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JUDICIAL STANDARDS FOR THE PROTECTION OF BASIC Freedoms

By JACOB D. HYMAN*

"I suppose the American people, on whose eternal vigilance liberty ultimately depends, are well agreed that what they want of the courts is that they both preserve liberty and protect security, finding ways to reconcile the two needs so that we do not lose our heritage in defending it."**

Elsewhere in the address from which the above quotation was taken, Mr. Justice Jackson reminded us that the issue between authority and liberty presented a dilemma, not because the issue is between right and wrong, but precisely because the issue is between two important rights.1 There is no need to review the grave dangers that confront the United States on the international scene, or to re-assert our devotion to our heritage of liberty. Complex as the conflict must be, it becomes more so because under present conditions our liberty is itself a primary component of our security. We can hardly win in a war of ideas if, in the waging of it, we are unable to show that we ourselves enjoy the liberty that we claim our way of life offers. Moreover, since the struggle is likely to continue for decades, our ultimate survival depends upon a maximum use of our resources. That cannot be achieved unless we constantly develop new ideas in governmental policy, in basic science, and in technology. And every impairment of freedom further limits the development of those essential ideas.2

Issues so fundamental and pervasive in our society must ultimately be resolved by the people. Certainly the Supreme Court cannot single-handed achieve a solution that will endure. It has even been doubted that the courts can play a significant role in the working out of such basic problems.3 This conclusion seems to underrate the influence of the Courts in a society in which the tradition of

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**Mr. Justice Robert H. Jackson, in the lecture which inaugurated a series at the Buffalo Law School in the memory of James McCormick Mitchell. 1 Bfl. L. Rev. 103, 115 (1951).

1. Ibid. at 117.

2. For a sobering discussion of the conflict between security and scientific progress, see Walter Gellhorn, Security, Loyalty and Science (1950); reviewed, 1 Bfl. L. Rev. 98 (1951).

judicial review gives the judges a final voice in many controversies and in which the Court has come to serve as a symbol whose pronouncements often "articulate and rationalize the aspirations reflected in the Constitution." With such a tradition, the influence of the Court can at all events be felt. When conflicting pressures in the nation at large are closely balanced, the influence of the Court in the preservation of freedom might be great. Thomas Jefferson's defense of a bill of rights against the charge that it was useless might well be recalled as a defense of the Court's potential influence in a time of crisis. He said:

"But though it [a bill of rights] is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen, with that brace the less." 5

If popular demand for freedom should lead to reckless disregard of security, there is of course nothing that the Court could do; for the Court's action must in the nature of things be the exercise or withholding of the judicial veto. But an unthinking popular demand for security at any price, including the sacrifice of freedom, could give the Courts an opportunity to exert a restraining influence. Assuming that the courts can exert substantial influence in this crisis, are we justified in asking them to participate? What tools are available for them to use? Are the available tools being used well in the issues now coming before the Courts? These are the questions to which the following discussion is addressed.

I

PREFERRED FREEDOMS

Ratification of the Constitution was threatened by the absence of a bill of rights. The state constitutions had carried on the long tradition, fully developed in seventeenth century England, of reducing to a written statement the essential limitations on governmental power. Sentiment was strong that the new Federal Government, although having only such power as was delegated to it, should be placed under explicit limitations. During the first session of Congress, therefore, a bill of rights was drafted, approved, and submitted to the states for ratification, which was completed in 1791. The unqualified language of the first of these amendments is arresting: "Congress shall make-no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Second and Third deal, respectively, with the right to bear arms and the quartering of soldiers in

4. Freund, supra note 3 at 552.
homes. The Fourth places restrictions upon searches and seizures. The Fifth, in addition to providing a variety of specific safeguards relating to criminal prosecutions, enjoins that no person shall be "deprived of life, liberty, or property, without due process of law," and bars the taking of private property for public use without compensation. The Sixth establishes further safeguards in criminal prosecutions, the Seventh preserves jury trial in civil actions, and the Eighth prohibits excessive bail and punishments.

Generally understood to be applicable only to the Federal Government,\(^6\) the application of these restraints to the states is the result of a comparatively recent determination of the scope of the due process clause of the 14th Amendment. Although the privileges and immunities clause was early held not to make the first eight amendments binding on the states,\(^7\) the steadily broadening interpretation of the substantive restrictions imposed by the due process clause led, in the 1920's and 1930's, to the determination that the First Amendment freedoms were among the basic liberties of a free society protected by that clause.\(^8\) Despite some early suggestions to the contrary, it has become settled that the First Amendment limitations are to be applied in words as well as in substance against the states.\(^9\) Thus the problems to be discussed are for all practical purposes identical whether it is the action of the states or of the Federal Government that is being reviewed for validity: for the states, the governing clause is the due process clause of the 14th Amendment, which makes the limitations of the First Amendment binding upon the states; for the Federal Government, it is the First Amendment in terms and the due process clause of the Fifth.

While the Bill of Rights contains no specific limitation on interferences with property rights—other than the prohibition against taking without compensation, which appears in the Fifth but not the Fourteenth Amendment—it was in the area of property rights that the conception of the due process as a limitation on the substance of legislative action developed.\(^10\) The development reached its apex in a series of decisions in the 1920's invalidating a wide range of state regulation of prices, wages, and labor relations of businesses not deemed to be affected with a public interest.\(^11\) In the late 1930's an abrupt change occurred, the crucial cases

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7. The Slaughter House Cases, 16 Wall. 36 (U. S. 1873).
10. See Twiss, Lawyers and the Constitution; How Laissez Faire Came to the Supreme Court (1942).
11. See, for example, the cases cited in Stern, The Problems of Yesteryear—Commerce and Due Process, 4 Vand. L. Rev. 446, note.
involving the validation of price-fixing in New York's milk industry, of minimum wage legislation, and of labor relations.

