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Communists And The First Amendment: The Shaping Of Freedom Of Advocacy In The Cold War Era*

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"Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."

Justice Hugo Black, dissenting in *Dennis v. United States*, June 4, 1951.1

"[W]hatever reasons there may primarily once have been for regarding the Soviet Union as a possible, if not probable military opponent, the time for that sort of thing has clearly passed."

George F. Kennan, testifying before the Senate Foreign Relations Committee, April 4, 1989.2

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1. 341 U.S. 494, 581 (1951) (Black, J., dissenting).
I. Introduction

George Kennan’s ringing declaration of peace, hardly surprising now in light of the recent political upheavals in the Soviet Union, underscores the fact that these are surely the “calmer times” to which Justice Black looked hopefully four decades ago. Kennan was, at that time, one of the architects of the policy of “containment” of Soviet expansionism, widely considered an external threat to American security. Justice Black’s words were uttered in connection with America’s postwar preoccupation with internal security, and specifically with regard to the conviction of eleven leaders of the Communist Party of the United States (CPUSA) of conspiring to advocate the forcible overthrow of the U.S. government. That case, Dennis v. United States, was decided at a point in American constitutional history when the law of freedom of speech and association was still in its formative years and remarkably undeveloped. By upholding those convictions, Dennis stunted that development, and blocked (at least temporarily) the evolution of the prevailing “clear and present danger” test for evaluating the constitutionality of laws regulating political speech. In addition, Dennis spawned a decade of case law modifying and building upon its central premise. Dennis also marked the beginning of the end of any meaningful national political presence of the Communists in America.

Dennis appears in every major American constitutional law casebook, typically accompanied by its spiritual companion cases, Yates v. United States and Scales v. United States, and is thus familiar to every student of American constitutional law. Yet these enormously important judicial opinions, raising and debating questions that go to the very heart of our system of freedom of speech, come across as abstract, dry, and dated—resulting from the total absence in Dennis of any consideration of the facts upon which the prosecution was based. The instant academic juxtaposition of these distant holdings with the more recent, and liberating, opinion in Brandenburg v. Ohio invites the student to conclude, all too easily, that Dennis is a mere historical relic—a decision of questionable validity and doubtful authority.

As a teacher of constitutional law, I found myself wanting to know more. What was the background against which Dennis had come about, and what was the nature of the evidence presented at the

trial? What happened to the American Communists thereafter? Other questions speak to the present significance of *Dennis* with respect to freedom to engage in radical political advocacy and association. How confidently can one conclude that *Dennis* is no longer a precedent of any viability, either because it has been supplanted by later case law, or because it is almost surely a decision confined to special circumstances at a special time? Most importantly, how confidently may one conclude that the decision in *Dennis* was, from the beginning, wrong as a matter of constitutional law?

The story of the American Communists, during the years between approximately 1949 and 1967, parallels closely the evolution of the law of freedom of speech in this country during that same period; an enormous percentage of the decisional work of the United States Supreme Court in the areas of speech and association during those two decades was the product of the various official responses to the perceived "Communist threat" in this nation. To explore the legal experience of the CPUSA is to study, in large part, the development of first amendment law in the 1950's and '60s.

Books have been written about the prosecutions of the leaders of the CPUSA, and much has been written about the major Supreme Court decisions of the Cold War era. But no book or article, to my knowledge, has examined in chronological sequence, the evolution of first amendment law in tandem with the experience of the CPUSA. This article makes such an examination, and suggests answers to the questions posed above.

II. WHAT HAPPENED TO THE AMERICAN COMMUNISTS?

A. The Early Years

The CPUSA came into being in September 1919, first as two separate parties that merged into one more than a year later. A careful student of the origins of the Party thought it "safe to assume that the American Communist movement started out with a minimum of 25,000 and a maximum of 40,000 enrolled members" in the latter part of 1919. The members were overwhelmingly foreign-born.

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11. Id. at 190. Roughly in accord is H. Klehr, The Heyday of American Com-
Almost immediately, repression set in at both the state and federal levels, in the form of arrests, prosecutions, and deportations. In 1919, twenty-seven states enacted “red flag” laws, sixteen states enacted “criminal syndicalism” laws, and twelve states enacted anarchy and sedition laws, of the kind upheld against first amendment challenges in cases such as *Gitlow v. New York* and *Whitney v. California*. At the federal level, the only available tools to combat political radicalism were the wartime sedition statute, which was repealed in 1921, and the deportation laws. In January of 1920, operating under the latter authority, Attorney General A. Mitchell Palmer arrested approximately 10,000 persons believed to be alien members of the two American Communist parties, ultimately deporting many while turning others (who turned out to be American citizens) over to local authorities for prosecution under state laws. During the next two years, “so many Communists were indicted all over the country that everyone in the movement regarded himself as a potential political prisoner or fugitive from the law.” During that period, estimates of membership in the “underground” Communist Party fell to approximately 5,000.

Reacting to the atrophying effects of its “underground” status, the American Communists created the Workers Party of America “as a legal party front” in December of 1921. In April of 1923, the Communist Party officially dissolved, leaving the legal Workers Party in its place. In the meantime, “[a]s America subsided into the comfortable normalcy of the Coolidge era,” popular and governmental concern with radicalism declined. Membership in 1923 may

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2. See infra text accompanying notes 206-08.
3. See infra text accompanying notes 206-08.
4. See infra text accompanying notes 206-08.
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21. See infra text accompanying notes 206-08.
22. See infra text accompanying notes 206-08.
23. See infra text accompanying notes 206-08.
have been as high as 15,000, but it plummeted to half that number shortly thereafter. 24 In 1924 the Workers Party appeared on the presidential ballot in thirteen states and garnered over 33,000 votes for its candidates; these candidates, William Z. Foster and Benjamin Gitlow, placed a distant sixth behind the incumbent Calvin Coolidge. 25 In 1928, as the candidates of the recently renamed Workers Party of America, the same ticket appeared on the ballot in thirty-four states, placing fourth with nearly 49,000 votes. 26 In 1929, the Party changed its name to the Communist Party, U.S.A. 27 As the 1920's came to a close, however, the Party's membership was small and its accomplishments minimal. One student of the era has observed: "For ten years, American Communists had used more energy fighting among themselves than fighting against capitalism." 28 Studies of the CPUSA during this era yield an overwhelming impression of endless internal theoretical struggle, always dominated and resolved by the Soviet-controlled Comintern. 29

In the 1930's, as the American Communists became heavily involved in attempting to organize both employed and unemployed workers, 30 legal action against them by the states surged anew. 31 The Party's presidential ticket, William Z. Foster and James Ford, drew nearly 103,000 votes in the 1932 election. 32 Shortly thereafter, a handful of states enacted laws barring from the ballot parties which advocated the forcible overthrow of the government. 33 Thousands of people joined the Party each year during this period, but most of

24. H. KLEHR, supra note 11, at 4-5; T. DRAPER, supra note 9, at 391.
25. I. HOWE & L. COSER, supra note 11, at 140.
26. Id. at 175-76.
27. T. DRAPER, supra note 10, at 390.
28. H. KLEHR, supra note 11, at 10. On the factionalism of the American Communists during the 1920's, see generally T. DRAPER, supra note 10, and I. HOWE & L. COSER, supra note 11, at 38-72, 144-74.
29. The "Comintern," the popularly-used shorthand designation for the Communist International, was the association of world Communist parties, founded in 1919, headquartered in Moscow, and dominated by the Soviet Union. See generally T. DRAPER, AMERICAN COMMUNISM AND SOVIET RUSSIA (1960).
30. See generally H. KLEHR, supra note 11, at 28-68, 118-52.
31. M. BELKNAP, supra note 8, at 11-12; R. GOLDSTEIN, supra note 13, at 202-06.
32. I. HOWE & L. COSER, supra note 11, at 235.
33. R. GOLDSTEIN, supra note 13, at 232.
them did not stay very long. Its membership climbed to the 18,000 level immediately after the 1932 election, but declined again the following year before reaching 26,000 members in 1934. As one student of this era has observed: "The first years of the Depression had brought few concrete results. Strident calls for revolution had succeeded only in isolating the Party. Despite all the objective conditions any revolutionary could hope for, the Communists had been unable to make a significant dent in American capitalism."

In 1935, the Party performed an extraordinary flip-flop, shifting from its former virulence toward the Roosevelt Administration, to a position of enthusiastic support of Franklin Delano Roosevelt (FDR). The change was dictated by the Comintern as part of a worldwide strategy that was spurred by Soviet concerns about the rise of fascism. This strategy included coalescing with progressive forces in "popular fronts" united against fascism and isolationism, maximizing good relations between the United States and the Soviet Union, and placing efforts to work steadfastly toward proletarian revolution on the back burner. The 1936 presidential candidacy of Earl Browder, Party leader since 1933, was not truly intended to hinder FDR’s reelection and had the effect of gaining the Communists a hitherto-unknown measure of respectability in the United States. Membership surged, possibly approaching 100,000 by 1939. Moreover, the Party attained greater geographical breadth (although New York was still dominant) and by 1936 a majority of the American Communists had been born in this country. Furthermore, it was a different Party, by virtue of its altered stance and new

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34. I. Howe & L. Coser, supra note 11, at 225. See also H. Klehr, supra note 11, at 91-92. That the Communist Party should have a greater attracting power than holding power is not surprising. Many desperate people saw it as an alternative during the Depression. Once they had some contact with it, they drifted away.” See also id. at 153-59, making the same point and describing the unattractiveness of Party activity: “A Party organizer complained in 1930: “Today we still have the situation where the agenda of a unit meeting . . . lasts 3 to 4 hours most of which is spent on details of relatively small importance . . .” One disgruntled member described a typical unit meeting: “We argue. We discuss. We get excited . . . No results. We leave the question for another meeting.”

Id. at 154-55.

35. H. Klehr, supra note 11, at 91, 153.

36. Id. at 85. Professor Klehr has also noted that the Party in the early 1930’s was disproportionately concentrated in New York and Chicago. Id. at 164 (“Most of the country was terra incognita.”).

37. On the “Popular Front” period and the reasons for it, see generally H. Klehr, supra note 11, at 97-117, 167-222, 349-85; I. Howe & L. Coser, supra note 11, at 319-86.

38. H. Klehr, supra note 11, at 191-96. “The Communists were becoming an acceptable ally in all kinds of movements where they had heretofore been shunned, ranging from the labor movement to insurgent state Farmer-Labor parties.” Id. at 200.

39. Id. at 365-67; I. Howe & L. Coser, supra note 11, at 385-86.

40. H. Klehr, supra note 11, at 379-81.
memberships, from the Party of a decade earlier; many who joined during the “Popular Front” era desired socialism, but “[f]ighting fascism and struggling for reforms took precedence.”

The signing of the Nazi-Soviet nonaggression pact in August of 1939 changed everything. Stunned by this action, the American Communists nonetheless fell into line, dramatically shifting from emphatic support of FDR’s foreign policy to a shrill policy of isolationist opposition to any American involvement in the “imperialist” war in Europe. The costs, in terms of Party membership and external goodwill, were predictably severe. At the same time, governmental legal actions, reflecting concerns about the Party, intensified anew. Of course, antipathy to the Communists in America had never fully subsided. A congressional committee had recommended in 1931 that the CPUSA be outlawed, and in 1938 the congressional investigative committee headed by Rep. Martin Dies (later to become the House Committee on Un-American Activities, or HUAC) began its public-relations assault on the CPUSA. After 1939, however, life clearly worsened for the Party. State criminal syndicalism prosecutions blossomed again, several additional states enacted laws barring the Communist Party from the ballot, and, at the federal level, the Party became the target of close scrutiny by the FBI. The same era saw the enactment, in 1940, of the Alien Registration Act, better known as the Smith Act, that would ultimately be used to prosecute and convict the leaders of the CPUSA.

B. Communists and the Court in the 1930’s

In terms of constitutional law, the 1930’s proved a hospitable decade for the American Communists. Following the easy assumption made in Gitlow v. New York, that freedom of speech was protected

41. Id. at 218.
42. See generally id. at 386-409.
43. Id. at 400-01.
44. Id. at 38.
45. R. Goldstein, supra note 13, at 240-44.
46. Id. at 255-60; M. Belknap, supra note 8, at 24.
47. R. Goldstein, supra note 13, at 256-59; M. Belknap, supra note 8, at 24. On the Party’s unhappy showing in the 1940 presidential campaign, partly due to its exclusion from the ballot in 15 states, see H. Klehr, supra note 11, at 406-07.
48. R. Goldstein, supra note 13, at 251-54. In the same overall time frame, several Communists, including Party leader Earl Browder (who was convicted and jailed), were prosecuted for passport violations, and the government began its effort to denaturalize California Party leader William Schneiderman. Id. at 248-49; M. Belknap, supra note 8, at 24.
by the due process clause of the fourteenth amendment against infringement by the states, 49 the Supreme Court began in the 1930's to strike down state laws, either facially or as applied, under the first and fourteenth amendments. One of the first such victories was Stromberg v. California, 50 which invalidated, as unconstitutional on its face, a California statute making it a felony to publicly display a red flag, inter alia, "as a sign, symbol or emblem of opposition to organized government. . . ." In what was arguably the Court's first facial overbreadth ruling, Chief Justice Hughes found the law invalid because it "might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power." 51

Another victory on fundamental grounds came in DeJonge v. Oregon 52 in 1937. DeJonge had been charged, under Oregon's criminal syndicalism law, with assisting in the conduct of a meeting "which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism." 53 He was not indicted for any advocacy, for membership in the Party, or for helping to organize the Party. Chief Justice Hughes observed, for a unanimous Court, that DeJonge's sole offense "was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party." 54 Thus, the conviction could not stand. In language that surely seems unexceptional today, the Chief Justice continued:

The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental . . . It follows [that] peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed . . . The question . . . is not as to the auspices under which the meeting is held but as to its purpose . . . We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. 55

In 1937, a divided Court also ruled in favor of a black communist organizer in Georgia who had been convicted in 1933 of "attempting to incite to insurrection" under Georgia law. 56 The indictment charged the defendant with "calling and attending public

50. 283 U.S. 359 (1931).
51. Id. at 369.
52. 299 U.S. 353 (1937).
53. Id. at 357.
54. Id. at 362.
55. Id. at 364-66.
assemblies and . . . making speeches for the purpose of organizing and establishing groups and combinations of white and colored persons under the name of the Communist Party of Atlanta for the purpose of . . ., by force and violence, over-throwing . . . the authority of the state.”

Herndon, the organizer, had been in possession of a considerable amount of Party literature, much of which addressed itself to the “Right of Self-Determination of the Negroes in the Black Belt.”

Most of that literature, as described in Justice Roberts' majority opinion and Justice Van Devanter's dissent, consisted of pretty tame political proselytizing, sprinkled with vague references to “revolutionary struggle” and “National Rebellion.” But there was no evidence that Herndon had distributed any of these writings, and no evidence that he had ever advocated forcible subversion. In essence, all he had done was recruit for the Party. The Court held that the State had failed to produce evidence of punishable incitement and consequently, the conviction violated the first amendment because:

In its application the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government . . . . In these circumstances, to make membership in the party and solicitation of members for that party a criminal offense . . . is an unwarranted invasion of the right of freedom of speech.

As a second ground for the result, Justice Roberts stated that the Georgia statute, “as construed and applied,” did not furnish “a sufficiently ascertainable standard of guilt.” Justice Roberts seemed to be disturbed by the fact that a conviction was possible under this law, even though the jury might think that forcible subversion would not occur until “some time in the indefinite future.” Thus, the statute suffered from a vagueness problem that was deemed fatal under the fourteenth amendment. Justice Roberts might have addressed this problem of Georgia law more directly as failing to satisfy a test of “clear and present danger” under the first amendment, but he did not.

The dissenters — Justices Van Devanter, Butler, Sutherland, and

57. Id. at 245.
58. Id. at 251.
59. Id. at 250-53, 270-74.
60. 301 U.S. at 260-61.
61. Id. at 261.
62. Id. at 262.
McReynolds — were much more impressed by the inciteful quality of Herndon’s literature, and thought the evidence allowed the inference that Herndon had distributed such literature to Party recruits.63 “That the constitutional guaranty of freedom of speech and assembly does not . . . afford protection for acts of intentional incitement to forcible resistance to the lawful authority of a state” Justice Van Devanter stated, “is settled by repeated decisions of this Court,” citing, among other cases, the Gitlow and Whitney decisions of the 1920’s.64

In terms of constitutional theory, DeJonge and Herndon were not difficult cases, given the weakness of the evidence therein concerning advocacy of forcible revolution. But the rulings were notable because, for the first time, the Supreme Court ruled in favor of active Communist operatives convicted under state anti-sedition laws. The Court thereby showed that it could be sensitive to the first amendment rights of leftist radicals.

What might have been the result in 1937, had Georgia charged Herndon with being an active, knowing member of an organization committed to the forcible overthrow of the government, and sharing the specific intent to bring about that result? Although the majority opinion in Herndon can be read so as to suggest that such a conviction would be unconstitutional, that question was simply not directly posed.

With the subsequent enactment of the Smith Act, the anti-sedition focus shifted from the state to the federal level for the next three decades.

C. Federal Legislation Directed at Subversives

1. Prior to World War II

The 1918 amendment to the Espionage Act of 1917, making it a crime to utter language “intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute,” was repealed in 1921.65 The Smith Act, passed in June of 1940, was the next federal law directly regulating political speech.66

63. Id. at 274-75.

64. Id. at 276-77. For further discussion of the details and history of the Herndon case, see Martin, The Angelo Herndon Case and Southern Justice, in AMERICAN POLITICAL TRIALS 177-99 (M. Belknap ed. 1981). See also H. Kalven, supra note 9, at 169-75.


66. However, with respect to federal employees, the Hatch Act, enacted in 1939, prohibited them from belonging to organizations which advocated the overthrow of the government by force. Hatch Act, Pub. L. No. 76-252, § 9A(1), 53 Stat. 1147-48 (1939) (current version at 5 U.S.C. § 7311 (1980)). In 1940, the Civil Service Commission defined the CP as coming within the purview of the statute. P. Steinberg, supra note 8, at 23. See also H. Chase, Security and Liberty: The Problem of Native Commu-
Federal legislation providing for the exclusion of subversive aliens, however, dates back to 1903. In 1917, Congress provided for the deportation of any alien who, at any time after entry into the United States, was "found advocating . . . the overthrow by force or violence of the Government of the United States . . . ." The following year, the law was amended to provide for the exclusion or deportation of any aliens who "believe in or advocate" forcible overthrow, or who were members of "any organization that advocates the overthrow by force or violence of the Government of the United States." The weight of "judicial . . . authority held that this general language embraced membership in the Communist Party." The Smith Act effectively "overrode" existing case law by providing that past beliefs, advocacy, or membership, of the kind that qualified one for deportation under the 1918 immigration law, even if discontinued prior to the initiation of deportation proceedings, still subjected an alien to deportation.

But, the key provision of the Smith Act provides that a person who

[K]nowingly or willfully advocates . . . the duty, necessity, desirability, or propriety of overthrowing . . . the government of the United States . . . by force or violence; or . . . organizes or helps . . . to organize any . . . group . . . of persons who teach, advocate, or encourage the overthrow . . . of any [government in the United States] by force or violence; or becomes or is a member of, or affiliates with, any such group, . . . knowing the purposes thereof—[s]hall be fined . . . or imprisoned not more than twenty years, or

67. Tilner, supra note 18, at 29-30.
71. Alien Registration Act of 1940, ch. 439, § 23, 54 Stat. 670, 673. R. Goldstein, supra note 13, at 245; Tilner, supra note 18, at 53. The "overruled" case was Kessler v. Strecker, 307 U.S. 22 (1939). Furthermore, The Nationality Act of October 14, 1940, provided for the denaturalization of former alien communists, and provided that no persons could thereafter be naturalized who had, within a ten-year period preceding their filing a naturalization petition, belonged to any organization advocating, or wrote or circulated material advocating, the violent overthrow of the government. The bill further provided that no persons could be naturalized unless they had been and still were "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."

R. Goldstein, supra note 13, at 246.
Thus, advocacy, organizing and “knowing” membership were made crimes, as was conspiracy to commit any of these offenses. As one commentator has persuasively observed, the Smith Act was “an anachronism” at the time of its passage; “[w]hatever the problems of internal security may have been in 1940, they did not arise from any public advocacy that the government be overthrown by force or violence.” Indeed, in light of the “mainstream” posture of the CPUSA in the years immediately preceding the Second World War, any judicial inclination to defer to Congressional judgment with respect to the need for the Smith Act’s prohibition of seditious advocacy would appear to be highly questionable.

The Voorhis Act, also enacted in 1940, requires registration with the Attorney General by “[e]very organization, the purpose or aim of which . . . is the . . . overthrow of a government . . . by the use of force . . .,” or which was “subject to foreign control [and] engage[d] in political activity.” Contrary to expectations, the CPUSA never registered under this statute; instead, it formally disaffiliated from the Comintern in November 1940.

Not until 1948 was the Smith Act used against the Communist Party.

2. After World War II

In March of 1947, President Truman issued an executive order establishing a sweeping federal-employee loyalty program designed to exclude persons disloyal to the United States. It was pursuant to this executive order that the infamous “Attorney General’s list” of subversive organizations, first published in December 1947 came into being. Membership in organizations designated by the Attorney General as “totalitarian, fascist, communist, or subversive” was

73. On the background and legislative history of the Smith Act, see generally M. Belknap, supra note 8, at 16-19, 21-27. See also E. Hutchinson, supra note 68, at 257-58.
74. T. Emerson, supra note 9, at 111; accord, H. Chase, supra note 66, at 25.
76. Sutherland, Freedom and Internal Security, 64 Harv. L. Rev. 383, 386, n. 13 (1951). “This statute, despite its threatening tone, has neither produced any registrations of importance, nor has it subdued left-wing agitation. It is quite completely a dead letter.” Id. at 408.
77. H. Klehr, supra note 11, at 409.
among "the activities and associations of an applicant or employee which may be considered in connection with [a] determination of disloyalty." 79

Also in 1947, in the Taft-Hartley amendments to the National Labor Relations Act (NLRA), Congress acted to eliminate Communists from labor union leadership positions. Section 9(h) of the Act was amended to provide that essential protections of the NLRA would be unavailable to a union unless each officer of that union filed an affidavit with the National Labor Relations Board (NLRB) stating "that he [was] not a member of the Communist Party or affiliated with such party, and that he [did] not believe in, and [was] not a member of or support[er] [of] any organization that believes in or teaches, the overthrow of the United States Government by force. . . ." 80 In 1959, Congress replaced section 9(h) with section 504, which simply made it a crime for a member of the Communist Party to be an officer of a labor union. 81

But the most comprehensive and detailed piece of federal legislation directed against the CPUSA was the Internal Security Act of 1950, also known as the McCarran Act, 82 that was enacted over

79. Exec. Order No. 9,835, 3 C.F.R. 129 (1947). "The list is evidence only of the character of the listed organizations in proceedings before loyalty boards to determine whether 'reasonable' grounds exist for belief 'that the employee under consideration' is disloyal to the Government of the U.S." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 191 (1951) (Reed, J., dissenting). There were reportedly 197 organizations on the list by November 1950. R. Goldstein, supra note 13, at 311. See generally id. at 308-11; T. Emerson, supra note 9, at 222-23; P. Steinberg, supra note 8, at 27-31; D. Caute, supra note 78, at 169-70.

80. Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 9(h), 61 Stat. 136. See American Communications Ass'n v. Douds, 339 U.S. 382 (1950). On the legislative history of § 9(h), and the passage of the Taft-Hartley Act over President Truman's veto, see H. Chase, supra note 66, at 56-57 and P. Steinberg, supra note 8, at 43-46. Although the Communist role in labor unions — especially in the CIO — was significant in the immediate postwar period (see I. Howe & L. Coser, supra note 11, at 457-69), one student of the era has stated that "[t]he assumption of a [Communist] threat to vital industry was highly questionable." P. Steinberg, supra note 8, at 44. Another commentator observed that the Congressional hearings on Communist infiltration of organized labor were "inconclusive and unsubstantial." H. Chase, supra note 66, at 57. It was also noted that, in the Congressional debate over § 9(h), "[t]here was no discussion of civil liberties questions." P. Steinberg, supra note 8, at 44. On the enforcement of § 9(h), see id. at 46-47; H. Chase, supra note 66, at 57-61.


82. 50 U.S.C. §§ 781-858 (1982). The act had its origin in bills considered in 1948 by the House Committee on Un-American Activities and sponsored by Reps. Karl E. Mundt and Richard M. Nixon. On the legislative history of the Act, see generally A. Harper, supra note 78, at 149-62; T. Emerson, supra note 9 at 129-33; P. Steinberg, supra note 8, at 104-06, 199-204; D. Caute, supra note 78, at 38-39; Sutherland, supra
President Truman's veto.\textsuperscript{83} The heart of the Act was a registration requirement applicable to "Communist-action" and "Communist-front" organizations, as defined by the Act; such organizations were subject to serious penalties if they failed to register. The Act also created a Subversive Activities Control Board (SACB) to determine which organizations were subject to the Act. Registration was to be accompanied by disclosure of the names and addresses of officers, and in the case of a "Communist-action" organization such as the CPUSA, of its members as well. Serious disabilities befell the members of organizations required to register, including prohibitions on federal employment, public communications, and access to passports.\textsuperscript{84} However, the Act explicitly provided that neither being an officer nor a member of any "Communist organization" would itself constitute a violation of any criminal statute.\textsuperscript{86}

The 1950 Act also amended the federal immigration laws, explicitly excluding aliens who were or had been members of the CPUSA or any other Communist party, as well as advocates of "doctrines of world Communism" or of forcible overthrow of the government.\textsuperscript{6} The Act further required the deportation of such aliens (i.e., past or present Party members) within the United States,\textsuperscript{87} and barred the

\textsuperscript{83} Testifying in support of his bill in 1948, Rep. Nixon stated that the Smith Act provided inadequate protection because "the Communists have developed techniques for taking over governments without using force and violence." P. STEINBERG, supra note 8, at 105. Interestingly, Attorney General Tom Clark testified in 1948 that the proposed law was unconstitutional. \textit{Id.} at 106.

\textsuperscript{84} See the lengthy description of this registration scheme by Justice Frankfurter in Communist Party v. SACB, 367 U.S. 1, 4-19 (1961). The Act contained other provisions as well, including an "internal security emergency" detention provision, 50 U.S.C. §§ 811-26 (1982), and § 783(a) making it unlawful "for any person knowingly to . . . conspire . . . with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship." 50 U.S.C. § 783(a) (1982). The former provision was repealed, unused, in 1971, Pub. L. No. 92-128, 85 Stat. 347-48 (1971), and the latter has never been employed. See generally T. EMERSON, supra note 9, at 144-45. On the statute overall, see R. GOLDBEIN, supra note 13, at 322-23 (calling it "one of the most massive onslaughts against freedom of speech and association ever launched in American history."). Section 783(a) was sharply criticized as an abridgment of civil liberties in H. CHASE, supra note 66, at 29.

\textsuperscript{85} 50 U.S.C. § 783(f) (1982). Nor would the fact of registration by any person be admissible in evidence against that person in any criminal prosecution. \textit{Id.}


naturalization of such aliens. The Congress of the early 1950’s was not done, however, with the task of fighting domestic Communism, especially since the McCarran Act accomplished so little. In the face of mounting domestic pressures to “do something” about Communism, a group of Democratic senators, including Hubert Humphrey, proposed to make it a federal crime to be a member of the Communist Party. (Under the Smith Act, of course, it was in effect already a crime to be a CP member, “knowing” the illegal purposes thereof.) But, President Eisenhower opposed this bill, and the resulting compromise, the Communist Control Act of 1954, was a bit cryptic and strange. In it, at the conclusion of a long introductory paragraph entitled “Findings of Fact,” Congress declared: “Therefore, the Communist Party should be outlawed.” The closest Congress came, in this legislation, to actually giving effect to that moral imperative was to provide, with majestic unclarity, that the CPUSA was [N]ot entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party ... by reason of the laws of the United States or any political subdivision thereof, are hereby terminated. What Congress had in mind, in its reference to “rights, privileges, and immunities,” was the subject of considerable speculation. It

89. H. CHASE, supra note 66, at 32; T. EMERSON, supra note 9, at 148; see also Chase, The Libertarian Case for Making It a Crime to be a Communist, 29 TEMP. L.Q. 121 (1956).
91. 50 U.S.C. § 841 (1982) (emphasis added). This declaration was reportedly later described as “merely an expression of policy” by Rep. Celler, Chairman of the House Judiciary Committee. Barber, supra note 90, at 103.
seemed relatively clear, however, that at a minimum Congress intended to keep the Party off of both federal and state election ballots. The 1954 Act also amended the 1950 Act in two theoretically important respects: it specifically provided that "knowing" members of the CPUSA were subject to all of the provisions and penalties of the 1950 Act, thereby potentially obviating, in part, the need for an SACB determination that the CPUSA was in fact a "Communist-action" organization; and it created a new category, the "Communist-infiltrated" organization. Meaningful sanctions would be imposed on labor unions found by the SACB to be "Communist-infiltrated"—namely, the loss of all benefits conferred upon unions under the National Labor Relations Act. Later that year, Congress enacted the Expatriation Act, making a Smith Act conspiracy conviction a renunciation of United States citizenship.

