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"The principal question in human affairs" is the determination of the limits of freedom, according to John Staurt Mill,[1] and others agree to its prime importance to man and society.[2] Not of recent origin is the search for principles and tests to determine the extent of the "fundamental freedoms,"[3] speech, press, religion and assembly. "For nearly twenty centuries, the effort of political philosophy in the Christian world has been to reconcile the dilemna posed by the latent antagonism between Divine Authority and mundane authorities."[4] In 1670 Spinoza felt compelled to "inquire how far such freedom can and ought to be conceded without danger to the peace of the state or the power of the rulers."[5] After noting that "in delimiting the field of liberty, courts have professed for the most part to go about their work empirically," Mr. Justice Cardozo in our time asserted his conviction "that empirical solutions will be saner and sounder if in the background of the empiricism there is the study and the knowledge of what men have thought and written in the anxious search and grouping for a co-ordinated principle."[6]

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1. Essay on Liberty (1859), (McCallum ed., 1946) 5.
2. "For Kant the first problem in law was the relation of law to liberty." Palmer, Liberty and Order, 32 A.B.A.J. 731 (1946). "The reconciliation of these opposites is one of the outstanding problems of the law; it is the problem of liberty and government." Cardozo, Paradoxes of Legal Science (1928) 87. "What is the line, the principle, which marks off those speech activities which are liable to legislative abridgment from those which, under the Constitution, the legislature is forbidden to regulate or suppress? Here is the critical question which must be studied, not only by the Supreme Court, but by every American who wishes to meet the intellectual responsibilities of his citizenship." Meiklejohn, Free Speech and its Relationship to Self-Government (1949) 35. "There is frank recognition today that one of the greatest problems of modern governments is the reconciliation of the liberty of the individual and the interests of the public order. . . ." Haines, Some Phases of the Theory and Practice of Judicial Review of Legislation in Foreign Countries, 24 Am. Pol. Sc. Rev. 583, 584-5 (1930).
3. "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. This phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties." Roberts, J., for the Court in Schneider v. New Jersey, 308 U.S. 147, 161 (1939). See also: Whitney v. California, 274 U.S. 357, 373 (1927) concurring opinion of Brandeies, J.; DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Lovel v. Griffin, 303 U.S. 444, 450 (1938); Grosjean v. American Press, 297 U.S. 233, 244 (1936); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942); Craig v. Harney, 331 U.S. 367, 373 (1947). And note the language of the United Nations Charter, Art. I, par. 3.
4. Morley, The Power in the People (1949) 134.
5. Tractatus Theologico-Politicus (1770). (Engl.ed., Ratner, titled The Philosophy of Spinoza) 55.
6. The Paradoxes of Legal Science (1928) 96-7. The case to case chaos has provoked a capable scholar into remarking that "the periphery of liberty, as constitutionally guaranteed and judicially protected, is enshrouded in a haze of uncertainty." Swisher, The Growth of Constitutional Power (1946) 182.

In society not even the "fundamental freedoms" can be absolutes.[7] Notwithstanding adequate evidence that Madison and Jefferson considered some of the freedoms as absolute, and forceful philsophical arguments from Schroeder to Meiklejohn, these liberties cannot be treated as absolutes in a society that considers its survival and treasures others interests. As Mr. Justice Black has ably said: "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do."[8] The socio-political group's claim to survival[9] inevitably clashes with and limits the "freedom" to precipitate immediate and violent overthrow of the state.[10] Society's proper interest in the preservation of life and the avoidance of friction and waste[11] precludes condonation of those who would falsely shout "Fire!"[12] in the crowded theaters of organized life. Clearly, too, the existence of one man's freedom must be tempered if freedom is to exist in others. The totality of freedom is reduced by indulging a religious zealot to play outside a church recording making impossible the worship of many others within. Even the foremost contemporary natural rights philosopher, Jacques Maritain, admits that "Freedom to spread ideas which one holds to be true. . . like freedom of association is subject to the regulations of positive law." "It is not true," he writes, "that every thought as such. . . has the right to be spread about in the community. The latter has the

7. "The rights with which we are dealing are not absolutes." Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943). "Liberty of speech and of the press is also not an absolute right. . . ." Near v. Minnesota, 283 U.S. 697, 708 (1931). "We, the democrats, have few absolutes. Even free speech is not so free as to override the law of libel. He who shouts 'Fire' in a crowded theater goes to jail. Religion that sanctifies human sacrifice or other kinds of immorality has no constitutional sanction." Justice William O. Douglas, Being An American (1948) 190. "The basic validity of the State's claims to protect the individual and general welfare against crime, trespass, libel, injury of all sorts to health and morals, as defined by the community, forbids the easy assumption that there is an unqualified right of religious liberty against the community and the State." Bates, Religious Liberty (1946) 301-2. Nevertheless, it is worth recalling Blackstone: "The first and primary ends of the State are to maintain the personal and civil rights of men." I Comm. 724.

