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FREE SPEECH

And Its Relation to Self-Government

By the Same Author

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WHAT DOES AMERICA MEAN?

EDUCATION BETWEEN TWO WORLDS

FREE SPEECH

And Its Relation to Self-Government

By ALEXANDER MEIKLEJOHN

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FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT

FIRST EDITION

G-X

TO

Walton Hale Hamilton

whose pupil I became, many years ago
when we were together at Amherst College

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FOREWORD

THE ARGUMENT of this book was first given in three lectures at the University of Chicago, under the Charles R. Walgreen Foundation for the Study of American Institutions. It was later given, in the same form, at the Law School of Yale University, at St. John's College, and, in part, as a lecture and discussion in the Great Issues Course at Dartmouth College. It is here presented with some slight changes which are intended to serve the transition from the hearing of an argument to the reading of it.

The book discusses a principle of law. It is written, however, not by a lawyer, but by a teacher. It springs from a strong conviction that a primary task of American education is to arouse and to cultivate, in all the members of the body politic, a desire to understand what our national plan of government is. The book, therefore, is a challenge to all of us, as citizens, to study the Constitution. That constitution derives whatever validity, whatever meaning, it has, not from its acceptance by our forefathers one hundred and sixty years ago, but from its acceptance by us, now. Clearly, however, we cannot, in any valid sense, "accept" the Constitution unless we know what it says. And, for that

reason, every loyal citizen of the nation must join with his fellows in the attempt to interpret, in principle and in action, that provision of the Constitution which is rightly regarded as its most vital assertion, its most significant contribution to political wisdom. What do We, the People of the United States, mean when we provide for the freedom of belief and of the expression of belief?

I

The First Amendment to the Constitution, as we all know, forbids the federal Congress to make any law which shall abridge the freedom of speech. In recent years, however, the government of the United States has in many ways limited the freedom of public discussion. For example, the Federal Bureau of Investigation has built up, throughout the country, a system of espionage, of secret police, by which hundreds of thousands of our people have been listed as holding this or that set of opinions. The only conceivable justification of that listing by a government agency is to provide a basis for action by the government in dealing with those persons. And that procedure reveals an attitude toward freedom of speech which is widely held in the United States. Many of us are now convinced that, under the Constitution, the government is justified in bringing pressure to bear against the holding or expressing of beliefs which are labeled "dangerous." Congress, we think, may rightly abridge the freedom of such beliefs.

Again, the legislative committees, federal and state, which have been appointed to investigate un-American

activities, express the same interpretation of the Constitution. All the inquirings and questionings of those committees are based upon the assumption that certain forms of political opinion and advocacy should be, and legitimately may be, suppressed. And, further, the Department of Justice, acting on the same assumption, has recently listed some sixty or more organizations, association with which may be taken by the government to raise the question of "disloyalty" to the United States. And finally, the President's Loyalty Order, moving with somewhat uncertain steps, follows the same road. We are officially engaged in the suppression of "dangerous" speech.

Now, these practices would seem to be flatly contradictory of the First Amendment. Are they? What do we mean when we say that "Congress shall make no law . . . abridging the freedom of speech . . . ?" What is this "freedom of speech" which we guard against invasion by our chosen and authorized representatives? Why may not a man be prevented from speaking if, in the judgment of Congress, his ideas are hostile and harmful to the general welfare of the nation? Are we, for example, required by the First Amendment to give men freedom to advocate the abolition of the First Amendment? Are we bound to grant freedom of speech to those who, if they had the power, would refuse it to us? The First Amendment, taken literally, seems to answer, "Yes" to those questions. It seems to say that no speech, however dangerous, may, for that reason, be suppressed. But the Federal Bureau of Investigation, the un-Amer-

ican Activities committees, the Department of Justice, the President, are, at the same time, answering "No" to the same question. Which answer is right? What is the valid American doctrine concerning the freedom of speech?

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Throughout our history, the need of clear and reasonable answering of that question has been very urgent. In fact, under our system of dealing with problems of domestic policy by "party" discussion and "party" action, the demand for such clarity and reasonableness is basic to our "democratic" way of life. But, with the ending of World War II, that demand has taken on a new, and even greater, urgency. Our nation has now assumed, or has had thrust upon it by Fate, a new role. We have taken leadership in the advocating of freedom of expression and of communication, not only at home, but also throughout the world. In the waging of that campaign we Americans have made many accusations against our enemies in war, hot or cold. But our most furious and righteous charge has been that they have suppressed, and are suppressing, the free exchange of information and of ideas. That evil drawing of a smoke curtain, we have declared, we will not tolerate. We will not submit to it within our own borders. We will not allow it abroad if, by legitimate means, we can prevent it. We are determined that, with respect to the freedom of its communications, the human world shall be a single community.

Now, the assuming of that high and heavy responsi-

bility for a political principle requires of us, first of all, that we understand what the principle is. We must think for it as well as fight for it. No fighting, however successful, will help to establish freedom unless the winners know what freedom is. What, then—we citizens under the Constitution must ask—what do we mean when we utter the flaming proclamation of the First Amendment? Do we mean that speaking may be suppressed or that it shall not be suppressed? And, in either case, on what grounds has the decision been made?

3

The issue here presented has been dramatically, though perhaps not very effectively, thrust upon the attention of the citizens of the United States by a recent order of the Attorney General. That order restricts the freedom of speech of temporary foreign visitors to our shores. It declares that certain classes of visitors are forbidden, except by special permission, to engage in public discussion of public policy while they are among us. Why may we not hear what these men from other countries, other systems of government, have to say? For what purpose does the Attorney General impose limits upon their speaking, upon our hearing? The plain truth is that he is seeking to protect the minds of the citizens of this free nation of ours from the influence of assertions, of doubts, of questions, of plans, of principles which the government judges to be too "dangerous" for us to hear. He is afraid that we, whose agent he is, will be led astray by opinions which are alien and subversive. Do We, the People of the United States, wish to be thus mentally

"protected"? To say that would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes has called the "experiment" of self-government. Have we, on that ground, abandoned or qualified the great experiment?

Here, then, is the question which we must try to answer as we interpret the First Amendment to the Constitution. In our discussions of public policy at home, do we intend that "dangerous" ideas shall be suppressed? Or are they, under the Constitution, guaranteed freedom from such suppression? And, correspondingly, in our dealings with other nations, are we saying to them, "The general welfare of the world requires that you and we shall not, in any way, abridge the freedom of expression and communication"? Or are we saying, "Every nation may, of course, forbid and punish the expression of ideas which are dangerous to the form of government or of industrial organization which it has established and is attempting to maintain"?

No one, of course, may prescribe that citizens of the United States shall interpret the Constitution in this way or that. It is not even required that the meaning of the Constitution shall be in the future what it has been in the past. We are free to change that meaning both by interpretation and by explicit amendment. But what is required of us by every consideration of honesty and self-respect is that we practice what we preach, that we preach only what we practice. What, then, as we deal with the present, as we plan for the future, do we intend that the principle of the freedom of speech shall mean?

FREE SPEECH

And Its Relation to Self-Government

CHAPTER I

The Rulers and the Ruled

THE PURPOSE of these lectures is to consider the freedom of speech which is guaranteed by the Constitution of the United States. The most general thesis of the argument is that, under the Constitution, there are two different freedoms of speech, and, hence, two different guarantees of freedom rather than only one.

More broadly, it may be asserted that our civil liberties, in general, are not all of one kind. They are of two kinds which, though radically different in constitutional status, are easily confused. And that confusion has been, and is, disastrous in its effect upon our understanding of the relations between an individual citizen and the government of the United States. The argument of these lectures is an attempt to clear away that confusion.

As an instance of the first kind of civil liberty I would offer that of religious or irreligious belief. In this country of ours, so far as the Constitution is effective, men are free to believe and to advocate or to disbelieve and to argue against, any creed. And the government is un-

qualifiedly forbidden to restrict that freedom. As an instance of the second kind, we may take the liberty of an individual to own, and to use the income from, his labor or his property. It is agreed among us that every man has a right, a liberty, to such ownership and use. And yet it is also agreed that the government may take whatever part of a man's income it deems necessary for the promoting of the general welfare. The liberty of owning and using property is, then, as contrasted with that of religious belief, a limited one. It may be invaded by the government. And the Constitution authorizes such invasion. It requires only that the procedure shall be properly and impartially carried out and that it shall be justified by public need.

Our Constitution, then, recognizes and protects two different sets of freedoms. One of these is open to restriction by the government. The other is not open to such restriction. It would be of great value to our argument and, in fact, to all attempts at political thinking in the United States, if there were available two sharply defined terms by which to identify these two fundamentally different kinds of civil liberty. But, alas, no such accurate use of words has been established among us. Men speak of the freedom of belief and the freedom of property as if, in the Constitution, the word "freedom," as used in these two cases, had the same meaning. Because of that confusion we are in constant danger of giving to a man's possessions the same dignity, the same status, as we give to the man himself. From that confusion our

national life has suffered disastrous effects in all its phases. But for this disease of our minds there is, so far as I know, no specific semantic cure. All that we can do at present is to remember that such terms as liberty, freedom, civil rights, etc., are ambiguous. We must, then, in each specific case, try to keep clear what meaning we are using.

I

We Americans think of ourselves as politically free. We believe in self-government. If men are to be governed, we say, then that governing must be done, not by others, but by themselves. So far, therefore, as our own affairs are concerned, we refuse to submit to alien control. That refusal, if need be, we will carry to the point of rebellion, of revolution. And if other men, within the jurisdiction of our laws, are denied their right to political freedom, we will, in the same spirit, rise to their defense. Governments, we insist, derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.

Now, this political program of ours, though passionately advocated by us, is not—as we all recognize—fully worked out in practice. Over one hundred and seventy years have gone by since the Declaration of Independence was written. But, to an unforgivable degree, citizens of the United States are still subjected to decisions in the making of which they have had no effective share. So far as that is true, we are not self-governed; we are not politically free. We are governed

by others. And, perhaps worse, we are, without their consent, the governors of others.

But a more important point—which we Americans do not so readily recognize—is that of the intellectual difficulties which are inherent in the making and administering of this political program of ours. We do not see how baffling, even to the point of desperation, is the task of using our minds, to which we are summoned by our plan of government. That plan is not intellectually simple. Its victories are chiefly won, not by the carnage of battle, but by the sweat and agony of the mind. By contrast with it, the idea of alien government which we reject—whatever its other merits or defects—is easy to understand. It is suited to simple-minded people who are unwilling or unable to question their own convictions, who would defend their principles by suppressing that hostile criticism which is necessary for their clarification.

The intellectual difficulty of which I am speaking is sharply indicated by Professor Edward Hallett Carr, in his recent book, *The Soviet Impact on the Western World*. Mr. Carr tells us that our American political program, as we formulate it, is not merely unclear. It is essentially self-contradictory and hence, nonsensical. "Confusion of thought," he says, "is often caused by the habit common among politicians and writers of the English-speaking world, of defining democracy in formal and conventional terms as 'self-government' or 'government by consent.' " What these terms define, he continues, "is not democracy, but anarchy. Government of some kind is necessary in the common interest precisely

because men will not govern themselves. 'Government by consent' is a contradiction in terms; for the purpose of government is to compel people to do what they would not do of their own volition. In short, government is a process by which some people exercise compulsion on others."[1]

Those words of Mr. Carr seem to me radically false. And, whatever else these lectures may do or fail to do, I hope that they may, in some measure, serve as a refutation of his contention. And yet the challenge of so able and well-balanced a mind cannot be ignored. If we believe in our principles we must make clear to others and to ourselves that self-government is not anarchy. We must show in what sense a free man, a free society, does practice self-direction. What, then, is the difference between a political system in which men do govern themselves and a political system in which men, without their consent, are governed by others? Unless we can make clear that distinction, discussion of freedom of speech or of any other freedom is meaningless and futile.

Alien government, we have said, is simple in idea. It is easy to understand. When one man or some self-chosen group holds control, without consent, over others, the relation between them is one of force and counterforce, of compulsion on the one hand and submission or resistance on the other. That relation is external and mechanical. It can be expressed in numbers—numbers of guns or planes or dollars or machines or policemen.

[1] Edward Hallett Carr, *The Soviet Impact on the Western World* (New York, Macmillan, 1947), p. 10.

The only basic fact is that one group "has the power" and the other group has not. In such a despotism, a ruler, by some excess of strength or guile or both, without the consent of his subjects, forces them into obedience. And in order to understand what he does, what they do, we need only measure the strength or weakness of the control and the strength or weakness of the resistance to it.

But government by consent—self-government—is not thus simple. It is, in fact, so complicated, so confusing, that, not only to the scholarly judgment of Mr. Carr, but also to the simple-mindedness which we call "shrewd, practical, calculating, common sense," it tends to seem silly, unrealistic, romantic, or—to use a favorite term of reproach—"idealistic." And the crux of the difficulty lies in the fact that, in such a society, the governors and the governed are not two distinct groups of persons. There is only one group—the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own masters, our own subjects. But that inner relationship of men to themselves is utterly different in kind from the external relationship of one man to another. It cannot be expressed in terms of forces and compulsions. If we attempt to think about the political procedures of self-government by means of the ideas which are useful in describing the external control of a hammer over a nail or of a master over his slaves, the meaning slips through the fingers of our minds. For thinking which is done merely in terms of forces, political freedom does not exist.

At this point, a protest must be entered against the oversimplified advice which tells us that we should introduce into the realms of economics, politics, and morals the "methods" of the "sciences." Insofar as the advice suggests to us that we keep our beliefs within the limits of the evidence which warrants them, insofar as it tells us that our thinking about human relationships must be as exact and tentative, as orderly and inclusive, as is the work done by students of physical or biological fact, no one may challenge either its validity or its importance. To believe what one has no reason for believing is a crime of the first order. But, on the other hand, it must be urged that the chief source of our blundering ineptness in dealing with moral and political problems is that we do not know how to think about them except by quantitative methods which are borrowed from non-moral, non-political, non-social sciences. In this sense we need to be, not more scientific, but less scientific, not more quantitative but other than quantitative. We must create and use methods of inquiry, methods of belief which are suitable to the study of men as self-governing persons but not suitable to the study of forces or of machines. In the understanding of a free society, scientific thinking has an essential part to play. But it is a secondary part. We shall not understand the Constitution of the United States if we think of men only as pushed around by forces. We must see them also as governing themselves.

