be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." [459]

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." [460] The fixing of a standard is necessary, by which to determine what degree of evil is "sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection" and how clear and imminent and likely the danger is.[461] That standard has fluctuated over the years, as the cases discussed below demonstrate.

Clear and Present Danger.—Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action, may either counsel the commission of criminal conduct or itself constitute criminal conduct. Leaving aside for the moment the problem of "speech-plus" communication, it becomes necessary to determine when expression that may be a nexus to criminal conduct is subject to punishment and restraint. At first, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, the advocacy of or promotion of the conduct could be made criminal.[462] Then, in *Schenck v. United States*,[463] in which the defendants had been convicted of seeking to disrupt recruitment of military personnel by disseminating leaflets, Justice Holmes formulated the "clear and present danger" test that has ever since been the starting point of argument. "The question in every case is

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[459] Whitney v. California, 274 U.S. 357, 375–76 (1927) (Justice Brandeis concurring).

[460] 274 U.S. at 373.

[461] 274 U.S. at 374.

[462] Davis v. Beason, 133 U.S. 333 (1890); Fox v. Washington, 236 U.S. 273 (1915).

[463] 249 U.S. 47 (1919).