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Supreme Court of the United States

BENJAMIN GITLOW, Defendant-in-Error, against THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-in-Error.	

BRIEF FOR PETITIONER ON APPLICATION TO THE FULL COURT FOR WRIT OF ERROR.

This is an application for a writ of error to review the judgment of the Court of Appeals of the State of New York affirming the conviction of Benjamin Gitlow for a statutory offense designated as criminal anarchy. The Federal point raised by the record is that the statute and the authority exercised under it by the State of New York deprived Gitlow of his liberty without due process of law in violation of the first section of the 14th Amendment to the Constitution of the United States.

This application was originally submitted to Mr. Justice Brandeis on July 22, 1922. It then appeared from the record that, in making his first objection to evidence on the trial, counsel for de-

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fendant had left blanks for the subsequent insertion of a specific reference to the section of the Federal Constitution to which he referred, and that he made his subsequent constitutional points in his motions to dismiss the indictment and direct a verdict, and a motion in arrest of judgment, by back reference, without further specification of the particular constitutional provision. It also appeared that the remittitur and opinions of the Court of Appeals did not distinctly specify that the question under the 14th Amendment to the Constitution was before the Court. Mr. Justice Brandeis expressed doubt whether on this state of the record the constitutional question was properly raised, and referred the application to the full Court.

Since the original presentation of the application to Mr. Justice Brandeis the record has been amended (Motion Papers, pp. 5, 6) so as to show that counsel for the defendant did in fact on the trial distinctly specify the due process provision of Section 1 of the 14th Amendment. Furthermore, at the next term of the New York Court of Appeals, after the decision (which came down in vacation), the remittitur of that Court was amended by the insertion of the following statement:

> "The question whether the New York Criminal Anarchy Law (Penal Law, Sections 160-161) and its application in this case is repugnant to the provision of the 14th Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, was considered and passed upon by this court" (Motion Papers, p. 135).

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This Court has repeatedly held that where the Supreme Court of a State has treated the Federal questions as necessarily involved and decided them adversely to the plaintiff-in-error, and could not otherwise have reached the result that it reached, it is immaterial to consider how the questions were raised on the trial.

> *Cissna* v. *Tenn.*, 246 U. S. 289, 293, 294;
> *Midreich* v. *Lauenstein*, 232 U. S. 236, 242, 243;
> *North Carolina R. R. Co.* v. *Zachery*, 232 U. S. 248, 257;
> *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41, 49;
> *Atchinson, Topeka & Santa Fe R. R.* v. *Sowers*, 213 U. S. 55, 63;
> *Chambers* v. *Baltimore & Ohio*, 204 U. S. 291, 297-299;
> *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 182;
> *Marvin* v. *Trout*, 199 U. S. 212, 223;
> *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308-309;
> *San Jose Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177;
> *Farmers etc. Ins. Co.* v. *Dobney*, 189 U. S. 301, 304;
> *Home for Incurables* v. *New York*, 187 U. S. 155, 157;
> *Jacobi* v. *Alabama*, 187 U. S. 133, 136;
> *Sweringen* v. *St. Louis*, 185 U. S. 38, 46;
> *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 153;
> *Mallett* v. *North Carolina*, 181 U. S. 589, 592.

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In view of these authorities, there can be no question that the remittitur as amended brings the Federal constitutional question in the case before this Court.

When application for a writ of error is referred to the full Court, this Court considers not only the manner in which Federal questions were raised, but their substantiality.

Spies v. *Illinois*, 123 U. S. 131, 163-164.

We append, therefore, in summary form an outline of the argument which we shall hope to present more fully at a hearing upon the writ of error. References are to pages of the printed papers on this application which contain folio references to the certified copy of the remittitur of the New York Court of Appeals on file with the Clerk of this Court.

We believe that this case is the first to bring before this Court the constitutionality of making a certain sort of political utterance criminal *per se*.

The provisions of the New York Penal Law (Secs. 160, 161) whose constitutionality and application are called in question are as follows:

> "160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."
>
> "161. Advocacy of criminal anarchy. Any person who:

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> 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
>
> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; * * *
>
> Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

This statute was enacted in 1902.

On its face it penalizes doctrine as doctrine, regardless of consequence or relation to consequence. The New York Courts so construed it, holding the admitted fact of defendant's responsibility for publication of a statement of doctrine (the Left Wing Manifesto, pp. 14-48) sufficient to sustain a conviction, without evidence that any concrete effect either occurred or was proximately likely to occur as a result of such publication, and declining to submit to the jury (see requests refused and rulings thereon, pp. 7-11) any question as to such effect.

