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Indiana Law Journal

Volume 26 | Issue 4 Article 1

Summer 1951

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INDIANA LAW JOURNAL

Volume 26 SUMMER 1951 Number 4

THE FIRST AMENDMENT AND EVILS THAT CONGRESS HAS A RIGHT TO PREVENT

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Recent decisions of the courts, affirming the "right" of Congress to abridge political freedom, have given added strength to the growing conviction that the Holmesian "test" of "clear and present danger" is both unintelligible in practice and baseless in theory. And, especially, the *Douds* opinion,[1] leading the way toward the decisions which support the constitutionality of the Smith Act, has confirmed that impression. This paper, beginning with an examination of the *Douds* opinion, will attempt to determine whether the implied criticisms of the doctrine are valid.

I

The well-known "test," which the *Douds* opinion adopts as expressing, since 1919, the prevailing view of the Court, reads as follows:

> 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.[2]

In that formula two vivid and effective phrases point the way toward two distinct, though related, lines of inquiry. The first of these is "clear and present," as applied to "dangers." The second is "that Congress has a right to prevent," as applied to "substantive evils." In the long series of controversies which, for thirty-two years, have raged around the interpretation of the for-

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1. American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).
2. Schenck v. United States, 249 U.S. 47, 52 (1919).

mula, attention has been directed chiefly to the phrase, "clear and present." At this point, the courts and the members of the courts have struggled in vain to give to the words a usable and dependable meaning. But the second phrase, much less discussed, is far more significant in its bearing upon the validity of the formula. That phrase, by sheer unsupported assumption, has assigned to Congress a Constitutional right—the right to "prevent certain evils." The major purpose of this paper is to challenge that assumption. It will try to show that the legislative authority which Justice Holmes asserted to belong to Congress is not, in fact, granted to Congress under the Constitution. If that contention can be sustained, the Holmesian justification of the abridging of First Amendment freedoms on grounds of "danger" is swept away.

II

What then, as we first consider the less important issue, does the opinion of the Court in the *Douds* case say about the meaning of "clear and present?"

The argument, in some detail, runs as follows:

1. In its adopting of § 9(h) of the National Labor-Management Relations Act, Congress had found that, in the past, political strikes by labor unions have interfered with the flow of commerce and that they threaten, in the future, even more serious interference.

2. Congress also believed that, in large measure, political strikes have been due to the fact that men holding certain specified opinions have been elected to office in labor unions.

3. The Act, therefore, provides that certain bargaining privileges, which, in general, are made available to unions, shall be denied to any union whose officers have failed to affirm or swear that they do not believe the opinions in question.

4. Therefore, the purpose of the Act, at this point, is to protect the freedom of commerce. It attempts to do this by "discouraging" the holding of specific "dangerous" opinions. To that end, it brings pressure upon unions to make the taking of a "belief-oath" a condition of eligibility for union office.

The Constitutional question presented to the Court by this procedure is: Does such "discouraging" of opinions violate the First Amendment? No one doubts that Congress has a right to protect commerce. But has it a right to do so by limiting the freedom of such activities as the holding of beliefs, the expressing of beliefs, the advocating of beliefs, the forming of groups or parties for the advocating or promoting of beliefs?

The *Douds* opinion is peculiarly significant for the Freedom issue because of the directness and simplicity with which it both asks and answers the "belief-oath" question. The issue is stated by the opinion as follows:

> By exerting pressures on unions to deny office to Communists and others identified therein, § 9(h) undoubtedly lessens the threat

> to interstate commerce, but it has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment. Men who hold union office often have little choice but to renounce Communism or give up their offices. Unions which wish to do so are discouraged from electing Communists to office. To the grave and difficult problem thus presented we must now turn our attention.[3]

Here is a frank admission that the statute under consideration does abridge the freedom of belief. If, then, the First Amendment means literally what it says, the statute violates the amendment. But the essence of the opinion, as it follows the contention of the Holmesian formula, is an assertion that the First Amendment does not mean literally what it says. The prohibiting of abridgment, though made without qualification, is not "absolute." It is open to exceptions, even though it does not mention them. And the phrase "clear and present danger" is devised to indicate what constitutes some of those exceptions. The *Douds* opinion enters upon the task of interpreting that theory by drawing a distinction between "due" and "undue" abridgments of political freedom. The conclusion at which it arrives reads as follows:

> . . . we conclude that § 9(h) of the Labor-Management Relations Act does not unduly infringe freedoms protected by the First Amendment. Those who, so Congress has found, would subvert the public interest cannot escape all regulation because, at the same time, they carry on legitimate political activities. Cf. Valentine v. Chrestensen, 316 U.S. 52 (1942). To encourage unions to displace them from positions of great power over the national economy, while at the same time leaving free the outlets by which they may pursue legitimate political activities of persuasion and advocacy, does not seem to us to contravene the purposes of the First Amendment. That Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantive evil will result therefrom. It does not require that he be permitted to be the keeper of the arsenal.[4]

From that statement the opinion derives justification for the ruling that when speech or belief threatens interference with the flow of commerce, it may be suppressed or discouraged. When, in this case, the freedom of commerce and the freedom of belief come into conflict, the freedom of belief must give way.

As it argues its way from premise toward conclusion, the opinion, perforce, seeks to define the meaning of the words "clear and present danger," as provided by the Holmesian formula, to give basis for the distinction between "due" and "undue" abridgments of freedom. And here, again, the *Douds* opinion is valuable because of the frankness with which it admits a difficulty.

3. American Communications Ass'n. v. Douds, 339 U.S. 382, 393 (1950).
4. *Id.* at 411, 412.

The phrase "clear and present," it tells us, has taken on, in the course of thirty-two years of controversy, two different and, even, contradictory general kinds of meaning.[5]

Under the original *Schenck* ruling, the *Douds* opinion rightly says, "any" danger, however slight, could justify the suppression of political freedom. Certainly, in that case, the danger, as reported, was very slight. But in later opinions, the predominant judgment of the Court has been that only "dangers to the nation" which are both "imminent" and "very serious" can justify Congressional interference.[6] Many different attempts have been made to give to this second interpretation a valid and usable meaning. For example, within a year after his speaking of "any" danger as sufficient for purposes of suppression, Justice Holmes, considering "opinions that we loathe and believe to be fraught with death," condemned restraint of their expression "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."[7] Justice Brandeis, too, in the same vein, uttered the well-known dictum that "Only an emergency [national] can justify repression."[8] And Chief Justice Hughes, in words quoted by the *Douds* opinion, justified Congressional invasion of Civil Liberties on the ground that "Civil Liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[9]

The conflict which thus divides the advocates of the "clear and present danger" test into two opposing camps brings to light, though perhaps not to clarity, the most significant issue of the Constitution in its dealing with the

5. "So far as the Schenck Case itself is concerned, imminent danger of any substantive evil that Congress may prevent justifies the restriction of speech. Since that time this Court has decided that however great the likelihood that a substantial evil will result, restrictions on speech and press cannot be sustained unless the evil itself is 'substantial' and 'relatively serious,' Brandeis, J., concurring in Whitney v. California, supra, or sometimes 'extremely serious,' Bridges v. California. And it follows therefrom that even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake. But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation. When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity." American Communications Ass'n. v. Douds, 339 U.S. 382, 397 (1950).

6. In Thomas v. Collins, 323 U.S. 516, 530 (1944) the Court held that "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" upon the exercise of First Amendment freedoms. As applied to free speech, the court there concluded that ". . . there can be no ban or restriction or burden . . . except on showing of exceptional circumstances where the public safety, morality or health is involved or some other substantial interest of the community is at stake." *Id.* at 536.

7. Abrams v. United States, 250 U.S. 616, 630 (1919).

8. Whitney v. California, 274 U.S. 357, 377 (1927).

9. Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

problem of political freedom. It is the issue of the special status, the preferred position, or the lack of special status and preferred position, of political freedom, in the general plan of the Constitution. Are freedom of commerce and freedom of belief on the same qualitative level of value? Is, then, our freedom of belief and utterance and association merely one of the many national values, coordinate in importance, which, added together, make up the total of the common defense and general welfare? Or, on the other hand, is political freedom so basic to the theory and practice of self-government that, under the Constitution, it is granted a priority over all the other interests, a superior and unique status of its own?

