THE FIRST AMENDMENT IN THE BALANCE

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"Let us consider, my Lords, that arbitrary power has seldom or never been introduced into any country at once. It must be introduced by slow degrees, and as it were step by step, lest the people should see its approach. The barriers and fences of the people's liberty must be plucked up one by one, and some plausible pretences must be found for removing or hoodwinking, one after another, those sentries who are posted by the constitution of a free country for warning the people of their danger."

Erskine, in defense of Thomas Paine, in 1792,
for publication of *The Rights of Man.*
WALFORD, SPEECHES OF THOMAS LORD ERSKINE 336 (1870).

THE first amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." In determining whether this provision has been violated, should a court "balance" the "competing interests" involved in the particular case?

Such an approach, for which Mr. Justice Frankfurter has been the chief spokesman,[1] has won the support of five Justices [2] in a number of recent Supreme Court decisions, despite vehement dissent led by Mr. Justice Black.[3] It remains obscure whether that majority regards "balancing" as applicable to all first amendment cases and, if not, to what class of cases it applies. How other cases are to be decided is problematical and at the present writing it is not clear whether this majority has survived the retirement of Mr. Justice Whittaker and his replacement by Mr. Justice White.[4]

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1. See, *e.g.*, Dennis v. United States, 341 U.S. 494, 524-25, 542 (1951) (concurring opinion by Frankfurter, J.).

2. Justices Frankfurter, Clark, Harlan, Whittaker, and Stewart. See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959).

3. See Lathrop v. Donohue, 367 U.S. 820, 873 (1961) (dissenting opinion); Scales v. United States, 367 U.S. 203, 261 (1961) (dissenting opinion); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 164 (1961) (dissenting opinion); *In re* Anastaplo, 366 U.S. 82, 110 (1961) (dissenting opinion); Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (dissenting opinion); Braden v. United States, 365 U.S. 431, 445 (1961) (dissenting opinion); Wilkinson v. United States, 365 U.S. 399, 420 (1961) (dissenting opinion); Uphaus v. Wyman, 364 U.S. 388, 392 (1960) (dissenting opinion); Barenblatt v. United States, 360 U.S. 109, 141 (1959) (dissenting opinion). *But cf.* National Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958) (balancing applied to uphold first amendment claim in opinion by Harlan, J. for unanimous Court).

4. Another possibly complicating factor is the illness of Mr. Justice Frankfurter, though he is presently expected to resume his duties at the beginning of the October 1962 Term.

The language which ultimately came to be cited as the authority for balancing originated in 1939 in *Schneider v. State*,[5] in an opinion by Justice Roberts for a majority of eight, which included Justices Black and Douglas as well as Mr. Justice Frankfurter. The problem was the constitutionality of certain city ordinances prohibiting handbill distribution.[6] After characterizing freedom of speech and press as "fundamental personal rights and liberties" whose exercise "lies at the foundation of free government," Justice Roberts continued:[7]

> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

These were nondiscriminatory ordinances. Distribution by handbill was denied equally to all points of view, while all other means of dissemination remained equally accessible under the ordinance. Taken in context, the essence of the language—"weigh the circumstances and appraise the substantiality"—was that, when a means of communicating with the public is cut off, the courts will demand a more substantial justification, and give less weight to the legislative judgment, than in the case of "regulation directed at other personal activities."[8] The language was subsequently cited for the same purpose in other strongly pro-free speech decisions,[9] including one written by Mr. Justice Black.[10]

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5. 308 U.S. 147.

6. In one of the four cases disposed of by the opinion, an ordinance requiring a permit to canvass was also held invalid as involving censorship through license.

7. 308 U.S. 147, 161.

8. *Cf.* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

9. *E.g.*, Thornhill v. Alabama, 310 U.S. 88, 96 (1940). In Cantwell v. Connecticut, 310 U.S. 296, 307 (1940), the Court undertook to determine whether the state's interest in peace and good order had been carried to a point by a license requirement for religious solicitations where it would come into fatal collision with the overriding interest in freedom of religion and freedom of communication protected by the federal constitution (opinion by Roberts, J., for unanimous Court).

10. Marsh v. Alabama, 326 U.S. 501, 509 (1946). Mr. Justice Black here balanced the constitutional rights of property owners against the rights of the people to freedom of press and religion, but added that "we remain mindful of the fact that the latter occupy a preferred position. . . ." *Ibid.* Mr. Justice Black has recently urged that the balancing concept "was first accepted as a method for insuring the complete protection of First Amendment freedoms even against purely incidental or inadvertent consequences" and was later misapplied to "governmental action that is aimed at speech and depends for its application upon the content of speech." Konigsberg v. State Bar, 366 U.S. 36, 68, 70 (1961) (dissenting opinion). And he has indicated that he still approves of the type of "balancing" done in *Schneider* and *Cantwell*, but that it must not be extended to laws "directly aimed at curtailing speech and political persuasion. . . ." Barenblatt v. United States, 360 U.S. 109, 142 (1959) (dissenting opinion).

This balancing language was first turned to a different purpose in 1950 in *American Communications Ass'n v. Douds*,[11] which dealt with the constitutionality of the non-Communist affidavit provision of the Taft-Hartley Act. Unlike the problem treated in *Schneider* of nondiscriminatory elimination of a particular means of reaching the public, in *Douds* particular persons were singled out for unfavorable special treatment on the basis of their beliefs, membership, or affiliation.

Chief Justice Vinson, for the majority, began by conceding that the affidavit "necessarily" had a deterrent effect on freedom of speech [12] and that the problem could not be disposed of merely by calling the governmental action the withholding of a privilege.[13] He further conceded that the view expressed by Justices Brandeis and Holmes was the command of the first amendment:[14] "Only . . . when force is very likely to follow an utterance before there is a chance for counter-argument to have effect may that utterance be punished or prevented."[15] But he found two reasons for not heeding this command. One was that "force may and must be met with force" and that the statute under consideration was "designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded that they have done and are likely to do again."[16] The other was that "When the effects of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity."[17]

"[T]he right of the public to be protected from the evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed," the Chief Justice asserted, "has received frequent and consistent recognition by this Court."[18] But of the cases he cited to illustrate and prove this "frequent and consistent recognition," two did not even recognize that first amendment rights had been infringed in any manner,[19] and the remainder dealt only with conduct required [20] or prohibited [21] without reference

11. 339 U.S. 382 (1950).
12. *Id.* at 393.
13. *Id.* at 389-90.
14. *Id.* at 396.
15. *Id.* at 395.
16. *Ibid.*
17. *Id.* at 397.
18. *Id.* at 398.
19. Davis v. Beason, 133 U.S. 333 (1890) (denial of vote to members of society advocating polygamy upheld on ground that teaching and counseling of crime is itself a crime); *In re* Summers, 325 U.S. 561 (1945) (conscientious objector denied admission to bar).
20. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination).
21. Reynolds v. United States, 98 U.S. 145 (1879) (bigamy). The Chief Justice also gave an "And see" citation to Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (conduct in violation of state antitrust statute not immunized because carried out in part by means of speech in the form of union picketing).

to speech, or with regulation such as that in *Schneider,* where the government's action was neutral in its application to different points of view.[22] From this collection of cases, unlike each other and unlike the case before the Court, the Chief Justice drew the following generalization:[23]

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

A year later, in *Dennis v. United States,*[24] the Court was confronted with another Communist case. But this time the statute was expressly directed at speech rather than conduct. And its impact on speech was not an "indirect, conditional, partial abridgment," merely resulting from the regulation of something else, but a direct prohibition, dealing with certain things which may not be said.[25]

Mr. Justice Frankfurter, in a solo concurrence, announced the view that balancing is the proper approach for the Court in all free speech cases. Although he did not profess to find this in the rationale of prior cases,[26] Mr. Justice Frankfurter took comfort in the view that it was consistent with their results.[27] Furthermore, he regarded balancing as desirable from the standpoint of free speech, since:[28]

> Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.

