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## THE LEFT, THE RIGHT AND THE FIRST AMENDMENT: 1918-1928\*

ROBERT M. COVER\*\*

The Supreme Court of the United States has long been more than a forum of last resort, an ultimate tribunal for resolving disputes. At least since its decision in *Marbury v. Madison*<sup>1</sup> in 1803 it also has been the political philosopher or, if one prefers a more pejorative connotation, the ideologue of the American democracy.<sup>2</sup> Constitutional law in the United

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\*\* Professor of Law, Yale Law School. I am grateful to the Harvard Law School and to Professors Paul Freund and Grant Gilmore for permission to use and quote from the Louis Brandeis and Oliver Wendell Holmes, Jr. manuscript collections. I am particularly grateful to Mrs. Erika Chadbourn, the Curator of those collections, for her generous assistance throughout the research for this article. All quotations from the Holmes and Brandeis papers are with the permission of the Harvard Law School. I wish to thank Bruce Ackerman, Marvin Chirelstein, Jan Deutsch, Owen Fiss, Paul Freund, Julius Getman, Joe Goldstein, Grant Gilmore, Arthur Leff and Peter Schuck for reading and commenting upon drafts of this paper.

1. 1 Cranch 137 (1803). While it is the section of *Marbury* devoted to judicial review that is most often read and analyzed, I am referring here to the earlier portions of the opinion devoted to the reach of "law" in circumscribing the activities of executive officers. *Id.* at 169-173.

2. I will use the term "ideology" because it denotes several salient characteristics of the Court's work. First, it suggests a comprehensive justificatory or apologetic intellectual enterprise. The Court is so engaged. Its job is either to undo the decisions affecting other persons and institutions in society or to explain why they shall stand. Its apologetic explanations, moreover, are rarely straightforward statements that the result is right. Rather, they are ordinarily explanations that since the allocation of political or economic power is, as a whole and systematically, just, it is appropriate to locate the decisional power where it happens to lie. Such systemic justifications trump claims of particular or local injustice with constitutional, structural and comprehensive perspectives on the legitimacy of the order.

A second sense in which I believe the term "ideology" is appropriate to the work of the Court is in its denotation of thought which is socially determined — a function of

States has been and continues to be the line at which the plane of political ideas meets that of political action. In constitutional law our political, economic and social activity must find acceptable justifications within our political philosophy while our ideas and ideals are tested and changed as they meet the realities of our practical life. It usually falls to the Supreme Court, in the final analysis, to make the formal judgments that legitimate our activity or render it illegitimate; that express and modify our ideas to the forms that will command collective efforts at realization. The Court is by no means the only actor in the drama of giving life to political ideas. But the Court, by virtue of judicial review, stands prepared to answer any challenge as to whether a given outcome or activity is consistent with the ultimate governing political norm, and it must explain its conclusion. The result — constitutional law — is an enormous series of statements as to what are or are not the implications of the central principles of our politics.<sup>3</sup>

Through history, very different political issues and ideas have claimed the Court's attention. Some have been specific, transitory in character. Others have remained, with variations, the constant dilemmas of our political experience. Because America has always seen political democracy — popular government — as her most distinctive characteristic, it has remained a constant theme for the Court. Any justification or critique of American institutions and of their consequences requires at least an implicit theory of popular government. Such a theory is not an academic exercise, however. It will be set against its threatening alternatives. At the earliest stages of American government the ideology of democracy evolved against the antitheses of monarchy and empire.<sup>4</sup> Through the early nineteenth century competing theories of popular government played their roles in America's internal dialectic between industrial capitalism and slavery.<sup>5</sup> In the

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the place of a social group within the social or economic structure. While I fully intend to suggest these two dimensions of "ideology" in my use of the term I would caution against reading other elements into it. I do not mean to suggest a Marxist taxonomy of the relevant social groups which might generate ideologies. Nor do I mean to suggest that the systems of thought so labelled are to be compared unfavorably to some "truer" vision of the world. In short, I use the term as part of a liberal and relativistic "sociology of knowledge." See, e.g., R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 456-89 (rev. ed. 1965).

3. The function of ideology is, in the words of Clifford Geertz, "to make an autonomous politics possible by providing the authoritative concepts that render it meaningful." C. GEERTZ, *Ideology as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 218 (1973). And see *IDEOLOGY AND DISCONTENT* 18 (D. Apter ed. 1964).

4. See, e.g., B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969).

5. See, e.g., E. GENOVESE, *ROLL JORDAN, ROLL* (1974); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848* (1977).

later nineteenth century and in the first twenty years of the twentieth century, the Court had to face the practical and conceptual challenges of adapting democratic processes and forms to an industrializing nation with its attendant class conflicts and dislocations.<sup>6</sup> In the wake of World War I, the focal period for this article, the conceptual challenge to democratic theory ceased to be primarily internal. With the political collapse of Europe, the Wilsonian program for peace, the struggle over the League of Nations and, finally and most important, the Russian Revolution and the rise of fascism, American "democracy" became a principal contender for ideological ascendancy in a global struggle for ideas and power.<sup>7</sup> The challenges wrought by industrialization, urbanization and immigration did not disappear but rather took on new and more far reaching implications in the context of worldwide ideological strife. The Supreme Court played a major role in these crucial post-war years in articulating what it was that American democracy stood for and what it required in that conflict.<sup>8</sup>

The Court did not set its own ideological agenda. It was Wilson at the peace table and Lenin in the wings who initially determined the shape of the coming war of ideas. From Versailles on, the fate of democratic institutions in Europe — buffeted by the challenges of fascism and communism — reverberated in America. Any useful account of American democratic theory had to take account of the "pathologies" in the European collapse of parliamentary governments. It became the task of American constitutional law to respond to these pathologies. The response had to occur on two levels. On the ideological level, it was necessary to mark the distinctions between the American variant of capitalist democracy and the foreign political pathologies — to reaffirm the distinct American mission and experiences and to describe them. On a practical level, it became necessary to delineate an effective defense to the political pathogens. For while Europe was clearly marked as the source of the disease, the very nature of the

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6. See, e.g., A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1969); G. WIEBE, *THE SEARCH FOR ORDER* (1967).

7. For different perspectives on the global ideological struggles, see, e.g., A. MAYER, *WILSON V. LENIN, POLITICAL ORIGINS OF THE NEW DIPLOMACY, 1917-1918* (1959); A. MAYER, *POLITICS AND DIPLOMACY OF PEACEMAKING IN EUROPE* (1967); A. MAYER, *THE DYNAMICS OF COUNTERREVOLUTION IN EUROPE, 1870-1956* (1971). And see H. ARENDT, *ON REVOLUTION* (1963); H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951); C. MAIER, *RECASTING BOURGEOIS EUROPE* (1975); E. NOLTE, *THE THREE FACES OF FASCISM* (1965).

8. See A. MASON, *HARLAN FISKE STONE, PILLAR OF THE LAW* 512-15 (1956) (concerning the international context for the famous footnote 4 of *United States v. Carolene Products Corp.*, 304 U.S. 144 at 152-53 (1938)); Cover, *Origins of Judicial Activism in the Protection of Minorities* (forthcoming in a publication of the American Enterprise Institute on Activist Judiciary).

struggle — its articulation in the transnational terms of class or race warfare — was that of a potential civil war.

A full account of the work of the Court in these respects, in distinguishing the American experience and defending against its enemies, necessarily would become a book-length treatise. It is possible to begin, however, with a single, critical problem, drastically in need of reappraisal in light of the contextual considerations noted above. That area is freedom of expression. The legal rubric corresponds to a far more complex problem of political theory: the role of information and advocacy in democratic government. In order to see the Court's work in perspective, however, we shall have to examine not only conventional free speech cases, but also a variety of other doctrines through which the Court approached the challenge. In the first two sections of this article I shall examine the two kinds of challenge to liberal democracy. First I shall consider the problem of insurgency — of disorderly politics. Next I shall consider the problem of ideology and interest in political communication. Finally, in the last section, I shall consider one distinctive answer to these problems in the commitment to deliberative politics that emerged in the free speech opinions of Holmes and, especially, Brandeis between 1919 and 1927.

#### MASS POLITICS OF INSURGENCY: CONSENSUS OF A CONSERVATIVE COURT

Our conventional constitutional histories of the interbellum period describe a great cleavage in the Court. There is a conservative old guard, dedicated to laissez-faire, to substantive due process, to anti-radical repression. It consists of White, McKenna, McReynolds, Van Devanter, Pitney, Day, Taft, Sutherland, Butler and Sanford. This old guard is a decisive majority of the Court throughout the period from World War I to 1930.<sup>9</sup> The opposing, "liberal" block is against the constitutionalization of any particular social or economic philosophy — that is, it is against substantive due process; it is for judicial restraint, but also for enforcement of civil liberties and civil rights as checks against the tyranny of majorities. The liberal block consists at first only of Holmes and Brandeis, later joined by Stone.

The traditional story is substantially accurate as far as it goes. But it misses an essential point. It obscures the extraordinary area of

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9. See, e.g., A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* (1958); R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941). And see Dean Acheson's interesting individual portraits of the Justices of the Court in 1920-21, in *MORNING AND NOON* 59-77 (1965).

consensus on the Court on major issues and the ways in which both the area of agreement and the area of dispute performed important symbolic functions in a larger war of ideas.

For the conservatives, the disorderly politics of the street that emerged in the wake of war in Europe and America were a primary threat not only to property but to civil society. William Howard Taft's evolution is instructive. When the February Revolution occurred in Russia, former President Taft, then law professor at Yale, pronounced: "The end of absolutism in Russia is the first great triumph of this war."<sup>10</sup> He foresaw that Russia "under the influence of civil liberty will blossom into a leading . . . progressive member of the family of nations."<sup>11</sup> Two years later, in June 1919, Taft was no longer sanguine about Russia; he was concerned about the spread of Bolshevism, but comforted himself and his audience by observing that "the great body of our workingmen are utterly opposed to Bolshevism."<sup>12</sup> He admonished his audience to reform industrial relations with the recognition of unions and with collective bargaining (though not necessarily with collective agreements) so as "to retain them [workingmen] and keep them out of the hands of extremists."<sup>13</sup>

Five months later Taft had declared that Bolshevism had a foothold in unions and was behind many of the strikes that had broken out. He was no longer prepared even to count the destruction of *old* orders as "triumphs" of the war:

The result of this war in destroying the old Governments, in shaking of society in every country in which the war had any influence, has been to weaken the supremacy of lawful authority.

. . .

This Bolshevism is militant and threatening in every European country. It has penetrated to this country. Because of the presence of hordes of ignorant European foreigners, not citizens . . . with little or no knowledge of our language, with no appreciation of American civilization or American institutions of civil liberty, it has taken strong hold in many of our congested centers and is the backing of a good many of the strikes from which our whole community is suffering today.<sup>14</sup>

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10. New York Times, Mar. 28, 1917, at 2, col. 6.

11. *Id.*

12. New York Times, June 21, 1919, at 6, col. 4. Already in 1918 Taft had called for intervention against Bolshevism. See A. MAYER, *POLITICS AND DIPLOMACY OF PEACEMAKING* 261 (1967).