While some states explicitly outlawed the Communist Party, the federal government, strictly speaking, did not. As we shall see, the elaborate federal legislation of the 1950's ultimately had little effect outside of the immigration context. Moreover, in 1956, state sedition laws were held to be preempted by the federal Smith Act, at least

Party retained its status as an "employer," under the New York Unemployment Insurance Law, despite the 1954 Act. Justice Harlan noted the total absence of legislative history concerning the "vague terminology" of § 842. See Comment, supra note 93, at 392-93. 94. Comment, supra note 93, at 738; Auerbach, supra note 93, at 175. On the questionable constitutionality of such an application of the Act, see Comment, supra note 93, at 729-30, 738-44; see also generally Auerbach, supra note 93, at 183-204. But see Salwen v. Rees, 16 N.J. 216, 108 A.2d 265 (1954). See also Mitchell v. Donovan, 290 F. Supp. 642 (D. Minn. 1968) (granting preliminary injunction based on "grave doubts" about the constitutionality of the Act). As of 1958, thirty-five states had reportedly enacted statutes barring from the ballot political parties or persons which advocated the forcible overthrow of the government; eighteen of them also explicitly barred the Communist Party from the ballot. Barber, supra note 90, at 103, n. 92. 95. 50 U.S.C. § 843 (1982). 96. But the meaning of this provision was uncertain, and the ongoing SACB proceedings, begun in 1950, were apparently uninfluenced by it. Auerbach, supra note 93, at 178-80. Apparently this provision was never utilized. T. Emerson, supra note 9, at 150. 97. 50 U.S.C. §§ 782(4A), 792a (1982). See Comment, supra note 93, at 759-63. On other provisions of the Act, see id. at 745-58. 98. 8 U.S.C. § 1481(a)(9) (1982). See H. Chase, supra note 66, at 33. For a consideration of its constitutionality, see Barber, supra note 90, at 105-06. 99. Auerbach, supra note 93, at 176, n. 12; T. Emerson, supra note 9, at 152; R. Goldstein, supra note 13, at 350; M. Konvitz, Expanding Liberties 141-42 (1966). For a discussion of the state of other state and local legislation — including loyalty programs, registration schemes, ballot exclusions, and employment bans — regarding the Communist Party, see generally R. Goldstein, supra note 13, at 348-60; D. Caute, supra note 78, at 70-81, 339-45; Sutherland, supra note 7, at 388-89. 100. Yet one commentator, writing in 1966, could understandably observe: "[O]ne could say that the party is not illegal. It is, however, doubtful if one would be justified in going further and saying that the party is legal." M. Konvitz, supra note 99, at 110. 101. Pennsylvania v. Nelson, 350 U.S. 497 (1956). The decision struck down a conviction under the Pennsylvania Sedition Act, which closely paralleled the Smith Act. To Chief Justice Warren, writing for the majority, "the conclusion [was] inescapable
insofar as those state laws addressed the potential overthrow of the federal government. This preemption effectively freed the CPUSA from direct regulation by the states.

But the Smith Act itself had become a major problem for the CPUSA by 1948.

D. The Law Applied: An Overview

1. The Smith Act Prosecutions

Although the Smith Act was enacted in 1940, eight years passed before it was used against its ideologically natural target, the CPUSA. The invasion of Russia by Nazi Germany in June of 1941 turned the American Communists around once more, hurling them into support for the Allied war effort. With Russia and America as allies against Germany, Americans developed a favorable feeling about Russia that, until very recently, was difficult to imagine during most of the postwar era. The American Communists almost certainly benefitted from that altered sentiment toward the pillar of world Communism. Meanwhile, the very first Smith Act prosecution for conspiracy to advocate the overthrow of the government by force and to organize a group which so advocated, was successfully brought against members of the Socialist Workers Party in Minnesota in 1941.

In June of 1943, reportedly as a "demonstration of solidarity with its allies," the Soviet Union dissolved the Comintern. Apparently believing themselves freer to pursue a more distinctively American approach toward a socialist society and desiring to adopt a less confrontational posture, the CPUSA under Earl Browder's leadership, officially dissolved itself in May of 1944, and formed in its place the

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102. Cf. Uphaus v. Wyman, 360 U.S. 72, 76 (1959), stating that, consistently with Nelson, "a State could proceed with prosecutions for sedition against the State itself."


104. See id. at 431-36; R. Goldstein, supra note 13, at 288.

105. See M. Belknap, supra note 8, at 37-38.


Communist Political Association, which would work within the mainstream of American political life. The absence of the Party was brief. Just as the war in Europe was ending in April 1945, a message was conveyed to the American Communists through an article by French Communist leader Jacques Duclos, that their new, cooperative approach to American politics was "revisionist" heresy. The article was believed to represent the views of Joseph Stalin, and the American Communists, ever obedient, reacted accordingly; the new policy of reformism was repudiated, Browder was forced out, and the CPUSA was reconstituted in July of 1945. William Z. Foster, long the leading voice of militance in the American Communist Party, reclaimed its leadership.

The next three years were a time of mounting public concern about international and domestic Communism, marked by the "fall" of governments in Eastern Europe to Communism and the discovery of Soviet espionage within the United States. This heightened concern was reflected by the newly established federal employee loyalty program, persistent hearings on domestic Communist "infiltration" (and proposed legislation to deal with it), by the House Committee on Un-American Activities (HUAC), and extensive investigation of the CPUSA by the FBI. In July of 1948, the first Smith Act indictment was filed in New York, against members of the Party, including William Z. Foster, Eugene Dennis, and Gus Hall. The defendants were charged with conspiring to advocate the forcible overthrow of the government and, because of their leadership in re-forming the CPUSA in July 1945, with conspiring to organize a

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108. Id.; P. Steinberg, supra note 8, at 61-63; H. Klehr, supra note 11, at 410-11; I. Howe & L. Coser, supra note 11, at 428; M. Belknap, supra note 8, at 37, 44,
110. On the HUAC, see R. Goldstein, supra note 13, at 306-08, 343-46; P. Steinberg, supra note 8, at 37-39; D. Caute, supra note 78, at 88-89; and M. Konvitz, supra note 99, at 113-15. On FBI scrutiny of the CP in the years leading up to the Smith Act prosecutions, see P. Steinberg, supra, at 4-14, 90-100; D. Caute, supra, at 111-21. On the complexion and evolution of American public opinion concerning Russia, before and after World War II, see T. Paterson, Meeting the Communist Threat: Truman to Reagan (1988).
111. U.S. v. Foster, 80 F. Supp. 479 (S.D.N.Y. 1948). For a detailed discussion of the background of the indictment, and the allegedly political motivations of the Truman Administration in seeking it, see M. Belknap, supra note 8, at 43-45, 48-51, 53. (A condensed version of that study appears at M. Belknap, Cold War in the Courtroom: The Foley Square Communist Trial, in American Political Trials 233, 237-38 (M. Belknap ed., 1981) [hereinafter Belknap, Trial]). An even more detailed account of the events leading up to the indictment, with an emphasis upon the involvement and influence of the FBI under J. Edgar Hoover, can be found in P. Steinberg, supra note 8, at 39-42, 95-111. See also M. Konvitz, supra note 99, at 115-16; D. Caute, supra note 78, at 25-34.
group that so advocated. Foster was never tried because of his poor health, but the remaining eleven defendants were convicted, and their convictions were upheld, against a constitutional challenge to the Smith Act, by the United States Supreme Court in the Dennis decision in 1951. Oddly, the Supreme Court granted certiorari in the Dennis case only with respect to the constitutionality of the Smith Act "as construed and applied," and not with respect to the sufficiency of the evidence to establish a constitutionally punishable conspiracy. Thus, the Smith Act's conspiracy-to-advocate and conspiracy-to-organize provisions were held constitutional, but the Court passed no judgment on the facts upon which the conviction rested. In any event, the top leaders of the CPUSA were by then either in prison or in hiding.

Similar conspiracy prosecutions—of persons often characterized as "second string" Communist leaders—followed in the early-to-mid-1950's, in such diverse cities as New York, Los Angeles, Baltimore, Pittsburgh, Honolulu, Detroit, Seattle, St. Louis, Philadelphia, Cleveland, New Haven, Denver, and Boston. The great majority of those indicted were

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114. Id. at 495-96.
115. Belknap, Trial, supra note 111, at 253-54.
120. Fujimoto v. U.S., 251 F.2d 342 (9th Cir. 1958) (conviction in June 1953).
In 1957, however, the Supreme Court reversed the convictions of the fourteen defendants in *Yates v. United States*, for reasons that were of enormous importance to defendants around the country. First, as a matter of statutory interpretation, the Court held that the CPUSA had been "organized" in 1945; thus, the governing three-year statute of limitations had expired sometime in 1948 with respect to the Smith Act indictments for conspiring to "organize" the CPUSA. Therefore, no CPUSA leader would again be prosecuted for "organizing" or conspiring to "organize" the CPUSA. Only the original eleven *Dennis* defendants were punished for that offense.

Second, the Court found that the jury instructions given by the trial judge failed to distinguish between advocacy of forcible overthrow "as an abstract principle" (which was not punishable) and "advocacy of action" (which was), as the Smith Act required. Reversal was thus necessary. But, in light of its second ground for reversal, the Court deemed it appropriate to review the evidence in the case to determine "whether the way should be left open" for a new trial of all or some of the petitioners. Looking to see "whether there are individuals as to whom acquittal is unequivocally demanded," the Court decided that, for five of the fourteen defendants it was. In these five instances, the evidence could not support a finding of the necessary "advocacy of action." As to the other nine, the Court was not prepared to say that such a finding "would be impossible." In reaching these results, the Supreme Court, for the first time, reviewed the evidence in a Smith Act prosecution and thereby provided guidance to the lower federal courts as to what speech amounted to punishable advocacy of action.

*Yates* was, therefore, enormously important, and it effectively ended the Smith Act "advocacy" prosecutions. The ruling in *Yates* that conspiracy-to-organize indictments were time-barred meant, at

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129. "Of the 126 men and women indicted on conspiracy charges, only ten were acquitted. . . . [O]f those defendants who actually had their fate decided by a trial court, just under 89 percent were convicted." Belknap, *Trial*, supra note 111, at 255; see also Mollan, *supra* note 122, at 709-10, notes 17-19. On the early round of "second-level" trials, see generally P. Steinberg, *supra* note 8, at 232-51. See generally *Note, Post-Dennis Prosecutions Under the Smith Act*, 31 Ind. L. J. 104 (1955); M. Belknap, *supra* note 8, at 152-66, linking prosecutions to contemporary politics.


132. 354 U.S. at 312.

133. *Id.* at 318, 320.

134. Justice Harland addressed the issue as one of statutory interpretation, but noted that "[i]n doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked. . . ." 354 U.S. at 319.

135. *Id.* at 327.

136. *Id.* at 328.

137. *Id.* at 332.
the very least, that all pending cases required new trials. Following the Supreme Court's lead, the federal courts of appeals then reviewed the evidence in each case to determine whether new trials were warranted. Most of those courts decided that the evidence was sufficient. Others held that acquittals were required. Ultimately, notwithstanding its victories, the government gave up, apparently recognizing its inability to secure a conviction under the Yates criteria.

As one student of these prosecutions observed, "The Yates ruling did nothing for the [Dennis case] Eleven, though. By the time the Supreme Court handed down its decision, most of them had already completed their sentences." It may be doubtful whether the evidence of illegal "advocacy" in Dennis was any stronger than that in the later prosecutions. It is true, however, that the conspiracy-to-organize count was a viable one with respect to those Dennis defendants.

But the Smith Act was not dead. Prosecutions under the "membership" clause of the Act had been launched in late 1954, in New York, Chicago, and North Carolina, and these prosecutions resulted in convictions in 1955 and 1956. For a combination of reasons, the Supreme Court did not rule on any of these cases until 1961, at which time it affirmed the membership-clause conviction in the Scales case by a 5-4 margin. The gist of the government's case is

138. E.g., Bary, 248 F.2d at 208-09, 214; Kuzma, 249 F.2d at 621; Sentner, 253 F.2d at 311; Brandt, 256 F.2d at 82; Wellman, 253 F.2d at 604; Mesarosh, 223 F.2d at 449.

139. E.g., Mesarosh, 223 F.2d at 452; Bary, 248 F.2d at 209-13; Sentner, 253 F.2d at 311; Brandt, 256 F.2d at 81; Wellman, 253 F.2d at 605; Kuzma, 249 F.2d at 622 (ordering acquittal for some but not all defendants).


141. The government dismissed its prosecution in Yates itself in December 1957. Fujimoto v. U.S., 251 F.2d 342 (9th Cir. 1958); Mollan, supra note 122, at 732. It has been reported that the government made only one further attempt at such a prosecution, without ultimate success. Belknap, Trial, supra note 111, at 257. See also U.S. v. Jackson, 257 F.2d 830, 832, n. 6 (2d Cir. 1958). A panel of the Ninth Circuit Court of Appeals opined, in dismissing one such case: "One may as well recognize that the Yates decision leaves the Smith Act, as to any further prosecution under it, a virtual sham. . . ." Fujimoto, 251 F.2d at 342. All of these post-Yates developments are reviewed in Mollan, supra note 122, at 730-40.

142. Belknap, Trial, supra note 111, at 257.


144. Scales, 367 U.S. at 206, n. 2.
best conveyed by these words from Justice Harlan's opinion for the Court:

The jury was instructed that in order to convict it must find that . . . (1) the Communist Party advocated the violent overthrow of the Government, in the sense of present "advocacy of action" to accomplish that end as soon as circumstances were propitious; and (2) petitioner was an "active" member of the Party, and not merely "a nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy and a specific intent to bring about violent overthrow "as speedily as circumstances would permit."  

Interpreting the Smith Act to require both "specific intent" and "active" membership, the Court upheld the constitutionality of the membership clause. Furthermore, the Court reviewed the sufficiency of the evidence and held that the evidence was sufficient to establish that the CPUSA had engaged in punishable "advocacy of action." (Had the government given up too soon, then, on its "advocacy" prosecutions?) In a companion case, however, the Court held that the evidence of illegal Party advocacy was insufficient; the Court scrupulously insisted that illegal Party advocacy be proven anew in each "membership" prosecution.

2. The Registration Requirements

Meanwhile, the Party had been contending with the Internal Security Act of 1950 as well. Pursuant to the Act's registration provisions, in late 1950, the Attorney General petitioned the SACB for an order requiring the CPUSA to register as a "Communist-action organization." Hearings were held in 1951, and in April of 1953 the Board ruled that the Party was a "Communist-action organization" within the meaning of the Act, and ordered the Party to register. The Party appealed, and a long series of procedural scuffles ensued, until finally the dispute came before the Supreme Court in 1961. By a 5-4 margin, the Court upheld the constitutionality of the registration requirement, thus requiring that all members of the Party file their names and addresses with the SACB. Significantly, the majority of the Court deemed many of the Party's challenges to

145. Id. at 220.
147. Id. at 299: "It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party." Id.
149. Id. at 82-115.
be premature, and therefore refused to address (a) the Party's legal argument that compelled registration would effectively compel the Party's officers to incriminate themselves, or (b) the constitutionality of any of the consequences of registration, such as disqualification from government employment and denial of passports.\footnote{160}

Thus, as of mid-1961, Smith Act prosecutions, especially under the “membership” clause, were potentially viable, but apparently were never pursued against CPUSA members again. The SACB’s order that the CPUSA register under the 1950 Internal Security Act was affirmed by the Supreme Court, and this regulatory avenue was pursued by the Kennedy and Johnson Justice Departments.\footnote{161}

When the Party was ordered to comply with the SACB order, however, its officers refused, asserting their fifth amendment right of freedom from compulsory self-incrimination. Their understandable concern was the prospect of prosecution under the Smith Act “membership” clause. The district court rejected this argument, and convicted the Party of non-compliance under the McCarran Act.\footnote{152} But the court of appeals reversed and remanded.\footnote{153} In Judge Bazelon’s view, because the availability of someone who could sign the Party’s registration forms was an element of the crime of non-compliance, and the officers’ claims of privilege against self-incrimination were valid, the government had the burden of proving that a volunteer was available.

The government pursued the matter of Party registration, winning a second conviction for non-compliance with the SACB order.\footnote{154} At the same time, the government asserted, under the Act,\footnote{155} that the officers and members of the CPUSA were required to register as individuals, because the Party had been ordered to register but had not done so. The SACB then ordered various individuals to register, but the Supreme Court unanimously reversed, upholding their claims of privilege against self-incrimination.\footnote{156} In light of that ruling, the United States Court of Appeals for the District of Columbia in 1967 again reversed the conviction of the Party for non-compliance with

\footnotesize{\begin{itemize}
\item \footnote{150} Id. at 71-81.
\item \footnote{151} See R. Goldstein, \textit{supra} note 13, at 418.
\item \footnote{153} Communist Party of United States v. U.S., 331 F.2d 807 (D.C. Cir. 1963).
\item \footnote{154} Communist Party of United States v. U.S., 384 F.2d 957, 958-59 (D.C. Cir. 1967).
\item \footnote{156} Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).
\end{itemize}}
Thus, after seventeen years of litigation, the provisions of the McCarran Act requiring the registration of "Communist-action organizations" or their officers and members turned out to be constitutionally incompatible with the preexisting "membership" clause of the Smith Act. However, orders of the SACB, finding groups to be "Communist-action" or "Communist-front organizations," had been made. Under the McCarran Act, certain consequences flowed from that fact alone.

One was the denial of passports to members of groups identified by the SACB as "Communist-action organizations." In late 1961, following the Supreme Court opinion in the SACB case, the Board revoked the passports of Herbert Aptheker, editor of Political Affairs, "the 'theoretical organ' of the Party in this country," and Elizabeth Gurley Flynn, the chairperson of the Party. Aptheker and Flynn brought suit challenging this provision of the Act, and prevailed before a divided Supreme Court. In the Court's eyes, the essential flaw in the statutory scheme was its application of the passport ban to all members of the Party, thus lumping together "knowing" and "unknowing," and "active" and "inactive," members. As such, the restriction had not been adequately justified, and was thus overbroad on its face. "The prohibition against travel," wrote Justice Goldberg, "is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress

158. For descriptions of the government's experience in trying to compel "Communist-front" organizations to register under the 1950 Act, see T. Emerson, supra note 9, at 141-44; M. Konvitz, supra note 99, at 152-56; D. Caute, supra note 78, at 172-78; see also W.E.B. DuBois Clubs v. Clark, 389 U.S. 309 (1967); American Committee for the Protection of Foreign Born v. Subversive Activities Control Bd., 331 F.2d 53 (D.C. Cir. 1963), vacated, 380 U.S. 503 (1965); Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Bd., 331 F.2d 64 (D.C. Cir. 1963), vacated, 380 U.S. 513 (1965); Weinstock v. Subversive Activities Control Bd., 331 F.2d 75 (D.C. Cir. 1963); Jefferson School of Social Science v. Subversive Activities Control Bd., 331 F.2d 76 (D.C. Cir. 1963); Nat'l Council of American-Soviet Friendship v. Subversive Activities Control Bd., 332 F.2d 375 (D.C. Cir. 1963). The ultimate result, given dissolutions of organizations and judicial reversals of SACB orders, was that no such organizations were registered.

Only two registration proceedings were brought under the "communist-infiltrated" organization provision of the 1954 Act, and both of them were ultimately dismissed. T. Emerson, supra note 9, at 171; M. Konvitz, supra note 99, at 154-55. As one commentator has reported: "Efforts to force registration of 'communist-front' organizations and 'communist infiltrated' labor unions with the SACB all had collapsed by 1966 either because the organizations involved had dissolved, the government dropped the proceedings or federal courts found the government case either could not be sustained or had grown 'stale' with time." R. Goldstein, supra note 13, at 418.

161. Id.
sought to proscribe.”

The “innocent membership” distinction that was the heart of the *Aptheker* decision was not novel as a point of constitutional law. A unanimous court had embraced it as early as 1952, in a decision striking down a state loyalty oath because it facilitated the barring of individuals from state employment simply on the basis of membership in subversive organizations, “innocent” or not. *Aptheker*, however, was the Court’s first ruling that the Constitution required legislatures to distinguish between “innocent” and “active” membership in the *Communist Party* itself. That distinction was central to Justice Harlan’s opinion upholding the Smith Act’s “membership” clause in the *Scales* case, but the Court was willing and able in that case to treat the distinction as implicit in the statute. In the *Aptheker* decision, significantly, the majority refused to do so.

A similar fate befell the McCarran Act provision barring members of “Communist-action organizations” from employment in any “defense facility.” This time, in contrast to its *Aptheker* decision, the Court based its ruling squarely on freedom of association, but the infirmity of the statute was essentially the same as in *Aptheker*. As Chief Justice Warren observed, it was irrelevant under the Act “that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization’s

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162. *Id.* at 514. *Aptheker*’s theoretical basis is criticized in H. Kalven, *supra* note 9, at 379-82. Oddly, Justice Goldberg premised the decision on the “right to travel,” rather than on freedom of association, yet filled his opinion with references to freedom of association — the more natural and persuasive basis for the ruling. For example, “Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.” 378 U.S. at 507. *See also* the language at *id.*. 514, 516-17. The petitioners had set forth a First Amendment theory, as well as a “travel theory,” in their complaint, but Justice Goldberg chose to focus on the “right to travel.” Justice Black, concurring *id.* at 518, was more inclined to rely directly on First Amendment freedoms, among others. *But see* Justice Douglas, concurring *id.* at 519-20. Later Supreme Court decisions have not suggested that there is a fundamental right of international, as opposed to interstate, travel. *Cf.* California v. Aznavorian, 439 U.S. 170 (1978).


164. 367 U.S. at 222.

165. 378 U.S. at 515-16. Justices Clark, Harlan, and White dissented, eschewing a “facial” challenge to the statute and focusing on the fact that “we have no ‘unknowing members’ before us.” *Id.* at 525.


167. U.S. v. Robel, 389 U.S. 258 (1967). This case apparently represented the only prosecution under this part of the statute. *Id.* at 265, n. 10. The decision is criticized in Gunther, *Reflections on Robel: It’s Not What the Court Did But the Way That It Did It*, 20 STAN. L. REV. 1140 (1968).
unlawful aims, or that he may disagree with those unlawful aims."\(^{168}\) Nor was the Act’s prohibition limited to sensitive positions in defense facilities. The government’s suggested justifications for this broad prohibition were easily swept aside by the majority, perhaps too easily. Interestingly, Justice Brennan, in his concurrence, showed considerably more sympathy for those justifications.\(^{169}\) As Robel illustrates, the “innocent membership” distinction had become a well-established constitutional principle by the late 1960’s,\(^{170}\) and one that would apparently prove fatal to virtually any law\(^{171}\) that was broadly addressed to mere “membership” in an allegedly subversive organization.

Applying this principle, the United States Court of Appeals for the District of Columbia dealt a further blow to the McCarran Act by holding unconstitutional the part of the Act which provided for public disclosure of an SACB order determining that an individual was a member of a “Communist-action organization.”\(^{172}\) The problem, in the words of Judge Bazelon, was that “disclosure attaches to mere membership in a Communist-action organization, whether or not the member whose affiliation is to be publicized has engaged in, or has any intent to further, the illicit ends of the organization.”\(^{173}\) In the course of so deciding, the judge made an accurate statement that merits quoting: “It seems clear to us that mere membership in the Communist Party is protected by the First Amendment.”\(^{174}\) The Supreme Court’s decision upholding the basic registration requirement in the SACB case, whatever its current status, was distinguished in that it addressed the Act as applied to organizations (and their membership) collectively, rather than to individuals. Thus, “[i]nnocent members were unavoidably caught up in a net designed to disclose the guilty.”\(^{175}\) Here, on the other hand, “since innocent

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168. 389 U.S. at 266.
169. Id. at 271. Justices White and Harlan dissented. Id. at 282-89.
171. However, possible exceptions to this “rule” do come to mind. First, the 1961 ruling in Communist Party v. Subversive Activities Control Board, rejecting a First Amendment challenge to the requirement that all members’ names be disclosed, may survive decisions like Robel. See infra text accompanying notes 522-55. But see the Boorda case, infra notes 173-76 and accompanying text, arguably casting some doubt on that suggestion. Second, in the words of Prof. Kalven: “Perhaps ‘the keeper of the arsenal’ may still be disqualified for mere membership in the Communist Party.” H. Kalven, supra note 9, at 376. Similarly, it has been suggested that it may be constitutional to deny all Communist Party members access to classified materials, as Congress did in the McCarran Act, 50 U.S.C. § 783(c) (1982). Note, Civil Disabilities and the First Amendment, 78 Yale L.J. 842, 861 (1969) (authored by Duncan Kennedy).
174. Id.
175. Id.
members may easily be separated from guilty ones, the public interest in exposure of the guilty cannot be used to justify exposure of the innocent.” Public disclosure of membership was deemed to be a substantial burden on associational rights, and accordingly the provision was invalid.

In 1968, Congress repealed the registration requirements of the 1950 Act, but left standing the power of the SACB to issue declaratory orders and the statutory disabilities flowing therefrom. In 1973, the SACB was deprived of funding, and faded from sight for good. In 1974, the notorious Attorney-General’s list was abolished.

3. Deportation and Denaturalization

Constitutional challenges regarding deportations of “subversive” aliens met with no success at the Supreme Court level. The constitutionality of the Smith Act provisions concerning deportation were upheld in Harisiades v. Shaughnessy, with only Justices Douglas and Black dissenting. Evidence that the deportees themselves, past members of the CPUSA, had never advocated forcible overthrow received little attention in Justice Jackson’s majority opinion, and their first amendment argument was quickly rejected. Concurrently, the Court upheld the Attorney-General’s holding in custody, without bail, alien Communists arrested for deportation. Justice Reed, for the majority, did not even discuss the first amendment, upholding the challenged practice in a highly deferential fashion:

We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens. Congress had before it evidence of resident aliens’ leadership in Communist domestic activities sufficient to furnish reasonable ground for action against alien resident Communists.

In dissent, Justice Black replied: “To put people in jail for fear of their talk seems to me to be an abridgment of speech in flat violation

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176. Id. at 1149.
177. Pub. L. 90-237, 81 Stat. 765 (1968). See also R. Goldstein, supra note 13, at 441; T. Emerson, supra note 9, at 146-47.
178. R. Goldstein, supra note 13, at 394.
180. Id. at 592.
182. Id. at 535-36.
Judicial deference to Congress in the immigration field was made even more explicit two years later, in Justice Frankfurter’s opinion for the Court in *Galvan v. Press*,184 upholding the deportation, under the McCarran Act, of an alien who briefly belonged to the CP in the mid-1940’s. Galvan’s claim that he never shared the Party’s alleged commitment to forcible overthrow drew Justice Frankfurter’s sympathy, but not his vote. “[D]eportation without permitting the alien to prove that he was unaware of the Communist Party’s advocacy of violence,” he wrote, “strikes one with a sense of harsh incongruity.”185 The due process clause thus might pose limits here, “were we writing on a clean slate . . . . But the slate is not clean.” The Court had long deferred to Congress with respect to substantive policies pertaining to the entry and exclusion of aliens, and would continue to do so.186 Justices Black and Douglas protested.

Thus, in the realm of entry and exclusion of aliens, the “innocent membership” distinction did not come into play.187

183. Id. at 555.
185. Id. at 530.
186. Id. at 530-31.


More recent evidence of the Supreme Court’s disinclination to impose ordinary First Amendment standards upon the ideological exclusion process was given by *Kleindienst v. Mandel*, 408 U.S. 753 (1972), in which the Court upheld the denial of a nonimmigrant visa to a Belgian Marxist, who wished to attend an academic conference in the U.S., on the ground, under 8 U.S.C. § 1182(a)(28)(D) (1982), that he was an advocate of world communism. Justice Blackmun stated for the majority: “We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against . . . First Amendment interests . . . .” *Id.* at 770. Justices Douglas, Marshall, and Brennan dissented. See also *Flemming v. Nestor*, 363 U.S. 603 (1960). Cf. *Fiallo v. Bell*, 430 U.S. 787, 796 (1977).


In the last few years, Congress has taken a series of steps suspending the applicability of the ideological-exclusion provisions, with certain exceptions, first on a temporary basis,
4. The Effects on the Party

At the time of the first Smith Act prosecution of CP leaders in the summer of 1948, the Party claimed a membership of approximately 60,000,\(^\text{188}\) represented a significant force in the American labor movement,\(^\text{188}\) and was notably involved in presidential politics as a prominent source of support for the third-party candidacy of former Vice-President Henry Wallace.\(^\text{190}\) By the mid-1950's, all of that had changed. Communist-dominated unions were expelled from the Congress of Industrial Organizations (CIO) in 1949 and 1950 (spurred by the Taft-Hartley Act),\(^\text{191}\) and by the mid-1950's the Communists were reduced to marginal status in the labor movement.\(^\text{192}\) The FBI estimated Party membership at approximately 23,000 members in 1955,\(^\text{119}\) and by the summer of 1958 all that remained was “a nearly dead Party of only 3,000 to 6,000 members.”\(^\text{194}\)

The reasons for the Party's dramatic decline are many, but one close student of the Party's fortunes concluded that “the major reason for that phenomenon was the Smith Act prosecutions.”\(^\text{195}\) However, according to Professor Belknap, it was not the simple fear of arrest and prosecution that drove members away from the Party in the early 1950's, but rather the perception, created by the startling emergence of undercover informants at the first trial, “that the Party had been thoroughly infiltrated by the FBI.”\(^\text{188}\) The result was “an
internal witch hunt which at least equaled in intensity the worst excesses of McCarthyism." Many members were expelled, and many dropped out. Moreover, the entire national leadership was at that time, "either in prison, in hiding, or on trial," and dissent began to arise concerning the Party's basic policies and strategy.

The near-fatal blows were delivered from abroad, in 1956, in the form of Khrushchev's speech denouncing the crimes of Stalin and, later, the Soviet repression of the uprising in Hungary. The resulting disillusionment, and bitter factional infighting, led to the decimation of the Party's ranks that occurred between 1956 and 1958. For the past three decades, the continued existence of the CPUSA has largely gone unnoticed in middle America, but it does still exist, and its membership has climbed over that span of time to an estimated 15,000 to 20,000 members.

But for the Smith Act prosecutions of 1949-55, would the Party have enjoyed greater prosperity and influence in America? We will never know.

### III. THE CASE LAW: A CLOSER LOOK

The American Communists, as we have seen, managed to finally escape the clutches of the SACB. The Yates decision in 1957 so demoralized the government that, prematurely or not, it abandoned its prosecutions of "advocacy" under the Smith Act. For whatever reason, "active membership" prosecutions under the Smith Act were never pursued to any great extent, despite the decision in Scales. After some twenty years of criminal and civil litigation, however, irreparable damage had been done to the CPUSA. Above all else, these consequences flowed from the decision in Dennis. Had the Court ruled therein that the defendants had a constitutional right to advocate their views and to join together for the purposes of such advocacy, the conclusion seems inescapable that they would have suffered no further direct legal impediments as a result of pure speech and association.