Two cases may be examined to illustrate the change in attitude. *Weaver v. Palmer Bros.*, involved the attempted enforcement of a Pennsylvania statute prohibiting the use of shoddy, whether new or second-hand, in comfortables. Shoddy is made by shredding woolen rags or waste. The plaintiff, who sought and obtained a Federal District Court injunction against the enforcement of the statute, sterilized all the shoddy which it used in its very extensive business. There was evidence on behalf of the plaintiff that bacteria or vermin would be unlikely to survive the manufacturing process and that, if they did, steam sterilization, which the plaintiff used, was effective to kill them. The Supreme Court sustained the injunction, the Court's opinion reasoning that the legislation could not be sustained as a health measure, because sterilization eliminated that danger, if there was any; nor as a safeguard against fraud and deception, because other statutes required inspection and labeling. The statute was therefore thought to be arbitrary and unreasonable. Holmes, accompanied by Brandeis and Stone, dissented, because it seemed to him that the opinion that unsterilized shoddy could spread disease was not manifestly absurd; and because it was admitted to be impossible after production to distinguish harmless from infected articles. To the dissenters, these facts made it permissible for the legislature, if it regarded the danger as great and inspection and tagging as inadequate precautions, to forbid all use of shoddy.

The opinion for the Court in *U. S. v. Carolene Products Co.* written by Mr. Justice Stone, reflects the approach of the dissenters in the *Weaver* case. The act of Congress challenged prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil, other than milk fat, so as to resemble milk or cream. The case came to the Court from a judgment sustaining a demurrer to the indictment. A result favorable to the statute was not hard to reach, in view of the allegation in the indictment that the article was injurious to the public health; of the Congressional findings that the use of filled milk as a substitute for whole milk was injurious to health and facilitated frauds upon the public; and of a decision twenty years earlier upholding similar state legislation. What is significant is the extremely broad test formulated for the determination of such questions: "... regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the

15. 270 U. S. 402 (1926).
16. 304 U. S. 144 (1938).
assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Elsewhere, the Court said: "... it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited."

The full significance of this standard of constitutionality became clearer six years later when the Supreme Court reviewed the conviction of the defendant which followed the above decision. Defendant was not allowed to introduce evidence as to the wholesomeness of its product. It challenged this exclusion, stressing the fact that defendant’s manufacturing process added to the product fish liver oils containing vitamins A and D. While the product was indistinguishable from evaporated whole milk except by chemical analysis, and was sold in cans of the same size and shape, the cans were truthfully labelled to show the trade names and ingredients. Defendant’s principal argument was directed at the health hazard referred to by the Congressional committee, and stressed in the earlier case; namely, the absence of vitamins from the product. This health hazard having been removed, defendant argued that its product no longer fell within the scope of the act and, if it did, the act could not constitutionally be applied to it. The Court rejected both arguments. It pointed out that vitamin deficiency was only one of the reasons for the statute, the other being the possibility of the consumer’s being deceived and getting filled milk when he wanted whole milk. The prevention of this deception was held "to furnish an adequate basis, other than unwholesomeness, for the action of Congress." When Congress exercises a delegated power ... the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat. Defendant's reliance upon the Weaver case was ineffectual.

The breadth of this test is obviously great. A well informed commentator has this to say of it:

18. 304 U. S. at 152.
19. Ibid at 154.
21. Ibid at 31-32. Recently, in holding that a statute could not fairly be construed as authorizing administrative action similar to the action taken by the legislature in the Carolene case, the Court observed: "If Congress wishes to say that nothing shall be marketed in likeness to a food as defined by the Administrator, though it is accurately labeled, entirely wholesome, and perhaps more within the reach of the meager purse, our decisions indicate that Congress may well do so." 62 Cases of Jam v. United States, 340 U. S. 593, 600-1 (1951).
"Since it is difficult to conceive of any statute for which some rational basis may not be found, this test means that the due process barrier to substantive legislation as to economic matters has been in effect removed—although it still stands in theory against completely arbitrary legislative action."22

Mr. Justice Roberts has recently stated the standard in the following terms: "State action . . . [is] condemned for arbitrariness, for lack of fairness assumed to be a postulate of the sort of civilized society for which our government exists."23

Our first question is whether any stricter standard should be applied by the Court in passing upon the constitutionality of legislation which restricts the freedoms of the First Amendment. It has been contended forthrightly that the standard should be no different.24 And this was essentially the implication of <i>Gitlow v. New York</i>, which upheld the validity of New York’s Criminal Syndicalism Act prohibiting the advocacy of the overturn of government by force or violence.25 The Court argued: "It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark . . . it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."26 This sounds very much like the standard finally adopted in the field of economic regulation. Why should not the legislature have as much freedom to bar the propagation of subversive ideas as of products likely to deceive the consumer? Why did Holmes and Brandeis, who in the <i>Weaver</i> case and many others, insisted in dissent that legislative judgment as to the need for regulation in the public interest should prevail if at all reasonable, again express dissent when the Court upheld a legislative judgment obviously not devoid of all reason? Why did Stone, in announcing his broad test of judicial abstention in the <i>Carolene</i> case, drop the following, now famous, footnote?

"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."27

It is submitted that there are compelling reasons for drawing this distinction. However difficult it may be at times for a heterogeneous people to agree upon a statement of ultimate values for man, or their source or authority, the existence

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22. Stern, <i>supra</i> note 11, at 449.
25. 268 U. S. 652 (1926).
27. 304 U. S. at 152.
of a written constitution, deeply rooted in two centuries of growth, authorita-
tively establishes some fundamental common values. The government created
by that Constitution vests powers of government in all the people, to be exercised
on their behalf, by representatives who are accountable to them. Whether such
a government be called a republic or a representative democracy, it is implicit
in its structure that its citizens should be free to engage in those activities which
are a precondition to its functioning. The language of the First Amendment
makes this postulate explicit: "Congress shall make no law . . . abridging the
freedom of speech, or of the press; or the right of the people peaceably to as-
semble, and to petition the Government for a redress of grievances." The need
here is a need of all of the citizens, and the right protected is not alone a personal
right, but a right of the whole people. Alexander Meiklejohn has expressed it
forcefully: "Far more essential, if men are to be their own rulers, is the demand
that whatever truth may become available shall be placed at the disposal of all
citizens of the community . . . The primary purpose of the First Amendment is,
then, that all the citizens shall, so far as possible, understand the issues which
bear upon our common life. That is why no idea . . . no relevant information,
may be kept from them." 29

