Article

Justice Frankfurter as the Pioneer of the Strict Scrutiny Test－Filling in the Blank in the Development of Free Speech Jurisprudence

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ABSTRACT

This article shows Justice Frankfurter's positive influence on the development of the jurisprudence of free speech, which has been overlooked in the shadow of his judicial passivism. Reading the decisions of that time carefully, this article finds the theoretical relationship between him and Justice Brennan, who played the main role in the progressive Warren Court.

As the Supreme Court began to yield to the hysteria of McCarthyism, Frankfurter's deep concern about the wide discouraging effect of the restraint came to the forefront. It was Frankfurter who began to use the terms "deter" and "chill" to describe the negative effect of restrictions on speech. In Sweezy v. New Hampshire*, Frankfurter demanded that the State interest be "compelling" to justify the intrusion on political liberties. Brennan succeeded in developing the compelling interest test in following decisions. It is true that Frankfurter needed more evidence than Brennan to recognize the deterrent effect enough to make restrictions unconstitutional. However, this article confirms that Frankfurter helped the restart of the Supreme Court with his keen sensitivity to the negative potential of restrictions on political liberties.*

Keywords: *freedom of speech, Justice Frankfurter, Justice Brennan, deterrent effect, compelling interest*

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I. INTRODUCTION

Justice Frankfurter is known as an advocate of judicial passivism, especially in the field of free speech. It is true that his "antagonistic" relationship with Justices Black and Douglas came to light most clearly in this realm.[1] However, when the Supreme Court's decisions on free speech in the 1950s are carefully examined, one can discover another story about his role.

Frankfurter had significant influence on the development of judicial precedents at this crucial time. This assertion is in fact not as strange as it sounds at first. Black and Douglas's literal "absolutistic" method of constitutional interpretation never occupied the dominant position in the Supreme Court[2] though they certainly played an important role in forming the consistent liberal majority in the Warren Court. What characterized the Warren Court's decisions was the pragmatic approach promoted mainly by Justice Brennan. He did not revive the preferred position doctrine which the Vinson Court had abandoned, but he raised the level of protection for freedom of expression by focusing on the real effect of the disputed restrictions. He took seriously the negative psychological influence of restrictions on potential speakers who had minority ideas. It was the central concern of the Warren Court to prevent this discouraging, deterrent effect of restrictions on free speech, which was later generally called the "chilling effect."[3] It is however often overlooked that this approach was a kind of balancing of interests. Brennan's method of analyzing cases with a realistic view was derived from Frankfurter's approach. Additionally, the concerns regarding the deterrent effect itself, working in favor of protecting freedom of expression when balancing controversial interests, had its root in Frankfurter's opinions. Frankfurter was pragmatic enough to realize the wide negative influences which the suppression of political activities could arouse during the strained Cold War period. As this article discusses, it was Frankfurter who first demanded a "compelling" interest, the integral part of

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1. JAMES F. SIMON, THE ANTAGONISTS**:** HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 116 (1989).

2. *See infra* text accompanying note 95. *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964) (Black, J., concurring).

3. *See* Harry Kalven, Jr., *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court,* 67 MICH. L. REV. 289, 297-99 (1968); Robert C. Post, *William J. Brennan and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123, 130-35 (Mark Tushnet ed., 1993); Morton J. Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23, 26-28 (1997). For discussion concerning the theoretical grounds of the chilling effect doctrine *see* Toru Mori, *Freedom in the Public Sphere and Democracy*, 2 KYOTO J.L. & POL. 55, 68-69 (2005). As for the term, "chilling effect" became popular after Brennan had resorted to it in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Until this decision, "deterrent effect" had been generally used. Dombrowski v. Pfister, 380 U.S. 479, 487, 494 (1965).

today's strict or most exacting scrutiny test,[4] to justify a restriction on the freedom of speech.[5]

It is known that the Warren Court did not need the "clear and present danger" test to protect the freedom of speech.[6] However, it is not well known how that became possible. The Warren Court's famous decisions on free speech were and still are praised and criticized, but their genesis has not been fully explored. This article provides the missing link in the development of the free speech doctrine.[7] There is a reason that the point has been missed. If, as typical, Brennan is classified as progressive whereas Frankfurter as conservative and the theoretical relationship between them is ignored, the real current of the free speech decisions is lost. It is true that generally speaking, "Frankfurter overestimated the dangers to a democratic society of judicial activism in the protection of freedom of speech, and underestimated the need for, and the effectiveness of, the Supreme Court's moral leadership in such matters."[8] Even in Frankfurter's opinions which negatively impacted liberties, however, he left important clues for future progress. This article will discuss Frankfurter's positive role as the pioneer of the strict scrutiny test.

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4. *See*, *e.g.*, Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). *See also e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) (a recent decision demanding "compelling" interest to legitimate a restraint on speech).

5. *See infra* text accompanying note 76. This article treats only the emergence of the strict scrutiny test in the field of free speech to which Frankfurter contributed. As for the origin of the strict scrutiny test in general, nevertheless, I find Stephen A. Siegel's view correct that it was born in the decisions on the First Amendment, not on the Equal Protection Clause. Although the Warren Court had already made famous decisions against racial segregation in the 1950s, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), they did not resort to the demand that the interest of the government be compelling in order to legitimate the segregation. Racial segregation was considered there simply unreasonable. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 384, 401-02 (2006). Richard H. Fallon, Jr. asserts, in contrast, that the strict scrutiny test evolved simultaneously in a number of fields of constitutional law in the 1960s. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273-85 (2007). This observation need not necessarily be judged wrong, but it does not show the cause of the formula of the "compelling interest." Fallon's article is still very helpful in realizing the function of the strict scrutiny today, which is also outside of the scope of this article.

6. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 213-14.

7. William T. Coleman, Jr. states correctly, "Justice Black's simple absolutism . . . has never been accepted as constitutional doctrine. . . . Frankfurter's careful efforts to articulate first amendment values assures [*sic*] that future Courts will have adequate guidance in resolving competing social claims." William T. Coleman does not make clear, however, what the concrete contribution of Frankfurter's efforts was to the "future Courts." This will be clarified in this article. William T. Coleman, Jr., *Mr. Justice Felix Frankfurter*, *in* SIX JUSTICES ON CIVIL RIGHTS 85, 102 (Ronald D. Rotunda ed., 1983).

8. Nathaniel L. Nathanson, *Mr. Justice Frankfurter and the Holmes Chair: A Study in Liberalism and Judicial Self-Restraint*, 71 NW. U. L. REV. 135, 157 (1976) (pointing out nevertheless correctly that Frankfurter resisted "the McCarthy hysteria" vigorously. *id*. at 155-56). This article will show that he had a consistent point of view regarding freedom of speech which enabled this resistance.