Notwithstanding the value of judicial balancing, Mr. Justice Frankfurter placed his main reliance on the principle of judicial restraint. And, on this basis, he made it clear that he was not really advocating that the courts should do their own weighing in each case. Rather they should, except in the most

22. Kovacs v. Cooper, 336 U.S. 77 (1949) (sound trucks emitting "loud and raucous noises"); United Public Workers v. Mitchell, 330 U.S. 75 (1947) (political activity by government employees); Prince v. Massachusetts, 321 U.S. 158 (1944) (statute prohibiting child labor on street applied to sale of religious publications); Cox v. New Hampshire, 312 U.S. 569 (1941) (nondiscretionary license required for parade).

23. American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950).

24. 341 U.S. 494 (1951).

25. 18 U.S.C. § 2385 (1958).

26. After reviewing the precedents for 10 pages, Mr. Justice Frankfurter stated: "I must leave to others the ungrateful task of trying to reconcile all these decisions." 341 U.S. 494, 539 (1959) (concurring opinion).

27.
> A survey of the relevant decisions indicates that the results which we have reached are on the whole those which would ensue from careful weighing of conflicting interests.

Id. at 542.

28. *Id.* at 524-25.

extreme cases, declare the statute valid out of deference to the balancing done when it was enacted:[29]

> Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

Chief Justice Vinson, writing for the majority, also remarked that ". . . the societal value of speech must, on occasion, be subordinated to other values and considerations."[30] But he did not undertake such a sweeping rejection of the rationale of prior decisions, nor assign to legislation so broad a power of self-validation. In the court below, Chief Judge Learned Hand had reinterpreted the "clear and present danger" test as meaning that: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[31] This version eliminated precisely that feature of the test—the necessity of meeting words with words so long as there is time for counter-argument to have effect—which Chief Justice Vinson, only a year previously in *Douds*, had characterized not only as the Holmes-Brandeis view, but also as "the command of the First Amendment."[32] Yet the Chief Justice now wrote of the Hand version:[33]

> We adopt this statement of the rule. . . . It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

This "reinterpretation" of the "clear and present danger" test appears to have killed it. The *Dennis* case itself has been relied on.[34] And the Court, while resorting to the original Brandeis language, declined to use the phrase "clear and present danger," in holding that the proscription of adultery by law does not justify suppression of a motion picture merely because it teaches that adultery is not always wrong.[35] Yet the Court, in ten years which have seen many important free speech cases, has never again expressly asked itself in Hand's terms "whether the gravity of the 'evil' discounted by its improbability" justifies a particular invasion of free speech.

While "clear and present danger" has lain mouldering—or perhaps only

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29. *Id.* at 539-40.

30. *Id.* at 503.

31. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

32. See text accompanying notes 14 and 15 *supra.*

33. Dennis v. United States, 341 U.S. 494, 510 (1951).

34. *E.g.*, Scales v. United States, 367 U.S. 203, 228 (1961) (holding constitutional a different clause of the statute involved in *Dennis*).

35. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 (1959) (opinion of Court by Stewart, J., joined only by the libertarian four who have usually found themselves in dissent in recent free speech cases but with Justices Frankfurter, Clark, Harlan, and Whittaker concurring in result).

slumbering—"balancing" has come to the fore. But it has come to the fore largely in a single type of case: that in which a compelled disclosure of membership or other association may have a deterrent effect on the exercise of first amendment freedoms, especially where private reprisals may reasonably be anticipated. Where the compelled disclosure has dealt with Communism,[36] or with attendance at a World Fellowship camp [37] by persons suspected of being subversive, the balance has been struck in favor of the government. On the other hand, when the compelled disclosure has dealt with organizations considered subversive only below the Mason-Dixon line, the balance has been struck the other way.[38]

To what cases is the Court's balancing test applicable? Judged by its origin in *Schneider*, it should apply only to regulations of the time, place, and manner of speaking which, though neutral as to the content of speech, may unduly limit the means otherwise available for communicating ideas to the public. As reformulated in *Douds*, it should apply only when the statute is construed as regulating conduct, and where the effect on speech is deemed both relatively minor and a mere incidental by-product of the conduct regulation. Other first amendment cases would presumably be tested without balancing. A somewhat similar view of its applicability has been recently stated by Mr. Justice Harlan, writing for what had by then become the familiar five-Justice majority,[39] in the 1961 *Konigsberg* case:[40]

> At the outset we reject the view that freedom of speech and association . . . [citation] . . . , as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection . . . [citations] . . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

36. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

37. Uphaus v. Wyman, 360 U.S. 72 (1959).

38. Bates v. Little Rock, 361 U.S. 516 (1960); National Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958). See also Louisiana v. National Ass'n for the Advancement of Colored People, 366 U.S. 293 (1961).

39. Note 2 *supra.*

40. Konigsberg v. State Bar, 366 U.S. 36, 49-51 (1961).

This opinion, though joined in by Mr. Justice Frankfurter, appears to be a striking departure from his theory. It seeks to enumerate principals for classification of free speech cases according to the type of regulation involved instead of assuming that only pragmatic considerations applicable to the particular case may be employed. Moreover, it expressly assumes that there is a "type of law" which the first amendment forbids Congress to pass, which could be regarded as the heart, if not almost the whole, of the approach for which Mr. Justice Black and the minority have all along been vainly contending.

Yet Mr. Justice Harlan's analysis is not altogether convincing as a description of what the Court has been doing, nor does it altogether square with what the same majority has since said.

First, if the balancing test applies only to "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," then the Smith Act cases would seem to be the clearest possible example of the type of case to which it should not be applied. Surely no one could say that the Smith Act was "not intended to control the content of speech" or that the manner in which it limits speech is "incidental" no matter how firmly he might believe that act to be consistent with the first amendment. Mr. Justice Harlan does indeed cite the Smith Act cases, not as an instance of balancing, but as an illustration of the phrase, "outside the scope of constitutional protection." Yet *Dennis* was decided by weighing the "gravity of the evil, discounted by its improbability," against the invasion of free speech. Surely this is a balancing test, even if it is not quite the same balancing test which some more recent cases seem to employ. So the Court has not in fact, or at least not always, used "balancing" as narrowly as Mr. Justice Harlan suggests.

Second, if there are categories, or "forms," of speech which are unprotected without regard to balancing, is it not proper to infer that there are categories which are protected without regard to balancing? Surely there are cases which do not fall within either Mr. Justice Harlan's balancing formula or his constitutionally unprotected categories. Yet the balancing Justices have not identified, or given express recognition to [41] any unconditionally protected area. By criticizing Mr. Justice Black, not for defining the extent of first amendment protection too broadly, but for treating it as "absolute," they have seemed to imply that there could be no such area.

And finally, what are we to make of the fact that the same five Justices for whom Mr. Justice Harlan spoke in *Konigsberg*, joined only a few weeks later in the following statement by Mr. Justice Frankfurter?:[42]

41. There is, however, a passing reference to "speech unconditionally guaranteed" in Speiser v. Randall, 357 U.S. 513, 525 (1958), in an opinion of the Court by Mr. Justice Brennan, speaking also for Justices Frankfurter, Harlan, and Whittaker. The Court then proceeds to draw a line between speech unconditionally guaranteed and speech which may be legitimately regulated.

42. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 90-91 (1961).

> [W]e agree that compulsory disclosure of the names of an organization's members may in certain instances infringe constitutionally protected rights of association . . . [citations] . . . . But to say this much is only to recognize one of the points of reference from which analysis must begin. To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the end which the regulation may achieve.

Does not this say that, even where first amendment protection "exists," it need not, and often will not, "prevail"? Yet did not the same five Justices assure us, only a few weeks before, that it was "undoubted" that the first amendment was an "absolute" in a sense which would not admit of this?[43] And the generality of the language used suggests that the Court is talking not only about the particular problem, but about its general method of decision. Doubtless this language does not commit the Court to the theory, expressed in Mr. Justice Frankfurter's opinion in *Dennis*, that the weighing of competing interests is the method of approach in all free speech cases, but it is certainly suggestive of that view.