Mr. Justice Brandeis expressed this same thought in his famous concurring
opinion in Whitney v. California:

"Those who won our independence believed . . . that freedom to think
as you will and to speak as you think are means indispensable to the
discovery and spread of political truth; that without free speech and
assembly discussion would be futile; that with them, discussion affords
ordinarily adequate protection against the dissemination of noxious
doctrine; that the greatest menace to freedom is an inert people; that
public discussion is a public duty; and that this should be a fundamental
principle of the American government." 30

Clear as this point is, there is another which to some will appear equally
compelling. The clause which denies Congress power to make any law "pro-
hibiting the free exercise" of religion reveals a concern with personal values.
The free exercise of religion is important primarily for what it means to
the individual. Concern with the dignity and significance of the individ-
ual human being as such is a heritage of the Judaeo-Christian tradition, rein-

28. "For let it be agreed that a government is republican in proportion
as every member composing it has his equal voice in the direction of its concerns
(not indeed in person, which would be impracticable beyond the limits of a city
or small township, but) by representatives chosen by himself, and responsible
to him at short periods . . . ", Thomas Jefferson, Letter to Samuel Kercheval,
29. Meiklejohn, Free Speech and its Relation to Self-Government, 88-9
(1948).
30. 274 U. S. 357, 375 (1927).
forced by the English tradition of political freedom, and thoroughly ingrained in the political structure which our Constitution erected. Here again, whatever disputes there may be about the ultimate source of such values, the inviolability of the individual conscience is made a postulate of our governmental system. Freedom of thought and speech are aspects of this value inseparably connected with freedom of religious belief. The juxtaposition of these freedoms in the First Amendment demonstrates and emphasizes their essential similarity. To Jefferson, who was so largely responsible for the adoption of the Bill of Rights, freedom of expression and freedom of conscience were inextricably related.\textsuperscript{31}

In the Whitney dissent, Mr. Justice Brandeis expressed this aspect of freedom along with the political aspect: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties... They valued liberty both as an end and as a means."\textsuperscript{32} Mr. Justice Jackson caught the spirit and some of the accents of Jefferson in his opinion for the Court in \textit{West Virginia Board of Education v. Barnette}: "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men... As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be... Ultimate futility of such attempts to compel coherence is the lesson of every such effort... Those who begin coercive elimination of dissent soon find themselves exterminating dissenters... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be called orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."\textsuperscript{33}

Freedom of expression, therefore, embodying as it does both personal and political values fundamental to our tradition and our constitutional government, rightly asserts a primacy and rightly demands that the Court scrutinize infringements with a more jealous eye than it scrutinizes economic arrangements which, so long as the political process remains free, can be corrected. With Mr. Justice Cardozo, one may say of the freedom of thought and speech, "that it is the matrix, the indispensable condition of nearly every other form of freedom."\textsuperscript{34}

Between 1925 and 1950, the Court marked out a somewhat uncertain path which acknowledged this demand. The first formulation was the announcement by Mr. Justice Holmes in \textit{Schenck v. United States} that when legislation curtailed free speech: "The question in every case is whether the words used are used in

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    \item[31.] See particularly, Notes on the State of Virginia, \textit{op. cit. supra}, n. 28, at 674-6.
    \item[32.] 274 U. S. at 375.
    \item[33.] 319 U. S. 624, 640-2 (1943).
    \item[34.] 304 U. S. 319, 327 (1937).
\end{itemize}
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such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that [the state] has a right to prevent." Then came the Gitlow decision, apparently rejecting that test where the legislature had declared mere words to be dangerous, and holding it applicable only where a conviction was sought for the utterance of words under a statute which in terms prohibited only acts. In his Whitney concurrence the following year, Mr. Justice Brandeis re-stated the test more strictly. He insisted that the evil had to be "relatively serious" and "the incidence of the evil apprehended ... so imminent that it may befall before there is opportunity for full discussion."  

In the years that followed, while Gitlow escaped direct repudiation, a substantial number of cases used the language of clear and present danger. Not until the Douds and Dennis cases of the last several years has there been an explicit reconciliation of the contrary lines of authority by the Court. In the latter case, the Chief Justice conceded that "there is little doubt that subsequent opinions have inclined towards the Holmes-Brandeis rationale." And his opinion then proceeded to adopt the re-formulation of the test suggested by Chief Judge Learned Hand in the Court of Appeals: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The adoption was coupled with a qualification: "It [the rule as newly articulated] takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."  

This qualification suggests that the effort to make "clear and present danger" a working rule has failed. Some thoughtful commentators have doubted that it ever could be made into a rule. Constitutional law has not proved a fruitful field for the development of formulas that automatically solve problems. Not only the meaning of the rule, but also the possibility of having any test for constitutional review other than the traditional one of arbitrariness present themselves anew as problems.

35. 249 U. S. 47, 52 (1919).  
36. 274 U. S. at 377.  
37. The cases are discussed in United States v. Dennis, 183 F. 2d 201, 207-12 (2d Cir. 1950) and Dennis v. United States, 341 U. S. 494, 556-61.  
40. 341 U. S. at 510.  
41. Freund, On Understanding the Supreme Court, 27-8 (1950). But resourceful and quite convincing efforts have been made to mold the clear and present danger doctrine into an adequate tool for constitutional adjudication. See Chafee, Free Speech in the United States (1941); Antieau, Judicial Delimitation of the First Amendment Freedoms, 34 Marq. L. Rev. 57 (1950).
CAN THERE BE MORE THAN ONE STANDARD FOR JUDICIAL REVIEW?

Judicial review of the constitutional validity of legislation is one of the outstanding American contributions to the practice of government. One hundred and fifty years of experience with judicial review has failed, however, to yield standards for the process which command anything like universal agreement. There is naturally a recurring tendency for those who dislike particular kinds of legislation to insist upon standards under which the courts may strike down the legislation, and for those who favor it to insist upon standards under which the courts will have to leave it alone. But an awareness of the danger that the Supreme Court might become a super-legislature has on the whole resulted in the dominance of standards which, in terms, tend to minimize the Court's interference with the broad exercise of legislative judgment. The Court is not supposed to strike down legislation as invalid because its members happen to be convinced that the legislation is unwise; they are not the judges of whether it is good or bad; they are merely to see to it that the legislature's choice remains within certain bounds.

