Legal Tests to Determine the Constitutionality of Statutes Restricting First Amendment Freedoms

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Comment

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INTRODUCTION

Prior to 1919, only a few important cases involving first amendment freedoms had been considered by the United States Supreme Court. However, in 1917 Congress passed two laws\(^1\) which resulted in extensive litigation concerning freedom of speech during wartime, and from that time to the present the Court has taken an active part in the protection of first amendment freedoms.

When presented with a question of whether a freedom secured by the first amendment has been infringed upon, two dilemmas immediately appear. First, there is the dilemma stated by Abraham Lincoln: "Whether any government, not too strong for the liberties of its people, can be strong enough to maintain its existence in great emergencies."\(^2\) And second, the dilemma arises which may appear in any field of law—the desire for certainty in legal principles on the one hand, and the desire for justice on the other.\(^3\) The ultimate problem is one of weighing two interests: "the relative necessity of the public interest as against private rights."\(^4\) In solving this problem the Supreme Court has formulated many different tests and doctrines during different periods of time, the evolution of which might be better described as a single process rather than a set of inexorable rules. It is the purpose of this comment to examine briefly some of the legal tests which have been, and are being, employed by the Court in reaching, insofar as possible, a satisfactory solution to the two dilemmas with which it is faced.\(^5\)

2. Response to a serenade, Nov. 10, 1864.
5. The cases discussed herein are in the main those which are considered leading in the field. The authorities which are cited are by no means exhaustive of the supply of materials which has been written on the subject. For other writings of interest see, Anderson, Constitutional Law—Freedom of Speech—Review of State Court Decisions by the U.S. Supreme Court, 29 B.U.L. REV. 556 (1949); Antieau, The Rule of Clear and Present Danger: Scope of Its Applicability, 48 MICH. L. REV. 811 (1950); Antieau, The Rule of Clear and Present Danger—Its Origin and Application, 13 U. DET. L.J. 198 (1950); Antieau, Judicial Delimitation of the First Amendment Freedoms, 34 MARQ. L. REV. 57 (1950); Antieau, Dennis v. United States—Precedent, Principle or Perversion?, 5 VAND. L. REV. 141 (1952);
I. FREE SPEECH BEFORE 1940

A. THE CLEAR AND PRESENT DANGER DOCTRINE

The first test employed by the Court in this judicial process to determine the constitutionality of statutes which, in one way or another, place restrictions on first amendment freedoms, was formulated by Mr. Justice Holmes in the now famous case of Schenck v. United States. As a result of the declaration of war against Germany in 1917 and the passage by Congress of the Conscription Act, Schenck and his fellow Socialist workers mailed anti-conscription circulars to draftees charging that conscription was despotism in its worst form and a monstrous wrong against humanity. The circular urged that the conscripts assert their opposition to the draft. Schenck and a fellow worker were indicted and convicted for conspiracy to violate the Espionage Act of 1917 in that they attempted to cause insubordination in the armed forces and to obstruct recruiting. On review to the Supreme Court, Schenck claimed that the utterances in the circular were protected by the freedom of speech provision of the first amendment.

Mr. Justice Holmes, speaking for a unanimous Court, seemed to assume the constitutionality of the Espionage Act. For him the problem was whether it could be applied to abridge speech and, if so, to delineate the constitutional limits of such abridgment. In seeking to answer these questions he said:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. . . . (Emphasis added.)

Thus was born the "clear and present danger" test. Mr. Justice Holmes pointed out that a hindrance to the war effort as was urged in the circular could not be protected by any constitutional right, and that it was the intent of the action and not success alone which warranted this conclusion and supported a criminal conviction therefor.

Fellman, Recent Tendencies in Civil Liberties Decisions of the Supreme Court, 34 Cornell L.Q. 331 (1949); Hyman, Judicial Standards for the Protection of Basic Freedoms, 1 Buffalo L. Rev. 221 (1952); Marshall, Mr. Justice Murphy and Civil Rights, 48 Mich. L. Rev. 745 (1950); Meiklejohn, The First Amendment and Evils that Congress has a Right to Prevent, 26 Ind. L.J. 477 (1951); Steamer, Mr. Justice Jackson and the First Amendment, 15 U. Pitt. L. Rev. 193 (1954).


8. Schenck v. United States, supra note 6, at 52.
Just what the ramifications of the test were and whether it would ever again be used was not readily apparent. However, it was not employed in the next two cases which involved claims of privileged speech, Frohwerk v. United States9 and Debs v. United States.10 Furthermore, neither case left even an impression of the existence of a constitutional requirement that a "clear and present danger" of some substantive evil be shown where intent to incite crime was found.11 Both cases involved convictions under the Espionage Act, both decisions were unanimous, both opinions were written by Mr. Justice Holmes, and in both the claims of privileged speech under the first amendment were rejected and the clear and present danger test unmentioned. The Schenck case was cited, but only in affirmation of the principle that freedom of speech is not absolute.

The following year, however, the clear and present danger language reappeared in Mr. Justice Holmes' dissent in Abrams v. United States.12 Mr. Justice Holmes objected to the majority's upholding a conviction for violation of the Espionage Act. He felt that the United States could constitutionally punish only that speech which "produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils" that the Government may constitutionally prevent.13

Mr. Justice Holmes retired from the Court in 1932, twelve years after the Abrams case, but before that time he succeeded in enrolling another Justice under his clear and present danger banner. That was Mr. Justice Brandeis who made his initial contribution in this area in 1920, dissenting in Schaefer v. United States.14 The Schaefer case pointed up the cleavage within the Court on the constitutional question of how related to consequences speech had to be before it could be punished. The majority held that the "tendency of articles and their efficacy were enough for offense."15 Mr. Justice Brandeis, however, insisted that the test to be applied, "as in the case of criminal attempts and incitements—is not the remote or possible effect. There must be the clear and present danger."16

9. 249 U.S. 204 (1919). In this case the defendant had published twelve newspaper articles criticizing this country's entry into the war and the conscription of men for overseas duty.
10. 249 U.S. 211 (1919). Debs was convicted for delivering a speech in which he spoke of the merits of socialism, denounced war as the curse of capitalism, and praised certain persons who had been convicted of obstructing the draft.
12. 250 U.S. 616 (1919). Russian-born Abrams and some of his comrades had printed leaflets which were thrown from a window of a New York City building. The leaflets called President Wilson a coward for sending United States troops "to crush the Russian Revolution," and urged "workers of the world" to stop producing munitions which were being used to murder those fighting for freedom in Russia.
13. Id. at 627.
14. 251 U.S. 466 (1920). Here, the majority affirmed a conviction under the Espionage Act for the publication and dissemination of a German-language newspaper which purportedly carried false reports on the progress of the war.
15. Id. at 479.
16. Id. at 486 (dissenting opinion).
Pierce v. United States,\(^\text{17}\) following shortly after Schaefer, found the Court divided as before. The majority was willing to sustain a conviction under the Espionage Act of Socialists who distributed a pamphlet telling of the gore of war. Mr. Justice Pitney, for the majority, felt that freedom of the press could be restricted if the statements “had a natural tendency to produce the forbidden consequences,”\(^\text{18}\) but Justices Holmes and Brandeis again insisted that clear and present danger should be the test.

