Shapiro

The Supreme Court and Constitutional Rights

Readings in Constitutional Law

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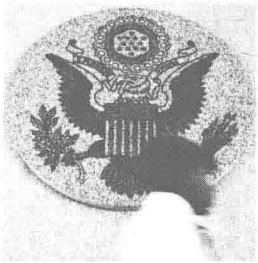

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Preface

Obviously a collection of readings of this length cannot supply the comprehensive and detailed coverage of a textbook. On the other hand it is designed to be something more than a random selection of "good pieces" to be used as an addendum to a casebook. With or without a casebook, *The Supreme Court and Constitutional Rights* should provide a student, even one totally new to constitutional law, with a survey of the most important current cases, doctrines, and issues in the area of constitutional rights. While a certain amount of technical discourse is unavoidable, most of the materials included deal with important general questions of public policy. And one of the blessings of legal scholarship is that legal authors usually feel the duty of providing a brief and easily understandable survey of the background material about which the reader needs to know in order to follow the main argument. To allow greater ease of reading for the student, footnote material that is not directly relevant to the text has been omitted.

This book is substantive rather than methodological. It focuses on what the Supreme Court has done and ought to do about constitutional rights, not on what methods we ought to use to find out what the Supreme Court is doing. A brief section on research methods and problems is appended at the end.

The reader new to materials such as these should remember that legal writers are accustomed to adversary proceedings—they are likely to push their own position hard and seek to undermine their immediate or potential adversary, rather than to present a balanced view. The reader should also remember that the traditions of legal scholarship in this country are very high and that the pursuit of truth is not limited to those who wear white lab coats. Do not make the mistake of thinking that lawyers are simply engaged in cynical word games in behalf of their clients; but do not forget that the task of the lawyer is to convince you that his version of truth, and his only, is the correct one.

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Chapter I

FREEDOM OF SPEECH

The subjects of this book are the Supreme Court and constitutional rights. The plural is used deliberately because two ranges of questions coexist here. The first concerns the desired scope of constitutional rights. For example, should Communists be allowed complete freedom of speech if they are going to urge the violent overthrow of our government? Should the indigent be provided with free legal counsel if it is going to cost taxpayers millions of dollars to defray the costs of frivolous and dilatory appeals by convicts who have nothing better to do? Should the police be held to standards of procedures so strict that they seriously hamper the suppression of dope peddling?

The second range of questions concerns the persons who should decide the first range and enforce the decisions. For instance, should the Supreme Court or Congress decide how much protection we need from Communism? Should the Supreme Court—an arm of the national government—tell the states how to operate their own criminal law machinery?

Throughout this book the reader will find a constant conflict between two schools of thought, often labeled *judicial modesty* and *judicial activism*. The judicially modest argue as follows: Congress, whose members are elected by the people, and not the Supreme Court (which is appointed for life), is the democratic branch of government. Judicial review—the power to declare acts of Congress unconstitutional—is not mentioned in the Constitution. In the very act of passing a statute, Congress declares that it is constitutional, for congressmen also take an oath to uphold the Constitution and would not pass an unconstitutional act. When the Supreme Court declares an act of Congress unconstitutional and thus void, it is simply disagreeing with Congress on a question of public policy, for constitutional decisions are largely policy decisions in disguise. In such disputes, why should the undemocratic branch of government be allowed to thwart the will of the majority as expressed by Congress, particularly when the legislature has the time and means to study questions of public policy far more thoroughly than do the courts? Thus the Supreme Court should not declare acts of Congress unconstitutional, and the Constitution, including the Bill of Rights, should be viewed as a moral admonition to Congress to do what is in the best interests of all the people. Parallel to this argument is the view that since, in a federal system, the states are to retain power over their own domestic affairs and act on the majority will of their own citizens, the Supreme Court, as both an undemocratic agency and a part of the national government, should not overrule the wishes of the states any more than is absolutely necessary to maintain the proper powers of the national government.