But the statement just made must be guarded against two easy misinterpretations. First, when we say that

self-government is hard to interpret, we are not saying that it is mysterious or magical or irrational. Quite the contrary is true. No idea which we have is more sane, more matter-of-fact, more immediately sensible, than that of self-government. Whether it be in the field of individual or of social activity, men are not recognizable as men unless, in any given situation, they are using their minds to give direction to their behavior. But the point which we are making is that the externalized measuring of the play of forces which serves the purposes of business or of science is wholly unsuited to our dealing with problems of moral or political freedom. And we Americans seem characteristically blind to the distinction. We are at the top of the world in engineering. We are experts in the knowledge and manipulation of measurable forces, whether physical or psychological. We invent and run machines of ever new and amazing power and intricacy. And we are tempted by that achievement to see if we can manipulate men with the same skill and ingenuity. But the manipulation of men is the destruction of self-government. Our skill, therefore, threatens our wisdom. In this respect the United States with its "know-how" is, today, the most dangerous nation in the world.

And, second, what we have said must not be allowed to obscure the fact that a free government, established by common consent, may and often must use force in compelling citizens to obey the laws. Every government, as such, must have external power. It must, in fact, be more powerful than any one of its citizens, than any

group of them. Political freedom does not mean freedom from control. It means self-control. If, for example, a nation becomes involved in war, the government must decide who shall be drafted to leave his family and home, to risk his life, his health, his sanity, upon the battlefield. The government must also levy and collect and expend taxes. In general, it must determine how far and in what ways the customs and privileges of peace are to be swept aside. In all these cases it may be taken for granted that, in a self-governing society, minorities will disagree with the decisions which are made. May a minority man, then, by appeal to the principle of "consent," refuse to submit to military control? May he evade payment of taxes which he thinks unwise or unjust? May he say, "I did not approve of this measure; therefore, as a self-governing man, I claim the right to disobey it"?

Certainly not! At the bottom of every plan of self-government is a basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens, whether they agree with them or not, and that, if need be, they shall, by due legal procedure, be enforced upon anyone who refuses to conform to them. The man who rejects that agreement is not objecting to tyranny or despotism. He is objecting to political freedom. He is not a democrat. He is the anarchist of whom Mr. Carr speaks. Self-government is nonsense unless the "self" which governs is able and determined to make its will effective.

2

What, then, is this compact or agreement which underlies any plan for political freedom? It cannot be understood unless we distinguish sharply and persistently between the "submission" of a slave and the "consent" of a free citizen. In both cases it is agreed that obedience shall be required. Even when despotism is so extreme as to be practically indistinguishable from enslavement, a sort of pseudo consent is given by the subjects. When the ruling force is overwhelming, men are driven not only to submit, but also to agree to do so. For the time, at least, they decide to make the best of a bad situation rather than to struggle against hopeless odds. And, coordinate with this "submission" by the people, there are "concessions" by the ruler. For the avoiding of trouble, to establish his power, to manipulate one hostile force against another, he must take account of the desires and interests of his subjects, must manage to keep them from becoming too rebellious. The granting of such "concessions" and the accepting of them are, perhaps, the clearest evidence that a government is not democratic but is essentially despotic and alien.

But the "consent" of free citizens is radically different in kind from this "submission" of slaves. Free men talk about their government, not in terms of its "favors" but in terms of their "rights." They do not bargain. They reason. Every one of them is, of course, subject to the laws which are made. But if the Declaration of Independence means what it says, if we mean what it says, then no man is called upon to obey a law unless he him-

self, equally with his fellows, has shared in making it. Under an agreement to which, in the closing words of the Declaration of Independence, "we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor," the consent which we give is not forced upon us. It expresses a voluntary compact among political equals. We, the People, acting together, either directly or through our representatives, make and administer law. We, the People, acting in groups or separately, are subject to the law. If we could make that double agreement effective, we would have accomplished the American Revolution. If we could understand that agreement we would understand the Revolution, which is still in the making. But the agreement can have meaning for us only as we clarify the tenuous and elusive distinction between a political "submission" which we abhor and a political "consent" in which we glory. Upon the effectiveness of that distinction rests the entire enormous and intricate structure of those free political institutions which we have pledged ourselves to build. If we can think that distinction clearly, we can be self-governing. If we lose our grip upon it, if, rightly or wrongly, we fall back into the prerevolutionary attitudes which regard our chosen representatives as alien and hostile to ourselves, nothing can save us from the slavery which, in 1776, we set out to destroy.

3

I have been saying that, under the plan of political freedom, we maintain by common consent a government which, being stronger than any one of us, than any

group of us, can take control over all of us. But the word "control" strikes terror into the hearts of many "free" men, especially if they are mechanically minded about their freedom. Out of that fear there arises the passionate demand that the government which controls us must itself be controlled. By whom, and in what ways?

In abstract principle, that question is easy to answer. A government of free men can properly be controlled only by itself. Who else could be trusted by us to hold our political institutions in check? Shall any single individual or any special group be allowed to take domination over the agencies of control? There is only one situation in which free men can answer "yes" to that question. If the government, as an institution, has broken down, if the basic agreement has collapsed, then both the right and the duty of rebellion are thrust upon the individual citizens. In that chaotic and desperate situation they must, for the sake of a new order, revolt and destroy, as the American colonies in 1776 revolted and destroyed. But, short of such violent lawlessness in the interest of a new law, there can be no doubt that a free government must be its own master. If We, the People are to be controlled, then We, the People must do the controlling. As a corporate body, we must exercise control over our separate members. That principle is a flat denial of the suggestion that we, acting as an unorganized and irresponsible mob, may drive into submission ourselves acting as an organized government. What it means is that the body politic, organized as a nation,

must recognize its own limitations of wisdom and of temper and of circumstance, and must, therefore, make adequate provision for self-criticism and self-restraint. The government itself must limit the government, must determine what it may and may not do. It must make sure that its attempts to make men free do not result in making them slaves.

Our own American constitutional procedure gives striking illustration of the double principle that no free government can submit to control other than its own and that, therefore, it must limit and control itself. For example, our agencies of government do their work under a scheme of mutual checks and balances. The Bill of Rights, also, sharply and explicitly defines boundaries beyond which acts of governing may not go. "Congress shall make no law . . ." it says. And again, "No person shall be held to answer for a capital or otherwise infamous crime unless . . ." And again, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." All these and many other limits are set to the powers of government. But in every case—let it be noted—these limits are set by government. These enactments were duly proposed, discussed, adopted, interpreted, and enforced by regular political procedure. And, as the years have gone by, We, the People, who, by explicit compact, are the government, have maintained and interpreted and extended them. In some cases, we have reinterpreted them or have even abolished them. They are expressions of our

own corporate self-control. They tell us that, by compact, explicit or implicit, we are self-governed.

Here, then, is the thesis upon which the argument of these lectures is to rest. At the bottom of our American plan of government there is, as Thomas Jefferson has firmly told us, a "compact." To Jefferson it is clear that as fellow citizens we have made and are continually remaking an agreement with one another, and that, whatever the cost, we are in honor bound to keep that agreement. The nature of the compact to which we "consent" is suggested by the familiar story of the meeting of the Pilgrims in the cabin of the Mayflower. "We whose names are underwritten, . . ." they said, ". . . Do by these Presents solemnly and mutually, in the presence of God, and one another, Covenant and Combine ourselves together into a Civil Body Politick, for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof do enact, constitute, and frame such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony; unto which we promise all due submission and obedience. . . ." This is the same pledge of comradeship, of responsible cooperation in a joint undertaking, which was given in the concluding words of the Declaration of Independence already quoted—"We mutually pledge to each other our Lives, our Fortunes, and our sacred Honor." And, some years later, as the national revolution moved on from its first step to its second, from the negative task of destroying

alien government to the positive work of creating self-government, the Preamble of the Constitution announced the common purposes in the pursuit of which we had become united. "We, the People of the United States," it says, "in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America."

In those words it is agreed, and with every passing moment it is reagreed, that the people of the United States shall be self-governed. To that fundamental enactment all other provisions of the Constitution, all statutes, all administrative decrees, are subsidiary and dependent. All other purposes, whether individual or social, can find their legitimate scope and meaning only as they conform to the one basic purpose that the citizens of this nation shall make and shall obey their own laws, shall be at once their own subjects and their own masters.

Our preliminary remarks about the Constitution of the United States may, then, be briefly summarized. That Constitution is based upon a twofold political agreement. It is ordained that all authority to exercise control, to determine common action, belongs to "We, the People." We, and we alone, are the rulers. But it is ordained also that We, the People, are, all alike, subject to control. Every one of us may be told what he is allowed to do, what he is not allowed to do, what he is required to do. But this agreed-upon requirement of

obedience does not transform a ruler into a slave. Citizens do not become puppets of the state when, having created it by common consent, they pledge allegiance to it and keep their pledge. Control by a self-governing nation is utterly different in kind from control by an irresponsible despotism. And to confuse these two is to lose all understanding of what political freedom is. Under actual conditions, there is no freedom for men except by the authority of government. Free men are not non-governed. They are governed—by themselves.

And now, after this long introduction, we are, I hope, ready for the task of interpreting the First Amendment to the Constitution, of trying to clear away the confusions by which its meaning has been obscured and even lost.

4

"Congress shall make no law . . . abridging the freedom of speech . . ." says the First Amendment to the Constitution. As we turn now to the interpreting of those words, three preliminary remarks should be made.

First, let it be noted that, by those words, Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bring-

ing them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.

And second, no one who reads with care the text of the First Amendment can fail to be startled by its absoluteness. The phrase, "Congress shall make no law . . . abridging the freedom of speech," is unqualified. It admits of no exceptions. To say that no laws of a given type shall be made means that no laws of that type shall, under any circumstances, be made. That prohibition holds good in war as in peace, in danger as in security. The men who adopted the Bill of Rights were not ignorant of the necessities of war or of national danger. It would, in fact, be nearer to the truth to say that it was exactly those necessities which they had in mind as they planned to defend freedom of discussion against them. Out of their own bitter experience they knew how terror and hatred, how war and strife, can drive men into acts of unreasoning suppression. They planned, therefore, both for the peace which they desired and for the wars which they feared. And in both cases they established an absolute, unqualified prohibition of the abridgment of the freedom of speech. That same requirement, for the same reasons, under the same Constitution, holds good today.

Against what has just been said it will be answered that twentieth-century America does not accept "absolutes" so readily as did the eighteenth century. But to this we must reply that the issue here involved cannot be dealt with by such twentieth-century a priori reasoning. It requires careful examination of the structure and functioning of our political system as a whole to see what part the principle of the freedom of speech plays, here and now, in that system. And when that examination is made, it seems to me clear that for our day and generation, the words of the First Amendment mean literally what they say. And what they say is that under no circumstances shall the freedom of speech be abridged. Whether or not that opinion can be justified is the primary issue with which this argument tries to deal.

But, third, this dictum which we rightly take to express the most vital wisdom which men have won in their striving for political freedom is yet—it must be admitted—strangely paradoxical. No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libellous assertions may be, and must be, forbidden and punished. So too must slander. Words which incite men to crime are themselves criminal and must be dealt with as such. Sedition and treason may be expressed by speech or writing. And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare. All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers

of the First Amendment. That amendment, then, we may take it for granted, *does not forbid the abridging of speech*. But, at the same time, *it does forbid the abridging of the freedom of speech*. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.

5

As we proceed now to reflect upon the relations of a thinking and speaking individual to the government which guards his freedom, we may do well to turn back for a few moments to the analysis of those relations given by Plato. The Athenian philosopher of the fourth century B.C. was himself caught in our paradox. He saw the connection between self-government and intelligence with a clarity and wisdom and wit which have never been excelled. In his two short dialogues, the *Apology* and the *Crito*, he grapples with the problem which we are facing.

In both dialogues, Plato is considering the right which a government has to demand obedience from its citizens. And in both dialogues, Socrates, a thinker and teacher who had aroused Plato from dogmatic slumber, is the citizen whose relations are discussed. The question is whether or not Socrates is in duty bound to obey the government. In the *Apology* the answer is "No." In the *Crito* the answer is "Yes." Plato is obviously using one of the favorite devices of the teacher. He is seeming to contradict himself. He is thereby demanding of his pupils

that they save themselves and him from contradiction by making clear a basic and elusive distinction.

In the *Apology*, Socrates is on trial for his life. The charge against him is that in his teaching he has "corrupted the youth" and has "denied the Gods." On the evidence presented by a kind of un-Athenian Subversive Activities Committee he is found guilty. His judges do not wish to put him to death, but they warn him that, unless he will agree to stop his teaching or to change its tenor, they must order his execution. And to this demand for obedience to a decree abridging his freedom of speech, Socrates replies with a flat and unequivocal declaration of disobedient independence. My teaching, he says, is not, in that sense, under the abridging control of the government. Athens is a free city. No official, no judge, he declares, may tell me what I shall, or shall not, teach or think. He recognizes that the government has the power and the legal right to put him to death. But so far as the content of his teaching is concerned, he claims unqualified independence. "Congress shall make no law abridging the freedom of speech," he seems to be saying. Present-day Americans who wish to understand the meaning, the human intention, expressed by the First Amendment, would do well to read and to ponder again Plato's *Apology*, written in Athens twenty-four centuries ago. It may well be argued that if the *Apology* had not been written—by Plato or by someone else—the First Amendment would not have been written. The relation here is one of trunk and branch.

But the argument of the *Crito* seems, at least, to con-

tradict that of the *Apology*. Here Socrates, having been condemned to death, is in prison awaiting the carrying out of the sentence. His friend Crito urges him to escape, to evade the punishment. This he refuses to do. He has no right, he says, to disobey the decision of the government that he must drink the hemlock. That government has legal authority over the life and death of its citizens. Even though it is mistaken, and, therefore, unjust, they must, in this field, conform to its decisions. For Socrates, obedience to the laws which would abridge his life is here quite as imperative as was disobedience to laws which would abridge his belief and the expression of it. In passages of amazing beauty and insight, Socrates explains that duty to Crito. He represents himself as conversing with The Laws of Athens about the compact into which they and he have entered. The Laws, he says, remind him that for seventy years, he has "consented" to them, has accepted from them all the rights and privileges of an Athenian citizen. Will he now, they ask, because his own life is threatened, withdraw his consent, annul the compact? To do that would be a shameful thing, unworthy of a citizen of Athens.

