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Substantive Due Process of Law and Civil Liberties

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Contributory negligence presents a particularly difficult question in crossing accident cases, because the reasonableness of plaintiff's conduct depends largely upon the conduct of the railroad's employees. For example, the care required of the driver of an automobile approaching a crossing varies with the presence or absence at the crossing of automatic signals, gates, or watchmen.[42] The driver's duty is also affected by his familiarity with the crossing and his knowledge of its dangers.[43] Similarly, the care required of the driver increases with the difficulty of seeing or hearing approaching trains.[44]

Usually, the momentum of a moving train is too great for it to stop in the few moments between the time at which a careful trainman could appreciate plaintiff's peril and the time of the train's arrival at the crossing.[45] For this reason, plaintiffs have had little success invoking the doctrine of last clear chance against a defense of contributory negligence in crossing collision cases.

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Substantive Due Process of Law and Civil Liberties

In recent years, the Supreme Court of the United States has seemed increasingly willing to accord state legislation in the field of civil liberties the same presumption of validity enjoyed by state economic regulation.

Until the early 1930's, the Court frequently considered state legislation regulating business activity repugnant to the Due Process Clause of the Fourteenth Amendment. For instance, state regulation of prices charged by businesses not "affected with a public interest" was regarded as depriving persons engaged in such businesses of their property without due process of law.[1]

42. Levy v. New Orleans & N.E.R.R., 20 So.2d 559 (La. App. 1945).

43. Stelly v. Texas & N.O.R.R., 49 So.2d 640 (La. App. 1950); Butler v. Chicago, R.I. & P. Ry., 46 F. Supp. 905 (W.D. La. 1942), *aff'd*, 141 F.2d 492 (5th Cir. 1944); *accord*, O'Connor v. Chicago, R.I. & P. Ry., 40 So.2d 663 (La. App. 1949); Ashy v. Missouri Pac. R.R., 186 So. 395 (La. App. 1939).

44. See note 9 *supra*.

45. Matthews v. New Orleans Terminal Co., 45 So.2d 547 (La. App. 1950); Teston v. Thompson, 77 F. Supp. 823 (W.D. La. 1948); Levy v. New Orleans & N.E.R.R., 20 So.2d 559 (La. App. 1945); McClain v. Missouri Pac. R.R., 200 So. 57 (La. App. 1941); Washington v. Yazoo & M.V.R.R., 11 La. App. 635, 124 So. 631 (1929).

1. See, *e.g.*, Ribnik v. McBride, 277 U.S. 350 (1928); Tyson & Bros. v. Banton, 273 U.S. 418 (1927).

In another area of state action, the Court declared state wage and hour regulation unconstitutional, interpreting the Due Process Clause as a guarantee of "liberty of contract."[2] A sharp change in the Court's attitude toward state economic regulation appeared in *Nebbia v. New York*,[3] decided in 1934. In that case, the Court, upholding a state statute authorizing milk price regulation, abandoned the old distinction between those businesses "affected with a public interest" and subject to price regulation, and other businesses theretofore exempt from such regulation. Three years later, in *West Coast Hotel Co. v. Parrish*,[4] the Court upheld a state minimum wage law against the claim that it violated the employer's freedom of contract. The Court made it unmistakably clear in that case that it would no longer invalidate state economic legislation reasonably adapted to the accomplishment of its object. Subsequent decisions in the field of economic due process have adopted this broad principle.[5]

State legislation in the field of civil liberties, however, has been viewed in a different light. One writer explains, "The reasonable-man test was appropriate in all other fields; but where the basic freedoms of the First Amendment were at issue, then the judiciary had to hold itself and the legislature to higher standards. These higher standards were required because of the 'preferred position' which the Constitution gives to the basic First Amendment freedoms."[6] It is believed that a brief review of the cases involving freedom of speech will show that the Court has gradually abandoned the view that civil liberties occupy this preferred position.

The first important speech case presented to the Court, in 1919, involved the indictment and conviction of the defendants under the Federal Espionage Act for circulating leaflets urging men to resist the draft.[7] In affirming the conviction Justice Holmes announced a principle frequently applied in subsequent cases involving freedom of speech:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature

2. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).
3. 291 U.S. 502 (1934).
4. 300 U.S. 379 (1937).
5. See Note, 24 IND. L. J. 451, 455 (1949) and authorities cited therein.
6. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 32-33 (1954).
7. Schenck v. United States, 249 U.S. 47 (1919).

> 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."[8] (Italics supplied.)

