



WHAT DID *GITLOW* DO?

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Introduction.....	727
I. <i>Gitlow</i> : Prelude and Decision.....	729
II. Did <i>Gitlow</i> Establish that the Fourteenth Amendment Includes the Right of Free Speech?.....	738
III. Was <i>Gitlow</i> an Incorporation Case?	748
Concluding Thoughts	753

INTRODUCTION

Dissenting in *Gitlow v. New York*, Justice Oliver Wendell Holmes remarked that while the “general principle of free speech” is part of the liberty guaranteed by the Fourteenth Amendment’s Due Process Clause, “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.”¹ The suggestion that the Constitution would constrain states less than the federal government in the area of free speech would have been consistent with an understanding of due process as an outer backstop, protecting against action so far afield that it “passes the bounds of reason and assumes the character of a merely arbitrary fiat.”² Such an understanding might have helped reconcile the existence of federal free speech limitations on states with the then-widely held view that the Fourteenth Amendment did not subject the states to the first eight amendments to the Constitution as such.

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¹ *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

² *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204 (1912).

The Supreme Court never adopted Holmes's suggestion. But to say only that would be misleading: Far from flirting with a more deferential attitude to freedom of speech in state cases, the Supreme Court from the beginning applied free speech principles to the states with substantially greater vigor than to the restrictions at the federal level.³

Gitlow is generally regarded as the first modern incorporation case, the genesis of both federal free speech curbs on state action and the larger project of making the same limitations that the federal Constitution imposes on the federal government applicable to the states.⁴ In both respects, moreover, it can also be seen as an important milestone in the larger twentieth century transformation of federal court practice and constitutional understanding centered on the assertion of individual rights. That linkage is no accident. For all the talk about federalism and state sovereignty in the U.S. Reports, the modern jurisprudence of constitutional rights does far more to constrain states than the federal government.⁵

At first blush, that might seem surprising since the principal vehicle by which this is accomplished, the Fourteenth Amendment's Due Process Clause, merely repeats the guarantee already applicable to the federal government under the Fifth Amendment. Of course, it could simply be that state officials are more prone to act improperly, but there are additional explanations, some of which may shed light on the why and wherefore of incorporation—most obviously the volume of litigation, the composition of cases, and the different dynamics presented by separation-of-powers issues compared to federal-state relations.

³ The Supreme Court did not invalidate a federal statute under the First Amendment's Speech or Press Clauses until *Lamont v. Postmaster General*, 381 U.S. 301, 306–07 (1965), forty years after *Gitlow* and well after an established canon of cases striking down state laws had emerged.

⁴ See G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 392 n.95 (1996) ("The Court unanimously and without elaboration decided to incorporate the First Amendment against the states in *Gitlow v. New York*, 268 U.S. 652 (1925)."); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U.L. REV. 1156, 1211 (1986).

⁵ The overwhelming majority of the Supreme Court's individual rights cases involve challenges to state, rather than federal, action. Beyond that, federal measures are reviewed more generously in some key contexts. *Cf., e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). There are also major differences in the availability of remedies. *See, e.g., Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012) ("We have never held that *Bivens* extends to First Amendment claims.").

A century has now passed since *Gitlow* was handed down, and while *Gitlow*'s causal role in constitutional law is open to question on not only the usual "realist" grounds but on doctrinal ones as well,⁶ it is unquestionably significant as at least a major episode in the story. The story has some nuances, more indeed than can be recounted here, but what follows are a few observations about *Gitlow* as a First Amendment case, about *Gitlow* as an incorporation case, and about the relationship between the two.

I. *GITLOW*: PRELUDE AND DECISION

To understand what *Gitlow* actually did, and why, it is obviously helpful to understand the context in which the issues it presented arose. The events leading up to the *Gitlow* case are often framed in terms of hysteria and reactionary politics, partly to understand the turn toward individual rights by people like Holmes and Justice Louis Brandeis, partly as way to validate and mythologize the larger project that they helped inaugurate, and partly as a result of historians absorbing the ideological narratives of the period crafted by the actors they viewed most favorably. Unquestionably there were excesses and some gross abuses, particularly in relation to the suppression of criticism during the First World War, and the general outlook of the era can be startling from the perspective of today's free speech culture.⁷ Even so, it is useful to stress some other parts of the story that are often overlooked or downplayed in conventional tellings. The evolution of Holmes and Brandeis is a fascinating question, but they were hardly the only agents of change, and it is useful to step back to appreciate the currents from which *Gitlow* emerged and the shape it took.

The last decade of the nineteenth century witnessed a succession of political and terroristic violence associated with so-called anarchist movements. These included indiscriminate, deadly bombings of public places like railway stations, religious processions, and theatres, as well as a number of successful political killings in Europe.⁸ In 1901, the wave of assassinations reached American shores when

⁶ For a thorough treatment reaching conclusions somewhat different from my own, see Klaus H. Heberle, *From Gitlow to Near: Judicial "Amendment" by Absent-Minded Incrementalism*, 34 J. POL. 458 (1972).

⁷ The past is indeed a foreign country. L.P. HARTLEY, *THE GO BETWEEN* 9 (1953).

⁸ See Richard Bach Jensen, *Daggers, Rifles and Dynamite: Anarchist Terrorism in Nineteenth Century Europe*, 16 *TERRORISM & POLITICAL VIOLENCE* 116, 134 (2004) (observing that between

President William McKinley was fatally shot by self-proclaimed anarchist Leon Czolgosz in Buffalo, New York. Czolgosz is reported to have told police that his “craze to kill” began after attending a lecture by the anarchist leader Emma Goldman, who taught the view that “all rulers should be exterminated.”⁹

Although Goldman denied associating with Czolgosz, within weeks of McKinley’s murder, she published a lengthy tribute to Czolgosz, comparing McKinley to Caesar and Czolgosz to Brutus.¹⁰ Congress eventually responded with its legislation permitting the exclusion of anarchists from the United States.¹¹ The state of New York moved faster, however, enacting the Criminal Anarchy Act in the months following the assassination. The act made it a felony to “advocate[], advise[], or teach[] the duty, necessity or propriety of overthrowing or overturning organized government by force or violence” or to knowingly distribute any written material doing so.¹²

The United States entered the First World War in April of 1917, a development not only opposed by but actively resisted by prominent anarchists in the United States. Immediately upon institution of the draft, Goldman and Alexander Berkman, who had served fourteen years in prison for the attempted assassination of industrialist Henry Clay Frick, founded the No-Conscription League, whose manifesto admonished readers to “resist conscription.”¹³ Radical ideology also demonstrated real-world potency with the Bolshevik takeover in Russia in 1917, as well as a wave of shorter-lived seizures of power by radicals across Europe.

With the November 1918 armistice, active hostilities in the First World War ceased, and war with Germany officially came to an end with the signing of the

1892 and 1901, “more monarchs, presidents, and prime ministers of major world powers were assassinated than at any other time in history” and describing the period as “the era of the terrorist bloodbath”).

⁹ *Assassin’s Trail of Crime from Chicago to the Pacific Coast*, S.F. CHRON., Sep. 8, 1901, at 2.

¹⁰ See Emma Goldman, *The Tragedy at Buffalo*, FREE SOC’Y, Oct. 6, 1901, at 1.

¹¹ See Alien Immigration Act of 1903, ch. 1012, § 2, 32 Stat. 1213 (1903); see also *United States ex rel. Turner v. Williams*, 194 U.S. 279, 293–95 (1904).

¹² See *Gitlow*, 268 U.S. at 654 (quoting N.Y. PEN. L. §§ 160, 161 (Consol. 1909)).