The question then arises as to how the decisions in Abrams, Schaefer, and Pierce can be reconciled inasmuch as both the majority and the dissenters placed reliance on the Schenck decision. One explanation which has been offered is that the “clear and present danger” language of the Schenck case was dictum:

That in reality it [the clear and present danger test] was not there [Schenck v. United States] relied on, nor in the next two cases [Abrams and Schaefer] is evident from the opinions of Holmes in the three cases. They do not discuss in detail the circumstances in which the prohibited words were uttered, nor whether the words under those circumstances created a substantial and immediate probability of the evil to be prevented. The . . . war . . . seems to have satisfied the test of “proximity and degree.” These decisions were handed down shortly after the . . . Armistice [which] may have produced a reexamination of their position by Holmes and Brandeis, and a determination that an inquiry into the special facts of each case should henceforth be had to show whether the deprivation of freedom of speech was so vitally necessary . . . The majority . . . continued to make the . . . war . . . the basis for the application of the restrictive statute. . . .\(^\text{19}\)

B. The Bad Tendency Test

Mr. Justice Holmes' last word on the clear and present danger doctrine came in his dissenting opinion in Gitlow v. New York.\(^\text{20}\) The Left Wing of the Socialist

17. 252 U.S. 239 (1920).
18. Id. at 244.
20. 268 U.S. 652 (1925). The case is important for the fact that it was the first dealing with a peace-time prosecution for criminal anarchy, but possibly overshadowing this factor, it was also the first case in which the Court held that the restrictions imposed by the first amendment upon the federal government in the areas of free speech and press were likewise imposed upon the states by virtue of the fourteenth amendment. This was done by virtue of an “assumption.” Gitlow v. New York, supra at 666. Similarly, De Jonge v. Oregon, 299 U.S. 353 (1937), determined that the right of peaceable assembly was a right cognate to those of free speech and free press and thus, too, was protected from state abridgment by the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940), brought the first amendment's protection of the free exercise of religion within the fourteenth amendment so as to deprive states of the power to act in such a manner as would place restrictions on this right. The Court also recognized that the right to the free exercise of religion was not an absolute one. Everson v. Board of Educ. of the Township of Ewing, 330 U.S. 1 (1947), held further that states were prohibited by the fourteenth amendment, from enacting any law respecting the establishment of religion.

http://scholarship.law.missouri.edu/mlr/vol26/iss4/9
Party printed in the *Revolutionary Age*, official organ of the party, the “Left Wing Manifesto” which advocated destruction of the parliamentary state, exhorted strikes, and ended with a prophecy of a revolutionary struggle against capitalism. Gitlow, business manager of the *Revolutionary Age*, was convicted under a New York statute punishing any advocacy of criminal anarchy, which was defined as the doctrine that government should be overthrown by force or violence or any unlawful means.

Delivering a seven-member opinion, Mr. Justice Sanford emphasized that the State, under its police power, could punish utterances tending to corrupt public morals, incite to crime, or disturb the peace. For the majority it was enough that “its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent.” Mr. Justice Sanford felt that the State should be permitted to suppress the threatened danger in its incipiency and therein he illustrated the basic difference in proximity and degree between the bad tendency and clear and present danger standards. He distinguished the language of *Schenck* by claiming that the general statement of the clear and present danger was intended to apply only to statutes prohibiting acts and not, as in the case under consideration, to statutes wherein the legislature had already found a danger of substantive evil from utterances of a particular character. To repudiate completely the clear and present danger test at this time would have been difficult due to the considerable amount of publicity and approval it had received. To accept the doctrine would have meant freedom for Gitlow since the manifesto did not present a clear and present danger to anything. Apparently the Court wanted the conviction to stick. Since the majority felt it could not ignore the doctrine, and to repudiate it meant an overruling of the unanimous *Schenck* decision, it pursued the only available alternative: *Gitlow* and *Schenck* were “distinguished” and, as a result, the clear and present danger test was practically distinguished out of existence.

The *Schenck* opinion declared that where a statute made certain acts or conduct criminal, and a person was prosecuted on the theory that his speeches or publications amounted to such acts, the question to be decided was whether what had been said or publicized created a clear and present danger of bringing them about. There was no statute prohibiting the publication of the circulars which Schenck mailed; he had been indicted for violating a statute which forbade obstruction of the draft and his conviction was sustained because the circular created a clear and present danger that the draft would be obstructed. The statute in *Gitlow* was different. It forbade certain “language” deemed by the legislature to be dangerous. The statute was constitutional and:

> [When] the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether

22. *Id.* at 668.
23. *Lusk*, *supra* note 7, at 598.
any specific utterance coming within the prohibited class is likely, in
and of itself, to bring about the substantive evil, is not open to considera-
tion. It is sufficient that the statute itself is constitutional and that the
use of the language comes within its prohibition.\(^{24}\)

Having no intention to limit their test to the Espionage Act or to other
statutes prohibiting only activity, Justices Holmes and Brandeis dissented, insist-
ing on the application of the clear and present danger test. They felt that the
speaker should not be punished because evil results might occur at some in-
definite time in the future. Nevertheless, the majority applied what is known as
the "bad tendency" test. The test seemed to favor legislative action, for it would
appear that the distinction the majority made would give legislatures a green
light to suppress ideas merely by forbidding their expression.

In 1927, while the bad tendency test was being used by the majority, the case
of Whitney v. California\(^ {25} \) presented itself to the Court. For purposes here, the
importance of Whitney lies in Mr. Justice Brandeis' concurrence which, at the
time, was potentially more significant than any opinion theretofore written on
matters of free speech. He argued that:

The fact that speech is likely to result in some violence or destruction of
property is not enough to justify its suppression. There must be the
probability of serious injury to the State. . . .
Moreover, even imminent danger cannot justify resort to prohibition
of these functions essential to effective democracy, unless the evil appre-
hended is relatively serious. Prohibition of free speech and assembly is a
measure so stringent that it would be inappropriate as the means for
averting a relatively trivial harm to society.\(^ {26} \)

At another point Mr. Justice Brandeis asserted why he felt that Congress could
not guard against dangers of the future but must wait until danger is imminent:

To courageous, self-reliant men, with confidence in the power of free and
fearless reasoning applied through the processes of popular government,
no danger flowing from speech can be deemed clear and present, unless
the incidence of the evil apprehended is so imminent that it may befall
before there is opportunity for full discussion. If there be time to expose
through discussion the falsehood and fallacies, to avert the evil by the
processes of education, the remedy to be applied is more speech, not
enforced silence.\(^ {27} \)

The persuasiveness of Mr. Justice Brandeis' arguments likely played no small
part in both the reappearance of the clear and present danger doctrine and the later

\(^{24} \) Gitlow v. New York, \textit{supra} note 20, at 670.
\(^{25} \) 274 U.S. 357 (1927). Anita Whitney had been found guilty of violating
the California Criminal Syndicalism Act by willfully assisting in organizing and be-
coming a member of the group organized to advocate, teach or aid and abet crim-
inal syndicalism. She insisted that the conviction was invalid since there was no
intent to join for the forbidden purpose. The Court, in a unanimous decision, held
that this was a question of fact and not open to review.
\(^{26} \) \textit{Id.} at 377-78 (concurring opinion).
\(^{27} \) \textit{Ibid.}
development of the preferred position doctrine. However, these effects were to come later, for following *Whitney* there was no further mention of clear and present danger for a full decade.\(^{28}\)

### C. Reappearance of the Clear and Present Danger Doctrine

The "clear and present danger" formula was resurrected in the 1937 case of *Herndon v. Lowry*\(^ {29}\) and, for the first time since *Schenck*, in a majority opinion. If the doctrine was ever to become a test of constitutionality, its limits and operation could not be discerned until a conviction was actually held unconstitutional by the Court by virtue of its application. This occurred in *Lowry*. A five-man majority reversed a conviction under the Georgia Anti-Insurrection Statute which penalized any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State. The defendant had solicited memberships for the Communist Party.

Mr. Justice Roberts applied the *Schenck* test as Justices Holmes and Brandeis would apply it, asserting that there was not such a proximity between an insurrection and procurement of party members that the procurement could be punished.

While the case is important for its application of the clear and present danger test, it is significant also in that the Court stated that: "the power of a state to abridge freedom of speech and of assembly is the exception rather than the rule. ... The limitation upon individual liberty must have appropriate relation to the safety of the state."\(^ {30}\) In *Gitlow* it had been declared that every presumption was to be indulged in to favor the validity of the statute. When a state statute is challenged under the due process clause this is the normal presumption; it is used to decide whether the challenged statute is a reasonable state measure. The presumption was relaxed here, the Court requiring more than mere "reasonableness" inasmuch as the statute affected freedom of speech.