13. New York Times, June 21, 1919, at 6, col. 4.

14. New York Times, Oct. 31, 1919, at 3, col. 1. It must be conceded that the extravagant rhetoric of this speech may be partially attributed to its context. It was a "stump" speech for the reelection of Governor Calvin Coolidge.

When Taft became Chief Justice, less than two years later, his first significant opinions were attempts to impose law and civility upon labor disputes.<sup>15</sup> He genuinely believed that militant confrontation in a labor dispute was a test of government's readiness to restrain private violence, of its will to tame the passion of the mob, of its capacity to impose civil forms upon private conflict. It was Taft's vision that lawful authority had failed in Europe, that militancy, coercion, and violence from the left had precipitated that failure. Taft, like all of us, undoubtedly found in history the lessons he was predisposed to learn.<sup>16</sup> But his predisposition should not obscure the genuine commitment of Taft and his conservative brethren to order, to public civility, and to the elimination of private organized violence. This commitment to civility was the mark of traditional conservatism. It eschewed alliance with the insurgent right and, after 1919, avoided the excesses of its rhetoric.

The commitment to civil order was more than a sword to be used against labor and the left, although that was its most obvious and frequent manifestation. It could and would carry with it the seed for striking against mass politics of the right as well. The dedication of the conservative wing of the Court to the elimination of private violence was most evident in its insistence upon the labor injunction as a remedy,<sup>17</sup> in its strained, anti-labor reading of the Clayton Act;<sup>18</sup> in its application of the Sherman Act to secondary boycotts;<sup>19</sup> in short, in its arming federal courts in order to stop picketing and organization work by unions. But after 1919 these same conservatives were prepared to acquiesce in some parallel restraints against the radical right. It is no

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15. Taft's first labor opinion, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), was only the third opinion delivered by Taft. The first two were a patent infringement case of no doctrinal significance, *Hildreth v. Mastoras*, 257 U.S. 27 (1921), and a case involving interpretation of the Rules Conformity Act as applied to federal court execution of a judgment upon stock, *Yazoo & Miss. Valley R.R. v. Clarksdale*, 257 U.S. 10 (1921). *Steel Foundries* is discussed in the text accompanying notes 33-39 *infra*. Taft's opinion in *Truax v. Corrigan*, 257 U.S. 312 (1921), was handed down one week after *Steel Foundries* and was only his fourth opinion as a Justice. For a discussion of *Truax*, see text accompanying notes 47-50 *infra*.

16. Taft's long standing anti-labor sentiments have always been appreciated by historians and biographers. See e.g., I. BERNSTEIN, *THE LEAN YEARS*, ch. 4, *Labor v. the Law* (1960); H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT*, (1939); Mason, *The Labor Decisions of Chief Justice Taft*, 78 U. PA. L. REV. 585-625 (1930).

17. This insistence is most prominently displayed in *Truax v. Corrigan*, 257 U.S. 312 (1921).

18. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

19. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925) (*Coronado II*); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assoc.*, 274 U.S. 37 (1927).

coincidence that a year after deciding *Truax v. Corrigan*,<sup>20</sup> the Court's most explicit and unequivocal statement of the need for the labor injunction, the Court, in *Moore v. Dempsey*,<sup>21</sup> implicitly overruled the recent precedent of *Frank v. Mangum*,<sup>22</sup> and empowered federal courts in habeas corpus cases to pierce the record and determine independently of the state court whether a state trial was dominated by a mob.

*Moore v. Dempsey* involved an explosive confrontation between a black community organizing itself against economic domination by whites and a violent white effort at suppression led by the American Legion.<sup>23</sup> While it was the "liberal," Holmes, the dissenter in *Frank v. Mangum*, who wrote for the majority in *Moore*, it was Taft who joined him and helped constitute the majority, and who assigned the opinion to the dissenter in *Frank*.<sup>24</sup>

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20. 257 U.S. 312 (1921), decided December 19, 1921.

21. 261 U.S. 86 (1923), decided February 19, 1923.

22. 237 U.S. 309 (1915). In *Moore*, Holmes mentions but does not explicitly overrule *Frank*; nor does he offer any distinguishing facts. Justice McReynolds, dissenting in *Moore*, correctly maintains that *Frank* is indistinguishable. 261 U.S. at 93-96 (quoting *Frank* at length).

23. See Holmes's statement of the case, 261 U.S. at 87-90. See the text of the Legion's Resolution in McReynold's dissent, *id.* at 99-100 n.1. An interesting account of the events leading to *Moore v. Dempsey* is to be found in A. WASKOW, FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960's at 143-74 (1966).

24. I do not have direct evidence of Taft's influence in the turn-around. The following personnel changes occurred between 1915 and 1923: Taft replaced White as Chief Justice; White had been in the *Frank* majority. Sanford replaced Pitney; Pitney wrote for the majority in *Frank*. Brandeis replaced Lamar; Lamar joined the majority in *Frank*. Butler replaced Day, who had been in the *Frank* majority. Sutherland sat in the chair formerly occupied by Hughes; Hughes had dissented with Holmes in *Frank* while Sutherland dissented with McReynolds in *Moore*. In short, Holmes and McReynolds remained consistent and were on opposite sides in both *Frank* and *Moore*. Van Devanter and McKenna "switched." Both of these Justices, but especially Van Devanter, were close to Taft and were more likely to have been influenced by him than by any one else. Moreover, the case was the subject of an unusual degree of concern between Taft and Van Devanter. There is relatively little surviving correspondence between Taft and Van Devanter relating to cases in which neither of them wrote opinions. One exception is a note relating to *Moore v. Dempsey*. Taft wrote to Van Devanter on Feb. 13, 1923:

[I] . . . can hardly reach here before Friday afternoon and too late for a conference with you and McR[eynolds] about Holmes's opinion in the Arkansas habeas corpus case. I enclose my copy with my endorsement and suggestions. It is difficult for me to make suggestions for I would have written the opinion in a different way and would have dwelt more on our hesitation at interfering with the State Court's decision and the State rule that subsequently discovered evidence is not receivable as a basis for a rehearing etc. But I doubt whether the opinion as now framed will make an uncomfortable precedent. No state officers will [now?] again be fools enough to let the defendants make an uncontestable case by affidavits and then demur. When you and McR. shall have conferred, forward my copy to Holmes. If you conclude to make further suggestions, hold it until Monday afternoon and let me know what you agree upon.

William Howard Taft to Willis Van Devanter, Van Devanter papers, Library of Congress.

The decision in *Moore* may appear to be a small and indirect step in taming the right by contrast with the powerful and direct use of the labor injunction against the left. But in America, mass movements of the right have characteristically had strong bases in local and state politics where they have often controlled or constituted the governing elites. The objective of taming the mass politics of the right has necessarily carried with it the task of penetrating the shields of federalism.<sup>25</sup> *Moore v. Dempsey* did just that. It was the first major doctrinal step since reconstruction in expanding the role of national administration of justice in the supervision of local autonomy.<sup>26</sup> It marked an outer boundary to what Legion — and Klan — dominated communities might do, and it gave comfort, ideological support, and a small bargaining chip to the opponents of these rightist movements. Moreover, the decision in *Moore v. Dempsey* may have had more than a passing connection with one of the great legislative constitutional questions of the 1920's, the constitutionality of federal anti-lynching legislation. In 1922, antilynching legislation, the Dyer Bill, was introduced and passed the House by a resounding 230-119 vote. A filibuster defeated the bill in the Senate, but in the words of the

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This note is consistent with the view that Taft undertook to persuade a reluctant Van Devanter to go along in *Moore* by claiming that the reach of the opinion would be quite limited. It is, of course, possible that Taft in fact thought the impact of the decision would be very small. What is clear is that the case was of more than routine significance to the conservatives and that Taft was actively involved in shaping the majority. Sanford and Butler from among the new Justices to the Court were clearly within Taft's rather than Holmes's or Brandeis's circle of influence.

Changes in the political composition of the Court do not seem likely to have been as significant as Taft's influence. It is true that White and Lamar were both Southern Democrats and were replaced respectively by "Mr. Republican," Taft, and by the Northern liberal Democrat, Brandeis. However, Butler was a conservative Democrat, replacing the Republican Day. Moreover, one must still account for the switch of McKenna and Van Devanter. The most plausible case against Taft's influence is a specific statement, which Frankfurter ascribed to Brandeis, that the Court had changed between *Frank* and *Moore*. If personnel changes could account for a 5-4 split in favor of the turnaround, Van Devanter and McKenna might have switched to avoid the politically loaded appearance of significant 5-4 decisions on constitutional matters. Senator Borah had proposed requiring 7-2 majorities for declaring statutes unconstitutional and some justices reacted by occasionally joining narrow majorities with which they disagreed. See, Brandeis-Frankfurter Conversations, Brandeis Papers (Harvard Law School Library).

25. See the analysis of the administration of justice in G. MYRDAL, *AN AMERICAN DILEMMA* (1944), where the author concludes that the popular political character of local administration in America "turns out . . . to be the greatest menace to legal democracy when it is based on restricted political participation and an ingrained tradition of caste suppression." *Id.* at 524 (emphasis omitted).

26. One might argue that cases long antedating *Moore* deserve primacy of place. See, e.g., *Carter v. Texas* 177 U.S. 442 (1900). But such cases did not create a mechanism for systematic oversight and development of the national administration of justice.

standard treatise on southern history for this period, "the agitation continued until 1925. . . ." <sup>27</sup> The Court thus spoke to the issue of the constitutional implications of a mob-dominated trial precisely at the time that mob justice was a critical politico-constitutional question before Congress. If the Court had reaffirmed *Frank v. Mangum* it would have surely provided major ammunition to the argument that federal antilynching legislation would be unconstitutional. It is likely that Taft, by far the most able, articulate and principled of the traditional conservatives on the Court, was behind the shift from *Frank* to *Moore*. <sup>28</sup> We know that in 1919 Taft had been one of several prominent Republicans who, at the request of the NAACP, petitioned senators for an investigation of lynching and race riots. <sup>29</sup>

It must also be noted that when state government did act directly against the mass movements of the right, the Taft Court was as willing to legitimate such acts of political repression as those directed at the left. In *New York ex rel. Bryant v. Zimmerman*, <sup>30</sup> the Supreme Court upheld a New York Klan registration statute just a year after upholding

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27. G. Tindall, *The Emergence of the New South* 174 (1967). A thorough discussion of the Dyer Bill and its aftermath is to be found in R. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING 1909-1960* (1980), Chapters 2 and 3. The constitutionality of the bill was a major concern in the Senate. For an account of the Senate's consideration of the Bill see R. ZANGRANDO, *supra* at 64-71. *Moore*, decided a few months after the fatal filibuster was subsequently cited by advocates of the Bill to support its constitutionality. See, e.g., the testimony of James Weldon Johnson before the Senate Judiciary Committee in 1926:

"We are the more confident that the court will find this bill constitutional in view of its very recent pronouncement in the case of *Moore v. Dempsey* decided Feb. 19, 1923. . . . The implications of this decision are of significance in connection with such legislation as is proposed herewith, because in such a case the United States Supreme Court examines into the State court trial, and, regardless of the approval of that trial by the State court of appeal, determines for itself whether or not the proceedings were dominated by the mob, so as to make good to them the constitutional guaranty under the fourteenth amendment that the State shall not deprive them of life or liberty without due process of law.

