

## Freedom of Assembly

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## A SYMPOSIUM ON FREEDOM

The following six articles consist of the papers delivered in a panel discussion by members of the Wisconsin bar on "The United States Supreme Court and Civil Liberties" at the Fall Institute of the State Bar Association of Wisconsin, Lake Delton, Wis., Sept. 21, 1940. The seventh article, "The Old Freedom," by Prof. William Sternberg of Creighton University Law School, Omaha, Neb., considers the relationship of liberty to law from the philosophic viewpoint.

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### FREEDOM OF ASSEMBLY

ALBERT C. HELLER

**O**FTEN the best approach to a discussion of any rule of Constitutional law is to go back to the once well recognized and so-called text book standard opinions and see which of them have become over-ruled. Before considering the comparatively recent case on freedom of

assembly,<sup>1</sup> *Hague v. Committee for Industrial Organization*,<sup>2</sup> let us accordingly first go back to the case of *Davis v. Commonwealth of Mass.*<sup>3</sup> In that case the United States Supreme Court sustained as valid and Constitutional an ordinance under which a preacher was convicted for holding a meeting in Boston Common without first obtaining a permit from the Boston authorities. In holding the ordinance Constitutional, the court, through Justice White, quoted at length from the opinion of the lower court<sup>4</sup> which it confirmed. Part of the quotation read as follows:

"For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."

That language, surprisingly enough, is from the pen of no less a liberal than Justice Oliver Wendell Holmes, who wrote it in 1897 when a member of the Supreme Court of Massachusetts.

In the more recent case of *Hague v. Committee for Industrial Organization*<sup>5</sup> an ordinance of Jersey City had required that a permit be obtained from the municipal authorities before the holding of any public assembly. Such permit could be refused in order to prevent, in the terms of the ordinance, a disorderly assemblage, disturbance, or riot. Attacking the ordinance as unconstitutional, the C. I. O., and certain of its

<sup>1</sup> Historically, the right of freedom of assembly is connected with the right to petition the government, which right was first protected by the English Bill of Rights of 1689.

The English Bill of Rights is the term commonly applied to the English Statute, 1 William & Mary, Session 2, Chap. 2 of 1689, the most important of the parliamentary enactments by which legal effect was given to the Revolution settlement declaring William & Mary king and queen.

Chaffee, 2 Encyclopaedia of Social Sciences 275.

The U. S. Constitution couples in the First Amendment in the Bill of Rights "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Under later constructions, the right peaceably to assemble for any lawful purpose has come to be protected under the Fourteenth Amendment. For a historical approach, see *U. S. v. Cruikshank*, 92 U.S. 542, 552, which has since been overruled by the line of decisions started by the *Gitlow* case on freedom of speech. *Gitlow v. N. Y.*, 268 U.S. 652, 69 L.Ed. 1138 (1925). The *Gitlow* case widened the due process clause of the Fourteenth Amendment to include within it the protection of all "fundamental" civil liberties. *Marshall v. Dow*, 176 U.S. 581 (1900) declined, however, to hold those liberties secure under the privileges and immunities clause of that Amendment. Warren, in 39 Harv. L. Rev. 431, in referring to the *Dow* ruling, said:

"This decision seemed to be a final block to all attempts to secure Federal protection to ordinary civil rights of the individual, through the Privileges & Immunities Clause of the 14th Amendment."

Only rights of the citizen are, under that ruling, contemplated in the privileges and immunities clause of the 14th Amendment.

<sup>2</sup> 307 U.S. 496, 59 Sup. Ct. 954, 83 L.Ed. 1429 (1938).

<sup>3</sup> 167 U.S. 43, 17 Sup. Ct. 731, 42 L.Ed. 71 (1897).

<sup>4</sup> 162 Mass. 510, 39 N.E. 113, 26 L.R.A. 712 (1895).

<sup>5</sup> 307 U.S. 496, 59 Sup. Ct. 954, 83 L.Ed. 1429 (1938).

members, who had been repeatedly refused a permit, brought a bill in equity to redress the deprivation of its, and their own, Constitutional rights.

It is true that the majority opinion in the *Hague* Case distinguished the Massachusetts case for the reason that the Boston ordinance had not been directed solely at the free exercise of the right of speech and assembly, but had been a general ordinance requiring permits for other activities which are clearly under municipal authority, such as vending and the use of firearms in the parks. However, Justice Butler in a dissent held the Massachusetts case controlling, and it must be admitted that the language of the opinion is in startling contrast to the theory advanced in the language taken from the old Holmes decision. In contrast to the theory that a municipality has unlimited ownership in its parks and streets, Justice Roberts wrote in the *Hague* case as follows:

"Wherever the title of streets and parks may rest, they have immemorially been held *in trust for the use of the public* and time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." (Italics by the author).

