The Schneiderman Case—Some Legal Aspects

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EACH epoch in the history of the Supreme Court is marked by a few "great cases" which characterize and give color to the constitutional trends of the given era. These cases are guide posts which will be closely scanned by the historians in later years to determine the juristic course of the Court: whether the justices were conservative or liberal, whether they followed precedents or the "election returns," whether they were realists or "a priori men," whether they aimed to make law or only to pronounce the law already in existence. True, a long cooling period must elapse before any case, no matter how important it may appear at the time of its pronouncement, falls definitely into the category of "great cases." Yet a tentative appraisal of current case law may be helpful, subject to the later revaluation and perhaps reversal of such temporary judgment. Evidence is at hand to prove that extra-judicial criticism, calmly and reasonably argued, is sometimes translated into corrective decisions by the Supreme Court.

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This article continues the examination of the trends in the Supreme Court since its reformation. See Kennedy, The Bethlehem Steel Case—A Test of the New Constitutionalism (1942) 11 Fordham L. Rev. 133. In the earlier installment the writer asked: "Is there any danger that the new and reconstructed court may forget the wise words of Chief Justice Stone warning of the need of self-restraint [Stone, J., dis. op. in the United States v. Butler, 297 U. S. 1, 78-79, (1936)]. Are there any indications that the human frailties incident to the tenure of the 'Nine Old Men' may return and find lodgment beneath judicial gowns of their more youthful successors?" The partial answers to these questions are found by implication, if not expressly, in the dissenting opinion of Chief Justice Stone in Schneiderman v. United States, 63 Sup. Ct. 1333, 1358-1374 (1943).

1. The term "great cases" is borrowed from Holmes, J., dis. op. in Northern Securities Company v. United States, 193 U. S. 197, 400, 24 Sup. Ct. 436 (1904).

2. Readers of Finley Peter Dunne's delightful stories about "Mr. Dooley" and "Mr. Hennessy" may recall "Mr. Dooley's" humorous observation: "... no matter whether th' constitution follows th' flag or not, th' supreme court follows th' election returns." Dunne, Mr. Dooley's Opinions (1901) 26.

3. Holmes, Collected Legal Papers (1920) 314.

4. Speedy reversal sometimes takes away the initial shock of a startling decision; gradual erosion in later cases may smooth away the sharp edges of a new postulate that cuts deeply into some settled precedents of constitutional law.

Once more a new era in our constitutional history is unfolding. New legal problems, world wide and stupendous, dot the judicial docket; the Supreme Court has been recently reconstructed and formal warning has been given that we may expect changes in the judicial interpretation of constitutional questions. Such warnings have been followed by action. Commentators are beginning to point to certain trends manifested by the newly revamped Court. The entire movement has been happily labeled: New Constitutionalism.

Now, as in the past, there is the tendency to lift up particular cases, label them “great” and affirm that they may be used to estimate and to appraise the long-range developments and judicial temper of a revitalized Supreme Court which, but a few years ago, narrowly escaped from a major operation after the diagnosis of judicial senility, social myopia and economic blindness.

Constitutionalism vs. Communism

Schneiderman v. United States seems to be such a case. Subject to enlargement later the Schneiderman case may be reduced to a few basic problems. It presents the questions of whether the United States government may reopen a naturalization decree which conferred citizenship upon an alien; if so, what degree of proof is required to set aside the grant of citizenship; whether the “principles of the Constitution” are consonant with the principles of Communism; whether the applicant’s behavior or belief determines the necessary degree of attachment to the Constitution. The Schneiderman case raises issues of tremendous importance and provides the justices with an opportunity to expound their contrasted philosophies of law and government. Marked diversity of opinion expressed with considerable acidity indicates that the reconstructed Court is subject to sharp division on fundamental questions. Within the contours of the Schneiderman case may be discovered contrasted views on the doctrine of stare decisis, the importance of following precedents and the contrasted methods of construing statutes.

But the focal issue throughout the Schneiderman case may still be

8. 63 Sup. Ct. 1333 (1943). Hereafter all citations to the Schneiderman case will refer to the pages of the Supreme Court Reporter.
9. Chief Justice Stone displays considerable feeling in his dissent especially against the separate concurring opinion of Mr. Justice Douglas with its proposal that a new construction be given to the statute “to meet the exigencies of this case”. Later the Chief Justice refers to “this easy proposal for the emasculation of the statute” and offers “several plain and obvious answers.” P. 1360. See infra, note 18.
stated in this form: Constitutionalism v. Communism. How far do the basic tenets of Communism clash with "the principles of the Constitution"? Here is a case that plumbs the depths of American citizenship, a civic relation between individual and Nation eloquently defined by Justice Murphy as "the highest hope of civilized men." While the Schneiderman case revolved about the political rights of one individual—William Schneiderman—Justice Rutledge sensed the true import of the case when he said that "the decision affects millions.

Before considering the exact questions presented to the Court it may be helpful to set down certain phases of naturalization and denaturalization proceedings which are acceptable to all the justices. Thus we may narrow the controversial issues that divided the Court.

Despite the deep rooted problems presented, the Schneiderman case paradoxically raises no penetrating questions of constitutional or substantive law. Both the majority and minority justices agree that there is clear and unlimited authority in Congress "to establish a uniform Rule of Naturalization." The judicial debate centers not about the power of

10. "For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men." P. 1335.