With respect to that issue, the "liberal" justices, led by Holmes, in his post-*Schenck* opinions, had affirmed, directly or by implication, the qualitative priority of political freedom. Only the desperate need of action to "save the country," they had said, could justify Congressional suppression of the freedom of the pursuit of truth. And in some of their most extreme utterances, even though still holding fast to the "clear and present danger" formula, they had gone almost to the limit of a virtual denial of the authority of Congress to break through the limits which, literally interpreted, the First Amendment had established.

The *Douds* opinion, on the other hand, in the curiously equivocal statement quoted in note 5, advocates a return to the *Schenck* theory that "any" danger can justify repression. Choice between freedom of belief and freedom of commerce is not, for it, qualitative. It is a merely quantitative measurement, of greater or lesser gains, of greater or lesser losses. This denial of the priority of First Amendment freedoms over other interests is recorded in two striking statements of principle. First, we are told that:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.[10]

And again, it is said that:

> In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership.[11]

It is not the purpose of this paper to argue the relative merits of the two conflicting interpretations of the Holmesian formula.[12] To this writer, the

10. Amercian Communications Ass'n. v. Douds, 339 U.S. 382, 399 (1950).
11. *Id.* at. 400.
12. For a discussion and analysis of the cases applying the formula see CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

"liberal" view is, of course, far more satisfying than its opposite.[13] The recognition of the special status of the political freedom of the People is of primary importance. And, in many cases, the practical effect of the "save the country" doctrine is indistinguishable from the effect of the theory that the First Amendment is not open to any exceptions whatever.

But the judicial difficulty which does trouble us is the instability of the judgments of the Court, as it uses the Holmesian formula. The meaning of that formula seems to shift from case to case, from decision to decision. It began with "any danger," then shifted to many forms of "serious danger," and now seems to have drifted rapidly back to its starting point. That lack of stability, of dependableness, seems to indicate that the formula itself is rooted in confusion, that it has no intelligible Constitutional basis. It is a "device" which does not "work."

This impression is strengthened by a reading of the recent opinion, written by Judge Learned Hand, confirming the conviction of Eugene Dennis and others for violation of the Smith Act.[14] Judge Hand, too, reviews the long series of attempts, since 1919, to give to the words "clear and present" a dependable meaning. The outcome of that survey is stated as follows:

> The phrase, "clear and present danger," has come to be used as a shorthand statement of those among such mixed or compounded utterances which the Amendment does not protect. Yet it is not a vade mecum; indeed, from its very words, it could not be. It is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. In each case they must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[15]

As he writes those words, Judge Hand is now saying, as did the *Douds* opinion, that, case by case, without general principle, the courts must decide whether the public gain which can be won by suppressing freedom is greater or less than the loss which it brings. But the method of that determination of gain and loss is left to the discretion of the courts, as if the First Amendment had never been written. The "clear and present danger" phrase, it appears, does not tell us "how," or on what scale of measurement the determination of values may be made. It says only "that" they may be made. The courts, Judge Hand declares, must "find their way as they can." And, speaking of the use of the phrase "clear and present" as possibly giving guidance, he says:

> But that would not have helped to define the forbidden conduct; for, not only are those words imprecise in themselves, . . . but, as we

13. For a fuller exposition of the writer's opinion see MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

14. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).

15. *Id.* at 212.

> have seen, they pre-suppose balancing the repression necessary to avoid the evil, against the evil itself, discounted by the improbability of its occurrence. That is a test in whose application the utmost differences of opinion have constantly arisen, even in the Supreme Court. Obviously it would be impossible to draft a statute which should attempt to prescribe a rule for each occasion; and it follows, as we have said, either that the Act is definite enough as it stands, or that it is practically impossible to deal with such conduct in general terms.[16]

In those words, coming from the powerful and penetrating mind of Learned Hand, the "clear and present danger" phrase is revealed in all its basic unintelligibility and uselessness. As it was first formulated, it gave promise of sharp and definite procedures in the defense or suppression of freedom. But thirty-two years of controversy over its meaning are summed up in the statement that the phrase "clear and present" is "a way to describe a penumbra of occasions, even the outskirts of which are indefinable." Surely the time has come when we must recognize that the Holmesian phrase is utterly inadequate to the task assigned it.[17] It is intolerable that the most precious, most fundamental, value in the American plan of self-government should depend, for its defense, upon a phrase which has no dependable meaning. That phrase should be abandoned. We need to make a fresh start in our thinking about the meaning of the Constitution as it provides for the defending and up-building of our political freedom.

