protected by the First Amendment or the Fourteenth Amendment. Referring to the inflammable language of the manifesto, the Court said:

> This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement. . . . That the jury were warranted in finding that the manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence, and unlawful means, but action to that end is clear. . . .

Casting aside the "clear and present danger" test and referring to the legislative power of a state to determine when its own welfare is threatened, the Court then proceeded:

> And the immediate danger is none the less real and substantive, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. . . . It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment suppress the threatened danger in its incipiency. . . . We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the state unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

In a strong dissenting opinion, Mr. Justice Holmes, joined by Mr. Justice Brandeis, stated that in applying the "clear and present danger" test they found no imminent danger of a sub-

[37] 268 U. S. 652 (1925).
[38] Footnote 33, supra.

stantive evil that the state had a right to prevent. Mr. Justice Holmes said:

> If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. . . . But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration.

Gitlow was subsequently pardoned by Governor Alfred E. Smith who, after the Supreme Court decision, stopped further prosecutions under the said criminal anarchy act.

What was the immediate effect of this decision? On the debit side—an appraisal seemed to reveal that the "clear and present danger" test had been abandoned and that the state was once again in a dictatorial position regarding the exercise of free expression by its citizens. There were murmurings that the Supreme Court had lost its vision and its courage when it permitted a putrid hash such as the Left Wing Manifesto to terrify prosecutors, judges, and legislators. On the credit side—the two luminous sparks on the scene that now appeared brighter than ever were the dissenting opinions of Justices Holmes and Brandeis. In addition, the great American tradition of freedom of speech and press now had in its arsenal two incomparable legal weapons, namely, Justice Holmes' test of "clear and present danger" and the Fourteenth Amendment which protects freedom of speech under the First Amendment against abridgment by the states.

In *People v. Altman*,[39] the defendants were convicted under the following New York penal statute:[40]

> A person, who shall display or expose to view the red flag in any public assembly or parade as a symbol or emblem of any organization or association, or in furtherance of any political, social, or economic principle, doctrine, or propaganda, is guilty of a misdemeanor.

It was undisputed that the defendants had carried a red flag as a symbol of the Young People's Socialist League and the sole question involved was the constitutionality of the statute under which they were convicted.

The court held, that on the authority of *Stromberg v. California*,[41] the statute was void. It therefore dismissed the information and discharged the defendants.

In *Winters v. New York*, defendant was convicted for having certain lewd magazines in his possession with intent to sell them in violation of the New York Penal Law.[42]

The Appellate Division of the Supreme Court of New York

[39] 241 App. Div. 858, 280 N. Y. S. 248 (1934).
[40] Penal Law, Sec. 2095-a.
[41] Footnote 13, supra.
[42] Sec. 1141.

affirmed.[43] The Court of Appeals of New York also affirmed[44] and held that the conviction did not violate the Fourteenth Amendment.

In reversing the New York Court of Appeals, the Supreme Court of the United States,[45] speaking through Mr. Justice Reed, held that the statute was so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

In a concurring opinion, Justice Douglas ignored the vagueness issue and concluded rather that the ordinance was invalid because it was a "flagrant form" of prior restraint.

In a dissenting opinion, Justice Frankfurter stressed the fact that the statute was enacted to control crime, and publications that incited to crime were not within the constitutional immunity of free speech.

In *Saia v. New York*, the defendant, a minister of the religious sect known as Jehovah's Witnesses was convicted of violating a penal ordinance of the City of Lockport[46] in that he used his

[43] 268 App. Div. 30, 48 N. Y. S. 2d 230 (1944).
[44] 294 N. Y. 545 (1945).
[45] 333 U. S. 507 (1946); see also Burstyn v. Wilson, 343 U. S. 137 (1953), where the Court held that States cannot constitutionally censor motion pictures on the ground that they are sacrilegious. Justice Clark, who wrote the Court's opinion, brought motion pictures within the protection of the First Amendment by way of the Fourteenth Amendment overruling Mutual Film Corporation v. Industrial Commissioner of Ohio, Footnote 4, supra; see also Gelling v. Texas, 343 U. S. 960 (1952), which held unconstitutional a city ordinance, the basis upon which a board of censors refused to license a motion picture dealing with a racial theme.
[46] Sec. 2 and 3.

sound equipment to amplify religious speeches in a park without first obtaining a permit from the chief of police.[47] Saia originally had such a permit; but when it expired, renewal was refused on the ground that there had been "complaints."

