cial decisions in line with clearly-stated legislative policy and obviate a resort to such extreme measures as the court in the instant case felt compelled to adopt.

Constitutional Law—Freedom of Speech—Requirement that Speeches and Program Be Submitted as Condition Precedent to Use of Public Auditorium Invalid—[California].—The petitioners, members of the San Diego Civil Liberties Committee, applied to the respondent school board for the use of a high school auditorium for a series of meetings. The California Civic Center Act[1] empowered the respondent board to require a copy of the program and speeches to be filed in advance and to permit the use of the school facilities only in accordance with regulations adopted by the board. The petitioners refused to submit a copy of their program and speeches. Thereupon the respondent agreed to grant the petitioners use of the auditorium upon the sole condition that the petitioners file an oath of non-affiliation with any organization seeking to overthrow the government by violence. The petitioners refused to comply and instituted mandamus proceedings in the California Supreme Court to compel the respondent board to grant the use of the auditorium free from any conditions. *Held*, the writ of mandamus should issue, two justices dissenting. Those sections of the California Civic Center Act requiring copies of the program and speeches to be filed in advance with the respondent board are an unconstitutional restriction upon freedom of expression. *Danskin v. San Diego Unified School District.*[2]

The vigorous dissent in this case questions the majority opinion's application of the clear and present danger test, noting the limited degree to which that test has been employed by courts in the past. An examination of the origin and previous application of this judicial test seems to substantiate the minority opinion. Few cases have directly considered the validity of a statute regulating the conduct of meetings in public auditoriums. *Davis v. Massachusetts*[3] was the leading case on the closely related question of statutes governing public meetings in streets and parks. As a consequence of this decision, statutes regulating freedom of expression by requiring a permit as a condition precedent to a public meeting were upheld by the courts where arbitrary and unlimited discretionary powers were not placed in the hands of the licensing official.[4] The test employed in determining the statute's validity in these cases was whether the restriction constituted a proper and reasonable exercise of a state's police power.[5]

[1] Cal. Education Code (Deering, 1944) §§ 19431–39.

[2] 171 P. 2d 885 (Cal., 1946). [3] 167 U.S. 43 (1897).

[4] Bloomington v. Richardson, 38 Ill. App. 60 (1889); Commonwealth v. Abrahams, 156 Mass. 57, 30 N.E. 79 (1892); Duquesne v. Fincke, 269 Pa. 112, 112 Atl. 130 (1920); Buffalo v. Till, 182 N.Y. Supp. 418 (App. Div., 1920).

[5] See also Cox v. New Hampshire, 312 U.S. 569 (1941); Anderson v. Wellington, 40 Kan. 173, 19 P. 719 (1888); Chicago v. Trotter, 136 Ill. 430, 26 N.E. 359 (1891); Fitts v. Atlanta, 121 Ga. 567, 49 S.E. 793 (1905); People ex rel. Doyle v. Atwell, 232 N.Y. 96, 133 N.E. 364 (1921); Commonwealth v. Surridge, 265 Mass. 425, 164 N.E. 480 (1928); Coughlin v. Chicago Park District, 364 Ill. 90, 4 N.E. 2d 1 (1936).

Recent cases, however, have indicated a more stringent attitude on the part of the courts toward any statute restricting freedom of expression.[6] This attitude has taken the form of restricting the scope of permissible state regulation in this field by employing a different test, which provides that a clear and present danger to the community must arise from an exercise of free speech before a statute may constitutionally prohibit or limit such expression. This doctrine first emerged in the United States Supreme Court cases arising out of the Espionage Acts of 1917 and 1918,[7] and, as subsequently developed, was applied to cases involving criminal prosecutions both under penal statutes[8] and at common law.[9] Actually, the application of a test based upon the imminence of a clear and present danger to the nation, rather than upon a reasonable or rational relation between the restriction imposed and the public welfare, ordinarily results in striking down the statute because of the rare existence of such a danger.

It should be noted, moreover, that in each instance where the test of a clear and present danger was employed by the United States Supreme Court, the statute in question contemplated a prosecution involving a fine or imprisonment, or both, upon conviction.[10] The language found in more recent Supreme Court cases has caused some authorities to believe that the clear and present danger test is to be applied to all legislation purporting to restrict freedom of expression, irrespective of whether the legislation contains the elements of a penal prosecution.[11] If this suggestion has in fact become law it would appear to be a substantial extension of this test as originally applied.

In *Pennekamp v. Florida*,[12] the most recent Supreme Court case employing the doctrine of a clear and present danger, the court indicated that the constitutionality of a restriction upon freedom of expression ultimately turns upon a balancing of values by the court, rather than upon an imminent national dan-

[6] Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1940); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Thomas v. Collins, 323 U.S. 516 (1944); Pennekamp v. Florida, 66 S. Ct. 1029 (1946).

[7] Schenck v. United States, 249 U.S. 47 (1919). Contra: Abrams v. United States, 250 U.S. 616 (1919). Justice Holmes, who wrote the majority opinion in the Schenck case, dissented vigorously in the Abrams case, maintaining that the clear and present danger test was improperly rejected.

[8] Whitney v. California, 274 U.S. 357 (1927); Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); Bridges v. California, 314 U.S. 252 (1941).

[9] Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[10] Schenck v. United States, 249 U.S. 47 (1919); Whitney v. California, 274 U.S. 357 (1927); DeJonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1940); Bridges v. California, 314 U.S. 252 (1941); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Thomas v. Collins, 323 U.S. 516 (1944).

[11] See the cases and arguments collected in Murrish, Protection of Free Speech under the Federal Constitution, 28 Calif. L. Rev. 733 (1940).