III

As already noted, the preceding discussion of the phrase "clear and present" has been based upon an assumption—the assumption that in order to "prevent evils" Congress has authority to abridge political freedom. But the chief purpose of this paper is to challenge that assumption, to question its validity. For that purpose we now turn to the Holmesian words, "substantive evils that Congress has a right to prevent." What is that "right?" Does it, as established by the Constitution, give to Congress authority to limit the freedom of the People of the United States, in the fields of religion, speech, press, assembly, and petition?

The argument which seeks to establish the "right" of Congress to abridge freedom on the ground that, by so doing, it may "prevent evils," is based upon the observation that, under the Constitution, the Government has responsi-

16. *Id.* at 214.

17. In Pennekamp v. Florida, 328 U.S. 331 (1946) Justice Frankfurter, in concurrence, stated that "'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context." *Id.* at 353. "It does an ill-service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma." *Id.* at 352.

bility for two distinct sets of interests. It must protect the political freedom of the People. But it must also provide for the common defense and the general welfare. And these two sets of interests, it is asserted, may be, on occasion, in conflict with one another. There comes about, therefore, the necessity of choosing between these interests, of "balancing" them, of judging their respective claims as items of national value.

This theory of "balancing" has been sharply and powerfully stated by Professor Zechariah Chafee, Jr.:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle.[18]

In those words, Professor Chafee, speaking as a life-long and shrewd defender of political freedom, has stated persuasively the "balancing" principle which, he tells us, underlies the "right to prevent evils" doctrine. Before the validity of that principle is discussed, a remark about the meaning of Professor Chafee's text must be made.

It may presumably be taken for granted that "the other purposes of government, such as order, the training of the young, protection against external aggression," are "subjects of general concern." There are, as the statement stands, only two sets of interests between which conflict is said to occur, and in respect to which, therefore, "balancing" must be done. On the one hand, there are "subjects of general concern," while, on the other, is "the discovery and spread of truth" concerning those same "subjects of general concern." The problem is, "How shall we adjust the conflicting claims of the common defense and general welfare and those of the pursuit and advocacy of truth concerning the common defense and general welfare?"

This writer, it has already been said, rejects the "congressional right to prevent evils" doctrine as it is asserted by the Holmesian argument.[19] That does not mean, however, that we must deny the necessity of balancing the respective claims of the national safety and welfare as against the political

18. CHAFEE, *op. cit. supra* note 12, at 31. The phrase "freedom . . . for the discovery and spread of truth on subjects of general concern" seems to express perfectly the intention and scope of the First Amendment. But the phrase "absolutely unlimited discussion" seems to miss its mark by a wide margin.

19. See MEIKLEJOHN, *op. cit. supra* note 13 at 47, 48.

freedom of the People, as they make up their minds about problems of safety and welfare. Nothing is more certain than that the program of political freedom is a dangerous one. It involves losses, as well as gains. It constantly exposes our national interests to serious dangers. And it is equally true that the political program of enslavement, of non-freedom, provides ways to "prevent evils" which are not available when men "govern themselves." And these facts mean that, somewhere, by some governing body, decision must be made, the "balancing" of which Professor Chafee speaks must be done. We must choose between Democracy and its opposite. The question at issue in this discussion, therefore, is not "Shall balancing be done?" The question is "By whom shall it be done?" And the answer of the Constitution to that question seems clear and decisive. The essential meaning of the First Amendment is that, already, in the making and maintaining of the Constitution, the procedure of "balancing" has been undertaken and completed. On the basis of long experience and careful deliberation, a general principle of balancing has been adopted and maintained. And that principle explicitly denies to Congress and, by implication, to any other branch of the government, authority, case by case, to abridge the political freedom of the People.

In support of what has just been said, it is important to observe that the First Amendment is not the only provision of the Constitution which sets limits to the authority of Congress, as it goes about its task of providing for the common defense and general welfare. What, then, are "the powers" of Congress, as those powers are "delegated" by the Constitution?

Article I, Section 1, tells us that whatever legislative powers are delegated to any governing body, are granted to Congress. And, on that basis, Section 8 of the same Article proceeds to state what, at present, those granted powers are. We, the People, it is declared, give to Congress general authority "to provide for the common defense and general welfare." The same section then lists, under sixteen headings, the specific kinds of laws which Congress may enact as it seeks to meet that responsibility. And, finally, the concluding paragraph of Section 8 adds the statement that Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof."