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197. *Id.*
198. P. Steinberg, *supra* note 8, at 263. On the Party's "underground" structure of the early 1950's, see M. Belknap, *supra* note 8, at 175, 193-95.
200. 1988 Yearbook on International Communist Affairs 124-30 (R. Staar ed. 1988). According to that source, party general secretary Gus Hall's "main report to the Twenty-fourth National Convention [in 1988] called for a continuation of recent party policies of working around and in the left wing of the liberal and labor movement. . . . He called for a 'united working-class front, all-people's unity—and most important, unity in action to defeat Reaganism.' *Id.* at 127.
201. Registration requirements, however, may still have been upheld. See *supra* note 172.
Moreover, *Dennis* was also highly significant—and may remain so today—for its reinterpretation of the "clear and present danger" test for the constitutionality of punishing advocacy of unlawful action. Therefore, this decision requires the closest scrutiny, as does its progeny.

To fully understand these judicial rulings, however, it is necessary to understand the doctrinal background from which they emerged.

### A. The Law of Free Speech Prior to *Dennis*

The remarkable characteristic of first amendment law prior to the *Dennis* decision, from today's standpoint, was its relative lack of development. The first amendment was not applied to the states prior to 1925,\(^{202}\) and even with respect to the federal government, it was given little significant attention or content prior to World War I.\(^{203}\) It is generally thought that the "modern" law of freedom of speech emerged from Justice Holmes' articulation of the "clear and present danger" test in the *Schenck* case of 1919.\(^{204}\) The test sounded speech-protective, but was not applied in an adequately protective way either in the case in which it was announced or in any other cases of the World War I era in which it was presumably the governing rule.\(^{205}\) The *Gitlow* case of 1925,\(^{206}\) reminiscent of *Dennis* in that it upheld a state conviction for advocacy of forcible overthrow of the government, was notable for its explicit refusal to apply the clear and present danger test, and for distinguishing the *Schenck* line of cases on the ground that they had involved prosecutions under statutes directed towards conduct (which might include speech), whereas the New York law in *Gitlow* explicitly targeted certain speech as dangerous and illegal.\(^{207}\) *Gitlow* provided the doctrinal underpinning for the repressive ruling against a Communist organizer in *Whitney v. California*\(^{208}\) in 1927.

Even as late as 1937, "clear and present danger" had not provided


\(^{207}\) *Id.* at 670-71.

\(^{208}\) 274 U.S. 357 (1927).
the rationale for a single holding of the United States Supreme Court in favor of a first amendment challenge to legislation. The principle was infused with content, however, by the famous opinions of Holmes and Brandeis, markedly at odds with the views of their brethren, in Abrams, Gitlow, and Whitney. The test was not needed by the court majorities that gave the first Supreme Court victories to radical speakers in the 1930's, but in the early part of the ensuing decade, it emerged as the test for the constitutionality of legal measures burdening freedom of speech.

Primary among such cases of the 1940's were three decisions upholding first amendment challenges to contempt convictions of persons who published criticisms of judges in connection with pending litigation. The language used by Justice Douglas, for the majority in the most recent of those cases, is indicative: "The fires which [the language] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Another "clear and present danger" case, decided in 1945, struck down a state law requiring labor organizers to register as a condition to their organizing activities. Any attempt to restrict first amendment liberties, Justice Rutledge said, "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." At least in verbal formulations, the emphasis upon imminence of danger, and thus the link to the Holmes-Brandeis rationale, was apparent.

209. 250 U.S. at 624 (Holmes, J., dissenting).
210. 268 U.S. at 672-73 (Holmes, J., dissenting).
212. See, Stromberg, 283 U.S. 359, DeJonge, 299 U.S. 353, and Herndon, 301 U.S. 242; see also supra text accompanying notes 49-64.
213. "Although no case subsequent to Whitney and Gitlow has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale." Dennis v. U.S., 341 U.S. 494, 507 (1951) (Vinson, C. J.).
217. Id. at 530.
218. See also Dennis v. U.S., 341 U.S. 494, 556-61 (Appendix to Opinion of Justice Frankfurter), setting forth additional quotations of "clear and present danger" language from cases of the 1940's); Hartzel v. U.S., 322 U.S. 680, 687 (1944). On the application of the clear and present danger test in the 1940's, see also H. KALVEN, supra note 9, at 179-83. More than one commentator has observed that only four Supreme Court Justices of that era appear to have been truly committed to that test: Black, Douglas, Murphy, and Rutledge. Id. at 181; Mendelson, Clear and Present Danger — From Schenck to Dennis, 52 COLUM. L. REV. 313, 322-23 (1952). Twelve of the 154 opinions (in 13 cases) written between 1943 and 1949 which used the language of that test were
In addition, the Court ruled in favor of some unpopular speakers on first amendment grounds during the 1940's. One such instance was *Taylor v. Mississippi*,\(^2\) in which the speakers had been convicted of intentionally distributing literature calculated to encourage disloyalty to the government of the United States or of the State of Mississippi, "by speech . . . [which] reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States or of the State of Mississippi."\(^\text{219, 220}\) One of the speeches basically criticized American involvement in World War II; the other asserted "that the salute of the national flag amounted to a contemptible form of primitive idol worship."\(^\text{221}\) The Supreme Court unanimously reversed the convictions. Justice Roberts observed that not only was there the absence of any clear and present danger, but also the absence of proof that the speakers had advocated subversive action.\(^\text{222}\) Another such instance was *Terminiello v. Chicago*,\(^\text{223}\) in which an inflammatory right-wing speaker spoke to a large and restive audience while an "angry and turbulent" crowd protested outside the hall. The speaker was convicted of disorderly conduct, but the Supreme Court reversed, with four Justices dissenting. For the majority, Justice Douglas found unconstitutional the trial judge's instruction to the jury that the speaker's misbehavior was criminal "if it stirs the public to anger, invites dispute, brings

\(^{219}\) 319 U.S. 583 (1943).
\(^{220}\) Id. at 584-85.
\(^{221}\) Id. at 587.
\(^{222}\) Id. at 589. *See also* Hartzel v. U.S., 322 U.S. 680 (1944), reversing a conviction under the federal Espionage Act, making it a crime to willfully attempt to cause insubordination and disloyalty in the Armed Forces or to obstruct enlistment. Petitioner had mailed, to numerous recipients in and out of the Armed Forces, articles harshly critical of American involvement in World War II (including "scurrilous and vitriolic attacks" on the English, the Jews, and FDR). The Court held that there was insufficient evidence of Hartzel's intent to cause insubordination or obstruct enlistment. What is surprising is that the four dissenting Justices — Reed, Frankfurter, Jackson, and Douglas — not only disagreed with the majority on the question of the sufficiency of the evidence, but had little difficulty in finding that a conviction for engaging in such speech would be constitutional. Making quick work of the constitutional inquiry, Justice Reed said: "It is only when the requisite intent to produce [insubordination or disloyalty in the military] is present that criticism may cross over the line of prohibited conduct. The constitutional power of Congress so to protect the national interest is beyond question." *Id.* at 690 (citing Schenck v. U.S.). (What happened to the requirement of clear and present danger?) For the majority, Justice Murphy stated that a clear and present danger must be shown, but he saw no need to pursue that inquiry in this case.

\(^{223}\) 337 U.S. 1 (1949).
about a condition of unrest, or creates a disturbance . . . ."\(^{224}\) In effect, the instruction was overbroad.

But it is noteworthy that three of the dissenting Justices—Jackson, Burton, and Frankfurter—were ready to uphold the constitutionality of the conviction. Looking at the excerpts of Terminiello’s speech set forth by Justice Jackson,\(^ {226}\) it seems fair to say that Terminiello advocated no action, but simply spoke of the mob outside in strongly critical and provocative terms, in an atmosphere that was apparently enormously tense. Projectiles were hurled into the hall by the people outside and some of them were arrested. Terminiello’s speech, it was said, “stirred the audience . . . to expressions of immediate anger, unrest and alarm.”\(^ {226}\) Reacting to these facts, Justice Jackson restated the clear and present danger test and concluded: “In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate.”\(^ {227}\) Other Justices may have agreed. Arguably, the position of these three Justices was not sufficiently protective of the rights of the speaker, who did not advocate violence but was, more accurately, a victim of it.\(^ {228}\)

Nor was the Court terribly sensitive to the right of a speaker to criticize public officials in *Chaplinsky v. New Hampshire*,\(^ {229}\) the case that gave rise to the well-known “fighting words” exception to protected speech. Chaplinsky’s punishable utterances, made to “the City Marshal,” were: “You are a God damned racketeer [and] a damned Fascist.” According to a unanimous Court in 1942, with no less a liberal than Justice Murphy speaking, “Argument is unnecessary to demonstrate that the appellations ‘damned racketeer’ and ‘damned Fascist’ are epithets likely to provoke the average person to retaliation,” and thus were not protected.\(^ {230}\) Was the Court, in effect, utilizing a species of “clear and present danger” analysis? Was its application of its governing principle persuasive or appropriate?

\(^{224}\) Id. at 3.

\(^{225}\) Id. at 17-22 (Jackson, J., dissenting).

\(^{226}\) Id. at 22. As described by the Illinois Supreme Court, “the explosive situation thus created by defendant resulted in innumerable acts of violence extending over a period of several hours.” City of Chicago v. Terminiello, 400 Ill. 23, 79 N.E.2d 39, 44 (1948).

\(^{227}\) Id. at 26. Justice Jackson recognized that Terminiello had not directly incited violence, but apparently thought that irrelevant: “Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. An effective and safer way is to incite mob action while pretending to deplore it. . . .” Id. at 35.

\(^{228}\) See also the Court’s decision, just prior to *Dennis*, in Feiner v. New York, 340 U.S. 315 (1951), shamefully upholding the disorderly conduct conviction of a speaker who refused two requests to stop speaking made by policemen because some in his audience were beginning to become restless and hostile. Only Justices Black, Douglas, and Minton dissented.

\(^{229}\) 315 U.S. 588 (1942).

\(^{230}\) Id. at 574.
The Chaplinsky decision is best-known for its articulation of a rationale for excluding some “pure” speech from first amendment protection altogether. Certain kinds of “utterances,” said Justice Murphy—including

[T]he lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—. . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.231

Notably, the list did not include, as one of its explicitly identified items, “advocacy of forcible overthrow of the government”, nor did the Court ever explicitly add such advocacy to the list of exceptions to first amendment protection.

Of course, additional first amendment doctrine had emerged as of 1950: the virtual per se rule against granting “unbridled discretion” to officials to license speakers was established early on;232 a different approach to the incidental regulation of speech via “time, place, and manner” regulations was in the early stages of formulation;233 and an entire body of cases dealing with labor picketing—viewed by all of the Justices as expressive but involving “more than free speech”—had been born and reached maturity within the decade of the 1940s.234

But much of the basic framework of contemporary first amendment analysis had yet to be constructed. Nothing had yet been heard of “content-based regulation;”235 nor had the general rule yet been formulated that a content-based regulation could survive constitutional challenge only if the law were narrowly tailored to achieve a compelling or “substantial” state interest.236 Those maxims came later.

Nor was the concept of “freedom of association” a familiar one to


readers of Supreme Court decisions in the year 1951. The Court rec-
ognized “freedom of assembly” in 1937 in DeJonge v. Oregon in con-
nection with political gatherings, but the “right . . . peaceably to
assemble” is explicitly set forth in the first amendment. As of 1951,
nothing had yet been said of a separate, while correlative, right of
like-minded persons to unite physically and spiritually for purposes
of political activity. Although the concept first received judicial men-
tion in an occasional concurring opinion, it did not truly emerge
until 1958, in the case of NAACP v. Alabama. Case law quickly
made it clear that “significant encroachments” upon freedom of as-
sociation could be justified only by compelling governmental
interests.

Another striking difference between the well-established law of
freedom of speech of today, and that of four decades earlier, is the
previous absence of a fully considered and relatively consistent judi-
cial intolerance of facially overbroad statutes affecting speech. While
the Supreme Court, relatively early on, employed the technique of
invalidating a statute because it swept too much protected speech
within its net, the practice was by no means commonplace.

In 1951, the “clear and present danger” test, typically applied to
the facts of individual cases, was dominant in the law of freedom of
speech. It had yet to be utilized, however, to save from punishment a
political activist engaging in advocacy of unlawful conduct.

### B. The Supreme Court and Communism Prior to Dennis

As we have seen, Communists fared poorly before the Supreme
Court in the 1920’s (recall Gitlow and Whitney), but fared well
there in the 1930’s (Herndon and DeJonge). As noted, however, the
1937 cases were in fact quite weak from the prosecution’s

238. See, e.g., Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J.,
concurring); American Communications Ass’n v. Douds, 339 U.S. 382, 417 (1950)
(Frankfurter, J., concurring). See also the unadorned statement, in Whitney v. Califor-
nia, 274 U.S. 357, 371-72 (1927), that the petitioner had suffered no deprivation of “any
right of free speech . . . assembly or association. . . .”
241. Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Lovell v. Griffin, 303 U.S.
son, 405 U.S. 518, 520-22 (1972); Bd. of Airport Comm’rs v. Jews for Jesus, Inc., 482
242. “Clear and present danger, although indisputably the test according to the
Vinson Court, was the test only for speech that did not matter, the luxury civil liberty.”
H. KALVEN, supra note 9, at 197. Another commentator has persuasively suggested that
the test was not even necessary to the decision of those cases of the 1940’s in which it
was employed. McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182, 1208
(1959).
standpoint.

In 1943, an extraordinary debate by the Justices on the nature of the Communist Party took place in a long forgotten, non-constitutional decision concerning the denaturalization of a foreign-born Russian Communist. William Schneiderman was secretary of the Communist Party in California at the time of the decision, and later became one of the criminal defendants in the *Yates* case. He became a naturalized American citizen in 1927, while a member of the Communist Party. In doing so, he took an oath to support the Constitution of the United States. Under the pre-1940 law applicable in 1927, mere Communist belief or affiliation was not enough to deny naturalization. Thus, in 1939, when the government later moved to strip Schneiderman of his United States citizenship, the question posed was whether Schneiderman was, at the time of his naturalization, “attached to the principles of the Constitution of the United States . . . .” In other words, could a card-carrying Communist be a good American citizen? The answer given by Justice Murphy, for a five-member majority of the Court (which included Justices Black and Douglas), was “yes.”

In his trial testimony, Schneiderman denied that he or the Communist Party advocated the forcible overthrow of the United States government. As to Schneiderman personally, there was no evidence to the contrary:

> He stated that he believed in retention of personal property for personal use but advocated social ownership of the means of production and exchange, with compensation to the owners. He believed and hoped that socialization could be achieved here by democratic processes but history showed that the ruling minority has always used force against the majority before surrendering power. By dictatorship of the proletariat petitioner meant that the “majority of the people shall really direct their own destinies. . . .”

None of this, observed Justice Murphy, was “necessarily incompatible with the ‘general political philosophy’ of the Constitution.”

But rather than simply focus on Schneiderman’s testimony concerning his own beliefs, the Court considered the tenets of the CPUSA itself in response to the Government’s argument that be-

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244. 354 U.S. 298 (1957).
245. 320 U.S. at 132.
246. 34 Stat. 598 (1906).
247. 320 U.S. at 127.
248. *Id.* at 146.
249. *Id.* at 127-28.
250. *Id.* at 141.
cause Schneiderman belonged to an organization which advocated forcible overthrow, Schneiderman must also have held those beliefs. The majority was unpersuaded.

Regarding the Marxist concept of "the dictatorship of the proletariat," Justice Murphy observed:

Theoretically it is control by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. It does not appear that it would necessarily mean the end of representative government or the federal system.

Although the Party had advocated radical restructuring of the federal government, Justice Murphy believed that "it is possible to advocate such changes and still be attached to the Constitution . . . ." But had the Party advocated forcible overthrow in 1927? "For some time," wrote Justice Murphy, this question "has perplexed courts, administrators, legislators, and students." The Supreme Court, he added, did not need to decide the question. A reasonable person could have so found, he said, but the government's burden was higher; it had to establish Schneiderman's lack of attachment to the United States Constitution by "clear, unequivocal and convincing" evidence. That burden had not been carried.

In the first place, Justice Murphy astutely observed, "there is, unfortunately, no absolutely accurate test of what a political party's principles are. Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written." In this case, the government relied on the "classics" of Marxism-Leninism, but the majority found the evidence of unlawful advocacy in these writings to be "sharply conflicting." Reviewing these works by Marx, Lenin, Stalin, and others, Justice Murphy concluded:

A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained con-

251. Id. at 146.
252. 320 U.S. at 142.
253. Id. at 143.
254. Id. at 144.
255. Id. at 147. Justice Murphy noted, at that point, that lower federal courts, addressing that question in deportation proceedings, had reached different conclusions, with some of them seeming to have taken judicial notice "that force and violence is a Party principle!" Id. at 147-48.
256. Id. at 154.
257. 320 U.S. at 154.
258. Id. at 149-52.
259. Id. at 155.
troll in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time . . . peaceful channels were no longer open.260

He continued, in language that contrasts remarkably with the language of Chief Justice Vinson's plurality opinion in Dennis, eight years later:

There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason.261

Because of this difference, he concluded, the majority was prepared to assume that Congress did not intend to denaturalize persons whose advocacy or beliefs fell into the latter category.

In dissent, Chief Justice Stone, joined by Justices Roberts and Frankfurter, undertook the unusual judicial task of sifting through the literature of the CP. Unlike Justice Murphy, Chief Justice Stone had no trouble concluding that, at least up until 1927, the CPUSA was dedicated to the goal of forcible overthrow of the government and the imposition of an undemocratic form of government.262 Perhaps because the subject was citizenship, the dissenters perceived no constitutional issue lurking in their application of federal law. The question presented by this case, wrote the Chief Justice, is not one "of freedom of thought, of speech or of opinion, or of present imminent danger to the United States from our acceptance as citizens of those who are not attached to the principles of our form of

260. Id. at 157.
261. Id. at 157-58 (citing Whitney, 274 U.S. 357 (Brandeis, J.)) (emphasis added). Justice Murphy reiterated his demanding view of the clear and present danger test in a strong concurring opinion, two years later, in Bridges v. Wixon, 326 U.S. 135 (1945), involving the attempted deportation of famed labor leader Harry Bridges. The majority ruled for Bridges on statutory grounds. Justice Murphy argued, inter alia, that the applicable deportation statute, which allowed deportation based solely on the alien's membership in an organization which advocated forcible overthrow, was unconstitutional under the clear and present danger test. "It is clear," he wrote,

that if an organization advocated and was capable of causing immediate and serious violence in order to overthrow the Government and if an alien member . . . personally joined in such advocacy a clear and present danger to the public welfare would be demonstrated and the Government would then have the power to deport or otherwise punish the alien. But the statute in issue . . . is apparently satisfied if an organization . . . advocated as a theoretical doctrine the use of force under hypothetical conditions at some indefinite future time.

Id. at 164 (emphasis added).

To subject a deportation statute to such a rigorous standard of review was virtually unheard of. See supra text accompanying notes 179-87.

262. 320 U.S. at 182-97.
Six years later, in *American Communications Association v. Douds*, a majority of the Justices gave further evidence of their views concerning the first amendment rights of Communists. The case involved a challenge to the constitutionality of section 9(h) of the National Labor Relations Act (NLRA), which imposed various disabilities upon a labor union unless each officer of such union filed an affidavit stating "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports [sic] any organization that believes in or teaches" the forcible overthrow of the United States Government. Justices Douglas, Clark, and Minton took no part in the decision. Five of the remaining six Justices found the affidavit requirement constitutional to the extent that it addressed membership in the CP. Two Justices were troubled only by the open-ended clauses of the required affidavit, which spoke to "belief[ ] in" and "support" of forcible overthrow. Only Justice Black would have found the entire provision unconstitutional.

Chief Justice Vinson wrote for what was, in effect, a majority of the Court with respect to the CP membership clause. He began by reviewing the ostensible purpose of the 1947 legislation, elimination of the "political strike." He observed that Congress had before it a great deal of evidence tending to show that Communists and others had "infiltrated" unions and had initiated "obstructive strikes" in the service of their revolutionary goals. There was no doubt, he stated that Congress could, under its power to regulate interstate commerce, attempt to eliminate such burdens on commerce. The remedy provided by section 9(h), he continued,

[B]ears reasonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership . . .

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263. *Id.* at 171. Writing in 1951, one writer, critical of Schneiderman, complained that the decision ended denaturalization efforts aimed at Communists. Wiener, "Freedom for the Thought That We Hate": Is It a Principle of the Constitution?, 37 A.B.A. J. 177, 178 (1951). The case is also examined, from a very different perspective, in S. Levinson, Constitutional Faith 126-48 (1988).


265. *See supra* note 80 and accompanying text.

266. 339 U.S. at 419 (Frankfurter, J., concurring); *id.* at 435, n.8 (Jackson, J., concurring in part and dissenting in part). One month later, the Court considered exactly the same legal issues, in a brief per curiam opinion, in Osman v. Douds, 339 U.S. 846 (1950), this time with Justices Douglas and Minton participating. Justice Minton fully joined in the views expressed by Chief Justice Vinson in the earlier opinion. Justice Douglas joined the earlier dissenters insofar as they would have stricken the "belief" section of the oath, and expressed no opinion with regard to the part of the oath pertaining to Communist Party membership.

267. 339 U.S. at 388-89.

268. *Id.* at 390.
and that many persons who believe in overthrow of the Government by force and violence are also likely to resort to such tactics.

The Chief Justice recognized, however, that such findings could not be the end of the analysis, because, by addressing the problem of "political strikes through section 9(h), "Congress has undeniably discouraged the lawful exercise of political freedoms as well. . . . Communists, we may assume, carry on legitimate political activities." Although the case predated the Court's explicit recognition of freedom of association, Chief Justice Vinson perceived that the law had the effect "of discouraging the exercise of political rights protected by the First Amendment," because it would act as a deterrent to Party membership. Thus, a first amendment analysis was required.

But precisely what analysis was called for? The challengers insisted that the clear and present danger test was the standard to be applied. But Chief Justice Vinson rejected that approach, finding it inapplicable to this case and in the process, expounded on the limits of that test in a manner that foreshadowed his opinion in Dennis. He began by decrying the use of clear and present danger "as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application. . . . It is the considerations that gave birth to the phrase, 'clear and present danger,' not the phrase itself, that are vital" in the Court's first amendment decisions. Moreover, first amendment freedoms "themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitement to commit unlawful acts."

But that language was dictum, because, as Chief Justice Vinson saw it, this was not a case involving the suppression of advocacy because of its likely effects. Rather, he pointed out that section 9(h) regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. . . . Section 9(h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what

269. Id. at 390-91.
270. Id. at 393.
271. Id. Justice Frankfurter, however, spoke in his concurring opinion of "the right of association for political purposes." Id. at 417.
272. 339 U.S. at 394.
273. Id. But Vinson appeared, later in the opinion, to endorse the use of the clear and present danger test when evaluating direct restraints on advocacy. Id. at 412.
Congress has concluded they have done and are likely to do again.274

This observation, coupled with the Chief Justice’s ability to characterize the effect of the law as “an indirect, conditional, partial abridgment of speech,” led Chief Justice Vinson to eschew the clear and present danger test in favor of a straight-out balancing approach.276

In performing that balancing, Chief Justice Vinson announced a willingness to defer to Congress, with respect to the importance of the government interest underlying the statute, that is seldom seen in first amendment cases today. “[I]nsofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence,” he stated, “this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress.”277 Accordingly, the government’s alleged need for section 9(h) was generally accepted at face value. The Chief Justice was also moved by the argument that, under the NLRA, Congress had conferred great power upon those labor unions which became collective bargaining representatives under the Act, and, accordingly, “the public interest in the good faith exercise of that power is very great.”278

Turning to the effects of the statute upon “the rights of speech and assembly,” Chief Justice Vinson emphasized the fact that no criminal sanction or direct suppression of speech was involved here.279 Furthermore, “only a relative handful of persons” were affected by what was, in effect, no more than a limitation on eligibility to hold union office.280 The balance thus tipped in favor of the government.

Concurring in this part of the Court’s ruling, Justice Jackson produced an absolutely extraordinary opinion in which he set forth at length, largely sans footnotes and apparently based upon “information before [Congressional] committees and . . . facts of general knowledge,”281 a series of conclusions about the Communist Party

274. Id. at 396 (emphasis added).
275. Id. at 399.
276. Id. at 399-400. Also, “When the effect of a statute or ordinance upon the expression of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity.” Id. at 397.
277. 339 U.S. at 400-01. Not surprisingly, Justice Frankfurter, concurring, echoed this deferential attitude. Id. at 418-19.
278. Id. at 402.
279. Id. at 402-04. See also id. at 408-09.
280. Id. at 404. See also id. at 412.
281. Id. at 424. In an equally extraordinary footnote, Jackson stated that it was unnecessary to review the evidentiary support for his opinion, admitting that “[m]ost of this information would be of doubtful admissibility or credibility in a judicial proceeding.” He did, however, provide a reading list. Id. at n.2.
which, in his view, Congress was entitled to draw. Admitting that he would otherwise be troubled by a legislative singling out of a particular political party, he found a “rational basis” (which apparently was all he thought necessary to sustain the law) “upon which Congress reasonably could have concluded that the Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law.”

The conclusions which Justice Jackson believed Congress was entitled to reach were as follows:

1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.
2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government.
3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party’s goal.
4. The Communist Party has sought to gain [a] leverage and hold on the American population by acquiring control of the labor movement.
5. Every member of the Communist Party is an agent to execute the Communist program.

Apparently governed by these insights, and echoing Chief Justice Vinson’s observations concerning the limited impact of the law, Justice Jackson had no trouble reaching the same result. Indeed, it seems fair to say that he showed almost no awareness in this part of his opinion, that first amendment interests were at stake.

Justice Black, alone in dissent, worried that the Court’s rationale could not logically be limited to the Communist Party, or to limitations on holding union office. With apparent accuracy, he ob-

282. 339 U.S. at 423.
283. Id. at 425-31 (emphasis in original).
284. To this he added: “It would be incredible naivete to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power.” Id. at 429.
285. Id. at 431. To this he added: “Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party’s programs.” Id. at 432.
286. Id. at 434.
287. Justice Jackson arguably did have first amendment concerns in mind in dissenting in part III of his opinion, with respect to the law’s “belief” clause, on the ground that it violated “the principle of free thought.” Id. at 435, 439.
288. Id. at 450.
289. “[I]ts reasoning would apply just as forcibly to statutes barring Communists . . . from election to political office, mere membership in unions, and in fact from getting or holding any jobs . . . .” 339 U.S. at 449.
served: “Never before has this Court held that the Government could for any reason attain persons for their political beliefs or affiliations.”

The essence of his loosely structured dissent appears to be his insistence upon “the basic constitutional precept that penalties should be imposed only for a person’s own conduct, not for his beliefs or for the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation . . .”

Looking at the Douds case from the vantage point of subsequent constitutional development, there are several reasons to view the result with suspicion. First, because the concept of freedom of association had not yet crystallized, the first amendment interests at stake were probably undervalued. Second, each of the participating Justices other than Justice Black brought into the analysis an attitude of deference that is distinctly outmoded in first amendment thinking today; a modern court would, presumably require and carefully scrutinize some evidentiary showing in support of the government’s factual conclusions about Communist labor leaders. But what is most striking about Douds, in light of later decisions such as Aptheker and Robel, is its total insensitivity to the distinctions that became well-established some twenty years later between “active” and “inactive” members of the Communist Party.

290. Id.
291. Id. at 452. Eleven years later, in a case giving an expansive and questionable meaning to the terms “membership” and “affiliation” in section 9(h), Justice Black, dissenting, reiterated his belief that section 9(h) was unconstitutional, and called for the overruling of Douds. Killian v. U.S., 368 U.S. 231, 260 (1961). Justice Douglas, indicating that he did not participate in Douds because he was not present at oral argument, stated that he saw “no constitutional answer to the opinions of Mr. Justice Black in that case and in the present one that Congress has no power to exact from people affirmations or affidavits of belief. . . .” Id. Justice Brennan dissented separately in Killian, finding the Court’s “subjective” definition of “membership” to be at odds with Douds, and urging, in light of that departure, a fresh examination of the constitutionality of section 9(h). Id. at 267-76.
292. See supra text accompanying notes 161-76. The distinction had not yet taken hold in 1961, as Killian, 368 U.S. 231, demonstrated. The dissent of Justice Douglas therein, 368 U.S. at 261, joined by Justices Black and Warren, was based on the argument that section 9(h) must be interpreted to apply only to active members. Justice Douglas expressed the view, in Killian, that the Douds decision did reflect that distinction. Id. at 263-64. However, that assertion seems clearly incorrect.

In 1959, Congress repealed section 9(h) (73 Stat. 525) and replaced it with 29 U.S.C. section 504, which simply made it a crime for a member of the Communist Party to be an officer of a labor union. See U.S. v. Brown, 381 U.S. 437, 477 (1965) (White, J., dissenting). The Ninth Circuit Court of Appeals held, in 1964, that section 504 violated the first amendment, by failing to distinguish between active and inactive members. U.S. v. Brown, 334 F.2d 488 (9th Cir. 1964). That court attempted to distinguish Douds, based on the seriousness of the criminal sanction under section 504. The Supreme Court affirmed, Brown v. U.S., 381 U.S. 437 (1965), but, oddly, on the ground that the statute constituted a bill of attainder. Even so, observations relevant to a first amendment analysis crept into Chief Justice Warren’s majority opinion: “In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party . . . can be regarded as an alternative, but equivalent, expression for a list of
But, in 1950, deference to Congress held great sway, and it appeared that some of the Justices held firm views as to the nature of the Communist Party. Further evidence of the latter proposition was provided the following year, in a case decided slightly more than a month before Dennis. In Joint Anti-Fascist Refugee Committee v. McGrath, the Court reversed the dismissal of a complaint which alleged that the Attorney General had no authority to characterize certain groups as "Communist" on the infamous "Attorney-General's list" of subversive organizations that was furnished to the Loyalty Review Board of the United States Civil Service Commission. The five Justices in the majority produced five separate opinions, offering a variety of constitutional and non-constitutional bases for concluding that the petitioners had indeed stated a good cause of action. The dissenting Justices included Reed, Minton, and Vinson, who were unimpressed by the petitioner's complaint, essentially seeing no real harm done to groups merely by virtue of their being undesirable characteristics." Id. at 455. Citing Schneiderman and Aptheker, he said: "These cases are relevant to the question before us." Id. at 456.