8. West Virginia Board of Education v. Barnette, 319 U.S. 624, 643 (1943) concurring opinion.

9. "In short this freedom does not deprive a state of the primary and essential right of self-preservation; which so long as human governments endure, they cannot be denied." Gitlow v. New York, 268 U.S. 652, 668 (1925). "Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights." Minersville School District v. Gobitis, 310 U.S. 586, 602 (1940). ". . .as long as human governments endure they cannot be denied the power of self-preservation." Turner v. Williams, 194 U.S. 279, 294 (1904). "The right of self- preservation is an attribute of government." Commonwealth v. Blankenstein, 81 Pa. Super. 340, 342 (1923). "The Constitution. . . does not deprive the State of the primary right of self-preservation." People v. Most, 64 N.E. 175, 177, 171 N.Y. 423 (1902).

10. "When the natural liberty (of speech) is adopted by a state, and becomes civil liberty, those further restrictions are justly added, which are necessary to the preservation of the state. . . ." Holt, Libel (1st Amer. ed., 1818) 66. "No bourgeois democracy has in fact ever tolerated the dissemination of opinion hostile to its fundamental tenets on any scale likely to menace its existence. Car, The Meaning of Human Rights, United Nations World, Vol. No. 7 (July, 1949) 55.

11. Cardozo, The Growth of the Law (1924) 140-1.

12. "The most stringent protection of free speech would not protect a man in falsely shouting 'Fire!' in a theater and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919), Holmes, J.

right to resist the propagation of lies or calumnies; to resist those activities which have as their aim the destruction of the state and of the foundations of common life."[13]

In politically organized societies, such as the United States, which have institutionalized their greater faith in the judiciary than in the legslature, the task of delimiting the fundamental freedoms is the function of the courts.[14] That it is a "delicate and difficult task" is readily admitted by the jurists principally charged with the responsibility.[15]

What factors of determinism suggest to a jurist where he shall draw the line between freedom and suppression? What principles does he recognize, what criteria does he utilize, in determining that certain expression is within or without the protective cloak of the Constitution?

The cases eloquently demonstrate, and the psychoanalytical excursions into the judicial mind verify, that the American judiciary has been influenced in the delimitation of liberty principally by the standards of history, and by an oft-opposed social utilitarianism posited primarily upon the interessenjurisprudenz of Jhering[16] and the pragmatism of Pound.[17] Nothwithstanding the immense influence of natural rights philosophy

13. The Rights of Man and Natural Law (1945) 49-50.
14. "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty." Charles Evans Hughes, Addresses and Papers (1908) 139-40. "The Supreme Court *is* the Constitution." Felix Frankfurter, quoted by Cushman, 23 B.U.L.Rev. 335, 336 (1943). "But we act in these matters *not* by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." West Virginia State Board of Education v. Barette, 319 U.S. 624, 640 (1949), Jackson J. That the judiciary has only recently been cognizant of its responsibility, note the observation of Schroeder: "I cannot recall a single case where a statute has been held unconstitutional because in violation of our guaranties of liberty of speech and of the press." Psychologic Study of Judicial Opinions, 6 Calif. L. Rev. 89, 113 (1918). Interesting historically is the now-abandonded rule that permitted juries, as judges of the law, to determine the constitutionality of legislative enactments. Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939).
15. Schnider v. New Jersey, 308 U.S. 147, 161 (1939), Roberts, J. "The task of translating the majestic generalities of the Bill of Rights. . .into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943), Jackson, J. "When the right of society from probable violence should prevail over the right of an individual to defy opposing opinion, presents a problem that always tests wisdom. . ." Terminiello v. City of Chicago, 69 S.Ct. 894 909 (1949), Jackson, J. "To make accommodations between these freedoms and the exercise of state authority always is delicate." Prince v. Massachusetts, 321, U.S. 158, 165 (1944), Rutledge, J. "A satisfactory adjustment of the conflicting interests is difficult. . . ." Kovacs v. Cooper, 336 U.S. 77, 81 (1949), Reed, J. "A grave responsibility confronts this Court whenever in the course of litigation it must reconcile the conflicting claims of liberty and authority." Minersville School District v. Gobitis, 310 U.S. 586, 591 (1940), Frankfurter, J. And note the words of Fraenkel: "The courts have had great difficulty in deciding where the line is to be drawn which divides the area of punishable words from the realm of free speech which is constitutionally protected." Our Civil Liberties (1944) 66.
16. Der Kampf ums Recht (1872), trans. by Lalov. Der Zweck im Recht (1877), trans. as Law as Means to an End by Husik.
17. Interests of Personality, 28 Harv. L. Rev. 445, 453 ff. (1915); A Theory of Social Interests, Proc. Am. Soc. Soc'y. 16 (1921); A Survey of Social Interests, 57 Harv. L. Rev. 1 (1943).

upon the Founding Fathers, it has not patently influenced contemporary jurists in the instant task. This is not at all because "the pure natural-rights position. . . rules out all communal supervision," as Riesman asserts,[18] but rather because natural rights philosophers regularly *admit* that freedom of expression is limitable by positive law,[19] without defining the situations in which limitation is permissible. This, admittedly, may not be the responsibility of the philosopher.