II. FRANKFURTER'S AMBIGUOUS ATTITUDE TO THE PREFERRED POSITION DOCTRINE OF FREEDOM OF SPEECH

As time passed in the 1940s, it became increasingly clear that Frankfurter was left behind by the liberal majority. However, he did not persist in pursuing judicial passivism in cases about constitutional liberties. Frankfurter did not oppose the basic idea of the famous footnote 4 of *United States v. Carolene Products Co.*[9] which suggested that the liberties necessary to maintain the democratic political process should be protected more carefully than the economic liberties, and became the starting point of the "preferred position" doctrine of freedom of speech. At first Frankfurter even supported the Court's opinions which referred to the clear and present danger test and denied the constitutionality of prohibitions on freedom of expression with the help of this test.[10]

But in *Bridges v. California*,[11] in which the limit of the contempt power of state courts was disputed, Frankfurter criticized the Court's decision written by Black, which allowed punishment only if a verbal offense against courts created a clear and present danger. Frankfurter wrote, "[b]ecause freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined."[12] He stressed that the power of states to keep adjudications fair was broad enough to prohibit publications having a "reasonable tendency" to interfere with them. He found a long history justifying this prohibition and criticized the opinion for replacing it with the new concept of "clear and present danger." However, Frankfurter avoided a frontal attack on this test. He said, "[t]he phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension."[13] Essentially the clear and present danger test should not ignore the "consideration of the circumstances of the particular case" either, which he thought was lacking in the majority opinion.[14] He did not abandon the possibility of reconciling the clear and present danger test with his method of constitutional interpretation.

In *West Virginia State Board of Education v. Barnette*,[15] in which the

9. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

10. Thornhill v. Alabama, 310 U.S. 88 (1940) (referring to *Carolene Products* expressly at 105); Cantwell v. Connecticut, 310 U.S. 296 (1940).

11. Bridges v. California, 314 U.S. 252 (1941).

12. *Id*. at 293 (Frankfurter, J., dissenting).

13. *Id*. at 295-96 (Frankfurter, J., dissenting).

14. *Id*. at 296-97 (Frankfurter, J., dissenting).

15. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Court condemned the Board for requiring pupils to salute the Flag, Frankfurter wrote a harsh dissenting opinion which appeared to barely acknowledge the claim that civil liberties should be protected more carefully by the judiciary than economic liberties. He emphasized the legislature's broad political power and the "very narrow" function of the Court. "The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. . . . Our power does not vary according to the particular provision of the Bill of Rights which is invoked."[16] Nevertheless, he did not deny the clear and present danger test, but restricted the sorts of regulations to which it was applicable. To use this criterion in this case, in which Frankfurter assumed the State had the legitimate power to regulate as an educational measure, is "to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted."[17] He wanted to put this test back in the right place where "mere speech," "mere utterance" which the States had naturally no power to regulate was suppressed.[18] It is apparent that Frankfurter recognized the clear and present danger test as a means to balance controversial interests in specific circumstances where the value of free speech should prevail. In this regard, he admitted that the speech itself should be out of reach of regulation in principle.

The majority of the "Roosevelt Court" went a different way than Frankfurter, however. It drew on the generalized conclusion of the preferred position of the freedom of speech out of the footnote 4 of *Carolene Products*. In *Thomas v. Collins*,[19] Justice Rutledge clearly declared the judicial philosophy at that time. He acknowledged "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[20] "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. . . . For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[21] The clear and present danger test thus became the symbolic manifestation of the heightened status of First Amendment liberties.

Frankfurter could not help attacking such a generalization. He unfolded his criticism in detail in his opinion in *Kovacs v. Cooper*,[22] which supported the prohibition of the use of sound trucks on public streets. He took up the catch phrase "the preferred position of freedom of speech" and went on to

16. *Id*. at 648 (Frankfurter, J., dissenting).
17. *Id*. at 662-63 (Frankfurter, J., dissenting).
18. *Id*. at 663 (Frankfurter, J., dissenting).
19. Thomas v. Collins, 323 U.S. 516 (1945).
20. *Id*. at 530.
21. *Id*. at 530.
22. Kovacs v. Cooper, 336 U.S. 77 (1949).

say, "I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity."[23] He stressed, "the *Carolene* footnote did not purport to announce any new doctrine" [24] nor did it assert a presumption of invalidity. Frankfurter acknowledged that former Justice Holmes, whose line of thought he saw had influenced the Court's decisions in the 1940s, had been "far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics" [25] in order to preserve an open society and the progress of civilization. This was evidently his own stance, too. Still, the preferred position doctrine was a "deceptive," "oversimplified" formula ignoring the "complicated process of constitutional adjudication." "Such a formula makes for mechanical jurisprudence,"[26] which Frankfurter thought was by no means suitable for the Court responsible for appropriate consideration of concrete situations.

III. THE GROWING SIGNIFICANCE OF FRANKFURTER'S ATTENTION TO THE DETERRENT EFFECT

A. *The Red Scare and the Changing Jurisprudence of the Supreme Court*

When *Kovacs* was decided, the liberal majority began to disappear, against the background of the hysterical atmosphere of McCarthyism. Freedom of speech had been a truly important legal problem, but previously it had been mostly related to religious minorities or incidental slanderers. Now it became the target of the most crucial social and political dispute in the Nation—how far the political activities of Communists or supposed Communists could be prohibited. The peril of communist penetration was felt as a serious national security concern. The Supreme Court could not resist the social tension and pressure that Congress and the President also helped to elevate. The clear and present danger test collapsed. It was time to restart. Frankfurter played an important role when the Supreme Court

23. *Id*. at 90 (Frankfurter, J., concurring in judgment).
24. *Id*. at 91 (Frankfurter, J., concurring in judgment).
25. *Id*. at 95 (Frankfurter, J., concurring in judgment).
26. *Id*. at 96 (Frankfurter, J., concurring in judgment). Melvin I. Urofsky concludes from this opinion, "Frankfurter did put speech on a higher plane–a preferred position–than other values. Judges would still balance, but perhaps the scales will be tipped." Though that seems a correct observation, he criticizes Frankfurter because he thinks that Frankfurter nevertheless persisted in his judicial philosophy of self-restraint even in the suppressive atmosphere of McCarthyism. He writes that Frankfurter was a courageous person, but "he lacked the vision" to show it in the Court. MELVIN I. UROFSKY, FELIX FRANKFURTER**:** JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 110-11, 127 (1991). I do not agree with this type of generalized negation of Frankfurter's judicial contributions, though he surely often argued against the freedom of speech. This article will show that Frankfurter's liberal attitude also operated in his judicial opinions and helped to shape the jurisprudence of the Supreme Court.

intended to rebuild protection for freedom of expression without the preferred position doctrine.

American Communications Association v. Douds[27] approved the constitutionality of a non-communist affidavit for labor union officers under the National Labor Relations Act. The statute did not forbid persons who did not sign the affidavit from holding positions, but the Act made it a condition for requesting help from the National Labor Relations Board. The Court's decision acknowledged that, in effect, the Act imposed restrictions on non-complying unions. May Congress then exert this pressure to prevent political strikes that the Communist Party could order to disrupt the free flow of commerce? Though the Court recognized the particular danger of this party, it also admitted that the normal political activities of Communists themselves could be legitimate and that beliefs are inviolate. It found a serious constitutional problem in that "Congress has undeniably discouraged the lawful exercise of political freedoms as well" with this statute.[28]

The unions contended, of course, that this broad suppression did not pass the clear and present danger test. The Court responded, however, that the test was not "a mechanical test in every case touching First Amendment freedoms."[29] The majority opinion distinguished this case from the restrictions to which the test had been applied in the past. In this case, there was a danger to the Nation. "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."[30] Facing a case with such political graveness, the Court chose to balance the interests and to determine which one was worth more protection. Furthermore, it respected the competence of Congress to estimate the need for regulation and supported the constitutionality of this statute.[31]

It is noteworthy that the Court's method of analysis closely resembled Frankfurter's approach. This highlights the fact that in his opinion, Frankfurter did not hail the triumph of his jurisprudence, but cautiously objected in part with the Court. He warned that "the conflict of political ideas now dividing the world"[32] would be the most serious challenge in the history of the Supreme Court.

