Civil Disabilities and the First Amendment

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Notes and Comments

Civil Disabilities and the First Amendment

Since 1950 the Supreme Court has passed on the constitutionality of a wide variety of statutes attaching civil disabilities to membership in political organizations, especially the Communist Party. While the Court has employed a number of constitutional theories in disposing of these cases, one of them—Justice Frankfurter's first amendment "balancing test"—has provided the primary doctrinal underpinning for most of the decisions. But in the latest disability cases, *Elfbrandt*

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1. "Civil disability" as used in this Note refers to the denial of government benefits to an individual because of his political association. Some disability statutes exclude individuals on the basis of association and impose criminal sanctions on those who attempt nonetheless to avail themselves of the benefit denied. Statutes of this kind may of course be tested in criminal prosecutions. The issue in such cases, however, is generally the constitutionality of the underlying exclusionary practice rather than of the criminal sanction. Cf. United States v. Robel, 389 U.S. 258 (1967).

2. Besides the first amendment right of association, which is dealt with in this Note, the Court has made extensive use of substantive due process (e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Wieman v. Updegraff*, 344 U.S. 183 (1952)); and procedural due process (e.g., *Greene v. McElroy*, 360 U.S. 474 (1959); *Vitarelli v. Scaton*, 359 U.S. 535 (1959)) to strike down disabilities. In upholding disability statutes, the Court has had resort to the right-privilege distinction, e.g., *Adler v. Board of Education*, 342 U.S. 485 (1952), and to a theory that discharge from employment for refusal to answer questions about political activity raises no first amendment issues if ostensibly based on "insubordination" rather than "disloyalty," e.g. *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960).

3. 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 . . . .

. . . The complex issues presented by regulation of speech in public places, by picketing, and by legislation prohibiting advocacy of crime have been resolved by scrutiny of many factors besides the imminence and gravity of the evil threatened. The matter has been well summarized by a reflective student of the Court's work. "The truth is that the clear-and-present danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' . . . it is not a substitute for the weighing of values. . . ." Freund, *On Understanding the Supreme Court*, 27-28.


Civil Disabilities and the First Amendment

v. Russell (1966),5 Keyishian v. Board of Regents (1967),6 and United States v. Robel (1967),7 the Court appears to have abandoned the balancing test in favor of a more structured process of adjudication. Although the opinions which mark this change are unusually confused, they suggest that due process notions of civil “punishment” put forward in dissent during the 1950’s by Justices Black and Douglas have had a strong influence on the Court. Despite its origin, the new approach can—and should—be justified in first amendment terms.

I.

Elfbrandt, Keyishian, and Robel represent a movement—though a somewhat erratic one—along the continuum which stretches from an extremely ad hoc method of decision to one based on per se rules.8 In the ad hoc model, the Court considers as many of the long and short run consequences of possible dispositions as it can imagine, attaches to each the weight which seems appropriate, and, by balancing the weighted consequences, reaches its decision. From the point of view of first amendment law, the most important feature of this approach is that decisions have little value as precedent.9 While an “all fours” case is conceivable, the large number of relevant factors virtually ensures that every subsequent case will contain enough dissimilar factual aspects to be easily distinguished.

At the other end of the continuum, the Court singles out a small number of factors as critical and uses them as the basis of a per se rule. To decide a case of first impression, the Court may consider the same wide range of consequences as it would under the ad hoc model, but the result is announced as a rule of law which is to be invoked whenever the critical factors appear. In any subsequent case the Court must still determine whether the critical aspects are present, but it need not deal with any of the other myriad factors considered in the case that originally laid down the rule.10

8. The distinction between ad hoc and per se methods of adjudication developed here resembles that used in Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755, 763-64, 773-76 (1963).
9. See note 11 infra.
10. These two models of decision are of course in no way peculiar to the law of the first amendment. In constitutional adjudication it is common for the Court to move from a relatively ad hoc model to one based on per se rules as it becomes “case-hardened” in a particular area. Compare Stein v. New York, 346 U.S. 156 (1953), and Ashcraft v. Tennessee, 322 U.S. 149 (1944), with Miranda v. Arizona, 384 U.S. 436 (1966) (coerced confessions); compare Betts v. Brady, 316 U.S. 455 (1942), with Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).
The Yale Law Journal

Vol. 78: 842, 1969

The balancing test approach to first amendment cases is very close to the ad hoc end of the continuum. The balancing court reserved the right to treat each case on the basis of the particular circumstances involved, weighing the importance of various government interests which were at stake against the severity of the infringement of speech or association and taking into account the range of alternatives which were available both to the state and to the citizen. Conversely, the “classificatory” approach of Justice Black and Professor Emerson is close to the other end of the continuum. The classifiers insist that in first amendment cases the Court must answer two distinct questions: Is the conduct affected “speech”? Is the state action “abridgement”? Each question must be answered on the basis of a sufficiently small number of factual aspects so that private actors will be able to predict whether or not their particular activities are legitimate.

11. Given the multiplicity of aspects which may have been important to the result, it is relatively difficult to predict under balancing whether a particular state action will be found in a particular case to have been an “abridgement” or a valid “regulation.” Compare NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), with Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); compare Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1963), with Wilkinson v. United States, 365 U.S. 399 (1961); compare NAACP v. Button, 371 U.S. 415 (1963), with Konigsberg v. State Bar, 366 U.S. 36 (1961).

