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THE HUGHES COURT AND RADICAL POLITICAL DISSENT: THE CASES OF DIRK DE JONGE AND ANGELO HERNDON

Mark Tushnet[1]

Scattered Supreme Court decisions in the early twentieth century dealt with the Constitution's protection of freedom of speech.[2] Radical dissent over United States participation in World War I and the nation's intervention against the Bolshevik revolution in Russia led the Court to its first sustained engagement with free speech cases. By the time Chief Justice Hughes took the center chair, the national government largely had abandoned its pursuit of radical dissenters, some of whom played large roles in the labor organizing that provided political support for the Roosevelt administration and, from 1935 to 1939, in the Communist Party's "Popular Front" that aligned the Party and its members and sympathizers with the administration. The Depression gave capitalism's critics more opportunities to organize, and state governments occasionally went through local "red scares," prosecuting such critics—particularly members of the newly organized Communist Party—who then raised free speech defenses.

Today we may be inclined to associate robust protection of civil liberties with the legacy of the Roosevelt Court after 1937. But, the Hughes Court at least cut away some of the underbrush before the Court's transformation. After laying out the doctrinal background for the Hughes Court's decisions in Part I, this Article examines Hughes Court decisions involving political radicals in Part II. The Court's "conservatives" and "liberals" were less divided on issues of civil liberties than today's readers might think. The conservatives may have felt the tug of a moderate libertarianism that affected their approach to constitutional law generally; the liberals the tug of

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1. This Article is an expansion of the 47th Henry J. Miller Lecture given at Georgia State University Law School, October 1, 2010. I thank Professor Eric Segall and Dean Steven Kamenshine for the invitation to present the lecture.

2. *See e.g.*, Patterson v. Colorado, 205 U.S. 454 (1907); Halter v. Nebraska, 205 U.S. 34 (1907).

advocacy for causes with which they shared some affinities even as they disagreed vigorously with radicals' overall programs. And, constitutional doctrine mattered.

I. THE DOCTRINAL BACKGROUND

At the start of the 1930s the constitutional law of free expression applicable to radical dissent fell into two categories, with one important collateral feature. The first category involved cases in which speakers were prosecuted because what they said had some possibility of leading to violations of some unquestionably valid law—what the cases called speech that in some sense caused a "substantive evil" that legislatures had a right to prevent. The second involved classic sedition laws, in which legislatures had outlawed some words or political doctrines as such, without requiring any showing in specific prosecutions that the doctrines had some causal connection to a substantive evil. The collateral feature was that the Court's doctrines applied to cases involving prosecutions by state authorities as well as national ones.

Schenck v. United States was the leading case in the first category.[3] Charles Schenck was an important figure in the Socialist Party. He helped prepare and distribute a pamphlet criticizing U.S. involvement in World War I, and in effect urging that young men refuse to register for the draft, which it described as little better than slavery and imprisonment. He was charged with violating the 1917 Espionage Act's prohibition of "willfully caus[ing] or attempt[ing] to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstruct[ing] the recruiting or enlistment service of the United States."[4] Justice Oliver Wendell Holmes's terse opinion upheld the prosecution against Schenck's invocation of the First Amendment.

3. 249 U.S. 47 (1919). Cases applying the standard developed in *Schenck*. included Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

4. 18 U.S.C. § 2388 (2006).

Justice Holmes's thinking was influenced by the word "attempt" in the statute. As a scholar and state-court judge he had made important contributions to the development of the common law of attempts. In his l881 lectures on "The Common Law," Justice Holmes pointed out that:

> The law does not punish every act which is done with the intent to bring about a crime. If a man starts from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped by the draw and goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion.[5]

Judges had "puzzled where to draw the line," but Justice Holmes argued that the principle was clear: "Public policy, that is to say, legislative considerations, are at the bottom of the matter; the considerations being . . . the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."[6] As a judge on the Massachusetts Supreme Judicial Court, Justice Holmes applied this approach in *Commonwealth v. Kennedy*, where the defendant had been charged with attempted murder for mixing rat poison in his intended victim's tea.[7] Whether Kennedy's actions were mere preparations, which could not be punished, or were a real attempt to murder depended on whether they were "near enough" to the intended harm:

> Every question of proximity must be determined by its own circumstances . . . . and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension . . . would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is

5. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 68 (Little, Brown, & Co. 1881).
6. *Id.*
7. 48 N.E. 770 (Mass. 1897).

> expected than might be the case with lighter crimes.[8]

The question of proximity was generally for the jury to decide, although Justice Holmes reserved the possibility that courts could block attempt prosecutions where the actions were mere preparations too remote from the ultimate harm.[9]

Justice Holmes began his First Amendment analysis in *Schenck* by conceding that "in many places and in ordinary times," what Schenck had published would have been protected by the First Amendment.[10] But, he continued, "the character of every act depends upon the circumstances in which it is done."[11] Evoking the language he had used in describing criminal attempts, Justice Holmes wrote that:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[12]

The war-time circumstances mattered: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[13]

Justice Holmes also wrote the Court's opinion upholding the conviction of Eugene Victor Debs, the nation's most prominent Socialist, for obstructing the draft in a speech where Debs had

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8. *Id.* at 771.

9. Leading scholarly treatments of the law of attempts echoed Justice Holmes's approach. *See* J.H. Beale, Jr., *Criminal Attempts*, 16 HARV. L. REV. 491, 501 (1903) (asserting that what mattered was a "dangerous proximity to success," which was "a question of degree."); *see also* Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 846 (1928) ("It is thus manifestly impossible to lay down any mechanical or hard and fast rule for the drawing of the line between preparation and indictable attempts . . . .").

10. Schenck v. United States, 249 U.S. 47, 52 (1919).

11. *Id.*

12. *Id.* at 52.

13. *Id.*

praised draft resisters and stated, "you need to know that you are fit for something better than slavery and cannon fodder."[14] He dissented, though, along with Justice Louis Brandeis, when the Court upheld the convictions of five Socialists from New York, who had printed a leaflet vigorously criticizing the United States' intervention against the Russian Revolution, calling President Woodrow Wilson a coward, and urging workers to "wake up" and "throw away all confidence [in the government], . . . spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war."[15] The defendants distributed the leaflet by throwing some copies off the roof of a building in New York.[16] For the Court's majority, the only issue in the case was whether the evidence supported the convictions, and in some sense that was the point on which Justice Holmes dissented. His premise was that *Schenck* and *Debs* had been correctly decided, but that the Court erred in finding that "the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[17] For Justice Holmes, no jury could reasonably find that the actions, by defendants who he described as "poor and puny anonymities," were done with the specific intent "to impede the United States in the war that it was carrying on," rather than "to help Russia and stop American intervention there."[18] Justice Holmes then appended a paragraph on the theory of free speech, which continued to guide him and Brandeis over the succeeding decade but had no immediate influence on the Supreme Court's First Amendment doctrine:

> Persecution for the expression of opinions seems to me perfectly

14. 249 U.S. 211, 214 (1919).
15. Abrams v. United States, 250 U.S. 616, 620 (1919).
16. *Id.* at 618–19; *see also* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (Cornell Univ. Press 1999).
17. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).
18. *Id.* at 629.

> logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But 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. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[19]

Cases like *Schenck* and *Debs* could easily fit into the criminal-attempts mold—requiring that a reasonable jury could find a dangerous proximity of success for inflicting the social harms of "substantive evils"—but the second set of cases could not. These cases involved statutes prohibiting words themselves, the doctrines of criminal syndicalism or criminal anarchy. New York and California had typical statutes. Enacted in the immediate aftermath of President William McKinley's assassination by the self-described anarchist Leon Colgosz, New York's statute defined criminal anarchy as "the doctrine that organized government should be overthrown by force or

19. *Id.* at 630.

violence, or by assassination of the executive head or any of the executive officials of government, or by any unlawful means," and made it a crime to "advocate[], advise[], or teach[] the duty, necessity, or propriety of overthrowing or overturning organized government by force or violence."[20] California enacted its statute in 1919, a legislative reaction to the rise of radical dissent in World War I. It prohibited "criminal syndicalism," which the statute defined as:

> any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change.[21]

Criminal anarchy statutes differed from the Espionage Act. The latter identified substantive evils such as draft obstruction or interference with war efforts. It could be violated by sabotaging weapons and like, activities that were not protected by the First Amendment under any sensible interpretation. Schenck's prosecution rested on the proposition that his words could cause a substantive evil. The criminal-attempt model required that reasonable juries be able to find that such words were sufficiently "close"—proximate—to the substantive evil to warrant punishment. Criminal anarchy statutes, in contrast, made the words themselves the offense. A prosecutor had to show only that the defendant had made statements that fit the statutory definition of advocacy of the prohibited doctrine. Put another way, the substantive evil such statutes targeted was speech itself.

With some pulling and hauling, one could force criminal anarchy statutes into the attempt model: Legislatures enacted such statutes

20. N.Y. PENAL LAW §§ 160, 161 (Consol. 1909); *see also* Gitlow v. New York, 268 U.S. 652, 654 (1925) (quoting the text of the statute); FRANK B. GILBERT, CRIMINAL LAW AND PRACTICE OF NEW YORK 46 (3d. ed., 1920) (quoting the text of the statute).

