THE OLD CONSTITUTION

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I

A student of Alexander Meiklejohn, Zechariah Chafee, and Felix Frankfurter is bound to make up his mind among them on issues of freedom of communication. When, in addition, this student is a colleague of William Crosskey, his life is complicated by a further influence.

Mr. Meiklejohn,¹ by skill in reading a few words and even greater skill in exploring the assumptions of representative government, has arrived at the conclusion that the First Amendment means what it seems to say. The provision that "Congress shall make no law . . . abridging the freedom of speech, or of the press" goes with provisions about religion and assembly which suggest that the clause refers to a limited subject matter. There is no reason to suppose that this clause, or comparable clauses in state constitutions in force at the time, had any application whatever to private gossip or fraudulent misrepresentations. The law of defamation applicable in private life could be strengthened, and newly devised frauds in the sale of securities punished, without any approach to the subject matter of the clause. Speech on public matters is the subject of protection, and it is to be protected without qualification. Political speech is the easiest example. It is free even though it creates a danger to government. No talk whatever about revolution, favorable or unfavorable, can be punished. Revolution can be punished and will be punished by any state worthy of the name; but that is another matter.

The argument, of which this is only the beginning, appeared at a time when the doctrine which we were taught in law school was about to show its defects. Doubtless to the regret of Professor Chafee,² but with the concurrence of Mr. Justice Frankfurter,³ the Supreme Court has arguably decided that any talk which Congress might possibly regard as increasing peril can be prohibited in any time of peril. No one more dangerous than a Jehovah's Witness can be at all confident that his freedom to communicate his views will be protected by the Constitution.

Professor Crosskey⁴ makes matters worse. In a magnificent book, which the writer has discussed with him over the past fifteen years, he makes two absolute-

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¹ See Meiklejohn, Free Speech and Its Relation to Self-Government (1941); What Does the First Amendment Mean?, 20 Univ. Chi. L. Rev. 461 (1953); and The First Amendment and Evils that Congress Has a Right to Prevent, 26 Ind. L. J. 477 (1951).


⁴ Crosskey, Politics and the Constitution in the History of the United States (1953).
ly convincing contributions to constitutional theory. First, Congress was understood by framers and public alike to have general powers of legislation, not simply the supposedly limited and delegated powers about which we learned in law school. Second, the federal judicial system was understood to be a national system, with power to unify and supervise the private law of the country. Both of these principles, new and old though they be, seem to be established beyond the possibility of a doubt by Professor Crosskey's investigations.

Moreover, Professor Crosskey's first volumes confirm the view that constitutional documents must be read in the context of the time when they became effective rather than in the light of present conditions. Only by applying its historical meaning can judges observe their oaths to obey the Constitution and avoid the temptation to unconstitutional readjustments of their powers. No other view is consistent either with judicial honesty or with the principle of the separation of powers.

So far the relationship between writers on freedom of speech and Mr. Crosskey is not apparent. Yet, in the course of his researches, Mr. Crosskey has made a considerable number of further modifications of accepted constitutional doctrine. He has, for example, contributed to our understanding of the safeguards for private rights included in the original Constitution and the amendments. He has established that the first eight amendments were indeed incorporated by reference in the privileges and immunities clause of the Fourteenth Amendment. Except where they specifically named Congress or the federal courts, they were originally understood as safeguards against the states as well as the United States. Now all eight are clearly so.

This sounds like some gain for civil liberties. On the other hand, Mr. Crosskey has given what is perhaps the final treatment of the vexed question of judicial review. The acts of state governments are clearly subject to judicial review by virtue of Article 6 of the Constitution. The reference in that Article to "judges in every state" is in marked contrast to the silence of the Constitution about the judges of the Supreme Court of the United States. The precedents available at the time go no further than to indicate that acts of Congress could be held invalid by the Court only in order to protect its own activities against congressional or executive usurpation or interference, and in order to assure minimum standards in the administration of justice, whether in the federal courts or in the administrative agencies which were much later to have a large part in the federal administration of justice.

One who, like the writer, is convinced by those portions of Professor Crosskey's theory which have thus far been described, is already in difficulties about

6 Mr. Crosskey's favorite example of the good results of his historical position is the resulting power of Congress to reform the private law as by passing the new Uniform Commercial Code, made generally applicable. Compare the writer's comments on the advances made possible by the Code provisions relating to secured transactions; and the possibility of giving them general effect by congressional use of power over bankruptcy. Corbin on Contracts: A Symposium Review, 61 Yale L.J. 1092, 1126-31(1952).
civil liberties. Whatever he says must be taken subject to the new light which we have on the meaning of the Constitution. Representatives and Senators are sworn to obey it, and so to give some thought to the meaning of obedience. As one of the privileges and immunities of citizens of the United States protected by the Fourteenth Amendment, freedom of communication may be safeguarded against state action by judicial review in the Supreme Court of the United States. It can be safeguarded against congressional action only by the intelligence and self-restraint of Representatives and Senators themselves.

Here is one novelty introduced into the discussion of civil liberties by Mr. Crosskey's investigations. A second novelty is more troublesome still. Mr. Crosskey has, in the writer's judgment quite soundly, given a controlling influence on the meaning of words used in the Constitution, to the context of writers and readers at the time the Constitution was made effective. While Mr. Crosskey is himself a friend of freedom of communication and freedom of business activity, he does not show in his book any considerable interest in the problem of the meaning of the First Amendment. His silence, and brief statements in Chapters 24 and 30, indicate that his historical point of view leads him to think that the safeguards of the First Amendment are of negligible importance for constitutional theory. The freedom of communication protected by the First Amendment, read with attention to the meaning of "abridging" and in its historical context, seems to him, as he has indicated in conversation, limited to some freedom from prior censorship and any other freedom safeguarded by the common law of the time.