12. The phrase “classificatory approach” describes the method of deciding first amendment cases elaborated by Professor Emerson. He has summarized it as follows:

[Math] Maintenence of a system of freedom of expression requires recognition of the distinction between those forms of conduct which should be classified as “expression” and those which should be classified as “action;” and that conduct classifiable as “expression” is entitled to complete protection against government infringement, although “action” is subject to reasonable and non-discriminatory regulation designed to achieve a legitimate social objective. The definition of “expression” is a functional one. It is based upon the proposition that normally no harm inheres in such conduct itself, but only from the ensuing “action;” upon the individual and social purposes served by freedom of expression in a democratic society; and upon the administrative requirements for maintaining an effective system of free expression in actual operation.

Translated into legal doctrine based upon the first amendment, this theory requires the Court to determine in every case whether the conduct involved is “expression” and whether it has been infringed by the exercise of governmental authority. The function of a court in applying the first amendment is to define the key terms of that provision—“freedom of speech,” “abridge,” and “law.” The definition of “abridge” and “law,” like the definition of “expression,” must be functional in character, derived from the basic considerations underlying a system of freedom of expression.


13. The classifiers tend to assert that their approach helps in determining which lines should be drawn, as well as demonstrating that lines are desirable. On the one hand, they
Civil Disabilities and the First Amendment

Although Justice Frankfurter urged that the Court remain close to the ad hoc end of the continuum in all first amendment cases,\textsuperscript{14} in fact it has tended to treat criminal prosecutions under the Smith Act\textsuperscript{15} in a relatively more classificatory fashion than so-called "indirect" cases involving municipal ordinances, requirements of political disclosure, and civil disabilities.\textsuperscript{16} In the area of disabilities, the Court has re-

seem to place some confidence in the everyday meanings of the words "speech" and "action" as offering a guide to the definition of protected and unprotected activity. Cf. Emerson, \textit{General Theory} 917; Black, \textit{The Bill of Rights}, 35 N.Y.U.L. Rev. 865 (1960). On the other, they put forward an analysis of the "function" of the first amendment in the American political system. From this the different functionalists derive their different ideas of what the first amendment protects. Cf. Emerson, \textit{General Theory} 878-86; Frantz, \textit{The First Amendment in Balance}, 71 YALE L.J. 1424, 1449 n.105 (1962); Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 Sup. Ct. Rev. 245. There is no apparent reason why a balancing court could not use these two guides to decision in first amendment cases. However, it seems unlikely that either will be of great usefulness in deciding the close cases which cause most conflict on the Court. This Note therefore focuses on the attitude toward per se rules as the principal issue between balancers and classifiers. 14. Dennis v. United States, 341 U.S. 494, 516-55 (1951) (concurring).

15. 18 U.S.C. § 2385 (1964). The principal cases are Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 489 (1951). These were styled "direct" cases, since the Smith Act was overtly designed to control the \textit{content} of speech rather than to achieve some other government objective by means which incidentally affected speech. The Court distinguished these from the municipal ordinance, disclosure, and disability cases on the basis of legislative intent, rather than on the ground that one group involved civil and the other criminal sanctions. Cf. Speiser v. Randall, 357 U.S. 513 (1958).

16. The "indirect" cases involving disabilities and disclosure are listed in note 8 \textit{supra}. Examples of the municipal ordinance cases are Kovacs v. Cooper, 336 U.S. 77 (1949); Prince v. Massachusetts, 321 U.S. 158 (1944); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940).

In the Smith Act cases, \textit{supra} note 15, the Court at least attempted to define mutually exclusive categories of protected and unprotected speech on the basis of per se rules. In Yates v. United States, 354 U.S. 298 (1957), the distinction was based on "advocacy in the realm of ideas," as opposed to "advocacy in the realm of action." In Scales v. United States, 367 U.S. 203 (1961), membership "with intent to further the illegal goals of the organization" was distinguished from membership without intent. By contrast, in the "indirect" cases the Court tended to avoid laying down any such precise boundaries for protected conduct. Justice Harlan has described the difference as follows:

One the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the first or fourteenth amendment forbade Congress or the States to pass, 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. Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961).

It may be objected that a per se rule based on an amorphous mental element such as intent or an abstraction such as "advocacy of ideas" offers little more certainty than a completely ad hoc decision. Cf. Noto v. United States, 367 U.S. 290 (1961). Yet even if the rule does not affirmatively resolve any given issue, it does eliminate issues from consideration altogether. Speiser v. Randall, 357 U.S. 513 (1958), is an example. California denied a veterans' tax exemption to advocates of violent overthrow and placed on the applicant the burden of proving non-advocacy. The Court treated the statute as a "direct" restraint analogous to the Smith Act and held that the sanction could be applied only to "unprotected" activity as defined by Dennis and Yates. From there it was a relatively easy step to the conclusion that the burden of proving indulgence in unprotected speech must be on the state in civil as well as criminal cases. By contrast, in Konigsberg v. State Bar, 366 U.S. 36 (1961), the denial of admission to the Bar for failure to answer questions concerning 845
cently moved away from balancing and begun to treat "indirect" cases in a manner previously reserved for "direct" cases.

This process began with the introduction of the concept of "specific intent to further the illegal goals of the organization" into civil disability cases. The concept was used in Scales v. United States, a "direct" case which involved a prosecution under the Smith Act, and was subsequently taken up in Aptheker v. Secretary of State. The issue in Aptheker was whether Congress could forbid any member of a "communist action organization" to apply for a passport. Justice Goldberg's majority opinion held this too broad an infringement of the right to travel, since the prohibition, as applied to many such members, had no reasonable relation to the asserted purpose of pre-

past membership in the Communist Party was treated as an "indirect" restraint proper for the balancing test. Although the State had made no affirmative showing whatever of unprotected activity by the applicant, the denial of admission was upheld on the basis of a weighing of the seriousness of the infringement against the magnitude of the State interest. Cf. Kalven & Steffen, The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black, 21 LAW IN TRANS. Q. 155 (1961).

