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THE COMMUNIST CONTROL ACT OF 1954: A PROPOSED LEGAL-POLIT- ICAL THEORY OF FREE SPEECH

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OUR REACTION TO THE danger of Soviet totalitarianism is explainable in large part by the fact that we became aware of the danger so late and then only after we were victimized by the illusion that the "Grand Alliance" which won the war would continue on to "win the peace." Disappointment, frustration and anger mixed with fear and found an outlet in the measures taken against the adherents of Communism in our midst. But men devoted to the democratic cause have charged that in adopting these measures to fight Communist totalitarianism, we are aping the methods of our foes.¹ Although the courts have so far upheld the principal measures taken by Congress to combat Communism at home, they have not allayed the apprehension which has been voiced so bitterly by the dissenting judges claiming to represent the American liberal tradition. The passage of the Communist Control Act of 1954² affords a fresh opportunity to explore the question—which should always be in order—whether we have forsaken democratic principles in the fight against Communism.

I. ANALYSIS OF THE HISTORY AND PROVISIONS OF THE COMMUNIST CONTROL ACT

A. LEGISLATIVE HISTORY

On August 12, 1954, as the Eighty-Third Congress was approaching adjournment and its members, anxious to be off for the coming campaign, were

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¹ Mr. Justice Douglas, for example, dissenting in *Dennis v. United States*, 341 U.S. 494, 591 (1951), said: "Vishinsky wrote in 1938 in *The Law of the Soviet State*, 'In our state, naturally there can be no place for freedom of speech, press, and so on, for the foes of socialism.' Our concern should be that we accept no such standard for the United States."

² 68 Stat. 775 (1954), 50 U.S.C.A. § 841 (Supp., 1954).

wearily debating the Butler bill to combat Communist infiltration of labor unions,³ Senator Humphrey of Minnesota introduced a substitute amendment to subject to imprisonment for not more than five years and a fine of \$10,000 any person who knowingly and wilfully became or remained a member of the Communist Party, with knowledge of its objectives.⁴ After voting 85-1 to add the Humphrey amendment to, instead of substituting it for, the Butler bill,⁵ and modifying the proposal in certain other respects, the Senate passed the bill, 85-0.⁶

In the week that followed, second thoughts assailed both the Senate and the House and their positions vacillated. Ultimately, Congress rejected the original Humphrey proposal because of doubts about its constitutionality and concern that, even if it were upheld, it would force the courts to invalidate the registration requirements of the Internal Security Act as in violation of the privilege against self-incrimination accorded by the Fifth Amendment. Instead, Congress, by overwhelming votes,⁷ adopted the Communist Control Act of 1954 in order "to outlaw the Communist Party."

B. PROVISIONS

Section 2. Section 2 of the Act sets forth the findings of fact which, in the judgment of Congress, make the legislation necessary. Congress found that the Communist Party purports to be a political party but is in fact "the agency of a hostile foreign power" and "an instrumentality of a conspiracy to overthrow the Government of the United States" by "any available means, including resort to force and violence." Therefore, Congress concluded, the party's existence presents "a clear present and continuing danger to the security of the United States" and it "should be outlawed."

Section 3. "Outlawry" is effected by the provision in Section 3 that "whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated." Literally,

³ The Butler bill, Sen. 3,706, was amended in some respects and incorporated in §§ 6-11 of the Communist Control Act of 1954. These sections, which amend the Subversive Activities Control Act of 1950, Title I of the Internal Security Act of 1950, 64 Stat. 987 (1950), 50 U.S.C.A. § 781, by adding the category of "Communist-infiltrated organizations" to the categories "Communist-action organization" and "Communist-front organization," will not be considered in this paper. For a detailed discussion of these sections and the other provisions of the Act, consult The Communist Control Act of 1954, 64 Yale L. J. 712, 752-65 (1955); Federal Anti-Subversive Legislation of 1954, 55 Col. L. Rev. 631, 674-701 (1955).

⁴ 100 Cong. Rec. 14,208 (1954).

⁵ *Ibid.*, at 14,229. Senator Daniel made this successful proposal and it was accepted by Senator Humphrey and all of his twenty Democratic co-sponsors except Senator Lehman who cast the only negative vote.

⁶ *Ibid.*, at 14,234.

⁷ The conference report was adopted by the House, 265-2, *ibid.*, at 15,237, and by the Senate, 79-0, *ibid.*, at 15,121.

this provision can be interpreted to deprive the party of *all* "rights, privileges, and immunities" because the "laws of the United States or any political subdivision thereof" include the common law as well as statute law of the states and all "rights, privileges, and immunities" are "granted" by such laws since these terms describe the extent to which particular individual or group claims or interests are secured by law.

It is clear from the debates that the Act was intended to bar the Communist Party from appearing on the ballot in any national, state or local election. Furthermore, although the language of Section 3 is directed solely at the party as an organization, it has been construed in *Salwen v. Rees*⁸ to preclude a candidate who was not a nominee of the Communist Party from appearing on the ballot in a state election under the Communist Party label. The court emphasized that this disqualification was not directed against the candidate personally, but was necessary to effectuate the objectives of the act with regard to the Party. *Salwen v. Rees*, therefore, does not foreclose the questions whether (1) a candidate who is a Communist Party member or an avowed party adherent must be given a place on the ballot if he foregoes use of the party label and (2) the votes written in for a party member, or an avowed party adherent, who has no place on the ballot must be counted. Unless these questions are answered in the negative, the exclusion of the Communist Party as such from a place on the ballot may not keep it from participating in the electoral process as actively as it may choose. Yet the language of Section 3 makes it very difficult to arrive at negative answers to these questions.

Beyond revealing the clear intention to keep the party off the ballot, the legislative history fails to elucidate the scope of Section 3.⁹ There is a brief mention that under the act, the party "could not sue" and "could not be sued."¹⁰ Senator Ferguson thought the party would not be able to make leases or enter into any contractual relations, "because the party would have

⁸ 16 N.J. 216, 108 A. 2d 265 (1954). The opinion of Judge Drew of the Superior Court, Chancery Division, which was affirmed per curiam by the Supreme Court, does not clarify the facts of the case. 55 Col. L. Rev., op. cit. supra note 3, at 708 n. 589 states that the appellant "argued that the [Communist Control] Act did not prevent him from using the Communist Party label, since he was not nominated by the Communist Party but had filed a petition containing the requisite number of signatures. Thus, he maintained, the Party as such would not be appearing on the ballot. Brief for Appellant, pp. 11-12, *Salwen v. Rees*, supra."

⁹ Nor are we aided particularly by the opening sentence of Section 3 which declares that the Communist Party and successor organizations "are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof." Since the Party is an unincorporated association, see 64 Yale L. J., op. cit. supra note 3, at 719 n. 43, and not a legal body "created" under any law, this sentence has value only for purposes of analogy.

¹⁰ Senator Kefauver, 100 Cong. Rec. 14,713 (1954). Senator Butler agreed, *ibid*.

no legal rights within the United States."¹¹ If, however, Section 3 is read to deprive the party of the right to sue in the courts, whether federal, state or local, as it literally seems to do, it may produce consequences unintended by Congress. The party's property, funds, books and records, if located, could be confiscated by the government and the party would have no recourse. The party could be denied the use of the mails and of radio and television.

Yet it was not the purpose of Section 3 to effect the dissolution of the Communist Party. Although Section 2 speaks of outlawing the party, Section 3 apparently was not intended to make the party's very existence unlawful. Legislation for this purpose has usually employed unmistakable language.¹² By contrast, the proviso at the end of Section 3 requires that the section shall not be construed as amending the Internal Security Act of 1950. In upholding the order of the Subversive Activities Control Board requiring the Communist

¹¹ *Ibid.*, at 14,719.

¹² "Outlawry," of course, means to "be put out of the protection of the law" and, historically, involved the forfeiture of the outlaw's goods, as well as the dissolution of every contract to which he was a party. 1 Pollock & Maitland, *History of English Law* 477 (2d ed., 1911). Forfeiture inured to the benefit of the Crown and foreclosed the possibility that private individuals might seize the outlaw's property with impunity.

The general language of Sections 2 and 3, read together, is subject to the interpretation that the declaration of outlawry itself causes the funds, records and other property of the Party to escheat to the state. But this language should be compared with that of Section 2 of Texas Rev. Civ. Stat. Ann., art. 6889-3A (Supp., 1954) which provides that "It shall be unlawful for [the Communist] Party . . . to exist, function, or operate in the State of Texas" and authorizes judicial proceedings to dissolve the Party. The Texas statute further provides that ". . . all funds, records, and other property belonging to such Party . . . shall be seized by and forfeited to the State of Texas, to escheat to the State as in the case of a person dying without heirs." Mass. Ann. Laws c. 264 (Supp., 1954) is equally specific. Section 16A declares the Communist Party to be a subversive organization as defined in Section 16 and Section 17 declares all subversive organizations to be unlawful. Section 18 authorizes judicial proceedings to enjoin the Party from acting further as a subversive organization and to dissolve it as an organization. "Other state laws declare the existence of organizations advocating the violent overthrow of the Government of the United States or of the state illegal, and provide for the seizure and forfeiture of the organizations' funds, books, and records. See, e.g., La. Rev. Stat. § 14.370 (Supp. 1954)." 64 Yale L. J., *op. cit. supra* note 3, at 715 n. 28.

As of 1950, thirty nations had "outlawed" the Communist Party. H.R. Rep. No. 2,980, 81st Cong. 2d Sess. 2 (1950). Outlawry of totalitarian organizations abroad has generally been effected by their dissolution as organizations and confiscation of their properties. For example, the Communist Party Dissolution Act of 1950 in Australia, 48 Australian Commonwealth Acts No. 16, declared the Australian Communist Party to be an unlawful association which, by force of the Act, was dissolved. The Act provided for the vesting of the Party's property in a receiver to be appointed by the Governor-General. The Act was declared unconstitutional as not within the powers of the federal government in *Australian Communist Party v. Commonwealth*, 83 Commw. L. R. 1 (1951). In accordance with the Basic Law of the German Federal Republic, the Federal Constitutional Court found that the object and activities of the neo-Nazi Sozialistische Reichspartei (SRP) were directed against the constitutional order and its decision eliminated the parliamentary seats held by SRP members, confiscated the Party's property and forbade the formation of a substitute organization. Friedrich and Sutherland, *Defense of the Constitutional Order*, in *Studies in Federalism* 703 (Bowie and Friedrich ed., 1954).

Party to register as a Communist-action organization, the court of appeals in *Communist Party of the United States v. Subversive Activities Control Board*¹³ concluded that the Communist Control Act did not in any way affect the party's obligations under the Internal Security Act. Certainly it would be inconsistent policy to effect the dissolution of the party as an organization and at the same time require it to register and file annual reports and subject it to fine for failure to do so. Furthermore, the information which the Internal Security Act requires the party to submit with its registration assumes a degree of activity on its part which will be made impossible if the self-enforcing provisions of Section 3 of the Communist Control Act are given their widest possible scope. For example, the Internal Security Act assumes that the party will continue to have offices, officers and members, collect and spend money, and make and keep records¹⁴ and that it will pay income tax.¹⁵ Since the party is required to label the publications it sends through the mails and disclose its sponsorship of radio and television broadcasts,¹⁶ it must have been anticipated that the party might engage in these activities. It would not be sound, however, to argue that because the regulatory provisions of the Internal Security Act will have no scope if the activities sought to be regulated are prohibited by the Communist Control Act, the proviso in Section 3 of the latter act should be interpreted to authorize the party to continue to engage in these activities. This argument could be stretched to the point where it would nullify Section 3. But the proviso does indicate, particularly in the light of the rejection of the original Humphrey proposal, that when faced with the alternatives of forcing the disclosure of Communist activities and prohibiting them entirely, Congress chose the former. However, the general language used in Section 3 indicates that the legislators did not think through the problems that would arise when the weapon of partial proscription was added to that of publicity in the fight against Communism.

The construction that will be given Section 3, therefore, is uncertain, beyond the barring of the party from the ballot. Obviously, as the court in *CP v. SACB* recognized, the Section 3 proviso preserves the party's right, under Section 14 of the Internal Security Act, to obtain judicial review of the board's order. Undoubtedly, too, Section 3 will deprive the party of any

¹³ 223 F. 2d 531 (App. D.C., 1954), cert. granted, 350 U.S. 859 (1955). This case will be referred to hereafter as *CP v. SACB*.

¹⁴ Section 7(d), 64 Stat. 993 (1950), 50 U.S.C.A. § 786 (d) (1951). See, too, the regulations prescribed by the Attorney-General pursuant to Section 7(d) to govern the registration of Communist organizations and their members. 19 Fed. Reg. 6035-36 (1954). These regulations were issued after the Communist Control Act became law. Section 11.204(a) of the regulations requires the Communist Party to keep "cancelled checks, bank statements and records of income and disbursements."

¹⁵ Section 11(b), 64 Stat. 997 (1950), 50 U.S.C.A. § 790(b) (1951).

¹⁶ Section 10, 64 Stat. 996 (1950), 50 U.S.C.A. § 789 (1951).

special "rights, privileges, and immunities," such as the second-class mailing privilege,¹⁷ granted by law to encourage particular kinds of activity.¹⁸

Section 4. Section 4 displaced the provision in the original Humphrey proposal imposing criminal penalties for party membership. It provides that whoever "knowingly and wilfully" becomes or remains a member of the Communist Party "with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization."¹⁹ If Section 4 of the Communist Control Act has any purpose at all, it

¹⁷ 39 U.S.C.A. §§ 224-34, particularly § 226 (1928).

¹⁸ In *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), the Court referred to the second-class mailing privilege as "a form of subsidy" designed "to encourage the distribution of periodicals which disseminated 'information of a public character' or which were devoted to 'literature, the sciences, arts, or some special industry' because it was thought that those publications as a class contributed to the public good." *Ibid.*, at 151, 154.

¹⁹ The Internal Security Act requires every "Communist-action" organization to register with the Attorney-General and to accompany its registration by a statement containing, *inter alia*, the names (including aliases) and addresses of its members (Sections 7(a), (c) and (d) (4), 64 Stat. 992-93 (1950), 50 U.S.C.A. § 786 (a), (c) and (d) (4) (1951)). If it fails to register voluntarily, the Attorney-General may institute proceedings before the Subversive Activities Control Board to compel it to register, Section 13, 64 Stat. 998 (1950), 50 U.S.C.A. § 792 (1951). A Board order requiring an organization to register is subject to judicial review, Section 14, 64 Stat. 1001 (1950), 50 U.S.C.A. § 793 (1951), and the penalties for failure to register do not attach until the Board's order becomes final, Section 15(a), 64 Stat. 1002 (1950), 50 U.S.C.A. § 794(a) (1951), which is not until after the process of judicial review is exhausted, Section 14 (b), 64 Stat. 1002 (1950), 50 U.S.C.A. § 793 (b) (1951).