Mr. Crosskey's views about freedom of communication find a complement in his views about the Fourteenth Amendment. He has indeed developed a convincing theory of the general meaning of the principal clauses of that amendment. The privileges and immunities clause has already been mentioned. The due process clauses of the Fifth and Fourteenth Amendments refer to procedure only. The provision for "equal protection of the laws" prohibits only two kinds of discrimination: racial discrimination and the award of peculiar privileges to specified persons at the expense of others, as in the Slaughterhouse Cases. Anything more leads, in Professor Crosskey's view, to the unlimited vagueness of substantive due process, and is ridiculous as well as unhistorical. While Mr. Crosskey has given new significance to the contracts clause as a protection to freedom of contract, as well as security of contracts, against state legislation, and has shown that the exports and imports clause was intended to do part of the work now done by the commerce clause, he thinks the equal protection

616 Wall. (U.S.) 36 (1873). Compare the two concurring opinions of Justice Field and Justice Bradley, with Harlan and Woods, JJ., concurring with the latter, in Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884).

7 There are curious ironies in the circumstance that his mistrust of logic has led the strongest living judicial defender of states' rights to approve a limit on state legislation supported neither by logic nor by experience. It is perhaps a logical extension of the wit and psychological inaccuracy of the maxim that "the life of the law has not been logic; it has been experience," to
clause will not bear the interpretation it has been given as an effective safeguard for commercial liberties against discriminatory legislation.

In the two related fields of freedom of communication and commercial freedom, Mr. Crosskey's work thus raises troublesome questions about constitutional safeguards for individual liberties. In cases involving freedom of communication, Mr. Crosskey's constitution would give freedom even less protection than would Mr. Justice Frankfurter's; considerably less than Professor Chafee's, as the writer reads Professor Chafee's work; and very much less than Mr. Meiklejohn's constitution. Mr. Crosskey's views are the least familiar of any, and his position the most troublesome. The writer has been forced by Mr. Crosskey's challenge to rethink completely his own views on these matters.

II

The one group of cases in which the protection of individuals' substantive rights against government is now being vigorously developed by the Supreme Court deals with the rights of Negroes to equal opportunities, "equal protec-
tion," in higher public education.\textsuperscript{8} It is to be hoped that the Court will not hesitate to take the next step and develop a rational and systematic meaning for the Fourteenth Amendment, in holding segregation in elementary public schools unconstitutional.

In the other important fields of individual substantive rights, the decisions of the Court follow a curious rhythm or line.\textsuperscript{9} The scope of individual economic rights protected by the Constitution was limited until the Civil War; then greatly extended by the course of decisions from 1873 to 1897 to 1937; and then closely restricted. In 1937, so-called civil liberties, particularly freedom of communication, were for the first time given extensive protection by the Court; but \textit{Dennis v. United States}\textsuperscript{10} may mark the end of effective judicial safeguards for freedoms of this type.

Philosophically and psychologically, the two sets of freedoms should supplement and strengthen each other, and any weakening of one should be a blow at the other. History can be used to support this thesis; but history can also be read as somewhat ambiguous about relevant correlations. At any rate, those interested in either form of liberty may well be interested in looking at some signs of the present relationships between them.

\textbf{Economic Freedom}

Economic liberty was never in such good condition as it now is. For example, enterprise competition is unquestionably more vigorous now than at any time in the history of man.\textsuperscript{11} With vigorous competition goes some awareness of the

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\item \textsuperscript{10} 341 U.S. 494 (1951).
\item \textsuperscript{11} See Nutter, The Extent of Enterprise Monopoly in the United States 1899–1939 (1951). Professor Nutter's careful study of a critical period which has been much studied by others, comes to the conclusion that there is no persuasive evidence of increase or decrease in enterprise monopoly during the period. For general agreement that there has been no significant change in the situation in more recent years, see Adelman, The Measurement of Industrial Concentration, 33 Rev. of Economics and Statistics 269 (1951) and comments by Edwards, Stocking, George, and Berle, 34 ibid. 156–74 (1952), with a rejoinder by Adelman, ibid., at 174–78. Professor Nutter's rigorous methods require him to neglect four readily observable lines of evidence for increasing competition, which in some vocabularies—probably most popular ones—implies decreasing monopoly. (1) Professor Nutter's controlling test of monopoly is for firm production of half an industry's production. Such a test neglects the possible significance of the increasing checks on monopoly power, "control of a market," which may come
need for reasonable care in expanding capacity and accumulating inventories. Apart from the effects of expenditures for military purposes and the danger of war itself, the economy is extraordinarily progressive and its leaders may have means of assuring that its progress will be stable. A favorable effect on liberty in general, both in habit and in law, may be expected.

As we rid ourselves of old stereotypes and become aware of the facts, we may, for example, expect that "equal protection," or the general idea for which it stands, will appear again somewhat more prominently in our constitutional doctrine. In particular, the basic moral notion that the power of the community should not be used simply for the service of limited parts of the community at the expense of other parts, will be seen again in its relationship to protection against the gift of any economic monopoly by the state.