11. P. 1356.

Doubtless the dissenting justices would readily agree with the majority that American citizenship is a priceless possession but they contend that it is not to be cheaply bought with the spurious coin of political philosophies which are hostile to American institutions. The minority justices would doubtless agree with Justice Rutledge that "the decision affects millions", millions who have already earned their right to become citizens by proved devotion to the ideals and "the principles of the Constitution." These thoughts run through dissenting opinion of Chief Justice Stone. Pp. 1358-1375.


This power over naturalization is exclusively resident in the Congress. No state has any power to confer citizenship upon an alien. Chirac v. Chirac, 2 Wheat. 259 (1817). Congress has uniformly exercised its discretion as to the method of naturalization by delegating its power to the judiciary since 1790. But it seems clear that this judicial monopoly could be ended by appropriate Congressional legislation and the power to determine naturalization cases vested in an administrative tribunal.

One of the questions mentioned but not decided by the court was the right of Congress to confer jurisdiction upon the courts to decree the admission of citizens, and then to qualify the grant of judicial power by allowing any court to reopen and to review the earlier decree by independent and original action. P. 1336n. Justice Rutledge discusses the same problem without deciding it. Pp. 1356-1358. It is true, as is said in United States v. Wong Kim Ark, 169 U. S. 649, 703 (1898) that the power of naturalization given to Congress "is a power to confer citizenship, not a power to take it away." But such right of
Congress to designate the alien classes to be barred from admission to citizenship, but rather poses the question of whether Congress has exercised its admitted power to bar Schneiderman from citizenship because of his political affiliations. All the justices agree that the preliminary examination of candidates for citizenship and requisite proof of satisfaction of all the conditions imposed by Congress in the naturalization statute carry with them the duty on the applicant of establishing by the preponderance of evidence his conformity with all the stated requirements.  

_Schneiderman—The Man_

"Immediately we are concerned with only one man, William Schneiderman..." The quotation appears in the first sentences of Justice Rutledge's concurring opinion. On that account it is important to consider the career of William Schneiderman, the man. William Schneiderman was born in Russia on August 1st, 1905 and came to the United States when he was about three years of age. At the age of 16 he became a charter member of the Young Workers (now Communist) League of California. He remained a member of the League until 1929 or 1930. For two or three years in the five year span between 1922-1927, he was educational director of the League actively engaged in organizing forums and study classes. Just after his naturalization Schneiderman became "organizer" and "director" of the League and was responsible for its administrative, political and educational affairs. During this period and later he was a delegate to the League's National conventions. In 1924, he filed his declaration of intention to become a citizen and in the same year he joined the Worker's Party, the predecessor of the Communist Party of the United States. He soon became "corresponding secretary" of the Party and after his naturalization continued his activities, as delegate, organizer and officer of the Communist organization, which was an affiliate of the Third International.

The above facts are not disputed and are repeated without material variance in both the majority and minority opinions. They warrant certain conclusions and implications which seem to be beyond debate.
Schneiderman was a member, an active and outstanding member, of the Communist organizations during his formative years and gradually became a leader in the subversive political movements. His whole career discloses not a juvenile plunge into radical politics but a steady expansion of interest and enthusiasm increasing in intensity as he grew up. Charter member, director, organizer, delegate, instructor, corresponding secretary—Schneiderman was no mere political hack but an enthusiastic and informed supporter whose adherence to and support of Communist programs persisted and developed down the years. While there is an issue between the justices regarding the meaning of the statutory phrase, "principles of the Constitution" and the "attachment" or lack of attachment of Schneiderman to these principles, it is not disputable that Schneiderman maintained unwavering, vigorous and constant "attachment" to the principles of Communism from his entry into the juvenile branch of the organization at the age of sixteen to the time of the denaturalization proceedings. Unless such close relationship to militant communism conforms with American Constitutionalism, the government's case seems to be firmly established.

Reviewing the above life history of William Schneiderman and his political affiliations from early youth to the time of his trial it appears that the trial court had ample grounds to conclude that William Schneiderman was thoroughly imbued with the principles of communism. If those principles were in conflict with the principles of the Constitution of the United States, it would seem that the case for the Government, which was sustained in the trial court and was affirmed by the Circuit Court of Appeals, provides a sound basis for reaffirmance in the Supreme Court of the United States unless some error of law, not revealed in the earlier stages of this proceeding, came forth out of the final review by the Supreme Court of the United States.

**The Issues**

Two sections of the Naturalization Act of 1906 provide the background material for much of the judicial argument. Section 4 reads as follows:

"Evidence of residence, character and attachment to principles of Constitution; evidence of witnesses.—It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States, five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the
United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.”

Section 15 reads, in part, as follows:

“It shall be the duty of the United States district attorneys, for the respective districts or the Commissioner or Deputy Commissioner of Naturalization upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. . .”