¹³ The group’s manifesto declared “We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.” *The No Conscription League*, 12 MOTHER EARTH BULL. 113 (1917). For their efforts to impede the draft, Goldman and Berkman were convicted under the Espionage Act of 1917, and ultimately deported.

Treaty of Versailles in June of 1919. Even as the Treaty was being negotiated, however, the United States experienced a fresh wave of anarchist violence. In April, dynamite-laden mail bombs were sent to several dozen prominent American government officials and other public figures, including senators, prosecutors, judges (Holmes among them), and the newly installed Attorney General, A. Mitchell Palmer. Two months later, anarchists detonated nine more bombs on the same day in eight major cities, targeting judges, elected officials, a factory owner, a Roman Catholic church, and, once again, the Attorney General, who was at home with his wife when the bomb intended for him was accidentally detonated on his porch, destroying parts of his house. Fliers included with the bombs declared, “[T]here will have to be murder: we will kill, because it is necessary; there will have to be destruction; we will destroy to rid the world of your tyrannical institutions.”¹⁴

The Justice Department responded swiftly, with the first of the so-called Palmer Raids taking place in July in Buffalo, New York, the site of McKinley’s assassination eighteen years earlier. Once again, the state of New York also took its own parallel action to target anarchists and other radical social movements. In November, investigators raided the offices of various radical organizations at the direction of the Lusk Committee, a joint committee established by the New York State Assembly earlier in the year to investigate seditious activities. Numerous arrests were made in connection with the raids, including that of Benjamin Gitlow, a former state assemblyman heavily involved in radical socialist politics.

Inspired by Russia’s Bolshevik Revolution, Gitlow had embraced “revolutionary socialism” and joined a faction of the Socialist Party known as the Left Wing, which sought to transform the party into a communist party. “We openly called for the violent overthrow of the United States Government,” Gitlow would later write.¹⁵ Gitlow became business manager of the Left Wing’s new house organ, *The Revolutionary Age*, which published its first issue in July 1919. It contained a tedious extended declaration titled “Left Wing Manifesto,” which endorsed “the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system,” declaring that “[h]umanity can be saved from its last excesses only by the Communist Revolution.”¹⁶

¹⁴ See PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND 81 (1991).

¹⁵ BENJAMIN GITLOW, I CONFESS: THE TRUTH ABOUT AMERICAN COMMUNISM 60 (1940).

¹⁶ See *Left Wing Manifesto*, THE REVOLUTIONARY AGE, July 5, 1919, at 6–8, 14–15.

Gitlow was tried and convicted in early 1920 for violating New York's criminal anarchy law by publishing the Left Wing Manifesto. His conviction was sustained by the New York courts on appeal,¹⁷ after which the U.S. Supreme Court agreed to hear the case on writ of error in November of 1922. The case was argued twice, first in the spring and then again in the fall of 1923, with members of the Court voting in conference shortly after argument. Gitlow maintained that the Fourteenth Amendment protected freedom of speech, a position that New York tacitly accepted in its own brief in response. The Court upheld Gitlow's conviction over Holmes's dissent, which Justice Louis Brandeis joined.

Justice Edward Terry Sanford's opinion for the Court had four major components.¹⁸ (1) It "assume[d]" that the Fourteenth Amendment protected freedom of speech and brushed off the suggestion that a recent decision, *Prudential v. Cheek*,¹⁹ had declared otherwise.²⁰ (2) The opinion ruled that where a category of speech is lawfully proscribed by statute, there is no need to determine whether any particular instance of speech belonging to that category presents an actual likelihood of harm—in contrast to cases where only certain conduct was proscribed and punishment was being imposed for speech because of its tendency to lead to a harmful result.²¹ (3) The opinion went on at some length to justify its emphatic conclusion that "utterances inciting to the overthrow of organized government by unlawful means" are categorically proscribable, and in doing so it distinguished between incitement and other forms of speech, such as "abstract doctrine."²² (4) The Court concluded that the "Left Wing Manifesto" did indeed constitute incitement, and its publication and distribution could therefore be criminalized.²³

¹⁷ *People v. Gitlow*, 234 N.Y. 132, 136 (1922). A dissent by Judge Cuthbert Pound, joined by Judge Benjamin Cardozo, argued that the Manifesto did not come within the terms of the statute, which criminalized anarchy, since it argued for the "dictatorship of the proletariat," rather than the abolition of government. *See id.* at 158 (Pound, J., dissenting). On Pound, *see* Henry W. Edgerton, *Liberal Judge Cuthbert W. Pound*, 21 CORNELL L. REV. 7 (1935).

¹⁸ These elements are re-ordered here for purposes of analytical organization.

¹⁹ 259 U.S. 530 (1922).

²⁰ *Gitlow*, 268 U.S. at 666.

²¹ *Id.* at 670–72.

²² *Id.* at 666–70.

²³ *Id.* at 665–66.

The opinion was unsympathetic to *Gitlow*, and it seems to express the Court's constitutional blessing upon efforts to suppress anarchists and similar radicals. Despite its confident belief that *Gitlow*'s conviction should be upheld, however, the Court's opinion did not offer a *carte blanche* in the prosecution of speakers and publishers of radical views. Its analysis strongly implied that "abstract doctrine," "academic discussion," "mere historical or philosophical essay," "the advocacy of changes in the form of government by constitutional and lawful means," or "the mere prediction of future events," ordinarily could not be prohibited, though it did not say so directly nor did it make any real effort to stress the importance of free speech.²⁴

On the merits of the free speech claim, three different questions with different standards of evaluation are implicit in the Court's discussion. The first is the extent, if any, to which a legislature's decision to regulate a particular category of speech is subject to judicial review. *Gitlow* treated this as reviewable but held that review should be deferential. The Court cited precedent involving the police power to the effect that statutes are entitled to a strong presumption of validity, but those precedents should be considered against the backdrop of the Court's overall track record during the period in striking down measures as exceeding the police power, in which judicial review was not toothless.²⁵ The *Gitlow* Court clearly thought that forbidding speech advocating violent overthrow of the government was an easy case, but even so, its opinion took pains to justify its conclusion at some length.

The second question is whether a particular utterance or publication belongs to a properly proscribable category. This too the Court seems to have treated as judicially reviewable, even on writ of error, without giving much of a sense of how searching that review should be.²⁶ The Court offered a number of quotations from the Left Wing Manifesto and explained why the document fell within the category of proscribable incitement. In its view, the text of the Manifesto entailed no innu-

²⁴ *Id.* at 664. The opinion referred to "abstract doctrine or academic discussion having no quality of incitement to any concrete action," and it is not clear whether the phrase about incitement operates as a further limitation on what would be protected as "abstract doctrine" or "academic discussion."

²⁵ *Id.* at 668 (citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).

²⁶ This is the question addressed in *Fiske v. Kansas*, 274 U.S. 380 (1927), discussed in the next section.

endo and required no leaps of imagination; to the contrary, it constituted “the language of direct incitement.”²⁷ The Court’s discussion treated the question as an easy one, and it is not clear how demanding the inquiry would be in a closer case. Notably, the Court did not say that a state court’s determination that a statement or other expression fell within a proscribable category of speech enjoyed a presumption of correctness.

