

Chief Justice Hughes wanted to direct the inquiry to the purpose of the meeting, not the guise under which the meeting was held. He insisted that the Court decide whether the speech went beyond that which was protected by the Constitution, rather than concern itself with the relations of the speakers. He argued that a right could be protected by more than one constitutional provision. Chief Justice Hughes concluded that the state could not use the mere participation in a peaceful assembly and lawful public discussion as the basis for a criminal charge.

AFTERMATH

The same year, in *Herndon v. Lowry* (1937), a divided Court also ruled in favor of a black communist organizer in Georgia who had been convicted in 1933 of “attempting to incite to insurrection” under Georgia law. The Court would later use a “clear and present danger” test as the appropriate test for a variety of First Amendment issues.

SIGNIFICANCE

By implication, *De Jonge* overruled *United States v. Cruikshank* (1875), which found that the First Amendment right to assembly and the Second Amendment right to bear arms were not protected by the Fourteenth Amendment. However, *De Jonge* did more to muddle than clarify the law governing subversive advocacy. While *De Jonge* proclaimed the right to assemble and discuss political issues peaceably was protected, it also indicated that the right to assemble could be abused. However, the Court did not identify where the line would be drawn between protected speech and assembly, and speech and assembly that transcended the bounds of the First Amendment, allowing legislative intervention. This was the first time that the freedom to assemble was made applicable to the states by means of the due process clause of the Fourteenth Amendment.

RELATED CASES

Whitney v. California, 271 U.S. 583 (1927)
Stromberg v. California, 283 U.S. 359 (1931)
Herndon v. Lowry, 301 U.S. 242 (1937)

Palko v. Connecticut, 302 U.S. 319 (1937)
Terminiello v. Chicago, 337 U.S. 1 (1949)
Dennis v. United States, 341 U.S. 494 (1951)
Yates v. United States, 355 U.S. 66 (1957)

RECOMMENDED READING

Glenn S. Howard, *Comment, Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 Chicago Law Review 297 (1974).

Sunstein, Cass R. *Democracy and the Problem of Free Speech*. New York: Free Press, 1993.



Case Title: *Herndon v. Lowry*

Legal Citation: 301 U.S. 242

Year of Decision: 1937



KEY ISSUE

To what extent can the state criminalize speech without violating the free speech and assembly clauses of the Constitution?

HISTORY OF THE CASE

The defendant was a member and active organizer in the American Communist Party. The defendant was charged and convicted under the Georgia statutes designed to prevent insurrection. When arrested, the defendant admitted being a member of the Communist Party and stated that the party sent him to Georgia for the purposes of soliciting and organizing membership. No specific admission was given concerning activities at meetings he held.

The most significant evidence against the defendant was found in the printed materials the defendant obtained from the party in New York. Most of the material was deemed irrelevant, with the exception of certain newspapers and books. Statements contained in those specific materials,

especially the books, linked the organization to revolutionary Marxism, approval of the Soviet Union, and a desire to weaken the American armed forces. But especially troublesome for the state were statements advocating the confiscation of land from white landowners in the southern states and self-determination for African Americans in what the party called the “Black Belt.” The literature suggested that the black belt would be an antonymous state made up of land formerly part of the southern states.

The defendant was charged and convicted under Georgia Penal Code §§ 55–58, which dealt with insurrection. The superior court issued a writ of habeas corpus on the grounds that the statute was too vague and indefinite to provide a standard of guilt. The Georgia Supreme Court reversed and denied the habeas petition.

SUMMARY OF ARGUMENTS

The defendant argued that while the state could legislate against abuses of freedom of speech, specifically prohibiting incitement of violence and crime, the regulation must not go beyond measures forbidding speech that created a clear and present danger. Therefore, his arrest was invalid, first, because it violated freedom of speech and assembly and, second, because the statute was too vague to provide a standard of guilt. The clear and present danger standard was based on the Supreme Court’s decisions under the Federal Espionage Acts, in which the court held that words alone were not sufficient. However, when considered in light of the circumstances, the words may be of such a nature as to bring about the evils the legislation intended to prevent.

The state argued for a “dangerous tendency” standard, whereby an utterance could be criminal if it tended to subversion of the government.

DECISION

The Court noted that where a statute was aimed at preventing utterances of a certain kind, application of the law to a statement falling within the specific class would be upheld as long as the statute itself was constitutional. However, a different situation was presented where the statute sought to prohibit certain acts involving a danger of sub-

stantive evil, without any reference to specific language. In those cases, in order to survive a free speech challenge, the state had to show that the words used were highly likely to bring about the evil the statute sought to prevent. That being so, the “dangerous tendency” standard advocated by the state failed.