> No doubt issues like those now before us cannot be completely

27. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950).
28. *Id*. at 387-93.
29. *Id*. at 394.
30. *Id*. at 395-98.
31. *Id*. at 398-401.
32. *Id*. at 415 (Frankfurter, J., concurring in part).

> severed from the political and emotional context out of which they emerge. For that very reason adjudication touching such matters should not go one whit beyond the immediate issues requiring decision, and what is said in support of the adjudication should insulate the Court as far as is rationally possible from the political conflict beneath the legal issues.[33]

It is clear in Frankfurter's opinion that this legal positivism did not let him ignore the real situation of the union members, but led him, on the contrary, to take into account the pressure the broad regulations of the Act would put on them. Though he admitted Congress's interest in securing interstate commerce from disruption by Communists, he thought that Congress had cast its net too indiscriminately by asking for an avowal not to believe in the overthrow of the U.S. Government by any illegal or unconstitutional methods. "It is asking more than rightfully may be asked of ordinary men to take oath that a method is not 'unconstitutional' or 'illegal' when constitutionality or legality is frequently determined by this Court by the chance of a single vote."[34] The danger of prosecution for perjury was too severe to be neutralized by judicial review. Moreover, "fastidiously scrupulous regard for [oaths] should be encouraged. . . . If a man has scruples about taking an oath because of uncertainty as to whether it encompasses some beliefs that are inviolate, the surrender of abstention is invited by the ambiguity of the congressional exaction."[35] An individual's freedom of thought is so important, however, that, "[e]ntry into that citadel can be justified, if at all, only if strictly confined so that the belief that a man is asked to reveal is so defined as to leave no fair room for doubt that he is not asked to disclose what he has a right to withhold."[36]

It is apparent that Frankfurter was very sensitive to the discouraging effect which vague regulations could bring about. He was so concerned about their pressure on the inner and core freedom of thought which would arise inevitably in the "political and emotional context" of the day in America that he considered it a legal problem. When the Supreme Court began to retreat from the generalized preferred position doctrine, Frankfurter's manner of keeping a close watch on the cases would play a role in protecting freedoms by taking a realistic view of the negative effect of restrictions.

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33. *Id*. at 416 (Frankfurter, J., concurring in part).
34. *Id*. at 420 (Frankfurter, J., concurring in part).
35. *Id*. at 420-21 (Frankfurter, J., concurring in part).
36. *Id*. at 421 (Frankfurter, J., concurring in part).

B. *Frankfurter's Candid Confession in the Dennis Case*

In *Dennis v. United States*,[37] the famous case of the conviction of Communist leaders for violations of the Smith Act,[38] Chief Justice Vinson's opinion stressed the importance of the interest to prevent the overthrow of the Government by force and violence "in the context of world crisis after crisis".[39] He agreed with Judge Learned Hand, who had written the lower court opinion, that the gravity of the evil could justify the regulation even if the probability of its realization was not high.[40]

Frankfurter did not join in the opinion primarily because, as often stated, he did not want to reinterpret the clear and present danger test, but dared to replace it with the "candid and informed weighing of the competing interests."[41] Furthermore, he recognized that the primary responsibility for this balancing should belong to Congress. When Congress had determined that the danger justified a restriction on freedom of speech, the judiciary must respect its decision.[42] One should not overlook, however, the part of his opinion in which Frankfurter confessed that the challenged provisions of the Smith Act also would have serious negative effects on the ability of persons not directly regulated by the law to exercise freedom of speech.

> Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. . . . [I]t is self-delusion to think that we can punish [the defendants] for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas.[43]

Frankfurter reminded us, "[f]or social development of trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. . . . Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes."[44]

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37. Dennis v. United States, 341 U.S. 494 (1951).
38. The text of the statute applied in that case is found in *Dennis*, 341 U.S. at 496-97. *See* 18 U.S.C. § 2385 (2006).
39. *Dennis*, 341 U.S. at 510 (Vinson, C.J., plurality opinion).
40. *Id*. at 509-10 (Vinson, C.J., plurality opinion).
41. *Id*. at 525 (Frankfurter, J., concurring in judgment).
42. *Id*. at 525-27, 550-52 (Frankfurter, J., concurring in judgment).
43. *Id*. at 549 (Frankfurter, J., concurring in judgment).
44. *Id*. at 550 (Frankfurter, J., concurring in judgment).

Frankfurter had strong concerns about the serious impact which would be inevitable if the activities of the Communists in America were forbidden. Frankfurter's opinion differs from the other opinions supporting the conviction in that he was aware that the challenged restriction had much to do with the freedom of expression of normal citizens. The restriction created an atmosphere in which criticism was silenced. Even the dissenting opinions of Black and Douglas, which denied the risk of Communists to be a sufficient reason for the conviction, did not take this broad influence into consideration. Frankfurter's realistic sense was able to see it as a legally relevant restraint of an important freedom.[45]

However, Frankfurter still respected the power of Congress in this case. His method of generously weighing the legislature's interests was criticized all the more, because after *Dennis* the Supreme Court ceased to apply the clear and present danger test to restrictions on speech and began to judge their constitutionality by using a balancing test.[46] Frankfurter seemed to be responsible for the Supreme Court's retreat in the time of the Red Scare. Black and Douglas also abandoned the test in the end out of despair of its worth for protecting free speech. If Frankfurter had not been sensitive to the silencing effect of prohibitions of speech, however, the Court's revival would have been much more difficult. When balancing the interests in question began to play a decisive role in Court decisions, Frankfurter could regard regulations of expression not simply as prohibitions on Communists or other dangerous groups, but as leading to a general atmosphere hostile to the exercise of freedom of speech.

C. *Frankfurter's Introduction of the Deterrent Effect to the Balancing Test*

Garner v. Board of Public Works of Los Angeles[47] demonstrated that this sensitiveness could work in favor of freedom of speech. In this case, decided on the same day as *Dennis*, Frankfurter dissented in part from the Court's opinion upholding the constitutionality of a city ordinance which required each city employee to take an oath that she had not advocated and would not advocate the overthrow of the Government by violence or had not been and would not be a member of groups aiming to achieve those ends.

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45. Geoffrey R. Stone finds in Frankfurter's statements in *Dennis* "a powerful and trenchant insight" "[i]n light of the climate of the times." Stone thinks that Frankfurter was nevertheless "captured by the image of the domestic Communist as treacherous, malignant, and powerful" and could not resist the pressures of the Cold War era. This view seems rather persuasive at least about *Dennis*, the criminal case against the leaders of the Communists, although Frankfurter did resist the atmosphere of those days in several decisions. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 404-06, 410-11 (2004).

46. *See* Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting).