Finally, there is the question whether any particular utterance is actually dangerous, and this, *Gitlow* held, simply was not a part of the constitutional analysis. One might still question how far the Court would be willing to take this proposition, and how much it really depends on the Court’s conclusions about the category of incitement. It isn’t particularly hard to grasp why today, even under the far more protective *Brandenburg* standard,²⁸ incitement to lawless action can still be punished, and especially incitement to violent government overthrow. The *Gitlow* majority regarded the general interests in security as weighty, and it was not without justification in doing so: from the McKinley assassination in 1901 to the bombings of 1919, it was clear that ideologically motivated violence was more than a fanciful concern. In the majority’s judgment, there could be no constitutional requirement to make an individualized showing of imminence, since “the State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler’s scale.”²⁹

Gitlow is often held up as an example of the “bad tendency” test, but that may not be entirely accurate. The statute at issue was directed at speech that advocated “overthrowing or overturning organized government by force or violence.” Although Sanford’s opinion certainly stressed the dangers that such speech may present, it did not say that as a general matter, the “natural tendency and probable effect” of such speech was to bring about any bad set of consequences, a characterization it reserved for cases involving conduct offenses. The Court seems to have seen no need to scrutinize closely the connection between the category of speech proscribed and whatever harm might flow from it because the connection was inherent in the speech itself. “What [the statute] prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means,”

²⁷ *Gitlow*, 268 U.S. at 665.

²⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁹ *Gitlow*, 268 U.S. at 669.

wrote Sanford, which is to say “urging to action.”³⁰ A State “may penalize utterances which *openly advocate* the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means.”³¹ Such statements may be outlawed because they endanger the peace and security “*by their very nature*.”³² Beneath the majority’s talk about legislative deference may lurk a certain sense that such speech, harmful or not, seeks harm and cannot in principle claim protection.

In a characteristically terse and aphoristic dissent, Holmes attacked the majority’s distinction between abstract doctrine and incitement, asserting that “[e]very idea is an incitement.”³³ And yet he implicitly acknowledged that a distinction exists between ideas generally and “an incitement in the narrower sense,” remarking that what distinguishes the latter is “the speaker’s enthusiasm for the result.”³⁴ His objection thus seems to be less with the coherence of the majority’s distinction than with its justification.

Holmes’s use of the word “enthusiasm” to criticize the majority’s dividing line was cleverly ambiguous, simultaneously suggesting that the hallmark of incitement in the majority’s sense is the speaker’s intention (does the speaker desire some consequence?) and the speaker’s fervency (does the speaker use energetic language?). With respect to intention, the distinction between a neutral declaration of fact and an imperative call to action might be clear enough from the standpoint of grammatical classification, but as a practical matter it has obvious weaknesses. A statement framed in merely declarative language might very obviously imply a call to action. With respect to fervency, the difference is no longer one of kind but of degree, and it is hard to see why the speaker’s zeal should matter except as an indication of propensity to bring about a particular result, in which case a test that directly considered actual dangerousness might be better suited to the task.

Rather than resting on a mere characterization of the utterance, Holmes regarded imminence as the basic dividing line, arguing that the expression of an idea could only be forbidden if doing so prevents a “clear and present” danger of harm.

³⁰ *Id.* at 664–65.

³¹ *Id.* at 668 (emphasis added).

³² *Id.* at 669 (emphasis added).

³³ *Id.* at 673 (Holmes, J., dissenting).

³⁴ *Id.*

In rejecting such a requirement, the majority noted that “[a] single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration” and declared that the state was justly empowered to act “to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.”³⁵ Holmes’s response seems essentially to have been to shrug his shoulders. An utterance threatening only some eventual harm, no matter how definitely, cannot be proscribed because the “only meaning” of free speech is that an idea that is “destined to be accepted by the dominant forces of the community” if given the chance to propagate must be allowed to do so.³⁶ Presumably, an utterance threatening imminent harm did not enjoy this protection because there was no chance to test whether it could sustain itself over “the long run.”³⁷

Today, the majority’s expressed concern for the state’s prophylactic interest in security is met with arguments for a prophylactic approach in guarding against abuses of power, among others.³⁸ But there is no constitutional right to overthrow the government by violence, and it bears reminding that it is not intuitive that there should be a right to call for violent overthrow of the government, or to do so as long as the call will probably go unheeded in the short term. Holmes certainly did not articulate much of a defense.

Arguably the differences between the two positions is less conceptual than a matter of line-drawing. The *Gitlow* majority seems to have regarded “abstract doctrine” and the like as at least presumptively protected, and, conversely, Holmes was willing to permit restraints on incitement to imminent lawless action. The Court’s opinion communicated great sympathy for the state and none for *Gitlow*, but it was not indifferent to the speech interests invoked, and it was consistently careful to qualify its denunciations of speech advocating government overthrow with the phrase “by violence or other unlawful means,”³⁹ something it had previously denied the need for in the context of exclusion of federal immigration law.⁴⁰

³⁵ *Id.* at 669.

³⁶ *Id.* at 673.

³⁷ *Cf.* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

³⁸ *See, e.g., NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198–200 (1988).

³⁹ *Gitlow*, 268 U.S. at 668.

⁴⁰ *See United States ex rel. Turner v. Williams*, 194 U.S. 279, 294 (1904).

The *Gitlow* majority, or at least Sanford, may have seen the case as an opportunity to call attention to what it regarded as an unfounded invocation of a basic liberty, a conclusion that required no twisting of established law to reach and that cannot simply be dismissed as an example of “Red Scare” hysteria. There was real reason to regard radical agitation as a genuine threat to order and safety. Anarchists had in fact perpetrated seriously threatening acts, and, moreover, they repeatedly expressed support for lawless activity for which they were not actually responsible, even as they complained about unwarranted repression.⁴¹ They similarly wasted no opportunity to claim that the nation’s labor disputes represented the means by which American government would be brought down, thereby imputing to themselves the much larger numbers and more immediate challenges entailed by large-scale industrial labor contests.

The Left Wing Manifesto may not have seemed very compelling, but revolution was the Left Wing’s stated reason for being and *Gitlow* was one of its leaders. Windy and abstruse declarations of principle and social theory were then, as they are now, the stock in trade of revolutionary ideologues, including successful ones,⁴² and the majority was confident in its conclusion that overt calls for violent or otherwise unlawful revolution were outside the protection of freedom of speech and public authorities should not have their hands tied in dealing with radicals who issued such calls openly. The *Gitlow* Court did not seek to break new ground, but merely to disapprove the invocation of freedom of speech to protect expressly revolutionary activities. *Gitlow*’s place in the constitutional story is thus bedeviled by cross-cutting ironies. It ushered in a transformative expansion in free speech rights even as it sought to emphasize their limits. At the same time, it was more respectful of speech claims than any number of prior decisions of the Supreme Court, but it is generally denigrated today as an instance of the reflexively repressive tendencies of its time.

⁴¹ See Jensen, *supra* note 8, at 128.

⁴² As it happens, *Gitlow* was handed down just weeks after the first publication of *Mein Kampf*.

II. DID *GITLOW* ESTABLISH THAT THE FOURTEENTH AMENDMENT INCLUDES THE RIGHT OF FREE SPEECH?

Six years after *Gitlow*, it was clear that the guarantee of due process under the Fourteenth Amendment protected freedom of speech. The Court said so unequivocally in a pair of decisions handed down in 1931, *Stromberg v. California*⁴³ and *Near v. Minnesota*,⁴⁴ written by Chief Justice Charles Evans Hughes. Citing to *Gitlow* and related cases, both opinions described the matter as having already been decided. But had it been?

The key language in *Gitlow* consists of two sentences:

For present purposes, 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. 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.⁴⁵

A footnote following the second sentence cryptically invited readers to “compare” cited pages in an eclectic set of eight sources, seven Supreme Court decisions and one of Thomas Cooley’s editions of Story’s *Commentaries on the Constitution*.⁴⁶

⁴³ See *Stromberg v. California*, 283 U.S. 359, 368 (1931).