Judicial activists, on the other hand, argue as follows: The Constitution is the highest law of the land. When two laws are in conflict, it is a normal part of a court's business to decide which shall be upheld. Thus, when a statute and the Constitution are in conflict, naturally the Supreme Court must decide between them, and just as naturally it must always uphold the higher law, the Constitution. Although judicial review is not mentioned in the Constitution, it is implied there, for without review the Constitution is merely a scrap of paper which Congress could ignore at will. Besides, Congress is often *not* the voice of the majority but the spokesman for special interest groups. The Supreme Court may better represent the majority view or the views of those minorities, such as Negroes, who are not represented fully enough in Congress to have their rights protected there. Since the Court has the power, hallowed by long historical acceptance, to right certain wrongs in our society, it should take the responsibility for doing so, particularly when Congress or the state legislatures refuse to right those wrongs.

These two sets of issues, the scope of constitutional rights and the role of the Supreme Court, have naturally tended to become closely interconnected. If the Court constructs very strict standards of constitutionality very protective of individual rights, it is much more likely to find acts of Congress unconstitutional than if it adopts looser standards. This interconnection is particularly evident in the area of freedom of speech. In each case the justice and the outside observer must ask himself both how much freedom of speech should there be and how much should the Supreme Court do about guaranteeing the desired degree of freedom of speech.

The exchange of ideas between Laurent B. Frantz and Wallace Mendelson presented below focuses on the problem of the balancing of conflicting interests, which will recur in some of the later materials in this book. In every society there are many interests held in varying degrees by groups and individuals: e.g., the interests in, valuing of, or concern for free speech, peace and quiet, protection of private property, fair trial, national security, good highways, a decent minimum wage, and adequate free public education. When two of these interests come into conflict, is it always the duty of the government to balance them against one another, or are some interests absolutely protected by the Constitution no matter how important the interests with which they conflict?

Underlying this debate is the conflict between modesty and activism. If the Supreme Court takes the position that the First Amendment absolutely forbids any interference with freedom of speech, it will encounter many instances in which it will either have to declare a statute regulating speech unconstitutional or flatly confess that while it believes the statute to be unconstitutional, it is unwilling to interfere with the decision of the legislature. If the Court adopts the position that the Constitution allows some infringements on freedom of speech when the government has some very important interest, like national security, to balance against the infringement, then the Court can insist that it is maintaining judicial review but can find in each individual case that Congress had enough reason to regulate the speech in question to justify the infringement.

Thus the Court could maintain the facade of judicial protection for freedom of speech while never actually interfering with congressional regulation. Among the large number of distinguished proponents of judicial modesty only one, Learned Hand, has ever flatly come out in favor of totally doing away with judicial enforcement of the Bill of Rights. There is absolutely no sign of the Court's formally abandoning its powers of judicial review. Balancing of interests is, therefore, crucial to the judicially modest in insuring that the Supreme Court can, within its formally acknowledged duty to uphold the Constitution, actually allow Congress to do whatever it pleases about subversive and other obnoxious forms of speech.

Selection 1

The First Amendment in the Balance

Laurent B. Frantz

The selection below and the three that follow represent a debate which is somewhat imbalanced, since it consists of two long articles by Laurent B. Frantz, a judicial activist, and two short replies by Wallace Mendelson, a proponent of judicial modesty whose views closely parallel those of the late Justice Felix Frankfurter. Those wishing to redress this difference in bulk might wish to read Mendelson's book, *Justices Black and Frankfurter: Conflict in the Court,** which triggered the exchange presented here.

Frantz believes that the courts should not employ the balancing of interests as "a substitute for an effort to find a rule or principle that can guide decision"; he does not contend, however, that the courts should *never* balance. Frantz draws a distinction between balancing as a *principle* (which is not acceptable) and balancing as the technique for choosing between alternatives that are, in principle, equally permissible (which procedure is acceptable). Mendelson comes out more strongly in favor of balancing, which he considers the essence of the judicial process—as long as it is done in the light of accepted legal principles.