Should the Court now adopt Mr. Justice Frankfurter's full theory, it would indeed be an ironic inversion of the purpose for which "weighing the circumstances" and "appraising the substantiality of the reasons" was originally suggested in *Schneider*.[44] That purpose, as we have seen, was to give the presumption of constitutionality attending legislative judgment *less* weight in free speech cases, even in dealing with a regulation which treats all points of view alike. Mr. Justice Frankfurter's version would give the legislative judgment the *same* effect it has when the validity of economic regulation is at issue—even when Congress has undertaken to legislate against dangerous ideas or those who promote them.

It must be admitted that the Justices composing the minority—Mr. Chief Justice Warren and Justices Black, Douglas, and Brennan[45]—have also left their basic theoretical position in some obscurity. I think they have been say-

43. See text accompanying note 40 *supra*. Some persons do not find this assurance in Mr. Justice Harlan's language in *Konigsberg*, but I cannot read it otherwise without first eliminating the word "undoubted." Thus I would paraphrase Mr. Justice Harlan's statement in this manner: We reject the view that freedom of speech is an "absolute" if the term "absolute" comprehends "not only" the uncontested proposition that when "the constitutional protection exists it must prevail," but also the additional proposition, which we reject, "that the scope of that protection must be gathered solely from a literal reading of the First Amendment."

44. See text accompanying notes 7-10 *supra*.

45. No implication that these four Justices share an identical position is intended. Mr. Justice Brennan has usually refrained from joining the opinions of Mr. Justice Black on this question. And even Justices Black and Douglas sometimes disagree on first amendment issues, as they did in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961). However, in *In re* Anastaplo, 366 U.S. 82, 110 (1961), Mr. Justice Black, in a dissenting opinion strongly rejecting the "balancing" test, spoke for all four members of the minority.

ing that the scope properly to be accorded the first amendment is a very broad one; that whatever falls within that scope should be regarded as having an unconditionally obligatory character, not subject to be put aside by Congress, by the courts, or by both together; and that therefore the approach of the "balancer" is impermissible, as are also most of his results. Yet Mr. Justice Black, as the principal spokesman for this position, has chosen to put his argument largely in the form that the first amendment "means what it says."[46] But to treat this as a sufficient answer to questions of whether and how the first amendment applies in a particular case is to imply that its terms are self-defining, that prefabricated answers to all questions of this type can be found merely by consulting the text.[47] This cannot be true unless the words of the amendment must be deemed to contain every proposition and require every application which can rationally be attributed to them—unless every litigant who makes a colorably rational appeal to first amendment protection must automatically win. I am quite sure this is not what Mr. Justice Black means and at times he has said that it is not what he means.[48] Yet his failure to spell out more clearly an alternative meaning has certainly contributed to the ability of his opponents to brush his arguments aside by putting this construction upon them, as Mr. Justice Harlan does in the *Konigsberg* opinion.[49]

The one thing which appears to emerge with reasonable clarity is that "balancing" has become the central first amendment issue. For those who have been in the majority, it is the method of decision in most recent free speech

46. Barenblatt v. United States, 360 U.S. 109, 143-44 (1959) (dissenting opinion). For other similar statements see Braden v. United States, 365 U.S. 431, 445 (1961) (dissenting opinion) ("The Founders of this Nation were not then willing to trust the definition of First Amendment freedoms to Congress or this Court, nor am I now"); Wilkinson v. United States, 365 U.S. 399, 422-23 (1961) (dissenting opinion) (". . . the principles of the First Amendment are stated in precise and mandatory terms and unless they are applied in those terms, the freedoms of religion, speech, press, assembly and petition will have no effective protection"); Smith v. California, 361 U.S. 147, 157 (1959) (concurring opinion) ("I read 'no law . . . abridging' to mean *no law abridging*").

47. Mr. Justice Black is not the first to take the view that the answers to some questions are contained in the text. Consider the following from an opinion of Justice Holmes, joined by Justice Brandeis:

> [W]hen habit and law combine to exclude every [means of communicating other than by mail] it seems to me that the First Amendment in terms forbids such control of the post as was exercised here.

Leach v. Carlile, 258 U.S. 138, 141 (1922) (dissenting opinion).

48.
> It is my belief that there *are* "absolutes" in our Bill of Rights. . . . In this talk I will state some of the reasons why I hold this view. In doing so, however, I shall not attempt to discuss the wholly different and complex problem of the marginal scope of each individual amendment as applied to the particular facts of particular cases. For example, there is a question as to whether the First Amendment was intended to protect speech that courts find "obscene" . . . . I am primarily discussing here whether liberties *admittedly* covered by the Bill of Rights can nevertheless be abridged on the ground that a superior public interest justifies the abridgment.

Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867 (1960) (Italics in original).

49. See text accompanying note 40 *supra*.

cases—and is apparently being employed with increasing frequency. For those who have been in the minority, it is the principal abuse on which their dissenting wrath is focussed. I therefore propose to "weigh" balancing—to inquire into the propriety and consequences of any such test. Since it is being vigorously asserted in some quarters that balancing is inevitable, that there is no alternative,[50] we will begin by examining this contention which, if true, forecloses discussion.

First, the inevitability of balancing is said to follow from the fact that the terms used in the first amendment are not self-defining. If the Constitution fails to tell the judge what he must do, it is argued that he has no choice but to put it aside and use his own best judgment.[51] And, in that case, what can he do but balance?

Doubtless our Constitution, being composed of general propositions, cannot, of its own unaided force, dictate answers to concrete questions. But if we therefore conclude that the text can play no part in deciding concrete questions, nothing can follow from this except the conclusion that it was an exercise in futility to write it in the first place.[52] And this point is independent of the problems of judicial review. If the text can add no new considera-

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50. Examples are Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 79-80 (1960); Kauper, Book Review, 58 Mich. L. Rev. 619, 626 (1960). Even Prof. Charles L. Black, Jr., who sympathizes with Mr. Justice Black on the merits, has been unable to find anything more than a difference in attitude in the choice between balancing and defining. See Black, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, Harper's Magazine, Feb. 1961.

51. The balancer's thinking processes eliminate the constitutional text so completely that he soon forgets there ever was one. Consider the following:

> Apologists for the modern version of activist Justice seem to concentrate upon its First Amendment aspects and ignore its economic implications. . . . This permits them to rest upon—or hide behind—the hallowed generalities of democratic dogma. Even so, they do not argue that the Constitution guarantees absolute freedom of expression, or that any explicit limitation can be found in the written document. *Choice then is inevitable.* Yet we are not told why a legislative choice between competing interests here is, *a priori*, less worthy of respect than elsewhere. To put it differently, the activist position assumes that courts are somehow inherently more competent to achieve a sound balance of interests in First Amendment cases than in others.

Mendelson, Justices Black and Frankfurter: Conflict in the Court 119-20 (1961) (italics in original).

Obviously, it would never occur to Prof. Mendelson that a court might be justified in construing two constitutional provisions differently merely because they have different histories and are expressed in radically different language. He will listen only to an *"a priori"* reason for doing so.

52. The fact that the Constitution which he invokes is written means that [the judge] must pay a substantial respect to the words in it, no matter how much he may feel that the society would be better if they had not been written, or if different words were in the Constitution. . . . [T]he Court does not have unlimited latitude to say what the Constitution is . . . Words limit the choices open to the Court. We can demand that Justices give words their due.

Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. Pa. L. Rev. 637, 656 (1961).

tions to the judiciary's deliberations, it can hardly do so for Congress, or the executive, or the people. Justice Cardozo, no naive believer in the theory that judges merely discover law and play no part in making it, did not conclude that the destruction of this myth requires the judges to live in a universe which contains nothing but *ad hoc* decisions.[53]

Second, it is maintained that balancing is still inevitable, since even the judge who undertakes to assign some meaning to the constitutional proposition contained in the first amendment must employ balancing considerations in order to decide what meaning to assign to it.[54] This proposition is true in a sense, but it errs in equating two things which are utterly unlike.