The doctrine of the Manifesto which the defendant participated in publishing is candid Bolshevism —advocacy of class government in the interests of the working class ("dictatorship of the proletariat") and of propaganda among the working

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class, particularly in times of industrial disturbance when conditions are most favorable for such propaganda, to win converts to this doctrine of class government. There is no advocacy of fomentation of industrial disturbances; these are deemed to occur spontaneously from causes inherent in the economic system. There is no plan of specific acts. Since the question is solely of the constitutionality of suppressing doctrine as doctrine, we conceive that extended discussion or criticism of the Manifesto would be out of place. We conceive also that it would be irrelevant to argue the incorrectness of the holding of the New York Courts that it is a doctrine not only of substantive governmental change, but also of unlawful means for bringing it about. The publication of the Manifesto was an attempt to win converts to a political theory. Whether the proponents of the theory could ever, with the most unlimited freedom of advocacy, win enough converts to develop a possibility of carrying it into effect, and what particular means, lawful or unlawful, they and their converts might adopt if they did, are matters of remote speculation.

The doctrine is a political and economic heresy. The constitutional question is whether heresy as such may be made a subject of criminal prosecution.

It is undoubtedly true that any fundamental dissent, fervently entertained, is pregnant with possible outbreaks against peace and good order. The doctrine of the abolition of negro slavery had and realized this possibility. The doctrine of Irish independence has it; also the intense nationalism of the Italian Fascisti; also, in a lesser degree, the doctrine of the undesirability of the 18th Amend-

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ment, and the issues of an ordinary political campaign. Witness also the "treat 'em rough" implications of heated patriotism in America. It is, however, a basic principle of our constitutional philosophy and jurisprudence that the advantage of permitting free exposure of all political doctrine to the criticism of free minds and the reactions of self-interest far outweighs the occasional dangers of fanaticism and excess.

Liberty of expression belongs to the same field of personal liberty protected by the 14th Amendment as the liberty of property. The words "due process of law"

> "refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."
>
> *In re Kemmler,* 136 U. S. 436, 438.

The situation in this case is not like that where the question is of the appurtenance to due process of law of a procedural requirement which, however salutary,

> "cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property."
>
> *Twining* v. *New Jersey,* 211 U. S. 78, 113.

As was said in *State* v. *McKee,* 73 Conn. 18, 28:

> "The right to discuss public matters stands in part on the necessity of that right

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> to the operation of a government by the people; but, with this exception, the right of every citizen to freely express his sentiments on all subjects stands on the broad principle which supports the equal right of all to exercise gifts of property and faculty in every pursuit of life."

While this Court has not found it necessary explicitly to assert this proposition in the course of decided cases, it has been at pains to make clear that it does not reject it. Thus in *Patterson* v. *Colorado,* 205 U. S. 454, the Court said, at page 462:

> "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First."

And Mr. Justice Harlan, dissenting in the same case, advanced (in addition to the proposition that freedom of expression is a right, privilege or immunity of national citizenship, which we do not now regard as open) the following:

> "I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law."

The dissenting opinion of Mr. Justice Brandeis in *Gilbert* v. *Minnesota,* 254 U. S. 325, 343, intimates a similar view; the majority opinion written by Mr. Justice McKenna (at p. 332) refrains from

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deciding the proposition, but assumes its correctness for the purposes of the case.

The 14th Amendment not only protects the rights, privileges and immunities of national citizenship, but also, with respect to liberties which, irrespective of the Constitution and of national citizenship, appertain to citizenship under a free government,

> "furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure."
>
> *In re Kemmler, supra,* 136 U. S., at p. 448.

It was said in *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589, that the liberty upon which the States may not encroach save by due process of law

> "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to the carrying out to a successful conclusion the purposes above mentioned."

There can be no ground for regarding the liberty of expression as less fundamental than the liberty to acquire and enjoy property and otherwise govern one's own life and conduct which has been so often recognized.