Justice White, dissenting on behalf of four Justices, complained that Douds had effectively been overruled. Id. at 464. He wrote of Douds with approval, and argued that Congress in 1959 had a rational basis for making the same conclusions about the CP that the Court had found permissible in 1950.

Oddly, the Court in 1969 spoke of Douds as though it were a viable precedent, explicitly refusing to reconsider it, in Bryson v. U.S., 396 U.S. 64 (1969). Following the Brown decision, Bryson sought to set aside his 1955 conviction for filing a fraudulent affidavit under section 9(h). Justice Harlan, or the majority, refused to consider Bryson's argument, in light of the fact that his affidavit had clearly been fraudulent. Justice Douglas, dissenting (joined by Justice Black), referred to Douds as "obviously . . . discredited." Id. at 76.

For further discussion and criticism of Douds, see H. Kalven, supra note 9, at 323-39; T. Emerson, supra note 9, at 164-75. Criticizing the succession of legislative efforts to eliminate Communist influence from labor unions, Professor Emerson wrote: "[O]ur internal security successfully survived the continuous failure of the [labor union] program . . . . [T]he experience does indicate that the threat to internal security was, as usual, exaggerated." Id. at 175. Treating Douds a bit more kindly is Currie, The Constitution in the Supreme Court: 1946-1953, 37 Emory L.J. 249, 273-75 (1988).

293. 341 U.S. 123 (1951). The case is discussed in H. Kalven, supra note 9, at 289-93.

294. See supra notes 78-79 and accompanying text.

295. Justices Frankfurter, Jackson, and Douglas invoked procedural due process concerns. Only Justice Black went further and asserted that "the executive has no constitutional authority, with or without a hearing," to publish the lists. The system, he said, "punishes many organizations and their members merely because of their political beliefs and utterances, . . . " in violation of the first amendment. 341 U.S. at 143. He also deemed it a bill of attainder.

"After the federal government established hearing procedures for listing groups [as a result of the McGrath decision] the Attorney General made no attempt to list any additional groups." R. Goldstein, supra note 13, at 369.
listed. What is especially interesting is the characterization of the Communist Party, probably gratuitous, that crept into Justice Reed's discussion of the Attorney General's procedure in compiling the list:

What is required by the [Executive] Order is an examination and determination by the Attorney General that these organizations are "communist." The description "communist" is adequate for the purposes of inquiry and listing. No such precision of definition is necessary as a criminal prosecution might require . . . . Communism is well understood to mean a group seeking to overthrow by force and violence governments such as ours and to establish a new government based on public ownership and direction of productive property. Undoubtedly, there are reasonable grounds to conclude that accepted history teaches that revolution by force and violence to accomplish this end is a tenet of communists. No more is necessary to justify an organization's designation as communist.298

In support of his conclusions, Justice Reed cited works by Marx, Trotsky, Lenin, and Stalin.297

Thus, of the eight Justices who decided the Dennis case, four—Reed, Minton, Jackson, and the Chief Justice—had recently taken judicial notice, in effect, that the Communist Party was dedicated to the forcible overthrow of the United States government. Two others, Frankfurter and Burton, along with Reed and Vinson, had written or joined opinions in the Douds case which explicitly endorsed the appropriateness of showing a high degree of deference to Congress even when first amendment rights were at stake. Justice Frankfurter had also joined the Stone dissent in the Schneiderman case, which had similarly characterized the Party, in 1927, as indisputably subversive.298 Of the five Justices making up the majority in Schneiderman, that had arguably demonstrated a greater tendency toward open-mindedness about the Party and its objectives, Justices Murphy and Rutledge both died in 1949 and were replaced by Justices Minton and Clark.

C. The Dennis Case

Casebooks on constitutional law typically include excerpts from the Supreme Court's decision in Dennis v. United States.299 What the Supreme Court decision does not clearly reveal is the high level of abstraction at which that decision was reached. Indeed, there is virtually no discussion in the Supreme Court opinion of the facts of the Dennis case, due to the oddly limited way in which the Court approached its task of reviewing the convictions. Despite being asked

296. Id. at 195.
297. Id. at n. 9.
298. 320 U.S. at 170 (Stone, C. J., dissenting).
to review the sufficiency of the evidence, the Court in *Dennis* granted certiorari

[Limited to the following two questions: (1) Whether either [section] 2 or [section] 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment. . .; (2) whether either [section] 2 or [section] 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.]

Given this deliberately limited grant, the Court expressly declined to consider the factual underpinnings of the case. “Whether on this record petitioners did in fact advocate the overthrow of the Government by force and violence,” wrote Chief Justice Vinson, “is not before us.”

Even accepting the Court’s own description of its task, it is hard to believe that a modern court, considering the constitutionality of a statute “as applied,” would not feel obliged to review the evidence in the record. Instead, the Court proceeded on the assumption that the facts were as the jury must have found them in order to convict the petitioners, namely, that the petitioners “advocate[d] . . . a successful overthrow of the existing order by force and violence,” and “intended to initiate a violent revolution whenever the propitious occasion appeared.” Not until *Yates* was decided six years later, would the Court take a hard look at the question of the kind of evidence needed under the first amendment to support a valid conviction for illegal advocacy of forcible overthrow (or for conspiracy to so advocate). A serious question thus arises as to

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300. 341 U.S. at 495-96. These were the first two (of twelve) proposed “questions presented” by the petitioners in their petition for writ of certiorari. The fifth of those questions, as to which certiorari was not granted, was “Whether, as to each of the petitioners, the evidence was sufficient to support the conviction.” The remaining nine questions pertained to procedural matters, such as the sufficiency of the indictment, the selection of the jury, certain admissions and exclusions of evidence, and the conduct of the trial judge. Petition for Writ of Certiorari, U.S. v. Dennis, 183 F.2d 201 (2d Cir.) (1950), at 10-12, reprinted in 47 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE U.S.: CONSTITUTIONAL LAW 17-19 (P. Kurland & G. Casper, eds. 1975).

301. *Dennis*, 341 U.S. at 497. Oddly, despite the limited grant of certiorari, both the petitioners and the government addressed the sufficiency of the evidence at some length in their briefs before the Supreme Court. Brief for Petitioners at 6-26, 188-205, U.S. v. Dennis, 183 F.2d 201 (2d Cir.) (1950); Brief for the United States at 10-156, U.S. v. Dennis, 183 F.2d 201 (2d Cir. (1950), LANDMARK BRIEFS, supra note 300, at 191-211, 373-90, 479-625.


303. 341 U.S. at 498.

304. Id. at 497.

whether sufficient—or, indeed, any—evidence of the necessary kind had been introduced at the Dennis trial.

1. The Trial

In July of 1948, the federal government indicted twelve of the top leaders of the CPUSA under the Smith Act. Among those charged were: William Z. Foster, the Party's National Secretary and highest official; Eugene Dennis, the Party's General Secretary; New York City Councilman Benjamin Davis; and Gus Hall, then chairman of the CP in Ohio, and a member of the Party's National Committee.308 Because of Foster's poor health, his case was severed and the trial proceeded without him.

The indictment charged that from approximately April 1, 1945, the defendants conspired: (a) to organize as the CPUSA a group of persons who teach and advocate the forcible overthrow of the United States government; and (b) to advocate and teach the necessity of doing so. The indictment focused on the dissolution of the Communist Political Association and subsequent reorganization of the CPUSA in 1945, and it specifically referred to meetings, organization of clubs, and recruitment of members. It stated that as a part of the conspiracy, the defendants "would publish and circulate . . . books . . . and newspapers advocating the principles of Marxism-Leninism," and that they would "conduct . . . schools and classes for the study of the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."309 The district judge denied a motion to dismiss the indictment on first amendment grounds,308 relying on the reasoning of an earlier Smith Act decision309 which in turn had relied on the reasoning of Gitlow v. New York:310 the legislature had decided that certain language was dangerous, so the clear and present danger test did not apply.

The theory of the prosecution311 was that the Communists returned, in 1945, to their pre-1935, pre-"popular front" position of devotion to a Marxist-Leninist philosophy which embraced forcible

306. For a description of each of the defendants, see M. Belknap, supra note 8, at 65-66.
310. 268 U.S. 652 (1925).
311. The trial has been described in fascinating detail in M. Belknap, supra note 8, at 79-112, and P. Steinberg, supra note 8, at 157-77. See also Belknap, Trial, supra note 111, at 242-48; D. Caute, supra note 78, at 189-93.
As a close student of the trial has summarized the prosecution's case:

[T]he prosecution relied mainly on articles, pamphlets, and books—especially on Marx and Engels' *The Communist Manifesto* (1848), Lenin's *State and Revolution* (1917), Stalin's *Fundamentals of Leninism* (1929) and *Program of the Communist International* (1928). Much of this literary evidence was quite dated, and the government could offer no proof that American Communists were about to translate into action any of the ideas it contained. Nevertheless, literature was the heart of the prosecution's case. Government lawyers regarded the testimony of witnesses as only corroborative of their printed evidence and put them on the stand primarily to introduce and interpret Communist literature and explain how it had manifested itself in the activities of the CPUSA.313

Judge Medina put the evidence in a somewhat different light in his instructions to the jury.314 In his review of the prosecution's case, the following statements are the most damning:

The prosecution claims that the defendants . . . resorted to many clandestine and fraudulent devices in teaching those subject to their influence secretly to prepare for the coming of some crisis, such as a deep depression or a war with the Soviet Union, to spring into action when the word of command was given, to paralyze power houses, the transportation system and the vast industrial machine at the heart of our economic system and in the resultant chaos and confusion to bring about, by violent and unlawful means, the overthrow or destruction of the Government . . . [and] that plans were deeply laid to place . . . members of the Communist Party in key positions in various industries indispensable to the functioning of the American economy, to be ready for action at a given signal; and that such action was to consist of strikes, sabotage, and violence of one sort or another appropriate to the consummation of the desired end, that is to say the smashing of the machine of state . . .

There was, however, apparently no evidence of direct "advocacy of action" by any of the defendants, relating to any of these types of action.316 Indeed, the historical record suggests that Justice Department officials knew of the absence of evidence of seditious advocacy, and as a result chose to charge the CP leaders with organizing and conspiring to so advocate.317

In their defense, the Communist leaders denied that the Party advocated forcible overthrow.318 Rather, as their basic contentions have

312. M. BELKNAP, supra note 8, at 82; Belknap, *Trial*, supra note 111, at 242.
314. The judge's summary of the evidence appears at 9 F.R.D. 381-86.
315. *Id.* at 381-82.
316. P. STEINBERG, supra note 8, at 166; see generally M. BELKNAP, supra note 8, at 79-112.
317. P. STEINBERG, supra note 8, at 108-09.
been summarized,

[T]he CPUSA sought to convert America to socialism not by force, but . . . by educating the masses about the need to build a political organization committed to that economic system and by persuading the people, when a majority of the country was prepared for the step, to install socialism in the United States . . . . Books written prior to 1935, such as most of those emphasized by the prosecution, were obsolete as expressions of party policy.\textsuperscript{310}

In the words of a careful student and critic of the trial, the government case "was not a strong one:"

If the Justice Department had possessed evidence that the CPUSA was plotting a revolt, it could have prosecuted the organization's leaders for seditious conspiracy . . . . Indeed, even under the Smith Act, federal prosecutors did not have as strong a case as they might have wished . . . . Fortunately for [the government], the Smith Act did not require a prosecutor to establish actual advocacy of armed revolt but only that the defendants were guilty of creating a group to engage in such activity or of conspiring to advocate or organize. Unable to prove actual incitement, let alone revolutionary deeds or plots, the authorities attacked the Party with the conspiracy provisions of the Smith Act.\textsuperscript{320}

In his charge to the jury, Judge Medina did display a certain degree of sensitivity to first amendment concerns, virtually anticipating the Supreme Court's later analysis in the \textit{Yates} case:

[I]t is not the abstract doctrine of over-throwing . . . organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably . . . calculated to incite persons to such action.\textsuperscript{321}

Arguably, the constitutional problem was that he did not instruct the jury, that to convict, they needed to find that any such "advocacy of action" \textit{had occurred}. Instead, he told them,

You cannot find the defendants . . . guilty . . . unless you are satisfied . . . that they \textit{conspired to organize [a] . . . group . . . of persons who teach and advocate} the overthrow . . . of the Government . . . by force . . . and

\textsuperscript{319} Belknap, \textit{Trial, supra} note 111, at 248.

\textsuperscript{320} M. \textit{BELKNAP, supra} note 8, at 80-81. Belknap's overall views are that the prosecution was the product of political motivations on the part of the Truman Administration; that the prosecution's case was weak; that the trial judge was hostile to the defendants and their attorneys and favored the prosecution in his evidentiary rulings; and that the defendants and their lawyers detracted from the effectiveness of their defense by the use of various tactics such as delay and proselytizing. See generally \textit{id.} at 43-112. The acrimony between Judge Medina and the defendants and their lawyers is too well-documented to be doubted.

The suggestion that the prosecution was basically politically motivated, coming as it did before the 1948 presidential election at a time when the Truman Administration had opposed anticommunist legislation in Congress, is basically supported by P. \textit{STEINBERG, supra} note 8. Interestingly, however, Steinberg has reported that neither President Truman nor the White House staff was ever involved in the decision to prosecute, \textit{id.} at 107, and that Attorney General Tom Clark initially opposed the idea. \textit{id.} at 110.

\textsuperscript{321} 9 F.R.D. at 391.
to advocate and teach the duty and necessity of overthrowing ... the Government ... by force ... with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow ... of the Government ... by force ... as speedily as circumstances would permit.  

Meanwhile, a Smith Act conspiracy did not require the commission of an overt act. Therefore, all the jury needed to find was a combination of association and intent.

Given the “fall” of China, the trial of Alger Hiss, and the explosion of the first Soviet atomic bomb, 1949 was surely not a year in which Americans were particularly inclined to take a benign view of domestic Communism. On October 14, 1949, the defendants were convicted, and all of them but one was sentenced to five years in prison and a $10,000 fine.

2. Appeal: Round 1

The appeal in Dennis was argued before a panel of the Second Circuit Court of Appeals on June 21 and 22, 1950. The following day, North Korean troops invaded South Korea. On August 1, the court announced its decision affirming the convictions.

Unlike the Supreme Court, the court of appeals did review the evidence below, and in approximately one page of discussion, Judge Learned Hand found it sufficient to convict, relying almost entirely upon the literature placed in evidence by the prosecution. An “honest jury,” he opined, “could scarcely have found otherwise” on the crucial issues in the case. Judge Chase, concurring, indicated that among the important evidence was proof of secret activity, a policy of infiltration of “basic industries,” and the close alliance with

322. Id. (emphasis added).
323. Id. at 394.
324. The judge properly instructed the jury, however, that guilt could not be based merely on a defendant's membership in the Communist Party. Id. at 392. But on the issue of intent, he told the jurors that it was “important” for them to “weigh with scrupulous care the testimony concerning secret schools, false names, devious ways, general falsification and so on. . . .” Id. at 391. Surely that did not help the defendants.
325. See generally A. Harper, supra note 78, at 85-121.
326. On the details of the sentencing, see M. Belknap, supra note 8, at 115.
327. 183 F.2d 201 (2d Cir. 1950).
328. Id. at 206.
329. Id. See also Judge Hand's description of the Communist Party, not explicitly linked to the record below, in the midst of his legal analysis: “The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means.” Id. at 212.
On the issue of constitutionality, Judge Hand’s opinion is famous for its reformulation of the clear and present danger test in terms later endorsed by Chief Justice Vinson:331 “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”332 But Judge Hand said more than that. Posing the question, “When does the conspiracy become a ‘present danger’?,” he asserted: “[T]he jury has found that the conspirators will strike as soon as success seems possible . . . .” 333 But did the jury necessarily so find? Again, all the jury needed to find, on the basis of Judge Medina’s instructions, was that the defendants conspired to organize a group which would engage in advocacy of forcible overthrow with the intent to act as soon as circumstances were favorable. To use the phrase “will strike,” albeit conditionally, is arguably to imply something closer to imminence than was warranted by a fair reading of the evidence.

Judge Hand’s opinion was also infused with explicit concerns about the American Communists in the light of contemporary world conditions. To Judge Hand, the question was

[H]ow probable of execution—[i]t [what?] was in the summer of 1948, when the indictment was found. We must not close our eyes to our position in the world at that time . . . . Any border fray, any diplomatic incident . . . such as the Berlin blockade . . . might prove a spark in the tinder-box, and lead to war. We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities.334

Discussion and rebuttal to the Communists’ advocacy “may be a proper enough antidote in ordinary times and for less redoubtable combinations,”335 but not here, and not now. “[W]e shall be silly dupes,” he continued, “if we forget that again and again in the past [thirty] years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe.” 336 Here, then, was a danger “of the utmost gravity and of enough probability to justify its suppression. We hold that it is a danger ‘clear and present.’” 337

Judge Chase, in his concurrence, was far more deferential to Congress, believing that the highly deferential opinions in Gitlow and Whitney were still good law and thus controlling in this case.338 In-

330. Id. at 235, n. 3.
331. 341 U.S. at 510.
332. 183 F.2d at 212.
333. Id. at 213 (emphasis added).
334. Id.
335. Id.
336. Id.
337. 183 F.2d at 213.
338. Id. at 234-37.
terestingly, he also drew upon the Chaplinsky decision, reasoning that the utterances prohibited by the Smith Act are "no essential part of any exposition of ideas, and are of such slight social value" as to be outweighed by the public interest in order. Judge Chase was also apparently influenced by his understanding of political developments abroad. "Communism has by forcible overthrow engulfed or attempted to engulf nation after nation," he wrote, "after preparation for the use of force by just such advocacy as this Act forbids."

For the convicted American Communist leaders, it was on to the Supreme Court.

3. Appeal: Round 2

The Supreme Court decision in *Dennis v. United States* has been the subject of much scholarly consideration and criticism. The three opinions upholding the constitutionality of the Smith Act provisions in question, representing the views of six Justices, collectively reflect: (a) great deference to the Congress, even in the realm of speech; (b) a clear consciousness of the perceived threat posed by the Soviet Union, and an apparent judgment that that threat was relevant to the decision at hand; and (c) an approach to first amendment issues, in general, that fell notably short of the highest level of vigilance. The question remains, however, as to whether the result they reached was surely wrong.

Chief Justice Vinson, writing for himself and Justices Reed, Burton, and Minton, initially deflected the argument that the statute prohibited even academic discussion of Marxism-Leninism. The statute, he said, "is directed at advocacy, not discussion." (Regrettably, significant and essential refinement of the meaning of punishable "advocacy" did not come until six years later, in *Yates.*"

Chief Justice Vinson wrote. "Rather Congress was concerned with

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340. *Id.* at 236.
341. *Dennis,* 341 U.S. 494 (1951). Justice Clark, Attorney General when the prosecution took place, did not participate in the decision.
342. See *infra* text accompanying notes 626-47.
343. 341 U.S. at 502. Justice Frankfurter, concurring, also focused on this distinction. *Id.* at 545-47.
344. *Id.* at 502.
the very kind of activity in which the evidence showed these petitioners engaged.\textsuperscript{345} This last comment was a bit striking, considering that the court had not set out to review the sufficiency of the evidence below.

Reaching the issue of constitutionality, Chief Justice Vinson accepted the general applicability of a “clear and present danger” test for judging the validity of “direct” restrictions on speech,\textsuperscript{346} but accepted Learned Hand’s reformulation of that test.\textsuperscript{347} It was a substantial reformulation, requiring an evaluation of “the gravity of the ‘evil,’ discounted by its improbability,”\textsuperscript{348} instead of asking whether the advocacy created a risk of relatively probable and fairly imminent harm. Why the reformulation? Because, Chief Justice Vinson explained, the clear and present danger test, as it was previously understood, was suitable only for cases, like Gitlow, involving “a comparatively isolated event, bearing little relation in [the minds of Justices Holmes and Brandeis] to any substantial threat to the safety of the community.”\textsuperscript{349} But in Gitlow, a Socialist who later became a Communist was convicted for advocating the forcible overthrow of the government.\textsuperscript{350} Why, then, was the Dennis case different? Vinson answered, in effect, by submitting that Holmes and Brandeis “were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.”\textsuperscript{351} Exactly what justified the less demanding approach? The “apparatus”? (The conspiracy? The number of its members?) Its apparent capacity for effectiveness? The “context of world crisis”? All of these things? Vinson didn’t say. In finding that “the requisite danger existed,” Vinson did make a slightly more specific reference to similar factors, some of which appear to be the product of the unacknowledged use of judicial notice, including “a highly organized conspiracy,” “the inflammable nature of world conditions [and] similar uprisings in other countries,” and “the touch-and-go nature of our relations” with the Soviet Union.\textsuperscript{352} But exactly how did these elements fit into the first amendment analysis? Whatever else might be said about Chief Justice Vinson’s opinion, it could surely have

\textsuperscript{345.} Id.
\textsuperscript{346.} Id. at 507-08.
\textsuperscript{347.} Id. at 510.
\textsuperscript{348.} Id.
\textsuperscript{349.} Id. Justice Frankfurter, concurring, similarly distinguished cases like Gitlow and Abrams. Id. at 542-43.
\textsuperscript{351.} 341 U.S. at 510.
\textsuperscript{352.} Id. at 510-11. This “uncontrolled” use of judicial notice by Vinson was criticized contemporaneously in Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 218 (1952); Boudin, “Seditious Doctrines” and the “Clear and Present Danger” Rule (Part II), 38 Va. L. Rev. 315, 354 (1952).
made its basic premises clearer.

Hovering about the foregoing were some conclusions that are probably incontestable: (1) preventing forcible overthrow of the government constitutes a substantial government interest;\textsuperscript{353} (2) Congress may act to prevent even an attempt at forcible overthrow;\textsuperscript{354} and (3) the government may act even if the attempt is unlikely to succeed.\textsuperscript{355} The key question then arises: given these conclusions, when may government intervene when speech has not given way to action? “If Government is aware,” answered Vinson, “that a group aiming [intent] at its overthrow [grave evil] is attempting to indoctrinate its members and to commit them to a course [speech] whereby they will strike when the leaders feel the circumstances permit [uncertain time of danger], action by the Government is required.”\textsuperscript{356} If there is something troubling about that statement, what is it? It might be unacceptable that the time element, “when the leaders feel the circumstance permit,” is something other than imminence. Or, it might be that “indoctrination” is still simply speech, and not even necessarily advocacy of action as opposed to mere “abstract” advocacy. But no such distinctions were put forth by Vinson.

Justice Frankfurter’s concurrence was quite clear on the necessity of deferring to Congress’ balancing of the relevant interests at stake.\textsuperscript{357} Even in this first amendment setting, he deemed the lowest level of judicial review as appropriate: “We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.”\textsuperscript{358} He was not satisfied, moreover, by a reformulation of the clear and present danger test, preferring instead to disavow its validity altogether.\textsuperscript{359} A “careful weighing of conflicting interests” was the proper approach,\textsuperscript{360} but with deference, apparently, toward the legislative weighing already done.\textsuperscript{361} Approaching that balancing, Justice Frankfurter drew upon the Chaplinsky the-

\textsuperscript{353} 341 U.S. at 509.
\textsuperscript{354} Id.
\textsuperscript{355} Id. at 510.
\textsuperscript{356} Id. at 509.
\textsuperscript{357} Id. at 525-26.
\textsuperscript{358} Id. at 525.
\textsuperscript{359} Id. at 527, 542-43.
\textsuperscript{360} Id. at 542.
\textsuperscript{361} Id. at 525-26. It has been properly observed, however, that Congress, which enacted the Smith Act in 1940, had never passed judgment on the danger posed by subversive advocacy in 1948. T. Emerson, supra note 9, at 118; accord, Rostow, supra note 352, at 216.
ory of "low-value" speech, as well as the trial judge's references to advocacy of action, to conclude: "On any scale of values which we have hitherto recognized, speech of this sort ranks low." In finding adequate support for the Congressional judgment, furthermore, Frankfurter engaged in a very candid use of judicial notice:

In determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury . . . . We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendency in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this time and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

In 1947, it has been reliably reported, at least 60,000 members were enrolled in the Party. Evidence was introduced in this case that the membership was organized in small units, linked by an intricate chain of command, and protected by elaborate precautions designed to prevent disclosure of individual identity. There are no reliable data tracing acts of sabotage or espionage directly to these defendants. But a Canadian Royal Commission . . . in 1946 . . . reported that it was "overwhelmingly established" that "the Communist movement was the principal base within which the espionage network was recruited . . . ." Evidence supports the conclusion that members of the Party seek and occupy positions of importance in political and labor organizations. Congress was not barred by the Constitution from believing that indifference to such experience would be an exercise not of freedom but of irresponsibility.

In evaluating those paragraphs, it must be remembered that Frankfurter was not looking for a "clear and present danger." But exactly what did he identify that ought to carry weight on the regulatory side of the balancing process? He seems to have said that the Party was a sizable, well-organized and secretive group, some of whose members had infiltrated other important institutions of American society; it was, in addition, linked to hostile foreign powers, and a base for foreign spies.

The Party's link to the Soviet Union was undeniable. Arguably it was well-organized. Whether it was sizable enough to be taken seriously is a matter for debate, however, and it does not appear fair to say that the Party's activities were fully shrouded in secrecy. Moreover, conclusions concerning a connection between the Party (as opposed to the Soviet Union directly) and domestic espionage are considerably more questionable, and Frankfurter himself appeared to acknowledge the absence of evidence to support such allegations. But even assuming that all of those observations were accurate and properly before the Court, did they suffice to carry the constitutional argument for the government?

362. 341 U.S. at 544-45.
363. Id. at 547-48 (footnotes omitted).
Interestingly, Justice Frankfurter, a legendary devotee of judicial restraint, appended to the bulk of his concurrence an argument, essentially addressed to Congress and the American people, against the prohibition of any political advocacy, suggesting that he personally viewed the threat posed by the CPUSA as minimal. Thus, quoting George F. Kennan at length, he offered a view of the Party similar to that underlying the dissenting opinion of Justice Douglas:

The American Communist Party is today, by and large, an external danger. It represents a tiny minority in our country; it has no real contact with the feelings of the mass of our people; and its position as the agency of a hostile foreign power is clearly recognized by the overwhelming mass of our citizens.

Justice Jackson’s concurrence set forth at length the reasons for not applying the clear and present danger test in this case. The essence of his opinion is easily expressed; it appears that he simply did not view the advocacy of forcible overthrow as protected speech. In reaching the decision to reject a clear and present danger approach, Jackson again expounded on the nature of the Communists (as he had done in his *Douds* concurrence), noting particularly that the Party sought to accomplish through infiltration and deception, not suddenly but over time, what it could not accomplish through recruitment or persuasion. Thus, he concluded, “the Communist stratagem outwits the anti-anarchist pattern of statute aimed against ‘overthrow by force and violence’ if qualified by the doctrine that only ‘clear and present danger’ of accomplishing that result will sustain the prosecution.” He would have saved the clear and present danger test “for application as a ‘rule of reason’ in the kind of case for which it was devised,” i.e., the case of the “hot-headed speech on a street corner” or “incendiary pamphlet,” in which its application was “not beyond the capacity of the judicial process.” But even then, he would apparently have limited its applicability to cases involving speech “which does not directly or explicitly advocate a crime.” Here, on the other hand, he argued—with considerable force under the circumstances—that to apply the clear and present danger test

364. *Id.* at 549-50, 553-55.
365. *Id.* at 554.
366. *Id.* at 570, 574.
367. *Id.* at 564-66.
368. *Id.* at 567.
369. *Id.* at 568 (footnote omitted).
370. *Id.*
We must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing government will deteriorate. No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more.371

It is impossible to credibly maintain that the Justices who constituted the majority in Dennis utilized a “clear and present danger” test in any meaningful sense.372 Two Justices explicitly disavowed doing so, while the four Justices who joined the plurality decision engaged in a balancing approach, but with a degree of conscious deference to the legislature’s judgment that today would represent an enormous departure from first amendment analysis. To ask whether the Court reached a wrong result in Dennis is to ask a much more difficult question, to which we will return. But, as Justice Black recognized,373 the Court surely did not require the government to demonstrate, on the record, the existence of a danger either imminent or probable. Perhaps, for the reasons stated by Justice Jackson, it was right not to do so, but perhaps the constitutional commitment to freedom of expression is such that, absent clear proof of impeding harm, speech should have prevailed in the balancing, notwith-

371. Id. at 570. Ironically, Professor Emerson, who would protect all “expression” absolutely, voiced similar thoughts, albeit in support of an argument that the “clear and present danger” test is insufficiently protective of speech. If the Court in Dennis had seriously attempted a “clear and present danger” analysis, he wrote, “it would have been plunged into consideration of a mass of historical, political, economic, psychological and social facts” concerning domestic and foreign communism, thereby engaging in “evaluation and prophecy of a sort no court is competent to give.” Emerson, Toward A General Theory of the First Amendment, 72 YALE L.J. 877, 911 (1963).

372. The Dennis decision is widely regarded as having ended the reign of “clear and present danger” as the test of the validity of governmental limitations on political advocacy. E.g., Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 CALIF. L. REV. 1159, 1171 (1982); Corwin, Bowing Out “Clear and Present Danger”, 27 NOTRE DAME LAW. 325 (1952). One writer described the Learned Hand formulation as “a balancing test that is devoid of any preference for the first amendment.” McKay, The Preference for Freedom, 34 N.Y.U. L. REV. 1182, 1209 (1959). Another observer reported that, at oral argument in Dennis, the Solicitor General admitted that application of the clear and present danger test in its traditional sense would require reversal of the conviction. Antieau, Dennis v. U.S. — Precedent, Principle or Perversion?, 5 VAND. L. REV. 141, 143 (1952). And the late Professor Kalven wryly observed: “[T]he supreme achievement of the [clear and present danger] test in American constitutional law, and perhaps its only achievement, was that it made the court sweat so much to affirm the conviction in Dennis. . . .” H. KALVEN, supra note 9, at 196. But another account of the Court’s decision-making process suggests that most of the Justices had little difficulty in reaching the result in Dennis. See J. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 199 (1989).