It would seem that the *Lowry* case had made the clear and present danger test the rule of the majority once more and that the bad tendency test had been abandoned. However, this position was short-lived, for the cases which followed the *Lowry* decision were perhaps in even more confusion than those before it.

### II. The Roosevelt Court and the Preferred Position Doctrine

Beginning in 1937 and ending around 1949, the Supreme Court took a somewhat different view of the constitutional status of first amendment freedoms. This

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28. However, during that same period two other state court convictions for subversive utterances were reversed for lack of evidence proving that the defendant had actually advocated criminal conduct to effect industrial or political change. De Jonge v. Oregon, 299 U.S. 353 (1937); Fiske v. Kansas, 274 U.S. 380 (1927).

29. 301 U.S. 242 (1937). In addition to the portion of the *Lowry* case discussed in the text, another portion dealt with the indefiniteness of the statute as construed by the State court. The Court apparently applied the clear and present danger test to invalidate the statute on the basis of indefiniteness, which was an application not in accord with Mr. Justice Holmes' view. See Lusk, *supra* note 7, at 585.

30. *Id.* at 258.
period was characterized by a fairly consistent determination to protect civil liberties and in doing so the Court gave first amendment freedoms a "preferred position" in the constitutional hierarchy of values. Those favoring this view took the position that it was the intention of Mr. Justice Holmes to ignore the usual "reasonableness" approach in areas where legislative action impinged upon civil liberties and to substitute therefor the clear and present danger test. They felt that even though the reasonableness rule was appropriate to test legislation in other areas, where basic first amendment freedoms were at stake the Court should hold legislatures to a higher standard. The reasonableness theory placed the burden of proof of unconstitutionality upon the person attacking the legislation; Lowry seemed to shift this burden to the defenders of legislation which restricted first amendment freedoms. Thus, while the Court adhered to the philosophy that in economic matters it would not look into the wisdom of the legislature, the same did not hold true where civil liberties were concerned.

The clear and present danger and preferred position doctrines were not opposing theories; both were manifestations of the same judicial attitude. In fact, the preferred position argument reinforced the clear and present danger test and supplied its raison d'etre. In order to justify legislative abridgment of these preferred, fundamental rights, the Court demanded persuasive showing of a clear and present danger to the security or welfare of the state or nation. The preferred position view was not a judicial theory which was raised and accepted in one stroke. In fact, never did it gain the support of a unanimous Court. It evolved through a number of opinions representing sometimes the majority and sometimes a dissenting view.

One of the earliest and important contributions to the preferred position view came in an opinion by Mr. Justice Cardozo in 1937. In speaking of the first amendment he said:

... [O]ne may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. ... So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.31

Mr. Justice Cardozo intimated that the first amendment transcends the others and must be given closer protection by the Court.

Herndon v. Lowry had indicated that the presumption which was normally engaged in to favor legislative action might not be applicable where first amendment freedoms were at stake. However, credit for this innovation is usually given to Mr. Justice Stone who mentioned it in a case which dealt with economic legislation and, therefore, in which the usual presumption was applied. The case was United States v. Carolene Prod. Co.,32 wherein Mr. Justice Stone placed the following language in a footnote:

32. 304 U.S. 144 (1938). The case involved the application of a congressional act which prohibited transportation of certain types of compounded milk products in interstate commerce.
There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

The language not only indicated that the presumption might be waived when dealing with a statute which restricted important constitutional rights, but also that the judiciary has a specific responsibility as defender of those liberties prerequisite to the purity of political processes.

The pronouncement was at most a tentative and qualified one. However, the idea leaped from the footnote into a majority opinion, in which Mr. Justice Frankfurter, who was strongly against the preferred position doctrine, joined. In *Schneider v. New Jersey*, speaking through Mr. Justice Roberts the Court said:

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.

While there was no mention of "preferred position," the opinion dealt with a number of ordinances placing restrictions on the distribution of handbills and the State was placed in the position of having to prove the reasonableness and necessity of the means selected.

In *Thornhill v. Alabama*, a State statute which made peaceful picketing a misdemeanor was held invalid on its face. Mr. Justice Murphy, writing the majority opinion, said that it was incumbent on the courts "to weigh the circumstances" and "appraise the substantiality of the reasons advanced" in testing a regulation which would abridge a fundamental freedom. The net effect was to apply the clear and present danger test in a case unlike those in which Justices Holmes and Brandeis would have applied it:

... Holmes and Brandeis never employed the test to determine the constitutionality of the statute itself; in every case the test was used to determine whether the statute had been constitutionally *applied*—their position being that a statute used to abridge speech could be validly

33. *Id.* at 152, n. 4.
35. 308 U.S. 147 (1939).
36. *Id.* at 161.
37. 310 U.S. 88 (1940).
38. *Id.* at 96.
applied only to those speeches and publications which in fact created a clear and present danger to the security of the state. Of course, Holmes and Brandeis would not have hesitated to strike down a statute which arbitrarily and without basis abridged freedom of speech. But in doing so they would not, so far as appears from their opinions, have applied the test of clear and present danger.\textsuperscript{59}

Mr. Justice Frankfurter stood with the majority in \textit{Thornhill} even though the clear and present danger test was there exalted, and, later the same year, he agreed with the invalidation of a state statute which prohibited persons from carrying on house-to-house solicitation for religious purposes without prior approval of a public official.\textsuperscript{40} However, in 1940 Mr. Justice Frankfurter wrote the majority opinion in \textit{Minersville School Dist. v. Gobitis}\textsuperscript{41} which approved a compulsory flag salute and in which he repudiated any preferred position which might be given first amendment freedoms. The majority found the prescribed ceremony to be rationally related to the purpose of fostering national unity which was "an interest inferior to none in the hierarchy of legal values."\textsuperscript{42} This was a manifestation of the so-called "reasonable basis" approach of which more will be seen later.\textsuperscript{43}

Mr. Justice Stone was the lone dissenter in \textit{Gobitis}. He felt that even though national cohesion was a desired end, it could not be gained through compulsion and force.\textsuperscript{44} He once more seemed to imply a constitutional "preference" for the first amendment when he asserted:

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.\textsuperscript{45}

Although standing alone in his dissent, he was highly praised for his stand.\textsuperscript{46}

A majority of the Court again rejected any idea of "preferred position" in \textit{Milk Wagon Drivers Union v. Meadowmoor Dairies}.\textsuperscript{47} It was there concluded by

\begin{footnotes}
39. Lusk, \textit{supra} note 7, at 585.
41. 310 U.S. 586 (1940). The Gobitis children had refused to join other pupils in the flag salute, as ordained by the school board. For them the flag salute violated the Biblical injunction against bowing down to a graven image.
42. \textit{Id.} at 595.
43. \textit{Infra} pp. 490-98.
46. See Mason, \textit{supra} note 34, at 620, wherein he discusses the trend of public opinion to the \textit{Gobitis} decision.
47. 312 U.S. 287 (1941).
\end{footnotes}
the majority, through Mr. Justice Frankfurter, that a state had a right to protect
its citizens from acts of violence which justified restraint of the right to picket. *Thornhill* and *Carlson* were approved, the Court making a distinction between
statutes which prohibited picketing in general and those wherein violence had
given the picketing a coercive effect. The significance of the case was, however,
in the fact that Justices Black and Douglas broke from the majority and joined
Mr. Justice Stone in adopting a more liberal view with respect to first amendment
freedoms. Through Mr. Justice Black they declared that the right to picket, even
in a "context of violence," was a constitutionally protected freedom of expression
which could not be proscribed on the ground that the State had a "reasonable
basis" for so doing. Again a preferred status was implied when it was asserted:

In determining whether the injunction does deprive petitioners of
their constitutional liberties, we cannot and should not lose sight of the
nature and importance of the particular liberties that are at stake. And in
reaching my conclusion I view the guaranties of the First Amendment
as the foundation upon which our governmental structure rests and with-
out which it could not continue to endure as conceived and planned.
Freedom to speak and write about public questions is as important to the
life of our government as is the heart to the human body. In fact, this
privilege is the heart of our government. If that heart be weakened, the
result is debilitation; if it be stilled, the result is death.