To be sure, a judge who is obliged to formulate a new rule of law must consider what its advantages and disadvantages would be and weigh them against the advantages and disadvantages of the possible alternative rules which might be adopted. For example, if the judge is asked to decide whether the first amendment protects the refusal to state one's political affiliations, he must take into consideration the possible dangers to political freedom and other values of denying such protection. And he must also consider whether protecting that refusal would strip the government of power which may be needed for legitimate, non-repressive purposes. Mr. Justice Black provided an example of this type of "balancing" when, in order to decide whether the first amendment protects a right to anonymous publication, he took into consideration the possible social values of anonymous publication as indicated by the role such publications have played in the past, and the danger of repressing controversial views if identification of the proponents were required.[55] But, though the mental process by which a judge determines what rule to adopt can be described as "balancing," this does not make it the same as balancing, independently of any rule, to determine what is the best disposition to make of a particular case.[56] Deciding the scope to be accorded a particular constitutional freedom is different from deciding whether the interest of a par-

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53. A definition of law which in effect denies the possibility of law since it denies the possibility of rules of general operation must contain within itself the seeds of fallacy and error. Analysis is useless if it destroys what it is intended to explain. Law and obedience to law are facts confirmed every day to us all in our experience of life.

CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 126-27 (1960 ed.).

54. Kauper, Book Review, 58 MICH. L. REV. 619, 626 (1960).

55. Talley v. California, 362 U.S. 60 (1960).

56. Between 1889 and 1904, the tribunal of the first instance of Château-Thierry . . . initiated a revolt against the existing order in jurisprudence. Its members . . . seem to have asked themselves in every instance what in the circumstances before them a good man would have wished to do, and to have rendered judgment accordingly. . . . Whatever the merits or demerits of such impressionism may be, that is not the judicial process as we know it in our law. Our jurisprudence has held fast to Kant's categorical imperative, "Act on a maxim which thou canst will to be law universal." It has refused to sacrifice the larger and more inclusive good to the narrower and smaller.

CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 138-39 (1960 ed.).

ticular litigant in freely expressing views which the judge may consider loathsome, dangerous, or ridiculous is outweighed by society's interest in "order," "security," or national "self-preservation."

Furthermore, once a series of cases has been decided, an additional difference emerges. The definer—the judge who undertakes to assign some distinct meaning to the constitutional proposition—has now drawn a line. It may be a wavering and uncertain line at many points. He may come up against cases which compel him to conclude that he has drawn it in the wrong place and that it should be moved. And no matter how satisfactorily the line is drawn, borderline cases can still arise which could arguably be placed on either side. Yet, despite all these difficulties, something new emerges from the mere fact that a line has been drawn. There are now cases that are not borderline: cases that are well within the line, as well as others well outside it. The definer has therefore placed limits (even though those limits are not absolutely beyond his own power to move) on his own future freedom of decision. There are cases in which (unless he is willing to change the rule or evade it with sophistries) he *must* say that freedom of speech has been unconstitutionally abridged, as well as others in which he must say it has not. The definer, in other words, must ultimately give the constitutional proposition a certain amount of content which he regards as being obligatory on the court. Consequently, in cases falling clearly within the defined area, the definer is largely relieved of responsibility for results in particular instances which he may find personally distasteful.

For the *ad hoc* balancer, the situation is quite different. For him, there can be no clearly protected area—all areas are subject to invasion whenever "competing interests" are sufficiently compelling. Furthermore, his initial assumption—without which he could never justify balancing—is that the constitutional proposition contained in the first amendment is incapable of being assigned any meaning which would not be too broad (or too narrow) for consistent application. Therefore, it must have been intended to be subject to unstated exceptions, which the court must make. And since the Constitution sheds no light on what exceptions are permissible, it is easy, if not inevitable, to fall into the assumption that the constitutional proposition is subject to any and all exceptions which the court may deem advisable. The *ad hoc* balancer's constitution is empty until the court decides what to put into it. It does not speak until the court speaks for it. It is inherently incapable of saying anything to the judge.

The third and final ground on which balancing is said to be inevitable is that to treat the first amendment as an "absolute" leads to absurd, undesirable, and self-contradictory consequences.

Although so moderate and perceptive a student of our institutions as Carl L. Becker was able to regard the provisions of the Bill of Rights as "absolutes," and to view absoluteness as the very essence of their function,[57] there has arisen a new criticism which asserts as an axiom that "there are no ab-

57. The occasions on which the sovereignty of the people can be exercised without restraint . . . are . . . constitutional conventions. In normal times the will of the

solutes."[58] And this new criticism triumphantly points out that to treat the protection accorded the freedom of speech by the first amendment as "absolute" would wipe out the law on such subjects as libel, fraud, and solicitation to crime,[59] and lead to numerous other results deemed both inconvenient and absurd.

This seems no more than a *non sequitur*, based on failure to distinguish between two of the numerous meanings of the word "absolute." The premise is that the first amendment cannot be "absolute" in the sense of unlimited in scope. But the conclusion is that it cannot be "absolute" in the sense of unconditionally obligatory within its proper scope, whatever that may be.

The confidence with which it can be asserted that scope and obligation are indistinguishable is sometimes astonishing.[60] Yet the balancing Justices have demonstrated—and in a balancing case—that they are quite capable of making this distinction:[61]

> Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, *unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment*, do not afford a witness the right to resist inquiry in all circumstances.

Is the fifth amendment self-incrimination clause an "absolute?" Certainly, it is not unlimited in scope: it does not confer the right to withhold information which is "degrading," but not "incriminating" and is subject to such limits as waiver and immunity. Nor is it self-defining; no one could ascertain with certainty, merely by consulting its text, whether it does or does not confer the right to withhold an answer which would be incriminating in a different

> majority can be effective only within those absolute limitations and through the intricately channeled procedures defined in the constitutions already established.
>
> The absolute limitations on governmental action are set forth in the bills of rights. Governments exist, as the Declaration of Independence has it, in order to secure the natural rights of man. But Jefferson and his contemporaries regarded some of these rights as of such fundamental importance to the individual that they should never be abolished or infringed by any government, even a republican government. In all our constitutions, accordingly, we find these rights declared to be imprescriptable, and therefore placed above and beyond the reach of legislative or administrative action. They are the so-called civil-liberties. . . .
>
> [T]he purpose of thus setting them forth is to define a sphere of action that is entirely withdrawn from governmental control.

BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 69-70, 72 (1945).

58. Dennis v. United States, 341 U.S. 494, 508 (1951). Of course this statement, being in absolute form, is self-contradictory.

59. Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961).

60.
> The very justices who assert that the prohibitions in the Bill of Rights are absolute, brooking no restrictions of the freedom they protect, have in fact voted to restrict the same freedoms on more than one occasion. A favorite judicial technique in such cases is to define one's absolute so that its protective scope does not cover the interests before the Court.

Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 78-79 (1960).

61. Barenblatt v. United States, 360 U.S. 109, 126 (1959) emphasis added.

jurisdiction, or facts which are innocent in themselves, but which might furnish leads to a possible prosecution. Yet when the question is one which the court recognizes as incriminating, when the privilege has been properly claimed, and no immunity has been conferred, the judge not only does not, but may not, base his ruling on an estimate as to whether the witness' interest in not incriminating himself is outweighed by society's need for his testimony. As Mr. Justice Harlan recognizes, the witness' interest may not be set aside even if the government is seeking his testimony in the name of "self-preservation," the "ultimate value of any society."[62]

So the fifth amendment self-incrimination clause, though neither limitless in scope nor expressed in self-defining terms, does have a hard core which, once located, does not yield to accommodate "competing interests." No amount of sloganizing against "absolutes" can explain why a hard core is possible for the fifth amendment, but not for the first.

Nor can it be said that this hard core is possible only because the fifth amendment protects a procedural right. Cases involving denial of equal protection instance treatment of a substantive right as an "absolute." In the Little Rock school case, a school district, which had attempted in good faith to carry out a desegregation plan, petitioned the district court for a postponement of desegregation on the ground that extreme public hostility had made it impossible to maintain a sound educational program with the Negro students in attendance. In granting the postponement, the district court said:[63]

> And while the Negro students at Little Rock have a personal interest in being admitted to the public schools on a nondiscriminatory basis as soon as practicable, that interest is only one factor of the equation, and must be balanced against the public interest, including the interest of all students and potential students in the district, in having a smoothly functioning educational system capable of furnishing the type of education that is necessary not only for successful living but also for the very survival of our nation and its institutions. There is also another public interest involved, namely, that of eliminating, or at least ameliorating, the unfortunate racial strife and tension which existed in Little Rock during the past year and still exists there.
>
> When the interests involved here are balanced, it is our opinion, in view of the situation which has prevailed and will in the foreseeable future continue to prevail at Central High School under existing conditions, the personal and immediate interests of the Negro students affected, must yield temporarily to the larger interests of both races.