The distinction between direct and indirect cases has given rise to two different sorts of confusion. First, the balancing majority of the 1950's and early 1960's differentiated the cases on the basis of the legislature's intent to control the content of speech. The classificers accepted this distinction in principle but claimed that the balancers had misapplied it. In fact, the classifiers accepted balancing in the municipal ordinance cases, arguing that these involved non-discriminatory regulations, but rejected it in the disability and disclosure cases, on the ground that there the State was attempting to punish unpopular political views. Compare Adderly v. Florida, 385 U.S. 39 (1966), with Konigsberg v. State Bar, 366 U.S. 56, 68-70 (1961) (Black, J., dissenting), and Barenblatt v. United States, 360 U.S. 109, 134, 141-42 (1959) (Black, J., dissenting). See generally Frantz, Is the First Amendment Law?—A Reply to Professor Mendelson, 51 CALIF. L. REV. 729, 736-38 (1963); Melklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245, 257-58, 261. The position of the majority of balancers was that disabilities and disclosure requirements were not intended to have any effect on speech at all, and were therefore "regulations" causing "incidental" effects like those of the municipal ordinances. E.g., American Communication Ass'n v. Douds, 339 U.S. 382, 396, 399 (1950); cf. Speiser v. Randall, 357 U.S. 513, 527 (1958). See generally Israel, Elfbrandt v. Russell: The Demise of the Oath? 1966 SUP. CT. REV. 193, 202-05. In the disability cases decided after 1964, the Court seems to have tacitly accepted Justice Black's view of the matter. See Part II of this Note.

Another sort of confusion is caused by the fact that while a majority of the Court insisted on a "direct/indirect" distinction, it was not at all apparent that the tests applied in the two sorts of cases were logically different. The initial formulation was that "clear and present danger" would be retained in direct cases, while indirect cases would be reserved for "balancing." American Communication Ass'n v. Douds, 339 U.S. 382, 396, 399 (1950). However, in Dennis the Court adopted Learned Hand's formulation of "clear and present danger" as "the gravity of the 'evil' discounted by its improbability," 341 U.S. 494 at 510 (1951). Since this appeared to eliminate the requirement of "imminence" from the earlier test, it was argued that the Supreme Court "balanced" in both direct and indirect cases. Moreover, in Scales—apparently a classic "direct" case—the Court did not mention "clear and present danger," giving some credence to the idea that the majority had accepted Justice Frankfurter's argument for an ad hoc approach to all first amendment cases. Cf. Frantz, The First Amendment in the Balance, 71 YALE L.J. 1421, 1427-28 (1962). In fact, a distinction was maintained even in Scales: direct cases were decided in a relatively more classificatory manner than indirect cases.


Civil Disabilities and the First Amendment

serving national security. Members without a specific evil intent composed one of the several groups as to whom the prohibition was not rational. 19

Aptheker did not announce a first amendment rule of specific intent. The decision does not purport to go beyond the facts and circumstances of the particular case, and the absence of intent was simply one of those circumstances. In fact, Aptheker, in its extensive listing of relevant factors, approaches the ad hoc end of the continuum, though the opinion does not mention the balancing test. 20 Two years later, however, Elfbrandt v. Russell, 21 in the course of holding a state loyalty oath invalid, gave both Aptheker and the concept of specific intent a considerably different cast. Justice Douglas writing for the majority in Elfbrandt flatly stated: "Any lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution was set at rest by our decision in Aptheker..." 22 Since the challenged Arizona loyalty oath failed to focus on specific intent, it was unconstitutionally overbroad.

Justice Douglas did not explain the sudden elevation of specific intent to the status of a constitutional requirement in all disability cases, and the reasoning of the opinion is so confused that the significance of the rhetoric is uncertain. 23 In the next disability case, Keyishian v.

19. 378 U.S. at 511-12.
20. Justice Goldberg holds the statute to be overbroad in four ways: the notice provisions are inadequate so that a person who is unaware that his organization has illegal goals may be convicted; the statute does not distinguish among members according to "activity" and "commitment," so that inactive members who may not "subscribe unqualifiedly" to the Party's goals are as much affected as the activists; the statute fails to discriminate according to the purpose of travel; and the statute applies to all travel destinations, regardless of their "security sensitivity." Id. at 509-12. None of these elements of overbreadth is treated as sufficient in itself to justify invalidation of the statute. "The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel." Id. at 514.
21. 384 U.S. 11 (1966). The Arizona loyalty oath statute in issue in this case was enacted in order to render any state employee who took the oath and then "knowingly and willfully" became a member of the Communist Party or of any other organization having as one of its purposes the overthrow of the government of Arizona, liable to prosecution for perjury where the employee had knowledge of the organization's unlawful purpose. The absence of scienter, which was important in Aptheker, was thus not a factor in Elfbrandt. The case was decided by a five to four majority with Justices Clark, Harlan, Stewart, and White dissenting.
22. 384 U.S. at 16.
23. Elfbrandt contains references to "overbreadth," "clear and present danger," and "vagueness" as well as to the necessity of showing specific intent. There is also considerable confusion as to whether Douglas is attacking the statute for permitting criminal prosecution for perjury in the absence of a showing of intent or for permitting discharge or exclusion from employment without such a showing. Id. at 16-17. For a futile attempt to make sense of the majority opinion, see Israel, Elfbrandt v. Russell: The Demise of the Oath? 1966 Sup. Ct. Rev. 193.
The Yale Law Journal  Vol. 78: 842, 1969

Board of Regents, the Court resolved this ambiguity while striking down a New York law which barred knowing members of the Communist Party from teaching positions. Justice Brennan's majority opinion took the view that:

