The Jurisprudence of Interests as a Method of Constitutional Adjudication

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The broad guarantees of the Constitution were intended to accommodate evolving societal interests. To the Supreme Court, as the final interpreter of the Constitution, falls the task of defining those interests of the society which deserve constitutional protection and determining which interest will prevail when two or more interests clash. Professor Antieau, focusing his attention on conflicts between first amendment freedoms and other societal interests, investigates the potential utility of a jurisprudence of interests, a system of constitutional adjudication in which opposed societal interests are openly evaluated and balanced. The author concludes that proper application of this method of adjudication and a clear articulation of the factors entering into the balancing process will produce the greatest return in terms of group and individual justice.

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The Jurisprudence of Interests as a Method of Constitutional Adjudication

I. INTRODUCTION

Contemporary constitutional controversies cannot adequately be resolved by the United States Supreme Court or other tribunals when the broad concepts, such as due process, equal protection, freedom of speech, freedom of press, freedom of assembly, freedom from an establishment of religion, the commerce clauses, the contract clause, the cruel and unusual punishment ban, and the privileges and immunities clauses are to be construed solely, or even primarily, by searching for "the intent of the framers" or by adherence to the precedents of past generations—judicial, legislative, or executive. The conflicts of our contemporary society can be more readily resolved through a more intensive application and refinement of the methodologies of interessejurisprudenz—a jurisprudence of interests. Under this method of dispute resolution, the constitutional tribunal identifies the opposed societal interests, reconciles them if possible, and, if reconciliation is not possible, rules that one societal interest under the circumstances must prevail over another, with an explanation to the community of why this is so.

Interessejurisprudenz owes its origin to the German jurist, Rudolf von Jhering. In this country the earliest endorsement of this form of jurisprudence came from Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo who readily saw the advantages of a sociological jurisprudence. As early as 1881 Holmes asserted that the task of judging demands an awareness of societal interests. He wrote:

The very considerations which judges most rarely mention . . . are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practices and traditions, the unconscious result of

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instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.\textsuperscript{2}

Holmes was well aware that successful constitutional adjudication demands a judicial awareness of clashing societal interests and a skillful reconciliation or resolution of such interests. He observed:

I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is stronger at the point of conflict.\textsuperscript{3}

In 1897 Holmes urged that judges openly explore the impact of their constitutional rulings upon their society:

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 \ldots\textsuperscript{4}

More than most of his contemporaries in 1908, Holmes knew of "the limits set to property by other public interests,"\textsuperscript{5} blanketed customarily in American public law under the compendious term, "the police power." He sagely observed that "[t]he boundary at which the conflicting interests balance cannot be determined by any general formula in advance."\textsuperscript{6} This remark applies not only to litigation involving a property interest, but to all cases in which societal interests clash.

By 1911 Roscoe Pound had endorsed a sociological jurisprudence and enthusiastically approved of von Jhering's \textit{interessenjurisprudenz}.\textsuperscript{7} He knew that broad constitutional concepts, such as due process of law, require a constant weighing, balancing, and adjusting of opposed societal interests. The very term, "due process of law," he explained in 1943, implies "a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment."\textsuperscript{8}

\textsuperscript{2} O. Holmes, The Common Law 35-36 (1881).
\textsuperscript{3} O. Holmes, Collected Legal Papers 239 (1920).
\textsuperscript{4} Holmes, The Path of the Law, 10 Harv. L. Rev. 456, 467 (1897).
\textsuperscript{5} Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).
\textsuperscript{6} Id.
\textsuperscript{8} Pound, A Survey of Social Interests, 57 Harv. L. Rev. 1, 4 (1943).
Benjamin Cardozo, later to become a distinguished Justice of the Supreme Court, recognized that constitutional adjudication requires an identification and balancing of opposed societal interests. As he summarized in 1921:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.\(^9\)

To Cardozo, the balancing of societal interests was the very essence of the function of the judge.

In problems such as these, 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. . . . 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. . . . 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 that we judge.\(^10\)

United States Supreme Court Justices who have succeeded Justices Holmes and Cardozo, have with rare exceptions, acknowledged the legitimacy of applying the methodologies of a jurisprudence of interests in constitutional construction. In 1957, for example, Justice Harlan spoke of the frequent instances where the Court is "called upon to balance the interest in free expression against other interests."\(^11\) Speaking for the Court in 1961, he appreciated that restraints upon the first amendment values have been upheld when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional pro-

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tions are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.12

Six years later, Justice Harlan reaffirmed his position: "I agree, of course, with this 'balancing' approach. Indeed, I cannot conceive of any other sound method of attacking this type of problem."13

Although he would have preferred the weighing and balancing of societal interests to be done whenever possible by the legislatures, Justice Frankfurter knew that in our society the Supreme Court would ultimately have to take this responsibility. "The Due Process Clause," he wrote, "places upon this Court the duty of exercising a judgment . . . upon interests of society pushing in opposite directions."14 He added:

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.15

In 1951 Justice Frankfurter expanded this discussion in the area of first amendment rights: "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests within the confines of the judicial process."16 "[J]udges . . .," he wrote, "have to adjudicate. If the conflict cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty."17


See Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 845, 478 P.2d 792, 799 (1970): "The balancing of conflicting interests is basic to the achievement of justice as the goal of law."

15. Id. at 172.
Similarly Justice Owen Roberts in 1940 saw the propriety of applying the methods of *interessenjurisprudenz* in constitutional adjudication and applied this method to recognize the strong societal interest in communication. He wrote for the Court, reviewing the validity of a conviction of an evangelist under a breach of the peace statute:

Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State . . . has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest . . . has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.18

Five years later, his colleague, Justice Wiley Rutledge indicated that he agreed with the need to identify and balance societal interests in constitutional adjudication:

Where the line shall be placed in a particular application rests . . . on the concrete clash of particular interests and the community's relative evaluation of 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 this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition.19

Justice William O. Douglas knew of the need for a jurisprudence of interests in constitutional adjudication, even when first amendment interests were involved. In 1948 he spoke for the Supreme Court in a case evaluating the constitutionality of a sound truck ordinance: "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here."20 Two years later, Chief Justice Vinson's opinion for the Court mirrored this view:

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial

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20. Saia v. New York, 334 U.S. 558, 562 (1948). However, despite the breadth of the quoted statement, Justice Douglas continues in this opinion to emphasize the preferred position of first amendment rights.
The extent to which the jurisprudence of interests has been assimilated into the adjudication of complex constitutional issues is evidenced by the fact that Chief Justice Vinson's predecessor and his two successors as Chief Justice have all accepted its validity.22 "The balancing test used by the Court," said Chief Justice Burger in 1976, "requires that fair recognition be given to competing interests."23

A number of distinguished modern Justices have acknowledged that there must be a weighing and balancing of social interests in the resolution of complex issues of constitutional law.24 Representative of this view is Justices Fortas, Goldberg, and Reed approved this method even where first amendment values were involved. Dissenting in Street v. New York, 394 U.S. 576 (1969), Justice Fortas stated that communicative action "may be subjected to reasonable regulation that appropriately takes into account the competing interests involved." Id. at 616. In his opinion in a courthouse picketing dispute, Justice Goldberg emphasized that the Court must "vindicate the State's interest in assuring justice under law," even if the interest in communication is thereby affected. Cox v. Louisiana, 379 U.S. 559, 562 (1965); accord, Pennekamp v. Florida, 328 U.S. 331, 336 (1946) (Reed, J.).


So, too, Justice Stewart has been willing to participate in adjusting and balancing societal interests. E.g., Gravel v. United States, 408 U.S. 606, 632 (1972) (dissenting in part); Wisconsin v. Yoder, 406 U.S. 205, 237-41 (1972) (opinion by White, J., with whom Brennan & Stewart, JJ., join, concurring); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971) (opinion by Marshall, J. with whom Stewart, J., joins, dissenting); Bates v. Little Rock, 361 U.S. 516, 524 (1960), although of late he has expressed his fears that the process may unwisely dilute the first amendment values. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human relations, 413 U.S. 376, 403 (1973) (dissenting) ("Those who think the First Amendment can and should be subordinated to other socially desirable interests will hail today's decision. But I find it frightening.")

Justice White has supported the necessity of a balancing approach, writing that some cases "inevitably call for a delicate balancing of important but conflicting interests." Wisconsin v. Yoder, 409 U.S. 205, 237 (1972). Apparently Justice Rehnquist is willing to accept the balancing role of the Court—so much so, in fact, that he describes it as the "typical" method of resolving
tice Powell’s acceptance of the propriety of a jurisprudence of interests in Brandenburg v. Hayes:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Clear statements of the views of the constitutional generation are, of course, relevant in contemporary construction, but only to the extent that they represent enduring values or interests of our society that are of a dignity deserving constitutional protection. The Supreme Court Justices and constitutional scholars have often concluded that the search for the intent of the framers is fruitless. Even when some expressions of the framers’ in-


Joining Justices of the Supreme Court in an endorsement of the methodologies of a jurisprudence of interests in constitutional adjudication have been a number of notable legal scholars: A. Bickel, The Supreme Court and the Idea of Progress 78 (1970); F. Castberg, Freedom of Speech in the West 499 (1960); Z. Chafee, Jr., Free Speech in the United States 35 (1941); M. Ramaswamy, The Creative Role of the Supreme Court of the United States 76 (1956); Heck; The Jurisprudence of Interests, An Outline, 2 The Jurisprudence of Interests 40 (M. Schoch ed. 1948); Cohn, Book Review, 13 Mod. L. Rev. 117, 119 (1950) (The Jurisprudence of Interests (1948)); Kauper, Book Review, 58 Mich. L. Rev. 619, 626 (1960) (A. Meiklejohn, Political Freedom (1960)).


26. Id. at 710. But note his 1974 opinion for the Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 343, 347 (1974), where he accepted the need for the Court to balance society’s interest in communication against its interest in protecting private reputation. He added that “an ad hoc resolution of the competing interests at stake in each particular case is not feasible,” and indicated his preference for a general rule allowing private citizens defamed by the media to collect compensatory damages under state law “so long as that law did not impose liability without fault.”

27. See Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 499, 495 (1977), wherein Justice Brennan states:

[The] genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth.

28. Speaking for the Court in Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398 (1934), Chief Justice Hughes admitted: “In the construction of the contract clause, the debates in the Constitutional Convention are of little aid.” Id. at 427. More recently, Justice White, writing for the Court regarding the article III jury clause, found the traditional sources to be less useful in establishing the intent of the Constitution’s drafters: “The ‘very scanty history . . . in the records of the Constitutional Convention’ sheds little light either way on the intended correlation between Article III’s ‘jury’ and the features of the jury at common law.” Williams v. Florida, 399 U.S. 78, 93 (1970) (quoting Frankfurter & Corcoran, Petty Federal Offenses and
tent are available, they may only represent the values of the past which later generations have deliberately chosen to repudiate.29

Nevertheless, to apply a jurisprudence of interests in constitutional adjudication is not to manifest disrespect for the generation that gave us the Constitution and the Bill of Rights. When the "Founding Fathers" dedicated our nation to the protection of the basic dignity of man, to the principles of a free society where individuals would have generous opportunity for developing their talents, and to the creation of a society where an open marketplace of ideas would prevail, they forcefully indicated the values and interests they hoped would continue to be shared by subsequent generations in this land. In general, these interests have been shared and appreciated not only by the society but by the courts charged with constitutional construction. Justice Frankfurter has reminded us, moreover, that the values to be weighed by a court applying the methods of a jurisprudence of interests are those "deemed representative of the community as a continuing society."30 It can safely be asserted that the constitutional generation believed with Holmes that "[t]he present has a right to govern itself,"31 and that later generations could permissibly infuse their newly discovered values and interests into the broad phrases of the Constitution.32 This attitude was expressed as early as 1816 by Thomas Jefferson in a letter to a friend:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. . . . Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.33

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31. O. HOLMES, COLLECTED LEGAL PAPERS 139 (1920).
32. See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966): [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.
Precedents and practices of earlier generations take on meaning only when and if they represent the continuing values of our society. Insofar as they represent repudiated values, as they frequently do, such precedents can be disavowed in contemporary constitutional construction. Justice Harlan maintained: "It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend of historical understanding and the adaptation of purpose to contemporary circumstances." On another occasion he added that the Court, in construing the broad concepts in the Constitution, is permitted to do so "in light of evolving needs and circumstances." Justice Frankfurter likewise looked backwards at times to the value structures of such generations as those responsible for the Constitution, the Bill of Rights and the fourteenth amendment, inter alia, to ascertain the lasting values and interests of our "community as a continuing society." But perhaps the most radical view was espoused by Justice Holmes who wrote that he looked forward "to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."

The jurisprudence of interests does not accept the absolute nature of either individual rights or societal interests. Even the societal interest in communication may be outweighed at times by other more important interests of society; this the Supreme Court accepts, as evidenced by Chief Justice Vinson's statement for the Court in 1951: "[T]he societal value of speech must, on occasion, be subordinated to other values and considerations." A quarter century later the Court confirmed its stance: "We have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved."

II. CRITICISMS OF A JURISPRUDENCE OF INTERESTS

Certain criticisms of the methods implicit in a jurisprudence of interests in constitutional adjudication have surfaced that merit identification and

34. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949) (with list of Supreme Court cases overruled, id. at 756-68).


37. O. HOLMES, supra note 31, at 195.


evaluation. Some critics have attacked the very basis of this approach to constitutional adjudication, questioning whether it is even possible to measure fundamental values or interests. Other commentators have suggested that judges typically have neither the means nor the competence to weigh and adjust such societal interests. Allowing the judiciary to identify and balance fundamental social interests, it is feared, may permit judges to impose their own values upon the society. Thus it has been urged that this task is properly reserved solely for legislative bodies. Some jurists have said that when the constitutional generation ratified the Bill of Rights it did all the balancing that was necessary, reflecting the fear that any further balancing by the judiciary will fail to respect adequately the societal interests in the freedoms contained within those amendments. Lastly, because the jurisprudence of interests is acknowledged to be sociological and utilitarian, some philosophers have felt the judiciary is incompetent to forecast the utility of a proposed rule or its impact upon the society.