Influence of Historial Methodology

Disciples of historical method are wont to define and delimit constitutional freedom by the standards of earlier cultures. Frequent is their retreat to the common law existing at the time of the adoption of the United States Constitution. Cooley stated: "We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. *For those standards we must look to the common-law rules which were in force force when the constitutional guaranties were established.*"[20] More recently Burgess wrote of the First Amendment: "We are warranted in assuming that this restriction could hardly have been intended to prevent the Government of the United States from introducing and administering the law of slander and libel. The common law never held the freedom of speech and of the press to be in any measure infringed by this law of slander and libel for the protection of private character."[21]

Courts have frequently utilized historical standards in delimiting the fundamental freedoms. The United States Supreme Court's determination that freedom of the press prevents pre-publication restraint by the sovereign was based primarily upon the antipathy to prior restraints in Britain and her American colonies. As stated by Chief Justice Hughes for the Court: "The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed."[22] Likewise, leaflets and pamphlets were brought within the protection of Constitutional freedom of the press largely because they "have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest."[23] And it was chiefly because of Colonial revulsion to "taxes on knowledge," that the Grosjean tax was held an unconstitutional infringement of freedom of the press.[24]

18. Riesman, Civil Liberties in a Period of Transition, 3 Public Policy 33, 66 (1942).
19. Maritain, The Rights of Man and Natural Law (1945) 49-50.
20. Constitutional Limitations (1st ed., 1868) 422. "We are at once . . .turned back from these provisions (of the First Amendment, to the common law, in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they assure." Id. at 417.
21. Recent Changes in American Constitutional History (1923) 67.
22. Near v. Minnesota, 283 U.S. 697, 713 (1931).
23. Lovell v. Griffin, 303 U.S. 444, 452 (1938).
24. Grosjean v. American Press, 297 U.S. 233 (1936).

More frequently, however, application of historical criteria results in the denial of Constitutional protection. In 1825 Chief Justice Parker of Massachusetts sustained a conviction for libel, saying: "Nor does our constitution and declaration of rights abrogate the common law in this respect, as some have insisted."[25] According to the New York court of 1902: "The Constitution places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law."[26] The typicality of these statements well justified the observation of Theodore Schroeder in 1918: "I cannot recall a single case where a statute has been held unconstitutional because in violation of our guaranties of liberty of speech and of the press. . . . Under the prevailing 'interpretation' of interpolations of our Constitutions, freedom of speech and press means just exactly what it meant in England and in the American Colonies before the American Revolution. The constitutional language has been interpreted in terms of the Star Chamber, Mansfield, Kenyon and Blackstone, instead of the language of Jefferson."[27]

The denial of constitutional free speech and press protection to language or literature labelled "obscene" is customarily defended on the ground that such words were punishable at the common law antedating our federal and state constitutions.[28] Similarly, refusal to extend free speech and press safeguards to the utterers of blasphemous and profane words has been justified with the rationale that the use of such language was offensive at common law, and that statutes prohibiting their utterance existed prior to the constitutions.[29] Refusal to cloak the libeller or slanderer with Constitutional protection is traceable to their common law responsibility. Mr. Justice Brown, speaking for the United States Supreme Court in 1897, said: "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principle of government, but simply to embody certain guaranties and immunities which we have inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus the

25. Commonwealth v. Blanding, 3 Pick. 304, 313 (1825).
26. People v. Most, 64 N.E. 175, 178, 171 N.Y. 423 (1902).
27. Phychologic Study of Judicial Opinions, 6 Calif. L. Rev. 89, 113 (1918).
28. State v. Van Wye, 37 S.W. 938, 939 (Mo., 1896); State v. McKee, 46 A. 409, 411, 413-4 (Conn., 1900); Knowles v. United States, 170 Fed. 409, 412 (CA, 8th, 1909); Williams v. State, 94 So. 882, 883, 130 Miss. 827 (1923); Commonwealth v. Isenstadt, 62 N.E. 2d. 840, 848, 318 Mass. 543 (1945). The obsecene language probably was *not* a crime at common law, see Kadin, Administrative Censorship, 19 B.U.L. Rev. 533, 536 (1939).
29. State v. Chandler, 2 Harr. 553, 555 (Del., 1839); People v. Ruggles, 5 Am. Dec. 335, 336, 8 Johns. 290 (N.Y., 1811); State v. Mockus, 113 A. 39, 44, 120 Me. 84, 14 A.L.R. 871 (1921); Commonwealth v. Kneeland, 37 Mass. 206, 214, 217, 218, 221 (1838).

freedom of speech and of the press does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation."[30]