Elfbrandt and Aptheker state the governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.25

In United States v. Robel, the most recent of the disability cases, the Court invalidated a statute barring members of communist-action organizations from defense employment. Since the statute applied both to sensitive and non-sensitive positions and did not require scienter, as well as ignoring specific intent, the highly per se method of Keyishian was unnecessary. Nonetheless, rather than revert to the ad hoc approach of Aptheker, the Court chose to state its conclusion in a distinctly classificatory manner: the statute was overbroad because it sought “to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights.”27

24. 385 U.S. 589 (1967). Keyishian involved three New York statutes. One made “treasonable or seditious” utterances or acts a cause for dismissal from the public educational system. A second disqualified advocates of violent overthrow from employment in the system. The third directed the state Board of Regents to list “subversive” organizations and to treat membership in listed organizations as “prima facie evidence” of disqualification to be employed in the schools. In a case decided in 1952, the Court had upheld the last of the three provisions on the ground that the denial of public employment could not raise first amendment issues because such employment is a “privilege,” not a “right.” Adler v. Board of Education, 342 U.S. 485 (1952). In Keyishian, the Court overturned the provisions relating to “treasonable and seditious” utterances or acts and the section relating to violent overthrow on grounds of vagueness, following Baggett v. Bullitt, 377 U.S. 360 (1964). 385 U.S. 589, 593-604. In the section of the opinion discussed here, the Court overruled Adler and invalidated the provision by which New York made membership in subversive organizations prima facie evidence of disqualification to teach. In effect, the law excluded “subversives” from the schools, since the prima facie case could be rebutted only by a showing of non-membership in the listed organization, by proof of lack of knowledge of its subversive nature, or by proof that the organization was not in fact subversive. Id. at 608. The case was decided by a five to four majority with Justices Clark, Harlan, Stewart, and White dissenting.

25. Id. at 607-08.

26. 389 U.S. 258 (1967). The statute in issue was Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C.A. § 784(a)(1)(D). Justices White and Harlan dissented; Justice Marshall did not participate in the decision; and Justice Brennan wrote a separate concurring opinion resting on the argument that the statute delegated to the Secretary of Defense unconstitutionally broad powers to designate “defense facilities.”

27. 389 U.S. 258, 266 (1967). The Court in Robel has adopted the “definitional” approach to first amendment adjudication, and this—though largely a matter of form—is an important sign of the movement toward a relatively classificatory method of decision. In the balancing cases, the Court did not hesitate to describe a statute as an “abridgement of free speech” and then uphold it as constitutional in light of the countervailing interest. E.g., Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 90-91 (1961) (majority opinion of Frankfurter, J.); American Communication Ass’n v. Douds, 339 U.S. 382,
Keyishian and Robel treat the issue of overbreadth in a manner plainly inconsistent with an ad hoc or balancing approach. In both cases, the Court objects to the coverage of the statutes, but in neither case does it attempt to measure the extent of overbreadth by weighing the first amendment rights infringed by the coverage against the gain in national security or the purity of the educational process. Instead of evaluating the conflicting claims in the light of the particular circumstances, the Court takes the requirements of activity and intent as a "standard," applies it, and summarily finds the statutes overbroad.

This conclusion may appear to be undercut because the majority opinions in Keyishian and Robel also ostensibly rely on the "reasonable alternative" form of overbreadth, quite apart from finding too inclusive coverage of individuals. Robel, for example, discussed the possibility of using criminal penalties for espionage and sabotage and an "industrial security screening program" as alternatives to the statute in issue. For a balancing court, however, "reasonable alternative" analysis requires examining the legislature's choice of means to judge whether an alternative would represent a sufficient gain in first amend-

389 (1950). For the classifiers, the statement that a statute "abridges protected speech" represents the conclusion of the Court's task rather than a step along the way: the form of the decision is a definition of "speech" and "abridge" which either validates or invalidates the statute. Emerson, General Theory, 914-15; Frantz, The First Amendment in the Balance, supra note 12, at 1494-98. This of course tells nothing about how the Court decided to place the conduct in question in one or the other pigeon-hole. The definitional approach is however more compatible with per se rules than with an ad hoc method, since it emphasizes the line-drawing aspect of a decision. The statement that this or that speech is "protected by the first amendment" makes little sense if the Court is unwilling to back it up by offering a rule which allows that speech to be identified in the future. Thus the adoption of definitional language suggests a movement away from an ad hoc mode of decision.

28. Cf. NAACP v. Button, 371 U.S. 415 (1963). In that case, the Court struck down a Virginia statute ostensibly aimed at barratry and champerty but found likely to prevent NAACP lawyers from developing civil rights litigation. The Court first established that the language of the statute was broad enough so that the NAACP lawyers might fear its application to them. The state's "subordinating interest" in regulation of the legal profession was then considered and found insufficient to justify the loss in first amendment rights likely to result from the statute. Id. at 444. See also Cole v. Young, 351 U.S. 536, 546 (1956).

29. In his concurrence in Robel, Justice Brennan expresses concern about this aspect of the decision. He points out that the statute in Aptheher applied to all communists, whereas Robel refers only to those who work in defense plants. Thus the restriction in Robel may be less serious than that in Aptheher. Moreover, the governmental interest protected by the defense facility statute appears more important to Justice Brennan than the interest involved in the passport statute. He is therefore "not persuaded" that the statute is overbroad and goes on to the delegation argument. 389 U.S. 258, 271-2 (concurring opinion). Justice Brennan's approach is that of the classic "balancer," refusing per se rules in favor of examining each case "in terms of the potential impact upon fundamental rights, the importance of the end sought and the necessity for the means adopted." Id. at 271. What is ironic about Justice Brennan's position is that his majority opinion in Keyishian goes farther toward setting up a per se rule of specific intent than does the majority in Robel.