In analogous fashion the present bill will, we confidently believe, be upheld as appropriate legislation to make good the guaranty of the fourteenth amendment to those who suffer from the unequal administration of the State laws, which now fail to protect them from the lynching mobs. Such an appeal to this legislative body, which represents all the people of this country and which is commanded by the highest law of the land to see that none of them is denied the equal protection of the laws of the States, must not fall on deaf ears."

"To Prevent and Punish the Crime of Lynching," Hearings before a Subcommittee of the Committee on the Judiciary, U.S. Senate 69th Cong. 1st. Sess., 36 (1926).

28. See note 24 *supra*.

29. A. WASKOW, *supra* note 23, at 205.

30. 278 U.S. 63 (1928).

California's criminal syndicalism law.<sup>31</sup> In upholding the classification by which New York required the Klan to register its members but exempted "benevolent orders, labor unions and college fraternities," Van Devanter wrote:

We assume that the legislature had before it such information as was readily available, including the published report of a hearing before a committee of the House of Representatives of the 57th Congress (1921) relating to the formation, purposes and activities of the Ku Klux Klan. If so, it was advised — putting aside controverted evidence — that . . . its membership was limited to native born, gentile, protestant whites; that in part of its constitution and printed creed it proclaimed the widest freedom for all and full adherence to the Constitution of the United States, in another exacted of its members an oath to shield and preserve "white supremacy," and in still another declared any person actively opposing its principles to be "a dangerous ingredient in the body politic of our country and an enemy to the weal of our national commonwealth"; that it was conducting a crusade against Catholics, Jews and Negroes and stimulating hurtful religious and race prejudices; that it was striving for political power and assuming a sort of guardianship over the administration of local, state and national affairs; and that at times it was taking into its own hands the punishment of what some of its members conceived to be crimes.

We think it plain that the action of the courts below in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed.<sup>32</sup>

Just as the traditional conservatives on the Court were willing — though not eager — to act against the violence and disorder of the right, and more important to see it condemned as a threat to public values and civility, so the so-called liberals on the Court were prepared to acquiesce in the suppression and condemnation of uncivil politics of labor and the left.

The contours of the conservative consensus concerning street politics and the willingness of Holmes and Brandeis to acquiesce in

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31. *Whitney v. California*, 274 U.S. 357 (1927). It is interesting that *Bryant* elicited no dissents or concurrences from Brandeis, Holmes or Stone. The only separate opinion is one by McReynolds arguing that the writ of error should have been dismissed on the ground that the record failed to disclose the federal issue decided below. 278 U.S. at 77. Van Devanter's majority opinion in *Bryant* does not cite *Whitney*, though like the majority in *Whitney* it relies upon the reasonableness of legislative findings that the targeted class of organizations is distinctively noxious. 278 U.S. at 75. See 274 U.S. at 370-72.

32. 278 U.S. at 76-77 (footnotes omitted).

putting down such militancy are both visible in *American Steel Foundries v. Tri-City Central Trades Council*,<sup>33</sup> decided in late 1921. That case was an important application and interpretation of section 20 of the Clayton Act, which forbids restraining orders and injunctions in actions between employees and employers "unless necessary to prevent irreparable injury to property or to a property right." Taft's opinion for the majority elicited the substantial acquiescence of every justice save Clarke. Holmes, writing to Laski of the case, thought Taft had admirably united the Court in his opinion.<sup>34</sup> What were the terms of this consensus? First, Taft conceded the legitimacy of unions, of their organization and of their objectives. But he read the Clayton Act as protecting only the most civil, deliberative of processes of communication in carrying out those legitimate functions. He wrote: "The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion."<sup>35</sup> Methods of persuasion which lead to intimidation or coercion must be restrained.

"How far may men go in persuasion and communication and still not violate the right of those whom they would influence?" asks Taft.<sup>36</sup> If an "offer . . . to communicate and discuss information" is declined, "then persistence, importunity, following and dogging becomes unjustifiable annoyance . . . which is likely soon to savor of intimidation."<sup>37</sup> When picket lines are formed, "[a]ll information tendered, all arguments advanced and all persuasion used under such circumstances [are] intimidation. . . . The number of the pickets in the groups [4-12] constituted intimidation. . . . When one or more assaults or disturbances ensued, they characterized the whole campaign, which became effective because of its intimidation character."<sup>38</sup> As a general rule, Taft called for the "chancellor" to make a judgment, the objective being "to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."<sup>39</sup>

This, then was the nature of the consensus: a communication of labor's message was protected by the Clayton Act, but courts could and should, under the Act, prohibit the politics of the street. Picketing as a show of strength or feeling was not protected, although the message

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33. 257 U.S. 184 (1921).

34. Letter from Holmes to Laski (Dec. 22, 1921), I. HOLMES-LASKI LETTERS 389 (M. Howe ed. 1953).

35. 257 U.S. at 205.

36. *Id.* at 204.

37. *Id.*

38. *Id.* at 205.

39. *Id.* at 207.

might be. Of course, the opinion says nothing of constitutional rights of expression. It is the Clayton Act that is being interpreted.

While *Steel Foundries* is a particularly striking statement by the Court, demonstrating that industrial disputes do not justify breaching the ordinary civil forms of deliberative intercourse, it is by no means the only or even the clearest evidence of the acquiescence of Holmes and Brandeis in that principle. Brandeis, surely the Justice on the Court most sympathetic to labor prior to 1937, was prepared to condemn in no uncertain terms coercive or violent behavior on the part of labor. Perhaps because he strongly opposed the use of injunctions against the improprieties of labor, he was prepared to see the full force of the criminal law visited upon the perpetrators of violence or intimidation<sup>40</sup> and the full measure of civil damages exacted from the union.<sup>41</sup> Most important, he was prepared to go to great rhetorical lengths to impress upon the public that the injustice and even immorality of the extant industrial order did not justify labor's resort to lawlessness. While Brandeis left no doubt of his sympathies in an unpublished draft dissent for *United Mine Workers v. Coronado Coal Co.*, there is similarly no doubt that he truly intended his conclusion when he wrote: "It may be morally wrong to use legal processes, great financial resources and a high intelligence to lower miners' standards of living; but so long as the law sanctions it, economic force may not be repelled by physical force."<sup>42</sup>

Civil conduct, formal legality and institutional public deliberation, rather than direct action, are to be the forms of popular government. Brandeis, of course, was far more prepared than was Taft to see the law permit labor's behavior to be governed by self-interest. But he was also prepared, as a policy matter, for the community's balance to be struck where deemed best by the legislature, and to have the balance enforced at that point as a matter of obedience to law! Consider *Duplex Printing*

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40. *Dorchy v. Kansas*, 272 U.S. 306 (1926). "And [the legislature] may subject to punishment him who uses the power or influence incident to his office in a union to order the [illegally coercive] strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Id.* at 311.

41. Brandeis joined the opinion of the Court in *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), holding unions suable as entities in federal court. Moreover, we know that he agreed fully with that part of the decision holding unions suable. In a letter to Felix Frankfurter dated August 31, 1922, Brandeis wrote that it was neither new law nor bad policy to hold unions to be an "entity" and, like virtually all entities, without general immunity for its wrongs. V LETTERS OF LOUIS BRANDEIS 56-59 (M. Urofsky and D. Levy eds. 1978) [hereinafter cited as V. BRANDEIS LETTERS]. See also A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 77-99 (1957) for an account of Brandeis's initial "dissent" in *Coronado*, a "dissent" which was not published when Taft swung the Court to Brandeis's position on the substantive question of Sherman Act liability.

42. BICKEL, *supra* note 41, at 88.

*Press Co. v. Deering*.<sup>43</sup> In that case the Court read the Clayton Act as permitting the enjoining of a secondary boycott which had inhibited the complainant's interstate business. Mr. Justice Pitney's directive to the lower court included the statement that defendants should be enjoined

from using any force, threats, command, direction, or *even persuasion* with the object or having the effect of causing any person . . . to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant.<sup>44</sup>

Brandeis's opinion is a most emphatic dissent about the proper reading of the Clayton Act. Yet he concludes:

Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, *I do not wish to be understood as attaching any constitutional or moral sanction to that right*. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot *continue their struggle without danger to the community*. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.<sup>45</sup>

*Duplex* amply demonstrates to what extent Brandeis and the conservatives differed on the terms and tactics to be used in securing order. And, of course, such differences did reflect divergent ideological and political commitments as surely as different articulations of the "fundamental principle" to be applied. But one of the ways in which American politics did, indeed, differ from those of Europe in the interbellum period was in the strength of a *traditional*, non-insurgent conservatism which elevated publicly secured order, formal legality and institutional solutions above the substance of desired ends. I am

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43. 254 U.S. 443 (1921). Note Brandeis's opinion. *Id.* at 479.

44. *Id.* at 478 (emphasis added).

45. *Id.* at 488 (emphasis added).

certainly prepared to concede that, unlike their European counterparts, American traditional conservatives were not sorely tempted to ally with the mass movement of the right, the Klan and the Legion, for they were by and large successful in retaining privilege and power through the twenties without such an alliance. And the purpose of my article is not to praise the Tafts of our world but to understand their significance.<sup>46</sup> Amidst conditions dictating non-alliance with the insurgent right, the Taft conservatives and Brandeis liberals alike participated in the elaboration of a theory of popular government and public order, a theory characterized by a supposed general participation in deliberative political processes and the preservation of order as a precondition to the functioning of those processes. The most apparent difference between these two groups lay in their readiness or reluctance to elevate the deliberation of the legislature above that of the courts.

In *Truax v. Corrigan*,<sup>47</sup> decided only a week after *Steel Foundries*, that difference split the Court. The issue in *Traux* was whether it was constitutional for the State of Arizona to deny the remedy of injunction in labor disputes.<sup>48</sup> In essence, the kind of gloss that Taft had put on the anti-injunction provision of the Clayton Act in *Steel Foundries* was not read into the Arizona statute by the Arizona Supreme Court.<sup>49</sup> The United States Supreme Court, in a majority opinion by Taft, held that the Arizona law as so construed was unconstitutional. *Truax v. Corrigan* thus constitutionalized the requirement of civil order in industrial disputes and enshrined the chancellor as the constitutionally prescribed guarantor of that order.

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46. Arno Mayer writes of traditional conservatives:

In ordinary times conservatives can afford to be purely practical and empirical in defense of the established order, while claiming special credit for being anti-doctrinaire and above partisan politics. In times of crisis, however, the logic of their position forces them into joining, condoning, or supporting those advocating an anti-revolutionary prophylaxis that is both ideological and aggressive.

A. MAYER, *DYNAMICS OF COUNTERREVOLUTION IN EUROPE, 1870-1956*, at 55 (1971). While I am inclined to agree with Mayer's conclusion here, it seems to need some qualification. I would have supposed that there were a range of intermediately threatening conditions under which different conservative elites might be expected to act differently. Their responses might depend on the extent of strength and legitimacy within the old order; the degree to which an intelligentsia has marshalled a strong challenge to the elite's self-perception as necessary and just; the possibility of co-opting some of the insurgent forces. If such a qualification is advanced, the success of a Court such as the Taft Court in framing its ideology of order may play a part in the future role of conservatives in crisis circumstances.