The requirement that the individual members of a Communist-action organization register is "an alternate, rather than an attachment, to the registration of the organization." *CP v. SACB*, 223 F.2d 531, 551 (App. D.C., 1954). It comes into play only "if an organization finally ordered to register fails to do so, or if upon registering and filing its membership list the organization fails to include the member's name." *Ibid.* See Section 8, 64 Stat. 995 (1950), 50 U.S.C.A. § 787 (1951). If, in such a case, a member of a Communist-action organization fails to register, the Attorney-General may institute proceedings before the Board to compel him to do so, but the criminal penalties for failure to register do not attach until the Board's order finding him to be a member and requiring him to register becomes final, following the exhaustion of the process of judicial review, Sections 13, 14 and 15(a), 64 Stat. 999-1002 (1950), 50 U.S.C.A. §§ 792, 793 and 794(a) (1951). Furthermore, an individual who denies that he is a member of a Communist-action organization, in spite of the fact that he has been listed in a registration statement, may resort to the specified procedure to have his name stricken from the statement, Section 7(g), 64 Stat. 994 (1950), 50 U.S.C.A. § 786 (g) (1951). But as soon as a Communist-action organization registers or a final order requiring it to register is in effect, certain sanctions are immediately imposed upon members—they are prohibited from holding any non-elective office or employment under the United States or engaging in any employment in any defense facility; and they may not obtain or use a passport, Sections 5(a)(1), 6(a), 64 Stat. 992-93 (1950), 50 U.S.C.A. §§ 784(a)(1), 785(a) (1951). Section 6 of the Communist Control Act, 68 Stat. 777 (1954), 50 U.S.C.A. § 784 (Supp., 1954), added the sanction that they may not hold office or employment with any labor organization or represent any employer in any proceeding under the National Labor Relations Act. For violation of any of these prohibitions, Section 15 (c), 64 Stat. 1003 (1950), 50 U.S.C.A. § 794 (c) (1951), imposes severe criminal penalties, which originally were not to apply against a person who was listed in a registration statement as a member

is to obviate the necessity of proceeding before the Subversive Activities Control Board to have the Communist Party declared a Communist-action organization and to preclude judicial review of the question.²⁰ Impatient with the fact that four years had elapsed since the Internal Security Act became law and no organization or individual was yet registered thereunder, Congress sought a short cut. But whether it found it in Section 4 is extremely doubtful. In the first place, Section 4 does not expressly require the Communist Party to register immediately as a Communist-action organization. Though *CP v. SACB* considered the applicability of the Communist Control Act, the opinion did not even mention the possibility that such a requirement might be inferred. Nor, obviously, did the court think that Section 4 had rendered the proceedings before the board superfluous or precluded judicial review. In fact, it reviewed in great detail the evidence upon which the board found the Communist Party to be a Communist-action organization and concluded that this finding was supported by a preponderance of the evidence, without relying in any way on the congressional findings in the Communist Control Act.

Secondly, so far as the individual party member is concerned, it is conceivable that Section 4 might be interpreted to require him to register immediately even if the party itself has not been finally ordered to do so. But the "provisions" of the Internal Security Act do not require him to register unless the party is finally ordered to register and fails to do so or the party registers but fails to include his name in the membership list (Section 8) and even then he is not subject to the penalties of Section 15 (a) unless he himself has been finally ordered to register (Sections 13, 14 and 15 (a)). It is difficult to construe the language of Section 4 as short-cutting these "provisions."²¹ Nor does it make very much sense to read Section 4 to say that for purposes of the "provisions" regarding registration of its members, the Communist Party shall be conclusively presumed to be a Communist-action organization, but not for purposes of the "provisions" regarding registration of the party

of a Communist-action organization but who requested the Attorney-General to remove his name from the list, unless and until the Attorney-General denied the request, Sections 5(c) and 6(c), 64 Stat. 993 (1950), 50 U.S.C.A. §§ 784(c) and 785(c) (1951) read together with Sections 7(g) and 9(b), 64 Stat. 994, 996 (1950), 50 U.S.C.A. §§ 786(g) and 788(b) (1951). The latter provisions were repealed by Section 7(c) of the Communist Control Act and "one who is a member is subject to the sanctions without the interval of immunity." *CP v. SACB*, 223 F. 2d 531, 553 n. 48 (App. D.C., 1954).

²⁰ See the statement of Senator Humphrey, 100 Cong. Rec. 15,105 (1954); but cf. the statements of Senator Butler, *ibid.*, at 15,103-4. Congressman Dies thought that Section 4 made membership in the Communist Party a crime in itself, punishable as such. *Ibid.*, at 15,237. This Senator Butler correctly denied. *Ibid.*, at 15,102.

²¹ Senator Butler expressed the view that Section 4 did not require the individual member to register immediately but only in accordance with the "provisions" of the Internal Security Act. 100 Cong. Rec. 15,103 (1954). Senators Cooper and McCarran apparently thought that Section 4 required individual members to register immediately. *Ibid.*, at 15,113.

itself. It is not reasonable, too, to interpret Section 4 to mean that the "penalties" provided by Section 15 (c) and the disabilities of Sections 5 and 6 of the Internal Security Act come into play immediately, even though neither the Communist Party nor the individual has registered or been ordered finally to register.²² The "provisions" of the Internal Security Act do not impose these penalties and disabilities unless the organization is registered or there is in effect a final order requiring it to do so. Furthermore, it would be incongruous to say that the Communist Party shall be conclusively presumed to be a Communist-action organization for purposes of the "provisions" regarding penalties and disabilities but not regarding registration. Both the suggestions rejected could also conceivably lead to the absurd result that party members would be required to register or incur penalties and disabilities because they belonged to an organization which the Supreme Court might eventually hold not to be a Communist-action organization. In any case, the question of the possible effect of Section 4 upon the party and its membership will shortly become academic when *CP v. SACB* is finally decided. Truly, in this respect, the mountain was in labor and, after all, brought forth a mouse.²³

²² Contrast 64 Yale L. J., op. cit. supra note 3, at 747 which reaches an opposite conclusion on the basis of very flimsy evidence, but prompted by the thought that Section 4 must be given some meaning that adds to the Internal Security Act. 55 Col. L. Rev., op. cit. supra note 3, at 716-17 suggests that Section 4 be interpreted to authorize proceedings before the Subversive Activities Control Board to require individual members of the Party to register even though the Party has not been finally ordered to register and to impose the disability and penalty provisions of the Internal Security Act upon members even before they are ordered to register. This position, as the authors recognize, is not free from the inconsistencies pointed out in the text. *Ibid.*, at 715-16 n. 646.

²³ The fact that Section 4 of the Communist Control Act makes the "provisions and penalties" of the Internal Security Act applicable only to individuals who "knowingly or wilfully" become or remain members of the Communist Party "with knowledge of the purpose or objective" of the Party, whereas the Internal Security Act speaks only of "members" does not mean that Section 4 has weakened the Internal Security Act. In *CP v. SACB*, Sections 5 and 6 of the Internal Security Act, 64 Stat. 992-93 (1950), 50 U.S.C.A. §§ 784 and 785 (1951), were interpreted to apply only to members "with knowledge or notice" that the organization to which they belong is registered or has been finally ordered to register. "If," said the court, "the organization has registered as a Communist-action organization without an order to do so, it has voluntarily agreed that it is such an organization. If a final order has been entered against it, its nature as such an organization has been determined by full administrative proceedings fully reviewed by the courts." Therefore, knowledge or notice of registration or a final order "carries knowledge or notice of the nature of the organization; its nature has been either admitted or established." *CP v. SACB*, 223 F. 2d 531, 551 (App. D.C., 1954). Though the court did not pass on this question, it seems clear that the penalties of Section 15, 64 Stat. 1003 (1950), 50 U.S.C.A. § 794 (1951), could not be applied to a member who did not have such knowledge or notice. Section 4 thus stated what was implicit in the Internal Security Act as originally passed.

It may be worth mentioning that Section 4 adds something new to the Internal Security Act. It applies not only to members of the Communist Party but also to members of "any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence." The other organizations referred to are not possible successors to the Communist Party, because sub-

Section 5. The most significant contribution of the Communist Control Act to the Internal Security Act is made by Section 5, which specifies the kind of evidence which, if presented, shall be considered in determining membership in the Communist Party.²⁴ Although this section is directed to "the jury, under instructions from the court," it will no doubt guide the Subversive Activities Control Board and the courts. The Internal Security

section (b) defines "Communist Party" for the purposes of Section 4 to mean "the organization now known as the Communist Party . . . whether or not any change is hereafter made in the name thereof." (Compare Section 3 which applies to the Communist Party "or any successors" thereof "regardless of the assumed name"). Yet the members of such another organization, which may be a Fascist, Nazi or other totalitarian anti-Communist organization are subjected to the Internal Security Act as members of a "Communist-action" organization. It will take a great deal of judicial ingenuity to make sense of this provision and bring such an organization and its members under the Internal Security Act. It might be done by construing Section 4 as amending the definition of a "Communist-action organization" in Section 3(3) of the Internal Security Act, 64 Stat. 989 (1950), 50 U.S.C.A. § 782(3) (1951); and all the other provisions of that act in a corresponding fashion.

²⁴ Section 5 provides: "In determining membership or participation in the Communist Party, or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

"(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

"(2) Has made financial contribution to the organization in dues, assessments, loans or in any other form;

"(3) Has made himself subject to the discipline of the organization in any form whatsoever;

"(4) Has executed orders, plans, or directives of any kind of the organization;

"(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

"(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

"(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

"(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

"(9) Has prepared documents, pamphlets, leaflets, books or any other type of publication in behalf of the objectives and purposes of the organization;

"(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

"(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

"(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes, of the organization;

"(13) Has in any other way participated in the activities, planning, actions, objectives or purposes of the organization;

"(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

Act did not define membership and Section 5 was intended to anticipate the difficulty of proving membership when party members no longer carry cards or other identifying documents and may even formally resign once the party is finally ordered to register as a Communist-action organization.²⁵ Although the "subjects of evidence" enumerated include the past as well as the present activities of an individual, the ultimate finding must be one of present membership.²⁶ And, as the court of appeals said in connection with the evidentiary considerations which Section 13 (e) of the Internal Security Act requires of the board in determining whether a group is a Communist-action organization: "The ultimate finding is to be derived as a conclusion from basic findings. The Board may find full activities in respect to some of these matters, partial activities in respect to some, and a complete absence of activity in respect to some. The Board may make findings in other relevant respects not here enumerated. Having made these several findings, the Board must distill from the composite an ultimate finding."²⁷ Like Section 13 (e), Section 5 does not "specify what quantum or what character of evidence shall produce a given result."²⁸ For this reason, in determining whether the enumerated evidentiary considerations are relevant to the determination of present membership, they must be taken together and not in isolation.

II. CONSTITUTIONALITY OF THE COMMUNIST CONTROL ACT

The main concern of this paper is with the constitutionality of Section 3 of the Act which terminates the "rights, privileges, and immunities" of the Communist Party. The basic questions concerning the constitutionality of the Internal Security Act will not be considered.²⁹

A. THE FIRST AMENDMENT: ARE THERE LIMITING POSTULATES?

Even if Section 3 is construed only to bar the Communist Party itself from the ballot, it will deny the claims of the party and its members to full

²⁵ See the statement of Attorney-General Brownell referred to in 100 Cong. Rec. 15,112 (1954). The non-Communist affidavit requirement of the Labor-Management Relations Act, 61 Stat. 143 (1947), 29 U.S.C.A. § 159(h) (Supp., 1954), has raised similar problems. See, e.g., *Hupman v. United States*, 219 F. 2d 243 (C.A. 6th, 1955).

²⁶ Section 4 refers to "whoever . . . becomes or remains a member." The registration requirements of Section 8 of the Internal Security Act are imposed upon "any individual who is or becomes a member" and Section 13(b) gives an individual registered under Section 8 an opportunity to institute proceedings for the cancellation of his registration. It must, therefore, have been contemplated that an individual who was once a member could cease to be so and be relieved of the burdens of the Act.

²⁷ *CP v. SACB*, 223 F. 2d 531, 559 (App. D.C., 1954).

²⁸ *Ibid.*, at 560. Congressman Dies expressed the view that Section 5 made proof of any one of the enumerated factual situations proof of membership. 100 Cong. Rec. 15,237 (1954). This interpretation is clearly erroneous.

²⁹ On these questions, see Sutherland, *Freedom and Internal Security*, 64 Harv. L. Rev. 383 (1951) and Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimination*, 18 U. of Chi. L. Rev. 687 (1951).

freedom of political organization and expression and raise questions under the First Amendment. These questions will come into sharper focus if Section 3 is read so as to effect the dissolution of the Communist Party as a legal organization. The discussion that follows is intended to apply even if the latter possibility materializes.

Evaluation of Section 2 Findings. Any approach to the problem of constitutionality will be determined by the underlying evaluation of the Communist movement and particularly by the acceptance or rejection of the findings in Section 2. To fortify the Act against attack under the First Amendment,³⁰ Congress found that the Communist Party purports to be a political party but is in fact "an instrumentality of a conspiracy to overthrow the Government of the United States" directed by a hostile foreign power. Whether we choose to call the Communist Party a "political party" is a matter of definition,³¹ but that it differs, in the respects enumerated in Section 2, from all other parties which accept the framework of democracy is, as Senator Humphrey said, a statement based "upon observation of the facts of life, both at home and abroad."³² The respects in which it differs, furthermore, are material to the ends which the Act seeks to serve and the means it employs.

The Communist Party of the United States is the American section of the world communist movement. Its policies and programs "are secretly prescribed for it by the foreign leaders" of that movement (Section 2). Its members "are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains" (*ibid.*). Its aim is to further the interests of the world communist movement by any means, including resort to force and violence, and at whatever costs to the people of the United States.³³ Should it come to power, it would crush the liberties

³⁰ "Congress shall make no law . . . abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

³¹ "The term 'party' is applied equally to the peaceful parties of America and to the Communist Party of Russia, the Nazi Party of Germany and the Fascist Party of Italy. The methodology of these parties varies, but their fundamental objective—to place and keep their leaders in the control of government—is the same." Key, *Politics, Parties and Pressure Groups* 246–47 (1942). "Party may be defined as an organized group that seeks to control both the personnel and the policy of the government." Sait, *American Parties and Elections* 141 (1927).

³² 100 Cong. Rec. 14,208 (1954).

³³ It has often been argued that "domestic" Communism is not a danger. See, for example, the statement of Professor Chafee, Hearings before the Subcommittee on S. 1,194 and S. 1,196 of the Senate Committee on the Judiciary, 81st Cong. 1st Sess. 241–42 (1949); dissenting opinion of Mr. Justice Douglas in *Dennis v. United States*, 341 U.S. 494, 588–89. But, as Professor Hook has pointed out, although the dangers of Communism "may be distinguished in their internal and external aspects. . . [t]here is no such thing as merely domestic Communism. Communism is an international movement whose capital is Moscow; it is this movement that is the enemy of American democracy; and the American Communist

of the people in the process of establishing a totalitarian state.³⁴ Yet the party makes every effort to appear like an ordinary "leftist" party in the great tradition of American dissent. The preamble to its constitution, adopted in 1948, states that "[t]he Communist Party upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights against its reactionary enemies who would destroy democracy and popular liberties."³⁵ "Propaganda," Hannah Arendt tells us, "is one and possibly the most important instrument of totalitarianism for dealing with the nontotalitarian world; terror, on the contrary, is the very essence of its form of government."³⁶

party, no matter what its size or influence (which is not inconsiderable), forms an integral part of that movement. Without its organic tie to the Soviet state apparatus with all its machinery for war, espionage, and terror, the American Communist Party would have only nuisance value, its members would be ineffectual, candidates for the political mental ward now inhabited by Communist splinter groups like the Trotskyists. It is not the words uttered by members of the Communist party that make them dangerous, but their organizational ties; these make them the paramilitary fifth column of a powerful state, obligated to strike whenever their foreign masters give the word." Hook, *Does the Smith Act Threaten Our Liberties?* 15 *Commentary* 63, 68 (1953).

See, too, *Burns v. Ransley*, 79 *Commw. L. R.* 101 (1949) in which a representative of the Australian Communist Party, replying to the following question, "We all realize the world could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?," said: "If Australia was involved in such a war, it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. We would oppose that war. It would be a reactionary war." Pressed for a "direct answer," Burns added: "We would oppose that war. We would fight on the side of Soviet Russia. That is a direct answer." The High Court of Australia upheld Burns' summary conviction for uttering seditious words.

³⁴ This, it seems to me, is the meaning of the finding in Section 2 that the Communist Party "constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution." Essentially the same finding was made by Congress in Section 2(2) of the Internal Security Act: "The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality." See too, Mr. Justice Jackson's incisive analysis of the aims and methods of the Communist Party in *American Communications Ass'n v. Douds*, 339 U.S. 382, 424-33 (1950).

³⁵ Quoted in *CP v. SACB*, 223 F. 2d 531, 571 (1954).

