

1942

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SUBVERSIVE ACTIVITIES AGAINST GOVERNMENT---TWO CON- FLICTING DOCTRINES*

ROGER SHERMAN HOAR*

IN a free democracy such as ours, one of the most difficult problems will always be to maintain a nice balance between non-encroachment on our freedoms, and the preservation of the government which protects those freedoms. Abraham Lincoln has well expressed this dilemma as follows:

“Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence.”¹

This fundamental dilemma is exemplified in the struggle for ascendancy, from the first World War until the second, between two doctrines of constitutional law: (1) the “clear and present danger” doctrine, sometimes called the “Holmes” doctrine, to the effect that civil liberties cannot be denied to subversive movements, unless and until those movements are seen to be on the verge of success; and (2) the “self-defense” doctrine, to the effect that the constitution, for its own protection, withdraws the benefits of its guarantees of civil liberties from those who seek to overthrow it.

The object of this present paper is to trace the constitutional history of the ups and down of these two competing doctrines, in opinions, both majority and dissenting, of the Supreme Court of the United States.

The “self-defense” doctrine is the more ancient of the two. Justice Frankfurter² traces it back to Abraham Lincoln’s message of July 4, 1861, to a special session of the Congress, when in reply to an accusation that he had illegally suspended the writ of habeas corpus, the President asserted that the Federal Government must be preserved, even if that preservation necessitates that

“some single law, made in such extreme tenderness of the citizen’s liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated.”³

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¹ *Minersville v. Gobitis*, 310 U.S. 586, 596 (1940). Justice Frankfurter gives no citation for this quotation. Cf. note 3, *infra*.

² Dissenting opinion in *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190 (1941) 203.

³ Richardson, “Messages and Papers of the Presidents,” 1908 ed., Vol. VI, p. 25.

It is generally agreed that the "clear and present danger" doctrine originated in the following dictum by Justice Holmes in the *Schenck* case in 1918:

"The question in every case is whether the words 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."⁴

It is important that we note the following facts about this obscure sentence. It occurs in a unanimous opinion. It was wholly unnecessary to the decision of the case, inasmuch as the conviction of Schenck for attempting to cause insubordination and obstruct the draft was *sustained* by the Court. Furthermore the context leads to the conclusion that these words were employed as a species of "thinking out loud," a sort of "on the one hand . . . ; but on the other . . ."

Whether they were noticed at all by the other members of the Court, who were unanimously agreed that Schenck should be convicted, doctrine or no doctrine, will probably never be known.

It would not be seemly to accuse Justice Holmes of inserting those words into that opinion as what fiction-writers call a "plant," but the fact remains that later on they proved very handy for that purpose. At any rate the thought contained in those words was not raised again by Justice Holmes in his opinions sustaining the convictions of Frohwerk⁵ and of Debs,⁶ on the authority of the *Schenck* case, nor even in his dissent in the *Stilson* case,⁷ in which dissent Justice Brandeis joined.

But, in 1919, in Justice Holme's dissenting opinion in the *Abrams* case, in which opinion Justice Brandies joined, the doctrine is casually alluded to in the following words:

"I do not doubt for a moment that by the same reason that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."⁸

This is an even more moderate statement of the doctrine than Justice Holmes's original statement of it, for note the words: "or is intended to produce," words later forgotten or repudiated by him.

In 1920, in the majority opinion of Justice McKenna in the *Schaefer* case, we find an explicit assertion of the competing "self-defense" doc-

⁴ *Schenck v. United States*, 249 U.S. 47, 52, 63 L.Ed. 470 (1918).

⁵ *Frohwerk v. United States*, 249 U.S. 204, 63 L.Ed. 560 (1918).

⁶ *Debs v. United States*, 249 U.S. 211, 63 L.Ed. 566 (1918).

⁷ *Stilson v. United States*, 250 U.S. 583, 589, 63 L.Ed. 1154 (1919).

⁸ *Abrams v. United States*, 250 U.S. 616, 627, 63 L.Ed. 1173 (1919).

trine, which had been implicit in the *Schenck*, *Frohwerk*, *Debs*, *Stilson* and *Abrams* opinions. The Court now stated:

"A curious spectacle was presented: that great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. . . . Verdicts and judgments of conviction were the reply to the challenge, and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it including that in the case at the bar."⁹

So they thought. Their assertion of that doctrine made it wholly unnecessary for the majority to dignify even by rebuttal the assertion of the "clear and present danger" doctrine in the dissent in that case by Justice Brandeis, Holmes concurring, in which the astonishing statement is made that in the *Schenck* case "the extent to which Congress may, under the Constitution, interfere with free speech was . . . declared by a unanimous court to be" this alleged doctrine!¹⁰ Brandeis and Holmes then proceed to base their entire dissent categorically on a demonstration that Schaefer's subversive publications created no clear and present danger.

Later that same year, in the *Pierce* case, Justice Brandeis (Holmes concurring) again asserted the "clear and present danger" doctrine,¹¹ and again the majority merely ignored it.