373. 341 U.S. at 579-80.
standing Justice Jackson's impressive rhetoric.

Immersing oneself in the flow of cautious judicial theorizing of those troubled times, one is likely to be enormously impressed by the deep commitment to freedom of speech held by the two Justices who dissented in *Dennis*. "Undoubtedly," wrote Justice Black, "a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk."374

Justice Douglas, the other dissenter, would have applied the clear and present danger test, as classically explicated by Holmes and Brandeis, to find the convictions invalid.375 His opinion focused on the position of the CPUSA in the United States, and is important for its criticism of the Court's use of judicial notice, and as a contemporary statement that offers a competing judicial vision of the extent of the Communist threat in the year 1951:

[T]he primary consideration is the strength and tactical position of petitioners and their converts in this country. On that there is no evidence in the record. If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that as a political party they are of little consequence. . . . Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force.376

As if to respond to Justice Jackson, he continued:

The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and government; the extent to which they have in fact infiltrated [government and industry] . . . all bear on the likelihood that their advocacy . . . will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech . . . . To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. . . .

This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act . . . . Free speech . . . should not be sacrificed on anything less than plain and objective proof of danger that the evil

374. *Id.* at 580.
375. *Id.* at 585-87. Douglas, moreover, would have submitted the question of "clear and present danger" to the jury, *id.* at 587, and Justice Black agreed. *Id.* at 580. Judge Medina had decided that question as a matter of law, and so informed the jury, prompting one critic of *Dennis* to write: "As soon as Medina informed the jury . . . that a clear and present danger existed, the jury's own function of determining the innocence or guilt of the defendants was largely expropriated — for how could there be a clear and present danger unless the defendants were guilty?" D. CAUTE, supra note 78, at 193.
376. 341 U.S. at 588.
advocated is imminent.\footnote{377}

Justice Douglas made some additional observations that underscored the serious flaw in the Court’s refusal to directly consider the sufficiency of the evidence in the record. If the defendants had taught “the techniques of sabotage,” or “methods of terror and other seditious conduct,” he would have upheld their convictions.\footnote{378} Tellingly, he observed: “This case was argued as if those were the facts . . . But the fact is that no such evidence was introduced at the trial.”\footnote{379}

With their convictions thus affirmed, the defendants began serving their prison sentences.\footnote{380}

\section*{D. The Subsequent Prosecutions}

\subsection*{1. The Lower Court Decisions: “Clear and Present Danger”}

The post-\textit{Dennis} prosecutions of the early 1950’s closely resembled the trial in \textit{Dennis} itself.\footnote{381} The defendants typically argued that their first amendment rights had been violated because of the absence of a clear and present danger; in none of these cases were they successful.\footnote{382} As might be expected, \textit{Dennis} had virtually settled the issue. However, one federal judge, William Hastie of the Third Circuit, was receptive to the first amendment argument, albeit in a dissenting opinion.\footnote{383} In essence, Judge Hastie read \textit{Dennis} as requiring evidence of advocacy “directed toward violent action ‘as speedily as the circumstances would permit.’”\footnote{384} “[A] call to action in the indefinite future,” he asserted, “is a meaningless contradiction of
terms;" there must be some orientation in time. Finding that the evidence in the case before him did not go beyond "inculcation of belief in and approval of an ultimate revolution," he stated, in language that anticipated the Supreme Court's decision in *Yates*, that as a principle of constitutional law, "[t]he line which the courts try to draw distinguishes punishable incitement to insurrectionary action from permissible teaching that at some time in the future violence is inevitable . . . ." If their present tactic is a waiting game," he continued, "characterized by the teaching of revolutionary theory while incitement to action is left for the indefinite future, the First Amendment prevents the government from proscribing their teaching." But such an opinion was a lonely exception to the rule.

In reiterating the existence of a "clear and present danger," as these courts generally did, it was not at all unusual for judges to take their cues from the Supreme Court and advert to current world events. For example, Judge Dimock, presiding over the second trial of Communist Party leaders in New York, took judicial notice of events in China, Tibet, Korea, Malaya, Indo-China, and Berlin, all in support of his finding of clear and present danger. In affirming that conviction, then-Judge Harlan stated: "And if the danger was clear and present in 1948, it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war." In at least one case, the defendants sought to introduce evidence contradicting this view, but were rebuffed: "The evidence which the appellants would have offered would have been immaterial in view of the court's undoubted knowledge of general world conditions . . . ." In another case, the defendants asked the trial judge to take judicial notice in 1951, of the minimal threat of overthrow, because the Party's size had been reduced to just over 43,000 (according to J. Edgar Hoover) at the end of 1950; that represented only 0.03 percent of the United States population at the time. Judge Dimock responded: "I might take judicial notice of the fact that a successful

385. *Id.*
386. *Id.* at 463-64.
387. *Id.* at 464.
revolution in Russia was accomplished by a group whose membership was probably less proportionately to the population of all Russia than the above figures show.\textsuperscript{381}

Indeed, the defendants in these cases simply did not fare very well when it came to “judicial notice” and “common knowledge.” One trial judge, in denying a motion for acquittal, held that the jury could reasonably find (as it ostensibly had) that the defendants advocated forcible overthrow, and gratuitously added: “Indeed, there is persuasive argument that such is the common notoriety of this alleged objective of the Communist Party that the courts might properly take judicial notice of it.”\textsuperscript{382} Another federal judge, concurring in an affirmation of Smith Act convictions in 1957, offered this view:

> It seems to me that notwithstanding the general phraseology of the Smith Act, . . . we may assume, as a matter of common knowledge, that the primary purpose of the Act was to combat the Communist conspiracy, the object of which was to effect the overthrow of the Government of the United States by force or violence.\textsuperscript{383}

An issue in each prosecution was whether the defendants conspired to organize the Party as a group which would so advocate.

2. Prelude to Yates

Was the decision in *Yates* in any significant way reflective of the change in the membership of the Court between 1951 and 1957? Four changes occurred: Chief Justice Fred Vinson died in 1953, and was replaced by Earl Warren; Robert Jackson died in 1954, with John Harlan taking his place the following year; Stanley Reed retired in 1957, replaced by Charles Whittaker; and Sherman Minton retired in 1956, replaced by William Brennan.

The Court that decided the *Dennis* case continued to uphold “loyalty”-related laws, for the most part, during the next two years. It sustained a requirement that public employees swear to oaths disavowing advocacy of forcible overthrow and “knowing” membership in organizations engaging in such advocacy, and an affidavit-disclosure requirement regarding Communist Party membership.\textsuperscript{384} The law made no distinction among members of the Communist Party, but only Justices Black and Douglas objected to this aspect of the law.\textsuperscript{385} The Court also upheld a New York law barring anyone who

\begin{itemize}
  \item 395. Justices Frankfurter and Burton dissented only with respect to the oath's reference to membership in any organization engaging in forbidden advocacy. Frankfurter
advocated forcible overthrow or who belonged to any organization having such a purpose from employment in the public schools. This law made no distinction among "active" and "inactive" members, but the New York courts construed the statute to require knowledge of organizational purpose before the regulation could apply. Justice Minton, writing for six members of the Court in that case, employed what is surely some of the most discredited reasoning of the modern judicial era:

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will . . . . It is equally clear that they have no right to work for the State in the school system on their own terms . . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.

Later cases would recognize that any governmental deprivation of a tangible benefit, even of an interest that might once have been labelled a "privilege", sufficed to bring first amendment interests into play when the deprivation was imposed on the basis of speech or association. Minton's opinion further suggests insufficient sensitivity to the not-yet-emerged concept of freedom of association, through comments such as these: "One's associates, past and present, . . . may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps." He knew of "no rule, constitutional or otherwise, that prevents the State . . . from considering the organizations and persons with whom [employees] associate." Again, the Court would display far greater sensitivity to such concerns by the end of the decade. For the moment, however, only Justices Black and Douglas bucked the prevailing tide.

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387. Id. at 492.
389. 342 U.S. at 493.
391. 342 U.S. at 496, 508. Justice Frankfurter dissented as well, on jurisdictional grounds. Id. at 497. Fifteen years later, Justice Brennan, writing for a bare majority of the Court, said of Adler: "[P]ertinent constitutional doctrines have since rejected the
But the Court did show some sensitivity to associational rights in another loyalty-oath case decided that same year. In *Wieman v. Updegraff*, a unanimous Court struck down a loyalty oath that required state employees, among other things, to disavow membership in any organization which the federal government had determined to be a Communist front or subversive organization. The problem, in Justice Clark's words, was that "the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly." The prior decisions were distinguished on this basis. But, if *Garner* was still good law, as it apparently was, it could only be because the Court was willing to distinguish between a requirement that one disclose membership in any subversive organization—in which case the law could validly apply only to "knowing" members—and a requirement that one disclose membership in the Communist Party—in which case the law could validly apply to all members.

During the years 1956 and 1957, the Supreme Court produced almost nothing but "liberal" decisions in the area of "loyalty"-related litigation, on a variety of grounds and in a variety of contexts. Three of those cases arose out of inquiries by legislative committees about past or present radical political associations; in each case, a divided Court upheld the right of the challenger to refuse to answer questions. None of these decisions rested firmly upon first amendment grounds. In the *Sweezy* case, however, the new Chief Justice, writing for a plurality of the Court, infused his opinion with a tone and sensitivity that had not often been heard in

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403. Id. at 191.
404. The exception was *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), in which a majority of the Court upheld a California Supreme Court decision permitting a private employer to discharge an employee on the grounds of Communist Party membership. The majority did not even perceive the presence of a substantial federal question, but the three dissenters — Douglas, Black and Chief Justice Warren — believed that a first amendment question was involved. Although the majority did not say so explicitly, it seems fair to say that their conclusion rested on the absence of sufficient "state action." Justice Douglas, however, citing *Shelley v. Kraemer*, 334 U.S. 1 (1948), viewed the involvement of state courts, in upholding the discharge, as sufficient to supply the necessary "state action." 351 U.S. at 302.
405. Slochower v. Bd. of Educ., 350 U.S. 551 (1956); Watkins v. U.S., 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). With respect to the *Watkins* and *Sweezy* cases, Prof. Emerson wrote that the Court "seemed to be having a difficult time working out a satisfactory theory for application of the First Amendment to legislative investigations." T. Emerson, supra note 9, at 260. The reasoning of *Watkins* is also criticized in H. KALVEN, supra note 9, at 483-92, and *Sweezy* is discussed, id. at 492-97. See generally id. at 465-72.
recent plurality or majority decisions:

Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference... These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment... Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations... All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought... Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.497

Two other decisions of 1957 reversed state rulings denying admission to the bar, on grounds of bad moral character, because the persons had been, or were suspected of having been, affiliated with the CPUSA.408 Again, these decisions did not rest on first amendment grounds, but they did provide the Justices with additional opportunities to discuss the Communist Party. Thus, in ruling that the New Mexico Bar had acted irrationally in excluding Schware, on the basis of his CP membership during the 1930's, Justice Black, writing for a unanimous Court, noted once again that “it cannot automatically be inferred that all [CP] members shared their evil purposes or participated in their illegal conduct.”409

407. 354 U.S. at 250-51. The decision upheld, on creative “due process” grounds, the right of a university professor to refuse to answer questions, before a one-person state investigating committee, concerning his academic lectures and the Progressive Party (allegedly infiltrated by Communists). Justice Frankfurter, concurring in the result with Justice Harlan, took an extremely strong stand in defense of Sweezy’s rights, speaking of the inviolability of privacy belonging to a citizen’s political loyalties.” Id. at 265. The language he used was sweeping, but he may have revealed his intent to limit its application when he said:

Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party.

Id. at 266.


409. 353 U.S. at 246. See also 353 U.S. at 273. Konigsberg raised the additional issue of whether one could be denied admission to the bar simply because he refused to answer questions concerning past CP membership. Justices Harlan and Clark, dissenting, insisted that the answer was “yes”, but, perhaps remarkably, the majority in 1957 did not agree, ruling simply that the record — including the possibility of past CP membership — did not support the Bar’s action. For further discussion of these cases, see H. Kalven, supra note 9, at 550-59.
Such was the state of the law when the Court decided *Yates*.

3. *Yates*

The *Yates* decision was occasioned by the Smith Act conspiracy convictions of fourteen CP leaders in Southern California in 1952. Justice Harlan wrote for the Court; Justices Brennan and Whittaker did not participate. Only Justice Clark dissented. The Court clarified the Smith Act in two important and related respects: (1) by distinguishing between “advocacy of action” and “mere abstract advocacy”; and (2) by finally describing the kinds of evidence needed to support a Smith Act conspiracy conviction.

The first point of clarification was necessitated by the erroneous jury instruction given by the trial judge. Arguing in support of that instruction, the government maintained that “the true constitutional dividing line [was] between advocacy as such, irrespective of its inciting qualities, and the mere discussion or exposition of violent overthrow as an abstract theory.” Only Justice Clark accepted that interpretation. “The essential distinction” made by the Smith Act, said Justice Harlan, “is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something.” This distinction was explicitly put forth as a matter of statutory interpretation, rather than as a constitutional ruling. But Justice Harlan stated that, in interpreting the Smith Act, “we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked.” Where and when that constitutional “marking” had occurred was not at all clear, because although Harlan cited *Schenck*, quoted *Gitlow*, and harmonized the present opinion with *Dennis*—in which the trial judge had properly instructed the jury—none of those cases had addressed the issue squarely as a point of constitutional law. Harlan’s clear but questionable implication was that this distinction was nothing new. However, having adverted to the likely constitutional dimensions of this bit of important statutory interpretation, he effectively made it so.

Justices Black and Douglas concurring in part, supported this ruling, but continued to stand dependably to the left of the majority. “Under the Court’s approach,” wrote Black for the two of them, “defendants could still be convicted simply for agreeing to talk as distinguished from agreeing to act. I believe that the First Amend-

411. *Id.* at 313.
412. *Id.* at 349.
413. *Id.* at 324-25 (emphasis in original).
414. *Id.* at 319.
ment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal.\footnote{415}

Turning to the record, now exposed as chock full of inoperative evidence pertaining to "organizing\footnote{416} the Party and advocacy of abstract doctrine, Harlan viewed it as "strikingly deficient" with respect to the crucial element of advocacy of action.\footnote{417} Surprisingly, despite the fact that the charge was "conspiracy to advocate," Harlan clearly did not view the prosecution's burden as being satisfied by mere proof of agreement to speak. \textit{Dennis}, he said, was concerned with "a conspiracy to \textit{advocate presently} the taking of forcible action in the future,\footnote{418} and from this observation he distilled somewhat oddly, a requirement of proof that actionable advocacy had \textit{already} been voiced by the defendants. Instances of such speech in this case, he said, "are so few and far between as to be almost completely over-shadowed by the hundreds of instances in the record in which \[mention of\] overthrow . . . occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value."\footnote{419} The Government's thesis was that the Party constituted the conspiracy group, and that membership in the conspiracy could be proved by showing a sufficient connection between the defendants, the Party, and the Party’s tenets. But, while the record supported the conclusion that abstract advocacy of forcible overthrow was one of the Party’s tenets, there was minimal evidence in the record, "even under the loosest standards," to support a finding of advocacy of action by the Party.\footnote{420}

Thus, it was necessary to consider, with respect to the individual defendants themselves, the evidence of conspiracy to engage in such advocacy. As to five of them, there was no evidence of conspiring; the sole evidence against them was that they had been members, officers, or functionaries of the Party.\footnote{421}

As to the remaining nine defendants, Harlan was "not prepared to say . . . that it would be impossible" for a jury to validly find the

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\begin{itemize}
  \item \footnote{415} Id. at 340.
  \item \footnote{416} \textit{See supra} text accompanying notes 130-31.
  \item \footnote{417} 354 U.S. at 329.
  \item \footnote{418} Id. at 324 (emphasis added).
  \item \footnote{419} Id. at 327.
  \item \footnote{420} Id. at 329-30.
  \item \footnote{421} Id. at 330-31. Justice Harlan observed, as well, that such evidence would not likely support the necessary finding of specific intent to forcibly overthrow the government. \textit{Id.} at 331.
\end{itemize}
requisite advocacy of action. It might be found, he said, that those defendants were sufficiently connected to systematic teaching—of "sabotage and street fighting," and of "methods . . . of moving 'masses of people in times of crisis'"—designed "to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against the government when the time was ripe."

Justices Black and Douglas, dissenting in part, would have ordered acquittal for all of the defendants. Justice Clark would have affirmed all of the convictions.

While the Harlan decision in Yates has been criticized as ambiguous and insufficiently protective of speech, it seems largely to have been hailed by legal scholars as a masterful piece of judicial craftsmanship inspired by a deliberate but unacknowledged desire to retreat gracefully from the constitutional doctrine of Dennis. For example, Professor Belknap has written that the Yates case "offered a way for justices concerned about the excesses of the anti-communist crusade to limit the Smith Act prosecutions without having to take the embarrassing step of directly overruling Dennis," and that the decision was "admirably suited to disguise a change in outlook and allow its author and Frankfurter to maintain at least the illusion of consistency." But although the Court in Yates broke new doctrinal ground, it did so as a matter of statutory interpretation, albeit with constitutional principles hovering closely above. As the concurring Justices in Yates noted, the basic constitutional principles of Dennis

422. 354 U.S. at 332.
423. Id. at 331-32. Interestingly, one of the defendants for whom the Court did not order an acquittal was William Schneiderman, the same person whose denaturalization had been reversed by the Supreme Court fourteen years earlier. Schneiderman v. U.S., 320 U.S. 118 (1943). In Yates, Schneiderman argued that the government was collaterally estopped, based on that ruling, from pursuing him under the Smith Act. The Court properly rejected that procedural argument. 354 U.S. at 335-38.
424. 354 U.S. at 339.
425. Id. at 345.
426. See Greenawalt, Speech and Crime, 1980 AM. B. FOUND. RES. J. 645, 720-21; M. Konvitz, supra note 99, at 126; see also Church, Conspiracy Doctrine and Speech Offenses: A Reexamination of Yates v. U.S. from the Perspective of U.S. v. Spock, 60 CORNELL L. REV. 569, 580-83 (1975). Perhaps the strongest critique has been voiced by Prof. Redish, who has opined that "attempting to distinguish between one who favors the ultimate overthrow of the government in the 'abstract' and one who illegally advocates overthrow at some undetermined future time rivals the inquiry into the number of angels dancing on a pin's head for absurdity." Redish, supra note 372, at 1196.
427. See, e.g., M. Konvitz, supra note 99, at 126; H. Kalven, supra note 9, at 211-22; P. Steinberg, supra note 8, at 279-80; Mollan, supra note 122, at 726; D. Caute, supra note 78, at 208; Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719, 753 (1975).
428. M. Belknap, supra note 8, at 241.
429. Id. at 246. With respect to Justice Frankfurter, Belknap points to correspondence by that Justice revealing his growing concern about the anti-Communist hysteria of the mid-1950's. Id. at 245.
had not been repudiated in *Yates*, and while the Court’s rulings on the evidence in *Yates* ultimately ended the Smith Act conspiracy prosecutions, the fact is that the Court was prepared to allow new trials for some of the *Yates* defendants on the basis of meager evidence. Only two Justices, Frankfurter and Burton, supported the results in both *Dennis* and *Yates*. Was it clear that six years after *Dennis*, they had second thoughts about their earlier votes? *Yates* was surely an important development, but the suggestion that it represented a clear retreat from *Dennis* appears to be unwarranted.

4. Back to the Lower Courts: The Evidence of Forbidden Advocacy

After *Yates*, then, certain advocacy of forcible overthrow was punishable under the Smith Act and the Constitution, while other such advocacy was not punishable, as a matter of constitutionally-influenced statutory interpretation. Was the distinction clear, workable, and constitutionally appropriate? The “essential distinction,” again, was “that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.”430 That sounds clear and workable, but is it? A review of some of the opinions of the courts of appeals that have applied *Yates* to pending cases raises serious questions in this regard.

Consider for example, the case of *Bary v. United States*,431 in which the Tenth Circuit Court of Appeals faced the task of applying *Yates* in reviewing the convictions of seven Smith Act defendants in Denver in 1954. From the Court’s extensive review of the evidence,432 here are, in this author’s opinion, the most incriminating pieces of evidence in the case:

Bary ... [i]n a lecture ... said that their job was to get the politicians to fight and thus create a political crisis ... and that the job of members of the Party was to work for peace as a tactic, to establish an economic crisis and also to work in the political field.433

Anna ... said that if the Party was in power in steel, meat packing, rubber, and mining industries in Colorado and there were strikes, they would be in a position to shut down such industries and thus affect the economy of the region and the nation. She was present at a meeting when a speaker said that it was necessary to create a huge Mexican organization in the Southwest to overthrow the capitalists; was present at an educational [meeting] when Bary compared the Party to an army staff and talked of

430. 354 U.S. at 324-25 (emphasis in original).
431. 248 F.2d 201 (10th Cir. 1957).
432. Id. at 209-13.
433. Id. at 210.
having cadres in correct position in key industries when the proper time came.

Zepelin... said at a meeting that the party must organize the Negro and Mexican people... Johnson... [at] a club meeting... said that they were trying to recruit a lot of people... and urged his listeners to make a sincere effort to bring someone into the party... 434

Scherrer... said... that the Communists could get in power in Pueblo through the Union... He... was present at a group meeting when Maia said that after civil, legal, and political means were exhausted, Negroes should take up arms to protect themselves...

Maia... said at a meeting that she thought it was not impossible to get some members of the party in the Ordinance Depot at Pueblo, and that it could be done very silently and safely. 435

Patricia stated in the course of a meeting that it was necessary to create a huge Mexican organization in the Southwest to overthrow the capitalists; and on another occasion, she said that it would be very fine if certain dissatisfied persons working at White Sands and Los Alamos, New Mexico, could be brought into the Party because they were working on such highly secret and important government projects. 436

How should such utterances be characterized? To categorize them as "mere abstract discussion" seems less than fully accurate. But were listeners urged to take any specific steps? Other than with respect to recruiting, it seems not. On which side of the line, should such speech fall? Would it be naive, and therefore erroneous, to insist, as a predicate for sanctions, on words that clearly and directly exhort a response on the part of a listener? In any event, the court of appeals had no trouble reaching a conclusion:

The evidence did not merely disclose advocacy, utterances, or teaching in the abstract—unrelated to or divorced from incitement to action... Neither did it merely disclose discussion or exposition of violent overthrow as an abstract theory. Considered in its totality, the evidence disclosed as to each of the appellants incitement and advocacy of action in an effort to overthrow the Government by force and violence as speedily as circumstances would permit... 437

The Bary court was not exceptional in its post-Yates review of evidence of forbidden advocacy. 438 But not all courts shared its views. For instance, the Second Circuit Court of Appeals did not share the view when it ordered acquittals for the Connecticut Communist leaders in United States v. Silverman. 439 Following a close

434. Id. at 211.
435. Id. at 212.
436. Id. at 212-13.
437. Id. at 213. The second trial in Bary resulted in another conviction, which was later reversed on other grounds. Bary v. U.S., 292 F.2d 53 (10th Cir. 1961). See M. Belknap, supra note 8, at 260-61.
438. See also Wellman v. U.S., 253 F.2d 601, 607-08 (6th Cir. 1958), in which the majority of the Court seemed to be inordinately impressed by the Party's secretiveness and "systematic" educational endeavors. The concurring opinion of then-Judge Potter Stewart, at 608-09, demonstrated considerably more awareness of the weakness of the evidence. It was enough for him, however, that the record was "not too tenuous to justify" retrial. On retrial, the case was dismissed for lack of sufficient evidence. Mollan, supra note 122, at 732.
and detailed analysis of the evidence which, in fairness, seems to have consisted more clearly of prognostications and justifications than was true in Bary, Judge Clark concluded that there was "no direct evidence of a single example of [forbidden] advocacy, despite ample opportunity for observation by FBI agents with access to the conspirators' innermost councils." Judge Clark even suggested an explanation of why the American Communists might not have engaged in "advocacy of action" in the early 1950's. While those seeking violent revolution in the future might presently teach its necessity, he observed, "would-be revolutionaries are at least as likely...to adopt the tactic in years of unpopularity of decrying the use of violence and posing as peaceful social reformers."

The crime charged, he emphasized, was conspiracy to advocate forcible overthrow, not conspiracy to commit sabotage or espionage. As it happened, all of the remaining Smith Act conspiracy prosecutions were eventually dropped or dismissed. But cases like Bary, as well as the Yates opinion itself, suggest that the government's crusade had not necessarily been rendered futile by the Yates decision. Nonetheless, while these prosecutions were ultimately abandoned, legal precedent was established which bears close analysis.

The question that should count, in a case like Bary, is not "Is it abstract advocacy, or a call to action?", but rather, "Is this speech constitutionally punishable?" The truly regrettable fact is that the Supreme Court never really answered that question. Yates was a decision based on statutory interpretation, albeit with serious constitutional overtones, in which "clear and present danger" re-analysis was

440. Id. at 677-86.
441. Id. at 686. Accord, Mollan, supra note 122, at 735, posing the possibility that the lack of government evidence of illegal advocacy "may have been because the Communist Party was skillful in preventing discovery of such...conspiracy. But the extent to which the FBI had infiltrated the Party makes this an unlikely hypothesis. Many of the Government's witnesses were informers who had succeeded in assuming positions of trust and leadership within the Party."
442. 248 F.2d at 686. In an insightful footnote, Judge Clark added: "The prosecution stresses the proof of industrial concentration and of concealment. But these do not rationally raise any inference that the appellants engaged in a plot to advocate insurrection at the time they were hiding and seeking factory jobs. The industrial concentration possibly suggests a conspiracy to commit sabotage, espionage, or political strikes...but it does not point very directly toward illegal exhortation. Similarly, concealment is consistent with any unpopular or illegal enterprise; but the jury could not tell the nature of the enterprise from the mere fact of concealment." Id. at 685, n. 5.
443. See supra text accompanying notes 138-41.
444. It is true, of course, that the Court in Yates did not decide that the evidence against nine defendants was sufficient to convict, but only that it justified a retrial. 354 U.S. at 328, 332.
avoided, probably because the decision was so favorable to the defendants. Had the nine defendants been retried and convicted, constitutional review could have taken place on the basis of a clear, uncluttered record. The Court's "clear and present danger" analysis in Dennis, such as it was, continued to govern, but Dennis was virtually an exercise in "abstract advocacy" itself, eschewing any direct focus upon the evidence while conjuring up images of revolutionary guerrillas waiting for the opportune moment to strike.\textsuperscript{445} Even Justice Harlan, in Yates, referred vividly to the preparation of Party members for "sabotage and street fighting,"\textsuperscript{446} in summarizing the "good" evidence of illegal advocacy. But where was the first amendment analysis of the validity of punishing the kind of speech described in cases like Bary, such as speech about creating political and economic "crises," about recruiting members and organizing among minority groups, and about placing members in key industries? Very possibly the Court in Dennis would have seen sufficient danger in such speech to justify its suppression. But the law of freedom of expression would have been much clearer if the Court had directly discussed such speech in constitutional terms.

5. Prelude to Scales and Noto

The Supreme Court returned to the Smith Act in 1961, but in the interim between the Yates and Scales decisions it decided a batch of loyalty-oath and disclosure cases that had resulted from the pervasive concern about the Communist threat to national security. In only one case out of ten did the Court strike down the challenged law, despite the more liberal trend in the decisions of 1956 and 1957. The exception was Speiser v. Randall,\textsuperscript{447} in which the Court struck down a California law conditioning property tax exemptions for veterans upon their signing an oath stating that they did not advocate forcible overthrow of the Government. Justice Brennan's rationale, for the majority, was a narrow and particularized one, infused with first amendment concerns but smacking equally of due process, and, as Justice Clark observed, Brennan did not unequivocally suggest that every such oath must be invalid. Justices Black and Douglas, concurring, relied firmly on the first amendment. They noted that the oath was not limited to incitement to action. "As Yates . . . makes clear," wrote Justice Douglas, "there is still a clear constitutional line between advocacy of abstract doctrine and

\textsuperscript{446} 354 U.S. at 331. Recall Justice Douglas in Dennis: "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, . . . I would have no doubts. . . . But the fact is that no such evidence was introduced at the trial," 341 U.S. at 581.
\textsuperscript{447} 357 U.S. 513 (1958).
advocacy of action." Thus, what was previously put forth, strictly speaking, as a matter of statutory interpretation was now clearly stated, by at least two Justices, as a constitutional principle. On that basis alone, the Speiser decision should have been an easy one, once one accepted the majority's now-fundamental assertion that a denial of a governmental benefit based upon speech is a limitation on freedom of speech. But even if the oath had applied solely to "advocacy of action," could there be a significant government interest in denying a monetary benefit on that basis alone? Did the greater power to make such advocacy criminal include the lesser power to deny benefits? While simple logic would suggest that the answer is "yes," that conclusion is not inescapable. Only Justice Clark, in dissent, expressly embraced it, finding the state's interest in avoiding "subsidization" of illegal advocacy sufficient.

In that same year, 1958, the Court promulgated its landmark opinion on freedom of association in NAACP v. Alabama. Although various Justices had occasionally spoken in previous opinions of a "right to associate," the majority opinion in NAACP was the first to crystallize and explain the first amendment protection of group association for the advancement of beliefs and ideas. For a unanimous Court, Justice Harlan recognized the serious harm, such as loss of employment, that could befall members of politically unpopular groups if the government could compel disclosure of membership in those groups.