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Adair v. *United States,* 208 U. S. 161;
Coppage v. *Kansas,* 234 U. S. 1;
Adams v. *Tanner,* 244 U. S. 590;
Allgeyer v. *Louisiana,* 165 U. S. 578, 589;
Lochner v. *U. S.,* 198 U. S. 45;
People v. *Gillson,* 109 N. Y. 389, 398, 404-406;
People v. *Turner,* 55 Ill. 280;
Ex parte Hudgins, 103 S. E. 326 (W. Va., 1920).

The liberty of expression is akin to the right of peaceable assembly for a lawful purpose not referring to the National Government which, though not a prerogative of national citizenship, has been recognized as an essential attribute of citizenship under a free government, inhering in state citizenship irrespective of constitutions. "The government of the United States when established found it in existence, with the obligation on the part of the states to afford it protection" (*U. S.* v. *Cruikshank*, 92 U. S. 542, 551; reiterated in *Twining* v. *New Jersey,* 211 U. S. 78, 96-97). The question which this Court asks when it considers the status of a right under the due process clause is not concerned with whether the right is of state or national appurtenance. It is this:

> "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"
>
> *Twining* v. *New Jersey,* 211 U. S. 78, 106.

In the New York courts, however, the argument that the Criminal Anarchy Law in its application in this case raised a question of deprivation of

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liberty without due process of law was disposed of with the following observation:

> "Manifestly, the argument based on lack of due process needs no extended consideration for he has had and is having due process of law which entitles him to a hearing and determination by a court of competent jurisdiction."
>
> *People* v. *Gitlow,* 195 App. Div. 773, at 786; papers on this application, p. 71.

In the Court of Appeals decisions (234 N. Y. 131, at 136-138 and 150-151; papers on this application, pp. 102-114, 125) there was little discussion of the constitutional point beyond simple assertion that the Court deemed the statute constitutional. The case of *People* v. *Most,* 171 N. Y. 423, relied upon in the opinion of Crane, *J.,* did not raise the question of the criminality of doctrine *per se.* It was a prosecution for conduct creating danger of breach of the peace, and the legislative power over freedom of expression which was sustained was not unlimited, but was confined (171 N. Y., at 431) to power "to punish the publication of matter which is injurious to society *according to the standard of the common law.*"

The liberty of expression, according to the standard of the common law, is not an unlimited license any more than the liberty of property is a license to decline taxation or to carry on commerce in a statutory poison. Just as property may be confiscated if contraband, so may expression be repressed and punished if it is a contempt of Court (*Patterson* v. *Colorado, supra*), or obscene or libelous of an individual, or partakes of the quality of a solicitation or attempt to commit crime.

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This is the correct limitation of the field of liberty of expression according to the standard of the common law as modified (with respect to the common law crime of sedition or seditious libel—see *Schofield, Proceedings American Sociological Society,* 76-87; *Chafee, Freedom of Speech in Wartime,* pp. 21-24) by the American Revolution. While earlier decisions gave some currency to the pre-revolutionary Blackstonian doctrine that any kind of expression might be punished after publication, liberty of speech and press consisting in freedom from prior restraint, this arbitrary and artificial test could not stand enlightened criticism and must now (*Schenck* v. *U. S.*, 249 U. S. 47, at 51) be considered definitely discarded.

The normal criminal statute undertakes to punish for an accomplished substantive evil. Statutes punishing acts of evil tendency without proof that substantive evil in fact resulted are, however, not unknown. In determining whether such statutes are unconstitutional as imposing undue restraint upon personal liberty, this Court has repeatedly adopted the test of whether the thing forbidden was akin to a common law attempt. Thus, in

> *Waters-Pierce Oil Co.* v. *U. S.,* 212 U. S. 86,

this Court, by Mr. Justice Day, sustaining a statute punishing acts "reasonably calculated" to restrain trade, said, at pages 109-110:

> "It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. * * * 'Reasonably calculated'—what does it include less than acts

> which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?"

In the same case the Court quoted as follows from *Swift & Co.* v. *U. S.*, 196 U. S. 375, 396:

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, for instance, the monopoly, but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee,* 177 Mass. 267, 272. But when that intent and the consequent dangerous probability exists, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

Whether "a dangerous probability" exists is not a matter of subjective impressionism. There must be provable criteria. This Court said, for example, in holding unconstitutional the provision of the Lever Act undertaking to penalize an unreasonable rate or charge in dealing with necessaries (*U. S.* v. *L. Cohen Grocery Co.,* 255 U. S. 81, at 89):

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. * * * We see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equiva-

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> lent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

In three cases,

> *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 221;
> *Collins* v. *Kentucky,* 234 U. S. 634, 637;
> *American Seeding Machine Co.* v. *Kentucky,* 236 U. S. 660, 662,

this Court held unconstitutional a set of Kentucky statutes purporting to make unlawful any combination to fix a price greater or less than the "real value" of an article. In *Collins* v. *Kentucky, supra,* at 638, the Court, *per* Mr. Justice Hughes, said:

> "He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to provable criteria, but by speculating upon imaginary conditions, endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition."

