



THE ENIGMA OF *GITLOW*: POSITIVISM, LIBERTY, DEMOCRACY, AND
FREEDOM OF SPEECH

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INTRODUCTION

The centennial of *Gitlow v. New York*¹ is upon us. *Gitlow* is typically praised as an essential step in the development of modern First Amendment doctrine, so that it is said that “[f]ew individual stars shine as brightly in the constellation of American civil liberties cases.”² Yet, closely examined, *Gitlow* seems a puzzling choice for constitutional canonization.

Decided at a time when there were virtually no First Amendment protections for speech,³ *Gitlow* held that government could punish mere abstract advocacy of violent revolution. Over the dissenting votes of Oliver Wendell Holmes, Jr. and Louis Brandeis, *Gitlow* stood for the proposition that “a State in the exercise of its police power may punish those who abuse” freedom of speech “by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by

¹ *Gitlow v. New York*, 268 U.S. 652 (1925).

² Thomas C. Mackey, “*They Are Positively Dangerous Men*”: *The Lost Court Documents of Benjamin Gitlow and James Larkin Before the New York City Magistrates’ Court, 1919*, 69 N.Y.U. L. REV. 421, 421 (1994).

³ When *Gitlow* was decided in 1925, the Supreme Court had never decided a First Amendment case protecting speech from government regulation. Indeed, as recently as 1907, the Court, speaking through Justice Holmes, had declared that “the main purpose” of the First Amendment was “to prevent all such *previous restraints* upon publications as had been practised by other governments,” and that the First Amendment did “not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Twelve years later, in March 1919, Holmes was for the first time prepared to acknowledge the possibility that the First Amendment might prevent government regulations of speech other than prior restraints. “It well may be,” Holmes wrote, “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, as intimated in *Patterson v. Colorado*.” *Schenck v. United States*, 249 U.S. 47, 51–52 (1919). But by 1925 the Court had still never exercised the option to strike down any government regulation of speech. On the sorry state of First Amendment doctrine at that time, see David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

unlawful means.”⁴ It would not be too much of an exaggeration to characterize *Gitlow* as “the clearest expression of the Supreme Court’s acceptance of seditious libel.”⁵

Modern First Amendment doctrine, by contrast, is founded on the fundamental axiom that the state may not punish seditious libel.⁶ If we now celebrate *Gitlow*, therefore, it is certainly not for its articulation of the substance of First Amendment protections. It must rather be because *Gitlow* construed the liberty interests protected by the Due Process Clause of the Fourteenth Amendment, which apply as against the States, to include free speech protections analogous to those protected by the First Amendment, which apply as against the federal government.⁷ “The precise question presented, and the only question which we can consider under this writ of error,” *Gitlow* states, is “whether the statute, as construed and applied in this case, by the State courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.”⁸

We are now apt to interpret this language through the lens of incorporation doctrine, which conceives the Due Process Clause of the Fourteenth Amendment as transparently reproducing the exact doctrines of the First Amendment “jot-for-

⁴ *Whitney v. California*, 274 U.S. 357, 371 (1927). Like *Gitlow*, *Whitney* was authored by Justice Edward Terry Sanford.

⁵ David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Doctrine*, 45 AM. J. LEGAL HIST. 154, 207–08 (2001).

⁶ This was for the first time clearly announced in *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964). Although Holmes had made the repudiation of seditious libel central to his newly developed theory of the First Amendment in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.”), the Court had refused to accept his theory.

⁷ “The extension of the Bill of Rights is the most important legacy of *Gitlow*.” MARC LENDLER, *GITLOW V. NEW YORK: EVERY IDEA AN INCITEMENT* 1 (2012). On the much-mooted question of whether *Gitlow* actually deserves credit for this doctrinal development, see Klaus H. Heberle, *From Gitlow to Near: Judicial “Amendment” by Absent-Minded Incrementalism*, 34 J. OF POLITICS 458 (1972).

⁸ *Gitlow*, 268 U.S. at 664. See *id.* at 666.

jot and case-for-case.”⁹ But any such conception of incorporation developed well after *Gitlow*,¹⁰ which understood itself instead to be explicating the specific nature of the liberty protected by the Fourteenth Amendment. The question in *Gitlow* was not what the First Amendment required; it was instead what was required by the liberty interests safeguarded by the Due Process Clause.

We should be clear that these same liberty interests also underlay *Lochner v. New York*.¹¹ These same liberty interests fueled the Court’s use of the Due Process Clause to strangle social and economic legislation. In the decade before *Gitlow*, for example, the Court had invoked these same liberty interests to strike down state efforts to protect union members¹² and to regulate the fees of employment agencies.¹³ Determined to resurrect and expand the reach of *Lochner*, the Taft Court

⁹ James Y. Stern, *First Amendment Lochnerism & the Origins of the Incorporation Doctrine*, 2020 U. ILL. L. REV. 1501, 1505. See *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

¹⁰ Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1176–77 (2011); Note, *Limiting State Action by the Fourteenth Amendment: Consequences of Abandoning the Theory of First Amendment Incorporation*, 67 HARV. L. REV. 1016, 1016–17 (1954) (“During the past fifteen years the Supreme Court has repeatedly declared that the Fourteenth Amendment incorporates the First, with the result that both state and federal action have been limited by the provisions of the First Amendment. . . . The Court could have continued to determine the validity of state action under the Fourteenth Amendment, applying standards similar to those imposed upon federal action under the First Amendment. Instead, however, the language of incorporation began to appear in the opinions of the Court with the result that the validity of both state and federal action was determined under the provisions of the First Amendment.”).

¹¹ 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.”).

¹² *Coppage v. Kansas*, 236 U.S. 1 (1915). *Coppage* invoked the liberty interests protected by the Due Process Clause to strike down a Kansas law forbidding employers from coercing employees to refrain from union membership. *Gitlow*’s lawyers cited *Coppage* in their brief to the Court arguing that Fourteenth Amendment liberty interests included freedom of speech. Brief for Plaintiff-in-Er-ror at 12, 99, *Gitlow* (No. 770) (October Term 1922).

¹³ *Adams v. Tanner*, 244 U.S. 590 (1917). Speaking through Justice James Clark McReynolds, the Court in *Adams* used the Due Process Clause to strike down a Washington state law forbidding employment agencies from exacting fees from applicants. The law, said the Court, was “arbitrary

during the 1920s was vilified as “the zenith of reaction.”¹⁴ Enlarging Fourteenth Amendment liberty to include freedom of speech threatened to enlarge the scope of judicial control over all state regulation.

Seen from this perspective, *Gitlow* can suddenly come to seem deeply enigmatic. We might ask why the Court bothered to extend free speech protections to states when its understanding of the substance of these protections was so stunted and feeble. What was actually at stake for the Court majority when it decided to interpret the liberty interests protected by the Due Process Clause of the Fourteenth Amendment to include freedom of speech?¹⁵

Conversely, why did Holmes and Brandeis, who were strongly opposed to the Court’s resurgent *Lochnerism*,¹⁶ nevertheless join the Court in holding that the “general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used.”¹⁷ How were Holmes and Brandeis able to interpret the word “liberty” in the Due Process Clause so that it might entail strict and independent judicial review of state censorship of speech, but nevertheless require deference to ordinary state social and economic regulations?

To unravel these questions, we must make a strenuous effort of historical imagination. We must put *Gitlow* back into the context of its time. The effort will prove rewarding. We shall learn, for example, that no Justice in the 1920s interpreted the word “liberty” in the Due Process Clause in anything like the manner of

and oppressive” and unduly restricted “the liberty of appellants, guaranteed by the 14th Amendment, to engage in a useful business.” *Id.* at 597. *Gitlow*’s lawyers cited *Adams* in their brief to the Court arguing that Fourteenth Amendment liberty interests included freedom of speech. Brief for Plaintiff-in-Error at 99, *Gitlow* (No. 770) (October Term 1922).

¹⁴ *Supreme Court and Interstate Commerce Commission*, 69 NEW REPUBLIC 256 (1932). The story is told in ROBERT POST, 2 THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930 at 732–916 (2024).

¹⁵ For an early study of this issue, see Gary Craig Turley, *Free Speech and the Doctrine of Incorporation: The Role of Gitlow v. New York in Modern First Amendment Theory* (1989) (Masters Thesis, University of Oregon School of Journalism).

¹⁶ See POST, *supra* note 14, at 732–916; ROBERT POST, 1 THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930 at 163–224, 295–372 (2024).

¹⁷ *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting). Brandeis, who did not write separately in *Gitlow*, joined this dissent.

the contemporary Court in a case like *Dobbs v. Jackson Women's Health Organization*.¹⁸ So far from viewing the scope of constitutionally protected liberty as a “fact” determined by the historical data of history and tradition,¹⁹ all Justices in the 1920s understood liberty interests to be defined by values they perceived as immanent in the Constitution.

For the majority of the Court, these values centered around protecting the constitutional “right of the citizen to be free in the enjoyment of all his faculties,” a libertarian constitutional vision first articulated at the start of the *Lochner* era in *Allgeyer v. Louisiana*.²⁰ Both Holmes and Brandeis strongly objected to this constitutional vision, which they condemned as inconsistent with the proper role of Article III courts. In *Gitlow*, Holmes and Brandeis instead interpreted Fourteenth Amendment liberty in light of their commitment to the specific constitutional value of freedom of speech.

Because they so often joined each other's opinions on this subject, we often imagine that Holmes and Brandeis supported freedom of speech for the same reasons. But the history of *Gitlow* illustrates that this was not the case. Whereas Holmes believed that freedom of speech was necessary to sustain the authority of positive law, Brandeis believed that freedom of speech was the lifeblood of a democracy whose purpose was to empower citizens to develop their own autonomous faculties. Freedom of speech was for Holmes a jurisprudential necessity, whereas for Brandeis it was “both . . . an end and . . . a means.”²¹ In contrast to Holmes, Brandeis was prepared to read democratically required liberties other than freedom of speech into the Due Process Clause.²²

Modern First Amendment doctrine has descended from Brandeis, not from Holmes. But Holmes's brief dissent in *Gitlow* nevertheless contains an important

¹⁸ 597 U.S. 215, 234 (2022).

¹⁹ Such data is exemplified by the state-counting that figures so prominently in the *Dobbs* opinion. See, e.g., Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99 (2023).

²⁰ 165 U.S. 578, 589 (1897). *Gitlow's* lawyers cited *Allgeyer* in their brief to the Court arguing that Fourteenth Amendment liberty interests included freedom of speech. Brief for Plaintiff-in-Error at 11–12, *Gitlow* (No. 770) (October Term 1922). For a discussion of this value, see POST, *supra* note 14, at 822–78.

²¹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

²² See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923).

lesson for contemporary constitutional theorists. Holmes was the founder and most analytically powerful practitioner of positivism in the history of American jurisprudence. Holmesian positivism has recently been revived by originalists and by those committed to interpreting the Constitution in light of a factually based account of history and tradition. Yet Holmes's short opinion in *Gitlow* illustrates that even rigorous positivists cannot ultimately interpret the Due Process Clause solely in terms of facts, whether the facts of original public meaning or of history and tradition. An internally consistent positivism must instead find its ultimate ground in fundamental constitutional values.

I. WORLD WAR I AND FREEDOM OF SPEECH

To situate *Gitlow* historically, we need first to understand the massive impact of World War I, which unleashed "a torrent of mistrust and hysteria" across the nation.²³ President Wilson made clear at the outset of hostilities that "the authority to exercise censorship over the press . . . is absolutely necessary to the public safety."²⁴ Five months later, Wilson's son-in-law and Secretary of the Treasury William G. McAdoo bluntly announced that "America intends that those well-meaning but misguided people who talk inopportunistically of peace when there can be no

²³ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 156 (2004). See ERIC T. CHESTER, *FREE SPEECH AND THE SUPPRESSION OF DISSENT DURING WORLD WAR I* (2020); HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917–1921* (2013); CHRISOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* (2008); PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* (1979).

²⁴ Quoted in *Wilson Demands Press Censorship*, N.Y. TIMES, May 23, 1917, at 1.

peace until the cancer which has rotted civilization in Europe is extirpated and destroyed forever, shall be silenced.”²⁵ “I want to say here and now,” McAdoo proclaimed, “that every pacifist speech in this country made at this inopportune and improper time is in effect traitorous.”²⁶

Eventually the Wilson administration would prosecute thousands of people under the Espionage Act of 1917²⁷ and the Sedition Act of 1918.²⁸ The wave of oppression was sudden, violent, and unexpected. Writing in September 1917, John Dewey professed himself not “specially concerned lest liberty of thought and speech seriously suffer among us, certainly not in any lasting way” by “hasty ill considered attempts to repress discussion of unpopular ideas and criticisms of government action.”²⁹ But only two months later Dewey expressed genuine shock that the “increase of intolerance of discussion to the point of religious bigotry has been so rapid that years might have passed. . . . Treason is every opinion and belief which irritates the majority of loyal citizens. For the time being the conservative upholders of the constitution are on the side of moral mob rule and psychological lynch law.”³⁰

The outpouring of oppression forced the Supreme Court of the United States seriously to confront the meaning of the First Amendment’s guarantees of freedom of speech. In a series of cases decided in 1919 and 1920, the Court addressed government authority to regulate speech during wartime.³¹ Its decisions, no doubt influenced by the urgency of belligerent exigencies, were notably generous to state power. *Gitlow* differed from these cases, however, because it involved freedom of

²⁵ *Calls on Nation for War’s Sinews*, N.Y. TIMES, Oct. 2, 1917, at 3.

²⁶ *Id.*

²⁷ 40 Stat. 217.

²⁸ 40 Stat. 553. See WILLIAM PRESTON, *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–1933* (1994); H.C. PETERSON & GILBERT C. FITE, *OPPONENTS OF WAR, 1917–1918* (1957). The federal government brought more than 2000 prosecutions and obtained over 1000 convictions. PHILIPPA STRUM, *SPEAKING FREELY: WHITNEY V. CALIFORNIA AND AMERICAN SPEECH LAW* 28 (2015).

²⁹ John Dewey, *Conscription of Thought*, NEW REPUBLIC, Sept. 1, 1917, at 129.

³⁰ John Dewey, *In Explanation of Our Lapse*, NEW REPUBLIC, Nov. 3, 1917, at 17.

³¹ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Sugarman v. United States*, 249 U.S. 182 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

speech during a time of peace.³² Benjamin Gitlow was charged with advocating the violent overthrow of the government on July 5, 1919,³³ almost eight months after the Armistice had ended the war.³⁴

It should be stressed that 1919 was hardly a normal year in American history.³⁵ The ferocity of the European trenches had somehow jumped to this side of the Atlantic, producing intense and unremitting racial and labor violence.³⁶ Lynchings and race riots spiked in 1919.³⁷ Employees vigorously resisted the determined efforts of employers to roll back gains made by organized labor during the war, so that “[o]ne of every five employed workers was involved in a strike during 1919, a record that has never been surpassed, or even approached, in American history.”³⁸

³² “There is nothing especially significant about the conviction of Gitlow except that it occurred in a time of peace.” *Restricting Freedom*, CHATTANOOGA NEWS, June 11, 1925, at 4. See Robertushman, *Constitutional Law in 1924–25*, 20 AM. POL. SCI. REV. 80, 97 (1926); Note, 14 CAL. L. REV. 54, 58 (1925):

[T]he most significant feature in the case is the authorities which the court cited. The Abrams, Gilbert, Schaefer and Pierce cases—the most extreme applications of wartime statutes—are all duly cited to construe and uphold the peacetime measure before the court. When those cases were decided, it was occasionally predicted that the inroads which they made on free speech would not be allowed to rest with the war but would be continued also in peace. However, these cases received much unfavorable criticism, and after the war opinion again swung toward allowing almost any political or economic discussion to go on largely undisturbed. With something of an air of relief it was acclaimed that the war restrictions on free speech were confined to war, and that there was no chance in the United States that they would be applied generally. The present case shows that this is not so. Wartime trammels on free discussion have left their mark on American life.

³³ Transcript of Record at 13, *Gitlow* (no. 770) (October Term 1922).

³⁴ See Laura Weinrib, *The Limits of Dissent: Reassessing the Legacy of the World War I Free Speech Cases*, 44 J. SUP. CT. HIST. 278, 288 (2019).

³⁵ See generally MARTIN W. SANDLER, 1919 THE YEAR THAT CHANGED AMERICA (2019).

³⁶ For a brief account, see POST, *supra* note 14, at 1217–23.

³⁷ The summer of 1919 has become known as “The Red Summer.” See generally CAMERON MCWHIRTER, RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA (2012) and DAVID F. KRUGLER, 1919, THE YEAR OF RACIAL VIOLENCE: HOW AFRICAN AMERICANS FOUGHT BACK (2014).

³⁸ DAVID BRODY, LABOR IN CRISIS: THE STEEL STRIKE OF 1919, at 129 (1987).

There was a general strike in Seattle. Steelworkers throughout the country walked off their jobs. So did coal miners. Even Boston policemen went out on strike.³⁹

Looming behind this unrest was the terrifying specter of Bolshevism, which in October 1917 had triumphed in Russia and which had established the Communist International that called for revolution in all advanced economic nations. “Republican Senator Joseph Frelinghuysen of New Jersey voiced the thoughts of many of his party colleagues when he declared in 1919 that . . . [i]f labor agitation continued unchecked, . . . ‘Sovietism’ would overthrow American institutions.”⁴⁰ If in the minds of contemporaries the crisis of war justified censoring speech, so also did the crisis of 1919. It inspired what Judge Learned Hand in November 1919 was moved grimly to label “the merry sport of Red-baiting.”⁴¹ So fierce was the sport that it was as if the war on radicals was simply an extension of the war on Germans.

II. THE BOLSHEVIK THREAT

In this context, Benjamin Gitlow was a villain straight out of central casting.⁴² Born in New York City on December 22, 1891, Gitlow was the child of Russian-Jewish emigres who raised him in the politics of radical unionism.⁴³ Gitlow early on displayed marked talents for leadership and eloquence. He became the first president of the Retails’ Clerks Union,⁴⁴ testifying before Wilson’s Commission of Industrial Relations that “the laws requiring a 54-hour week, an hour for luncheon, and sufficient seats for workers were broken persistently,” and that “the girls were exposed to great moral dangers through being dependent on the favor of the foremen, buyers, and superintendents for promotion.”⁴⁵ Gitlow joined the Socialist

³⁹ ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920*, at 57–66, 122–59 (1955).

⁴⁰ Robert H. Zieger, *From Hostility to Moderation: Railroad Labor Policy in the 1920s*, 9 LABOR HISTORY 23, 25 (1968).

⁴¹ Learned Hand to Oliver Wendell Holmes, Jr. (Nov. 25, 1919), in REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 80 (Constance Jordan ed., 2013).