When an accused claimed that freedom of religion exempted him from statutes outlawing bigamy, the United States Supreme Court measured this Constitutional freedom by an eighteenth century yardstick. Chief Justice Waite remarked: "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately we think, than to the history of the times in the midst of which the provision was adopted."[31] Mr. Justice Frankfurter also indulged in an historical approach in his soon repudiated Gobitis opinion. In denying claims of religious liberty he said: "In the judicial enforcement of religious freedom we are concerned with an historic concept. The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects.[32] And a plenitude of punishments under the Constitution have been justified[33] because Blackstone had the notion that freedom of the press constituted no deterrent to any subsequent punishment for printing or distributing literature.[34]

The techniques of historical methodology have resolved adequately controversies not too frequent and not too fighting. Not many, for example, would contend that freedom of press embraces a right to libel. Nor is there much dispute as to the propriety of a rule that refusal to care for the health of one's child is not within freedom of religion. In placing beyond the pale activities whose claim to the protection of Constitutional freedom are neither traditionally accepted nor generally acceptable, the methods of history have on occasion served adequately. Beyond this, however, they are more productive of harm than of good. Note how a great jurist once strayed through the use of historical standards in this area of Constitutional freedom. In 1907 Mr. Justice Holmes said that "such constitutional provisions (freedom of speech and press) . . .do not prevent the *subsequent punishment of such as may be deemed contrary to the public* welfare."[35] Fortunately, another twelve years of judicial maturation convinced the Justice of the error of such an approach to the delimitation of freedom, and he enthusiastically repudiated the Patterson aberation in later years.[36]

30. Robertson v. Baldwin, 165 U.S. 275, 281 (1897). See also Caldwell v. Crowell-Collier Publishing Co., 161 F.2d 333 (CA, 5th, 1947); Commonwealth v. Blanding, 3 Pick. 313, 15 Am. Dec. 214, 218 (Mass., 1825); and Cooley, Constitutional Limitations (1st ed., 1868) 420.
31. Reynolds v. United States, 98 U.S. 145, 162 (1875).
32. Minersville School District v. Gobitis, 310 U.S. 586, 594-5 (1940).
33. e.g. Patterson v. Colorado, 205 U.S. 454 (1907).
34. 4 Bl. Comm. 150.
35. Patterson v. Colorado, 205 U.S. 454, 462 (1907).
36. Schneck v. United States, 249 U.S. 47 (1919); Gitlow v. New York, 268 U.S. 652, 672 (1925) dissenting opinion. Only illustrative of many Supreme Court decisions utilizing historical measures in the assessment of the place of freedom are: Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943)); "It should be remembered that the

To measure permissible liberty in contemporary America by the conditions of pre-Revolutionary England is unthinkable. The religious test oath and the Star Chamber furnish neither guidance nor inspiration to a judiciary charged with defining Constitutionally enshrined freedom. Madison wrote: "The nature of governments, elective and limited, and responsible in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. . . . Is it not natural and necessary under such circumstances, that a different degree of freedom in the use of the press should be contemplated?"[37] In 1799 the Committee of the Virginia House of Delegates on Resolutions regarding the Alien and Sedition Laws reported, through Mr. Madison: "The state of the press. . . under the common law, cannot be. . .the standard of its freedom in the United States. . . .The freedom of conscience and of religion are founded in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States."[38] Schofield has well said that "One of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press,"[39] and the United States Supreme Court has readily acquiesced in this statement.[40] The same Court has emphasized that "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly and petition than the people of Great Britain had ever enjoyed."[41] Mr. Justice Holmes once said: "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.[42] Similarly, Professor Chafee has stated: "The First Amendment was written by men. . .who intended to wipe out the common law of sedition."[43] According to Patterson, too, "The very purpose of the Constitution, and particularly of these ten amendments, was to secure a greater degree of personal liberty under the new government."[44] Nor do Colonial bigotries and intolerances furnish more desirable charts to contemporary constitutional liberties.[45]

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pamphlets of Thomas Paine were not distributed free of charge;" and Martin v. Struthers, 319 U.S. 141, (1943): "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas."

37. VI Writing of James Madison (Hunt ed.) 386.
38. Id. at 387-9.
39. Freedom of the Press in the United States, 9 Proc. Am. Sociolog. Soc. 76, 87 (1915).
40. "To assume that English common law in this field is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law in liberty of speech and of the press.' More specifically, it is to forget the environment in which the First Amendment was ratified." Bridges v. California, 314 U.S. 252, 264 (1941).
41. Id. at 263.
42. Abrams v. United States, 250 U.S. 616, 630 (1919) dissenting opinion.
43. Freedom of Speech (1920) 23.
44. Free Speech and a Free Press (1939) 125.
45. "Religious tolerance was not common in the American colonies." Fraenkel, Our Civil Liberties (1944) 51; Meyers, History of Bigotry in the United States (1943);