Equal protection is a manageable and somewhat limited notion. While Mr. Crosskey is undoubtedly right in fearing that it may develop the scope and vagueness of substantive due process, the degree of his concern seems exaggerated. Classification is indeed as essential for good legislation as functionless differentiation is fatal to it. It is only where functionless legislative or administrative differentiation, "discrimination," is clear that a person prejudiced by it may invoke the protection of the Constitution. Such cases do occur, and protection against the states by judicial decision may serve as a reminder to Representatives and Senators that it is the characteristic of "legislative powers" to classify, and the characteristic of tyranny to discriminate, in a private interest.12 It may, with decreasing concentration within his monopoly classification. Consider, for example, the significance of the gradual disappearance of much higher concentrations, amounting sometimes to one firm control of virtually all production, which has taken place since the 1890's in such industries as sugar refining, where the government lost its great antitrust case; oil refining, where it won; steel, where it lost. Oligopoly may, in some situations and for some periods of time, be more restrictive than monopoly; it may be about equally restrictive; but what little empirical evidence there is suggests that on balance it is less restrictive, particularly in the lower concentrations included in Professor Nutter's monopoly classification. The other indications of increasing competition are more clear and their significance is easier to appreciate. (2) Local monopolies, like that of the early cobbler or the 1930 lumber yard, have been corrected—as in the distribution of groceries and drugs—by marked improvements in transportation and selling methods. (3) The competition between old or second-hand and new products is observable and significant, as in refrigerators, washing machines, cars, copper and aluminum scrap. (4) Most striking perhaps is the increasing vigor of competition between different products with the same uses, as coal and oil, aluminum and other materials, different kinds of transportation. See Slichter, How Stable is the American Economy?, 30 Yale Rev. 577, 582 (1950).

Study of the degree of competition and monopoly in the labor markets will doubtless correct many of our rough impressions, and prepare for the kind of legal measures suitable for a situation in which labor organizations have reached maturity. See Lewis, The Labor-Monopoly Problem: A Positive Program, 59 J. Pol. Econ. 277 (1951).

12 Consider, e.g., the situations and their legal treatment in Liggett Co. v. Baldridge, 278 U.S. 105 (1928); Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942), and Dean Milk Co. v. Chicago, 385 Ill. 565 (1944), affecting both dairies' and container manufacturers' competition, and followed by a change in ordinance; Fidelity & Deposit Co. v. Tafaya, 270 U.S. 426 (1926), questionably distinguished in Osborn v. Ozlin, 310 U.S. 53 (1940), with a somewhat ironical
for example, eventually be recognized that the protective tariff is unconstitu-
tional, as Calhoun in his later days thought it.

There are decisions which will not simply submit to the kind of test that has
been suggested. For example, the question whether eliminating the "imperfe-
tions" of competition does not tend to eliminate competition cannot be solved,
or partly solved, by resort to any such test as has been suggested. The disregard
or overruling of one of the decisions of the 1920's, holding unconstitutional a
state's efforts to eliminate some buyers' "discrimination" thought to be unfavor-
able to farmers, has properly left the legislatures free to act in this field; and
Representatives and Senators will find no help in reflecting on their oath of office
when deciding whether to extend, limit, or preserve the present powers of the
Federal Trade Commission in dealing with business discrimination. So questions
about improving standards of living for the poor in the interests of social justice,
and about means of assuring the stability of the economy, will have to be solved
without much help from the basic moral and economic standards expressed by
the equal protection clause and the grant of "legislative powers" to Congress.

The economy is vigorous and will doubtless survive if it has nothing worse to
contend with than mistakes about equal protection or the effects of trying to
make competition "perfect." Nevertheless, the educative and symbolic effects of
an insistence by the Supreme Court on minimum standards of state legislation
may help to remind Representatives and Senators of the minimum standards
which they have sworn to observe in enacting federal legislation. It may do
something to help check the tendency, already in process of correction, to let
powerfully organized private groups write their own legislation.

**Freedom of Communication**

Freedom of communication, even more than freedom of business activity, is
the characteristic American symbol of mutual respect in a free society. On a cor-
rect view of the Constitution, Congress alone can limit its own power to interfere
with freedom of communication. This is not only Mr. Crosskey's view; it is the
practical effect of the decision in the *Dennis* case.¹

Unfortunately, the opinion in the *Dennis* case goes further. It may be a prece-
dent for later decisions on state statutes. Perhaps even more serious, the decision
does not simply decline to review an act of Congress. The opinion advises Con-
gress that the Smith Act as interpreted by the Court is constitutional.

Robinson-Patman Act—Is It in the Public Interest?, Amer. Bar Ass'n, Section of Antitrust
Laws 60 (1952).

Though it may be heresy to say so, this seems questionable. Read in the light of the record, the result is a theory that Congress may legitimately curb any speech which may have the least effect in increasing danger, in any time of danger.

The words of the First Amendment will hardly bear such a qualification. Prior censorship of philosophical and political publications may have been the familiar evil at which the amendment was aimed. Nevertheless, the Supreme Court has emphasized the good sense of Cooley's observation that such broad and unqualified words as those of the amendment must be read as designed to protect the freedom threatened by such censorship; and that the objective requires the condemnation of restraints after publication which would have a long run effect on feeling, thought and conduct much like that of censorship prior to publication.\(^{15}\)

\(^{15}\) Near v. Minnesota, 283 U.S. 697 (1931). The argument here may be answered by further information or insight about the historical context of the First Amendment. If so, observations about substantive constitutional rights to freedom of communication in the rest of this comment will need to be changed or eliminated. An argument of legislative, executive, administrative, and judicial policy, familiar in outline and indicated in parts of the comment, would be substituted.

In the meantime, it may be suggested that, in this instance, available knowledge about words and context leaves something to be desired. "Abridging" may mean decreasing, so that it would have been incorrect to speak in the eighteenth century United States, of the institution of Negro slavery as "abridging" freedom, in the sense of decreasing legal protections to individuals in the country. At the same time, the word "freedom" needs attention. As they arrived in the United States, Negroes free just before capture in Africa found that their freedom had at some point in the course of events been decreased. It does not seem inaccurate to say that in the sequence of events some effect in decreasing their freedom, as by encouraging their capture, was produced by the institution of Negro slavery in the United States. Somewhat similarly, freedom of speech may have meant not only the freedom, including "privileges" in Hohfeld's sense, which could be found defined by statements in contemporary English or American statutes, constitutions, or common law opinions, authoritative whether as of 1776 or as of 1787 or 1789, or in various possible combinations of these statutes, constitutions, and opinions. It may have meant also the freedom, again including privileges, of which no adequate relevant limiting definition could be found.