30. 389 U.S. at 267.
ment freedoms to outweigh whatever loss in efficacy it might entail. Yet the Court in Robel concluded that “[It is not] our function to determine whether an industrial security screening program exhausts the possible alternatives to the statute under review” and professed to be concerned “solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake.” In these cases the theory of judicial weighing which underlies “reasonable alternative” doctrine seems to have been repudiated. As the Court has restricted its focus to a small number of aspects of the case—here primarily the presence or absence of intent—the words “less drastic means” have come to represent nothing more than the conclusion that the particular means adopted are illegitimate. Moreover, a final footnote to the majority opinion makes quite clear that the Court thinks it has an alternative to balancing:

It has been suggested that this case should be decided by “balancing” the governmental interests expressed in [the statute] against the First Amendment rights asserted by the appellee. This we decline to do. . . . [W]e have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way “balanced” those respective interests.

What the Court has done is withdraw from consideration the large number of factual aspects important to an ad hoc method of deciding first amendment cases. The question, What is protected “speech”? is

31. Cf. Braunfeld v. Brown, 366 U.S. 599, 607-9 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 461 (1969). Since the balancers are particularly concerned with preserving proper judicial deference toward the judgments of the legislature, the logical requirement that they evaluate alternatives in making a determination of overbreadth poses a problem for them. A common “solution” is that adopted by Justice Brennan in his concurrence in Robel: “We may assume, too, that Congress may have been justified in its conclusion that alternatives to [the statute] were inadequate.” 389 U.S. 258 at 271. Cf. Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring). For an attack on the failure of the majority opinion in Robel to provide a candid “balancing” of alternatives, see Gunther, Reflections on Robel, 20 Stan. L. Rev. 1140, 1147 (1968).
32. 389 U.S. at 267.
33. Id.
34. Id.
35. The view of the case taken here is directly contrary to that expressed by Professor Gunther in a recent comment. Gunther, supra note 31. For Professor Gunther, the Court’s disavowal of balancing is explainable only by reference to psychology and politics:

. . . Perhaps some day the Court will be able to assess alternatives, as it does here at least implicitly, without the compulsion to deny that it is doing so; perhaps some day it will be able to assess competing ultimate values, as it does here, without denying that it is doing so—whether the process is called “balancing” or has another label to which the majority is less allergic. The reluctance is understandable, for unguarded
Civil Disabilities and the First Amendment
to be answered in a relatively classificatory manner by a rule of specific intent. The cases also imply a change in the treatment of the question, What is an “abridgement”? After Aptheker, the Court makes no attempt, once the boundaries of protected conduct have been established, to weigh the seriousness of the disability against the countervailing governmental interest. In effect, the Court now presumes disabilities sufficiently serious to be unconstitutional when applied to conduct defined as “speech,” thus treating them in the relatively classificatory manner once reserved only for “direct” cases of criminal punishment of speech. As noted above, the requirement of specific intent in disability cases is an extension of the rule adopted in Scales v. United States, where the Court read the requirements of intent and activity into the membership clause of the Smith Act.

The move away from a resolutely ad hoc method of decision does not eliminate close cases, or even make them easier to decide. Yet there are important consequences: the discretionary element in each particular disability case becomes less apparent, and litigants can predict with greater certainty how disabilities will be treated. On the other hand, the Court has sacrificed some of its flexibility in a complex and sensitive area. Perhaps most important, the change suggests that the avowal carries its own risks, especially of increased institutional vulnerability. But if the Court is indeed to operate in this arena of conflicting basic interests, as it surely has done, perhaps there is long-range governmental value in relatively unobscured acknowledgement of that function.

Id. at 1148. One of the arguments of this Note is that, Professor Gunther notwithstanding, the Court may quite properly refuse to “assess alternatives” and “competing ultimate values” in a particular case, if the Court has previously evolved a per se rule (based on the broadest kind of balancing) which covers that case. See pp. 843-44 supra. For a discussion of the issue of “institutional vulnerability,” see note 40 infra.

36. See notes 15 & 16 supra.
37. 367 U.S. 203 (1961). The heavy reliance on Scales in Elfbrandt, Keyishian, and Robel provides a good example of the disintegration of the balancing test in disability cases. Scales involved the very serious sanction of imprisonment and would therefore be of little value to a balancing court considering the much less serious sanction of loss of particular employment. The dissents point out this distinction in Elfbrandt (384 U.S. at 23, White, J., dissenting) and Robel (389 U.S. at 288, White, J., dissenting) but the majority opinions do not even attempt to answer them.
39. One branch of the debate over balancing and absolutes has been concerned with the “legal” virtues of the two tests. The one clear virtue of per se rules is certainty. The one clear virtue of ad hoc decisions is flexibility. Both sides claim the virtue of “candor,” perhaps equally unconvincingly. Compare Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Cal. L. Rev. 821, 825-26 (1962), with Franz, Is the First Amendment Law? 51 Cal. L. Rev. 729, 748-49 (1963). Both sides also claim history as an unequivocal ally. Compare Dennis v. United States, 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring), with Meiklejohn, What Does the First Amendment Mean? 20 U. Chi. L. Rev. 461 (1953). As for “rationality,” it is clear that both the ad hoc and the per se approach can be made to meet the minimal formal requirement that all the factual aspects important to the decision be stated and that subjective “weight” be attached to them in a consistent way.