Admittedly, there were other issues than balancing at stake in the Little Rock school case. There was a deliberate attempt to obstruct and defeat action which the Supreme Court had held to be constitutionally obligatory. And there was the danger that permitting this attempt to achieve even partial and temporary success might encourage similar action elsewhere. Yet the Supreme

62. *Id.* at 128, quoting Dennis v. United States, 341 U.S. 494, 509 (1951) (emphasis added).

63. Aaron v. Cooper, 163 F. Supp. 13, 27 (E.D. Ark. 1958), *rev'd*, 257 F.2d 33 (8th Cir. 1958), *reversal aff'd*, 358 U.S. 1 (1958).

Court did not suggest that the trial judge had erred by assigning too much weight to one interest or not enough to another, or by leaving out some factor which he ought to have weighed. Nor did the Supreme Court expressly re-strike the balance on its own account. Instead, in an opinion announcing as being that of each of the nine Justices, it resorted to "absolutist" language:[64]

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. . . .

But if depriving persons of equal protection is not a permissible means of preserving law and order, why should depriving them of freedom of speech be a permissible means of doing so? No amount of sloganizing against "absolutes" can explain why the right to hold and express an opinion as to what the public welfare requires cannot be made as unyielding as the rights guaranteed by the equal protection clause.

Thus *ad hoc* balancing is not unavoidable and we can meaningfully inquire whether or not it is desirable. One particularly objectionable application of balancing in some recent cases deserves note before passing to those fundamental problems which inhere in the method and are independent of the particular manner of its application.

Irrespective of the ultimate merits of balancing, it will not do to treat freedom of speech as though it were a mere private interest of the individual before the court, as the majority did in *Barenblatt*.[65] It is that, but it is also much more.[66] And it is equally unsound to equate repression with national "self-preservation" merely because government happens to be the adverse litigant.[67] This lends to the government's interest such immediacy and magnitude that any other public interest would automatically have to give way, let alone one treated as though it were merely private.

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64. Cooper v. Aaron, 358 U.S. 1, 16 (1958).

65. Barenblatt v. United States, 360 U.S. 109, 126, 134 (1959).

66. The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws, and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself.

Gilbert v. Minnesota, 254 U.S. 325, 337-38 (1920) (Brandeis, J., dissenting). And see Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903 (1960).

67. Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464, 479 (1956).

It is perfectly conceivable that the public interest—even in "security" or in national "self-preservation"—might be better served by maintaining freedom of speech than by the policies and programs to which the first amendment is asked to yield. It may be that freedom of speech is safer than repression in the long run. Not only do Justices Black and Douglas think so,[68] but so did Justices Brandeis and Holmes,[69] and such has been, at times, the opinion of the Court.[70] If this is now minority doctrine, the opposite judgment cannot be deemed self-evident. And so, it is most peculiar that, in the balancing cases, the view that repression is safer than freedom does not evolve as the product of careful analysis. It appears as an unexamined initial premise. By making that assumption, the Court from the outset begs the very question which it purports to be examining. Yet without that assumption, this kind of balancing cannot begin. We cannot balance freedom against security if they both belong on the same side of the scales.

In any event, there would seem to be no justification for putting the government's objective on one side of the scales without first requiring a demonstration that it cannot be obtained by less repressive methods. Surely the end cannot justify the means unless it at least requires them.[71] Several recent cases

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68. Barenblatt v. United States, 360 U.S. 109, 145-46 (1959) (dissenting opinion); Wieman v. Updegraff, 344 U.S. 183, 194 (1952) (concurring opinion).

69. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.

Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting).

> Those who won our independence . . . 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.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring).

70. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

DeJonge v. Oregon, 299 U.S. 353, 365 (1937) (opinion by Hughes, C.J., for unanimous Court). And see West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 636-37 (1943).

71. In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960).

> Where state assertions of authority are attacked as impermissibly restrictive upon thought, expression, or association, the existence *vel non* of other possible less restric-

in which the balance has been struck against freedom of speech are conspicuously lacking in any such demonstration.[72] Yet without it, the most that can logically be put on the government's side of the scale is the convenience to the government of employing this method, rather than some other, for the pursuit of its objective.[73]

But these objectionable assumptions may not be inherent in the balancing theory—though that theory has been consistently used to sanction their adoption by the Court. Let us turn to an evaluation of the theory itself. And let us first be clear which balancing theory we are discussing. We are not discussing the theory that a judge should examine the pros and cons before defining the *scope* of a constitutional guarantee. We are not discussing whether it is proper to "weigh the circumstances and appraise the substantiality of the reasons advanced" in order to determine whether a regulation of the time, place, and manner of speaking, though neutral in its impact on various points of view, unreasonably and unnecessarily restricts the means otherwise available for communicating with the public. Nor are we discussing whether "balancing" is the proper approach when a regulation aimed not at speech but at conduct has, as an accidental and unintended by-product, some deterrent effect on the expression of opinion. We are discussing the theory that the first amendment has no hard core, that it protects not rights but "interests," that those "interests" are to be weighed against "competing interests" on a case-to-case basis and protected only when not found to be outweighed.

This theory would seem to reduce the problem to one of expediency rather than principle since to weigh freedom of speech against considerations of mere expediency would be impossible if one could not treat the two as commensurable. One's need for a new car may be balanced against the other uses to which the same money might be put, but not against "Thou shalt not steal." But the theory, though it characterizes freedom of speech as always expendable, does not, *per se*, say anything about the position it should occupy on the value scale of expediencies. Accordingly, it is conceivable that a court might apply the balancing test, yet attach so high a value to freedom of speech that the balance would nearly always be struck in its favor. It is even conceivable that a balancer who attached a very high value to freedom of speech might decide in its favor more often than a definer who applied a narrow definition. There are nevertheless objections to the balancing theory which are independent of the

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> tive means of achieving the object which the State seeks is, of course, a constitutionally relevant consideration.

Id. at 493 (Frankfurter, J., dissenting).

72. Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959). Note also that, though a very strong case has been made that the Subversive Activities Control Act of 1950 is unnecessary—see CHAFEE, THE BLESSINGS OF LIBERTY 122-36 (1956)—Mr. Justice Frankfurter, in upholding the act by a balancing test, neither met that case nor required the government to meet it. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

73. Schneider v. State (Irvington), 308 U.S. 147, 164 (1939).

manner in which the competing interests are identified and characterized and the relative weight accorded them:

1. There is a fundamental logical and legal objection to "weighing" a governmental objective, however legitimate and important that objective may be, against a constitutional statement that the government may not employ a certain means for the attainment of any of its objectives. Objectives may indeed conflict and, when they do, they must be weighed against each other. Either we must decide that one is the more important or subordinate than the other, or we must arrive at some accommodation in which both are only partially achieved. But it does not follow that any objective can ever be weighed against an express limitation on the means available for its pursuit. The public interest in the suppression of crime, for example, cannot be weighed against a constitutional provision that accused persons may not be denied the right to counsel. If a constitution expressly prohibits the imposition of a particular type of tax, the government's need for revenue can be weighed against that prohibition only for the purpose of showing that it ought to be eliminated or modified by constitutional amendment. A showing of the government's need for revenue could not justify a decision that a tax of the prohibited type may be imposed, without constitutional amendment, provided it is not too large. Nor could it shed any light on the question as to whether a specific tax was or was not one of the prohibited type.

2. We have often been assured that a court's disagreement with the policy of a statute cannot make it unconstitutional.[74] And, when this is the point being made, we are likely to be told also that the Court's concern is with legislative "power," not with "wisdom."[75] This would seem undoubtedly sound—but it is meaningful only if legislative power can be determined without reference to wisdom. However, the balancing doctrine rests on an undemonstrated assumption that no such determination of congressional power is possible in free speech cases independent of a decision on the "wisdom" of the balance struck by the legislature. If a court's opinion that the policy of a statute is unwise does not impair its validity, why should an opposite opinion have any tendency to confer constitutionally?