It is worth noticing that the suggested test may lead to at least one result likely to surprise a twentieth century student. It is arguable that the Sedition Act of 1798, dealing with false and defamatory statements about public officials, was constitutional. The force of the argument for this position indicates indeed a possible historical difficulty with an unqualified present danger test, as with any other unqualified test. Compare Chafee, Free Speech in the United States, op. cit. supra note 2, at 19-21.

How far revolutionary utterances without abuse of officials were criminal in 17th and 18th century English or American law is, however, not clear. See 2 Stephen, A History of the Criminal Law of England, c. 24 (1883). It is not certain that simply advocating such a movement as the American Revolution or Shays's Rebellion would have been a crime throughout the colonies or states. Perhaps it would have been; but the writer knows of no clear definition, authoritative in 1776, 1787, or 1789, of this sort of freedom. Nevertheless, some significance may attach to the contemporary English debate over the treatment of criminal libels, and to the limits on the scope of prosecutions set, even under the influence of the French Revolution, by the Sedition Act of 1798. Contrast the harsher English statute of 1799, 39 Geo. III, c. 79, printed in part at the end of Bk. IV, c. 11 of Blackstone's Commentaries (Amer. ed., 1807). The significance of the constitutional definition of treason, however ambiguous in its effect on Congress, is perhaps comparable.

There is force, moreover, in Professor Chafee's argument that the uncertain and annoying features of the contemporary law of sedition may have created a context in which the ap-
The unhistorical, textually unsupported, but somewhat persuasive development of the present danger test has now led us, by experience, to a reductio ad

apparently simple words of the First Amendment should be read as simplifying matters and eliminating rules which were the occasion of criticism; and which must have appeared in a peculiar light to those who had recently conducted a successful revolution against British rulers. Was The Trial of John Peter Zenger, 17 How. St. Tr. 675 (1735), famous and often reprinted, authority in the United States—on and after July 4, 1776—for the theory of the judge’s charge, or for the theory of Andrew Hamilton’s argument, acted on, it seems, by the jury? Compare People v. Croswell, 3 Johns. Cas. 421 (1804). The evolution of the privilege against self-incrimination in England in reaction to earlier law suggests possible comparisons. See 8 Wigmore, Evidence § 2250 (3d ed., 1940). The influences of both acceptance and rejection of the English law, past and contemporary, are apparent throughout Art. 1, §§ 9, 10 of the Constitution, as well as the Bill of Rights.

For this reason, among others, the definitions of “freedom of speech” authoritative in English law as of 1776, are not as illuminating, where they exist, as they may at first seem in indicating possible limits for the freedom protected by the First Amendment. Clear definitions of American law between 1776 and 1787 or 1789 would be somewhat more helpful. Compare, e.g., the statutes cited in Hurst, Treason in the United States, 58 Harv. L. Rev. 226, 249 n. 36 (1944), with Pa. Const. c. I, Art. XII (1776); Va. Const. c. I, Art. XII (1776); Mass. Const. Pt. I, Art. XVI (1780)—all to be compared with N.Y. Const. of 1777. It should be observed, moreover, that, whatever may be said of the defects of “The Federalist” as an interpretation of the original Constitution, No. LXXIV, published before the drafting of Amendment 1, has some value in throwing light on the meaning of that amendment. Diversity in state laws, particularly contemporary state constitutions, may explain the form of the amendment. Congress may not “abridge” freedom of speech, but may, it seems, enlarge it.

A return may be made to the words “abridging” and “freedom” in the First Amendment. It may be that it would have seemed natural to 18th century readers or hearers, as it may seem to us, to speak of the institution of Negro slavery as abridging the freedom of human beings in the United States, in the sense that it decreased the capacity of slaves to act without restraints by others which they would have had in the absence of slavery and its accompanying and enforcing law. Reference to a state of nature, perhaps vaguely historical, relating to primitive or revolutionary conditions, but more significantly abstract and “ideal,” was common in the thought of the time; and abstract, “natural” liberty or freedom was familiar. Natural personal liberty may well have been considered abridged by slavery, however consistently with the Constitution. At the same time, a legislative act limiting that communication on philosophical and political matters which had been the subject of controversy at least since Milton’s time, might well have been thought of as “abridging” a “natural” or abstract “freedom of speech.”

Finally, it is to be observed that, while the Oxford Dictionary attributes to “abridge” a number of meanings which have led to the use of “decrease” as a synonym in this note, it also gives as a last meaning: “With a person:—Const. of, rarely from, in. To stint, to curtail in; to deprive of; to debar from,” with interesting illustrations. The meaning of “abridging” in the First Amendment, while not clear in the sense suggested here, is also, it seems, not free from doubt in any other sense. If, for example, “abridging persons of [or in] the freedom of speech” can be understood, the argument from the text for extensive protections is strengthened.

Subject though it may possibly be to historical qualifications, the amendment is, so far as is now known, sufficiently ambiguous to admit a careful use of arguments from policy, general tradition, and the assumptions of representative government, and sufficiently general to suggest a disregard of any difference between prior restraints and subsequent penalties. Milton’s Areopagitica, while at some points it emphasizes the distinction, indicates at least that in the 17th and 18th centuries, a thoughtful person might have expected the elimination of prior censorship of philosophical and political publications to produce the kind of freedom for which the absence of subsequent penalties is required. (Professors Kalven, Ming, and Crosskey have contributed to the development of these observations, as to other parts of this comment; but none of them would agree with the present formulation of either these observations or the comment.)
absurdum of present danger theory. Though not a pragmatist, Mr. Meiklejohn has received, subject perhaps to some qualification by history in cases of defamation, pragmatic confirmation of the wisdom of his own insistence that speech on public issues, including political issues, was given unlimited protection by the First Amendment. Interference is proper only where arming has begun, or where specific preparations for sabotage or espionage have been made, or where some such familiar criminal action, not political words alone, is in question. The clearest pragmatic confirmation of the wisdom of Mr. Meiklejohn’s idealistic position is the consequence of the Dennis case, not only for legislation but for administrative action as well.