On a more substantive level, it has been argued that unless the Court takes into account
current majority may no longer accept the concept of the Court as a frankly political but deferential participant in the process of government—a view which underlay the doctrine of "balancing" first amendment rights. It seems likely that the appearance of "principled" decision-making afforded by classification attracts a number of the Justices. It is also natural for a Court under intense attack for its "activist" interpretation of the constitution to seek protection in the rhetoric of rule-making and rule-application.  

A very large number of factual aspects of each case—a highly ad hoc method—it cannot hope to achieve anything approaching intelligent results. Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75. On the other hand, there is evidence suggesting that the accumulation of indigestible factual material may cause judges to abandon rationality altogether. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 295-98 (1960). Opponents of the ad hoc approach have seen it as particularly undesirable in constitutional adjudication, where the Court has the function of maintaining a particular historical scheme, as opposed to common law adjudication, where the judicial function is constantly to adjust "law" to "reality," Reich, supra note 12, at 737-38. The answer to this is that in a period of burgeoning litigation when constitutional issues—once raised—are brought very rapidly before the Court, an emphasis on rules creates the danger that the Court will find itself driven in the name of consistency to extreme applications or the creation of extreme exceptions. Ad hoc treatment, on the other hand, gives maximum play to "experience." For an interesting discussion of this tension, see Deutsch, Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science, 20 Stan. L. Rev. 169, 229-35 (1968).

One of the ironies of the debate is that a number of enthusiastic "balancers" have also been strong advocates of "principled" decision making. Compare Gunther, The Subtle Vices of the Passive Virtues, 64 Colum. L. Rev. 1 (1964), with Gunther, supra note 31; compare Griswold, Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81, 89, 91-94 (1960), with Griswold, Absolute is in the Dark, 8 Utah L. Rev. 167 (1963). Professor Freund is an exception. P. Freund, The Supreme Court of the United States 85-87, 188-90 (1961). On "neutral principles" generally, see Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1960); Deutsch, supra, at 178-229. If "neutral principles" mean anything more than minimal rigor and good faith, then it would appear that they are at the opposite extreme from a resolutely ad hoc weighing of a welter of conflicting interests to produce a one-time-only result.

A second branch of the debate over balancing has been concerned with what the different tests imply about the institutional position of the Court. For the balancers, it is of paramount importance that the Court preserve its legitimacy as the final arbiter of constitutional disputes, and they believe this requires that the Court stay sufficiently within the political mainstream to avoid becoming the object of the sort of attack which came close to destroying it in the 1930's. The crisis of the Nine Old Men is seen as the product of an inflated view of the Court's authority to construe the Constitution independently of national political and economic conditions. When the Court faced an equally serious political crisis at the beginning of the Cold War, the prescription of the balancers was to recognize candidly that the Constitution is in no sense a source of a natural law of free speech and that judicial decisions in all speech cases are very much analogous to those of the legislature. The consequence of this analysis was the rejection of rules. Balancing meant restraint in the sense that it deprived the Court of the mystique of rules of law as a means to defend decisions running counter to the political opinions expressed by other branches of government. At the same time, balancing meant discretion in the sense of liberation from precedent as a strong determinant of the result in individual cases, and this discretion could be used to keep the Court out of dangerous political crossfires. Both restraint and discretion were supposed to lead to a relatively passive judiciary, and this was seen as desirable, given the institutional vulnerability of the Court, an underlying feeling that the political process alone is the ultimate guarantor of the system of political liberty, and a consequent coolness toward the whole notion of judicial review.
Civil Disabilities and the First Amendment

II.

The simplest explanation of the shift toward the use of the per se rule in civil disability cases is the change in the personnel of the Court. Yet unless the new majority is to be dismissed as altogether disingenuous, the course of reasoning by which it arrived at *Keyishian* and *Robel* is not unimportant. The genesis of the Court's shift lies in the argument of Justices Black and Douglas—dissenting from decisions

The classifiers stood this analysis on its head. Like the balancers, they see the Court as inextricably involved in making political decisions, but they have a higher estimate of its ability to survive in a hostile climate, perhaps a greater concern that the crisis of the Cold War endangered the whole system of free expression, and consequently a more sympathetic attitude toward the notion of judicial review. They prescribe a strengthening of the legal mystique which comes from laying down rules of law. The consequence of their approach is seen as the imposition of restraint by the creation of and adherence to precedent. At the same time they would increase the Court's discretion to disregard the political consensus as formulated by the legislative and executive branches. They further argue that the adoption of the defensive posture implied by balancing can only lead to a weakening of the Court's institutional position, a strengthening of antilibertarian tendencies in the legislature, and therefore an undermining of the Court's capacity to carry out its function of review. The laying down of rules—no matter what their content—is regarded as preferable for the maintenance of independent centers of political activity which balance the power of the legislature and executive. The balancing test, on the other hand, deters individual dissenters because of uncertainty as to what is permitted, but does nothing to discourage the state from repeated interference with the political process.

An irony of the balancers' position is that if their theory of ad hoc decision making were applied literally, it would have the effect of increasing judicial intervention in the political process. By insisting on reviewing all the facts which led the legislature to act, the Court would be imposing its own discretion on that of the other branches. At the same time, the Court would be denying the citizen any area in which his power of political expression was unfettered. See Fried, *supra* note 8. Justice Frankfurter had an answer for this:

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.

*Dennis v. United States*, 341 U.S. 494, 539-40 (1951) (concurring opinion). The marked swing which has occurred during the last fifteen years away from an ad hoc toward a per se approach (cf. note 10 *supra*) can be seen as in large part a result of the unwillingness of an activist Court to accept the restrictions implied by Justice Frankfurter's solution.