So much on the positive side! But Section 9 of Article I is equally explicit in denying powers to Congress, in specifying laws which it may not enact, as it provides for the common defense and the general welfare. "No bill of attainder or ex post facto law may be passed." Again, "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. . . ." In eight paragraphs of this kind, Section 9 specifies types of law-making authority which, being held by the People, might be granted to Congress, but which, by explicit statement, are as yet

denied to it. Such powers, however useful and "necessary" they might be on this or that occasion, are not deemed "proper" to Congress. And, in the same vein, the Bill of Rights extends the negative work of Section 9. Its enactments are a series of definite and deliberate limitations of the scope of Congressional and other government authority.

The First Amendment, then, as it protects from Congressional interference the freedoms of religion, speech, press, assembly and petition, is not unique. Many other provisions, chiefly in Article I, Section 9 and in the Bill of Rights, declare that neither the Legislative nor the Executive nor the Judiciary may do this or that. For example, legislation which would direct the taking of a man's life, liberty, or property without due process of law, is forbidden. The privilege of the writ of habeas corpus may not be suspended except in cases of defined emergency. The levying of taxes and the convicting of men for treason are kept within carefully prescribed limits. In these and many other ways the exercise of the "right to prevent evils" is hemmed in or denied. The three branches of our government which the Constitution establishes and maintains are not granted unlimited powers. To say they were would be to deny the fundamental postulates of self-government on which the Constitution is based.

It has just been argued that both the text and the logic of the Constitution have limited the Congressional power to "prevent evils" by forbidding that body to abridge political freedom. But, at this point, the hard-headed "realism" of so-called "experience" breaks out in denunciation of the follies of "theorists," of "idealists," who are concerned with "words" rather than with the "things" which the words should represent.

"What you are saying," these non-theorists tell us, "is that a Government, in time of danger, even of extreme danger, has no right to defend itself. If men are advocating the very overthrow of this government by force and violence, you would have us believe that the government has no authority whatever to forbid such advocacy, to prevent it by the process of laws and convictions and punishments. Such a theory is sheer madness. The first duty, the primary right, of any government is that of self-defense, of self-preservation. If the government is destroyed, all other values, public and private, including the value of freedom, are destroyed with it."

It was that "realism" which found expression in the *Schenck* case, as the basis of the Holmesian doctrine. In justifying his new formula, Justice Holmes made no appeal either to the text or to the logic of the Constitution. What he said was, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."[20] Over and over again, in the thirty-two

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

years since 1919, the followers of Justice Holmes have based their policies on that statement which seems to them a solid rock of common sense. In the *Douds* case, for example, we are told that:

> Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts.[21]

What answer shall a "theorist" make to that "sensible" doctrine? Has the Government of the United States the "right" to defend itself, of which the Holmesians speak? Has it authority, under the Constitution, in the interests of its own safety and welfare, to abridge or even to abolish the freedoms of religion, speech, press, assembly and petition, together with other freedoms and rights now guaranteed by the Constitution?

To both of these questions the answer must be an unqualified "Yes." Any sovereign government, as such, grants to itself the right of self-defense. And, further, that right may be exercised in whatever form, by whatever methods, the government may choose. If, then, abridgment of freedom is necessary for the preservation of the nation, the right to abridge freedom cannot be questioned. And, still again, the right of a government to change its mind, to re-make its will, is not open to intelligible question. And this means that, since the freedoms of religion, speech, press, assembly and petition exist politically only through the will of the Government of the United States, that government may destroy or modify them whenever, in its judgment, such action seems advisable.