³⁶ Arendt, *The Origins of Totalitarianism* 335 (1951). (This profound and moving work is indispensable for an understanding of modern totalitarianism.) Similarly, Judge Learned Hand concluded that the "violent capture" of all existing governments was an article of the Communist faith "which is a common-place among initiates," but "a part of the homiletics for novitiates, although so far as conveniently it can be, it is covered by an innocent terminology, designed to prevent its disclosure." *United States v. Dennis*, 183 F. 2d 201, 212 (C.A. 2d, 1950).

Nevertheless, Section 2 tends to oversimplify the problem presented by the Communist Party. It is foolhardy to regard it simply as a political party and overlook its conspiratorial nature. But it is not merely an illegal conspiracy masquerading as a political party. It is an organized section of a world movement struggling for political power by both legal and illegal, open and conspiratorial means. Its "open" and "legal" methods are those used by all other political parties, yet they are intertwined with its secret and illegal methods. For experience has shown that the conspiratorial center orders the "line" which the "open" activities should take. And the legal activities cover the conspiratorial center and serve as a recruiting ground for illegal operations.⁸⁷ It is this combination of legality and illegality which makes for the peculiar difficulties a democracy faces in dealing with the party—difficulties which are compounded by the organizational ties of the party to a world movement.

Constitutionality in the Light of the Dennis Case. In many ways, it is easier to uphold Section 3 of the Communist Control Act against attack under the First Amendment than the convictions in *Dennis v. United States*.⁸⁸ The eleven top Communist leaders were convicted of conspiring to organize the Communist Party as a society, group and assembly of persons who teach and advocate the duty and necessity of action to overthrow the United States government by force and violence, employing language reasonably and ordinarily calculated to incite persons to such action and with the specific intent of accomplishing their purpose at the earliest time that circumstances would permit. While speech was the basis of the conviction in the *Dennis* case, Section 3 is aimed directly against the organization created to effectuate Communist aims. Also, as Dean Rostow has pointed out, judicial notice had to be relied upon by the Court to supply the facts and judgments upon which constitutionality was rested in the *Dennis* case, because there were no legislative determinations that the organized promulgation of Communist doctrine threatened the security of the state at the time of trial or "on the probability and gravity of the evil sought to be suppressed and on the 'necessity' of re-

⁸⁷ The Report of the Australian Royal Commission on Espionage on the Petrov case, like the Report of the Canadian Royal Commission on Soviet Espionage (1946), concluded that "the evidence clearly shows that it was only among Communists (in which term we include Communist sympathizers) that the M.V.D. could expect to find in Australia willing helpers. The only Australians who so far as the evidence shows knowingly assisted Soviet espionage directly or indirectly were Communists." New York Times, p. 14, col. 7 (Sept. 15, 1955).

Totalitarian movements have been aptly called "secret societies established in broad daylight." Koyré, *The Political Function of the Modern Lie*, Contemporary Jewish Record (June 1945), quoted by Arendt, op. cit. supra note 36, at 363. Totalitarian parties "are a development, historically and psychologically, not of the political party, but of the secret society." Russell, *Power* 177 (1938).

⁸⁸ 341 U.S. 494 (1951).

stricting speech in order to prevent it."³⁹ But Section 3 is supported by the congressional finding that the Communist Party "should be outlawed" because "its existence" is a "clear, present and continuing danger to the security of the United States."⁴⁰ Finally, the courts in the *Dennis* case were troubled by the fact that the Smith Act was worded so generally that it could reach many situations to which its application would be unconstitutional. To prevent this possibility, the scope of the Smith Act was limited by interpretation. Directed specifically at the Communist Party, Section 3 escapes this difficulty.⁴¹

But the matter should not rest with an analysis of the constitutionality of Section 3 in the light of the "clear and present danger" test as evolved and applied in the *Dennis* case. No issue of this importance is ever settled and a new problem provides an opportunity for reconsideration of premises. It will be submitted that the "clear and present danger" doctrine, whether as enunciated by Holmes or Brandeis or Hand, is an unsatisfactory test to determine the limits which the First Amendment imposes upon congressional action designed to meet the threat of modern totalitarianism. Instead, it will be argued that no principle of the Constitution or of democracy requires that a political movement be permitted to engage in the struggle for power if its objective is to crush democracy itself.

Assumptions Underlying the First Amendment—Movements Seeking To Crush Freedom Need Not Be Tolerated. Clear thinking about the First Amendment will heed Mr. Chief Justice Hughes' admonition that behind "the words of the constitutional provisions are postulates which limit and control."⁴² In the opinion of Judge Learned Hand, the First Amendment "rests upon a skepticism as to all political orthodoxy, upon a belief that there are no impregnable political absolutes, and that a flux of tentative doctrines is preferable to any authoritative creed."⁴³ This skepticism and belief are

³⁹ Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 216-17 (1952).

⁴⁰ It is also arguable that the facts may support more readily a finding that the Communist Party is a clear and present danger to the security of the United States than that there was a clear and present danger of an attempted overthrow of the United States government by force and violence, which was the finding made in the *Dennis* case.

⁴¹ Though it was argued in the *Dennis* case that the Smith Act was too vague and general, undoubtedly it will be argued that the Communist Control Act is too specific. This question will be considered at a later point.

⁴² *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). The historic antecedents of the First Amendment, as Mr. Justice Frankfurter has shown, also "preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest." *Dennis v. United States*, 341 U.S. 494, 521 (1951). Mr. Justice Frankfurter points out, for example, that Jefferson, in opposing the Sedition Act, argued that the First Amendment reflected a limitation upon federal power, leaving the right to enforce restrictions on speech to the states.

⁴³ *United States v. Dennis*, 183 F. 2d 201, 207 (C.A. 2d, 1950).

also reflected in John Stuart Mill's defense of freedom of thought and expression in *On Liberty*. "We can never be sure," says Mill, "that the opinion we are endeavoring to stifle is a false opinion. . . . Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action;" however true a particular opinion may be, "if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth," because "conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth." "[T]hough the silenced opinion be an error," Mill adds, "it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any object is rarely or never the whole truth, it is only by collision of adverse opinions that the remainder of the truth has any chance of being supplied."⁴⁴

To justify freedom of speech, however, it is not necessary to agree with Mr. Justice Holmes that "the theory of our Constitution" is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁴⁵ This view, which may at times also have been voiced by Mill, has the dangerous tendency to define truth in terms of what the market-place comes to accept.⁴⁶ Nor is it necessary to accept "the idealist view that what is true will survive,"⁴⁷ because experience may refute this assumption. Yet the argument for the "clear and present danger" rule as elaborated by Holmes and Brandeis is based essentially on this pragmatist or idealist conception of truth and often the two merge since the idealist view will always be confirmed if the pragmatist definition of truth is accepted. While freedom to criticize

⁴⁴ Mill, *On Liberty*, in 25 *Harvard Classics* 219, 222, 238, 249, 256.

⁴⁵ Dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630-31 (1919).

⁴⁶ Mr. Max Lerner has pointed out this weakness in Holmes' pragmatic view which has been termed the "survival" theory of truth—"the position that the idea which survives in the struggle of ideas is therefore the true one." Lerner, *The Mind and Faith of Justice Holmes* 290 (Modern Library ed., 1954). Lerner comments: "This is a dangerous position in a time when the manipulation of symbols has become as highly organized as under the Nazi regime, and in the working of Nazi propaganda outside of Germany." *Ibid.* For present purposes, I would substitute "Communist" for "Nazi" and "Soviet Union" for "Germany."

⁴⁷ Lerner thinks that this view, too, is implicit in some of Holmes' writings. *Ibid.* It is explicit, as he points out, in Milton: "And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?" *Areopagitica*, in *The Portable Milton* 199 (1949). It is the basis also of the famous quotation from Jefferson's First Inaugural in 1801: "If there be any among us who wish to dissolve this Union, or to 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." *Inaugural Addresses of the Presidents of the United States*, H.R. Doc. No. 540, 82d Cong. 2d Sess. 12 (1952). See, too, the dissenting opinion of Mr. Justice Douglas in the *Dennis* case, 341 U.S. 494, 584 (1951). ("When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents.")

may not guarantee the survival or victory of truth, it is sufficient to justify the First Amendment that it offers the only possibility of correcting error by the peaceful means of appeal to the reason of man. We may agree also with Professor Stone that in democratic countries the claims to free opinion and expression should "approach nearer absoluteness than perhaps any other single claim" because "they are a vital prerequisite to the formulation and expression of human demands concerning the exercise of political authority. Indeed, insofar as we recognize that the function of law in a free community is the satisfaction of human demands for the time being, it is proper to point out that this function must be frustrated insofar as freedom of speech is not permitted to articulate these demands."⁴⁸

Mill's classic argument, the eloquent statement of Judge Learned Hand and Professor Stone's formulation must all assume, it seems to me, one "impregnable" absolute—freedom itself. For if the theory that there are no political orthodoxies is taken to mean that we must also be skeptical about the value of freedom and therefore tolerate freedom's enemies, it will tend to produce, in practice, the very absolutism it was designed to avoid—as experience with modern totalitarianism demonstrates. When, therefore, Mill says that "we can never be sure that the opinion we are endeavoring to stifle is a false opinion," he could not consistently have been referring to the opinion that freedom of opinion itself should be suppressed.⁴⁹ There is a passage in *On Liberty* which, I think, supports this inference and has significance for our contemporary problem. Asking whether the law should enforce an agreement under which an individual sells himself, voluntarily, as a slave, Mill says no and argues: "The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. . . . But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom."⁵⁰

So, in suppressing totalitarian movements a democratic society is not acting to protect the status quo, but the very same interests which freedom of speech itself seeks to secure—the possibility of peaceful progress under freedom. That suppression may sometimes have to be the means of securing and enlarging freedom is a paradox which is not unknown in other areas of the law of modern

⁴⁸ Stone, *The Province and Function of Law* 520–21 (1950).

⁴⁹ Nor does Mill's admonition that however true a particular opinion may be, "if it is not fully, frequently and fearlessly discussed, it will be held as a dead dogma, not a living truth," require toleration for the view that freedom of opinion should be suppressed. The value of freedom of speech and opinion will constantly prove itself as it is practiced to criticize the status quo in all fields of human thought and endeavor.

⁵⁰ Mill, *op. cit.* supra note 44, at 311–12.

democratic states. The basic "postulate," therefore, which should "limit and control" the First Amendment is that it is part of the framework for a constitutional democracy and should, therefore, not be used to curb the power of Congress to exclude from the political struggle those groups which, if victorious, would crush democracy and impose totalitarianism. Whether in any particular case and at any particular time, Congress should suppress a totalitarian movement should be regarded as a matter of wisdom for its sole determination. But a democracy should claim the moral and constitutional right to suppress these movements whenever it deems it advisable to do so.⁵¹

Objections to Position Taken. Does It Propose a Workable Criterion?

Though Professor Riesman sees merit in the view that we should not tolerate the intolerant, because he thinks it implies that "its expounders have abandoned the unproven hope that their example of noninterference will convert the foes of civil liberties" in favor of the determination that "civil liberties constitute an active cause, deserving of protection against its enemies like any other and not above the battle," he rejects it because of "several ethical objections and insurmountable administrative difficulties."⁵² Riesman objects that the suggested limit of tolerance is unworkable because of the difficulties of proving the true intentions and principles of totalitarian groups, like the Communists, who profess their affection for civil liberties and other democratic procedures.⁵³ But surely the difficulties of evaluating the historical forms of Fascist and Communist totalitarianism with which modern democracies have to cope are not insurmountable. Successive waves of events since the Bolshevik revolution should have removed all reasonable doubts about the true significance and intentions of the world communist movement. Furthermore, as will be suggested, the determination of fact underlying the decision to proscribe a particular group, namely, that its objectives are totalitarian, should be reviewed by the Supreme Court in passing upon the constitutionality of the attempted proscription. This will not make the problem of proof less difficult, but will provide additional assurance that action will not be taken without proof.

In fact, Riesman concedes that if the totalitarians presented the only problem in the application of the suggested test, it "might somehow be manageable."⁵⁴ But, he argues, "many, if not most, American groups, as they admit or as can be inferred from their behavior or ultimate beliefs, would if they

⁵¹ See I Popper, *The Open Society and Its Enemies* 265 n. 4 (2d ed., 1952) on the so-called "paradox of tolerance." As will become apparent, I am greatly indebted to Professor Popper's work and share his views about the implications of democracy.

⁵² Riesman, *Civil Liberties in a Period of Transition*, in *Public Policy* 33, 52 (1942). Though the parts of this article which I shall consider are those with which I do not in the main agree, my indebtedness to Riesman is great and I agree with his principal thesis.

⁵³ *Ibid.*, at 55.

⁵⁴ *Ibid.*, at 56.

could deny certain civil liberties to some of their political opponents. . . . [Where] reactionary Catholics are in control, they seek to deny freedom of expression to 'Reds' (as defined by them), to atheists, to advocates of non-rhythmic birth control. Protestant fundamentalists have sought to silence evolutionists, and some from the same background would silence Catholics or Jews, and of course Negroes. Business groups, such as the National Association of Manufacturers, veterans' organizations, the Hearst opinion empire, have sought to curb civil liberties for critics of capitalism, as well as for critics of 'democracy' (as defined by them). The list is as endless as it is familiar."⁵⁵ But the position which Riesman here rejects is not that taken in this paper. It is not proposed that as a matter of public policy the government undertake to ferret out and suppress every intolerant group in the United States which would, if it could, deny civil liberties to some other group. This policy may be unwise and unworkable. But the "reactionary Catholics," "Protestant fundamentalists," "Business groups," and "Veterans' organizations" of which Riesman speaks are not engaged in the struggle for political power as such. To the extent that they may exert pressure for the use of political power to enforce their intolerant private views, they can and should be resisted. But it is the "universality, or generality of the design"⁵⁶ of totalitarian movements seeking political power which makes them dangerous enough to warrant suppression.

Is It Consistent with Democratic Principles? The Paradox of Freedom. Riesman's "ethical objections" remain. He argues, first, that "any judgment that these radical groups [Fascist, Nazi and Communist] should be denied the right to urge their case—a case which includes as one of its features the denial of certain civil liberties to certain opponents—is in fact a concealed judgment concerning the worth of the total aims of these groups."⁵⁷ I do not agree, though I confess to regarding modern totalitarianism as an "absolute evil."⁵⁸ Even if the professed social aims of the totalitarians are regarded as desirable and it is thought possible to achieve them in a totalitarian state, there is implicit in the democratic creed "the conviction that the acceptance of even a bad policy in a democracy (as long as we can work for a peaceful change) is preferable to the submission to a tyranny, however wise or be-

⁵⁵ Ibid., at 56–57.

⁵⁶ Livingston, Circuit Justice, in *United States v. Hoxie*, 26 Fed. Cas. 397, 401, No. 15, 407 (C.C., D.Vt., 1808). The judicial limitations of the scope of "constructive" treason by levying war is analogous to the suggested limitation of the principle that we should not tolerate the intolerant. See Hurst, *Treason in the United States*, 58 Harv. L. Rev. 226, 395, 806 (1944–45), particularly at 411, 418, 428, 442, 808, 814, 818–25.

⁵⁷ Riesman, *op. cit.* supra note 52, at 54.

⁵⁸ See Arendt, *op. cit.* supra note 36, at 429–39, particularly at 433.

nevolent.”⁵⁹ And this conviction may be the basis of the judgment to suppress totalitarian movements. In other words, because the democratic method of settling conflict keeps open the avenue of change so that wrongs may be righted peacefully, the citizens of a democracy have a greater stake in this method of settlement than in any particular outcome of any particular conflict. No group in our society, therefore, is justified in working for the destruction of democracy in order to achieve any particular ends, however meritorious they may, at the moment, seem to be.