"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, has won the support of five Justices[1] in a number of recent Supreme Court decisions, despite vehement dissent led by Mr. Justice Black. 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.

The language which ultimately came to be cited as the authority for balancing originated in 1939 in *Schneider v. State,*[2] 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. 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:[3]

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged leg-

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"The First Amendment in the Balance" by Laurent B. Frantz, 71 *Yale Law Journal* 1424 (1962). Reprinted by permission of the Yale Law Journal Company and Fred B. Rothman & Company.

*Wallace Mendelson, *Justices Black and Frankfurter: Conflict in the Court* (Chicago: University of Chicago Press, 1961).

islation. 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."[4] The language was subsequently cited for the same purpose in other strongly pro-free speech decisions,[5] including one written by Mr. Justice Black.[6]

This balancing language was first turned to a different purpose in 1950 in *American Communications Ass'n v. Douds,*[7] 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 and that the problem could not be disposed of merely by calling the governmental action the withholding of a privilege. He further conceded that the view expressed by Justices Brandeis and Holmes was the command of the first amendment: "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."[8] 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."[9] 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."[10]

"[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."[11] 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,[12] and the remainder dealt only with conduct required[13] or prohibited[14] without reference 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.[15] From this collection of cases, unlike each other and unlike the case before the Court, the Chief Justice drew the following generalization:[16]

"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,*[17] 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.

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, Mr. Justice Frankfurter took comfort in the view that it was consistent with their results. Furthermore, he regarded balancing as desirable from the standpoint of free speech, since:[18]

"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 extreme cases, declare the statute valid out of deference to the balancing done when it was enacted:[19]

"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."[20] 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."[21] 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." Yet the Chief Justice now wrote of the Hand version:[22]

"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.[23] 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.[24] 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 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,[25] or with attendance at a World Fellowship camp[26] 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.[27]

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,[28] in the 1961 *Konigsberg* case.[29]

"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."

This opinion, though joined in by Mr. Justice Frankfurter, appears to be a striking departure from his theory. It seeks to enumerate principles 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 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?[30]

"[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?[31] 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.* 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[32]—have also left their basic theoretical position in some obscurity. I think they have been saying 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."[33] 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. 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. 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.

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 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,[34] 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.[35] 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. And this point is independent of the problems of judicial review. If the text can add no new considerations 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.[36]

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.[37] 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 must 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.[38] 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. Deciding the scope to be accorded a particular constitutional freedom is different from deciding whether the interest of a particular 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,[39] there has arisen a new criticism which asserts as an axiom that "there are no absolutes."[40] 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,[41] 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. Yet the balancing Justices have demonstrated—and in a balancing case—that they are quite capable of making this distinction:[42]

"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 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."[43]

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:[44]

"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 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 restrike the balance on its own account. Instead, in an opinion announced as being that of each of the nine Justices, it resorted to "absolutist" language:[45]

"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*.[46] It is that, but it is also much more.[47] And it is equally unsound to equate repression with national "self-preservation" merely because government happens to be the adverse litigant.[48] 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.

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, but so did Justices Brandeis and Holmes, and such has been, at times, the opinion of the Court. 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. Several recent cases in which the balance has been struck against freedom of speech are conspicuously lacking in any such demonstration.[49] 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.[50]

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 expediences. 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 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. 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." 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."[51] 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.,[52] but not those of members of the Communist Party,[53] nor, apparently, those of members of the Ku Klux Klan.[54] And an officer of a local N.A.A.C.P. chapter may not be compelled to produce a list of her members,[55] but the director of a World Fellowship camp may be compelled to produce a list of his guests.[56] Perhaps a reconciliation of these results on an impartial basis can be stated,[57] but at least what can be said is that they do not look impartial, 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.

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 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. 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. 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.[58] It requires evaluating vast arrays of facts of a kind which 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