The practical distinctions which make such a test useable are illustrated by a suggestion made by Mr. Meiklejohn in conversation as early as 1948. In the first two free speech picketing cases, speech on public matters was in question. In one, though picketing might be the only means of bringing the issues of a simple strike to a community’s attention, and though it might be used for that purpose, it was forbidden by the statute in question. In the other, the actual picketing was used in a simple strike over employment on a public project, a matter of public concern. Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940). In some situations, on the other hand, picketing is as private as manufacturers’ conversations about prices, and protected only by such constitutional safeguards as those expressed in the assurance of equal protection of the laws and due process of law. Sugar Inst. v. United States, 297 U.S. 553 (1936); Giboney v. Empire Storage Co., 336 U.S. 490 (1949); Local Union v. Graham, 21 U.S. L. Week 4252 (U.S., 1953). The case of the man shouting “fire” in a theatre is, as it is ordinarily stated, a case of private speech. If the man has an ultimate political objective, his conduct is still as easily reached as arming or the command of armed forces, under the suggested test. Whatever the defects of particular definitions of crimes, the conduct in the theatre is, as ordinarily presented, at least attempted homicide or attempted mayhem. Mr. Meiklejohn’s philosophy leads him to skepticism about the argument “from particulars to particulars,” including the argument “from analogy”; and the form of the argument of his book, not adequately suggested in this comment, and based on the assumptions of representative government, may interest lawyers. Compare 1 Bradley, op. cit. supra note 7, at 348 ff., esp. 351. See also Dewey, Logic—The Theory of Inquiry 268, 479–81, and cc. IX, XXIV (1938). Compare Levi, An Introduction to Legal Reasoning (1949).

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (deportation of alien for previous membership in the Communist party, under the McCarran Act, upheld; Clark, J., not participating; Douglas and Black, JJ., dissenting); Carlson v. Landon, 342 U.S. 524 (1952) (McCarran Act authorizes detention of alien arrested for deportation as a Communist, without bail, subject to the not unreasonable discretion of the Attorney General, exercised through delegation by district attorneys; and is constitutional; Frankfurter and Burton, JJ., dissenting, on the construction of the Act; Black, J., dissenting on construction and constitutionality; Douglas, J., dissenting on constitutionality); Adler v. Board of Educ. of the City of New York, 342 U.S. 485 (1952) (state act providing for discharge of teachers who advocate or teach violent overthrow, or who organize or [with knowledge of purposes?] join any group “which teaches or advocates” violent overthrow; with regulations ambiguously permitting some regard for earlier membership or advocacy, but requiring trial of issue of advocacy or membership, past [?] or present, only, before loyalty boards, constitutional; Frankfurter, J., dissenting on the ground that the question presented, in advance of any enforcement action, by a declaratory judgment proceeding, was not ready for decision; Black and Douglas, JJ., dissenting on the application of the Constitution). As to prior membership, and membership without knowledge of purposes, under oath requirements for public employees, compare Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 721, 723–24, 726–27 (1951); Wieman v. Updegraff, 344 U.S. 183 (1952). As to membership without knowledge of purposes in prosecutions for crime, compare the passages in the Garner case, 341 U.S. at 726–27, and in Dennis v. United States, 341 U.S. 494, 516 (1951). Knowledge about the conduct of the trial in the Dennis case was
A practical and historical treatment of the privileges and immunities clause and the First Amendment would lead, for example, to an appreciation that much of what legislative and congressional Un-American Activities Committees have been doing is unconstitutional. The kind of legislation applicable to private persons with which they are ostensibly concerned is itself, by a reasonable test, unconstitutional.

It is sometimes said that such committees can always propose constitutional amendments, and so the subject matter of their investigation is not limited by the Constitution. It is no doubt true that an investigation with a view to amending the Constitution can constitutionally be authorized by Congress. It does not follow that a resolution authorizing an investigation of any single subject goes so far. Problems both of interpretation and of validity may appear. What would a believer in current traditions about federal power say, for example, about a resolution simply treated as authorizing a committee of Congress to investigate the efficiency of the Chicago or Philadelphia fire department? Even under Mr. Crosskey's views there is a problem here. Unless a specific amendment is seriously under consideration, the powers of Congress and its committees must, it seems, be limited to consideration of legislation presently constitutional.

Confusion over the meaning of the First Amendment has contributed to the action of committees, sometimes already violating the First Amendment, in violating other provisions of the Constitution.

There is no doubt that congressional committees have great scope in investigating the conduct of public officers, past or present, in policy-forming or sensitive positions. Congress may, of course, legislate in such a way as to insure that its policies will be carried into effect, subject to constitutional limitations. Its power includes the power to insure the honest and loyal discharge of public duties and the protection of the public service, particularly the public service dealing with "sensitive" matters, where serious espionage or sabotage may occur.

Nevertheless the Un-American Activities Committees have gone beyond legitimate investigations useful in preparing for legislative action. The activities of state committees are clearly subject to control by the Supreme Court; and we are now in a field where, even under Mr. Crosskey's views, congressional committees are subject to judicial control. The Supreme Court has thus far indicated that it will not intervene. Nevertheless, as one private citizen participant can advanced by the opinions dealing with the decision to sustain the contempt sentences against counsel for the defendants. Sacher v. United States, 343 U.S. 1 (1952) (Clark, J., not participating; Frankfurter, Black, and Douglas, JJ., dissenting). Compare Beauharnais v. Illinois, 343 U.S. 250 (1951); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); and, e.g., on the matter of emergency, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

testify, the use of a committee hearing simply and patently as a means of pun-
ishing political offenses not on any statute book, is at least a theoretical possi-
bility. This is, at any rate, an elementary violation of the principle of separa-
tion of powers, certainly an unauthorized exercise of judicial power. It is hard
to see how the Court can in all possible cases protect itself by denying certiorari.