Secondly, Riesman argues that “the denial of freedom of expression to those who disbelieve in it is inconsistent with orthodox, although perhaps erroneous, conceptions of the democratic theory. Under that theory, a majority is entitled to abandon traditional civil liberties if it follows the constitutional forms. Democrats for whom democracy means majority rule must therefore logically insist that this putative anti-civil-liberty majority should have the opportunity of hearing evidence that it would be better off in the absence of, say, freedom of speech and press.”⁶⁰ It must be admitted that this “orthodox” conception of democratic theory underlies existing legislation against the totalitarian threat,⁶¹ as well as the judicial approach to questions of the constitutionality of this legislation. Without exception, the courts seem to have assumed that the Communists have a “right,” which the courts will protect, to pursue their aims by peaceful, “constitutional” means. For example, in his dissenting opinion in *Gitlow v. New York*,⁶² Mr. Justice Holmes said: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their

⁵⁹ Popper, op. cit. supra note 51, at 125. Bertrand Russell quotes Democritus as having said: “Poverty in a democracy is as much to be preferred to what is called prosperity under despots as freedom is to slavery.” *The History of Western Philosophy* 92 n. 1 (1946).

⁶⁰ Riesman, op. cit. supra note 52, at 54.

⁶¹ The seditious conspiracy statute, 62 Stat. 808 (1948), 18 U.S.C.A. § 2384 (1951), makes it a crime to conspire “to overthrow, put down, or to destroy by force the Government of the United States.” The Smith Act is directed at the teaching or advocacy of the duty or necessity of overthrowing or destroying any government in the United States by force or violence. 62 Stat. 808, 811 (1948), 18 U.S.C.A. §§ 2385, 2387 (1951). The Voorhis Act of 1940, 62 Stat. 808 (1948), 18 U.S.C.A. § 2386 (1951) requires any organization aiming at the forcible overthrow of the government to register with the Attorney-General. Section 4(a) of the Internal Security Act, 64 Stat. 991 (1950), 50 U.S.C.A. § 783 (1951), which is directed at the establishment of a totalitarian dictatorship in the United States, specifically provides that it shall not apply “to the proposal of a constitutional amendment.” The findings of fact in Section 2 of the Communist Control Act, 68 Stat. 775 (1954), 50 U.S.C.A. § 841 (Supp., 1954), also stress the unlawful means which the Communist movement is prepared to employ, but recognize, as do even more explicitly the findings in Section 2 of the Internal Security Act, that the Communist Party “constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution.”

⁶² 268 U.S. 652 (1925).

way."⁶³ Even Mr. Justice Jackson, in an opinion which showed an acute awareness of the aims of the Communist movement, thought it important to point out that "if they [the American Communists] can persuade enough citizens, they may not only name new officials and inaugurate new policies, but, by amendment of the Constitution, they can abolish the Bill of Rights and set up an absolute government by legal methods."⁶⁴ Judge Learned Hand was equally explicit in the *Dennis* case. In his opinion, the First Amendment "protects all utterances, individual or concerted, seeking constitutional changes, however revolutionary, by the processes which the Constitution provides. Any amendment to the Constitution passed in conformity with Article V is as valid as though it had been originally incorporated in it; the only exception being that no state, [without its consent] shall be denied 'its equal suffrage in the Senate.'"⁶⁵

But any theory which equates democracy with majority rule is self-contradictory, as Professor Popper has conclusively shown. He tells us that Plato, by asking "What if it is the will of the people that they should not rule, but a tyrant instead?," was the first to pose this paradox of freedom.⁶⁶ The "orthodox" answer to this question, as we have seen, is that the people, that is, the majority of them, shall have their way. But then, Professor Popper replies, the principle of majority rule requires its adherents to oppose the new tyranny willed by the majority.⁶⁷ If any totalitarian party, using legal means, came to power in the manner prescribed by the Constitution and succeeded by constitutional amendment to inaugurate a totalitarian state, all partisans of democracy would have the moral right, recognized by the Declaration of Independence,⁶⁸ to use force and violence, if necessary, to overthrow the tyranny. Cer-

⁶³ Ibid at 673.

⁶⁴ American Communications Ass'n v. Douds, 339 U.S. 382, 429 (1950).

⁶⁵ 183 F. 2d 201, 206 (C.A. 2d, 1950).

⁶⁶ Popper, op. cit. supra note 51, at 123.

⁶⁷ Ibid.

⁶⁸ The "right of revolution" is usually based on the sentence in the Declaration beginning, "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it. . . ." But Professor Hook, op. cit. supra note 33, at 63, has called attention in this context to the next two sentences: "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." These sentences support Mr. Chief Justice Vinson's statement in the *Dennis* case, 341 U.S. 494, 501 (1951), that "whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change." The "right to rebellion" in any case can only be a moral claim, never a legal right, because obviously no

tainly then, it is inconsistent to maintain that the Constitution protects a totalitarian movement on its road to power, so long as it employs constitutional means, but once it comes to power, it becomes the moral right and duty of the people "to throw off such government." By then, too, an attempt to do so may be without hope of success. We can avoid these difficulties only by recognizing that democracy is not merely majority rule, but also embodies the principle of freedom and that, to paraphrase Mill, the principle of freedom cannot require that the people, or a majority of them, should be free to alienate its freedom. The principle of freedom requires that democratic policy be directed "to create, develop, and protect political institutions for the avoidance of tyranny,"⁶⁹ which Professor Popper defines as a government "which the ruled cannot get rid of except by way of a successful revolution—that is to say, in most cases, not at all."⁷⁰ We should regard as a "democracy," therefore, not any government which is the product of the will of a majority, but only that government "which we can get rid of without bloodshed—for example, by way of general elections."⁷¹

Professor Hurst has suggested to me that it may be argued that the historic fact of the defeat of Calhoun's theory of the concurrent majority⁷² is additional proof that American constitutional tradition assumes the orthodox theory of democracy. I have admitted that the orthodox theory is official doctrine; to persuade that it should not be is the burden of this paper. Nevertheless, it is doubtful whether the argument for the orthodox theory is supported by the historic rejection of Calhoun's theory. In the first place, Calhoun

state can secure this claim. As Judge Learned Hand has said, "The advocacy of violence may, or may not, fail; but in neither case can there be any 'right' to use it. Revolutions are often 'right,' but a 'right of revolution' is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution." 183 F. 2d 201, 213 (C.A. 2d, 1950). Even the moral claim to use force and violence to overthrow a tyranny is justified only if the action has as its exclusive aim the re-establishment of democratic institutions. The "use of violence is justified only under a tyranny which makes reforms without violence impossible and it should have only one aim, that is, to bring about a state of affairs which makes reforms without violence possible." II Popper, *op. cit.* supra note 51, at 151.

⁶⁹ I Popper, *op. cit.* supra note 51, at 125.

⁷⁰ *Ibid.*, at 124.

⁷¹ *Ibid.*, at 125. Bertrand Russell also defines democratic government "as a method of settling internal disputes without violence." *The Practice and Theory of Bolshevism* 98 (2d ed., 1949). Professor Riesman regards the "orthodox" conception of democracy as "perhaps erroneous" and admits it is plausible to argue that "one majority should have no right to preclude future majorities from reopening the issue and arriving at a different conclusion, and therefore no right—although all else is open to them—to tamper with the procedures of free opinion formation and electioneering which permit a present minority to become a future majority." *Op. cit.* supra note 52, at 54.

⁷² Consult Calhoun, *Disquisition on Government*, in Calhoun, *Basic Documents* (Anderson ed., 1952).

himself did not use his theory of the concurrent majority to justify the democratic order and the right of suffrage upon which it is based. He regarded this right as "the indispensable and primary principle in the *foundation* of a constitutional government"⁷³ because it was the only way to effect a system of government "by which resistance may be systematically and peaceably made on the part of the ruled, to oppression and abuse of power on the part of the rulers."⁷⁴ On this point, the views of Popper and Bertrand Russell are indistinguishable from those of Calhoun. However, Calhoun did not think the right of suffrage, of itself, "sufficient to form constitutional governments."⁷⁵ It had to be implemented by a principle "calculated to prevent any one interest, or combination of interests, from using the powers of government to aggrandize itself at the expense of the others."⁷⁶ Only the principle of the concurrent majority could accomplish this objective by giving "to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws, or a veto on their execution."⁷⁷ The fires of the Civil War consumed Calhoun's theory insofar as it was intended to support a particular view of the desirable basis for American federalism and, generally, to slow the process of social change. Calhoun placed his theory at the service of the institution of slavery, not the principle of freedom. But his more general concern that the existing constitutional checks and balances may be inadequate to prevent any one interest or combination of interests from dominating American society is still our concern. The development of centers of "countervailing power"⁷⁸ in our society has tended, so far, to avoid this domination. In any case, the rejection of Calhoun's theory of the concurrent majority does not reasonably imply acceptance of the view that a majority has the legal and moral right to decide to dispense with constitutional government altogether.

The rejection of the "orthodox" theory of democracy necessarily implies that one type of constitutional change in the constitutional system is excluded—"a change which would endanger its democratic character."⁷⁹ This, it is submitted, is the basic postulate which should control, not only the interpretation of the First Amendment, but also the amendment article (Art. V) of the Constitution. No one will maintain that the establishment of a totalitarian dictatorship in the United States by a constitutional amendment would not upset the basic scheme of things embodied in the Constitution as much as an amendment depriving certain states without their consent of their equal

⁷³ *Ibid.*, at 37.

⁷⁴ *Ibid.*, at 36.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, at 44.

⁷⁷ *Ibid.*, at 44-45.

⁷⁸ Consult Galbraith, *American Capitalism* (1952).

⁷⁹ *II Popper*, *op. cit. supra* note 51, at 161.

representation in the Senate—which Article V expressly prohibits.⁸⁰ No democratic or constitutional principle is violated, therefore, when a democracy acts to exclude those groups from entering the struggle for political power which, if victorious, will not permit that struggle to continue in accordance with the democratic way.⁸¹

This view makes it irrelevant, for purposes of constitutional adjudication, whether a particular group is committed to the use of illegal means in the struggle for political power and will help to dissipate confusion resulting from the application of the clear and present danger rule to legislation forbidding the advocacy of the violent overthrow of the government. This conclusion is not based upon Riesman's view that such legislation "must fail of ethical justification, because it should never be assumed as a matter of course that a particular government deserves to stand, even if violence or the urging of violence is the only method by which, for all practical purposes, it can be overthrown."⁸² The exercise of the Jeffersonian "right of revolution," upon which Riesman relies, has moral justification, as I have indicated, only if the government in power is a tyranny which closes all avenues of peaceful change and then only if the restoration of democracy is the sole objective.⁸³ Furthermore,

⁸⁰ Consult Corwin, *The Constitution and What It Means Today* 175 (11th ed., 1954): "Of the two exceptions to the amending power the first is today obsolete. This does not signify, however, that the only change that the power which amends the Constitution may not make in the Constitution is to deprive a state without its consent of its 'equal suffrage in the Senate.' The amending, like all other powers organized in the Constitution, is in form a delegated, and hence, a limited power, although this does not imply necessarily that the Supreme Court is vested with authority to determine its limits. The one power known to the Constitution which clearly is not limited by it is that which ordains it—in other words, the original, inalienable power of the people of the United States to determine their own political institutions." If I read Professor Corwin correctly, I infer that he would agree that even a majority of the people of the United States (and the people in the 36 ratifying states may constitute less than a majority) would have no constitutional right to exercise their power to determine their own political institutions so as to yield it to a totalitarian dictatorship, because this power is "original" and "inalienable."

⁸¹ A democracy would thus have the right to suppress totalitarian movements whether they were committed to use (1) illegal means to come to power in a manner not prescribed by the existing constitution; or (2) illegal means (e.g., the terrorization of voters) to come to power in a manner prescribed by the existing constitution; or (3) legal means to come to power in a manner prescribed by the existing constitution, but once in power to use illegal means to overthrow the existing democratic order; or (4) legal means to come to power in a manner prescribed by the existing constitution and once in power, to use legal means (e.g., constitutional amendment) to inaugurate a totalitarian state. Cf. Friedrich and Sutherland, *op. cit. supra* note 12, at 682 n. 10. While the authors here define "subversion" merely "as a course of action designed mediately or immediately to change an established constitutional order by unconstitutional means," they recognize that the "development of new techniques of subversion may well call for a long-range revision of the statutory and constitutional rules which prescribe the legitimate conditions of party competition in modern democracies. . . ." *Ibid.*, at 682, 687.

⁸² Riesman, *op. cit. supra* note 52, at 60–61.

⁸³ See *supra*, note 68. This disposes of the argument that the suppression of the totalitarians will give them moral justification for using illegal means which they would otherwise lack, because their objective is to crush, not support, democracy.

resort to the violent seizure of power in a democratic state, even if intended to accomplish limited ends and not to destroy the democratic framework itself, is pernicious because the use of violence is "peculiarly calculated to create habits of despotism which would survive the crisis by which they were generated."⁸⁴ Therefore, because I agree with the legislative and judicial findings that the totalitarian Communist movement is committed to the use of force and violence, this fact alone, in my opinion, should support the congressional decision to outlaw the Communist Party. Nevertheless, there is reason to question the Supreme Court's finding that the conspiracy in the *Dennis* case created a clear and present danger of an attempt to overthrow the government by force and violence. We may agree, as I do, with Judge Learned Hand's determination that the gravity of the evil in the *Dennis* case (an attempt at overthrow), discounted by its improbability, was greater than the mischief of the repression. But we must agree with Mr. Justice Frankfurter that "[i]n all fairness, the argument [that "there is a constitutional principle . . . prohibiting restriction upon utterance unless it creates a situation of 'imminent' peril against which legislation may guard"] cannot be met by reinterpreting the Court's frequent use of 'clear' and 'present' to mean an entertainable 'probability.'"⁸⁵ Yet it is precisely this reinterpretation which has given rise to the fear that there are no longer any principles safeguarding freedom of speech.

Implications for the Clear and Present Danger Rule of Rejection of Orthodox Democratic Theory. If we accept the implications of the theory of democracy presented in this paper, the clear and present danger rule, whether as stated by Holmes,⁸⁶ Brandeis,⁸⁷ or Learned Hand,⁸⁸ will lose its significance

⁸⁴ Russell, *The Practice and Theory of Bolshevism* 92-93 (2d ed., 1949). Our constitutional tradition supports this view, since the taking up of arms would undoubtedly constitute the crime of treason by levying war. See *The Trial of Thomas Wilson Dorr*, 2 *American State Trials* 5 (Lawson ed., 1914) (R.I. Sup. Ct., 1844) and *The Trial of John Brown*, 6 *American State Trials* 700 (Lawson ed., 1916) (Jefferson City C.C. Va., 1859), cited in Hurst, *op. cit. supra* note 56, at 849.

⁸⁵ 341 U.S. 494, 527 (1951).

⁸⁶ "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁸⁷ "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927).

⁸⁸ "In each case they [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F. 2d 201, 212 (C.A. 2d, 1950).

in determining the constitutional limits upon the power of federal and state governments to exclude totalitarian movements from the arena of party struggle in a democracy. Some may still argue, however, that even if these implications are accepted, the First Amendment should be read as requiring that a totalitarian party be permitted to engage in the constitutional competition for political power until there is a "clear and present danger" that it may be victorious. All the objections that may be advanced against the clear and present danger rule as the test of constitutionality of legislation aimed at the use of force and violence as a means of political change also apply against the rule as the test of legislation aimed at totalitarian movements whether or not they are committed to the use of illegal means. In addition, it seems even more impossible to determine when there is a "clear and present danger" of a legal victory by a totalitarian party than of an attempt to overthrow the government by force and violence. The idealist and pragmatist assumptions at the basis of the views of the exponents of the clear and present danger rule enable them to avoid these difficulties, as becomes apparent when they attempt to meet the objection that this test⁸⁹ imposes the risk that it restrains action until it may be too late to prevent a totalitarian victory. "Our faith," says Mr. Justice Douglas, "should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our nation was founded."⁹⁰ The pragmatist overtones of this expression of idealist faith are clear in Professor Nathanson's criticism of the *Dennis* case. "We expose our government," he writes, "to the apparent risk of successful revolution because we are confident that no government which is worth preserving can be seriously endangered by advocacy of the propriety or necessity of its violent overthrow. . . . [This] is a prophecy based essentially on faith in the democratic process."⁹¹ Accordingly, even the success of the revolution should not be too disturbing because it would merely mean that the democracy overthrown, e.g., the Weimar Republic, Kerensky government or Czechoslovakian democracy, was not "worth preserving." But we value the democratic process, as has been pointed out, not because we assume that the policies of a democratic government are always the best or wisest or most just, but because it keeps open the path of non-violent change. And it is quite wrong, as Professor Popper warns, "to blame democracy for the political short-

⁸⁹ "When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt." Mr. Justice Douglas, dissenting in *Dennis v. United States*, 341 U.S. 494, 585 (1951).

