

SUPREME COURT OF THE UNITED STATES[†]

No. 44 – October Term, 1926

Charles E. Ruthenberg, Plaintiff in Error

vs.

The People of the State of Michigan.

In Error to the Supreme Court
of the State of Michigan.

Mr. Justice Brandeis, dissenting.

Ruthenberg was tried, convicted and sentenced for the crime of voluntary assembling with the Communist Party of America, a society “formed to teach or advocate the doctrines of criminal syndicalism” – and for that crime only. This new felony of voluntarily assembling is very unlike the ancient misdemeanor of unlawful assembly. Its criminal quality does not arise from immediate danger of breach of the peace incident to a gathering at a particular time and place under particular circumstances. It inheres, as the statute is construed by the Supreme Court of Michigan, in every gathering of a society, formed to advocate the obnoxious doctrine of criminal syndicalism. 229 Mich. 315. The mere act of assembling is given the dynamic quality of crime. The accused is to be punished, not for violence or threat of violence, not for attempt, incitement or conspiracy, but for a step in preparation for which, if it threatens the public order at all, does so only remotely. There is guilt, although there was no present act of promulgation of syndicalism. What the society had done before the accused attended the meeting and what the assemblage did later, are of no significance except as evidence to establish the purpose of the meeting and his election to join it. The felony is complete at the moment the accused becomes part of the particular assemblage, whatever the time, place or circumstance, however remote the danger apprehended, and however improbable that serious evil will eventually befall. Is the statute so construed and as here applied consistent with the due process clause?

[2] The right to liberty obviously does not prevent a State from taking action reasonably required to protect itself from destruction or serious political, economic or moral injury. To this end, it may, in the exercise of its police power, ordinarily adopt any measure which the governing majority deems necessary and appropriate. But, despite arguments to the contrary which had seemed to me persuasive, it has been settled that the State’s power, so far as its exercise involves fundamental rights of the citizen, is restricted by the due process clause in matters of substantive law as well as in procedural law. Whether a particular measure is reasonable and appropriate, may therefore present a justiciable federal question. In this case, the matters requiring consideration are whether the right to peaceful assembly is one of the fundamental rights; if so, what its limits

[†] This unpublished draft opinion is located in *The Louis Brandeis Papers: Part I, 1916-1931* (Harvard Legal Manuscripts, Harvard Law School Library), microfilm reel 34, frames 00351-00360, and is reproduced with permission of the Harvard Law School Library. It appeared originally as an appendix to Ronald Collins and David Skover, “Curious Concurrence: Justice Brandeis’s Vote in *Whitney v. California*, 2005 *Supreme Court Review* 333, 388-395.

are; and whether these have been invaded by the statute as construed and applied. As to the first of these enquiries, there seems little room for doubt. The right of assembly partakes of the nature of the rights to free speech, to a free press, and to teach – the fundamental rights with which it is closely associated. See *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Pierce v. Society of Sisters*, 268 U.S. 510. The protection extended by the Constitution to the right of assembly must, therefore, be as broad as that enjoyed by these other fundamental rights. Like them, it may be restricted only if, and to the extent that its exercise involves clear and present danger.

The novelty in the prohibition introduced is that the statute aims not directly at the practice of criminal syndicalism, but at the preaching of it. The practice of “sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform” had already been made a crime. So had conspiracy, and incitement to others, to use such means. But no attempt was made to prove any such overt act in Michigan, or elsewhere in the United States, nor to show danger of breach of the peace at the assemblage. The convention was held in a remote and secluded spot supposed to be known only to a few trusted delegates who attended it. There was not even danger that the obnoxious doctrine would be taught at the convention. All the delegates were familiar with it.

[3] Since the attack made upon the statute as construed and applied, our decision of this question must depend upon the specific facts. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282. But, before these can be examined profitably, it is necessary to determine generally, when a danger shall be deemed clear; how remote the danger may be and still be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrines which a vast majority of its citizen believes to be false and fraught with evil consequences; in other words, why free speech and assembly were made constitutional rights. We must bear in mind, also, the wide difference legally between assembling and conspiracy, between advocacy and incitement, between preparation and attempt.