Among those jurists who were reluctant to accept a jurisprudence of interests because they believed values or interests are not measurable was Judge Learned Hand. Such a method, he wrote, would “demand the appraisal and balancing of human values which there are no scales to weigh.” “The difficulty here,” he added, “does not come from ignorance, but from the absence of any standards, for values are incommensurable.” 40 Some other constitutional scholars have agreed with Judge Hand’s analysis, pointing out that without a “basis of absolutes” societal interests evade a rational balancing process. 41 Questioning whether human values are commensurable, Morris Cohen remarked:

For years I have followed with close interest and great hope the movement of Interessenjurisprudenz in France, Germany, and in this country, and I regret not to be able to see as yet any substantial progress toward the solution of the problem of determining with some degree of definiteness the relative weights which different social interests should have in the legal system.

Yet he realistically concluded: “Still the effort at some kind of systematic evaluation of these interests is inescapable. The possibility of intelligent choice depends on it.” 42 Even Justice Harlan expressed a fear that some interests are “incommensurate,” at least by the Supreme Court, 43 and yet he was generally more willing to accept the methods of a jurisprudence of interests than any of his colleagues.

42. M. Cohen, Reason and Law 8, 97 (1950).
In response, it must be emphasized that values and interests are not only identifiable but are also measurable by organs of the state. Legislatures daily weigh and balance societal interests in drafting legislation. If anything, the task should be easier for constitutional courts which we have endeavored to immunize from the passions and prejudices of the moment. Furthermore, courts have measured and balanced societal interests for centuries in the common law world with a great measure of social acceptance. Sir Richard O'Sullivan has aptly testified that "[i]n the measurement of these interests . . . the Common Law habitually uses a certain scale of objective values, the lesser of which it is ready to subordinate, and on occasion even sacrifice, to those of a higher rank." 44 Certainly, the judicial organs of a society that has a written constitution in which the larger values are identified should be able to determine and measure some values of the group.

Jurisprudence of interests has been criticized on the basis that the judiciary has neither the means nor the competence to weigh and adjust the important interests of society. Even Justice Harlan expressed reservations about the competence of the courts to weigh particular values in clashing situations when he wrote that "judgments of the sort involved here [determining whether Congress could permit eighteen-year-olds to vote] are beyond the institutional competence and constitutional authority of the judiciary. . . . They are pre-eminently matters for legislative discretion, with judicial review, if it exists at all, narrowly limited." 45 His colleagues disagreed, however, and proceeded to balance the opposed interests in a way generally acceptable to the community. 46

Professor Paton has suggested that the only way the judiciary can determine that one interest outweighs another is by recourse to public opinion, 47 but he is in error. Some understanding of the preferences of the society can be obtained by mere reference to the organic law. 48 The ways in which legislative bodies in the society have adjusted competing interests tend to manifest society's relative evaluation of those opposed interests. In addition, judicial precedents very often divulge the Court's conclusions as to how the clashing interests should be evaluated. There are other sources open to any

44. O'Sullivan, A Scale of Values in the Common Law, 1 MOD. L. REV. 27, 38 (1937).
46. As previously indicated, however, Justice Harlan was generally and overwhelmingly committed to the judiciary's use of the methods of a jurisprudence of interests in constitutional adjudication. See text accompanying note 13 supra.
47. "A survey of the actual interests demanded by society provides no basis for preferring one to another save that provided by the strength of popular opinion." G. PATON, supra note 41, at 127.
court concerned with constitutional adjudication, as later parts of this article explore.

Some jurists have suggested that the weighing of conflicting societal interests is almost exclusively a task for legislative bodies. Justice Frankfurter, for one, believed that the society's elected representatives were more competent to strike the balance between these interests than were courts.

Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.49

Nevertheless, Justice Frankfurter participated willingly in judicial weighing of opposed interests on many occasions. Voicing his opposition to absolute rules in 1951, he wrote: "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved."50 There was a comparable inclination on the part of Justice Harlan to leave the weighing of interests to the legislatures.51

Notwithstanding the respect due these two Justices, it must be recognized that in our constitutional society, committed to judicial review, the task of identifying and balancing the competing interests must ultimately be performed by the Supreme Court—not by Congress or any other legislature. It must be appreciated that in many situations requiring constitutional adjudication by that Court, there has been no previous balancing by any legislative body. This is so, for instance, when some public servant without any legislative authority arbitrarily suppresses the communicative process.52 It is equally true in a host of cases where a misguided trial court issues orders in accordance with what it considers a proper weighing of the relevant societal interests.53 And, it is so where citizens are prosecuted under common law crimes.54

See text accompanying note 13 supra.
53. E.g., Carroll v. Princess Anne County, 393 U.S. 175 (1968).
Even where there have been previous judgments by local legislators, they may have to be set aside by the Supreme Court because parochial concerns were overemphasized at the expense of the national interest.\textsuperscript{55} Furthermore, even when Congress attempts to balance competing interests, it may lose sight of the lasting values of our continuing society or give insufficient weight to the legitimate concerns of the states in our federal system so that intervention by the high court is mandated.\textsuperscript{56}

A fourth criticism of a jurisprudence of interests has been leveled by Chief Justice Warren, as well as Justices Black, Douglas, and Stewart. Each has, on occasion, asserted that all the necessary balancing in first amendment cases was done by the generation that ratified the Bill of Rights and that permitting a contemporary Supreme Court to balance the interests would too often subordinate the societal interest in communication to other interests. As Justice Black stated: "The men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."\textsuperscript{57} Justice Douglas often agreed.\textsuperscript{58} Chief Justice Warren, with Justices Black and Douglas, dissented in 1959 from the majority's decision to balance a "governmental" interest in security against an "individual" interest of a teacher who was unwilling to talk about his allegedly subversive associations. They protested:

To apply the Court's balancing test under such circumstances is to read the First Amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised."\textsuperscript{59}

Admittedly, the majority's balancing of "governmental" versus "individual" interests rather than opposed societal interests was a gross perversion of the

\textsuperscript{55} E.g., Cantwell v. Connecticut, 310 U.S. 296 (1940).
\textsuperscript{56} E.g., United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).
\textsuperscript{57} Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (dissenting). "I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are 'more important interests.' The contrary notion is, in my judgment, court-made not Constitution-made." Smith v. California, 361 U.S. 147, 158-59 (1959) (concurring). See also California v. Byers, 402 U.S. 424 (1971) (dissenting); El Paso v. Simmons, 379 U.S. 497 (1965) (dissenting).
\textsuperscript{58} Why does "the freedom of speech" that the Court is willing to protect turn out to be so pale and tame? It is because . . . the Bill of Rights is constantly watered down through judicial "balancing" of what the Constitution says and what judges think is needed for a well-ordered society.
\textsuperscript{59} Barenblatt v. United States, 360 U.S. 109, 143 (1959) (dissenting).
jurisprudence of interests, but the dissent seemed to say that any balancing was uncalled for.


> So long as Members of this Court view the First Amendment as no more than a set of "values" to be balanced against other "values," that Amendment will remain in grave jeopardy. . . . Those who think the First Amendment can and should be subordinated to other socially desirable interests will hail today's decision. But I find it frightening.

One is entitled to be frightened at some of the first amendment decisions of the Supreme Court, but most of these were reached without even the recognition of the methods of a jurisprudence of interests. Moreover, especially in five-to-four decisions, it can be expected that the American community will not always be satisfied with results reached under a conscious weighing and balancing by the courts.

Notwithstanding the foregoing utterances of these respected Justices, it should be noted that they, like their colleagues, have frequently balanced opposed societal interests in constitutional litigation involving first amendment values. In 1948, Justice Douglas firmly maintained that "courts must balance the various community interests in passing on the constitutionality of local regulations" affecting communication. In *United States v. O'Brien* and *Kramer v. Union Free School District*, Chief Justice Warren was quite willing to utilize the methods of *interessenjurisprudenz* to resolve constitutional issues. Even Justice Black wrote in *Martin v. Struthers*, a first amendment case, that the Court is "faced . . . with the necessity of weighing the conflicting interests." Three years later he confirmed this approach, acknowledging that "we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion."

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60. For a discussion of the proper interests to be balanced, see text accompanying notes 79-85 infra.
62. Id. at 402-03.
67. 319 U.S. 141 (1943).
68. Id. at 143.
Justice Stewart, too, has been willing—and quite properly—to participate in arriving at constitutional decisions even in first amendment controversies by consciously weighing and balancing societal interests. There is simply no other way of satisfactorily adjudicating the clash of values which are not absolutes.

Another criticism of the jurisprudence of interests arises from the fear that this method of analysis will lead the Supreme Court Justices to impose their own value structures upon the society. "Where the balance is to be struck," said Justice Harlan, "depends ultimately on the values and the perspective of the decisionmaker." This remark, although not representative of the views of Justice Harlan, illustrates the community's common perception of judicial balancing.

Judicial decisionmaking, utilizing the methodologies of a jurisprudence of interests, does not depend upon the personal values or predilections of the judge as has been thoroughly understood by capable Justices such as Cardozo and Frankfurter. Judges, said Justice Cardozo, are not free "to substitute their own ideas of reason and justice for those of the men and women whom they serve. Their standard must be an objective one." Justice Frankfurter was in complete accord. Speaking of due process of law, he said:

We cannot escape acknowledging that it involves the application of standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the impersonal standards of society which alone Judges, as the organs of Law, are empowered to enforce. [Judges must apply] that consensus of society's opinion which, for the purposes of due process, is the standard enjoined by the Constitution.

In Solesbee v. Balkcom, he further described the process of constitutional adjudication in the area of due process: "In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions." "It is the essence of judicial duty to subordinate our own personal views," echoed Justice Stewart, dis-

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71. Oregon v. Mitchell, 400 U.S. 112, 206 (1970) (concurring in part and dissenting in part) (unable to accept judicial responsibility for deciding whether society's interests sustained a congressional judgment that eighteen-year-olds were sufficiently mature to vote).
75. Id. at 16.
senting in *Griswold v. Connecticut,* and other Justices have similarly understood that their own personal values and interests are not to prevail in application of a jurisprudence of interests.

Critics of a utilitarian jurisprudence have sometimes doubted that the judicial machinery is adequate to assess the social utility of a proposed rule and to forecast the impact of a norm upon the society. Professor Rawls has written: "The principle of utility makes such heavy demands on our ability to estimate the balance of advantages that it defines at best an ambiguous court of appeal for questions of justice." Such an attack is obviously not limited to a jurisprudence of interests, but is a charge addressed to any sociological or utilitarian jurisprudence. If one accepts the value of a system of jurisprudence in which the competing interests are balanced, the effort to identify and assign social weights to these interests is a necessary component of justice. The judicial machinery is no less competent than the institutions which presently strike the balance. Legislators daily must endeavor to anticipate the utility of their laws and the impact of new rules upon society. If anything, a judiciary which is more isolated from temporal passions can, with greater scholarship and wisdom, make a successful forecast of the consequences of rulings open to the courts. More than any other available system of jurisprudence, the jurisprudence of interests can, when skillfully and prudentially applied with the methods set forth later in this article, produce the greatest return in terms of group and individual justice that society has been able to achieve.

III. MISCONCEPTIONS OF THE JURISPRUDENCE OF INTERESTS

Only societal interests are to be weighed and balanced in constitutional adjudication, but Supreme Court Justices—influenced by our traditions of individual right—have placed individual interests upon the scales in opposition to what they have conceived to be group interests. Chief Justice Warren saw the judicial role as one "of accommodating the interests of the Government with the rights and privileges of individuals." For example, when a citizen claimed he was justified in refusing to testify before Congress, the Chief Justice wrote: "Accommodation of the Congressional need for particular information with the individual and personal interest in privacy

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76. 381 U.S. 479, 530-31 (1965).
is an arduous and delicate task for any court." Justice Harlan, in *Barenblatt v. United States,* perceives the interests to be accommodated as "public" versus "private": "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Justice Marshall viewed the Court's task similarly: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Justice Black, no great believer in the balancing of societal interests in first amendment cases, was astute enough to see that the misguided efforts of many of his brethren in balancing "individual" interests against "governmental," "state," or "public" interests were serious misunderstandings of a jurisprudence of interests in constitutional adjudication and were necessarily dangerous to the interest of our society in freedom of communication. In the *Barenblatt* decision Justice Black informed his colleagues that when a Justice balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations [he] mistakes the factors to be weighed [and] completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations . . . without later being subjected to governmental penalties for having dared to think for themselves . . . rather than Barenblatt's own right to silence, which I think the Court should put on the balance against the demands of the Government, if any balancing process is to be tolerated.

Dean Roscoe Pound saw the danger to sound constitutional adjudication from balancing "private" against "public" interests. He wrote in 1943:

> When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it.

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80. *Id.* at 198.
82. *Id.* at 126.
84. 360 U.S. 109, 144 (1959) (dissenting).
Capable courts understand that they are to be concerned in constitutional adjudication only with societal interests. To illustrate, the United States Court of Appeals for the Ninth Circuit, after noting that the litigants had personal interests involved, added that "far weightier than they are the public interests in First Amendment freedoms." 86

Regrettably, some Supreme Court Justices have thought their task was that of placing governmental interests on the scales in opposition to various other concerns. 87 Of course, legitimate societal concerns are at times advanced by public servants just as by citizens, but an interest is to be placed upon the scales in constitutional adjudication only because it is of value to the society, not because it is advanced by some functionary upon behalf of the "government," the "establishment," or the "state." In a free society no governmental interests are ever to be placed upon the judicial scales to outweigh the societal interest in freedom.