If legislative justice of this sort is to become a part of our system of govern-
ment, it should at the very least be subject to administrative safeguards. Here
again, as Mr. Crosskey's views imply, the clear direction of the due process
clauses, together with the attribution of judicial power to the Supreme Court of
the United States, gives that Court the authority and the constitutional duty
to set minimum standards of procedural decency in the administration of justice
by state and federal agencies.

Neglect of the limitations imposed by the First Amendment and the privileges
and immunities clause of the Fourteenth Amendment may thus be supplement-
ed by the vagaries of legislative justice in violation of provisions for the separa-
tion of powers, and carried out by procedures condemned by the due process
clauses. It is not only Un-American Activities Committees which illustrate the
interactions between substantive safeguards and administrative due process.
Perhaps even more serious in both their immediate effect and their pervasive
example are the great and increasing range of loyalty proceedings.

Legislatures have ample powers to see that their policies are carried out. On
the other hand, while it is true that no one has a simple right to public employ-
ment, it is also true that no one—including a foreign corporation engaged in
commerce among the states—may be denied any advantage within the grant

Representative Velde and Senator Jenner have indicated clearly that they have no serious
purpose of using committee hearings on alleged subversives among teachers to prepare legis-
lation. See Subversive Influence in the Educational Process—Report of the Subcommittee To
Investigate the Administration of the Internal Security Act and other Internal Security Laws
to the Committee on the Judiciary, Sen. Rep., 82d Cong. 2d Sess. 1, esp. at 9-13 (Jan. 2, 1953)
(signed by Senator Jenner as a subcommittee member); Interview with Representative Velde
in the Chicago Daily News (Red Streak edition), p. 8, col. 4 (Feb. 16, 1953). See also interviews
with Representative Velde and Senator McCarthy in 34 U.S. News & World Report 28, 30
(Jan. 2, 1953); Kiplinger Washington Letter (Jan. 3, 1953). The function of the hearings evi-
dently is to exert supervision over school boards, regents, and trustees. Another function is
perhaps to aid district attorneys and grand juries in instituting prosecutions. Although the
extent of criminal liability for alleged subversive activities has not been defined
by the courts, the committees will be implementing their own views on these matters by determining when
it is appropriate to effect discharges or impair opportunities for promotion and employment;
or to ridicule, disgrace or inconvenience citizens; and thus to apply sanctions often quite
as serious as fine or imprisonment. It is difficult to find authority for such activities in
the grant of "legislative powers" to Congress. See Sharp, The Classical American Doctrine
of "The Separation of Powers," 2 Univ. Chi. L. Rev. 385, esp. at 405-6 (1935); Berman

20 Compare, however, note 7 supra. The strong argument of Henderson, The Position of
the Foreign Corporation in American Constitutional Law (1918), anticipated the subsequent
development. Terral v. Burke Construction Co., 257 U.S. 529 (1922); Liggett Co. v. Baldridge,
278 U.S. 105 (1928); Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926); Wheeling
(1939). In Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), private school attendance
of government on condition of giving up a constitutional right. In spite of indications to the contrary, it seems doubtful whether Congress or the President may constitutionally condition public employment generally on giving up the expression of legal political opinions by means of membership in legal political organizations. A Democratic Congress may doubtless inquire, for example, whether Republican procurement officers are vigilant and whether Department of Labor officials are faithfully executing labor legislation. But it may not legitimately make it a condition of appointment to a nonsensitive agency that the appointee shall or shall not be a member of any political party, if our interpretation of the First Amendment is correct.

No doubt special qualifications, like dependable discretion, may properly be required for appointment to and continued service in the sensitive agencies—Atomic Energy Commission, Defense Department, Central Intelligence Agency, State Department—and related sensitive positions in other agencies. Even here, however, whatever the normal powers of discharge, it is doubtful whether employment can be conditioned on submission to discharge procedures resembling administrative procedures but without the elementary characteristics of administrative due process. The circumstances of the sensitive agencies and positions may possibly make a difference in procedure legitimate, but it is hard to see a justification for departures from normal standards of administrative procedure in loyalty proceedings elsewhere. Whatever may be the implications of the due process clauses; the Court will have the final word on the positive law. For here, as Mr. Crosskey and the present Court must agree, we are concerned with the federal administration of justice, and the matter is for the Court to decide.

In view of the harm which impressive but inadequate procedures can do to both the individual and the community, the constitutional arguments suggested are at the very least persuasive as to policy.

Is there any limit on hearsay? Is there any limit, substantive or procedural,

was an alternative to public school attendance on condition of the flag salute, and what appears to be a form of the doctrine of unconstitutional conditions was there rejected. With whatever warrant, the record in the later critical case was apparently treated as showing a legal requirement of attendance at public school, with compulsory flag salutes, and the question, therefore, was slightly different. Nevertheless, the Gobitis case was expressly overruled. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Compare Wieman v. Updegraff, 344 U.S. 183 (1952).

See notes 3 and 17 supra. It may be that special circumstances justify some control of union activities and public employment in spite of some interference with freedom of expression by some use of conditional privileges. American Communications Ass'n v. Douds, 339 U.S. 382 (1930); United Public Workers v. Mitchell, 330 U.S. 75, esp. at 100 (1947); Geronde v. Board of Supervisors of Elections of Baltimore City, 341 U.S. 56 (1951); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); Adler v. Board of Educ. of City of New York, 342 U.S. 485 (1952). With our present perspective, however, these decisions seem questionable, and represent, at best, it seems, the limits of justifiable restraint.