The importance of provable external and objective criteria for a conclusion as to dangerous probability is not less when the subject under consideration is the tendency of an heretical doctrine than when it is the fairness of a price. "Political trials," wrote Alexander Dumas of the trial of Charles I, "are always empty formalities, for the same passions which bring the accusation pronounce the judgment also" (*Twenty Years After,* Vol. 2, Ch. 23).

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This Court in *Reynolds* v. *U. S.,* 98 U. S. 145, 163, has quoted with approval the language of Thomas Jefferson in his preamble to the Virginia Toleration Act of 1785:

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being, of course, judge of that tendency, will make his opinion the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own."

The danger that passion will obscure justice in prosecutions for sedition was strikingly illustrated in the California case of

> *People* v. *Taylor,* 187 Cal. 378; 62 Cal. Dec. 546, 553; 203 Pac. 85.

There, upon evidence alone that the defendant was a member of the Industrial Workers of the World and of publications and utterances attributed to that organization, but not personally connected with the defendant, a jury found the defendant guilty under a count charging that he *personally committed* acts of crime, injury to property, violence or terrorism. His conviction on this count was, of course, reversed. But the fact that a jury could find such a verdict on such evidence brings home the inevitability of unjust verdicts in cases where a jury is confronted with a doctrine of obnoxious ends, such as the desirability of a dictatorship of the proletariat, and is called upon to pass upon the subtler question of whether the doctrine

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necessarily involves recourse to unlawful means. Loyalty to traditions and institutions is such that it is unreasonable to suppose, human nature being what it is, that juries, or even Courts, will pass upon such questions of construction with impartiality and detachment. And a statute such as the New York Criminal Anarchy Law provides no external criteria by which excesses of prejudice in arriving at conclusions on these subtler questions can be corrected.

This Court, in sustaining the constitutional validity of statutes under which speech or writing has been held punishable as involving dangerous probability, has been careful to insist that this probability shall be gauged by objective and external tests. In

Fox v. *Washington*, 236 U. S. 273,

the Court had before it a statute forbidding the publication of matter "advocating, encouraging or inciting or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or any court or courts of justice." The charge in the particular case was based upon a publication entitled "The Nude and the Prudes," inciting a particular group of persons to persistent continuation of a course of actual violation of the law against indecent exposure. This Court, construing in favor of constitutionality, sustained the statute, not upon its broad language, but as limited by this particular application of it, saying, at page 277:

> "We understand the state court by implication at least to have read the statute as

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confined to encouraging an actual breach of the law. * * * It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinion of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. * * *

If the statute should be construed as going no further than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness."

Similarly, in sustaining convictions under the Espionage Act, this Court gauged the dangerous probability of utterance by the concrete test of the objective circumstances surrounding it:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."
>
> *Schenck* v. *U. S.,* 249 U. S. 47, 52.

The extraordinary fact of war was, of course, an external circumstance of fundamental importance.

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."
>
> *Schenck* v. *U. S., supra.*

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See, also:

> *Debs* v. *U. S.,* 249 U. S. 211, 216;
> *Abrams* v. *U. S.,* 250 U. S. 616;
> *Schaefer* v. *U. S.,* 251 U. S. 466;
> *Pierce* v. *U. S.,* 252 U. S. 239.

This disagreement in the later cases between the majority of the Court and Mr. Justice Holmes, who wrote the opinions in the *Schenck* and *Debs* cases, and Mr. Justice Brandeis, who concurred, did not go to the principles of decision or imply a doctrine that expression may constitutionally be made criminal *per se.* Mr. Justice Pitney, writing for the Court in the *Pierce* case, reiterated the rule laid down by Mr. Justice Holmes in the *Schenck* case:

> "Whether the printed words in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution."
> 252 U. S., at 250.

Mr. Justice Clarke, in the *Abrams* case (250 U. S., at 622), dwelt not alone upon the character of the articles, but also upon the circumstances that they were

> "circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas."