47. Garner v. L.A. Bd. of Pub. Works, 341 U.S. 716 (1951).

The Court treated the sanction only as a loss of the privilege to work for the city and considered the requirement within the reach of the city's power when the oath text was so restrictively construed that scienter was implicit in it.[48]

Frankfurter ensured that even conditions on privileges should not be unreasonable. "To describe public employment as a privilege does not meet the problem."[49] Moreover, he did not allow the Court to reinterpret the content of the oath. In his opinion, "[t]he vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of government."[50] Grave problems would arise when such an oath were sustained. "It is bound to operate as a real deterrent to people contemplating even innocent associations."[51] Anyone would be concerned that her organization could be found one day to advocate the overthrow of government. "All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people" "Such curbs are indeed self-defeating. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."[52]

In *Wieman v. Updegraff*,[53] a similar case about the constitutionality of a loyalty oath required of a state college's teachers, the Court determined the oath was unconstitutional because under the challenged statute, knowledge about the organization was not needed to exclude persons from public employment. In balancing the interests, the Court's opinion stated that exclusion on disloyalty grounds meant "a badge of infamy" in the American community. "Especially is this so in time of cold war and hot emotions."[54] Frankfurter wrote, moreover, how broadly the risk of being so badged would affect current or potential teachers in fact. "[Such unwarranted inhibition] has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."[55] "[Teachers] must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind

48. *Id*. at 721-24.
49. *Id*. at 725 (Frankfurter, J., concurring in part and dissenting in part).
50. *Id*. at 726 (Frankfurter, J., concurring in part and dissenting in part).
51. *Id*. at 727-28 (Frankfurter, J., concurring in part and dissenting in part).
52. *Id*. at 728 (Frankfurter, J., concurring in part and dissenting in part).
53. Wieman v. Updegraff, 344 U.S. 183 (1952).
54. *Id*. at 189-91.
55. *Id*. at 195. (Frankfurter, J., concurring).

are denied to them."[56]

It was Frankfurter who began to use the terms "deter" and "chill" to describe the effect of restrictions on speech which should be prevented in principle in order to keep a vital society open to critical minds. These terms would later grow to be the very means by which Brennan and the Warren Court would enlarge freedom of expression.[57] Of course, Frankfurter did not always regard this broad influence of prohibition as fatal. It was an element in the balancing process. Still, it opened eyes to reality and prevented respecting the legislature's interest one-sidedly, as the following cases also demonstrate.

In *Adler v. Board of Education of City of New York*,[58] the Supreme Court upheld a state law that required public school teachers not to be members of subversive groups like the Communist Party. The Court's decision recognized the State's interest to protect children from the influence of subversive groups on the one hand and, on the other, did not consider the disqualification of teachers as an invasion of freedom of expression. "[H]e is not thereby denied the right of free speech and assembly."[59] Douglas and Black objected to this judgment vehemently. Anyone would be afraid that she could be condemned if she associates with suspected groups. "Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled."[60] "Fear stalks the classroom . . . . [P]ursuit of knowledge is discouraged; discussion often leaves off where it should begin."[61]

Frankfurter also dissented, but with a rather technical reason that the controversy was not yet ripe to be judicially decided. He pointed out as an element of the lack of ripeness that the appellant teachers did not show that they were deterred from activities for fear of the challenged law. He was not satisfied with the general suggestion that the system complained of would have this effect on teachers as a group.[62] Frankfurter did not agree with the Court's majority opinion that this statute's requirement did not deny freedom of speech. He was aware that it could have a deterrent effect on the exercise of free speech which should be protected intrinsically, but was not aware in this case if the statute's requirement would cause such an effect in fact; this set him apart from his liberal brethren.

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56. *Id*. at 196. (Frankfurter, J., concurring).

57. *See*, *e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); Dombrowski v. Pfister, 380 U.S. 479, 486-87, 494 (1965).

58. Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485 (1952).

59. *Id*. at 489-93.

60. *Id*. at 509 (Douglas, J., dissenting).

61. *Id*.

62. *Id*. at 504 (Frankfurter, J., dissenting).

In *Beauharnais v. Illinois,*[63] Frankfurter wrote the opinion of the Court supporting the constitutionality of a group libel law, under which the petitioner was convicted for publishing hate speech against African Americans. He acknowledged the State's interest to keep peace between races with this criminal law against the background of high racial tension of that time. He also examined the risk that the law could be abused. "Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled," but Frankfurter recognized that the statute could be interpreted so clearly that he was able to slight this danger.[64] Black dissented because he regarded the statute as a much more serious infringement on freedom of expression. He thought that it would be very difficult for any court to interpret this statute in good conscience in racial controversies which often proceeded emotionally. It would become dangerous to only criticize groups. "No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion."[65]

Black and Douglas's approach in these cases shared Frankfurter's realistic view about the broad stifling effect of prohibitions. What led them to the absolutist doctrine after the decline of the clear and present danger test was their keen consciousness that restrictions on speech of that day threatened the openness of the society in general. It is true that this firm belief could not be shared by the Supreme Court. Nevertheless, there remained the possibility of dialogue between them and Frankfurter. They shared the concern about the vulnerable conditions of freedom of expression. Frankfurter balanced this concern with the needs of the regulation in the facts of each case. What the Warren Court developed was this very method, as will be discussed in the next section.

IV. FRANKFURTER'S POSITIVE ROLE IN THE WARREN COURT

A. *Examining the "Compelling" Interest of Government to Protect the Fragility of Speech*

When Warren and Brennan joined the Supreme Court, they tended to act as liberals, changing the power relationship in the Court a great deal. It did not return to the preferred position doctrine, however. The Court did not bravely declare that the value of free speech was special, partly because the new liberal bloc of four Justices was not strong enough to rule the Court. They had to gain at least one more vote, for which they looked especially to

63. Beauharnais v. Illinois, 343 U.S. 250 (1952).
64. *Id*. at 258-64 (1952).
65. *Id*. at 273-74 (Black, J., dissenting).

Frankfurter or Justice Harlan, who consciously behaved like "Frankfurter's principal ally."[66] Therefore, the decisions could be only those well reasoned as good solutions for concrete conflicts.[67] Brennan, especially, adopted what was then also Frankfurter's concern about the deterrent effect of regulations into the balancing process, which enabled him to take the loss of freedoms seriously.

In *Watkins v. United States,*[68] the range of Congress's contempt power was challenged by a summoned witness of a Subcommittee of the House of Representatives Committee on Un-American Activities. The witness testified that he had cooperated with the Communist Party in the past, but he refused to tell if he knew whether other persons on a list were members. The Court's decision, written by Chief Justice Warren, emphasized that the contempt power of Congress should clearly be restricted. When the risk of abuse remained, for example about the word "Un-American," grave negative effects would appear.

> [W]hen those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. . . . Nor does the witness alone suffer the consequences. Those who are identified by witnesses, and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time.[69]

In contrast, Justice Clark's dissenting opinion described the logic of the judicial passivism in those days clearly. He stressed the broad authority of Congress to investigate about national security on the one hand, and on the other hand slighted the negative influence of its inquiry on the freedom of speech. "Remote and indirect disadvantages such as 'public stigma, scorn and obloquy' may be related to the First Amendment, but they are not enough to block investigation."[70] It is therefore interesting that Frankfurter joined Warren and added a short opinion which showed off his talent for

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66. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 466-67 (1983). *See also* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 130 (1992).

67. See CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 131, 149 (1974); MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK AND THE PROCESS OF JUDICIAL DECISION MAKING 203-04 (1984).

68. Watkins v. United States, 354 U.S. 178 (1957).

69. *Id*. at 197-98.