Plato is too great a teacher to formulate for us, or for his more immediate pupils, the distinction which he is here drawing. He demands of us that we make it for ourselves. But that there is a distinction and that the understanding of it is essential for the practice of freedom, he asserts passionately and without equivocation. If the government attempts to limit the freedom of a man's opinions, he tells us, that man and his fellows with

him, has both the right and the duty of disobedience. But if, on the other hand, by regular legal procedure, his life or his property are required of him, he must submit; he must let them go willingly. In one phase of a man's activities, the government may exercise control over him. In another phase, it may not. What then, are those two phases? Only as we see clearly the distinction between them, Plato is saying, do we know what government by consent of the governed means.

6

The difficulties of the paradox of freedom as applied to speech may perhaps be lessened if we now examine the procedure of the traditional American town meeting. That institution is commonly, and rightly, regarded as a model by which free political procedures may be measured. It is self-government in its simplest, most obvious form.

In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication

that restrictions upon speech have been set up. The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed. Except as he is overruled by the meeting as a whole, he will enforce those rules. His business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." If one man "has the floor," no one else may interrupt him except as provided by the rules. The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as the doing of the business under actual conditions may require. If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged. It is not a Hyde Park. It is a parliament or congress. It is a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all. It is self-government.

These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution

does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses. They do not declare that any man may talk as he pleases, when he pleases, about what he pleases, about whom he pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right. No one, for example, may, without consent of nurse or doctor, rise up in a sickroom to argue for his principles or his candidate. In the sickroom, that question is not "before the house." The discussion is, therefore, "out of order." To you who now listen to my words, it is allowable to differ with me, but it is not allowable for you to state that difference in words until I have finished my reading. Anyone who would thus irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, a classroom, a football field, or a home, does not thereby exhibit his freedom. Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.

What, then, does the First Amendment forbid? Here again the town meeting suggests an answer. That meeting is called to discuss and, on the basis of such discussion, to decide matters of public policy. For example, shall there be a school? Where shall it be located? Who shall teach? What shall be taught? The community has agreed that such questions as these shall be freely discussed and that, when the discussion is ended, decision upon them will be made by vote of the citizens. Now,

in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.

The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. If, for example, at a town meeting, twenty like-minded citizens have become a "party," and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion. What is essential is not that everyone shall speak, but that everything worth saying shall be said. To this

end, for example, it may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available. But however it be arranged, the vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared "out of order" because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason

in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

If, then, on any occasion in the United States it is allowable to say that the Constitution is a good document it is equally allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may likewise be publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or Germany, it may, with equal freedom, be said that those of England or Russia or Germany are superior to ours. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. When a question of policy is "before the house," free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged.

CHAPTER II

Clear and Present Danger

IN OUR FIRST lecture we found the political program of self-government to be bewildering and paradoxical. The principles of our Constitution are not, I think, contradictory of each other. And yet they are certainly beset, if not by contradiction, at least by the appearance of it. What do we Americans mean when we say that one hundred and forty million people, acting together as a body politic, are pledged to take legislative, executive, and judicial control over those same one hundred and forty million people, acting separately as individuals and as groups? And, especially, what do we mean when we say that men who thus become self-governed are thereby made politically free? As we try to understand this program of ours, the strain upon our thinking apparatus seems almost unbearable. It is little wonder that we have difficulty in explaining our institutions to other peoples, and even more difficulty when, after conquering another nation in war and taking domination over it, we proceed to impose upon it our own plan of free self-government. The plain truth is

that, if the Constitution be taken as the test of Americanism, our current methods of political thinking are curiously un-American. Our minds, as at present educated, are not equipped for the work they have to do. It is in the midst of that confusion, that mental unpreparedness, that we must attempt to fight our way toward an understanding of the meaning of the First Amendment of our Constitution.

Now the primary purpose of this lecture is to challenge the interpretation of the freedom-of-speech principle which, since 1919, has been adopted by the Supreme Court of the United States. In that year, and in the years which have ensued, the court, following the lead of Justice Oliver Wendell Holmes, has persistently ruled that the freedom of speech of the American community may constitutionally be abridged by legislative action. That ruling annuls the most significant purpose of the First Amendment. It destroys the intellectual basis of our plan of self-government. The court has interpreted the dictum that Congress shall not abridge the freedom of speech by defining the conditions under which such abridging is allowable. Congress, we are now told, is forbidden to destroy our freedom except when it finds it advisable to do so.

The 1919 decision of which I am speaking arose from a review by the Supreme Court of the conviction, during World War I, of a group of persons who were accused of obstructing the drafting of men into the army. In the course of the trial in the lower court it had been shown that the defendants had mailed circulars to men

who had been passed by the exemption boards. These circulars contained violent denunciations of the Conscription Act under which the draft was being administered. They impressed upon their readers "the right to assert your opposition to the draft," and urged the draftees to exercise that right. The Supreme Court unanimously sustained the conviction and Mr. Holmes wrote the opinion. In doing so, he formulated a new test of the freedom of speech guarantee. During the twenty-eight years which have passed since that decision was handed down, that test in varying forms has been accepted as expressing the law of the land. It is known as the principle of "clear and present danger."

The words in which Mr. Holmes explained and justified his decision have often been quoted. "We admit," he said, "that in many places and in ordinary times, the defendants in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words which may have all the effect of force. . . . 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. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort

that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that, if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced."[2]

The epoch-making importance of that argument is beyond question. Professor Zechariah Chafee, Jr., one of our most thoughtful and persistent students of free speech, says of it, "The concept of freedom received for the first time an authoritative judicial interpretation in accordance with the purposes of the framers of the Constitution."[3] As the sequel will show, we may, perhaps, differ from Mr. Chafee as to the success of Mr. Holmes in interpreting the purposes of the makers of the First Amendment. The formula offers an exception to the principle rather than an interpretation of it. But no one can doubt his judgment of the significance and the novelty of the argument which Mr. Holmes devised. That argument may or may not be valid. But, valid or not, it has striking originality and it has been widely and deeply influential.

As we proceed, in the remaining lectures of this series, to examine and perhaps to reject the attitude toward the freedom of speech which Mr. Holmes has defined, two explanatory remarks seem necessary.

First, as already noted, we shall criticize the decision

[2] Myer Cohen, *Selected Supreme Court Decisions* (New York, Harper & Brothers, 1937), p. 4. Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, Mass., Harvard University Press, 1942), p. 81.

[3] Chafee, *op. cit.*, p. 82.

of the Supreme Court, not after the manner of lawyers, but from the point of view of a teacher. In the American schools and colleges, thousands of men and women are devoting their lives to the attempt to lead their pupils into active and intelligent sharing in the activities of self-government. And to us who labor at that task of educating Americans it becomes, year by year, more evident that the Supreme Court has a large part to play in our national teaching. That court is commissioned to interpret to us our own purposes, our own meanings. To a self-governing community it must make clear what, in actual practice, self-governing is. And its teaching has peculiar importance because it interprets principles of fact and of value, not merely in the abstract, but also in their bearing upon the concrete, immediate problems which are, at any given moment, puzzling and dividing us. But it is just those problems with which any vital system of education is concerned. And for this reason, the court holds a unique place in the cultivating of our national intelligence. Other institutions may be more direct in their teaching influence. But no other institution is more deeply decisive in its effect upon our understanding of ourselves and our government.

But, second, the Supreme Court, like any other teacher, may be wrong as well as right, may do harm as well as good. There is, it is true, a sense in which the court is always right. As Chief Justice Hughes is said to have remarked in the days when he was Governor of the State of New York: "We are under a Constitution; but the Constitution is what the courts say it is."

Now, for the purposes of action at a given time, that dictum is clearly true. When opinions differ as to what the Constitution or the statutes mean, some court must decide among them, and, in one sense, we must accept its judgment. But it is equally true, and perhaps more important, to say that the law is what the Supreme Court, more or less successfully, is trying to say. Or, even better, the law is what that court ought to say. As they study their cases, the members of the Supreme Court are not merely trying to discover what they are going to say. They are trying to decide what, in that situation, it is right to say in fact and principle. And as they grapple with that problem, they are keenly aware of their difficulties, of their lack of success. The individual members recognize frankly their own fallibilities, as well as those of their brethren. They are often puzzled and uncertain. They hand down opposing opinions. From time to time, their judgments are reconsidered and changed. Granted, then, that on any specific occasion we must, as Mr. Hughes suggests, "abide by" the rulings of the court; it does not follow that we must "agree with" them. Our duty, as free men, to reflect upon judicial pronouncements is quite as imperative as our duty to submit to their temporary legal authority. Not even our wisest interpreters, those whom we trust most, can give us final dogmas about self-government. They and we together must still be thinking about what freedom is and how it works.

And, in the problem before us—that of the First Amendment—as we gather up the import of a series of

opinions and decisions in which, since 1919, the phrase, "clear and present danger," has held a dominating influence, I wish to argue that their effect upon our understanding of self-government has been one of disaster. The philosophizing of Mr. Holmes has, I think, led us astray. As already remarked, it has, in effect, led to the annulment of the First Amendment rather than to its interpretation. And since, among all the provisions of the Constitution, those which protect intellectual freedom come nearest to the work of the teacher, it is in the field of education that such an error may be most clearly seen, its consequences most keenly felt. In the interest of American education, therefore, I ask you to plunge with me into a criticism of that interpretation of the freedom of speech which, since 1919, the Supreme Court has presented to the people of our country, to whom, as an interpreter, it is responsible.

I

In the opinion from which we have quoted, Mr. Holmes formulates and answers, in part at least, the question with which any interpretation of the freedom of speech must try to deal. And, as he does so, his words have the disturbing and provocative quality of first-rate dialectical teaching. He had a talent for challenging the slothfulness, the contentment, of the inactive mind. Speaking to us as the interpreter of our own intentions, he tells us that certain forms of utterance "will not be endured" by us. But how do those forms of speech differ from those others which will be endured, which we

welcome and approve as playing a proper and necessary part in the life of the community? What is the line, the principle, which marks off those speech activities which are liable to legislative abridgment from those which, under the Constitution, the legislature is forbidden to regulate or to suppress? Here is the critical question which must be studied, not only by the Supreme Court, but by every American who wishes to meet the intellectual responsibilities of his citizenship.

As we proceed now to grapple with this basic problem, it is at once evident that we cannot understand either the First Amendment or the "clear and present danger" interpretation of it unless we take into consideration certain other provisions of the Constitution which, more or less directly, are concerned with the freedom of speech. Three of these seem especially important.

First, we must remember that, in the Constitution as it stood before it was amended by the Bill of Rights, the principle of the freedom of public discussion had been already clearly recognized and adopted. Article I, section 6, of the Constitution, as it defines the duties and privileges of the members of Congress, says, ". . . and for any speech or debate in either House, they shall not be questioned in any other place." Here is a prohibition against abridgment of the freedom of speech which is equally uncompromising, equally absolute, with that of the First Amendment. Unqualifiedly, the freedom of debate of our representatives upon the floor of either house is protected from abridging interference. May that protection, under the Constitution, be limited or

withdrawn in time of clear and present danger? And if not, why not?

No one can possibly doubt or deny that congressional debate, on occasion, brings serious and immediate threat to the general welfare. For example, military conscription, both in principle and in procedure, has been bitterly attacked by our federal representatives. On the floors of both houses, in time of peace as well as in war, national policies have been criticized with an effectiveness which the words of private citizens could never achieve. Shall we, then, as we guard against "substantive evils that we have a right to prevent," call our representatives to account in some other place? It is commonly believed, for example, that at the very time when Mr. Holmes was writing his opinion, certain "wilful men" in Congress were blocking President Wilson's plans for peace and were thereby doing enormous damage both to the nation and to the world. It is possible that, in large measure, they made World War II inevitable. But they were never brought to trial for that dreadful offense. Their liability for words that obstructed the organization of the world for peace was never enforced by legal action. And the reason is clear. If congressional immunity were not absolute and unconditional, the whole program of representative self-government would be broken down. And likewise, by common consent, the same kind of immunity is guaranteed to the judges in our courts. Everyone knows that the dissenting opinions of members of the Supreme Court are a clear and present threat to the effectiveness of majority decisions. And yet the free-

dom of the minorities on the bench to challenge and to dissent has not been legally abridged. Nor will it be.

And that fact throws strong and direct light upon the provision of the First Amendment that the public discussions of "citizens" shall have the same immunity. In the last resort, it is not our representatives who govern us. We govern ourselves, using them. And we do so in such ways as our own free judgment may decide. And, that being true, it is essential that when we speak in the open forum, we "shall not be questioned in any other place." It is not enough for us, as self-governing men, that we be governed wisely and justly, by someone else. We insist on doing our own governing. The freedom which we grant to our representatives is merely a derivative of the prior freedom which belongs to us as voters. In spite of all the dangers which it involves, Article I, section 6, suggests that the First Amendment means what it says: In the field of common action, of public discussion, the freedom of speech shall not be abridged.

And, second, the Fifth Amendment—by contrast of meaning, rather than by similarity—throws light upon the First. By the relevant clause of the Fifth Amendment we are told that no person within the jurisdiction of the laws of the United States may be "deprived of life, liberty, or property, without due process of law." And, whatever may have been the original reference of the term "liberty," as used in that sentence when it was written, it has been, in recent times, construed by the Supreme Court to include "the liberty of speech." The Fifth Amendment is, then, saying that the people of the

United States have a civil liberty of speech which, by due legal process, the government may limit or suppress. But this means that, under the Bill of Rights, there are two freedoms, or liberties, of speech, rather than only one. There is a "freedom of speech" which the First Amendment declares to be non-abridgable. But there is also a "liberty of speech" which the Fifth Amendment declares to be abridgable. And for the inquiry in which we are engaged, the distinction between these two, the fact that there are two, is of fundamental importance. The Fifth Amendment, it appears, has to do with a class of utterances concerning which the legislature may, legitimately, raise the question, "Shall they be endured?" The First Amendment, on the other hand, has to do with a class of utterances concerning which that question may never legitimately be raised. And if that be true, then the problem which Mr. Holmes has suggested—that of separating two classes of utterances—becomes the problem of defining the difference between, and the relation between, the First and Fifth amendments, so far as they deal with matters of speech.