⁴² For a comprehensive history of the *Gitlow* case, see LENDLER, *supra* note 7.

⁴³ Gitlow tells his own story in BENJAMIN GITLOW, *I CONFESS: THE TRUTH ABOUT AMERICAN COMMUNISM* (1940).

⁴⁴ LENDLER, *supra* note 7, at 8.

⁴⁵ *Store Clerks Tell of their Troubles*, N.Y. TIMES, June 12, 1914, at 4.

Party of America in 1909,⁴⁶ and in 1917 he was elected on the party ticket to the New York State Assembly.⁴⁷

The triumph of Bolshevism in Russia transformed Gitlow's politics. The rise of Lenin allowed Gitlow and like-minded radicals to glimpse for the first time the intoxicating possibility of a "*revolutionary*" socialism.⁴⁸ "We accepted the Bolshevik Revolution as our revolution, the Bolshevik leaders as our leaders. We worshiped Lenin and Trotsky as the heroes of the Revolution."⁴⁹ Disenchanted with an agenda of gradual, legislative reforms,⁵⁰ Gitlow and compatriots like John Reed and Charles E. Ruthenberg set out "to wreck the Socialist Party."⁵¹

In Spring 1918, Gitlow joined what was known as the "Left Wing" of the Socialist Party.⁵² The Left Wing repudiated parliamentary reform and instead embraced Bolshevism and revolution.⁵³ In May 1919, the Socialist Party expelled members of the Left Wing,⁵⁴ who responded by holding a national convention and creating a National Council, to which Gitlow was elected.⁵⁵ The "ultimate aim of the Left Wing in the Socialist Party was to capture the Socialist Party and change it

⁴⁶ GITLOW, *supra* note 43, at 13.

⁴⁷ *Seven Socialists in New Assembly*, N.Y. TIMES, Nov. 7, 1917, at 2.

⁴⁸ GITLOW, *supra* note 43, at 12 (*italics in the original*).

⁴⁹ *Id.*

⁵⁰ "The Bolshevik Revolution . . . convinced me that the prevailing position of modern Socialism—that Socialism could be attained peacefully and through a gradual accumulation of reforms—was wrong. I looked upon the reformist Socialists with contempt. I deduced from the war that brutal force and violence were the final arbitrators, and concluded that Socialism would come as the result of revolution in which the masses would use force and violence in overthrowing their oppressors. . . . I became a *revolutionary* Socialist." *Id.* at 20–21. By contrast, at the 1912 national convention of the Socialist Party, Gitlow had voted in favor of Morris Hillquit's motion "calling for the expulsion of all those members of the party who advocated crime, sabotage and violence as a means of working class action." *Id.* at 15.

⁵¹ *Id.* at 13.

⁵² *Id.* at 21.

⁵³ *Id.*

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 34. Other members of the Council were Louis C. Fraina, Charles E. Ruthenberg, Isaac E. Ferguson, John J. Ballam, James Larkin, Eadmonn MacAlpine, Maximilian Cohen, and Bertram D. Wolfe. For a vivid description of the founding of the Left Wing, see *People v. Lloyd*, 304 Ill. 23, 45–65 (1922).

into a Communist Party.”⁵⁶ The new organization adopted as its voice *The Revolutionary Age*, which had previously been published by the Latvian federation of the Socialist Party in Boston.⁵⁷ Gitlow became the publication’s business manager, producing its first issue on July 5, 1919.⁵⁸ That issue featured “The Left Wing Manifesto,” which set forth the program adopted by the National Council.

These developments landed squarely athwart a “red scare” that was seizing the nation. At the beginning of the year, in response to the Seattle general strike, a subcommittee of the Senate Judiciary Committee known as the Overman Committee conducted widely publicized hearings on the perils of Bolshevism, emphasizing that Russians were bent on “world-wide revolution.”⁵⁹ The Committee heard testimony from a lawyer named Archibald E. Stevenson, who can perhaps best be described as a professional red baiter.⁶⁰ Stevenson advised “that American citizens who advocate revolution should be punished under a law drawn for that purpose.”⁶¹

Stevenson subsequently proved crucial in prompting the New York legislature to commission an investigation of radical activities in the State,⁶² an investigation

⁵⁶ GITLOW, *supra* note 43, at 32.

⁵⁷ *Id.* at 35.

⁵⁸ *Id.*

⁵⁹ Bolshevik Propaganda, Hearings Before a Subcommittee of the Committee on the Judiciary, U.S. Senate (65th Cong., 3rd Sess.) (1919), at 1030. See MURRAY, *supra* note 39, at 94–98; *Bolshevism’s “Heaven on Earth,”* 60 LITERARY DIGEST 15 (Mar. 22, 1919).

⁶⁰ Stevenson testified that Bolsheviks sought “to overthrow this Government.” *Bolshevik Propaganda*, *supra* note 59, at 29. At previous hearings of the same subcommittee, Stevenson had provided a list of sixty-two individuals with dangerous sentiments. The list included Jane Addams, Roger Baldwin, Frederick C. Howe, David Starr Jordan, Judah Magnes, Scott Nearing, Eugene Debs, Amos Pinchot, Gilbert Roe, John N. Sayre, Helen Phelps Stokes, Norman Thomas, and Oswald Garrison Villard. 2 *Brewing and Liquor Interests and German and Bolshevik Propaganda*, Report and Hearings of the Senate Subcommittee on the Judiciary, S. Doc. 62, at 2782–85 (65th Cong. 1st Sess.) (1919). Stevenson’s testimony was so overblown that it prompted severe blowback. See THE TRUTH ABOUT THE LUSK COMMITTEE: A REPORT PREPARED BY THE LEGISLATIVE COMMITTEE OF THE PEOPLE’S FREEDOM UNION 4–7 (1920).

⁶¹ *Bolshevik Propaganda*, *supra* note 59, at 36.

⁶² Harold Josephson, *The Dynamics of Repression: New York During the Red Scare*, 59 MID-AMERICA: AN HISTORICAL REVIEW 131, 134 (1977).

that would be led by state Senator Clayton R. Lusk and staffed by New York Attorney General Charles D. Newton as chief counsel and Stevenson as assistant counsel.⁶³ The report of the “Lusk Committee” would prove “even more famous and sensational” than the report of the Overman Committee.⁶⁴ On June 21, 1919, the Lusk Committee raided the headquarters of the Left Wing National Council,⁶⁵ and on November 8, it raided the Council once again, this time arresting Gitlow and James Larkin and holding them each on \$15,000 bail.⁶⁶ On November 14, New York City Chief Magistrate William McAdoo, who was not related to President Wilson, bound Gitlow and Larkin over to a grand jury. McAdoo branded both defendants “positively dangerous men.”⁶⁷

⁶³ MURRAY, *supra* note 39, at 98; THE TRUTH ABOUT THE LUSK COMMITTEE, *supra* note 61, at 6–8.

⁶⁴ MURRAY, *supra* note 39, at 98. See NEW YORK STATE LEGISLATURE, JOINT COMMITTEE INVESTIGATING SEDITIOUS ACTIVITIES, REVOLUTIONARY RADICALISM: ITS HISTORY, PURPOSE AND TACTICS WITH AN EXPOSITION AND DISCUSSION OF THE STEPS BEING TAKEN AND REQUIRED TO CURB IT (1920).

⁶⁵ GITLOW, *supra* note 43, at 31–32; REVOLUTIONARY RADICALISM, *supra* note 64, at 682–83; LENDLER, *supra* note 7, at 17.

⁶⁶ *Larkin and Gitlow Held in \$15,000*, N.Y. TIMES, Nov. 11, 1919, at 1. “Refusing to reduce bail, the magistrate said the Communist Party had declared a state of war against the United States and the government of this State, and the establishment of such a party in this State was the highest crime known to our law.” *Suspects Taken in Raid Arraigned*, CHRISTIAN SCIENCE MONITOR, Nov. 13, 1919, at 2.

⁶⁷ Mackey, *supra* note 2, at 427, 433. “Are we to lose ourselves in legal subtleties and nice disquisitions and historical references, and bury our heads in clouds of rhetoric about liberty of speech?” McAdoo asked. “Are there no limits to liberty of speech? Can these men openly state that they intend to destroy the state, murder whole classes of citizens, rob them of their property and then escape under the plea of liberty of speech?” *Id.* at 433. McAdoo explicitly referenced *Abrams v. United States*, 250 U.S. 616 (1919), which had been decided on November 10: “Certainly those of us who are bound by the decisions of the Supreme Court of the United States, as evidenced in the case of Jacob Abrams, et al., vs. United States, convicted of distributing in this city inflammatory placards and circulars, will not have any doubt as to what is the law of the land in dealing with such people.” Mackey, *supra* note 2, at 431.

III. THE LEFT WING MANIFESTO

Gitlow was indicted by a grand jury⁶⁸ for violating a New York statute prohibiting advocacy of criminal anarchy.⁶⁹ The statute had been enacted in 1902 after the

⁶⁸ Also indicted were James Larkin, Charles D. Ruthenberg, and Isaac Ferguson. Harold Josephson, *Political Justice During the Red Scare: The Trial of Benjamin Gitlow*, in AMERICAN POLITICAL TRIALS 158–59 (Michael R. Belknap ed., 1981). “Archibald Stevenson and Assistant District Attorney Alexander Rorke decided to bring Gitlow to trial alone . . . before they tried the other three defendants. The reason was that his position as business manager of the *Revolutionary Age* made him more vulnerable than they to the charge of publishing the paper.” *Id.* See LENDLER, *supra* note 7, at 35–36.

Ruthenberg and Ferguson were later convicted, but their convictions were overturned by the New York Court of Appeals on the ground that the state had failed to produce sufficient evidence showing that they had written, printed, published, or sold the Manifesto. *People v. Ferguson*, 234 N.Y. 159 (1922). It is plain that Gitlow did not appreciate this defense. See GITLOW, *supra* note 43, at 415:

I had every personal reason for detesting Ruthenberg because of his shabby action against me in the past. When we were in Sing Sing, he and Ferguson won their case on appeal by charging me with sole responsibility for the publication of *The Revolutionary Age* and the articles it contained, alleging that I, as its business manager, had taken the copy to the printer. The fact was that I did not even once take the copy to the printer and that Ruthenberg, who was a member of the National Council, and Ferguson, who was its Secretary, shared equal responsibility with me. At the time I wrote from prison that “I am glad that my shoulders are broad enough to sustain both Ferguson and Ruthenberg.”

After being retried, Larkin was convicted and served time in prison until pardoned by Governor Al Smith in 1923. See *People v. Larkin*, 200 A.D. 858 (1922), *aff’d*, 234 N.Y. 530 (1922); *Larkin Pardoned, Leaves Sing Sing*, N.Y. TIMES, Jan. 18, 1923, at 1; Josephson, *supra* note 68, at 162. Explaining his decision to pardon Larkin, Smith stated:

[T]here is no evidence that Larkin ever endeavored to incite any specific act of violence or lawlessness. What he did was to voice a faith that in the ultimate development of our political institutions there should be . . . radical changes Substantially his offense was nothing more than the issuance of a misguided opinion that in the remote future our system of Government should be changed by a process abhorrent to our institutions. . . .

Political progress results from the clash of conflicting opinions. The public assertion of an erroneous doctrine is perhaps the surest way to disclose the error and make it evident to the electorate. And it is a distinct disservice of the State to impose, for the utterance of a misguided opinion, such extreme punishment as may tend to deter, in proper cases, that full and free discussion of political issues which is a fundamental of Democracy.

Larkin Pardoned; Leaves Sing Sing, *supra*, at 6.

assassination of President McKinley in Buffalo,⁷⁰ and it had since remained virtually dormant.⁷¹ The statute provided that a person would be guilty of a felony if he:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means.⁷²

The indictment against Gitlow was laid in two counts. The first charged that he violated section one of the criminal anarchy statute by publishing the “Left Wing

Gitlow refused the possibility of a pardon in 1923 so that he could perfect his appeal to the Supreme Court of the United States. Josephson, *supra* note 68, at 162.

⁶⁹ *Transcript*, *supra* note 33, at 13–49.

⁷⁰ At the time the *New York Tribune* reported that “In his message the Governor deplored the death of President McKinley and declared that ‘those whose utterances have a tendency to incite to disorder or murder should be punished.’ Acting upon this suggestion, the Senate Judiciary Committee framed an act, which is now Chapter 371 of the laws of this year, for the punishment of criminal anarchy.” *Legislative Enactments: Bills Passed and Approved at Albany, and What They Mean to New York*, N.Y. TRIBUNE, Apr. 28, 1902, at 3. Commentators pronounced it “gratifying to have this attempt made to prevent open and bold advocacy of crime by anarchists. The statute carefully guards the right of free speech by limiting the definition of the crime to the advocacy of unlawful means for the overthrow of government, so that the free discussion and advocacy of a purely philosophic theory that human society ought to have no organized government is still permitted. . . . There is nothing contrary to justice or to the principles of a free government in this statute, and it is to be hoped that something equivalent to it, and reaching the same end, may be adopted in every state of the Union.” *Jetsam and Flotsam: Statutes Against Anarchy*, 55 CENTRAL L.J. 493 (1902). See James M. Beck, *The Suppression of Anarchy*, 36 AM. L. REV. 190 (1902).

⁷¹ “*Clear and Present Danger*”, WORLD, June 10, 1925, at 10; *The Gitlow Case*, BOSTON GLOBE, June 10, 1925, at 16; *Anarchy Law Valid*, BUFFALO NEWS, June 10, 1925, at 6; *The Supreme Court and the Gitlow Decision*, CHRISTIAN CENTURY, June 25, 1925, at 818; Josephson, *supra* note 68, at 156.

⁷² *Gitlow*, 268 U.S. at 654–55. In binding over Gitlow and Larkin to the grand jury, McAdoo wrote: “Well-meaning gentlemen tell us that we should not interfere with the incendiary when he is preparing the torch, we should only apprehend him when he is setting fire to the building. This statute is a preventative measure. It is intended to head off these mad and cruel men at the beginning of their careers. It is intended to put out a fire with a bucket of water which might later on not yield to the contents of the reservoir.” Mackey, *supra* note 2, at 432.

Manifesto.” The second charged that he violated section two of the statute by publishing the issue of *The Revolutionary Age* containing the Manifesto.⁷³ It was never alleged, nor was it true, that Gitlow had written the Manifesto itself.⁷⁴

The Manifesto itself was a long, repetitive, and pedantic explanation of the need to reject the meliorist agenda of the existing Socialist Party and to adopt instead the revolutionary program of the Left Wing. In the acerbic words of Harvard Law School Professor Zechariah Chafee in *The New Republic*, “any agitator who read the thirty-four pages of the Manifesto” would not be moved “to violence except perhaps against himself. This Manifesto would disperse” potential revolutionaries “faster than the Riot Act. It is best described by recalling the Mouse in Alice in Wonderland reading about the Norman Conquest to dry off the Dodo and the Lory. ““Ahem,” said the Mouse with an important air, “are you all ready? This is the driest thing I know.””⁷⁵

The Manifesto attacked “moderate Socialism” because that form of socialism “accepted the bourgeois state as the basis of its activity and *strengthened* that state. Its goal became ‘constructive reforms’ and cabinet portfolios—the ‘co-operation of the classes.’”⁷⁶ The Manifesto declared moderate socialism unacceptable because it “was prepared to share responsibility with the bourgeoisie in the control of the capitalist state.”⁷⁷ This was error because “Humanity can be saved from its last excesses only by the Communist Revolution.”⁷⁸ In contrast to moderate socialism, “Revolutionary Socialism” holds “that it is necessary to destroy the parliamentary

⁷³ *Gitlow*, 268 U.S. at 655.

⁷⁴ See *infra* note 89.

⁷⁵ Zechariah Chafee, Jr., *The Gitlow Case*, NEW REPUBLIC, July 1, 1925, at 141. “The Left Manifesto is a tepid hash of the Communist Manifesto of Marx and Engels, which has been the program of influential Parliamentary groups in every Continental country for over half a century. The terror which these dull and rusty phrases has caused our prosecutors and judges would render them the laughing-stock of European Conservatives. The real danger in this country is not a conflagration but dry-rot, ‘the slow smokeless burning of decay.’ The ballot-box is not likely to be overthrown by force, but if non-voting goes on increasing, it may become as meaningless as the electoral college.” *Id.* at 142. We know that this otherwise anonymous article is by Chafee because of ZECHARIAH CHAFEE, JR., THE INQUIRING MIND 99–107 (1928).

⁷⁶ *The Left Wing Manifesto*, 2 THE REVOLUTIONARY AGE 6, 7 (July 5, 1919).

⁷⁷ *Id.*

⁷⁸ *Id.* at 6.

state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat.”⁷⁹

The Manifesto carefully observed that “this is not the moment of revolution, but it is the moment of revolutionary struggle.”⁸⁰ It predicted that

conditions of Imperialism and of multiplied aggression will necessarily produce proletarian action against Capitalism. Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being.⁸¹

The Manifesto asserted that “Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state.”⁸²

“The final objective of mass action,” stated the Manifesto, “is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat.”⁸³ “It is . . . necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie*.”⁸⁴ “The proletarian revolution disrupts bourgeois democracy. It disrupts this democracy in order to end class divisions and class rule, to realize the industrial self-government of the workers which alone can assure peace and liberty to the peoples.”⁸⁵

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* “It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power.” *Id.* at 15.

⁸¹ *Id.* at 8.

⁸² *Id.*

⁸³ *Id.* at 15.

⁸⁴ *Id.* (italics in the original).

⁸⁵ *Id.* The Manifesto continued:

Breaking the political power of the capitalists is the most important task of the revolutionary dictatorship of the proletariat, since upon this depends the economic and social reconstruction of society.

But this political expropriation proceeds simultaneously with an immediate, if partial, expropriation of the bourgeoisie economically, the scope of these measures being determined by industrial development and the maturity of the proletariat. These measures, at first, include:

- (a) Workmen's control of industry, to be exercised by the industrial organizations of the workers, operating by means of the industrial vote.
- (b) Expropriation and nationalization of the banks, as a necessary preliminary measure for the complete expropriation of capital.
- (c) Expropriation and nationalization of the large (trust) organizations of capital. Expropriation proceeds without compensation, as "buying out" the capitalists is a repudiation of the tasks of the revolution.
- (d) Repudiation of all national debts and the financial obligations of the old system.
- (e) The nationalization of foreign trade.
- (f) Measures for the socialization of agriculture.