In the delimitation of First Amendment freedom recourse to the context of the Constitution's adoption is of very limited utility. Many of the Founding Fathers' concepts of liberty were primitive, and their writings are citable with equal facility for opposite positions on many questions in this area.[46] The Constitutional debates at Philadelphia cast no light upon the intent of the men there assembled, and the Hamiltonian explantion in the Federalist Papers that the bill of right was considered unnecessary in a government of limited powers[47] is now as moot as it was then unconvincing. We know that the popular clamor for a bill of rights found representation in resolutions adopted by a number of the conventions called to ratify the Constitution,[48] and these resolutions persuaded the first Congress to propose the amendments,[49] but nothing in the language of the amendments advanced by the state conventions or the

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Whipple, Our Ancient Liberties (1927); Wright, Religious Liberty under the Constitution of the United States, 27 Va. L. Rev. 75 (1940); Patterson, supra note 42 at 104-112; Cooley, Constitutional Limitations (1st ed., 1868) 418.

46. e.g. Jones v. Opelika, 319 U.S. 105 (1943). "The inconclusiveness of the historical argument is apparent from the cases. In five of the recent major cases involving interpretation of the First Amendment, the writers of the majority and minority opinions have both used the historical argument to prove their point. In each of those cases the argument seemed almost equally adaptable to the disagreeing judges who arrived at contradictory conclusions. It is submitted that any argument which is so pliable is of strictly limited utility in deciding cases." Summers, Sources and Limits of Religious Freedom, 41 Ill. L. Rev. 53, 57 (1946).

47. The Federalists, 84.

48. The ratification of New Hampshire on June 21, 1788 contained the recommendation that there be added an amendment to the effect that "Congress shall make no laws touching religion, or to infringe the rights of conscience." Elliot's Debates IV, 215. When New York ratified the Constitution on July 26, 1788, the members of that convention solemnly declared: "That the people have an equal, natural, and unalienable right, freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others. . . .That the people have a right peaceably to assemble together for their common good. . . .That the freedom of the press ought not to be violated or restrained." Elliot, IV, 216-7. Although North Carolina did not ratify until January 11, 1790, a convention there assembled for that purpose resolved on August 1, 1788 that a declaration of rights be added to the Constitution, to state: "That the people have a right peaceably to assemble for the common good. . . .That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated. . . .That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force of violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established by law in preference to others." Elliot, III, 212. When Rhode Island ratified on June 16, 1790 it, too, appended a resolution in terms identical with North Carolina. Elliot, IV, 224.

49. At the first session of the First Congress under the Constitution, the following resolution was adopted: "The conventions of a number of the states, having at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added. And as extending the ground of public confidence in the government will best insure the beneficent ends of its institutions: Resolved, by the senate and house of representatives of the United States of America in congress assembled, two-thirds of both houses concurring, that the following articles be proposed to the legislatures of the several states, as amendments to the constitution of the United States. . . ." Elliot, IV, 227-8. As early as October 14, 1774 the Continental Congress had resolved "That they have a right peaceably to assemble.... That they are entitled to life, liberty and property." 1 Journals of Congress 30, Tucker, Constitution of the United States (1899) II, 886.

proceedings of these conventions indicates the intended scope of the constitutional safeguards desired. Neither the legislative history of the Amendment nor the debates of the Congress illuminate the intent of that body when it proposed the Amendment other than the interesting, but now academic, point that the Congress refused to accede to Madison's request for a provision denying to the states power to abridge these freedoms.[50]

James Madison's early reluctance to suggest amendments to the Constitution was based solely upon his desire not to delay its adoption. Since he proposed the First Amendment in the Congress and led the fight for it on the floor of the House, his intent should be interesting. It is safe to conclude that his biographers are not far wrong in stating that he envisaged an absolute prohibition upon Congressional legislation restricting expression. Hunt has written of Mr. Madison: "He regarded the prohibition upon Congress of the First Amendment as absolute,[51] and Burns adds: "Absolute exemption of religion from any degree of political control was almost an obsession with him."[52] The evidence is overwhelming that he considered the Sedition Act an unconstitutional abridgment of freedom of speech and of the press.[53] As interesting as is the Madisonian intent, it is unserviceable, because of its absolutism, in a judicial balancing of opposed societal interests.