The nature of this difference comes to light if we note that the "liberty" of speech which is subject to abridgment is correlated, in the Fifth Amendment, with our rights to "life" and "property." These are private rights. They are individual possessions. And there can be no doubt that among the many forms of individual action and possession which are protected by the Constitution —not from regulation, but from undue regulation—the right to speak one's mind as one chooses is esteemed by

us as one of our most highly cherished private possessions. Individuals have, then, a private right of speech which may on occasion be denied or limited, though such limitations may not be imposed unnecessarily or unequally. So says the Fifth Amendment. But this limited guarantee of the freedom of a man's wish to speak is radically different in intent from the unlimited guarantee of the freedom of public discussion, which is given by the First Amendment. The latter, correlating the freedom of speech in which it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation, beyond even the due process of law. With regard to them, Congress has no negative powers whatever. There are, then, in the theory of the Constitution, two radically different kinds of utterances. The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare. And from this it follows that the Constitution provides differently for two different kinds of "freedom of speech."

Now, the basic error which we shall find in the "clear and present danger" principle, as it seeks to separate speech which will be endured from speech which will not be endured, is that it ignores or denies this difference of reference between the First and Fifth amendments. Mr. Holmes and the Supreme Court have ventured to annul the First Amendment because they have believed that the due process clause of the Fifth Amendment

could take its place. But if that substitution can be shown to be invalid; if, under the Constitution, we have two essentially different freedoms of speech rather than only one, the position taken by the court becomes untenable. Here, then, is the crucial issue of our argument. Does the Bill of Rights protect two different freedoms of speech, or only one? To that issue we must return when the argument of Mr. Holmes has been more adequately stated.

A third provision of the Constitution which we must consider is found in the final words of the First Amendment itself. It is significant as showing how curiously intermingled are public and private interests, as the government is called upon to deal with them. The words in question give to petitions for redress of grievances the same absolute guarantee of freedom which is granted to religion, speech, press, and assembly. With none of these may Congress interfere. But a petition for redress of grievance seems, on the face of it, to express private interest. Why, then, is it given the unlimited freedom of the First Amendment? The answer is, I think, that such a petition, whatever its motivation, raises definitely a question of public policy. It asserts an error in public decision. The petitioners have found, or think they have found, that in the adoption of a government policy, some private interest has been misjudged or overlooked. They ask, therefore, for reconsideration. And in doing so, they are clearly within the field of the public interest. They are not saying, "We want this; please give it to us." They are saying to officials who are their agents,

"You have made a mistake; kindly correct it." And such a responsible statement that some interest has not been properly judged gives valid ground for a public demand for reconsideration. Because the freedom of that demand may not be abridged, it is guarded by the First Amendment.

2

Now, with these materials from the Constitution before us, we must return to Mr. Holmes and to the problem of separating by definition the abridgable and non-abridgable freedoms of speech. In the opinion from which we have quoted, Mr. Holmes brilliantly suggests one of the most popular answers to our problem. Speech, he tells us, is sometimes more than an expression of thought. It may be a form of action. The words in which Mr. Holmes makes this point are, perhaps, his best-known utterance.

"The most stringent protection of free speech," he says, "would not protect a man in *falsely*[4] shouting fire in a theatre, and causing a panic."[5] Such a lie in such a situation is, in fact, a way of attempting murder. It attacks the lives of the persons in the theater as directly and effectively as would the use of bludgeons or pistols or poison gas. It produces—to borrow another phrase from the same opinion, "substantive evils that Congress [or some other legal body] has a right to prevent." Such an utterance may, therefore, as a murderous act,

[4] Italics mine. This word is too often ignored in the reading of the opinion.

[5] Cohen, *op. cit.*, p. 4. Chafee, *op. cit.*, p. 15.

be forbidden by statute. If any man is accused of disobeying that statute, justice requires that he be given a fair trial. But he is liable to trial. And if he is found guilty, he may be deprived of life, liberty, or property, by way of punishment. And as that legal procedure moves on, the First Amendment has nothing to say about it. The man who falsely shouted "fire" was not discussing the public interest, though the success of his maneuver depended on his pretending to do so. He was deliberately and falsely starting a dangerous panic. Speech-actions such as that are clearly within the field of private interest and, hence, of legislative abridgment.

Speech, then, may be action, Mr. Holmes tells us. And action which is criminal may be forbidden and punished. But what is the relevance of those facts for our problem of separating, in principle, speech which may be abridged from speech which may not be abridged? Does it mean that whenever speech is an act, it has, therefore, no claim to the freedom guaranteed by the First Amendment? That suggestion is clearly absurd. The citizen who votes "Aye" or "No" on an issue of public policy has acted. The judge who condemns a man to fine or imprisonment or death, the Congress which declares war or the ending of war, the president who vetoes an act of Congress—all these are acting, in the same sense as did the man who shouted "fire." But the primary purpose of the First Amendment is the guaranteeing of freedom to just such speech-actions as these. Voters must vote freely. Judges must judge freely. Congress must enact freely. The president

must "preside" freely. And in none of these cases may the freedom of the speech-act be abridged. The distinction between speech-actions and speech-thoughts is not, then, the distinction which we need for the proper interpretation of the First Amendment. The fire-shouting illustration given by Mr. Holmes tells us of one type of action, viz., criminal action, which is not protected by the principle of the freedom of speech. It does not follow, however, that all speech-acts are to be denied the freedom guaranteed by that principle.

Another popular solution of our problem, closely related to the first, is indicated by Mr. Holmes and is rightly rejected by him. It is the suggestion that speech which incites men to action is, as such, debarred from the protection of the First Amendment. It must, of course, be recognized that a person who successfully incites another to act must share in the legal responsibility for the consequences of the act. The man who effectively urges another to arson or theft may properly be dealt with as an arsonist or a thief. Shall we then say that no incitement to action—as contrasted with an expression of opinion—is entitled to the freedom of speech which the Constitution guarantees?

The responsibility for accepting or rejecting that theory was presented to Mr. Holmes when he dissented from a decision, written by Mr. Sanford, confirming the conviction of a Communist who had shared in the publication and distribution of a passionate left-wing manifesto. The manifesto in the case was a Communist call to battle. It declared, "The proletarian revolution and

the Communist reconstruction of society—the struggle for these—is now indispensable . . . The Communist International calls the proletariat of the world to the final struggle."[6] Speaking for the court, Mr. Sanford had found that these words have no claim to "liberty of expression." "This is not," he said, "the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement." And to this he adds, "The jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism."[7]

Freedom to engage in "mere academic and harmless discussion"! Is that the freedom which is guarded by the First Amendment? Is that the cause for which the followers of Socrates have fought and died through the ages? As against that intolerable belittling of the practical value of human freedom of mind, Mr. Holmes, in his dissent, entered spirited, if not very coherent, words of protest. "It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant

[6] Cohen, *op. cit.*, p. 14.
[7] *Ibid.*, pp. 13, 14.

discourse before us, it had no chance of starting a present conflagration. 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 way."[8]

What Mr. Holmes here says about opinions and incitements and their relations to one another may be challenged in many ways. Surely, opinions are often very enthusiastic. And, further, incitements may be tentative and tepid and lacking in eloquence. Nor, if words are used in the senses relevant to our inquiry, can it be validly said that every idea is, legally, an incitement. But, however that may be, the magnificent words of the final sentence leave no doubt that, on the essential issue, the heart of Mr. Holmes is in the right place. He demands freedom not merely for idle contemplation, but for the vigorous thinking and deciding which determine public action. Human discourse, as the First Amendment sees it, is not "a mere academic and harmless discussion." If it were, the advocates of self-government would be as little concerned about it as they would be concerned about the freedom of men playing solitaire or chess. The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement. It was written to clear

[8] *Ibid.*, pp. 15-16. Chafee, *op. cit.*, pp. 323-324.

the way for thinking which serves the general welfare. It offers defense to men who plan and advocate and incite toward corporate action for the common good. On behalf of such men it tells us that every plan of action must have a hearing, every relevant idea of fact or value must have full consideration, whatever may be the dangers which that activity involves. It makes no difference whether a man is advocating conscription or opposing it, speaking in favor of a war or against it, defending democracy or attacking it, planning a communist reconstruction of our economy or criticising it. So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged. That freedom is the basic postulate of a society which is governed by the votes of its citizens.

"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 way." That is Americanism. In these wretched days of postwar and, it may be, of prewar, hysterical brutality, when we Americans, from the president down, are seeking to thrust back Communist belief by jailing its advocates, by debarring them from office, by expelling them from the country, by hating them, the gallant, uncompromising words of Mr. Holmes, if we would listen to them, might help to restore our sanity, our understanding of the principles of the Constitution.

They might arouse in us something of the sense of shame which the nation so sorely needs.

3

Mr. Holmes, then, rejects Mr. Sanford's doctrine that all incitements to action are properly barred from the protection of the First Amendment. But what principle of differentiation, as among incitements, does he put in its place? A partial answer to that question is given by the test of "clear and present danger." That test, as already noted, does not tell us in positive terms what forms of speech can rightly claim freedom, and on what ground they can claim it. But it does declare, on the negative side, that certain forms of speech, under the Constitution, are not entitled to freedom. For the elucidation of that statement we must turn back to the opinion in which the new test was first formulated.

In the course of his argument Mr. Holmes says, "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." And to this he adds, a few sentences later, "It seems to be admitted that, if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced."

As one reads these words of Mr. Holmes, one is uneasily aware of the dangers of his rhetorical skill. At two points the argument seems at first much more convincing than it turns out to be. First, the phrase, "sub-

stantive evils that Congress has a right to prevent," seems to settle the issue by presumption, seems to establish the right of legislative control. If the legislature has both the right and the duty to prevent certain evils, then apparently it follows that the legislature must be authorized to take whatever action is needed for the preventing of those evils. But our plan of government by limited powers forbids that that inference be drawn. The Bill of Rights, for example, is a series of denials that the inference is valid. It lists, one after the other, forms of action which, however useful they might be in the service of the general welfare, the legislature is forbidden to take. And, that being true, the "right to prevent evils" does not give unqualifiedly the right to prevent evils. In the judgment of the Constitution, some preventions are more evil than are the evils from which they would save us. And the First Amendment is a case in point. If that amendment means anything, it means that certain substantive evils which, in principle, Congress has a right to prevent, must be endured if the only way of avoiding them is by the abridging of that freedom of speech upon which the entire structure of our free institutions rests.

And, again, in another way, the argument of Mr. Holmes tempts us into the accepting of a conclusion which is not justified by the evidence which is presented. In the case before the court, the defendants had been, in the opinion of Mr. Holmes, rightly convicted of criminal action, in the form of a deliberate obstruction of the draft in time of war. But the principle which Mr.

Holmes formulates to justify that conviction is so broad that, under it, any utterance which threatens clear and present danger to the public safety, whether intended to impede the action of the government or not, may be suppressed and punished. No form of argument could have been more unfortunate than this. Taken literally, it means that in all "dangerous" situations, minorities, however law-abiding and loyal, must be silent. It puts upon them all alike, if they speak honestly, the stigma of criminal disloyalty.

The argument which accomplishes this transition needs careful watching. It moves in two steps. First, Mr. Holmes tells us, the defendants were accused of a criminal attack upon the safety of the country. And the evidence in support of that charge he finds to be adequate. "Of course," he says, "the document would not have been sent unless it had been intended to have some effect and we do not see what effect it could be expected to have upon persons subject to the draft except to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point."[9]

But, second, the "clear and present danger" argument which Mr. Holmes here offers, moves quickly from deliberate obstruction of a law to reasonable protest against it. Taken as it stands, his formula tells us that whenever the expression of a minority opinion involves clear and present danger to the public safety it may be denied the protection of the First Amendment. And that

[9] *Ibid.*, p. 4.

means that whenever crucial and dangerous issues have come upon the nation, free and unhindered discussion of them must stop. If, for example, a majority in Congress is taking action against "substantive evils which Congress has a right to prevent," a minority which opposes such action is not entitled to the freedom of speech of Article I, section 6. Under that ruling, dissenting judges might, in "dangerous" situations, be forbidden to record their dissents. Minority citizens might, in like situations, be required to hold their peace. No one, of course, believes that this is what Mr. Holmes or the court intended to say. But it is what, in plain words, they did say. The "clear and present danger" opinion stands on the record of the court as a peculiarly inept and unsuccessful attempt to formulate an exception to the principle of the freedom of speech.

4

In support of this criticism it is worthy of note that, both by Mr. Holmes and by Mr. Brandeis who, in general, concurred with him, the "clear and present danger" formula was very quickly found to be unsatisfactory. Within the same year, 1919, in which the principle had found its first expression, these two gallant defenders of freedom were confronted by the fact that the great majority of their colleagues were taking very seriously the assertion of Mr. Holmes that whenever any utterance creates clear and present danger to the public safety, that utterance may be forbidden and punished. Against that doctrine, the two dissenters spoke out with

insistent passion. It is not enough, they said, that a danger created by speech be clear and present. It must also be very serious. In this vein, Mr. Holmes, with the approval of Mr. Brandeis, wrote, "I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and think to be fraught with death, unless they so imminently threaten interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[10] If the modification here suggested had been made when the principle was first devised it could not possibly have been applied to the case then before the court. But in the ten years which followed, this additional test of the extreme gravity of the danger involved is so strongly urged by both justices that the basic meaning of the test is, for them, radically altered. By implication, at least, it becomes no longer recognizable as the principle of "clear and present danger." The danger must be clear and present, but, also, terrific.

The character of this change begins to appear when Mr. Brandeis, with Mr. Holmes agreeing, says, "The fact that speech is likely to result in some violence or destruction of property is not enough to justify its suppression. There must be probability of serious injury to the State."[11] And again, we read from the same source, "Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively

[10] *Ibid.*, p. 9. Chafee, *op. cit.*, p. 137.