But that statement, it must be noted, does not support the right of *Congress* to "prevent evils" by abridging freedom. The statement is true, but it is beside the question. It is one thing to say that the Government of the United States has a specific power of self-defense. It is an utterly different thing to say that Congress has that power. And the second of these statements does not follow from the first. Congress is not the Government. It is one of three subordinate agencies established by the Government with limited and specified powers. Congress is directed to use those powers to "prevent evils." But the sovereign government, in delegating powers for that task, has not only failed to include among them the power to abridge political freedom; it has clearly and unequivocally, on the basis of long deliberation, declared that Congress shall not have, shall not exercise, that power. We, the People of the United States, have powers which we have "reserved" as well

21. American Communications Ass'n. v. Douds, 339 U.S. 382, 394 (1950).

as powers which we have "delegated." And the power to abridge political freedom is "reserved."[22]

The Government of the United States, we have said, has decided, for the present at least, not to defend itself nor to allow any of its agencies to defend it, by abridging "the freedom of the discovery and spread of truth about subjects of general concern." Why has that decision been made? Certainly it does not express a reluctance, an unwillingness, to defend the nation. Free people are fully as eager to protect themselves and their institutions as are governments whose people are enslaved. The First Amendment, then, expresses hostility, not to the aim of self-defense, but to a suggested method of achieving that aim. It gives voice to the conviction that, for the defending of free governments, the methods of suppression are always self-defeating and ineffectual. Always those methods accomplish the exact opposite of what they intend to do. They sometimes "prevent evils" but, in doing so, they create far greater evils to take their place. Free institutions, therefore, are built on the assurance that the procedures of political freedom are shrewd and efficient. The political system of self-government is not constructed out of the idle fancies of dreamers lacking in common sense. It is rugged wisdom which has been won by many centuries of hard experience, of bold and courageous thinking. As nations, side by side, in friendship or in hostility, seek for self-preservation, the Faith of a democratic nation can be simply stated. It says, "For our purposes, suppression 'does not pay;' for our purposes, 'political freedom does pay.'" That judgment has been made, not by the Congress or Courts of the United States, but by the governing body which has established, and which maintains, the Constitution. It may be that the judgment should be reversed or amended. But neither Congress nor the Courts have been granted authority to take either of those actions.

As one looks back over thirty-two years of controversy concerning the meaning and validity of the Holmesian formula, one of the most illuminating statements about it is given at a crucial point in the *Douds* opinion. That opinion, as has been noted, rejects the "liberal" doctrine of "national emergency" or "save the country" as giving meaning to the "clear and present danger" phrase. But, by a peculiar trick of logic, which might be found amus-

22. In this connection, the attention of the writer has been called to some words from a "separate" opinion by Justice Brewer, Turner v. Williams, 194 U.S. 279, 295, 296 (1904) which reads: "While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the 10th article of the amendments to the Constitution, that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The powers the people have given to the general government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people, and can be exercised only by them, or upon further grant from them."

The contention that the 10th Amendment underlies the 1st has been argued elsewhere by the writer of this paper, and that contention underlies all the present argument.

ing if it were not so tragic in its consequences, it manages to accept the doctrine as well as to reject it. By a kind of poetic justice it thus gives to the "save the country" theory the same medicine which that theory had administered to the First Amendment.

The "liberal" justices, led by Justice Holmes, had not rejected the assertion that Congress may not abridge political freedom. They had "interpreted" it by deciding that the assertion cannot possibly mean what, literally, it says. By means of the ruling that the First Amendment is not "absolute," they had thus been able both to accept and to reject its pronouncement. The prohibition of abridgment was kept in the text of the Constitution, but the practice of Congressional abridgment was authorized, subject only to the approval of the courts.

And now, in the *Douds* opinion, by a passage quoted in note 5, the liberal creed is given the same treatment. The "save the country" principle is not rejected. It is, in fact, mentioned with high approval. But to this is added the observation that it cannot possibly mean what, literally, it says. A "rigid" interpretation and use of it would be, we are told, an "absurdity." That is a logical procedure by means of which strange results can be accomplished. In the issue before us, it has enabled the American nation, while publicly and proudly committed to the principle of political freedom, to "make exceptions" to the principle wherever, in the judgment of Congress, such double-dealing seems advisable.