In reversing the New York Court of Appeals, the Supreme Court of the United States,[48] speaking through Mr. Justice Douglas, held the ordinance unconstitutional on its face as a previous restraint on the right of free speech, with no standards prescribed for the exercise of discretion by the chief of police in using his licensing powers. There might be abuses in the use of loudspeakers, but, if so, they would have to be controlled by "narrowly drawn statutes" aimed at those abuses and not by giving a police officer power to deny the use of loudspeakers entirely. Unfortunately, reasoned the Court, people might allege that they were annoyed by noise when they were really annoyed by the ideas noisily expressed. "The power of censorship inherent in this type of ordinance reveals its vice," said the Court.

The dissenting opinions were written by Justices Frankfurter and Jackson. The Frankfurter dissent was based on the fact that uncontrolled noise is an "intrusion into cherished privacy," in that it disturbs "the refreshment of mere silence, or meditation, or quiet conversation." Justice Frankfurter pointed out that during the Constitutional Convention in 1787, the Founders had shown their appreciation of the virtues of quiet by having "the street outside Independence Hall covered with earth so that their deliberations might not be disturbed by passing traffic."

In a characteristically vigorous dissent, Justice Jackson thought that this was not a case involving free speech, but rather one testing where society can exercise control over "apparatus which, when put to unregulated proselyting propaganda and commercial uses, can render life unbearable."

In *Kunz v. New York,* defendant, a Baptist minister, in 1946 obtained from the Police Commissioner of the City of New York a permit to hold religious meetings on the streets of New York City during that year only. It was revoked on evidence that he

[47] 297 N. Y. 659 (1947).
[48] 334 U. S. 558 (1948); but see Kovacs v. Cooper, 336 U. S. 77 (1949), where a Trenton ordinance making it unlawful for sound trucks or similar amplifying devices emitting "loud and raucous" noises to operate on the public streets, was upheld as constitutional.

had ridiculed and denounced other religious beliefs in violation of a criminal provision of the ordinance under which the permit was issued. In 1948, the defendant's application for a similar permit was denied and he was convicted for holding a religious meeting on the streets without a permit. The Court of Appeals of New York affirmed.[49]

In reversing the Court of Appeals of New York, the Supreme Court of the United States,[50] speaking through Mr. Chief Justice Vinson, stated:

> We have here then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights. . . . New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.

In a vigorous dissenting opinion, Justice Jackson, stated:

> The law of New York does not segregate according to their diverse nationalities, races, religious, or political associations, the vast hordes of people living in its narrow confines. Every individual in this frightening aggregation is legally free to live, to labor, to travel when and where he chooses. In streets and public places, all races and nationalities and all sorts and conditions of people walk, linger, and mingle. Is it not reasonable that the City protect the dignity of those persons against fanatics who take possession of its streets to hurl into the crowds defamatory epithets that hurt like rocks? . . . The 'consecrated hatreds of sect' account for more than a few of the world's bloody disorders. These are explosives which the Court says Kunz may play with in the public streets, and the community must not only tolerate, but aid him. I find no such doctrine in the Constitution. In this case there is no evidence of a purpose to suppress speech, except to keep it in bounds that will not upset good order.

Kunz v. New York[51] has been viewed as a difficultly conceived decision in view of the fact that the Supreme Court appears to have dealt unrealistically with a starkly practical prob-

[49] 300 N. Y. 273 (1949).

[50] 340 U. S. 290 (1951); but see Poulos v. New Hampshire, 345 U. S. 395 (1953) where the Court held constitutional a city ordinance providing for licensing of meetings in public streets or parks, where the state supreme court had required that the licensing system must be "uniform, nondiscriminatory and consistent," and whereby the licensing officials had "no discretion as to granting permits, no power to discriminate, no control over speech;" also see Cox v. New Hampshire, 312 U. S. 569 (1941) where a similar licensing ordinance as in the Poulos case (supra) was upheld in spite of the challenged assertion that the regulation constituted a prior restraint on the exercise of First Amendment rights of free speech. Compare Niemotko v. Maryland, 340 U. S. 268 (1951), where a group of Jehovah's Witnesses who wished to give a series of Sunday Bible talks in a public park and who were denied a permit, proceeded to hold their meeting without a permit as a result of which their speaker was arrested and convicted of disorderly conduct. The Court unanimously reversed the conviction as a prior restraint on speech, noting that the conduct of the speaker had been quite orderly and that the only basis for the charge was the failure to have a permit.