An abridgment of the freedom of speech and assembly must find its justification in a reasonable apprehension of danger to the government. Vagueness in the statute was the primary issue here. If the statute were too vague, it could be used to punish the fair use of speech and assembly in the political process. In this case, the defendant was charged with incitement to insurrection. The state had the burden of showing that the defendant did so incite. Failure to make this showing means that as applied, the statute unreasonably restricted the defendant’s freedom of speech and assembly. The Court found the evidence insufficient to support a conviction. Significantly, the evidence failed to show that the defendant distributed any of the questioned materials or advocated their principles publicly.

The Court adopted the “clear and present danger” standard advocated by the defendant. The Court noted that the statute did not provide a sufficient standard of guilt. It did not prohibit interference with a specific government function nor specify conduct or utterance falling within its scope. Therefore, the trier of fact would have difficulty determining the circumstances when it had been violated. It was not enough that the accused intended that an insurrection happen some time in the future. It must be shown that the defendant intended the insurrection with some immediacy.

In sum, the Court saw the statute as a dragnet whereby the state could seek conviction of anyone who argued for a change in government, as long as the jury could be convinced that the accused could foresee his or her words would have some effect on the future conduct of others.

Justice Van Devanter, joined by Justices McReynolds, Sutherland, and Butler, dissented. The dissent focused on two points. First, circumstantial evidence had to be sufficient to show that the defendant advocated the policies outlined in the literature. Second, causation was supported

by the fact that the literature was directed primarily at African Americans, whose history made them especially susceptible to incitement.

SIGNIFICANCE

This was the first case in which the Court relied on the “clear and present danger” test and found against the state.

AFTERMATH

After *Herndon*, the Court consistently used the clear and present danger test to uphold the First Amendment rights of citizens and groups. The test was interpreted broadly in favor of citizens’ rights until *United States v. Dennis* (1950) narrowed the test in favor of governmental interests.

RELATED CASES

Charles T. Schenck v. United States, 249 U.S. 47 (1919)

Stromberg v. California, 283 U.S. 359 (1931)

Dennis v. United States, 341 U.S. 494 (1951)

RECOMMENDED READING

Christenson, Ron. *Political Trials in History: From Antiquity to Present*. New Brunswick, N.J.: Transaction, 1991.

John Denvir, *The Casebook Blues: A Review of “Landmark Cases Left out of Your Textbooks,”* 9 Journal of Law and Social Challenges 104 (2008).

Freedom of Expression in the Supreme Court: The Defining Cases. Lanham, Md.: Rowman & Littlefield, 2000.



Case Title: *Hague v. Committee for Industrial Organization*

Legal Citation: 307 U.S. 496

Year of Decision: 1939



KEY ISSUE

Is the freedom to assemble peaceably on public grounds a privilege or immunity of a U.S. citizen protected against state infringement under the Fourteenth Amendment?

HISTORY OF THE CASE

By the late 1930s, Mayor Frank Hague of Jersey City, New Jersey, had become opposed to the presence of organized labor in the city. A Jersey City ordinance forbade “public parades” and “public assemblies that were held without receipt of a permit from the Director of Public Safety.” It further stated that “the Director of Public Safety is hereby authorized to refuse to issue said permit when . . . he believes it to be proper to refuse the issuance . . . for the purpose of preventing riots, disturbances, or disorderly assemblage.” In 1937, Mayor Hague, under this ordinance, denied the Committee for Industrial Organization (CIO) the right to hold meetings at a public hall in Jersey City. He claimed that during these meetings the CIO promoted communist ideas and proposed the overthrow of the government of the United States.

The trial court ruled in favor of the CIO, holding that the city, having failed to prove that the CIO gathered to accomplish anything other than legal aims, had enforced an ordinance that prevented CIO members from exercising their constitutionally protected rights. The Third Circuit Court of Appeals concurred with the trial court’s holding. Hague appealed to the U.S. Supreme Court on the grounds that the lower courts erred in their finding that the city ordinances banning public gatherings and the distribution of printed materials without a permit were facially unconstitutional. The Supreme Court granted certiorari.

SUMMARY OF ARGUMENTS

The members of the CIO argued that the Jersey City ordinance requiring a permit from the director of public safety before conducting meetings on public land resulted in the deprivation of rights and immunities guaranteed by the Constitution. Specifically, the CIO argued that the ordinance