21. 1919 Cal. Stat. 281.

because they believed that the dissemination of the ideas of criminal anarchy would eventually cause some other substantive evils such as sabotage or attempted revolution. But, under the general theory of police powers that everyone on the Supreme Court accepted, including Justices Holmes and Brandeis, a government could enforce its police-power regulations without showing in each case that violating the regulation created a "dangerous proximity of success" in causing harm.[22] A provision of the New York statute in *Lochner*, for example, prohibited bakers from sleeping where bread was produced.[23] The statute's purpose was obvious: Such arrangements created a risk that human waste products would work their way into the bread produced nearby. No one thought, though, that a bakery owner could defend against a prosecution for letting workers sleep in the bakery by demonstrating that no waste products had in fact contaminated the bread.

Perhaps the First Amendment imposed a more stringent requirement, but exactly what the requirement could be was unclear. The substantive evils that led legislatures to enact criminal anarchy statutes were themselves punished under other criminal laws. If the First Amendment required in a criminal anarchy prosecution that the prosecutor demonstrate a dangerous proximity to successful sabotage, the criminal anarchy statute added nothing to the existing prohibition on attempted sabotage.

The Supreme Court's majority understood all this when it considered criminal anarchy prosecutions in the 1920s. Communist Party activities led prosecutors in New York, California, and Michigan to charge prominent Party leaders with criminal anarchy or syndicalism. Michigan prosecuted Charles Ruthenberg, the Party's executive secretary; New York prosecuted Benjamin Gitlow, a leading member of the Communist faction that broke away from the Socialist Party in 1919; and California prosecuted Anita Whitney, a member of a prominent and wealthy California family who had helped organize the Communist Party there.

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22. *See* Beale, *supra* note 9.
23. Lochner v. New York, 198 U.S. 45, 46 n.* (1905) (providing the statute at issue).

Gitlow's case got to the Supreme Court first. He had been convicted for publishing and distributing the Communist Party's "manifesto," which, as Justice Edward Sanford put it:

> advocated, in plain and unequivocal language, the necessity of accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism,' based on 'the class struggle' and mobilizing the 'power of the proletariat in action,' through mass industrial revolts developing into mass political strikes and 'revolutionary mass action,' for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a 'revolutionary dictatorship of the proletariat,' the system of Communist Socialism.[24]

Gitlow's lawyers argued that his conviction should be overturned because the jury had been instructed that it could convict him simply for advocating violent revolution, without any showing that the Manifesto's distribution was likely to have any concrete result. The statute, they said, therefore punished "the mere utterance, as such, of 'doctrine' having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences."[25]

Justice Sanford's majority opinion observed that, as construed by the state courts, New York's criminal anarchy statute did not "penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action."[26] Rather, "[w]hat it prohibits is language advocating, advising, or teaching the overthrow of organized government by unlawful means," words that "impl[ied] urging to action."[27] Free speech was "an inestimable privilege in a free government," but everyone agreed, Sanford wrote, that it could be limited, for

24. Gitlow v. New York, 268 U.S. 652, 657–58 (1925).
25. *Id.* at 664.
26. *Id.*
27. *Id.* at 664–65.

otherwise "it might become the scourge of the republic."[28] The state could use its police power to:

> punish those who abuse this freedom by utterances inimical to the public welfare . . . . And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State.[29]

New York's legislature had "determined . . . that utterances advocating the overthrow of organized government by force . . . are so inimical to the general welfare and involve such danger of substantive evil" that they could be prohibited under the state's police power.[30]

What, though, of the argument that the government had not shown that any untoward action was likely to occur? For the Court, that argument missed the point. New York's legislature had made a judgment that criminal anarchy created a risk of substantive evils. The courts had to defer to that judgment, as long as it was reasonable. And it surely was, Justice Sanford said. Statements advocating criminal anarchy "by their very nature, involve danger to the public peace . . . . And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen."[31] Justice Sanford employed a vivid metaphor: "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."[32] New York was not "acting arbitrarily or unreasonably when . . . it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."[33] That was enough to

28. *Id.* at 667.
29. *Id.*
30. Gitlow v. New York, 268 U.S. 652, 668 (1925).
31. *Id.* at 669.
32. *Id.*
33. *Id.*

show that the statue was constitutional. Then, just as in the case of barring sleeping quarters in bakeries, it did not matter that the government did not try to show that Gitlow's statements were "likely, in and of [themselves], to bring about the substantive evil."[34] All that mattered was whether Gitlow's statements came "within the prohibited class."[35]

Justice Sanford distinguished *Schenck*. The Espionage Act "merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself."[36] In *Schenck* the government applied the statute to the defendant's language. Because Congress had not made any judgment that Schenck's words posed a threat of substantive evil, judges and juries necessarily had to determine whether the words he used posed a sufficient threat of the social harm Congress *had* identified, obstruction of the draft or interference with the war effort and the like. The clear-and-present-danger test, a reformulation of the requirement of a dangerous proximity of success, "has no application to [cases] . . . where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[37]

Justices Holmes and Brandeis dissented, in a three-paragraph opinion by Justice Holmes, in which he insisted that the clear-and-present-danger test should be applied. Picking up on Justice Sanford's metaphor, Justice Holmes wrote,

> Every idea is an incitement . . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.[38]

34. *Id.* at 670.
35. *Id.* at 670.
36. Gitlow v. New York, 268 U.S. 652, 670 (1935).
37. *Id.* at 671.
38. *Id.* at 673 (Holmes, J., dissenting).

The opinion did not confront Justice Sanford's argument that the test Justice Holmes preferred made sense when the legislature had not identified words themselves as the substantive evil, but not when it had done so.

Justice Brandeis was even more eloquent in his classic opinion, effectively a dissent, when the Court affirmed Anita Whitney's conviction for violating California's criminal syndicalism law.[39] Again Justice Sanford wrote the majority's opinion, which added nothing analytically significant to First Amendment doctrine but only restated what *Gitlow* had held.[40] Justice Brandeis thought that the Court did not have jurisdiction to consider Whitney's free speech claim, but incorporated into his separate opinion the dissent he had been ready to file in the case of Charles Ruthenberg, convicted of violating Michigan's similar law. Ruthenberg's appeal was dismissed when he died, but Justice Brandeis wanted to get his views on the record.[41] Justice Brandeis spent a few sentences attempting to discredit the distinction the majority offered between *Schenck* and *Gitlow*: "The Legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity."[42] This rebuttal rested on the implicit proposition that the "certain condition" that had to exist was a substantial likelihood of illegal action, but Justice Sanford's analysis defended criminal anarchy laws on the ground that the "condition" for their enactment was a judgment that specific utterances posed a *risk* that illegal action would ensue. And Sanford did not take the statute's enactment as "establishing" that such a risk existed. Rather, employing what he called deference to the

39. *See generally* Whitney v. California, 274 U.S. 357 (1927).
40. *Id.*
41. *See* Ronald Collins & David Skover, *Curious Concurrence: Justice Brandeis's Vote in* Whitney v. California, 2005 SUP. CT. REV. 333 (2006).
42. Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

legislature, he found that the legislature had made a reasonable judgment about risk.[43]

Justice Brandeis's concern went far beyond what he clearly believed was the merely technical distinction between *Schenck* and *Gitlow*. In some of the most passionate and eloquent words in the United States Reports, Brandeis offered a full account of free speech's values and of why governments could not be trusted to regulate speech:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to [be] the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that

43. *Id.*

> free speech and assembly should be guaranteed.
>
> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . . 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, selfreliant 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 opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.[44]

44. *Id.* at 375-77 (Brandeis, J., concurring).

But these words, powerful as they were, were written in what was functionally a dissent from the majority's analysis of the First Amendment claim. The majority's more generous view toward criminal anarchy laws was the law when Justice Hughes became Chief Justice.

Finally, free speech doctrine had to deal with the fact that the First Amendment's terms referred only to the national government: "Congress shall make no law . . . abridging the freedom of speech."[45] The cases arising out of World War I involved prosecutions by that government, and the First Amendment unquestionably applied to such prosecutions. State attacks on radical dissent raised a different legal question. States were barred only from denying "due process of law," which the Court in the *Lochner* line of cases had interpreted to mean that states could not infringe on fundamental liberties.[46] The *Lochner* approach was controversial, though, and some supporters of free speech were uncomfortable with protecting free speech as a fundamental liberty protected only by the due process clause. As Justice Brandeis grudgingly put it in his opinion in *Whitney*, "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."[47]

Further, the principles articulated in due process cases seemed to give governments greater leeway than those articulated in the Court's World War I free speech decisions. *Schenck* drew the clear-and-present-danger test from the criminal law of attempts,[48] but it was hardly obvious that state courts could not modify the common law rules regarding criminal attempts, and so it was hardly obvious that the clear-and-present-danger test set the due process limit to state government power.