You will note that the language of Justice Roberts is taken not from the due process clause, but rather from the clause of the 14th Amendment which reads:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The reason for basing the decision on that clause rather than on the due process clause of the 14th Amendment was merely jurisdictional. Justice Roberts held, in a construction of the Judicial Code, that the federal district court, here the trial court, was not empowered to consider the due process clause.<sup>6</sup> It had jurisdiction to consider only the application of the privileges and immunities clause.<sup>7</sup>

The result, as pointed out by Justice Roberts, was to narrow the issues decided. Since the privileges and immunities clause applies only

<sup>6</sup> Sec. 24 (1) of the Judicial Code (28 U.S.C.A., Sec. 41 (1) ) grants jurisdiction "to suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds exclusive of interest and costs, the sum or value of \$3000, and arises under the Constitution or laws of the United States."

The attorneys in the trial of the case did not show that an amount of more than \$3000 was involved.

<sup>7</sup> Sec. 24 (14) of the Judicial Code (28 U.S.C.A., Sec. 41 (14) ) grants jurisdiction to the federal court for suits "at law or in equity . . . brought by any person to redress the deprivation, under color of any law, statute, custom or usage of any State of any right, privilege, or immunity secured by the Constitution." Roberts held this section to apply only to the privileges and immunities clause. Stone and Reed held that it also exempted from the \$3000 jurisdictional requirement action involving the due process clause.

to those rights which a United States *citizen* has, and further only to those rights which he has in his relationship to the federal government, the majority decision could not decide all the issues urged. The point decided by the case is merely that citizens of the United States may peaceably assemble in the public parks and streets to discuss their rights under federal legislation without undue restriction. In the *Hague* Case, which concerned the C. I. O., the federal legislation to be discussed was found to have been a proper federal subject for discussion, that is, the rights of labor under the Wagner Act.

Although the jurisdictional question and the construction of the pertinent parts of the Judicial Code need not be discussed here, the decision demonstrates well that it is often by such extraneous matters that our constitutional law must be affected and the decisions under it be confined and narrowed.

Justices Stone and Reed differed from Roberts as to the jurisdictional requisite; and it is interesting to note that because of this relatively unimportant difference in construing the Judicial Code, had Stone's and Reed's view controlled, the court could have gone so far as to hold the Jersey City ordinance void as to all persons, whether citizens or not, and could perhaps have so held no matter for what legal purposes the assembly was to be convened—that is, whether it be for the discussion of things effecting citizens' rights in relation to their national government, or for the discussion of broader issues as well.<sup>8</sup>

A more illuminating decision on the freedom of assembly is that of *De Jonge v. Oregon*,<sup>9</sup> decided in 1937. In that case a communist had been indicted for conducting a public meeting under an Oregon statute which made it immaterial as to what matters were discussed or for what purposes the meeting was called, provided that those under whose auspices the meeting was called were shown to advocate a violent overthrow of industry or government. The statute was held void under the due process clause. Thus were aliens as well as citizens given the protection of the Fourteenth Amendment in their right to freely assemble for any legal purpose. The opinion holds that it is the subjects discussed at the assembly, the purposes of and the nature of that assembly itself that must control. The fact that the persons assembled might

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<sup>8</sup> Justice McReynolds dissented, pointing out that in his opinion the whole matter was a local affair, and a ruling should have been obtained in the state court from which there would be ample opportunity for final review on the federal questions involved. Butler dissented on the grounds that he found the ordinance from Jersey City entirely similar to the ordinance from Boston which had been upheld in that Holmes decision (*Massachusetts v. Davis*). Justices Frankfurter and Douglas took no part.

<sup>9</sup> 299 U.S. 353, 57 Sup. Ct. 255, 81 L.Ed. 278 (1937).

have conspired elsewhere against public peace or cannot be seized upon by the state in forbidding their participation in a peaceful assembly.<sup>10</sup>

The court did, however, point out that the rights of speech, press and assembly "may be abused by using speech or press or assembly in order to incite to violence and crime." Thus it may be said that, had the statute covered such a gathering, it is likely it might have been upheld as constitutional. However, in accordance with the principles laid down by the earlier decision of *Herndon v. Lowry*<sup>11</sup> the offenders under such a statute would have had to have reason to contemplate that such violence and crime would have occurred as a direct result of their assembly and within a reasonable time thereafter. A mere possibility that, as a result of a chain of causation set in motion by the assembly, some group may arise at some future date, and resort to force would not have constituted sufficient reason to forbid an otherwise peaceful assembly.