When Mr. Justice Frankfurter states "That there was such legal liability (for *abuse* of freedom) was so taken for granted by the framers of the First Amendment that it was not spelled out,"[54] he is almost certainly in error. The framer of the Amendment, James Madison, entertained no such notion. Mr. Justice Frankfurter's summary of state constitutions providing for punishment for *abuse* of freedom — his proof of the framers' intent — is accurate enough *as of today,* but at the time of the framing of the First Amendment not a single state constitution recognized such a concept. In fact, the abuse notion did not originate until 1804 when it was argued to Chancellor Kent's Now York court by Hamilton.[55] Kent perpetuated the phrase,[56] but it was not until 1821 that it found its way into any state constitution.[57] Furthermore, to interpret the First Amendment by the language of state constitutions in existence at the time of adoption of the First Amendment is a basic error, since the very inadequacy of the state documents influenced Mr. Madison and his colleagues. On

50. Annals of the United States Congress, 1st Cong., I, 440-1.
51. Writings (Hunt ed.) VI, 391.
52. James Madison, Philosopher of the Constitution (1938) 83.
53. "In the discussion of the Sedition Law. . .Mr. Madison maintained its unconstitutionality upon the ground of its being an abridgment of the freedom speech and of the press." Tucker, Constitution of the United States (1899) II, 669. Writings (Hunt ed.) VI, 327-30.
54. Pennekamp v. Florida, 328 U.S. 331, 356 n. 5 (1945) concurring opinion.
55. People v. Croswell, 3 Johns. Cas. 337 (1804).
56. Comm., (1st ed., 1826) II, 14.
57. New York Constitution of 1821, Art. VII, Sec. 8, Poore's Federal and State Constitutions, 1847.

the floor of the First Congress Mr. Madison stated: "Some states have no bills of rights, there others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with common ideas of liberty."[58] And the state constitutions and bills of rights at the time were too broadly stated and varied too greatly to be of any assistance in interpreting the First Amendment.[59]

Logically, there is no more justification for interpreting freedom of speech, press, religion and assembly by the norms of 1790 than in limiting "commerce" to the media of transportation known in 1787.[60] To a contemporary judiciary charged with the delimitation of Constitutional freedoms the standards of history are of very limited utility.

Influence of Interessenjurisprudenz and Pragmatism

Inevitably the societal and individual interests[61] in freedom of expression clash on occasion with other social interests. At times freedom has allegedly imperiled the societal interests in preserving the state,[62] in waging war,[63] in fostering respect for the symbols of govenment,[64] in a patriotic bar,[65] in an efficient and unpolitical public service,[66] in protecting reputation[67] and property,[68] in safeguarding the public health,[69] peace,[70] order,[71] morality[72] and purse.[73]

Transplantation of social utilitarianism into the judicial process has resulted in a characteristic judicial weighing of societal utilties when determining the limits of freedom. Of America's judicial pragmatists, Mr.

58. Annals of the United States Congress, First Congress, I, 440.
59. Poore's Federal and State Constitutions (1878).
60. "But that the First Amendment limited its protection of speech to the natural range of the human voice as it existed in 1790 would be, for me, like saying that the commerce power remains limited to navigation by sail and travel by the use of horses and oxen in accordance with the principal modes of carrying on commerce in 1789. The Constitution was not drawn with such limited vision of time, space and mechanics." Kovacs v. Cooper, 69 S.Ct. 448, 463 (1949), Rutledge, J., dissenting. A classic line of Holmes is worth recalling: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." The Path of the Law, in Collected Legal Papers, 187. Note also Chafee, Free Speech in the United States (1941) 20.
61. Pound, Interests of Personality, 28 Harv. L. Rev. 445, 453 (1915).
62. Stromberg v. California, 283 U.S. 359 (1931).
63. Sugarman v. United States, 249 U.S. 182 (1919).
64. Taylor v. Mississippi, 319 U.S. 583 (1943).
65. In re Summers, 325 U.S. 561 (1945).
66. United Public Workers v. Mitchell, 330 U.S. 75 (1947).
67. Robertson v. Baldwin, 165 U.S. 275 (1897).
68. Thornhill v. Alabama, 310 U.S. 88 (1940).
69. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
70. Cantwell v. Connecticut, 310 U.S. 296 (1940).
71. Terminiello v. City of Chicago, 337 U.S. 1 (1949).
72. Reynolds v. United States, 98 U.S. 145 (1879).
73. United States v. Ballard, 322 U.S. 78 (1944).

Justice Cardozo was the most expressive. He readily admitted that here, as elsewhere, the judicial decision "must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or imparied."[74] To him "the need is fairly obvious for a balancing of social interests and a choice proportioned to the value. . . .Involved at every turn is the equilibration of social interests, moral and economic. . . .Back of the answers is a measurement of interests, a balancing of values, an appeal to the experience and sentiments and moral and economic judgments of the community, the group, the trade. . . .Constant and inevitable, even when half concealed, is the relation between the legality of the act and its value to society. We are balancing and compromising and adjusting every moment we judge."[75]

Mr. Justice Holmes wrote: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."[76] Categorizing Mr. Justice Holmes with the historical school,[77] largely, one suspects, because of The Common Law of his comparative youth, is rather ill-advised.