⁴⁴ See *Near v. Minnesota*, 283 U.S. 697, 707 (1931); see also *id.* at 723–24 (Butler, J., dissenting).

⁴⁵ *Gitlow*, 268 U.S. at 666.

⁴⁶ *Coppage v. Kansas*, 236 U.S. 1 (1905), declared that the Fourteenth Amendment’s Due Process Clause “debars the states from any unwarranted interference” with liberty. *Id.* at 17. *Twining v. New Jersey*, 211 U.S. 78 (1908), raised the general possibility that the Fourteenth Amendment’s Due Process Clause might extend protections corresponding with one or more provisions of the first eight amendments if they are considered sufficiently fundamental. *Id.* at 107. *Meyer v. Nebraska*, 262 U.S. 390 (1923), endorsed a broad understanding of “liberty” under the Fourteenth Amendment’s Due Process Clause that referred to matters of education and conscience. *Schaefer v. United States*, 251 U.S. 466 (1920), a case rejecting a challenge to the federal Espionage Act, commented that “freedom of speech and of the press are elements of liberty.” *Id.* at 474. The three remaining cases, all of which preceded *Cheek*, rejected free speech challenges to state action without determining whether the Fourteenth Amendment imposed a free speech right on states. See *Fox v. Washington*, 236 U.S. 273, 276 (1915); *Gilbert v. Minnesota*, 254 U.S. 325, 338 (1920); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). The passage from Cooley’s edition of Story endorsed a broad reading of “liberty” under the Fourteenth Amendment, explicitly including “freedom of speech,” among others.

The Court's second sentence, concerning the decision in *Prudential v. Cheek*, is one of the more striking aspects of the issue. *Cheek* was decided just three years earlier (and scarcely a year before the Court argument in *Gitlow*), and unequivocally declared 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.'"⁴⁷ The case involved a Fourteenth Amendment challenge to a state "service letter" statute, under which corporations were required to provide a statement to former employees describing the character of their work and the circumstances of their leaving. The Court sustained the statute by a six to three vote, with Justices Holmes and Brandeis voting to uphold it and Chief Justice William Howard Taft and Justices Willis Van Devanter and James McReynolds dissenting without opinion.

In his brief to the Supreme Court, *Gitlow* sought to distinguish *Cheek* on the ground that it concerned restrictions that could be imposed on corporations,⁴⁸ but while there is language concerning limitations of the corporate form, that does not appear to be at the heart of the analysis of any of the claims in the case.⁴⁹ *Cheek*'s statements about the Fourteenth Amendment and freedom of speech made no mention of corporations, even though it could easily have offered a corporate status-based argument based on precedent holding that "[t]he liberty referred to in that Amendment is the liberty of natural, not artificial, persons."⁵⁰ And its conclusion about freedom of speech was followed by a further declaration that the Fourteenth Amendment does not confer any right of privacy "upon either persons or corporations," suggesting that the same principle applied to both alike.⁵¹

How could the Court regard the matter as even an open question in light of *Cheek*? None of the cases cited in the footnote contradicted *Cheek*'s declarations,

⁴⁷ *Cheek*, 259 U.S. at 543; see also *id.* at 538 (stating 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.").

⁴⁸ Brief for Plaintiff in Error, *Gitlow*, 268 U.S. 652, at 16–17.

⁴⁹ Compare, e.g., *Cheek*, 259 U.S. at 543, with *id.* at 537. In response to *Prudential*'s more general freedom-of-contract argument, the Court's basic position was simply that the service letter requirement was a reasonable one, which did not substantially impair rights secured by the Fourteenth Amendment. See *id.* at 537.

⁵⁰ *Northwestern National Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

⁵¹ *Cheek*, 259 U.S. at 543.

and some of them had little direct relevance to the question at all. It is possible the Court accepted *Gitlow*'s interpretation of the case, but it certainly did not say so and there was little basis for doing so. More likely, the Court regarded the statement in *Cheek* as overbroad. It was "incidental" to the matter presented since the primary argument against the service letter statute was a freedom-of-contract claim. More than that, its sweeping statement was out of proportion to the case itself, which presented a rights assertion relatively far removed from what one might think of as the core domain of speech protection. *Cheek* involved what today would be referred to as a compelled speech claim, one arising in the commercial realm, and the challenged compulsion entailed not an affirmation of any sort of orthodoxy but simply a truthful and relatively limited disclosure of facts. Though the Court had raised the possibility of Due Process protection for fundamental rights and had reserved the question of free speech protection under the Fourteenth Amendment in prior decisions, *Cheek* did not cite any of them. The *Gitlow* Court could probably safely say that the question whether the Fourteenth Amendment protected freedom of speech to *any* degree was not one that the *Cheek* Court intended to address categorically in its decision about service letter statutes.⁵²

There had also been a significant change in the composition of the Court in the short period since *Cheek* was handed down. By the time *Gitlow* was decided, only two of the six justices from the *Cheek* majority remained on the Court, and they were Holmes and Brandeis. Not a single member of the majority in *Cheek* was part of the majority in *Gitlow*, but all three *Cheek* dissenters—Taft, Van Devanter, and McReynolds—joined it. Of these, Van Devanter apparently did believe the Fourteenth Amendment protected freedom of speech, regarding *Cheek* as being "not in point."⁵³ Taft very likely did too, as records indicate he initially voted to overturn *Gitlow*'s conviction. And McReynolds had endorsed an expansive view of the meaning of liberty under the Due Process Clause in the 1923 decision in *Meyer v. Nebraska*.⁵⁴ Given both their dissenting position in *Cheek* and their likely belief that

⁵² Brandeis, who joined the *Cheek* majority, had already expressed some support for free speech protection under the Fourteenth Amendment's due process guarantee. See *Gilbert*, 254 U.S. at 343 (Brandeis, J., dissenting).

⁵³ See Robert Post, *The Enigma of Gitlow: Positivism, Liberty, Democracy, and Freedom of Speech*, 6 J. FREE SPEECH L. 569, 594 (2025).

⁵⁴ 262 U.S. 390, 399 (1923).

the Due Process Clause did protect freedom of speech in some form, they may well have been inclined to read qualifications into *Cheek*'s seemingly broad declaration.

But if the *Gitlow* Court did not regard the question as having been resolved by precedent, did *Gitlow* resolve it? That is, did *Gitlow* establish that the Fourteenth Amendment protects freedom of speech? The answer is closer to yes than no.

It cannot reasonably be claimed that *Gitlow* clearly did so. By its own terms, the Court stated that "we may and do assume" that freedom of speech is one of the fundamental "personal rights and 'liberties'" protected by the Fourteenth Amendment. The proposition was not presented as a conclusion but as an assumption.⁵⁵ The particular phrasing used—"we may and do assume"—might have reflected the need to shore up the Court's jurisdiction on writ of error, given how emphatic the statement in *Cheek* had been.⁵⁶ Dismissing the case for want of a substantial federal question would have had the same result for *Gitlow*, but it would not have given the majority the opportunity to stress that advocacy of revolution by violent or unlawful means was constitutionally fair game for regulation.

Moreover, *Gitlow* can be read as attempting to say no more about the Fourteenth Amendment than the Court had said in earlier decisions presenting free speech claims. In its 1907 decision in *Patterson v. Colorado*, the Court acknowledged the possibility that the Fourteenth Amendment contained protections analogous to the first, but chose to leave the question "undecided."⁵⁷ In its view, there was no constitutional violation, "even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States, but also of the states."⁵⁸ And in its 1920 decision in *Gilbert v. Minnesota*, the Court again rendered its decision without deciding whether free speech is a "natural and inherent right" and without considering whether it is guaranteed by the U.S. Constitution, concluding that the measure in question was

⁵⁵ Although the word "assume" can also mean to acquire or take on, those usages do not seem plausible in this context.