47. 257 U.S. 312 (1921).

48. *Id.* at 330.

49. *Id.* at 328.

Holmes, Pitney (joined by Clarke) and Brandeis wrote dissents. All three dissenting opinions stressed the legitimacy of a legislatively determined balance drawn between conflicting forces in industrial strife. The kind and degree of order to be enforced by the judiciary should be the product, not the prerequisite, of legislation.<sup>50</sup>

*Truax* and *Steel Foundries* thus expose the consensus and its limited nature. By consensus, legal imposition of civic order on the streets was a laudable, desirable achievement. The terms of that order were fairly understood to be the product of a legislative determination and the Court would be quick to enforce it even if the disorder was part of a struggle against an unjust economic system. By contrast, the constitutional obligation to impose civic order in defense of existing economic relations, regardless of legislative judgments to the contrary, remained a subject dividing the Court. For Taft and the conservatives the primacy of the concept of order required that the streets not be the locus of decision, even if the legislature chose to lodge it there. For Holmes and Brandeis (Pitney and Clarke would leave the Court within a year), the ultimate objective was not order itself, but, as we shall see, the order necessary to achieve the deliberative politics of popular government. Where the deliberative processes of popular government themselves determined that the community could tolerate and perhaps benefit from a sphere of street conflict, then, they concluded, such decisions should stand.

#### THE CRISIS IN THE POLITICAL THEORY OF DEMOCRACY

I should like to turn now from the politics of the streets to that of the libraries. In confronting the uncivil challenge of insurgency, both from the left and the right, the Court treated the problem as one of public order. Freedom of expression was not mentioned. The limited consensus emerged on the critical issue of suppressing street politics. But at exactly the same time as the insurgent left and right mounted a practical challenge to the "deliberative" character of democratic politics, others of a much different ilk mounted an intellectual challenge to the "deliberative" model of popular government.

If we look, albeit casually, to contemporaneous concerns about democracy in the aftermath of World War I, we can do no better than to consider the widely read, influential works of Walter Lippmann and, in

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50. *Id.* at 342 (Holmes, J., dissenting); *id.* at 344 (Pitney & Clarke, JJ., dissenting); *id.* at 354 (Brandeis, J., dissenting).

particular, his master work, *Public Opinion*.<sup>51</sup> Published in 1922, *Public Opinion* was a rich elaboration of ideas first published by Lippmann in magazine articles and issued in book form in 1920 as *Liberty and the News*.<sup>52</sup> *Public Opinion* also served as the inspiration of Lippmann's subsequent work, *The Phantom Public*,<sup>53</sup> published in 1925. The ideas of *Public Opinion* may be said to have dominated his work for a decade — a decade which is nearly coincident with the birth of "modern" first amendment law and with the challenge of insurgent politics.

Lippman's work is not chosen casually. There is every reason to consider it above others if we wish to understand the task to which early first amendment law was addressed. We know *Public Opinion* was read and esteemed both by Holmes and by Brandeis when it first came out.<sup>54</sup> Lippman solicited Holmes's reactions to the preliminary pieces that appeared as articles.<sup>55</sup> And while neither Holmes nor Brandeis could

51. W. LIPPMANN, *PUBLIC OPINION* (1965). For an extensive treatment of Lippmann and his work see R. STEELE, *WALTER LIPPMANN AND THE AMERICAN CENTURY* (1980).

52. W. LIPPMANN, *LIBERTY AND THE NEWS* (1920). The introductory essay of this work originated in the 1920 publication. The second and third essays were published in 1919 in the *Atlantic Monthly*.

53. W. LIPPMANN, *THE PHANTOM PUBLIC* (1925).

54. Laski wrote to Holmes on April 5, 1922:

[T]he diagnosis is admirable with an amazing ability to lift the curtain which conceals the intimate recesses of the mind. And yet what does it say at the end? . . . My difficulty is that the expert has no more ability at interpreting facts than the first-rate practical-minded amateur.

1 HOLMES-LASKI LETTERS 416 (M. Howe ed. 1953). Holmes replied:

What you say about Lippmann's *Public Opinion* impresses me. I too was struck by his not coming out anywhere — but much more by the intimate perception of the subtleties of the human mind and of human relations.

*Id.* at 417 (April 22, 1922).

Brandeis, on April 8, 1922, wrote to Frankfurter that "[Holmes] is enthusiastic over Walter's *Public Opinion*." V. BRANDEIS LETTERS, *supra* note 41, at 50. Brandeis also wrote to Frankfurter after reading *The Phantom Public*:

But I think it is a remarkable book with the classic quality in thought and expression. The defects are the inevitable ones due to his qualities and lacks which we have often discussed . . . Still, I think his book will be distinctly helpful to those who try to think on political sciences; and that this helpfulness will more than outweigh the misuse which the Industrial Conference et al. will make of his statements. Walter's criticisms should compel others who feel and care as we do, to come to grips with the difficulties instead of closing their eyes. . . .

W.L. has a definite art as a mind, and a pen. For the rest we must look elsewhere.

V. BRANDEIS LETTERS, *supra* note 41, at 191.

55. See letter dated "Nov. 18," Walter Lippmann to O.W. Holmes, Jr., Oliver Wendell Holmes, Jr. Papers (Harvard Law School Library). The letter, based on internal evidence is clearly from 1919 and asks Holmes to look at a forthcoming *Atlantic Monthly* article. Lippmann says it is "a bit of a book on which I've been working intermittently for five years and am nowhere near the end of. I'm examining how 'public opinion' is made, and am deeply troubled by the effects of the tentative conclusions on our current theories of popular government." Oliver Wendell Holmes, Jr. Papers, (Harvard Law School Library).

stomach the essentially sophomoric quality of Lippmann's proposals, they, like John Dewey who reviewed the book, could agree that it presented an unsettling, powerful attack on the conceptual underpinnings of popular government.<sup>56</sup>

Lippmann triangulated the problem of "opinion" and "action."<sup>57</sup> He pointed out that conventional theories of popular government are concerned with the link between what the people want and what government, through its leaders, does. So conceived, popular government is a highly complex and abstruse problem of agency.<sup>58</sup> There are, indeed, information problems — primarily concerned with communication of the preferences (including the intensities of preferences) of the governed. And there are, of course, problems associated with fidelity to one's office and charge. But, Lippmann pointed out, however real those problems are, they assume the unproblematic character of the formation of the "opinion" which we wish to be effectively communicated to the governors and faithfully acted upon. Instead of a duality — governors and governed — Lippmann proposes a triangle in which a reality is apprehended (by the "public"), views concerning it are communicated to the governors, and action is taken to reshape the reality. The relationship between reality and opinion is every bit as problematic as the "agency" between people and government.<sup>59</sup>

The genius of *Public Opinion* was its application of the general upheaval and interest in epistemology to the area of politics. Wittgenstein's Vienna epitomized the Western world. Knowledge had become problematic across a broad front. There are sections of *Public Opinion* in which Lippmann borrowed heavily from Marxist "sociology" of knowledge and anticipated some of the insights of Mannheim.<sup>60</sup> Elsewhere, Lippmann picked and chose from various concepts of psychology. But his

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56. Dewey's review is in the *NEW REPUBLIC*, May 3, 1922, at 286–88. Dewey concludes that "its critical portion is more successful than its constructive." *Id.* at 288. He starts his review by conceding the book to be "perhaps the most effective indictment of democracy as currently conceived ever penned." *Id.* at 286. We know that Holmes and Brandeis both read the *New Republic* and esteemed Dewey.

57. *PUBLIC OPINION*, *supra* note 51, at 10 *passim*.

58. For an example of a more conventional treatment see I BRYCE, *MODERN DEMOCRACIES* (1921). In Chapter XV Bryce's discussion of public opinion is dominated by problems of definition and communication. Bryce comes closest to touching some of Lippmann's primary concerns in Chapter X, *The Press in a Democracy*. See also A. LOWELL, *PUBLIC OPINION AND POPULAR GOVERNMENT* (1913) for a conventional account. Lowell's later work, *Public Opinion in Peace and War*, is still conventional but Lippmann's work is occasionally cited. A LOWELL, *PUBLIC OPINION IN PEACE AND WAR* (1923).

59. *PUBLIC OPINION*, *supra* note 51, at 19 *passim*.

60. The first edition of Mannheim's *Ideology and Utopia* was published in 1929. Both *PUBLIC OPINION* and *THE PHANTOM PUBLIC* are noted in the bibliography. K. MANNHEIM, *IDEOLOGY AND UTOPIA* 249 (1949).

eclecticism never defeated the unifying theme: the public opinion upon which popular government is necessarily based itself bears a problematic relation to any relevant reality.

The orthodox theory holds that a public opinion constitutes a moral judgment on a group of facts. The theory I am suggesting is that, in the present state of education, a public opinion is primarily a moralized and codified version of the facts. I am arguing that the pattern of stereotypes at the center of our codes largely determines what groups of facts we shall see, and in what light we shall see them. That is why . . . a capitalist sees one set of facts, and certain aspects of human nature, literally sees them; his socialist opponent another set and other aspects, and why each regards the other as unreasonable or perverse, when the real difference between them is a difference of perception.

. . . The opponent has always to be explained, and the last explanation that we ever look for is that he sees a different set of facts. Such an explanation we avoid, because it saps the very foundation of our own assurance that we have seen life steadily and seen it whole. . . . For while men are willing to admit that there are two sides to a "question," they do not believe that there are two sides to what they regard as a "fact." And they never do believe it until . . . they are fully conscious of how second-hand and subjective is their apprehension of their social data.<sup>61</sup>

Here and in several other striking passages Lippmann approached what Mannheim would later call the "total conception of ideology," a conception in which opposing social groups challenge the intellectual foundations of each other's thought and beliefs as the product of the collective, contingent experience of the group. Thought is a function of the place of the group in a social/economic structure.<sup>62</sup>

Such a "total" ideological perspective is radically destructive of any model of deliberative intergroup politics, and thus of broad-based, liberal popular government. Lippmann, however, periodically backs off from the more radical implications of his observations of political epistemology and retreats to rather shallow, technocratic solutions. It is almost as if he were afraid to apply his radical epistemology to social science itself. (This was the very step that Mannheim so thoroughly

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61. PUBLIC OPINION, *supra* note 51, at 81-82.

62. K. MANNHEIM, *IDEOLOGY AND UTOPIA* 57-62 (1949). *See also* R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 457 (rev. ed. 1957): "Within a context of distrust [between groups], one no longer inquires into the content of beliefs and assertions to determine whether they are valid or not, . . . but introduces an entirely new question: how does it happen that these views are maintained? Thought becomes functionalized. . . ."

pursued several years later in *Ideology and Utopia*.) Lippmann proposed government information bureaus and data specialists, thus implicitly withdrawing the force of his critique from the broad front of political epistemology to the much narrower one of data processing. Lippmann's technocratic solutions did not find a sympathetic audience among the most thoughtful of his contemporaries. But his critique of democratic theory was acknowledged to be powerful.