The tendency or the intention of the conveners to accomplish an unlawful or violent act must be almost direct. Restrictions on the right to assemble can, however, be justified, in the words of the opinion, "in a reasonable apprehension of danger to organized government." The restriction on assembling may be proper under the due process clause, the opinion says, if it have "appropriate relation to the safety of the state."

In fact it has been pointed out<sup>12</sup> that the right of assembly has been more restricted than any of the other elements of personal liberty. The general common law, without benefit of statutes, has defined an un-

<sup>10</sup> The court, in a unanimous opinion written by Chief Justice Hughes, said:

"It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holdings of meetings for peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere or if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." . . .

"We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the 14th Amendment."

See 39 Harv. L. Rev. 431, Prof. Warren on the due process clause generally.

<sup>11</sup> 301 U.S. 242, 57 Sup. Ct. 732, 81 L.Ed. 1066 (1937).

This case involved a Georgia statute under which a negro communist was convicted for advocating insurrection against the lawful authority of the State.

<sup>12</sup> 42 Harv. L. Rev. 265.

lawful assembly as a gathering, usually of three or more persons, with a common intent to commit disorderly acts so as to cause sane and firm and courageous persons in the neighborhood to fear a rather immediate breach of the peace.<sup>13</sup> Such seems to be the rule under our own Wisconsin decisions.<sup>14</sup> To prevent such an unlawful assembly is plainly within the police power. There is a Latin maxim which one sees often applied: *Salus reipublicae suprema lex*.<sup>15</sup> Today, surely more than ever before, with modern devices and current subversive influences, the power of organization rulers, the strength of concentrated pressure groups, and the cruelty of mob thought and psychology are all potential forces that can make the public assembly a truly formidable threat to the "safety of the republic." Furthermore, in considering cases that involve personal civil liberties as weighed against this "safety of the republic," it is possible that the court may decline to give civil liberties the same preeminent protection it has heretofore accorded to them. In former cases the right and issue for which curtailing of civil liberties had been attempted may be deemed as less essential than the "safety of the republic." Accordingly, where that safety is held to be at stake, those former cases upholding the rights of civil liberties may not, in the pressure of the moment, be considered so persuasive as precedent. An indication of this tendency can be found in Justice Frankfurter's recent decision, *Minersville School District v. Gobitis*.<sup>16</sup>

This brings us to the question, which, as lawyers and also as citizens, has become recently increasingly perplexing: Does our Federal Constitution, as it has been so far construed by our highest court, actually guarantee, as unqualifiedly as has been claimed, the freedom

<sup>13</sup> 58 A.L.R. 751; 9 N. Y. L. Q. Rev. 1; In *People v. Kerreck*, 261 Pac. 756, it was said that a gin party could not at common law be called an unlawful assembly, nor could one characterize college football games as such.

<sup>14</sup> *Aron v. Wausau*, 98 Wis. 592, 596, 74 N.W. 354 (1898). Wisconsin Constitution, Sec. 4, Art. 1.

"Peaceable assembly and petition. The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

<sup>15</sup> The safety of the republic is the highest law.

"In England the courts have gone extremely far in considering unlawful all meetings at which seditious speeches have been made, but in this country the basis of the crime appears to be its tendency to produce an immediate breach of the peace." 42 Harv. L. Rev. 265.

<sup>16</sup> 84 L.Ed. 993, June 3, 1940. In this decision the court upheld a Pennsylvania school board in requiring the children of the Jehovah's Witnesses sect, despite their religious scruples, to salute the American flag as a condition to their being admitted in the public schools. The court, in citing the recent handbill decision *Schneider v. Irigington*, 308 U.S. 147, 60 S. Ct. 146 which had upheld the right of freedom of speech, said at p. 996:

"National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through the distribution of handbills."

to assemble, to camp, and to meet, to members of anti-democratic organizations?

Let us listen for an answer, to certain of the language of two of the most eloquent and fearless proponents of liberal democratic thinking. Justice Brandeis, with Holmes concurring, wrote as follows in an opinion handed down by the court in 1926:<sup>17</sup>

“Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty . . . Only an emergency can justify repression . . .

“But, although the rights of free speech and assembly are fundamental rights, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral.”

Have we come to that state of emergency that can justify repression? Are we seriously threatened as yet with political or moral injury? Is there a method whereby we can guard closely the “safety of the republic” without our having to exalt order, in the terms of Brandeis’ admonition, at the cost of liberty?

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<sup>17</sup> *Whitney v. California*, 274 U.S. 357, 47 Sup. Ct. 71 L.Ed. 1095 (1926).