70. *Id*. at 232 (Clark, J., dissenting).

applying the balancing test. He also showed his respect for Congress's traditional power to punish for contempt, but at the same time required that the scope of inquiry should be clearly defined to allow witnesses to be aware of the relevance of the questions.[71] Frankfurter admitted the judicial relevance of the deterrent effect emerging from vague sanctions against political activities, which distinguished him from the other conservatives in the Court.

Sweezy v. New Hampshire,[72] decided on the same day, was a similar case about a witness's refusal to testify regarding certain questions at a committee of State legislature. Chief Justice Warren's opinion was joined by only three liberal Justices, but the case was decided with the help of Frankfurter's opinion concurring in judgment. In this case, an inquiry was held about "subversive organizations" and "subversive persons." A summoned university teacher had refused to answer some questions about the Progressive Party and his own beliefs. Warren criticized that, according to the law, people could be treated as "subversive persons" without knowing it. He cited a paragraph from *Wieman* and added, "[t]he sanction emanating from legislative investigations is of a different kind than loss of employment. But the stain of the stamp of disloyalty is just as deep. The inhibiting effect in the flow of democratic expression and controversy upon those directly affected and those touched more subtly is equally grave."[73]

Frankfurter dared not depend on the vagueness of the state law to decide the case, but tried to weigh the competing claims squarely. He emphasized the value of intellectual freedom in universities and the grave harm resulting from governmental intrusion into it. Inquiries and speculations must be left as unfettered as possible. "Political power must abstain from intrusion into this activity of freedom . . . except for reasons that are exigent and obviously compelling. . . . It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."[74] Therefore, "in these matters of the spirit inroads on legitimacy must be resisted at their incipiency."[75] Furthermore, Frankfurter's explanation went beyond the importance of academic freedom and reached that of the right to privacy in citizens' political thoughts and associations in general. He doubted the State's belief that the Progressive Party was infiltrated by Communists and repeated, "[f]or a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating

71. *Id*. at 216-17 (Frankfurter, J., concurring).
72. Sweezy v. New Hampshire, 354 U.S. 234 (1957).
73. *Id*. at 246-51 (Warren, C.J., plurality opinion).
74. *Id*. at 262 (Frankfurter, J., concurring in judgment).
75. *Id*. at 263 (Frankfurter, J., concurring in judgment).

interest of the State must be compelling."[76] The State's evidence was not therefore sufficient to require the defendant to disclose his political loyalties.

This opinion reflected Frankfurter's deep concern about the situation in universities. Professors were indeed some of the main targets of the investigations into suspicions for disloyalty in the McCarthy era. Once they were suspected as un-American, professors' lectures and talks with colleagues would be searched, disclosed, and condemned. Under this tremendous pressure, they were eager to avoid any risks of being suspected, which seemed to Frankfurter, as a former professor, to mean the death of academic inquiries.[77] He was therefore confident that academic freedom was "at once so fragile and so indispensable"[78] that it should be protected most carefully. This view inevitably reminds us of the famous phrase out of *NAACP v. Button*, a typical free speech decision of the Warren Court written by Brennan; "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[79] Frankfurter also agreed that citizens' political beliefs in general must be primarily protected against forced disclosure. He shared the sense of the vulnerability of free speech with Brennan.

Frankfurter took the lead in the development of free speech jurisprudence in the early Warren court. The Court had already left the clear and present danger doctrine and decided the cases then by a balancing of interests. Unfortunately, this method included the danger that its results

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76. *Id*. at 264-66 (Frankfurter, J., concurring in judgment). Frankfurter's opinion in *Sweezy* has drawn much attention because of his passionate defense of freedom, which looks unusual for him. I find that H. N. Hirsch's assertion that in this case Frankfurter arbitrarily left the judicial passivism because of his personal inclination is not persuasive at all, when it is read in the stream of opinions at that time. H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 193-96 (1981). On the contrary, the most impressive commentary has been made by Clyde E. Jacobs. He describes *Sweezy* in connection with Frankfurter's "candid" concession of broad silencing effect of the conviction in *Dennis*. He finds Frankfurter's consistent concern about the fragile character of freedom of expression in these opinions which are apparently opposed to each other. However, he does not mention the meaning of *Sweezy* in the development of freedom of speech jurisprudence. JACOBS, *supra* note 67, at 120-27. *See also* Joseph L. Rauh, Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L. L. REV. 496, 508, 519 (1976); SILVERSTEIN, *supra* note 67, at 204-06.

77. According to Ellen W. Schrecker, "it may well be that almost 20 percent of the witnesses called before congressional and state investigating committees were college teachers or graduate students. Most of those academic witnesses who did not clear themselves with the committees lost their jobs." ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 10 (1986). *See*, *e.g.,* RALF S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES 120-34 (1958). *See also* ZECHARIAH CHAFEE, JR., THE BLESSINGS OF LIBERTY 179-252 (1956) (depicting the critical situation of universities at that time). Chafee himself was condemned by Senator McCarthy as having "bad loyalty," and being "dangerous to America." DONALD L. SMITH, ZECHARIAH CHAFEE, JR., DEFENDER OF LIBERTY AND LAW 261-62 (1986).

78. *Sweezy*, 354 U.S. at 262.

79. NAACP v. Button, 371 U.S. 415, 433 (1963).

would depend on arbitrary choices by judges. To avoid this danger, criteria to measure interests needed to be determined before the courts faced concrete cases. With his recognition of the fragility of freedom of expression, Frankfurter was able to find the measure to determine the interest needed to restrict First Amendment freedoms. The interest must be "compelling." It was then that this representative word of the later called "strict scrutiny" test first appeared in Supreme Court opinions. Though the requirement of having a compelling interest for restricting speech played a decisive role in decisions thereafter, its origin is almost forgotten. Perhaps the reason lies in the fact that it did not come from Black or Douglas, nor from Brennan or Warren, but came from Frankfurter, of all people an acknowledged advocate of judicial passivism. That seems almost unbelievable and indeed has not been researched.[80] It was because Frankfurter was realistic about the extreme difficulties of freedoms of those times, however, that the Court could begin to protect them carefully once again with his vote.

In *NAACP v. Alabama ex rel. Patterson*,[81] Harlan introduced the "compelling" interest standard from Frankfurter's opinion into the opinion of the Court. The question there was whether Alabama could compel the NAACP to reveal its members' names and addresses. The Court stressed that such a disclosure forced on unpopular groups was not a direct prohibition on the freedom of association, but had a "discouraging," "deterrent effect" on it, which by itself required the State to show that it had an interest sufficient to justify this inhibition. "Such a '. . . subordinating interest of the State must be compelling,' *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (concurring opinion)."[82] The State's need to know the group's members was not so important, and therefore forcing disclosure was unconstitutional. This was the first use of the "compelling" interest test in an opinion of the Court.[83] It is noteworthy that sensitivity to the fragility of First Amendment freedoms played an important role in recognizing the real degree of restriction on

80. Although Stephen A. Siegel mentions Frankfurter's opinion in *Sweezy* in his article on the origin of the strict scrutiny, he does not admit that it implied substantial significance in the development of the test. He recognizes it only in the decisions after Frankfurter's retirement and the formation of the solid liberal majority. Siegel, *supra* note 5, at 361-80. This evaluation underestimates Frankfurter's role there. Siegel does not doubt that Frankfurter and Harlan were "low-protectionists" and does not anticipate that they and Brennan had common concern about the situation of the freedom in the hysteria of anti-communism. Of course, they and Brennan had often different opinions about what interest legitimated the restriction on the freedom of expression, as this article will show. However, Frankfurter's reference to "compelling" in *Sweezy* had the theoretical background which Brennan shared. Therefore, it helped Brennan substantially to build his own jurisprudence. *See also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 97-98 (2000).

81. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958).

82. *Id*. at 463.

83. *See* Barenblatt v. United States, 360 U.S. 109, 127 (1959) (written also by Harlan, who cited the same sentence from Frankfurter's opinion in *Sweezy*).

freedoms and to require the State to show not just some legitimate interest, but a compelling interest.

B. *Frankfurter and Brennan's Shared Concern*

On the same day, the *Speiser v. Randall*[84] opinion was written by a Court newcomer, Justice Brennan. This case was about denying a tax exemption to veterans who refused to subscribe to an oath that they would not advocate the overthrow of the Government by force. The California Constitution denied people advocating such a policy any tax exemptions. The State demanded the oath from the claimants in order to reduce the State's burden to ascertain whether or not they had such beliefs. The veterans could request judicial review if they refused the oaths and were denied the tax exemption. Brennan recognized immediately that this was not only a case about denial of privileges. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[85] He emphasized that to regulate the freedom of speech the State must provide adequate procedures. Brennan stated that the State fell short of this requirement because the claimants who had refused to subscribe to the oath needed to bring a suit against the State in order to prove that they were entitled to the tax exemption and, furthermore, the burden of proof was allocated to them.

> The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding–inherent in all litigation–will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.[86]

In this opinion, Brennan found a serious constitutional problem in the deterrent effect of regulation, even if it did not prohibit speech directly. He

84. Speiser v. Randall, 357 U.S. 513 (1958).
85. *Id*. at 518.
86. *Id*. at 526.

cited, to confirm this viewpoint, *Douds* and *Wieman*,[87] which had acknowledged that exclusion from some privileges or offices might mean "a badge of infamy" and bring about a "discouraging" effect broadly. In each of those cases, Frankfurter had written opinions more sensitive to the fragility of free speech under social pressure. He had also confirmed in *Garner* that even conditioning privileges was unconstitutional if it operated "as a real deterrent."[88] In *Speiser*, Brennan made this realistic approach his own and also introduced the term "deterrent effect" as an important checkpoint in the scrutiny of the constitutionality of restrictions on free speech.[89] He tried to enlarge the protection of free speech thereafter with this approach. This decision was the starting point of his jurisprudence on free speech. It is also notable that Brennan shared concerns about the issues concerning freedom of speech with Frankfurter, who joined *Speiser* as well as *Alabama*.

I do not insist that in the face of concrete cases these two justices always had the same perception about the vulnerability of freedom of expression and the necessity of its protection. Frankfurter tended to trust in the sincerity of legislatures more. In *Beilan v. Board of Education*,[90] decided on the same day as *Alabama* and *Speiser*, the two Justices took different positions. *Beilan* was about the constitutionality of discharging a teacher on the grounds of his refusal to answer a loyalty test. The Court's decision stated that the questions about his relationship with Communists were relevant to his fitness as a teacher and that the Board might consider his refusal as proof of his incompetence as a teacher. The Court confirmed carefully that the reason for the teacher's discharge had not been a finding of disloyalty.[91] Frankfurter wrote a concurring opinion to emphasize this point—the teacher had not been labeled as "disloyal". He warned that it would curb the State power on the school system too much to treat the teacher, on the contrary to its explanation, as a sufferer of this fatal finding and negate the legitimacy of

87. *Id*. at 519.

88. *See supra* text accompanying note 51.

89. Lawrence H. Tribe emphasizes the significance of *Speiser*, "[f]or the first time in the context of individual rights and liberties, the Court made clear that calling something a 'privilege' did not immunize its allocation from judicial review." He treats it as the starting point of the doctrine of unconstitutional conditions. Lawrence H. Tribe, *Sticks and Carrots*, *in* REASON AND PASSION 123, 127 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997). *See also* Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech*, 139 U. PA. L. REV. 1333, 1337-39 (1991). This decision had much precedential influence on the following cases, but I do not regard it, as Tribe does, as Brennan's surprising great contribution in the Supreme Court where the formalistic attitude had ruled. Brennan's opinion in that case can and should be understood in the context of the continuing struggle of the Court to rebuild the jurisprudence of free speech. The attention to the deterrent effect was not Brennan's discovery, but he adopted it and developed it with his excellent talent as a Justice. Lucas A. Powe, Jr.'s observation that "*Speiser* itself would be the precedent for what would become known as the chilling effect" is fully persuasive, although the decision should be read in the context said above. POWE, *supra* note 80, at 135-36.

90. Beilan v. Bd. of Educ., 357 U.S. 399 (1958).

91. *Id*. at 405-06.

the discharge.[92]

The four liberal Justices dissented, but it was Brennan who refuted Frankfurter precisely on how to understand the meaning of the discharge. According to Brennan, this case could not be looked upon as a conflict only about the teacher's competence. "It is obvious that more is at stake here. . . . Rather, it is the simultaneous public labeling of the employees as disloyal that gives rise to our concern."[93] The serious negative effect of the challenged discharge was the same as that in *Wieman*. The State placed such grave blame on the teacher without due process, and that should be forbidden as unconstitutional.[94]

What was important for Brennan was not what the State itself explained as the reason for the discharge, but what its action publicly announced. This was just the source of the "badge of infamy" that the Court had been concerned about in earlier cases. Frankfurter certainly acknowledged the negative effect of this label on the freedom of speech, too. All the more, he had to specify that the teacher had not been so labeled. It seems that he also recognized the possibility that the teacher could be deemed disloyal publicly, because he did not deny such an inference. It did not seem certain enough, however, to restrict the State's power on education. Frankfurter and Brennan truly disagreed, but they both used a similar approach to estimate the real effect of restrictions on speech.

The similar thinking of these two Justices is also demonstrated in *Smith v. California*,[95] a case about the conviction of a bookstore proprietor under a city ordinance which made it unlawful to have any obscene books for sale even if the possessor had no knowledge of their obscenity. This decision is well-known as the stage for the theoretical confrontation between Black and Frankfurter, though they agreed with Brennan's opinion for the Court that the ordinance was unconstitutional.[96] Black criticized Brennan's interpretation because it allowed for a balancing of interests. He declared in this obscenity case his famous absolutism about the First Amendment clearly—that freedom of speech and press is "beyond the reach" of federal and state power.[97] Frankfurter retorted that this attitude was "doctrinaire absolutism."[98] Black's inflexible method does not seem very persuasive, to be sure, but he did not lose the realistic view. On the contrary, his doctrinaire position was caused by his concern about the real danger for free speech. He

92. *Id*. at 410-11 (Frankfurter, J., concurring).
93. *Id*. at 418 (Brennan, J., dissenting).
94. *Id*. at 418-19 (Brennan, J., dissenting).
95. Smith v. California, 361 U.S. 147 (1959).
96. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 491 (1994); JAMES J. MAGEE, MR. JUSTICE BLACK 133-34 (1980).
97. *Smith*, 361 U.S. at 157-59 (Black, J., concurring).
98. *Id*. at 163 (Frankfurter, J., concurring).

felt, "we are on the way to national censorship."[99] Therefore, the Court must be watchful against "any stealthy encroachments" on freedom of speech.[100] His absolutism seemed necessary to fulfill this duty. It was not a simple literalistic interpretation, but reflected Black's deepening worry about the conditions of American society.