Six years later, however, a completely new test was applied by the Court in *Gitlow v. New York*.[9] Gitlow was convicted under the New York Criminal Anarchy Act for circulating Communist literature. It can hardly be said that his conduct presented a "clear and present danger." In affirming his conviction, the Court applied what has been termed the "bad tendency" test. Although this test was never repudiated, the Court did not apply it during the following years when freedom of speech continued to occupy a preferred position.[10]

In *United States v. Carolene Products Co.*,[11] decided in 1938, Justice Stone, in a footnote, suggested a view which the Court apparently held throughout the following decade. The decision upheld certain federal economic legislation against the claim that it violated the Due Process Clause of the Fifth Amendment. The footnote stated in part:

> "*There may be narrower scope for operation of the presumption of constitutionality* when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[12] (Italics supplied.)

The high point of the Court's preferential treatment of civil liberties appears in *Thornhill v. Alabama*,[13] decided in 1940, where the Court invalidated a state statute forbidding all picketing. Justice Murphy, speaking for the Court, stated that the freedom of speech and press embraces at least the liberty to discuss all matters of public concern publicly and truthfully without previous restraint or fear of subsequent punishment. In the

8. *Id.* at 52.
9. 268 U.S. 652 (1925).
10. CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 122 (9th ed. 1950).
11. 304 U.S. 144 (1938).
12. *Id.* at 152, n. 4. Yet, earlier that year a similar view could be derived from Mr. Chief Justice Hughes' opinion declaring a city ordinance void on its face as a violation of speech and press contrary to the Fourteenth Amendment. Lovell v. Griffin, 303 U.S. 444 (1938).
13. 310 U.S. 88 (1940). This decision reaffirms the Court's position in a number of speech cases since Gitlow v. New York, 268 U.S. 652 (1925). See Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936); Stromberg v. California, 283 U.S. 359 (1931).

Thornhill decision the statute involved was clearly denied the presumption of validity which the Court had traditionally accorded state legislation. Only one Justice dissented from the opinion in the *Thornhill* case; four, however, dissented in *Thomas v. Collins*,[14] decided five years later. In that case the Court declared invalid a Texas statute requiring labor organizers to register with a state official before soliciting membership in labor unions. The dissenting Justices seem to have placed the question presented by petitioner's conviction under the statute in the field of economic due process while the majority treated the issue as one of freedom of speech.[15]

In 1948 a city ordinance prohibiting the use of sound trucks was held unconstitutional in *Saia v. New York*,[16] with Justices Frankfurter, Reed, Burton, and Jackson dissenting. Without a change in personnel the Court upheld a similar city ordinance in *Kovacs v. Cooper*,[17] decided in 1949, Chief Justice Vinson having joined the four Justices who dissented in the *Saia* case. The majority, attempting to distinguish *Saia v. New York*, noted that the ordinance in that case placed a previous restraint on free speech, whereas the one involved in the *Kovacs* case applied only to amplifiers that emitted "loud and raucous" noises. Justice Jackson concurred with the majority in the *Kovacs* case but thought its holding conflicted with *Saia v. New York*. That same year Justice Murphy, who wrote the opinion in *Thornhill v. Alabama*, and Justice Rutledge, who wrote the opinion in *Thomas v. Collins*, died.[18] Justices Black and Douglas remained as the chief defenders of the preferred position given to civil liberties in the past.

Several cases followed which prove interesting in the light

14. 323 U.S. 516 (1945).

15. Mr. Justice Jackson and Mr. Justice Rutledge were the only new replacements, and the former, concurring, stated: "Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. . . . And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable. . . ." *Id.* at 547. It might be said that Mr. Justice Jackson found it difficult to apply this standard in later speech cases.

16. 334 U.S. 558 (1948).

17. 336 U.S. 77 (1949).

18. Although the *Kovacs* case explained the view of the majority which was to remain intact for some time, the loss of Mr. Justices Murphy and Rutledge might be important in regard to the granting of certiorari. Four votes are necessary to bring a case up by that method. In the Flag saluting cases the writ had been denied more than once for want of a substantial federal question before the issue was finally decided. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

of the *Thornhill* decision. In one case[19] the Court upheld an injunction against picketing aimed at inducing an ice company to refrain from selling to non-union peddlers. Acquiescence in the picketers' demands would have violated the state's antitrust law. Perhaps the decision can be reconciled with the rationale of the *Thornhill* case by considering the picketing as economic activity not deserving preferred constitutional protection. In another case, *International Brotherhood of Teamsters v. Hanke*,[20] an automobile repairman and his three sons, as co-partners, were picketed by a labor union seeking a union shop. The Court sustained an injunction against the picketing and rejected the union's claim that the Fourteenth Amendment guaranteed the right to picket peacefully. It is noteworthy that Justice Minton, dissenting, saw the end of the *Thornhill* era.[21]

Court activity also proved interesting during 1951 and 1952. In *Breard v. City of Alexandria*,[22] the Court upheld a municipal ordinance which forbade soliciting orders for merchandise without first obtaining the permission of the owners or occupants to enter the premises. The majority found no conflict with an earlier decision[23] invalidating an ordinance that prohibited the distribution of literature at private residences. The only distinction between the two cases would seem to be that the earlier case dealt with distribution of free religious literature, while the *Breard* case involved commercial solicitation.