The principal issues center around the questions of the degree of proof that the United States was obliged to sustain in the denaturalization proceeding; the quantum of “attachment” to the principles of the Constitution to be disclosed by candidates for admission to American citizenship and the all pervasive question: whether force and violence are necessary parts of the Communist program. Political as well as legal authorities are found in the text and the footnotes. When legal precedents are cited by the majority, the case-law invoked is frequently drawn from minority opinions or consist of fragments from allegedly analogous cases pieced together and offered as a justification for the reversal of decisions of the federal trial and appellate courts. The final impression after reading

18. The Court relies upon the following dissenting opinions: (1) United States v. Macintosh, 283 U. S. 605, 635, 51 Sup. Ct. 570, 579 (1931), which is cited three times. See 63 Sup. Ct. 1340, 1341, 1355. The majority also questions the soundness of United States v. Schwimmer, 279 U. S. 644, 49 Sup. Ct. 448 (1929) and United States v. Macintosh, supra in the matter of their holding that the Naturalization Act of 1906, Section 4, calls for real belief in Constitutional principles and not mere behavior indicating attachment to the principles of the Constitution. See 63 Sup. Ct.-1333, 1341 and 1341n.

Chief Justice Stone indicates clearly that the Court is departing from former precedents. “Until now this Court, without a dissenting voice, has many times held that in a suit under this statute it is the duty of the court to render a judgment cancelling the certificate of naturalization if the court finds upon evidence that the applicant did not satisfy the conditions which Congress had made prerequisite to the award of citizenship.” P. 1359.
the opinions of the majority is that the doctrine of *stare decisis* is not too rigorously followed by the Court in the *Schneiderman* case.

*Clear, Unequivocal and Convincing Evidence*

The first legal proposition, mentioned at least six times in the prevailing opinions, is distinctly procedural; it imposes a very exacting burden of proof which must be sustained by the Government in order to justify cancellation of Schneiderman's certificate of citizenship. Justice Murphy states the rule of evidence as follows:

"Assuming as we have that the United States is entitled to attack a finding of attachment upon a charge of illegality, it must sustain the heavy burden which then rests upon it to prove lack of attachment by 'clear, unequivocal, and convincing' evidence which does not leave the issue in doubt."20

Stated in various forms this obligation of the Government to support its case by "clear, unequivocal and convincing" evidence runs through the argument of the majority. We now proceed to analyze this rule of procedure.

The importance of the stated measure of proof in the development and establishment of the Court's opinion is clear. The onerous rule of evidence compelled the Government to do more than establish its case against Schneiderman by sustaining the preponderance of evidence. Just how much more than the preponderance of proof is debatable and will be considered later.21 But it is submitted that the successful maintenance of this procedural point by the Court is the key principle of the Court's argument. If it appears, after examination, that the Government should not be charged with the duty of maintaining its case by "clear, unequivocal and convincing evidence," and that a preponderance of proof alone suffices, then the case for the Government seems to be firmly established and the judgments of the federal courts, trial and appellate, should have been affirmed.

This absolute dependence of the Court's opinion upon a stated point of procedure is demonstrable not alone from a reading of the dissenting opinion, but is virtually conceded in the majority opinion. Therein, Justice Murphy says:

"We do not say that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence. But that is not the issue here. We are not concerned with the question whether a reasonable man might

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20. P. 1341.
As pointed out before, this is a denaturalization proceeding in which, if the Government is entitled to attack a finding of attachment as we have assumed, the burden rests upon it to prove the alleged lack of attachment by 'clear, unequivocal and convincing' evidence. That burden has not been carried.\(^2\)

A fair interpretation of the above quotation would seem to lead to the conclusion that Justice Murphy conceded that a reasonable man, judge or juror, could have found that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence. If it were sufficient as a matter of law to so find, and a reasonable man could reach these conclusions, Justice Murphy is clearly conceding that such finding would not be disturbed.

We now turn to consider why the Supreme Court was not "concerned" with the findings of a "reasonable man" regarding the principles of the Communist Party in 1927.

By what steps did Justice Murphy establish his contention that "clear, unequivocal and convincing" evidence is necessary in order to permit the Government to revoke the naturalization certificate? Certain it is that not a single pertinent precedent of the Supreme Court was available to justify the placement of this heavy burden of proof on the Government.\(^3\) Despite the many cases in the Federal courts wherein denaturalization had been sought in the past, not one was cited by the Court in aid of its novel contention that a denaturalization statute passed to aid the Government should create a procedural strait-jacket restricting the relief of the United States under the statute. Where did the learned justices go in quest of their "clear-unequivocal-and-convincing" test? From what line of cases did they derive the exacting formula of proof which provided the core of their argument? The Court was obliged to invoke an alleged analogy between the denaturalization cases and cases dealing with the revocation of a public grant of land. Having found such an analogy, the Court contended that the same rule of evidence applied in both types of legal action. The pertinent passage disclosing this alleged analogy between denaturalization and land-grant cases is as follows:

"Johannessen v. United States states that a certificate of citizenship is 'an instrument granting political privileges, and open like other public grants to

\(^{22}\) P. 1350. Italics added.