⁹⁰ 341 U.S. 494, 591 (1951). "I happen to believe," said Mr. Justice Black, dissenting in *Carlson v. Landon*, "that our free way of life enlists such respect and love that our nation cannot be imperiled by mere talk." 342 U.S. 524, 555-56 (1952). See, too, Nathanson, *The Communist Trial and the Clear and Present Danger Test*, 63 Harv. L. Rev. 1167, 1174 (1950).

⁹¹ Nathanson, *op. cit. supra* note 90, at 1175.

comings of a democratic state. We should rather blame ourselves, that is to say, the citizens of the democratic state," because democracy only makes possible "the use of reason in the designing of new institutions and the adjusting of old ones. It cannot provide reason."⁹²

It seems to me, too, that the current defenders of the clear and present danger rule, as stated particularly by Mr. Justice Brandeis, show an insufficient understanding of the nature and roots of modern totalitarianism. What Professor Wechsler said in criticism of legislation directed at the advocacy of violent overthrow of government can be said appropriately of the clear and present danger rule. "It represents an uncritical acceptance of a formula devised during the days when the Communist manifesto represented the technique of revolution; when revolutionaries operated by declaring rather than disguising their principles; when revolutionaries accepted rather than rejected the rule of reason; when they played upon the aspirations of men rather than upon their prejudices."⁹³ It is not necessary to assume that the American people, too, have become apathetic and possessed of the psychological need to "escape from freedom"⁹⁴ and that mass propaganda, using the new facilities of mass communication, will lead them to succumb to the irrational appeal of totalitarianism, in order to agree with Riesman that "events have not shown that speech and writing, even those which begin as 'puny anonymities,' are incapable of promoting revolution,"⁹⁵ and that the "job of wise statesmanship would seem to be to eliminate unnecessary gambles in the realm of public policy."⁹⁶ In any event, whether Mr. Justice Douglas' faith that "it can't happen here" is accepted as the basis of public policy at any particular time, it is difficult to see why such faith should become the basis of a constitutional doctrine limiting a democratic government's power to deal with totalitarian movements. Apart from the position that the question will never arise, it is inconsistent in principle, to say that the claim of a totali-

⁹² I Popper, *op. cit. supra* note 51, at 126-27.

⁹³ Wechsler, Symposium on Civil Liberties, 9 Am. L. School Rev. 881, 888-89 (1941). "It does not follow," Judge Hand has said, that Brandeis would have been of the same opinion "if the conspirators had sought to mask their purposes by fair words, as they did in the case at bar." 183 F. 2d 201, 208 (C.A. 2d, 1950). The cases in which the "clear and present danger" test was elaborated all arose, as Mr. Justice Jackson has pointed out, "before the era of World War II revealed the subtlety and efficacy of modernized revolutionary techniques used by totalitarian parties." *Dennis v. United States*, 341 U.S. 494, 567 (1951). Consult, also, Russell, *The Practice and Theory of Bolshevism* 95 (2d ed., 1949).

⁹⁴ Consult Fromm, *Escape from Freedom* (1941).

⁹⁵ Riesman, *op. cit. supra* note 52, at 39. The term "puny anonymities" was used by Mr. Justice Holmes in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 629 (1919).

⁹⁶ Riesman, *op. cit. supra* note 52, at 40. "[I]n government, as in medicine or law," Riesman continues, "progress in the art is measured by the extent to which preventive measures are adopted before the point is reached at which only curative remedies are left." *Ibid.*

tarian movement to engage in the political struggle by legal means should be secured by the Constitution but that this protection should be withdrawn if the totalitarians approach victory by these means.

Judge Learned Hand interpreted the clear and present danger rule as involving "in every case a comparison between interests which are to be appraised qualitatively."⁹⁷ In each case, he wrote, the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁹⁸ The interests he saw in conflict are those sought to be secured by free speech and the social interest in the general security sought to be protected by thwarting attempts to overthrow the government by force or violence. But so long as any test of constitutionality leaves it to the courts to estimate the gravity and probability of the evil—the attempt at forceful overthrow—it remains open to the criticism which Mr. Justice Frankfurter levelled against the view that "clear and present" means "imminent." "To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment."⁹⁹ Judge Hand, it seems to me, would not deny the validity of this criticism, but would reply that the courts in the *Dennis* case at any rate had no choice but to make the forecast since the Smith Act made the courts the "surrogate" of Congress to do so.¹⁰⁰ To avoid the difficulty in Judge Hand's position, Mr. Justice Frankfurter calls essentially for a "candid and informed weighing of the competing interests"¹⁰¹ without use of the clear and present danger formula. Thereby he makes explicit the legislative nature of the task which the courts have always had to perform in applying the clear and present danger rule. Recognition of this fact made it necessary for him to acknowledge that the legislature had the "primary responsibility"¹⁰² to choose between competing interests and the courts must respect the legislative choice "unless outside the pale of fair judgment."¹⁰³

Mr. Justice Frankfurter analyzed the conflicting interests as did Judge Hand and justified judicial deference to the legislative judgment solely because it was the judgment of the people's "representatives."¹⁰⁴ On both these points,

⁹⁷ 183 F. 2d 201, 212 (C.A. 2d, 1950).

⁹⁸ *Ibid.*

⁹⁹ Concurring opinion of Mr. Justice Frankfurter in the *Dennis* case, 341 U.S. 494, 551 (1951). Mr. Justice Jackson made the same point at 570.

¹⁰⁰ 183 F. 2d 201, 216 (C.A. 2d, 1950).

¹⁰¹ 341 U.S. 494, 525 (1951).

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, at 540.

¹⁰⁴ *Ibid.*, at 552.

it is submitted with respect, Mr. Justice Frankfurter's analysis does not go far enough and has been subjected to justifiable criticism.¹⁰⁵ Majority rule, as has been argued, does not exhaust the content of our constitutional democracy.¹⁰⁶ "The framers were not unaware," Mr. Chief Justice Stone has said, "that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection."¹⁰⁷ It is not "undemocratic" for the Court to resist the will of the majority in order to uphold the principle of freedom. But it is not inconsistent with this view to urge that the attitude of the Court toward anti-totalitarian legislation be similar to that which it takes toward legislation regulating economic affairs. Economic regulation, no less than anti-totalitarian legislation, involves the "paradox of freedom." It, too, limits the freedom of those subjected to it, but it may be upheld as constitutional not simply because of the deference due to the will of the majority, but in order to effectuate the principle of freedom; not because some interests other than those sought to be secured by freedom are considered more important by the legislature, but because economic regulation itself secures and expands the area of freedom. In other words, we have come to recognize that freedom means more than the absence of legal restraint and may require the removal of other restraints, like economic insecurity, which inhibit the individual personality. To enlarge the freedom of the economically weak, we see the necessity of limiting the freedom of the economically strong.¹⁰⁸ Similarly, it is not interests other than those sought to be secured by freedom of speech which may be protected by anti-totalitarian legislation like the Communist Control Act, but these very interests themselves. Concern for the national security in this case may not be concern for any existing institutions other than those which make possible non-violent change in a democratic framework. The principle of freedom, itself, therefore, requires that the Supreme Court uphold the judgment of Congress that totalitarian political organizations be proscribed.

¹⁰⁵ Rostow, *op. cit. supra* note 39 (*passim*).

¹⁰⁶ In his first speech in the Virginia ratifying convention, Madison warned that in republics, the turbulence, violence and abuse of power of majorities have more frequently than any other cause produced despotism. 3 Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 87 (2d ed., 1845), cited in Hurst, *op. cit. supra* note 56, at 406 n. 97. Although Jefferson regarded "absolute acquiescence in the decisions of the majority as the 'vital principle of republics,'" he also invoked the "sacred principle" that the will of the majority "to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect and to violate would be oppression." First Inaugural in 1801, Inaugural Addresses of the Presidents of the United States, H.R. Doc. No. 540, 82d Cong. 2d Sess. 11-12 (1952). This strain runs through American thought otherwise as diverse as Calhoun, Lincoln, Thoreau and Emerson.

¹⁰⁷ Dissenting opinion in *Minersville School District v. Gobitis*, 310 U.S. 586, 604-5 (1940).

¹⁰⁸ Consult II Popper, *op. cit. supra* note 51, at 125.

However, this same principle of freedom, read into the First Amendment, requires that the Court review the congressional finding that a particular political organization sought to be proscribed is totalitarian in fact. Clearly, the findings in Section 2 of the Communist Control Act are not conclusive upon the courts.¹⁰⁹ The important question is the scope of judicial review. In the *Dennis* case, Mr. Justice Frankfurter suggested that the Court ask whether the congressional determinations have "the warrant of substantial proof."¹¹⁰ I would urge, however, that the Court go at least as far as Section 14 of the Internal Security Act and invalidate Section 3 of the Communist Control Act if it concludes that the findings in Section 2 are not supported by the preponderance of the evidence presented to it. This comes very close

¹⁰⁹ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Bryant v. Zimmerman*, 278 U.S. 63 (1928) (reviewing findings about the Ku Klux Klan). See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), after remand, 104 F. Supp. 567 (D.D.C., 1952), cert. denied, 345 U.S. 911 (1953).

¹¹⁰ Concurring opinion in the *Dennis* case, 341 U.S. 494, 526 (1951). It does not help to determine the standard of review to talk about the "presumption" of constitutionality or unconstitutionality. Judge Learned Hand has held the "presumption of constitutionality" to be applicable not only when the courts are reviewing a legislative "choice of values," but also when the courts have "undertaken an inquiry as to the facts on which the validity of a statute turns." *Borden's Farm Products Co. v. Ten Eyck*, 11 F. Supp. 599, 600 (S.D. N.Y., 1935) on remand after *Borden's Farm Products v. Baldwin*, 293 U.S. 194 (1934), in which Mr. Chief Justice Hughes stated (293 U.S. 194, 209) that the presumption of constitutionality was a "presumption . . . of the existence of factual conditions supporting the legislation." To Judge Hand this meant that a court was to hold a law invalid not if "it finds to its own satisfaction that the necessary facts do not exist," but only if it finds that "reasonable people could not believe that they did. . . ." 11 F. Supp. 599, 600 (S.D.N.Y., 1935). He then compared the function of the court in reviewing legislative findings to its function in reviewing a jury verdict or the findings of an administrative tribunal. This test of course comes very close to the test of the "warrant of substantial proof." Judging by his review of the legislative findings in the *Carolene Products Co.* case, it does not seem that Mr. Chief Justice Stone envisaged a lesser function for the judiciary when he suggested that the test of unconstitutionality was whether the legislation was "of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). See, too, Freund, *On Understanding the Supreme Court* 88 (1945).

In the *Joint Anti-Fascist Refugee Committee* case, Mr. Justice Burton, speaking for the Court, did not indicate what the scope of judicial review would be, but merely said: "Whether the complaining organizations are in fact Communistic or whether the Attorney-General possesses information from which he could reasonably find them to be so must await determination by the District Court upon remand." 341 U.S. 123, 141 (1951). On remand, the district court thought evidence should be received concerning the factual matters upon which the Attorney-General based his action in order "to determine whether, in the light of such evidence, there was a reasonable basis for his reaching the conclusion which he did." 104 F. Supp. 567, 571 (D.D.C., 1952).

Section 14(a) of the Internal Security Act provides that the findings of the Subversive Activities Control Board as to the facts "if supported by the preponderance of the evidence, shall be conclusive." 64 Stat. 1001 (1950), 50 U.S.C.A. § 793 (1951). Judge Prettyman thought this was "a less stringent restriction upon the function of judicial review than is customary in such statutes" and imposed "a laborious task upon the reviewing court." *CP v. SACB*, 223 F.2d 531, 562 (App. D.C., 1954).

to saying, as I would prefer to do, that the Court should hold the Section invalid if it "finds to its own satisfaction"¹¹¹ that the Communist Party is not a totalitarian organization. To the extent that deference to the principle of majority rule may make the courts reluctant to go this far, what has already been said on this question should, it is submitted, dispel the reluctance. Furthermore, the courts are as able as Congress or an administrative tribunal to evaluate the theoretical, historical and empirical data involved in determining whether a particular political organization is totalitarian. In fact, the Section 2 findings are in large measure based upon judicial assessments of the Communist movement.

The Treason Clause. Professor Hurst has argued persuasively that the history of the treason clause¹¹² suggests it "was in fact understood to guarantee non-violent political controversy against suppression under the charge of treason or any other criminal charge based on its supposed subversive character" and that this guarantee, therefore, should make up the specific, minimum content of the First Amendment as well.¹¹³ Although the courts have not drawn this implication from the treason clause¹¹⁴ and the point has not been discussed in any of the recent cases involving anti-subversive legislation, it merits serious consideration in any re-evaluation of the free speech problem. But like most arguments based upon constitutional history which emphasize "what seemed wise and practical to the men who created this government,"¹¹⁵ it cannot provide automatic solutions for new problems confronting a new generation.

It is not a profitable task to attempt to decide, by historical analogy, whether the founding fathers, if they were alive today, would permit a totalitarian political organization to compete for power even by peaceful means. As I read and re-read the historical evidence adduced by Hurst, no overwhelming inference emerges. Emphasizing the political liberalism of the founding fathers, we may draw one inference; emphasizing their hatred of tyranny, an opposite one. There is evidence that in drafting the treason clause, the founding fathers were anxious to protect the kind of activities in which they themselves had engaged during the pre-revolutionary struggle against Great Britain. They were certain these activities consisted of political opposition and

¹¹¹ Judge Learned Hand in *Borden's Farm Products Co. v. Ten Eyck*, 11 F. Supp. 599 (S.D. N.Y., 1935).

¹¹² U.S. Const. Art. III, § 3: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

¹¹³ Hurst, op. cit. supra note 56, at 416-44. The quotation is at 442.

¹¹⁴ See *Frohwerk v. United States*, 249 U.S. 204, 210 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); Hurst, op. cit. supra note 56, at 439-42.

¹¹⁵ Hurst, op. cit. supra note 56, at 444.

resistance to tyrannical government. In 1792, Jefferson, for example, wrote that "Treason, . . . when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government*, and acts against the *oppressions of the government*; the latter are virtues; yet they have furnished more victims to the executioner than the former; real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries."¹¹⁶ There is no evidence that when the founding fathers expressed concern about the abuses which the treason laws made possible, they intended to protect a political opposition which, if successful, would put an end to the political processes of a free government. There is evidence, however, that they intended to protect rival political groups operating within the framework of a free government from using treason accusations and prosecutions as political weapons against each other.¹¹⁷ Significantly, Hurst concludes that the provisions of Article IV, Section 4¹¹⁸ of the Constitution were changed during the process of deliberation "in order to exclude interference thereunder with the peaceful political processes, subject perhaps to one limitation—if it is such—that even by peaceful means no state might adopt a monarchical or other fundamentally non-republican form of government" and that this history "suggests the scope of the policy probably represented also by the stringent limitations of the closely related treason section."¹¹⁹ There is nothing inconsistent, in my opinion, between this position and the views put forth in this paper. I would agree that "the historic scope of the treason clause" is "evidence of the constitutional policy in favor of free expression and advocacy of ideas and beliefs," including the idea and belief that a "monarchical or other fundamentally non-republican form of government" should be adopted. This, I think, was fundamentally Jefferson's view in the oft-quoted passage from his First Inaugural in 1801.¹²⁰ But by proscribing the Communist Party, Congress is not aiming

¹¹⁶ 8 The Writings of Thomas Jefferson 332 (Library ed., 1903), quoted by Hurst, *op. cit.* supra note 56, at 250 n. 39. Hurst recounts that Jefferson, as Secretary of State, was writing to Messrs. Carmichael and Short, regarding negotiations with Spain and explaining why this country would not wish to agree to surrender political refugees.