The most persistent and recurrent formulation is that the legislative determination must stand if it has a "rational basis," or conversely, if it is not capricious—an arbitrary fiat." These are the words of the Court in the second Carolene case, which sustained a pretty drastic prohibition. Strangely enough, almost identical words have appeared in countless opinions in the past which struck down far less drastic restrictions. In the Weaver case, discussed above, the Court declared that the prohibition on the use of shoddy in mattresses was "purely arbitrary." In the famous case of Lochner v. New York, the Court, invalidating a New York law limiting employment in bakeries to ten hours a day and sixty hours a week in the interest of health, asked whether the law was "an unreasonable, unnecessary, and arbitrary interference with the right of the individual" and concluded that it had "no reasonable foundation." A standard couched in similar terms is typically employed by state courts when considering the validity of legislation under state constitutions. For example, in passing upon a challenged annexation of territory by the City of Houston, the Supreme Court of Texas said

42. See Lenhoff, America's Legal Inventions adopted in other Countries, 1 Bfo. L. Rev. 118, 123 (1951).
43. 198 U. S. 45, 56, 58 (1905).
that the action was legislative and not so unrelated to the needs of the city "as to be wholly unreasonable and arbitrary and for that reason subject to judicial review."\textsuperscript{44}

Unless suspicion is aroused by the conflicting results which the standard yields, it sounds reassuringly suitable for the task in hand. Seemingly courts in applying it do not interfere with legislative judgment; they merely make sure that the legislative act is not wholly devoid of rationality. Unless rational, the legislature must either be acting out of sheer caprice—defined as "a sudden change of mind without apparent or adequate motive" \textsuperscript{45}—or corruptly or attempting to serve some ulterior and impermissible end. It has been contended that this standard is the only one available; that unless the court will accept a judgment of the legislature which is rational, it must itself take over the function of the legislature and act solely with reference to "its personal appraisal of what is wise."\textsuperscript{46} This assertion calls for closer analysis.

In most cases where the test of capriciousness is stated to be controlling, the courts apparently are thinking primarily in terms of the relationship between the law adopted and a permissible legislative goal. If the law is likely to have some tendency to achieve the goal, the passage of the law is not a capricious action. What is involved here is a probability judgment; an appraisal of the likelihood that the result will follow from the adoption of the means. There are obviously varying degrees of likelihood, although they do not normally lend themselves to measurement. The laws of logic in combination with the laws of physical and social sciences and our unsystematized knowledge of the world are the tools and data used in making such predictions.\textsuperscript{47} The process is essentially the same as that involved in the reconstruction of past events called fact-finding in law suits and called history when pursued on a larger scale. In both, the same combination of deductive logic and information is used to draw a factual inference that has a greater or lesser degree of probability.\textsuperscript{48} The range in degree of probability is from

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\item \textsuperscript{44} City of Houston v. State ex rel. City of West University Place, 142 Tex. 190, 176 S. W. 2d 928; 931 (1944).
\item \textsuperscript{45} The American College Dictionary (1947).
\item \textsuperscript{46} Richardson, Freedom of Expression and the Function of Courts, 65 Harv. L. Rev. 1, 50 (1951). "How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment." Frankfurter, J., concurring in Dennis v. United States, 341 U. S. at 539-40.
\item \textsuperscript{47} Reichenbach, The Rise of Scientific Philosophy 278 (1951).
\item \textsuperscript{48} Cohen and Nagel, An Introduction to Logic and Scientific Method, 323-351 (1936). See also ch. VIII, Probable Inference. At one point a conclusion is said to be probable if the class of such inferences lead to true conclusions more often than not. This would seem to exclude ranges of probability. Yet elsewhere the notion of degrees of probability is used, as in the reference to "highly probable." 170, 171 note 4.
\end{itemize}
the highly unlikely to the virtually certain. But there is no benchmark along
that range which tells us when we have passed from the realm of the arbitrary
into the realm of the rational.

Even if the data could be measured, there would still be a problem about
drawing a particular line as marking the limit of rationality. The calculus of
probability is a very well developed technique which can give us answers in
numerical terms once we give it the data in numerical terms. But there is no
mathematical way of selecting the numerical probability for a "rational" decision
to act, any more than there is of selecting the degree of probability for a more
restrictive limitation on action. In short, the test of rationality is one of delusive
precision; there is nothing about it that inherently justifies its selection as the
only possible basis for reviewing the action of others.

The law is, of course, replete with situations in which lines are drawn without
any basis in measurement. Negligence is conduct which falls below the standard
of care a reasonable man should exercise under the circumstances. The widespread
acceptance of this term as making a kind of threshold has led some courts to
maintain that degrees of negligence are meaningless concepts; that "gross negli-
gence is ordinary negligence with a vituperative epithet."40 Yet the courts have
in general worked on the assumption that if there be a relationship between care
and risk which we can characterize as negligence there is some other relationship
which we can characterize as gross negligence.50

More familiar is the range of standards applied to fact finding in judicial
proceedings. One recent discussion suggests that there are only three distinguish-
able levels: (a) what probably has happened; (b) what highly probably has
happened; and (c) what almost certainly has happened.51 In the first situation
here, the author apparently uses "probably" as equivalent to "more probable than
not."52 If this be so, then there must be a fourth class involving a lesser degree
of probability that the asserted fact occurred. Thus, at least in Federal Employers'
Liability Act cases, the governing rule has been stated in terms of sufficient prob-
ability to permit a rational inference: "Whenever facts are in dispute or the
evidence is such that fair-minded men may draw different inferences, a measure