The dissenting view in *Meadowmoor* became, to an extent at least, the majority
view in *Bridges v. California*, decided in 1941. There, a State court had acted
on the basis of its general common law powers without the benefit of statute, and
in doing so punished publications which dealt with pending litigation. The clear
and present danger language again appeared and there seemed to be a preferred
position given to freedom of speech:

What finally emerges from the "clear and present danger" cases is a
working principle that the substantive evil must be extremely serious and
the degree of imminence extremely high before utterances can be punished.
Those cases do not purport to mark the furthestmost constitutional
boundaries of protected expression, nor do we here. They do no more than
recognize a minimum compulsion of the Bill of Rights. For the First
Amendment does not speak equivocally. It prohibits any law "abridging the
freedom of speech, or of the press." It must be taken as a command of the
broadest scope that explicit language, read in the context of a liberty-
loving society, will allow.(Emphasis added.)

48. Carlson v. California, 310 U.S. 106 (1940). The *Carlson* case was decided
the same day as *Thornhill* v. Alabama, supra note 37; it invalidated a city ordinance
similar to the statute involved in *Thornhill.*


50. *Id.* at 307 (dissenting opinion).

51. *Id.* at 301-02 (dissenting opinion).

52. 314 U.S. 252 (1941).

53. *Id.* at 263.
Mr. Justice Frankfurter dissented. He felt that state action seeking to assure the impartial accomplishment of justice was not an abridgement of either freedom of speech or of press.

Until this time the phrase "preferred position" had not actually been used in an opinion, although that idea had been suggested by some of the Justices. Mr. Justice Frankfurter had been attempting to minimize the use of the clear and present danger test and at the same time repudiate any idea of a preferred position for first amendment freedoms. His argument against the clear and present danger test, from which the preferred position argument draws life, was that it was being used for a purpose other than that which Mr. Justice Holmes contemplated; that was, to determine the constitutionality of legislation rather than as a test of the application of a statute. Although in 1942 a majority of the Justices were reflecting the views of Mr. Justice Frankfurter, the strong dissent in Gobitis must have had some influence, for, assisted by public reaction, it seemed to promote reflection and reappraisal by certain members of the Gobitis majority. This is indicated by the relative positions on the Court in the Meadowmoor and Bridges cases.

The first use of the term "preferred position" occurred in Mr. Chief Justice Stone's dissenting opinion in Jones v. Opelika. The Court there held valid an ordinance which imposed a license tax on the privilege of selling books and pamphlets on the streets or from house to house. The Jehovah's Witnesses had violated the ordinance and the majority felt that the sales involved commercial transactions and were not of a religious nature. Mr. Chief Justice Stone would have held the ordinance invalid on its face and toward this end he asserted:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of a privilege, is capable of being used to control or suppress it.

Justices Black, Douglas, and Murphy joined in the Chief Justice's views. All three were members of the Gobitis majority and they took Opelika as an opportunity to express the view that Gobitis had been wrongly decided.

In October of 1942, Mr. Justice Byrnes, a member of the Opelika majority, resigned and Mr. Justice Rutledge succeeded him. Four days after Mr. Justice Rutledge took his seat, the Court granted certiorari in Murdock v. Pennsylvania and ordered reargument of Opelika. Justices Black, Douglas, Murphy and Rut-

54. Pritchett, Civil Liberties and the Vinson Court 31 (1954).
55. 316 U.S. 584 (1942).
56. Mr. Justice Stone was commissioned Chief Justice in July of 1941.
57. Jones v. Opelika, supra note 55, at 608 (dissenting opinion).
58. 318 U.S. 748 (1942).
ledge, and Mr. Chief Justice Stone formed the majority and reversed the *Opelika* case. The Court, through the same group, rendered a judgment favorable to the Jehovah’s Witnesses in *Murdock*, which involved the sect’s distribution of religious literature in violation of a city ordinance requiring all persons canvassing or soliciting for wares, goods, or such to obtain a license. In holding the ordinance violative of the first amendment, Mr. Justice Rutledge, writing for the majority, said:

> The fact that the ordinance is “nondiscriminatory” is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

Justices Frankfurter, Jackson, Reed, and Roberts were now in the minority. With the retirement of Mr. Justice Byrnes and the appointment of Mr. Justice Rutledge there was a reversal of the Court’s attitude in the first *Opelika* case. The new majority view prevailed again in a decision handed down the same day as *Murdock*.

In *West Virginia State Bd. of Educ. v. Barnette*, Mr. Justice Jackson’s position made the majority even stronger. He had previously been antagonistic to the preferred position philosophy but in this case he endorsed the view in the strongest of terms. He felt that the courts must be cautious in holding legislation invalid on ordinary due process grounds because of the indefiniteness of the standard. However, he asserted that the definiteness of the first amendment permits the replacement of the “reasonableness” test by considerably stricter standards. Drawing heavily on Mr. Justice Stone’s dissent in *Gobitis*, Mr. Justice Jackson said that:

62. *Id.* at 115.
63. *Martin v. City of Struthers*, 319 U.S. 141 (1943). This case involved a Jehovah’s Witness who was convicted for violation of an ordinance which forbade any person to knock on doors, ring doorbells, or otherwise summon to the door occupants of any residence for the purpose of distributing handbills or circulars. The Court held that the ordinance, as applied to a person distributing advertisements for a religious meeting, was invalid as a denial of freedom of speech and press. See also, *Taylor v. Mississippi*, 319 U.S. 583 (1943), where the Court invalidated a statute which sought to punish as a criminal, one who teaches resistance to governmental compulsion to salute.
64. *319 U.S. 624* (1943). The State Board of Education had adopted a resolution requiring the flag salute of both pupils and teachers. To refuse meant “insubordination”; insubordination meant expulsion; expulsion made a child a delinquent; and delinquency subjected both child and parents to prosecution. Walter Barnette and several other Jehovah’s Witnesses sued to enjoin enforcement of the resolution claiming that it violated the first and fourteenth amendments.
65. PRITCHETT, *op. cit. supra* note 54, at 35.
Much of the vagueness of the due process clause disappears when the specific prohibitions of the First Amendment become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect...  

He strengthened this argument when he went on to conclude that:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.66

Mr. Justice Frankfurter dissented. He felt that inasmuch as the legislatures are responsible directly to the people, the duty of legislating lies with them. Further, he asserted that the Court's very narrow function is to "determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.68

The libertarian majority did not find Mr. Justice Jackson's support in another Jehovah's Witnesses case69 the following year, but the Court was near unanimity as to result. The majority opinion was written by Mr. Justice Rutledge. The Court upheld, as an appropriate exercise of police power, a statute which prohibited children from selling or exercising any trade in a public place, and penalizing anyone furnishin them with merchandise for such purposes. The opinion asserted that the first amendment was deserving of a "preferred position," but, nevertheless, the State's interest in the welfare and protection of children was greater than the interests of religious expression or parental authority insofar as the case was concerned. Justices Jackson, Roberts, and Frankfurter concurred and would have upheld the statute as regulating "commercial" activities. They believed that actions for the purpose of raising money, even when conducted by religious groups, were affairs of Caesar rather than of God and subject to the restraint of the State.70

Mr. Justice Murphy took a more liberal view than any of his associates. He would have condemned the statute on either of the grounds dealt with by the other opinions. In doing so he would give the statute a presumption of invalidity as it restricted first amendment freedoms:

In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of religious belief, we are not aided by any strong

67. Id. at 642.
68. Id. at 649 (dissenting opinion).
70. Barnett, Mr. Justice Murphy, Civil Liberties and the Holmes Tradition, 32 CORNELL L.Q. 177, 200 (1946).
presumption of the constitutionality of such legislation. On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded.\textsuperscript{71}

A short time later, in \textit{Follett v. Town of McCormick},\textsuperscript{72} the Court invalidated, over the dissents of Justices Frankfurter, Roberts, and Jackson, a local ordinance which exacted a book agents’ license fee for distributing literature. The appellant earned his livelihood entirely from “contributions” requested in return for religious literature which he distributed. The majority found that the activity was “religious,” but the dissenters contended it was “commercial” and that the appellant should bear his part of the community expenses.