⁵⁶ See *Sugarman v. United States*, 249 U.S. 182, 184 (1919) ("[I]t is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below.").

⁵⁷ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

⁵⁸ *Id.*

within the power of the state to enforce regardless.⁵⁹ Besides these, in two other cases, the Court also upheld state measures against free speech challenges without commenting on whether freedom of speech was protected by the Fourteenth Amendment.⁶⁰

There are other indications from the Court and its justices that *Gitlow*'s assumption was no more than that. Despite his insinuation in *Stromberg* and *Near* that the matter had already been decided, Chief Justice Hughes later wrote that "It fell to my lot as Chief justice in 1930 to write the opinions of the Court . . . holding that freedom of speech and of the press was embraced by the Fourteenth Amendment."⁶¹ Language in Justice Pierce Butler's dissents in those cases could be read to indicate at least he did not regard the question as having been decided in *Gitlow*, though his remarks are ambiguous.⁶² In 1936, Justice George Sutherland, writing for a unanimous court, split the difference, describing the issue as having "been settled by a series of decisions of this Court beginning with *Gitlow* and ending with *Near*."⁶³

⁵⁹ *Gilbert v. Minnesota*, 254 U.S. 325, 322 (1920).

⁶⁰ See *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897); *Fox v. Washington*, 236 U.S. 273, 275 (1915).

⁶¹ See Heberle, *supra* note 6, at 475 (quoting Charles E. Hughes, Memorandum, The Fourteenth Amendment and Freedom of Speech and of The Press, at 3, Hughes Papers, Library of Congress.).

⁶² Writing only for himself in *Stromberg*, Butler argued that "the Court is not called on to decide whether the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press, or to decide whether such freedom is a part of the liberty protected by the Fourteenth Amendment." *Stromberg*, 283 U.S. at 376. In *Near*, he wrote that the Court "was not called on until 1925 to decide whether the 'liberty' protected by the Fourteenth Amendment includes the right of free speech and press" but "That question has been finally answered in the affirmative." *Near*, 283 U.S. at 723–24. The statement was followed by citations to *Patterson*, *Cheek*, *Gitlow*, *Fiske*, and *Stromberg*. It isn't clear whether he meant that the question was decided in 1925 (by *Gitlow*) or in 1931 (by *Stromberg* or *Near*). His dissent was joined by Van Devanter, McReynolds, and Justice George Sutherland, one or more of whom probably had little doubt on the matter. For examples of Sutherland's willingness to embrace free speech protection, see *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 133–141 (1937) (Sutherland, J., dissenting).

⁶³ *Grosjean*, 297 U.S. at 244.

On that score, to the extent *Gitlow* is regarded not as establishing free speech protection under the Fourteenth Amendment as a matter of precedent or even persuasive reasoning but more modestly as beginning a process that culminated in recognition of the protection in *Stromberg* and *Near*, the real origin arguably lay earlier. Perhaps most notable is Justice McReynolds's 1923 opinion in *Meyer*.⁶⁴ *Meyer* struck down a state law prohibiting foreign language instruction to school-children, and in so doing declared that the liberty protected by the Due Process Clause includes not only bodily freedom, but the right "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."⁶⁵ The Court acknowledged that these rights are held subject to the police power, but the police power itself cannot be exercised in a manner that is "arbitrary or without reasonable relation to some purpose within the competency of the State to effect." Although the Supreme Court's 1940 decision in *Cantwell v. Connecticut*⁶⁶ is generally cited as the first case to find that the Fourteenth Amendment protects against state action infringing religious liberty, *Meyer* seems to have done essentially that, albeit in dicta.⁶⁷ In its subsequent decision in *Pierce v. Society of Sisters*,⁶⁸ handed down

⁶⁴ 262 U.S. 390 (1923). A set of companion cases, collectively captioned as *Bartels v. Iowa*, 262 U.S. 404 (1923), dealt with similar measures.

⁶⁵ *Meyer*, 262 U.S. at 399–400.

⁶⁶ 310 U.S. 296 (1940).

⁶⁷ In addition to *Meyer*, there were some other antecedents. Although the *Slaughter-House Cases* are regarded as having rejected the idea that the Fourteenth Amendment made any of the rights set forth in the first eight amendments applicable to the states, that may be a misreading and, at any rate, it in fact described the right to peaceably assemble and petition for redress of grievances as privileges of citizens of the United States, seemingly recognizing them as protected by the Fourteenth Amendment, at least so far as they concerned attempts to engage with the federal government. See *Slaughter-House Cases*, 83 U.S. 36, 79 (1873). The subsequent decision in *United States v. Cruikshank* declared that "the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

⁶⁸ 268 U.S. 510 (1925).

just days before *Gitlow*, the Court extended the precedent set in *Meyer*, again espousing a liberal view of constitutional protection that went beyond the protection of property and contract rights associated with the so-called *Lochner* era.⁶⁹

But with these caveats understood, *Gitlow* was nevertheless a watershed. For a start, it clearly eliminated the idea that *Cheek* would be read to have categorically ruled out Fourteenth Amendment free speech protection. But beyond that, the Court's assumption in *Gitlow* can plausibly be said to have accomplished the adoption of the view it "assumed." A pair of follow-on cases, decided two years after *Gitlow* and also authored by Justice Sanford, offer evidence of a shift in the law.

In *Whitney v. California*,⁷⁰ the Court relied on an abbreviated version of the argument it gave in *Gitlow* to reject a free speech challenge to California's criminal syndicalism law. Its discussion cited *Gitlow* for the proposition that "the freedom of speech which is secured by the Constitution does not confer an absolute right to speak" and "a State in the exercise of its police power may punish those who abuse this freedom," including by utterances that threaten overthrow of the government by unlawful means. But notably, the Court did not say that it "assumed" the Fourteenth Amendment protected free speech, instead referring simply to the "the freedom of speech which is secured by the Constitution."⁷¹ That omission, or shift, is especially suggestive given Justice Brandeis's stirring concurrence in the case, in which he explicitly declared that the Fourteenth Amendment protects freedom of speech through the Due Process Clause.⁷² *Whitney*'s brief, too, treated *Gitlow* as a holding.⁷³

In *Fiske v. Kansas*, handed down the same day as *Whitney*, the Court invalidated a conviction under a Kansas criminal syndicalism law on the ground that the

⁶⁹ *Pierce* struck down a state law requiring children to attend public schools, rather than private ones. McReynolds's opinion for the Court declared that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

⁷⁰ 274 U.S. 357 (1927).

⁷¹ *Id.* at 371. The Court similarly rejected any claim that the challenged statute "is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association" or that persons "who abuse such rights" are protected by the Due Process Clause.

⁷² *Id.* at 373 (Brandeis, J., dissenting).