The Court finessed the problem. In 1907, upholding a conviction for contempt of court through publication of articles and cartoons

45. U.S. CONST. amend. I.
46. *See generally* Lochner v. New York, 198 U.S. 45 (1905).
47. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).
48. Schneck v. United States, 249 U.S. 47 (1919).

criticizing the Colorado Supreme Court, Justice Holmes wrote, "We leave undecided the question whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st," because "even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states," the defendant would lose anyway because "the main purpose" of the constitutional provision was to prevent prior restraints on publication, not to bar punishment after publication.[49] In *Gitlow* the Court went a bit further. Justice Edward Sanford "assume[d] that the freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[50] As Zechariah Chafee observed in a comment on *Gitlow*, this was a "new gain, the possibility of federal protection against state suppression. A more liberal court may prevent a checker-board nation, with ultra-conservative states into which moderately radical Americans come at peril of imprisonment for sedition."[51] But, he noted, "[n]ot much can be hoped today."[52]

The Due Process Clause had another function, applicable in cases involving much more than speech. The clause was a guarantee of fundamental fairness in the state's treatment of those subject to its authority. At its core, the clause required that states let people know which of their activities violated the criminal law. Statutes had to be clear enough to give notice.[53] If a criminal offense could be

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49. Patterson v. Colorado, 205 U.S. 454, 462 (1907). *Schneck*, also written by Justice Holmes, backed away from this last conclusion: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . ." 249 U.S. at 51–52.

50. Gitlow v. New York, 268 U.S. 652, 666 (1925).

51. ZECHARIAH CHAFEE, JR., THE INQUIRING MIND 106 (De Capo Press, 1974) (reprinted from Zechariah Chafee, Jr., *The Gitlow Case*, THE NEW REPUBLIC, July 1, 1925).

52. *Id.*

53. *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (Justice Sutherland noted: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first

committed in several ways, the instructions had to make those differences clear, so that defendants could focus their arguments, and jurors focus their deliberations, appropriately. The First Amendment fed into these fairness concerns. A statute's terms might suggest that it could be violated in many ways, some of which were clearly protected by the First Amendment. A jury had to be instructed that it could not convict a defendant based only upon evidence that the defendant had violated the statute in a way protected by the Constitution.

The First Amendment as it had been interpreted in the federal cases arising out of World War I and as it had been assumed to apply in the state cases of the 1920s framed the Hughes Court's treatment of radical dissent. A theory that offered robust protection for radical dissent had been eloquently stated, but only in dissent. The Hughes Court's decisions ended up protecting many dissenters, but not by directly invoking the First Amendment. They were due process decisions influenced by the First Amendment.

II. POLITICAL RADICALS IN THE NEW DEAL ERA

Radicals in the United States were critical supporters of the New Deal in two senses: They played an important role in generating political support for the New Deal, especially as labor organizers, but many of them argued that the New Deal did not go nearly far enough, and saw it as much a defense of capitalism as the beginning of a socialist transformation. It was at least symbolically appropriate for the Court to take up its next criminal syndicalism case in 1936, as it was confronting the Roosevelt administration on the constitutionality of the New Deal.[54]

A. Dirk De Jonge and Labor Defense

Longshoremen in Portland, Oregon, were on strike in July 1934. The strike occasioned violence, and four of the strikers were shot by

essential of due process of law.").

54. *See generally* De Jonge v. Oregon, 299 U.S. 353 (1937).

police officers. Dirk De Jonge, a Communist and longshoreman, organized a meeting to protest the police action.[55] Somewhere between 150 and 300 people attended the meeting, which was sponsored by the Communist Party, although only a few dozen of those attending were Communists.[56] De Jonge was the second speaker on the program. He criticized conditions at the local jail, and described the police actions against the strikers as "attacks upon the working class" to break the strike.[57] He asked his listeners to buy Communist Party literature and to help increase the Party's membership.[58] Police officers raided the meeting, arresting De Jonge and other speakers. He was charged with violating Oregon's criminal syndicalism law by "conducting" the meeting, at which speakers "taught and advocated the doctrines of criminal syndicalism and sabotage."[59] According to Harry Gross, one of De Jonge's lawyers, the prosecution had been arranged with the assistance of the local "Citizen's Emergency League," which the lawyer described as "a local vigilante group organized by the Chamber of Commerce during the strike."[60] The state appointed a special prosecutor to try the case, again according to Gross "at the request of . . . a group of commanders of the local posts" of veterans' organizations such as the American Legion and the Veterans of Foreign Wars.[61] In addition to showing what had happened at the meeting, the prosecutor introduced excerpts from Communist literature into the record.

Gross was joined in defending De Jonge by three other lawyers from the International Labor Defense (the ILD).[62] The ILD was created in 1925.[63] Supported by the Soviet Union and taking the "international" in its name seriously, the ILD's goals were "to defend all persecuted for their activity in the labor movement, to defend the

55. *Id.* at 359–60.
56. *Id.* at 358.
57. State v. De Jonge, 51 P.2d 674, 676 (Or. 1935).
58. *Id.* at 681.
59. Harry L. Gross, *Vigilante Justice in Oregon*, THE NATION, Dec. 26, 1934, at 742.
60. *Id.*
61. *Id.*
62. Gross, *supra* note 59, at 742.
63. Charles H. Martin, *The International Labor Defense and Black America*, 26 LABOR HIST. 165, 167 (1985).

struggles of the national minorities, and to support the families of victims of ruling class terror."[64] It responded to a dilemma faced by political radicals of a Marxist bent. They were in an awkward position when they defended their actions by invoking their constitutional rights. Their theory of law and society implied that law, even constitutional law, was a reflection of basic power relations, a tool of the ruling class to suppress the working class. As the ILD's head noted, the organization's purpose was "to destroy the illusions of a democracy and justice above classes, and to expose their class character."[65] How could radicals expect judges, who were among the elites in the ruling class, to interpret the law to immunize political radicals from persecution and prosecution? As *The New Republic* put it in commenting on a long sentence imposed by a Georgia court on a Communist organizer, "Even a paper as conservative as the New York Herald Tribune has protested the outrageous injustice of this sentence, which goes far to prove what the Communists have long charged about capitalist-ruled courts, in the Deep South and elsewhere."[66]

To a large extent the Communists did not harbor great expectations of judges. Their main defense of invoking the Constitution when they were prosecuted lay not in hopes of vindication in court but in what they called "labor defense."[67] Labor defense treated prosecutions as occasions for organizing support for radicals. Prosecutions demonstrated that capitalist "rule of law" was a sham, discarded as soon as the ruling class felt threatened by radical dissent. Labor defense exposed that sham through publicity and demonstrations. The Industrial Workers of the World organized "free speech fights" from 1909 to 1913, but these fights were disruptive demonstrations in the streets, not invocations of the law in courtrooms.[68]

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64. *Id.* at 167 (quoting the ILD program).

65. *Id.* (quoting William L. Patterson).

66. *This Week*, THE NEW REPUBLIC, Feb. 1, 1933, at 309.

67. For a discussion, see REBECCA N. HILL, MEN, MOBS, AND LAW: ANTI-LYNCHING AND LABOR DEFENSE IN U.S. RADICAL HISTORY (2008).

68. For a discussion of the free-speech campaigns, see WILLIAM PRESTON, ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–1933, at 43–55 (2d. ed., Harvard Univ. Press 1966).

The best vehicles for labor defense were prosecutions that could be described as frame-ups of innocent defendants—at least, defendants who were innocent of the crimes with which they were charged. Campaigns against the continued imprisonment of Tom Mooney, convicted for setting a bomb that killed ten and injured forty at a "Preparedness Day" celebration in San Francisco in 1916, and of the execution of Joe Hill, for murdering a Salt Lake City butcher and his son in 1914, and of Nicola Sacco and Bartolomeo Vanzetti, convicted in 1921 of a robbery and murder in South Braintree, Massachusetts, foreshadowed the development of labor defense as a weapon for using prosecutions as an organizing device.[69]

Labor defense worked best when its organizers could credibly claim that the victims were being framed, as they could in the cases prominent during the 1920s. Lawyers who accepted the theory could ask juries to acquit, even in the face of evidence, and thereby to demonstrate how working people could stand up to the ruling class. After conviction, the theory of labor defense had to confront the difficulty that the lawyers were attempting to persuade members of the ruling class to let political radicals go free in the face of a jury's decision that they had violated the law. This was made even more awkward when the defendants were convicted of political offenses rather than ordinary crimes. Radicals were proud of their political positions, and were uncomfortable at best in claiming that they had not made the speeches or published the pamphlets that were at the basis of the charges against them. Mooney, Hill, and Sacco and Vanzetti might have been framed for murder, but political radicals were not being framed when they were charged with offenses that were defined by their radical views.