Not all the problems Lippmann addressed were as radical and intractable as that of ideology. One of the less subtle problems addressed, and the only one to which his solutions are responsive, was the lack of adequate machinery for generating data, communicating it and making it interesting to a sufficiently large public to support the idea of popular government.<sup>63</sup> Even this most conventional of Lippmann's points raised serious questions about information deficiencies in popular government, for it linked the economics of the media to their adequacy as sources of information for the mass public. Lippmann, like the more conventional Bryce and Lowell before him, was intensely aware that a mass electorate was subject to influence by the yellow press, and that the mass media made up a concentrated industry with attendant political dangers.<sup>64</sup>

Lippmann understood that other, more serious political dangers come into focus once one analyzed the problematic character of opinion formation. Government itself was in a position to manipulate opinion:

Within the life of the generation now in control of affairs, persuasion has become a self-conscious art and a regular organ of popular government. . . . [T]he knowledge of how to create consent will alter every political calculation and modify every political premise. . . . It is no longer possible . . . to believe in the original dogma of democracy.<sup>65</sup>

Lippmann provided subtle elaboration of this point. He attributed the provincialism that many have found characteristic of democracy to a half-conscious, correct realization that only in a truly provincial setting could one approximate autonomous opinion formation by a citizenry not subject to the manipulation of opinion elites. The realization that a provincial setting is a precondition to a popular government leads to a

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63. PUBLIC OPINION, *supra* note 51, at 226-62.

64. *Id.* at 226-30. See I BRYCE, MODERN DEMOCRACIES 92-110 (1921).

65. PUBLIC OPINION, *supra* note 51, at 158. Lippmann's service with the War Department in World War I alerted him to both the significance of "propaganda" and to its dangers in the hands of fools. See R. STEELE, WALTER LIPPMANN AND THE AMERICAN CENTURY 124-27, 141-54 (1980).

collective act of wish fulfillment; a collective rejection of that part of our social reality inconsistent with the desired provincial setting.

The democratic tradition is therefore always trying to see a world where people are exclusively concerned with affairs of which the causes and effects all operate within the region they inhabit. Never has democratic theory been able to conceive itself in the context of a wide and unpredictable environment. . . . And although democrats recognize that they are in contact with external affairs, they see quite surely that every contact outside that self-contained group is a threat to democracy as originally conceived. That is a wise fear. If democracy is to be spontaneous, the interests of democracy must remain simple, intelligible and easily managed. . . . The environment must be confined within the range of every man's direct and certain knowledge.<sup>66</sup>

Lippmann did not shy away from the political and constitutional implications of these insights. The prerequisites for such a provincialism no longer obtain. Politically, therefore, public affairs

can be managed only by a specialized class whose personal interests reach beyond the locality. This class is irresponsible for it acts upon information that is not common property, in situations that the public at large does not conceive, and it can be held to account only on the accomplished fact.<sup>67</sup>

Finally, Lippmann describes the limitations of civil liberty in the sense of a free market place of ideas:

[C]ivil liberty . . . does not guarantee public opinion in the modern world. For it always assumes that truth is spontaneous, or that the means of securing truth exist when there is no external interference. But when you are dealing with an invisible environment the assumption is false. The truth about distant or complex matters is not self-evident, and the machinery for assembling information is technical and expensive.<sup>68</sup>

Lippmann's skepticism about the sufficiency of civil libertarian ideas should not be construed to imply outright hostility to their substance. His is an argument about the *limits* of such conventional thought as part of a theory of government. He is striking not at

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66. *Id.* at 171.

67. *Id.* at 195.

68. *Id.* at 202.

toleration itself, but at the happy assumption that toleration is a sufficient condition for popular government.

It ought not be supposed that Lippmann's elaborate statement about the necessity for "organizing intelligence" and going beyond civil liberty in order to provide the public and its decision makers with information represented a seer's insight into an opaque process. The need was transparent, and the justices from time to time had addressed it. For example, in late 1918, in *International News Service v. Associated Press*,<sup>69</sup> the Court confronted a major question about the structure of the news industry. Defendant International News Service (INS), a private, for profit, wire service, had been copying Associated Press (AP) stories from early editions of some papers and from public postings and had been transmitting such stories to its subscribers as its own. Associated Press sued, claiming a property right in its uncopyrighted stories that gave it power to exclude others from using them at least until their commercial value as news had disappeared. Pitney, for a majority of the Court, held that there was such a right. He recognized that the case presented important policy issues with respect to the organization of the mass media and consequently with respect to the provision of information to the public. Pitney argued not only the intrinsic justice of a remedy against such pirating, but also that the incentives for putting together a news gathering and transmission organization depended upon the possibility of successful commercial exploitation of the news.<sup>70</sup>

Justice Brandeis, in his elaborate dissent, conceded that the majority's rule might protect the investment necessary for newsgathering on a world scale, but he pointed, as well, to the fact that many large segments of the public were unserved by AP. An injunction restraining INS could not, therefore, be understood as an unqualified boon to the public's interest in information. Brandeis did not conclude from this, however, that the wisest course was necessarily to leave AP's interest unprotected. Rather, he concluded that any satisfactory scheme would entail antecedent investigation and ongoing administration beyond the capacity of courts.<sup>71</sup>

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69. 248 U.S. 215 (1918).

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That business [news gathering and transmission consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that . . . is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world.

248 U.S. at 235.

71. *Id.* at 248, 262-63.

He included here a famous critique of judge-made law:

[T]he unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent. . . . Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that . . . resort to legislation has latterly been had with increasing frequency.<sup>72</sup>

Brandeis concluded:

Courts would be powerless to prescribe the detailed regulations essential for full enjoyment for the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear.<sup>73</sup>

Here, Brandeis anticipates much of Lippmann. The organization of the media is too important and complex to be left either to self-help or to the judiciary. Serious public decision and administration would be necessary. It is interesting that in this opinion, rendered only months after *Hammer v. Dagenhart*,<sup>74</sup> Brandeis's strong distaste for *judicializing* decisions of public import via the Constitution was extended to the "common law." Here, as in labor matters, it was not so important what wisdom dictated as the reference to the legislative process where deliberation might take place. As we shall see from Brandeis's later first amendment cases, it is the legislature which clears the market in the trade in ideas.

The *Associated Press* decision demonstrates both an awareness that the structure of the media is relevant to public opinion and deliberation,

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72. *Id.* at 262–63.

73. *Id.* at 267.

74. 247 U.S. 251 (1918). Brandeis joined the dissent of Holmes. *Id.* at 277–81. See also BICKEL, *supra* note 41, at 1–20.

and a total disinterest in constitutionalizing any particular solution to the problem. It may be that the Constitution, as a constraint on government, did not suggest itself as the relevant source of law when the dispute appeared to be one between private competitors. It is to be noted that Brandeis's inclination to legislative and administrative solutions or experiments would, naturally enough, lead more directly to constitutional difficulties.

THE DEFENSE OF DELIBERATION: LIBERAL IDEOLOGY  
AS CONSTITUTIONAL UTOPIA

In *Associated Press*, then, the Court began to grapple with the problems of the role of information in democracy. The majority, though not unaware of the larger themes, treated the case within a narrow framework of the law of trade practices. Justice Brandeis's far-ranging dissent was more directly concerned with the problem of information in democracy but was wholly agnostic as to any solution. He had characteristically referred the matter to the legislature. With the Draft and Espionage Act cases of 1919, any idea that the Court might avoid the necessity of speaking to the relation between public information and popular government disappeared. This section treats the development of a libertarian tradition in free speech law from those 1919 cases to Brandeis's 1927 concurrence in *Whitney v. California*.<sup>75</sup> I am less concerned with what the "law" of free speech was at any given time during the decade than with the development of an "answer" to the urgent questions placed upon the Court's agenda by the practical threats of domestic disorder and world-wide revolution and by the theoretical threats posed by the ideas of a manipulated public opinion and a contingent consciousness. Brandeis's *Whitney* opinion represented a comprehensive ideological response relevant to all these concerns. It thus deserves its place as a classic statement of free speech and warrants our prolonged attention in the historical treatment of these ideas.

In *Schenck v. United States*,<sup>76</sup> *Frohweck v. United States*,<sup>77</sup> and *Debs v. United States*,<sup>78</sup> Holmes wrote his famous opinions for a unanimous Court upholding convictions against first amendment attack. In *Schenck* he articulated the . . . "clear and present danger

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75. 274 U.S. 357 (1927).

76. 249 U.S. 47 (1919).

77. 249 U.S. 204 (1919).

78. 249 U.S. 211 (1919).

test,"<sup>79</sup> and in the other two cases purported to apply it. The test was born, thus, as an apology for repression.

Between *Debs* and *Abrams v. United States*,<sup>80</sup> as several scholars have shown, Holmes corresponded with Zachariah Chafee<sup>81</sup> and with Learned Hand,<sup>82</sup> read critical reviews of *Debs*, and even considered replying to them.<sup>83</sup> Arguably, Holmes began to move to a position regarding the use of the "clear and present danger" formula inconsistent with its application in *Debs*.<sup>84</sup> With his famous *Abrams* dissent Holmes marked a major change and took a giant step in advancing the libertarian tradition.

The *Abrams* dissent was significant in several ways. It was most important in marking the first departure from the Court's unanimity in upholding the wartime prosecutions. We now know that this unanimity was quite significant to the Court. In his memoirs, Dean Acheson, who was Brandeis's clerk during that period, retells a story told to him by Holmes's clerk in 1919, Stanley Morrison. Morrison described what took place after Holmes and Brandeis had indicated their intent to dissent in *Abrams*:

Justice Holmes was then waited on by three of his colleagues, who brought Mrs. Holmes with them.

. . .

[Two] were Justices Van Devanter and Pitney for whom Holmes had warm regard. They laid before him their request that in this case, which they thought affected the safety of the country, he should, like the old soldier he had once been, close ranks and forego individual predilections. Mrs. Holmes agreed. The tone of the

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79. 249 U.S. 47, 52.

80. 250 U.S. 616 (1919).

81. See Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971).

82. See Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 739-41 (1975) (reprinting parts of some of the most significant letters).

83. Ernst Freund wrote a scathing critique of *Debs*. Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13, reprinted in 40 U. CHI. L. REV. 239 (1973). For an account of Holmes' correspondence concerning that article, see GINSBURG, *Afterword*, 40 U. CHI. L. REV. 243, 245 (1973). See I HOLMES-LASKI LETTERS 202-04 (M. Howe ed. 1953) for a draft of a letter to Herbert Croly, editor of the *New Republic*, a letter which Holmes decided not to send.

84. That is the conclusion of Harry Kalven in Kalven, *Professor Ernst Freund and Debs v. United States*, 40 U. CHI. L. REV. 235, 238 (1973). That is also the conclusion of Chafee, Ragan, and Gunther.

discussion was at all times friendly, even affectionate. The Justice regretted that he could not do as they wished. They did not press.<sup>85</sup>

By dissenting in *Abrams*, then, Holmes not only *argued* that the Constitution tolerated dissent, he also exemplified the dissent. Moreover, in so doing he signalled by his own example, and against the urgings of colleagues and spouse, that no present emergency justified the imposition of uniformity of opinion. To put it differently, to have complied with the requests of his colleagues surely would have meant conceding the existence of a state of affairs which might justify silencing others as it would justify silencing himself. No one could have symbolized more potently the legitimacy of dissent than the old soldier, Holmes.