\(^{23}\) Supra note 18.
be revoked if and when it shall be found to have been unlawfully or fraudu-
ently procured. It is in this respect closely analogous to a public grant of
land. . . ." 225 U. S. 227, 238, 32 S. Ct. 613, 615, 56 L. Ed. 1066. See, also,
Tutun v. United States, supra. To set aside such a grant the evidence must be
'clear, unequivocal, and convincing'—"it cannot be done upon a bare prepon-
derance of evidence which leaves the issue in doubt' Maxwell Land-Grant
Case (United States v. Maxwell Land-Grant Co.,) 121 U. S. 325, 381, 7 S. Ct. 
1015, 1029, 30 L. Ed. 949. . . ."24

The source of the clear-and-convincing rule of evidence, applied in
the Schneiderman case, is now revealed. It is a hybrid-citation derived
in part out of Johannessen v. United States25 and in part out of the
Maxwell Land-Grant case.26 Justice Murphy apparently contends that
there is a close analogy between the issuance of a certificate of citizen-
ship and the issuance of a public deed of land on the matter of burden
of proof. Having discovered that the denaturalization cases and the land-
grant cases are juristic twins, the next step was easy: the Court points
out that the Land-Grant cases required "clear, unequivocal and convinc-
ing" evidence in order to set aside such a land grant. Ergo, the same
"clear, unequivocal and convincing evidence" must be required in the
analogous cases of actions to revoke a grant of citizenship. Q.E.D.

Reduced to a syllogistic form Justice Murphy's argument would seem
to follow this logistic pattern:

A grant of citizenship is "closely analogous" legally to a public grant
of land.

But a public grant of land may only be revoked by "clear, unequivocal
and convincing" evidence.

Therefore a grant of citizenship may only be revoked by "clear, un-
equivocal and convincing" evidence.

This somewhat labored method of linking the "clear-unequivocal-and-
convincing" rule of evidence with the burden of proof in cases involving
revocation of citizenship calls for careful reexamination before accept-
tance. Lacking any denaturalization case which enunciated such burden
of proof, the very necessity which impelled the Court to piece together
bits of language—in jig-saw puzzle fashion—from a denaturalization de-
cision and a Land-Grant case and to work them into a new rule of evi-
dence argues for a careful and cautious revaluation of the Johannessen

and Maxwell Land-Grant cases before accepting such circuitous argumentation.

The reproduction in full of the pertinent paragraphs from the Johannessen and Maxwell cases only partially set down in Justice Murphy's opinion may aid in testing the alleged analogy between a grant of citizenship and a grant of land. The complete paragraph from the Johannessen case reads as follows:

"Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured ex parte in the ordinary way, any conclusive effect as against the public. Such a certificate, including the 'judgment' upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect, closely analogous to a public grant of land (Rev. Stat., § 2289, etc.), or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., § 4883, etc.)."

It is respectfully argued that the complete paragraph materially weakens the claim of Justice Murphy that there is a close analogy between the certificate of citizenship and the public grant of land or that such analogy found expression in the Johannessen case. First of all, the unabridged paragraph shows that the Supreme Court in the Johannessen case was not stating that there was any analogy, close or otherwise, between the degree of proof required in denaturalization proceedings and in the revocation of land grants. The Court was primarily engaged in defending the right of the Government to seek a revocation of citizenship. It was not at all concerned with the question whether "clear, and convincing" evidence was necessary to revoke a certificate of citizenship, but solely with the question whether there could be any revocation at all!

The exact clause of the above passage from the Johannessen case which deserves particular emphasis reads as follows: "It is in this respect closely analogous to a public grant of land or of the exclusive right to make, use and vend a new and useful invention." Obviously the question arises: in what respect is a grant of citizenship "closely analogous" to a public grant of land? The abbreviated quotation in the Schneiderman case leaves the reader with the impression that the denaturalization and land-grant cases are closely analogous in the matter of degree of proof which must be introduced in order to set aside the grant of land.

27. Supra note 25, at 238. Italics added.
28. Ibid.
29. Ibid. Italics added.
or the naturalization certificate. A rereading of this passage from the Johannessen case in unabridged form shows clearly that Justice Pitney was referring to the right of the government to revoke naturalization decrees and not to the burden of proof which must be presented in order to revoke.\(^{30}\)

Similarly the partial quotation from the Maxwell Land-Grant case, reproduced in the Schneiderman case, merits complete citation for purposes of comparison. The complete passage reads as follows:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."\(^{31}\)

Here for the first time we meet with the "clear, unequivocal and convincing" rule applied—it should be noted—not even to all land-grant cases but only to those actions which seek to annul a written instrument "for fraud or mistake." No mention is made of the extension of this exacting requirement of proof to denaturalization cases. Save for the remote and unsatisfactory reference to public grants of land in the Johannessen case, the extension of the test of "clear, unequivocal and convincing" evidence to denaturalization cases seems to be largely judge-made and unsupported by past precedents.

Certainly there is considerable warrant for the conclusion of Chief Justice Stone that this part of the majority opinion is novel and indefensible. The dissenting Chief Justice said:

"As we are not here considering whether petitioner's certificate of naturalization was procured by fraud, there is no occasion, and indeed no justification, for importing into this case the rule, derived from land fraud cases, that fraud, which involves personal moral obliquity, must be proved by clear and convincing evidence. The issue is not whether petitioner committed a crime but whether he should be permitted to enjoy citizenship when he has never satisfied the

\(^{30}\) That the Court in the Johannessen case is not at all concerned with the degree of proof necessary to revoke naturalization certificates but is only dealing with the right to revoke is further evidenced by the reference to letters patent. \textit{Id.} at 238-239. The Court develops at length the power of the government to cancel letters patent issued unlawfully or through mistake or fraud and argues that \textit{in this respect} the same right of revocation is given to government in adjoining fields of public grant, naturalization and letters patent. The entire passage is devoid of any reference to rules of procedure or burden of proof.

