Constitutional Law—Criminal Syndicalism Statutes—Right of Peaceable Assembly—[Federal].—The Communist Party held a public meeting at which the defendant discussed a maritime strike and raids on party headquarters. Conviction of the defendant under the Oregon Criminal Syndicalism law followed. Criminal Syndicalism is defined as the advocacy of physical violence, sabotage or any unlawful acts or methods to accomplish industrial or political change. Ore. Code 1930, § 14-3110, as amended by Ore. L. 1933, c. 459. There was no proof of advocacy of criminal syndicalism at the meeting; rather, the conviction was rested upon the mere fact that the meeting was sponsored by the Communist Party, which admittedly, itself, advocated criminal syndicalism. On appeal to the United States Supreme Court, *held*, reversed. Such a conviction is a denial of due process because it abridges the right of peaceable assembly. *De Jonge v. Oregon*, 57 Sup. Ct. 255 (1937).

Extension of the due process clause to include the right of peaceable assembly practically completes the Supreme Court's transcription of the personal liberties of the First Amendment into the Fourteenth. See Warren, The New "Liberty" under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926); Foster, The 1931 Personal Liberties Cases, 9 N.Y.U.L.Q. Rev. 64, 81 (1931). For the origins of the right, see Jarrett and Mund, The Right of Assembly, 9 N.Y.U.L.Q. Rev. 1 (1931). But the principal decision has a very limited application. Contributing nothing to the definition of the word "peaceable," it says merely that a peaceable assembly may not be prohibited because its sponsors are criminal. Nor is the *dictum* helpful in determining the extent of the "liberty" protected by the due process clause. In *Gitlow v. New York* (268 U.S. 652 (1925)), a divided court suggested two rules for determining the constitutionality of the conviction of a Left Wing Socialist publisher. Mr. Justice Sanford, speaking for the majority, maintained that the Supreme Court should not interfere with the application of a state statute prohibiting a general class of utterances which the legislature reasonably considered against public welfare. If any case is properly within such a reasonable classification, the Constitution does not permit the Court to inquire whether or not the individual restraint is excessive. And the New York statute was reasonable, Sanford thought, because it merely prohibited incitement to revolution, a highly dangerous activity. Mr. Justice Holmes, dissenting, insisted that the individual facts in each case are crucial, that however reasonable a statute may seem, it is unconstitutional if applied to punish utterances which the Supreme Court does not consider *clearly and immediately dangerous* even though somewhat objectionable to public welfare. See also *Schenck v. United States*, 249 U.S. 47, 52 (1919). Even Sanford did not profess to consider Gitlow dangerous.

It is obvious that Sanford's rule offered no significant protection to personal liberty. Since sedition statutes can be so vaguely drawn within the bounds of reasonableness as to include parlor conversation, there would be free speech only in proportion to the prosecutor's indolence. Holmes' view recognized that the framers of the Bill of Rights intended an excess of caution. Fresh from their own revolutionary explosion, they hoped to forestall its recurrence by providing a safety valve of public expression. See Brandeis, J., dissenting in *Whitney v. California*, 274 U.S. 357, 375 (1927). Sanford objected that a law which could be applied only when there was clear and present danger would not be applied until it was too late to protect the nation. This is clearly not true where the utterances are dangerous only in a restricted area. And even though it be conceded that the syndicalism laws have any tendency to forestall

serious attacks on the government, it is insisted, in return, that a policy of speech abridgement has so strong a tendency to foment dissatisfaction that its exercise is properly forbidden. A more serious objection to Holmes' rule is that it apparently sets up a purely subjective standard. In the hands of a terrified magistrate it is not at all clear that a student who had drawn the Communist Manifesto from the college library and used it to support his class argument would be protected by this rule from an extensive jail sentence. See Chafee, Freedom of Speech, c. III, especially at 146–48 (1920); Sacramento Criminal Syndicalism Cases, 4 Internat'l Jurid. Ass'n Bull., no. 6, p. 4 (1935). See also *People v. Flanagan*, 65 Cal. App. 268, 279, 223 Pac. 1014, 1019 (1924); *Abrams v. United States*, 250 U.S. 616, 621 ff. (1919).

Since Holmes' rule is, however, a much healthier point of view than Sanford's and since no greater protection has been suggested save the scorned rule of absolute freedom, it is important to determine whether or not Sanford's rule is still supported by the majority of the Court. In *Near v. Minnesota* (283 U.S. 697 (1931)), a publisher used his journal to stir up public feeling against a minority group. Enjoined under a state journalist nuisance statute, he appealed to the United States Supreme Court on the ground that the statute violated the principle of freedom of the press. This time the so-called conservatives were in the minority in insisting that the legislature had reasonably interpreted the state's welfare needs. It was the majority who, though disapproving the material published, found the state's interference constitutionally unjustifiable. An important difference between the *Near* case and the criminal syndicalism cases makes the former of doubtful authority: Near's propaganda, while dangerous from the point of view of the minority group assailed, was not directed against the government, and the injunction was aimed at malicious nuisance, not at sedition. But the minority relied heavily on the "malice" involved, perhaps more justifiably than did McKenna, J., in his astonishing conclusion that one who opposed the World War *must* have been motivated by malice. *Gilbert v. Minnesota*, 254 U.S. 325, 333 (1920). Except for reasoning like McKenna's, the defendants in the criminal syndicalism cases will not be accused of malice, and for that reason will tend to be accorded more protection. Since the *Near* case is ambiguous, however, it is regrettable that the Court did not seize upon the *De Jonge* case to cement the overruling of the *Gitlow* doctrine and restore significance to the personal liberties.

Constitutional Law—Taxation—State Tax on Production of Energy for Instrumentalities of Interstate Commerce—[Federal].—The plaintiff corporation operated interstate pipe lines for the sale and transportation of gas. Pressure necessary to move the gas was created by compression pumps driven by internal combustion engines. A Louisiana statute, in levying a sales tax upon producers and distributors of electricity, provided that a corporation which used "electrical or mechanical power of more than 10 horsepower" and which did not procure all the power required from a corporation subject to the sales tax, should pay a privilege tax of $1.00 "for each horsepower of capacity of the machinery or apparatus, known as the 'prime mover' or 'prime movers'.operated by such . . . . corporation . . . . , for the purpose of producing power for use in such . . . . business. . . . ." La. L. 1932, no. 6, §§ 1, 2, 3. The plaintiff, having been assessed a tax measured by the number of horsepower of the engines used to drive its pumps, applied for an injunction to prevent the collection of