On occasion, instead of balancing societal interests, Justices of the Court have thought balancing was to be done between "rights" of the plaintiff and "rights" of the defendant. 88 Some scholars comparably have looked upon constitutional adjudication as a clash of rights. 89 It is at best a pleasant phrase to state that the rights of some cannot be honored "in disregard of the rights of others," 90 but it provides neither adequate insight into the judicial function nor aid to a court in the responsibility of deciding concrete cases. Whatever may be deemed the role of a court applying private law, in constitutional adjudication a tribunal is not to balance "private rights." In a defamation case, for example, a court that weighs the right of the victim against the right of the publisher horribly misconceives the task of *interessenjurisprudenz*. The Court has begun to give evidence that it understands this. 91 In 1974, noting that a state has "the important and legitimate interest of maintaining the integrity of elections," the Supreme Court remarked: "This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." 92 It then added most significantly: "The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or

86. Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972).
89. P. FREUND, ON LAW AND JUSTICE 36 (1968).
parties or both and it is this broad interest that must be weighed in the balance.”

On a few occasions Supreme Court Justices have spoken as though they conceived their task in constitutional adjudication to be one of balancing "principles." In 1953 the Court spoke of the need for "[a]ccommodation of these contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitations imposed by the First Amendment." Thirteen years later the Justices spoke in comparable language:

There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality.

Legal principles devoid of societal interest have no place on the scales of constitutional adjudication. If supported by social utility, they are apt to be propositions so broadly stated as to be of little help to a court that must decide concrete controversies or, at best, encapsulated versions of how particular societal interests have been resolved under identified circumstances. Nothing is to be gained by attempts at balancing principles; rather, courts in constitutional adjudication must confine their evaluations and adjustments to societal interests.

IV. THE JUDICIAL PROCESS OF DETERMINING THE SOCIETAL INTERESTS DESERVING CONSTITUTIONAL PROTECTION

Every society has a system of values or a hierarchy of interests which the institutions of that society are charged with protecting. The basic interests of some societies have been relatively constant, but with the passage of time certain interests become less important while new interests appear that deserve protection. Professor Friedrich aptly noted that "as new interests arise in the community, they will clamor for recognition as soon as they become sufficiently weighty to arouse a sizable group of people to rally to their support.”

A society must have some means of identifying its basic interests and must provide some method of ranking these interests so that they may be

93. Id. at 718.
adjusted in clashing situations by some organ of the state: legislative, executive, or judicial. It is "both possible and necessary, for any given society," wrote Julius Stone, "to set out in an ordered scheme the interests to which its law ought to give effect."97 "Interests are derived from inspection of the claims actually made in societies,"98 as Professor Sawer noted. He added trenchantly: "The task of the law is to classify these interests, to decide in the light of some system of values which interests should be given effect to and to what extent."99

In the United States the ultimate identification of the societal interests deserving of constitutional protection is the task of the United States Supreme Court as interpreter of the Constitution. Although a few Justices of that Court have said that it is not within their powers to identify new interests to be constitutionally safeguarded100—that this is solely the function of constitutional amendment—analysis finds them with their colleagues participating in the Supreme Court's identification of new societal interests worthy of constitutional protection.101 The responsibility of ascertaining and announcing what societal interests are so fundamental as to be constitutionally protected requires of the Court, in the words of Justice Harlan, a "solid recognition of the basic values that underlie our society."102

These basic values are found, first of all, in the written Constitution. For example, the contract clause manifests a strong societal interest in the security of transactions; the equal protection clause of the fourteenth amendment expresses the enduring interest of our society in equal justice and opportunity; the first amendment is testimony to the profound commitment of our society to the interests in communication and religion; and equally deep commitments are evidenced by the other provisions of the Bill of Rights. The Supreme Court readily acknowledges that it has "increasingly looked to the specific guarantees of the [Bill of Rights] to ascertain the important values or interests of our society."103

The Constitution is not the only source from which the Court may derive important societal interests, however. The task of the judge in ascertaining the fundamental interests of our society that are so basic as to be deserving

98. G. SAWER, LAW IN SOCIETY 150 (1965).
99. Id.
of constitutional protection is generally the same as that of the legislator—to
draw his knowledge of these interests and priorities of his society, as Justice
Cardozo pointed out many years ago “from experience and study and reflec-
tion.”  

A. Identifying Protectable Societal Interests

1. Reference to the Legitimate Claims of Free Men and Women

In a free society, a judiciary concerned with ascertaining societal in-
terests must determine, and honor, the legitimate claims of free men and
women. The French scholar, Professor Rene Capitant, accurately com-
mented that “there exists an irreducible minimum of individual liberty
which proceeds from the very nature of man and the demand of human
beings. Without it, man would cease to be man.” When our society
constitutionalized “liberty” in both the fifth and fourteenth amendments, it
clearly manifested the concern that the legitimate claims of citizens to free-
dom be safeguarded by our legal institutions. “The Fourteenth Amend-
ment,” Justice Frankfurter explained, “did mean to withdraw from the
States the right to act in ways that are offensive to a decent respect for the
dignity of man, and heedless of his freedom.” Admitting that “these are very
broad terms,” he nevertheless admonished that “the duty of such adjudica-
tion on a basis no less narrow has been committed to this Court.”

Given the heritage of a jurisprudence of individualism, characterized for
over our first hundred years at least by doctrinal espousal of natural rights, it
is understandable that, instead of articulating societal interests, the Supreme
Court virtually always spoke of individual rights, first labelled as “natural”
rights and more recently, as “fundamental rights.” One might expect that in
identifying new rights the Court would explain their fundamentality,
perhaps in terms of social utility, but the language employed is customarily
either conclusory or too vague to divulge why the rights preferred by the
Court deserve constitutional protection or paramountcy over opposing in-
terests of society. When in 1888 the Supreme Court held for the first time
that freedom of enterprise was sufficiently fundamental in our society to be
protected as a constitutional right, it provided only the explanation that “the
privilege of pursuing an ordinary calling or trade . . . is an essential part of
. . . liberty.” Likewise, freedom to pursue a chosen vocation was to be

105. Capitant, La crise et la reforme du parlamentarisme en France, 1936 JAHRBUCH DES
OFFENTLICHEN RECHTS 14.
protected, the Court announced in *Meyer v. Nebraska*,\(^{108}\) because it was part of "liberty." Two years later the Court added that the right to educate one's children as one chose was to be constitutionally protected because it was embraced within "the fundamental theory of liberty upon which all governments in this union repose."\(^{109}\) In ruling for the first time that freedom of association was to be constitutionally protected, the Supreme Court simply said: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause."\(^{110}\) When in 1965 the Court held that the privacy right deserved constitutional recognition, it gave only the explanation that the right "is a legitimate one."\(^{111}\)

Broader statements proffered by the Supreme Court to explain their conclusion of fundamentality, or a justification for giving constitutional protection to various claims or interests, have not been much more illuminating. When the Court says that rights are to be protected when they are part of "the concept of ordered liberty,"\(^{112}\) or part of "the traditions and conscience of our people,"\(^{113}\) or because they are seemingly mandated by those "canons of decency and fairness which express the notions of justice of English-speaking peoples,"\(^{114}\) one is virtually forced to agree with the conclusion of Professor McWhinney that "[c]oncepts such as these are so vaguely and loosely worded as to allow almost any content to be poured into them."\(^{115}\)

Nevertheless, a number of legitimate claims are readily identifiable as necessary to the preservation of a free society. A basic claim of all free men and women is their entitlement to be free from slavery and involuntary servitude. This is universally identified in our community as a societal interest demanding protection.\(^{116}\) The claim of the individual to integrity, dignity, and decency readily qualifies as a societal interest deserving of constitutional protection, and both the eighth amendment and a host of cases demonstrate the community's legitimate concern.\(^{117}\)

\(^{108}\) 262 U.S. 390, 399 (1923). See id.: "[T]his Court has not attempted to define with exactness the liberty . . . guaranteed [by the fourteenth amendment]. . . ."


\(^{114}\) Adamson v. California, 332 U.S. 46, 67 (1947).


\(^{116}\) U.S. CONST. amend. XIII.

The pursuit of happiness was deemed a natural right by the founding fathers, and our society has a recognized interest in honoring this claim of the individual. Constitutional protection must be given to "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." The individual's claim to be able to develop his talents and personality is clearly embraced within the protected interest of the society. Every society ought to secure to all its members, so far as possible, the opportunity to develop their individual talents and powers so far as they can without detriment to one another or to the well-being of the society as a whole. The object of the state, observed the distinguished French Professor Waline, is "to guarantee the individual the liberties necessary for the development of his personality." In 1888 Justice Field noted: "With the gift of life there necessarily goes to everyone the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor."

Embraced, too, within the general societal interest indicated is the legitimate claim of the individual to marry and procreate. "The freedom to marry," said the Supreme Court in 1967, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

Also contained within the protected concept of "pursuit of happiness" is what we customarily refer to as freedom of enterprise. Justice Bradley wrote in 1884: "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence. . . . This right is a large ingredient in the civil liberty of the citizen." In recognizing a societal concern for what we call freedom of contract, the Supreme Court said in 1897, with reference to the fourteenth amendment:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose enter into all

120. See D. Ritchie, Natural Rights 139 (1924).
contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.\textsuperscript{125}

All these aspects of the "pursuit of happiness" are seen to be societal interests by contemporary courts. "The Supreme Court," in the language of one federal judge, "has created a sphere of protectable interests, including, but not limited to, the interests specifically designated in the first eight amendments, as essential to the orderly pursuit of happiness by free men."\textsuperscript{126}

The "incidents of freedom" are to be constitutionally protected as societal interests, and among such incidents, says the Supreme Court, first amendment values "hold a preferred position."\textsuperscript{127} Moreover, our community recognizes a societal interest in honoring the legitimate claims of individuals to fair proceedings in dealing with the state, and in criminal prosecutions a number of rights have been deemed fundamental because they were considered "essential to a fair trial."\textsuperscript{128}

Although legitimate claims to dignity, decency, integrity, equality, expression, and fairness in relations with the state and others are interests of the individual, they are characteristic of the society; therefore, in applying the methods of jurisprudence of interests these individual concerns are weighed as societal interests. Indeed, \textit{interessenjurisprudenz} should produce more judicial rulings protective of these claims than the holdings of the past which primarily resulted from viewing such disputes as a clash between individual rights and the state.

2. \textit{The Nature and Needs of a Free Society}

There are "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"\textsuperscript{129} according to the Supreme Court, and it was with recourse to these that the Court decided in times past which rights were sufficiently fundamental to be made binding upon the states. Whether defined as "the very essence of a scheme of ordered liberty,"\textsuperscript{130} "ultimate decency in a civilized society,"\textsuperscript{131} or "[e]xperience with

\textsuperscript{125} Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).
\textsuperscript{128} Pointer v. Texas, 380 U.S. 400, 404 (1965).
\textsuperscript{129} Twining v. New Jersey, 211 U.S. 78, 102 (1908), \textit{quoting In re Kemmler}, 136 U.S. 436, 448 (1890).
\textsuperscript{131} Adamson v. California, 332 U.S. 46, 61 (1947).
the requirements of a free society,” 132 the attributes deemed characteristic of the society are a reference for determining which societal interests are to be given constitutional protection.

There is general agreement that a free society must be characterized by a free flow of information, ideas, and intelligence. The distinguished Norwegian scholar, Professor Frede Castberg, has written: “First and foremost free discussion and a wide measure of freedom of information has been regarded as necessary to any effective democracy.” 133 Justice Holmes was certain that “[t]he ultimate good . . . is better reached by free trade in ideas.” 134 Chief Justice Hughes, speaking for the Court in 1937, wrote that it is imperative . . . to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. 135

In his veto message on the McCarran Act before Congress, President Truman said: “To permit freedom of expression is primarily for the benefit of the majority because it protects criticism and criticism leads to progress.” 136 “The vitality of civil and political institutions in our society depends on free discussion,” 137 said Justice Douglas for the Supreme Court in 1949. He added: “[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.” 138

A free society is one in which individuals can move freely within the nation and, if so disposed, depart the country. It must be characterized by a willingness to honor the claim of the individual to develop his talents and skills as he desires, and to lead the life style most compatible with his philosophy. Furthermore, a free society does not grant to the political state a monopoly of economic power, but acknowledges the claim of the individual and his associates to freedom of enterprise. Embraced, too, within the economic aspects of a free federal society is the group interest in the free movement of goods and trade throughout the nation.

133. F. CASTBERG, FREEDOM OF SPEECH IN THE WEST 422 (1960).
3. The Lessons of History

"Continual insistence upon respect for the teachings of history" is necessary in constitutional adjudication.\(^{139}\) Accordingly, in deciding whether an interest is deserving of constitutional protection, a court will ascertain whether it has traditionally and historically been honored. "The gloss may be the deposit of history," suggested Justice Frankfurter.\(^{140}\)

The Supreme Court has continually looked "to the 'traditions... of our people' to determine whether a principle is 'so rooted [there] as to be ranked as fundamental,'" \(^{141}\) and this practice will probably continue. The Court has at times looked to English law prior to our separation to ascertain if a right or interest was part of our enduring society.\(^{142}\) For example, in holding fundamental the right to a public trial, the Court noted protection of the right in English law dating back to the abolition of the Star Chamber in 1641.\(^{143}\) And, when justifying its conclusion that the right to a speedy trial was fundamental, the Court explained that it "has its roots at the very foundation of our English law heritage." \(^{144}\) It is certainly true, as Justice Holmes concluded, that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." \(^{145}\)

In many instances our Constitution was intended to repudiate English values at the time of separation, so a societal interest generally recognized in the United States is not to be denied constitutional protection because it has no historical roots in England. The Supreme Court, in cases involving the clash of interests between communication and the integrity of the judicial process, has at least twice "rejected the idea that the interests were to be accommodated by applying the common law of England at the time the Constitution was adopted." \(^{146}\)

\(^{142}\) What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.
\(^{144}\) In re Oliver, 333 U.S. 257, 266-71 (1948); accord, Faretta v. California, 422 U.S. 806, 821-32 (1975).
As another source of constitutional construction courts have frequently looked at the common law prevailing in the states at the time the Constitution was adopted, and it is likely that in seeking the lessons of history, courts will continue to be guided by this source in determining whether an interest has been part of our traditional values.