In the *Gilbert* case late in 1920, Justice McKenna, speaking for the majority of the Court, including Justice Holmes, reasserted the "self-defense" doctrine. After citing a number of prior opinions, from *Schenck* down to *Abrams*, Justice McKenna said:

"In *Schaefer v. United States*, 251 U.S. 466, commenting on those cases and their contentions it was said that the curious spectacle was presented of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. And we did more than reject the contention, we forestalled all repetitions of it, and the contention in the case at bar is a repetition of it."¹²

Chief Justice White dissented on merely a point of jurisdiction. Justice Brandeis alone dissented on the merits¹³; and it is to be noted that, now that for the first time Justice Holmes was on the other side of the fence, there is no mention of the "clear and present danger"

⁹ *Schaefer v. United States*, 251 U.S. 466, 477, 64 L.Ed. 360 (1919).

¹⁰ *Schaefer v. United States*, *supra*, 482.

¹¹ *Pierce v. United States*, 252 U.S. 239, 255, 64 L.Ed. 542 (1919).

¹² *Gilbert v. Minnesota*, 254 U.S. 325, 332, 65 L.Ed. 287 (1920).

¹³ *Id.*, at 334.

doctrine. May not this occurrence absolve Mr. Brandeis from responsibility for that doctrine?

This brings us down to 1925, up to which time the "self-defense" doctrine had been categorically asserted in two majority opinions, and had been implicit in at least five more, and had not up to then been explicitly questioned even in a dissent. We find that the "clear and present danger" doctrine had been asserted in one dictum (written by Justice Holmes) and in three Holmes-Brandeis dissents; but even this slight recognition had brought the alleged doctrine to the point where it could not longer be ignored by the rest of the Court; it became incumbent upon the majority to scotch it. Accordingly, in the *Gitlow* case, the majority opinion by Justice Sanford quotes with approval the following from the Supreme Court of Illinois:

"Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."¹⁴

And, he further says:

"That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. . . . And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. . . . A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency."¹⁵

Justice Holmes and Brandeis, in their dissent,^{15a} again assert the doctrine refuted by the above quotations from the majority. Their in-

¹⁴ *Gitlow v. New York*, 268 U.S. 652, 669-670, 69 L.Ed. 1138 (1924) quoting *People v. Lloyd*, 304 Ill. 23, 35 (1924).

¹⁵ *Id.*, at 669.

^{15a} *Id.*, at 672.

sistence that this doctrine had the unanimous sanction of the Court in the *Schenck* case, required some reply.

This reply consisted in *distinguishing* the *Schenck* case, rather than in dignifying the alleged "clear and present danger" doctrine by *overruling* it. Justice Sanford stated that the sentence which Justice Holmes had inserted in the *Schenck* case,

"has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."¹⁶

Subsequent developments cast doubt on the tactical wisdom of Justice Sanford's not dismissing the Hughes interpolation as a mere inadvertent dictum of the *Schenck* case, rather than to have resorted to this somewhat labored attempt at distinction.

The *Whitney* case in 1927 afforded Justices Holmes and Brandeis an opportunity to attack the *Gitlow* opinion on two fronts, with a pincers movement. Their specially concurring opinion¹⁷: (a) relied on the fact that the *Gitlow* case had merely distinguished the *Schenck* dictum; and (b) invented a new doctrine to combat the ground of distinction. This new doctrine was that a legislative determination that certain acts are dangerous, must be disregarded unless the Court finds that these acts actually *are* dangerous. The two dissenters even tried to add a new limitation to the "clear and present danger" doctrine, namely that the danger must also be *serious*. Thus they sought not only to limit the applicability of the *Gitlow* decision, but also to weaken it in cases to which it was applicable. And all under the guise of a *conurrence!*

Such persistence certainly deserves to be rewarded. Yet, up until 1936 there had never been a majority reliance upon the "clear and present danger" doctrine, so often asserted by Holmes and Brandeis, and by them alone; a doctrine once completely and logically demolished by the majority, a doctrine utterly inconsistent with the twice-asserted majority "self-defense" doctrine.

In the *Stromberg* case in 1931, although a conviction under a red flag law was reversed, the majority opinion by Justice Hughes reiterated the "self-defense" doctrine in the following words:

"There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions."¹⁸

¹⁶ *Gitlow v. New York*, *supra*, 671.

¹⁷ *Whitney v. California*, 274 U.S. 357, 372, 71 L.Ed. 1095 (1926).

¹⁸ *Stromberg v. California*, 283 U.S. 359, 368-369, 75 L.Ed. 1117 (1930).