\(^{31}\) Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 1029 (1887). Italics added.
basic conditions which Congress required for the grant of that privilege. We are concerned only with the question whether petitioner's qualifications were so lacking that he was not lawfully entitled to the privilege of citizenship which he has procured. There is nothing in § 15, [of the Naturalization Act of 1906] nor in any of our numerous decisions under it, to suggest that such an issue is to be tried as fraud is tried, or that it is not to be resolved, as are other cases, by the weight of evidence. No plausible reason has been advanced why it should not be.\textsuperscript{32}

But even assuming that "clear and convincing evidence" must be produced to establish the Government's case, the cause of Schneiderman is not clearly established, for it is easily demonstrable that the evidence adduced to associate him to the Communist doctrine and program is not cloudy or unconvincing; at least it was set forth in a manner which convinced the Federal courts (trial and appellate). The communists' adherence to force and disorder is supported by a welter of supporting material in the footnotes and the appendix of the dissenting opinion.\textsuperscript{33}

Turning to the authorities it is true that there are many variant views of the terms "clear, unequivocal and convincing" in the area of evidentiary proof. The meanings run from a modest mandate that this rule of evidence merely calls for a preponderance of proof\textsuperscript{34} to the exacting requirements that "unequivocal" evidence imports proof of the nature "of mathematical certainty—something that in human affairs is all but impossible to obtain."\textsuperscript{35}

The true meaning of these terms seems to be somewhere between the above poles. Clear and convincing evidence requires something more than a preponderance of proof and something less than "mathematical certainty." Going back to the above quotation from the Maxwell Land-Grant case it is significant that the Court follows the "clear" evidence test by stating that the annulment of a land grant "cannot be done upon

\begin{footnotes}
\item[32.] Pp. 1361-1362.
\item[33.] Pp. 1358-1375. See Dr. Timasheff's complete coverage of the same problem, supra pp. 209-230.
\item[34.] American Freehold Land Mortgage Co. v. Pace, 23 Tex. Civ. App., 56 S. W. 377, 391 (1900) states that "clear" evidence is evidence that "is not ambiguous, equivocal and contradictory." And it has been said that "clear and convincing proof" does not necessarily mean, uncontradicted proof. "It is sufficient if it is proof of a probative and substantive nature carrying the weight of evidence sufficient to convince ordinary prudent minded people. Rowland v. Holt, 253 Ky. 718, 70 S. W. (2d) 5, 9 (1934). See also Ward v. Waterman, 85 Cal. 488, 24 Pac. 930, 934 (1890); Karr v. Pearl, 212 Ky. 387, 278 S. W. 631, 632 (1926).
\item[35.] Merrick v. Ditzler, 91 Ohio 256, 257, 110 N. E. 493, 494 (1915).
\end{footnotes}
a bare preponderance of evidence which leaves the issue in doubt."\textsuperscript{36}
Such temperate explanation of the meaning of clear and convincing evidence strongly supports the authorities that maintain that such terms merely require evidence "of a probative and substantial nature . . . sufficient to convince ordinarily prudent minded people."\textsuperscript{37}

"Attachment to the Principles of the Constitution"

One of the provisions of the Naturalization Act of 1906, that presented a debatable question to the justices, is found in Section 4 which provides that a candidate for citizenship must prove that during his five-year period of probation "he has behaved as a man of good moral character attached to the principles of the Constitution. . . ."\textsuperscript{38} Latent in this clause are two questions of construction: (1) What was the intention of Congress in prescribing that a candidate must be attached to the principles of the Constitution? (2) Did it suffice to show that the candidate "behaved" as an individual thus attached, or was it necessary for the applicant to prove that he not only behaved, but also believed in accordance with fundamental constitutional principles?

Reverting to the first question of the qualities of attachment prescribed by Congress in Section 15, the Supreme Court in the Schneiderman case referred no less than three times to a sentence in the dissenting opinion of Chief Justice Hughes in \textit{United States v. Macintosh}\textsuperscript{39} wherein the Chief Justice characterized the requirement of "attachment to the principles of the constitution" in the following manner: "Here, again, is a general phrase which should be construed, not in opposition to, but in accord with, the theory and practice of our government in relation to freedom of conscience."\textsuperscript{40}

Relying heavily upon the statement of the former Chief Justice, the majority of the justices in the Schneiderman case virtually dismissed the provision requiring proof of "attachment to the principles of the constitution" on the ground that it is vague and elusive, to be satisfied by candidate's reputation rather than by character, by his behavior rather than by belief, by passive inaction rather than affirmative evidence of good will. In so far as the Court seeks support for its whittling away of the mandate of attachment to constitutional principles by invoking the words

\textsuperscript{36} See note 31, supra.
\textsuperscript{37} Rowland v. Holt, supra note 34.
\textsuperscript{38} Supra p. 235.
\textsuperscript{39} 283 U. S. 605, 627, 51 Sup. Ct. 570 (1931).
\textsuperscript{40} Id. at 635.
of Chief Justice Hughes in the Macintosh case, a brief survey will disclose that there is a wide difference between the Schneiderman and Macintosh cases and that the dissent of Hughes in the Macintosh case does not argue for his implied acceptance of Schneiderman’s claim of citizenship.