In NAACP, Alabama sought to compel the organization itself to

448. Id. at 537. Ironically, Justices Douglas and Black relied upon that distinction while still believing that even advocacy of action was constitutionally protected speech. Id. at 538.
449. Id. at 518.
450. Id. at 542-43:
The majority assumes, without deciding, that California may deny a tax exemption to those in the proscribed class. I think it perfectly clear that the State may do so, since only that speech is affected which is criminally punishable under the Federal Smith Act. . . . The interest of the State that justifies restriction of speech by imposition of criminal sanctions surely justifies the far less severe measure of denying a tax exemption. . . . (Justice Clark's statement about the majority's "assumption" seems to me to go a bit too far, but it is true that Justice Brennan's majority opinion allowed for the possibility that such a denial could be upheld.) Problems with Speiser are suggested in Note, Loyalty Oaths, 77 YALE L.J. 739, 764-65 (1968).
452. See cases cited supra note 238. See also the plurality opinion of Chief Justice Warren in Sweezy v. New Hampshire, 354 U.S. 235 (1957), see supra in text accompanying notes 405-07.
453. 357 U.S. at 461-63.
disclose its membership records, for highly unpersuasive reasons. The Court rejected the state’s position, stating in the process that the state’s interest, in order to overcome the first amendment rights at stake, must be “compelling.”

In 1960 the Court reached a similar result in another case, and, in yet another, struck down an Arkansas statute requiring every teacher to file an affidavit listing “every organization to which he has belonged . . . within the preceding five years.” Justice Stewart, who had replaced Justice Burton in 1958, wrote for the majority that the requirement swept too broadly without sufficient justification.

Yet, on the same day that NAACP was decided, a divided Court, in two separate cases, upheld the dismissals of a teacher and a subway-car conductor for their refusals to answer questions concerning past or present membership in the Communist Party. The majority of the Court did not seem to even perceive these cases as raising the same issue of freedom of association posed by the Alabama and Arkansas disclosure requirements. Only Justice Douglas, joined by Justice Black, insisted that the principles of NAACP should control. Justice Douglas also protested that “the most we can assume from their failure to answer is that” the discharged employees were Communists; yet membership in the CP “may be innocent,” and therefore, beyond the power of the state to penalize. But the Court had not yet clearly accepted the notion that CP membership might be innocent and therefore beyond sanction. Nor was it settled that a state could not inquire into status, even if that status alone could not be penalized.

But the associational-freedom argument was squarely confronted and rejected, by a 5-4 margin, in the following year, in a case involving a state’s ability to inquire into possible Communist involvement in an organization called World Fellowship, Inc. Given the evidence and the circumstances, the majority found “the governmental interest in self-preservation . . . sufficiently compelling to

454. Id. at 463.
456. Shelton v. Tucker, 364 U.S. 479 (1960). But in this case there were four dissenters: Justices Frankfurter, Clark, Harlan, and Whittaker.
458. Beilan, 357 U.S. at 414. Justices Brennan and Warren also dissented, but on procedural due process grounds. The arguable difficulty of reconciling these decisions is reflected in Professor Kalven’s quip: “It is tempting to join the ‘realist’ and state the operative principle bluntly: The Communists cannot win, the NAACP cannot lose.” H. Kalven, supra note 9, at 259.
459. Beilan, 357 U.S. at 414.
subordinate the interest in associational privacy.”

That same day, an identical majority of the Court, in *Barenblatt v. United States*, upheld the contempt conviction of a witness before the House Committee on Un-American Activities (HUAC) in 1954 who refused to answer questions about his past or present membership in the CP. Because Congress had the power to legislate in the field of Communist activity, Justice Harlan reasoned, it also had the power to investigate in aid of that legislative authority. In justifying the application to the Communists of the power of national “self-preservation,” Harlan cited *Dennis*, and used language reminiscent of much that was said in that opinion: “Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence,” a view, he noted, with reference to the Internal Security Act of 1950, “which has been given formal expression by the Congress.”

Thus, he continued, the Court “has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.” Reaching the critical point at hand, he concluded: “An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party.”

Very significantly, he added: “The strict requirements of a prosecution under the Smith Act... are not the measure of the permissible scope of a congressional investigation into ‘overthrow,’ for of necessity the investigatory process must proceed step by step.”

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461. *Id.* at 81. While the quoted passage hints at the exercise of strict scrutiny, Justice Clark posed the question at hand as “whether the public interests overbalance” the interests in associational privacy, and asserted that the decision would turn on the “substantiality” of the state’s interests. *Id.* at 78. In his dissent, Justice Brennan characterized the state’s goal as “exposure for exposure’s sake”, and rejected that goal as an “impermissible” state interest. *Id.* at 82.


463. *Id.* at 127.

464. *Id.* at 128.

465. *Id.* To suggest that the CP be viewed as an “ordinary political party from the standpoint of national security”, he added, would be “to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in *U.S. v. Dennis*. . . .” *Id.* at 128-29.

466. *Id.* at 130.

467. *Id.* *Barenblatt* is criticized in H. Kalven, *supra* note 9, at 497-505; T. Emer-
but were outweighed by those of the government. Once again, Justices Black, Douglas, Brennan, and Warren dissented. In the next two years, the Court sustained the penalties imposed upon resistant witnesses before the HUAC in three additional cases, with the Justices dividing along virtually the same lines as in *Barenblatt* and *Uphaus*.468

Splitting exactly the same way, the Court in 1961 (in striking contrast to its rulings of 1957) upheld two state bar decisions denying admission to would-be attorneys who refused to answer questions concerning their political associations and beliefs, including past or present membership in the Communist Party.469 Admission to the California bar, at stake in one of the cases, was unavailable to persons who advocated forcible overthrow of the government, and, thus, information concerning CP membership was deemed relevant to the ultimate inquiry. Again, the fact that mere membership alone was not a ground for disqualification under state law did not mean, to the majority, that it was unconstitutional for the question to be asked and an answer required.470 The requirement of non-advocacy itself, as a condition to bar admission, had not been challenged in this litigation, but caused the majority no difficulty. Speaking for the Court yet again, Justice Harlan stated:

> It would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political

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469. Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961); In Re Anastaplo, 366 U.S. 82 (1961). *Konigsberg* was the follow-up to the 1957 decision of the same name. The decision in *Konigsberg I* addressed the Bar's conclusion that Konigsberg had failed to prove his good moral character and non-advocacy of forcible overthrow. *Konigsberg II* addressed the Bar's later decision, following rehearing, expressly based on Konigsberg's refusal to answer certain questions. The difference presumptively explains why Justice Frankfurter was in the majority in both cases.

470. 366 U.S. at 46-47.
The state’s interest in having lawyers “who are devoted to law in its broadest sense,” including its procedures for orderly change, was deemed “sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure.”

Justice Harlan spoke, in *Konigsberg* II, of “weighing” interests and “the informed exercise of valid governmental powers.” Justice Black, dissenting, took Harlan to task for engaging in “balancing,” believing “that the First Amendment’s unequivocal command” revealed that the Framers “did all the ‘balancing’ that was to be done in this field.” What no one raised was the ostensible rule, stated by Justice Harlan himself in *NAACP v. Alabama*, that a valid interference with freedom of association requires a “compelling” state interest. Justice Harlan distinguished that case on the ground that, because the Bar’s inquiry was private, there was no danger here of opprobrium descending upon an exposed Communist; consequently, he seemed to be little impressed with the first amendment claim. Justice Black disagreed with both the majority’s suggestion that the effect on speech was “minimal” or “incidental,” and that the answers given would likely be kept confidential. He also noted that the majority had not attempted to find a “clear” or “present” danger posed by the speech or association in question.

What can we conclude from these cases of the late 1950’s and early ’60’s? For one thing, it is clear that the famed “liberal” wing of the Warren Court had not yet come into the ascendancy. The majority that consisted of Justices Frankfurter, Clark, and Harlan, plus newcomers Potter Stewart and the inscrutable Charles Whitta-
ker, had upheld virtually every requirement, whether state or federal, that questions be answered and information disclosed, pertaining directly to past or present membership in the Communist Party. The bounds of permissible inquiry, moreover, were not co-equal with the bounds of permissible punishment. The theoretical approach of the Court varied in these cases. The language of strict scrutiny, emerging in 1958 but failing to take firm hold, was used in cases involving NAACP members, who generally succeeded in their challenges to disclosure requirements. In the “Communist” cases, the majority typically fell back into the language of “balancing.”

Did the willingness of a Justice to uphold a disclosure requirement imply his agreement with the basic constitutional ruling in Dennis? (Ten years later, only Justices Frankfurter, Black, and Douglas remained, from the Dennis Court.) Had Dennis played any role in laying the conceptual groundwork for these disclosure decisions? If the Court had ruled in Dennis that the application of the Smith Act therein was unconstitutional, would these later cases have been affected? Was the validity of demanding these disclosures in any way dependent upon the fact that, according to Dennis, the CPUSA did pose a sufficiently “clear and present” danger of attempted overthrow?

It is not possible to be certain that the answer to any of these questions is “yes”. In strict theory, the question of disclosure is quite separate from the question of criminal punishment for advocacy, organization, or membership. The advocacy of the Communists could have been fully protected by the first amendment, and still membership could have been deemed relevant to potential legislation bearing upon sabotage, or other illegal conduct. However, given the characterization of the Communist Party set forth by Justice Harlan in Barenblatt, it is surely possible to imagine, in an era of persistent 5-4 rulings, that had Dennis not etched in stone the assumption that the CP truly posed a grave danger to national security, these subsequent cases might have come out differently.

6. The Scales and Noto Decisions

The twelve leaders of the CPUSA who were convicted in 1949 had been indicted under the membership clause of the Smith Act as well, but the government chose to try them only for conspiracy. Beginning in the spring of 1954 and continuing into 1956, various American Communists were indicted, and later tried, under the membership clause.479 All were convicted. One of them was Junius Scales, ini-

479. For the history of these prosecutions, see generally M. Belknap, supra note 8, at 262-65, 271-72. According to Belknap, the trials resembled those in the conspiracy cases, involving “the same battle of books.” Id. at 263. See also Mollan, supra note 122,
tially convicted in North Carolina in 1955, whose case ultimately found its way to the United States Supreme Court. After a series of delays, the Supreme Court decided the case on its merits in 1961. As had become commonplace, Justice Harlan wrote for the majority, while Justices Black, Douglas, Brennan, and the Chief Justice dissented.

The jury had been instructed that, to convict, it had to find that

(1) the Communist Party advocated the violent overthrow of the Government, in the sense of present "advocacy of action" to accomplish that end as soon as circumstances were propitious; and (2) [Scales] was an "active" member of the Party, and not merely "a nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy and a specific intent to bring about violent overthrow "as speedily as circumstances would permit."

The Court approved that construction of the membership clause, and, as so interpreted, found it constitutional.

On the constitutional issue, Justice Harlan made his point with admirable succinctness:

Little remains to be said concerning the claim that the statute infringes First Amendment freedoms. It was settled in Dennis that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, . . . is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.

at 716-20, 740-41.

480. The procedural history of the case is set out in Scales v. U.S., 367 U.S. 203, 206, n. 2 (1961). See also M. Belknap, supra note 8, at 265-66. The Scales decisions at the court of appeals level are analyzed in Mollan, supra note 122, at 720-23, 741-44, along with the decision in U.S. v. Lightfoot, 228 F.2d 861 (7th Cir. 1956), rev'd on other grounds 355 U.S. 2 (1957). The courts of appeals had no problems upholding the constitutionality of these convictions.

On the chronology and context of the Scales case, see also Taylor, Foreword to J. Scales & R. Nickson, Cause at Heart: A Former Communist Remembers at xi-xxvi (1987). Taylor suggests therein that the government's motivation in retrying Scales, after the reversal of his first conviction and after he had withdrawn from the CP, was to bolster its position with respect to the McCarran Act. "Thus it had become plain to the government, that if either the membership clause of the Smith Act, or the much more important Internal Security Act, was to be salvaged, the immediate necessity was to produce before the Supreme Court a case in which the evidence about the CP would satisfy the Yates case standards and persuade the Supreme Court to find that the Party was an organization which incited the use of force and violence to overthrow the government. The Scales case was chosen as the vehicle for that purpose. . . ." Taylor, supra at xviii.

481. 367 U.S. 203, 220.

482. Id. at 228-29. See also id. at 251.
For the first time in a majority opinion, the opinion also hinted strongly that anything other than “active” membership in the Communist Party, “even though accompanied by ‘knowledge’ and ‘intent,’” could not be made illegal under the first amendment. To do so, Justice Harlan recognized, would create “a real danger that legitimate political expression or association would be impaired.” To that extent, Scales took a significant step forward.

But can it be doubted that, with respect to the first amendment, Scales rested firmly and necessarily on Dennis, its ten-year-old predecessor? Furthermore, was there no need for reassessment of the Dennis finding of the “clear and present danger” posed by the CPUSA? All three of the “majority” opinions in Dennis had adverted to world conditions at the time of the conviction, as had other federal judges in the ensuing conspiracy prosecutions. Was reassessment of the international situation not warranted? Was the demonstrably reduced potency of the CPUSA in the mid-1950’s irrelevant? Even by Learned Hand’s standards, should not the “improbability” discount have been raised sometime between 1949 and 1961, even if the “gravity of the ‘evil’” remained the same? Characterizing Dennis in a nutshell in 1957, Justice Harlan had written:

The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action . . . by advocacy found to be directed to “action for the accomplishment” of forcible overthrow, . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.

Did all those circumstances still exist in 1955, or 1961? Apparently, no one asked.

The Scales opinion was also important, in theory, because of its treatment of the sufficiency of the evidence at trial. Again, an essential element of a membership clause violation was illegal Party “advocacy of action.” Scales contended that the evidence of such advocacy in his case was no better than that which was found wanting in

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483. Id. at 222.
484. Id. at 229.
485. See supra text accompanying notes 351-52, 363, 371.
486. See supra text accompanying notes 388-90.
487. See supra text accompanying notes 331-32.
489. In a footnote, Justice Harlan indicated that the petition for certiorari had not raised the issue of the application of the clear and present danger test in this case; therefore, the Court would not consider it. Nonetheless, the Court did evaluate the constitutionality of the membership clause. Justices Black and Douglas dissented on first amendment grounds, 367 U.S. at 260, 262-68, but spoke only in broad, general terms. Justice Brennan, joined by Justice Douglas and the Chief Justice, wrote a separate dissenting opinion arguing solely that section (4)(f) of the McCarran Act — making clear that CP membership per se was not a crime — had effectively repealed the Smith Act’s membership clause. No dissenter addressed the sufficiency of the evidence.
Yates itself. The Court disagreed.

Harlan began this part of his opinion by listing the kinds of evidence that would and would not suffice. Properly on the "insufficient" list were: teaching of the Marxist-Leninist "classics" and "general literature"; general Party resolutions and pronouncements; "the clandestine nature of the Party"; and statements supportive of the Soviet Union. The "sufficient" list is not as easily described, and even less easily understood. Reviewing the Yates evidence in summary form, Harlan referred to the teaching of "techniques for achieving" violent revolution, examples of which were teaching members: (1) how to "convert a general strike into a revolution;" (2) how "to deal with Negroes so as to prepare them specifically for revolution;" (3) "methods of moving 'masses of people in times of crisis;'" and (4) the "development of a special communication system." All of this indicated, he said, two patterns of evidence that were sufficient to show illegal advocacy:

(1) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached; and
(2) the teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.

Examples (1) and (3) above arguably fall into and exemplify pattern (a), in that they can be seen as present directions concerning long-term future acts. Examples (2) and (4) are similar, but arguably fall into a category which we might describe as present directions concerning present or short-term future acts. But pattern (b), as described by Justice Harlan, seems anomalous, in that its key element amounts to nothing more than present legal conduct. The "teaching of forceful overthrow," which must accompany it, obviously would not suffice in and of itself, as it might be wholly abstract, and thus protected. How could legal abstract advocacy, accompanied by legal conduct, add up to illegal advocacy? It is not at all clear, however, that this troubling verbal formula had any direct effect upon the decision.

Again, the critical Yates distinction was the difference between (a) urging a listener to believe in something, and (b) urging a listener to do something. The trial judge in Scales, judging by his instructions to the jury, seems to have fully understood the distinc-

490. 367 U.S. at 232.
491. Id. at 233.
492. Id. at 234 (emphasis added).
In fact, he underscored it well by advising the jurors of the necessity to find Party advocacy which "one, called on its members to take forcible and concrete action at some advantageous time thereafter . . . and, two, expressed that call in such . . . words as would reasonably and ordinarily be calculated to incite its members to take [such] action. . . ." But Justice Harlan's extensive review of the evidence of Party advocacy suggests that there was very little evidence of such punishable speech. Many of the testimonial excerpts concerning Party teaching, which Harlan deemed important enough to quote, concern highly abstract or predictive statements, such as these:

[T]he forcible elements of the capitalist state must be smashed in the course of taking power. . . .

[Petitioner repeatedly told [a member] of the necessity for revolution to bring about the Dictatorship of the Proletariat . . . [and] that . . . when the revolution started, we would have the benefit of the help from the mother country, Russia, in bringing about our own revolution . . . Petitioner . . . said "that we Communists in this country would have to start the revolution, and we would have to continue fighting it . . . [He also stated, as Scales had,] that "the revolution basically would come about by combining the forces of . . . the Negro nation and the working class as the vanguard."

Other highlighted statements were merely descriptive:

[Petitioner told [a member] that . . . the strategy of the Communist Party was to bring the working class . . . and what he termed the Negro nation, together, to bring about a forceful overthrow of the Government. The District Organizer . . . told the students that . . . the Communist Party has a program of industrial concentration in which they try to get . . . Communist Party members into key shops or key industries . . . so that the Communist Party members . . . will be able to more effectively . . . [attempt] to control the union in that particular plant.

Other statements pertained solely to what would happen after the revolution. A great many of the statements attributed to Party members could possibly be construed as "urging someone to do something," but not as urging "concrete action," in the trial judge's words, or in words "ordinarily . . . calculated to incite." Examples:

[A party activist testified that she] was told that the "role" of the Communist Party was "preparing the workers and the people to be ready to be able to take power, to know how to take power" when a revolutionary situation

493. Id. at 252-53, n. 27.
494. Id. at 252, n. 27 (emphasis added).
495. Id. at 234-51.
496. Id. at 237.
497. Id. at 245.
498. Id. at 246.
499. Id.
500. Id. at 248.
501. Id. at 244-45.
502. Id. at 250.
503. Id. at 240.
Something relatively "concrete" that Party members were arguably taught to do was to teach others. Thus, the witness Duran had testified:

Professor Moreau explained throughout the school that the Proletarian Revolution would only come about if a Bolshevik rank and file . . . would get out and teach, and teach the people, the desirability of changing the system and the necessity of changing them, and in doing that, we had to teach the people that you cannot change the capitalist system to a Socialist system . . . the peaceful way; it had to be . . . taken away by force and violence, . . . and the entire state machinery of the Bourgeoisie smashed . . .

How relevant was this? Could punishable "advocacy of action" consist of advocacy of more abstract advocacy?

In some seventeen pages of testimonial excerpts, the only evidence of Party statements unequivocally urging "concrete" action were these:

Wilkerson advised Clontz that he should not let his membership in the Communist Party become known, that by remaining "under cover" he "would be much more helpful to the Party when the revolution came." As part of his undercover activity, Clontz was directed to attempt to infiltrate various organizations of the working class in order to achieve "a background of respectability" and to be able to lead such organizations "toward the goal of the Communist Party . . .."

Scales directed him to "get in with the ACLU organization to report on what value they might have in the coming struggle . . .." Clontz had also been advised by an associate of petitioner to "infiltrate . . .. the Civilian Defense setup."

Reavis was . . . advised to seek employment at the Western Electric Plant in Winston-Salem [and to sign a Taft-Hartley affidavit].
Based on all of this and without any indications as to which statements, if any, carried particular weight, Justice Harlan concluded that the jury could infer that "advocacy of action" had been engaged in by the Party. In doing so, he characterized the Party's speech as "the kind of indoctrination preparatory to action which was condemned in Dennis." That phrase, "indoctrination preparatory to action," seems apt, and, for the most part, more descriptive of the Party's speech in Scales than calling it "urging someone to do something." Does not the word "indoctrination" connote, to some extent, the kind of mere "abstract advocacy" (i.e., urging someone to believe something) that was ostensibly protected speech?

The evidence has been explored in some detail here in order to convey some of its flavor, to demonstrate again how difficult it is to apply the critical distinction between "urging to do" and "urging to believe," and to provoke serious thought on the question of whether the American Communists' advocacy and teaching—so overwhelmingly concerned, as far as the government or the judges knew, with theory and prediction, recruitment and organization, and industrial infiltration—truly posed a sufficient danger to justify its suppression consistently with the first amendment.

The acceptance of the evidence in Scales is all the more difficult to understand in light of the Court's unanimous decision, finding the evidence insufficient to support a membership clause conviction, in the companion case, Noto v. United States, and especially in light of Justice Harlan's opinion therein. There must be evidence under the Smith Act, he said in Noto, "of a call to violence now or in the future." Where was such evidence, beyond the abstract, in Scales? As Harlan acknowledged, the Noto record was filled with evidence of teaching of industrial infiltration. Such teaching constituted the most unequivocal advocacy in Scales. Yet, in Noto, Harlan said of this evidence that

[It] too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. The most that can be said is that the evidence as to that program might justify an inference that the

512. Id. at 252. On the fate of Junius Scales personally, and the commutation of his sentence in 1962, see M. Konvitz, supra note 99, at 129.
513. Accord, Mollan, supra note 122, at 741: "[T]his advocacy of forcible overthrow hardly could be said to be concrete planning to commit specific acts at any foreseeable time in the future."
514. Professor Kalven, who found Harlan's acceptance of the evidence in Scales "puzzling," supra note 9, at 224, was also led by the Scales decision to wonder whether the Yates distinction was viable. Id. at 225-26. He further critically analyzed Scales at 246-53. See also T. Emerson, supra note 9, at 127-29.
516. Id. at 298 (emphasis added).
517. Id. at 292-95.
leadership of the Party was preparing the way for a situation in which future acts of sabotage might be facilitated, but there is no evidence that such acts of sabotage were presently advocated; and it is present advocacy, and not an intent to advocate in the future . . . , which is an element of the crime under the membership clause.\

Strangely enough, no Justice dissented in Noto, and none argued that the evidence in Scales was no better than that in Noto.\

The government abandoned its use of the membership clause shortly after the Scales decision. The Noto decision very likely was largely responsible for that development. The Scales decision, however, did leave the door open for further membership-clause prosecutions, and made clear that convictions for active CP membership were possible.

E. The SACB Registration Case

On the same day that it decided the Scales and Noto cases, the Supreme Court announced its long-delayed decision on the validity of the registration requirements of the Subversive Activities Control Act of 1950. That Act set forth extensive Congressional findings

518. Id. at 298 (emphasis originally). See also H. Kalven, supra note 9, at 225: "[T]he differences between the evidence that failed in Noto and the evidence that persuaded in Scales are pretty subtle."\

519. The Scales dissenters all concurred separately in Noto, essentially adhering to the positions they had taken in Scales. 367 U.S. at 300, 302. Justice Douglas stated that he considered the speech in both cases to be protected by the first amendment. Professor Kalven has criticized the quality of the arguments raised in the dissenting opinions in Scales: "Scales was the Court's first full dress confrontation with the strategy of applying conspiracy notions to membership in 'quasi-political parties,' a question of the greatest import for political freedom in America. Rejoinder to the Harlan analysis in these terms should have commandeered all the dissenters' energy." H. Kalven, supra note 9, at 253.

520. See M. Belknap, supra note 8, at 271-72. Compare Hellman v. U.S., 298 F.2d 810 (9th Cir. 1961), reversing a membership-clause conviction due to lack of sufficient evidence of the requisite intent, with U.S. v. Blumberg, 207 F. Supp. 28 (E.D. Pa. 1962), finding the evidence sufficient to support a conviction, but ordering a new trial on other grounds; that trial was never held. Mollan, supra note 122, at 740. As in Scales, the "worst" advocacy revealed by the evidence in Blumberg was advocacy of infiltration of basic industries. 207 F. Supp. at 40, 42.

521. Thus, the evaluation of the Scales-Noto decisions by Professor Belknap seems overly sanguine. According to Belknap, the Court "overturned the conviction of Noto on evidentiary grounds, and in this way deprived the Scales ruling of most of its value as a precedent. While appearing to give a great deal with his right hand, Harlan took most of it away with his left." M. Belknap, supra note 8, at 268. The evidence in Scales does not appear to have been by any means impossible to replicate, but, as Belknap more persuasively observed, by the late 1950's "Communists had become so careful about what they said and did that proving membership of the type required by [Scales] and Noto was virtually impossible." M. Belknap, supra note 8, at 272.

concerning the Communist threat, including the extraordinary legislative declaration that "[t]he Communist organization in the United States, . . . and the nature and control of the World Communist Movement itself, present a clear and present danger to the security of the United States . . . ." It required the registration of any "Communist-action organization," defined by the Act as an organization "which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the World Communist Movement . . . and (ii) operates primarily to advance the objectives of such World Communist Movement"—namely, "to establish a Communist totalitarian dictatorship in the countries throughout the world." Again, registration required disclosure of the names of all members of such organizations. Not surprisingly, the SACB found that the CPUSA was a "Communist-action organization."

By a now familiar 5-4 margin, the Supreme Court rejected the Party's challenge to the registration requirements as violative of its members' freedom of speech and association. In doing so, Justice Frankfurter, writing for the majority, essentially refused to in any way second-guess the Congressional judgment, and, while purporting to balance the interests at stake, watered down the governing standard of review to its lowest possible level.

Justice Frankfurter accurately observed that the statute at hand did not prohibit any activity, and that the registration requirement was tied, not to speech, but to the fact of foreign domination. At the same time, he recognized that first amendment interests were implicated by a compulsory disclosure requirement of this kind, especially because disclosure of membership was as likely to produce problems for members of the Communist Party as it had for members of the NAACP in Alabama. But, the NAACP cases had been easy cases for the Court to decide, and thus, despite the Court's use of the language of strict scrutiny in those opinions, Justice Frankfurter was able, without serious inaccuracy, to recharacterize those decisions as having held that "where the required making public of an organization's membership lists bears no rational relation to the interest which is asserted by the State to justify disclosure, . . . disclosure cannot constitutionally be

526. 367 U.S. at 91.
527. Id. at 97.
528. Id. at 90, 104.
529. Id. at 102.
compelled. At that point he summarized the Congressional findings regarding Communism set forth in the Act, and concluded: "It is not for the courts to re-examine the validity of these legislative findings and reject them . . . . We certainly cannot dismiss them as unfounded or irrational imaginings. He proceeded to characterize the Congressional judgment as "a not unentertainable appraisal by Congress of the threat" and a "not wholly insupportable" conclusion. Characteristically, the majority did not question whether the legislative findings of 1950 were reasonable eleven years later.

In support of this highly deferential approach to the resolution of a first amendment question, Justice Frankfurter cited Nebbia v. New York, the 1934 case famous for its relaxation of judicial review of economic legislation in the name of substantive due process, and Galvan v. Press, an exemplar of the several decisions in which the Court deferred almost completely to Congress in the fields of immigration and naturalization. Providing a bit more explanation for his methodology, he stated, in language reminiscent of the words of Justice Jackson in Dennis, ten years earlier, that the legislative judgment should not be set aside "where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate" as they were here—"when existing government is menaced by a world-wide integrated movement which employs every combination of possible means . . . to destroy the government . . . ."

By the standards of the 1980's, Frankfurter's opinion fares poorly because of its excessive deference to government in a case involving first amendment freedoms. The use of a higher standard of review,

531. 367 U.S. at 92 (emphasis added). Shelton v. Tucker, 364 U.S. 479 (1960), was similarly distinguished, albeit as a decision resting upon "the absence of substantial connection between the breadth of disclosure demanded and the purpose which disclosure was asserted to serve." 367 U.S. at 93.
532. 367 U.S. at 93.
533. Id. at 94-95.
534. Id. at 95.
535. See M. KONVITZ, supra note 99, at 136-38; see also T. EMERSON, supra note 9, at 143.
538. 367 U.S. at 96.
presumptively strict scrutiny, 539 would have altered the SACB analysis primarily by requiring something more than a mere governmental assertion (and unarticulated judicial notice?) of a need for the registration scheme. Presumptively, some proof would be required, 540 although the Court might well find that "proof" in the committee reports and transcripts of Congressional hearings produced during the preceding decade or two. 541

Yet the result is neither clearly erroneous nor dependent upon the earlier decision in Dennis. In fact, while four Justices dissented, two of them—Douglas and Brennan—indicated that they did not disagree with the majority's response to the first amendment challenge. Justice Douglas, in an unprecedented break with Justice Black on a first amendment question in the "loyalty" context, discussed the issue at some length. For him, the Congressional findings, especially of Soviet control of the CPUSA, "establish[ed] that more than . . . free speech and association are involved." He found persuasive, as did Frankfurter, 543 the analogy to other federal registration requirements, and concluded:

When an organization is used by a foreign power to make advances here, questions of security are raised beyond the ken of disputation and debate between the people resident here. Espionage, business activities, formation of cells for subversion, as well as the exercise of First Amendment rights, are then used to pry open our society and make intrusion of a foreign power easy. These machinations of a foreign power add additional elements to free speech just as marching up and down adds something to picketing that goes beyond free speech.

These are reasons why, in my view, the bare requirement that the Communist Party register and disclose the names of its officers and directors is in line with the most exacting adjudications touching First Amendment activities. 544

Critics of the SACB decision have been unimpressed with this "foreign control" rationale. Professor Emerson, for example, characterized the Soviet control of the CPUSA, as found by the SACB, as "entirely ideological," and went on to argue that "[s]hort of domination by the purse or the sword, foreign influence would not seem an adequate ground for restricting freedom of expression by citizens and residents of the United States." 545 But while Justice Frankfurter interpreted the Act as foreclosing the CP's contention that, for the Act to apply, the Soviet Union must enjoy "enforceable control"

539. See cases cited supra note 236.
542. 367 U.S. at 172.
543. Id. at 97-101.
544. Id. at 174-75. Justice Brennan stated his agreement, id. at 191.
545. T. EMERSON, supra note 9, at 138.
over it, he also rejected the Party’s suggestion that the SACB’s report held “that conformity [to Soviet policies] which stems from nothing more than ideological agreement satisfies the requirements of [the Act].” The subjection to foreign domination of which the Act speaks, he said, “is a disposition unerringly to follow the dictates of a designated foreign country . . . , not by the exercise of independent judgment on the intrinsic appeal that those dictates carry, but for the reason that they emanate from that country . . . .” In light of all that has been written about the CPUSA, it seems difficult to deny the applicability of that definition. The real question was: how threatening was such an organization to the security of the United States?