The advocates of labor defense never fully worked out how appeals to higher courts fit into radical political theory. Trumpeting one victory, Communist leader Earl Browder declared, "The higher court was forced by the pressure of aroused mass opinion and protest

69. Representative of a large literature are RICHARD H. FROST, THE MOONEY CASE (1968); GIBBS M. SMITH, JOE HILL (1969) and MOSHIK TEMKIN, THE SACCO-VANZETTI AFFAIR: AMERICA ON TRIAL (2009).

to set aside the verdict . . . ."[70] Similarly, ILD leader William Patterson asserted, "Not legal pressure alone, but mass pressure, into which the legal defense is merged, has forced the capitalist courts . . . to grant a new trial."[71] Yet, exactly how mass pressure could force capitalist courts to do anything was obscure. One promising path lay in describing political prosecutions as "legal lynchings." Doing so allowed the lawyers to seek relief from one segment of the ruling class—the judges of the national courts, especially the Supreme Court—against decisions made by a more parochial segment of the ruling class, particularly judges in southern courts. The idea was that sophisticated political elites would understand that legal lynchings undermined the credibility of the general claim that the capitalist rule of law was fundamentally fair and generally involved defendants who posed no real threat to the capitalist economic, social, and political order. The contrast *The New Republic* drew between the conservative New York newspaper and the Georgia courts suggests this line of argument.[72]

The lawyers defending political radicals also appealed to liberals who had civil libertarian inclinations, and in several important cases liberal lawyers played important roles in the appeals to the higher courts. Felix Frankfurter, for example, was prominently associated with the campaign to free Sacco and Vanzetti, in 1927 publishing a book, based on a long magazine article he had written, offering a "critical analysis" of the case.[73] Rebecca Hill suggests that anarchists and liberals "bonded over . . . a belief in the importance of individual ideas—and individualism."[74] The combination of labor defense with civil libertarianism was more awkward. Labor defense treated appeals to the Constitution as purely instrumental, likely to succeed only under special conditions, while civil libertarians had a principled commitment to the constitutional claims being made. Judges

70. CHARLES H. MARTIN, THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE 15 (1976).
71. *Id.*
72. Editorial, *The Herndon Case,* THE NEW REPUBLIC, Apr. 10, 1935, at 230-31.
73. FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN (1927).
74. HILL, *supra* note 67, at 189.

considering appeals in cases where a strenuous labor defense had been mounted might well have been suspicious of the sincerity with which the defendants' lawyers were invoking the Constitution. Still, suspicious or not, they had to deal with the legal arguments as such.

As the 1930s proceeded, political radicals developed another way of explaining their reliance on the Constitution in their defense. Captured best in the Communist Party slogan adopted during the Popular Front period after 1935, "Communism is 20th Century Americanism"[75] radicals located themselves *within* the American constitutional tradition rather than outside or against it. Claude Bowers, a journalist and historian, wrote of the conflict between Thomas Jefferson and Alexander Hamilton as a preview of modern battles against large corporations, a "clear-cut fight between democracy and aristocracy," as he put it in his preface, and the "spirits of Jefferson and Hamilton still stalk the ways of man—still fighting," as he put it on the last page of the volume.[76] For Bowers, Jefferson's opposition to the Alien and Sedition Acts was the true American tradition of liberty. The Alien and Sedition Acts inaugurated what Bowers called a "Reign of Terror" throughout the country.[77] The phrase's resonance with the terminology of a "Red Scare" used a few years earlier could not have been clearer. In this view political radicals who took a "Jeffersonian" position against those who Bowers called "terrorists" who suppressed speech were continuing America's best tradition.[78]

De Jonge's defense was a modest example of labor defense in action. During the three weeks the trial consumed, De Jonge's supporters filled the courtroom, wearing red badges. At trial the ILD lawyers repeatedly challenged the special prosecutor's references to De Jonge "as a 'rat,' a dangerous radical, and a liar."[79] The lawyers

75. *Communists: Rain Check on Revolution*, TIME MAGAZINE, May 30, 1938.

76. CLAUDE BOWERS, JEFFERSON AND HAMILTON: THE STRUGGLE FOR DEMOCRACY IN AMERICA vii, 511 (1926). Roosevelt appointed Bowers ambassador to Spain, where he served from 1933, and then to Chile, where he served until his resignation and retirement after Dwight Eisenhower's election, in 1953.

77. *Id.* at 386.

78. *Id.* at 387.

79. Gross, *supra* note 59, at 742.

were told that the jury was initially divided evenly on whether to convict De Jonge, then eight-to-four for conviction.[80] The judge re-read the instructions to the jury, and a few hours later two jurors agreed to vote for conviction if the jury also recommended a lenient sentence.[81] Because in Oregon only ten votes were needed to convict that was what happened: a conviction by a ten-to-two vote, with a recommendation for leniency.[82] The judge, not bound by the recommendation, sentenced De Jonge to seven years in prison rather than the maximum possible sentence of ten years.[83] De Jonge's trial exemplified labor defense in its almost-successful appeal to jurors directly, and in his lawyers' characterization of the case as involving vigilante justice.[84]

Osmond K. Fraenkel, a New York lawyer affiliated with the New York Liberties Committee, not then a branch of the American Civil Liberties Union, took over the case when it reached the Supreme Court. With a "political bias to the left," Fraenkel was a committed civil libertarian who believed that "people should do whatever they wanted as long as they didn't hurt anybody else."[85]

The precise charge against De Jonge turned out to be crucial. He violated the criminal syndicalism statute, the indicatment said, by "presid[ing] at . . . [and] conducting an assemblage of persons . . . the Communist Party, which . . . was . . . teaching and advocating . . . the doctrine of criminal syndicalism and sabotage."[86] A police undercover agent testified at De Jonge's trial about incidents in which Communists suggested that members rob banks to get money

80. *Id.* at 743.
81. *Id.*
82. *Id.*
83. *Id.*
84. *See* Gross, *supra* note 59; *see also* Cathy Howard, *The Case of Dirk De Jonge*, PORTLAND OREGONIAN, NORTHWEST MAGAZINE, Mar. 28, 1976, at 9 (I thank Seneca Gray and Tung Yin for locating a copy of this article.). Two judges of the Oregon Supreme Court would have reversed De Jonge's conviction because of the admission of hearsay evidence, the testimony about bank robberies, and the special prosecutor's improper appeals to passion. They also criticized the length of De Jonge's sentence. State v. De Jonge, 51 P.2d 674, 684–87 (Or. 1935).
85. David Margolick, *Osmond K. Fraenkel Dies at 94; Former Counsel to the A.C.L.U.*, N.Y. TIMES, May 17, 1983, at B6; Roger K. Newman, *Fraenkel, Osmond K.*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 200 (Roger K. Newman ed., 2009).
86. De Jonge v. Oregon, 299 U.S. 353, 361 (1937).

for a trip to Russia, but no evidence showed that De Jonge had made similar statements. Fraenkel's brief repeatedly sounded one theme: The charge allowed a conviction simply for helping to organize a meeting sponsored by the Communist Party, and that was all the evidence showed De Jonge had done. No evidence showed that anyone had advocated criminal syndicalism or sabotage at the meeting, nor did it show that the meeting was one *of* the Communist Party; it showed only that the Communist Party generally—in its overall teaching—advocated criminal syndicalism. As Fraenkel put it, the statute as construed by the state courts did not punish "assistance to an organization '*to* advocate'" criminal syndicalism, but rather "mere assistance to an organization '*which* advocates'" that doctrine.[87] So, Fraenkel wrote, the question for the Court was "whether a statute is constitutional which punishes a person for participation in a lawful meeting, called for a lawful purpose, merely because the meeting was called by an organization which, it is charged, advocated prohibited doctrines."[88] Under the state court's decision, "any person could be convicted who participated in a symposium called by the Communist Party for the discussion of the campaign issues of the current year, were such a person a Democrat, a Republican, or a member of any other political party."[89] After distinguishing *Whitney* on the ground that Oregon's legislature had never determined that activities like De Jonge's were dangerous, Fraenkel returned to the "guilt by association" theme: "If the conviction in this case can be sustained, then anyone who speaks at a meeting called by the Communist Party for any purpose whatsoever might likewise be convicted."[90]

The state's brief verged on incompetence. It did little more than pile quotation upon quotation from decisions by the Supreme Court and by state courts. A short passage asserting, "By making it a crime to preside at, conduct, or assist in conducting a meeting of the

87. Brief for Appellant, De Jonge v. Oregon, 299 U.S. 353 (1936) (No. 123), 1936 WL 39965 at *12.

88. *Id*. at *7.

89. *Id*. at *8.

90. *Id.*

Communist Party, meetings of such an organization are prevented,"[91] showed that the state's lawyers simply did not understand the distinction Fraenkel drew, and Chief Justice Hughes pressed the point at oral argument. The fact that Fraenkel's oral argument consumed only eight minutes suggested the Court's inclinations.[92]

The Supreme Court returned from its December break on January 4, 1937, just a month after it had heard the arguments in *De Jonge*. Chief Justice Hughes delivered the opinion for a unanimous Court.[93] Written with what the New York *Times* called his "characteristic . . . tight-lipped reasoning and . . . a restrained emotion which often rises to real eloquence,"[94] Chief Justice Hughes's opinion continued along the path of developing an affirmative theory of the First Amendment. As Chief Justice Hughes understood the case, De Jonge was convicted simply because "he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party."[95] That De Jonge was in fact a Communist was irrelevant to the charge.