[11] Cohen, *op. cit.*, p. 20.

serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."[12]

But the transformation of the principle does not stop with the addition of seriousness to clarity and immediacy. The more one reads the opinions of Mr. Holmes and Mr. Brandeis on questions of free speech in times of emergency, the more one becomes convinced that they are engaged in an attempt which James Stephens describes himself as making when he says:

> I would think until I found
> Something I can never find;
> Something lying on the ground,
> In the bottom of my mind.

In support of this suggestion may I note the fact that in the expositions of the formula of "clear and present danger," the most difficult and tantalizing factor for a reader has always been the insistence that a danger must be imminent, rather than remote, if it is to justify suppression. What is the basis for that insistence? It is relatively easy to understand why such a danger must be "clear." But why is it necessary that it be "present"? If the justification of suppression is, as Mr. Holmes says, that Congress is required and empowered to guard against dangers to the public safety, why should not that justification apply to clear and remote evils as well as to those which are clear and present? Surely we are

[12] *Ibid.*, p. 19. Chafee, *op. cit.*, p. 349.

not being told that, as Congress guards the common welfare, shortsightedness on its part is a virtue. Why, then, may it not take the same action in providing against the dangers of the future? As one reads the words of the advocates of the doctrine one feels certain that there is a valid reason for this differentiation which they are making. But in the early opinions, at least, that reason is never brought to light. The test remains, as Chief Justice Stone once described it, a "working device," rather than a reasoned principle. It means something, but it does not succeed in saying what that meaning is.

Eight years after the first formulation of the doctrine, however, Mr. Brandeis, writing with the approval of Mr. Holmes, moved forward toward an explanation of this immediacy. But the logical effect of this change was to lead the way toward the substitution of a valid principle of freedom for that given in the "clear and present danger" test. "Those who won our independence by revolution," he says, "were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. 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 free discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy

to be applied is more speech, not enforced silence. Only an emergency can justify suppression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."[13]

In making that statement, Mr. Brandeis, though he keeps the traditional legal words, has abandoned the idea of "clear and present danger." He has brought us far along the road toward that very different principle of the absolute freedom of public discussion which was advocated in the first lecture of this series. Dangers, he now says, do not, as such, justify suppression. We Americans are not afraid of ideas, of any idea, if only we can have a fair chance to think about it. Under our plan of government, only an "emergency" can justify suppression.

And if we wish to see how far Mr. Brandeis has departed, or is departing, from the position originally taken by Mr. Holmes, we need only examine what are for him the defining characteristics of an "emergency." It is a situation in which there is "no opportunity for full discussion," in which there is no "time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education." Never when the ordinary civil processes of discussion and education are available, says Mr. Brandeis, will the Constitution tolerate the resort to suppression. The only allowable justifica-

[13] Cohen, *op. cit.*, p. 19. Chafee, *op. cit.*, p. 349.

tion of it is to be found, not in the dangerous character of a specific set of ideas, but in the social situation which, for the time, renders the community incapable of the reasonable consideration of the issues of policy which confront it. In an emergency, as so defined, there can be no assurance that partisan ideas will be given by the citizens a fair and intelligent hearing. There can be no assurance that all ideas will be fairly and adequately presented. In a word, when such a civil or military emergency comes upon us, the processes of public discussion have broken down. In that situation as so defined, no advocate of the freedom of speech, however ardent, could deny the right and the duty of the government to declare that public discussion must be, not by one party alone, but by all parties alike, stopped until the order necessary for fruitful discussion has been restored. When the roof falls in, a moderator may, without violating the First Amendment, declare the meeting adjourned.

But to say these things is to deny at its very roots the principle which had been formulated by Mr. Holmes. That principle was directed toward the suppression of some one partisan set of ideas. And it did so at the same time and under the same conditions in which opposed and competing partisan ideas were allowed free expression. "Dangerous" ideas were suppressed while "safe" ideas were encouraged. The doctrine, as stated, assumed that the normal processes of free public discussion were going on. But in the very midst of those processes it attacked and punished the advocates of some one point

of view on the ground that their beliefs seemed to those in authority dangerous. That procedure Mr. Brandeis, if I understand him, now flatly repudiates. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." The logical integrity, the social passion of Mr. Brandeis, could not tolerate the essential incoherence, the rabid intolerance, of the "clear and present danger" principle, which would give a hearing to one side while denying it to the other. His lucid and painstaking mind fought its way through the self-contradictions of that doctrine as a theory of self-government. And as he did so, he brought nearer the day when we Americans can again hold up our heads and reaffirm our loyalty to the fundamental principles of the Constitution, can say without equivocation, with confidence that the words mean what they say, "Congress shall make no law abridging the freedom of speech."

CHAPTER III

American Individualism and the Constitution

IN THE FIRST and second lectures of this series we have argued that the effect of the "clear and present danger" theory of the freedom of speech, of late adopted by the Supreme Court, has been to merge the First Amendment into the Fifth. Under that interpretation, the freedom in question has become alienable rather than unalienable, subject to restriction rather than safe from restriction, a matter of circumstances rather than a matter of principle, relative rather than absolute. Public discussion has thus been reduced to the same legal status as private discussion. Individual self-seeking has been given the same constitutional rating as national provision for the general welfare. The rights of men as makers of laws are now indistinguishable from their rights as subjects of law. What men possess has the same guarantee of freedom as what they think.

Now, as already stated, the primary interest of these lectures is not in the legal problems of freedom but in

the significance of those problems and their solutions for the education of American citizens in the understanding of their own political institutions. The Supreme Court, we have said, is and must be one of our most effective teachers. It is, in the last resort, an accredited interpreter to us of our own intentions. If, then, as Plato has told us, the best wisdom of men can be summed up in the phrase, "Know thyself," it is to our highest court that we must turn when we seek for wisdom concerning our relations to one another and to the government which, under the Constitution, we have established and now maintain. In this last lecture, then, we shall be trying to discover the philosophy, the view of human institutions, the theory of human destiny, out of which the "clear and present danger" principle springs. We shall be asking, also, whether or not that philosophy is valid. Does it, as I believe, cut away rather than sustain the fundamental roots of our constitutional procedure? That philosophy is, today, largely dominant over our popular thinking. It is possible, therefore, that the Supreme Court, in its recent dealings with freedom of speech, has been confirming us in our errors rather than leading us out of them. We must now try to see whether or not that suggestion is justified.

As we thus proceed with our study of the First and Fifth amendments, we must stop for a moment to take note of the interpretation which the Supreme Court has given to the Fourteenth Amendment. That interpretation throws much light upon our assertion that

the two earlier provisions for the freedom of speech have now been made one.

As everyone knows, the First and Fifth amendments deal only with legislation by the federal Congress. After the Civil War, however, it was decided to lay down similar restrictions upon legislation by the several states. To this end, the Fourteenth Amendment was adopted. That amendment, therefore, in defined ways, guards the freedom of speech from "state" interference. Now, in that situation, the Supreme Court has rightly assumed that within the text of the Fourteenth Amendment, words will be found which will do in the state field what the First and Fifth together are doing in the federal field. What, then, are those words?

The clause which seems intended to carry the double burden reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is not hard, in that statement, to single out the clause which is the proper mate of the Fifth Amendment. As a matter of fact, the relevant words are directly copied from the one to the other. The statement, "nor shall any State deprive any person of life, liberty, or property without due process of law," is obviously intended to put upon state action the same restriction which the same words of the Fifth Amendment put upon federal action. In both cases, speech as a private possession, cor-

relative with life and property, is protected from improper restrictions.

But which words of the Fourteenth Amendment reproduce, in their own field, the intention of the First Amendment? What statement corresponds to the dictum, "Congress shall make no law . . . abridging the freedom of speech"? To the nonlegal mind it would seem clear, as Mr. Brandeis once suggested, that the clause, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," was intended to do that work. The use of the term "abridge" rather than "deprive" suggests the connection. Then, too, the freedom of speech has traditionally been regarded by us as one of our "privileges or immunities." And still again, the clause in question seems suited to match the First Amendment because it speaks, rightly or wrongly, with the same absoluteness. Its temper is not the relative mood of due process but the unqualified mood of absolute prohibition. Unfortunately, the clause in question protects "citizens" rather than "persons," and, hence, resident aliens are not provided for. And yet that difficulty is more apparent than real. The essential point is not that the alien has a right to speak but that we citizens have a right to hear him. The freedom in question is ours.

But, strange as it may seem, the Supreme Court has decided otherwise. With some hesitation and uncertainty, it has thrust aside the "privileges and immunities" clause of the Fourteenth Amendment and has chosen, in the state field, to protect both the freedom of speech

of the First Amendment and that of the Fifth, under the due process clause which is taken directly from the latter. That decision clearly reveals the point of view which the court had already adopted in dealing with federal legislation. The First Amendment had been swallowed up by the Fifth. The freedom of public discussion is, therefore, no longer safe from abridgment. It is safe only from *undue* abridgment. By judicial fiat, the Constitution of the United States has been radically amended.

I

As we now seek to discover and criticize the ideas, the philosophy, which underlie the adoption of the "clear and present danger" principle, we must, of course, deal primarily with the opinions and other writings of Mr. Holmes himself. His position has, however, been given by Professor Zechariah Chafee, Jr., an explanation and elucidation which are exceedingly useful for our purpose. Mr. Chafee does not always agree with the reasonings or the conclusions of Mr. Holmes. If he follows, he does so independently. But he is, on the whole, a sympathetic interpreter. In his *Free Speech in the United States*, he develops a sustained and beautifully organized argument. And his rendering of the "clear and present danger" principle is much more explicit and systematic than that given by the inventor of the phrase. We shall be better able to understand Mr. Holmes if we first follow Mr. Chafee's argument along the two different lines which it takes.

"The First Amendment," Mr. Chafee tells us, "pro-

tects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course but carry it out in the wisest way."[14]

These words reveal, more sharply than anything said by Mr. Holmes, the legal meaning of the "clear and present danger" thinking. Mr. Chafee separates, as we have done, the private interest in speech from the public interest in speech. But he assigns to them both the same constitutional guarantee of freedom. He places them both under the protection of the First Amendment. But the effect of that decision is identical with that which puts them both within the scope of the Fifth Amendment. There can be no doubt that a private interest in speech as such, must be under legislative control. And "the need of many men to express their opinions" is no exception to that rule. If, then, Mr. Chafee is right, a freedom of speech protected by the First Amendment may be abridged. And from this it follows that, so far as the First Amendment is concerned, the freedom of speech in the public interest may also be abridged. By its association with private speech under a common principle, public speech is reduced to the level of "proximity and degree." The camel, once admitted to the tent, knocks it down. The right of the citizens of the United States to know what they are voting about, by an unholy union with a private desire for private satisfaction,

[14] Chafee, *op. cit.*, p. 33.

is robbed of its virtue. The constitutional defences of public discussion have been broken through.

But as against this position taken by Mr. Chafee, it must be urged again that the absoluteness of the First Amendment rests upon the fact that it is not double-minded in reference. It is single-minded. It has no concern about the "needs of many men to express their opinions." It provides, not for many men, but for all men. The Fifth Amendment, by contrast, gives assurance that a private need to speak will get the impartial consideration to which it is entitled. But the First Amendment has other work to do. It is protecting the common needs of all the members of the body politic. It cares for the public need. And since that wider interest includes all the narrower ones insofar as they can be reconciled, it is prior to them all. The public discussion of it, therefore, has a constitutional status which no pursuit of an individual purpose can ever claim. It stands alone, as the cornerstone of the structure of self-government. If that uniqueness were taken away, government by consent of the governed would have perished from the earth.

But Mr. Chafee has a second line of argument by which the "clear and present danger" principle is clarified and defended. "The true boundary line of the First Amendment," he says, "can be fixed only when Congress and the Courts realize that the principle on which speech is classified as lawful and unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth.

Every reasonable attempt should be made to maintain both interests unimpaired and the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled, and not, as most men believe, when it is barely conceivable that it may be slightly affected."[15]

That statement reveals more clearly than any other I have seen the fighting issue with respect to the Holmesian interpretation of the freedom of speech. Mr. Chafee is here puzzling, as were Mr. Holmes and Mr. Brandeis, in their earlier opinions, about action appropriate to an "emergency." But he seems to me to take the wrong road. The interest in the public safety and the interest in the search for truth are, Mr. Chafee says, two distinct interests. And they may be so balanced against each other, he says, that on occasion we must choose between them. Is that the relation between public discussion and the public welfare as it is conceived by the Constitution? I do not think so. And I can find nothing in the Constitution which justifies the assertion. Where, in that document, are we told of the balancing of which Mr. Chafee speaks? In what words is it said that if the search for truth imperils the public safety, that search shall be checked, its freedom may be abridged? There are no such words. And, more than that, the logic of the plan of self-government, as defined by the Constitution, decisively rejects the "balancing" theory which Mr. Chafee advances.

In reaching his conclusion at this point Mr. Chafee is, I am sure, misled by his inclusion of an individual inter-

[15] *Ibid.*, p. 35.

est within the scope of the First Amendment. That private interest may, of course, be "balanced" against the public safety. The felt need of an individual to speak on a given occasion may be contrary to the common good. And, in that case, the private need, under proper safeguards, must give way. But the First Amendment, as noted in our first lecture, is not saying that any man may talk whenever and wherever he chooses. It is not dealing with that private issue. It is saying that, as interests, the integrity of public discussion and the care for the public safety are identical. We Americans, in choosing our form of government, have made, at this point, a momentous decision. We have decided to be self-governed. We have measured the dangers and the values of the suppression of the freedom of public inquiry and debate. And, on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient. The conviction recorded by that decision is not a sentimental vagary about the "natural rights" of individuals. It is a reasoned and sober judgment as to the best available method of guarding the public safety. We, the People, as we plan for the general welfare, do not choose to be "protected" from the "search for truth." On the contrary, we have adopted it as our "way of life," our method of doing the work of governing for which, as citizens, we are responsible. Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate

and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.

In his study, *Free Speech in the United States*, Mr. Chafee gives abundant evidence in support of this criticism of his position. The suppression of freedom of speech, he finds, has been throughout our history a disastrous threat to the public safety. As he sums up his results, he takes as a kind of motto the words of John Stuart Mill: "A State which dwarfs its men in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished."[16] Mr. Chafee tells the story, as he sees it, of the futility and disaster which came upon the efforts of President Wilson in World War I as he was driven, by the threat of clear and present dangers, into the suppressions of the Espionage Act.