[12] 66 S. Ct. 1029 (1946).

ger in the sense that that phrase has been most frequently used.[13] For example, in the "picketing" cases,[14] the Supreme Court weighed the values of permitting unrestricted freedom of expression in organizing and furthering labor unionism against the coercive threat presented by unrestricted picketing. In the "leaflet" cases,[15] the value of free expression was held to override the danger of littered streets; and in the "meeting" cases,[16] the value of free expression was given a greater weight than any difficulties of policing.[17]

The California Supreme Court in the present case, by invoking the clear and present danger test, is not only accepting but apparently extending this doctrine to all cases involving freedom of expression. The question presented to the court was not one of punishment under a penal statute, but whether the state, having permitted the use of its public schools for meetings, must grant such use unconditionally without subjecting the applicants to some measure of responsibility.

The technique of balancing social values in determining the constitutionality of a restriction upon freedom of expression involves a process similar to that employed by the courts in considering legislation under the state's police power. And inasmuch as the statute in this case is not penal in nature, it would seem that in this phase of civil liberties the statute should stand or fall on the same basis as those statutes enacted under the police power of a state.[18]

On the other hand, this extension of the clear and present danger doctrine to a non-penal statute may be justified if it eliminates a previous restraint. Stat-

[13] In the Pennekamp case, Mr. Justice Reed, speaking for the majority, said, ". . . . we must weigh the impact of the words against the protection given by the principles of the First Amendment . . . . to public comment on pending court cases. We conclude that the danger . . . . has not the clearness and immediacy necessary to close the door of permissible public comment." 66 S. Ct. 1029, 1039 (1946). Note that Mr. Justice Frankfurter limits the application of the clear and present danger test to the specifically alleged danger in this case, thus avoiding any reference to a national danger. See also Cathcart, Constitutional Freedom of Speech and of the Press, 21 A.B.A.J. 595 (1935).

[14] Thornhill v. Alabama, 310 U.S. 88 (1940); American Federation of Labor v. Swing, 312 U.S. 321 (1941).

[15] Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1940).

[16] DeJonge v. Oregon, 299 U.S. 353 (1937); Hague v. C.I.O., 307 U.S. 496 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941).

[17] But in the "flag-salute" cases, freedom of expression was subordinated to the state's policy of encouraging national unity until the United States Supreme Court reversed itself in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1934). Six "flag-salute" cases were decided by the Supreme Court within a span of six years. The first five cases upheld the state's power to require flag saluting. Leoles v. Landers, 302 U.S. 656 (1937); Hering v. State Board of Education, 303 U.S. 624 (1938); Gabrielli v. Knickerbocker, 306 U.S. 621 (1939); Johnson v. Deerfield, 306 U.S. 621 (1939); Minersville District v. Gobitis, 310 U.S. 586 (1940). However in the Barnette case, the clear and present danger doctrine was invoked and the state statute was invalidated. But it should be noted that only in this latter case was the statute penal in nature.

[18] For a striking illustration of a parallel situation where this approach was utilized, see People v. Sandstrom, 279 N.Y. 523, 18 N.E. 2d 840 (1939).

utes requiring the fulfillment of conditions precedent to the exercise of free speech can operate as effectively to restrain an individual as would a penal statute. Where this is the situation, such statutes should, logically, also be invalidated. Consequently, the court in the *Danskin* case might well be serving notice that it will not tolerate any limitation whatsoever upon freedom of expression by a statute calculated to circumvent the judicial test applicable to penal statutes, where the statute in question operates with equal effectiveness to inhibit the freedom of expression. A general adoption of this view would operate to extend the clear and present danger test to all instances where the legislature seeks to regulate freedom of expression, an extension which has been urged by various writers.[19] It has also been suggested that states should actively encourage freedom of expression as a necessary prerequisite for an enlightened society.[20] In many communities the achievement of such a goal is necessarily dependent upon the acquisition of a meeting-place usually under the control of a public agency. Certainly the California Supreme Court, in requiring that where public auditoriums are to be used for meetings they must be made available without prior restraints, is clearing the way for a greater freedom of expression.

Income Taxation—Dividend-on Purchases—Dividends from Capitalized Earnings Taxable to One becoming Stockholder after Capitalization—[Federal]. —Between 1916, when it was organized, and 1932, a corporation had sold 8,840 shares of $100 par value common stock at $100 per share. Between 1921 and 1924, corporate earnings were capitalized through the distribution of non-taxable common stock dividends. In 1932, by a reduction of par value from $100 to $25, the capital stock account was written down and a capital surplus was created. Subsequent earnings were carried in an earned surplus account. In 1939 a cash dividend of $9 per share was distributed; $0.4489 of this was debited to earned surplus (thereby exhausting the earned surplus account) and $8.5511 was debited to the capital surplus account. Plaintiff, an officer of the corporation, who had purchased 12,120 of 23,417 outstanding shares at an aggregate cost of $206,845 between 1931 and 1939, treated that part of the dividend which had been debited to capital surplus as a return of capital and reported only the $0.4489 per share as a taxable dividend. The commissioner determined that the entire distribution was a taxable dividend since the source of the capital surplus created by the par value reduction was the undistributed earnings which had been capitalized upon the issuance of the previous stock dividends. The Tax Court upheld the commissioner. On petition of review to the circuit court, *held*, the previous non-taxable stock dividends had not changed earnings to capital, and the fact that the plaintiff was not a distributee of such a dividend but a pur-

[19] Chafee, Freedom of Speech (1920). For a discussion of related problems see Corwin, Freedom of Speech and Press under the First Amendment: a Résumé, 30 Yale L. J. 48 (1920); Willis, Freedom of Speech and of the Press, 4 Ind. L. J. 445 (1929).

[20] Reisman, Civil Liberties in a Period of Transition 88 (1942).