49. Willes, J. in Grull v. General Iron Screw Collier Co., L. R. 1 C. P. 600,
612 (1866).
50. Restatement, Torts §500 (g).
51. Mc Baine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242, 246-7
(1944).
52. Ibid at 249. Cf. Seavey, Keeton and Thurston, Cases on Torts 190 (1950)
where it is stated that in civil cases generally there is no reason for shifting a
loss "unless it is more likely than not that the defendant has caused the harm,
and, in negligence cases, has fallen below the standard." Reference is also made
to the "balance of probability." See James, Functions of Judge and Jury in
supra note 48 at 347.
of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. 53  Similarly, the recently revived controversy about the meaning of the rule of res ipsa loquitur turns about the question whether the rule does or does not permit a finding of negligence on proof which would otherwise be regarded as inadequate to support the necessary finding that it was more likely than not that the facts were as the the plaintiff claimed. 54

It may fairly be concluded, then, that the courts generally recognize at least four degrees of probability in fact-finding, ranging from the "rational basis" test to the "beyond a reasonable doubt" test of the criminal law. But there are two aspects to the application of these standards. One relates to the degree of assurance that the trier of fact must feel about the inference. This aspect is covered in jury cases by the charge, and by the endless controversies as to just how the charge is to be framed to inform the jury of how firmly they must be persuaded before they may find for the party having the burden of persuasion. The second aspect is more germane to our present discussion and also more difficult. It involves the question of how the reviewing court determines whether the evidence is sufficient to permit the trier to assert that he has been persuaded to the requisite degree. Certainly if the probability falls below some uncertain threshold, the reviewing court will not permit the trier to find the fact; if there is no "rational" basis for the inference, it should be set aside as presumably dictated by caprice, bias, or legally irrelevant considerations. Higher degrees of probability are required, as in criminal cases, before the courts will permit the trier to assert that he has been persuaded beyond a reasonable doubt. There is as much justification for a reviewing court to say that there is no adequate basis for the trier's being persuaded beyond a reasonable doubt as there is for the court to tell the trier that on the proof it will not be permitted to draw the necessary inference. Similarly, with respect to the intermediate standard that certain issues must be established by evidence that is "clear and convincing" or "clear, convincing and satisfying;" 55 that is, that the inference be highly probable. In all three cases there is a rough appraisal of the range of probability within which the inferences will be permitted to be drawn. Theoretically, the reviewing court does not in any case make the finding or substitute its judgment about the facts for that of the trier; it merely, in the interest of important social considerations, sets bounds within which the judgment of the trier is to be permitted to function. If there is a lack of precise boundaries, the defect touches all three standards equally.

54. See Jaffe, Res Ipsa Loquitur Vindicated, 1 Bfl. L. Rev. 1 (1951), and the articles by Professors Seavey and Prosser therein cited at notes 1 and 2.
55. The use of this formula, primarily in matters where fraud is thought to be a dangerous possibility, by the federal appellate courts is helpfully explored in note, 60 Harv. L. Rev. (1946).
In reviewing legislation, the fact-finding element is involved, although the fact is a future rather than a past one. One aspect of all judicial review is the determination of whether there is an appropriate relationship between the means embodied in the legislation and a permissible goal. At this first step, certainly, the range of standards for judicial review of fact-finding should be available. But regulatory legislation typically limits or controls conduct in a way which may harm certain interests other than those the legislation is designed to protect. There is, therefore, a price to be paid for the legislation. This involves another probability determination: the probability that a harm will result. These separate probability determinations are related to each other in terms of the nature of and the degree to which the opposed interests are adversely affected.

At this point an explicit problem of evaluation enters, and evaluation is supposed to be for the legislature, not the courts. But the test of rationality, the very least formula that must be accepted by anyone who accepts judicial review, is obviously feasible here. The most reluctant believer in judicial review must acknowledge that it would be capricious for the legislature to abolish newspapers and magazines in order to prevent the littering of the streets. There is a rational basis for believing that the measure would result in clean streets. But the interests involved are of such a strikingly different order that it would be regarded as capricious to sacrifice one in order to achieve the other. Just as in the case of probability judgments, a broad grouping would seem to be possible. If the Courts may not, in reviewing the actions of the legislature, regularly supersede the evaluation of two interests, they may declare that excessive disproportion is not permitted. A rough ranking by the courts, therefore, does not involve a supersession of the legislative judgment.

Mere ranking of the interests involved, however, is not sufficient. To use a word that has gained considerable popularity in this field, each of the values must be discounted by the magnitude and probability of its impairment depending on whether the legislative action is taken or not. This is to say merely that the third step in the analysis—the ranking of the interests involved—must be done against the background of the first two steps—the probability that action will protect the favored interest and injure the disfavored one.

Thus far, we have seen that since legislative action involves the selection of an end and the formulation of a means to achieve it, appraisal of the action involves scrutiny of the probability that the means will secure the end, and of the probability that any other interest will be adversely affected, in the light of the approximate relative importance of the two interests to society as a whole. A

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56. It may be that this evaluation is also a kind of probability judgment, involving the relative likelihood that the action or the failure to take it would more effectively serve the overriding interest in preserving a free society.
weighing at this point may indicate that the legislature, in deciding to act, has made its determination within the limits of whatever test may be imposed for the purpose of reviewing that decision. But, assuming that the action impairs any recognized interest, a further consideration demands attention: whether the end sought could be achieved in some other way with a lesser impairment of any recognized interest. In other words, the question arises whether the desired good can be achieved at a lesser cost.

The established due process test for economic regulation appears to disregard this element. In the *Carolene* case the Court gave no consideration to the possibility of avoiding fraud in the sale of filled milk by requiring it to be packaged in cans wholly different in shape from those in which whole condensed milk was sold, and by requiring warning and informational labelling. And the cost of the protection against fraud was extremely high, involving the complete suppression of a commodity to the production of which a considerable investment in resources and knowledge had been devoted.\(^{57}\) It would be unwise, however, to conclude that under no circumstances would avoidable cost be invoked as a basis for condemning legislative action as arbitrary. In reviewing jury verdicts, appellate courts generally permit the jury to accept direct evidence of a fact as an adequate basis for finding the existence of that fact, irrespective of the other evidence in the record. But if the reviewing court finds the evidence not to be reasonably credible, either because it seems inherently fantastic, or incompatible with uncontroversial physical facts, or flatly and overwhelmingly contradicted by seemingly disinterested testimony, it will not permit the jury to make the finding.\(^{58}\)

Thus far we have suggested four elements that seem to require examination when legislation is being reviewed upon a challenge to its constitutional validity: first, the probability that the legislation will achieve a permissible result; second, the probability that it will adversely affect some other recognized interest; third, the approximate relative value to the community of the interest sought to be protected and the interest adversely affected by the legislation; fourth, the probability that the result sought could be achieved by other means involving less harm to recognized interests. It is obvious that there are other ways in which the issues could be stated, just as it is obvious that the analysis along the

\(^{57}\) Cf. the Court's unwillingness to find statutory authorization for a similar action by the Food and Drug Administration. *62 Cases of Jam v. United States*, 340 U. S. 593 (1951).