Thus, at the close of 1944, the “preferred position” concept had gained enough support to bring it from the form of suggestion in a footnote in the \textit{Carolene} case, to the prevailing attitude on the Court. However, as indicated, the Justices were not unanimous in this view and sharp splits characterized most of the cases involving the problem.

What were likely the strongest implications of the preferred position view, as well as the peak of its employment, can be found in \textit{Thomas v. Collins}\textsuperscript{73} and \textit{Mars v. Alabama}.\textsuperscript{74} The following passage from Mr. Justice Rutledge’s opinion in \textit{Collins} may be taken as a summary of the liberal view of the majority in 1945:

\begin{quote}
The case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.
\end{quote}

\textsuperscript{71} Prince v. Massachusetts, \textit{supra} note 69, at 173 (dissenting opinion).
\textsuperscript{72} 321 U.S. 573 (1944). The facts in this case were similar to those in \textit{Murdock}, but here Follet was a resident of the town, and confined his activities to the community. In \textit{Murdock}, on the other hand, the ordinance dealt with itinerant evangelists.
\textsuperscript{73} 323 U.S. 516 (1945). This case involved the validity of a Texas statute which required union organizers to register with the Secretary of State before soliciting memberships. Thomas, who was president of the UAW, had scheduled a speech before a group of employees. Prior to the speech he was enjoined from solicitation unless he registered as required. In the speech, Thomas invited one nonunion man to join the Oil Workers Industrial Union. The State court, holding Thomas in contempt, considered the whole speech and assembly to be a “solicitation,” basing its ruling on the single invitation. The Supreme Court restricted the issue to whether the registration statute could be validly applied to one speaking at a peaceful assembly on the benefits of the labor movement. By so restricting the issue, and holding only the particular application invalid, the Court was able to preserve the statute.
\textsuperscript{74} 326 U.S. 501 (1946).
For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.

One commentator has said that in the opinion Mr. Justice Rutledge employed a "psychological approach, but an influential one." That is, Mr. Justice Rutledge felt that the clear and present danger principle placed a heavy burden on government to justify infringements of those preferred freedoms guaranteed by the first amendment. It must be noted, however, that this was the view of only four Justices, for Mr. Justice Jackson, who supplied the fifth vote in *Thomas v. Collins*, concurred on other grounds.

A further, and yet perhaps stronger, indication of the preference which the majority was willing to give to first amendment freedoms occurred in *Marsh v. Alabama*, in which those freedoms prevailed over the rights of an owner of private property. The Court held, in invalidating a statute which made it a crime to enter upon or remain on premises of another after being warned not to do so, that a person could remain on private property without the owner's permission and contrary to State law so long as the only objection to his presence was that he was exercising an asserted right to express his religious views. Mr. Justice Black wrote the opinion. He reasoned that when the constitutional rights of owners of property were balanced against those of the people to enjoy freedom of speech or religion, the "latter occupy a preferred position." It should again be noted that while the Court was concerned with the matter here being emphasized—the matter of giving first amendment freedoms a preferred status—the clear and present danger formula was still important. Its use was to determine whether a particular publication or utterance was of such a nature to warrant its restriction.

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77. *Supra* note 74. Grace Marsh, a Jehovah's Witness, was distributing religious literature on the streets of Chickasaw, a town privately owned by Gulf Shipbuilding Corporation. She was warned not to distribute without a permit, and was arrested upon her refusal to obtain one.
78. *Id.* at 509.
79. See Pennekamp v. Florida, 328 U.S. 331 (1946). A paper had published two editorials and a cartoon criticizing certain actions previously taken by a Florida trial court as being too favorable to criminals and gambling establishments. Petitioners were convicted of contempt of court in that the publication reflected on the court's integrity, tended to create a distrust for the court, and also tended to obstruct the fair and impartial justice of pending cases. The Supreme Court unanimously held that this conviction was in violation of the petitioners' rights to free speech and press.
During 1946 a significant change occurred in the composition of the Court. Mr. Chief Justice Stone, perhaps the chief proponent of the preferred position, died. President Truman appointed Fred M. Vinson to the post of Chief Justice and, as a result, the "preferred position" libertarians were once more a minority. In *United Public Workers of America v. Mitchell*, the Court, over the dissents of Justices Black, Douglas, and Rutledge, repudiated the preferred position doctrine while upholding the validity of the Hatch Act which limited the political activity of government employees. The act required the removal from jobs of those who took an active part in political management or in political campaigns.

However, certainty in deciding cases concerning first amendment freedoms was not yet insured for, contrary to the implications of *Mitchell*, a majority of the Court once again endorsed a preferred status for such freedoms in *Saia v. New York*. The Court invalidated a city ordinance which prohibited the use of sound equipment without permission of the chief of police. This was found to be an intolerable limitation on the right of free speech. Mr. Justice Douglas, speaking for the majority, felt that it was the Court's responsibility to:

> [B]alance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the first amendment in a preferred position.

In spite of *Saia* the preferred position doctrine had run its course and the last case in which it had any significance was *United States v. C.I.O.*, and then only in a concurrence by Mr. Justice Rutledge who argued in favor of the reversed presumption idea thusly:

> As the Court has declared repeatedly, that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusion into these domains.

The reversal of the usual presumption of constitutionality of statutes when they restricted or abridged the freedoms of speech, press, religion, or assembly was the crux and the strength of the preferred position argument. This idea embedded itself into the attitudes and opinions of a majority of the Justices during the 1940's.

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81. 334 U.S. 558 (1948).
82. Id. at 562.
83. 335 U.S. 106 (1948). The case grew out of the Taft-Hartley Act's restrictions on expenditures in political campaigns. Any comment on or participation in elections by labor newspapers were prohibited if they were supported by general union funds. The labor organization and its president were indicted for making expenditures from the funds of the union for publication of an editorial in the *C.I.O. News*, urging members to vote for a particular candidate in a special congressional election held in Maryland. The Court held that these expenditures were not within the prohibition of the statute.
84. Id. at 140 (concurring opinion).
However, at no time did the argument enjoy unanimous approval by the Court. Nevertheless, the phrase was employed often enough, and by enough of the Justices, to insure against, at least to an extent, legislative action which would place arbitrary limitations on the first amendment liberties.

III. THE MODERN CONSERVATIVE COURT

A. Decline of the Preferred Position and Clear and Present Danger Doctrines

As indicated, the exalted state that characterized the first amendment liberties was to lose popularity with a majority of the Court. Evidence of this decline came in *Kovacs v. Cooper*, which arose out of the operation of a sound truck in Trenton, New Jersey, in violation of a city ordinance. The city made unlawful the operation of sound trucks or similar amplifying devices emitting "loud and raucous" noises on the public streets. Mr. Justice Reed, for the Court, interpreted the ordinance as prohibiting only loud and raucous sound trucks and not prohibiting all such trucks in general. He saved the ordinance in this manner, but it was not made clear whether a sound truck could be operated other than in a loud and raucous manner. If not, the decision would seemingly overrule *Saia*. However, Mr. Justice Reed distinguished the two cases; the ordinance in *Saia* established a previous restraint on free speech, whereas the Trenton ordinance was aimed at preventing disturbing noises. He alluded to a preferred position for freedom of speech, but asserted that it did not mean that legislators had to be insensible to the comfort and convenience of the citizens. The reference to "preferred position" brought an outburst from Mr. Justice Frankfurter in a concurring opinion. He deemed it a mischievous phrase if it carried the thought, which it seems to imply, that "any law touching communication is infected with presumptive invalidity."86

Although the reversed presumption was on the way out following *Kovacs*, in the same year the Court invalidated an ordinance prohibiting any misconduct which led to a "breach of peace."87 A coalition of Justices Reed, Black, Douglas, Murphy, and Rutledge concluded that speech could not be censored or punished on the grounds that it might "invite dispute" or "bring about a condition of unrest," but only where it was "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."88 The libertarians had won another battle, but the victory was to be only temporary. Even Mr. Justice Jackson, who had once strongly accepted the preferred position language,89 was now rejecting it, his feeling being...
that select constitutional rights could not be given a preferred position without others being relegated to a deferred position.90