In addition, respect for the lessons of history prompts a court charged with determining the importance of a right or interest to investigate the common law after the adoption of the Constitution and, indeed, all the historical experience and heritage of our society. When the Supreme Court decided the right to travel was worthy of constitutional protection, for instance, it explained that this right was "engrained in our history" and "a part of our heritage." "Liberty" is to be defined, according to the Court, by reference to "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." When concerned with defining the particular rights that should be protected under the umbrella of due process, Justice Harlan stated:

Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words "liberty" and "due process of law" and attempt to define them in a way that accords with American traditions and our system of government.

The Supreme Court has gone so far as to deny constitutional protection to asserted claims because they were not supported by our history. Noting that obscenity was an offense when the Constitution was adopted and has remained so disfavored, the Court remarked: "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect" asserted rights to distribute such literature. Again, in 1972 when the Court held that a newsman has no constitutional right to refuse to divulge his sources when questioned by a grand jury investigating crime, the Court emphasized that the common law recognized no such right. The lesson taught by history, according to the Court, is that a newsman's right to refuse to divulge his sources is not necessary to the free flow of information.

148. "The Constitution . . . must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898).
Notwithstanding respect for the record of history, however, a societal interest widely accepted in contemporary America is not to be denied solely because it was not part of either the common law or our historical heritage. Justice Frankfurter agreed with this view of a progressing law: "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right." \(^{154}\) "[D]evelopment of the community's sense of justice," said Justices Harlan and Clark—both of whom strongly appreciated historical materials—will in time "lead to the expansion of the protection which due process affords" \(^{155}\) and to constitutional protection for societal interests not identified or fully appreciated by our forebears.

4. Legislative, Executive, and Administrative Materials

The magnitude of a societal interest can also be ascertained in part by investigating the extent to which it has been protected in private law, a practice followed by the Supreme Court. The fact that the right of privacy, for example, has been extensively protected by our legislatures and courts in private law undoubtedly influenced the Court to conclude it was a societal interest deserving of constitutional protection. \(^{156}\)

Enactments of national, state, and local legislatures provide exceptional evidence of interests considered most important by the society. \(^{157}\) The United States Supreme Court has often looked to legislative materials to determine whether various claims or rights were to be protected. \(^{158}\) As Justice Frankfurter explained: "[A] fair reflex, for purposes of the Due Process Clause, of the underlying feelings of our society" can be found by reference to legislation enacted in the various states. \(^{159}\)

In resolving constitutional issues, the Supreme Court has also looked to practices of the executive branch. Thus, in 1925, in ruling that the President could pardon contempts of court, it observed: "[C]riminal contempts of a federal court have been pardoned for eighty-five years. . . . Such long practice under the pardoning power and acquiescence in it strongly sustain the construction it is based on." \(^{160}\) In 1974 when the Supreme Court ruled that Presidents could pardon on condition, it justified its ruling by noting "that Presidents throughout our history as a Nation have exercised the power to pardon or commute sentences upon conditions that are not specifi-

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157. E.g., State Right of Privacy Statutes; see Donahue v. Warner Bros., 2 Utah 2d 256, 272 P.2d 177 (1954) (regarding such statutes).
cally authorized by statute." 161 In holding that an adjournment at the end of the first session of the 69th Congress prevented the President from returning a bill and made a pocket veto permissible, the Supreme Court in 1929 said its conclusion was "confirmed by the practical construction that has been given to it by the Presidents through a long course of years in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." 162

Rulings and regulations of federal administrative agencies, authorized by the Congress, can also provide clues to important societal interests and to how, in the event of a conflict, they should be adjusted. To illustrate, the "fairness doctrine" of the Federal Communications Commission has influenced the Supreme Court in its task of adjusting societal interests between the need for communication and the concern for the good name of individuals. 163 Long-standing and widely accepted regulations of federal administrative agencies may divulge to a court, as fully as legislative enactments, the important interests of the social group.

5. The Expressed Values of the American States and Comparable Cultures

In construing the Constitution in its broad clauses, and in seeking to determine how highly the society respects certain rights, the Supreme Court has frequently looked to state constitutions, legislation, and judicial decision. 164 The Court announced in 1934:

The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 165

Many decisions of the Court have relied on this interpretive device. "[A] fair reflex, for purposes of the Due Process Clause, of the underlying feel-

163. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ("[I]n evaluating ... First Amendment claims ... we must afford great weight to the decision of Congress and the experience of the Commission [since] Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned.").
nings of our society,” can be found by referring to state legislation and practices, said Justice Frankfurter, urging that societal well-being required a constitutional ruling making it impermissible for the government to put to death individuals who were insane.  

The fact that every American state guaranteed the right of trial by jury in criminal prosecutions strongly persuaded the Court that the right was fundamental. The Court noted in 1968: “The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.”  

A year later, holding fundamental the ban upon double jeopardy, the Court explained: “Today, every State incorporates some form of the prohibition in its constitution or common law.” Again, in holding that the right to a speedy trial is fundamental, the Supreme Court indicated its awareness that “each of the 50 States guarantees the right to a speedy trial to its citizens.”  

Comparably, when the Court held the right to a public trial fundamental, it emphasized that the right was protected by virtually every state.

Conversely, when a majority of the states does not by constitution, common law, or statute honor a particular claim, the Supreme Court has been reluctant to find the right fundamental. To illustrate, in 1971 the Court noted that at least twenty-nine states and the District of Columbia denied jury trials in juvenile court proceedings and then held there was no federal constitutional right to such trials. Under a jurisprudence of interests analysis, as in the past, the courts in adjudicating controversies under the Federal Constitution will continue to use state constitutions, statutes, and decisions as one factor indicating the important interests of society and demonstrating how the community feels they should be reconciled.

In delineating the interests of our society and in determining how clashing societal interests should be adjusted, American courts must also be encouraged to look to the values and the solutions of comparable law cultures. More than his colleagues, Justice Frankfurter was willing to utilize comparative materials, especially laws and judicial rulings from the British Commonwealth. After noting that ten jurisdictions within the United Kingdom and British Commonwealth had refused to apply the exclusionary rule to evidence illegally seized, Justice Frankfurter observed in Wolf v. Colorado that “most of the English-speaking world does not regard as vital to

such protection the exclusion of evidence thus obtained”\textsuperscript{174} and that the interests of our society, as understood at the time, did not require such exclusion. Stressing that “approximately seventy other jurisdictions in the world... celebrate their regard for civilization and humanity by shunning capital punishment,” Justice Marshall argued that this must also be an interest of our society and the proper interpretation of our Constitution.\textsuperscript{175} Admittedly, it is unlikely that any other society has a value structure identical to ours, but we are heirs not only of the English experience but of the Western World, and the Supreme Court must be encouraged to look, much more than in the past, at the identification and resolution of societal interests by comparable cultures.

6. Community Conscience and Public Opinion

A court concerned with identifying the values of the society deserving protection under the Constitution may legitimately inquire into the moral sense of the society, the ethical values of the group, the community conscience, and public opinion. Wrote Justice Cardozo, there must be “an appeal to the experience and sentiments and moral and economic judgments of the community” to ascertain the interests deserving of constitutional protection.\textsuperscript{176} The Supreme Court has often looked to “the community conscience” to determine constitutional construction,\textsuperscript{177} and it has frequently attested that it will determine whether claims are to be given constitutional safeguard by reference to the “principles of justice so rooted in the traditions and conscience of our people” as to be deemed fundamental.\textsuperscript{178} In 1950 Justice Frankfurter could aptly state that “[i]t is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental.”\textsuperscript{179}

Just as legislators from the earliest of times have given legitimate consideration to the views of their community, so too courts concerned with constitutional adjudication may make reference to the views, the opinions, and the feelings of their society. While a professor of law at Harvard, Justice Frankfurter wrote:

\textsuperscript{174} Id. at 29.
\textsuperscript{175} Furman v. Georgia, 408 U.S. 238, 371 (1972) (concurring).
\textsuperscript{176} B. Cardozo, The Paradoxes of Legal Science 75 (1928).
\textsuperscript{177} See Furman v. Georgia, 408 U.S. 238 (1972); Roth v. United States, 354 U.S. 476 (1957); Rochin v. California, 342 U.S. 165 (1952).
\textsuperscript{179} Solesbee v. Balkcom, 339 U.S. 9, 16 (1951) (dissenting).
To a large extent the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion.\textsuperscript{180}

Supreme Court Justices would be well advised, he wrote, "to gather meaning, not from reading the Constitution, but from reading life."\textsuperscript{181}

\textbf{B. The Interests Presently Identified by the Supreme Court as Deserving Constitutional Protection}

In almost two centuries of existence the United States Supreme Court has identified most of the substantial interests of our society deserving constitutional protection, and worthy of being placed on the judicial scales in opposition to other societal interests with which they at times clash. The interests of our society, already identified by the Court as values worthy of protection under the Constitution, include:

\begin{itemize}
  \item[(a)] the interest in freedom of communication and religion,\textsuperscript{182}
  \item[(b)] the interest in the liberty of the individual, embracing many particulars, such as
    \begin{itemize}
      \item[(1)] the interest that no person be held in slavery or peonage,\textsuperscript{183}
      \item[(2)] the interest in freedom of the individual to travel,\textsuperscript{184}
      \item[(3)] the interest in freedom of enterprise and contract,\textsuperscript{185}
      \item[(4)] the interest in giving breathing space to individuals in the expression of their personalities,\textsuperscript{186} and
      \item[(5)] the interest in freedom from an establishment of religion,\textsuperscript{187}
    \end{itemize}
  \item[(c)] the interest in equality of law and opportunity,\textsuperscript{188}
  \item[(d)] the interest in protecting private property,\textsuperscript{189}
  \item[(e)] the interest in peace, safety, and good order,\textsuperscript{190}
\end{itemize}

\textsuperscript{180} F. Frankfurter, Law and Politics 197 (Prichard & MacLeish eds. 1939).
\textsuperscript{181} Id. at 30.
\textsuperscript{182} "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).
\textsuperscript{183} U.S. Const. amend. XIII.
\textsuperscript{184} Griffin v. Breckenridge, 403 U.S. 88 (1971).
\textsuperscript{185} Allgeyer v. Louisiana, 165 U.S. 578 (1897).
\textsuperscript{187} Lemon v. Kurtzman, 403 U.S. 602 (1971).
\textsuperscript{188} Shapiro v. Thompson, 394 U.S. 618 (1969).
\textsuperscript{189} Central Hardware Co. v. NLRB, 407 U.S. 539 (1972).
(f) the interest in protecting private reputation,\(^{191}\)
(g) the interest in protecting the privacy of the individual,\(^{192}\)
(h) the interest in protecting the public health,\(^{193}\)
(i) the interest in protecting public morality,\(^{194}\)
(j) the interest in protecting the security of the state,\(^{195}\)
(k) the interest in the fair and effective administration of justice,\(^{196}\)
(l) the interest in an effective educational process,\(^{197}\)
(m) the interest in protecting the legislative process,\(^{198}\)
(n) the interest in the integrity of the electoral process,\(^{199}\)
(o) the interest in the continued availability of political opportunity,\(^{200}\)
and
(p) the interest in safeguarding the security of transactions.\(^{201}\)

While some of these have been identified as individual rather than societal interests by the Court, they are, in fact, societal concerns to be balanced in applying the method of *interessenjurisprudenz* advocated here. Each one reflects a value of a free society, necessary for the survival of our way of life. Nevertheless, each interest assumes a greater or lesser importance when it comes into conflict with another societal interest depending upon the state of contemporary culture. When the Court correctly identifies these interests and acknowledges in its opinions that it is balancing one against another, it is applying a jurisprudence of interests.

V. APPLYING A JURISPRUDENCE OF INTERESTS

A. Judicial Methods Other Than Balancing Appropriate to a Jurisprudence of Interests

Although illustrations are by now readily available from many areas of constitutional law, the experience of the United States Supreme Court and other tribunals applying a jurisprudence of interests analysis has been most extensive in the area involving the first amendment. While the following analysis of methodology at work will, therefore, focus upon the resolution of competing interests in the first amendment area, the methods discussed are generally applicable to the analysis of other constitutional issues.

The task of balancing opposed societal interests requires a high degree of judicial skill and a conviction on the part of the judge that a particular societal interest is more important under the circumstances than an opposing interest. Consequently, it can be expected that Supreme Court Justices will avoid such balancing if they can arrive at a just result in any other acceptable way. Writing for the Court in 1967, Chief Justice Warren declined an invitation from counsel to balance openly the societal interest in communication and association against society's interest in state security:

It has been suggested that this case should be decided by "balancing" the governmental interest . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed.202

Rather than approaching the protection of the interests through a balancing analysis, the Court voided the governmental control as impermissibly broad and thus protected the interest in communication and association. Although the Chief Justice did not reach the propriety of judicial balancing of societal interests in constitutional adjudication, he misconceived the nature of the task as one of balancing governmental interests against individual rights. However, the case is illustrative of many techniques utilized by the Court to arrive at a just result without actually weighing and balancing the opposed societal interests. These techniques require identification and discussion.

First, a court concerned with constitutional adjudication can properly invalidate legislative or executive action impinging upon a societal interest, such as freedom of expression, when the restrictive action is not within the constitutional power of the governmental entity or official imposing the restraint.203 Second, a court can avoid balancing societal interests when, for any reason, it finds the legislation void on its face. For example, the Court has consistently declared void legislation restricting speech when that legislation was so unclear, vague, and indefinite that a person desiring to communicate could not reasonably determine what to avoid in order to remain law-abiding.204 Third, the Court can avoid the balancing of interests by invalidating statutes demanding licenses or permits of those who would engage in communication on the grounds that the legislative body failed to provide adequate standards to the public official given the power to deny

the license or permit. Fourth, the Courts may also void legislation which, attempting to protect one interest, unnecessarily and too broadly impacts upon another important societal interest. "It is not sufficient for the State to show that [its] requirements further a very substantial state interest . . . . In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity." As an example, the Court will only sustain legislation which, although designed to protect another interest, restricts first amendment interests "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Since "all society, and not merely . . . those exercising their rights, might be the loser," overly broad statutes impinging upon freedom of communication must be voided.