[51] Ibid.

lem. The Court seemed not fully alert enough to the fact that street preaching in Columbus Circle in polyglotted New York City is done in a milieu quite different from preaching on a New England village green; especially, where the evidence had disclosed that Kunz had no compunction upon prior occasions about offending and outraging the deepest religious sensibilities of others. What the Court seems to have done here was no more than substituting its abstract views for the informed judgment of local authorities and local courts who are charged with the duty of preserving the peace and discouraging hostile ideological forces to use city streets as battlegrounds, with resulting destruction of public order. Furthermore, the position of the Court appears rather inconsistent when we analyze its decision in *Feiner v. New York*,[52] which was decided the same day as the Kunz case (supra).

In *Feiner v. New York*, petitioner was convicted of the offense of disorderly conduct under a New York penal statute[53] and was sentenced to thirty days in the County penitentiary. The conviction was affirmed by the County Court, and the New York Court of Appeals.[54] Petitioner claimed that his right of free speech under the First and Fourteenth Amendments was violated. The facts disclose that petitioner made an inflammatory speech to a mixed crowd of eighty negroes and white persons on a city street in Syracuse. He made derogatory remarks against President Truman, the American Legion, and local political officials, and endeavored to arouse the negroes against the whites and urged them to rise up in arms and fight for equal rights. The crowd which blocked the street became restless and its feelings were rising. After observing the situation for some time without interference, police officers, in order to prevent a fight, requested the petitioner on three occasions to get off the box and stop speaking. After his third refusal, they arrested him and he was convicted of violating Section 722 of the Penal Law which in effect forbids incitement of a breach of the peace.

In sustaining the conviction, the Supreme Court of the United

[52] 340 U. S. 315 (1951); compare Terminiello v. Chicago, 337 U. S. 1 (1949).
[53] Penal Law, Sec. 722.
[54] 300 N. Y. 339 (1950).

States, speaking through Mr. Chief Justice Vinson, held that the speaker's remarks as to whether "a clear danger of disorder" was imminent had been weighed and affirmed by the trial and appellate courts of the state. The defendant had a right to express his views; but free speech does not include the right to "incite to riot," said the Court.

An indication of the weakness of the Vinson opinion may be gathered not alone from a comparison with the vigorous dissenting opinions of Justices Black and Douglas, but possibly even more so from the fact that Justice Minton, a seemingly staunch "police power" advocate joined with the dissenters in this case. Justice Douglas expressed the view that a perusal of the record showed no likelihood of riot. Justice Black felt that the majority holding made it "a dark day for civil liberties in our Nation."

Justice Jackson's agreement with this decision makes his attitude rather difficult to understand in view of his dissent in the *Kunz* case (supra) wherein he expressed the view that the Court-approved *Feiner* type of police control was actually much more dangerous than the permit system which the Court deprecated in the *Kunz* case (supra).

The final significant case of far reaching importance to be dealt with in this paper, which involved a clash between Constitutional free speech and State police power, is the case of *Adler v. Board of Education of the City of New York.*[55] In that case the defendants brought a declaratory judgment action in the Supreme Court of New York, Kings County, praying that Section 12-a of the Civil Service Law[56] (which in substance provides that any member of any organization who advocates the overthrow of the government by force, violence, or any unlawful means is ineligible for employment in any public school)—as implemented by Section 3022 of the Education Law[57]—(which in substance requires the Board of Regents to adopt and enforce rules for the removal of any employee who violates Section 12-a of the Civil Service Law, membership of a schoolteacher in any organization labeled by the Board of Regents as subversive being prima facie evidence for disqualification for appointment to or retention in any school

[55] 342 U. S. 485 (1952).
[56] N. Y. Laws, 1939, c. 547 as amended, N. Y. Laws 1940, c. 564.
[57] N. Y. Law 1949, c. 360.

position)—be declared unconstitutional, and that action by the Board of Education of the City of New York thereunder be enjoined.

On motion for judgment on the pleadings, the Court held that Section 12-a of the Civil Service Law, Section 3022 of the Educational Law (hereinafter referred to as the Feinberg Law) and the Rules of the State Board of Regents promulgated thereunder, violated the due process clause of the Fourteenth Amendment, and issued an injunction.[58] The Appellate Division of the Supreme Court of New York, reversed,[59] and the Court of Appeals of New York affirmed[60] the judgment of the Appellate Division.

The Board of Education argued that members of subversive groups use their positions to advocate and teach their doctrines and are usually bound by oath to advocate and teach party line doctrine. According to the Board, this propaganda was sufficiently subtle to escape detection and thus the menace of such infiltration was difficult to measure. To protect children from such influence, the Feinberg Law was enacted so that teachers who practiced this subtle insemination could be disqualified after notice and full hearing.

The defendants argued that the Feinberg Law was an abridgment of the freedoms of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.