There was no mention of the "clear and present danger" doctrine in this case, nor in three others of about the same period to which it might have been pertinent.¹⁹

In the first *Herndon* case, Justice Cardozo mentioned the doctrine in a dissent.²⁰

Finally, in 1937, nineteen years after its first assertion, the "clear and present danger" doctrine first received majority reliance, not however in a case involving either national defense or an attempt at overthrowing the government, but rather one merely involving the preaching of race-equality to negroes.²¹ Even this case does not overrule the *Gitlow* case, but reasserts the two principles there asserted; and, in at last dignifying the *Schenck* dictum as a principle of law, does so by merely distinguishing the *Gitlow* dictum as it in turn had distinguished the *Schenck* dictum. As the writer interprets the distinguishment in the *Herndon* case, it is that *Herndon* was not trying to overthrow the government. The second pincer of the Holmes-Brandeis specially concurring opinion in the *Whitney* case, namely that the court can go behind a legislative determination of imminent danger, still has not been dignified by majority support. In fact, recent decisions in other fields seem to bar out this possibility.

Since the initial majority recognition of the "clear and present danger" doctrine in the second *Herndon* case, it has been reasserted only five times, one of them a dissent, and all in fields remote from the field of national defense in which Justice Holmes so often futilely tried to establish it. Three of these five instances related to peaceful picketing,²² one to the distribution of religious tracts (alleged to be likely to disturb the peace),²³ and one to contempt of court.²⁴

It was not asserted in the handbill cases,²⁵ nor in the Jersey City free speech case,²⁶ nor in the flag-salute case,²⁷ nor even in Justice Stone's lone dissent in the latter, though it may perhaps be considered implicit in his concluding sentence.²⁸

¹⁹ *Burns v. United States*, 274 U.S. 328 (1927); *Fiske v. Kansas*, 274 U.S. 380 (1927); *De Jonge v. Oregon*, 299 U.S. 353 (1937). In the *Burns* case, Justice Brandeis alone dissented, and did not raise the point; thus again supplying evidence that the "clear and present danger" doctrine was merely a Holmes idea.

²⁰ *Herndon v. Georgia*, 295 U.S. 441, 447 (1935).

²¹ *Herndon v. Lowry*, 301 U.S. 242, 256, 81 L.Ed. 1066 (1936).

²² *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940); *American Federation of Labor v. Swing*, 312 U.S. 321, 325 (1941); Justice Black's dissent in *Milk Wagon Drivers U. v. Meadowmoor*, 312 U.S. 287, 313 (1941).

²³ *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940).

²⁴ *Bridges v. California*, 62 S.Ct. 190, 203 (1941).

²⁵ *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939).

²⁶ *Hague v. C. I. O.*, 307 U.S. 496 (1939).

²⁷ *Minersville v. Gobitis*, 310 U.S. 586 (1940).

²⁸ *Ibid.*

In the *Bridges* case, handed down the day after "Pearl Harbor," but too soon to have been influenced thereby, we can note what may be the beginning of a new trend. Justice Frankfurter, is now the dissenter, and *against* the "clear and present danger" doctrine. He says:

"Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. . . . In the cases before us, the claims on behalf of freedom of speech and of the press encounter claims on behalf of liberties no less precious. California asserts her right to do what she has done as a means of safeguarding her system of justice."²⁹

He is joined by the strongest members of the Court: Chief Justice Stone, and Justices Roberts and Byrnes. Is it not likely that this Frankfurter dissent may lay the foundation for the eventual repudiation of this doctrine?

From all the foregoing, we can draw the following conclusions:

1. The "self-defense" doctrine is well-established, and has never been directly attacked, even in a dissent.

2. The "clear and present danger" doctrine has never been relied on by the Court to overturn a conviction in a case involving an attempt to subvert the government, or opposition to national defense.

3. The majority has applied it only five times: once in a case involving propaganda of race equality, twice in picketing cases, once in a case involving distribution of literature, and once in a case involving contempt of court.

4. The latest time that it has been applied, it prevailed in a mere five-to-four decision, the dissenters being the strongest members of the Court, headed by that great liberal, Justice Frankfurter.

5. The complete refutation of the doctrine by Justice Sanford in the *Gitlow* case has never been answered, in fact no attempt has ever been made to answer it.

6. The "clear and present danger" doctrine is utterly inconsistent with the well-established "self-defense" doctrine.

7. It may be considered to have reached its height just before Pearl Harbor, and now to be on its way out.

Shortly after the formulation of the Constitution of the United States, and before the result had been made public, Benjamin Franklin was asked by a Philadelphia lady whether "we had a monarchy or a republic." He replied: "A republic, if you can keep it."³⁰

Is not the answer to the proponents of the "clear and present danger" doctrine: "What good are civil liberties, if we are unwilling to qualify them in order to keep them?"

²⁹ *Bridges v. California*, *supra*, 596.

³⁰ "Formation of the Union," Government Printing Office, 1927, p. 952.

MARQUETTE LAW REVIEW

FEBRUARY, 1943

VOLUME XXVII

MILWAUKEE, WISCONSIN

NUMBER TWO

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Published December, February, April and June by the faculty and students of Marquette University School of Law. \$2.00 per annum. 60 cents per current number.