Fifth, without ever coming to a weighing of the competing societal interests but assuming that the interest intended to be protected by governmental action is an important one, the Supreme Court properly voids such action when it is not necessary to protect the asserted government interest. To illustrate, in voiding a state court decree preventing a labor union from assisting its members in litigation arising out of employment, the Supreme Court concluded: "The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics." “[G]overnmental action may withstand constitutional scrutiny,” in the language of Justices Brennan, Marshall, and White, “only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.” In invalidating discriminations in welfare assistance which, in effect, inhibited the free exercise of the right to travel, the Supreme Court announced that “any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”

Sixth, without actually weighing competing societal interests, courts in constitutional adjudication may void governmental action allegedly designed to protect one interest when proof indicates that there is a substantial interference with a worthy second interest and there is no clear showing that the governmental action substantially safeguards or advances the former in-

The Supreme Court applied this technique in passing upon Arizona's long-train law which seriously interfered with the movement of interstate commerce. The Court voided the statute, which purported to be a public safety measure, upon proof that, in practice, the act resulted in more, rather than fewer, accidents. Said the Court: "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it . . . ." 214

There must be both a "rational relation"215 and a "substantial relation"216 between governmental action, such as legislation, and the interest sought to be protected, or it will be unconstitutional. The Court has been most ready to apply this rule where constitutionally recognized societal values are infringed upon or negated by the governmental action.217 The Supreme Court, invalidating a municipal ordinance requiring the NAACP to furnish city officials with a list of the local members, stated:

[C]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.218

Therefore, the Court will void statutory disclosure requirements when there is no "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."219 Similarly, the Court will require that any interrogation of citizens conducted by public servants in the exercise of general investigative authority be closely related to an important societal interest.220 The Supreme Court has said:

[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of

speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.\textsuperscript{221}

Whenever any important societal interest is affected by governmental action, the Court will void such action when "the requisite rational relation"\textsuperscript{222} between the action and the interest intended to be protected is absent. For example, in holding unconstitutional overly restrictive maternity leave regulations, the Supreme Court in 1974 explained that it did so because "the arbitrary cutoff dates embodied in the mandatory leave rules . . . have no rational relationship to the valid state interest of preserving continuity of instruction."\textsuperscript{223}

Seventh, in constitutional adjudication there is no need for a tribunal to weigh and balance opposing societal interests when legislative or executive action which affects another important societal interest, such as communication, either on its face or in its application subjects certain individuals or groups to unreasonable discrimination.\textsuperscript{224} Justice Marshall was speaking for the Court in 1972 when he said:

\begin{quote}
[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.\textsuperscript{225}
\end{quote}

When adjudicating constitutional conflicts of interests, the Supreme Court has at times been inclined to avoid weighing and balancing opposing interests when governmental action protective of one interest has affected the societal interest in communication in the form of a "prior restraint."\textsuperscript{226} However, the Court has suggested that "absolute" bans upon prior restraints do not represent acceptable judicial craftsmanship. Rather a court must weigh and balance the opposing societal interests in constitutional controversies before deciding whether our society should or should not accept prior restraints upon some forms of communication.\textsuperscript{227}

\textsuperscript{223} Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 643 (1974).
\textsuperscript{225} Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).
\textsuperscript{226} Near v. Minnesota, 283 U.S. 697 (1913).
\textsuperscript{227} Paris Adult Theater I v. Slaton, 413 U.S. 49, 57 (1973). Writing for the Court, Chief Justice Burger announced: "We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation. . . ." Id.
B. Balancing the Opposing Interests

If the techniques previously noted are not appropriate under the circumstances of the particular case, or productive of the just result, the Supreme Court and other tribunals concerned with constitutional adjudication must then identify clearly the opposed societal interests. Faced with actual litigation, a court cannot accomplish its task operating solely on a level of generalities, for example, by weighing society’s broad interest in communication against equally broad societal interests such as state security, or peace, safety, and good order. “It must never be forgotten,” wrote Professor Chafee, “that the balancing cannot be properly done unless all the interests involved are adequately ascertained . . . .” 228

In approaching a first amendment case, the Court must identify the societal interest both in the particular content of the communication and in the specific means used to communicate and then must weigh these concerns against the particular subinterest embraced within, for example, the broad social interest in peace, safety, and good order. The Supreme Court has recognized some utterances as having greater social utility than others. In placing “beyond the pale” whole groups of communications because of their content, the Court has clearly indicated that, in its judgment, opposed societal interests that are important and substantial will always outweigh these particular utterances. In a 1940 case, the Court volunteered the dictum that “resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” 229 Two years later the Court concluded that a class of utterances denominated “fighting words—those which by their very utterance injure or tend to incite an immediate breach of the peace [were] 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.” 230 While denying these utterances constitutional protection, the Court added gratuitously that it was prepared also to place “beyond the pale” the “lewd, . . . obscene, . . . profane and libelous.” 231

In 1976, the Supreme Court, considering the application of first amendment protection to erotic materials, stated: “[I]t is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .” 232 Similarly, when Justice Douglas said that “[a] speaker may not,

228. Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 32 (1941).
231. Id.
of course, incite a riot," 233 he undoubtedly expressed a view shared by a majority of the Court that such speech did not reflect a strong enough societal interest to overcome the competing interest in peace and order. 234

The Supreme Court has indicated that society's interest in communication is greatest when "pure speech" is involved. Accompanying this position is the explicit or implied notion that impure speech (whatever this is to the Court) and certain communicative conduct, such as picketing, deserves a lesser degree of protection by the society. What the Court is saying by indirection is that, regardless of the societal value in the content of the communication, if it is conveyed in undesirable ways the Court will refuse to acknowledge fully that value. Justice Goldberg summarized the Court's opinion:

We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. 235

Similarly, Justice White, speaking for the Court, remarked that "differences in the character of new[s] media justify differences in the First Amendment standards applied to them." 236 Sustaining the conviction of one who publicly burned his Selective Service registration certificates, Chief Justice Warren remarked: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 237 He added "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 238

There is the assumption in these remarks that what the Court calls "non-communicative conduct" can be readily distinguished from "communicative conduct," with apparently no consideration being given to the intent of the citizen who would convey by his conduct what he considers a most impor-
Both the attempts to distinguish pure speech from less pure communication, and efforts to characterize conduct held by the judiciary to be noncommunicative must be strongly repudiated. First, while an editorial in the *New York Times* on foreign policy might strike the judiciary as pure speech, to the poorer members of our community inexpensive sound amplifiers attached to their cars or hand-made signs expressing opposition to racism carried by solitary pickets are the only effective avenues of communication open to them, and it is grossly unfair and unsound to depreciate these media because mechanical means or picketing are involved. Second, it should by now be well established that the protection of symbolic speech is a legitimate interest of society because always to the speaker and generally to his audience there is a message conveyed (frequently more powerful than words). Finally, there are no objective criteria available to distinguish communicative conduct from noncommunicative conduct. The Justices must abandon their efforts to distinguish from pure speech all other forms of communication, verbal and symbolic. Attempts at placing “beyond the pale” either methods of communication or communicative contents are utterly inadequate substitutes for the conscious weighing and balancing of societal interests required in every case.

Just as the societal interest in all forms of the communicative process is not the same, so too, the weight of the societal interests opposed to communication will vary with the specific or particular interest embraced within the larger, generic value. Two examples illustrate this point: interests embraced within the larger and broadly stated interests in state security, and interests in peace, safety, and good order. The interest in state security embraces a legitimate concern that the institutions of government not be overthrown by force so long as the peaceful avenues of democratic change are generally available. Society’s interest in preventing the “[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech.” Contained, too, within this broadly stated societal interest in state security are the interests in being free in wartime from treasonous utterances in support of the enemy, in an effective system of providing manpower for the defense of the nation, in regulating organizations controlled by foreign powers, in safeguarding

239. *Id.* at 382.
military and naval establishments, in the dignity of the flag, and in sheltering the President from verbal assaults and threats.

Within the societal interest in peace, safety, and good order, deemed at times sufficient to outweigh the interest in communication, are also many identifiable subinterests. There is, for example, a clear societal interest in minimizing noise around schools, and the same can certainly be said of noise around hospitals and courthouses. There is a discernible interest in protecting against breaches of the peace. In addition there are interests in keeping secure places of confinement, in protecting the citizen from schemes to defraud, in safeguarding citizens from being endangered, as by being forced into the streets by speakers and crowds blocking the sidewalks, and an interest that private gatherings not be disturbed by intruders and hecklers. Even momentary reflection makes it clear that the societal interest is not the same for each subinterest embraced within the broadly stated societal interest in peace, safety, and good order. Accordingly, when a constitutional court is weighing one of these interests against a particular interest contained in the first amendment, it must identify with particularity the opposing subinterest involved, determine the weight accorded to it by society, and balance it against the value that our society attaches to the specific kind of communication involved.

The courts' task in balancing societal interests in constitutional controversies requires a high degree of skill and prudence, but again it should be recognized that the judicial function here closely parallels the work of legislators who daily have to decide that under given circumstances one societal interest outweighs another. Justices must bring to their task a basic understanding of how their society ranks its values and interests, experience in legislating and in life itself, competence in forecasting the social result of adopting new norms, and a high degree of statesmanship. As Justice Cardozo wrote with great insight:

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248. Of this interest the Supreme Court has said, "The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." Watts v. United States, 394 U.S. 705, 707 (1969).
If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisement of values, must in the end be guided by like considerations of the one as for the other. Each indeed is legislating within the limits of his competence.256

1. The Obligation of the Court to Honor Both Competing Societal Interests

Generally, in the adjudication of constitutional controversies, a court has the obligation to honor, if possible, both competing societal interests. Dean Roscoe Pound gave this advice: "[S]ecure all interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests as a whole."257 The Supreme Court apparently is willing to honor the obligation to respect competing interests whenever possible. Because the Court has in the past customarily spoken of individual rights rather than societal interests, such recognition will be expressed in the language of rights. "Accommodation between the two [opposed rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other," as the Supreme Court held in 1956.258

The Court has traditionally manifested its commitment to the obligation to honor both interests, if possible, by interpreting governmental action protective of one interest as narrowly as possible in order to give reasonable protection to that interest while leaving room for the broadest possible exercise of the opposing interest being restrained by the governmental action.259 Accordingly, the Supreme Court will interpret legislation so as to hold it constitutional, if at all possible. "The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality."260

Occasionally in constitutional adjudication, courts are faced with plaintiffs and defendants whose arguments are both posited upon the same societal interest.261 Here, especially, the courts should acknowledge an obligation

257. R. POUND, JURISPRUDENCE 334 (1959). Professor Chafee wrote, "Every reasonable attempt should be made to maintain both interests unimpaired." Z. CHAFEE, JR., supra note 228, at 32. What is necessary, according to Professor Patton, is "the working out of effective rules which will provide reasonable protection for each (interest) without endangering the others." G. PATON, JURISPRUDENCE 124 (3d ed. 1964).
to honor the claims of both parties. To illustrate, the California Court, setting aside the conviction of a heckler who annoyed speakers at a public meeting, ruled that impolite and discourteous utterances from the audience would be permitted as long as the conduct of the meeting was not shown to be substantially impaired.  

2. When One Interest Must Be Preferred

a. Protecting Conduct Expressive of One Societal Interest Unless the Opposed Societal Interest Is Clearly Imperiled. Concomitant with the judicial obligation to honor both societal interests when they are of approximately equal value or utility, courts must not condone the punishment of citizens expressing one important societal interest unless it is clearly proven by the government or the private party asserting another societal interest that the latter interest is clearly and seriously endangered.

Professor Chafee wrote in 1920 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, in public safety and in search for truth, [and when judges recognize that] the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled.  

It must be clear, held the United States Supreme Court, that there are "substantive evils flowing from petitioner's activities" before he can be penalized.  

Furthermore, legislation restricting first amendment interests, the Supreme Court said in 1966, would only be sustained if "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."  

Although the wording of the test was modified in subsequent cases, the principal utility of the clear and present danger statement was to make clear to the courts the necessity of finding that the citizen exercising first amendment freedoms had clearly, seriously, and imminently endangered the opposing societal interest.

Governmental action protective of one societal interest, but affecting another significant societal interest, will be sustained when the Supreme

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263. Z. CHAFEE, JR., supra note 228, at 38.
Court concludes that the impact upon the second interest is only "minimal," "relatively small," "only incidental," "remote and conjectural," or "uncertain." First amendment interests "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."  

b. When No Opposed Interest Can Be Discerned. Occasional cases reach the Supreme Court in which an obvious societal interest, such as the interest in first amendment values, takes preference because there is simply no discoverable societal interest supporting the action of the government or private party in opposition. Thus, in 1971 the Supreme Court honored the claims of an applicant for the bar based upon first amendment values, when it could find "no legitimate state interest" that justified broad inquiries into his beliefs and associations by a bar association committee. Again, when the Supreme Court concluded that a state had "no interest in limiting its legislators' capacity to discuss their views of local or national policy," it ruled that a state legislature could not refuse to seat a duly elected member because of such utterances.  

In 1976 Chief Justice Burger was willing to invalidate the disclosure provisions of the Election Campaign Act because, as he saw it, "no legitimate public interest has been shown in forcing the disclosure of modest contributions that are the prime support of new, unpopular or unfashionable political causes." And, as the California Supreme Court noted: "If the state curtails First Amendment freedoms to protect an interest that is nonexistent, whether claimed on behalf of the government or on behalf of a private individual, it violates the First and Fourteenth Amendments."  

c. When the Opposed Interest Is Insignificant. Judicial balancing of opposed societal interests in first amendment cases is accomplished most readily when the interest in opposition to the societal interest is insignificant or unimportant. The United States Supreme Court, in 1939, invalidated an ordinance in effect prohibiting the distribution of literature on the sidewalks of a city. It reasoned: "We are of opinion that the purpose to keep the streets

276. Id.
279. In re Hoffman, 67 Cal. 2d 845, 850, 434 P.2d 353, 356, 64 Cal. Rptr. 97, 100 (1967).
clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.”  