The second accomplishment of the *Abrams* dissent was the transformation of the phrase "clear and present danger" from an apology for repression into a commitment to oppose authority. In the *Abrams* dissent the phrase is shown to have great critical potential. The establishment of an ambivalent character for the *Schenck* test meant that will and judgment — precisely those elements subject to ideological predisposition — would control future applications. The dissent made an ideological critique of the Court's conclusions more plausible.

The third achievement of the *Abrams* dissent was the introduction into our rhetoric of the metaphor of "free trade" and "competition of the market" in ideas.<sup>86</sup> This image, which was never used by Brandeis, suggests a number of important ideas that will be contrasted with Brandeis's rhetoric. I shall only enumerate the ideas here, leaving their development to later. First, a market in ideas suggests the arbitrary character of any given proposed idea. Like market preferences, beliefs and opinions are simply there. Second, the market is a radically decentralized decision mechanism. Third, the market depends upon freedom from external constraint to operate properly. Finally, the market produces decisions about allocation and production without authority. It is efficient while being unresponsive to reasoned manipulation. To impose a solution is not to make it work but to deny it the opportunity to work.

In short, by late 1919 Holmes had given us a two-edged test, "clear and present danger," in the apologetic application of which his brethren had concurred, and had created a suggestive metaphor which to liberal nineteenth century men certainly implied the absence of governmental constraint.

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85. D. ACHESON, *MORNING AND NOON* 119 (1965).

86. 250 U.S. at 630.

The development of Brandeis's thought was very different from that of Holmes. By 1923 Brandeis had come to regret that he had not written separately in the 1919 cases. His 1923 remarks to Felix Frankfurter reveal a great deal about the early opinions:

I have never been quite happy about my concurrence in *Debs* and *Schenck* cases. I had not then thought the issues of freedom of speech out — I thought at the subject, not through it. Not until I came to write the *Pierce* and *Schaefer* cases did I understand it. I would have placed the *Debs* case on the war power — instead of taking Holmes's line about "clear and present danger." Put it frankly on war power — like *Hamilton* case [*Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919)] — and then the scope of the espionage legislation would be confined to war. [In the *Hamilton* opinion, written by Mr. Justice Brandeis, the Court upheld the War-time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918), on the ground that it was a reasonable exercise of Congress's power to make all laws "necessary and proper" for carrying into execution its express war powers.] But in peace the protection against restrictions of freedom of speech would be unabated. You might as well recognize that during a war — FF: All bets are off.

LDB: Yes, all bets are off. But we would have a clear line to go on. I didn't know enough in the early cases to put it on that ground. Of course you must also remember that when Holmes writes, he doesn't give a fellow a chance — he shoots so quickly.

But in *Schaefer* and *Pierce* cases I made up my mind I would put it all out, let the future know what weren't allowed to say in the days of the war and following.<sup>87</sup>

What Brandeis had not thought through in *Schenck* and *Debs*, however, was not simply the formulation of a legal test. For it is remarkable that the constant refrain in all his subsequent free speech

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87. Brandeis-Frankfurter Conversations, Brandeis Papers (Harvard Law School Library). Part of this passage is quoted in A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 27–28 (1978). Bickel omits the interesting passage which says in essence that when Holmes writes he doesn't give a fellow a chance. This theme, that Holmes's speed in opinion writing sometimes produced insufficient consideration by his brethren, appears elsewhere in the manuscript of the Brandeis-Frankfurter Conversations. Brandeis was apparently led by it to suggest, in vain, that the Court adopt a rule requiring finished opinions to be held eight days before publication except when waived by unanimous consent.

opinions, *Pierce v. United States*,<sup>88</sup> *Schaefer v. United States*,<sup>89</sup> *Gilbert v. Minnesota*,<sup>90</sup> *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*,<sup>91</sup> *Whitney v. California*,<sup>92</sup> and *Burns v. United States*<sup>93</sup> is that the *Schenck* "clear and present danger" articulation is appropriate and either is not being applied or is being misapplied or misunderstood by the majority. One might suppose that Brandeis, in the later cases, argued from the "clear and present danger" formulation because it had been accepted by the Court in *Schenck*, and thus would have a better chance of securing support than would the absolutist test suggested by the word "unabated" in the Frankfurter conversation. However, where he deemed it appropriate, as in *Gilbert v. Minnesota*, Brandeis was quite capable of radical free speech formulations in dissent.<sup>94</sup> Moreover, as we shall see, the Brandeis opinions present a coherent whole in which the "clear and present danger" test as modified has an important part to play. The Frankfurter conversation which was, after all, a good deal more casually formulated than were the opinions, is susceptible to the interpretation not that the "clear and present danger" test is generally wrong or inappropriate but that *it was wrong for Debs*! The *Debs* conclusion and the use of the test suggested by it could only be supported by a war powers analysis.<sup>95</sup>

Brandeis, in the 1920 cases, made a twofold addition to Holmes's critical use of the "clear and present danger" test and market metaphor in *Abrams*. First, he explicated the precise institutional consequences of the "clear and present danger" test. Holmes in *Abrams* had left vague

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88. 252 U.S. 239, 253 (1920) (dissenting opinion).

89. 251 U.S. 466, 982 (1920) (dissenting opinion).

90. 254 U.S. 325, 334 (1920) (dissenting opinion).

91. 255 U.S. 407, 417 (1920) (dissenting opinion).

92. 274 U.S. 357, 372 (1927) (concurring opinion).

93. 274 U.S. 328, 337 (1927) (dissenting opinion).

94. When the ideas in the Brandeis *Gilbert* dissent were proposed, Brandeis's clerk, Dean Acheson, characterized them as "altogether out of the question" and "impossible." See memorandum of Nov. 19, 1920 [Acheson] in the *Gilbert v. Minnesota* case files, Brandeis Papers (Harvard Law School Library). For an admiring modern view see C. BLACK, PERSPECTIVES ON CONSTITUTIONAL LAW 84-86 (1970).

95. Harry Kalven made the point that *Debs* and *Schenk* must be read together. Kalven, *supra* note 84, at 236. If so read they are surely inconsistent with the strict view of clear and present danger taken by Brandeis in the later cases. *Id.* Note that Brandeis wrote the *Hamilton* opinion, *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), a year after *Debs* and supported the view that Congress can act domestically in a manner otherwise unconstitutional to further the war effort. Moreover, the power exercised, prohibition of the sale of alcoholic beverages, bore only an indirect relation to the war effort. We tend to forget how many extraordinary powers, then thought to be of doubtful constitutionality, were exercised by the federal government during World War I, including management of the railroads and of shipping, and drastic regulation of most critical industrial sectors.

the device by which the test should make it impossible to convict or to harshly sentence the defendants. Was the indictment in some sense bad? Should there have been a directed verdict of acquittal on the basis of the text of the utterances, or the circumstances in which uttered? Did Holmes really mean to suggest Supreme Court review of the severity of the sentence? In the *Pierce* and *Schaefer* dissents Brandeis spelled out the institutional consequences of his position. Judges must control juries and make an independent judgment, one that would be reviewable by the appellate courts, as to whether the nature of the utterance in the circumstances attending it created the clear and present danger required by *Schenck*. Ultimately, the judge would pass upon whether the jury's conclusion implicit in a general verdict of conviction had been justified.<sup>96</sup>

But Brandeis had done more than think through the institutional consequences of the test. He had also thought through the political-theory justifications for it. The *Schaefer* opinion has little of such theory. It emerges first in *Pierce*, then blossoms fully in *Gilbert*.<sup>97</sup>

In *Pierce* the same institutional points are made as in *Schaefer*, but conjoined with them is an epigrammatic paragraph:

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law — merely, because the argument presented seems to those exercising judicial power to be unfair in its assumptions, unsound in reasoning or intemperate in language.<sup>98</sup>

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96. In *Schaefer v. United States*, 251 U.S. 466, 483 (1920), Brandeis stated:

The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule [clear and present danger] enunciated by this court, one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited. The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error.

See *Pierce v. United States*, 252 U.S. 239, 269, 272 (1920).

97. *Gilbert v. Minnesota*, 254 U.S. 325, 334–43 (1920). See discussion at note 102 *infra*.

98. 252 U.S. at 334. Holmes returned his copy of the Brandeis draft dissent in *Pierce* with the suggestion to "make a little more explicit the false statement was not merely [?] but that it was discussion of a *public* fact of public interest." Brandeis Papers, File 4–2 (Harvard Law School Library) (emphasis in the original).

This theme becomes Brandeis's chief free speech refrain — not that truth will prevail in some market place of ideas but that free input is necessary to deliberative politics. The theme is even more pronounced in *Gilbert v. Minnesota*, where it constitutes the basis for a legal masterpiece.<sup>99</sup>

In *Gilbert*, Brandeis confronted an extraordinarily difficult series of technical legal questions. Gilbert had been convicted of violating a Minnesota statute which made it unlawful "to advocate that men should not enlist" or "to teach . . . that citizens of this state should not aid or assist the United States in prosecuting or carrying on war with [its] public enemies."<sup>100</sup> In the state courts Gilbert's counsel had objected to the introduction of any evidence, on the very general ground that the statements were of the type that Gilbert had a right to make under the Constitution and laws of the United States. No further specification of errors was made until Gilbert petitioned the state supreme court for a reargument. The assignment of error before the U.S. Supreme Court cited only the overruling of the objection to the evidence as error and generally alleged that statements made were constitutionally protected.<sup>101</sup>

These elements posed the following legal problems. First, was it possible to find a source of protection for speech operative against *state* infringement? It was not apparent that the first amendment operated against the states by its own force, nor was there clear authority for the proposition that the fourteenth amendment included free expression within its due process protections of substantive liberties.<sup>102</sup> For

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99. 254 U.S. 325, 334.

100. *Id.* at 326-27.

101. See memorandum from Dean Acheson to Justice Brandeis, Nov. 19, 1920, Brandeis Papers, File 5-12 (Harvard Law School Library), (raising procedural doubts about the case). None of the actual opinions expresses doubt about the propriety of reaching the merits, though Brandeis would surely have been the most likely to have expressed such reservations. See Ch. I, *The Most Important Thing We Do Is Not Doing*, in A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957).

102. The question of whether or how the first amendment may be said to have created restraints upon the states in 1920 is a complex one. In the majority opinion in *Gilbert*, Mr. Justice McKenna speaks of the "right of free speech" rather than the first amendment. He concedes arguendo "*without so deciding*" that the "asserted freedom is natural and inherent." 254 U.S. at 332 (emphasis added). He then argues that the freedom is not absolute and that, conceding arguendo that it applies against the states, it would not protect the conduct at issue in the case. *Id.* at 333.

As late as 1922, in dicta in a commercial context, Mr. Justice Pitney in an opinion for the Court was able to say 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." *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 538 (1922). The issue in *Cheek* was the rather interesting one of whether employers could be required to give (truthful) reference letters upon the request of former employees.

Brandeis, who was strongly opposed to extending the reach of substantive due process, it would have been difficult to push hard for expansion

Prudential argued *inter alia* that the requirement violated its free speech rights. It was, of course, in *Gitlow v. New York*, 268 U.S. 652 (1925), that the Court said: "For present purposes we may and do assume 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." *Id.* at 666.