Since the two positions rest on divergent premises concerning judicial review, the vulnerability of the Court, and the dynamics of the system of political liberty, it seems unlikely that the debate between balancers and classifiers will ever be resolved. In one sense, this is desirable. Restraint and discretion, like certainty and flexibility, are each qualities we require of the judicial process, however irreconcilable they may be in theory. In the absence of satisfactory general rules which will tell us when to lean to one side or the other in resolving constitutional issues, it seems best to examine each area of the law in the light of its particular characteristics. Part III of this Note argues that in the particular area of civil disabilities a per se method is both feasible and desirable. For a similar argument applied to the area of compulsion of testimony by legislative investigating committees, see Note, *Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation*, 65 Yale L.J. 1139 (1956).

in the early 1950's—that civil disability and disclosure statutes were punitive in intent and effect. Neither Justice offered a comprehensive definition of punishment, and both were less concerned with the problem of determining legislative intent than with the fact that disabilities and disclosure requirements might be almost as effective coercive tools as criminal sanctions. Thus, in *Barsky v. Board of Regents* (1954), Justice Douglas drew the analogy between disabilities and criminal punishment in terms of their severe impact on the individual:

If, for the same reason [suspicion of subversive activities, and membership in suspected subversive organization], New York had attempted to put Dr. Barsky to death or put him in jail or to take away his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things but may nevertheless suspend Dr. Barsky's power to practice his profession. . . . [I]t does a man little good to stay alive and free and propertied if he cannot work.

While the Court's majority held that the government could impose a disability on the basis of "reasonable probability" of misbehavior,


44. Id. at 473. See also *Joint Anti-Fascist Refugee Relief Comm. v. McGrath*, 341 U.S. 123, 174-83 (1951) (Douglas, J., concurring).

45. The majority view was that the statutes were regulations and as such only had to be reasonably related to the ends they sought to accomplish. An element of reasonable relation was a reasonable probability that those affected would misbehave in the manner feared by the Government. E.g., *Beilan v. Board of Education*, 357 U.S. 399 (1958); *Garner v. Board of Public Works*, 341 U.S. 716, 720-22 (1951). The argument that the statutes were punitive was met by reference to their regulatory form and by a refusal to impute sinister intentions to the legislature.

Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

A second string to the bow of the majority was the "right/privilege" distinction, which was used on a number of occasions, especially by Justice Clark, to deny that any first amendment issues at all were raised by state denial of employment or other benefits.
Civil Disabilities and the First Amendment

the analogy to criminal punishment led the dissenters to assert that both an "act" and some "mental element" must be present before the sanction could apply. To infer "guilt" and permit "punishment" on the basis of less was a violation of due process. Justice Black had expressed this idea as early as his dissent in American Communication Ass'n v. Douds:

"Penalties should be imposed only for a person's own conduct, not . . . for the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas which they advocate." 47

The drawing of the impermissible inference came to be called "guilt by association," especially in the opinions of Justice Douglas, who fully exploited the emotive quality of the phrase. 48

For the minority, then, the question became: What conduct would support a finding of "guilt" sufficient to justify the imposition of a


46. It has long been true that what is ostensibly a civil regulation may be held by the Court to be a punishment and therefore invalid unless accompanied by procedural safeguards approximating those of criminal due process. E.g., Lipke v. Lederer, 259 U.S. 557 (1922) (tax under National Prohibition Act held unconstitutional). Along with the argument that the disability and disclosure statutes of the 1950's denied due process by omitting mens rea, the dissenters argued that as punishment the restrictions could not be imposed without more than the usual safeguards of administrative procedure. Uphaus v. Wyman, 360 U.S. 72, 83-108 (1959) (Brennan, J., dissenting); Barsky v. Board of Regents, 347 U.S. 442, 472-74 (1954) (Douglas, J., dissenting); Joint Anti-Fascist Refugee Relief Comm. v. McGrath, 341 U.S. 123, 174-83 (1951) (Douglas, J., concurring). Without going so far as to accept the characterization of the statutes as punishment, a majority of the Court did on occasion accept a due process argument that the severity of the sanction made it necessary that particular care be given to procedural fairness. See Greene v. McElroy, 360 U.S. 474 (1959); Peters v. Hobby, 349 U.S. 331 (1955).

Justice Brennan combined the notion of a special due process for "civil punishment" with the notion of a preferred position for first amendment freedoms to produce an odd first amendment due process. The theory seems to be that where a civil or criminal statute has the effect of "punishing" conduct closely related to and difficult to distinguish from protected speech, the normal rules of due process may be found inadequate on first amendment grounds. Speiser v. Randall, 347 U.S. 513, 524-26 (1958). Cf. Smith v. California, 361 U.S. 147 (1959). Friedman, Mr. Justice Brennan: The First Decade, 80 Harv. L. Rev. 7, 16-25 (1966). The holding in Speiser—that a civil disability might be punitive and therefore invalid without special due process safeguards—was picked up in Elfbrandt as a justification of the rule of specific intent, but was not pursued in Keyishian or Robel.

47. 339 U.S. 382, 452 (1950). The theory that the imputation of mens rea purely on the basis of organizational affiliation violates due process seems to have appeared for the first time in Schneiderman v. United States, 320 U.S. 118, 136, 146-54 (1943), in which the Court refused to impute to the defendant in a denaturalization proceeding the views of the Communist Party on the use of violence as a political weapon.

disability? Justice Black supplied a partial answer in his majority opinion in *Schware v. Board of Examiners* (1957). There he held that inferring lack of good character from past knowing membership in the Communist Party—absent a showing of any intent to further the illegal goals of the Party—denied an applicant for admission to the state bar due process of law. While *Schware* and the earlier dissents made intent significant only from the perspective of due process, the notion became commingled with first amendment theory in *Scales v. United States* (1961). *Scales* involved a challenge to a criminal prosecution under the section of the Smith Act which outlawed membership in an organization advocating violent overthrow of the government. Justice Harlan, writing for the majority, saw the problem as one of distinguishing associational activity which constitutionally could be criminally punished from associational activity which could not. Because criminal punishment was at issue, the line drawn had to satisfy the standards of criminal due process as well as the first amendment.