At the same time, it is somewhat troubling that the SACB was directed by Congress to consider, as one of several factors pointing toward a finding of the requisite foreign domination, “the extent to which [an organization’s] views and policies do not deviate from those of such foreign government . . . .” This provision was by no means academic, for the SACB concluded that it was “a material consideration” that “during the years since 1943 [the CPUSA] has without a single exception, as before [1943], continued to adhere to the views and policies of the Soviet Union; and that its witnesses when asked to do so were unable to show conflict in any of these policies.” That the expression of opinions on matters of public concern could be used against the speakers in this fashion has been intensely criticized by some constitutional scholars. It is by no means clear, however, that in the overall context of this legislative scheme, the use of policy positions as one indication of foreign domination ought to invalidate the Act on first amendment grounds.

Only Justice Black dissented explicitly on first amendment grounds, characteristically speaking of first amendment freedoms

546. 367 U.S. at 36-42.
547. Id. at 41.
548. Id. at 39-40.
549. 50 U.S.C.A. § 792(e)(2) (West 1951).
551. T. EMERSON, supra note 9, at 138; H. KALVEN, supra note 9, at 276: “The Court thus ratified, without even seeming to be aware of it, a devastating technique for chilling discussion of public issues.”
552. Chief Justice Warren dissented on a variety of non-constitutional grounds, but one of them was his agreement with the Party that the Act should be interpreted to require registration of a Communist-action organization only if the SACB finds “that the organization is engaged in advocacy aimed at inciting action,” 367 U.S. at 132, as distinct from mere abstract advocacy. Here, no such finding of illegal advocacy had been
in sweeping terms. Going back to basics with citations to Holmes and Brandeis, he acknowledged the potential danger posed by advocacy of revolution, but responded:

But, under our system of government, the remedy for this danger must be the same remedy that is applied to the danger that comes from any other erroneous talk—education and contrary argument. If that remedy is not sufficient, the only meaning of free speech must be that the revolutionary ideas will be allowed to prevail.\textsuperscript{553}

Justices Douglas and Brennan dissented, with Justice Black's agreement, on the ground that the registration requirement violated the fifth amendment privilege against self-incrimination, in light of the Smith Act's membership clause—the same argument, in essence, that ultimately persuaded a unanimous Court four years later.\textsuperscript{564} The registration requirements thus ultimately became moot; but, in the absence of federal law making active Communist Party membership criminal, it appears that only one or two of the Justices would have invalidated such registration requirements under the first amendment.\textsuperscript{565}
F. Aftermath: The 1960's

After the Scales and SACB decisions of 1961, every first amendment challenge to "loyalty" laws that reached the Supreme Court in the 1960's was successful. None of these cases, however, posed issues as fundamental, momentous, or difficult as those faced by the Court in Dennis and Scales. Indeed, once the majority accepted as constitutionally basic the "innocent-membership" distinction which had emerged in Scales, all of the later decisions of the 1960s, dealing as many of them did with disabilities befalling all Communist Party members, were actually fairly easy. At the same time, the "real" Warren Court came into being in 1962, when Arthur Goldberg replaced Felix Frankfurter; that same year, Byron White succeeded the barely-noticed Charles Whittaker.

Even prior to those changes, the Court managed to achieve a rare unanimity in striking down, as unconstitutionally vague, a Florida statute requiring state employees to swear that they had never lent "aid, support, advice, counsel or influence to the Communist Party." Less than three years later, a divided Court reached the same result, on similar reasoning, with respect to Washington loyalty oaths whose constitutional infirmities were less obvious. The pri-
mary vice in each of these cases, according to the Court, was that prospective state employees might reasonably be unsure about whether they had rendered assistance to someone who intended forcible overthrow.

In 1963, a closely divided Court ruled that a Florida legislative committee lacked the power to compel a NAACP representative to bring NAACP membership records to a committee hearing, despite the fact that the committee was investigating Communist infiltration of organizations like the NAACP.\textsuperscript{569} Recall that freedom of association had consistently prevailed, on a strict-scrutiny basis, in the NAACP cases of 1958-60,\textsuperscript{560} but that the government had consistently prevailed, under a "balancing" approach, in the Communist-disclosure cases of 1958-61.\textsuperscript{561} In the \textit{Gibson} case, the NAACP "met" the Communist Party, but still managed to win. Justice Goldberg provided the crucial vote and wrote the majority opinion. It was essential, he said, "that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."\textsuperscript{562} Here, a relationship between the NAACP and Communists had not been shown. Cases like \textit{Barenblatt} were distinguished—perhaps unconvincingly, as Justices Harlan and White suggested\textsuperscript{563}—on the ground that, in those cases, witnesses had been questioned concerning their \textit{own} Communist affiliations.

In 1964 the Court decided the \textit{Aptheker} case,\textsuperscript{564} striking down the passport restrictions on CP members. In 1965 the Court dealt the death-blow to the McCarran Act registration requirements on the ground that they compelled the officers of the CPUSA to incriminate themselves.\textsuperscript{565} That same year, the Court took the highly unusual

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\textsuperscript{560} See supra text accompanying notes 451-56.
\textsuperscript{561} See supra text accompanying notes 457-78.
\textsuperscript{562} 372 U.S. at 546.
\textsuperscript{563} Justice Harlan was joined in dissent by Justices Clark, Stewart, and White. Justice White, who filed a separate dissenting opinion as well, gave some evidence therein of a distinctly illiberal approach to the issue at hand:

\begin{quote}
I would have thought that the freedom of association which is and should be entitled to constitutional protection would be promoted, not hindered, by disclosure which permits members of an organization to know with whom they are associating and affords them the opportunity to make an intelligent choice as to whether certain of their associates who are Communists should be allowed to continue their membership.
\end{quote}

\textsuperscript{565} See supra text accompanying notes 159-65.

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step of striking down a statute as a bill of attainder. The Court struck down section 504 of the Labor Management Reporting and Disclosure Act of 1959, explicitly making it a crime for a CP member to be an officer of a labor union.\(^5\)\(^6\)\(^8\) Notably, the majority hinted at the emerging "innocent-membership" rationale, without actually relying on it, despite the fact that the court of appeals had utilized that rationale in striking down the law.\(^6\)\(^7\) At nearly the same time the Court struck down, without dissent, a federal law allowing the Postmaster General to detain mail from foreign countries determined to be "Communist political propaganda;"\(^5\)\(^6\)\(^8\) with the requirement that the addressee of such mail request its delivery in writing was seen as an undue interference with first amendment rights.

In 1966 the Court returned to the subject of loyalty-oaths and legislative investigations, ruling in favor of the challengers each time. In a case involving an ongoing state investigation of subversion in New Hampshire, the Court upheld the first amendment right of a witness to refuse to answer questions concerning CP membership and activities prior to 1957.\(^6\)\(^6\)\(^9\) For the majority, Justice Douglas referred to the "staleness" of the inquiry, and adverted to the use of a high level of judicial scrutiny in resolving the constitutional issue presented. "There is no showing of 'overriding and compelling state interest' . . . that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment." The information sought was "historical, not current." While that alone would not be fatal, he observed, "[t]he present record is devoid of any evidence that there is any Communist movement in New Hampshire . . . . There is no showing whatsoever of present danger of sedition against the State itself, the only area to which the Authority of the State extends." Thus, the state's interest was "too remote and conjectural" to override the witness' associational rights.\(^7\)\(^0\) For the first time, a Court majority had unequivocally spoken the language of strict scrutiny in a "pure" loyalty-investigation case. Whereas the dissenters—once in the majority—would apparently have allowed any and

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567. 334 F.2d 488 (9th Cir. 1964). Justice White, dissenting, asserted that Brown had overruled Douds, 381 U.S. at 464-65, and that the disabling provisions of the 1950 SAC Act had now been called into question as well. As Robel, 389 U.S. 258 (1967), demonstrated, he was correct, but not because the Act was a bill of attainder.
570. Id. at 829-30. Justices Harlan, Stewart, and White dissented.
all inquiries into past or present political activity, the majority paid
attention to the presence or absence of a “showing . . . of present
danger of sedition.”

The second “loyalty oath” decision of 1966, *Elfbrandt v. Russ-
sell*, 572 rested firmly and expressly, for the first time, on the theory
that a statute that penalized knowing membership in the Communist
Party (as well as any other subversive organization), and was not
limited to those members who shared the “specific intent” to further
the Party’s unlawful goals, effected an unconstitutional infringement
of freedom of association under the first amendment. 573 Justice
White, joined in dissent by Justices Clark, Harlan, and Stewart, ac-
curately observed that the *Elfbrandt* decision represented a departure
from past doctrine. Several prior decisions had upheld state
laws which, like the Arizona law at issue here, essentially required
state employees to swear that they were not knowingly members of
the CP or other subversive organizations. 574 Thus, the Court which
in 1952 had permitted states to deny employment to any member of
the Communist Party 575 was now ruling that only those members
with criminal intent could be so treated. Moreover, as the dissenters
noted, 576 it was a major step to go from placing limits on what could
constitutionally be made *criminal* (compare *Scales*) to placing those
same limits on eligibility requirements for state *employment*. Later
that term, in *Keyishian v. Board of Regents*, 577 the Court effectively

571. *Id.* at 829.
573. *Aptheker v. Sec'y of State*, 378 U.S. 500, 510 (1964), too, had turned largely
on the failure of the law to distinguish between “active” and “innocent” members, but
had done so under the ostensible heading of “freedom of travel.” See *supra* text accom-
panying notes 159-62. Professor Gunther has suggested that *Robel* was the ground-
breaking case in this area, observing that, in prior cases, “again and again, the Court
rested these rulings not on the broad issues tendered to it but on narrow, often tenuous,
escape routes.” Gunther, *supra* note 167, at 1141. But the *Elfbrandt* and *Keyishian*
decisions seem clearly grounded on straight-ahead first amendment principles.

574. See *supra* text accompanying notes 394-99.
576. *Elfbrandt*, 384 U.S. at 23. It is worth noting, however, that the dissenters
were, in 1966, still willing to accept as established fact the Congressional findings of
1950, namely that the CPUSA was “an organization which has been found to be con-
trolled by a foreign power and to be dedicated to the overthrow of the government by any
illegal means necessary to achieve this end.” *Id.* at 21.

577. 385 U.S. 589 (1967) (*Keyishian* also struck down, on vagueness grounds, a
provision requiring removal from state employment of one who makes “treasonable or
seditionous” utterances, because of the problem in distinguishing between incitements to
action and statements of abstract doctrine.) See also *Gilmore v. James*, 274 F. Supp. 75,
91-93 (N.D. Tex. 1967) (relying on *Keyishian* and *Elfbrandt*), *aff'd*, 389 U.S. 572
(S.D.N.Y. 1967), *aff'd*, 390 U.S. 36 (1968), each of which upheld “positive” loyalty-oath
requirements (*i.e.*, oaths pledging to support the U.S. Constitution) imposed upon public
reaffirmed the holding of *Elfbrandt*, by an identical 5-4 margin, as did the *Robel* decision, in essence, shortly thereafter.\(^{578}\)


For criticism of *Keyishian*, *Whitehill*, *Knight*, and the distinction generally between “positive” and “negative” oaths, *see Note, Loyalty Oaths*, 77 YALE L.J. 739, 753-64 (1968). For criticism of loyalty oaths generally, *see H. Kalven, supra* note 9, at 340-67 (“The test oath is . . . a gratuitous, unnecessary legal device. . . .” *Id.* at 341). *See also* T. Emerson, *supra* note 9, at 240-41, 245-46, criticizing the “positive” oath, and observing, at 240, that the Supreme Court “has made it virtually impossible for . . . government to impose a meaningful loyalty oath upon its employees.”

*See also* Schneider v. Smith, 390 U.S. 17 (1968), ruling, on statutory grounds, in favor of a marine engineer who had been denied a license by the Coast Guard because he admitted, in response to an official questionnaire, that he had belonged to the CP. Sidestepping constitutional questions, the majority (through Justice Douglas) declined to conclude that Congress had authorized any such inquiry into associational ties on the part of maritime personnel. To construe the governing legislation more broadly, he said, would raise “the kind of issue present in *Shelton v. Tucker.*” *Id.* at 24.

Loyalty oaths continued to be a subject of Supreme Court attention into the early 1970’s. Another “positive” oath was upheld summarily, in Ohlson v. Phillips, 397 U.S. 317 (1970), *aff'g* 304 F. Supp. 1152 (D. Colo. 1969). In Lisker v. Kelley, 401 U.S. 928 (1971), *aff'g* 315 F. Supp. 777 (M.D. Pa. 1970), the Court summarily upheld an oath required of candidates for public office in Pennsylvania, to the effect that a candidate is not a “subversive person,” defined as, *inter alia*, a knowing member, sharing the organization’s unlawful goals, of an organization which advocates the forcible overthrow of government. (*Lisker* thus appears to be consistent with *Elfbrandt*.) Justices Douglas and Brennan dissented.

Connell v. Higginbotham, 403 U.S. 207 (1971), was a per curiam opinion which unanimously upheld the “positive” part of a Florida loyalty oath, but which reversed the appellant’s dismissal for refusing to swear that she “[does] not believe in the overthrow of the Government . . . by force or violence.” That part of the oath, said the Court, fell “within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process.” *Id.* at 208. The majority cited *Slochower* and *Speiser*, but made the point more clearly in this case than it had in those. Justice Marshall, joined by Justices Douglas and Brennan in concurring in the result, asserted that “belief in overthrow” could not properly be made the basis for a denial of governmental benefits.

Finally, in *Cole v. Richardson*, 405 U.S. 676 (1972), a controversial two-part oath was upheld, by four of seven justices, as essentially a “positive” oath in its entirety. The majority was untroubled by the requirement that Massachusetts public employees promise to “oppose” the forcible or illegal overthrow of government, viewing it as merely supportive of the required promise to “uphold and defend” the Constitution. Justices Douglas, Marshall and Brennan disagreed, with Justice Douglas observing that the oath “requires that appellee ‘oppose’ that which she has an indisputable right to advocate.” *Id.* at 689.

578. 389 U.S. 258 (1967). *See supra* text accompanying notes 167-69. *See also* Reed v. Gardner, 261 F. Supp. 87 (C.D. Cal. 1966), relying on *Elfbrandt* in striking down a Medicare provision denying benefits to *all* members of organizations required to register under the McCarran Act.
As the 1960's drew to a close, the era of concern over Communist subversion of American society was essentially over. For virtually every term in nearly two decades, the Supreme Court had confronted cases involving some aspect of the national crusade against Communism, rendering multiple rulings on the extent of the constitutional rights of an American citizen to advocate the forcible overthrow of the government, to be a member of the Communist Party, and to refuse to answer questions concerning such advocacy or membership. The most libertarian position the Court adopted was with respect to civil and criminal penalties attached to membership in the CP; the Court allowed "active" membership to be punished, but would not permit a law to stand that punished anything less.

With respect to civil penalties, such as ineligibility for government employment or state bar membership, resulting from failure to answer questions pertaining to advocacy or membership, the law was less clear. The Court had begun, in the mid-1960's, to employ strict judicial scrutiny more consistently in freedom of association cases, but the less liberal HUAC and bar admission cases of the late 1950's and early 1960's had not been overruled. In addition, a strong presence was still felt on the Court by Justices who believed that compulsory disclosure was permissible even in contexts in which sanctions for membership or advocacy itself would not be.

Regarding punishable advocacy itself, nothing had changed; Dennis was still good law, albeit modified by Yates. The Scales decision of 1961, upholding the constitutionality of making "active" CP membership a crime, rested firmly on Dennis' shoulders. While the years following Scales brought nothing but greater "liberalism" from the fabled Warren Court, was there clearly a reason to believe that by the end of the decade, the Court would have overruled the Dennis decision of 1951, or at least have reached a different result, if a new Smith Act conviction were brought before it for review?

From the Dennis Court itself, only the dissenters, Justices Black and Douglas, remained. Would they have been joined, in the late 1960's, by Abe Fortas, who had succeeded Arthur Goldberg in 1965? By Thurgood Marshall, who had replaced Tom Clark in 1967? By Chief Justice Warren or Justice Brennan, each of whom had voted against the government in "loyalty" cases at nearly every opportunity since joining the Court in 1953 and 1956, respectively? Despite their voting records, neither the Chief Justice nor Justice Brennan ever wrote or joined an opinion which called the basic constitutional premises of Dennis and Scales into question, despite the fact that Justices Black and Douglas were doing so on a continual basis. In fact, Justice Brennan had indicated some agreement with
the government's constitutional position in the SACB case,\textsuperscript{579} and shown meaningful sympathy for the government's position in Robel.\textsuperscript{580}

It was also possible, but obviously less likely, that even one or more of the "conservative" Justices of the late Warren Court era might have joined an opinion at variance with Dennis. Justice Harlan had authored the liberalizing Yates opinion, but had also authored the Scales opinion, in which Justice Stewart joined. None of the other votes cast in cases decided subsequent to 1961 were a clear indication of how a Justice would have voted in Dennis itself. Many of those votes, however, on the constitutionality of laws imposing employment disabilities on Communists,\textsuperscript{581} arguably implied a concurrence with the fundamental precept of Dennis that (active) members of the CPUSA posed a sufficiently serious danger to American society to justify legislation that would otherwise violate the first amendment. Justices Harlan, Stewart, and White had generally been part of the "conservative" bloc in those cases. Then again, none of those later cases dealt with laws making seditious advocacy a crime.

Then came Brandenburg.

IV. MODERN TIMES: BRANDENBURG AND BEYOND

A. Did Brandenburg Change the Law?

The case of Brandenburg v. Ohio,\textsuperscript{582} decided in 1969, produced, as pure dictum, a wonderful restatement of the clear and present danger test in the course of resolving a remarkably easy constitutional dispute.

The actual speech which led to the conviction of Brandenburg, a Ku Klux Klan leader, under the Ohio Criminal Syndicalism Statute, can barely be said to have contained any incitement. The Supreme Court might well have decided the case with a minimum of discussion, on the simple grounds that the speech in question, while mildly threatening, was surely within the protection of the first amendment. Instead, the Court focused solely on the Ohio statute, striking it down as overbroad on its face without ever uttering the word "overbroad."

\textsuperscript{579} CP v. SACB, 367 U.S. 1, 191 (1961) (Brennan, J., dissenting in part).


\textsuperscript{581} E.g., Robel, 389 U.S. 258; Keyishian, 385 U.S. 589; Elfbrandt, 384 U.S. 11; Aptheker, 378 U.S. 500.

\textsuperscript{582} 395 U.S. 444 (1969).
The facial overbreadth approach, which in its extreme form totally bypasses the facts of the case and simply considers plausible hypothetical applications of a statute, had been used to an ever greater extent in civil rights cases of the preceding decade, although the doctrine had yet to be fully explicated. In Brandenburg its use was wholly appropriate and virtually free of difficulty, as the rare unanimity of the decision attests. The Ohio Act made it criminal to advocate the "necessity . . . of violence . . . as a means of accomplishing . . . political reform." The infirmity of such a statute, once one accepts the use of the facial overbreadth approach, is clear: it may be applied to mere abstract advocacy, which is constitutionally protected speech, as well as to punishable incitement. That is the principle of Yates, fully consistent with Dennis, and that was all the Court needed to say in Brandenburg.

But the Court, in a brief per curiam opinion, said more. It said that decisions subsequent to 1927—citing only Dennis at this point—

[H]ave fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

The use of the word "imminent" as a necessary ingredient in the formula, not only with respect to either the speaker's intent or the natural tendency of the speech (whichever the Court meant by "directed to inciting"), but also qualifying the nature of the requisite probable response, is striking. If "imminent" is given its usual meaning (as likely to happen without significant delay), and if this was truly meant to be a first amendment rule for all seditious seasons, then Dennis has to have reached a "wrong" result. Yet the Court appended to its apparently momentous formulation the following footnote:

It was on the theory that the Smith Act . . . embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. Dennis . . . That this was the basis for Dennis was emphasized in Yates . . ., in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

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586. 395 U.S. at 447 (emphasis added).
587. Id. at 447-48, n. 2. One scholar has suggested that the citation of Dennis in Brandenburg "must be disingenuous, unless it represents some equivocal reservation that the Brandenburg standard does not apply to secret political conspiracies aiming at over-
The remainder of the brief majority opinion, aside from its mysterious citation of a string of libertarian decisions ranging from Stromberg to Robel, does nothing but underscore the simple and uncontroversial basis for the decision: the distinction between abstract advocacy and advocacy of action, introduced as a constitutionally-influenced product of statutory interpretation in Yates but now firmly, yet unsurprisingly, ensconced in the first amendment. The word "imminent" reappeared once in the opinion, but needlessly, as the Court observed that "[n]either the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action."\(^{588}\)

Eighteen years after Dennis, Justices Black and Douglas continued to stake out positions to the left of the rest of the Court in their Brandenburg concurrences. Justice Black was succinct, and hopeful. "I join the Court's opinion," he said, "which, as I understand it, simply cites Dennis . . . , but does not indicate any agreement on the Court's part with the 'clear and present danger' doctrine on which Dennis purported to rely."\(^{589}\) Justice Douglas wrote at greater length, expressing his opposition, with Justice Black, to the use of any clear and present danger test, and criticizing its "free-wheeling", "twisted and perverted" use in Dennis.\(^{590}\) To him, the constitutional dividing line was not the line between abstract advocacy and incitement, but that between "ideas and overt acts."\(^{591}\) Quoting from Justice Holmes' opinion in Gitlow v. New York, he asserted, with justification: "We have never been faithful to the philosophy of that dissent."\(^{592}\)

By the unnecessary but presumptively purposeful use of the word "imminent" in restating the clear and present danger test, the Court in Brandenburg took a highly visible step toward re-adopting the Holmes-Brandeis theory of freedom of speech.\(^{593}\) Yet, as Douglas

\(^{588}\) 395 U.S. at 448-49. Other commentators have agreed that the Yates standard sufficed to invalidate the Ohio statute in question in Brandenburg. See, e.g., Redish, supra note 372, at 1175; Rabban, supra note 211, at 1351.

\(^{589}\) 395 U.S. at 450.

\(^{590}\) Id. at 454.

\(^{591}\) Id. at 456-57.

\(^{592}\) Id. at 452.

\(^{593}\) Prof. Kalven observed that "the gesture of the per curiam opinion, which is
recognized, in no truly difficult case had that rationale yet prevailed.\textsuperscript{\textit{864}}

\textbf{B. The Supreme Court Post-Brandenburg (1) Cases Involving Advocacy}

In the two decades since \textit{Brandenburg}, the Supreme Court has rarely returned to the important issues raised in that decision, and has shed little added light upon its meaning. One such occasion was \textit{Hess v. Indiana},\textsuperscript{\textit{606}} another brief per curiam opinion, in another easy case. The case centered around a single statement made by Hess during a college anti-war demonstration which had apparently evolved into a mild confrontation with the police. During a moment of retreat, it appeared that Hess was heard to say either “We'll take the fucking street later” or “We'll take the fucking street again.” According to the evidence, Hess “did not appear to be exhorting the crowd to go back into the street” and “was facing the crowd and not the street when he uttered the statement.”\textsuperscript{\textit{866}} The Court reversed his conviction for disorderly conduct, addressing the state’s “incitement” rationale within a single paragraph:

\begin{quote}
At best, . . . [his] statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess’ speech. [The Court then restated its \textit{Brandenburg} “test”, adding emphasis to the word “imminent.”] Since the uncontroverted evidence showed that Hess’ statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, \textit{imminent} disorder, those words could not be punished by the State on the ground that they had “a ‘tendency to lead to violence.’”\textsuperscript{\textit{197}}
\end{quote}

\textsuperscript{\textit{606}} customarily a warning not to make too much of the Court’s action, suggests that it did not regard what it was doing as especially important.” H. \textsc{Kalven}, \textit{supra} note 9, at 123. Professors Barrett, Cohen, and Varat report in their casebook, moreover, that they were informed by “a reliable source” that “the case was regarded as easy in its result, and [thus] very little attention was paid to what the opinion said.” \textsc{Constitutional Law: Cases and Materials} 1238 (E. Barrett, W. Cohen, & J. Varat, eds., 8th ed. 1989).

The meaning of the Court’s language in \textit{Brandenburg} has been much analyzed, and frequently deemed uncertain. See, e.g., Rabban, \textit{supra} note 211, at 1351-52; Redish, \textit{supra} note 372, at 1175-77; Greenawalt, \textit{supra} note 426, at 650; H. \textsc{Kalven}, \textit{supra} note 9, at 233-34; Nathanson, \textit{supra} note 459, at 162. Some commentators, however, have had less difficulty finding clarity therein. See, e.g., Gunther, \textit{supra} note 427, at 754 (1975); Comment, \textit{Brandenburg v. Ohio: A Speech Test for All Seasons?}, 43 U. Chi. L. \textsc{Rev.} 151, 156-59, 164 (1975) (authored by Staughton Lynd); J. \textsc{Nowak} and R. \textsc{Rotunda}, \textsc{Constitutional Law} 967-68 (4th ed. 1991).

\textsuperscript{\textit{197}} As Prof. Rabban has observed: “The fact that the \textit{Brandenburg} standard has never been tested during a period of widespread intolerance exacerbates uncertainties about its power, even if its logic is conceded.” Rabban, \textit{supra} note 211, at 1354.

\textsuperscript{\textit{595}} 414 U.S. 105 (1973).

\textsuperscript{\textit{596}} \textit{Id.} at 107.

\textsuperscript{\textit{597}} \textit{Id.} at 108-09 (emphasis in original).
Surely, the author of the Hess opinion meant to emphasize the critical importance of “imminence” of danger as a prerequisite to a valid conviction for incitement; that is the clear thrust of the first, second, and last sentences in the quoted passage. But, as the third quoted sentence indicates, here, as in Brandenburg, a less stringent rationale for the result suggests itself: it cannot fairly be said that Hess was advocating any action, presently or in the future. That being so, the decision, while commendably protective of speech that conceivably could have been characterized as advocacy of action, arguably did not put the Court’s commitment to an “imminence” requirement to a meaningful test. Notably, three Justices dissented anyway, finding Hess’ statement “susceptible of characterization as an exhortation” to “more or less immediate” action.

No more instructive was the revisiting of Brandenburg by Justice Stevens, who wrote for a virtually unanimous Court, nine years later, in NAACP v. Claiborne Hardware Co. The question was whether an award of monetary damages against Charles Evers, imposed in a civil suit arising out of an economic boycott of white merchants by black citizens in Claiborne County, Mississippi, could validly be predicated upon certain speeches made by Evers in 1966 and 1969. In the words of Justice Stevens, Evers’ speeches “generally contained an impassioned plea for black citizens to unify, . . . and to realize the political and economic power available to them.” “In the passionate atmosphere in which the speeches were delivered,” however, they might have been understood as threatening violent retaliation against listeners who failed to uphold the boycott.

Not surprisingly, the Court found that Evers’ speeches were constitutionally protected, and, accordingly, set aside the judgment against him. Somewhat oddly, what seemed to matter to Justice Stevens was simply that no violent acts occurred as a result of the speeches in question. Thus, while reiterating the Brandenburg formulation, he went on to say that if Evers’ speeches “had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct.” But, no violence followed the 1969 speech, and the violence of 1966 occurred “weeks or months” after Evers’ speech.

598. Accord, Redish, supra note 372, at 1175-76.
599. 414 U.S. at 111 (Rehnquist, J., dissenting).
601. Id. at 928.
602. Id. at 927.
“When such appeals do not incite lawless action,” concluded Stevens, “they must be regarded as protected speech.” Instead of focusing, as one might expect, upon (1) whether the speaker in fact advocated any unlawful action, (2) whether any such unlawful action was likely to occur, and (3) whether it was likely to occur imminently, Justice Stevens appears to have been concerned only with the question of whether any unlawful acts occurred as a result of the speech. This would indeed be perplexing, if Claiborne did not involve civil liability, thus making it essential to link the defendant’s advocacy to some compensable consequence. In any event, the opinion adds little to our knowledge of the depth of the Court’s commitment to the literal wording of the Brandenburg formulation—except that, thirteen years after its emergence, the Court continued to reiterate that highly protective verbal formula.

(2) Cases Involving Association

When the question of the validity of requiring prospective attorneys to disclose prior membership in subversive organizations returned to the Supreme Court in 1971, four Justices adhered to the libertarian view that had governed the issue in 1957. In Baird v. State Bar of Arizona, Justices Black, Douglas, Brennan, and Marshall united behind the position that the State had no power to require a Bar applicant to disclose whether she had ever been a member of the Communist Party or any organization that advocates forcible overthrow of the government. Extending their reasoning in the companion case of In Re Stolar, those four Justices applied the teaching of Shelton v. Tucker in concluding that the state could not require a disclosure of all organizations to which the Bar applicant had ever belonged. Justice Stewart, concurring only in the judgments, supplied the crucial fifth vote in each case. One problem with the disclosure requirement, he explained in Baird, was that mere membership could not be sufficient ground for disqualification. Another problem, in his view, was that Arizona appeared prepared to exclude Baird merely because of her beliefs. Four Justices dissented in each case, deeming inquiries as to “mere membership” permissible as a means of discovering “knowing membership and...willingness to participate in the forceful destruction of

603. Id. at 928.
604. The “test” has also, on occasion been set forth, as such, in dictum. Texas v. Johnson, 109 S. Ct. 2533, 2542 (1989); Healy v. James, 408 U.S. 169, 188 (1972).
605. 401 U.S. 1 (1971).
608. 401 U.S. at 9-10; see also Stolar, 401 U.S. 23, at 31.