¹¹⁷ For example, Madison wrote in No. 43 of the *Federalist*: "[N]ewfangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other." Quoted by Hurst, *op. cit.* supra note 56, at 414.

¹¹⁸ "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the Legislature, or of the Executive (when the legislature cannot be convened) against domestic Violence."

¹¹⁹ Hurst, *op. cit.* supra note 56, at 435.

¹²⁰ See note 47 supra. Compare Jefferson's views on the Burr conspiracy as related in 3 Beveridge, *The Life of John Marshall* 274-545 (1919).

at "ideas and beliefs" or "utterances" but at an organized movement seeking political power to crush democracy. By launching a totalitarian movement, its leaders and "knowing" members demonstrate that they have "moved from the realm of thought, plan, ideas, or opinions into the world of action."¹²¹ Their "specific intent" is thereby revealed and the overt act committed against which a democracy may seek to protect itself.

B. BILL OF ATTAINDER AND DUE PROCESS CLAUSES

Accepting the view that the right to vote is meaningless without the right to organize and work in political parties which alone can make the vote effective, it may be argued that the proscription of the Communist Party either accomplishes "the disfranchisement of voters" or else compels them, "if they vote at all, to vote for representatives of political parties other than that to which they belong," in which case the "deprivation of the right of selection is a deprivation of the right of franchise."¹²² But not every "deprivation of the right of selection" is unconstitutional. Most states impose requirements of various sorts which a party must meet to be eligible to appear on the ballot.¹²³ It has been the major burden of this paper to show that it is consistent with democratic principle to regard totalitarian parties as ineligible and to deprive individuals of the opportunity to vote for them. Nevertheless, the specificity of Section 3 of the Communist Control Act raises other constitutional questions—is it an act in the nature of a bill of attainder prohibited by Article I, Section 9 of the Constitution; does it otherwise violate due process?

Before considering these questions, it should be noted that Section 3 also proscribes "any successors of the Communist party, regardless of the assumed name, whose object or purpose is to overthrow" any government in the United States by force and violence. The constitutional objections about to be discussed would not apply to this provision. In answer to the argument of the Communist Party that the Internal Security Act "contains a pre-determination of its nature as a Communist-action organization—a built-in verdict against it," the court of appeals said: "We find no such pre-determination. Petitioner is not mentioned. Whether it does or does not fall within the de-

¹²¹ Hurst, *op. cit.* supra note 56, at 830.

¹²² *Britton v. Board of Election Commissioners*, 129 Cal. 337, 344, 61 Pac. 1115, 1117 (1900); *Communist Party v. Peek*, 20 Cal. 2d 536, 127 P. 2d 889 (1942). See, generally, Starr, *The Legal Status of American Political Parties*, 34 Am. Pol. Sci. Rev. 439, 685 (1940). Whether such a deprivation is an unconstitutional federal encroachment upon states' rights will be considered subsequently. It may also be argued that the proscription of a party abridges "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" in violation of the First Amendment. But all that has been said about the applicability of the guarantee of freedom of speech would be pertinent in meeting this argument.

¹²³ Consult *Limitations on Access to the General Election Ballot*, 37 Col. L. Rev. 86 (1937).

scription in the statute is a matter of evidence, just as it is in respect to every other respondent to a petition before the Board. A statute is not necessarily null merely because it fits a known person. Many valid statutes do."¹²⁴ Clearly, then, even if the bill of attainder or due process argument is sustained, because the Party is proscribed by name, Congress will be able to achieve its objective by a generally worded statute. Yet if we are to have anti-totalitarian legislation, specificity safeguards civil liberties the more; general language always opens possibilities of abuse.¹²⁵ It would seem, too, that the practice of specifying the organization to be outlawed offers the greater protection to the organization itself. Under a generally worded statute, the initial decision to proceed against a particular organization is solely that of the executive. The organization has no opportunity to protect itself against this initial step. Full-scale discussion and debate in Congress about the propriety and wisdom of proscribing a named political organization, subject as it always is to the pressure of public opinion, affords the greater initial protection. But, of course, under a generally worded statute the initial executive action is followed by a trial or an administrative hearing and determination subject to judicial review. The judiciary thereby plays the crucial role in protecting the rights of the organization. But the courts should play no lesser role in connection with the Communist Control Act, because, as has been argued, the First Amendment should be read to require judicial review of the congressional finding that the Communist Party is a totalitarian organization.

State legislation has raised many of these same questions. In *Communist Party v. Peek*,¹²⁶ the California court upheld a statute¹²⁷ denying a place on the ballot in primary elections to any party which advocated the forceful overthrow of government, on the ground that it was a reasonable exercise of the power granted the legislature by the California constitution "to determine the tests and conditions upon which electors, political parties, or organ-

¹²⁴ *CP v. SACB*, 223 F. 2d 531, 558 (App. D.C., 1954).

¹²⁵ Professor Chafee gave an excellent example of this danger in a letter to the Senate Judiciary Committee opposing the bills which eventually became the Internal Security Act. 39 Stat. 919 (1917), 18 U.S.C.A. § 871 (1950), punishes with imprisonment up to five years a wilful "threat to take the life of the President. . . ." "What could be plainer?" wrote Professor Chafee. "At once we think of the need of shutting up the man who writes the President that he will be shot unless a certain bill is vetoed. But that is not the way this statute has worked out. A man in Beaumont, Texas, got into a violent argument about Wilson's war policies and exclaimed 'I wish Wilson was in hell, and if I had the power I would put him there.' He was convicted under this law, and the appellate judges held his revolting language was punishable as a threat to kill the President, because how could he be in hell unless he were dead? (*Clark v. United States*, 250 Fed. 449 (C.A. 5th, 1918))." Hearing before a Subcommittee on S. 1194 and S. 1196 of the Senate Committee on the Judiciary, 81st Cong. 1st Sess. 248 (1949).

¹²⁶ 20 Cal. 2d 536, 127 P. 2d 889 (1942).

¹²⁷ Cal. Stat. (Deering, Supp., 1941) §2540.4.

izations of electors may participate in any . . . primary election."¹²⁸ Parties which were barred, said the court, "constitute an immediate threat to the functioning of our institutions, including the continued exercise of the right of suffrage," and "the finding of the Legislature that the problem requires restrictive legislation is conclusive on the courts."¹²⁹ But the California court invalidated the statutory provisions barring any party "which uses or adopts as any part of its party designation the word 'communist' or any derivative of the word 'communist,'" or "which is directly or indirectly affiliated, by any means whatsoever, with the Communist Party of the United States, [or] the Third Communist International."¹³⁰ Unlike the Communist Control Act, the California statute contained no findings of fact about the nature of the Communist Party or the Third International, and the court refused to take judicial notice that the Party advocated the overthrow of the United States government by force and violence.¹³¹ The statutory provisions, therefore, in the court's opinion, had no reasonable relation to the end sought to be achieved by the legislature, because the "name adopted by a political party is frequently without any value in ascertaining the political beliefs of its adherents, and if the beliefs were pernicious, they would remain so despite a change in the name of the party."¹³² To the argument that the statute contained an implied finding that the Communist Party advocated the forceful overthrow of

¹²⁸ Cal. Const. Art. II § 2½.

¹²⁹ 20 Cal. 2d 536, 551, 549, 127 P. 2d 889, 898, 897 (1942). As of January 1, 1951, 15 states excluded from elections political groups advocating the overthrow of the government by force and violence. Gellhorn, *The States and Subversion* 373 (1952). This type of legislation was also upheld in *Field v. Hall*, 201 Ark. 77, 143 S.W. 2d 567 (1940), in which case, however, the court refused to accept the view that the prohibition of a political party interfered with the right of suffrage.

¹³⁰ Cal. Stat. (Deering, Supp., 1941) §§ 2540.3, 2540.4. Gellhorn lists 7 other states as having similar legislation, *op. cit. supra* note 129, at Appendix A. The California court also invalidated the portion of § 2540.4 which barred any party "which is directly or indirectly affiliated, by any means whatsoever, with . . . any other foreign agency, political party, organization or government. . . ." because this provision was "too sweeping," since the purposes of such a foreign organization might be beneficial or far removed from the field of political action in the United States. See, too, *Feinglass v. Reinecke*, 48 F. Supp. 438 (N.D. Ill., 1942).

¹³¹ The court took the same position in *State ex rel. Huff v. Reeves*, 5 Wash. 2d 637, 106 P. 2d 729 (1940) and issued a peremptory writ of mandamus requiring the secretary of state to allow the Communist Party to appear on the ballot. Existing law required every political party to file its declaration of principles as a condition precedent to appearing on the ballot. The Party's declaration stated that its principles were "To keep America at peace, to win economic security and prosperity for the people of the State of Washington and the American people; to protect and maintain the Bill of Rights and the civil liberties of the people." The secretary of state charged that the statute had not been complied with because this declaration was false. There was no other statutory basis for barring the Party from the ballot.

¹³² 20 Cal. 2d 536, 546, 127 P. 2d 889, 895 (1942). See, too, *Feinglass v. Reinecke*, 48 F. Supp. 438 (N.D. Ill., 1942).

the government which was binding on the courts, the court replied that it was a judicial, not a legislative function "to determine whether a Statute declaring a general policy has been violated in a particular case"¹³³ and, besides, a statute which purported to determine that a particular person or group violated a general law would be a "special" law prohibited by the California constitution.¹³⁴

The California court did not rely upon or even mention Article I, Section 10, clause 1 of the Constitution which prohibits states from passing bills of attainder. Moreover, state courts have generally upheld the "Test Oath Acts" designed directly to bar from public office or voting any person "who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government" on the ground that these laws did not inflict punishment for past actions but imposed reasonable qualifications for holding public office or voting.¹³⁵ More recently, the Supreme Court of Washington¹³⁶ took a more restrictive view in considering whether a statute¹³⁷ was a bill of attainder because it required every candidate for office to accompany his declaration of candidacy with an affidavit to the effect that he was not a subversive person, as that term was defined in the statute. The court assumed that if the statute were construed to require an oath covering past conduct, it would be unconstitutional as a bill of attainder, but since it read the statute "to require an oath of allegiance relating to the present and the future,"¹³⁸ it upheld it. But clearly the Communist Control Act also relates to the "present and the future" and not to the past. In any case, the federal courts have not adopted the restrictive view of the Washington court.

¹³³ 20 Cal. 2d 536, 548, 127 P. 2d 889, 897 (1942).

¹³⁴ Cal. Const. Art. IV, § 25, ¶ 11.

¹³⁵ *Boyd v. Mills*, 53 Kan. 594, 37 Pac. 16 (1894) (this case did not directly involve the oath); *Blair v. Ridgely*, 41 Mo. 63 (1867); *Anderson v. Baker*, 23 Md. 531 (1865). In *Green v. Shumway*, 39 N.Y. 418, 36 How. Pr. 5 (1868), it was held that a test oath act violated the New York constitution which prescribed qualifications for electors, because the legislature had no power to impose disabilities not existing at the time the constitution was adopted. Only two judges thought the act a "bill of attainder," saying "There can be no doubt . . . that to deprive a citizen of the privilege of exercising the elective franchise, for any conduct of which he has previously been guilty, is to inflict punishment for the act done." *Ibid.*, at 421, 8. Cf. *Shepherd v. Grimmett*, 3 Idaho 403, 31 Pac. 793 (1892). It is assumed that like the privilege against self-incrimination, only natural persons may raise the objection that a statute is a bill of attainder. Cf. *United States v. White*, 322 U.S. 694 (1944). But the analysis presented herein would not be essentially different if it were held that the Communist Party as such may interpose this objection. For the argument that the Party as such may raise this question, see 64 Yale L. J., *op. cit. supra* note 3, at 724-25 n. 74.

¹³⁶ *Huntamer v. Coe*, 40 Wash. 2d 767, 246 P. 2d 489 (1952).

¹³⁷ Wash. L. (1951) c. 254, §§ 1(e), 16.

¹³⁸ 40 Wash. 2d 767, 776, 246 P. 2d 489, 494 (1952).

Mr. Justice Clark, speaking for the Court which upheld a Los Angeles ordinance requiring every city employee to take a loyalty oath and execute an affidavit that he was not and never had been a member of the Communist Party, said: "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.'¹³⁹ We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."¹⁴⁰ He stressed the point that whereas the subject matter of the required oaths in *Cummings v. Missouri*¹⁴¹ and *Ex parte Garland*¹⁴² was not relevant to the qualifications for the offices and positions closed to the persons who refused to take the oath in those cases, the requirements of the Los Angeles ordinance were relevant. The Court has also affirmed a judgment denying a place on the ballot for a municipal election in Baltimore, Maryland, to a candidate who refused to file the affidavit required by the Ober Act to the effect that he was not engaged in one way or another in the attempt to overthrow the government by force or violence and was not knowingly a member of any organization engaged in such an attempt.¹⁴³ Similarly, in refusing to enjoin the enforcement of the Michigan Trucks Act which provides that the name of any communist or any nominee of the Communist Party shall not be printed upon ballots used in primary or general elections in the state, a three-judge federal court rejected the contention that the act constituted a bill of attainder.¹⁴⁴ The plaintiffs, said the court, "are subject to possible loss of opportunity to seek election to public office only because there is substantial ground that their beliefs and loyalties

¹³⁹ *Cummings v. Missouri*, 4 Wall. (U.S.) 277, 320 (1866).

¹⁴⁰ *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 722 (1951).

¹⁴¹ 4 Wall. (U.S.) 277 (1866).

¹⁴² 4 Wall. (U.S.) 333 (1866).

¹⁴³ *Gerende v. Board of Supervisors of Election of Baltimore*, 341 U.S. 56 (1951). As of January 1, 1951, Alaska, Florida, Kansas, New Jersey, Oklahoma, Oregon and Texas had similar legislation. Gellhorn, *op. cit. supra* note 129, at 405. For the problems which such oaths may raise under state law, compare the *Gerende* case and *Shub v. Simpson*, 196 Md. 177, 76 A. 2d 332 (1950) with *Imbrie v. Marsh*, 3 N.J. 578, 71 A. 2d 352 (1950). The appeal in *Shub v. Simpson* was dismissed on the ground that the federal questions had become moot, 340 U.S. 881 (1950), after the Court had denied a motion to advance and expedite the hearing of the appeal, 340 U.S. 861 (1950), and a motion to reconsider its denial of the motion to advance, 340 U.S. 873 (1950). The Court also denied a petition for certiorari to review the holding of the Maryland court that the Ober Act could not apply to candidates for Congress. *Simpson v. Gerende*, 340 U.S. 861 (1950).