The year 1949 brought about significant changes in the Court's personnel. Justices Murphy and Rutledge passed away; they had been strong libertarians, along with Justices Black and Douglas. President Truman filled the vacancies with appointments of Tom C. Clark and Sherman Minton. The initial effect was to put the more conservative view of Justices Frankfurter, Burton, Reed, Jackson and the Chief Justice in a strong majority as Justices Clark and Minton joined in their views. The net effect was, however, to cast the liberal preferred position view permanently out of use by a majority of the Court, which is at least understandable, no matter what one's individual view might be, when the doctrine is considered in its historical setting. The late forties were characterized by fears and uncertainties which tended to create a sense of conservatism in American politics and national life. This was largely the result of the threat of the cold war and the division of the larger part of the world into two hostile elements—Communist and anti-Communist. The period also witnessed exposure of Communist infiltration into government, labor unions, and other important areas. The Supreme Court reflected, to a degree, this atmosphere of conservatism, especially in the field of civil liberties. From a determination to protect civil liberties, the Court's attitude changed to a determination to maintain national security.91 "As some libertarian wag might put it—our First Amendment freedoms moved from a 'preferred' to a 'deferred' position, their protection being deferred to some future time, less critical and less emotion-packed."92

American Communications Ass'n v. Douds,93 furnished the first indication that the Court regarded the clear and present danger test a poor weapon to protect national security. The challenged statute was the Taft-Hartley Act which required labor union officers to sign non-Communist affidavits as a prerequisite to a union's use of NLRB services. In holding the statute not violative of the first amendment, Mr. Chief Justice Vinson said that Congress was seeking to prevent political strikes and that the clear and present danger principle could not apply because the statute did not interfere with speech. He felt that this was a commercial regulation and a valid exercise of the commerce power. Indicating that the clear and present danger test should be discarded in favor of a balancing of interests, the Chief Justice said:

When the effect 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.94

91. The Court continued to decide cases in which civil rights or civil liberties were involved, emphasizing that it had not abdicated from its position as protector in these areas. However, as the cases indicate, the emphasis had changed.
94. Id. at 397.
It should be noted, however, that although the conservative element of the Court, led by Justices Frankfurter and Jackson, was not willing to accept a "preferred" status for first amendment freedoms, neither was it willing to defer completely the freedoms to a point of religious discrimination through the use of local licensing requirements.95

B. The Emergence of the Balancing Test

In the early 1950's, it became clear that the Supreme Court was looking upon legislation restricting the first amendment freedoms with a more conservative approach. The "reasonable-basis" or "balancing" test was a manifestation of this outlook. The application of the test involved a balancing of two interests: the interest of the state in the welfare and security of its citizens, on the one hand, and the interest of the individual in respect to his first amendment guarantees, on the other. Where there was, by statute or otherwise, a significant encroachment upon personal liberty, the state could prevail only upon showing a subordinating interest which was compelling. This approach had been used before,96 in fact, even the preferred position libertarians applied a balance, but on one side of the scale was the weight of the first amendment which occupied a "preferred" place.97

In a series of three cases, in 1951, the Court employed the balancing of interests view to uphold restrictions upon first amendment freedoms. The first of these was Feiner v. New York,98 involving a "riotous" speech made by a university student wherein he, in a "loud, high-pitched voice," spoke derogatorily about President Truman, Mayor O'Dwyer of New York, and the American Legion. The student was arrested and convicted on a disorderly conduct charge. Speaking for a six-man majority, Mr. Chief Justice Vinson recognized that Feiner had a right to speak, but denied him the right to "incite a riot." The student was "neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered." Thus, the Court respected the community interest, and placed it above the right of Feiner to speak his mind in the manner which he did.

The second of these cases was Dennis v. United States,99 which made it evident that the Court was a conservative one, desirous of insuring national security. Eleven leaders of the American Communist Party had been convicted of violations

95. See Niemotko v. Maryland, 340 U.S. 268 (1951). This case involved a group of Jehovah's Witnesses who were giving talks in a public park. The use of the park was not regulated, but it was a custom to obtain a permit before making speeches. The group was refused a permit because of its religious views, so it held the meeting without one. The Court unanimously held that the conduct of the speaker had been orderly and that the basis for the charge was the failure to have a permit. The Court found that there had been "unwarranted discrimination" not compatible with the Constitution.
of the Smith Act. The Court was faced with the problem of reconciling, with the guarantees of free speech, a statute which treated the advocacy and teaching of the overthrow of the Government by force and violence as a criminal offense. Mr. Chief Justice Vinson, speaking for the Court, reinterpreted the clear and present danger test in affirming the conviction. He did not go so far as the majority had gone in *Gitlow*, but took a position that had been used by Judge Learned Hand, asking: "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Neither did the Chief Justice go so far as Justices Holmes and Brandeis would have gone in *Gitlow* in the other direction, that is, that the Court should affirm statutes only if the likelihood of success for the subversive activity is immediate and pressing; his was a middle ground. Justices Jackson and Frankfurter also added their interpretations of the case; they would again reject the clear and present danger test, apply the balancing test, and conclude that the weight was in favor of an invasion of speech. Mr. Justice Black, dissenting, would have held section three of the Smith Act invalid on its face as a censorship of free speech and press. He said:

... I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress....

Mr. Justice Black felt that the Court was placing too much emphasis on the fear of the times and the concern over national security. In favoring the once popular preferred position view, he went on to state that:

... [T]here is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

The last of the three cases was *Breard v. Alexandria*. The Court upheld a "Green River Ordinance," in which door-to-door solicitation by itinerant salesmen of magazine subscriptions was prohibited. Mr. Justice Reed wrote the majority opinion and in holding that the ordinance did not abridge first amendment liberties, concluded that communities which had found house to house canvassing "obnoxious" had such an interest as to justify the right to control it by ordinance. Thus,

101. Section two of the Smith Act made criminal advocacy itself punishable; section three of the act went even further in that it made criminal a conspiracy to advocate. The prosecution involved in *Dennis* was for a conspiracy to advocate under section three.
102. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).
104. *Id.* at 580 (dissenting opinion).
105. *Id.* at 581 (dissenting opinion).
the Court's conservatism was not limited to those cases in which national security was at stake. In insisting that the first amendment liberties enjoyed preferred status, Justices Black and Douglas once again attempted to restore the reversed presumption in the face of an antagonistic majority.

In 1952 the Court was faced with the case of *Beauharnais v. Illinois.*107 There, an Illinois criminal libel statute restricting freedoms of the first amendment was upheld on the ground that the State had a rational basis for the limitations. The statute made it unlawful for persons or corporations to publish or exhibit any writing, picture, drama, or moving picture which portrayed depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion, which would expose any of these citizens to contempt, derision, or obloquy or which would be productive of breaches of peace or riots. Mr. Justice Frankfurter, speaking for a five-man majority, placed libelous speech in the same category as obscene utterances and said that neither were to be accorded constitutional protection. In treating the statute as a "group" libel law, he reasoned that since a state could punish libels directed at individuals, speech which would be libelous if so directed, could also be libelous when aimed at a group and individuals were "inextricably involved" therein. Dissenting, Mr. Justice Black felt that the decision manifested the shocking results of the reasonable-basis test in the civil liberties field. He argued that under the Court's view the first amendment was not even accorded the respect of a passing mention. Mr. Justice Douglas, in a separate dissent, vigorously disapproved the conservative attitude of the Court, asserting that:

The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. . . .

Mr. Justice Jackson, who usually sided with the conservative element, also dissented. He agreed that the State had power to adopt a group libel law, but took this opportunity to reiterate the view which he took in the *Dennis* case. There he had referred to the clear and present danger doctrine, saying:

I would save it, unmodified, for application as a "rule of reason" in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. It is not a prophecy, for the danger in such cases has matured by the time of trial or it was never present. The test applies and has meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime but to which such tendency is sought to be attributed by construction or by implication from external circumstances. The formula in

108. Id. at 285 (dissenting opinion).

http://scholarship.law.missouri.edu/mlr/vol26/iss4/9
such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave. . . .