Some commentators have suggested that in *Gilbert* Brandeis was arguing for substantive due process protection of free speech. See Z. CHAFEE, *FREE SPEECH IN THE U.S.* 295-96 (1941). I read the opinion somewhat differently. The last paragraph of the dissent begins: "As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment." 254 U.S. at 343. Brandeis then attaches a long "But . . ." which concludes "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property." *Id.* It seems to me that Brandeis here relates two essentials in his constitutional jurisprudence — his antipathy to substantive due process and his firm espousal of free expression. It is significant that the last paragraph begins by saying the fourteenth amendment argument is *not* needed, for it places a contingent note upon the rest. The tone seems to me to suggest that, *if* one must have *Coppage v. Kansas*, 236 U.S. 1 (1915), and other horrors in our jurisprudence, *then* surely the principle of those cases justifies extending free speech to the states. But it seems to me that Brandeis is holding back precisely so that it remains possible for him to deny substantive due process altogether.

Frankfurter's notes on summer conversations with Brandeis set forth Frankfurter's sketchy recollections of Brandeis's views on this subject.

Long talk on the application (?) of due process as to freedom of speech and foreign language cases. Agreed.

1. Due process should be restricted to procedural regularity and
2. In favor of repeal but
3. While it is, must be applied to substantive laws and so as to things that are fundamental.

Right to appeal,

Right to education,

Right to choice of profession,

Right to locomotion,

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

Brandeis-Frankfurter Conversations, Brandeis Papers (Harvard Law School Library) (emphasis added). See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 25-26 (1970), where this text is referred to and quoted in part.

This conversation almost certainly took place in Chatham in 1923, the summer after the decisions in *Jackman v. Rosenbaum Co.*, 262 U.S. 22 (1922), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), cases mentioned in a later portion of the same text, and the summer after *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Bartels v. Iowa*, 262 U.S. 404 (1923), which are referred to obliquely as the "foreign language cases." Brandeis and

of that term. Moreover, there was a procedural difficulty presented by a fourteenth amendment claim. The defendant arguably had failed to present the fourteenth amendment claim below. Such was the initial conclusion of Brandeis's clerk, Dean Acheson.<sup>103</sup>

Brandeis was as yet unprepared to make the concession to substantive due process that he had made in *Whitney v. California*: that the due process clause of the fourteenth amendment protected liberty of expression much as the majority had been holding that it protected the liberty of contract.<sup>104</sup> Rather, Brandeis argued that exclusive national jurisdiction over the national functions of conscription and war required constitutional immunity from state interference with the flow of public deliberation necessary to informed legislation. Brandeis asserted that

[t]he right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail. . . . The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself.<sup>105</sup>

The power of Brandeis's formulation here, though it never prevailed, is extraordinary. As to any subject within the national legislative competence, states would be prohibited from inhibiting free expression by the force of a kind of structural preemption argument in which the deliberations of Congress are presumed to require the

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Frankfurter were together that summer. See V. BRANDEIS LETTERS, *supra* note 41, at 98, 100. The conversation shows a transition from *Gilbert*, where Brandeis refrains from basing his opinion on due process, to *Whitney*, in which he explicitly uses the due process rationale. Here, Brandeis has decided that if there is to be substantive due process it must be directed from property to free speech and education issues. See *Whitney v. California*, 274 U.S. 357, 373 (1927). The Frankfurter conversation also demonstrates how important avoiding the due process rationale must have been. *Gilbert* thus assumes greater significance to Brandeis since he contemplated doing away with any substantive reliance on the clause.

103. Memorandum of Dean Acheson to Louis Brandeis, Brandeis Papers, File 5-12 (Harvard Law School Library).

104. See note 102 *supra*.

105. 254 U.S. at 337-38.

participation of a public in which many conflicting opinions are represented. Of course Congress, as opposed to the states, might decide it does not want certain kinds of input, but that decision would be directly foreclosed for all but clear and present danger situations by the first amendment. It is thus the model of constitutionally mandated deliberative government at the federal level that inhibits *state* proscriptions without recourse to substantive due process — truly a *tour de force*.<sup>106</sup>

It is interesting to contrast Brandeis's eloquent formulation of the speech preemption argument with a similar argument by Chafee in the first edition of his classic book, *Freedom of Speech*.<sup>107</sup> In preparation for the *Gilbert* opinion, Dean Acheson wrote to Chafee on Brandeis's behalf and secured page proofs of the relevant portions of the book, which was then in preparation.<sup>108</sup> Chafee does make the argument that the Minnesota statute and others like it ought to be viewed as preempted by federal legislation on the subject. And he argues that if Congress and the executive wish to permit discussion "it is very unfortunate that their policy should be hampered by bitter prosecutions based on an entirely different policy. . . ."<sup>109</sup> Chafee goes on to chronicle "discontent" that might thus smolder and eventually disrupt the war effort. Brandeis's opinion is not only more eloquent, but it emphasizes a different underlying principle. To Brandeis, it is not potential disruption of the *war* that grounds preemption but disruption of the national *deliberative political process* — a process with a purpose as "high" as any we have.

The only limitation that can exist on that deliberation is the power of Congress to prohibit interference with the draft or interference with

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106. See C. BLACK, PERSPECTIVES ON CONSTITUTIONAL LAW 83-93 (1963). The notion that article IV privileges and immunities include freedom of expression on national issues was at earlier times most prominently expressed by the abolitionists. See W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848 (1977).

107. Z. CHAFEE, JR., FREEDOM OF SPEECH 110-13 (1920).

108. The *Gilbert* files in the Brandeis papers (Harvard Law School Library) contain two letters from Chafee to Acheson, one dated November 20, 1920 and one dated November 24. Chafee's letters included galley proofs of chapter II, part VII of *Freedom of Speech* which treats the state espionage acts as well as galleys of Appendix V, entitled *State War & Peace Statutes Affecting Freedom of Speech*. In the November 20 letter Chafee laments: "Except for the dissent in 108 Atl. 318 which came after I wrote this, I have as yet got no one to agree with my Constitutional argument that the state powers over opposition to war are no stronger than state powers over interstate railroads, so that. . . ." Letter from Chafee to Acheson, Nov. 20, 1920, Brandeis Papers, File 5-12 (Harvard Law School Library).

109. Z. CHAFEE, JR., FREEDOM OF SPEECH 112 (1920).

the war effort in order "*to avert a clear and present danger.*"<sup>110</sup> Moreover, Brandeis forged a link between the clear and present danger test and the primacy of political deliberation.

There are times when those charged with the responsibility of Government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative, *because the emergency does not permit reliance upon the slower conquest of error by truth.* And in such emergencies the power to suppress exists.<sup>111</sup>

In this rationale for the "clear and present danger" test, the test is turned into an *exception*. The issue is not so much whether there is a sufficient danger that the undesirable result will occur, but rather whether the feared result will occur before the deliberative process can have a fair chance to work. There are, in effect, no exceptions to what must be made subject to deliberative politics where the capacity to deliberate is intact. To this remarkable opinion, Holmes replied, "I think you go too far. I have marked McK[enna]'s Op[inion] 'Concur in result on the record.'"<sup>112</sup> It is the only free speech case in the decade in which Holmes and Brandeis reach conflicting results.

Before addressing the culmination of the liberal tradition in the 1920's with the *Gitlow* and *Whitney* opinions, it is well to take stock of the weak points of the respective Holmes and Brandeis formulations. Holmes had stated the "clear and present danger" test but left its institutional consequences vague. He had eloquently articulated a faith in the open process of competition in ideas, but had failed to specify, save metaphorically, how the struggle of ideas was related to the production of truth or decision in the polity. The market metaphor was anti-political.

Brandeis had outlined the concrete ramifications of the "clear and present danger" test as between judge and jury, trial judge and appellate court. He had specified the relationship of the struggle of ideas to political decisionmaking in the legislature, that is, to popular government. Moreover, he had confined "clear and present danger" to the status of an emergency exception to political deliberation. However, in specifying the political decision processes to which free expression is relevant, Brandeis had not accounted for the many non-political and informal ways that cultures and societies arrive at "truth." Holmes's

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110. 254 U.S. at 336.

111. *Id.* at 338 (emphasis added).

112. Letter from Holmes to Brandeis, Brandeis Papers, File 5-13 (Harvard Law School Library).

formulation left secure the non-governmental character of a philosophical phenomenon. Brandeis brought philosophy down to earth but may have impoverished it in stressing concrete political processes. In the later opinions of *Gitlow* and *Whitney* the tendencies of the two justices remain visibly distinct, although in *Whitney*, as we shall see, there is strong evidence of growth in Brandeis's conception of the problem-growth which incorporates some of Holmes's distinctive perspective.

The majority opinion by Justice Sanford in *Gitlow v. New York*<sup>113</sup> largely denied the applicability of the clear and present danger test to "criminal anarchy" legislation. He, in effect, read *Schenck* narrowly as providing a special rule for treating speech as an element in the commission of an inchoate crime. Thus, the "clear and present danger" formulation became merely a way of measuring whether the speech came close enough to the centrally proscribed conduct, *i.e.*, interference with the draft, sedition or espionage. But where the legislatively proscribed conduct was the advocacy of a doctrine itself, as in the criminal syndicalism and anarchy statutes at issue in the cases of the mid-1920's, then Sanford considered it senseless to measure the proximity of the speech to the proscribed conduct.<sup>114</sup>

Holmes, in his *Gitlow* dissent, insisted that the *Schenck* test, properly applied, was a measure for legislative classification as well.<sup>115</sup> That is, the central operative words of the test were clear and present danger of "substantive evils that [the State] *has a right to prevent*."<sup>116</sup> Thus, the question in *Gitlow* would not be the proximity and danger of advocating overthrow, but the proximity and danger of actual overthrow of government. Holmes's conclusion concerning *Gitlow* was that:

[W]hatever may be thought of the redundant discourse before us it had no chance of stating a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.<sup>117</sup>

In addition to the clarification or, more accurately, the expansion of the "clear and present danger" test, there is also an important continuity with the *Abrams* themes. For, in *Gitlow*, as in *Abrams*, Holmes refused to tie the rationale for liberty of expression to specific

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113. 268 U.S. 652 (1925).

114. *Id.* at 670-71 (distinguishing *Schenck*).

115. 268 U.S. at 672.

116. *Id.* at 672-73 (emphasis added).