Justice Frankfurter could aptly remark twelve years later: “The easiest cases have been those in which the only interest opposing free communication was that of keeping the streets of the community clean. This could scarcely justify prohibiting the dissemination of information by handbills or censoring their contents.”

Similarly, an interest in preventing “inconvenience, annoyance, or unrest” is simply not sufficient to justify depriving citizens of their liberty. Justice Douglas spoke for a majority of the Court in 1949 when he said:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.

Two years later Chief Justice Vinson, speaking for the Court, explained that in many of the cases where the clear-and-present-danger or similar tests were used and convictions for communicating were reversed, “the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech.”

Because to Justice Harlan “the federal interest in protecting the Nation against pornography” was only “attenuated,” he was ready to honor claims based upon the first amendment, even when his colleagues ruled the materials obscene. When in 1964 the Supreme Court concluded that “the State . . . has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan to recommend the lawyers it selects to represent injured workers,” it refused to sustain limitations imposed upon a labor union that were deemed to infringe upon first amendment interests.

The United States Supreme Court has used a variety of adjectives to describe the kind of societal interest that can be placed on the scales with, and possibly outweigh, the interest of our society in freedom of communication. Frequently the Supreme Court has said that only a “compelling” interest may outweigh the interest in communication. At other times the Supreme Court has said that the societal interest in communication can only be outweighed by an interest described as “substantial,” “subordinating,” “paramount,” “cogent,” “strong,” “weighty,” “important,” “sufficiently important,” “overriding,” or “significant.” In *Brotherhood of Railroad Trainmen v. Virginia*, the Court insisted upon a showing of an “appreciable public interest.” A restriction on access to the electoral process “can be sustained only if it furthers a ‘vital’ governmental interest,” the Court declared in 1976. Only “the very strongest of state interests” will justify restrictions upon expression, said Chief Justice Burger.

286. DeGregory v. New Hampshire Attorney Gen., 383 U.S. 825 (1966); Sherbert v. Verner, 374 U.S. 398 (1963); NAACP v. Alabama, 357 U.S. 449, 463 (1958) (quoting Sweezy v. New Hampshire, 354 U.S. 265 (1957) (“Such a ‘subordinating interest of the State must be compelling.’”)); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (“Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.”); Talley v. California, 362 U.S. 60, 66 (1960) (Harlan, J., concurring) (“We have said that state action impinging on a free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling.”); Kleindienst v. Mandel, 408 U.S. 753, 777 (1972) (“It is established constitutional doctrine . . . that government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest.”); NAACP v. Button, 371 U.S. 415, 438 (1963) (“The decisions of this Court have consistently held that only a ‘compelling’ state interest . . . can justify limiting First Amendment freedoms.”).


294. Id. at 25.
298. Id. at 8.
in the same case.300 "Colorable" state interests will not suffice to outweigh the societal interest in communication,301 nor will interests that are "too remote and conjectural."302

There have been some indications by various Justices that merely "legitimate" interests may properly find a place on the scales with the preferred interest in communication, but this would be an improper balancing. With four Justices dissenting, Chief Justice Burger in 1973 wrote for the Court that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material."303 In a companion case he continued in like vein, stating: "The States have a long-recognized legitimate interest in regulating the use of obscene material . . . . [T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity . . . . [W]e hold that the States have a legitimate interest in regulating commerce in obscene material . . . ."304 Justice Brennan, however, has concluded that the interest in suppressing obscenity is "essentially unfocused and ill-defined," as well as "speculative," and as such is unworthy of being balanced against society's interest in communication.305 In dissent he and Justice Marshall properly stated that "merely 'legitimate' governmental interest cannot override" claims based upon society's interest in communication.306 In the same year the Supreme Court was willing to announce that "only those interests of the highest order" will ever outweigh the interest in first amendment values.307 By 1976 the Court reported: "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest."308 Although the judicial record is not yet entirely clear, the better view is that one who advances another interest in opposition to the interest in communication must show the "important," "significant," and "compelling" nature of the interest he asserts.309

300. Id. at 245 (concurring in part and dissenting in part).
305. Id. at 109 (dissenting).

"It is well-settled law that once it is determined that state action impinges on high-order First Amendment rights . . . then the burden of proof is on the state to show that the governmental interests asserted to support the impingement are 'compelling.' " New Left Educ. Project v. Board of Regents, 326 F. Supp. 159, 163-64 (W.D. Tex. 1970) (per curiam; mem.); accord, Jackson v. Godwin, 400 F.2d 529, 541 (5th Cir. 1968).
d. Preference for Interests Enshrined in the Constitution. There is some evidence that in a close case the Supreme Court gives preference to societal interests which have been deliberately enshrined in the Constitution over other interests which the Court accepts as significant. First amendment values are often referred to by the Supreme Court as the "preferred" freedoms,\textsuperscript{310} and one reason given is that these interests were specifically incorporated into the Constitution by the founding fathers. Chief Justice Stone once explained:

The very fact that we have constitutional guaranties of civil liberties and the specificity of their command where freedom of speech and of religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that those liberties be protected against the action of government itself.\textsuperscript{311}

Although the Court has readily acknowledged that a state had a legitimate interest in the preservation of peace and good order, it has nevertheless preferred the societal interests represented by the first amendment. The Court explained its balancing task in these words:

We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the Federal compact.\textsuperscript{312}

Occasionally, however, there has been a down-grading of claims and interests by the Supreme Court because they were not specifically mentioned in the Constitution. When freedom of contract was urged upon the Court to invalidate a minimum wage law, the tribunal rejected the argument, remarking: "The Constitution does not speak of freedom of contract."\textsuperscript{313} Although the Court is certainly justified in manifesting its own respect for the enduring values of our society specifically incorporated into our organic law, it should not fail to give full weight to a contemporary societal interest, such as penumbral interests in privacy or association, simply because they were not expressed openly in the Constitution by the generation that ratified the basic law.

\textsuperscript{311} Minersville School Dist. v. Gobitis, 310 U.S. 586, 602-03 (1940) (dissenting).
\textsuperscript{313} West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).
e. The Availability of Alternatives. The United States Supreme Court will, in effect, prefer one societal interest over another when there are reasonable alternatives available to the government or private party which would protect the second interest with less impact upon the former interest. This is especially so where legislation designed to safeguard some other interest impacts upon the societal interest in communication. Justice Stewart, speaking for the Supreme Court in 1960, reported:

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

The government or party advancing interests opposed to first amendment values must prove that there exists no reasonable alternative that would protect the opposed interest with fewer negative effects on the interest in communication. It would be incumbent upon the government, said the Supreme Court in 1963, "to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." Nor is it only where first amendment interests are being restricted that the reasonable alternative requirement is relevant. Justice Frankfurter aptly remarked: "Whenever the reasonableness and fairness of a measure are at issue—as they are in every case in which this Court must apply the standards of reason and fairness—the availability or unavailability of alternative methods of proceeding is germane.

At times the Supreme Court has, in contrast, given preference to the interest opposed to communication when the parties asserting first amendment values had readily available to them equally effective methods of communication which would not have so imperiled the opposing interest. In 1972 the Supreme Court held that the interest in property justified the owner of a shopping center in banning Vietnam war protesters from the premises. The Court reached this decision in part because the literature could have easily been distributed on adjacent sidewalks and streets: "It

would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." The same year, in sustaining governmental action excluding from the country one Mandel under the broad authority conferred upon the Attorney General, the Court refused to balance rights assertedly opposed but added that if it had to, "alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against government regulatory interests." Two years later the Supreme Court sustained a prison regulation banning face-to-face interviews between media representatives and designated prisoners, largely because alternative means of communication between the prisoners and the outer world existed and the Court deemed them adequate. The prison regulation, said the Court, "must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison."

Customarily, however, the Supreme Court has not subordinated the societal interest in communication because some other less annoying form of expression would have been available to the citizen. In setting aside the refusal of municipal authorities to permit the rock musical "Hair" to play in a municipal theater open generally to other productions, Justice Blackmun, speaking for the Court, said: "Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint." If the reasonable alternative requirement is to be applied to persons asserting First Amendment interests, there should be a heavy burden upon the government or private party advancing an opposed interest to prove that feasible, inexpensive, and effective alternative means of communication are readily available under the circumstances. Joining in an opinion which, based on the particular facts, gave preference to an interest opposed to communication, Justice Harlan took pains to indicate clearly that he would hold otherwise if no alternative means existed for "reaching a significant audience" with whom the citizen desired to communicate.

321. Id. at 567.
324. Id. at 823.
C. Use of Prior Balancing

The English common law existing at the time of our separation is only infrequently a useful guide to a Supreme Court currently balancing societal interests in constitutional adjudication. Many particulars of the Constitution, such as the ban upon an establishment of religion, were intended to be a rejection of practices found acceptable in England. For example, twelve of the original thirteen colonies rejected the English rule denying counsel to an accused in grave cases. In 1941 the Supreme Court observed: “To assume that English common law in this field became ours 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 on liberty of speech and of the press.’” Twenty-one years later, in another first amendment case, the Supreme Court again affirmed that we have “rejected the idea that the interests were to be accommodated by applying the common law of England at the time the Constitution was adopted.” The doctrine justifying recourse to the common law, said the Supreme Court in 1936, “is subject to the qualifications that the common-law rule invoked shall be one not rejected by our ancestors as unsuited to their civil and political conditions.”

Justice Black, in a dissent joined by Chief Justice Warren and Justice Douglas, warned in 1958 against constitutional construction with heavy reliance upon the common law:

Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder. In truth there was widespread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified.

In currently balancing societal interests in constitutional adjudication, the United States Supreme Court has been more willing to make reference to

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330. Wood v. Georgia, 370 U.S. 375, 384 & n.5 (1962). The occasional case involving due process of law in civil procedure has been a noticeable exception, often being resolved in part by reference to the English law at the time of the Revolution. See, e.g., Ownbey v. Morgan, 256 U.S. 94 (1921).
the common law in America, either as it existed at the time of the adoption of the Constitution or at the time of a later amendment and as it developed thereafter. Speaking for the Court in 1905, Justice Brewer stated: "One other fact must be borne in mind, and that is that in interpreting the Constitution we must have recourse to the common law." 333 Justice Sutherland was speaking for the Court in 1934 when he stated that the seventh amendment guaranty of trial by jury in civil cases is to be construed according to "the rules of the common law, in respect of trial by jury, as these rules existed in 1791." 334 In decisions involving private as well as public law, American common law, especially if of long duration and current vitality, can indicate to a court concerned with constitutional adjudication how the clashing societal interests should be adjusted. The common law development in tort law of privacy interests, at the expense of other societal interests, 335 has clearly influenced the Supreme Court in concluding that this interest was not only deserving of constitutional protection but would, in defined circumstances, often outweigh other important interests of the community. 336

A good deal of eighteenth century common law, however, represents values long since repudiated, and the Supreme Court has indicated very clearly that practices acceptable to the community in 1789 or 1791 are less than appropriate guides to an acceptable balancing of societal interests in contemporary America. For instance, the notion that the cruel and unusual punishment clause of the eighth amendment should be construed according to common law practices at the time of adoption of the Bill of Rights has been conclusively repudiated. 337 In defining grants of power to the federal government, the common law has been virtually disregarded. 338 The common law has thus been a poor guide in balancing first amendment interests against others. 339

In utilizing either English or American common law materials, a court in constitutional adjudication must be very sure that the values represented by the old cases continue to reflect the societal interests of contemporary America and that the community desires them to be balanced as in the past. Justice Moody commented on construction according to the common law in

1908: "If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straightjacket, only to be unloosed by constitutional amendment." 340 To construe the Constitution solely by reference to the common law, in the language of Justice Mathews, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." 341 Even Justice Harlan, who was ordinarily quite willing to employ historical materials in constitutional adjudication, cautioned: "It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend of historical understanding and the adaptation of purpose to contemporary circumstances." 342

Courts concerned with constitutional adjudication can detect the relative weights to be accorded societal interests and discover some clues to their acceptable adjustment by reference to precedents which have not been repudiated by constitutional amendment, overruled by the Supreme Court, or rejected by later legislation. "[I]n the main," said Justice Cardozo, "there shall be adherence to precedent." 343 However, a group of precedents have been consciously repudiated by constitutional amendment because they balanced interests with utterly inappropriate results. 344 For the same reason, the Court has overruled a long list of its precedents 345 that were either wrongly decided at the time or which no longer represent an acceptable adjustment of the competing societal interests. 346 Because older precedents, not recently reaffirmed, may represent abnormalities occasioned by crisis 347 or simply mirror adjustments acceptable to past generations but long since passé, courts in balancing competing societal interests must be very cautious in the extent to which they permit themselves to be influenced by early precedents. Judicial decisions are social experiments and, like experiments generally, many of them do not work and are to be rejected as soon as the erroneous balancing becomes apparent. 348

344. See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), repudiated by the fourteenth amendment.
346. Id. at 735-55.
347. Korematsu v. United States, 323 U.S. 214 (1944). But see id. at 233 (Murphy, J., dissenting).
2. Legislative Balancing

The United States Supreme Court has in most areas given considerable deference to the judgment of legislative bodies that have indicated how clashing societal interests are to be balanced in particular situations. In 1944 Justice Frankfurter described the Court's traditional reticence to challenge congressional determinations:

As society becomes more and more complicated and individual experience correspondingly narrower, tolerance and humility in passing judgment on the experience and beliefs expressed by those entrusted with the duty of legislating emerge as the decisive factors in constitutional adjudication.

Seven years later Justice Frankfurter reiterated the propriety of deference to legislative judgments: "How best to reconcile competing interests is the business of legislatures, and the balance they strike is not a judgment to be displaced by ours, but to be respected unless outside the pale of fair judgment." 

Justice Harlan was in full accord that ordinarily in constitutional adjudication previous legislative balancing of societal interests was to be respected. He wrote in 1967:

It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the "main guardian" of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as "well-nigh" conclusive.

Both of these jurists, however, understood thoroughly that in many cases of constitutional construction there has been no previous legislative weighing of the competing interests of society. Moreover, they accepted the proposition that when important values or interests are at stake and the legislative judgment is outrageously improper for our larger society, judicial weighing of the competing interests reaching a different balance of the opposed societal interests is both invited and required.