In *Feiner v. New York*,[24] decided in 1951, petitioner made an inflammatory speech containing derogatory remarks about the President, the American Legion, and local officials. To prevent an outbreak of violence, the police asked the petitioner to stop speaking. After his third refusal he was arrested and convicted of violating the Penal Code of New York which forbade inciting a breach of the peace. The conviction was upheld by the Court on the grounds that a community has a right to maintain peace and order on its public streets. Justice Black, dissenting, thought that the police should have made all reasonable efforts to protect

19. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
20. 339 U.S. 470 (1950).
21. *Id.* at 483. See also Note, *Free Speech and Picketing for "Unlawful Objectives,"* 16 U. OF CHI. L. REV. 701, 704 (1949) for a discussion of a modification of the *Thornhill* rule. Comment, *Constitutional Law—Due Process of Law—Thornhill Re-Examined*, 49 MICH. L. REV. 1048 (1951); Jones, *The Right to Picket—Twilight Zone of the Constitution*, 102 U. OF PA. L. REV. 995 (1954).
22. 341 U.S. 622 (1951).
23. Martin v. City of Struthers, 319 U.S. 141 (1943).
24. 340 U.S. 315 (1951).

the speaker and preserve order before taking such action. A similar fact situation had been presented in *Terminiello v. Chicago*,[25] two years before the *Feiner* case. The petitioner addressed a large audience in an auditorium while an angry crowd protested outside. The speech contained criticism of various political and racial groups. His conviction was reversed by the Court in a five-to-four decision on the grounds that the trial court had incorrectly instructed the jury. Justice Jackson, vigorously dissenting, said, "There is danger, that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[26]

Beauharnais v. Illinois,[27] a 1952 decision, upheld the conviction of the petitioner for distributing anti-Negro leaflets on the streets of Chicago in violation of an Illinois "group libel" law. The majority concluded that the law was directed at a defined evil which the state had a right to suppress. Since the majority considered the utterances libelous and not within the area of protected speech, they found it unnecessary to apply the "clear and present danger" test. This decision clearly indicates that the Court is narrowing the scope of the "clear and present danger" test; it also shows that the Court is inclined to entertain a presumption of validity for state statutes in the field of civil liberties. *Burstyn v. Wilson*,[28] decided in 1952, seems at first blush to indicate the contrary. A New York statute permitted a state agency to ban the showing of "sacrilegious" motion picture films. A New York court's judgment revoking petitioner's license for showing a film deemed "sacrilegious" was reversed, and the statute was declared unconstitutional for vagueness. The significance of this decision diminishes when one considers the Court's traditional readiness to invalidate statutes framed in vague or uncertain terms.[29]

25. 337 U.S. 1 (1949).
26. *Id.* at 37.
27. 343 U.S. 250 (1952).
28. 343 U.S. 495 (1952).
29. See United States v. Cohen Grocery, 255 U.S. 81 (1921); Winters v. New York, 333 U.S. 507 (1948). In Alder v. Bd. of Ed. of City of New York, 342 U.S. 485 (1952), the Court upheld the New York "Feinberg" law which provided for the removal of teachers for disloyalty, the theory being that the New York courts had construed the statute to require knowledge of the organization's purpose before the regulation could apply. Yet in Wieman v. Updegraff, 344 U.S. 183 (1952), decided the same year, the Court held void an Oklahoma statute which excluded persons from state employment solely on the basis of membership in an organization listed by the Attorney General of the United States as Communist or subversive. In the act, membership alone was disqualifying and the Court thought membership might be innocent.

The Court has regarded federal legislation impinging on civil liberties in much the same light that it has viewed similar state legislation. Its attitude toward the "clear and present danger" test is apparent in *American Communications Assn. v. Douds*,[30] decided in 1950. The Labor Management Relations Act, Section 9(h), required officers of labor organizations to file non-Communist affidavits in order to avail themselves of the benefits of the act. In rejecting the union's claims that this requirement violated the First Amendment, the Court expressed the view that "a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."[31]