Whereas Black, with his general suspicion against the Government, tended nevertheless to depart from the concrete consideration of the cases, Brennan and Frankfurter attached importance to the real effects of the challenged regulations. In this case, Brennan's opinion for the Court condemned the ordinance because it would bring about "the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it."[101] Obscene writings were not protected, indeed, but the ordinance would restrict the dissemination of books which were not obscene, because it penalized the booksellers even if they did not know the contents. "The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."[102] The bookseller's tendency to "self-censorship" which would thus necessarily occur as the result of this ordinance was too extensive to be justified by the State's interest to regulate obscene books.[103] Frankfurter accepted this reasoning, but added a concurring opinion to make it clear that the State could prohibit obscene books in a balanced way. He was more conscious of the legitimate State interest than Brennan. He agreed nevertheless with Brennan, because he also realized the peril which the ordinance would cause for "the vital role of free speech."[104]

C. *The Demand for More Evidence Made Frankfurter More Passive*

Frankfurter disagreed with the majority in *Shelton v. Tucker*,[105] a case about the constitutionality of an Arkansas statute which compelled every teacher to annually file an affidavit listing all organizations to which she belonged or regularly contributed. The Court's decision, written by Justice Stewart, found the statute unconstitutional on its face. Although the State had the right to investigate the competence of teachers, the requirement of the statute was too intrusive upon the freedom of association to be balanced

99. *Id*. at 159-60 (Black, J., concurring).
100. *Id*. at 159-60 (Black, J., concurring).
101. *Id*. at 150-51.
102. *Id*. at 153-54.
103. *Id*. at 154-55.
104. *Id*. at 162-64 (Frankfurter, J., concurring).
105. Shelton v. Tucker, 364 U.S. 479 (1960).

with—the scope of inquiry was completely unlimited. The fear of public exposure and of the danger of the resulting discharge would seriously widen the impairment of liberty. The Court cited here Frankfurter's opinion in *Wieman* which had referred to the "tendency to chill" of the forced oath there. Then Stewart wrote, "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"[106].

Frankfurter began his dissenting opinion with a renewed declaration of his judicial passivism.

> As one who has strong views against crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function, I may find displeasure with the Arkansas legislation now under review. But in maintaining the distinction between private views and constitutional restrictions, I am constrained to find that it does not exceed the permissible range of state action limited by the Fourteenth Amendment.[107]

This passage is not a denial of the judicial relevance of the "atmosphere of creative freedom." Frankfurter had acknowledged the value of this atmosphere and therefore was aware of the rather large restraints on freedom of expression even in the deterrents to the ability to exercise those freedoms. He cited his own opinions in *Wieman* and *Sweezy* to clearly demonstrate his consistency.[108] It seemed to him, however, that in *Shelton,* the "vice of deterring the exercise of constitutional freedoms" was not as grave as in the other cases. "The statute challenged in the present cases involves neither administrative discretion to censor nor vague, overreaching tests of criminal responsibility."[109] As such, the Court could not demand the State to take the narrowest means. However, at the end of his opinion, Frankfurter carefully noted that if the gathered information were used to discharge teachers because of their memberships, that use would violate the Fourteenth Amendment. [110] Frankfurter needed more evidence of restrictions on freedom to override the State's interest. That is the reason he thought that the intrusion here looked displeasing, but was not vicious enough to be declared unconstitutional.

This decision once again demonstrates the attention given to the

106. *Id*. at 485-88.
107. *Id*. at 490 (Frankfurter, J., dissenting).
108. *Id*. at 495 (Frankfurter, J., dissenting).
109. *Id*. at 492 (Frankfurter, J., dissenting).
110. *Id*. at 496 (Frankfurter, J., dissenting).

deterrent, broadly stifling effect of regulating speech. The Warren Court decided cases, differing from the Court in the 1940s, by using the balancing test. Even with this method, the Court was able to protect freedom of expression against government interests because it was ready to recognize the fragility of the freedom of expression, and accordingly to seriously estimate the damage caused by regulation. Frankfurter himself balanced the same concern with his respect for the power of legislatures in each case, which often led to different results from the liberal Justices. Even in those cases, however, their opinions were somewhat influenced by Frankfurter's worthwhile ideas.

Frankfurter's last lengthy Court opinion in this field, *Communist Party of United States v. Subversive Activities Control Board*,[111] which strengthened his notorious image as an advocate of the cold passivism, should be reread from this viewpoint. Frankfurter approved the constitutionality of the registration of the Communist Party as a Communist-action organization pursuant to the so-called McCarran Act. This registration brought the group a lot of grave disadvantages, including requiring it to bear the writing "a Communist organization" on its publications, and banning its members from employment in the U.S. Government or any defense facility or from applying for a passport. It was characteristic of Frankfurter's opinion that he excluded an examination about the constitutionality of those concrete measures from the focus of judicial review because the conflicts were not ripe. "It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport, or seek government or defense-facility or labor-union employment . . . "[112] Because he limited himself to the constitutional problem about the registration itself, he recognized as a result "only potential deterrence of association," but no real threat.[113] On the contrary, he respected the findings of Congress and admitted the vital importance of the interest of the United States to fight against the Communism. "[T]he magnitude of the public interests which the registration and disclosure provisions are designed to protect" was great enough to justify the potential disadvantages resulting from the registration.[114]

Black and Douglas criticized the Court's decision because they observed that just the registration itself caused enormous suppressive effects on the group. It branded the registered groups as disloyal to the United States. "The plan of the Act is to make it impossible for an organization to continue to

111. Communist Party of U. S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961).
112. *Id*. at 70-72, 78-79.
113. *Id*. at 79-81.
114. *Id*. at 93.

function once a registration order is issued against it."[115]

These Justices believed that Frankfurter ignored the reality of this case. Their criticism was rather persuasive. Nevertheless, it should not be forgotten that Frankfurter did not deny the possibility that the concrete measures of the challenged statute could cause serious harm and make it unconstitutional. He required, as in *Shelton*, more evidence of a deterrent effect to override such a vital interest of the United States and therefore postponed crucial judgments. Brennan, dissenting in part, was clever enough to realize the meaning of Frankfurter's judicial self-restraint here. He stated in his opinion that the constitutionality of each concrete duty and sanction was not decided yet.[116] He knew that Frankfurter's view would permit the denial of the statute's constitutionality if the Court could find the real deterrent effect caused by it. After Frankfurter's retirement in 1962, the Supreme Court declared in fact that some measures were unconstitutional.[117]

D. *Development of the Jurisprudence*

The sensitivity to the deterrent or chilling effect of regulations on freedom of expression characterized the decisions of the Warren Court. This very concern required the government to show "compelling" interests in order to justify the regulations. In *Bates v. Little Rock*,[118] a case about forced disclosure from the NAACP as in *Alabama,* the Court said, "[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference"[119]. The Court recognized "fear of community hostility and economic reprisals that would follow public disclosure of the membership lists,"[120] and continued, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *NAACP v. Alabama*, 357 U.S. 449."[121] As a result, "[w]e conclude that the municipalities have failed to demonstrate a controlling justification for the deterrence of free association."[122]

This 1960 decision already showed the typical logic of the Warren Court when it intended to protect First Amendment freedoms. In 1963, *NAACP v.*

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115. *Id*. at 141 (Black, J., dissenting).