The Supreme Court of the United States,[61] speaking through Mr. Justice Minton, held the act constitutional. The Court said:

> If, under the procedure set up in the New York Law, a person is found to be unfit and is unqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his free-

[58] 196 Misc. 873, 95 N. Y. S. 2d 114 (1949).
[59] 276 App. Div. 527, 96 N. Y. S. 2d 466 (1950).
[60] 301 N. Y. 476 (1950).
[61] 342 U. S. 485 (1952). See also Garner v. Board of Public Works, 341 U. S. 716 (1951) and United Public Workers v. Mitchell, 330 U. S. 75 (1947); but see Schneiderman v. United States, 320 U. S. 118 (1943), where Justice Murphy, in his opinion for a majority of five Justices, rejected the theory of guilt by association, saying "beliefs are personal and not a matter of mere association."

dom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

In a strong dissent, Mr. Justice Black set forth his views in the following manner:

> This is another of those rapidly multiplying legislative enactments which makes it dangerous—this time for school teachers—to think or say anything except what a transient majority happen to approve at the moment. Basically these laws rest on the belief that government should supervise and limit the flow of ideas into the minds of men. . . . Quite a different governmental policy rests on the belief that the government should leave the mind and spirit of man absolutely free. Such a governmental policy encourages varied intellectual outlooks in the belief that the best views will prevail. . . . Public officials cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with. Public officials with such powers are not public servants; they are public masters.

Justice Douglas also dissented in a poignantly searching opinion, portions of which follow:

The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher. . . . The present law proceeds on a principle repugnant to our society—guilt by association. . . . To be sure, she may have a hearing when charges of disloyalty are leveled against her. . . . She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed. . . . The very threat of such procedure is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms—long forgotten—become the ghosts of a harrowing present. Any organization committed to a liberal cause . . . becomes suspect. A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner, freedom of expression will be stifled. . . . What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classroom. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no free exercise of intellect. . . . A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin. . . . It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to proect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life . . . The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these

teachings of the First Amendment when we sustain this law.

For the majority of the Court, duly constituted state legislatures were entitled to decide on what basis its teachers were deemed fit as educators of its future citizens. For the minority—unable to cite legal precedent upholding their views—they turned to argue the social unwisdom of censorship and the obnoxious un-American principle of guilt by association.[62]

To a certain extent, former faded shades of the early case of *Patterson v. Colorado*[63]—where the Supreme Court stated that it would not interfere with matters of local law—were again taking on fresh color.

CONCLUSION

Which shall give way when a clash occurs between an individual asserting his constitutional right of "freedom of speech" and a state asserting its right to act for the common weal of its citizens under its internal "police powers"? What formulae shall the courts use in deciding problems of free speech? Actually, there are no royal roads leading to an easy or precise solution of Consitutional Law problems, especially in the area of free speech In fact, the challenge becomes most formidable when we realize that in the free speech arena the courts are constantly confronted with the grave task of accommodating legislative power for the general security to the constitutional guarantees of freedom of expression. At times, the contestants, with their niceties of argument and nuances of ratiocination are even more delicately balanced than a jeweler's scale. Nevertheless, the courts, as duly constituted judicial tribunals, must stand ready, willing, and able to decide some of these most delicate, intangible, yet superlatively important issues that can arise in a democratic society. They must be creatures of the times and sensitive to the same currents of opinion as move legislators, to the end that the standards of reasonableness by which they judge legislative action will not be detached from reality. At the same time they must be sensitive to the myriad human expectations which have made the American courts a type of ark within which the American conscience reposes, with the responsibility not merely of mollifying legislatures but of fearlessly passing judgment on their actions in the light of the great libertarian principles of the Constitution.[64] Only when courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two important social interests, namely, public safety and the search for truth, can the true boundary line of free speech be fixed.[65] There is no doubt that every reasonable effort should be made to maintain both interests unimpaired. But if the great interest in free speech must be sacrificed, let it be sacrificed only when the interest in public safety is really imperiled, and not, as most men emotionally believe, when it is barely conceivable that it may be slightly affected.

[62] Alfred Bettman in Hearings before the Committee on Rules, 66th Cong., 2d Sess., on H. Res. 438, Wash., 1920, pp. 125-128. See also John Lord O'Brian, "The Menace of Administrative Law," 25 Reports of the Maryland State Bar Association, 1920, at p. 163.

[63] Footnote 3, supra.

[64] Pritchett, Civil Liberties and the Vinson Court 253 (1954).

[65] Chafee, Free Speech in the United States 35 (1948).