> A like fate might have attended any speaker . . . . However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party.[96]

Discussions of tariffs, foreign policy, taxation, relief—all might lead to criminal liability for participants, were the discussion sponsored by the Communist Party. Legislatures could address abuses of

91. Brief for Appellee at 30, De Jonge v. Oregon, 299 U.S. 353 (1937) (No.123), 1936 WL 40125 at *29.

92. *Id.*; *Supreme Court Justices Question Closely Oregon's Argument in Communist's Appeal*, N.Y. TIMES, Dec. 10, 1936, at 13; NEWMAN, *supra* note 85.

93. Justice Stone did not participate because of his recent illness. *See* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 450 (Viking Press 1956).

94. Editorial, *The Right of Free Assembly*, N.Y. TIMES, Jan. 6, 1937, at 22.

95. De Jonge v. Oregon, 299 U.S. 353, 362 (1937).

96. *Id.*

constitutional rights, but "[t]he rights themselves must not be curtailed."[97]

Chief Justice Hughes then offered a statement of First Amendment theory focusing on the role speech and assembly had in democratic government:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[98]

The First Amendment protected the ability of the American people to change the policies their government pursued, and even the form of their government, by peaceful means. De Jonge and others were "entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances."[99] Chief Justice Hughes stated a broad rule: "[P]eaceable assembly for lawful discussion cannot be made a crime."[100] Criminal syndicalists might be prosecuted for whatever crimes they committed "elsewhere." But the government could not "seize[] upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."[101]

Editorial reactions to the De Jonge decision showed how protecting free expression could appeal to liberals and conservatives. The *Portland Oregonian* wrote that the decision rejected "the red-baiting witch hunts which have characterized some of our

97. *Id.* at 365.
98. *Id.*
99. *Id.*
100. *Id.*
101. De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

officialdom and part of our press here in Oregon," and a columnist said that it showed "that we are making headway against the fascist drift in this country."[102] To the *New York Times*, the decision showed that judges "who have so often been described as narrow-minded reactionaries" could "let the breath of life and liberty" into Oregon, "one of the most progressive and liberal-minded states."[103] To the *Chicago Daily Tribune* the decision "ought to strengthen the restraints upon hasty impulse in lawmaking" at a time when the "mood" and the "most powerful leadership" of the American people "show little regard for the dangers of legislative haste under pressure of public excitement."[104] All constitutional limitations, not merely the First Amendment, were designed to protect the nation from "impulsive lawmaking" enacted during moments of "public excitement," when the people "disregard permanent considerations in the pursuit of an immediate object."[105] "A wise people," the *Tribune* said,

> will wish to protect themselves from their own moments of passionate impulse and hasty decision, . . . [f]or what seems to be our will at the moment may be and often has been the defeat of our real will, obscured for the moment by passion, but expressed in the enduring principles our reason cherishes.[106]

The implicit reference was of course to Roosevelt and the New Deal, in the aftermath of the Democrats' electoral victory in 1936 and on the eve of Roosevelt's challenge to the Court.

B. Angelo Herndon and Sedition in Georgia

Starting in March 1930, Atlanta's police, directed by prosecutor John Hudson, conducted a series of raids on meetings organized by members of the Communist Party, dispatched to the region to help

102. Howard, *supra* note 84, at 9.
103. Editorial, *supra* note 94, at 22
104. *Impulsive Lawmaking*, CHI. TRIB., Jan. 10, 1937, at 14.
105. *Id*.
106. *Id*.

organize workers and relief recipients. Eventually Joseph Carr, an eighteen-year-old Communist, and five others were indicted for attempting to incite insurrection, under a statute dating from the pre-Civil War years. The Communists saw Atlanta as fertile ground because, facing severe shortfalls in income, the city had cut its expenditures on relief—as well as salaries for public officials. On June 30, 1932, about one thousand marchers organized by Communists under Angelo Herndon's leadership demonstrated at the doors of the city council in the local courthouse building.[107] Herndon was arrested eleven days later, for violating the anti-insurrection statute.[108]

Herndon, born in southern Ohio in 1913, wandered through the South after his father's death in 1922, working at coal mines in Kentucky and Alabama.[109] In 1930 he chanced upon a meeting of the Communist-sponsored Unemployed Council in Birmingham and immediately found in Communism an explanation for the poverty he experienced and a program for eliminating its cause, capitalism.[110] He attended national meetings of the Unemployed Councils, and in the fall of 1930 he was arrested along with Carr for attempting to organize coal miners in Birmingham.[111] Later, the Party sent him to New Orleans and then, in 1932, to Atlanta, where, paid ten dollars a week, he continued his organizing efforts.[112]

Herndon's presence in Atlanta resulted from strategic choices made by the Communist Party in the late 1920s. African Americans had played an important role in the Communist Party almost from its founding, and increasingly so in the 1920s. By the end of that decade, the Party was divided over whether to take organizing African Americans in the South as an important goal.[113] The debates entwined esoteric disputes over Marxist theory with power struggles

107. MARTIN, *supra* note 70, at 1–6.
108. *Id.*; GLENDA ELIZABETH GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919–1950, at 114 (2008).
109. MARTIN, *supra* note 70, at 8–9.
110. *Id.* at 9.
111. *Id.* at 9–10.
112. *Id.* at 10; Herndon v. State, 174 S.E. 597, 610–11 (Ga. 1934).
113. GILMORE, *supra* note 108, at 59–61.

in the Soviet Union, with Joseph Stalin using Marxist theory as his excuse for eliminating his opponents.[114] The argument against organizing in the South was that revolution was not imminent in the United States, and that the best way to bring the revolution on, inevitably a long-term project, was to organize in the industrial North rather than the rural South.[115] The argument for organizing in the South was that the Depression showed that capitalism was on its last legs, that revolution was just around the corner, and that African Americans in the South, oppressed by both racism and capitalism, would be important foot-soldiers in the revolution.[116] The Party in the United States took the side of organizing, or more precisely Stalin took the side of those favoring organizing in the South, because the advocates of the longer-term strategy were allied with his opponents in the Soviet Union.[117] The Party adopted a program advocating African American self-determination in the Black Belt, with the goal of establishing a separate state for African Americans, assuming that that was what African Americans would choose if given the chance.[118] In January 1929, the American Communist Party formally adopted a program to send organizers southward.[119]

Herndon's arrest in 1932 galvanized the International Labor Defense (ILD), which sent its national secretary William L. Patterson to Atlanta to locate lawyers who could both defend Herndon and help in a labor defense campaign.[120] Patterson first hired a prominent white lawyer, with whom he quickly fell out.[121] Then Patterson met Benjamin Davis, a young black lawyer who recently graduated from Harvard Law School. He had the ILD retain Davis and his partner John Geer to defend Herndon.[122] Davis and Geer agreed to the labor

114. *Id.*
115. *Id.*
116. *Id.* at 61.
117. *Id.* at 61–64.
118. *Id.*
119. *See* GILMORE, *supra* note 108, at 70. For a discussion of African Americans and the Communist Party in the 1920s, see *id.* at 36–42, 51–57, 70. Gilmore discusses the disputes over organizing African Americans, *id.* at 59–61, and the adoption of the self-determination program, *id.* at 61–64.
120. MARTIN, *supra* note 70, at 10–11.
121. *Id.* at 11.
122. *Id.*

defense approach, "legal efforts at justice within the court system and political efforts outside it aimed at undermining the socioeconomic forces which had originally inspired the prosecution."[123]

In court Davis and Geer mounted constitutional challenges to the indictment, to the exclusion of African Americans from the jury, and, eventually, to the inadequate questioning of potential jurors to determine whether they were prejudiced against Herndon.[124] Their first victory was to get Herndon's bond reduced so that he could be released from the jail in which he had been held from July to December.[125] A frail young man, Herndon had continually complained about the physical conditions at the jail, and his release allowed him to go on a speaking tour as part of the labor defense campaign.[126]

Herndon's trial was contentious, to the point where, as historian Glenda Gilmore put it, Davis "walked into the packed courtroom a nominal Republican" and "strode out a card-carrying Communist."[127] Prosecution and defense quarreled over the questions jurors were asked and the evidence the prosecution sought to introduce to show that Communists advocated insurrection, even though they did not try to show that Herndon himself had distributed or even read the literature they put before the jury.[128] Quarrelsomeness was part of the labor defense strategy too; Davis and Geer tried to show jurors that, as the Communist newspaper the *Daily Worker* put it, the changes were a "frame-up,"[129] not in the sense that Herndon had not organized for the Party, but in the sense that jurors ought to find nothing wrong with what he had done.[130] The jurors were unswayed, and accompanied their guilty verdict with a recommendation that Herndon be sentenced to eighteen-to-twenty years in prison.[131]

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123. *Id.* at 12.
124. *Id.* at 12, 34.
125. MARTIN, *supra* note 70, at 35.
126. *Id.* at 101.
127. GILMORE, *supra* note 108, at 165.
128. *See* MARTIN, *supra* note 70, at 39–61 (recounting the course of the trial in some detail).
129. *Id.* at 10.
130. *Id.* at 39–61.
131. *Id.* at 61.