⁷³ See Brief for Plaintiff in Error, *Whitney v. California*, 274 U.S. 357 (1927), at 26, 66, 75.

documents allegedly showing the defendant's participation in an organization that advocated the use of "unlawful acts or methods" to accomplish industrial or political ends did not do so. This can be thought of as the second of three substantive questions addressed in *Gitlow*, concerning the characterization of the publication forming the basis for prosecution. The precise issue before the Court was whether an utterance that did not expressly advocate violence or illegality could be interpreted to do so, but the Court to some extent sidestepped it, opining that there was no basis for such an inference given the language used and the record of the case. The Court's opinion, which was unanimous, declared that the Kansas statute:

has been applied in this case to sustain the conviction of the defendant *without any charge or evidence* that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied, the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment.⁷⁴

Fiske may well be the first case to strike down a state law on free speech grounds, but once again, there is ambiguity. The Court's decision could also be read to have decided it simply as a matter of evidentiary sufficiency (or the adequacy of the specific charges made against *Fiske*). A free speech rationale would imply that a statute must require advocacy of violence or other illegal activity, while the latter would mean only that where a requirement is imposed, there must be a sufficient evidentiary basis alleged or proved to support a conviction.

Some notable commentators have indeed concluded that *Fiske* was decided on procedural grounds, not substantive free speech ones.⁷⁵ Critically, the Court itself never referred to freedom of speech in its explanation for reversing the conviction, nor did it set up *Gitlow* as the source of the rule being applied. It does seem quite strange to overturn a state conviction as a violation of freedom of speech for the first time without ever referring to the principle—unlike prior decisions rejecting Fourteenth Amendment free speech claims, including Sanford's own opinions in *Whitney* and *Gitlow*. Moreover, the Court noted that the defendant had objected at trial that "the evidence and the facts stated did not constitute a public offense and

⁷⁴ *Id.* at 387.

⁷⁵ See, e.g., Heberle, *supra* note 6, at 470; Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in Whitney v. California*, 2005 SUP. CT. REV. 333, 382 n.151.

substantiate the charges alleged in the information” and that the verdict “was contrary to the law and the evidence and wholly unsupported by the evidence.”⁷⁶ The rejection of those claims formed the basis for Fiske’s appeal to the Kansas Supreme Court, although in challenging their rejection, he argued that the Kansas statute “‘insofar as it sustains this prosecution, is in violation . . . of the Constitution of the United States, and especially of the Fourteenth Amendment,’ including the due process clause thereof.”⁷⁷

But the procedural reading of the case is ultimately hard to defend. The Court did not declare or cite to any authority for the general proposition suggesting that evidentiary insufficiency itself constitutes a violation of the Fourteenth Amendment.⁷⁸ Rather, it explained that “this Court will review the finding of facts by a State court where a Federal right has been denied *as the result of a finding shown by the record to be without evidence to support it*, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.”⁷⁹ The Court quoted the Kansas Supreme Court’s opinion sustaining the conviction, in which the Kansas court rejected the argument that the statute “is obnoxious to the due process of law clause of the Fourteenth Amendment to the Federal Constitution” with a single sentence stating that “Statutes penalizing the advocacy of violence in bringing about governmental changes do not violate constitutional guarantees of freedom of speech.” Although portions of the Kansas opinion concerning the evidence were also quoted, they made no reference to the Fourteenth Amendment.

Fiske’s brief to the Supreme Court treated the issue as a free speech matter, and in doing so remarked that “we assume from the decision in *Gitlow*, and former decisions of this court, that freedom of speech and of the press are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states, and have therefore not discussed the question at length.”⁸⁰ This phrasing cleverly repeats *Gitlow*’s assumption

⁷⁶ *Fiske*, 274 U.S. at 384.

⁷⁷ *Id.*

⁷⁸ *Cf. Thompson v. City of Louisville*, 362 U.S. 199, 206 n.13 (1960).

⁷⁹ *Fiske*, 274 U.S. at 385 (emphasis added).

⁸⁰ See Brief for Plaintiff in Error, *Fiske v. Kansas*, 273 U.S. 782 (1927), at 27.

language, but gives a meaning to the verb “assume” that is different from an assumption for the sake of argument. The proposition assumed in the brief is necessary to Fiske’s overall argument: that it *has* been established that the Fourteenth Amendment protects freedom of speech, and the brief seems to use the term to cement an interpretation or extract a key premise. In doing so, the brief may have assisted the Court in treating the *Gitlow* assumption as a positive statement. The Court’s opinion in *Fiske* contrasted the case with those of *Gitlow* and *Whitney*, and its reference to the “police power” in setting out its conclusion is more in line with challenges to legislation than with its decisions about state criminal procedure.⁸¹ This language closely tracked the language the Court used in *Whitney*.⁸² At least one member of the *Fiske* Court would later express the view that it was the first case to find state action unconstitutional on free speech grounds.⁸³ On balance, *Fiske* probably was decided on a free speech basis, but it is possible Sanford was deliberately obscure to avoid a direct confrontation with the issue.

Besides the *Whitney* and *Fiske* decisions, there is reason to believe that at least five members of the Court—the three *Cheek* dissenters, plus Holmes and Brandeis—accepted the general idea that due process protects freedom of speech, and Sanford’s extended analysis in *Gitlow* also tends to belie the suggestion that he regarded such protection as a mere assumption for argument’s sake.⁸⁴ It is worth noting that no member of the Court ever disputed that the Fourteenth Amendment extended such protection. The doctrinal environment was conducive to the argument, both because the Court had read liberty expansively, particularly in *Meyer*, and because due process and free speech doctrine as developed to that point each gave ample reason to think that free speech protection would not have particularly

⁸¹ See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Frank v. Mangum*, 237 U.S. 309 (1915); *Twining v. New Jersey*, 211 U.S. 78 (1908); *West v. Louisiana*, 194 U.S. 258, 259 (1904); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

⁸² See *supra* note 71.

⁸³ See Heberle, *supra* note 6, at 470 (quoting undated note from Harlan F. Stone to Felix Frankfurter, circa 1940); see also *Carolene Products v. United States*, 304 U.S. 144, 152 n.4 (1938).

⁸⁴ Prior to his elevation to the bench, Sanford served in the Justice Department, where at one point he is known to have invoked the Sixth Amendment in connection with the rights of a state-court criminal defendant, a very slight indication that he was sympathetically inclined toward incorporation generally. See STEPHANIE L. SLATER, *EDWARD TERRY SANFORD: A TENNESSEAN ON THE U.S. SUPREME COURT* 298 (2018).

dramatic effects. Other litigants framed *Gitlow* as a holding, including the defendants in *Ruthenberg v. Michigan*⁸⁵ and in *Stromberg*.⁸⁶

Gitlow was an early step in the march to federal free speech protection against states, but more than that, it probably did most of the work as a practical matter. The Court may have purported to reserve the question, but in all likelihood there was a general consensus in favor of free speech protection when *Gitlow* was decided, and the merits decision in *Gitlow* largely secured its recognition. Even so, at a time when it was already recognized that due process protected the “right of the citizen to be free in the enjoyment of all his faculties”⁸⁷ and the right “to acquire useful knowledge,”⁸⁸ it was in some sense unremarkable that it likewise protected the right to speak and to write. The real key lay in the fight over what that protection entailed.

III. WAS *GITLOW* AN INCORPORATION CASE?

Even if *Gitlow* did establish that the Fourteenth Amendment protects freedom of speech, it does not necessarily follow that it was an incorporation case. That conclusion depends on what is meant by incorporation and the implications of different meanings.

Elsewhere, I have distinguished between an “overlap” and a “cross-reference” understanding of incorporation.⁸⁹ Today we are used to thinking of incorporation in the cross-reference sense: Incorporation means that the Fourteenth Amendment makes a provision of the first eight amendments applicable to the states, as though incorporated by reference. But the early cases endorsed a different view that regarded the Fourteenth Amendment as protecting fundamental liberties, which in some cases happened to mirror or parallel those set out in the first eight amendments, much as a state constitutional provision might constrain the state in terms

⁸⁵ See Brief for Plaintiff in Error, *Ruthenberg v. Michigan*, 273 U.S. 782 (1927), at 33. Much of what Justice Brandeis wrote in his *Whitney* concurrence was originally intended as a dissent in *Ruthenberg* until the death of the defendant resulted in the case’s dismissal. See Collins & Skover, *supra* note 75, at 336.