Id. "Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism,—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order." *Id.*

In describing the Manifesto when binding Gitlow over to the Grand Jury, McAdoo stated that although the Manifesto "is a little guarded as to what direct action means," nevertheless:

How is this revolution to be accomplished? The manifesto gives the battle cry and slogan in practically two words, *coercion and suppression*. The mass action strike is to paralyze all the industries of the country, depriving millions of people of the necessities of life, paralyzing the armed forces of the United States, making the soldier and the policeman impotent and silencing of such voices in the pulpit as are not in accord. That is the first stage, coercion by absolutely and unqualifiedly illegal means, unlawful practices and a criminal conspiracy deliberately invented to carry out the purposes intended. These strikes are called mass action and have nothing whatever to do with the efforts for increase of wages or lessening of hours or the betterment of the workers. It is a militant uprising of the red revolutionists. At this point the state is given the option that it must either suicide or be killed. Wherein does this differ from professed anarchy?

If the great middle classes of the country, which include organized labor as at present, do not surrender at once all their property and possessions and commit their lives to the tender mercies of the raging proletariat, what is to be done with them? The manifesto makes it perfectly plain. If they resist they are to be suppressed. What does suppression

The Manifesto concluded with what seems very much like an exhortation to participate in revolutionary socialism: “The proletarian revolution and the Communist reconstruction of society—the *struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!”⁸⁶

IV. GITLOW’S TRIAL

The State of New York was represented at Gitlow’s trial by Assistant District Attorney Alexander Rorke, who told the jury: “You twelve men stand between civilization and anarchy as the sentinels of society.”⁸⁷ He charged that Gitlow “would make America a Red Ruby in the Red Treasure Chest of the Red Terror.”⁸⁸ Gitlow was represented by Clarence Darrow, who chose to call no witnesses in Gitlow’s defense.⁸⁹ In an unusual ruling, presiding Justice Bartow S. Weeks allowed Gitlow directly to address the jury without cross examination, perhaps believing that the jurors would find Gitlow’s statement highly incriminating.⁹⁰ Gitlow spoke for some fifteen minutes. He explained:

The manifesto of the Left Wing Section of the Socialist Party is a statement of the principles of Revolutionary Socialism. These principles maintain that in order to bring

mean? It means that if they continue to resist they must be exterminated; while the money from the banks and other repositories flows into the coffers of the leaders of the revolutionary communists, the blood of the doomed class will flow in the gutters. If this is not violence, if this is not anarchy, if this is not directly, openly and brazenly a defiance of the Penal Law of this State, what is?

Mackey, *supra* note 2, at 430–32.

⁸⁶ *The Left Wing Manifesto*, *supra* note 76, at 15.

⁸⁷ Arturo Giovannitti, *Communism on Trial*, 3 THE LIBERATOR 5, 6 (Mar. 1920).

⁸⁸ THE “RED RUBY”: ADDRESS TO THE JURY BY BENJAMIN GITLOW 1 (Communist Labor Party n.d.).

⁸⁹ Darrow oddly conceded that Gitlow was responsible for publishing the Manifesto, even though “Gitlow clearly did not write or even contribute to the article. He was the business manager, not the editor. The actual writer of the article—[Louis C.] Fraina—landed in a rival organization shortly after it was published. And Gitlow moved to a new newspaper, the *Voice of Labor*, motivated in part by his discomfort with the amount of bombast in the ‘Left Wing Manifesto.’” LENDLER, *supra* note 7, at 39.

⁹⁰ See Josephson, *supra* note 68, at 160. Darrow was not much pleased by Gitlow’s request directly to address the jury. LENDLER, *supra* note 7, at 37. See *id.* at 42–43.

about socialism, capitalist governments must be overthrown, and in their place a new form of government must be set up, known as the dictatorship of the proletariat. . . .

I want you to realize that I believe in those principles, that I will support those principles, . . . and that I am not going to evade the issue. My whole life has been dedicated to the movement which I am in. No jails will change my opinion in that respect. I ask no clemency. I realize that as an individual I have a perfect right to my opinions, that I would be false to myself if I tried to evade that which I supported. Regardless of your verdict, I maintain that the principles of the Left Wing Manifesto and Program on the whole are correct, that capitalism is in a state of collapse, that capitalism has brought untold misery and hardships to the working men.⁹¹

A sympathetic observer at the trial commented that “I have seldom been thrilled as I was when Ben Gitlow got up. . . . Impassive, clear-eyed, sure of himself, . . . he spoke with a clear, even, resonant voice. . . . Big, dark, wholesomely fleshy, he seemed to have been carved out of a huge granite rock by the sledge hammer of a master.”⁹²

Clarence Darrow’s closing argument to the jury lasted for about two hours. He contended that the Manifesto was “only a history, a statement of the facts, as to how . . . it might come in the days to come, whenever those days should be. Not a word inciting anyone to violence, not a word inciting to unlawful action.”⁹³ The Manifesto was mere “history” and “prophecy,” “pointing out something that will some day happen.”⁹⁴

The jury took about three hours to return a verdict of guilty,⁹⁵ and Weeks slammed Gitlow with a maximum sentence of five to ten years at hard labor in Sing Sing.⁹⁶ Weeks thanked the jury, observing that “There must be a right in organized

⁹¹ THE “RED RUBY”, *supra* note 88, at 8.

⁹² Giovannitti, *supra* note 87, at 7.

⁹³ THE “RED RUBY”, *supra* note 88, at 12.

⁹⁴ *Id.* at 11.

⁹⁵ LENDLER, *supra* note 7, at 46. “It was believed that Gitlow’s ‘Red’ speech to the court had something to do with hastening the conclusions of the jury.” *Gitlow Convicted in Anarchy Trial*, N.Y. TIMES, Feb. 6, 1920, at 17.

⁹⁶ GITLOW, *supra* note 43, at 73; *Gitlow, Anarchist, Gets Limit Sentence*, N.Y. TIMES, Feb. 12, 1920, at 15. At Gitlow’s sentencing, Assistant District Attorney Alexander I. Rorke said to the judge:

In 1918 and 1919 [Gitlow] cast his fortunes with a band of notoriously criminal anarchists. By spoken, printed, and written word this group of brainy, well-educated, well-financed, and well-defended social revolutionaries both citizens and aliens, advocated, taught, and

society to protect itself. . . . And it is difficult for the Court to see how absolute destruction of private property can exist in an atmosphere of civilization.”⁹⁷ Weeks continued:

This defendant by the writings that he disseminated, seems to think otherwise, and seems to be proud, as he was the other day, to express his continued and present belief in such theories. A young man, 29 years of age, of intelligence, a striking example of the educational system of this country, able-bodied, of full intellect, confesses he owns no property. Employed at \$41 a week the last time he was employed and never accumulated any property!

Is that in harmony with the ideas of ambition and self-improvement, that those who come from foreign lands to this land of opportunity, might be expected to have. How can he claim that he has taken advantage of the opportunities of citizenship? . . .

Gentlemen, your duty has been faithfully performed. I trust that the lesson that has been taught from your verdict is one that will reach out and influence and correct and save these misguided idealists who have allowed themselves to be carried beyond their depth into the stormy waters of a would-be-revolution.⁹⁸

The New York Times applauded the verdict. “A carefully thought out, deliberate, and elaborate plan to destroy the Government of the United States, to destroy all free government—that is Communism,” said the *Times*. “A few convictions like this may cool the ferocity of the thousands of Communists now in the United States.”⁹⁹

advised among the toilers of our country the doctrine that America was brutal to workmen and that there was no hope to better their condition by constitutional means.

They thought also that there was no remedy through the ballot and the Legislature and that the only remedy lay in the toilers’ precipitating civil war, annihilating all classes of society, seizing all property, and destroying the Government of the United States.

Id.

⁹⁷ THE “RED RUBY”, *supra* note 88, at 13.

⁹⁸ *Id.*

⁹⁹ *A Criminal Anarchist*, N.Y. TIMES, Feb. 7, 1920, at 10.

V. NEW YORK APPELLATE DECISIONS

On April 1, 1921, Gitlow's conviction was upheld in a long and clear opinion by Justice Laughlin in the Appellate Division.¹⁰⁰ Laughlin wrote:

It is perfectly plain that the plan and purpose advocated by the appellant and those associated with him in this movement contemplate the overthrow and destruction of the governments of the United States and of all the states, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, as to which in view of the recent decision of the Supreme Court of the United States sustaining the Eighteenth Amendment (*Rhode Island v. Palmer*, 253 U. S. 350) there seems to be little, if any, limitation, but by immediately organizing the industrial proletariat into militant Socialist unions, and at the earliest opportunity, through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship taking charge of and appropriating all property and administering it, and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it.¹⁰¹

Contrasting the bad tendency test of *Debs*¹⁰² with the clear and present danger test of *Schenck*,¹⁰³ Laughlin concluded "that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom . . . has no applications here. The articles in question are not a discussion of ideas and theories."¹⁰⁴ They are instead "propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown, and all public and private property expropriated and nationalized."¹⁰⁵ "We must assume," Laughlin wrote, "that the Legislature deemed that, unless the advocacy of such a doctrine was prohibited, there was danger that sooner or later the government might be overthrown thereby."¹⁰⁶

¹⁰⁰ *People v. Gitlow*, 195 A.D. 773 (1921). In its brief to the Supreme Court, the State of New York stated that "We stand squarely and flatly on the opinion rendered by the Appellate Division." Brief for Defendant-In-Error, *Gitlow v. New York*, October Term 1922, at 13.

¹⁰¹ *Gitlow*, 195 A.D. at 782.

¹⁰² *Debs v. United States*, 249 U.S. 211 (1919).

¹⁰³ *Schenck v. United States*, 249 U.S. 47 (1919). See *infra* text at notes 124–135.

¹⁰⁴ *Gitlow*, 195 A.D. at 790.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 791. Laughlin continued:

On June 12, 1922, the New York Court of Appeals affirmed Gitlow's conviction in two separate lackluster opinions. Judge Crane wrote one that cited *Schenck* and concluded that "The First Amendment to the United States Constitution and section eight of article one of the New York State Constitution, which secure the freedom and liberty of speech and of the press, do not . . . permit attempts to destroy that freedom which the Constitutions have established."¹⁰⁷ The second was authored by Chief Judge Hiscock, who asserted that "we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless

The doctrines advocated are not harmless. They are a menace, and it behooves Americans to be on their guard to meet and combat the movement, which, if permitted to progress as contemplated, may undermine and endanger our cherished institutions of liberty and equality. But if immigration is properly supervised and restricted, and the people become aroused to the danger to be apprehended from the propaganda of class prejudice and hatred—by a very small minority, mostly of foreign birth, which has for its object, not only the overthrow of government, but the destruction of civilization and all the innumerable benefits it has brought to mankind—there can be no doubt but that the God-fearing, liberty-loving Americans, both in the urban and rural communities, who appreciate the equal opportunities for all for bettering their status and for advancement afforded by our constitutional form of government, under which the majority rule, and have made and are making sacrifices to improve their condition and that of their families, and to accumulate property for themselves and those who come after them, will see to it that these pernicious doctrines are not permitted to take root in America.

Id. at 791–92.

¹⁰⁷ *People v. Gitlow*, 234 N.Y. 132, 136 (1922) (Opinion of Crane, J.). *See id.* at 141: "This defendant through the manifesto of the Left Wing advocated the destruction of the state and the establishment of the dictatorship of the proletariat. The way in which this is to be accomplished is by the use of the mass strike; the strike workers attempting to usurp the functions of municipal government as in Seattle and Winnipeg. The strikes advocated by the defendant were not for any labor purposes or to bring about the betterment of the working man, but solely for political purposes to destroy the state or to seize state power. Mass strike means the striking or the ceasing to work by concerted action of, and among, all working classes. Thus government and the functions of government are paralyzed and come to an end."

It should be noted that two years previously federal judge George W. Anderson had explicitly held that a general strike, although "a tremendous, almost terrorizing force," was "not violence." It was "a political weapon," "only in degree . . . a greater and more destructive force than a railroad strike." *Colyer v. Skeffington*, 265 F.17, 61–62 (D. Mass. 1920), *rev'd sub nom. Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922). In Anderson's view, therefore, to advocate a general strike was not to advocate the violent overthrow of the government. *See Note, The New York Criminal Anarchy Act*, 36 HARV. L. REV. 199, 202 (1922) ("the theory of the strike is non-violent").

discussion of the advantages of communism and advanced socialism and a mere Utopian portrayal of the blessings which would flow from the establishment of those conditions. We think . . . that the jury were entirely justified in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes.”¹⁰⁸

Judges Pound and Cardozo dissented on the ground that the “advocate of the proletarian class rule, while advocating a vicious doctrine subversive to our institutions and menacing the orderly rule of law, is advocating, not anarchy, but something entirely different. The setting up of the dictatorship of the proletariat would be a far-reaching change in the form of government, but it would not be the destruction of all organized government. The statute is aimed historically only at advocacy of the latter doctrine.”¹⁰⁹

VI. THE SUPREME COURT DECISION IN *GITLOW*

On November 27, 1922, the Supreme Court agreed to hear Gitlow’s case on a writ of error.¹¹⁰ It was argued on April 12, 1923,¹¹¹ three days after the Court’s announcement of its opinion in the momentous and controversial case of *Adkins v. Children’s Hospital*,¹¹² which invoked the liberty interests protected by the Due Process Clause of the Fifth Amendment to strike down a federal minimum wage law for women in the District of Columbia.¹¹³ At the time Holmes wrote a friend: “I am curious to see what the enthusiasts for liberty of contract will say with regard to

¹⁰⁸ *Id.* at 149 (Opinion of Hiscock, C.J.). The Court’s decision was applauded by *The New York Times*, which thought it made “good sense and therefore good law. It is impossible that a State should not possess the constitutional power to prevent attempts to subvert its Constitution and its form of government by violence.” *The Right of Self-Preservation*, N.Y. TIMES, July 14, 1922, at 8.

¹⁰⁹ *People v. Gitlow*, 234 N.Y. at 158 (Pound, J., dissenting).

¹¹⁰ 43 S. Ct. 163 (1922).

¹¹¹ The Court that heard this argument was only recently assembled. Justice Sanford had taken his seat on the Court at the end of January 1923; Butler at the end of December 1922; and Sutherland in September 1922.

¹¹² 261 U.S. 525 (1923).

¹¹³ For a detailed discussion of the case, see POST, *supra* note 14, at 755–91.

liberty of speech under a State law punishing advocating the overthrow of government—by violence.”¹¹⁴

The Court conferred to decide *Gitlow* on April 20, 1923. Butler’s 1922 Term docket book indicates that although Justices McKenna, Van Devanter, McReynolds, Butler, and Sanford were each ready to affirm the judgment of the New York Court of Appeals, Justice Sutherland passed. No votes were recorded for Chief Justice Taft, Justice Holmes, or Justice Brandeis. Butler notes that the case was “restored to the docket for re-argument” on May 7, 1923.¹¹⁵

Gitlow was argued for a second time on November 23, 1923.¹¹⁶ Butler’s 1923 Term docket book contains fascinating notes about the Court’s second conference, which was held on November 24. They indicate that Taft, Holmes, and Brandeis voted to reverse the Court of Appeals. Butler records that “CJ thinks advocacy of the overthrow by force—not incitation of people to lawlessness.” Sutherland came out in favor of sustaining *Gitlow*’s conviction, stating that “The law prevails on balancing.” The only Justice to speak to the application of the First Amendment to state law was the powerful Willis Van Devanter,¹¹⁷ about whom Butler wrote: “WV

¹¹⁴ Oliver Wendell Holmes, Jr. to Harold Laski (Apr. 14, 1923), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD LASKI, 1916–1935, at 495 (Mark DeWolfe Howe ed., 1963).

¹¹⁵ 1922 Docket Book of Pierce Butler, at 283.

¹¹⁶ According to the *Washington Post*, at oral argument *Gitlow*’s counsel insisted that “Reformatory measures would be impossible . . . if the citizen must stop short of questioning the fundamental institutions of government and of suggesting drastic forms of collective action. The New York statute, they insisted, rested on the theory that the people were not sovereigns but were subjects. . . . Public opinion to be sound, they added, ‘must take account of every doctrine and advocacy at large in the community.’” *Free Speech Seen as Endangered by New York Statute*, WASH. POST, Nov. 24, 1923, at 5. By contrast, “Counsel for New York State asserted that the manifesto advocated the overthrow of the government by force and those who were involved in its distribution had placed themselves beyond the constitutional guarantee of freedom of speech. It was not necessary for New York to wait, counsel stated, until overt acts aimed to overthrow the government had been committed before prosecuting those guilty of actively participating in a revolution against the government.” *Id.*

¹¹⁷ On the immense influence of Van Devanter on the deliberations of the Taft Court, see POST, *supra* note 16, at 225–58.

thinks *Prudential*¹¹⁸ not in point. Free speech protected by 14th. Read the Statute: Right of free speech never went that far. Right to criticize opinions conceded.”¹¹⁹

The Court’s newest justice, Edward T. Sanford, was assigned the task of writing the opinion. Sanford was a notoriously slow and laborious writer.¹²⁰ His opinion did not come down until June 8, 1925, the last day of the 1924 Term. Holmes published a short dissent, which Brandeis joined.¹²¹ We know that Holmes courted Taft’s vote until the very end, because on May 4, 1925, Holmes wrote Taft: “Dear Chief: As you voted to reverse in this case and possibly we may agree with enclosed, I add the inquiry whether it would be well to add by way of caution the following:

If the publication of the document had been laid as an attempt to induce an uprising at once and not at some indefinite time in the future, it could have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any

¹¹⁸ *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922), had upheld a state law requiring corporate employers to provide letters “setting forth the nature and character of service rendered by such employe to such corporation and the duration thereof, and truly stating for what cause, if any, such employe has quit such service.” *Id.* at 532. Rejecting the argument that the law violated “the general private right of silence” which was “incident” to the “liberty of speech,” Justice Pitney said for the Court that “the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence.” *Id.* at 538. Chief Justice Taft and Justices Van Devanter and McReynolds dissented from the judgment of the Court.

¹¹⁹ 1923 Docket Book of Pierce Butler, at page 315. This page of Butler’s docket book is reproduced as Appendix A.

¹²⁰ POST, *supra* note 16, at 86–87.