The dangers of multiple hearsay are illustrated by the cases of two women restored by the Defense Department, with back pay less earnings, at the ages of 26 and 35, respectively, after four years under the cloud of a loyalty proceeding discharge. They were finally able to prove that they were not at specific meetings where their presence had been reported. Chicago Sun-Times, p. 6 (Jan. 12, 1952). On the other hand, Miss Bailey was discharged from her
determined by any requirement of relevance? May an applicant for admission to the bar be denied admission by a character committee on the ground that he, like Innocent III, St. Thomas, John Locke, Thomas Jefferson, and Karl Marx, believes in the philosophical "right" of revolution? If a statement in his questionnaire and his answers to questions on the subject may, on the record, be the basis of a committee decision against him, is this simply irremediable bad logic, or is it a denial of a privilege or immunity of a citizen or of due process of law or both?

Suppose that the applicant testifies, in answer to questions, that in his judgment a Communist is not necessarily disqualified to practice law. Suppose that he later refuses to answer questions whether he is a member of the Communist party, whether he has been a member of Attorney General's list organizations, and whether he has ever subscribed to the Daily Worker. Suppose that there is affirmative evidence that the applicant is of good character and a serious citizen, insensitive position by a loyalty board, permanently, so far as we know, on the testimony of persons unknown to her and the board, apparently unsworn, given to the FBI, and tending to show that she was active in a communist "front" organization. The decision of the board was upheld, over a strong dissent, in the Court of Appeals, and that decision was in turn affirmed, per curiam, by a divided vote, Clark, J., not participating. Bailey v. Richardson, 341 U.S. 918 (1951). The somewhat ineffectual decision on the Attorney General's list, rendered the same day, had the advantage of enabling the justices to indicate or express their opinions on the Bailey case. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). See Frank, The United States Supreme Court, 1950-51, 19 Univ. Chi. L. Rev. 165, 195-98 (1952). Mr. Justice Douglas' statement is particularly interesting. 341 U.S. at 179-83 (1951).

2 The question for the committee in Illinois under the applicable rule of court, appears to be that of "character and moral fitness." See Ill. Rev. St. (1949), 110, § 259.58 (Rule 58), IX. See also Ill. Const. Art. V, § 25. Admission to the bar is sometimes described as a "privilege," not a "right," but it is one which apparently cannot be denied subject to an unconstitutional condition or by procedures which lack due process of law. In re Summers, 325 U.S. 561 (1945). There it was held, however, that belief in nonresistance might be held by the Illinois Supreme Court inconsistent with an oath to support the Illinois Constitution. On the other hand, every thoughtful Catholic or Jeffersonian, everyone who likes to imagine he would have had courage to resist the Nuremberg laws, must believe in the philosophical "right" of revolution. Though Communists publicly supported over-all negotiation with Russia, and Mr. Churchill at the same time advocated over-all negotiation with Russia, it would not have been "permissible" to infer that he was then a Communist. The process of "inference" would, however, be like that attributed to the committee in the case supposed. In the proceeding which raises these questions in the writer's reflections, there were no written or oral pleadings and, though it was requested, no statement of the grounds of decision, no "findings of fact" or "conclusions of law." (On the logical and practical importance of findings and conclusions, consider Application of Murra, 166 F. 2d 605 (C.A. 7th, 1948), 178 F. 2d 670 (C.A. 7th, 1949), resulting in the petitioner's naturalization.) An investigator's report was apparently available to the Bar committee, but the applicant has been denied access to a copy. As a result of these circumstances, it is impossible to know the reason or reasons for the committee's action. The case or cases stated must therefore be treated as hypothetical. Nevertheless, in view of the expressed allegiances of the profession and the eminence of some members of the committee, the actual case has a symbolic value comparable to that which has become associated with some of the activities of the Un-American Activities Committees and their backers. Mimeographed copies of those parts of the record to which the applicant was given access are available. See further London, Heresy and the Illinois Bar: The Application of George Anastaplo for Admission, 12 Lawyers Guild Rev. 163 (1952).
and that there is no evidence that he has ever been a Communist, a "communist sympathizer," a member of any Attorney General's list organization, or a subscriber to the Daily Worker. He testifies that his answers and his refusals to answer are due to his belief in basic liberties and his belief that they are impaired by such questioning. If his application is denied on some or all of these grounds, has he constitutional protection?24