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The utmost that was sustained was the charge to the jury in the *Schaefer* case that they had the right to call upon the fund of general information which was in their keeping, as to which (in its context) Mr. Justice McKenna said (251 U. S., at 473-474):

> "In other words, the minds of the jurors were directed to the gist of the case which was the despatches received and then changed to express falsehood to the detriment of the success of the United States, and the fact and effect of change the jurors might judge of from the testimony as presented and 'from the fund of general information which' was in their 'keeping.' That is, from the fact of the source from which the despatches were received, from the fact of war and what was necessary for its spirited and effective conduct and how far a false cast to the despatches received was depressing or detrimental to patriotic ardor."

The difference of opinion in this court in these three cases was not as to the principle, but (as was made clear by Mr. Justice Brandeis in the *Schaefer* case, 251 U. S., at 483) as to the sufficiency of the circumstances shown to warrant submission to the jury of any question whether words created clear and present danger of substantive evil. It was a difference as to degree of approach to punishment of opinion *per se,* not as to the unconstitutionality of such punishment. Assuming the same factual premises, there can hardly be dispute as to the soundness of Mr. Justice Brandeis' observations in the *Schaefer* case (251 U. S., at 493-495):

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> "The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance. * * * The constitutional right of free speech has been declared to be the same in peace as in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief."

Or as to Mr. Justice Holmes' statement in the *Abrams* case (250 U. S., at 630) of our constitutional philosophy:

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech means to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the

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> power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

The Minnesota wartime sedition law was sustained precisely upon the principles announced in the *Schenck* case.

Gilbert v. *Minnesota,* 254 U. S. 325.

In addition to the outstanding circumstance of the flagrancy of war, the opinion of the Court points out (pp. 331, 333) that

> "Gilbert's remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence. * * * The same conditions existed as in the cited cases, that is, a condition of war and its emergency existed."

The New York Courts in the case at bar disregarded the clear limitation of the criminality of expression to the situation when it creates immi-

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nent danger. The opinions in the Court of Appeals assert the constitutionality of the Criminal Anarchy Law without discussion. In the Appellate Division, however, Mr. Justice Laughlin, writing for the Court, after citing the Espionage Act cases, expressly repudiated their doctrine, saying (195 App. Div., at 790; p. 77 of the printed papers on this application):

> "I am of opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here" (papers on this application, p. 77).
>
> "We must assume that the Legislature deemed that, unless the advocacy of such a doctrine was prohibited, there was danger that sooner or later the government might be overthrown thereby" (papers on this application, p. 78).
>
> "Since it is competent for the Legislature to enact laws for the preservation of the State and Nation, the laws required for that purpose rest in the legislative discretion, and if they are reasonably adapted to that end and are based on danger reasonably to be apprehended, *even though not present or immediate,* they may not be annulled by the courts either on the theory that it would be wiser to leave it to the people to meet the pernicious doctrines by argument, or that they unnecessarily restrict the freedom of speech or of the press or of personal liberty" (italics ours) (papers on this application, p. 79).

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OTHER STATE DECISIONS.

It was squarely held in

> *Ex parte Meckel,* 87 Tex. Cr. Ap. 120; 220 S. W. 81,

that a legislature cannot make the use of language *per se* a felony. Other state decisions upon statutes of criminal syndicalism or sedition laws having general resemblances with the New York Criminal Anarchy Law, have, however, reached contrary conclusions. The laws sustained are all of recent enactment. In some of these cases the Courts, in refusing to go behind legislative discretion, assumed that the Legislature acted with reference to a current prevalence of criminal outbreaks. The New York statute was enacted in 1902, with specific reference to the doctrine of promoting anarchy by assassination which was believed to have resulted in the murder of President McKinley.

In

> *State of Washington* v. *Hennessey,* 114 Wash. 351; 195 Pac. 211,

the Supreme Court of Washington upheld a law penalizing advocacy of crime, sedition, violence, intimidation or injury as a means of effecting or resisting any industrial, economic, social or political change. Its conclusion as to constitutionality rests upon the authority of its own general language in *State* v. *Fox,* 71 Wash. 185, *not* upon the construction of the statute before the Court in that case based upon its application to the facts of the particular case, which was relied upon by this Court

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in its affirmance (*Fox* v. *Washington, supra,* 236 U. S. 273).