116. *Id*. at 191 (Brennan, J., dissenting in part).

117. *See*, *e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500 (1964) (concerning nullification of passports); United States v. Robel, 389 U.S. 258 (1967) (concerning prohibition of employment in defense-facility).

118. Bates v. Little Rock, 361 U.S. 516 (1960).

119. *Id*. at 523.

120. *Id*. at 524.

121. *Id*.

122. *Id*. at 527. *See* POWE, *supra* note 80, at 167.

Button,[123] written by Brennan, declared unconstitutional a statute regulating the solicitation of legal business, which aimed in fact to inhibit the activities of the NAACP. The Supreme Court emphasized there, as previously discussed,[124] the vulnerability of freedom of speech and at the same time the vice of "a vague and broad statute" especially for "unpopular causes." "Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens."[125] Then the Court showed how to weigh the interests in conflict against this background. "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[126] Brennan concluded that the State had failed to advance such reasoning. Originating from Frankfurter's opinion in *Sweezy*, the requirement of a compelling interest was thus established in the Court's jurisprudence.[127]

In this manner, the Supreme Court in the 1960s reestablished its strict attitude against the regulation of freedom of speech. The approach was not the same as in the 1940s, however. After *Dennis*, the Supreme Court did not return to the clear and present danger test. Under the tremendous pressure of the Red Scare, the balancing of interests approach, supported mainly by Frankfurter, won the majority. That did not mean, however, that the Court always remained passive. It was also Frankfurter who was realistic about the deterrent effect caused by restrictions on speech[128] and demanded a compelling interest from the government in order to justify it. What is now known as the strict or most exacting scrutiny was developed from this standpoint. This relationship was nonetheless almost forgotten, because the compelling interest test later became a symbol of the positive attitude of the Court, which seemed just the opposite to Frankfurter.

V. CONCLUSION

In the 1950s, Frankfurter explained his motives in his early book about the *Sacco-Vanzetti* case, in which he had critically examined the evidence

123. NAACP v. Button, 371 U.S. 415 (1963).

124. *See supra* text accompanying note 79.

125. *Button*, 371 U.S. at 435-36.

126. *Id*. at 438.

127. The Supreme Court could already say in 1963, "[s]ignificantly, the parties are in substantial agreement as to the proper test to be applied to reconcile the competing claims of government and individual." That was, of course, the compelling interest test. Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963) (forced disclosure of membership of a branch of NAACP was declared unconstitutional).

128. *See* BROWN, *supra* note 77, at 183-93 (analyzing the broad impact of the loyalty tests on the attitude of citizens).

which had led to the convictions of Sacco and Vanzetti.[129] "Few questions bother me more from time to time than what is it that makes people cowardly, makes people timid and afraid to say publicly what they say privately."[130] The result of this timidity is that "those who have no scruples, who are ruthless, who don't give a damn, influence gradually wider and wider circles, and you get Hitler movements in Germany, . . . McCarthyism cowing most of the Senators of the United States at least to the extent that they didn't speak out, etcetera, etcetera."[131] "So the affair like Sacco-Vanzetti for me was a manifestation of what one might call the human situation. The upshot is that I didn't think that it should be minimized to the trivialities of a few individuals."[132] He had tried to defy that weakness in most people. This reminiscence seems to reveal the origin of his keen concern about the deterrent effect.[133] He was consistent in his awareness of the "human situation" after he joined the Supreme Court. Although he respected the political judgments of legislatures in general, he was too sensitive to the fragile character of freedom of expression to trivialize it in balancing interests.

Brennan's pragmatic sense of the fragility of First Amendment freedoms was often praised. Morton J. Horwitz reveals the roots of Brennan's deep concern about the chilling effect during the experience of McCarthyism. "The chilling effects doctrine was more than an important legal formula; it also reflected a deep understanding of the stagnation of political, cultural, and intellectual life in American society during the McCarthy era, and the dangers that such stagnation posed to democracy."[134] I agree. However, his retrospect emphasizing Brennan's role, which claims that until Brennan joined the Court, "[u]nder Justice Frankfurter's influence, the Court had rubber-stamped a wide variety of repressive McCarthyite laws, triggering an unprecedented climate of political fear and suspicion"[135] is an

129. FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 11-34 (1927).

130. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 242 (1962).

131. *Id*. at 243.

132. *Id*.

133. Frankfurter chose as one of the best "advice" he had ever had a remark of Justice Brandeis, his great mentor; "[p]erhaps the greatest weakness of man is his inability to say 'No.'" Frankfurter believed that this weakness was deep-rooted in "the nature of man." FELIX FRANKFURTER, *The Best Advice I Ever Had*, *in* OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956-1963, at 37, 38 (Philip B. Kurland ed., 1965). Perhaps this consciousness also helped him recognize psychological effects of regulations realistically. More fundamentally, I suppose, his Jewish origin had something to do with his sensitivity to the fragility of freedoms.

134. Horwitz, *supra* note 3, at 28. *See also* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 68-73 (1998); Stone, *supra* note 89, at 1337.

135. Horwitz, *supra* note 3, at 26. Horwitz says that Brennan built his jurisprudence of free speech on the footnote 4 of *Carolene Products*. Horwitz, *supra* note 3, at 27. However widespread this view is, it has no textual grounds. *See* POWE, *supra* note 80, at 489. Moreover, it remains unclear how this view relates to Brennan's attention to the chilling effect. I believe that his opinions can be

oversimplified observation. If one examines the Court's decisions carefully, it can be seen that Frankfurter's opinions functioned as Brennan's trailblazer. Even if they often took different positions, the Supreme Court was able to prepare in the 1950s for the development of the jurisprudence thereafter because Frankfurter's concern about the dangerous situation of free speech had already moved the Court in that direction.

understood better from the viewpoint this article shows.

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Frankfurter大法官作為嚴格審查的先驅——填補言論自由審查標準的缺口

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摘 要

本文以案例分析為研究方法，主張Frankfurter大法官對於言論自由嚴格審查基準的發展有正面影響，上述貢獻因其著名的「司法消極主義」主張而受到世人忽略；同時，本文也發現Frankfurter大法官影響了在進步的華倫法院扮演主要角色的Brennan大法官的法學理論。

當聯邦最高法院向麥卡錫主義退讓時，Frankfurter大法官對於限制疑似共產黨人活動所生的影響深表關切，並率先使用「威懾」與「寒蟬效應」描述限制言論自由對一個開放社會的負面影響。在*Sweezy v. New Hampshire*一案中，Frankfurter大法官主張，只有重大迫切的國家利益始可正當化對政治自由之限制。Brennan大法官延續Frankfurter大法官的理論，在言論自由領域發展出重大迫切利益的審查標準。儘管Frankfurter大法官相較於Brennan大法官，在認定寒蟬效應以宣告言論自由限制違憲時，需要更堅實的證據。然而，本文依然確認了Frankfurter大法官以其敏感度，使美國聯邦最高法院注意到限制政治自由的負面效應，對言論自由違憲審查基準的建立產生正面影響。

關鍵詞：言論自由、Frankfurter大法官、Brennan大法官、寒蟬效應、重大迫切利益