3. "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness."[76] Yet the balancing test, while still in its infancy, has already established that compulsory disclosure of membership lists, where likely to lead to reprisals against the members, violates the constitutional rights of members of the N.A.A.C.P.,[77] but not those

74. *E.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952).

75. *E.g.*, Flemming v. Nestor, 363 U.S. 603, 611 (1960). The inconsistency between the balancing test and the theory that the Court is not concerned with the wisdom of the statute has been pointed out by Mr. Justice Black. *In re* Anastaplo, 366 U.S. 82, 111-12 (1961) (dissenting opinion).

76. Cardozo, The Nature of the Judicial Process 112 (1960 ed.).

77. Louisiana *ex rel.* Gremillion v. National Ass'n for the Advancement of Colored People, 366 U.S. 293 (1961); National Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

of members of the Communist Party,[78] nor, apparently, those of members of the Ku Klux Klan.[79] And an officer of a local N.A.A.C.P. chapter may not be compelled to produce a list of her members,[80] but the director of a World Fellowship camp may be compelled to produce a list of his guests.[81] Perhaps a reconciliation of these results on an impartial basis can be stated,[82] but at least what can be said is that they do not look impartial,[83] and confidence in the impartiality of the judiciary at the highest level may well be undermined. It is difficult to see how the impartiality of such judgments can be assured—much less made apparent—unless the Justices abandon *ad hoc* balancing and undertake to state a rule on this subject, by which the rights of all can be measured.[84]

4. As treated by the balancing test, "the freedom of speech" protected by the first amendment is not affirmatively definable. It is defined only by the weight of the interests arrayed against it and it is inversely proportional to the weight accorded to those interests. When this approach is taken, there can be no floor beneath which that freedom may not be allowed to sink. No matter how low it may fall, we must always be prepared to see it fall still further if

78. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

79. New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928). This case is not only pre-balancing, but was decided before the incorporation of the first amendment in the fourteenth was firmly established. It held that a statute requiring oath-bound organizations to file membership lists for public record was a reasonable exercise of the police power. The deterrent effect of the listing on antisocial conduct was mentioned in order to *justify* the statute. The possibility that individuals might suffer private reprisals merely because their names were listed, and that listing might thus have a deterrent effect on mere membership, was not considered. The "nature of the organization" was referred to, not to generate a public interest to which private rights could be subordinated, but simply to show that the *exclusion* of labor unions and named fraternal orders from the statute did not result in an arbitrary classification violative of the equal protection clause.

80. Bates v. City of Little Rock, 361 U.S. 516 (1960).

81. Uphaus v. Wyman, 360 U.S. 72 (1959).

82. The distinguishing feature is said to be "the nature of the organization regulated, and hence the danger involved in its covert operation . . . ." Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 101 (1961). But does not a considerable element of personal approval or disapproval of the cause enter into the judicial notion of the "nature of the organization"?

83. See People v. Talley, 172 Cal. App. 2d 797, 803, 332 P.2d 447, 450 (App. Dept. 1958), *rev'd sub nom.* Talley v. California, 362 U.S. 60 (1960). See also concurring opinion of Judge Swain, 172 Cal. App. 2d at 805, 332 P.2d at 452. And see Uphaus v. Wyman, 364 U.S. 388, 408 (1960) (Douglas, J., dissenting).

84. One of the chief advantages derived from the maintenance of a body of fixed legal rules which are not subject to the "arbitrium" of its administration is that on this basis rests the prestige and power of the administration of justice. The law is impartial. It has no respect of persons. Just or unjust, wise or foolish, it is the same for all, and for this reason men readily submit to its arbitrament. In the application and enforcement of a fixed and predetermined rule, alike for all and not made for or regarding his own case alone, a man will willingly acquiesce. But to the "ipse dixit" of a court, however just or impartial, men are not so constituted as to afford the same ready obedience and respect.

9 SALMOND, SCIENCE OF LEGAL METHOD lxxxi (Modern Legal Philosophy Series, 1917).

the needs of "security" increase—or if an atmosphere of fear and hysteria makes them seem to increase.

5. A balancing construction of the first amendment fails to give effective encouragement even to the amount of free speech which it theoretically recognizes. The attitude toward freedom of speech which encourages uninhibited discussion is conveyed by such popular expressions as: "You have a right to say it. This is a free country." But the assumption underlying such a statement is not that the right to speak out will probably be upheld by the Supreme Court upon a weighing of all relevant factors. Rather the assumption is that the right to speak out is so clear that there is no substantial danger that doing so might result in prosecution.

If the first amendment is subject to *ad hoc* balancing, it is inherently incapable of any such assurances. Under it, the right to speak and publish is never clear, since it is never defined. Whether one had a right to speak or publish cannot be known until after the event and depends on the unpredictable weight which a court may someday give to "competing interests." No doubt the boldest will speak anyway, but many others will be deterred merely by the pervasive and ineradicable uncertainty.[85] Inevitably the speech so deterred will include much which, had it ever been brought before the Court, would have been held protected. The Court condemns statutes which, because of their breadth or vagueness, deter protected speech.[86] Yet its own balancing test has a similar effect.

6. The balancing test assures us little, if any, more freedom of speech than we should have had if the first amendment had never been adopted. Rational governments do not take affirmative action without counting the costs, without having "balanced the interests" and concluded that those to be served outweigh those to be sacrificed.

Accordingly, the only difference between a balancing first amendment and none at all is that it permits the balance to be struck twice, first by Congress and then again by the courts. At first glance, this might seem a difference of great practical importance, but the more closely it is analyzed, the less likely it seems that it will prove so. The balancing of conflicting interests would seem to be inherently a legislative question for which the judicial process is very ill-adapted.[87] It requires evaluating vast arrays of facts of a kind which

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85. Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically, fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive.

United States v. Roth, 237 F.2d 796, 820 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

86. *E.g.*, Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Smith v. California, 361 U.S. 147 (1959); Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

87. This statement may seem paradoxical, since of course the courts often balance conflicting interests. But the interests they are accustomed to balance are much more easily and noncontroversially identifiable and operate on a much smaller scale. To decide the con-

are not to be found in the ordinary judicial record—and which will be extremely difficult for the litigants to put there. It also involves considerations so debatable that they cannot be effectively or fairly handled by means of judicial notice. Yet the Court under the balancing theory must ask itself the very same question—is this worth what it costs?—which the Congress necessarily asked itself, and to which it gave its answer when it decided to take the action.

When these considerations are taken into account, it must be regarded as very nearly inevitable that a court which clings to the balancing test will sooner or later adopt a corollary that the balance struck by Congress is not only presumed correct, but is to be accorded extreme, almost total, judicial deference. As we have seen, Mr. Justice Frankfurter, the senior and apparently most influential advocate of balancing on the Court, adopted this corollary and gave it major stress in his initial balancing manifesto. Once such a corollary is adopted, the difference between a balancing first amendment and none at all approaches, if it does not reach, the vanishing point. No doubt the courts will save themselves some such potential check on the reins as that indicated by Mr. Justice Frankfurter's statement that courts may set aside the balance struck by Congress if it is "outside the pale of fair judgment."[88] As a practical matter, if constitutionally protected freedom of speech is to be reduced to this, then the eloquence which has been expended upon it might better have been addressed to some more significant topic. Furthermore, the courts could have saved this much without any first amendment—merely by resorting to the "liberty" aspect of the due process clause. So, if it comes to this (as, unless the balancing test is abandoned, it seems that it must), it will be difficult to say that the first amendment protects even an insignificant residue of freedom of speech which would not have been equally safe without it. Governmental power to regulate commerce in ideas will be indistinguishable, at least in principle, from governmental power to regulate commerce in goods.