¹²¹ Upon receiving a draft of the dissent, Brandeis wrote Holmes “Very glad to join in this.” (Holmes papers). McKenna had left the court in January 1925, and Stone had joined it in March. POST, *supra* note 16, at 122, 126. Because of this, there was some ambiguity whether Stone joined in the *Gitlow* opinion. Much later Stone would write Princeton graduate student Clinton Rossiter that Rossiter had erred in concluding that Stone was with the majority in *Gitlow*. “The fact is that the *Gitlow* case was argued before I went on the Court and I had no part in it. For some reason the Reporter omitted to state that fact in his report of the case and, due to my inexperience I neglected to see that he did so. I have always regretted the oversight.” Harlan F. Stone to Clinton L. Rossiter, III (Mar. 27, 1941) (Stone papers). It is notable that two years later Stone would join the majority in *Whitney v. California*, 274 U.S. 357 (1927), and Stone’s own docket book shows that he did not dissent in conference.

result, or in other words whether it was not futile and too remote from forbidden consequences. But the indictment alleges a publication and nothing more.¹²²

But Taft, who loathed dissent, changed his conference vote and agreed to join Sanford's majority opinion.¹²³

Sanford produced a careful and competent opinion. He meticulously distinguished precedents like *Schenck v. United States*¹²⁴ and *Debs v. United States*,¹²⁵ which arose under the Espionage Act of 1917 and which had charged defendants with prohibited *conduct*—with attempting to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States.¹²⁶ In such cases, wrote Sanford, “it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.”¹²⁷

In *Schenck* and *Debs*, in other words, the Court's job was to determine whether defendants' words were closely enough connected to conduct prohibited by Congress as to constitute an attempt to commit that conduct.¹²⁸ Such precedents, said Sanford, had “no application” to a case like *Gitlow*, “where the legislative body itself

¹²² Oliver Wendell Holmes, Jr. to William Howard Taft (May 4, 1925) (Holmes papers). The paragraph proposed by Holmes would appear in his published dissent.

¹²³ On the prominent tendency of Taft Court justices to alter their conference votes to avoid dissent, which can be called a “norm of acquiescence,” see POST, *supra* note 16, at 610–48.

¹²⁴ 249 U.S. 47 (1919).

¹²⁵ 249 U.S. 211 (1919).

¹²⁶ *Id.* at 212; *Schenck*, 249 U.S. at 48–49.

¹²⁷ *Gitlow*, 268 U.S. at 671.

¹²⁸ “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. . . . If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.” *Schenck*, 249 U.S. at 52. Although Holmes's opinions in cases like *Schenck* and *Debs* are now read as statements of First Amendment doctrine, they in fact sounded entirely in the substantive criminal law of attempt and had little First Amendment content. Robert Post, *Writing the Dissent in Abrams*, 51 SETON HALL L. REV. 21, 26–30 (2020); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 432 (1992).

has previously determined the danger of substantive evil arising from utterances of a specified character.”¹²⁹

When a legislature forbids specific language, as distinct from specific conduct, it is the legislature, not a court, who has determined that the proscribed language is sufficiently connected to substantive evils as to justify its prohibition. The direct precedent for *Gitlow* was thus not *Schenck* or *Debs*, but *Abrams v. United States*,¹³⁰ which concerned the Sedition Act of 1918 that directly prohibited certain kinds of language—“disloyal, scurrilous and abusive language about the form of government of the United States” or “language ‘intended to incite, provoke and encourage resistance to the United States’” when the country was at war.¹³¹ Justice Clarke, who authored the majority opinion in *Abrams*, had missed the distinction between a legislature prohibiting conduct, as to which words could constitute an attempt, and a legislature directly prohibiting language itself. Clarke had glibly concluded that the constitutional objections raised by the defendants in *Abrams* were “sufficiently discussed and . . . definitely negated in *Schenck*.”¹³²

Sanford was by contrast fully aware of the difference between these two distinct kinds of statutes, and he cleverly used this difference to his advantage.¹³³ Sanford wrote that it was an “entirely different” situation if a legislative body has itself “determined . . . that utterances of a certain kind involve such danger of substantive evil that they may be punished.”¹³⁴ In such circumstances, it was the duty of a court to defer to the judgment of a legislature that the proscribed communications were harmful.

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. And the case is to be considered ‘in the light of the principle that the State is primarily the judge of regulations required in the interest of

¹²⁹ *Gitlow*, 268 U.S. at 671.

¹³⁰ 250 U.S. 616 (1919).

¹³¹ *Id.* at 617.

¹³² *Abrams*, 250 U.S. at 619.

¹³³ HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 154–55 (1988).

¹³⁴ *Gitlow*, 268 U.S. at 670.

public safety and welfare'; and that its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.'¹³⁵

Holmes and Brandeis had for years made exactly this same argument in the context of the Court's use of the Due Process Clause to strike down social and economic legislation.¹³⁶ Holmes and Brandeis had repeatedly argued the courts ought to defer to legislative judgments that statutory regulations were necessary and useful. Now Sanford was returning the favor. Courts, he reasoned, should defer to these same legislative judgments in cases involving liberty interests implicating freedom of speech.¹³⁷ This was the standard of judicial review used by the Court in Fourteenth Amendment cases when it did not believe that important constitutional rights were at stake.¹³⁸

Sanford constructed his opinion to tightly constrict freedom of speech. He held that government would be justified in punishing speech that was "inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace."¹³⁹ *A fortiori* a state can "punish utterances endangering the foundations

¹³⁵ *Id.* at 668–69. Thus "the general statement in the Schenck Case, p. 52 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,'—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character." *Id.* at 671.

¹³⁶ See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J. dissenting); *id.* at 354 (Brandeis, J., dissenting).

¹³⁷ In his dissent in *Gitlow*, by contrast, Holmes refused to display any deference to legislative judgments. The inconsistency between the position of Holmes and Brandeis in *Gitlow* and their position in other substantive due process decisions was noticed by contemporaries. See, e.g., Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 963–64, 966 (1927).

¹³⁸ See POST, *supra* note 14, at 732–41, 1430–33.

¹³⁹ *Gitlow*, 268 U.S. at 667. Contemporaries construed Sanford's opinion to approve "suppression of utterances because of their bad tendency and bad effect." Edward L. Coyle, *Limiting the Freedom of Speech by Suppressing the Advocacy of Direct Action*, 4 U. CIN. L. REV. 211, 213 (1930). See Chafee, *supra* note 75, at 141 ("Justice Sanford virtually adopts the bad tendency test."); Cushman, *supra* note 32, at 97–98 ("It is to be regretted that in dealing with the case the court applied once more the 'bad tendency' test which was set up in the *Abrams* Case and later war-time cases, in

accordance with which one may be punished for utterances or publications the general tendency or effect of which is toward the culmination of objects which might properly be forbidden.”); Thomas Reed Powell, *The Supreme Court and the State Police Power, 1922–1930—III*, 17 VA. L. REV. 765, 767 (1931) (“Mr. Justice Sanford rejected the present-danger test”); Hugh E. Willis, *Freedom of Speech and of the Press*, 4 IND. L.J. 445, 453 (1929). It was said that the “bad tendency” test “seems, beginning with the *Abrams* case, to have become the rule of the Court.” Note, 25 COLUM. L. REV. 966, 967 (1925). See James Parker Hall, *Constitutional Law—Due Process of Law—Liberty—Free Speech*, 20 ILL. L. REV. 809, 809 (1926); Note, 35 YALE L.J. 108 (1925); Note, *supra* note 32, at 56–57; but see Note, 24 MICH. L. REV. 188–89 (1925).

In support of his reasoning, Sanford cited *Robertson v. Baldwin*, 165 U.S. 275 (1897), which stated:

The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the ‘Bill of Rights,’ were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation.

Id. at 281. Sanford also cited several state court decisions, such as *State v. McKee*, 46 A. 409 (Conn. 1900), in which the Connecticut Supreme Court of Errors had upheld a Connecticut law prohibiting publications “principally made up of criminal news, police reports, or picture and stories of deeds of bloodshed, lust, or crime.” *Id.* at 410. The court held: “The notion that the broad guaranty of the common right to free speech and free thought contained in our constitution is intended to erect a bulwark or supply a place of refuge in behalf of the violators of laws enacted for the protection of society from the contagion of moral diseases belittles the conception of constitutional safeguards, and implies ignorance of the essentials of civil liberty.” *Id.* at 414.

Sanford also cited *People v. Most*, 171 N.Y. 423 (1902), in which the New York Court of Appeals had upheld a conviction for publishing an article “advocating and advising revolution and murder.” *Id.* at 425. The court held:

While the publication was not addressed to any one in particular, it was impliedly addressed to the readers of the ‘*Freiheit*’; and while it did not urge the murder of any particular individual, it advocated the murder of all rulers and the destruction of all government.

A publication which instigates revolution and murder; which suggests the persons to be murdered through the positions occupied and the duties performed by them; which advises all to discharge their duty to the human race by murdering those who enforce the law; which denounces those who spare the ministers of public justice, as guilty of a crime

against humanity and which names poison and dynamite as the agencies to be used to murder and destroy, necessarily endangers the public peace. . . .

The defendant was not charged with an actual breach of the peace, which is a distinct offense both at common law and by statute, but with an act alleged to seriously endanger it. The public peace is in danger when a breach thereof is likely to occur in the ordinary course of events. The publication of the defendant manifestly tended toward this result, for he held forth murder as a duty and exhorted his readers to practice it upon their rulers. What would be more apt to alarm the people and disturb the peace of society? . . .

The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control and the courts may punish the licentiousness of the press. . . .

The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. . . . It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government.

Id. at 429–32. *Most* was followed in *State v. Hennessy*, 114 Wash. 351, 359–60 (1921), which was another state case cited by Sanford. Other state supreme courts also followed *Most*. See *People v. Steelik*, 187 Cal. 361, 375 (1921); *People v. Lloyd*, 304 Ill. 23, 37–39 (1922); *People v. Ruthenberg*, 229 Mich. 315, 324 (1924).

Sanford also cited *State v. Boyd*, 91 A. 586 (N.J. 1914), which had upheld a conviction for advocating “the unlawful burning or destruction of public or private property.” *Id.* at 586. The New Jersey Supreme Court held: “[F]ree speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and toward breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible.” *Id.* at 587–88. Also cited by Sanford was *State v. Holm*, 139 Minn. 267 (1918), in which the Minnesota Supreme Court had upheld a conviction for circulating a pamphlet advocating opposition to enlistment in the armed forces of the federal or state government, or advocating “that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States.” *Id.* at 270. The court stated:

Defendants also contend that the statute abridges the freedom of speech and of the press secured to citizens of the United States by the first section of the Fourteenth Amendment to the federal Constitution. To what extent this amendment takes from the states the

of organized government and threatening its overthrow by unlawful means.”¹⁴⁰ The First Amendment “does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, . . . cannot be denied.”¹⁴¹

power to place legislative restrictions upon the freedom of speech and the freedom of the press is still a mooted question; but, conceding that it protects this right from abridgment by the states, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the state may prohibit publications or teachings which are injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare.

Id. at 275. See *State v. Moilen*, 140 Minn. 112 (1918). For other precedents to this effect, see *Free Speech and Criminal Anarchy*, 9 CONST. REV. 239, 242–44 (1925); Note, *supra* note 107, at 199 n.3, 203 n.29.

¹⁴⁰ *Gitlow*, 268 U.S. at 667.

¹⁴¹ *Id.* at 668. Sanford cited in support of this proposition *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904), which had upheld a federal statute denying admission to the United States aliens “who believe in or advocate the overthrow by force of violence of the government of the United States or of all government or of all forms of law.” *Id.* at 284. In *Turner*, Chief Justice Fuller had written:

If the word ‘anarchists’ should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers, innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few; and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, as applicable to any alien who is opposed to all organized government.

We are not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does not involve those considerations. The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human governments endure they cannot be denied the power of self-preservation, as that question is presented here.

Id. at 294.

Sanford implicitly acknowledged that a different question would be presented if New York were to “penalize the utterance or publication of abstract ‘doctrine’ or academic discussion having no quality of incitement to any concrete action.”¹⁴² But

One contemporary commentator summarized this line of argument: “Why should the state by its constitutional guaranties protect one in his attempt to overthrow that constitution and the government founded upon it, even though there is little or no chance of the plan advocated being consummated? . . . A state has the right to pass legislation which it thinks necessary and beneficial, so long as it does not unreasonably and arbitrarily deprive one of his rights as guaranteed by the state and federal constitutions. What is reasonable is largely a question of policy, the determination of which should be left to the legislative tribunals of the several states regardless of whether the court agrees with the wisdom of the policy.” Note, 4 NEB. L. BUL. 166, 168 (1925).

¹⁴² *Gitlow*, 268 U.S. at 664. Butler records Van Devanter as making this distinction in conference. See *supra* text at note 118. In 1925 there were a smattering of state court decisions that made this same distinction, holding that the prohibition of the simple expression of opinion, or even of the advocacy of legal change, would be unconstitutional. See, e.g., *State v. Diamond*, 202 P. 988, 991 (N.M. 1921) (“A fair, general view of the whole statute leads to the conclusion that it was designed to close the mouths and tie the hands of people who were dissatisfied with the government as at present constituted, and who advocated by any means, peaceful or otherwise change in the form of government, or the abandonment of organized government entirely.”); *State v. Gabriel*, 95 N.J.L. 337, 340–41 (1921) (“Under the Constitution and Bill of Rights the Legislature cannot make it criminal to belong to a party organized or formed for the purpose of encouraging hostility or opposition to the government of the United States or of this state, unless the hostility or opposition includes a purpose to overthrow or subvert such government. . . . A party organized to change the Constitution of the United States or of the state by a proceeding lawful in method, although evincing a purpose hostile or in opposition in part at least to the existing government, would be under this statute an organization of which its members could be charged as criminals. This section of the statute violates article 1, par. 18, of the Constitution of the state, relating to rights and privileges, which reads: ‘The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.’”); *Ex parte Meckel*, 87 Tex. Crim. 120, 123 (1919) (“On the present hearing we are convinced that, giving the language used in the statute its true meaning, it could not be held to denounce a breach of the peace, but that its purport is to denounce as a felony the use of the disloyal language described. It cannot make the use of the language per se a felony, for the reason stated in the original opinion that every person may speak the truth with good motives with reference to the officers, agencies, and policies of the government.”); *Ex parte Harrison*, 110 S.W. 709, 710 (Mo. 1908) (“The General Assembly, under the legislative power granted it by the people, subject to the limitations of the state and federal Constitutions, unquestionably has the power to enact penal statutes and prescribe civil remedies, ‘for all abuses of that liberty’ of speech, or publication. If a publication is neither blasphemous, obscene, seditious, or defamatory, then, under the Constitution of this state, no court has the right to restrain it, nor the Legislature power to punish it. The report which the petitioner published has nothing in it either blasphemous, seditious, obscene, or defamatory, and clearly falls within the liberty of speech

Sanford concluded that the Manifesto was no such abstract discussion. Instead it “advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. . . . [It] is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.”¹⁴³ Communications containing such

or publication granted by the Constitution.”); Note, 41 HARV. L. REV. 525, 527 (1928); cf. *State v. Sinchuk*, 115 A. 33, 35 (Conn. 1921); *State ex rel. Metcalf v. District Court of Fourth Judicial Dist.*, 52 Mont. 46 (1916).

¹⁴³ *Gitlow*, 268 U.S. at 665. When describing the program of the Left Wing, the Illinois Supreme Court was far more forceful:

Plaintiffs in error advocate the overthrow of this government, and the substitution of class rule. They repudiate the idea of a government ‘of the people, by the people, and for the people.’ Interpreting their language literally, they propose to organize all who have no property, and by sheer force of numbers to seize the property from those who have it. They preach class hatred and class war. After we tear away the smoke screen of words, they advocate plain robbery. Men of common understanding are supposed to know the natural consequences of their acts, and plaintiffs in error must know that their program can only be carried out by killing those who resist. The plain, unvarnished truth is that the plaintiffs in error have conspired to rob and to murder. They propose a reign of terror by a self-appointed dictatorship, responsible to no one, and which holds its power by so managing affairs that it will satisfy the mob. If such a program were advocated by a few men in any community, they would be promptly arrested and punished, and no one would have the temerity to defend their acts. But plaintiffs in error seem to take the position that because their band has become so large and the nefarious doctrines they advocate have assumed world-wide proportions, it must be held to be an honest effort to reform a bad system of government. The fact that a conspiracy to commit a felony assumes tremendous proportions does not change the character of the conspiracy. Robbery is robbery, and murder is murder, whether it is done by one or a thousand. Our federal Supreme Court has held that, with people who adhere to the doctrines of plaintiffs in error, ‘capitalism’ is synonymous with ‘state,’ and that when they appeal to the proletariat to ‘put down capitalism’ they are advocating the overthrow by force of the government of the United States. *Abrams v. United States*, 250 U.S. 616.

People v. Lloyd, 304 Ill. 23, 87 (1922).

advocacy “tend to subvert or imperil the government”¹⁴⁴ and consequently “present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion.”¹⁴⁵

Sanford employed a distinction closely analogous to one that Learned Hand had eight years earlier proposed in *Masses Pub. Co. v. Patten*.¹⁴⁶ Hand had sharply distinguished the mere expression “of opinion and of criticism” from “urging upon others that it is their duty or their interest to resist the law.”¹⁴⁷ If the former received constitutional protection, the latter did not. “One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.”¹⁴⁸

Sanford in *Gitlow*, however, offered an extremely capacious definition of illegal advocacy. He explicitly held that it was not necessary “that the defendant should

¹⁴⁴ *Gitlow*, 268 U.S. at 667.

¹⁴⁵ *Id.* at 669. In his *Whitney* concurrence, by contrast, Brandeis would later stress: “[E]ven 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. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.” *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

¹⁴⁶ 244 F. 535 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917).

¹⁴⁷ *Id.* at 539–40. This same distinction was implicit in *Fox v. Washington*, 236 U.S. 273 (1915), a decision authored by Holmes. At issue in *Fox* was a state statute penalizing speech tending “to encourage or advocate disrespect for law or for any court.” *Id.* at 275. The defendant had been convicted for publishing an article entitled “The Nude and the Prudes” that criticized the arrest of nude bathers. Citing the principle that “So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed,” *id.* at 277, Holmes interpreted the state statute, and held that the state court had interpreted the state statute, “as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it,—an overt breach and technically criminal act.” *Id.*

¹⁴⁸ *Masses*, 244 F. at 540.

have advocated ‘some definite or immediate act or acts’ of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated.”¹⁴⁹ “Nor was it necessary,” Sanford added, “that the language should have been ‘reasonably and ordinarily calculated to incite certain persons’ to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular.”¹⁵⁰

¹⁴⁹ *Gitlow*, 268 U.S. at 671–72.

¹⁵⁰ *Id.* at 672. This same broad definition of advocacy was implicit in *Fox*, *supra* note 147, and in *Most*, *supra* note 139. It is not clear whether Hand would have agreed with this broad and encompassing definition of advocacy. See text at note 147 *supra*.