⁸⁶ Brief for Appellant, *Stromberg*, 283 U.S. 359, at 14, 17–18.

⁸⁷ *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

⁸⁸ *Meyer*, 262 U.S. at 399.

⁸⁹ See James Y. Stern, *First Amendment Lochnerism & the Origins of the Incorporation Doctrine*, 2020 U. ILL. L. REV. 1501, 1505.

equivalent to a restriction imposed by the federal constitution on the federal government.⁹⁰

The cross-reference conception of incorporation is significant in two important and opposing ways. The first, and the source of its immediate controversy, is its rights-expanding tendency. The cross-reference view implies that the same rights apply in the same way to both federal and state actions. And although the Supreme Court declined to hold that the Fourteenth Amendment makes states subject to all of the rights set out in the first eight amendments, it has come very close to doing so, albeit through a series of piecemeal decisions.⁹¹ Once one right is held to apply automatically, it is difficult to say why others do not, given the absence of any clear criterion to distinguish incorporated provisions from unincorporated ones.

In other ways, however, the cross-reference view can also serve to limit the scope of due process protection. In contrast to the view that “liberty” refers amorphously to fundamental rights, the cross-reference view attributes a formal operation to the Due Process Clause, which diminishes the sense that the Clause also provides a looser, more generalized form of protection extending beyond the Bill of Rights. Thus Hugo Black, the Warren Court’s foremost advocate of incorporation,⁹² who repeatedly pushed the Court toward a cross-reference view,⁹³ was also opposed to a variety of other, more freeform protections under the Due Process Clause across a wide range of areas.⁹⁴

The salience of incorporation in the overlap sense, by contrast, is more limited. In the overlap conception, it is the nature of the rights contended for in their own terms that drives their recognition, rather than their inclusion in the text of the first

⁹⁰ See *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

⁹¹ See Stern, *supra* note 89, at 1507–08.

⁹² See *Adamson v. California*, 332 U.S. 46, 71–78 (1947) (Black, J., dissenting).

⁹³ *Id.*; see, e.g., *Marsh v. Alabama*, 326 U.S. 501, 502, 504, 508 (1946); see also, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963); *Betts v. Brady*, 316 U.S. 455, 475 (1942) (Black, J., dissenting).

⁹⁴ See *International Shoe Co. v. Washington*, 326 U.S. 310, 322 (1945) (separate op. of Black, J.); *Brady v. Maryland*, 373 U.S. 83, 92 (1963) (Harlan, J., dissenting, joined by Black, J.); *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (Black, J., dissenting).

eight amendments.⁹⁵ There is no strong implication that rights should operate identically at the state and federal levels or that the existence of one type of protection under the Fourteenth Amendment that matches an enumerated right implies the existence of any others. The recognition that the Fourteenth Amendment happens to replicate various federal rights might be interesting to observe, but as a legal matter, incorporation describes an effect, not a cause.⁹⁶ The principal significance of the overlap conception is that it might pave the way for the cross-reference understanding—which is exactly what happened in American constitutional law.

Freedom of speech was the first domino to fall in the twentieth century incorporation progression.⁹⁷ One basic reason for this was because it lent itself so well to the transition from the overlap to the cross-reference understanding of incorporation. The Court had already embraced an approach to the Due Process Clause involving more than minimal oversight of state legislation in cases like *Lochner v. New York*.⁹⁸ Today these decisions are regarded as involving “economic rights,” but that is not how the Court described them in their own time. The overarching idea was that the state’s police powers could not be exercised in an “arbitrary” manner, and certain sorts of measures were likely to trigger special concerns about such arbitrariness. What matters for present purposes is not whether those determinations were contestable—they were—but the general view of constitutional rights they reflected: All rights were held subject to the police power; assertions of the police power were subject to a fairly deferential but nevertheless meaningful judicial scrutiny; and certain core restrictions were regarded as unreasonable. This protection

⁹⁵ The overlap and cross-reference understandings can be thought of as opposite poles, and real-world practices might lie somewhere between the two, if, for example, inclusion among the first eight amendments were treated as supporting some sort of presumption that the Fourteenth Amendment imposed a similar restriction on the states.

⁹⁶ Incorporation in the overlap sense might be significant to rebut a general presumption that rights specifically articulated in the first eight amendments are not part protected by the Fourteenth Amendment’s Due Process Clause, given that the federal government is already subject to its own Due Process obligation. *Cf. Hurtado v. California*, 110 U.S. 516, 520–21, 534–35 (1884).

⁹⁷ Although the Supreme Court held that the Fourteenth Amendment required payment of just compensation for takings in the late nineteenth century, see *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U.S. 226, 235 (1897); see also *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 416–17 (1896), that determination was not taken as a precedent supporting anything like incorporation on a wider scale.

⁹⁸ 198 U.S. 45 (1905).

was cast as a matter of fundamental rights of personal liberty and property generally. The right to form contracts was essential to “the right of the citizen to be free in the enjoyment of all his faculties,” “to live and work where he will,” and “to earn his livelihood by any lawful calling.”⁹⁹ This was not a view of markets as sacred, but of individuals as agents free to do what they will with their lives, an important aspect of which was their livelihoods. The explicit reference to rights of conscience in the 1923 *Meyer* decision was not one that would have been easy to object to in this context, and from there it was not much of a step to *Gitlow* and beyond.¹⁰⁰

Freedom of speech is a very general “principle,” to use Holmes’s term, compared with the more procedural rights in the first eight amendments, and this was critical to both initial recognition on an overlap understanding in *Gitlow* and its progeny, as well as to the shift from the overlap to the cross-reference understanding in later cases. The general idea of an overlap version of incorporation was discussed by the Supreme Court in its 1908 *Twining* decision, which involved a claimed right against compulsory self-incrimination.¹⁰¹ Due process of law is a phrase “elusive of apprehension,” said the Court, but in determining whether it includes a particular form of protection the basic question could be stated succinctly: “Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?”¹⁰² In the case of any of the specific procedural safeguards generally relevant to criminal prosecutions, that might be hard to show.

But freedom of speech is not so specific, and it is clearly related to free government in a direct way. Ironically, the procedural rights are less easily justified as implications of due process protection than the more substantive rights identified by the First Amendment. And since the First Amendment is not more specific than what Holmes called “the general principle of freedom of speech,” it was relatively easy to slide from an overlap understanding anchored in the notion of “due process” to a cross-reference understanding anchored in the First Amendment, since there was no apparent difference between the two.

⁹⁹ *Allgeyer*, 165 U.S. at 589.

¹⁰⁰ Indeed, *Meyer* invoked the right of teachers to earn a living. *Gitlow*, meanwhile, was the business manager of *The Revolutionary Age*.

¹⁰¹ *Twining v. New Jersey*, 211 U.S. 78 (1908).

¹⁰² *Id.* at 100, 106.