In a democracy public discussion is a political duty. This principle lies at the foundation of the American system of government. Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. Without free speech and assembly discussion would be futile. With them, discussion affords ordinarily adequate protection against the dissemination of the noxious doctrine. Those who won our independence by revolution valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They recognized that the greatest menace to freedom is an inert people; that the greatest menace to stable government is repression; and that the fitting remedy for evil counsels good ideas. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution as to guarantee free speech and assembly.

To self-reliant men, with confidence in the power of reason applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall [4] before there is opportunity for full discussion. Only an emergency can justify repression. Mere bad tendency of the utterance cannot. If authority is to be reconciled with freedom this rule must prevail.¹ Moreover, even imminent danger cannot justify resort to prohibition of functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because it is an inappropriate means of protection. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass.

In the case at bar, the evil feared was obviously not a trivial one. But the question for decision is whether there was reasonable ground for fear. No such ground existed, unless there was in 1922 imminent danger that some evil might result from Ruthenberg's assembling with the Communist Party of America, and unless the [5] evil which might reasonably be apprehended was one sufficiently serious to make denial of free speech and assembly an appropriate remedy. These matters require consideration not only of the doctrine to be advanced, but also of the circumstances under which it was to be preached.

The Program and other documents introduced at the trial establish that the doctrine to be taught and advocated by the Communist Party of America was "criminal syndicalism." The Party teaches that workers are now exploited and oppressed; that the interests of capital and labor are irreconcilable; that the low condition of labor results from the fact that existing government, municipal, state and national, constitutes government by and for the capitalist class; that the class struggle is inevitable; and that to secure adequate relief, the class struggle must take the form of political struggle - a struggle for the control of government. The Party declares that the ultimate goal is destruction of existing government and substitution of a proletarian dictatorship; that, as the workers are dependent for life, liberty and happiness upon the ownership and control of the

¹ Compare Z. Chafee, Jr., 'Freedom of Speech,' pp. 24-39, 207-221, 228, 262-265; H. J. Laski, 'Grammar of Politics,' pp. 120, 121. See Thomas Jefferson: "If there be any among us who wish to dissolve the union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." First Inaugural Address. Also: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, *The Nation*, July 7, 1926, Vol. 123, P. 8. And Lord Justice Scrutton in *Rex v. Secretary for Home Affairs, Ex parte O'Brien*, (1923) 2 K. B. 361, 382: "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . ." Compare Warren, "The New Liberty Under the Fourteenth Amendment," 39 *Harvard Law Review*, 431, 461.

raw materials and machinery of production, this dictatorship will take these from capitalists; that it will establish ownership; that with such ownership it will develop management of the industries by the workers; and that it will, in time, include as workers the whole adult population.

There is no suggestion of sabotage. In fact, the Party rejects as absurd the theory that the revolution can be accomplished by the direct seizure of industry without first overthrowing the capitalist state. The teaching is that American Democracy is a fraud, that not merely the practice, but the form of our government makes it the effective instrument of capitalist control; that effective control by the workers can be secured only through destroying the existing government and substituting therefor the dictatorship of the proletariat, in the form of workers' councils or Soviets; that this indispensable revolutionary change can be achieved through the mass power of the exploited class, provided its members are united in unshakable loyalty to the principles and leaders of the Party; but that the capture of political power cannot be effected by the ballot alone; that to overthrow capitalist government, resort must eventually be had to the same kind of armed force which [6] is now used by the ruling class to keep the working class in subjection; and that in the transition period from Capitalism to Communism force must and will be used to establish and to maintain the dictatorship of the proletariat.