After his conviction was affirmed by the Supreme Court, Gitlow was returned to prison on November 9, 1925. He had been out of prison to pursue his appeal since December 1922. Gitlow was pardoned by Governor Al Smith on December 11, 1925. *Gitlow Is Pardoned by Governor Smith as Punished Enough*, N.Y. TIMES, Dec. 12, 1925, at 1; *Gitlow Pardon Follows Five-Year Fight in Courts*, BALTIMORE SUN, Dec. 12, 1925, at 1. “The 300 delegates of the convention of the International Ladies Garment Workers Union rose and sang the ‘International’ when the pardoning of Benjamin Gitlow was announced this afternoon at their session here. They voted to send a telegram of thanks to Governor Smith.” *Garment Workers Sing Red Hymn*, N.Y. TIMES, Dec. 12, 1925, at 1. Gitlow resumed his life of activism. In 1928, for example, he ran for Vice President on the ticket of the Workers’ Communist Party, alongside of William Z. Foster. *Editorial Points*, BOSTON GLOBE, May 29, 1928, at 16; *Gitlow Makes Strong Plea for Workers*, HARTFORD COURANT, Aug. 20, 1928, at 6. Gitlow “said that Communists in the United States did not hope to carry their policies through the ballot box, but that campaigning ‘will afford an opportunity of inciting workers to an uprising against the capitalists, to have them rise and seize the tools of production.’ He said he intended to bring Russian Bolshevism to the United States.” *Gitlow Attacks Rivals*, N.Y. TIMES, Sept. 30, 1928, at 34. Gitlow was expelled from the Workers’ Communist Party in 1929, see LENDLER, *supra* note 7, at 145–46, but he formed a rival radical group that continued to publish *The Revolutionary Age*. In 1930, he lost a suit that sought to overrule the banning of *The Revolutionary Age* from the U.S. mail. *Gitlow v. Kiely*, 44 F.2d 227 (S.D.N.Y. 1930). The decision was unanimously affirmed by the Second Circuit, with Learned Hand sitting on the panel, “on the authority of *Gitlow v. New York*, 268 U.S. 652.” 49 F.2d 1077 (2d Cir.), *cert. denied*, 284 U.S. 648 (1931).

Later in his life, Gitlow became a vigorous opponent of communism who attacked the Soviet Union and supported Taft’s son Robert in his campaign for the presidency. See *Gitlow to Speak for Taft*, N.Y. TIMES, Apr. 13, 1952, at 47; *Benjamin Gitlow*, 74; *Controversial Ex-Red*, WASH. POST, July 21, 1965, at C4.

VII. HOLMES'S DISSENT

In *Abrams v. United States*,¹⁵¹ the Court in 1919 had considered the constitutionality of a prosecution under the Sedition Act of 1918, which prohibited the language of seditious libel—"disloyal, scurrilous and abusive language about the form of government of the United States."¹⁵² The shock of this encounter prompted Holmes to invent modern First Amendment doctrine.¹⁵³ Holmes was moved to argue for the first time that the Constitution protected a marketplace of ideas. If the state could prohibit all language that "tended" to cause a harm, Holmes reasoned, the state could in effect "forbid all effort to change the mind of the country."¹⁵⁴ The First Amendment therefore prohibited government from suppressing communications 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."¹⁵⁵ This is the origin of what we now call the First Amendment "clear and present danger" test.¹⁵⁶

The Court in *Abrams*, however, had explicitly rejected Holmes's innovative reasoning.¹⁵⁷ Holmes's new theory of the First Amendment remained only a dissent. Personally committed to the authority of precedent, Holmes would ordinarily

¹⁵¹ 250 U.S. 616 (1919).

¹⁵² *Id.* at 617.

¹⁵³ See Post, *supra* note 128, at 31–38.

¹⁵⁴ *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting). See CHAFEE, *supra* note 75, at 104 ("This bad-tendency test is an English eighteenth-century doctrine, wholly at variance with any true freedom of discussion, because it permits the government to go outside its proper field of acts, present or probable, into the field of ideas, and to condemn them by the judgment of a judge or jury, who, human nature being what it is, consider a doctrine they dislike as so liable to cause harm some day that it had better be nipped in the bud.").

¹⁵⁵ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

¹⁵⁶ Although Holmes had used the phrase "clear and present danger" in *Schenck*, 249 U.S. at 52, it had not then referred to First Amendment requirements, but only to the substantive criminal law of attempt. See Note, *supra* note 142, at 526 ("In its essence it constituted the test applied to common law attempts."); Post, *supra* note 128, at 36–38; *supra* note 128. This can easily be seen by comparing Holmes's contemporaneous opinions in *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211 (1919). See LENDLER, *supra* note 7, at 101–02. On Holmes's view of the criminal law of attempt, see *Commonwealth v. Peaslee*, 177 Mass. 267 (1901).

¹⁵⁷ See *supra* text at note 132.

withdraw and bow to majority rulings when the Court rejected his views.¹⁵⁸ “There are obvious limits of propriety,” he said, “to the persistent expression of opinions that do not command the agreement of the Court.”¹⁵⁹ It is therefore particularly notable that Holmes was explicit in *Gitlow* that his dissenting opinion in *Abrams* had expressed convictions that “are too deep for it to be possible for me as yet to believe” that the Court had “settled the law. If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views.”¹⁶⁰

Set in the context of Holmes’s customary practice of deferring to precedent, this passage eloquently expresses the intensity of Holmes’s commitment to freedom of speech. Holmes declined to accept the authority of the *Abrams* decision. He chose to insist yet again that government could not proscribe speech unless the speech threatened imminent harm. Because the Left Wing Manifesto threatened no such danger, it ought to be immune from legal sanction.

Sanford had anticipated this line of attack, however, and he crafted his opinion to challenge the foundation of Holmes’s dissent. Building on arguments that Holmes himself had long advanced in other contexts,¹⁶¹ Sanford asserted that courts should *defer* to the reasonable judgment of legislatures that certain kinds of

¹⁵⁸ See, e.g., *Washington v. Dawson & Co.*, 264 U.S. 219, 228 (1924) (separate opinion of Holmes, J.) (“The reasoning of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, and cases following it never has satisfied me, and therefore I should have been glad to see a limit set to the principle. But I must leave it to those who think the principle right to say how far it extends.”); *Miles v. Graham*, 268 U.S. 501 (1925) (Holmes had dissented in *Evans v. Gore*, 253 U.S. 245 (1920), the precedent applied by *Miles*); *Murphy v. Sardell*, 269 U.S. 530 (1925) (“Justice Holmes requests that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in *Adkins v. Children’s Hospital*.”); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 421 (1926) (“Mr. Justice Homes concurs in the result.”).

¹⁵⁹ *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 456 (1922) (Holmes, J., dissenting).

¹⁶⁰ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting). After Holmes’s *Abrams* dissent, both he and Brandeis would maintain the fiction that Holmes’s use of the phrase “clear and present danger” for a unanimous Court in *Schenck* referred to the accepted First Amendment doctrine of the Court. See Post, *supra* note 128, at 38–39.

¹⁶¹ See, e.g., *Adkins v. Children’s Hospital*, 261 U.S. 525, 570–71 (1923) (Holmes, J., dissenting).

speech, like the advocacy of violent revolution, threatened serious harm to the state.¹⁶² To this argument, Holmes's *Gitlow* dissent offered no response at all.¹⁶³

¹⁶² Sanford wrote:

The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency.

Gitlow, 268 U.S. at 669. The tropes in Sanford's rhetoric come close to those that Holmes himself had used in his opinion for the Court in *Frohwerk v. United States*, 249 U.S. 204 (1919), which had upheld a conviction for violating the Espionage Act of 1917 because articles in an obscure German newspaper tended to obstruct recruitment to the armed forces. Holmes stated: "It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed. But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out." *Id.* at 208–09.

¹⁶³ Yosaf Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1400–01 (1984); KALVEN, *supra* note 133, at 155. The question of *who* should decide whether speech posed a clear and present danger of illegal conduct would later be explicitly addressed by Brandeis in his concurrence in *Whitney*:

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 condition exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Holmes was explicit, however, that it ought not matter to constitutional analysis that the Manifesto “was more than a theory, that it was an incitement.”¹⁶⁴ “Every idea is an incitement,” Holmes wrote. “It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. 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.”¹⁶⁵

Deeply versed in American pragmatism,¹⁶⁶ Holmes believed that all ideas were essentially guides to action.¹⁶⁷ It followed that there could be no cogent constitutional distinction between advocacy and the mere expression of opinion. Both forms of speech were ultimately invitations to action. If a legislature were empowered to regulate advocacy because of its tendency to produce harmful conduct, therefore, it ought also to be empowered to regulate the abstract discussion of ideas.

Holmes thus explicitly rejected the analytic framework proposed by Hand in 1917 in *The Masses*. It was not a framework that could effectively protect speech. As Holmes wrote his friend Lewis Einstein later that summer: “I had my whack on free speech some years ago in the case of one Abrams and therefore did no more than recur to that and add that an idea is always an incitement—to show the ardor of the writer is not a sufficient reason for judging him. I regarded my view as simply upholding the right of a donkey to drool. But the usual notion is that you are free

Whitney, 274 U.S. at 374, 378–79 (Brandeis, J., concurring). About this passage in Brandeis’s *Whitney* concurrence, Zechariah Chafee commented: “While the legislature must decide in the first instance what is necessary, its decision is no more final when it denies liberty of speech than in the many cases where statutes have denied liberty of contract and been overthrown by the Supreme Court.” CHAFEE, *supra* note 75, at 123.

¹⁶⁴ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

¹⁶⁵ *Id.*

¹⁶⁶ LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 201, 432–33 (2002); BRUCE KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY: CAMBRIDGE, MASSACHUSETTS 1860–1930* at 47–50 (1977); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

¹⁶⁷ See, e.g., C.S. Peirce, *The Fixation of Belief*, POPULAR SCI. MONTHLY, Nov. 1877, at 5 (“Our beliefs guide our desires and shape our actions. . . . The feeling of believing is a more or less sure indication of there being established in our nature some habit which will determine our actions.”).

to say what you like if you don't shock men. Of course, the value of the constitutional right is only when you do shock people."¹⁶⁸

VIII. GITLOW'S RECEPTION

Gitlow was received in the American press as an "epochal"¹⁶⁹ and "most important"¹⁷⁰ decision, "one of the most decisive pronouncements of the court's history on the subject of the right of free speech."¹⁷¹ It received "widespread" comment, the "great volume" of which was "favorable to the majority decision."¹⁷² The

¹⁶⁸ Oliver Wendell Holmes, Jr. to Lewis Einstein (July 11, 1925) in *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903-1935* at 244 (James Bishop Peabody ed., 1964).

¹⁶⁹ *Ishmael*, WASH. POST, June 11, 1925, at 6.

¹⁷⁰ *That Free Speech Decision*, PITTSBURGH POST-GAZETTE, June 14, 1925, at 47. *See Important Decision*, JOHNSON CITY STAFF-NEWS, June 10, 1925, at 4; *Free Speech, Limited*, LITERARY DIGEST, June 20, 1925, at 9.

¹⁷¹ *The Gitlow Case*, LOUISVILLE COURIER-J., June 11, 1925, at 6. *The New Republic* pronounced the decision as "one of the greatest importance." NEW REPUBLIC, June 24, 1925, at 110.

¹⁷² *Court's Decision in Gitlow Anarchy Case Approved*, ATLANTA J., June 24, 1925, at 10. *See The State Press on the Gitlow Case*, PORT HURON TIMES HERALD, June 20, 1925, at 4; *Curb on Free Speech Upheld by High Court*, PHILA. INQUIRER, June 9, 1925, at 1 (the "case has commanded widespread notice"). For examples of hostile press coverage, see *Incitement Surely Criminal*, STANDARD UNION (BROOKLYN), June 9, 1925, at 10 ("The Communist International calls the proletariat of the world to the final struggle,' [Gitlow] wrote. That's baying at the moon. The proletariat of this city is called every morning to the struggle for seats on trains."); *The Free Speech Decision*, ST. LOUIS POST-DISPATCH, June 10, 1925, at 18 ("The danger of soap-box vehemence is imaginary. . . Justice Holmes knows that our Government cannot be protected from verbal assaults by suppression, nor can our institutions be secured by jailing their critics. . . The permanency of our Government rests on the faith and intelligent loyalty of the people. If that faith and that loyalty withers the Government is doomed, and statutes and court judgments will not avail to save it."); *Unwise Policy*, BALTIMORE SUN, June 10, 1925, at 12 ("The implication of the language of the majority opinion, that this utterance endangers the foundations of the Government seems preposterous in the light of the existing facts. . . More converts are made to communism by creating martyrs out of communists than by their arguments."); C.E. Ruthenberg, *The Gitlow Case and "American Democracy"*, DAILY WORKER, June 11, 1925, at 3 ("To the Communists the supreme court has given one more proof that the boasted American democracy is a sham and a fraud, one more proof that it is not constitutions but the interests of the capitalists which dominate all the institutions of the government—one more proof that the only way to democracy for the workers is thru the establishment of the highest form of democracy, the Soviets and the proletarian dictatorship."); *Limit to Free Speech*, KINGSTON (NEW YORK) DAILY FREEMAN, June 27, 1925, at 4 ("[N]o liberal minded observer can fail to be impressed by Justice Holmes's idea that there is greater safety for a modern state in a large liberty of expression

general thought was that the Court's opinion "has a normal ring about it that is decidedly refreshing to the man who wants to and does think . . . Governments are entitled to the right of self protection within the law, and the vaporings of hot-headed fanatics must be controlled."¹⁷³ The "life of the nation," it was said, "is more important than any person's right to say what he pleases."¹⁷⁴ "Denial of the right of a State to enact measures looking to its own protection against revolutionists and anarchists, actively proposing overthrow of the State's constitutional government, would reduce the State to an impotent instrument for the safeguarding of its citizens."¹⁷⁵

The decision was applauded as driving "another nail in the anarchy coffin": "Too long Americans have chafed under the spectacle of foreign born reds, attempting while sojourning in this country to tear down the flag, as it were with their seditious propaganda."¹⁷⁶ It was stressed that "[e]very citizen here has the right to

than in any limitation thereof."); *What Price Liberty?*, EVENING SUN (BALTIMORE), June 9, 1925, at 19; *The Case of Benjamin Gitlow*, SEATTLE STAR, June 15, 1925, at 8; *Overloading the Constitution*, INDEPENDENT, June 20, 1925, at 683; "Clear and Present Danger", *supra* note 71; *The Gitlow Case*, *supra* note 75.

¹⁷³ RUSHVILLE (NEBRASKA) RECORDER, July 3, 1925, at 4.

¹⁷⁴ "Free" Speech, MARION STAR, June 13, 1925, at 6. See *When Anarchy Is Criminal*, N.Y. TIMES, June 9, 1925, at 20.

¹⁷⁵ *Protection of the State*, SPRINGFIELD EVENING UNION, June 10, 1925, at 10. "Society in America has as much right to protect itself from assault at the hands of a little band of psychopathic raiders and criminal conspirators as it has to protect itself from attack by a hostile military force from another country." *The Limits of Free Speech*, MONTGOMERY ADVERTISER, June 11, 1925, at 4. See *The Gitlow Decision*, EVENING STAR (WASHINGTON, D.C.), June 9, 1925, at 6 ("This decision will strengthen the defenses of this country against radical subversion."); *The Gitlow Decision*, BROOKLYN CITIZEN, June 9, 1925, at 4 ("All this talk of free speech is mere poppycock. There are limits to free speech and those limits have been recognized by all civilized countries").

¹⁷⁶ *That Gitlow Decision*, HOLYOKE TRANSCRIPT-TELEGRAM, June 10, 1925, at 8. See *For National Safety*, SHREVEPORT TIMES, June 10, 1925, at 4 ("The true American everywhere in this country will applaud the supreme court decisions. . . . It is to be noted that these so called 'leaders' usually bear names of foreign coinage and address themselves in a foreign tongue to people who either have not had the opportunity of familiarizing themselves with American institutions or have not taken the time or trouble to learn or seek to understand American ideals and principles."); *The Use and the Abuse of Free Speech*, PHILA. INQUIRER, June 10, 1925, at 12 ("We need have no fear that freedom of speech in the real and proper meaning of the phrase will be abridged in this country. Our danger will be in showing too much consideration to the unwashed pests of radicalism."); *A Limit on "Free Speech"*, PORTLAND (MAINE) PRESS HERALD, June 13, 1925, at 8 ("In this country agitators of the

advocate a change of government. But none has the right to agitate for making the change by force Changes take place every election. That is pursuant to one of the popular liberties that the Gitlows would take away from the people, substituting therefore a tyranny of their own.”¹⁷⁷ Holmes’s appeal in dissent to the clear and present danger test was rejected as showing “how theorizing blinds one’s mind to practical issues. . . . On the same reasoning it would be foolish to call out the fire department as long as the blaze is but a little one; wait till it gets big enough to make

Gitlow type, nearly all of alien birth, have been permitted to go about preaching revolution and bloodshed. Our government has dealt with them in a most lenient manner. Such people who have sought a refuge in our country and after they have been here a while and been accorded the rights of citizens, have abused their privileges and set out to cause disorder and bloodshed where they have found safety and peace.”); *The Decision in the Gitlow Case*, COLUMBIA (MISSOURI) DAILY TRIB., June 15, 1925, at 2 (“Gitlow’s conviction . . . is a warning to the gentry, most of which is alien, that is constantly inveighing against this government and its institutions before they obtain any benefits of what is called the melting pot process. . . . The only objection to the decision in the Gitlow case that can possibly be raised by a red-blooded American is that the country’s highest tribunal was too tardy in dealing with it.”).

¹⁷⁷ *Meaning of Gitlow Decision*, HERALD STATESMAN, June 11, 1925, at 16. “It requires no bloodshed for the American people to change their laws, their institutions, their form of government. It requires only their own settled purpose and desire to do so, with the ballot box the sure and peaceful instrumentality.” *Not a Shield for Crime*, OMAHA WORLD-HERALD, June 12, 1925, at 10. *See Government by Force*, ALBANY DEMOCRAT-HERALD, July 6, 1925, at 4 (“Gitlow and his fellow anarchists live in a self-governing country. If they don’t like it, they have constitutional methods for changing it. But they must change it not by physical force but by the test of the nation’s citizens. If they wish to establish a different kind of government here, they need only to convince the people that the kind they propose is superior. . . . There is no need in this government of ours to rely or advocate physical force as the instrument for changing our governmental system.”).

it look as tho it might take the whole block.”¹⁷⁸ “It is just as well,” opined *the Washington Herald*, “not to run any risks.”¹⁷⁹

The press covered the case as if there was “nothing in the decision” that “takes it beyond those precedents which have been fairly well established.”¹⁸⁰ “In upholding the conviction of Benjamin Gitlow under the New York criminal anarchy act,” asserted one editorial, “the United States Supreme Court enunciated no new doctrine.”¹⁸¹ I have been able to identify only a single daily paper, which, in an editorial most likely authored by the brilliant Walter Lippmann, noticed the important fact that

the opinion assumes that the due process clause of the Fourteenth Amendment is a restraint on State interference with the freedom of speech and of the press. It thereby throws the aegis of the Federal Constitution against future State action which transcends the limits which future majorities of the Supreme Court may set to legislative regulation of speaking and writing. This puts a welcome negative on some previous careless dicta that the Federal Constitution affords no guarantee against State action directed against freedom of expression.¹⁸²

¹⁷⁸ *Men and Things*, LINCOLN J. STAR, June 19, 1925, at 21. See *May Check Anarchy*, PASADENA POST, June 12, 1925, at 4; J. Jeremy Snyder, *Mirrored from the Week's News*, MORNING CALL (ALLEN TOWN), June 14, 1925, at 6 (“The seven held that an admitted incendiary with a box of matches in his hand should be apprehended and punished, while the two hold that nothing should be done to him until he has lighted a match and stooped down to the pile of oil-soaked shavings to set them on fire. The minority comes pretty near saying that nothing should be done until the fire has started.”); *Abuse of the Freedom of Speech*, SPRINGFIELD UNION, June 9, 1925, at 10 (“And with all respect for the opinions of Justices Holmes and Brandeis it is not a question of the immediate danger from such abuse of free speech by one person but of the ultimate danger of tolerating and encouraging widespread preaching of violence and anarchy by many persons. One Gitlow might not be able to cause a bloody revolution but the harm that might be caused by a hundred or a thousand unrestrained Gitlows is easy to conjecture. Nipping anarchy and sedition in the bud is the only safe and sane course.”).