7. If a balancing test is applied to the first amendment, it is hard to see why it should not be applied to the entire Constitution. If the first amendment, and only the first amendment, can be balanced away, then that amendment is assigned a status inferior to the rest of the Constitution. Thus the Court has, for the moment, achieved an ironic inversion of the old theory that the first

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stitutional question involved in a case like *Barenblatt v. United States, supra* note 2, by a meaningful balancing process, it would be necessary to put into the record everything which is known about Communism, past and present, domestic and foreign. It would be necessary to make a comprehensive analysis of the international situation and forecast its future development. It would be necessary to assess the contribution to the legislative process made by the type of investigation conducted by the House Committee on Un-American Activities and the probable adequacy of other methods by which Congress might undertake to keep itself informed. There would have to be a careful estimate of how such investigations have affected freedom of expression and association, their side-effects on the national psyche, their effect on our "image" abroad, etc. And the Court would have to take into consideration the effectiveness of other anti-Communist programs and activities, including many, such as those of the F.B.I., the details of which are not readily available for judicial study. This is not the kind of "balancing" courts do to decide an equity case.

88. Text accompanying note 29 *supra*.

amendment has a *preferred* status. Yet it is difficult to see how, in the long run, so strange a result can be rationalized. And, if it cannot be, it is hard to see how the courts can avoid a choice between abandoning balancing and extending it to any and all constitutional questions. The late Judge Learned Hand, if I understand him correctly, suggested such an approach to the whole of the Bill of Rights.[89] But, on what basis can one stop with the Bill of Rights? Why should these provisions be regarded as any less "absolute" than the original document, or the later amendments? If the arguments employed to justify balancing are carried to their logical conclusion, then the Constitution does not contain—and is not even capable of containing—anything whatever which is unconditionally obligatory. Defendants in criminal cases can be tried in secret, or held incommunicado without trial, can be denied knowledge of the accusation against them, and the right to counsel, and the right to call witnesses in their own defense, and the right to trial by jury. Ex post facto laws and bills of attainder can be passed. Habeas corpus can be suspended, though there is neither rebellion nor invasion. Private property can be taken for public use without just, or any, compensation. Suffrage qualifications based on sex or race can be reinstituted. Anything which the Constitution says *cannot* be done *can* be done, if Congress thinks and the Court agrees (or is unwilling to set aside the congressional judgment) that the interests thereby served outweighed those which were sacrificed. Thus the whole idea of a government of limited powers, and of a written constitution as a device for attaining that end, is at least potentially at stake.

Finally, we must consider the argument which justifies the balancing test on grounds of "judicial restraint,"[90] albeit this seems a strange name to employ for an argument which would, on policy grounds, read a constitutional provision as meaning very nearly the opposite of what it says. The argument runs thus: if the Court does not leave Congress free to control speech so long as Congress' view is not "outside the pale of fair judgment," then the Court will be making the same mistake it made in past periods when it attempted to halt economic reform in the name of substantive "due process."

First, let us note that any constitutional limitation serves a significant function only insofar as it stands in the way of something which government thinks ought to be done. Nothing else needs to be prohibited.

But the crux of the argument is that there is no difference between the old "substantive due process" theory and a judicial attempt to treat "Congress shall make no law . . ." as imposing a significant limitation on Congress' freedom to make laws. Actually, there are enormous differences.

The first, of course, is that the Constitution itself treats the two problems

89. HAND, THE BILL OF RIGHTS 66-69 (1958). See also HAND, SPIRIT OF LIBERTY 204 (2d ed. 1953), where Judge Hand states that the Bill of Rights is to be interpreted not as law, but merely as an "admonition to forbearance" which the judges cannot compel the legislators or the electorate to follow.

90. *E.g.*, MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961), especially at 124-31.

differently.[91] A court which ignores this fact because it thinks they ought to be treated alike may be subordinating its own policy notions to those of Congress, but it is also subordinating the work of the framers to its own notions of constitutional policy. It is likewise ignoring one historically justified tradition: that a government's power to deal with mere words ought to be drastically narrower than its power to deal with acts.[92]

For those who are unmoved by such textual and historical arguments,[93] there are fundamental policy reasons for treating the two problems differently. An economic mistake or injustice does not interfere with the political process and that process therefore remains open for its correction or redress if the courts refuse relief. The same cannot be said where legislation results in infringement of political rights, for the injured can hardly rely for redress on the very weapons of which they are deprived. Even Mr. Justice Frankfurter has recognized that this distinction justifies two different standards of judicial

91. This is true, at present, only with respect to the constitutional protection of freedom of speech against the federal government. The Court is currently protecting freedom of speech against the states in the name of the due process clause of the fourteenth amendment. Accordingly, in these cases, the Constitution, as currently read, does not treat the two problems differently. This is the fault of the Court majority which, in the *Slaughter House Cases*, 16 Wall. 36 (U.S. 1873), saved states' rights by construing the privileges and immunities clause of the fourteenth amendment as an essentially meaningless enactment, protecting only rights which were already protected by the supremacy clause. It is also the fault of the Court of the late 1920's and early 1930's which, in deciding to incorporate some provisions of the Bill of Rights in the fourteenth amendment, illogically resorted to the due process clause instead of reexamining *Slaughter House*. If there is one thing clear about the intent of the framers of the fourteenth amendment, it is that, if they intended incorporation of the Bill of Rights, or any part of it, it was the privileges and immunities clause, not the due process clause, which was intended to have that effect. See generally, Frantz, *Enforcement of the Fourteenth Amendment*, 9 LAW. GUILD REV. 122 (1949). Of course, if freedom of speech is protected against the states only because it is part of the "liberty" referred to in the due process clause, then the Constitution does not say that the states may not abridge it. It says that they may—provided due process is followed. And if the answer to this is that a statute which abridges liberty is "not due process," then the whole statement becomes meaningless. This is a dilemma of the Court's own making and there is no escape from it except to abandon incorporation, abandon *Slaughter House*—or ignore the difficulty.

92. *E.g.*, Jefferson's statement that:

> [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.

12 Hening's Stat., ch. 34, p. 84 (Va. 1823).

> This idea that the limit on freedom of speech or press should be set only by an actual overt act was not new. It had been asserted by a long line of distinguished thinkers including John Locke, Montesquieu in his *The Spirit of the Laws* ('Words do not constitute an overt act'), the Rev. Philip Furneaux, James Madison, and Thomas Jefferson.

WHIPPLE, OUR ANCIENT LIBERTIES 95 (1927), quoted in Dennis v. United States, 341 U.S. 494, 590 n.5 (1951) (Douglas, J., dissenting).

93. See, *e.g.*, note 51 *supra*.

review.[94] Furthermore, economic interests are typically represented in legislative bodies—or able to obtain a hearing from them. Despised ideological minorities typically are not.[95] In extreme situations such as those which give rise to first amendment test cases, their political influence may be less than zero, for it may be better politics for a legislator to abuse them than to listen to their grievances.

Under such circumstances, judicial deference to a legislative judgment curbing the political rights of a minority is hardly the same "judicial restraint" espoused by Justices Holmes and Brandeis,[96] which allows considerable latitude to legislative judgments on the need for economic reform.[97]

"Activism" in economic review narrows the range of popular choice by prescribing that there are certain legislative experiments which may not be attempted. "Activism" in libertarian review prevents a narrowing of the range of popular choice by preventing Congress from circumscribing that area of permissible discussion and advocacy which is the ultimate source of social change and legislative innovation. The historical evidence, far from suggesting that the two go together, indicates that they have always tended to be mutually exclusive.[98]

But the advocate of "judicial restraint" will insist that where there is room for a reasonable difference of opinion between Congress and the Court as to whether certain action violates the first amendment, Congress' view should take precedence. There are excellent reasons why it should not. First of all, "Congress shall make no law . . ." is an obvious and express effort to restrain congressional power. If that restraint is to be effective, then Congress

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94. Minersville School Dist. v. Gobitis, 310 U.S. 586, 599, 600 (1940), overruled in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The same distinction is suggested, but not passed upon, by Stone, J., in United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

95. The adoption of repressive and witch-hunting techniques in the United States has occurred, not because the Communists were strong, but because they were so weak as to have no representation in Congress and the legislatures and, in general, no defenders in the political arena. In countries like France and Italy, where Communists are very much stronger and are therefore represented in legislative bodies, no such methods are possible. See GINZBURG, REDEDICATION TO FREEDOM 136 (1959).