President Wilson's tragic failure, according to Mr. Chafee, was his blindness to the imperative need of public information and public discussion bearing on the issues of war and peace. He felt bound to prevent imminent substantive evils which might arise from that dis-

[16] *Ibid.*, p. 564.

cussion. In the attempt to do so, nearly two thousand persons, Mr. Chafee tells us, were prosecuted. The fruits of those prosecutions he sums up as follows: ". . . tens of thousands among those 'forward-looking men and women' to whom President Wilson had appealed in earlier years were bewildered and depressed and silenced by the negation of freedom in the twenty-year sentences requested by his legal subordinates from complacent judges. So we had plenty of patriotism and very little criticism, except of the slowness of ammunition production. Wrong courses were followed like the dispatch of troops to Archangel in 1918, which fatally alienated Russia from Wilson's aims for a peaceful Europe. Harmful facts like the secret treaties were concealed while they could have been cured, only to bob up later and wreck everything. What was equally disastrous, right positions, like our support of the League of Nations before the armistice, were taken unthinkingly merely because the President favored them; then they collapsed as soon as the excitement was over, because they had no depth and had never been hardened by the hammer-blows of open discussion. And so, when we attained military victory, we did not know what to do with it. No well-informed public opinion existed to carry through Wilson's war aims for a new world order to render impossible the recurrence of disaster."[17]

As he writes those words, Mr. Chafee seems to me to have changed sides on his own fighting issue. He is not now judging between the interest in the search for truth

[17] *Ibid.*, pp. 561-562.

and the interest in the public safety, balancing one of these against the other. That is what he accuses President Wilson of doing. On the contrary, he is shrewdly and passionately declaring that these two public interests are, in intention and in practice, identical. His complaint against President Wilson is not merely that the president curbed the search for truth. It is that, by doing so, he had made inevitable "the recurrence of disaster," had proceeded to "wreck everything." And that is the final argument upon which the absoluteness of the First Amendment rests. It does not balance intellectual freedom against public safety. On the contrary, its great declaration is that intellectual freedom is the necessary bulwark of the public safety. That declaration admits of no exceptions. If, by suppression, we attempt to avoid lesser evils, we create greater evils. We buy temporary and partial advantage at the cost of permanent and dreadful disaster. That disaster is the breakdown of self-government. Free men need the truth as they need nothing else. In the last resort, it is only the search for and the dissemination of truth that can keep our country safe.

As seen in philosophical terms, the defect in Mr. Chafee's argument becomes clear. That argument is dangerously hostile to the purposes of the Constitution because it implies a theory of the nature and function of intelligence which destroys the belief that men can govern themselves. It undermines the conviction that a man or a society can, by taking thought, guide its own actions. When men decide to be self-governed, to take control

of their behavior, the search for truth is not merely one of a number of interests which may be "balanced," on equal terms, against one another. In that enterprise, the attempt to know and to understand has a unique status, a unique authority, to which all other activities are subordinated. It tells them what to do and what not to do. It judges them. It approves and condemns their claims. It organizes them into inclusive and exclusive plans of action. It has, therefore, an authority over them all which is wholly incongruous with the notion that one of them, or all of them together, might be balanced against it. One might as well speak of the judge in a courtroom as balanced against the defendant. Political self-government comes into being only insofar as the common judgment, the available intelligence, of the community takes control over all interests, only insofar as its authority over them is recognized and is effective.

And it is that authority of these truth-seeking activities which the First Amendment recognizes as uniquely significant when it says that the freedom of public discussion shall never be abridged. It is the failure to recognize the uniqueness of that authority which has led the Supreme Court to break down the difference between the First Amendment and the Fifth. That authority is sadly misconceived or ignored when we bring under the same constitutional protection both our possessions and our wisdom in the use of those possessions. Under the Bill of Rights it is "we" who "govern" our possessions. It is "we" and not "they" that must be free. If we break down that basic distinction we have lost sight of the re-

sponsibilities and the dignity of a "citizen." We have failed to see the role which public intelligence plays in the life of a democracy. We have made impossible the understanding and the teaching of government by consent of the governed.

2

Our argument now turns to Mr. Holmes himself, the leading hero, or villain, of the plot. And, first of all, we must pay tribute to his leadership in the defense of the freedom of speech for half a century. He was a gay and gallant gentleman. No man of his time so captured and excited the spirit of young fighters for Civil Liberties as did he. More effectively than any of his associates he called upon his fellow citizens, young and old, to criticize their prejudices, to dig deep in search for the meaning of their political institutions. The Magnificent Yankee was one of the very great teachers of political freedom.

And yet the thinking of Mr. Holmes about the First Amendment has no such excellence. Without giving the slightest justification in fact or in principle, he thrust into the interpretation of that formula the blank assertion that certain kinds of speech "will not be endured." He declared that if "clear and present danger" is involved, the suppression of speech may be, on that ground, justified. Those assertions were not supported by constitutional reasons. What then, is, for him, the source of these beliefs?

As we seek acquaintance with the mind of Mr.

Holmes, we must remember that he brought to the interpretation of the Constitution the results of an eager and lifelong preoccupation with the problems of philosophy. He loved to read, to reflect, to debate with his friends, about men and the universe. His exploring mind searched for those deeper springs of belief and preference and action from which have come the rushing currents of the Constitution. He studied thinking and its uses in the struggle for political freedom. And his opinions on constitutional questions give record of the conclusions which he reached by means of those studies. We cannot, therefore, validly accept or reject his interpretations of our legal customs, unless we meet him on this, his own, ground. We, too, must philosophize. With him we must go down as deep as we can to examine the moral and intellectual foundations of a self-governing society.

The philosophy of Mr. Holmes was, we shall find, one of excessive individualism. In it there is to be found a strange mingling of the new Darwinism of his day, which had not yet found its meaning, with an old and outworn Puritanism which had lost its ancient virtue. And to these two factors, the early experiences of Mr. Holmes in the Civil War had added the martial spirit of the reminiscent and even sentimental soldier. With these divisive influences at the back of his mind, Mr. Holmes sees a human society as a multitude of individuals, each struggling for his own existence, each living his own life, each saving his own soul, if he has a soul to save, in the social forms of a competitive independence. Always,

therefore, he tends to interpret the constitutional cooperation of one hundred and more millions of Americans, together with the past and future generations who belong to the same community, as if they had no fundamental community of purpose at all. The theory of strife he can understand—but not the theory of cooperation. A nation tends to be, for his mind, a huge collocation of externally related human atoms.

It is largely because of the effectiveness of his expression of this individualism that Mr. Holmes stands out as one of the most representative men of his time and country. He differs from his fellow Americans, not in his beliefs, but in the clarity and fearlessness with which he expresses those beliefs. His mind is too honest to evade an issue, too incisive to overlook it. He has an unusual power for devising sharp and challenging phrases. He can say to us what we ourselves would say if we were not too busy to examine our own ideas, too prudent and worldly-wise to risk the danger of discovering what those ideas mean. For these reasons he has, at the present crisis in our history, a peculiar significance for his fellow countrymen. In him we can see ourselves, as it were, under high illumination. And if, as seems obvious, the time has come when leadership in the world has brought to us responsibility for understanding what men are, and where they are going, and why, there can be no doubt that the opinions of Mr. Holmes about self-government provide materials for study on which the mind of every loyal American should be busily at work. That

assertion is even more true when we assume Mr. Holmes to be wrong than it is when and where we assume him to be right.

As a student of philosophy, Mr. Holmes was, of course, deeply interested in the relation between the machinery of the law and the moral purpose of justice. His reflections upon that relation, though partial, were keen and incisive. With the zest of a good craftsman, he was, in legal theory, a mechanist. The activities of legislatures and courts he sees, from this point of view, simply as a play of forces which are in conflict. And he delights in the technical game of the manipulation of those forces. He follows the ups and downs of the contests of the law with lively interest and, at times, it must be said, with ironical glee. Human living is, he tells us, "a roar of bargain and battle." And though, as a dispassionate spectator, he is convinced that there is little, if anything, to be gained by the fighting except the fun of the fighting itself, Mr. Holmes, as a good soldier, plunges gloriously into the conflict.

That Mr. Holmes is a mechanist in legal theory is shown by his fascinating description of "The Path of the Law," in a speech given at the Boston University School of Law in 1897. "If you want to know the law and nothing else," he said, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of

conscience."[18] And again, "But, as I shall try to show, a legal duty so-called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this way or that by judgment of the court—and so of a legal right."[19] And still again, "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."[20]

With the exception of the phrase, "the vaguer sanctions of conscience," these statements are impressive, both in their audacity and in their validity. As a technician, Mr. Holmes strips "the business of the law" of all "moral" implications. Legal battles he finds to be fought in terms of the conflict of interests, individual and social. Their results are the victories and defeats of forces and counterforces. And they are, for the technician, nothing else, except, it may be, a source of revenue. This is magnificent, clearheaded legal technology.

But there is a philosophic weakness in this mechanistic theory which can be stated in two different ways. First, being partial, it gives no adequate account of the deeper social ends and ideas upon which the legal procedure depends for life and meaning. These battles of which Mr. Holmes speaks are not fought in a jungle, in a moral

[18] Oliver Wendell Holmes, *Collected Legal Papers*. Harcourt, Brace and Howe, New York, 1920. p. 17.
[19] *Ibid.*, p. 169.
[20] *Ibid.*, p. 167.

vacuum. They are fought in the legislatures and courts which have been established by a self-governing society. They are not mere conflicts of interest. They are conflicts under laws which define a public interest. They are, therefore, fought by agreement as well as by difference —an agreement which is accepted by both sides. That agreement provides judges and juries whose duty it is to determine not merely what is going to happen, but what, under our plan of life, should happen. The fighting goes on under a Constitution in which We, the People, have formulated and made authoritative our deepest convictions concerning the welfare of men and of society. And Mr. Holmes' description of the legal machinery, valid as it is technologically, provided these deeper and wider meanings be given assured control, is utterly invalid if it be taken as an account of the total legal process. On this basis it seems fair to say that, as he interprets the freedom of speech which the Constitution protects, the one thing to which Mr. Holmes, the mechanist, does not pay attention is the Constitution itself. One finds in his arguing little reference to the fact that we of the United States have decided to be a self-governing community. There is not much said about a fundamental agreement among us to which we have pledged "our Lives, our Fortunes, and our sacred Honor." We are, for the argument, merely a horde of fighting individuals, restrained or supported by laws which "happen" to be on the books.

The same conclusion will be reached if we examine carefully what Mr. Holmes says about "the vaguer sanctions of conscience," the demands and principles of

morality. As we read his words about law and morality we must recognize that it is not strictly accurate to say that he takes no account whatever of the moral factor. It would be more true to say that he is troubled by it, that he does not know where to place it. As he studies legislation and litigation, morality constantly thrusts itself forward as a disturbing influence which threatens to clog the legal machinery. Mr. Holmes has told us that one cannot understand the law unless one looks at it as a bad man. But meanwhile, he is aware that men are, in some respects, good, even when they are dealing with the law. In the very midst of the conflicting forces of interest Mr. Holmes finds "other things" such as "a good man's reasons for conduct," revealing themselves and claiming relevance. In his statement of the mechanistic theory he says, ". . . I ask you for the moment to imagine yourselves indifferent to other and greater things."[21] But the account of these other things when Mr. Holmes, in other moments, comes back to them, is vague, unclear, and shifting. As contrasted with the sharp and skillful phrases which describe the battles of the courts, the descriptions of morality are neither sharp nor skillful. The mind of Mr. Holmes deals easily, and even merrily, with the "bad man." But the "good man," as an object of philosophical inquiry, mystifies and confuses him. The bad man is clear—too clear to be true. He wants to know what he can get away with. He wants a prediction of the differing consequences of law-breaking, and of law-observance, so that he may have a ground for choosing

[21] Holmes, *ibid.*, p. 170.

between them. He hires a lawyer to tell him. The lawyer does what he is paid to do. And Mr. Holmes delights in beating them both at their own game. But meanwhile, what of the good man? What does he want? What is he trying to find out when, if ever, he goes to his lawyer? To those questions Mr. Holmes has no ready answer. His thought has very great difficulty in piercing through the legal machinery to discover those elements of human fellowship and virtue for the sake of which good men have established and maintained, against the assaults of bad men and their legal advisers, the laws and the Constitution of the United States. As against the dogma of Mr. Holmes I would venture to assert the counterdogma that one cannot understand the basic purposes of our Constitution as a judge or a citizen should understand them, unless one sees them as a good man, a man who, in his political activities, is not merely fighting for what, under the law, he can get, but is eagerly and generously serving the common welfare.

3

With respect to the nature of goodness, Mr. Holmes has two very different and conflicting sets of opinions. And it is his failure to resolve that conflict which seems to me to lie at the root of his misinterpretation of the First Amendment. We must, therefore, examine more carefully what he has to say about the principles of right behavior.

On the one hand, scattered through his meditations are such statements as the following:

For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine.[22]

With all humility I think, "Whatever thy hand finds to do, do it with thy might," infinitely more important than the vain attempt to love one's neighbor as one's self.[23]

But, in the last resort, a man rightly prefers his own interest to that of his neighbors. And this is as true of legislation as in any other form of corporate action.[24]

The fact is that legislation in this country, as well as elsewhere . . . is necessarily made a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of some one else.[25]

But it seems to me clear that the ultima ratio, not only regum, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy, and all the social feelings, is a justifiable self-preference.[26]

Self-preference and force—those are the basic principles of human behavior. According to those principles, a good man takes what he can get. If there are burdens to bear, he sees to it that someone else bears them. Such self-interest should, of course, be intelligent, that is, shrewd. But it is, nonetheless, interest in self. It is not interest in the welfare of others.