¹⁷⁹ WASH. HERALD, June 9, 1925, at 2.

¹⁸⁰ *The Gitlow Case Decision*, CHRISTIAN SCIENCE MONITOR, June 11, 1925, at 16.

¹⁸¹ *Freedom of Speech Does Not Permit Advocacy of Violence*, STOCKTON INDEPENDENT, June 9, 1925, at 4. Contrast the coverage of the case forty years later in *Benjamin Gitlow Is Dead at 73*, N.Y. TIMES, July 20, 1965, at 33 (the importance of the *Gitlow* decision “lies in the fact that for the first time the Court proceeded on the assumption that the liberty in the due process clause included the liberty of expression”).

¹⁸² “*Clear and Present Danger*,” *supra* note 71. Zechariah Chafee in *The New Republic* also emphasized that “for the first time in the history of the Court” it issued an opinion assuming “that the

IX. FREEDOM OF SPEECH AND THE STATES

In truth, the Court had long flirted with the possibility that the Due Process Clause of the Fourteenth Amendment might protect liberty interests that included freedom of speech. Although it was black letter law that the federal bill of rights did not apply to States,¹⁸³ the Court, speaking through Holmes in 1907 in *Patterson v. Colorado*,¹⁸⁴ upheld the judgment of a Colorado court for contempt against a newspaper that had published critical articles and cartoons. Holmes deftly sidestepped the question of Due Process Clause liberty, stating that “[w]e leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First.”¹⁸⁵ In dissent, John Marshall Harlan argued forcefully that First Amendment rights were included in the “privileges or immunities of citizens of the United States,”¹⁸⁶ adding that “I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man’s liberty, and are protected against violation

‘due process’ clause of the Fourteenth Amendment to the Constitution is a restraint on interference by the individual states with freedom of speech and of the press.” NEW REPUBLIC, *supra* note 171, at 110. When Chafee republished this essay in 1928 he edited this passage to read: “In several cases the court had carefully refrained from deciding whether ‘liberty’ protects liberty of speech as well as liberty of the person and of contracts, but the recent holding that liberty to teach a foreign language in private schools was within the Fourteenth Amendment [*Meyer v. Nebraska*, 262 U.S. 390 (1923)] naturally lead the way to the unanimous statement of the court in the *Gitlow* case that ‘we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and “liberties” protected . . . from impairment by the states.’” CHAFEE, *supra* note 75, at 103–04. See Chafee, *supra* note 75, at 141.

¹⁸³ *Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833).

¹⁸⁴ 205 U.S. 454 (1907).

¹⁸⁵ *Id.* at 462. Holmes could sidestep the question because he concluded “even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is ‘to prevent all such *previous restraints* upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.” *Id.*

¹⁸⁶ *Id.* at 464–65 (Harlan, J., dissenting).

by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law.”¹⁸⁷

Eight years later, in *Fox v. Washington*,¹⁸⁸ Holmes, speaking for a unanimous Court, held that a state regulation of speech was constitutional under the Fourteenth Amendment,¹⁸⁹ explaining that the Court could reach the merits of the case because the state tribunal below had itself “relied upon” the Fourteenth Amendment in reaching its conclusions.¹⁹⁰ In 1920, in *Gilbert v. Minnesota*,¹⁹¹ the Court adjudicated the claim that a state statute prohibiting speech that discouraged enlistment into the armed forces was “obnoxious to the ‘inherent right of free speech respecting the concerns, activities and interests of the United States of America and its government.’”¹⁹² Conceding “that the asserted freedom is natural and inherent,” the Court held that the statute did not violate the right of free speech “without so deciding or considering the freedom asserted as guaranteed or secured either by the Constitution of the United States or by the Constitution of the state.”¹⁹³

Following Harlan’s lead in *Patterson*, Brandeis dissented in *Gilbert* and argued that the right of free speech was a privilege or immunity of federal citizenship that states were “powerless to curtail.”¹⁹⁴ Brandeis pointedly added that freedom of speech might also be included within the liberty interests protected by the Fourteenth Amendment:

¹⁸⁷ *Id.* at 465. Harlan continued: “It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press.” *Id.*

¹⁸⁸ 236 U.S. 273 (1915).

¹⁸⁹ See *supra* note 147.

¹⁹⁰ *Fox*, 236 U.S. at 276.

¹⁹¹ 254 U.S. 325 (1920).

¹⁹² *Id.* at 328.

¹⁹³ *Id.* at 332. In 1921 Zechariah Chafee summarized *Gilbert* this way: “Has the United States Supreme Court any power to reverse a state conviction because it unduly restricts freedom of speech? This power can not arise from the First Amendment, which limits only federal action. Since all decisions in which the question had previously been raised held that there was no improper restriction in the particular facts, the Supreme Court had been willing to assume the existence of this power for the sake of argument. This continues to be Justice McKenna’s position.” CHAFEE, *supra* note 75, at 49.

¹⁹⁴ *Gilbert*, 254 U.S. at 337–39 (Brandeis, J., dissenting).

As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment. But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, *Coppage v. Kansas*, 236 U. S. 1, the right of a business man to conduct a private employment agency, *Adams v. Tanner*, 244 U. S. 590, or to contract outside the state for insurance of his property, *Allgeyer v. Louisiana*, 165 U. S. 578, 589, although the Legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.¹⁹⁵

Two years later, in *Prudential Insurance Co. v. Cheek*,¹⁹⁶ the Court took a very different tack. The case concerned the constitutionality of a state statute requiring a corporation to provide to ex-employees who resigned “a letter setting forth the nature and character of the services rendered by him” to the corporation “and truly stating for what cause” the former employee “had quit.”¹⁹⁷ Speaking for a majority of six (with Taft, Van Devanter, and McReynolds dissenting), the Court, per Mahlon Pitney, asserted that “neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about ‘freedom of speech’ or the ‘liberty of silence.’”¹⁹⁸

As the Court pondered Gitlow’s appeal in 1923, therefore, it was faced with a rich and inconsistent history regarding the question of whether the Constitution prohibited States from violating freedom of speech.¹⁹⁹ A note discussing freedom of speech in the December 1922 issue of the *Harvard Law Review*, for example, could declare, on the one hand, “It is settled that the federal Bill of Rights does not restrict state legislation,” and yet assert, on the other, “It may be argued . . . that the

¹⁹⁵ *Id.* at 343. Three years later Gitlow’s lawyers would cite in support of their contention that Fourteenth Amendment liberty included the right to freedom of speech *Coppage*, *Adams*, and *Allgeyer*.

¹⁹⁶ 259 U.S. 530 (1922).

¹⁹⁷ *Id.* at 531.

¹⁹⁸ *Id.* at 543.

¹⁹⁹ Note, *supra* note 142, at 525 n.3.

Fourteenth Amendment guarantee of life, liberty and property protects against state denial of the liberty to advocate overthrow of the government by a mass strike.”²⁰⁰

As we have observed, the powerful and influential Van Devanter advised during the Court’s conference to decide *Gitlow* that “*Prudential* not in point. Free speech protected by 14th.”²⁰¹ When Sanford came to write the opinion, however, he waffled slightly. “For present purposes,” Sanford said, “we may and do assume that 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.”²⁰² Echoing Van Devanter’s comments in conference, Sanford added: “We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek* that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.”²⁰³

To this sentence Sanford appended a footnote identifying authorities that supported including freedom of speech in the liberty interests protected by the Fourteenth Amendment. The footnote states in full:

Compare *Patterson v. Colorado*, 205 U. S. 454, 462; *Twining v. New Jersey*, 211 U. S. 78; *Coppage v. Kansas*, 236 U. S. 1; *Fox v. Washington*, 236 U. S. 273, 276; *Schaefer v. United States*, 251 U. S. 466, 474; *Gilbert v. Minnesota*, 254 U. S. 325, 338; *Meyer v. Nebraska*, 262 U. S. 390, 399; 2 *Story on the Constitution*, 5th Ed., § 1950, p. 698.²⁰⁴

We have already discussed *Patterson*, *Fox*, and *Gilbert*, which are the only decisions directly on point. *Shaefer* is a case about the federal Espionage Act. It does not discuss the Due Process Clause, but it does contain diffuse dicta about freedom of speech: “That freedom of speech and of the press are elements of liberty all will acclaim. Indeed, they are so intimate to liberty in every one’s convictions--we may say feelings--that there is an instinctive and instant revolt from any limitation of them, either by law or a charge under the law, and judgment must be summoned

²⁰⁰ Note, *supra* note 107, at 200 n.3. The Note cited *Coppage* for the proposition that “The Fourteenth Amendment recognizes ‘liberty’ as fully as ‘property,’ and bars the states from unwarranted interference with either.” *Id.*

²⁰¹ Butler docket book for 1923 Term, at 315.

²⁰² *Gitlow*, 268 U.S. at 666.

²⁰³ *Id.*

²⁰⁴ *Id.* at 666 n.9.

against the impulse that might condemn a limitation without consideration of its propriety.”²⁰⁵

Twining and *Coppage* are decisions about the Due Process Clause of the Fourteenth Amendment, but the decisions assert only the very general point that courts are authorized to protect the “liberty” interests encompassed by the Clause. The cases do not specifically discuss freedom of speech. Closer in spirit is *Meyer v. Nebraska*,²⁰⁶ which was a Taft Court precedent holding that a state law prohibiting the teaching of foreign languages was unconstitutional under the liberty interests of the Due Process Clause. Speaking for a Court majority that included Brandeis but not Holmes, McReynolds offered a broad and encompassing definition of Fourteenth Amendment liberty:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.²⁰⁷

It is noteworthy that *Meyer* explicitly asserts that courts ought not to defer to asserted legislative justifications when protecting Fourteenth Amendment liberty interests. In *Gitlow*, by contrast, Sanford insists that courts should defer to precisely such justifications in the context of alleged infringements of freedom of speech.

The last citation in Sanford’s footnote is to a passage in the fifth edition of Joseph Story’s *Treatise on Constitutional Law*, which provides:

It should be observed of the terms, “life,” “liberty,” and “property,” that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. The limbs are equally

²⁰⁵ *Schaefer*, 251 U.S. at 474–75.

²⁰⁶ 262 U.S. 390 (1923).

²⁰⁷ *Id.* at 399–400.

protected with the life; the right to the pursuit of happiness in any legitimate calling or occupation is as much guaranteed as the right to go at large and move about from place to place. . . . The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right. The word we employ to comprehend the whole is not, therefore, a mere shield to personal liberty, but to civil liberty, and to political liberty also so far as it has been conferred and is possessed. It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom of religious worship, the right of self-defence against unlawful violence, the right freely to buy and sell as others may, or the right in the public schools, found no protection here . . . The word . . . embraces all our liberties—personal, civil, and political. None of them are to be taken away, except in accordance with established principles.²⁰⁸

This passage was written by Thomas Cooley after the Civil War and the ratification of the Fourteenth Amendment.²⁰⁹ Although the text explicitly references freedom of speech, it does so in the context of a highly general and libertarian account of personal liberty, one resting on “the right to the pursuit of happiness in any legitimate calling.”²¹⁰

It is notable that even Holmes in his dissent agreed that the Fourteenth Amendment protected freedom of speech. Although Holmes had refused to join Brandeis’s speculations in *Gilbert* that there existed federal constitutional free speech rights enforceable against States,²¹¹ Holmes was now, along with Brandeis, prepared to acknowledge “[t]he general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.”²¹² Given the fierce and unrelenting campaign that both Holmes and Brandeis had heretofore

²⁰⁸ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1950, at 697–98 (5th ed., Melville M. Bigelow ed., 1891).

²⁰⁹ *Id.* at 676.

²¹⁰ This passage was cited to the Court in the Brief of Gitlow’s attorneys. Brief for Plaintiff-in-Error at 13–14, *Gitlow* (No. 770) (October Term 1922).

²¹¹ *Gilbert*, 254 U.S. at 334. See Philippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 688–89 (2007).

²¹² *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting).

waged against the expansion of Fourteenth Amendment due process liberty interests, this was a significant concession.²¹³

In toting up “a profit and loss account of the *Gitlow* case,” Zechariah Chafee in *The New Republic* counted the inclusion of free speech rights into the liberty interests protected by the Fourteenth Amendment as “one new gain.”²¹⁴ “The possibility of federal protection against state suppression,” he explained, “may prevent a checker-board nation, with ultra-conservative states into which moderately radical Americans come at peril of imprisonment for sedition.”²¹⁵ But Chafee set against that gain the extraordinarily lax interpretation of freedom of speech contained in Sanford’s majority opinion. “Without the danger test, freedom of speech means little more than the right to say what a considerable number of citizens regard as sound, which consequently is not likely to be prosecuted. For novel and unpopular ideas, where alone it is really needed, it seems no longer to exist as a legal right.”²¹⁶

X. FREEDOM OF SPEECH AND THE DUE PROCESS CLAUSE

The eminent legal historian Charles Warren was alarmed by the casual and unexplained way in which *Gitlow* “expanded the meaning of one word” in the Due Process Clause of the Fourteenth Amendment.²¹⁷ “No one who read Judge Sanford’s opinion would imagine that, for over fifty years, counsel had, time and again, attempted to get the Court to hold that rights similar to the right of freedom of

²¹³ See Ben Ely, Jr., *Federal Constitutional Limitations on Searches by State Authority*, 12 ST. LOUIS L. REV. 161, 167–68 (1927). Two years later, Brandeis (joined by Holmes) reaffirmed the concession: “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. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.” *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

²¹⁴ Chafee, *supra* note 75, at 142.

²¹⁵ *Id.* *Gitlow* was celebrated precisely for its “nationalization of civil liberty.” Harold M. Bowman, *The Supreme Court’s Part in the Building of the Nation*, 11 B.U. L. REV. 445, 477 (1931).

²¹⁶ Chafee, *supra* note 75, at 142.

²¹⁷ Charles Warren, *The New Liberty Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 432 (1926).

speech were protected by the Fourteenth Amendment against infringement by State legislation, and that in every instance the Court had declined so to hold.”²¹⁸

Warren noted that “there seems to be little question that, under the common law, the word ‘liberty’ meant simply ‘liberty of the person,’ or, in other words, ‘the right to have one’s person free from physical restraint.’”²¹⁹ It was not until 1897, in *Allgeyer v. Louisiana*,²²⁰ that the Court began to interpret “liberty” in the ample way advocated by Thomas Cooley and expatiated in *Meyer v. Nebraska*.²²¹ In the context of the Taft Court’s ferocious revival of *Lochnerism*,²²² Warren feared that *Gitlow*’s facile and capacious expansion of the Fourteenth Amendment could produce “a tremendous engine for attack on State legislation—an engine which could not have been conceived possible by the framers of the first Ten Amendments or by the framers of the Fourteenth Amendment itself.”²²³

It is worth asking, therefore, why the Court was prepared to take the momentous step of reading freedom of speech into the liberty protected by the Fourteenth Amendment Due Process Clause. In their brief to the Court, *Gitlow*’s brilliant ACLU attorneys, Walter H. Pollak and Walter Nelles, appealed to the reasoning of *Twining v. New Jersey*,²²⁴ which held that the Due Process Clause should be interpreted to protect only those interests that involved “a fundamental principle of lib-

²¹⁸ *Id.* at 432–33.

²¹⁹ *Id.* at 440.

²²⁰ 165 U.S. 578 (1897).

²²¹ Warren believed that “it is clear that the Court” in *Allgeyer* “departed from the original definition of ‘liberty’ which prevailed in 1789, and which had been the definition adopted by the State Courts prior to 1868.” Warren, *supra* note 217, at 449. He asserted that “it is clear that ‘liberty,’ as now defined, was never a ‘fundamental right long recognized under the common law system.’” *Id.* at 453.

²²² For a discussion, see POST, *supra* note 14, at 681–83. “Symbolizing the decade’s pro-business orientation, the Taft Court invalidated state and federal regulatory laws in greater numbers and more frequently than any previous Court.” EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 21–22 (2000).

²²³ Warren, *supra* note 217, at 462.

²²⁴ 211 U.S. 78 (1908); Brief for Plaintiff-in-Error at 18, *Gitlow* (No. 770) (October Term 1922).

erty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government.”²²⁵ “With respect to freedom of opinion and expression on matters of public concern,” Pollak and Nelles argued, there was “only one” possible answer to the question of whether freedom of speech satisfies the criterion of *Twining*.²²⁶ That is because “public opinion is our final authority, and public opinion, to be sound, must take account of every doctrine and advocacy at large in the community, not merely of selected premises.”²²⁷ Hence the “right of free expression, more than any other, lies at the base of government by the people.”²²⁸

It is easy to see why this reasoning might have been attractive to Holmes and Brandeis. But its appeal to the other Justices on the Court is far less plain. Indeed, this rationale for making free speech a fundamental liberty interest seems plainly inconsistent with the abject deference *Gitlow* holds is appropriate for ascertaining the reach of free speech rights.²²⁹ *Gitlow* requires such comprehensive deference that it raises the question of why the Court even bothered to incorporate freedom of speech into Fourteenth Amendment liberty. Sanford and the Court were plainly not driven by the urgent need to protect free speech as necessary for democracy.

If *Gitlow*’s holding does not flow from a commitment specifically to freedom of speech, it seems most plausible to conclude that it derives instead from a commitment to the Due Process Clause. Since the late 19th Century, the Court had embarked on a long-term campaign to expand the “rights which are covered by the word ‘liberty,’ as contained in the fourteenth amendment.”²³⁰ The object was to

²²⁵ *Twining*, 211 U.S. at 106.

²²⁶ Brief for Plaintiff-in-Error at 18, *Gitlow* (No. 770) (October Term 1922).

²²⁷ *Id.* at 103.