The full context of United States v. Macintosh clearly indicates that Chief Justice Hughes was not defending the freedom of a citizen-candidate to believe in or teach opposition to organized government or to endorse force and violence as a method of overthrowing lawful authority. He carefully pointed out that Douglas Clyde Macintosh “entertained none of these disqualifying opinions and had none of the associations or relations disapproved.” The offense of Macintosh was not hostility to the Government, nor lack of attachment to the principles of the constitution, but a mental reservation against the bearing of arms in the event that his country, in his judgment, was entering upon an unjust war. There is a wide chasm separating Macintosh, the professor of theology who served as a Chaplain in World War I, and Schneiderman, an avowed Communist who was actively engaged in furthering the cause of Communism for many years.

It is interesting to note that Justice [now Chief Justice] Stone joined in the dissent of Chief Justice Hughes in the Macintosh case and yet as a result found nothing inconsistent in his vigorous opposition to the admission of Schneiderman. True, Chief Justice Hughes argued that “attachment” to the constitution is a “general phrase”, but he did not mean that such phrase is to be read out of the statute or reduced to the vanishing point in relation to an individual who has long been a leading figure in an organization dedicated to the forceful overthrow of organized government.

Apart from Chief Justice Hughes’ interpretation of the meaning of “attachment to the principles of the Constitution” in his dissent in the Macintosh case, there is no room for doubt as to Chief Justice Hughes’ estimate of Communist activities in this country in the early ’20’s, nor is it possible to argue or to imply from his dissent in the Macintosh case that he would have joined the prevailing justices in the Schneiderman case. Elsewhere and in a very decisive manner Chief Justice Hughes clearly declared his views on the fundamental issue of Communism versus Constitutionalism, and particularly on the basic question whether threats of force and violence directed against organized government were

41. Id. at 628.
mere mouthing of irresponsible Communist speakers or formed a formidable and necessary part of their political philosophy twenty years ago. On January 21, 1924, Chief Justice [then Secretary of State] Hughes transmitted to the Senate Judiciary Committee an exhaustive 500-page document fully developing the political activities of the Communist Party in the United States. Summarizing the authorities collected in his survey, Secretary of State Hughes said:

"From the above it will be seen that the question of whether communist programs contemplate the use of force and violence has been passed upon by every class of tribunal which could pass upon it, namely, Federal and State Courts, administrative tribunals and legislative committees of both Federal and State governments, and in every class the result has been in support of the position that force and violence are inseparable from communist programs." 43

Despite the triple use of Chief Justice Hughes' dissent in the Macintosh case it is submitted that Chief Justice Stone's position, rather than the majority opinions of Justices Murphy, Douglas and Rutledge, represents the views of the former Chief Justice. Justice Stone joined with Chief Justice Hughes in the Macintosh case. It is believed that Chief Justice Hughes would have returned the compliment and participated in the dissent of Chief Justice Stone in the Schneiderman case had he then been a member of the Supreme Court. A full consideration of the Macintosh case leads to the conclusion that the dissenting opinion of the former Chief Justice gives scant support to the majority in United States v. Schneiderman.

"Behavior or Belief"

Another question of statutory construction which comes out of Section 15 of the Naturalization Act of 1906 and is closely interlocked with the foregoing discussion of the requirement regarding "attachment to the principles of the constitution", is the type and form of attachment to the organic law which must be shown. Does it suffice that the applicant act like a man attached to the American way of life or is it necessary that the candidate believe in our constitutional form of government? Justice Murphy, writing for the majority, construes the statute to mean that

42. The date of this report—January 21, 1924—coincides with the five-year period examined by the Supreme Court in the Schneiderman case. Oddly enough, Schneiderman filed his declaration of intention to become a citizen in the same year, 1924, and his certificate of citizenship was issued in 1927.

43. RECOGNITION OF RUSSIA, Hearings before a sub-committee of the Committee of Foreign Relations on S. Res. 50, 68th Cong., 1st Sess. (1924) 500. Italics added.
behavior rather than belief is the important test and is so intended by Congress. Under this view it would seem that reputation is more important than character; that a nod in the direction of the Constitution is what Congress demands rather than genuine good will. Once more the viewpoint of the prevailing justices is squarely contra to the construction of this same clause in United States v. Macintosh. In that case the court said:

“In specifically requiring that the court shall be satisfied that the applicant, during his residence in the United States, has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, etc., it is obvious that Congress regarded the fact of good character and the fact of attachment to the principles of the Constitution as matters of the first importance. The applicant's behavior is significant to the extent that it tends to establish or negative these facts.”

Here is a clean-cut issue. Did Congress intend to allow aliens to become citizens on the basis of their conduct or their character? The Macintosh case points out that the very section which uses the word “behavior” requires the testimony of at least two witnesses “as to facts of residence, moral character and attachment to the principles of the constitution...” Note that this mandate certainly is not satisfied by anything less than facts of moral character and attachment to the constitutional principles; mere proof of behavior does not suffice except “to the extent that it tends to establish or negative these facts.”

A "Tenable Conclusion"?

Once the Court was satisfied that the Government had the burden of proving by “clear, unequivocal and convincing evidence”, that Communism connoted force and violence and that conflicting evidence prevented the Supreme Court from finding that the Government had proved this issue beyond any doubt, it was possible for the majority to propose a Communist program that presented a mild exterior freed from any violent agitation. In lieu of the forcible measures generally associated with the spread of Communism, the Supreme Court offers the substitute of oratory as the chief weapon countenanced by political reformers arguing for the adoption of Communism. At least such a moderate interpretation of Communism, argues Justice Murphy, is permissible after an

44. United States v. Macintosh, 283 U. S. 605, 616 (1931). Italics added except the italicized word fact which is italicized in original text.
45. Id. at 614.
46. Supra note 44.
examination of the Communist authorities prevailing in America twenty years ago.