¹⁴⁴ *Albertson v. Millard*, 106 F. Supp. 635 (E.D. Mich., 1952), vacated and remanded with directions "to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts." 345 U.S. 242, 245 (1953). The provision referred to is contained in § 7 of the Act. Mich. Stat. Ann. (Cum. Supp., 1953) §§ 28.243(11)—28.243(22). As of January 1, 1951, Alaska, Arizona, Florida, Georgia, Kansas, Maryland, New Jersey and Oklahoma had similar legislation. Gellhorn, *op. cit. supra* note 129, at 405.

will be transformed into future conduct. The history of past or present conduct may be the foundation for judgment as to what that future conduct is likely to be.¹⁴⁵ The court also sustained the Trucks Act against attack based upon the due process clause of the Fourteenth Amendment, taking judicial notice, which the California court refused to do ten years earlier in *Communist Party v. Peek*, that the Communist Party was "other than a political party, in the usual and historical sense."¹⁴⁶

The Communist Control Act proceeds on the warranted assumption that whether an organization is totalitarian is relevant to its qualification to continue to participate in the electoral struggle in a democracy. It does not, therefore, exact "punishment" as retribution for any past acts¹⁴⁷ of the Party or its members, but disqualifies the Party for the future. Finally, if the courts undertake to review the legislative findings characterizing the Communist Party as a totalitarian organization, as has been proposed, it cannot be maintained that the "punishment," even if such it be, inflicted by Section 3 of the Act, is imposed without the safeguards of a judicial trial.¹⁴⁸

It has been argued that the Act is a bill of attainder because it has retroactive effect within the meaning of the *Douds* rule since nothing the Party can do or refrain from doing can take it out of the reach of the statute.¹⁴⁹ But this is not so. To show that the non-communist affidavit requirement of the Taft-Hartley Act was aimed at future and not past action, Mr. Chief Justice Vinson said: "members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted

¹⁴⁵ 106 F. Supp. 635, 644. Cf. *Davis v. Beason*, 133 U.S. 333 (1890), in which the Court upheld against attack based upon the First Amendment a statute of the Territory of Idaho barring any person from registering or voting at an election who was "a member of any . . . organization . . . which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy . . . as a duty arising or resulting from membership in such . . . organization. . . ." It sustained the conviction of an individual for falsely swearing, in order to register, that he was not a member of such an organization, merely upon a showing that he was a member of the Mormon church, though not a bigamist or polygamist himself. The Court regarded belief in monogamy, which it thought essential to the "founding of a free, self-governing commonwealth," citing *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), as a reasonable qualification for voting.

¹⁴⁶ 106 F. Supp. 635, 642. One judge dissented, arguing that the Act (1) denied due process because the statutory definitions of "communist" and "Communist Party" were too vague and (2) invaded the field pre-empted by the Internal Security Act.

¹⁴⁷ Compare *United States v. Lovett*, 328 U.S. 303 (1946) and the *Cummings and Garland* cases, *supra*, with the *Garner and Douds* cases, *supra*. Basically for the reason indicated in the text, the contention that the Internal Security Act was a bill of attainder was rejected in *CP v. SACB*, 223 F. 2d 531, 558 (App. D.C., 1954).

¹⁴⁸ *United States v. Lovett*, 328 U.S. 303, 315 (1946). The above analysis of the bill of attainder problem will also apply to any attempt to use the Communist Control Act to justify confiscation of the assets of the Communist Party. Cf. *Mugler v. Kansas*, 123 U.S. 623 (1887) and *Hamilton v. Kentucky Distilleries & W. Co.*, 251 U.S. 146 (1919).

¹⁴⁹ 64 Yale L. J., *op. cit. supra* note 3, at 725-26 n. 81.

a bar to signing the affidavit in the past . . . there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit."¹⁵⁰ Similarly, the individuals who make up the unincorporated association that is the Communist Party may voluntarily alter their loyalties and organize a non-totalitarian political party which will not be prohibited by the Act from participating in the electoral struggle. Section 3 obviously admits of this possibility because it proscribes only those successors of the Communist Party "whose object or purpose is to overthrow" government in the United States "by force and violence."¹⁵¹

The question remains whether Section 3 violates any other requirement of due process. The fact that the Party will obtain a judicial hearing only after and not before the initial act of proscription should not be held to violate due process.¹⁵² Even a holding that due process bars the listing by the Attorney-General of an organization as "subversive" without prior notice and hearing, would not govern the question under the Communist Control Act. The public deliberations that accompany a proposal in Congress to outlaw an organization are in marked contrast with the secrecy that surrounds a listing by the Attorney-General. While, too, there seems to be no good reason why notice and hearing should not precede administrative listing of an organization, as is the case in New York,¹⁵³ there is good reason, as I have tried to show, why a legislative proscription should be specific. Furthermore, it cannot be main-

¹⁵⁰ *American Communications Ass'n v. Douds*, 339 U.S. 382, 414 (1950).

¹⁵¹ A rather perverted argument is made in 55 Col. L. Rev., op. cit. supra note 3, at 727-28 that Section 3 is a bill of attainder within the meaning of the Douds doctrine because § 9(h) of the Taft-Hartley Act permits Communist Party members to function as such without restriction if they resign from union office, but there is no way under Section 3 in which Party members, by withdrawing from non-Party pursuits, can engage in conventional party activity. But the question under § 9(h) was whether the disqualification of Party members from union office constituted a bill of attainder and this disqualification was itself in no way ameliorated by the fact that Party members could resign from union office and continue to function as Party members. Similarly the question under Section 3 is whether the disqualification of the Communist Party from participation in the electoral process is a bill of attainder and this disqualification cannot constitute a bill of attainder simply because Party members may be willing to withdraw from all non-Party pursuits, even if that were humanly possible. Whether the disqualification of Party members from union office and the disqualification of the Party from participation in the electoral process are objectives which Congress may constitutionally pursue are, of course, questions independent of the bill of attainder question.

¹⁵² *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), on remand 104 F. Supp. 567 (D.D.C., 1952); *Albertson v. Millard*, 106 F. Supp. 635 (E.D. Mich., 1952); *Field v. Hall*, 201 Ark. 77, 143 S.W. 2d 567 (1940). In *Kutcher v. Gray*, 199 F. 2d 783 (App. D.C., 1952), the court held that evidence of membership in a listed organization was competent in a loyalty proceeding, even though the organization was listed without prior notice or hearing. But see the concurring opinion of Mr. Justice Frankfurter in the Refugee Committee case, to the effect that due process barred the listing of any organization without prior notice and hearing. Justices Black, Douglas and Jackson agreed.

¹⁵³ *Adler v. Board of Education*, 342 U.S. 485 (1952).

tained reasonably that the Communist Party, in fact, has not received any hearing prior to its proscription. The findings in Section 2 of the Act are supported by numerous reports of different congressional committees issued on the basis of investigations conducted over a period of many years¹⁵⁴ and the haste and confusion which accompanied passage of the Act by no means imply that Congress' characterization of the Communist Party is a product of haste and confusion. Then, too, the courts have already reviewed and upheld the essential findings about the Communist Party embodied in Section 2. In the *Doufs* and *Dennis* cases, Mr. Justice Jackson, relying on these congressional reports and other data of which he took judicial notice, presented masterly analyses of the aims and methods of the Communist Party. Mr. Justice Frankfurter stated in the *Dennis* case that facts of common knowledge "would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security."¹⁵⁵ The Court has also reviewed and upheld the findings about the Communist movement in the United States set forth in Section 2 (15) of the Internal Security Act¹⁵⁶ in cases involving the deportation of aliens. In *Carlson v. Landon*¹⁵⁷ it concluded that "the doctrines and practices of communism clearly enough teach the use of force to achieve political control. . . ."¹⁵⁸ And, of course, the findings of the Subversive Activities Control Board about the nature of the Party were reviewed and upheld in *CP v. SACB*. Finally, if the dissolution of the Communist Party is an end which Congress may constitutionally effectuate, as has been argued in this paper, any deprivation sought to be read into the general language of Section 3—the right to sue, to hold property, or to enter into contracts—is reasonably related to this end and meets the substantive due process requirements of the Fifth Amendment.

C. THE BASIS OF FEDERAL AUTHORITY FOR THE COMMUNIST CONTROL ACT

Up to this point, we have been considering the applicability of various constitutional limitations upon congressional power, but what is the source of the power to enact Section 3?

¹⁵⁴ For a listing of these reports, see the memorandum from the Legislative Reference Service, 100 Cong. Rec. 13,992 (Aug. 16, 1954).

¹⁵⁵ 341 U.S. 494, 547.

¹⁵⁶ 64 Stat. 987 (1950), 50 U.S.C.A. § 781(15) (1951).

¹⁵⁷ 342 U.S. 524 (1952).

¹⁵⁸ *Ibid.*, at 535. Arguing that the legislative findings in the Internal Security Act could not reasonably be interpreted as a legislative declaration that all alien Communists were to be refused bail, Mr. Justice Frankfurter, dissenting in this case, said: "The immigration authorities were by the Act relieved of proving—in order to make a *prima facie* case—that the Communist Party is an 'organization . . . that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government.' But in the circumstances of today a legislative definition of the Communist Party as an organization advocating violent overthrow of government made little difference in the required proof." *Ibid.*, at 565.

Article I, Section 4, paragraph 1¹⁵⁹ of the Constitution together with the "necessary and proper" clause¹⁶⁰ are the sources of Congress' authority to exclude the Communist Party from the ballot in primary and general elections for Senators and Representatives. If Congress is not regulating the "Manner of holding Elections" when it prescribes the parties which may appear on the ballot, neither are the states when they do the prescribing.¹⁶¹ Yet the states have closely regulated the participation of political parties in elections and Article I, Section 4, paragraph 1 has often been suggested as the basis for federal action to alter or abolish the severe limitations which many states have imposed on access to the ballot.¹⁶² Section 3 may also be upheld as a measure to protect the integrity of federal elections and the basic right of all citizens to vote in federal elections which would be jeopardized in a totalitarian state.¹⁶³

It has been suggested, however,¹⁶⁴ that Section 3 may be subject to attack because it attempts to impose additional qualifications upon candidates for Congress in violation of Article I, Section 2, paragraph 2¹⁶⁵ and Article I, Section 3, paragraph 3.¹⁶⁶ But this attack can hardly be successful so long as

¹⁵⁹ "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

¹⁶⁰ U.S. Const. Art. I, § 8, ¶ 18. "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

¹⁶¹ "For the election of Senators and Representatives in Congress is a Federal function; whatever the states do in the matter they do under authority derived from the Constitution of the United States. The reservation contained in the Tenth Amendment cannot properly operate upon this subject in favor of the state governments; they could not reserve power over a matter that had no previous existence; hence if the power was not delegated to the United States it must be deemed to have been reserved to the people, and would require a constitutional amendment to bring it into play—a deplorable result of strict construction." Mr. Justice Pitney, concurring in part in *Newberry v. United States*, 256 U.S. 232, 281 (1921).

¹⁶² See, for example, *Limitation on Access to the General Election Ballot*, 37 Col. L. Rev. 86 (1937).

¹⁶³ Cf. *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Moseley*, 238 U.S. 383 (1915); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880).

¹⁶⁴ 64 Yale L. J., op. cit. supra note 3, at 740-41.

¹⁶⁵ "No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

¹⁶⁶ "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Legally, the question may be put more sharply in terms of whether Section 3 interferes with the prerogatives given each House by Article I, Section 5, to be "the Judge of the Elections, Returns, and Qualifications of its own Members. . . ." Cf. *Burton v. United States*, 202 U.S. 344 (1906).

Section 3 is confined to barring from the ballot only the Communist Party itself and those candidates, as in *Salwen v. Rees*, who insist upon carrying the Party label.¹⁶⁷ Under these circumstances, it is the Party, not the individual candidate, against which the exclusion is aimed. Since political parties came into being only after the Constitution was adopted and their regulation has been a function of government since early times, it cannot be maintained that the regulatory principle embodied in Section 3 imposes an additional qualification for individual candidates within the meaning of the term "qualifications" as used in Article I, Section 5. But should Section 3 be interpreted also to bar from the ballot Communist Party members and avowed Party adherents, even though they are prepared to discard the Party label, a construction which is rather unlikely in view of the Section's language, a serious constitutional question would arise.¹⁶⁸ Even then it may be argued reasonably that Section 3 merely implements Article VI, paragraph 3 which requires that senators and representatives "be bound by Oath or Affirmation to support" the Constitution.¹⁶⁹ Since its earliest days, Congress has passed legislation implementing the oath requirement of Article VI. In his successful efforts to get Congress to uphold the Test Oath Acts, Charles Sumner argued that the constitutional oath requirement in effect imposed the fourth and most important constitutional qualification for congressional office—loyalty.¹⁷⁰

To bar the Communist Party from the ballot in elections for presidential electors and in state and local elections presents no greater difficulties. Although the Supreme Court has held that under Article II, Section 1,¹⁷¹ "the appointment and mode of appointment of electors belong exclusively to the States,"¹⁷² it has rejected the view that congressional authority is limited to

¹⁶⁷ 55 Col. L. Rev., op. cit. supra note 3, at 708, agrees with this conclusion.

¹⁶⁸ See *Shub v. Simpson*, 196 Md. 177, 76 A. 2d 332 (1950); cf. *Imbrie v. Marsh*, 3 N.J. 578, 71 A. 2d 352 (1950).

¹⁶⁹ Cf. *Huntamer v. Coe*, 40 Wash. 767, 246 P. 2d 489 (1952). The Washington court construed the Washington statute to apply to candidates for Congress, saying: "The time for taking such an oath is merely advanced . . . to the time a candidate files and declares his candidacy and the oath is required of *all* candidates—those ultimately successful, as well as those ultimately unsuccessful." *Ibid.*, at 777, 495.

¹⁷⁰ See, for example, I Hinds, *Precedents of the H. of R.* §§ 448, 449 and 451 (1907).

¹⁷¹ Paragraph 2 of Section 1: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . ." Paragraph 3 of Section 1: "The Congress may determine the Time of chusing the Electors. . . ."

¹⁷² *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). See, too, *Minor v. Happersett*, 21 Wall. (U.S.) 162 (1875); *Walker v. United States*, 93 F. 2d 383 (C.A. 8th, 1937), cert. denied, 303 U.S. 655 (1938), in which the court affirmed a judgment of guilty in an indictment arising out of the Kansas City election frauds which charged defendants with conspiring in violation of 18 U.S.C. § 241 to injure and oppress citizens in their right to vote for presidential electors and to have their votes counted as cast. Although the court acknowledged that the right to vote for presidential electors depended "directly and exclusively on state

determining the time of choosing the electors and recognized congressional power to safeguard the elections of presidential electors.¹⁷³ Congress possesses this power, said the Court, "as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."¹⁷⁴

This same "power of self-preservation" may also be invoked to bar the Communist Party from participating in state and local elections. While the Communist Control Act does not recite the powers which it undertakes to exercise,¹⁷⁵ the findings make it clear that its purpose is to protect "the security of the United States." The national defense power, coupled with the inherent right of self-preservation, has been held to support the Smith and Internal Security Acts. Although the Smith Act was passed before war broke out and contains no recital of the powers which it exercises, it is apparent from the *Dennis* case, which did not go into this question in any detail, that the Court found congressional power in the "right of a government to maintain its existence—self-preservation: . . ."¹⁷⁶ In *Dunne v. United States*,¹⁷⁷ the court of appeals cited as authority for the Smith Act, the preamble to the Constitution,¹⁷⁸ the defense powers,¹⁷⁹ the inherent right of self-preservation and Article IV, Section 4.¹⁸⁰ Similarly, Section 2(15) of the Internal Security Act declares its purpose to be "to provide for the common defense, to preserve the sovereignty of the United States as an independent nation and to guarantee to each state a republican form of government." There is as much reason to uphold Sec-

legislation," it was careful to point out that the question before it was "not one of the power of Congress to safeguard the elections of presidential electors but rather whether it has done so by" 18 U.S.C. § 241. *Ibid.*, at 388. Intimations of congressional power to safeguard the elections of presidential electors are also present in *Ray v. Blair*, 343 U.S. 214 (1952).

¹⁷³ *Burroughs v. United States*, 290 U.S. 534 (1934). The Court viewed the Federal Corrupt Practices Act, which it upheld, as seeking "to preserve the purity of presidential and vice-presidential elections" and not in either purpose or in effect as interfering "with the power of a state to appoint electors or the manner in which their appointment shall be made." *Ibid.*, at 544.

¹⁷⁴ *Ibid.*, at 545.

¹⁷⁵ "The question of the constitutionality of action taken by Congress does not depend" on such recitals. Mr. Justice Douglas speaking for the Court in *Woods v. Miller*, 333 U.S. 138, 144 (1948).