Furthermore, not only do the Communists get no defense in Congress, but the principles of civil liberties do not get much defense there either:

> Anybody who has studied the enactment of the Smith Act and subsequent sedition statutes can see that the indispensable balance of the values of free speech against the danger of violent acts, etc., does not take place in a legislature today. Instead, free speech gets little attention and the dangers are everything.

CHAFEE, THE BLESSINGS OF LIBERTY 85 (1956).

96. It might even be fair to say that they expressly protested such "restraint" in Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (dissenting opinion).

97. It has recently been argued that the Supreme Court's main function should be representing groups which lack adequate representation in the political arena. Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175, 196-98 (1962).

98. See generally Frantz, *Two Kinds of Judicial Review*, 19 LAW. GUILD REV. 75 (1959).

is the least appropriate body in the world to be accorded the final word as to what it means.[99] And, while I have no desire to re-wage the general battle for judicial review, the evidence is reasonably clear that the first amendment was proposed with the express expectation and intention that the courts would enforce it.[100]

When a bill which is dubious on first amendment grounds is proposed in our Congress, Congress may debate its constitutionality—but it does so on the implicit, and often explicit, assumption that anything which the courts will permit is constitutional. And it appears to feel no impropriety in treating constitutionality as a mere technical obstacle which may, perhaps, be avoided by astute draftsmanship.[101] If the statute is enacted and the courts uphold it by deferring to the legislative judgment, they are deferring to a judgment which, so far as constitutionality is concerned, has never really been exercised.[102]

Furthermore, this argument for "judicial restraint" takes no cognizance of an important feature of our system: judicial enforcement of a challenged statute is not abstention, but validation. So far as constitutional power to enact it is concerned, it is an endorsement of constitutionality by the body still recognized as having the final word on the subject.[103] Whether that result is reached on constitutional or pragmatic grounds, or merely by deferring to the legislative judgment, it becomes a constitutional precedent which Congress can rely and enlarge upon in the future.

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99. We cannot, after all, make arrangements *de novo*. The Congress has traditionally decided on the merits and left the final constitutional issues to the Court. It has for a very long time enjoyed the relative freedom of decision-making which comes with such a shift of final responsibility. There is no reason to believe that Congress will give up the freedom just because the Court divests itself of the responsibility, particularly if Justices' resignation is accomplished not by a formal transfer of authority but a series of modest proposals in judicial opinions which Congress is free to ignore.

Shapiro, *supra* note 97, at 194.

100. Thus Madison, in presenting the proposed Bill of Rights to the Congress, stated:

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an inpenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 ANNALS OF CONGRESS 139 (1789).

And see generally the materials cited in H. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960) and Brant, *The Madison Heritage*, 35 N.Y.U.L. REV. 882 (1960).

101. The insertion of § 4(f), 64 Stat. 991 (1950), 50 U.S.C. § 783(f) (1958), in an effort to save the registration features of the Subversive Activities Control Act of 1950 from being held invalid as involving compulsory self-incrimination, would appear to be an example of this. See Scales v. United States, 367 U.S. 203, 206-19 (1961).

102. [T]he nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified, or responsible judgments on the constitutionality of its own statutes.

Shapiro, *supra* note 97, at 193.

103. The importance of the legitimating function performed by the Court when it upholds statutes is stressed in C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960).

Perhaps Congress should take more responsibility for constitutionality.[104] And there may be ways, even within our present system, by which that responsibility can be increased, but judicial rubber-stamping of anything which Congress at a particular moment may reasonably think desirable is not one of them.

In sum, the "balancing" test does not permit the first amendment to perform its function as a constitutional limitation. It virtually converts that amendment into its opposite. A prohibition against abridgment has become a license to abridge. And, notwithstanding that on its face this purports to be a limited license, the limitation is so narrow and, on analysis, so largely illusory, that it comes close to being an unlimited license.

The balancing test does not even permit the first amendment to serve as an effective admonition. The amendment, as construed by this doctrine, fails to tell Congress that there is anything it may not do—or even anything it ought not to do—except those things which, even without the amendment, it would have no adequate governmental motive for doing.

Not only does a "balancing" first amendment fail to protect freedom of speech, but it becomes a mechanism for rationalizing and validating the kinds of governmental action intended to be prohibited.

Such are the consequences of distorting the amendment's thunderous "Thou shalt not abridge" into a quavering "Abridge if you must, but try to keep it reasonable."[105]

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104. However, a strong argument can be made for the view that judicial defense of civil liberties does not weaken, but strengthens, congressional and popular responsibility in this area. See Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208-10 (1952).

105. It is beyond the scope of this article to consider how constitutionally protected freedom of speech should be defined. Any adequate discussion of that topic would require another article at least as long as this one. However, lest it be said that no definition is possible short of an "unlimited license to talk," I will indicate in skeletal form what my definition would be.

I would take as my starting point the thesis of Dr. Alexander Meiklejohn that freedom of speech is essential to self-government. See MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960). And I would agree that: "Other liberties are held under governments, but liberty of opinion keeps governments themselves in due subjection to their duties." 2 LORD ERSKINE'S SPEECHES 139, 140 (1876) (speech in defense of Thomas Paine). Consideration of this function, rather than analysis of the literal words of the amendment, is the key to definition, though the words must not be ignored. As Meiklejohn points out, it is not a question of the rights of the individual, but of the constitutional powers of the people as a self-governing body.

Accordingly, I would define "the freedom of speech" as the exclusion of governmental force from the process by which public opinion is formed on public issues. Any governmental action which makes it more difficult or hazardous to take one side of a public issue than to take the other is an abridgment, whether or not this was its avowed purpose. "Public issues," for this purpose, are not limited to those on which governmental action may be taken, but include philosophy, religion, ethics, esthetics, social sciences, etc.—all those, in other words, on which an enlightened public opinion may be deemed desirable.

An act or relationship (such as a conspiracy in restraint of trade) which is itself unlawful is not immunized by the use of speech as a means. And speech employed to induce

an unlawful act by another is unprotected. But the expression of a viewpoint on a public issue cannot be punished or prevented on the ground that it is likely to cause or inspire unlawful conduct, unless the Brandeis test of no-time-to-answer is met. And the "danger" that the public will be persuaded to adopt an incorrect opinion is not one which government has any right to prevent. In addition, there are narrow areas which are unprotected because no public issue is involved. For example, the speech involved in private libel cases is typically addressed to such issues as whether or not a specified private individual has committed a crime. This, if open to decision at all, is for a jury to decide, and public debate on the topic is neither necessary nor desirable.

Governmental action which tends to regulate the content of public debate, either directly, or by singling out ideological groups or tendencies for special treatment, is permissible only if it focusses narrowly on unprotected speech and has no unnecessary deterrent effect on protected speech.

The act of speaking, as distinct from the content of what is said, is always subject to regulation. But such regulations must meet three standards: (1) They must be neutral in their impact on the expression of various points of view. (2) They must avoid discretionary licensing features which would empower an official or body to use them as a means of content regulation. And (3), they must leave open reasonably adequate means—including low-cost means—of reaching the public with all points of view.

Substantial doubts in the application of any of these standards should be resolved in favor of protection.

Most, if not all, of the elements of this definition are already contained in Supreme Court opinions. Furthermore, I believe that, except for the cases in which the Court has backed away from its own principles in order to accommodate anti-Communism, there have been comparatively few decisions since 1931 which are inconsistent with this analysis.

Of course, no contention is made that this definition would eliminate the difficult borderline case. No other definition with which I am acquainted would do that—nor does balancing.

I have excluded this discussion from the text, partly because it is really extraneous to the argument, but chiefly because objections to the particular definition might otherwise distract attention from my present thesis, which is simply that definition is necessary. But if my definition does not satisfy, it does not follow that balancing is vindicated. The alternative to balancing is not my definition, but whatever definition the Supreme Court would adopt, if persuaded of the necessity of adopting one. There can be no danger that any definition which the Court could be persuaded to adopt would not be preferable to *ad hoc* balancing, if the objections to the latter are as profound as I am contending.