Labor defense then moved into its next phases—an appeal to the Georgia Supreme Court and, more important to the ILD, a local and nationwide publicity campaign. A local defense group formed to publicize the case in Atlanta, which continued to go through a local Red Scare with new police raids and arrests.[132] Nationally, William Patterson wrote, "only mass pressure can bring about the release of a class war prisoner," though that pressure had to be "supplemented by legal defense" conducted on the highest level, presumably because judges had to be given some legal hook on which to hang their response to mass pressure.[133] Herndon spoke in Washington, Baltimore, Philadelphia, Newark, and New York, and then in the Midwest where he was joined by the mother of one of the Scottsboro defendants.[134] In New York, Herndon told his audience, "the Southern ruling class thought that they had just another 'nigger' case . . . but they discovered they had to take notice of millions of protests that came in from the masses all over the world."[135]

Much of the Georgia Supreme Court's decision was devoted to trial-related issues such as the selection of jurors and the admissibility of testimony. At the end the court turned to evaluating the evidence to determine whether it was enough to support the conviction. Herndon came to Atlanta "as an organizer for the Communist Party," and the jury could "find that his chief objective was to press the cause of the Communist Party."[136] So, the jury could consider the Party's "program, and statutes" in assessing whether he was attempting to incite insurrection.[137] The court then provided a fairly extensive summary of a booklet, "The Communist Position on the Negro Question," describing the Party's interest in self-determination in the "Black Belt," and concluding with the sentence, "[Negro Communists'] constant call to the Negro masses must be: Revolutionary struggle against the ruling white bourgeoisie, through

132. *See* MARTIN, *supra* note 70, at 77, 82–96, 117–19.
133. *Id.* at 79.
134. *See* GILMORE, *supra* note 108, at 182.
135. *Id.*
136. *Id.* at 610.
137. Herndon v. State, 174 S.E. 597, 612 (Ga. 1934).

a fighting alliance with the revolutionary white proletariat."[138] It quoted Herndon's testimony at trial:

> We know the system we are living under is on the verge of collapse; no matter what system we are living under, it has developed to its highest point and comes back—for instance, you can take a balloon and get so much air in it, and when you get too much it bursts; so with the system we are living under—of course, I don't know whether that is insurrection or not, but the question, it has developed to its highest point[139]

and asked, "Did this statement not indicate a belief that the conditions were opportune for a revolution or insurrection and that now or soon would be a seasonable time to strike?"[140] The Communist Party and Herndon could not reasonably believe that the Black Belt's self-determination could occur "by peaceful . . . and lawful processes."[141] The jury, the court said, could "infer that violence was intended."[142] The opinion concluded with a long quotation from *Gitlow*, and the statement that the "evidence authorized the verdict."[143]

In some ways, the Georgia Supreme Court's decision rested on the same perception that animated the Communist Party's southern efforts: The Black Belt was ripe for revolution, secession through self-determination was a realistic possibility, and it could happen only violently. Northern liberals saw the decision as a large threat to civil liberties. An editorial in *The New Republic*, for example, said that the state court's decision illustrated "the danger of legislation directed against radical activities."[144] Because the decision appeared to "establish the principle that the ownership of any book . . . that advocates social change is proof of one's determination to overthrow

138. *Id.* at 612–14.
139. *Id.* at 615.
140. *Id.*
141. *Id.*
142. *Id.*
143. Herndon v. State, 174 S.E. 597, 616 (Ga. 1934).
144. Editorial, *supra* note 72, at 231.

the government," if the decision stood, it would "block every avenue by which we may hope to reach a better and fuller life, and reduce our status as free and independent Americans to a point somewhere near absolute zero."[145]

Herndon's lawyers were surprised by the Georgia Supreme Court's decision. Their entire free-speech argument had been that the evidence presented at trial did not show that Herndon had actually violated the anti-insurrection statute under the standard, derived from *Schenck*, that the jury had been told to apply. The Georgia Supreme Court, though, upheld the conviction by interpreting the statute to require less evidence and finding that under the new interpretation there was indeed enough evidence to support Herndon's conviction.[146] As the lawyers saw it, this injected a new issue into the case: Was the anti-insurrection statute, as now construed, consistent with free speech principles?

Labor defense was well and good as an organizing tool, but Herndon, who had complained about conditions at the jail in Atlanta, still faced twenty years in a Georgia prison, where the conditions were likely to be worse. His lawyers, of course, wanted to overturn his conviction. Drawing on their connections within the Communist Party, they contacted Carol Weiss King, a radical New York lawyer whose network of professional friends included Communists and liberals. Through her contacts at Columbia Law School, King recruited Walter Gellhorn, a rising star of the faculty. Gellhorn went to Atlanta and got another young lawyer just making his mark in Atlanta legal circles, W.A. Sutherland, to prepare a petition for rehearing in the Georgia Supreme Court, arguing that the court had mistakenly applied the *Gitlow* standard to uphold a conviction for attempting to incite insurrection, a *Schenck*-type charge. Returning to New York, Gellhorn in turn recruited Whitney North Seymour, a Wall Street lawyer who had served in the Solicitor General's office during the Hoover administration, who would give the Communist organizer's case a respectable face. Seymour and Gellhorn then

145. *Id.*
146. Herndon v. State, 174 S.E. 597, 609–16 (Ga. 1934).

persuaded another Columbia law professor, Herbert Wechsler, to join them in preparing Herndon's appeal. The final member of the appellate team was Elbert Tuttle, Sutherland's partner.[147]

With an eye on an appeal to the Supreme Court, Geer and Seymour filed the petition for rehearing in the Georgia Supreme Court, arguing that the statute, as it had been construed, was unconstitutional and that Herndon was entitled to raise the question then even though he had not raised it earlier because his lawyers could not reasonably have anticipated the new interpretation. The Georgia Supreme Court denied the petition. It modified its earlier interpretation of the statute by saying, "Force must have been contemplated," but "it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."[148] Were that interpretation to be unconstitutional, the court continued, Herndon's lawyers had to have raised their constitutional argument earlier. The court did not explain how Herndon's lawyers could have anticipated the interpretation at any time before the court itself rendered its decision.

Seymour decided to abandon the challenge to the jury's fairness; under the statutes regulating the U.S. Supreme Court's jurisdiction, that issue could be raised only by a writ of certiorari, which the Court had the right to deny for any reason at all, and Seymour may have believed that the jury issue was unlikely to attract the Court's concern. In contrast, the Court had jurisdiction by appeal in cases where a state statute had been upheld against a constitutional challenge, and it was required to determine the validity of that challenge on the merits—if the case was properly presented to it.

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147. MARTIN, *supra* note 70, at 140-41; *see, generally* ANN FAGAN GINGER, CAROL WEISS KING: HUMAN RIGHTS LAWYER, 1895-1952 (1993); Conrad K. Harper, *Seymour, Whitney North*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 490–91 (Roger K. Newman ed.,2009). Sutherland and Tuttle founded the distinguished Atlanta law firm Sutherland, Asbill, and Brennan, and Tuttle was later appointed to the federal court of appeals by President Dwight Eisenhower. *See* Thomas G. Walker, *Tuttle, Elbert Parr*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 555 (Roger K. Newman ed.,2009).

148. Herndon v. State, 176 S.E. 620, 622 (Ga. 1934).

Seymour's brief noted that the Georgia Supreme Court had upheld Herndon's conviction by construing the state's ban on attempting to incite insurrection to permit conviction without jury consideration of how remote the risk of insurrection was and without considering the likelihood that it would occur.[149] That construction, Seymour observed, was squarely in conflict with the Court's holdings in *Schenck* and subsequent cases. That was enough to show that there really was a constitutional issue in the case.[150]

The fact that the Georgia Supreme Court had refused to address the constitutional question because it had not been properly raised in the trial court posed a problem for Seymour. The U.S. Supreme Court had jurisdiction over the case only if the constitutional claim had been presented to the state courts in a manner consistent with those courts' procedural rules. The failure to raise the constitutional challenge in the trial court was hardly surprising, of course, because the trial judge had instructed the jury in terms drawn from *Schenck*. Had the Georgia Supreme Court affirmed the conviction by finding that the jury's verdict was supported by evidence of a clear and present danger, the Georgia statute would have been constitutional. Instead, though, Seymour argued, that court came up with a different construction of the statute, one under which remoteness, circumstances, and the like were irrelevant. And, under *that* construction, the statute was unconstitutional. Herndon's lawyers had raised their constitutional challenge at the first moment they could, in a petition for a rehearing. As Seymour's brief put it, before the Georgia Supreme Court's decision Herndon "was reasonably content to rest his case upon the sufficiency of the evidence as a matter of State law to meet the standard declared by the trial court."[151] His lawyers were "not required to anticipate in the trial court" that the Georgia Supreme Court would evaluate the evidence against him