24 Compare the cases dealing with the oath, somewhat better controlled than current loyalty proceedings, and so far upheld only for labor leaders using NLRB facilities, and public employees or officials. American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); Geronde v. Board of Supervisors of Baltimore City, 341 U.S. 56 (1951). No record has yet presented the case where the only plausible explanation for refusal to take an oath or answer questions about political matters is that it is an expression of opinion unfavorable to the oath requirement or the questions, and so protected by constitutional safeguards for freedom of communication. The University of California oath situation has made such expressions of opinion familiar. In disposing of a related but narrower question under the California Constitution, the District Court of Appeal of the Third District of California expressed itself clearly on the merits of the policy factors which may influence a difficult decision on problems of statutory or constitutional interpretation. Tolman v. Underhill, 229 P. 2d 447, 452 (Cal. App., 1951). Compare Pockman v. Leonard, 249 P. 2d 267 (Calif., 1952); Tolman v. Underhill, 249 P. 2d 280 (Calif., 1952); Fraser v. Regents of University of California, 249 P. 2d 283 (Calif., 1952). Questions of the general sort may still have to be decided in the administration of such programs as that instituted by the Feinberg Law, as well as in the administration of oath requirements, bar examination procedures, and loyalty procedures generally. Compare Adler v. Board of Educ. of the City of New York, 342 U.S. 485 (1952); Bailey v. Richardson, 341 U.S. 918 (1951). Compare also Matter of Cassidy, 268 App. Div. 282, 51 N.Y.S. 2d 202 (1944), 270 App. Div. 1046, 63 N.Y.S. 2d 840 (1946), aff'd, 296 N.Y. 926, 73 N.E. 2d 41 (1947), with a questionable treatment of rather clear-cut political action, coming close to traditional conspiracy, as an alternative ground of decision in the Appellate Division. See Booker, The "Right" to Practice Law, 1 Duke Bar J. 249 (1951), and a discussion of the Canadian situation with respect to bar admissions in Meredith, Communism and the British Columbia Bar, 28 Can. Bar. Rev. 893 (1950), commenting on Martin v. Law Soc. of Brit. Columbia, [1950] 3 D.L.R. 173. As yet, loyalty proceedings have been upheld in the United States only for public employees. Adler v. Board of Educ. of the City of New York, 342 U.S. 485 (1952). They will doubtless be approved—subject, it is to be hoped, to procedures satisfying the requirements of administrative due process of law—for industrial and business personnel engaged on classified military orders, who are now subject to loyalty proceedings; and of whom appropriate special qualifications, of discretion for example, may appropriately be required, as of government servants in sensitive positions. The tendency of loyalty proceedings to spread and to be carried on by private authorities is noticeable, for example in the medical profession and in every day business occupations. The question whether they are constitutional at all in determining admission to the "private practice" of the insensitive profession of the law, may occasion difficulty if it is ever presented to the Court. It is also possible that there will be difficulty on the narrower question, if it is ever presented, whether admission to the bar may constitutionally be denied on the ground of refusal to take an oath or answer questions which is explicable, on the record, only as an expression of conscientious objection to the oath or the questions. Consider the significance for the cases stated of the factors of interpretation of the First Amendment and the privileges and immunities clause of the Fourteenth Amendment referred to in note 15 supra; as well as the possible implications of "due process of law" about regard for minimum standards of relevance and logic as an element among the elementary decencies of procedure. In Dennis v. United States, 341 U.S. 494, 516 (1951), the Court said: "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." This sentence has been read by some as indicating that the present danger test may still have some operative effect.
It is particularly such cases, far from the facts of the Dennis case, which indicate pragmatically the danger of any less rigorous treatment of the First Amendment than that proposed by Mr. Meiklejohn. The logic of his argument is persuasive, and if one remembers what sweep and significance Milton gave to his argument against prior censorship, one will find a clue to an historical justification, in the present state of our knowledge, for a clear cut meaning for the First Amendment.

III

Anyone who can remember the circumstances of the first World War must be impressed with the differences in the time of the second World War and the similarities in the time of the Korean War. Circumstances were remarkably favorable to freedom of communication during the second World War.25 There was not, as in 1917, any room for dissent about the declaration of war; and the passions associated with the opponents of participation in the war of 1914 were prevented by the unanimity with which the attack upon Pearl Harbor was inevitably received. We were used to foreigners, for example, foreigners with German accents, who were opposed to the regimes which we were fighting; and the absurd hostility which was continually appearing, during 1917 and 1918, against harmless people with foreign accents did not occur during the war of 1939. Immediately after the Russian revolution, in 1917, anti-Bolshevik passion was strong; but from 1941 to 1945, the Russians were on our side.

All these favorable influences are absent in the time of the Korean War. There is partisan passion about the war. We are against all Reds, and anyone with what anyone else may take to be a faint trace of a Red accent is treated by some with contempt and hatred.

One favorable influence, absent in 1917 but present in 1941, may still be at work. Influenced by reflection, and perhaps affected as well by their first experience with central planning, conservatives became between the world wars increasingly aware of their vital interest in freedom of communication, and of the place which freedom of communication holds in a system of economic and po-

in cases involving the expression of minority political views by means of speech or other communication. Consider also the possible significance of West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), and particularly the statement at 642. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." If exceptions have now occurred, it may nevertheless still be true that the principle suggested has some significance in the cases stated. The cases are distinguishable from the situation which led to Thoreau's essay "On Civil Disobedience," or from draft resistance as a protest against a particular war, by the indispensability of taxation and the draft for government, and the dubious character of the constitutional authority for any government interference with simple freedom of opinion and communication on matters of government.

25 See Sharp, Civil Rights in the First Six Months of the War, 23 Chi. Bar Ass'n Rec. 408, 434, 436 (1942), taking an optimistic view of the prospect for civil liberties at the time.
While the great political leader of the conservatives, himself a lawyer and the son of a chief justice, appears to have forgotten these matters during the campaigns, other vigorous conservatives are apparently alert. The Inland Steel Company's "Inland News" emphatically went on record last May in favor of protecting the schools against the passions of the times. Going beyond the position of the presidential candidate of the Democratic party, the News seemed to indicate an awareness that there is a relationship, which could easily become more significant, between loyalty proceedings in the public schools and the "seizure" of steel mills by government.

The safeguards of the law are threatened in many places by passions which are also among the passions associated with revolution and war. "Reason" and a changing law may be enlisted on one side or the other, but the requirements of biological wisdom seem clear.

26 The most striking single illustration is perhaps suggested by the names of losing counsel on amicus curiae briefs, and by the history and position of the one dissenting Justice, in relation to the position of all the so-called "New Deal Justices," in Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

27 The first tentative exploration of the current relation between liberty and the "deepest" of these passions, some of them deeper than "fear," is in Carey McWilliams, Witch Hunt (1950). Compare the writer's reflections in The Limits of the Law, 61 Ethics 270 (1951) and Biology and Law, 16 Univ. Chi. L. Rev. 403 (1949). Kafka's "The Trial," written between 1914 and 1920 and published (as "Der Prozess") in 1925, is the definitive philosophical statement about loyalty proceedings; and suggests the possibilities in case the personnel of the loyalty boards changes.