Like due process protection generally, freedom of speech was understood to be subject to the police power, with some residual protection, perhaps, against penalizing mere “abstract doctrine” and the like. By contrast, rights like double jeopardy or grand jury indictment are seemingly absolute. Free speech cases were also far less common than criminal ones. A decision that any of the federal criminal procedure rights set out in the Constitution also applied to the states would at once have had far more significant, indeed sweeping, consequences. Besides this, there was very little free speech doctrine, and what doctrine existed was quite solicitous toward state regulation. The *Gitlow* majority had little reason to think that recognition of freedom of speech would have anything like the effect modern free speech doctrine would eventually have.¹⁰³

Having recognized free speech as a general and fundamental principle that could be assimilated to the Court’s existing approach to due process under the Fourteenth Amendment, it was easy to transition to one that regarded the Fourteenth Amendment as extending the First Amendment to the states. Despite Holmes’s suggestion that the First Amendment might be more demanding than the Fourteenth, there was in fact very little First Amendment doctrine to speak of and “the freedom of speech” referred to in the First Amendment’s text was hardly more specific in its guarantees than the freedom of speech referred to in *Gitlow* and its progeny.

A clear shift in language is apparent in the years following *Gitlow*. Up until the late 1930s, the Court’s free speech decisions omitted mention of the First Amendment altogether¹⁰⁴ or mentioned it incidentally, while identifying due process as the source of protection.¹⁰⁵ From the 1940s onward, the cases seldom referred to “due process” and virtually always referred to the First Amendment in articulating the basic rights at stake. Echoing *Gitlow*, the earlier cases typically stated that First Amendment freedoms are “liberties” protected by the Fourteenth, but in time the

¹⁰³ Indeed, a more robust set of free speech rights might have been hard to stomach. Modern First Amendment doctrine is only possible because of a number of conceptual innovations that make it possible to establish stronger protection by limiting its scope, like rules governing the denial of various types of government benefits.

¹⁰⁴ See *Stromberg*, 283 U.S. 359; *Fiske*, 274 U.S. 380; *Whitney*, 274 U.S. 357.

¹⁰⁵ See *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937); *Near*, 283 U.S. at 723–24; see also *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243–45 (1936).

Court began to use formulations in which the First Amendment was “made applicable” to the states by the Fourteenth.¹⁰⁶ The re-conceptualization of the basis for federal free speech protection against states helped pave the way for the wider incorporation phenomenon, in combination with Justice Hugo Black’s conviction that the Fourteenth Amendment was designed to have such an effect and the eventual emergence of a majority on the Court dedicated to a more rights-expansive view of constitutional law.

CONCLUDING THOUGHTS

Not long before *Gitlow* turned fifty, Professor Klaus Heberle published a thoughtful study of the early Fourteenth Amendment free speech cases.¹⁰⁷ Heberle concluded (1) that “*Gitlow* did not effect incorporation of the protections of speech and press,” (2) that *Gitlow* did begin that process, however, and that it concluded with *Stromberg* and *Near*, (3) that thereafter “it became difficult for the Court to avoid making the rest of the provisions of the First Amendment applicable to the states,” and (4) that incorporation was accomplished by “absent-minded incrementalism,” in that the series of cases in which the Court seemingly misunderstood its own prior decisions was undertaken without any thought for the federalism implications presented.¹⁰⁸

Now that *Gitlow* has reached its centenary, some reconsideration is in order. *Gitlow* did not “incorporate” freedom of speech or press in the modern, cross-reference sense, but that isn’t really the right question to ask. The question is whether it established that the Fourteenth Amendment provides a free speech right, and while the language of the opinion suggests a mere “assumption,” both litigants and the Court seem to have treated it as a holding, or at least regarded its assumption as a foregone conclusion.

It was not inevitable, or even nearly inevitable, that the rest of incorporation would follow as a matter of course—certainly not the wholesale application of the

¹⁰⁶ Compare, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940), with *Follett v. Town of McCormick*, 321 U.S. 573, 574 (1944); see also *Marsh*, 326 U.S. at 502, 504, 508 (referring simply to “the First and Fourteenth Amendments”); *Thomas v. Collins*, 323 U.S. 516 (1945) (referring to “the Fourteenth Amendment, as it incorporates the First”); *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (referring to “[t]he First Amendment, and the Fourteenth through its absorption of the First”).

¹⁰⁷ See Heberle, *supra* note 6.

¹⁰⁸ *Id.* at 459–60.

criminal procedure rights. The conceptual structure of the First Amendment helped facilitate that in an important way, but so did members of the Court, chief among them Justice Black, who inclined toward a formalist approach and was committed to the general idea of incorporation.¹⁰⁹ *Gitlow* and its progeny probably helped a lot, but the substitution of an understanding centered on due process to one centered on incorporation-by-reference, with the Fourteenth Amendment as little more than an afterthought, was also driven by the predilections and objectives of Black and his allies.

Which brings us to “absent-mindedness.” To repeat what has already been said, *Gitlow* did not “incorporate” in the sense in which that term is used today, and the only real federalism issue reasonably presented was whether due process should include free speech protection, not whether the Bill of Rights should be nationalized.¹¹⁰ That *Gitlow*’s conclusion that due process did not forbid outlawing calls for violent revolution would, for example, lead to the conclusion forty years later that the Sixth Amendment’s Confrontation Clause was “made applicable to the States by the Fourteenth Amendment”¹¹¹ was not a likelihood the Court would reasonably have had to consider, given the then-prevailing understanding of the issues presented.

Nor is it necessarily the case that the Court stumbled into recognizing Fourteenth Amendment free speech protection. The “assumption” that such protection existed in *Gitlow* may well have been motivated, at least in part, by a desire on the part of members of the majority who wanted to make a statement about the propriety of restricting anarchist agitation but who nevertheless believed that due process protection included some sort of free speech element. Likewise, Chief Justice Hughes’s characterization of *Gitlow* in *Stromberg* and *Near* may have represented his own desire to convert what was officially just an assumption into an actual premise—whether out of a desire to make official what he and his colleagues already thought, or to secure what he regarded as important civil liberties, or both.¹¹²

¹⁰⁹ See *Adamson*, 332 U.S. at 71–78 (Black, J., dissenting).

¹¹⁰ It is true, however, that it was foreseen by some. E.g., Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 454 (1926).

¹¹¹ *Pointer v. Texas*, 380 U.S. 400, 407–08 (1965).

¹¹² The Progressive Hughes had a decidedly civil libertarian streak. In 1920, between his two stints on the Supreme Court, Hughes had submitted a celebrated brief protesting the expulsion of five socialists from the New York Assembly. 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 392–93

The justices, in other words, probably understood exactly what they were doing—that seems far more likely than the possibility that they just misunderstood what *Gitlow* said. What they could not really appreciate was how the doctrines they established would themselves change in a relatively short amount of time.

This prompts one final observation. In the standard accounts, the great judicial heroes in the quest to bring modern free speech doctrine into being are Oliver Wendell Holmes and even more so Louis Brandeis, chiefly through their separate opinions in a small handful of celebrated cases. But other members of the Court made key contributions that should also be noted. John Marshall Harlan first and forcefully expressed the idea, in a 1907 dissent, that the Fourteenth Amendment's due process clause protected against state violations of the right of free speech.¹¹³ Various of the so-called Four Horsemen—the old guard who emerged as foes of prominent New Deal measures—were willing to support the recognition of free speech rights, and the generally odious James McReynolds provided some important early fuel. Edward Terry Sanford was willing to finesse matters to get free speech issues back before the Court, operating under cover of pseudo-dicta. And Charles Evans Hughes pushed to shore up the pseudo-precedents that resulted. The ultimate consequence was a radical transformation of American federalism and constitutional culture, but, by and large, a transformation that lay decades in the future.

(1951). Hughes was also on record criticizing measures like the Nebraska law struck down in *Meyer*, as well as the Tennessee Anti-Evolution law at issue in *Scopes v. Tennessee*, 289 S.W. 363 (Tenn. 1925).

¹¹³ *Patterson v. Colorado*, 205 U.S. 454 (1907).