In the subsequent case of *State* v. *Aspelin,* Wash. , ; 203 Pac. 964, the Washington Court somewhat modified the broad theory announced in the *Hennessey* case, reversing a conviction upon the ground that a charge that "sedition means to speak or write against the character and Constitution of the government or to seek to change it by any means except those prescribed by law" was too broad, both the Washington statute and the common law definition of sedition requiring that language be such as would naturally tend to promote factious commotion and violation of law. It was apparently felt, however, that language might be found to have this quality *per se,* without reference to external circumstances. The Court remarked,

> "There does not seem to be any American case on prosecution for sedition,"

not, however, noting the constitutional significance of this fact.

In

> *State* v. *Gibson,* 189 Iowa 212; 174 N. W. 34,

a sedition law was sustained as creating a crime analogous to libel.

In

> *State* v. *Moilen,* 140 Minn. 112; 167 N. W. 345,

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and

> *People* v. *Malley,* 33 Cal. App. 346; 194 Pac. 48,

the Courts of Minnesota and California respectively sustained substantially identical criminal syndicalism acts upon the ground that

> "It is the exclusive province of the legislature to declare what acts deemed by the law-makers inimical to the public welfare shall constitute a crime, to prohibit the same and impose appropriate penalties for a violation thereof. With the wisdom or propriety thereof the courts are not concerned."

These Courts, however, laid stress upon the fact that acts of sabotage and terrorism were notoriously prevalent in their jurisdictions (140 Minn., at pp. 114-115; 194 Pac., at 50). In the *Malley* case it was said that in each case the question whether the matter was circulated under such circumstances and was of such a character as to create a clear and present danger of an evil that the Legislature had a right to prevent should be submitted to the jury (194 Pac., at 54). The Oregon case of *State* v. *Taundy,* 204 Pac. 958, 963, follows the *Moilen* and *Malley* cases. The California case of

> *People* v. *Steelik,* 187 Cal. 361; 62 Cal. Dec. 536; 203 Pac. 78,

was concerned only with the section of the California statute penalizing membership in a group organized for forbidden purposes and sustained this section on the theory that it was to be construed

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as defining a crime of *conspiracy* to do acts tending to accomplish a forbidden purpose, when accompanied by an overt act directed towards effectuation.

In

> *State* v. *Gabriel,* 95 N. J. Law 337; 112 Atl. 611,

and

> *State* v. *Tachin,* 92 N. J. Law 269; 106 Atl. 145; aff'd 108 Atl. 318; 93 N. J. Law 485,

a statute punishing advocacy of subversion of government by *force* was sustained upon the ground that the determination of the limit of liberty of expression was an exclusive legislative prerogative. There was no reference to any criterion of dangerous probability. It was held, however, that a section punishing encouragement of hostility or opposition to government and not limited to encouragement of unlawful or violent hostility or opposition was unconstitutional. A similar distinction was taken in

> *State* v. *Diamond,* 27 N. M. 477; 202 Pac. 988.

In

> *State* v. *Sinchuk,* Conn. ; 115 Atl. 33,

the Court, overlooking, we believe, the history and philosophy of our government with respect to the common law crime of sedition or seditious libel, held that the prohibition of defamatory aspersions

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against government was constitutional on that analogy (115 Atl., at p. 35). The Court held further that an alien had no standing to invoke constitutional guarantees of personal liberty. This, we believe, was inconsistent with the well-established doctrine as to unconstitutional discrimination.

> *Yick Wo* v. *Hopkins,* 118 U. S. 356;
> *Truax* v. *Raich,* 239 U. S. 33, 39;
> *People* v. *Crane,* 214 N. Y. 154;
> *Ratstone* v. *Pennsylvania,* 232 U. S. 138, 145;
> *Opinion of Justices,* 207 Mass. 601.
> *Gulf, Colorado & Santa Fe Railway* v. *Ellis,* 165 U. S. 150, 165.

The Constitution applies impartially. No discrimination can be based upon either the citizenship or the personal character or views of a person who asserts constitutional rights. An enemy of cherished institutions does not become *ipso facto* an outlaw, nor is he estopped to assert his equality before the law, whatever opinion may be entertained as to the quality of his use of it.

CONCLUSION.

The grave and novel question of abridgment of constitutional liberties raised by this case calls for the fullest consideration. A writ of error should issue.

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Respectfully submitted,

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