The predicted use of force in the final struggle by which the communist state is to be substituted in America for the capitalistic was in 1922 a remote contingency. The Party had then less than six thousand members, scattered throughout the United States. Of these, all but five thousand were foreign born – persons apparently of small means and unfamiliar with the English language. The aggregate of a year's expenditures for all its activities was \$185,715. Even if all the resources, intellectual and financial, of the Russian Soviet Republic were to be devoted to propaganda here, the process of converting any substantial portion of the thirty million American workers to revolutionary views would necessarily be a slow one. Before the predicted cataclysm could supervene, there would be ample time and opportunity to meet false assertions by evidence and fallacious reasoning by sound argument. If the only evil apprehended was illegal violence in the final struggle, there could be no basis for a claim that mere assemblage with this society, although formed to advocate the noxious doctrine, would create imminent danger of the evil. There was absent that proximate relation of cause to consequence of which alone the law commonly takes account.

The claim seriously urged is a different one. It is that the Communist Party of America advocates, as a means of preparation for the final struggle, the immediate commission of criminal acts of violence or other unlawful methods of terrorism; and that the possibility of such immediate preparatory acts constitutes clear and present danger which justifies denial of the right of assembly. The Program supplies ample evidence that the Party plans to propagate immediately the criminal state of mind. It proclaims boldly the foul doctrine that the end justifies the means. It declares that the party does not feel itself bound by existing laws, because these were forced upon the workers by the "bourgeois class state." It states that it will prepare the workers for the ultimate armed insurrection incident to overthrowing the capitalist state, by teaching [7] its members and other workers, that during the intermediate period of preparation, the fighting proletariat must come into open conflict "with bourgeois justice and the organs of bourgeois state apparatus." But,

while the criminal state of mind was to be developed, the time was apparently not then deemed ripe for putting foul doctrines into practice, either as a means of preparation and education or otherwise.

The Party announces its purpose to unite industrial workers, farm laborers, working farmers and negroes, and to build a United Front of the whole exploited class, so that its direct mass power may become a factor in the class struggle, which is eventually to culminate in armed insurrection and civil war. It declares, that in order to educate members of the Party to assume leadership of the mass, its tentacles should reach out into every form of workers' organizations; that it will strive to control these organizations and the workers; and that its members should participate in elections and endeavor to revolutionize both organized and unorganized labor. But neither in the record, nor in matter of which we take judicial notice, is there any basis for a contention that in 1922 the time and conditions were deemed by the Party opportune for any form of immediate violence, or that there was any reason for belief on the part of the state authorities that the Party deemed it to be so. So far as it appears, neither the Party, nor any member of it had therefore resorted to any act of violence, or had attempted, threatened, or conspired to do so; or deemed that immediate acts of violence were then advisable.

The Party propagation of the criminal state of mind by its teaching, and its program of violence as a means of preparation, bring the danger incident to formation of the society nearer than it would be, if the only violence to be apprehended were that involved in the predicted final struggle. Every denunciation of existing law tends in some measure to increase the probability that there will be some violation of it.² Condonation of a breach enhances the probability. Expressions of approval add to the probability. Advocacy heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for [8] denying free speech, where, as here, the advocacy falls short of incitement. Here, there is nothing to indicate that the advocacy would be immediately acted on. To support a finding of such danger it would have to be shown either that immediate violence was, in fact, advocated, or that the past conduct of Ruthenberg, or other delegate furnished reason to believe that such advocacy was then contemplated. The documents introduced showed little more than what sort of people were gathered at the convention, their beliefs and their hopes.

Ruthenberg was not an obscure or mysterious person. He and his history were well known. He was nearly forty years old. Continuously since his birth he had been a citizen of Cleveland, Ohio. From 1909 to 1919, he had been an active member of the Socialist Party. He had several times been its candidate for mayor. He had been its candidate, also, for state treasurer, for governor, for representative in Congress and for United States senator. It is true that he had been arrested repeatedly in Cleveland and elsewhere. But no prosecution had ripened into final sentence, except one. That was for violation of the Selective Draft Act by inducing another to fail to register. See *Ruthenberg v. United States*, 245 U.S. 480. All other prosecutions were likewise for political speeches or for the circulation of political literature. There is not even a suggestion that

² Compare Judge Learned Hand in *Masses Publishing Co. v. Patten*, 244 Fed. 535, 540; Judge Amidon in *United States v. Fortuna*, Bull. Dept. Justice No. 148, pp. 4-5; Chafee, "Freedom of Speech," pp. 46-56, 174.