\(^{58}\) See James, *op. cit. supra*, note 52, at 672, and the cases there referred to in notes 26-28. One wonders whether in requiring that administrative findings be supported by substantial evidence on the whole record, Congress meant to demand anything more of the courts than is required in reviewing the adequacy of evidence for fact findings in jury cases. But see *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951), critically analyzed in Jaffe, *Judicial Review: Substantial Evidence on the Whole Record*, 64 Harv. L. Rev. 1233 (1951).
The old due process test used by the Supreme Court placed great emphasis on the fourth factor—the necessity for the restriction to achieve the result. In the *Weaver* case, for example, the Court was unable to see why sterilization and labelling were not adequate to guard against the dangers of disease and fraud created by the use of shoddy in mattresses. The Court insisted that the necessity be established to a high probability (clear and convincing), if not to the point of virtual certainty (beyond a reasonable doubt). And the reason for this high standard of review, it seems clear, was the Court’s insistence that freedom from restraints on economic activity was among the highest values of our society, of the same order as the physical security of the nation.

These considerations were more explicitly stated in the *Lochner* case. New York’s attempt to convince the Court that the hours of labor in bakeries were related to health failed to reach that degree of certainty which the court demanded when confronted with laws which were “meddlesome interferences” with the right to make contracts. The New York Court of Appeals forthrightly expressed a similar attitude when it invalidated a law prohibiting the manufacture of cigars in tenement houses in New York City. Acknowledging the existence of a police power in the legislature, the Court declared that economic affairs generally have been “long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one.” A comparable, although less extreme, elevation of freedom of economic activity as such to the highest pinnacle of values is found today in the application by some state courts of the due process clause of the state constitution. Thus, in declaring invalid a Virginia statute requiring that photographers be licensed, the Supreme Court of Appeals declared itself “constrained to emphasize the virtue of a firm adherence to the philosophy that that state is best governed which is least governed.”

Insofar as the Constitution of the United States is concerned, the present meaning of the due process clause reflects the dissenting statements of Mr. Justice Holmes in the *Lochner* case: “This case is decided upon a theory which a large part of the country does not entertain . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez faire. It is made for people of

59. 198 U. S. at 61.
fundamentally differing views . . .” These contrasting attitudes as to the value in the constitutional scheme of unhampered and unregulated economic activity resulted in the application of different standards to test the relationship between end and means and the necessity of the legislative action. In contrast to the approach of cases like *Lochner* and *Weaver*, a minimum test of rationality is now employed in appraising the relationship between the means and the end, a clear showing of substantial impairment of other important interests would be demanded of those attacking the legislation, and no strong basis in necessity for the legislation need appear.

If each of the four elements discussed above be taken separately, it is not difficult to see that a more rigorous test than that of bare rationality can be formulated in terms similar to those used in reviewing judicial fact-finding as to issues on which a clear and convincing showing is demanded. It might be argued, however, that even if this conclusion be accepted, it by no means follows that two or more standards can be meaningfully employed to appraise the final result of the complex interrelation of four variables, each of which ranges over a broad area in a highly complex fashion. The suggestion seems to be that in situations of such complexity, the only possibility open to the reviewer is to brood over the whole situation and then emerge with a final intuition as to whether the result is acceptable or not. But brooding should work equally well whether the brooder attempts conscientiously to satisfy himself that the legislative judgment is convincingly justified or that it is barely rational. The same attitude with which the component factors are analyzed is maintained in the final consideration. But no standard can mean anything if the reviewing process operates on an undifferentiated, unanalyzed mass of data. Whatever the standard, it can be meaningful only to the extent that it is applied to components of the problem so formulated that they can be rationally scrutinized.

There is one area of constitutional law in which a more rigorous standard than that applied generally with respect to economic regulation has been continued in use. State regulation of matters closely connected with interstate commerce

62. 198 U. S. at 75-6. Today there are far fewer voices which insist upon the validity of the economic theory upon which the *Lochner* case was decided. The most responsible recent statement of that theory for general consumption is Von Hayek, The Road to Serfdom (1944). Hayek, however, makes concessions which would have disturbed the members of the Court of Appeals who decided the Jacobs case. See the review of Hayek in Hansen, Economic Policy and Full Employment, App. A (1947). Clark, Alternatives to Serfdom (1948), is a fuller statement for the general reader of an economist's answer to the Hayek position. To Thomas Jefferson, property was, like government, an indispensable means to the achievement of human happiness, but it did not stand on quite the same plane as the inalienable rights of mind and conscience. See Malone, Jefferson the Virginian 227-8 (1948); Jefferson and the Rights of Man 224 (1951).

63. Cf. the formulation of the test for judicial review of administrative fact finding in Jaffe, op. cit. supra note 58 at 1239: “... the judge must reverse if he cannot conscientiously escape the conclusion that the finding is unfair.”
is still examined with care by the Court, even in the absence of conflicting federal legislation. At one time it seemed that the Court might defer to the state legislative judgment as to the appropriateness of regulation of local interests with which interstate commerce was entangled. In *South Carolina State Highway Dept. v. Barnwell Bros.*,64 interstate truckers launched a strong attack on a state law limiting the size and gross weight of trucks on the highways. The limitations were much more restrictive than those established in most states, and the effect on interstate trucking was quite substantial. Evidence was offered by the truckers to show that highway damage was determined, not by gross load, but by axle and wheel loads. In the course of his opinion upholding the state legislation, Mr. Justice Stone said: "In the absence of such [Congressional legislation] the judicial function, under the commerce clause, as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."65