There are literally dozens of illustrations of judicial respect for legislative judgments when the courts are called upon to balance societal interests in constitutional controversies. A few examples suffice. When in 1972 the Supreme Court ruled that there was to be no constitutional privilege of a newsman to refuse to answer the questions of a grand jury attempting to deal with crime, it made reference to the fact that neither the federal Congress nor legislatures in a majority of the states had enacted legislation creating such a privilege.354 Again, in holding violative of equal protection the Ohio laws whose onerous requirements made it virtually impossible for third party candidates to get on the ballot, including one that necessitated that a new party produce signatures of fifteen percent of those who voted in the last gubernatorial election, the Supreme Court was impressed with the fact that forty-two states required signatures from only one percent or fewer of the voters.355

Where the Congress of the United States has constitutionally delegated rulemaking power to the federal administrative agencies, the Supreme Court, in balancing societal interests, has indicated its willingness to be guided by administrative regulations promulgated within the congressional grant and approved, even implicitly, by the Congress. To illustrate, in balancing the interests represented by those who sought access to the broadcast media against the other interests represented by station owners and national systems, the Supreme Court respected the judgment of the Federal Communications Commission, as authorized by the Congress, that the “fairness doctrine” governed broadcasting and that, beyond this, there was generally to be no constitutional right of access to the media even for discussion of political matters.356

Although the Supreme Court at times has shown respect in constitutional adjudication to a previous balancing by a state legislature of the societal interests concerned, even when it was restricting first amendment freedoms,357 the essence of our federal society would not be dishonored if the Supreme Court, in weighing and balancing societal interests, gave a smaller quantum of respect to judgments of state legislatures than it does to Congress. As the ultimate arbiter of our federalism, the Court must frequently tell the states that they have improperly magnified state interests at the expense of national societal interests. The commerce clause area abounds with instances where the weighing by state legislatures inadequately appreciated the interests of the larger society, and state legislation had to be invalidated as unconstitutional by the high court.358 At times, too, the Sup-

reme Court has seen the societal interest in communication as being of national scope, requiring the invalidation of legislation based on state interests which were pushed too far at the expense of the national interest. Recall the language of Justice Roberts speaking for the Court and describing that tribunal's task: "We must determine," he wrote, "whether the alleged protection of the State's interests . . . has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact." Until such time as the state legislatures can be schooled to identify and weigh adequately the national interests of our society, especially in areas of freedom of communication, the Supreme Court will be justified in according a modest measure of respect to state legislation restrictive of either first amendment values or the national interest in a free flow of interstate commerce.

As the Supreme Court performs its responsibility of balancing the societal interests of the nation, it may well be justified in giving the minimum quantum of respect to previous balancing by the typical small, unicameral legislatures of local governments. Here the pressure of the parochial and the chauvinistic is at its greatest, and professional help to the legislator at the minimum, so that the resulting legislation all too frequently disregards or neglects the larger and more important interests of our society. Literally hundreds of local ordinances have been voided as unconstitutional by the Supreme Court because of faulty balancing of the affected societal interests, and, as the number increases yearly, it is understandable if the respect by the Court for the previous legislative judgment decreases proportionately. Whatever respect is given to previous legislative judgments, in our society the role of consciously and skillfully balancing the opposed societal interests in constitutional controversies is that of the Supreme Court, and it can be abdicated to no other body.

3. The Use of Presumptions and the Placement of Burdens

When the Congress of the United States has previously identified and weighed the opposing societal interests, respect by the courts for the legislative balancing of such interests is often manifested by a presumption that the legislation is constitutional. However, where the congressional legislation impacts upon the societal interest in freedom of communication, there will be no such presumption. The Supreme Court at times has accorded a presumption of validity under the Constitution to products of state legislatures, but it is very

unlikely that it will confer such a presumption upon state laws interfering with an interest of the broader, national society. At least since 1945, for example, it has been established that "the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." \textsuperscript{363} The year before, Justice Murphy had suggested that "the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid." \textsuperscript{364} Nor will the Court confer the presumption on state laws interfering with interstate commerce.

It is by now well established that, in the balancing of societal interests, the Supreme Court will entertain a strong presumption that any prior restraint upon first amendment values will be unconstitutional whether the legislation is enacted by the Congress, state legislatures, or municipal councils. Prior decisions\textsuperscript{365} abundantly supported the 1968 statement of the Court "that [a] system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." \textsuperscript{366}

Just as the balancing of societal interests can be aided by the use of presumptions, so too the placement of burdens by the Court will contribute to the success of the weighing and balancing by a judicial tribunal charged with constitutional adjudication. In balancing first amendment interests against other interests, the Supreme Court and other tribunals properly place upon the government or the private party advancing the opposed interest the burden of showing that it outweighs the very important interest in freedom of communication and that no alternatives are available to protect the opposed interest with less of an impact upon communication.\textsuperscript{367} The government, when advancing an opposing interest, must show "a controlling justification for the deterrent effect on the free enjoyment of the right to associate." \textsuperscript{368} Five years later the Court added that it will "plainly be incumbent" upon those advancing opposed interests to demonstrate that no

\textsuperscript{364} Prince v. Massachusetts, 321 U.S. 158, 173 (1944) (dissenting).
\textsuperscript{367} "When governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests." Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972).
\textsuperscript{368} NAACP v. Alabama, 357 U.S. 449, 466 (1958).
alternative forms exist that would reasonably protect those interests with less of an impact upon communication.\textsuperscript{369}

In 1972 in a case involving the societal interest in first amendment associational values, the Supreme Court ruled that when a college refused to recognize a student group, "the burden was upon the college administration to justify its decision of rejection."\textsuperscript{370} It added: "While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."\textsuperscript{371} When the Supreme Court invalidated a state law requiring an applicant for a tax exemption to bear the burden of showing it was not engaged in unlawful advocacy of governmental overthrow by force, the Court stated: "Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."\textsuperscript{372} In 1971 the Supreme Court added generally: "When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest."\textsuperscript{373} The Supreme Court's recognition of the very important societal interest in freedom of communication results in the rule that a citizen subjected to legislation allegedly protective of opposed interests but void for overbreadth "does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him."\textsuperscript{374}

The creation of presumptions and the placement of burdens, as indicated above, is a desirable and proper part of the task of weighing competing societal interests. The Court must continue to add presumptions and burdens in favor of those interests it recognizes as most important.

4. \textit{State Court Resolutions}

Although, as noted earlier, there are certain areas in which state and local legislative bodies have been inclined to prefer local interests at the expense of national societal values, the Supreme Court is fortunate in having available over fifty laboratories to which it can look to see how segments of

\textsuperscript{370} Healy v. James, 408 U.S. 169, 184 (1972).
\textsuperscript{371} Id.
\textsuperscript{373} Baird v. State Bar, 401 U.S. 1, 6-7 (1971).
\textsuperscript{374} Thornhill v. Alabama, 310 U.S. 88, 98 (1940).
our society desire interests balanced. More importantly, the Court can judge the effects on society of the balance of interests struck in state courts.

In most areas of constitutional law, the Supreme Court has been willing to look to the standards, practices, and experiences of the states and the District of Columbia to ascertain how they weigh certain values and how such segments of our larger society feel clashing societal values should be adjusted within the constitutional framework. In 1952, for example, the Court was willing to deny first amendment protection to defamation after discovering that “every American jurisdiction” had held constitutional punishment for libels directed at individuals.\(^{375}\) Five years later, when the Court discovered that the laws of all American states outlawed “obscene” materials, it held that the societal interest in protecting public morality in effect outweighed the societal interest in communication.\(^{376}\) In 1964, in defining the circumstances under which victims of defamation who were public officials could recover from the press, the Supreme Court placed considerable reliance upon the reasoning and language of the Kansas court which, it noted, had been adopted by a number of other state courts.\(^{377}\) Again, when charged with balancing societal interests in communication and the administration of justice, the Supreme Court in 1972 noted the fact that a majority of the states had not by legislation or judicial ruling created a newsman’s privilege, and the Court accepted as proper such balancing by the states.\(^{378}\) Finally, in passing upon the Virginia statute prohibiting pharmacists from advertising the prices of prescription drugs, the Supreme Court was guided by the fact that a number of state courts had ruled that the societal interest in communication was to be preferred and that the result of such rulings did not imperil any other important interest of society.\(^{379}\)

However, there is always the danger that state laws enacted many years earlier and state judicial holdings of some time past represent only values of another generation. Professor Kadish has remarked that “[s]urely, the decisions of a group of legislators and judges are not an accurate measure of the judgment of society; first, they are a selected group, and second, there may well be a time lag between the decision of the people and its implementation in law.”\(^{380}\) Reference by the Court to the practices and experiences of

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the states can produce rulings utterly unsuited to the interests of our con-
temporary society. In utilizing state constitutional provisions, statutes, prac-
tices, and judicial holdings, the Supreme Court must exercise extreme cau-
tion that the values thereby protected are both national and current.

5. Other Law Cultures

When the nations of the world generally acknowledge a particular societal interest and agree on how it should be balanced against opposing interests in particular cases, the Supreme Court may be guided in its balanc-
ing by such consensus. Whether balancing a public interest in obscenity\textsuperscript{381} or in the death penalty,\textsuperscript{382} the Court has often looked to "what dozens of other countries" have done. Especially where the common law countries are in general accord in balancing societal interests, they have influenced the Court and other tribunals in their task of balancing interests in constitutional adjudication.\textsuperscript{383} We have looked most readily at the practices, experiences, solutions, and effects in Great Britain and the Commonwealth countries.\textsuperscript{384} To illustrate, the Court of Appeals for the District of Columbia ruled that claims of executive privilege were not beyond review, pointing out that "indeed, no common law country follows the rule, urged by the President in this case, that mere executive assertions of privilege are conclusive on the courts."\textsuperscript{385} The Supreme Court affirmed.\textsuperscript{386}

The law of nations and the \textit{jus belli}, or law of war, frequently represent the judgment of most nations on how societal interests are to be balanced in particular cases, and the Supreme Court has agreed that these laws are to be followed by American courts in resolving constitutional controversies.\textsuperscript{387} Admittedly, no two cultures have the same hierarchy of societal values, but the same conflicts arise in many countries year after year, and both the bar and the courts must be encouraged to investigate how comparable societies are resolving clashes of interest similar to those present in the United States, with a particular view toward discovering the effect upon the society of preferring one societal interest to another in given circumstances.

\begin{footnotesize}
\footnote{381. Roth v. United States, 354 U.S. 476 (1957).}
\footnote{382. Furman v. Georgia, 408 U.S. 238 (1972).}
\footnote{383. See, e.g., Wolf v. Colorado, 338 U.S. 25 (1949).}
\footnote{384. Rochin v. California, 342 U.S. 165 (1952). \textit{But see id. at} 174 (Black, J., concurring); Adamson v. California, 332 U.S. 46 (1947).}
\footnote{385. Nixon v. Sirica, 487 F.2d 700, 714 n.60 (D.C. Cir. 1973).}
\footnote{387. \textit{Ex parte} Quirin, 317 U.S. 1 (1942); United States v. Arjona, 120 U.S. 479 (1887); \textit{Prize Cases}, 67 U.S. (2 Black) 635 (1863).}
\end{footnotesize}
D. Consideration of the Impact of a Ruling on Society

In constitutional adjudication the jurisprudence of interests, like all forms of sociological jurisprudence, requires the jurist to consider the utility of the rule contemplated with full consideration of the impact and effect of the norm upon his society. Professor Richard Wasserstrom has ably noted that "restricted utilitarianism performs the practical function of forcing concentration upon the kinds of consequences that should always be taken into account and that all too often are apt to be neglected."\textsuperscript{388}

Some Supreme Court Justices have long understood the obligation of the Court to fully explore the utility and effects of all possible rulings within a given case. As early as 1881, Justice Holmes stressed that a court must always consider "what is expedient for the community concerned."\textsuperscript{389} In 1897 he urged that judges must "recognize their duty of weighing considerations of social advantage."\textsuperscript{390} In deciding whether to overrule precedents, Chief Justice Stone said in 1944 that the Justices must "make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity."\textsuperscript{391}

There is evidence going back at least one hundred years that the Justices of the Supreme Court have regularly—and properly—considered the impact upon our society of possible rulings in a particular case. In 1871 the Court explained why it was sustaining congressional power to issue paper currency and make it legal tender: "It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice."\textsuperscript{392}

Cases involving communication illustrate well the willingness of the Court to consider the impact of its rulings upon the community. The Supreme Court in 1960 voided an ordinance forbidding the circulation of anonymous handbills because it had "no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."\textsuperscript{393} Justice Harlan spoke for the Court in emphasizing that compelled disclosure of NAACP membership in Alabama would expose the members "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility,"\textsuperscript{394}

\textsuperscript{389} O. HOLMES, THE COMMON LAW 35-36 (1881).
\textsuperscript{390} Holmes, The Path of the Law, 10 HARV. L. REV. 457, 467 (1897).
\textsuperscript{391} United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 580 (1944) (dissenting).
\textsuperscript{392} Legal Tender Cases, 79 U.S. (12 Wall.) 457, 529 (1871).
\textsuperscript{393} Talley v. California, 362 U.S. 60, 64 (1960).
\textsuperscript{394} NAACP v. Alabama, 357 U.S. 449, 462 (1958).
resulting in an intolerable loss of protection to first amendment interests. When the Supreme Court voided a federal requirement that an addressee of mail must notify in writing the Postmaster General if he wanted "communist political propaganda" delivered to him, the Court explained:

This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood maybe dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. 395

When, in 1972, the Court held that the interest in the fair and effective administration of criminal justice required that newsmen, like other citizens, respond to grand jury subpoenas and questions, it noted that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen." 396 Particularly in cases involving freedom of expression, the Court has been quick to respond when decisions adverse to such interests result in a "chilling effect" on their exercise. 397 In voiding overly broad statutes impinging upon communication, the Supreme Court explained that the decisions were necessary because "all society, and not merely . . . those exercising their rights, might be the loser" if such inroads upon first amendment values were allowed to stand. 398

Capable scholars concur that it is essential for the Supreme Court and other tribunals to consider carefully the impact of constitutional rulings on our society. Miller and Howell take perhaps the most extreme position, stating that "judicial decisions should be gauged by their results and not by either their coincidence with a set of allegedly consistent doctrinal principles or by an impossible reference to neutrality of principle." 399 Professor Kadish would probably accept this statement, for he emphasized that ultimately every constitutional judgment "entails a prediction of consequences." 400 Not every legal scholar, however, agrees fully with this placement of emphasis on result. Although Professor Wechsler accepted the importance of weighing each decision according to its potential "contribution

398. Id. at 486.
to the quality of our society,” he also stressed that “[i]t is not enough that a
decision makes such a contribution unless it rests on neutral principles.”