But Mr. Holmes cannot be content to leave the matter there. He has another theory of goodness. His phrase, "the vaguer sanctions of conscience," indicates his aware-

[22] Oliver Wendell Holmes, *Speeches*. (Boston, Little, Brown & Co., 1934), p. 58.
[23] *Ibid.*, p. 85.
[24] Max Lerner, *The Mind and Faith of Justice Holmes*. Boston, Little, Brown & Co., 1943, p. 50.
[25] *Ibid.*, p. 51.
[26] *Ibid.*, p. 59.

ness that, in the midst of all the force and self-preference, another human factor is at work. Of that factor he can speak with an adoring rapture. But his words about it have no clarity. They express little more than mystical meaninglessness. "Life," he tells us, "is a roar of bargain and battle, but in the very heart of it, there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull detail into romance. It reminds us that our only but adequate significance is as parts of the unimaginable whole. It suggests that while we think we are egotists, we are living to ends outside ourselves."[27]

Are we living to ends outside ourselves? If so, neither Mr. Holmes nor we can rightly think that we are altogether egotists. That "suggestion," as he calls it, is either valid or invalid. And if it is valid, the entire structure of explanation in terms of force and self-preference becomes untenable. It must be abandoned. If the universe as a whole is unimaginable then neither a mystic spiritual tone nor anything else has given meaning to it. It has no meaning. Why pretend that it has? If the dull detail of life is merely selfishness, one can be romantic about it only by sheer self-deception. The words which Mr. Holmes here writes are thrilling in their rhetorical beauty, but they are disastrous in their effect upon the human understanding of human goodness. And his failure at this point is crucial for our argument because, whatever else it may mean, the First Amendment is an expression of human goodness. That amendment, in its own field, stands guard over the general welfare of the

[27] Holmes, *Speeches*, p. 97.

community. It protects men as they engage in the moral endeavor to advance that welfare. If that endeavor be reduced to meaninglessness it is little wonder that, in the same hands, the First Amendment has suffered the same fate.

This failure of Mr. Holmes to recognize the sane and solid moral principles which find expression in our national agreement that government shall be carried on only by consent of the governed is obvious at every turn of his writing. His romantic morality has no chance whatever when it comes into conflict with his clear-eyed, tough-minded technology. The outcome of such a battle is readily seen in the well-known letter to Mr. Wu, in which he enters vigorous and radical objection to the moral idealism which says that, under our form of government, every citizen has, and has a right to have, dignity—the dignity of men who govern themselves. With scorn for such idealism, Mr. Holmes writes, "I don't believe that it is an absolute principle or even a human ultimate that man is always an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it. Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough."[28]

One pig against another! Or, perhaps better, a lot of pigs against one! What shall we say of the man who thus explains the courtesies and the moralities of human so-

[28] Lerner, *op. cit.*, p. 431.

ciety? Harold Laski has just closed a glowing tribute to his revered master with the words, "I have known no man who lived on the heights in whom nobility and kindness were at once so effortless and so spacious in their dignified serenity."[29] And many of us who knew him, closely or not so closely, in and around his home on Eye Street in Washington, were deeply moved by the same affection and admiration. But to say that is to speak of the personal quality of Mr. Holmes, rather than of his ideas. And it was a set of ideas, a theory of morality, which ran deeply through all his reflections and seeped down into his interpretations of the Constitution. It is that set of ideas, that theory or morality, which we must critically judge if we seek to determine the validity of the opinions which Mr. Holmes wrote.

Many of us, I am sure, agree with him that the dignity of man is not an absolute principle, if by that is meant a principle of the universe. So far as we can see, the non-human universe has no moral principles. It neither knows nor cares about human dignity, nor about anything else. And further, we may agree that respect for human dignity is not a *human* ultimate. That attitude of mutual regard is created and justified only insofar as groups of men have succeeded in binding themselves together into a fellowship which, by explicit or implicit compact, maintains a "way of life." And that goal is, for humanity as a whole, still far off. But when, in the face of our Constitution, someone says that a *fellow citizen* has no "dig-

[29] Harold Laski, "Ever Sincerely Yours, O. W. Holmes," book review in the *New York Times Magazine*, February 15, 1948.

nity" which "must be respected"—that is another matter. To say that is not merely to ignore the Constitution. It is to deny it. Mr. Holmes, in those words, flatly repudiates the moral compact on which our plan of self-government rests. And, especially, he breaks down the basic principle of the First Amendment. As one makes this accusation, one must, of course, recognize the difference between the intention of our institutions and their success in realizing that intention. Everyone knows how partial is our achievement in the maintaining of self-government. In large measure, we live and act without dignity. But the essential point is that we are pledged together to create a society in which men shall have the status of governors of themselves. They must move, not with bayonets behind, but with purposes ahead. And if we fail in that, as we do, we must have "scruples about it." If we submit to our failure without regret, without scruple, we have abandoned the Constitution. We have divided our community into the "we" who have dignity and the "they" who have not. The battle of the Constitution has been lost.

4

Now, with these reflections of Mr. Holmes in mind, we are ready, or should be ready, to take the final step in our argument. We must now read and try to interpret the famous dissenting opinion in the Abrams case, in which Mr. Holmes explicitly stated the positive theory of the Constitution insofar as it relates to the principle

of the freedom of speech. The opinion reads, in part, as follows:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based on imperfect knowledge. While that experiment is part of our system I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of July 14, 1798, by repaying fines that it imposed. Only the emergency that

makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."[30]

These words are beautifully written. They are at once provocative and deeply moving. Mr. Justice Frankfurter has said of them, "It is not reckless prophecy to assume that his famous dissenting opinion in the Abrams case will live so long as English prose retains its power to move."[31] And Max Lerner, speaking with like hot admiration, has told us, "I can add little to what has been said of Holmes' language. It has economy, grace, finality, and it is the greatest utterance on intellectual freedom by an American, ranking in the English language with Milton and Mill."[32]

An American teacher, reading those words, may join heartily in praise of the rhetorical excellence of the opinion. But its meaning, its logic, have no such excellence. In form it is, as Mr. Lerner says, one of our greatest utterances. But in content Mr. Holmes, here as elsewhere, has spoken eloquently for an American Individualism whose excesses have weakened and riddled our understanding of the meaning of intellectual freedom. To that negative criticism, however, two exceptions must be made.

First, no one who is sensitive to the human values at stake in the case under consideration can fail to thrill

[30] Cohen, *op. cit.*, pp. 8-9. Chafee, *op. cit.*, pp. 136-137.
[31] Felix Frankfurter, *Justice Holmes and The Supreme Court*, Cambridge, Mass., Harvard University Press, 1938, pp. 54-55.
[32] Lerner, *op. cit.*, p. 306.

with admiration of the gallant conclusion in which Mr. Holmes condemns the judgment of his colleagues. In the lower court, after one of the most disgraceful trials ever held in the history of the nation, a group of helpless, ineffectual Russian immigrants had been literally thrown to the wild beasts of prejudice and hatred which war had let loose upon the country. And their crime was that they had advocated policies which, at the same time, were being urged upon President Wilson by some of his wisest advisers. Those advisers were not indicted and convicted and punished, even though their words might have been expected to have far greater effect. But the defenseless rebels were sentenced to jail for periods ranging up to twenty years. For his castigation of that shameful legal crime, Mr. Holmes will be remembered and honored so long as the Constitution endures.

And, further, we must accept and applaud the assertion that the Constitution is an experiment, in the sense in which all life is an experiment. Our plan of government, being based on imperfect knowledge, must be forever open to amendment, forever on trial. It will change as social conditions change, and as human insight changes. And no one can tell in advance how slow or how quick, how superficial or how radical, those changes will be. We, the People, acting under the Constitution, will decide, from time to time, on that issue. And our successors will be free, as we are, to determine what form, for them, the government shall take.

But the remarks of Mr. Holmes upon the central issue of the case before him—upon the testing of truth and

upon the using of truth in the service of the common welfare—have no such adequacy. He does not, I am sure, at either of these points, give us, as he intends to do, "the theory of our Constitution."

First, there is undeniably a genuine, though partial, validity in the dictum that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." It rightly tells us that the only truth which we self-governing men can rely on is that which we win for ourselves in the give and take of public discussion and decision. What we together think at any time is, for us, our truth at that time. And, in the sense in which words are here used, that test of truth is not merely the "best" test. There is no other. But that partial insight has often been interperted by the individualism which Mr. Holmes represents, to be a total characterization of the truth-seeking process. And, in that form, it has become, in our American public life, a fruitful source of intellectual irresponsibility and of the errors which irresponsibility brings. We Americans, when thinking in that vein, have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of "the rulers of the nation." That testing is to be done, we believe, not by us, but by "the competition of the market." Each one of us, therefore, feels free to think as he pleases, to believe whatever will serve his own private interests. We think, not as members of the body politic of "We, the People of the United States," but as farm-

ers, as trade-union workers, as employers, as investors. We plan and vote for cotton or beets or silver or steel or wheat. Our ideas belong to the East or the West or the North or the South or the Middle. And our aim, as we debate in those capacities, is not that of finding the truth. The competition of the market will take care of that. Our aim is to "make a case," to win a fight, to make our plea plausible, to keep the pressure on. And the intellectual degradation which that interpretation of truth-testing has brought upon the minds of our people is almost unbelievable. Under its influence, there are no standards for determining the difference between the true and the false. The truth is what a man or an interest or a nation can get away with. That dependence upon intellectual laissez-faire, more than any other single factor, has destroyed the foundations of our national education, has robbed of their meaning such terms as "reasonableness" and "intelligence," and "devotion to the general welfare." It has made intellectual freedom indistinguishable from intellectual license. And to that disastrous end the beautiful words of Mr. Holmes have greatly contributed.

But the other argument of Mr. Holmes, which deals with the using of truth as well as its testing, bears more directly upon our constitutional question. It may be summarized in two statements. First, says Mr. Holmes, men are naturally intolerant. And they are rightly so. Suppression of the hostile opinions of others is justified. It is justified on grounds of self-preference, backed by force. But, second, men have learned by experience that

intolerance does not pay. We need the truth as a basis for our actions. But the truth is better attained if men trade ideas freely than it is if each man stays within the limits of his own discoveries. A man's ideas must, therefore, be subjected to the competition of the market. His own self-interest requires of him that his right and natural disposition toward suppression must give way before the clear necessity of trading ideas with anyone else who is studying the same problems.

Is that the theory because of which the Constitution forbids the abridging of the freedom of speech? It is a part of it, but only, I am sure, a secondary and individualistic part. No one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which

bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves. But the competitive individualism of Mr. Holmes, when it gets hold of him, drives out of his mind the existence of that compact. As he thus reads the First Amendment, his interest is directed, not toward the public freedom which is required for the purposes of self-government, but toward the private freedom of this or that individual who is seeking to understand. And for that reason, he robs the amendment of its essential meaning—the meaning of our common agreement that, working together as a body politic, we will be our own rulers. That meaning is the highest insight which men have reached in their search for political freedom. And Mr. Holmes—at least in his "clear and present danger" thinking—misses it.

5

Here, then, are the charges which I would bring against the "clear and present danger" theory. They are all, it is clear, differing forms of the basic accusation that the compact of self-government has been ignored or repudiated.

First, the theory denies or obscures the fact that free citizens have two distinct sets of civil liberties. As the makers of the laws, they have duties and responsibilities which require an absolute freedom. As the subjects of

the laws, they have possessions and rights, to which belongs a relative freedom.

Second, the theory fails to keep clear the distinction between the constitutional status of discussions of public policy and the corresponding status of discussions of private policy.

Third, the theory fails to recognize that, under the Constitution, the freedom of advocacy or incitement to action *by the government* may never be abridged. It is only advocacy or incitement to action by individuals or nonpolitical groups which is open to regulation.

Fourth, the theory regards the freedom of speech as a mere device which is to be abandoned when dangers threaten the public welfare. On the contrary, it is the very presence of those dangers which makes it imperative that, in the midst of our fears, we remember and observe a principle upon whose integrity the entire structure of government by consent of the governed rests.

Fifth, the Supreme Court, by adopting a theory which annuls the First Amendment, has struck a disastrous blow at our national education. It has denied the belief that men can, by processes of free public discussion, govern themselves.

6

"Congress shall make no law . . . abridging the freedom of speech . . ."

That principle of the Constitution tells us that we may attack the Constitution in public discussion as freely

as we may defend it. It gives us freedom to believe in and to advocate socialism or communism, just as some of our fellow citizens are advocating capitalism. It declares that the suppressive activities of the Federal Bureau of Investigation, of the un-American Activities Committees, of the Department of Justice and its Immigration Service, of the President's Loyalty Order—all these are false in theory and therefore disastrous in practice. It tells us that such books as Hitler's *Mein Kampf*, or Lenin's *The State and Revolution*, or the *Communist Manifesto* of Engels and Marx, may be freely printed, freely sold, freely distributed, freely read, freely discussed, freely believed, freely disbelieved, throughout the United States. And the purpose of that provision is not to protect the need of Hitler or Lenin or Engels or Marx "to express his opinions on matters vital to him if life is to be worth living." We are not defending the financial interests of a publisher, or a distributor, or even of a writer. We are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them.

The unabridged freedom of public discussion is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any clear and present—or, even, terrific—danger.

CHAPTER IV

Reflections

NO ARGUMENT about principles is, I suppose, ever finished. But the argument of these lectures seems to the writer of them, peculiarly incomplete. They constitute, it seems to me, not an inquiry, but only the beginning of an inquiry. Even if it be agreed that the "clear and present danger" formula denies rather than expresses the meaning of the Constitution, even if we are convinced that the guarantee of the freedom of public discussion which is provided by the First Amendment admits of no exceptions, we are, because of those very conclusions, plunged at once into a multitude of bewildering questions. Those questions relate both to theory and to practice. And this book makes no pretense of having specifically dealt with them. In these closing reflections, the attempt will be made to indicate some lines along which further study of the meaning of the freedom of speech might go.

I

There is immediate and urgent need that We, the People of the United States, should win clarity of mind

on that mutual agreement of ours concerning speech, which is recorded in the First Amendment. These lectures have tried to show that the "clear and present danger" formula, as dealt with in the discussions of the Supreme Court, has not been able to keep either its original meaning or its validity. In the keen, shrewd competition of that market place, its verbal victory has become equivocal and empty. But in the wider market of popular discussion, the dominance of the seductive phrase, in its original meaning, is clear and unmistakable. Our people are, in general, convinced that, by authority of the Supreme Court, whenever or wherever the "American Way of Life," so-called, is criticized, is declared inferior to some other set of beliefs and institutions, we are, under the Constitution, justified in resorting to the suppression of civil liberties, including the freedom of speech. This disloyalty of ours to our own plan of government, with all its dreadful consequences, now threatens to run riot through every phase of American life, including that of government. And, for that threat of disaster, the Supreme Court, on the ground of its acceptance of the phrase, must be held largely responsible. May a teacher venture to suggest that the time has come when the court, as teacher, must declare, in unequivocal terms, that no idea may be suppressed because someone in office, or out of office, has judged it to be "dangerous?"