149. Brief for Appellant, Herndon v. Georgia, 295 U.S. 441 (1935) (No. 665), 1935 WL 32962.

150. Statement as to Jurisdiction at 12–13, Herndon v. Georgia, 295 U.S. 441 (1935) (No. 665), 1934 WL 31894.

151. Brief for Appellant, Herndon v. Georgia, 295 U.S. 441 (1935) (No. 665), 1935 WL 32962.

"under another standard which is more rigorous, and which renders the statute invalid."[152]

Seymour's logic was unassailable, but it foundered on the U.S. Supreme Court's understanding of what the Georgia Supreme Court had done. Justice George Sutherland wrote the majority opinion, holding that the Supreme Court did not have jurisdiction to consider the constitutional challenge because it had not been properly raised in the state courts.[153] The time line of several Georgia cases, not only Herndon's, was crucial for Justice Sutherland.[154] He agreed that Herndon's lawyers had no reason to challenge the "immediate serious violence" instruction initially given the jury.[155] But, he continued, Herndon was convicted on January 18, 1933, and Herndon's lawyers made a motion for a new trial.[156] While that motion was pending in the trial court, in March 1933 the Georgia Supreme Court issued a decision upholding convictions under the anti-insurrection statute.[157] In the course of that decision it referred to a previous decision upholding the defendants' indictment, describing that earlier decision's discussion of *Gitlow* and *Whitney* as "useful and salutary" in assessing the anti-insurrection statute.[158] According to Justice Sutherland, the March decision should have signaled to Herndon's lawyers that they should immediately modify their motion for a new trial to insert a new challenge, that the Constitution *required* the instruction the trial court had given.[159] Herndon "cannot plead ignorance" of the Georgia Supreme Court's holding in the March decision, "and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below."[160]

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152. *Id.* at 10–11.
153. Herndon v. Georgia, 295 U.S. 441, 442 (1935).
154. *Id.* at 445–46.
155. *Id.* at 445 (quoting Herndon v. State, 174 S.E. 597, 608 (Ga. 1934)).
156. *Id.* at 444–45.
157. Carr v. State, 169 S.E. 201, 201 (Ga. 1933).
158. *Id.*
159. Herndon v. Georgia, 295 U.S. 441, 446 (1935).
160. *Id.*

Unmentioned by Justice Sutherland was the fact that Herndon and his local lawyers almost certainly knew of the two decisions to which his opinion referred. The first rejected a pre-trial challenge by the Atlanta Six, including Herndon's fellow Communist organizer Joseph Carr, to the constitutionality of the state's anti-insurrection statute.[161] The Georgia Supreme Court held that the indictments alleged sufficient facts to justify a conviction, should there be one.[162] In the course of upholding the indictment, the court's opinion referred extensively to *Gitlow* and *Whitney*. The second upheld the convictions of the Atlanta Six for violating the anti-insurrection statute.[163]

In *Herndon v. Georgia*, Justice Benjamin Cardozo dissented, joined by Justices Louis Brandeis and Harlan Fiske Stone.[164] Justice Cardozo pointed out that under the Supreme Court's precedents the standard for assessing the constitutionality of criminal anarchy statutes—the *Gitlow* standard —was different from the standard for assessing the constitutionality of a statute making speech criminal because it posed a risk of a substantive evil such as insurrection, the *Schenck* standard.[165] Even a well-informed and sophisticated lawyer would not think that dicta referring to criminal anarchy statutes in a decision rejecting a challenge to an indictment as inadequate under *Schenck* had any implications for the standard the Constitution required that juries use in prosecutions under an anti-insurrection statute. Lawyers should not bother trial courts with unnecessary motions that rested on the guess or fear that the Georgia Supreme Court would confuse *Gitlow*-type statutes with *Schenck*-type ones. Herndon "came into the highest court of Georgia without notice that the statute defining his offense was to be given a new meaning. There had been no rejection, certainly no unequivocal rejection, of the doctrine of Schenck . . . ."[166]

161. Carr v. State, 166 S.E. 827 (Ga. 1932).
162. *Id.*
163. Carr v. State, 169 S.E. 201 (Ga. 1933).
164. Herndon v. Georgia, 295 U.S. 441, 446 (1935) (Cardozo, J., dissenting).
165. *Id.* at 448–51.
166. *Id.* at 452.

Justice Cardozo's analysis was completely accurate as to the law, but it rested on a quite careful parsing of the Georgia Supreme Court's decision in the two *Carr* cases. Decided before Herndon's trial, *Carr I* upheld an anti-insurrection indictment against constitutional challenge, in an opinion with a two-part structure.[167] After a series of quotations from *Gitlow* and *Whitney*, the opinion contained an extensive description of the facts alleged in the indictment. Based on those facts, the court allowed the prosecution to proceed. The opinion was ambiguous about the relation between its parts. The first part might have been dicta, with the indictment upheld because the factual allegations, if proven, would be sufficient to sustain a conviction under *Schenck*. Or, that part might have signaled the Georgia Supreme Court's position that an indictment under a *Schenck*-type statute could be sustained under jury instructions based on *Gitlow* and *Whitney*. The ambiguity remained unresolved when Herndon's case was submitted to the jury with instructions favoring Cardozo's position that *Schenck* provided the applicable constitutional standard. *Carr II* might have been taken to resolve that ambiguity, except that its references to *Gitlow* and *Whitney* only indirectly suggested that those cases provided the constitutional standard. Experienced and subtle lawyers might have discerned from the *Carr* cases the position the Georgia Supreme Court eventually took in Herndon's case. Davis and Geer were of course not experienced, and Justice Cardozo's position, that the *Carr* decisions hardly gave ordinary lawyers clear notice of what the Georgia Supreme Court thought, was obviously correct.

Yet, Justice Cardozo's opinion did overlook the fact that confusion between *Schenck*-type statutes and *Gitlow*-type ones was widespread. Indeed, in one sense Justice Brandeis himself, concurring in *Whitney*, had argued that constitutional law should not distinguish between the two types of statutes, and one might say as well that the fact that a majority of the Supreme Court in Herndon's case failed to draw the distinction was a signal that good lawyers should have anticipated the confusion and so should have raised the constitutional challenge

167. Carr v. State, 169 S.E. 201 (Ga. 1933).

immediately after the Georgia Supreme Court upheld the *Carr* indictments.

The *New York Post* called Justice Sutherland's opinion "a mass of shabby technicalities," a common reaction among those who commented on the decision.[168] Law review comments were similar. A note in the *University of Pennsylvania Law Review* observed that the Court "is scarcely to be commended to the assiduousness with which it went about avoiding a decision."[169] The decision, it continued, "should prove distressing to those who love consistency in the law, as well as to those who cherish the rights of free speech of and racial minorities."[170]

Herndon's case was not over with the Supreme Court's rejection of his appeal. Seymour filed a petition for rehearing in the Supreme Court, arguing that under Georgia law Herndon's lawyers could not have inserted the constitutional claim into the case by modifying their motion for a new trial, and otherwise quarreling with Justice Sutherland's analysis. Although the Court denied the petition without comment, the petition mattered because it left Herndon free on bail to continue the labor-defense effort. The Communist Party had recently adopted a "Popular Front" strategy.[171] Earlier it had denounced liberal organizations as class-traitors and collaborators with capitalism, but the Popular Front strategy called for alliances between Communists and liberals in the face of the common threat fascism posed.[172] Herndon approached the National Association for the Advancement of Colored People for support, and the organization agreed to file an amicus brief on Herndon's behalf supporting the petition for rehearing.[173]

Herndon's lawyers' next move invoked Georgia's habeas corpus procedure, which allowed those whose convictions had been upheld on direct appeal to file a habeas corpus petition for post-conviction

168. Martin, *supra* note 70, at 150 (referencing a May 22, 1935 *New York Post* article)
169. *Recent Cases*, 84 U. PA. L. REV. 250, 257 (1935–36).
170. *Id.*
171. GILMORE, *supra* note 108, at 185–86.
172. *Id.*
173. *Id.*

relief. Relief could be granted if the original conviction was based on an unconstitutional statute.[174] The case was assigned to Judge Hugh M. Dorsey. Judge Dorsey had become notorious in liberal circles as the prosecutor of Leo Frank, convicted of murdering a young woman and then lynched when the state's governor commuted his death penalty into a life sentence. Judge Dorsey had capitalized on his role in the Frank case to run successfully for governor, where he pursued moderate policies, including some moderation on issues of race. Elbert Tuttle, who had worked briefly as a subordinate to Judge Dorsey, assured Seymour that Judge Dorsey was fair-minded.[175]

Tuttle's judgment was vindicated when Judge Dorsey held the anti-insurrection statute unconstitutionally vague.[176] To the *Daily Worker*, "The United Front freed Herndon! Onward with the United Front!"[177] The success was short-lived, though. The Georgia Supreme Court quickly reversed Judge Dorsey's decision, in a short opinion that merely referred to its early decision upholding Herndon's conviction.[178] But, having addressed the merits, the Georgia Supreme Court opened up its decision to review by the U.S. Supreme Court.[179]

The briefs in the appeal of the habeas corpus decision added nothing new to what had been argued in the first go-round.[180] Seymour argued that the anti-insurrection statute was unconstitutional as construed by the Georgia Supreme Court because it allowed the jury to convict Herndon without finding the kind of close connection *Schenck* required between what he said and the possibility that insurrection would actually occur. True, the jury had been instructed properly, but the Georgia Supreme Court evaluated Herndon's conviction by using a looser standard. Were the proper

174. Moore v. Wheeler, 35 S.E. 116 (Ga. 1900).

175. MARTIN, *supra* note 63, at 162.

176. Dorsey's decision became an issue when he sought re-election in 1936. He won a close race against John Hudson, who had led Herndon's prosecution. *Id.* at 172–73.