The learned Justice says:

"A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."47

This remote prospect of force to be used only when all peaceful means fail does not, as Mr. Justice Murphy seems to argue, spell out the purposeful abandonment of violent action for the sweet and soothing syllogism of forensic debate, but is more accurately expressed as the unwilling postponement of futile gestures of violence until the opportunity presents itself to use force with a probable chance of success. It is submitted that such a quiescent attitude by communists, either in America or elsewhere, does not connote the abandonment of force but merely the substitution of a Party policy which awaits the opportune moment to use force.48 One might as well argue that the Low Countries of Europe

47. P. 1352.

48. Writing under the suggestive chapter-heading The Trojan Horse, Dr. Fulton J. Sheen says: "Another reason for the failure of Communism to achieve its revolutionary end by preaching revolution was the fewness of Communists. As the official spokesman of Communism has put it: 'In the overwhelming majority of capitalist countries, the Communists are too weak to lead the masses directly into the fight for the establishment of the proletarian dictatorship.' Hence the necessity of changing the approach in order to effect the revolution. Accordingly in July and August of 1935 it called the Seventh World Congress of Communism which decided to change the tactics of Communism. From that point on it resolved to use non-revolutionary language in the open to attain revolutionary ends in secret." SHEEN, LIBERTY, EQUALITY AND FRATERNITY (1938) 86-87. The figure of the Trojan Horse is not the invention of the critics of Communism. Speaking before the World Communists at the Moscow Congress, George Dimitrov said: "Comrades, you remember the ancient tale of the capture of Troy. Troy was inaccessible to the armies attacking her, thanks to her impregnable walls. And the attacking army after suffering great losses, was still unable to achieve victory until with the aid of the famous Trojan horse it managed to penetrate to the very heart of the enemy camp." Id. at 90. It must be noted that the issue in the Schneiderman case is the political program of Communism in 1927 (not in later years). Strictly speaking, the use of Communist authorities after 1927 may not be permissible, but it is significant that long after 1927, the concealed threat of force and violence still prevailed in Communist propaganda. SHEEN, supra 85-110. In any event, as Chief Justice Stone points out, "... whether at some time after 1927 the Party may have abandoned these doctrines is immaterial." P. 1369.
have given up their objective of the forcible overthrow of Nazi rule in the subjugated lands. Not so. What these distressed people have given up (and with the full support and even advice of the United Nations) is the costly and unwise display of individual acts of aggression and violence in advance of the planned day of liberation. Is there any doubt that the French, Belgian and Norwegian peoples are prepared to strike at the appropriate moment? In the meantime their philosophy has not changed. So with Communism: it merely awaits the Day when force may be used with some hope of success.

Continuing his argument of remoteness regarding the possible or probable application of violent means to bring about communism, Justice Murphy says:

"There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that it is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." 49

It is respectfully asked: From whence comes the definition of Communist propaganda which reduces it to a visionary expression of the possible future exercise of force if all other means fail. Certainly this mollified definition of Communism does not seem to fit the majority of passages cited in the footnotes or appendix of the Schneiderman case. The Court seems to have confused the promise and performance latent in Communist writings. It may well be that the performance of violence and force must be postponed (due to lack of opportunity for present day success) but planned postponement does not justify the easy assumption that Communism is therefore promising not to use its familiar weapons because it no longer believes in them. Again it may be asked whether the mandates of law or self-preservation require that America must await tangible and convincing proof of "a clear and present danger of public disorder or other substantive evil" coming forth from communism before the advocates of such political theories may be deprived of the right of citizenship. Certain it is that the weight of political documents appearing in the text and appendix of the Schneiderman case warranted the conclusion of the inferior Federal Courts that the continued presence of active communists constituted at least a threat against the "principles of the

49. P. 1352.
Constitution"; and the same documents likewise render extremely doubt-
ful the contention of the majority that communistic propaganda amounted
to a "mere doctrinal justification or prediction of the use of force under
hypothetical conditions at some indefinite future time."

The Great Divide

There is a wide valley separating the majority and the minority of
the Supreme Court in United States v. Schneiderman. This division is
something more than a difference of opinion on the permanency of past
precedents in the naturalization cases, something more than a diversity
of interpretation of basic statutes controlling admission to citizenship,
something more than a clash of judicial minds over the real doctrines of
Communism. True, these divergencies were present and have been noted
in the above pages. But the most pronounced division of juristic think-
ing is revealed in the enumeration and evaluation of the principles of the
United States Constitution. One might expect to find some core of agree-
ment among the Justices regarding the Constitutional principles, some
basic point of departure. Instead we discover the Great Divide—a juris-
tic chasm separating the members of the Supreme Court on the most
fundamental principles of our organic law. Chief Justice Stone some-
what dispairingly says: "My brethren of the majority do not deny that
there are principles of the Constitution", and the Chief Justice then
proceeds to point out that his brethren on the Court virtually contend
that there is no enduring principle of the American Constitution; that
there is no tenet of the Federal charter which cannot be altered by
amendment; that it is politically and juristically possible for Communism
and Constitutionalism to coexist in America! "The constitutional fore-
fathers, fresh from a revolution, did not forge a political straitjacket for
the generations to come." And so, says the majority, they wrote Arti-
cle V with its processes of constitutional change. Why not leave open
the freedom of thought to evolve changes, any changes, to our organic
law? The argument of the Court has plausibility and persuasion if we
once more accept the majority's contention that Communism speaks with
a soft voice rather than with a mailed fist. The words of Chief Justice
Stone give answer to this contention of the Court:

"On the argument we were admonished that petitioner favored change in
our form of government, which is itself a principle of the Constitution, since the

50. P. 1363.
51. P. 1342.
Constitution provides for its own amendment, and that in any case the Communist Party had greatly modified its aims in more recent years. It is true that the Constitution provides for its own amendment by an orderly procedure but not through the breakdown of our governmental system by lawless conduct and by force. It can hardly satisfy the requirement of 'attachment to the principles of the Constitution' that one is attached to the means for its destruction.1

Conclusion

The Schneiderman case offers many interesting questions for long range consideration.52 Has the Schneiderman case the makings of a "great case"? Does it foretell the new era of Constitutional law, a further development of the New Constitutionalism? Does it prepare the way for a revision of Constitutional principles, perhaps for an infusion of Communist doctrines? While the majority of the Justices contend that the

52. P. 1369.
53. One of these questions might be a consideration of the "clear and present danger" test proposed by Justice Murphy in determining whether political agitation should be quelled. He indicates that he is not in favor of governmental interference unless the exhortation calls for "present violent action which creates a clear and present danger of public disorder or other substantive evil..." (P. 1352. Italics added). What is a present danger? When is such danger clear? The Supreme Court has left these questions open. [Bridges v. California, 314 U. S. 252, 262-263, 62 Sup. Ct. 190, 193 (1941)]. The phrase seems to throw a mantle of protection around the individual or political party advocating violence providing only that they place a future date upon the threatened use of force in the overthrow of government and thereby establish a sort of legalized timing device on the predicted use of violence. It would be worthwhile to compare Justice Murphy's "time table" with Professor Chaffee's vigorous defense of the "clear and present danger" formula which runs through his excellent treatise on free speech. Chaffee, Free Speech in the United States (1941). Professor Chaffee also uses the "stop-watch" formula to determine whether political agitation is to be tolerated or condemned. He argues that the Deportation Act was supposed to protect us from "the alien who urges his hearers to blow up the Capitol this afternoon, kidnap the President tonight, and elect Commissars on the Mall tomorrow." (Id. at 221). Sed quere: Isn't Professor Chaffee circumscribing the term "present danger" too closely? It may be asked whether clear and present danger may not embrace a danger of public disorder next week, next month, next year.

It would be interesting to examine the soundness of the clear and present danger test now applied by the Court alike to political parties and criminal actions in the matter of free speech. It may well be that such a test is permissible in determining the criminal acts of a single individual, but it does not follow that such test is equally defensible when invoked as a standard in the determination of aliens' fitness for admission to American citizenship. Otherwise stated, we may be willing to admit that the "clear and present danger" standard should be used to prevent a citizen from being sent to a penitentiary cell; but it does not follow that the same test should determine an alien's right to set up a Communist cell.
tenets of Communism can be interwoven legally into the framework of the Constitution, they indicate clearly that the stated principles "are distasteful to most of us".\textsuperscript{54} However distasteful to the Justices may be the program of Communism, the fact remains that Communism comes forth from the \textit{Schneiderman} case with two major victories scored against the United States Government in any subsequent effort to review naturalization proceedings: (1) once the decree of citizenship is granted to a Communist, it is practically impossible for the Government to seek a successful revocation of his citizenship because of the impossibility of satisfying the heavy burden of proof imposed in the \textit{Schneiderman} case, a burden which compels the Government to prove beyond doubt the defendant's lack of attachment to the Constitution and the dominance of force and violence as essential ingredients of Communism. (2) The Court has defined a modified form of Communism which seems to be clearly unsupported save by a few casual authorities of Soviet origin, and has offered this sweetened program as a "tenable conclusion" regarding the purposes of Communism.

Two comforting points for the critics of the \textit{Schneiderman} case deserve final mention; later consideration may permit of their emphasis and enlargement: (1) if the exacting and unprecedented rule of evidence imposed upon the Government can be shown to be indefensible in theory and operation (and it can be) and if the Government can sustain the fair burden of proof that Communism endorses unlawful action and physical violence as parts of its agenda (and it can do so) then even the majority of the Supreme Court must join with the dissenting Justices in the overthrow of \textit{United States v. Schneiderman}. (2) A case does not become "great" until it has been subjected to the test of fair comment and reasoned analysis, whether it be the criticism of judicial or extra-judicial critics.\textsuperscript{55} This "cooling" period for the \textit{Schneiderman} case has not yet expired. The persuasive and forceful dissent of Chief Justice Stone may yet win over the majority of his brethren. It is hoped that the last word has not yet been written regarding the penetrating problems of citizenship tentatively decided in \textit{United States v. Schneiderman}.

\textsuperscript{54} P. 1342.
\textsuperscript{55} \textit{Supra}, note 5.