The attitude of both elements of the Court as they stood in 1953 can be illustrated by statements found in *Poulos v. New Hampshire*.

Mr. Justice Reed wrote the majority opinion and said:

The principles of the first amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a *non sequitur* to say that first amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated to the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the first amendment guarantees of free speech, press and the exercise of religion.

Dissenting, Mr. Justice Douglas distinguished between the clear speech issue raised in *Poulos* and the traffic control problem involved in *Cox v. New Hampshire*. He stated that:

An unconstitutional statute is not necessarily a nullity; it may have intermediate consequences binding upon people . . . . But when a legislature undertakes to proscribe the exercise of a citizen's constitutional right to free speech, it acts lawlessly; and the citizen can take matters in his own hands and proceed on the basis that such a law is not law at all. . . . The reason is the preferred position granted freedom of speech, freedom of press, freedom of assembly, and freedom of religion by the first amendment.

Mr. Justice Douglas concluded that no standards or procedural safeguards could save a licensing system because even a reasonable regulation of the right of free speech is not compatible with the first amendment.

As the Court stood at the end of 1953, four of the nine Court members had been appointed by President Truman. The remaining five were Roosevelt appointees—Justices Black (1937), Reed (1938), Frankfurter and Douglas (1939), and Jackson (1941). Mr. Justice Burton was appointed in 1945, Mr. Chief Justice Vinson in 1946, and Justices Clark and Minton in 1949. Within this Court the libertarian view of Justices Black and Douglas was in a definite minority. Now, however, Mr. Chief Justice Vinson and Justices Reed, Jackson, Minton, and Burton are gone. They were replaced by Mr. Chief Justice Warren and Justices Harlan,
Whittaker, Brennan and Stewart. The effect which these five appointments had in the area of first amendment freedoms is illustrated by a survey of some of the more recent Court opinions.

The present Court may be sharply divided, for this purpose, into two groups: five somewhat "conservative" Justices and four "liberals." This characteristic is brought into focus by two decisions in cases decided in 1959, both of which involved matters affecting internal security.

In Barenblatt v. United States,114 a closely divided Court upheld the conviction of Lloyd Barenblatt for contempt of Congress. He had refused, while giving testimony before a subcommittee of the House Committee on Un-American Activities, to answer certain questions regarding his alleged Communist affiliations at the time of the hearing and at a time when he was a teaching fellow at the University of Michigan. Mr. Justice Harlan spoke for the majority and placed emphasis on the congressional power to conduct investigations. In answering the allegation that the conviction was violative of the appellant's first amendment rights, Mr. Justice Harlan said that:

Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.115

He concluded that the balance between the individual and the governmental interests at stake was in favor of the latter and that therefore, the provisions of the first amendment had not been offended. Mr. Justice Black wrote a vigorous dissent in which the Chief Justice and Justices Douglas and Brennan concurred. Mr. Justice Black rejected the Court's balancing concept, denying that "laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process."116 He agreed that a balancing test might be proper in cases concerned with laws which primarily regulate conduct but which might also indirectly affect speech if, however, the effect on speech was minor in relation to the need for control of the conduct. But, he said, laws which are directly aimed at curtailing speech could not be saved through any balancing of interests, and furthermore, even if a balancing were applicable, he argued that the majority was weighing the wrong factors:

But even assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later

115. Id. at 126.
116. Id. at 141 (dissenting opinion).
being subjected to governmental penalties for having dared to think for themselves.\textsuperscript{117} (Emphasis added.)

Moreover, the dissenters argued, the Court negated the balancing concept by the overwhelming weight it gave to the concept of "self-preservation."

\textit{Uphaus v. Wyman}\textsuperscript{118} was handed down the same day as \textit{Barenblatt}. The same group of Justices comprised the majority which held that the Attorney General of New Hampshire, acting as an investigating agency for the State legislature, could require Uphaus to produce a list of attendants at a summer camp. The legislature had directed the Attorney General to conduct a probe of subversive activities within the State. During the investigation, he summoned Uphaus, who was the Executive Director of World Fellowship, Incorporated. Uphaus refused to comply with subpoenas calling for the production of certain corporate records and he was convicted of contempt. In answering the claim that the conviction was violative of the rights of free speech and association under the first and fourteenth amendments, Mr. Justice Clark, for the majority, weighed the public interests involved against the private ones and concluded that the State's interest in "self-preservation" justified a restriction of the constitutional rights. Mr. Justice Brennan dissented in an opinion joined in by the Chief Justice and Justices Black and Douglas. The primary assertion of the dissent was that the record failed to reveal any interest in the State sufficient to subordinate the petitioner's constitutionally protected rights. Mr. Justice Brennan felt that the legislative objective of exposure, purely for the sake of exposure, was not a valid subordinating purpose. Justices Black and Douglas wrote an additional dissenting opinion in which they asserted that they would have decided the case on the basis that Uphaus was deprived of his rights under the first and fourteenth amendments under the principles asserted in their dissents in \textit{Beauharnais v. Illinois}.

The two cases, \textit{Barenblatt} and \textit{Uphaus}, indicate the position of the newer members of the Court and their attitudes concerning the first amendment where national security is also involved. The dissenting minority in both cases consisted of the Chief Justice and Justices Black, Douglas and Brennan, and while this liberal group was determined in its stand, the conservative attitude of the remaining Justices was able to prevail.

It is worthy of note, however, that not always was the majority's balance struck in favor of the state. The balancing approach was applied in \textit{N.A.A.C.P. v. Alabama},\textsuperscript{119} but the State's interest was found insufficient to justify constitutional infringements. Mr. Justice Harlan, a member of the conservative block, there asserted that when it is shown that state action threatens significantly to impinge upon constitutionally protected freedoms, the question becomes:

\[ \text{Whether . . . [the State] has demonstrated an interest in obtaining the disclosures it asks . . . sufficient to justify the deterrent effect which} \]

\textsuperscript{117} \textit{Id.} at 144 (dissenting opinion).
\textsuperscript{119} 357 U.S. 449 (1958).
we have concluded these disclosures may well have on the free exercise by petitioner members of their constitutionally protected right of association.120

Even more recently, however, a majority of the Court members have reaffirmed their *Barenblatt* position. In *Wilkinson v. United States*121 the majority asserted that the *Barenblatt* case was indistinguishable and therefore controlled. It was said that *Barenblatt* made it clear that "it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest."122 This position was followed also in *Braden v. United States.*123 The majority held that the interest of the Government in "self-preservation" justified the invasion of petitioner's constitutional rights. Mr. Justice Black, speaking for the libertarians, dissented and asserted that *Barenblatt* and *Beauharnais* should be overruled. He felt that due to the present trend of cases there was no limit to congressional encroachments in this area "except such as a majority of this Court may choose to set by a value-weighing process on a case-by-case basis."124 This process, he argued, was a "dangerous trend" and should be stopped before it was too late.

Again reflecting the status of the conservative members of the Court, *Communist Party v. Subversive Activities Control Bd.*125 found the Court upholding the registration requirements of the 1950 Subversive Activities Control Act126 section seven (a) of which requires all "Communist-action organizations" to register

120. *Id.* at 463. For a similar holding see *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

121. 365 U.S. 399 (1961). This case arose out of hearings held by a subcommittee of the House Committee on Un-American Activities, in Atlanta, Georgia, pursuant to a resolution of the committee directing an investigation of Communist Party propaganda in the South and Communist infiltration in southern textile and other industries. The petitioner, a representative of the Emergency Civil Liberties Committee, decided to go to Atlanta to support opponents of the hearings. Within an hour after his registration at an Atlanta hotel, he was served with a subpoena calling for his appearance before the subcommittee. Upon his appearance, a number of questions were put to him, including questions as to whether he was a member of the Communist Party. He refused to answer any of the questions but did not assert protection under the fifth amendment. He was convicted under a statute making it a misdemeanor for any person summoned as a witness by either congressional chamber, or a committee thereof, to refuse to answer any question pertinent to the matter under inquiry. The Court sustained the conviction.