The intellectual confusion and self-contradiction which thus characterizes the *Douds* opinion in its dealing with the word "absolute" finds its culminating expression in a statement made by the recent ruling of the Supreme Court on the constitutionality of the Smith Act. That statement reveals the fact that one of the deepest sources of the confusion underlying the Holmesian formula is a misunderstanding of a well known and valid philosophical theory about the "absoluteness" of human statements of fact or of opinion. The passage in question reads as follows:

> Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. . . . To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.[23]

Now the purpose of that statement is to give basis for the assertion that the First Amendment is "open to exceptions." But its startling and destructive quality lies in the fact that it would justify Congress in making exceptions, not only to the demand for political freedom, but to every other provision which the Constitution makes. If, in the sense asserted, "all concepts are

23. Dennis v. United States, 71 Sup. Ct. 857, 866, 867 (1951).

relative," then there is not a single principle built into our plan of government which Congress may not, at its own discretion, set aside whenever, in the public interest, such action seems to it advisable. Surely, when we are speaking of a government in which "powers" are both "delegated" and "reserved," that argument proves too much. It would land us, if not in a strait-jacket, in a constitutional madhouse in which the resort to strait-jackets is a well recognized custom.

What, then, is the source of this intellectual absurdity? It is to be found, as has been said, in a confusion between two meanings of the words "absolute" and "relative," as applied to statements of fact or of opinion. There is a well recognized principle of philosophy which finds that no conclusion reached by human thinking can be unconditionally or absolutely true. All human inquiry, it says, is partial and incomplete. However much thinking has been done on any question, there is always more thinking to be done on it; more evidence to be considered. And that later thinking, while it may lead to continued acceptance of an opinion, may also lead to its modification or even rejection. It is in this sense that we say that the Constitution itself is not "absolute." Every sentence in it is open to reconsideration by the political body whose will and judgment it expresses. And this means that We, the People, who have established and who maintain our present plan of government have reserved to ourselves authority, if we so choose, to abolish, or to modify, the First Amendment, or any other enactment we have made. In a word, the present form of our institutions is not "final." In that sense, it is not "absolute."

But the words "absolute" and "relative" have another pair of meanings, very different from the first. Some statements of fact or of opinion, we say, contain within themselves modifying conditions. They are hypothetical, rather than absolute, in form. But other statements contain no such limitations of their scope. They are made without qualifications or exceptions. In that sense, they are unconditional or "absolute." And the effect of this distinction, when applied to the provisions of the Constitution, is radically different from that which results from the use of the words "absolute" and "relative," in their other senses. That effect is to separate those provisions into two distinct groups, on the basis of a difference of character rather than to bring them all together into a single group on the basis of the possession of a common character.

Now the error of the statement in the Smith Act opinion is that, to a question in which the word "absolute" is used in one sense, a reply is given in which the word "absolute" is used in the other sense. The problem raised by the *Schenck* case and by all others which deal with political freedom is "To which of two groups of Constitutional provisions does the First Amendment belong: does it protect political freedom absolutely, that is, without condi-

tions, or does it protect it relatively, that is, with conditions?" And to this the answer is given, "All provisions of the Constitution are made relatively, and, hence, the First Amendment statement is made with conditions, is 'open to exceptions.'" The defect of that reasoning is not that it is false, but that it is irrelevant. Beyond question, the statement "Congress shall make no law" abridging political freedom is open to reconsideration. But that can hardly be taken to mean that, as it now stands, it is "open to exception." The denial of absoluteness to the First Amendment finds as little support in philosophy as it finds in the text of the Constitution.[24]

IV

The concluding section of this paper will attempt a "balancing" of the gains and losses which have accrued to the United States from the Supreme Court action in the *Schenck* case of thirty-two years ago, when it gave unanimous approval to the newly-devised formula which granted to Congress a qualified power to abridge the freedoms which the First Amendment had declared protected from such abridgment.

So far as the immediate issues in the *Schenck* case were concerned, in 1919, the gains and losses of the decision were, on both sides, small in amount. On the profit side, two persons whose utterances had threatened the military draft were restrained and punished. Apparently, however, the danger of their threat was very slight and the gain for the draft, therefore, rather unimportant. On the other side of the balance, two inconspicuous and seemingly well-meaning persons were consigned to jail. They suffered imprisonment, public disrepute, and, undoubtedly, a bitter sense of misunderstanding and injustice. Who can tell how that balance should be drawn?

But now, thirty-two years later, the account of gains and losses, but especially of losses, caused by the formula, is far more intricate and far more decisive. What is the general outline of that reckoning up to date? As matters to be considered in the balancing of the national gains and losses following from that pronouncement during the past thirty-two years, this paper offers three items of loss.