¹⁷⁶ Concurring opinion of Mr. Justice Frankfurter, 341 U.S. 494, 517.

¹⁷⁷ 138 F. 2d 137 (C.A. 8th, 1943).

¹⁷⁸ "[To] insure domestic Tranquility, [to] provide for the common defense . . . and [to] secure the Blessings of Liberty."

¹⁷⁹ Art. I, § 8, ¶ 1 (to "provide for the common Defence"), 12-16 and 18 (the necessary and proper clause).

¹⁸⁰ The "Republican Form of Government" clause. See note 118 *supra*.

tion 3 of the Communist Control Act as an exercise of the defense power as the Smith and Internal Security Acts.¹⁸¹

However, the source of constitutional authority most consistent with the thesis presented in this paper is Article IV, Section 4, because Section 4's objective is to "guarantee to every State in this Union a Republican Form of Government." But may Congress act without prior application by the state legislature or executive for federal assistance? It was held in *Commonwealth v. Nelson*,¹⁸² on the authority of *Hines v. Davidowitz*,¹⁸³ that the Smith Act superseded the Pennsylvania Sedition Act¹⁸⁴ because "the duty of suppressing sedition within a State rests directly upon the Federal Government by virtue of Article IV, Section 4, of the Constitution."¹⁸⁵ Even if it is thought that the *Nelson* case goes too far because the language of Article IV, Section 4 indicates that the suppression of "domestic violence" in a state is the state's primary concern until it asks for federal aid,¹⁸⁶ Section 3 of the Communist Control Act would not constitute an undue interference with states' rights. For the language of Article IV, Section 4 does not condition either the federal guarantee of a republican form of government (or the federal protection against invasion) upon prior state application for federal assistance. And properly so. It is conceivable that a totalitarian party could come to power legally in a particular state, in which case, of course, the state would obviously not ask for federal action against itself. Yet the duty of Congress to overthrow such a government under Article IV, Section 4 would be unquestionable.¹⁸⁷

¹⁸¹ But cf. *Australian Communist Party v. Commonwealth*, 83 Commw. L. R. 1 (1951), in which the Communist Party Dissolution Act of 1950 was held not to be authorized by the defense power in the Australian Constitution and therefore to be beyond the power of the federal government. See Beasley, *Australia's Communist Party Dissolution Act*, 29 Can. Bar Rev. 490 (1951). A constitutional amendment specifically authorizing the act was rejected in a popular referendum. Friedrich and Sutherland, op. cit. supra note 12, at 697.

¹⁸² 377 Pa. 58, 104 A. 2d 133 (1954), cert. granted 348 U.S. 814 (1954). The court reversed the conviction of a Communist Party leader for attempting to overthrow the government of the United States by force and violence.

¹⁸³ 312 U.S. 52 (1941).

¹⁸⁴ Originally enacted in 1919, re-enacted as Section 207 of Act of June 24, 1939, 18 Penn. Stat. § 4207 (1945).

¹⁸⁵ 377 Pa. 58, 69, 104 A. 2d 133, 139. Although the indictment charged only sedition against the state, the court said that it was difficult to conceive of an act of sedition against a state which would not at the same time be an act of sedition against the United States and pointed out that the Smith Act was expressly directed against overthrow of the government of any state as well as of the United States.

¹⁸⁶ Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 Mich. L. Rev. 407, 423 (1955).

¹⁸⁷ Cf. the following statement by Mr. Chief Justice Taney speaking for the Court in *Luther v. Borden*, 7 How. (U.S.) 1, 45 (1849): "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it."

If Section 3 is held to be an exercise of congressional authority to guarantee to every state a republican form of government, will it then become immune to any attack in the courts? In most of the cases in which the courts have refused to review "political questions" under Article IV, Section 4, they have been asked to enforce the guarantee by declaring an existing situation in a particular state to be inconsistent with a republican form of government.¹⁸⁸ They have refused to do so for a variety of reasons—their inability "to secure the facts necessary for decision; the need for discretion in decision and the courts' inability to develop or apply controlling principles of law; the superiority of political checks as guides to decision; . . . the inability of courts to deal with the possible consequences of decision, such as would follow, for example, a holding that an entire state government was unconstitutional. . . ."¹⁸⁹ These reasons have led the courts to place the responsibility for enforcing the guarantee of a republican form of government upon Congress and the Executive. But this does not mean that every aspect of a congressional act necessarily becomes immune from judicial review merely because it purports to enforce the guarantee, and particularly when it raises questions of the violation of other express constitutional provisions, like the First Amendment. Thus, whether totalitarian organizations should be barred from the ballot in state elections may be regarded as a "political question" not subject to judicial review. But none of the reasons advanced for judicial self-limitation apply to review of a congressional determination that a particular organization is totalitarian.¹⁹⁰

¹⁸⁸ *Luther v. Borden*, 7 How. (U.S.) 1 (1849); *Texas v. White*, 7 Wall. (U.S.) 700 (1869); *Minor v. Happersett*, 21 Wall. (U.S.) 162 (1875); *Taylor v. Beckham*, 178 U.S. 548 (1900); *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); *Kiernan v. Portland*, 223 U.S. 151 (1912); *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937).

¹⁸⁹ Hart and Wechsler, *The Federal Courts and the Federal System* 192 (1953).

¹⁹⁰ See *Coyle v. Smith*, 221 U.S. 559 (1911), in which the Court, holding that Article IV, Section 4 did not authorize Congress to impose restrictions upon the admission of a new state into the Union which deprived it of equality with other states, invalidated an act of Congress which specified where the state capitol should be located until 1913. And cf. *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), in which it was held that it was a non-justiciable controversy whether an act of Congress permitting a state legislature to provide for a referendum to apportion the state for the purpose of congressional elections was itself repugnant to the guarantee of a republican form of government. Mr. Chief Justice Hughes, speaking for the Court, said: "[A]t best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guarantee of a republican form of government, has done something which it is deemed is repugnant to that guarantee, therefore there was automatically created judicial authority to go beyond the limits of judicial power and in doing so to usurp congressional power on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control free from judicial interference." *Ibid.*, at 570. But here too, the Court was dealing with a situation in which it was asked to declare an existing form of government to be non-republican in form in the face of a contrary determination by Congress. No such conflict would be created by the scope of review herein suggested with regard to Section 3 of the Communist Control Act.

III. THE WISDOM OF THE COMMUNIST CONTROL ACT

Most of the objections voiced against the Communist Control Act assume that it violates democratic principles in the interest of a short-sighted political expediency.¹⁹¹ However eloquently these criticisms may be expressed, they are inapposite, as this paper has tried to show. The Act has also been attacked because of its undisputed political motivation. With an election impending, the liberal democrats who supported the original Humphrey proposal were anxious to demonstrate to the country that they were not "soft" on Communism and that the Democratic Party was not a "party of treason."¹⁹² The Republicans joined in lest the Democrats steal their anti-communist thunder. Undoubtedly some legislators in both parties voted for the Act to vent their spleen against "leftism" in general. But all this does not imply that the Act itself is unwise. Those who condemn the argument that a cause is evil simply because Communists also support it should not be quick to criticize anti-Communist legislation simply because men of totalitarian "rightist" mentality also favor it. Nor is it an argument against the Act that it might persuade the people that the Republican and Democratic parties are united and equally zealous in their anti-Communism. Whether it has had this persuasive effect is, of course, debatable. Prominent Republican spokesmen during the last election did not, because of it, cease their attacks upon the Democratic Party as the "party of treason." Yet it may be the case that the Act weakened the effectiveness of this attack. Democratic senators have stated, informally, that the Act contributed to their electoral victories.

In short, the Communist Control Act does not represent an abandonment of the liberal tradition. Men and women who call themselves liberals should be in the forefront of the fight against Communism, just as they were in the fight against Fascism. It was one of the tragedies of the 1930's that many liberals were as blind to the implications of totalitarian Communism as many conservatives were to those of totalitarian Fascism. There is no excuse for a repetition of this dual folly. Only a united opposition to totalitarianism which will take the issue out of the area of party conflict will hasten public understanding of the difference between all totalitarian movements, on the one hand,

¹⁹¹ Arguments for and against outlawry of the Communist Party are assembled in the memorandum prepared by the Legislative Reference Service, 100 Cong. Rec. 14,613-22 (1954).

¹⁹² When he introduced his original proposal, Senator Humphrey said: "I am tired of reading headlines about being 'soft' toward communism. I am tired of reading headlines about being a leftist and others being leftists." 100 Cong. Rec. 14,210 (1954). When the House threw out his provisions illegalizing membership in the Communist Party, Senator Humphrey said: "I do not want to hear any more talk from anyone, after this attempt to be so soft on communism, about a party of treason." 100 Cong. Rec. 14,578 (1954). It is interesting to recall once again that it was one of the purposes of the treason clause to limit the epithet value of the term "treason" in political combat. See *supra* note 117 and Hurst, *op. cit. supra* note 56, at 424.

and, on the other, those movements which, however radical their proposals for changing the status quo, accept the framework of democracy. Renewed appreciation and enthusiasm for the American tradition of political dissent depend upon this public understanding.

Yet it remains debatable whether the Act is the best way to combat the Communist fifth column in this country and will do more good than harm to the cause of democracy throughout the world. In making this difficult evaluation, the Act must be considered together with the Smith and Internal Security Acts. The three do not make up a wholly consistent program. The registration requirements of the Internal Security Act, as has been pointed out, assume the continued legal existence of the Communist Party as an organization engaging in political and propaganda activities. But the purpose of the Smith and Communist Control Acts seems to be to strip the Party of its legality and force the dissolution of the overt Communist organization. This latter objective (which, interestingly enough, was also that of the original Humphrey proposal) may be accomplished by the Smith Act alone, if the courts sustain the conviction of Communist Party members as members of a "society, group or assembly of persons" who "teach, advocate, or encourage the overthrow" of the government by force or violence, "knowing the purposes thereof."¹⁹³ The incongruity of the Smith Act prosecutions and permitting the Communist Party to appear as a legal party on the ballot in national, state and local elections is apparent. But even without the Communist Control Act, it is unlikely that the Party will be eager to run candidates for office, since Party nomination would single out the nominee for prosecution under the Smith Act.¹⁹⁴

The question then resolves itself into whether the Communist Party should be permitted to continue its open activities as an organization. No policy of suppression, of course, can by itself put an end to its secret, conspiratorial operations.¹⁹⁵ But suppression can drive the entire Communist apparatus

¹⁹³ 62 Stat. 808 (1948), 18 U.S.C.A. § 2385 (1951). It was under this provision that Claude M. Lightfoot, executive secretary of the Communist Party of Illinois, was convicted and sentenced to imprisonment for 5 years and a fine of \$5,000. *N.Y. Times* p. 15, col. 6 (Feb. 16, 1955). The judgment of conviction was affirmed in *United States v. Lightfoot*, 228 F. 2d 861 (C.A. 7th, 1956).

¹⁹⁴ The Communist Party appeared on the ballot in the presidential elections of 1924, 1928, 1932, 1936 and 1940. It polled the following votes in these elections, respectively: 36,386, 48,770, 102,991, 80,159 and 48,579. *Statistical Abstract of the United States* 343 (1954).

¹⁹⁵ This distinction between the overt and covert activities of the Party is often not appreciated by those who charge that the Act will not be effective in any case. It is true that Communist espionage and sabotage can be combatted successfully only by our own counter-intelligence. But no reason is apparent why the Smith and Communist Control Acts could not together succeed in destroying the Communist Party as an open organization. The experience of the Weimar Republic with outlawing the Nazi Party is not very apt. As I read Professor Loewenstein's summary of the German and other European experiences, I take

underground and deprive the Party of the opportunities which open activities afford to recruit adherents, disseminate propaganda and cloak its conspiratorial activities. This may result in spurring the Party to infiltrate other parties and organizations. Without the Party's open activities, which enable others to read Party literature, identify Party leaders, and attend Party meetings, it will be more difficult to recognize the "Party line" and thereby to expose infiltration. Suppression, too, will encourage the formation of a larger, hard core of Communist fanatics, whereas open activities may lead Party members into paths which induce defection and it may serve us well in the ideological struggle with world Communism to adopt the missionary attitude that every Communist soul is worth saving.¹⁹⁶

Resort to suppression also increases tension and excitement at home at a time when it is of the utmost importance to be calm and helps to give the rest of the world a picture of a frightened America, unsure of its strength and uncertain of its purpose. While the picture which even our allies have of us is, undoubtedly, greatly distorted, the government's policy towards all phases of the security problem makes it easier for others to accept the distorted picture as a reflection of reality. Insofar, too, as the orthodox conception of democracy prevails at home and abroad, we appear to be hypocritical when we espouse the cause of free elections the world over, yet bar the Communist Party from participating in elections at home. Although this judgment of our policy, in my opinion, is based upon erroneous assumptions, it is a fact of which we must take account.

On balance, therefore, it seems to me that both the Smith and Communist Control Acts are unwise because the open activities of the Communist Party do not intensify the danger presented by the world Communist movement so much as to warrant sacrificing the positive gains which can be won by the democratic cause if these open activities are tolerated.¹⁹⁷ Though a democracy should not wait until the danger becomes "clear and present," an

him to conclude that the anti-fascist and anti-communist legislation of the 1930's was effective whenever the determination existed to make it so. Loewenstein, *Militant Democracy and Fundamental Rights*, 31 *Am. Pol. Sci. Rev.* 417, 638 (1937); *Legislative Control of Political Extremism in European Democracies*, 38 *Col. L. Rev.* 591, 725 (1938). Studying the European experience, Professor Riesman concluded that "[I]t cannot be asserted . . . that legislation is an entirely futile weapon, but rather that the difficulties are immense and the social conditions of the time all but controlling." *Op. cit. supra* note 52, at 59. In the United States today, the difficulties would be of a manageable proportion.

¹⁹⁶ According to recent press estimates, there are currently about 25,000 such souls.

¹⁹⁷ In reaching this conclusion, I do not give any weight to the argument that suppression of the Communist Party may sacrifice needed "criticism of defects in our society." (Mr. Justice Frankfurter in the Dennis case, 341 U.S. 494, 549.) We do not lack such criticism from men and groups devoted to democracy. Communists, furthermore, distort and corrupt every movement for reform of which they are a part. And reforms, it seems to me, should be justified more on their own merits than on the ground they will help to fight Communism.

evaluation of the nature of the danger and the gains to be won by toleration is essential to a wise policy. Communism has suffered its greatest defeats in the field of open political debate. Why should democracy desert a field of battle in which it has been so successful?

But our problem is not yet answered. We are not faced with the original question whether the Smith and Communist Control Acts should become law, but whether they should now be repealed. And this question involves additional considerations. It would be a mistake to repeal these laws if the action might be interpreted as a reversal by Congress of its estimate of the nature of the Communist movement and threat. To rekindle the illusion that the Communist Party is just like any other "radical" party is more to be feared, in my opinion, than legislation depriving the Party of its legal existence. Whether or not there is agreement on the policy conclusions reached in this paper, there should be little dispute about the need for a non-partisan re-examination of the issues. Calls for a high-level presidential commission to do this job have come from many quarters. It is time they were heeded.¹⁹⁸

In conclusion, it is hoped that this paper will serve to emphasize the importance of keeping separate and clear the issues of principle and policy involved in meeting the totalitarian threat. Confusion of these issues does harm to the cause of civil liberties. To hide a weak policy argument against the suppression of the Communist Party behind talk of democratic principles and the constitutional rights of Communists may produce popular contempt for the principles and rights themselves. On the other hand, a strong argument against suppression becomes doubly persuasive if it is based upon acceptance of the view that no principle of democracy or the Constitution protects movements which seek political power only to destroy constitutional democratic government.

¹⁹⁸ The creation of the Commission on Government Security goes a good part but not the whole of the way. See Pub. L. No. 304, 84th Cong., 1st Sess. (Aug. 9, 1955), 69 Stat. 595. For the membership of the twelve man Commission, see N.Y. Times p. 1, col. 5 (Nov. 1, 1955).