Ruthenberg had, in any connection, committed, or attempted or conspired to commit, or had incited any other person to commit, any act of violence or terrorism.

The past conduct of the others in attendance at the Bridgman convention afforded likewise no basis for apprehending immediate violence. Every person present was a duly accredited delegate. All that these men had done, and all that they planned, had presumably been learned by the State. For ever since the organization of the party in September, 1919, Francis A. Morrow had been employed by the Department of Justice as a spy upon its operations. In that capacity, he joined the Party and had become active in its counsels. Being active and trusted, he had been elected as a delegate to this convention. It was he who became their chief witness. But neither through his testimony, nor otherwise, was there introduced a particle of evidence that these delegates, or any of the Party's officers, had advocated resort in the near future to crime, sabotage, violence or other unlawful methods of terrorism as a means of preparation for accomplishing industrial or political reform, or for any other purpose, either in Michi[9]gan or elsewhere in the United States, or had attempted or conspired or threatened to resort, or had incited any other person to resort to such means of preparation.

The secrecy of the meeting was not, under the circumstances, evidence of any such illegal purpose. Secrecy was resorted to, not because the formation of the Party was believed to be illegal, or because some act in violation of some law of Michigan or of the United States was contemplated, but for a very different reason. Those who formed the Communist Party of America at Chicago in 1919 had done so openly. The organization meeting and its later proceedings had been as public as those of other political parties. Without change of platform or general plans, the Party was converted later into a secret organization, because the Secretary of Labor had ruled meanwhile that mere membership in it by an alien authorized his deportation under the Act of Congress, October 16, 1918, c. 186, § 2, 40 Stat. 1012, amended June 5, 1920, c. 251, 41 Stat. 1008; and because several thousand persons resident in the United States had been arrested through operations of the Department of Justice, on the charge that they were aliens liable to deportation because of membership in the Communist Party of America. See *Colyer v. Skeffington*, 265 Fed. 17.³ As most of the members of the Party were aliens, the Secretary's ruling, and the occurrences of January, 1920, led the Party to believe that secrecy was essential to its existence.⁴

The jury were not instructed that there must be clear and present danger of immediate violence to justify conviction. It is contended that neither the jury nor this Court has any concern with the question whether the existence of this weak political party did in fact furnish a reasonable basis for the belief that assembling with it constituted a clear and present danger of serious evil; that it was the function of the legislature of the State to determine [10] whether, under then existing

³ Among the members so arrested were many citizens, but all these were immediately released as soon as the fact of citizenship was ascertained. This action by the Government showed that there was no reason to believe that the persons arrested had violated either any federal or state law, since in making the arrests agents of the Department of Justice cooperated with the state authorities. "The Deportations Delirium of Nineteen Twenty," by Louis F. Post, pp. 51-55.

⁴ "The Deportations Delirium of Nineteen Twenty," by Louis F. Post, pp. 80-153.

conditions, voluntary assembly with a society formed to advocate the overthrow of organized government by force and violence constituted a clear and present danger of substantive evil; and that, by enacting the measure, the legislature had impliedly decided that question in the affirmative. Compare *Gitlow v. New York*, 268 U.S. 652, 668-671. The legislature must, obviously, determine, in the first instance, whether a danger exists which calls for the particular protective measure which it enacts. But where the statute enacted is valid only in case certain conditions exist, the enactment cannot alone establish the facts which are essential conditions of the statute's validity. This is not a case like *Hawes v. Georgia*, 258 U.S. 1, where the prosecution relies upon the statute as creating a rebuttable presumption.

Statutes enacted under the police power, which imposed merely absolute prohibition, as distinguished from regulation, have been repeatedly held invalid in cases involving the liberty to engage in business.⁵ The power and duty of this Court are no less where the liberty involved is that of free speech and assembly.

⁵ Compare *Frost v. R.R. Comm. of California*, 271 U.S. ____; *Weaver v. Palmer Bros. Co.*, 270 U.S. 402; *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393; *Adams v. Tanner*, 244 U.S. 590.