122. *Id.* at 414.

123. 365 U.S. 431 (1961). In this case the same subcommittee as was involved in *Wilkinson* had subpoenaed the defendant, a field representative of the Southern Conference Educational Fund, an organization active in promoting racial integration in the South. Braden had drafted and was active in the circulation of two letters, one calling for defeat of a measure to empower states to enact anti-sedition statutes and the other opposing the southern hearings of the subcommittee. Braden was asked if he was a member of the Communist Party at the time he signed the first letter. Upon his refusal to answer he was declared in contempt and later convicted. The Court affirmed the conviction in a five to four decision.

124. *Id.* at 445 (dissenting opinion).


with the Attorney General on a form prescribed by him according to his regulations. Mr. Justice Frankfurter, writing the Court's opinion, applied the balancing of interest test in reaching the conclusion that the provision was constitutionally valid:

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 ends which the regulation may achieve.

With respect to the assertion that rights guaranteed by the first amendment had been infringed upon, Mr. Justice Frankfurter asserted that more was at stake than the exercise of rights of free speech and assembly. He noted that the congressional power in this sphere is limited by the first amendment, and that individual liberties fundamental to American institutions are not to be destroyed under the pretext of preserving those institutions, even from the gravest external dangers. He went on to say, however, that:

... [W]here the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods.

Mr. Justice Black, in a dissenting opinion, reasserted his often-expressed objection to the balancing test employed by the majority.

In the most recent opinion concerning this problem, Scales v. United States, the Court upheld a conviction under the Smith Act which makes it a crime to be a member of an organization which advocates forceful overthrow of the Government of the United States knowing that to be the view of the organization. The Court, speaking through Mr. Justice Harlan, rejected the constitutional claim that the statute infringed upon free political expression in violation of the first amendment.

127. The statute defines a Communist-action organization as one which is controlled by a foreign power controlling the “world Communist movement” and which operates primarily to advance that movement. The statute establishes a Subversive Activities Control Board which has the duty to determine whether or not any given organization is a Communist-action organization required to register under the act. The registration must include the names and addresses of the organization’s present officers and those who were officers within the previous twelve months and the names and addresses of each individual who was a member during the same period. Registration statements are to be kept up to date by annual reports.


129. Id. at 96-97.

On the argument that the petitioner had a right of freedom of association, the Court answered that active participation in a party which has illegal aims is not constitutionally protected. The Court felt that the *Dennis* case, which upheld the conspiracy provisions of the Smith Act, disposed of the free speech claims in the case.\(^{131}\) Mr. Justice Black continued to argue for repudiation of the balancing test used by the majority. In a dissenting opinion he said that the Court's application of the test in *Scales* definitely infringed upon freedom of speech, thus indicating the unlimited breadth and danger of the test as it was being applied by the Court. His view of the test is indicated by his statement in *Scales* that:

Under that "test," the question in every case in which a First Amendment right is asserted is not whether there has been an abridgment of that right, not whether the abridgment of that right was intentional on the part of the Government, and not whether there is any other way in which the Government could accomplish a lawful aim without an invasion of the constitutionally guaranteed rights of the people. It is, rather, simply whether the Government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of this Court, to justify the Government's action in doing so. This doctrine, to say the very least, is capable of being used to justify almost any action Government may wish to take to suppress First Amendment freedoms.\(^{132}\)

**Some Observations**

In a recent publication of the American Jewish Congress\(^{133}\) some interesting and perhaps illuminating statistics were given. It was shown that of the number of cases decided by the Supreme Court during the 1960-1961 term in which opinions were written, nearly half were concerned with civil rights or civil liberties matters. The significance of this fact is brought into sharper focus when compared with the opinions rendered only twenty-five years ago. In its 1935-1936 term, the Court handed down one hundred and sixty opinions, only two of which concerned civil rights or civil liberties.\(^{134}\) This change is radical to the point of being almost revolutionary. The Court, as it stood in 1936, still had as its chief architect Mr. Chief Justice John Marshall. It had been fashioned by him to be the protector of property rights and to safeguard commerce, industry and finance from hostile legislatures on both state and federal levels. Beginning about the time of President Roosevelt's threatened "packing," however, the Court has abandoned the role fashioned for it by Mr. Chief Justice Marshall, and has become the nation's guardian of the liberties of the people. Inasmuch as the Court, for the most part, controls its own calen-

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131. *Id.* at 230, n. 21.
132. *Id.* at 262 (dissenting opinion).
134. *Id.* at 1.
dar and decides for itself which cases it accepts for consideration, it is clear that this role has been voluntarily assumed.

It is only fair to note, however, that while it is clear that the Court's increasing concern in this area was begun under a Democratic administration, the majority of the Justices today were appointed by a Republican President. This indicates that the Court's concern in this area does not depend upon the party in power or by whom the Justices are appointed. It is the fact that the Court is repeatedly hearing this type of case, and not so much in which direction the decisions go, that indicates that civil rights and civil liberties are of primary concern to the Court. And, looking to the past twenty-five years for a guide, it appears that this is a permanent development, or at least a development the termination of which lies in the indefinite future.

Not so clear as the obvious concern of the Court in this area, is the direction the Court will take in protecting the liberties of the people. For example, the present status of the clear and present danger doctrine is not clear. One author\textsuperscript{135} has suggested that the heart of the doctrine was extracted in \textit{Yates v. United States}.\textsuperscript{136} However, that case made no mention of the doctrine. Moreover, help may not be obtained from the \textit{Scales} case, the most recent on this matter, as the issue of whether the test would be applied to the membership clause of the Smith Act was not decided. On the other hand, there seems to be no question that the "preferred position" philosophy has been abandoned, at least for the present time. One can only speculate as to whether the phrase will ever be used again, but while Justices Black and Douglas remain on the Court there is always the possibility that the phrase will sometime reappear.

For the past decade the Court has been employing a "reasonableness" approach in settling these questions. Under this view the Court balances the constitutional guarantees in question against the wisdom and reasonableness of the regulation in question. But even under this approach the Court has cautioned that freedom of speech and press must weigh heavily on the scales.\textsuperscript{137} In applying the balance it is not possible to determine all of the values which a Justice may have related to a particular decision. A working hypothesis in decisions involving civil liberties is that the decision will be influenced by the interaction of two factors:

One is the direction and intensity of a Justice's libertarian sympathies, which will vary according to his weighing of the relative claims of liberty and order in our society. These positions range from the right of the individual on the one hand, and the right of the state on the other. The second factor is the conception which the Justice holds of his judicial role and the obligations imposed on him by his judicial function.\textsuperscript{138}

Ranking the Justices according to these criteria would be difficult, but ranking them in relation to one another is not so difficult. Mr. Chief Justice Warren and

\textsuperscript{136} 354 U.S. 298, 340 (1957).
\textsuperscript{137} American Communications Ass'n v. Douds, \textit{supra} note 73, at 399-400.
\textsuperscript{138} Pritchett, \textit{Civil Liberties and the Vinson Court} 191 (1954).
Justices Black, Douglas, and Brennan side with libertarian claims in an extremely high number of the cases. This would seem to indicate that while their personal preferences are strongly libertarian, they also have a conception of their judicial function which permits them to give effect to these personal preferences. On the other hand, Justices Frankfurter, Harlan, Whittaker, Clark and Stewart, being somewhat conservative in their approach, are more willing to tip the scales in the direction of the rights of the state.

This liberal-conservative split is exemplified in some of the recent cases involving matters of internal security. These cases, coming largely as a result of the hardening of American-Russian relations, reflect our nation's intense concern with the problems of Communist subversion and internal security. But what the future has in store, or what test the Court will apply in the future, is not capable of determination. It does seem fair to say, however, that the future actions of the Court will depend in large measure upon public opinion, international relations, personal philosophy and many other such variables.

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