²²⁸ *Id.* The brief continued: “Before that right can be impaired a very compelling public necessity indeed must be shown. . . . [I]f that freedom be curtailed, the democratic processes by which free government is secured will be impaired. . . . Harm speculative and remote cannot out-weight it. Yet such is the theory of the statute before the Court.” *Id.* at 103–04.

²²⁹ See *supra* note 228. The Court itself referred to *Gitlow*’s brief only to say: “We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant’s brief. These are so unlike the present statute, that we think the decisions under them cast no helpful light upon the questions here.” *Gitlow*, 268 U.S. at 672.

²³⁰ *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897).

define Due Process Clause liberty interests as comprehensively embracing “the right of the citizen to be free in the enjoyment of all his faculties.”²³¹ By expanding the meaning of “liberty” in the Due Process Clause, the Court correspondingly enlarged the scope of its control over state legislation, which was no doubt useful at a time when the Court was vigorously reviving its commitment to *Lochner*.²³² The shrewd, strategic, and deeply conservative²³³ Van Devanter was surely aware that the Fourteenth Amendment holding of *Gitlow* carried this implication. *Gitlow*’s approach might well have altered the judgment of the Court in the *Prudential* case, for example, in which both Van Devanter and McReynolds had dissented.²³⁴

In light of current constitutional debates, it is relevant to note that *Gitlow*’s interpretation of liberty in the Due Process Clause has nothing to do with what is now denominated the method of “history and tradition.”²³⁵ *Gitlow* does not purport to determine whether freedom of speech is “an essential component of what we have

²³¹ *Id.* at 589.

²³² See *supra* note 222. Many contemporaries interpreted *Gitlow* in this way. See, e.g., Hall, *supra* note 139, at 810–11: “Whatever may have been the original conception of ‘liberty’ in our due process clauses, it was practically inevitable that some freedom of speech should be included within it after the unanimous statement of the Supreme Court in *Allgeyer v. Louisiana* that it ‘embraced the right of the citizen to be free in the enjoyment of his faculties.’”; Note, *supra* note 141, at 166–67 (cleaned up): “The court, then, without so holding, assumed freedom of speech to be covered by the Fourteenth Amendment. Although the question was left open in the cases of *Fox v. Washington* and *Gilbert v. Minnesota*, there is, owing to the scope the court has given to the word ‘liberty,’ little doubt that free speech will be held to be covered by it. ‘Liberty’ as used in the Fourteenth Amendment has been repeatedly held to include freedom to contract. It has been held to include the right to carry on a business and to earn a livelihood free from unreasonable interference by the state, and also the right of a teacher to carry on his vocation of teaching German.” See also John Raeburn Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U. L.Q. 497, 505–08 (1942) (“It was not until after *Lochner v. New York* that the claim was made that freedom of expression, or any of the other rights guaranteed by the Bill of Rights, were included in the ‘liberty’ protected by the Fourteenth Amendment.”); Turley, *supra* note 15, at 11 (“[I]t was the protection afforded certain economic interests and not civil rights that led the Court, however reluctantly, to accept freedom of speech as similarly protected.”).

²³³ Harlan Stone would later characterize Van Devanter as “the commander-in-chief of judicial reaction.” Quoted in M. Paul Holsinger, *Mr. Justice Van Devanter and the New Deal: A Note*, 31 THE HISTORIAN 57, 58 n.3 (Nov. 1, 1968).

²³⁴ See *supra* note 118.

²³⁵ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 234 (2022).

described as ‘ordered liberty.’”²³⁶ *Gitlow* does not ask whether free speech is among the “fundamental rights of American citizenship,”²³⁷ or whether courts had a history and tradition of protecting free speech rights, which most certainly they did not.²³⁸ *Gitlow*’s casual conclusion seems instead to be simply an outgrowth of the libertarian premises of *Adkins*, which only three days before *Gitlow*’s first argument had asserted that “freedom of contract is . . . the general rule and restraint the exception.”²³⁹ Several of the authorities cited in Sanford’s footnote, like *Coppage*, *Meyer* and *Thomas Cooley*, explicitly express exactly this form of thinking.

XI. HOLMES, FREEDOM OF SPEECH, AND POSITIVISM

In sharp contrast to Sanford and the majority of the Court, Justices Holmes and Brandeis approved interpolating freedom of speech into the “liberty” protected by the Fourteenth Amendment primarily because they cared about the substance of freedom of speech. Brandeis, as we have seen, had wrestled explicitly with this problem in 1920 in *Gilbert*.²⁴⁰ But Holmes had then refused to join Brandeis’s assertion that freedom of speech applied as against state regulation.

This refusal may explain why Holmes’s vote to reverse the New York Court of Appeals is marked in Butler’s docket book in *Gitlow* as “*In dubitante*.” It is most probable that in November 1923 Holmes was still somewhat uncertain about whether he could countenance expanding the meaning of “liberty” in the Fourteenth Amendment Due Process Clause to include substantive rights of free speech. We know that as late as July 1923, *after* the first argument in *Gitlow*, Holmes remained opposed to reading free speech rights into the Fourteenth Amendment. At that time, Brandeis reported to Frankfurter that Holmes “doesn’t want to extend XIV” even in the context of freedom of speech.²⁴¹

²³⁶ *Id.*

²³⁷ Stephen E. Sachs, Dobbs and the Originalists, 47 HARV. J. L. & PUB. POL. 539, 551 (2024).

²³⁸ “The overwhelming majority of prewar decisions in all jurisdictions rejected free speech claims, often by ignoring their existence.” David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 523 (1981).

²³⁹ *Adkins v. Children’s Hospital*, 261 U.S. 525, 546 (1923).

²⁴⁰ See *supra* text at notes 191–195.

²⁴¹ Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 320; text at *infra* note 283.

With regard to the substance of free speech rights, however, both Holmes and Brandeis agreed that such rights could be abridged only by a clear and present danger. The application of the clear and present danger test required close judicial supervision over state constraints on speech. Yet this kind of rigorous scrutiny differed sharply from how Holmes and Brandeis believed that courts should review deprivations of “liberty” in the context of ordinary social and economic regulations.²⁴² Dissenting in *Lochner*,²⁴³ for example, Holmes was clear that “the word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”²⁴⁴ An important question, therefore, is why Holmes and Brandeis, who believed in extreme deference when courts used the Due Process Clause to review social and economic legislation, should advocate for a form of elevated judicial scrutiny when courts used the Clause to review restrictions on speech.

The usual explanation focuses on Holmes’s dissent in *Abrams*, with its famous passage about the marketplace of ideas: “[W]hen 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.”²⁴⁵ Because this passage appeals to the importance of “truth,” it is usually construed in an epistemological register.²⁴⁶ Holmes is inter-

²⁴² On this tension, see Rogat & Fallon, *supra* note 163, at 1399–1401.

²⁴³ *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

²⁴⁴ *Id.* at 76. Brandeis was explicit that in such contexts “My views in regard to the constitution are . . . very much those of Mr. Justice Holmes.” Louis D. Brandeis to Thomas Watt Gregory (Apr. 14, 1916), in 4 LETTERS OF LOUIS D. BRANDEIS 165 (Melvin I. Urofsky & David W. Levy eds., 1975).

²⁴⁵ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁴⁶ EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 427 (1995) (discussing the early interpretation of Zechariah Chafee).

preted as advocating for “free trade in ideas” because “truth” is necessary for responsible human action, and because the test of truth is its acceptance “in the competition of the market.”²⁴⁷

The problem with this interpretation of Holmes’s *Abrams* dissent is that it rests on an extraordinarily crude and unconvincing epistemology. Popular opinion does not determine truth in the context of many different kinds of claims to knowledge. We would not take a poll on the internet to determine whether the earth was created in six days or whether COVID-19 vaccines will make your bones glow. If we want to know whether man-made global warming exists, or whether nicotine causes cancer, we need to appeal to forms of disciplinary expertise that are quite distinct from any simple popular marketplace of ideas.²⁴⁸ As Thomas Kuhn once observed, “One of the strongest, if still unwritten, rules of scientific life is the prohibition of appeals to heads of state or to the populace at large in matters scientific.”²⁴⁹

It is the case that Holmes sometimes used the word “truth” in ways that we might now find puzzling. So, for example, Holmes once wrote: “I used to say, when I was young, that truth was the majority vote of that nation that could lick all others. Certainly we may expect that the received opinion about the present war will depend a good deal upon which side wins Our test of truth is a reference to either a present or an imagined future majority in favor of our view.”²⁵⁰ As this passage

²⁴⁷ The reasoning is typically connected to John Stuart Mill’s arguments in *On Liberty*. See, e.g., LENDLER, *supra* note 7, at 103–04; David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 885 (1986); David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 136–37, 188 (1982). As Zechariah Chafee put it in 1924, “Knowledge is not a series of propositions to be absorbed, but a series of problems to be solved. Or rather I should say, to be partly solved, for all the answers are incomplete and tentative.” CHAFEE, *supra* note 75, at 3.

²⁴⁸ For a discussion, see ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 27–60 (2012). Expert knowledge requires academic freedom, which differs fundamentally from the marketplace of ideas protected by the First Amendment. See *id.* at 61–93; Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* (Lee C. Bollinger and Geoffrey R. Stone eds., 2019); Robert Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530 (2015).

²⁴⁹ THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 168 (2d ed., 1970).

²⁵⁰ Oliver Wendell Holmes, Jr., *Natural Law*, in OLIVER WENDELL HOLMES, JR., *COLLECTED LEGAL PAPERS* 310 (1920). See White, *supra* note 128, at 339–40.

suggests, Holmes would at times use the word “truth” to refer to what we might now call large political ideologies, rather than to what we would deem actual questions of knowledge.²⁵¹ It is highly doubtful that Holmes would have thought that the number of votes that Lincoln received in 1864, which is a matter of fact that is either true or false, would depend on which side won the Civil War.

Today we are inclined to use the word “truth” to refer to claims of fact or of knowledge, rather than to assertions of opinion and ideology. Holmes himself, in other contexts, was perfectly willing to acknowledge that an opinion is the mere “expression of a judgment” and that such judgments are “not capable of proof as to their falsity.”²⁵² If opinions cannot be proved to be false, it makes little sense to assert that they can nevertheless be shown to be true. What makes Holmes’ *Abrams* dissent so confusing is Holmes’ capacious and rhetorical use of the word “truth,” as is evidenced by the fact that Holmes is explicit that he is “speaking only of expressions of opinions and exhortations.”²⁵³

Given that “opinions and exhortations” cannot strictly speaking be either true or false, it might perhaps make most sense to interpret Holmes’ use of the term “truth” to refer to the processes by which opinions acquire social authority.²⁵⁴ If we

²⁵¹ Compare Chafee, *supra* note 247.

²⁵² *Pierce v. United States*, 252 U.S. 239, 266–67 (1920) (Brandeis, J., dissenting). Holmes joined this Brandeis dissent. On the constitutional difference between facts and opinions, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 649–66 (1990).

²⁵³ *Abrams*, 250 U.S. at 631 (Holmes, J., dissenting).

²⁵⁴ Two years after *Gitlow*, in his *Whitney* concurrence, Brandeis refused to use the simple term “truth” to describe the purpose of freedom of speech. Instead, tipping his hat to Holmes’s *Abrams* dissent but nevertheless fastidiously maintaining his own intellectual precision, Brandeis asserted that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of *political truth*.” *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (emphasis added). We know that Brandeis believed that opinions were neither true nor false, *Pierce v. United States*, 252 U.S. 239, 266–67 (1920) (Brandeis, J., dissenting), and so he apparently coined the odd and opaque phrase “political truth” to obliquely remove misleading epistemological concerns from First Amendment doctrine. Nearly half a century later, Robert Bork explicitly glossed the phrase “political truth” to refer to authoritative opinion. “Political truth,” Bork said, “is what the majority decides it wants.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 30–31 (1971).

ask why such processes might be *constitutionally* important to Holmes, we can immediately see a close and fascinating connection to the jurisprudence of positivism that he was so influential in pioneering.²⁵⁵ Holmes “pushed American legal thought into the twentieth century” by insisting “on a sharp distinction between law and morals.”²⁵⁶ Holmes envisioned society as the scene of existential struggle among groups competing for power and influence.²⁵⁷ Law deflected this struggle by providing a peaceful avenue for “orderly change.”²⁵⁸ Law channeled a vicious Darwinian battle among antagonistic social interests into a structured competition for control of legislation. Legislatures were the “mouthpiece”²⁵⁹ of the state because they were designed to reflect “the will of the dominant forces of the community.”²⁶⁰ Holmesian positivism held that legislation was authoritative precisely because it was the presumptive expression of this will.²⁶¹ The essential contribution of Holmesian positivism was that courts were obliged accurately and faithfully to enforce such legislation.²⁶²

²⁵⁵ See Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951).

²⁵⁶ Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 67–69 (Robert W. Gordon ed., 1922).

²⁵⁷ For a discussion, see POST, *supra* note 16, at 168–72.

²⁵⁸ Oliver Wendell Holmes, Jr., *Law and the Court*, in COLLECTED LEGAL PAPERS, *supra* note 250, at 294–95.

²⁵⁹ *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398, 404 (1907).

²⁶⁰ Oliver Wendell Holmes, Jr. to Felix Frankfurter (Mar. 24, 1914), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1914, at 19 (Robert M. Mennell & Christine L. Compston eds., 1996). See Vincent A. Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 30. Hence Holmes spoke of the “the right of a majority to embody their opinions in law.” *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

²⁶¹ “What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community,” Holmes asked, “that is, conformity to the wishes of the dominant power? . . . [T]he proximate test of a good government is the dominant power has its way.” Oliver Wendell Holmes, Jr., *Montesquieu*, in COLLECTED LEGAL PAPERS, *supra* note 250, at 258. “The only excellence of law,” Holmes wrote a friend, “is that it expresses the beliefs and wishes of the dominant force of the community.” Oliver Wendell Holmes, Jr. to Alice Stopford Green (July 11, 1905) (Holmes papers).

²⁶² Holmes wrote his friend Laski stating the true function of a court was to be “a voice of the sovereign power.” Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 4, 1920), in HOLMES-LASKI LETTERS, *supra* note 114, at 248. As Holmes once jokingly said, his tombstone ought to be engraved

Underlying Holmesian positivism, therefore, lay the assumption that legislatures ought to channel and express “the actual equilibrium of force in the community.”²⁶³ This assumption not only grounded the authority of positive law, but also served to promote the stability of the legal system. If legislation failed to express the will of the dominant force in the community, the winners in the Darwinian struggle of competing social interests might find other ways to implement their wishes. They might be tempted to seek recourse in violence outside of law.

What Holmes apparently came to realize in his *Abrams* dissent is that legislatures could accurately register dominant social opinion only if public opinion could freely be formed.²⁶⁴ The significance of freedom of speech is thus that “fighting faiths”²⁶⁵ are given free rein to struggle for acceptance.

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . 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.²⁶⁶

Underlying Holmes’s dissent in *Abrams*, in other words, lay the thought that legislation could not express “the actual equilibrium of force in the community” if the full range of opinions in a society were not tolerated.²⁶⁷ It is thus noteworthy that in his *Gitlow* dissent six years later Holmes does not mention truth. He does not use the inflated rhetoric that he had deployed in his *Abrams* dissent. He instead

with the epitaph: “Here lies the supple tool of power.” CHARLES EVANS HUGHES, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 175 (David J. Danelski & Joseph S. Tulchin eds., 1973). Building on the premises of common law adjudication, conservatives on the Court during Holmes’s tenure believed, contrary to the tenets of Holmesian positivism, that judges were obligated independently to assess the dominant sentiments of the community. Such assessments could consist of inquiries into tradition and custom or instead into the prerequisites of economic growth and prosperity. See POST, *supra* note 16, at xxvii–xxix, 168–71.

²⁶³ Oliver Wendell Holmes, Jr., *Montesquieu*, *supra* note 261, at 258.

²⁶⁴ Blasi, *supra* note 260, at 31–33.

²⁶⁵ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁶⁶ *Id.*

²⁶⁷ Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 684–95 (2011); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 501 (1994).

asserts that “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”²⁶⁸ By the time of *Gitlow*, Holmes was prepared precisely to assert that the “meaning of free speech” does not ultimately cash out in truth, but instead in maintaining a necessary correspondence between law and the “dominant forces” in a community.²⁶⁹ For Holmes the value of speech lay in the “power of the thought to get itself accepted.”²⁷⁰

On this account, then, Holmes insisted on close judicial review of legislation impairing freedom of speech, even if that review was applied through the Due Process Clause of the Fourteenth Amendment, so that political processes could continue accurately to register the dominant views of the community. The need for this kind of marketplace of ideas was equally compelling for both state and federal governments. Freedom of speech ensured that both state and federal legislation could represent the actual views of the true sovereign—the “wishes of the dominant power.”²⁷¹ Society required strict protections for freedom of speech so that positive law, whether federal or state, could continue to offer a stable alternative to violence.

XII. BRANDEIS, FREEDOM OF SPEECH, AND DEMOCRACY

Although Holmes and Brandeis each supported strong judicial protections for freedom of speech, they did so for entirely different reasons. Holmes held a deeply cynical view of human nature. He had lived through the unspeakable violence of the Civil War, in which he was three times wounded,²⁷² and he thereafter tended to view human society in the manner of Thomas Hobbes, as a scene of existential

²⁶⁸ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

²⁶⁹ Holmes determination to maintain this correspondence is sometimes interpreted as a commitment to democracy. See, e.g., Thomas C. Grey, *The Colin Raugh Thomas O’Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 524–25, 534, 538 (1992). But, as the contrast to Brandeis makes clear, see *infra* notes 276–287, this interpretation is not convincing, at least with respect to any normatively robust account of democracy. It is more plausible to imagine that Holmes was instead primarily committed to maintaining the authority of positive law.

²⁷⁰ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added). I am grateful to Vince Blasi for this observation.

²⁷¹ Oliver Wendell Holmes, Jr. to Felix Frankfurter (Mar. 24, 1914), *supra* note 260.

²⁷² POST, *supra* note 16, at 163–64.

struggle. “When two crowds determinately wish to make different kinds of a world,” Holmes said, “if they come in contact I don’t see what there is to do but to fight.”²⁷³ This attitude left Holmes not only with a deep and abiding skepticism, but also without any clear idea of human flourishing. “I look at men through Malthus’s glasses,” he once commented to a friend, “as like flies—here swept away by a pestilence—there multiplying unduly and paying for it.”²⁷⁴ The “orderly” processes of law kept the perpetual threat of Armageddon at bay.