Seven years later the railroads challenged Arizona's law limiting the length of trains travelling through the state, ostensibly to protect against personal injuries from the slack action of long trains, the cumulative whipping effect caused by the taking up of the slack in the couplings. The law was invalidated in an opinion by Chief Justice Stone which carefully reviewed both the law and the facts. The underlying rule was restated as follows:66 "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." There were some factual differences between this case and the *Barnwell* case. Particular stress was placed upon the greater control the state was said properly to maintain over its highways than over railroad lines crossing its territory. More important, however, is the change in the Court's approach. In contrast to the linking of the due process and commerce clause problems in the *Barnwell* case, the Court here pointedly declared that the restrictions imposed upon a state by the commerce clause were "not to be avoided by simply invoking the convenient apologetics of the police power."67 This change in attitude was plainly reflected in the Court's formulation of the standard by which it reviewed the legislative resolution of the conflicting interests. "It's [the state's] regulation of train lengths admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it

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64. 303 U. S. 177 (1938).
65. Ibid at 190.
66. 325 U. S. 761, 769 (1945).
67. Ibid at 760.
does not appear that it will lessen rather than increase the danger of accident." Here there was no problem of unequal interests; protecting the lives of its citizens was certainly a goal requiring a relatively high evaluation. But the probability of the goal being achieved by the legislation was not found by the Court to be convincingly high. And it was virtually certain that the regulation cast a heavy burden upon the interest in efficient interstate transportation by rail. Under this appraisal of the factors, the legislation fell.

In the more recent case of *Dean Milk Co. v. City of Madison*, a divided court, at the suit of an Illinois dairy, invalidated an ordinance of Madison, Wisconsin which, in the asserted interest of health, prohibited the sale of milk in the city unless it was processed and bottled at a pasteurization plant located within five miles of the city. The probability that the ordinance would assure a safe supply of milk was quite high. The probability that interstate commerce would be adversely affected was even higher. The interest of the city was probably of a higher order than that of the out-of-state seller. But the record contained considerable expert testimony that other means of achieving a safe milk supply, both reasonable and adequate, were available. Primarily on this ground of lack of necessity for the burden, the ordinance was invalidated.

It was previously argued that the freedoms of the First Amendment are so fundamental to the structure and successful functioning of our government that the courts should, if methods are available, scrutinize any impairment of them with commensurate care. It seems from the foregoing that the constitutional validity of legislation can be reviewed by the courts under a standard more restrictive than that of bare rationality, yet without making it inevitable that the Court should supersede the legislative judgment. Professor Freund, in a penetrating study of the whole problem, has incisively summarized the grounds for the conviction that a more rigorous standard of review is appropriate in the treatment of state legislation under the commerce clause and under the Bill of Rights:

"The choice of means, so generously granted to the states in matters of local economic control, will be severely limited when the flow of commerce or of ideas is impeded in the interest of health or order and there are available more moderate measures to protect these interests of the state. So far as the role of the Court is concerned, there is more than a verbal likeness between the national market in goods and the free market in ideas. It is in precisely these areas that the Court may seem at times to be acting as a legislative drafting service. If the Court does require a local government to turn square corners when it deals with interstate commerce or trade in ideas it is vindicating its responsibility as the guardian of structure and process."

70. Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 550 (1951),
There is no doubt, of course, that the clear and present danger test was devised, and slowly achieved acceptance by the Court, just because it was thought to impose a more rigorous standard than the one that was evolving under the due process clause. As happens so often, the formula begins to take on life of its own, and to be dealt with as a kind of independent entity. The consequence is that when, by a verbal device, it is made to appear that the formula has been satisfied, the substance of what the formula was meant to preserve becomes lost. There appears to be good ground for believing that this is what happened in the Dennis case, in which the Supreme Court sustained the validity of a statute making it a crime to conspire to teach or advocate the forcible overthrow of the Government.\(^7\)

In this case the Court definitively resolved the long uncertainty as to the relationship between the Gitlow case, with its broad test of reasonableness for the validity of legislation aimed at the dissemination of ideas, and the line of cases relying upon the clear and present danger test as announced in the dissent in the Gitlow case. In the opinion for himself, and Justices Reed, Burton and Minton, the Chief Justice quoted Judge Learned Hand's formulation of the clear and present danger rule and stated: "We adopt this statement of the rule." The formulation of Judge Hand was this: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."\(^7\) That the statute restricted freedom of expression was perfectly clear, for in terms it forbade the utterance of words which did not fall in the traditionally punishable categories: fighting words, threatening immediate breaches of the peace; obscenity; and defamation.\(^7\)

The Dennis case was tried and decided in the shadow of two large elements in the Government's case: first, the contention that the Communist Party was organized not merely to teach the necessity of violent overthrow, but also to prepare for and take affirmative steps to bring about violent overthrow; second, the fact that no immediate action to overthrow was planned. Perhaps the significance of the first element can be best understood from parts of the trial court's charge to the jury:

\(^7\) Dennis v. United States, 341 U. S. 494 (1951).
\(^7\) 341 U. S. at 510.
"You must be satisfied from the evidence beyond a reasonable doubt that the defendants had an intent to cause the overthrow or destruction of the Government of the United States by force and violence, and that it was with this intent and for the purpose of furthering that objective that they conspired [to organize the party and to teach the necessity of forcible overthrow] . . . And you must further find that it was the intent of the defendants to achieve this goal . . . by force and violence as speedily as circumstances would permit it to be achieved. No such intent could be inferred from the open and aboveboard teaching of a course on the principles and implications of communism . . . That is why it is so important for you to weigh with scrupulous care the testimony concerning secret schools, false names, devious ways, general falsification and so on, all alleged to be in the setting of a huge and well disciplined organization, spreading to practically every state of the union and all the principal cities and industries."

And earlier:

"The prosecution claims that . . . in truth and in fact they [the defendants] resorted to many clandestine and fraudulent devices in teaching those subject to their influence secretly to prepare for the coming of some crisis . . . to spring into action when the word of command was given, to paralyze power houses, the transportation system and the vast industrial machine at the heart of our economic system and in the resultant chaos and confusion to bring about, by violent and unlawful means, the overthrow or destruction of the Government and the establishment of the dictatorship of the proletariat."