In *Dennis v. United States*,[32] decided in 1951, the Court affirmed the conviction of eleven Communist party leaders under the Smith Act for conspiring to teach and advocate the overthrow and destruction of the government by force and violence. The decision reveals how the personnel of the Court interpreted the "clear and present danger" test. Chief Justice Vinson, who announced the judgment of the Court, was joined by Justices Reed, Burton, and Minton. They expressed the belief that many of the decisions in which the Court reversed convictions by applying the "clear and present danger" test were based on the fact that the interest of the state in those cases was too insubstantial to warrant interference with freedom of speech. It seems that these four Justices would apply the test where a statute proscribes conduct amounting to mere nonconformity, but not where the conduct prohibited is of a subversive character. Justice Frankfurter, concurring, quoted approvingly the statement of Professor Freund that "No matter how rapidly we utter the phrase 'clear and present danger', or how closely we hyphenate the words, they are not a substitute for the weighing of values."[33] To him the test is "no more conclusive in judicial review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself."[34] Justice Jackson, also concurring, "would save it, unmodified, for application as a 'rule of reason' in the kind of case for which it was devised,"[35] presumably in cases where the interest of the state is insubstantial. In his view,

30. 339 U.S. 382 (1950).
31. *Id.* at 397.
32. 341 U.S. 494 (1951).
33. FREUND, ON UNDERSTANDING THE SUPREME COURT 27 (1949), cited at 341 U.S. 542 (1951).
34. *Id.* at 544.
35. *Id.* at 568.

extending the "clear and present danger" test to cases involving Communists would be misapplying it. Justice Black, dissenting, stated, "I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness'."[36] Justice Douglas, also dissenting, said, "Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent."[37] Justice Clark took no part in the consideration or decision of the case. A reading of the opinions in the *Dennis* case leaves one with the impression that the two dissenting Justices would apply the "clear and present danger" test to all cases in which freedom of speech is an issue while the majority would apply it only in cases where it is "safe" to do so.

With few exceptions the decisions indicate that the Court has discarded the preferred position view of civil liberties prevailing in the 1940's. Change in personnel has been an important factor. The Court that rendered the *Thornhill* decision could hardly have decided *Beauharnais v. Illinois* the same day. Somewhere between these two decisions the presumption shifted in favor of the validity of statutes curtailing civil liberties. Popular distaste for Communism has influenced the Court; in the words of Justice Black:

> "Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[38]

Perhaps the cases today are harder to decide. It was clear that a statute of the *Thornhill* type, placing a prior restraint on all picketing was bad; but picketing for demands that could only be granted by violating a valid criminal statute[39] presents a question requiring the utmost judicial deliberation. Refusal to salute a flag on religious grounds[40] is a problem of nonconformity involving less danger than delivering inflammatory speeches.[41]

36. *Id.* at 580.
37. *Id.* at 590.
38. Dennis v. United States, 341 U.S. 494, 581 (1951).
39. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
40. West Virginia St. Board of Ed. v. Barnette, 319 U.S. 624 (1943).
41. Feiner v. New York, 340 U.S. 315 (1951).

The cases in this field require "more exacting judicial scrutiny"[42] and a "correspondingly more searching judicial inquiry."[43] It is not suggested that the Court should turn the Bill of Rights into a "suicide pact";[44] but the Court might well re-examine Justice Stone's footnote in *United States v. Carolene Products Co.*,[45] and, where legislation affecting civil liberties is involved, allow "narrower scope for the presumption of constitutionality."[46]

John M. Shaw

Discontinuance and Nonsuit

Common Law

In the early common law, a plaintiff could escape an impending adverse judgment by means of two procedural devices, discontinuance and nonsuit. The effects of these were similar and the terms "discontinuance" and "nonsuit" were sometimes applied interchangeably.

The term "discontinuance" originated in the law of real property and was first used in pleading and practice[1] to denote plaintiff's failure to proceed with his suit from day to day.[2] Later the term was applied to any actual discontinuance of plaintiff's suit, whether voluntary or by order of court. One noted authority stated that the plaintiff was allowed to discontinue his suit as a matter of right prior to commencement of trial but could only discontinue it with leave of court after argument or demurrer.[3] Defective pleading or failure to prosecute the suit in due course was cause for involuntary discontinuance.[4] The effect of a discontinuance was to put the parties out of court, to charge plaintiff with payment of costs, and to compel him to begin *de novo* should he decide to renew his demand.[5]

42. United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938).
43. *Id.* at 153, n. 4.
44. Terminiello v. Chicago, 337 U.S. 1, 37 (1949).
45. 304 U.S. 144 (1938). See page 179 *supra*.
46. *Id.* at 152, n. 4.
1. Head, *History and Development of Nonsuit*, 27 W.VA. L.Q. 20 (1920).
2. 3 BL. COMM. 296 (2d ed. 1766).
3. 2 TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 732 (2d Am. ed. 1828): "The rule to discontinue is a side-bar rule; and may be had, as a matter of course, from the clerk of the rules in the King's Bench, at any time before trial or inquiry. . . ."
4. STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING 216 (3d Am. ed. 1875).
5. 2 TIDD'S PRACTICE 732 (2d Am. ed. 1828).