177. *Id.* at 164.

178. Lowry v. Herndon, 186 S.E. 429 (Ga. 1936).

179. MARTIN, *supra* note 63, at 164 (quoting Daily Worker); Lowry v. Herndon, 186 S.E. 429 (Ga. 1936).

180. *See generally* Brief for Appellee, Herndon v. Lowry, 301 U.S. 242 (1937) (Nos. 474, 475), 1937 WL 40657.

standard to be applied, Seymour argued, the conviction was not supported by sufficient evidence. The state's brief suggested that the Court abandon the "clear and present danger" test for the older "bad tendency" test that *Schenck* had rejected.

A five-justice majority of the Supreme Court rejected Georgia's innovative suggestion, and applied *Schenck*, or at least purported to do so.[181] Saying that the state's power "to abridge freedom of speech . . . is the exception rather than the rule,"[182] Justice Owen Robert's largely pedestrian opinion drew the appropriate distinction between *Schneck*-type cases and *Gitlow*-type ones and cited *De Jonge* to show that state laws had to have an "appropriate relation to the safety of the state."[183] Reading the state court's decisions, Justice Roberts concluded that the state court had necessarily construed its statute to mean that "one who seeks members for . . . a party which has the purposes and objects disclosed by the documents in evidence may be found guilty of an attempt to incite insurrection."[184]

That construction led Justice Roberts to examine the evidence against Herndon closely. Justice Roberts noted Georgia's "especial[]" reliance on the booklet *The Communist Position on the Negro Question*, which he described in detail.[185] Did Herndon incite insurrection by inducing people to join the Communist Party:

> by reason of the fact that they agreed to abide by the tenets of the party, some of them lawful, others, as may be assumed, unlawful, in the absence of proof that he brought the unlawful aims to their notice . . . or that the fantastic program they envisaged was conceived of by any one as more than an ultimate ideal?[186]

181. Herndon v. Lowry, 301 U.S. 242 (1937).
182. *Id.* at 258.
183. *Id.*
184. *Id.* at 255.
185. *Id.* at 250.
186. *Id.* at 260–61.

As construed, the statute did not allow the judge and jury to "appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function."[187] Rather, the jury could convict if it concluded that "any act or utterance" Herndon made "in opposition to the established order . . . might, in the distant future, eventuate in a combination to offer forcible resistance to the state."[188] He did not have to "advocate resort to force," and indeed, Justice Roberts wrote, had Herndon merely "forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date . . . resort to force," he could be found guilty.[189] The scope of potential liability, as Justice Roberts described it, was enormous:

> Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government, he may be convicted . . . .[190]

Phrases such as "reasonably might foretell" and "some time in the indefinite future" were the hallmarks of a statute that restricted freedom of speech far too much.[191] Georgia's statute "as construed and applied, amounts merely to a dragnet which may enmesh any one who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others."[192]

Justice Roberts and his colleagues in the majority said that they were only following through on the logic of *Schenck* and its concern

187. Herndon v. Lowry, 301 U.S. 242, 261 (1937).
188. *Id.* at 262.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 263–64.

that juries might be enflamed by local and national passions against radical dissenters who posed no serious threat to the government's stability. The Four Horsemen, led by Justice Willis Van Devanter, disagreed. Their concurrence in *De Jonge* showed that they had no quarrel with the principles Justice Roberts articulated. They did think, though, that the evidence showed a greater threat than the majority acknowledged. They found the program for the Black Belt, as elaborated in the booklet from which Justice Van Devanter quoted extensively, far more dangerous than the majority had it.[193] Justice Van Devanter pointed out that the booklet "was particularly adapted to appeal to negroes" in the South, "for it pictured their condition as an unhappy one."[194] As had the Georgia Supreme Court, Justice Van Devanter's analysis unconsciously echoed the Communist Party's understanding: Proposing to create an independent state in the Black Belt "was nothing short of advising a resort to force and violence, for all know that such measures could not be effected otherwise."[195] Given this threat, the state was entitled to convict Herndon if the jury found that illegal action might take place "at any time within which [Herndon] might reasonably expect his influence to continue to be directly operative."[196]

This might well have been a reasonable interpretation of what "clear and present danger" meant in the context of the World War I cases, which had, after all, upheld the convictions in *Abrams*[197] under circumstances where the likelihood of anyone doing anything serious was far smaller than the threat in the South during the Depression. The nation, though, was more than a decade beyond the World War I prosecutions and the Red Scare of the early 1920s, and "clear and present danger" had come to mean something more stringent than it had in the early 1920s. Justice Roberts's opinion applied the test as it had come to be understood by 1937.[198]

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193. Herndon v. Lowry, 301 U.S. 242, 272–78 (1937) (Van Devanter, J., dissenting).
194. *Id.* at 275.
195. *Id.* at 276.
196. *Id.* at 277 (internal quotation marks omitted).
197. *See Abrams v. United States*, 250 U.S. 616, 624 (1919).
198. Herndon remained a Communist into the 1940s, and co-edited a Communist-sponsored cultural magazine, *The Negro Quarterly*, with Ralph Ellison for a few years. He then drifted away from the

CONCLUSION

Historian Glenda Gilmore connects *Herndon v. Lowry* to the "switch in time."[199] Editorial reactions to *Herndon v. Lowry* similarly read it against the background of Roosevelt's Court-packing plan. To the *New York Times*, the decision showed that the Court's critics overlooked the fact that the Court stood in the way of "injustice, hysteria and tyranny," and was "the guardian of civil rights belonging to even the humblest citizen."[200] The *St. Louis Post-Dispatch* said that the decision showed that the Court "again stands out in bold relief as an indispensable bulwark of human rights against invasion by unwarranted governmental authority."[201] For liberal columnist Heywood Broun five-to-four decisions favoring civil liberties were fine, but "they are not good enough to stand as fundamental settlements of pressing problems, since it is not beyond the bounds of experience for a Justice of the Supreme Court to change his mind."[202] Unlike the claims about Justice Roberts's change in position in *West Coast Hotel v. Parrish*, this one is at least unembarrassed by a question of timing. Roosevelt announced the Court-packing plan on Friday, February 5, 1937; *Herndon v. Lowry* was argued three days later, on Monday, February 8, 1937. And, Justice Roberts's evaluation of the evidence against Herndon was quite searching and skeptical.

Yet, the association of *Herndon v. Lowry* with the switch-in-time seems strained. Roosevelt had made it clear that the Court-packing plan was aimed at getting the Court out of the horse-and-buggy age so that it would uphold New Deal initiatives. Whatever Justice Roberts might have thought about the threat Court-packing posed to the Court, he could not reasonably have believed that Roosevelt or anyone else likely to go after the Court's power cared in the slightest

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Party, eventually moving from New York to the Midwest to work in sales. MARTIN, *supra* note 70, at 212–13.

199. GILMORE, *supra* note 108, at 195.

200. MARTIN, *supra* note 70, at 188.

201. MARTIN, *supra* note 70, at 188–89.

202. MARTIN, *supra* note 70, at 187. For a compilation of editorial reactions, see *id*. at 184–88.

about how the Court dealt with domestic radicals. *Herndon v. Lowry* is better understood as another step in the Court's gradual distancing itself from its decisions in the aftermath of the Red Scare of the 1920s. In *Schenck* Holmes had written, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[203] This was simultaneously a suggestion that the constitutional rule should be applied differently in peacetime than in wartime and a prediction about what courts would do. *De Jonge* and *Herndon v. Lowry* confirmed both the doctrinal differences between war and peace, and Holmes's prediction. Perhaps enough Justices came to think that they had overreacted in approving too much of what had been done in the 1920s that they chose to employ the framework of those decisions to reach results in *De Jonge* and *Herndon v. Lowry* more tolerant of radical dissent. They may have been encouraged to do so by the fact that, unlike what had happened in the 1920s, the federal government abstained from serious attacks on domestic radicalism in the 1930s. *De Jonge* and *Herndon v. Lowry* are undoubtedly different in tone from *Gitlow* and *Whitney*, though not on their face different in doctrine. But, the differences did not arise from the dramatic events of early 1937. They had deeper roots.

203. Schenck v. United States, 249 U.S. 47, 52 (1919).