E. The Community Conscience and Consensus

Weighing and balancing societal interests in constitutional adjudication
regularly requires recourse to the collective conscience and consensus of the
community. Benjamin Cardozo wrote in 1921 that a judge is “under a duty
to conform to the accepted standards of the community, the mores of the
times.” Seven years later he wrote that the judiciary in measuring and
balancing interests must look “to the experience and sentiments and moral
and economic judgments of the community.” Speaking for the Supreme
Court, Justice Cardozo wrote that “the conscience of mankind” must be con-
sulted to determine if particular rights or interests are to be honored.

Justice Frankfurter also stressed the need for the courts in constitutional
adjudication to seek out and honor the moral sense of the society and the
community conscience. Rights and interests to be preferred, he wrote in
1950, must be “based on moral principles so deeply embedded in the tradi-
tions and feelings of our people as to be deemed fundamental to a civilized
society as conceived by our whole history.” He added that “the Court
enforces those permanent and pervasive feelings of our society as to which
there is compelling evidence of the kind relevant to judgments on social
institutions.” Four years later Justice Frankfurter wrote that “the whole
training and proved performance [of Supreme Court Justices] substantially
insure that their conclusions reflect understanding of, and due regard for,
law as the expression of the views and feelings that may fairly be deemed
representative of the community as a continuing society.”

Professor Bra-
den tells us that Justice Frankfurter decided cases “only on the basis of the
consensus of society’s opinion of what are fundamental standards of fair play
and justice.”

The Supreme Court has long seen its task as necessitating the adjustment
of societal interests so as to prefer claims based upon “those fundamental

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401. Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 27
(1959).
402. B. CARDOZO, supra note 343, at 108.
403. B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 72-75 (1928).
97 (1934).
406. Id.
(magazine), at 14.
408. Braden, The Search for Objectivity in Constitutional Law, 57 YALE L.J. 571,
582-89 (1948).
principles of liberty and justice which lie at the base of all our civil and political institutions." 409 Fifty years later the Court stated that "the conscience of our people" must be consulted in resolving constitutional controversies. 410 More recently, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan again emphasized that "the collective conscience of our people" must be ascertained in adjudicating constitutional disputes. 411 Methods that "shock the conscience" or "offend a sense of justice" will not be allowed under the Supreme Court's guardianship of constitutional values. 412

A court in balancing societal interests can properly consult "the pervasive feelings of our society," 413 as well as "contemporary community standards." 414 Justices at times have expressed their fears that their colleagues will confuse their own values with the community consensus, 415 but capable craftsmen on the bench fully appreciate that it is the society and community consensus that control how interests are to be balanced in constitutional controversies. Justice Frankfurter once said that construction of the due process clause "involves the application of standards of fairness and justice very broadly conceived," adding: "They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce." 416 Justices are not to impose personal notions, according to Justice Frankfurter, but rather "that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution." 417 On another occasion Justice Frankfurter wrote of the broad clauses in the Constitution:

In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large, untechnical concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions. 418

415. Interesting in this regard is the perceptive observation by Justice Harlan that "[s]pecific provisions of the Constitution, no less than 'due process,' lend themselves as readily to 'personal' interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed 'tune with the times.'" Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (concurring).
417. Id. at 471.
Application of contemporary community standards is relevant in first amendment situations, as elsewhere. In determining which kinds of erotic materials are to be given protection of that amendment in opposition to the societal interest in public morality, the Court has indicated that "contemporary community standards" govern, and that publications and films will be protected unless "the material goes substantially beyond customary limits of candor." The moral sense of the community is ascertainable by sociologists, anthropologists, social psychologists, and other social scientists conversant with the means for discovering how the community desires clashes of societal interests to be resolved, and the level of performance of both the bar and the bench will be significantly elevated when the profession perfects its handling of these materials.

F. The Relevance of Quantitative Considerations

When a court in constitutional adjudication tentatively concludes that the opposed societal interests are of roughly comparable value, it can permissibly explore quantitative considerations, endeavoring to ascertain the number of persons who would be advantaged by the preference of one interest compared to the number who might gain if the opposed interest were honored. Implicitly, quantitative considerations have influenced the resolution of constitutional controversies in many areas. Long ago the courts, in effect, held that in condemnation proceedings, the private property interests of an individual would be subordinated, under the eminent domain power of the sovereign, when necessary to protect the common weal. The supremacy clause of the United States Constitution is a deliberate recognition that the interests of the larger society, when protected by action within the constitutional competence of the federal government, are to prevail over interests advanced by the states and their local governments. Dozens of commerce clause decisions illustrate this. When the Supreme Court in 1974 held that the federal civil rights laws forbade denying 2,856 non-English speaking students of Chinese ancestry a meaningful opportunity to participate in the public school educational program, Justice Blackmun wrote in his concurring opinion, with the agreement of the Chief Justice: "For me, numbers are at the heart of this case ...."

423. U.S. CONST. art. VI, cl. 2.
Notwithstanding the incorporation of particular interests in the Constitution and the existence of the supremacy clause, it should be expected that at times the numbers affected by legislation enacted by a state for the protection of a substantial and important interest will be much greater than the numbers claiming protection under either federal constitutional or legislative provisions. This situation might justify a court, in constitutional adjudication, in sustaining the societal interest advanced by the state or local community.426

G. The Utility of Formulas

Neither the United States Supreme Court nor any other tribunal concerned with constitutional adjudication has produced a formula that will eliminate the case-by-case weighing and balancing of societal interests in particular litigation, and it is almost certain that no verbalization of formula or test can significantly help the courts in their basic task. Although Justice Holmes was concerned with the societal interest in property in his opinion in Hudson County Water Co. v. McCarter,427 his observations are equally applicable to all societal interests deserving of constitutional protection.

The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.428

Chief Justice Hughes, nearly twenty years later, concurred in this observation adding that the protection of individual rights required both an “appreciation of social conditions and a true appraisal of the actual effect of conduct.”429

It “inheres in the very nature of the judicial enforcement of the Due Process Clause,” said Justice Frankfurter, that balancing will be done on a case-by-case basis. He continued:

We cannot escape such instance-by-instance, case-by-case application of that clause in all the varieties of situations that come before this Court. It would be comfortable if, by a comprehensive formula, we could decide when a confession is coerced so as to vitiate a state conviction. There is no such talismanic formula. Every term we have to examine the particular circumstances of a particular

428. Id. at 355.
case in order to apply generalities which on one disputes. It is needless to multiply instances. It is the nature of the concept of due process, and, I venture to believe, its high serviceability in our constitutional system, that the judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule. The task is onerous and exacting, demanding as it does the utmost discipline in objectivity, the severest control of personal predilections. But it cannot be escaped, not even by disavowing that such is the nature of our task.

Justice Frankfurter's observations are equally valid when any broad concept in the Constitution is to be construed. When a formula is invoked, its effect on important interests can be devastating. Chief Judge Learned Hand, in Dennis v. United States, concocted a standard unjustifiably weighted against the societal interest in communication. He wrote: "In each case [the 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." It was a sad day when this standard was adopted by the Supreme Court, but fortunately it has quietly disappeared upon subsequent reflection. Implicit in its very expression was the notion that if some societal interest were to be sacrificed, it would be the one deliberately enshrined by the founding fathers in the Constitution. Comparably deficient, for the same reason, is the statement by Chief Justice Warren in United States v. O'Brien that, at least when "speech" and "non-speech" elements are employed by a citizen, government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Other so-called tests, such as those permitting incarceration of citizens when they incite to riot, distribute obscene literature, or abuse their...
freedom are so hopelessly vague as to discourage communication, to the ultimate loss of the community. To deprive citizens of their freedom under standards devoid of any real guidance is simply an abuse of political power.

Too much was perhaps expected of the "clear and present danger" guide, and it, too, was deficient in its acceptance of the proposition that the societal interest in freedom of communication was to be sacrificed at the altar of any other "substantive" interest. It has contributed, however, to the judicial balancing of opposed societal interests by its legitimate insistence that conduct manifesting one important interest is not to be punished unless it immediately and significantly imperils the opposed interest.

H. The Role of Rules and Doctrines

In spite of the aforementioned difficulties with set formulas, however, to adjudicate constitutional controversies purely on an ad hoc basis would be a never-ending task for the Supreme Court. Even more significantly, it would result in the incarceration of citizens who had been provided with no reasonable guides, for instance to permissible expression and communication, unless the newly announced rule or doctrine were to be applied prospectively only. Thus, some compromise is essential.

Even as he insisted upon the need for case-by-case adjudication in constitutional law, Justice Frankfurter acknowledged and endorsed the previous activity of the high court in announcing the rule that coerced confessions could not be used to convict. Justice Powell, who has been generally receptive to utilizing the methods of a jurisprudence of interests in constitutional controversies, has complained that "an ad hoc resolution of the competing interests at stake in each particular case is not feasible." The task of the Court, he urged, is the formulation of general rules that reflect a prudential weighing and balancing of the societal interests in repetitive situations.

In weighing and balancing opposed societal interests in constitutional controversies, it is possible for the Supreme Court to adopt general rules expressed originally by the Congress or other legislative bodies, or to create their own rules and doctrines giving greater guidance to the citizenry and the lower courts. For one example, when Congress had concluded that the interest in state security and the life of the President outweighed any interest in communication expressed in the form of a threat upon the life of

443. Id. at 343-44.
the Chief Executive, the Court readily agreed with such a balancing of interests.\textsuperscript{444}

In our society it is the prime obligation of the legislatures to weigh and balance the opposed societal interests and to announce rules and doctrines which reflect prudential balances. We demand too much of the Supreme Court when we expect it alone to perform tasks that can and should be done by legislative bodies. Legislatures at all levels must become more vigorous and responsible in recognizing the values of our society and balancing them in ways more reasonable, more just, and more acceptable to the larger community.

Once the Supreme Court has announced a rule or doctrine, or given its approval to a legislative reconciliation of competing interests, it should not be expected to police the operation of the rule in practice by making continuous, individual assessments of social utility and balances of the opposed societal interests in a continuum of cases. Justice Frankfurter wrote: "It is important to bear in mind that this Court can only hope to set limits and point the way. It falls to the lot of legislative bodies and administrative officials to find practical solutions within the frame of our decisions."\textsuperscript{445} It is utterly inappropriate and unbecoming that the highest court in our society should concern itself with endeavoring to balance every conceivable expression against important interests of the society, or to make assessments of social utility in an infinite parade of terms such as "Fuck the Draft,"\textsuperscript{446} "God-damned racketeer,"\textsuperscript{447} "White son of a bitch,"\textsuperscript{448} and "Mother-fucker."\textsuperscript{449} Comparably, the Court can conserve its time and energies by leaving to other tribunals judgments on the "obscene" nature of hundreds of films, magazines, and books. If it is humanly impossible for the Court to formulate rules and doctrines applicable by lower courts, with adequate guidance to a citizen who would be law-abiding, it must leave the task of balancing societal interests in cases such as this with increasing frequency to the state supreme courts and the federal courts of appeal.

VI. CONCLUSION

Although the Supreme Court and other tribunals continue to misconceive, in some cases, the proper methodology of a jurisprudence of interests

by placing on the scales not the appropriate societal interests, but "gov-
ernmental" interests and "individual" interests, there is sufficient encour-
agement to justify the statement that Supreme Court Justices now realize
that societal or public interests are to be balanced. Notwithstanding some
uncertainty as to the existence of societal interests in particular asserted
claims, it can be said that the Supreme Court has generally been able to
ascertain the interests our society deems worthy of being placed on the
scales in opposition to the societal interests delineated in the Constitution.

It is entirely legitimate and indeed prudent to avoid balancing societal
interests when a controversy may be resolved by other means open to the
judiciary. The variety of techniques which stop short of balancing are
numerous and capable of producing a just result. The Supreme Court has
not only agreed to the propriety of their application but has mastered well
their use.

When the Supreme Court has openly understood its obligation to weigh
and balance opposed societal interests with skill and prudence, its decisions,
as well as its language, have been generally acceptable to our society and
its system of values. Especially in the area of the first amendment interests,
the Justices have shown willingness and competence in balancing the op-
posed interests to the benefit and satisfaction of the society. It is desirable
to recall the words of Justice Roberts, writing the opinion for the Court in
Cantwell v. Connecticut and balancing the interest in peace, safety, and
good order against the interest in communication:

> We must determine whether the alleged protection of the State's
> interest, means to which end would, in the absence of limitation
> by the Federal Constitution, lie wholly within the State's discre-
> tion, has been pressed, in this instance, to a point where it has
> come into fatal collision with the overriding interest protected by
> the federal compact.

As the bar and the bench improve their techniques of openly assessing
the societal utility of interests opposed in litigation and in forecasting ac-
curately the effect of possible rulings upon the community, it can be antici-
pated that rulings of courts utilizing the methodology of a jurisprudence of
interests will be accompanied with explanations as to why one interest is to
prevail over the other in the particular circumstances, with indications of the
sources relied upon. When this methodology is utilized, constitutional rul-
ings will be open to more rational evaluation and criticism, and greater input
into the balancing process from outside the judiciary may be exercised by
the redrafting of legislation or by constitutional amendment.

451. Id. at 307.