First, the effect of the Holmesian principle upon the popular thinking of the nation about its protection and suppression of freedom has been decisive and disastrous. Whatever may have been the experience of the courts in using the words "clear and present danger," it is certain, beyond question, that, in the fields of public discussion, those words have become a war-cry, a slogan, claiming authorization by the Supreme Court of the United States, for the stirring up of passion, of enthusiasm, for the suppression of ideas and persons, wherever they are found to be "dangerous." And, by means of another

24. See MEIKLEJOHN, *op. cit. supra* note 13, at 70-90.

rhetorical phrase, radically false and misleading in its suggestion, non-legal minds—and some legal minds as well—have been led to believe that any one who opposes prevailing customs or beliefs may be identified in character and in action with a person "falsely shouting fire in a theater, and causing a panic." Such persons, it is held, may, therefore, be dealt with as the fire-shouting murderer should be dealt with. They have little claim either to mercy or to justice. Whether it be a legislative committee on Un-American Activities, or an Immigration Department excluding or silencing aliens, or a voluntary group seeking out sedition, or educational authorities testing the loyalty of teachers, our citizens now commonly believe that the Supreme Court can be counted on to give to blind hatred and hysteria the authority, the insight, of its calm and dispassionate deliberations. What is the public gain which would offset that basic corruption of the American mind concerning that belief in freedom which exceeds in value any other single item, and perhaps all other items added together, in our national life?

There is a second item of national loss which cannot, it is true, be attributed wholly or directly to the adoption of the "right to prevent evils" formula. But it can be attributed, in large measure, to the state of mind, the processes of thinking, out of which that formula comes. It is a loss which has become more and more serious as the course of events has brought to our nation leadership in the struggle for freedom throughout the world.

Are we of the United States equipped in mind and attitude to take that leadership? A major factor in such equipment would be ability to command the confidence of other nations that, when we speak to them about freedom, we can be counted on to mean what we say. Have we built up that confidence? Every nation in the world now knows that we can, and do, talk glibly and passionately about political freedom. But they are not so sure that, in the face of "clear and present dangers" which now threaten to engulf the modern world, our actions will not belie our words. And our confused creed that "all concepts are relative" plays a large part in creating that uncertainty. Because of it, we are becoming known as past masters in the art of "making exceptions" without mentioning them. We "wave" the principles of freedom in our words, but we are officially committed to the doctrine that, in time of danger, we must "waive" them again. Any other course, we say, would be an "absurdity." What is the gain which over-balances that undermining of all our efforts toward the making of a free world?

Deeper and more serious than either of the losses already mentioned is a third which is bringing confusion and ineffectiveness into all our dealings with freedom, at home or abroad. Underlying the Holmesian formula, with its reliance upon experience as against logic, is a fear of abstract reasoning; a distrust of words, which threatens the integrity, not only of the First Amendment; not only of the entire body of "abstract principles," out of which the

Constitution is made, but, also, of every demand for truth and justice which seeks to express and make effective the purposes of our national life. The "practical wisdom," of which we are so proud, with its hatred of theories and ideals, its shrinking from persistent intellectual searching for the truth, is, at the bottom, a kind of cowardice, a lack of the courage which is needed for seeing things as they are.

The plain fact which is revealed by thirty-two years of experience with the Holmesian formula is that in terms of gains and losses for the public safety and welfare, the formula has done the exact opposite of what it was intended to do. Instead of "preventing" evils, it has created them. Its promise of definiteness and certainty of judgment, given by the words "clear and present," has been sadly disappointing. In place of those qualities, we have suffered the vagueness and variability of "a test in whose application the utmost differences of opinion have constantly arisen, even in the Supreme Court." Again, the extension of the powers of Congress beyond the limits explicitly set by the Constitution has shaken to its very foundations our American theory that the political freedoms of a self-governing People may not be abridged by agencies whose only governing powers are those which have been specifically delegated to them by the People. Finally, and worst of all, the justfication of that decision, given in the misleading assertion that "all concepts are relative," has made it certain that when we Americans speak about freedom, we cannot be trusted, either by our friends, our enemies or ourselves, to mean what we say; to do what we say we will do. Whatever may have been the balance in 1919, the swing of it in 1951 is obvious and disastrous.

The First Amendment expresses, without qualification, the most fundamental principle of government which human wisdom has devised. The formula which qualifies it has done damage enough. The time has come when *unqualified* political freedom should be firmly reestablished.