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In a companion case, however, Justice Stewart saw things differently, and the outcome changed accordingly. New York required Bar applicants to respond to a two-part question: the first part asked about knowing membership in organizations advocating forcible overthrow, while the second part asked whether the applicant had shared the “specific intent to further the aims of such an organization or group.” Justice Stewart, for the majority, found such an inquiry acceptable. The question, he wrote, was “precisely tailored to conform to the relevant decisions of this Court.” Referring, ten years after Scales, to that decision without any hint of disapproval, he added: “We have held that knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization’s illegal goals, may be made criminally punishable.”

Justice Black, joined by Justice Douglas, dissented, finding the New York case indistinguishable from Baird or Stolar. He suggested, moreover, that the present ruling was inconsistent with Brandenburg, because New York inquired about organizational membership without specifying “that the organization’s advocacy must have been ‘directed to inciting or producing imminent lawless action’ and ‘likely to . . . produce such action.’” (This would obviously be a rather difficult standard to meet, to say the least.) Justice Marshall, in a separate dissent joined by Justice Brennan, appeared to agree. Thus, at least four Justices in 1971 appeared to take seriously the notion that the Brandenburg requirement of “likelihood of imminent harm” applied to all government regulation pertaining to subversive organizations. The other five Justices, far less troubled generally by what they deemed relevant official inquiry (as opposed to prohibition or direct imposition of disabilities), obviously did not believe that Brandenburg had changed the constitutional rules with respect to the Bar admission process. For them, an inclination toward violent overthrow was sufficient to disqualify a would-be attorney, regardless of

611. Id. at 165.
612. Id.
613. Id. at 184 (Black, J., dissenting).
614. Id. at 197. The 1971 bar admission cases are criticized in H. Kalven, supra note 9, at 574-86; and Comment, supra note 593, at 166-73. On compelled disclosure of organizational membership generally, see Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449, 497-98 (1985).
imminence of harm.

In 1974, a majority of the Court applied the principle of *Yates* to an Indiana provision limiting ballot access to political parties willing to file affidavits stating that they do not advocate forcible overthrow.\(^{615}\) The problem, in Justice Brennan’s view, was that the required oath “embrac[ed] advocacy of abstract doctrine as well as advocacy of action.”\(^{616}\) Interestingly, Justice Brennan’s otherwise straightforward opinion appears to contain an obviously inaccurate depiction of pre-Brandenburg case law; after quoting from *Brandenburg*, he wrote:

> This principle that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” has been applied not only to statutes that directly forbid or proscribe advocacy, see *Scales* . . . , *Noto* . . . , *Yates* . . . ; but also to regulatory schemes that determine eligibility for public employment, *Keyishian* . . . ; *Elfbrandt* . . . ; *Cramp* . . . ; see also . . . *Robel* . . . ; tax exemptions, *Speiser* . . . ; and moral fitness justifying disbarment, *Schware* . . . .\(^{617}\)

But of course the Brandenburg “imminence” requirement had not been referred to in any of those earlier cases. Is it remotely possible that Justice Brennan believed that *Brandenburg* had introduced nothing new? Or did he simply wished to make it so appear?

V. Has the Constitutional Teaching of *Dennis* Been Discredited?

If the Supreme Court truly meant (and can be depended on still to mean) its articulation of an “imminence” requirement in *Brandenburg* to be taken seriously, then the conclusion seems inescapable that *Dennis* has been effectively overruled, and indeed, *Dennis* has been described as “obsolete.”\(^{618}\) But, as we have seen, the precedential foundations of the Brandenburg “test” are quite fragile, and it is far from clear that the Court is committed to its application in genuinely difficult cases. Is it so clear that the “constitutional result” of *Dennis* would—or should—be discarded today, if a “similar” case could somehow arise? By my reference to *Dennis*’ “constitutional result,” I mean to focus upon neither the constitutional reasoning of the Justices in 1951 (because the combination of (1) enormous deference to Congress in the area of content-based regulation of speech,

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616. *Id.* at 447. Four Justices, concurring only in the result, felt it unnecessary to reach this issue. *Id.* at 451.
617. *Id.* at 448-49.
and (2) a distortion of the once-paramount "clear and present dan-
ger" test seems so unlikely to recur today) nor the actual result of
the decision (because Yates casts enormous doubt upon the constitu-
tional sufficiency of the evidence against the CPUSA leaders con-
victed in Dennis). Instead, I mean to focus upon the overarching
constitutional principle of Dennis, as modified by Yates and rein-
forced by Scales, that the first amendment permits, at least under
certain circumstances, the punishment of present advocacy of forc-
ible overthrow of the government in the future.

A. Is Subversive Advocacy Within the Protection of the First
Amendment?

At least a few first amendment scholars have argued that the con-
stitutional protection of freedom of speech simply does not embrace
subversive advocacy. If they are correct, then presumably, so was
Dennis.

Such an argument might be based upon historical considerations.
Professor Leonard Levy, in a work not overtly designed to influence
modern constitutional decisionmaking, has persuasively set forth
substantial evidence tending to show that those who adopted the first
amendment were unlikely to have accepted the notion of an unlim-
ited right to criticize the government;\textsuperscript{619} the crime of "seditious li-
bel" had deep roots in the common law of England, and few 18th-
century writers suggested that the concept was fundamentally illegit-
imate. However, direct evidence of what the term "freedom of
speech" meant to the Framers is virtually nonexistent. As Professor
Levy has written: "One searches in vain for a definition of any of the
First Amendment freedoms in the rhetorical effusions of [the] advo-
cates of a bill of rights."\textsuperscript{620} While some have reached conclusions
contrary to those suggested by Professor Levy,\textsuperscript{621} the prevailing ap-
proach to first amendment interpretation appears to be implicitly in
accord with the words of Professor BeVier: "If history suggests that

\textsuperscript{619} L. LEVY, EMERGENCE OF A FREE PRESS (1985).
\textsuperscript{620} Id. at 235.
\textsuperscript{621} Alexander Meiklejohn argued, relying on the writings of Madison and Hamil-
ton, that the first amendment does protect the right to advocate revolution. Meiklejohn,
What Does the First Amendment Mean?, 20 U. CHI. L. REV. 461 (1953). More recently,
Prof. Mayton argued, \textit{inter alia}, that the treason clause of the United States Constitu-
tion, article III, section 3, by virtue of its requirement of an "overt act", bars a convic-
tion for seditious speech. Mayton, Seditious Libel and the Lost Guarantee of a Freedom
treason clause, see also Auerbach, supra note 93, at 202-04.
the framers had no specific meaning in mind, however, it also per-
mits the conclusion that no particular meanings were deliberately 
foreclosed, except perhaps a meaning that would permit prior licens-
restraints.” Thus, commentators have felt fairly free to rumi-
nate about pragmatic and philosophical reasons for extending or de-
nying special protection to speech, unconstrained by a need to 
attribute such thoughts to the Framers.

The argument that subversive advocacy deserves no constitutional 
protection was made as early as 1956, by Professor Auerbach, but 
was perhaps expressed best by Robert Bork in a 1971 article:

Speech advocating forcible overthrow of the government contemplates a 
group less than a majority seizing control of the monopoly power of the 
state when it cannot gain its ends through speech and political activity. 
Speech advocating violent overthrow is thus not “political speech” as that 
term must be defined by a Madisonian system of government. It is not polit-
ical speech because it is not aimed at a new definition of political truth by a 
legislative majority. Violent overthrow of government breaks the premises 
of our system concerning the ways in which truth is defined, and yet those 
premises are the only reasons for protecting political speech. It follows that 
there is no constitutional reason to protect speech advocating forcible 
overthrow.

It is an argument possessing great force and logic. Can it be persua-
sively rebutted?

Attempts to justify constitutional protection of subversive advoca-
cy have been made. Professor Emerson, the first amendment 
scholar whose views seem to most nearly approximate those of Jus-
tice Black, argued that extending freedom of expression “to all 
groups, even those which seek to destroy it,” was the only position 
consistent with a basic affirmative theory of freedom of expression.

Reaching the same result with respect to the status of subversive 
advocacy as presumptively protected speech, Professor Redish has 
written: “If the first amendment means anything, it represents a 
value judgment that the interchange of ideas, information and sug-
gestions is to be kept free and open, at least if the interchange

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624. Auerbach, supra note 93, at 186-89.
625. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 31 (1971). Accord, BeVier, supra note 622, at 309-11; see also F. Schauer, Free Speech: A Philosophical Enquiry 194-97 (1982), treating similar arguments with re-
spect, but stopping short of an ultimate conclusion.
626. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 309 (1963). See also T. Emerson, supra note 9, at 160. For another “avowedly absolutilst” interpretation of the first amendment, holding that “[t]he central function” of the guarantee of freedom of speech “is to keep open the possibility of correcting erroneous beliefs,” see DuVal, Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication, 41 GEO. WASH. L. REV. 161, 258 (1972).
presents no real threat of harm to society.”627 In reaching this conclusion, Professor Redish emphasized “the value inherent in allowing individuals to think and discuss freely,” thus enabling people “to develop their mental faculties to the fullest.”628

But the most satisfying rebuttal to the Bork argument may have been set forth by Professor Kalven:

If a man is seriously enough at odds with the society to advocate violent overthrow, his speech has utility not because advocating violence is useful but because the premises underlying his call to action should be heard. He says something more than “Revolt! Revolt!” He advances premises in support of that conclusion. And those premises are worth protecting, for they are likely to incorporate serious and radical criticism of the society and the government.629

Drawing a workable line between the “valuable radical premises—the criticism” and the “not-so-valuable” call to illegal action, Professor Kalven went on to say, is a very difficult task.630 In harmony with that view, Professor Emerson argued that the punishment of subversive advocacy inhibits “other participants in the political process, on the border or near the position taken by those who have been proceeded against,” thus creating “an atmosphere hostile to all open discussion.”631

The extension of presumptive first amendment protection to subversive advocacy is thus appropriate, and, contrary to Professor Emerson’s thesis, should not be limited by any artificial characterization of some action-oriented advocacy as “action” rather than “speech.” In his admirable zeal to construct (or explain) a system in

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627. Redish, supra note 372, at 1165.
628. Id. at 1164. See also F. Schauer, supra note 625, at 195-96, addressing arguments for protection of subversive advocacy based upon both “autonomy” and “ca-tharsis” (“advocacy of illegal conduct may be less likely to lead to illegal conduct than would prohibition of that advocacy”); Solum, Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech, 83 Nw. U.L. Rev. 54, 120-23 (1989).
629. H. Kalven, supra note 9, at 120. Effectively augmenting Prof. Kalven’s point, Prof. Greenawalt has observed that advocacy of law violation “could be of significant value for participants making political decisions. Bork does not really explain why explicitly political expression that may contribute substantially to the operation of democratic political process can summarily be put outside the First Amendment because of the nonparticipatory attitude of the speaker.” Greenawalt, supra note 426, at 758-59, n. 418. See also F. Schauer, supra note 625, at 196, agreeing that “where words of incitement are combined with words of criticism . . . such speech is covered by the Free Speech Principle.”
630. H. Kalven, supra note 9, at 120.
631. T. Emerson, supra note 9, at 126. “In short,” he concluded, “no system of free expression can neatly excise one form of expression, however noxious, and leave the system unimpaired.” Id.
which “expression” is never subject to suppression by government, Professor Emerson wrote:

As the communication approached the point of urging immediate and particular acts of violence, it would come closer to being classifiable as action . . . Instructions on techniques of sabotage, street fighting, or specific methods of violence are well into the area of action. A fortiori, . . . organizing groups to engage in acts of violence would fall within the action category.632

The characterization of words as “action” should be rejected primarily because it is literally inaccurate, and because appropriate real-world results may still be reached, albeit in a less theoretically “pure” fashion, by conceding that freedom of speech, while presumed, is not absolute.633

The additional argument has on occasion been made that “clandestine utterance is not entitled to the same high level of protection that must be accorded its open counterpart,” and that this distinction justifies the conviction of the CPUSA leaders in Dennis.634 The argument proceeds from the well-received Holmesian “marketplace of ideas” metaphor,635 and postulates that a speaker who declines to compete in the open market is not deserving of first amendment protection because his speech potentially creates danger that cannot be averted by “the antidote of public discussion.”636 The argument is not without force, but is ultimately unpersuasive, and rests upon an unnecessarily restricted view of the “marketplace” rationale. Subversive expression may or may not pose a greater danger when communicated in secret, but there seems no inherent reason why purely private communications should not presumptively be treated as constitutionally protected speech. Moreover, an exception predicated upon the “clandestine” nature of speech would necessitate the difficult task of deciding just how widely or publicly communicated one’s words need be to receive first amendment protection. Furthermore, the argument would be stripped of utility as soon as the subversive

632. Id. at 125. See also Mendelson, The Clear and Present Danger Test — A Reply to Mr. Meiklejohn, 5 VAND. L. REV. 792, 794 (1952), suggesting a constitutional distinction between “discussion-words” and “force-words”.

633. Compare Greenawalt, supra note 426, at 747, arguing that speech directed to training others to commit crimes should not ultimately receive protection.

634. Mendelson, Clandestine Speech and the First Amendment — A Reappraisal of the Dennis Case, 51 MICH. L. REV. 553, 557 (1953) [hereinafter Mendelson, Clandestine Speech]. Accord, Mendelson, Clear and Present Danger — From Schenck to Dennis, 52 COLUM. L. REV. 313, 330-31 (1952). Agreeing in principle with Prof. Mendelson is Lusk, The Present Status of the “Clear and Present Danger Test” — A Brief History and Some Observations, 45 KY. L. J. 576, 604-06 (1957); Mr. Lusk nonetheless viewed Dennis as wrongly decided because, inter alia, “the Court made no distinction in its holding between open and secret speech,” and because the jury had not been instructed that clandestine speech was a prerequisite to conviction. Id. at 605, n. 115.


636. Mendelson, Clandestine Speech, supra note at 555.
advocacy was "publicly" voiced. In any event, it is by no means clear that all of the advocacy for which American Communists were prosecuted in the postwar era can accurately be characterized as "clandestine." 637

Finally, any suggestion that association for the purpose of expression ought not to be protected, simply because it fits a legal definition of "conspiracy," should be rejected. The suggestion found expression, in the concurring opinion of Justice Jackson in Dennis, 638 and that opinion has been the subject of thorough and persuasive criticism elsewhere. 639 In the words of Professor Filvaroff, "it is difficult to understand why—as Justice Jackson would have had it in Dennis—an agreement to make a speech which exists only in the defendants' minds is entitled to less protection than a speech which has actually been delivered." 640 If the conspiracy to speak is inchoate at the time of prosecution, there is obviously a problem in punishing the conspiracy if the speech itself would only be punishable under circumstances which have not yet come into being—such as circumstances posing a likelihood of imminent harm, in the words of Brandenburg. 641 Moreover, despite the enhanced danger of combination that justifies conspiracy prosecutions in general, a conspiracy to engage in subversive advocacy (as opposed to a conspiracy to act) does not necessarily pose a sufficiently cognizable danger to warrant a societal sanction. To quote Professor Filvaroff once again:

Just as conspiracy itself is an inchoate crime, so too is incitement, like most other speech crimes. Thus, to charge a speech conspiracy is to load one inchoate offense upon another . . . . A conspiracy to incite is thus an offense twice removed from the substantive crime, an offense doubly distant from the evil sought to be avoided. 642

637. Prof. Mendelson argued, to the contrary, that the advocacy which led to the Smith Act prosecutions took place "only in a . . . network of secret underground 'study groups' open only to carefully selected totalitarian party members. . . ." Id. at 556. Such a characterization arguably ignores the Party's publications and public rallies and speeches.

638. 341 U.S. at 572-76 (Jackson, J., concurring).
640. Id. at 219. Essentially in agreement is Greenawalt, supra note 426, at 774, n. 273. If an agreement to speak is not protected, he wrote, "this would not appear to be a simple product of the law of conspiracy, but of some sort of test of danger, which Jackson eschewed formulating in Dennis." See also Greenawalt, supra note 211, at 203.
641. Greenawalt, supra note 426, at 774; H. Kalven, supra note 8, at 193; Nathanson, supra note 467, at 192.
642. Filvaroff, supra note 639, at 235. Prof. Emerson, characteristically, was more blunt: "Conspiracy to engage in expression cannot constitutionally be made an offense." T. Emerson, supra note 9, at 410. Accord, Nathanson, supra note 467, at 192.
Resolving the question of Dennis’ validity, therefore, cannot rest upon a pronouncement that subversive advocacy, or association to engage therein, is outside the protection of the first amendment.

B. Can the “Constitutional Result” of Dennis Be Justified by the Danger Posed by Advocacy of Future Subversion?

1. What Was the Constitutionally Significant Danger?

In his plurality opinion in Dennis, Chief Justice Vinson suggested that “an attempt to overthrow the Government by force, even though doomed from the outset,” was a constitutionally “sufficient evil for Congress to prevent.” The damage which such attempts create both physically and politically to a nation, he continued, “makes it impossible to measure the validity [of government suppression of subversive advocacy, presumably] in terms of the probability of success ....” Governmental concern regarding an attempt at forcible overthrow would, in an appropriate case, surely be justified. Might any lesser danger justify suppression of advocacy?

Only rarely, to my knowledge, has the suggestion been made that something less than the danger of an attempted overthrow (however remote) might possibly justify punishment of speech. Most notable is the argument, made by Gorfinkel and Mack in 1951, that “[a] conspiracy to plan the overthrow of the government by force and violence should be a sufficient substantive evil to justify interference with speech that creates a clear and present danger of aiding or abetting [or helping to bring about] that conspiracy.” Those commentators raised the possible objection, however, that the Smith Act, so analyzed, would add little or nothing to the existing crime of seditious conspiracy; at most, it would “[move] the line of defense one step forward.” But to justify the creation of one essentially inchoate offense, on the ground that it may give rise to the danger that yet another inchoate crime may result, is an unacceptably tenuous basis for the suppression of free expression.

At a minimum, then, the danger that begins to justify governmental deterrence of subversive advocacy is the danger of an attempt to forcibly overthrow the government.

643. 341 U.S. at 509 (emphasis added).
644. Id.
645. “Among the possible substantive evils in Dennis, for example, are successful overthrow of the government (very great evil — very small likelihood), substantial unsuccessful revolution (great evil — small likelihood), violent acts preparatory to revolution (less evil — greater likelihood).” Greenawalt, supra note 419, at 717.
647. Id. at 501 (citing 18 U.S.C. § 2384).
2. How Great Must the Evidence of Danger Be to Justify Suppression?

a. How Great Was the Danger in 1948?

It is beyond the scope of this article to comprehensively evaluate the danger of attempted forcible overthrow posed by the American Communist Party in the late 1940's. Moreover, in making such an assessment with the benefit of hindsight, one may well fail to adequately appreciate the contemporary reasonableness of the perception of potential danger posed by Party advocacy at that time. The reaction to Dennis by the American press was apparently largely favorable, and some legal scholars wrote approvingly of the decision as well. None of them suggested, however, that the CPUSA posed an imminent danger to American internal security.

What does seem highly significant is the existence of contemporaneous writings by commentators who, like Justice Douglas, were not persuaded that the CPUSA posed any significant danger to American democracy in the mid-20th century. Particularly striking, in this regard, is an article by Louis B. Boudin, debunking the notion that either the Russian or Eastern European experience with Communist takeover was at all likely to be replicated in this country.

648. The task would likely prove difficult in any event. Writing in 1984, Steinberg observed: "All government documents with relation to the CP remain classified." P. STEINBERG, supra note 8, at 293.

649. M. BELKNAP, supra note 8, at 141-42. The majority of American citizens probably supported the ruling as well. A survey taken in mid-1954 found that, in response to the question, "How great a danger do you feel American Communists are to this country at the present time — a very great danger, a great danger, some danger, hardly any danger, or no danger?," a combined 43% of respondents chose "a very great danger" or "a great danger," while only 11% selected either "hardly any danger" or "no danger." S. STOUFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES 75-76 (1955).

650. E.g., Corwin, supra note 372; Richardson, Freedom of Expression and the Function of Courts, 65 HARV. L. REV. 1 (1951); see also W. BERNs, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 124 (1957); Gorfinkel & Mack, supra note 646; Wiener, supra note 263.

651. E.g., H. CHASE, supra note 66, at 1-10, 27; Antieau, Dennis v. U.S. — Precedent, Principle or Perversion?, 5 VAND. L. REV. 141, 144-47 (1952); see also J. L. O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 49-56 (1955). The same judgment has, of course, been made in retrospect. E.g., T. EMERSON, supra note 9, at 115; D. CAUTE, supra note 78, at 187 ("The government took a sledgehammer to squash a gnat."); P. STEINBERG, supra note 8, at 290. Also, see the discussion of the limited official fear of the CPUSA in 1947 and 1948, in P. STEINBERG, supra note 8, at 59-61, 144. Steinberg also quotes President Truman, from a 1950 speech: "We know that the greatest threat to us does not come from the Communists in this country where they are a noisy but small and universally despised group." Id. at 187.

652. Boudin, supra note 347.
With respect to the Communist nations of Eastern Europe, Boudin contended:

In all of those countries the governments which had existed prior to World War II were destroyed by the German invasion; and the governments established by the Germans were, in their turn, overthrown by the Russian armies. The Communist Parties of those countries had nothing to do with these overturns, and were established in power by the Russian armies. Furthermore, Boudin continued, “none of those countries had ever known real democratic government; and . . . in Czechoslovakia, which had enjoyed democratic government for a short period, the situation was sui generis.” Finally, he observed, “coalition government, the entering wedge which gave the Communists a leverage on the government of which they were a part, . . . is utterly unknown and actually impossible under our system of government.”

As many a commentator has suggested, any dangers posed by the Communist Party in America in the late 1940’s almost surely were not the product of the subversive advocacy (or the conspiracy to so advocate) for which they were ostensibly punished. The Party may have enhanced the dangers of foreign espionage and industrial sabotage, and may even have amounted to a conspiracy to forcibly overthrow the United States government, but these were not (and could not have been) the bases of the Smith Act prosecutions.

Therefore, there is reason to seriously doubt that Communist

653. Id. at 342.
654. Id. at 346.
655. Id. at 347. Boudin was, in large part, responding to the position espoused by Justice Jackson in Dennis. Jackson, of course, had argued in Dennis that “the Communist strategem” — based largely on “infiltration and deception” — “outwits” statutes like the Smith Act if a clear and present danger is a prerequisite to conviction. 341 U.S. at 565, 567. Boudin properly retorted: “His criticism is in effect directed not only to the ‘clear and present danger’ rule, but against the kind of statute to which it was being applied. But the defendants at bar were not convicted under a statute outlawing the assumption of power by wit and cunning.” Boudin, supra note 352, at 347.
656. See, e.g., M. Belknap, supra note 8, at 143; H. Kalven, supra note 8, at 199, 254; M. Konvitz, supra note 99, at 123.
657. Indeed, those dangers are arguably the only tangible ones to emerge from a candid reading of so clearly an anti-communist tract as J. Edgar Hoover, Masters of Deceit (1958); see especially id. at 271-87. See also H. Chase, supra note 66, at 10, and his comment, at 79, that “the record offers no evidence that laws abridging freedom of speech and the like have in themselves curtailed the recruiting of spies and saboteurs, actual or potential.” Hoover himself, writing in 1958, conceded that the Soviet Union had, by the postwar era, gone far in the direction of divorcing its espionage activities from the CPUSA. J. Edgar Hoover, supra, at 274-75. “There is no documentation in the public record of a direct connection between the American Communist Party and espionage during the entire postwar period.” D. Caute, supra note 78, at 54 (emphasis in original). Accord, R. Morgan, Domestic Intelligence: Monitoring Dissent in America 45 (1980). See also J. Edgar Hoover, supra at 283: “The Communist Party USA, has not reached the point where preparations for sabotage are vital to its future plans.”
658. The suggestion appears, e.g., in Rostow, supra note 352, at 224, but is questioned in H. Kalven, supra note 9, at 199.
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Party advocacy posed any significant danger in America during the postwar era.

b. How Should the Danger Be Evaluated?

The selection of a general approach to the formulation of constitutional limits upon the regulation of subversive advocacy is an endeavor that has been central to the mission of many other thoughtful articles, and is beyond the scope of this one. At least two prominent scholars, in fairly recent works, have essentially embraced the Brandenburg test, but with important modifications, appropriately raising questions about the scope and meaning of that test and persuasively suggesting answers to those questions. While the “clear and present danger” test, so designated, has survived Dennis in only one or two very narrow contexts, Professor Redish has properly observed that “many have viewed Brandenburg—and it is a view that seems entirely correct—as simply a protectionist version of clear and present danger.” Equally prominent scholars, in the recent past, have rejected the “clear and present danger” test as insufficiently protective of speech.

In the absence of a specialized rule, regulation of subversive advocacy would, as content-based regulation of expression, presumptively be governed by a strict standard of judicial scrutiny, requiring the government to demonstrate a “compelling” need for the prohibition. Indeed, as Professor Redish has suggested in presenting his version of the “clear and present danger” test, such a standard “partakes of the compelling interest approach that ideally guides courts...”

659. Redish, supra note 372, at 1176-97; Greenawalt, supra note 426, at 756-62. Prof. Greenawalt would reserve the strongest protection, however, for “public ideological solicitation,” and suggested a less stringent “probability” test for “private ideological solicitation.” See id. at 762-63. Prof. Redish, significantly, would “[replace] the universal requirement of imminence with a flexible method of determining the level of immediacy needed in each case.” Redish, supra note 372, at 1181.

660. It has apparently remained the standard for assessing the legitimacy of judicial orders holding speakers in contempt of court as a result of speech publicly criticizing judges in connection with ongoing judicial proceedings. See, e.g., Wood v. Georgia, 370 U.S. 375, 384-85 (1962). See also Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976), suggesting a similar approach to cases involving prior restraints in the form of judicial “gag orders”.

661. Redish, supra note 372, at 1185.

662. T. Emerson, supra note 9, at 124; Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 910-12 (1963); Linde, supra note 577, at 1174-75, 1183-84. (“Legislation directed in terms at expression,” according to Justice Linde, “should be found void on its face.” Id. at 1174.)

663. See cases cited supra at note 236.
in their interpretations of the First Amendment.” Properly utilized and understood, the compelling interest approach requires a factual showing by the government in support of its contention that the danger to which the law is directed is real.

By any of these measures, Dennis appears to have been wrongly decided, in principle as well as in fact.

VI. WHERE DO WE STAND TODAY?

The Smith Act remains on the books, unused now for nearly three decades. So, too, do various state statutes, some of which declare that the Communist Party (or any “subversive organization”, more generally defined) is illegal within that state; some of which make it illegal to be a member of such an organization; and some of which continue to proscribe advocacy of crime or violence as a means of effecting political change.

Presumptively, a statute of the latter kind would be facially overbroad, and thus unconstitutional, unless narrowly construed by the courts of that state to reach no further than Brandenburg permits; but there would seem to be no general impediment to arriving at such narrowing constructions. Prohibitions of membership, if not completely preempted by the Smith Act, almost certainly must be narrowed to conform to the Scales distinction between innocent and active membership. As so narrowed, however, these statutes would also seem able to withstand constitutional challenge, unless the courts are prepared to rule that Scales and its progeny have been undermined by Brandenburg, with the result that only likely immi-
dent danger can justify membership prohibitions. Such a result is
difficult to imagine, as a practical matter, and does not appear to be
the law in light of the post-Brandenburg decisions in Whitcomb\textsuperscript{671}
and the 1971 bar admission trilogy.\textsuperscript{672}

At the federal level, the Smith Act itself is facially overbroad as
written, but must be regarded as narrowed by Scales, with respect to
the membership clause, and by Yates (and Brandenburg?), with re-
spect to its prohibitions of advocacy. Only the state statutes outlaw-
ing the Party completely are clearly unconstitutional, under Scales,
if not pre-empted by federal legislation as well.

Might any or all of these prohibitions usefully be removed from
the statute books of our nation? Others have wondered, with justifi-
cation, whether these laws have truly contributed to our national se-
curity.\textsuperscript{672} To suggest that the statutes governing seditious advocacy
be repealed is probably to go too far, if Brandenburg truly limits the
reach of those proscriptions. But to make membership—even know-
ing, active membership—in any organization a crime does seem to
be a highly unnecessary restriction on individual freedom, given the
existence of valid statutory prohibitions of conspiracies to act ille-
gally.\textsuperscript{674} As others have suggested,\textsuperscript{676} membership prohibitions seem
more likely than conspiracy prosecutions to chill and inhibit political
association, yet give little marginal advantage. Moreover, there must
always be concern, under the first amendment, about setting (or tol-
erating) precedents that may prove difficult to isolate. In the words
of Justice Black: “When the practice of outlawing parties and vari-
ous public groups begins, no one can say where it will end.”\textsuperscript{676}

Prohibitions of subversive organizations, and of membership in such
organizations, ought therefore to be repealed.

In making that recommendation, I have no illusions. As Professor
(now Justice) Linde wrote, almost 20 years ago: “Rarely is there any

\textsuperscript{671} See supra text accompanying notes 615-17.
\textsuperscript{672} See supra text accompanying notes 605-14.
\textsuperscript{673} E.g., T. Emerson, supra note 9, at 126: “Would the Smith Act make the
margin of difference between the Government of the United States continuing to operate
according to democratic procedures and its being overthrown by force and violence? It is
difficult to believe that it would.”
\textsuperscript{674} Accord, Blasi, supra note 614, at 496-97: “In pathological periods, factfinding
processes cannot be relied upon to make discriminating judgments regarding the inten-
tions of persons who carry the stigma of any kind of affiliation with a highly unpopular
organization.” See also T. Emerson, supra note 9, at 128.
\textsuperscript{675} See, e.g., H. Kalven, supra note 9, at 248-49.
\textsuperscript{676} Communist Party v. Subversive Activities Central Board, 367 U.S. 1, 145
(Black, J., dissenting).
political incentive to initiate and carry out an effort to repeal repressive laws against unpopular and annoying forms of speech. It is a quixotic undertaking, thankless and very likely futile." It is, nevertheless, the right thing to do. For those who are reluctant to abandon these statutory vestiges of more troubled times, perhaps the words of the late Justice Hugo Black, writing in 1958, can provide the necessary courage and inspiration:

The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of "loyalty" oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government. I also adhere to the proposition that the First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.

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677. Linde, supra note 585, at 1181.