Mr. Justice Stone also saw that the judicial function here, as elsewhere, was a balancing and reconciliation of interests. He stated: "Where there are competing demands of interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both, and that it is the function of the courts to determine whether such accommodation is reasonably possible."[78]

Contemporary high court justices regularly recognize and express the need for a balancing of interests in the performance of the judicial function. The clearest revelation in a freedom situation is that of Mr. Justice Rutledge who wrote: "Where the line shall be placed in a particular application rests. . .on the concrete clash of particular interests and the community's relative evaluation both of them and how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question

74. The Nature of the Judicial Process (1922) 112.
75. The Paradoxes of Legal Science (1928) 72-5.
76. The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897). John Dewey said of Holmes: "In deprecating the undue share which study of history of the law has come to play, he says that he looks forward to a time when the part played by history in the explanation of dogma shall be very small." Quoted by Frankfurter, Justice Holmes and the Liberal Mind, in Mr. Justice Holmes (1938) 42.
77. Stone, The Province and Function of Law (1946) 8.
78. Minersville School District v. Gobitis, 310 U.S. 586, 603 (1940) dissenting opinion.

this Court cannot escape answering independently whatever the legislative judgment, in the light of our constitutional tradition."[79]

Mr. Justice Murphy was writing for the Court in *Thornhill v. Alabama* in striking down a statute because it did "not evidence any such care in balancing those interests (in privacy and the protection of industrial property) against the interest of the community and that of the individual in freedom of discussion on matters of public concern.[80]

That the Court is "faced. . .with the necessity of weighing the conflicting interests" in freedom controversies is evident to Mr. Justice Black.[81] And he is clear that when constitutional liberties are involved, the scales are weighted in their favor. "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here," he wrote in *Marsh v. Alabama,* "we remain mindful that the latter occupy a preferred position."[82]

Mr. Justice Douglas has also recognized that "Courts must balance the various community interests in passing on the constitutionality of local regulations," and he, too, adds significantly: "But in that process they should be mindful to keep the freedom of the First Amendment in a preferred position."[83]

In another freedom controversy, Mr. Justice Reed acknowledged that "reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."[84] And in the *Hatch Act* case he recognized that the Court was confronted with the problem of balancing the "extent of the guarantees of freedom against a Congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."[85] There is evidence that Mr. Justice Frankfurter recognizes that the Court is weighing opposed societal interests in determining freedom controversies.[86]

Recently, however, a voice of disagreement has been heard. In his dissent in the *Saia* case, Mr. Justice Jackson protested the balancing of societal interests by his colleagues. "I disagree entirely," he objected, "with the idea that 'Courts must balance the various community interests in passing on the constitutonality of local regulations (of freedom of speech).' It is for the local communities to balance their own interests—

79. Thomas v. Collins, 323 U.S. 516, 531-2 (1945).
80. 310 U.S. 88, 105 (1940). Note also his opinion sustaining a conviction in Chaplinsky v. New Hampshire because "such utterances. . .are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 315 U.S. 568, 572 (1942).
81. Martin v. Struthers, 319 U.S. 141, 143 (1943).
82. 326 U.S. 501, 509 (1946).
83. Saia v. New York, 334 U.S. 558, 562 (1948).
84. Pennekamp v. Florida, 328 U.S. 331, 336 (1946).
85. United Public Workers v. Mitchell, 330 U.S. 75, 96 (1947).
86. Bridges v. California, 314 U.S. 252, 282 (1941) dissenting opinion.

that is politics— and what courts should keep out of. Our only function is to apply constitutional limitations."[87] One wonders what Mr. Justice Jackson thought he was doing as he applied the clear and present danger test in the *Barnette* case.[88] How he would determine "constitutional limitations" remains rather mysterious, and his statement recalls the comment of Holmes.[89]

As great a student of this task as Chafee intimates that "Our problem of locating the boundary line of free speech is solved" when "courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests," and when judges recognize that "the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled. . . ."[90] We must, however, realize that human interests are not weighed as readily as meats, and we had better remember the warning of Morris Cohen that the commensurability of human interests is in its infancy and no easy task for sociologist or judge.[91] Where a test is thought to lurk, there is only a technique.

Although most students of the problem join Chafee in affirming the necessity and desirability of balancing societal interests in the delimitation of freedom,[92] Meiklejohn has argued that the Constitutional inclusion of freedom of speech permits *no* weighing of any interests against the absolute right "of discussions of public policy." According to him, "the logic of the plan of self-government, as defined by the Constitution, decisively rejects the 'balancing' theory which Mr. Chafee advances."[93] He asserts that "we have measured the dangers and the values of the suppression of the freedom of public inquiry and debate. And, on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient."[94] "When men decide to be self-governed, to take control of their behavior," he concludes, "the search for truth is not merely one