"The prosecution further contends that . . . a rigid system of party discipline was rigorously enforced . . . that deliberate lying and false swearing were condoned and even encouraged, when the needs of the Communist Party so required; that the use of false names . . . and various other secret and devious devices were resorted to; that plans were deeply laid to place energetic and militant members of the Communist Party in key positions in various industries indispensable to the functioning of the American economy, to be ready for action at a given signal; and that such action was to consist of strikes, sabotage and violence of one sort or another appropriate to the consummation of the desired end, that is to say the smashing of the machine of state, the destruction of the army and the police force and the overthrow of the Government . . ."

In this recital, the conspiracy to teach a doctrine pales before the vivid depiction of a conspiracy to use force and violence, and of steps already taken to lay the basis for that action. This is the background of the statement of the Chief Justice that:

"If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."75

True, as the charge indicates, the moment for action had not yet arrived or even been fixed. But it is to be the earliest propitious moment. Against this background, there seems to be no escape from the dilemma that haunts the case: does the First Amendment mean that the Government must wait "until the putsch is about to be executed" before it may act? The answer of the clear and present danger test seemed to be yes, the Government must wait. And the attention of the Court was focused hypnotically on that point. Here, seemingly, was a result that had to be avoided, if the Court was reasonably to keep the test.

A resolution was achieved by modifying the rule: the gravity of the evil must be discounted by the improbability of its occurrence. The greater the evil the less imminent it need be before speech which promotes the evil may be suppressed. Since the world situation was fraught with danger, and the defendants were perfecting an apparatus for action, the probability of an effort at forcible overthrow was regarded as great.76 But these considerations would seem to suggest that the danger of action was at least as imminent as the danger of world war, which was a present danger. It is far from clear what this qualification does to the rule as previously formulated.

More important than conundrums about the rule, however, is the fact that preoccupation with the attempt to reconcile the requirement that the danger must be "present" with the finding that the defendants had fixed no day certain for their action, led to disregard of other vital considerations. Returning to the factors discussed above, we can hardly deny that the protection of the Government from violent overthrow, or substantial attempts at it, is an interest of the same order of magnitude as the protection of freedom of expression. But the mere invocation of a fundamental interest does not exhaust the analysis. What about the probability that the application of the sanction would contribute to the avoidance of the danger? Much of the discussion in the case seems to assume that the Smith Act would end the danger. Mr. Justice Jackson expressed personal doubts about the efficacy of such action to achieve its protective purpose, and Mr. Justice Frankfurter convincingly developed a similar point.77 Surely this consideration should be more than a personal aside; it should have been part of the total judicial analysis even though one might conclude that the legislature could determine that such a prohibition would plainly make an effective contribution to the goal sought.

75. 341 U. S. at 509.
76. 183 F. 2d 201, 212-13 (2d Cir. 1950).
77. 341 U. S. at 578, 553-6.
While recognition was given in a general way to the fact that freedom of expression was repressed, the sweep of the repression was hardly considered. For the most part the Court seems to have been assuming that, as Mr. Justice Frankfurter phrased it, speech of the kind prohibited "ranks low" in the scale of values.\(^{78}\) Surely more attention should have been given to the demonstration, elsewhere in Mr. Justice Frankfurter's own opinion, that: "Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be construed." "It is a sobering fact that in sustaining the conviction before us we can hardly escape restriction on the interchange of ideas."\(^{79}\)

More significant is the total absence of discussion of the necessity for this particular, extremely costly, measure. To grant that the Government must be able to act in a situation like that presented to the Court by the record and the surrounding circumstances is not to grant that any measure having any tendency to give protection must be permitted. The necessity for the particular measure, in the light of its great cost, should certainly have been inquired into. The test as adopted includes a reference to the necessity for the invasion of free speech. But there is no discussion of the possibility that other measures might obviate the necessity.

This is not to suggest that counter-espionage is the only constitutionally permissible method of combating attempts to overthrow the Government by force and violence. It is to suggest that in the light of the evidence in the case other sanctions may be available against the activity charged to the Communist Party's leaders, activity which colored the entire case, which was relied on to prove their intent under the Smith Act, and which laid a basis for the judicial finding that there was a clear and present danger. Perjury and subornation of perjury are crimes.\(^{80}\) Conspiracy to commit any offense against the United States is also a crime.\(^{81}\) The evidence in the Dennis case strongly suggested that these crimes were being committed by the Communist Party. Furthermore, the seditious conspiracy statute makes it a crime for "two or more persons ... [to] conspire to overthrow, put down, or destroy by force the Government of the United States ... or to oppose by force the authority thereof."\(^{82}\) The Government's proof, summarized in the portions of the charge quoted above, certainly goes far toward

\(^{78}\) Ibid at 545.  
\(^{79}\) Ibid at 549.  
\(^{80}\) 18 U. S. C. §§1621, 1622.  
\(^{82}\) 18 U. S. C. §2384.
establishing the elements of seditious conspiracy. Perhaps it did not go far enough to support a conviction under that statute. If it fell short, it did not fall far short. With these safeguards available, the necessity for the Smith Act's prohibition of the advocacy of violent overthrow is hardly self-evident.

Even with full exploration of these alternative means of protection, and a more considered analysis of the other factors, the Court might still have concluded that the restraint on expression embodied in the Smith Act was constitutionally permissible. Space to examine the case fully is lacking here. But the failure to explore the necessity for such restraints with the utmost care, because of involvement with the verbal intricacies of the clear and present danger test, means that the purpose of the test was lost sight of in the very act of explicitly adopting it.

The Dennis case will be a calamity in the development of American Constitutional law unless the Court recognizes that the clear and present danger test there adopted was formulated and developed for the purpose of insuring a more rigorous judicial review of legislative action when the liberties protected by the Bill of Rights are being restricted. The courts are not doing the job Mr. Justice Jackson rightly said the American people expect of them in this time of crisis if they carelessly jettison one of the more effective safeguards of freedom that our institutions have produced.

83. See Nathanson, The Communist Trial and the Clear and Present Danger Test, 63 Harv. L. Rev. 1167, 1172-3 (1950).