2

If, however, as our argument has tried to show, the principle of the freedom of speech is derived, not from

some supposed "Natural Right," but from the necessities of self-government by universal suffrage, there follows at once a very large limitation of the scope of the principle. The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment. If men are engaged, as we so commonly are, in argument, or inquiry, or advocacy, or incitement which is directed toward our private interests, private privileges, private possessions, we are, of course, entitled to "due process" protection of those activities. But the First Amendment has no concern over such protection. That pronouncement remains forever confused and unintelligible unless we draw sharply and clearly the line which separates the public welfare of the community from the private goods of any individual citizen or group of citizens.

What, then, is the distinction between, and the relation between, the common good and our many different private goods? On no problem of our national life is the American mind more confused than on this problem. And nowhere else is the need for clarity and sanity more imperative.

Every one of us, of course, recognizes, in words, the distinction between public and private welfare. We know, clearly or vaguely, that under the American plan of self-government every citizen has two radically dif-

ferent sets of purposes and hence two radically different relations to the governing authority, which he and his fellows maintain. If men are free, they have two sets of values. They "care for" their country. But they care, also, for themselves. On the one hand, each of us, as a citizen, has a part to play in the governing of the nation. In that capacity, we think and speak and plan and act for the general good. On the other hand, each of us, as an individual or as a member of some private group, is rightly pursuing his own advantage, is seeking his own welfare. In the first of these roles, we are voters, lawmakers, rulers. Taken together in that role, We, the People, are the government. But, in the second role, we are, as individuals, governed. Our constitutional agreement is that each man's individual possessions and activities shall be subject to regulation by laws which he is bound to obey. His private rights, including the right of "private" speech, are liable to such abridgments as the general welfare may require.

Here, then, are our two sets of human interests and activities, which, under the Constitution, are given, and must be given, fundamentally different status. How are they related? What is the bearing of the common good on my goods—and upon yours? Are they identical? Are they different, but congruous? Are they opposed? Are they mutually indifferent to one another? Unless this relation can be made clear, nothing which has to do with political freedom can be understood.

We cannot, of course, in a few words analyze adequately all the implications of the Constitution with

respect to public and private goods. Nor, it must be said, could we do so if many words were available. The human relations involved in the distinction between the general welfare and individual advantage are deeply and permanently perplexing. We can mention here only a few phases of the relationship which touch upon the problem of the freedom of speech.

In the Preamble to the Constitution there are listed in summary fashion the items of public interest which the body politic of the United States has adopted as its own. These are: A more perfect union, justice, domestic tranquillity, the common defense, the general welfare, the blessings of liberty. These ends or purposes We, the People, hold in common. For these we plan and work together. They are the objects of our common loyalty. How, then, do they bear upon our distinctive desires and activities as separate individuals? In answer to this question, five observations may be made.

First, in our American society, as we intend it to be, the public interest is not another different interest superimposed upon our individual desires and intentions. It is compounded out of them. It includes nothing which is not included by them. The common purpose is made up out of the separate purposes of the citizens. So far as possible, it combines them all.

But, second, since human interests are in constant conflict with one another, they cannot all be realized. We cannot make the common good by simply adding them together. To give play to one of them means often to deny play to others. And, for this reason, the public

interest cannot be merely the totality of the private interests. It is, of necessity, an organization of them, a selection and arrangement, based upon judgment of relative values and mutual implications.

Third, the judgments which a government makes between interests are based upon such general principles as unity, justice, tranquillity, defense, welfare, equality, liberty. For the sake of these common demands as expressed in impartial laws, any given individual in any given situation may be required to suffer the loss of his life, his liberty, his property, his happiness. And the government which guards the common welfare is authorized, by due process, to make and, if need be, to enforce the decision that those sacrifices are needful. Some millions of the young men and women of our nation and of other nations have recently learned, and are still learning, by actual experience what that statement means.

Fourth, the activities of the government as it cares for the public interest and, thereby, for the private interests which constitute it, are both negative and positive. On the one hand, the government protects individuals and groups by enforcing prohibitions against arson, monopoly, murder, and the like. On the other hand, by supplying such facilities as roads, postal service, parks, pensions, collective bargaining, soil conservation, libraries, schools, colleges, and a host of other forms of social wealth, We, the People, carry on constructive enterprises which individuals, as such, cannot so well carry on for themselves and for their fellows.

And, fifth, it should be noted that the Constitution does not, in principle, prescribe what share of the activities needed for furthering the common good shall be directly exercised by the government and what share shall be reserved to individuals, acting separately. At this point, there is sharp division of opinion among us. There are members of our body politic who tell us that the public interest is best served when government action is reduced to a minimum and especially when it is kept negative in character. But just now, the nation as a whole seems to be moving rather swiftly and decisively—as is the world as a whole—in the opposite direction. More and more, we Americans are initiating new forms of positive government action for the common good. Between these two tendencies the struggle becomes every day more open and more intense. And as we wage that conflict it is well to remember that the logic of the Constitution gives no backing to either of the two combatants, as against the other. We are left free, as any self-governing people must leave itself free, to determine by specific decisions what our economy shall be. It would be ludicrous to say that we are committed by the Constitution to the economic cooperations of socialism. But equally ludicrous are those appeals by which, in current debate, we are called upon to defend the practices of capitalism, of "free enterprise," so-called, as essential to the freedom of the American Way of Life. The American Way of Life is free because it is what we Americans freely choose—from time to time—that it shall be.

3

The statement that the First Amendment stands guard over the freedom of public speech but is indifferent to the rights of private speech has sharp and, at times, decisive implications for many issues of civil liberty now in dispute among us. It would be a fascinating and important task to follow those implications as they bear upon the rights to freedom which are claimed, for example, by lobbyists for special interests, by advertisers in press or radio, by picketing labor unions, by Jehovah's Witnesses, by the distributors of handbills on city streets, by preachers of racial intolerance, and many others. In all these cases the crucial task is that of separating public and private claims. But such discussion would go far beyond the limits of the present inquiry. I must, however, mention one new issue which is startling, and even shocking in its threat to what has been traditionally regarded as one of our primary "public" freedoms. We have assumed that the studies of the "scholar" must have, in all respects, the absolute protection of the First Amendment. But with the devising of "atomic" and "bacteriological" knowledge for the use of, and under the direction of, military forces, we can now see how loose and inaccurate, at this point, our thinking has been. Under present circumstances it is criminally stupid to describe the inquiries of scholarship as merely "the disinterested pursuit of knowledge for its own sake." Both public and private interests are clearly involved. They subsidize much of our scholarship. And

the clashes among them may bring irretrievable disaster to mankind. It may be, therefore, that the time has come when the guarding of human welfare requires that we shall abridge the private desire of the scholar—or of those who subsidize him—to study whatever he may please. It may be that the freedom of the "pursuit of truth" must, in that sense, be abridged. And, if such action were taken with that motivation, the guarantee of the First Amendment would not, in my opinion, have been violated. As I write these words, I am not taking a final stand on the issue which is here suggested. But I am sure that the issue is coming upon us and cannot be evaded. In a rapidly changing world, another of our ancient sanctities—the holiness of research—has been brought under question.

4

If the meaning and validity of the First Amendment be derived from the principles of self-government, still another very serious limitation of its scope must be recognized. The principle of the unqualified freedom of public speech is, then, valid only in and for a society which is self-governing. It has no political justification where men are governed without their consent. For example, in such social institutions as an army or a prison or an insane asylum, the principle of freedom of speech is neither relevant nor valid. Those communities are not governed by the consent of their members. That statement should, perhaps, be mitigated in the case of an army whose soldiers are also citizens of a free body

politic to which the commanders of the army are responsible. And, in lesser degree, the same limitation holds true for the management of an asylum or a prison. And yet, in all these cases, the immediate fact of control without consent remains. Policies and actions are not decided on the basis of general discussion and voting by the group. There is, therefore, no political ground for the demand that discussion within the institution shall be free from abridgment.

The same irrelevance is evident when we examine the military control of a nation which has been conquered in war. On December 16, 1944, General Eisenhower issued a proclamation prescribing plans for education in Germany during military occupation. One section of his order reads as follows: "German teachers will be instructed to eliminate from their teaching anything which: (A) Glorifies militarism, expounds the practice of war or of mobilization and preparation for war, whether in the scientific, economic, or industrial fields, or the study of military geography; (B) Seeks to propagate, revive, or justify the doctrines of Nazism or to extol the achievements of Nazi leaders; (C) Favors a policy of discrimination on grounds of race or religion; (D) Is hostile to or seeks to disturb the relations between any of the United Nations. Any infringement of these provisions will be cause for immediate dismissal and punishment."

In those words, which would be utterly intolerable if applied to the teachers of the United States, the official representative of the nations which had fought for free-

dom, denies freedom of speech to the German teachers. And that decision, whether wise or unwise, cannot be challenged on the ground that it violates the freedom of teaching. During the period of military occupation, Germany is not self-governing. She, and her teachers, must therefore be subject to orders which they have no part in making. Her will, if she has one, must give way before an alien will or, it may be, before a number of wills which are alien, not only to her but also to each other. And so long as that is true, German teachers, unlike Socrates, unlike the teachers of our American schools and colleges, have no political right to teach what they believe true.

5

This book has, I hope, succeeded in expressing the passionate devotion of one American citizen to the principle of the freedom of speech. And yet passions may blind us, as well as lead us. It will not do to pour out all our passion for freedom into such a cause as that which the First Amendment represents. When all that concerns our argument has been felt and said, the stark fact remains that the First Amendment is a negation. It protects. It forbids interference with something. And that protection can have value only as the "something" which is protected has value. What, we must ask, would be the use of giving to American citizens freedom to speak if they had nothing worth saying to say? Or—to state the principle less baldly—surely it is true that the protection of public discussion in our nation takes on an ever-

increasing importance as the nation succeeds in so educating and informing its people that, in mind and will, they are able to think and act as self-governing citizens. And this means that far deeper and more significant than the demand for the freedom of speech is the demand for education, for the freeing of minds. These are not different demands. The one is a negative and external form of the other. We shall not understand the First Amendment unless we see that underlying it is the purpose that all the citizens of our self-governing society shall be "equally" educated.

I cannot, in these closing pages, discuss the methods, the successes and failures, of our national education—though my argument is only a fragment unless that is done. It is essential, however, to mention one typical failure which, since it has to do with the agencies of communication, falls within the field of our inquiry. The failure which I have in mind is that of the commercial radio.

When this new form of communication became available, there opened up before us the possibility that, as a people living a common life under a common agreement, we might communicate with one another freely with regard to the values, the opportunities, the difficulties, the joys and sorrows, the hopes and fears, the plans and purposes, of that common life. It seemed possible that, amid all our differences, we might become a community of mutual understanding and of shared interests. It was that hope which justified our making the

radio "free," our giving it the protection of the First Amendment.

But never was a human hope more bitterly disappointed. The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare.

As one utters these words of disappointment, one must gratefully acknowledge that there are, working in the radio business, intelligent and devoted men who are fighting against the main current. And their efforts are not wholly unavailing. But, in spite of them, the total effect, as judged in terms of educational value, is one of terrible destruction. The radio, as we now have it, is not cultivating those qualities of taste, of reasoned judgment, of integrity, of loyalty, of mutual understanding upon which the enterprise of self-government depends. On the contrary, it is a mighty force for breaking them down. It corrupts both our morals and our intelligence. And that catastrophe is significant for our inquiry, because it reveals how hollow may be the victories of the freedom of speech when our acceptance of the principle is merely formalistic. Misguided by that formalism we Americans have given to the doctrine merely its negative meaning. We have used it for the protection of private,

possessive interests with which it has no concern. It is misinterpretations such as this which, in our use of the radio, the moving picture, the newspaper and other forms of publication, are giving the name "freedoms" to the most flagrant enslavements of our minds and wills.

6

Our final reflection brings us again face to face with that curious quality of paradox by which all interpretations of self-government are affected.

On the one hand, We, the People of the United States, are a body politic. Under the Constitution, we are agreed together that we will be, by corporate action, self-governed. We are agreed that as free men, politically equal, we alone will make the laws and that, as loyal citizens, equal before the laws, we will obey them. That is our social compact—the source both of our freedoms and of our obligations.

From that compact are derived the "just powers" of the government which we establish. That establishment does not mean that someone else, other than ourselves, has authority over us. It means that, in such ways as we may choose, we have taken authority over ourselves. It does not mean that we have lost our political freedom. It means that, by eternal vigilance, we are continually creating and securing it. So far as the compact is effective, we are not subservient to any Fuehrer or Dictator. But we are bound by obligations—obligations to one another and to the common cause in which we all share.

But, on the other side of the paradox, are the claims of an individualism which, when it becomes excessive, refuses to acknowledge the validity of political obligations. Men are, as they say, willing to work and sacrifice for the common good. But they are not willing that any political authority, even their own, shall require them to do so. Our blind and unthinking faith in the scheme of competitive strife which we so falsely call the "American Way of Life" blinds us to the meaning, and even to the existence, of the political agreement by which all our social institutions are inspired and directed.

How, then, shall we, the members of the body politic, become more clearly and effectively aware of our compact with one another? To bring that about is, I am sure, the primary task of American teaching. Our young women and men who enter into citizenship must learn what it means to be a member of a self-governing society. Our older citizens, if they have won that understanding, must be saved from losing it. It is the basic need of that understanding which finds partial and negative expression in the First Amendment. The guarding of the freedom of public discussion is a preliminary step in the unending attempt of our nation to be intelligent about its own purposes.

If, then, we seek to understand at its source that guarantee of the freedom of speech which the Constitution provides, I suggest that we pay heed to the sayings of two great teachers of freedom. Side by side, with the Socratic "Know Thyself," let us place the saying of Epictetus, "The rulers of the state have said

that only free men shall be educated; but Reason has said that only educated men shall be free." That is why, in the last resort, ". . . Congress shall make no law . . . abridging the freedom of speech."