87. Saia v. New York, 68 S.Ct. 1148, 1155 (1948) dissenting opinion.
88. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
89. Supra note 76.
90. Free Speech (1920) 38.
91. On Absolutisms in Legal Though, 84 U. of Pa. L. Rev. 681, 707 (1936).
92. "If we are to draw a line to separate the publications that we must suppress in order to be safe and decent from those that we must protect in order to be free and democratic, there must be a weighing of competing claims and values." Cushman, Keep Our Press Free, Public Affairs Pamphlet No. 123 (1946) 9. "Necessarily, then, the problem of determining the line which divides those publications to which responsibility may be attached from those which may be published with impunity must be solved by weighing the conflicting social and individual interests involved." Note, 14. Minn. L. Rev. 787, 791 (1930). "Whenever other interests are in the opinion of the Supreme Court more important than personal liberty, it has upheld social control." Willis, Constitutional Liberty, 17 Social Science No. 4 (Oct., 1942) 364. Green, Liberty under the Fourteenth Amendment, 1943-4, 43 Mich. L. Rev. 437, 463-4 (1944). Wachaler, Symposium on Civil Liberties, 9 Am. L. Sch. Rev. 881, 889 (1941). But note the criticism of the activity by Thornton, Balancing Various Community Interests: Should this be part of the Judicial Function, 35 A.B.A.J. 473 (1949).
93. Free Speech and its Relations to Self-Government (1948) 64.
94. Id. at 65.

of a number of interests which may be 'balanced' on equal terms, against one another."[95] To Meiklejohn, freedom of "discussions of public policy . . .takes control over all interests."[96] He errs, of course, in suggesting that the present Court balances freedom of discussion on equal terms with other interests, and he is neither liberal nor cogent in sacrificing to the will of any temporal majority all religious, economic and philosophic debates.

Judicial balancing of societal interests will endanger the fundamental freedoms unless the courts remain ever cognizant that the scales are weighted in favor of expression and the search for truth. Green aptly remarks: The balancing of social interests. . .has. . .not always been performed as consciously or as carefully as might be desired; it is of course dangerous unless adequate weight is attached to the freedom."[97] The First Amendment freedoms will always be endangered if judges deify themselves as sole oracles of the truth. The mortals on the bench cannot be permitted to assess constitutionality by the worth they can see in communications. Constitutional liberties cannot hinge upon the myopia of a judge.

Furthermore, there are justices who can see a societal contribution from political discussion, but who cannot perceive the social interest in the exercise of religious liberty. While this is so, a purported weighing of societal interests could effect a smaller scope for this freedom than is commensurate with the Constitutional purpose. Society's interest in freedom of religion is great, and fortunately the perceptive jurist sees not only the considerable contributions to peace, order and morality that flow from sanctions the law can never provide, but also the social concern in dignifying the individual member of society through a full exercise of his spiritual powers. Mr. Justice Douglas has stated: "Man can never be only a machine. He has a soul, a personality, a creative capacity. He is happy only when he has an opportunity to develop the spiritual aspects of his being. He can achieve happiness only when he is free. . . .Freedom of religion and of expression are the keys to spiritual strength of men. Without them personalities are shrunk and man's fullest development as a spiritual being is thwarted."[98] Since the social utility of this freedom may not be so apparent, jurists in weighing societal interests, must be ever mindful that when this liberty was enshrined within the Constitution it was given a weight to be balanced only by a grave and imminent peril to the very foundations of society. Mr. Justice Frankfurter has well said: "Because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith."[99]

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95. Id. at 68-9.
96. Id. at 69.
97. Liberty under the Fourteenth Amendment, 27 Wash. U.L.Q. 497, 557 (1942).
98. The Human Welfare State, 97 U. of Pa. L. Rev. 597, 601 (1949).
99. Minersville School District v. Gobitis, 310 U.S. 586, 495 (1940).

The evaluation and reconciliation of opposed societal interests has been accomplished most successfully under the clear and present danger test.[100] Where other tests have encouraged judicial abdication to the majority will, or encouraged mechanical jurisprudence through the affixation of label, clear and present danger has been a working principle that implicitly demands a judicial examination of the "substantiality" of the evil—which is merely another way of saying the importance of the opposed social interest—and a critical inquiry into the necessity for denial of the Constitutional freedoms. To rationalize a legislative or administrative negation of freedom of expression by categorizing the communication as "abuse" of freedom, or "licentiousness" rather than liberty is something far less than constitutional adjudication.

The experience of our own nation, as well as those of other nations, such as Australia and the Philippines, having a system of judicial review comparable to ours, does not give any assurance that a single test can or should be applied to the resolution of all controversies involving freedom of speech, press, religion and assembly. The annulment of legislative restrictions of freedom because they were unconstitutionally vague and indefinite, or because they attempted to tax the exercise of a national right have all been adequate judicial responses to the situation without utlization of any verbalized criterion. And, judicial weighing of society's interest in freedom against its interest in preserving the public health has generally been accomplished rather satisfactorily without use of any test. Objective tests are quite valueless, and subjective tests will serve their purpose if they stimulate the judiciary to a conscious, intelligent weighing of opposed societal interests with due regard for the preferred place of freedom in our socio-legal hierarchy of values.

100. For analysis of the cases applying the clear and present danger test see articles by the present author in the April, 1950 Michigan Law Review, and the May, 1950 Univerity of Detroit Law Journal.