117. *Id.* at 673.

governmental processes or deliberations. When Holmes spoke of our constitutionally mandated institutional indifference to the long term triumph of the idea of "proletarian dictatorship", he did not say "if this idea is adopted by the legislature" or "if this idea is ratified into our Constitution" or even "if this idea is destined to be accepted by a majority of the voters." Instead, he used what are, in effect, terms of art in saying "if [these ideas] are destined to be accepted by the dominant forces in the community." Holmes's notion of how societies do in fact arrive at political "truths" was thus by no means institutional in character. Holmes's perspective on tolerance combined skepticism and fatalism about the ideas which would *ultimately* prevail: a philosophical skepticism about "truths" and Spencerian fatalism about long-term social destiny. Holmes's most attractive moments, however, are found in his existential poses as the fighter for values in spite of the perception of a cosmic void and the long-run earthly insignificance of individual action. The "clear and present danger" test that he formulated permitted society to act affirmatively within the bounds of the tightly circumscribed time frame of effective human knowledge while preserving an ideational gene pool for future social evolution.<sup>118</sup>

In many ways the criminal syndicalism statutes posed more of a problem for Brandeis than for Holmes. Brandeis's most powerful statements on behalf of liberty of expression had been closely tied to the political deliberation of popular government, of which the legislative process was paradigmatic. But the restraints imposed by the criminal syndicalism law were directed, at least in theory, against those who preached and organized overthrow of government by force. It is possible to see how a faith in an invisible hand in the market place of ideas, or how belief in the process of social evolution with its gradual mutations of ideas and societies, might treat even this "preference" or "gene" (depending upon the metaphor) as potentially valuable and necessary for an unknown future product. But if one is concerned with the quality of political deliberation, especially in the legislative forum, it is somewhat more difficult to specify how speech and organization aimed at subverting that deliberative process have special value. They may provide data about the society and dissatisfaction, but so may riots and theft. It is not apparent that they are in any meaningful sense parts of the deliberation itself. Brandeis saw this difficulty and addressed it directly in *Whitney*.

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118. There are obviously many "sources" for these views of Holmes. Both the classic liberalism of Mills and the social Darwinism of Spencer converge in their notion that in minorities may reside the seed for future growth of society.

Brandeis's *Whitney* concurrence<sup>119</sup> started out as a dissent in the case of *Ruthenberg v. Michigan*.<sup>120</sup> Virtually every bit of the free speech theory and rhetoric in the opinion was crafted to its present form and fitted to the facts of *Ruthenberg*, but it was rendered moot when the defendant in that case died.<sup>121</sup> Brandeis then grafted the long free speech essay to what had started as a very short, page-and-a-half concurrence in *Whitney*.<sup>122</sup> It is of some relevance to know this because it removes at least one red herring from an understanding of how far Brandeis intended to go. Within the Communist labor party, Anita Whitney herself had stood with the so-called "political faction" which argued for continuation of participation by the party in some forms of conventional politics.<sup>123</sup> She was a most sympathetic, goodhearted former social worker of impeccable family. Ruthenberg, however, had been the first national secretary of the Communist Party. After his arrest in 1922, he had remained a major figure on the national level in the Communist Party and had attended the "Bridgman Convention" as a member of the central executive committee. Although not an advocate of immediate revolution, Ruthenberg had personally authored statements calling for "extra-parliamentary means of achieving power." In his own words, "this includes the use of armed force."<sup>124</sup> Brandeis's

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119. *Whitney v. California*, 274 U.S. 357, 372 (1927) (concurring opinion).

120. 273 U.S. 782 (1927). See *Whitney v. California* files, Brandeis Papers, Files 44-5 through 44-9 (Harvard Law School Library) (containing drafts of a *Ruthenberg v. Michigan* opinion which develop verbatim the rhetoric which finally emerged in the *Whitney* opinion).

121. 273 U.S. 782 (1927).

122. See Brandeis Papers, File 44-10 (Harvard Law School Library) for a draft of a bare-bones *Whitney* opinion which refers the reader to the *Ruthenberg* dissent.

123. See Brief of Plaintiff in Error at 1-2, 11-13 *Whitney v. California*, 274 U.S. 357 (1927), where counsel for Anita Whitney press this point. It was picked up by contemporaneous commentators. See Felix Frankfurter's article written after Whitney's conviction but prior to the Supreme Court decision. F. FRANKFURTER, *The Case of Anita Whitney*, in FELIX FRANKFURTER AND THE SUPREME COURT 180 (P. Kurland ed. 1970) (reprinting an editorial in the *NEW REPUBLIC*, Nov. 4, 1925).

124. See *People v. Ruthenberg*, 229 Mich. 315, 339, 201 N.W. 358, 365 (1924). The Court reviews specific evidence linking the defendant to the general purposes of the organization and rendering it appropriate to attribute to him those purposes. *Id.* at 335-36, 339-40, 201 N.W. at 364, 365-66. The opinion of Judge Wiest for the Court can in no way be characterized as calm or dispassionate. But there are many more specifics linking Ruthenberg to the means and objectives of revolutionary (*i.e.*, violent) overthrow of government than was the case for Anita Whitney. Ruthenberg, elected the first National Secretary of the Communist Party in 1919, was characterized by a leading historian of the Party as "[t]he man who emerged from the conventions in 1919 as the outstanding American Communist." T. DRAPER, *THE ROOTS OF AMERICAN COMMUNISM* 193 (1977); and see this work, *passim*, for the significance of Ruthenberg throughout the period. Anita Whitney rates a single, brief mention in this standard work on American Communism while Ruthenberg's name pervades the work and is second only to that of Louis Fraina in significance for this early period of the Party.

concurrence in *Whitney* was authored as a dissent for the *Ruthenberg* case, and it must be understood as applicable to the facts of that case: to the conviction of a hard-core, national leader of the Party, apprehended while attempting to cover the retreat of a secret convention at which the first official envoy of the Comintern was attempting to dictate party unity on the basis of a plan which included a secret, extra-legal party apparatus. Early drafts of Brandeis's *Ruthenberg* opinion included a paragraph characterizing the Communist Party as a conspiracy to train cadres for infiltration. Brandeis concluded, however, that this character was insufficient to justify repression without evidence of the immediate danger of illegal acts resulting therefrom.<sup>125</sup>

The most striking new element in Brandeis's thought that is revealed by the *Whitney* concurrence is the shift from a focus upon legislative process to a more inclusive public politics. The essay on free speech begins by characterizing the essential choice of political modes as being one between the "deliberative" and the "arbitrary."<sup>126</sup> The commitment to the "deliberative" mode is then historically validated as the act of the Founders to which an ongoing commitment is eternally necessary. Brandeis's research for the *Whitney/Ruthenberg* opinion suggests some of the principal problems that this commitment entailed. What is the role of the call to disorderly, non-deliberative change in politics? Brandeis had James Landis, his clerk in 1925-1926, prepare a memorandum on calls to resistance of the Fugitive Slave Law and resistance to Prohibition.<sup>127</sup> It is likely that from such research there emerged the language in the opinion: "Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it."<sup>128</sup>

Brandeis did not deny the danger, but required the commitment to liberty in the face of it as an act of courage demanded by the structure of our politics. This understanding of liberty of expression deepens the sense that "clear and present danger" is to be understood as applicable only to those emergencies in which the deliberative mode has insufficient time to operate. Brandeis had come to believe that the great dichotomy was between the deliberative and the arbitrary, between reason and force in politics. Law mediates that dichotomy and becomes

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125. See early drafts of *Ruthenberg v. Michigan*, Brandeis Papers, File 44-5 (Harvard Law School Library). On the Bridgman Convention see T. DRAPER, *supra* note 124, at 363-75.

126. 274 U.S. at 375.

127. Brandeis Papers, File 44-6 (Harvard Law School Library). This memorandum is really a list of quotations.

128. 274 U.S. at 376.

justifiably arbitrary and coercive *only* by remaining the *product* of as purely deliberative a process as possible. Scrawled in Brandeis's hand across the back of Landis's memorandum on calls to resist the Fugitive Slave Law and Prohibition is the first approximation, and then the final language, of the sentence in *Whitney* which identifies the force of law itself with the arbitrary in the public space of politics.

First there is written: "Believers in the force of reason they rejected silencing by law as the argument of force." Then underneath that sentence is scrawled: "As I interpret their acts — Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in the worst form."<sup>129</sup>

The *Whitney* concurrence (or rather the *Ruthenberg* dissent) was intended to accomplish two related objectives. First, it was to elaborate the centrality of a free and open public space in our politics and to relate that space to a courageous commitment to undertake the admitted risks entailed. Brandeis, while asserting that the Communist Party of the United States did not present, in 1922, a clear and present danger of the imminent overthrow of the government, could hardly dismiss the party in the cavalier manner used by Holmes to characterize the defendants in the *Abrams* dissent. Some risk was present.

Second, the *Whitney/Ruthenberg* opinion of Brandeis laid out a program for legal elaboration of the clear and present danger test.

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection.<sup>130</sup>

But that elaboration required explicit reference to the larger, background purposes of the first amendment.

The commitment to reason and deliberation thus answered the question of how "clear" and how imminent the danger must be. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."<sup>131</sup> Moreover, since the commitment to deliberation was so central politically, Brandeis added a new note by insisting that the

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129. Brandeis Papers, File 44-6 (Harvard Law School Library). The last quoted sentence appears almost verbatim in 274 U.S. at 375.

130. 274 U.S. at 374.

131. *Id.* at 377.

"clear and present" evil be sufficiently substantial to warrant the inhibition of public debate.<sup>132</sup>

### CONCLUSION

This elaborate elucidation of a familiar classic may allow us to appreciate somewhat better the nature of the contradictions confronting the Court and the centrality of free speech law in the construction of a liberal ideological response to them. Taft and the conservatives had identified in street conflict the arbitrary, coercive and violent elements that had to be removed before deliberative modes of decision could be operative. In *Truax v. Corrigan* they reached the high water mark of the attempt to constitutionally mandate a remedy for such arbitrary conduct of the streets. It is significant that although the Court split on constitutionalizing the obligation to provide a remedy, it was unanimous on the *capacity* of the government to impose order on street politics.

In a dramatic counterpoint to that development, Brandeis by 1927 had been driven to identify the law itself with force, violence, and arbitrariness when used to silence discussion. He saw the deliberative model of politics which justified the drive for order imposed by law as radically circumscribing the kinds of order that "law" could impose. Brandeis's conclusions about law itself were impossible for his brethren to accept. Once the measured forms of law are identified with force, are branded as illegitimate in much the same terms as picketing and street politics; once the ideal of deliberation is understood to be as inconsistent with a court order as with massed phalanx of men; then the resolution or imposition of closure on major issues of the day appears to depend upon the flimsy possibility of the agreement of all concerned.

These two opposing thrusts present, in utero, one of the major questions for twentieth century politics. Can a polity, indeed, avoid both forms of the "arbitrary?" Is it possible to stop the arbitrary, coercive, violent forms of street politics without resort to the arbitrary violence of the law? It is a measure of the distinction of the Taft Court that it had vividly presented this dilemma to the nation and to the world. The conservatives had resolved to accept the force of law, the voice of the then dominant groups in the community. Justices Brandeis and Holmes, the two oldest Justices on the Court in 1927, expressed a different faith and a commitment to have it both ways. For them, the possibility of restraining *both* private and public force demanded courage and a dedication to public politics, to active citizenship. Citizens, in their very

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132. *Id.* at 377-78.

decision to participate, express a faith in their capacity to speak to one another and to transcend ideology. This capacity is not an inherent feature of our politics, but an achievement created by a scrupulous "eschewing" of the arbitrary. Brandeis's answer to Walter Lippmann, finally, is that the commitment to deliberation is a question of will. That commitment, if it is carried out, can generate intelligence and apply it. Ultimately, the sociology of knowledge tells us only where people start from, not whither — through deliberation — they can bring themselves to go.