But Brandeis held an entirely different view of human nature.²⁷⁵ He was, as Harold Laski once remarked, a “romantic” individualist.²⁷⁶ Brandeis believed that the perfection and expression of individual autonomy were essential to human flourishing, that society owed to all persons the conditions that would allow for such flourishing, and that democracy was the only form of government consistent with such flourishing. After Holmes’s 1919 dissent in *Abrams*, Brandeis became convinced that freedom of speech was necessary for democracy.²⁷⁷ Brandeis thus observed in his 1920 dissent in *Pierce v. United States*:

²⁷³ Oliver Wendell Holmes, Jr. to Harold Laski (Oct. 24, 1930), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD LASKI, 1916–1935, at 1291–92 (Mark DeWolfe Howe ed., 1963). “Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way.” Oliver Wendell Holmes, Jr., *Natural Law*, *supra* note 250, at 311–12. “I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between groups that want to make inconsistent kinds of world I see no remedy except force.” Oliver Wendell Holmes, Jr. to Frederick Pollock (Feb. 1, 1920) in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932 at 36 (Mark DeWolfe Howe ed., 1942).

²⁷⁴ Oliver Wendell Holmes, Jr. to Harold Laski (July 23, 1925), in HOLMES-LASKI LETTERS, *supra* note 114, at 762.

²⁷⁵ For an extended discussion, see POST, *supra* note 16, at 295–372.

²⁷⁶ Harold Laski to Oliver Wendell Holmes, Jr. (Aug. 12, 1933), in HOLMES-LASKI LETTERS, *supra* note 273, at 1448.

²⁷⁷ As Brandeis told Felix Frankfurter on August 8, 1923:

I have never been quite happy about my concurrence in *Debs* and *Schenk* cases. I had not then thought the issues of freedom of speech out—I thought at the subject, not through it. Not until I came to write the *Pierce* [&] *Schaefer* cases did I understand it. I would have placed the *Debs* case on the war power—instead of taking Holmes’ line about “clear and

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language.”²⁷⁸

To repress such speech, Brandeis said in his dissent in *Schaefer v. United States*,²⁷⁹ was to “threaten freedom of thought and of belief.”²⁸⁰

Nine months later, Brandeis knitted these themes together in his truly path-breaking dissent in *Gilbert v. Minnesota*:

The right to speak freely concerning functions of the federal government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a state was powerless to curtail. . . . The right of a citizen of the United States to take part, for his own or the country’s benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril. There are times when those charged with the responsibility of government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative;

present danger.” Put it frankly on war power . . . and then the scope of espionage legislation would be confined to war. But in peace the protection against restrictions of freedom of speech would be unabated. You might as well recognize that during a war—F.F.: All bets are off.

LDB: Yes, all bets are off. But we would have a clear line to go on. I didn’t know enough in the early cases to put it on that ground. . . .

But in *Schaefer* & *Pierce* cases I made up my mind I would put it all out, let the future know what we weren’t allowed to say in the days of the war and following.

Urofsky, *supra* note 241, at 323–24.

²⁷⁸ 252 U.S. 239, 273 (1920) (Brandeis, J., dissenting).

²⁷⁹ 251 U.S. 466 (1920).

²⁸⁰ *Id.* at 495 (Brandeis, J., dissenting).

because the emergency does not permit reliance upon the slower conquest of error by truth. And in such emergencies the power to suppress exists.²⁸¹

Like Holmes, Brandeis conceived the function of freedom of speech as protecting a structure of communication that must remain in perennial flux. But whereas for Holmes the purpose of this ever-evolving structure was to keep open pathways through which dominant forces in the community could control the state, for Brandeis the structure was instead necessary to maintain democracy, which was the only way to reconcile the individual autonomy of citizens and the requirements of collective governance. As Brandeis would later say in his *Whitney* concurrence, “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.”²⁸²

In a well-functioning democracy, individual citizens render government compulsion consistent with their own autonomy by striving to ensure that government remain responsive to their own understandings of the good life. Democracy thus requires citizens perpetually to participate in the formation of a public opinion to which government must continuously be held accountable. This constant effort to reconcile individual and collective autonomy underwrites the “harmony” celebrated by Brandeis in his *Gilbert* dissent.

Participation in public discourse was therefore for Brandeis a “duty” because without such participation government power would collapse into the brute exercise of heteronomous force. By contrast, Holmes had no conceptual apparatus that could plausibly characterize participation in public discourse as a “duty.” Freedom of speech was, for Holmes, simply the mechanism through which those who had power ensured that society would respond to it. Holmes was not committed to any concept of individual human flourishing that freedom of speech might independently serve.

Frankfurter recounts at length a fascinating discussion with Brandeis that occurred on July 19, 1923:

Long talk on scope of due process as to freedom of speech and foreign language cases. Agreed.

²⁸¹ 254 U.S. 325, 337–38 (1920) (Brandeis, J., dissenting).

²⁸² *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

1. d.p. should be restricted to procedural regularity, &
2. In favor of repeal, but
3. While it is, *must* be applied to substantive laws & so as to things

that are fundamental

Right to speech.

" " education.

" " choice of profession

" " to locomotion.

are such fundamental rights not to be impaired or withdrawn except as judged by "clear and present danger" test. Holmes says doesn't want to extend XIV. L.D.B. says it means-- you are going to cut down freedom through striking down regulation of property but not give protection. Property, it is absurd as Holmes says, to deem fundamental in the sense that you can't curtail its use or its accumulation or power. There may be some aspects of property that are fundamental--but not regard as fundamental specific limitations upon it. Whereas right to your education & to utter speech is fundamental *except* clear and present danger.²⁸³

This conversation occurred a month after the Court decided *Meyer v. Nebraska*,²⁸⁴ in which the Court used the liberty interest in the Fourteenth Amendment's Due Process Clause to strike down a state statute prohibiting the teaching of foreign languages before the eighth grade.²⁸⁵ It is noteworthy that whereas Brandeis joined the Court's opinion in *Meyer*, no doubt for the reasons he articulated in his conversation with Frankfurter, Holmes dissented.²⁸⁶ For Brandeis, who was an "implacable democrat,"²⁸⁷ the task of courts was constitutionally to protect the rights necessary for a well-functioning democracy, which he deemed "fundamental." Holmes experienced no such obligation.²⁸⁸

Rights typically existed for Holmes when they were enshrined in positive law. First Amendment rights against the federal government were significant because

²⁸³ Urofsky, *supra* note 241, at 320.

²⁸⁴ 262 U.S. 390 (1923).

²⁸⁵ See *supra* text at note 207. For a discussion, see POST, *supra* note 14, at 827–30.

²⁸⁶ *Meyer*, 262 U.S. at 403.

²⁸⁷ Strum, *supra* note 211, at 704.

²⁸⁸ "Meyer was a watershed," Gerald Gunther writes, because it split the progressive community. "Hand and Frankfurter quickly embraced Holmes's position," whereas Lippmann followed Brandeis. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 377 (1994). For a discussion, see POST, *supra* note 14, at 829, 853–54.

they were set out in an explicit text. But the “general words”²⁸⁹ of the Fourteenth Amendment contained no such text, and Holmes believed that it was “one of the greatest dangers to our system of giving the last word to the judges” that there existed a “tendency to read into the fundamental instrument one’s own economic and social views, when the words don’t require it.”²⁹⁰

It seems most likely, then, that Holmes did not come to agree with Brandeis’s position that free speech rights were necessary to assert against all governments, state and federal, until he had also become convinced that freedom of speech was a necessary precondition for the legitimacy of positive law itself. Holmes’s late and reluctant change of heart illustrates how even the most rigorous of positivists must ultimately interpret texts by invoking a purposive account of law.

XIII. WHAT POSITIVISM CAN LEARN FROM *GITLOW*

Gitlow lies at the intersection of at least three distinct jurisprudential currents. For Sanford and the majority, freedom of speech appears to have had no special significance. It was merely an aspect of the general liberty of persons that courts were empowered to protect under the generic umbrella of Due Process “liberty.” The Court majority most likely included free speech under Fourteenth Amendment liberty to enlarge the realm of judicial control over wayward legislatures.

For Holmes, by contrast, freedom of speech was necessary to sustain the legitimacy of positive law. Law could express the ever-shifting views of dominant community members only if there were a true marketplace of ideas.

For Brandeis, freedom of speech served the quite different purpose of sustaining democracy. Brandeis was concerned to maintain a realm of individual and collective freedom in which “deliberative forces” substituted for “the arbitrary” violence of state power.²⁹¹ Democracy was for Brandeis the great *telos* of the American

²⁸⁹ Oliver Wendell Holmes, Jr. to Franklin Ford (Jan. 13, 1911), in *PROGRESSIVE MASKS: LETTERS OF OLIVER WENDELL HOLMES, JR. AND FRANKLIN FORD* 83 (David H. Burton ed., 1982).

²⁹⁰ Oliver Wendell Holmes, Jr. to Alice Stopford Green (July 11, 1905) (Holmes papers).

²⁹¹ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

state: “[W]e must bear in mind all the time . . . that the United States is a democracy,”²⁹² he said. “We Americans are committed primarily to democracy.”²⁹³

These three views happened to converge on the conclusion that freedom of speech ought to be protected by the due process of law guaranteed by the Fourteenth Amendment. But because the majority of the Court in *Gitlow* had no particular account of the distinct purpose or value of free speech, Sanford’s opinion expresses only an insufficient and untheorized account of the substance of freedom of speech. Contemporary First Amendment doctrine has instead evolved from the perspective of Brandeis.

For the past ninety years, the Court has protected First Amendment rights primarily because “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”²⁹⁴ This perspective has led to the conclusion that advocacy of illegal conduct is constitutionally permissible unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁹⁵ Modern First Amendment doctrine is designed to assure that we remain a democracy in which to the greatest possible degree “authority . . . is to be controlled by public opinion, not public opinion by authority.”²⁹⁶

Our classic First Amendment tradition²⁹⁷ represents the profound legacy of Brandeis. No Justice before him had ever sought to derive “fundamental” constitutional rights from the distinct values of democratic self-government.²⁹⁸ But Brandeis did not write in *Gitlow*, and the roots of modern First Amendment doctrine therefore trace back to Brandeis’s concurrence in *Whitney*, which beautifully

²⁹² THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 73 (Osmond K. Fraenkel ed., 1934).

²⁹³ *Id.*

²⁹⁴ *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

²⁹⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁹⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

²⁹⁷ For a discussion of this tradition, see Post, *The Classic First Amendment Tradition*, *supra* note 248, at 106–08.

²⁹⁸ POST, *supra* note 16, at 312–15, 320–21.

and eloquently explains his interpretation of fundamental free speech principles. It is a question, therefore, how the Court's enigmatic opinions in *Gitlow* might speak to contemporary constitutional issues.

What is most striking about modern constitutional thinking is that some theorists now seek to repudiate our Brandeisian tradition and instead to revive the austere positivism of Holmes. These theorists seem to believe that the content of law should be determined not by purposes or values (like democracy)²⁹⁹ but by facts³⁰⁰—the facts of history and tradition,³⁰¹ or the facts of original public meaning,³⁰² or the facts of past practices.³⁰³ Thus in the recent case of *Vidal v. Elster*,³⁰⁴ Justice Thomas, speaking for Chief Justice Roberts and Justices Alito, Gorsuch, and

²⁹⁹ On the nature of democracy as a value instead of a fact, see Robert Post, *Between Democracy and Community: The Legal Constitution of Social Form*, NOMOS XXXV: DEMOCRATIC COMMUNITY 163 (John W. Chapman & Ian Shapiro eds., 1993).

³⁰⁰ See, e.g., Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 B.Y.U. L. REV. 401, 405 (2021). On the relationship between positivism and facts, see RONALD DWORKIN, *LAW'S EMPIRE* 7 (1986) (Positivism holds that "law exists as a plain fact"). See *id.* at 31–34.

³⁰¹ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 234 (2022). See Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL'Y (2023).

³⁰² Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 278 (2017); Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 241, 248 (2020). Randy Barnett has claimed that "the New Originalism . . . seeks to establish an empirical fact about the objective meaning of the text at a particular point in time." Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 415 (2013). In Barnett's view, originalism does not turn on "normative" considerations, but seeks to settle constitutional questions on the basis of "empirical inquiry." *Id.*

³⁰³ William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1459 (2019).

³⁰⁴ 602 U.S. 286 (2024).

Kavanaugh, sought to determine the proper application of First Amendment doctrine to trademark law by adducing positive facts of “history and tradition”³⁰⁵ rather than by substantively analyzing “the purpose of trademark law”³⁰⁶ in the context of the public discourse that Brandeis taught long ago was required by democracy.³⁰⁷

In such circumstances, *Gitlow* does indeed offer a lesson for modern scholars and judges. *Gitlow* illustrates that the great progenitor of American positivism, Oliver Wendell Holmes, Jr., understood full well that positive law itself requires justification. Holmes believed that positive law was necessary because it allowed dominant members of the community to exercise their true sovereignty. But positive law could serve this function only in the context of a well-functioning marketplace of ideas. That is why Holmes came to agree with Brandeis that freedom of speech ought to be protected by the Fourteenth Amendment.

Not even Holmes, the inventor and most rigorous practitioner of positivism in the history of American jurisprudence, was prepared to interpret the Fourteenth Amendment Due Process Clause merely in the light of simple facts, whether those of text or of history or of traditional practices.³⁰⁸ Holmes instead interpreted the

³⁰⁵ *Id.* at 301.

³⁰⁶ *Id.* at 308.

³⁰⁷ The Court has recently flirted with a similar positivism that is narrowly focused on the mere facts of history and tradition in the context of Second Amendment rights, see *New York Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), a flirtation that received an abrupt check in *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (Second Amendment rights are not “trapped in amber”; constitutional laws must “comport with principles underlying the Second Amendment”). See *id.* at 1912 (Kavanaugh, J., concurring) (“[T]he historical approach examines the laws, practices, and understandings from before and after ratification that may help the interpreter discern the meaning of the constitutional text *and the principles embodied in that text.*”) (emphasis added); *id.* at 1925 (Barrett, J., concurring) (“Historical regulations reveal a principle, not a mold.”); but see *id.* at 1908 (Gorsuch, J., concurring) (“[W]e have expressly rejected argument that courts should proceed . . . by trying to glean from historic exceptions overarching ‘policies,’ ‘purposes,’ or ‘values’ to guide them. We have rejected those paths because the Constitution enshrines the people’s choice . . . as original understood at the time of the founding.”).

³⁰⁸ As careful historical work has demonstrated, it is in fact unclear how such an approach can make any sense at all of contemporary First Amendment doctrine. See, e.g., Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 256–57 (2017) (“If the Supreme Court wanted to apply only those legal rules that the Founders recognized (or likely would have recognized), a huge swath of modern case law would have to go. . . . [T]he First Amendment did not enshrine a

Clause in the light of the larger values he perceived at stake in American constitutionalism.³⁰⁹

Hence the teaching of *Gitlow*, which some newly-minted positivists apparently seem to have forgotten: Freedom of speech doctrine can never be solely a matter of fact. The content of the doctrine is inevitably and properly influenced by relevant constitutional values. As Brandeis reminded us in *Whitney*: “To reach sound conclusions on these matters, we must bear in mind *why* a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.”³¹⁰

As we debate the purposes that freedom of speech should serve in our nation, so we construct the contours of constitutional freedom of speech doctrine. That is the lasting message of Holmes’s short, reluctant dissent in *Gitlow*. It is a salutary

judgment that the costs of restricting expression outweigh the benefits. At most, it recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote the public good.”); Margaret A. Blanchard, *Filling the Void: Speech and Press in State Courts Prior to Gitlow*, in *THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND THE PRESS* 14, 25 (Bill F. Chamberlin & Charlene J. Brown eds., 1982) (“By 1925 state court opinions had established a series of basic propositions regarding the speech and press guarantees that were generally followed in decision making. The key to these propositions was that freedom and responsibility had to be coupled in the exercise of these rights. Almost of equal importance was the idea that courts should look at how the contested exercise of these rights would affect the general welfare. . . . Also apparent was that courts would allow the regulation, under the state’s police power, of speech and press perceived as detrimental to the general welfare.”). See Richard H. Fallon, *Selective Originalism and Judicial Role Morality*, 102 *TEX. L. REV.* 221, 252 (2023); Michael L. Smith & Alexander S. Hiland, *Using Bruen to Overturn New York Times v. Sullivan*, 2022 *PEPP. L. REV.* 80, 102–03 (2022). On the general question of whether the history and tradition of controversial and complex issues of constitutional law can ever be reduced to mere matters of fact, see Reva B. Siegel, *The Politics of Constitutional Memory*, 20 *GEO. J. L. & PUB. POL’Y* 19 (2022). I have contended elsewhere that, as Holmes’s dissent in *Gitlow* illustrates, to argue that constitutional law inheres in mere facts, like the fact of consent, is always to leave open the normative, legal question of why those facts should matter. This legal question can never itself be reduced to a fact. Robert C. Post, *Theories of Constitutional Interpretation*, *REPRESENTATIONS*, No. 30, Spring 1990, at 13.

³⁰⁹ For a simple and obvious example of the contemporary “originalist” Court adopting exactly this perspective, see *Trump v. United States*, 144 S. Ct. 2312 (2024).

³¹⁰ *Whitney*, 474 U.S. at 374 (Brandeis, J., concurring) (emphasis added). I am indebted to Jim Weinstein for this observation.

message that by itself is a sufficient reason to celebrate *Gitlow* on its centennial birthday.

APPENDIX: *GITLOW* ENTRY IN JUSTICE BUTLER'S DOCKET BOOK

ACTION TAKEN ON CASES, MOTIONS, CERTIFICATES, AND MISCELLANEOUS MATTERS.

315

Recommitted

Reallotted

Passed

Nov. 23, 1923 Argued

_____, 19___ Submitted

Nov. 24, 1923 Voted on

_____, 19___ Announced

No. 183

Sanford

_____, 19___ Recommitted

_____, 19___ Reallotted

_____, 19___ Passed

_____, 19___

Gillow

VS.

New York

In error to N.Y. Circuit.

Lit. Officer's advisory of the overthrown by force - not inadvisable
of people to be aware of it. not app. at all. Red.
Mr. W. thinks application of cases - not in point. Fairly good
in fact. Had the Statute left of their speech never
went that far. Right to criticize them was & would do =
Force sufficient to overthrow the Government "words of eff."

has no precedents on balancing.

REMARKS.

	MERITS.			DISMISS.			QUESTION.			REQUEST FOR RULE.		DISCHARGE — RULE.		S. D.		P. TO H.		Absent.	Not Voting.	REMARKS.
	Aff.	Rev.	Ten.	No.	Ten.	No.	Yes.	No.	Yes.	Grant.	Refuse.	Yes.	No.	Yes.	No.	Yes.	No.			
Sanford, J.	X																			
Butler, J.	Y																			
Sutherland, J.	X																			
Brandeis, J.		X																		
McReynolds, J.	X																			
Van Devanter, J.	Y																			
Holmes, J.		X																		
McKenna, J.	X																			
Taft, C. J.		X																		

—1164—