Justice Harlan’s solution was to limit the application of the statute to active members with specific intent to further the Party’s illegal goals. This requirement satisfied the due process clause by providing an act and mens rea sufficient to support personal guilt. At the same time, the Court held that punishing association without intent produced an inhibiting effect on first amendment freedoms that outweighed the government interest in so dealing with the “substantive evils which Congress has a right to prevent.” On its first amendment side, then, *Scales* lays down a per se rule of specific intent arrived at by balancing conflicting interests, but limited narrowly to criminal cases. As though to emphasize the ad hoc aspect of the decision, on the same day that it handed down *Scales* the Court decided that the McCarran Act could constitutionally compel all Communists to register, regardless of their activity or specific intent.

*Aptheker, Elfbrandt, Keyishian,* and *Robel* seem to have mixed up the result in *Scales* with the due process arguments of Justices Black and Douglas. What is largely fifth amendment reasoning suddenly comes forward as first amendment theory. Each of the four cases os-

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50. *Id.* at 247.
51. 367 U.S. 203 (1961). The case was decided by a five to four majority. Chief Justice Warren and Justices Black, Douglas, and Brennan dissented.
53. 367 U.S. at 244-28.
54. *Id.* at 239 (quoting *Schenck v. United States*, 249 U.S. 47 (1919)).
Civil Disabilities and the First Amendment

tensibly applies first amendment criteria, but the language of the opinions suggests that the Court's real concern is with the punishment of innocent persons by the imposition of civil disabilities. In *Aptheker*, for example, the denial of passports to Party members who are inactive or lack intent is thought to raise

the danger of punishing a member of a communist organization for "his adherence to lawfully and constitutionally protected purposes, because of other and constitutionally unprotected purposes which he does not necessarily share." *Noto v. United States*...

*Scales v. United States*...

Similarly, Douglas describes the statute in *Elfbrandt* as imposing "guilt by association," citing *Schware*, which was of course a due process case. Justice White in dissent toys with the idea that Douglas has voided the statute because the disability is "punishment," and therefore cannot be imposed without observing the forms of criminal due process; but he finally rejects this interpretation because it would imply that the Court has overruled *sub silentio* a number of earlier decisions holding disabilities not punitive.

In *Keyishian*, Justice Brennan refers to "guilt by association" and rejects the notion that intent can be inferred from association alone. He draws the parallel with the earlier due process cases explicitly:

Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, see *Scales v. United States*... nor may it warrant a finding of moral unfitness justifying disbarment. *Schware v. Board of Bar Examiners*...  

57. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). The Court also describes the statute as establishing a "conclusive presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States." *Id.* at 511. The Court cites *Schneiderman v. United States*, 320 U.S. 118 (1943), and *Schware v. Board of Examiners*, 353 U.S. 232 (1967), both due process cases, in support of the proposition that it is unreasonable to make such a presumption. In dissent, Justice Clark points out that if the statute is a regulation to be evaluated in terms of its reasonableness, then there is a vast amount of authority to the effect that the exclusion of all members of the dangerous group is permissible, and that a showing that each individual affected is likely to misbehave is unnecessary. *Aptheker v. Secretary of State*, 378 U.S. 500, 527-28 (1964).

58. *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966). Douglas also objects to the statute for imposing a "conclusive presumption that the member shares the unlawful aims of the organization." *Cf. note 57 supra*. The argument is bolstered by citation of *Speiser v. Randall*, 357 U.S. 513 (1958), which involved a similar due process-first amendment theory and was premised on the punitive nature of the disability statute. *See note 46 supra.*

59. 357 U.S. at 19-20.

60. *Keyishian v. Board of Regents*, 385 U.S. 589, 607 (1967). Justice Brennan also cites *Schneiderman v. United States*, 320 U.S. 118 (1943), a due process case, for the proposition that "beliefs are personal" and that adherence to an organization's purposes cannot be inferred from mere membership. 385 U.S. at 607.
This due process rationale is equally present in *Robel*, where the Chief Justice's majority opinion charges that the statute "casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished... [citing *Scales*] and membership which cannot be so proscribed... [citing *Eifbrandt*]."

Yet in spite of the almost exclusive emphasis on fair imputation of intent to further illegal ends in association cases, the Court seems determined to base its decisions on the first rather than the fifth amendment. *Keyishian* purports to rest squarely on the first amendment, despite a fully developed fifth amendment theory of specific intent offered in the brief for the accused, and due process is not even mentioned in *Robel*. In fact, the Supreme Court seems no closer to adopting a formal theory of "punishment" due process in first amendment situations than it was in the 1950's, even though a majority now shares the underlying assumptions of such a theory.

One good reason for the hesitation to rely on the fifth amendment may be the dubious results of attempts in earlier cases to define punishment for due process purposes. Presumably, if the Court adopted the approach of Justices Black and Douglas, it would have to determine whether the disability was "punitive" or "regulatory" in nature before it could logically invoke the rule of specific intent. *Robel* and its three precursors avoid any of the long and detailed assessment of legislative intent necessary to resolve this issue. Rather than enter this morass, the Court has chosen simply to characterize the disability statutes as "punishment," "proscription," or "sanction" and apply the per se rule requiring specific intent.

A second problem with the fifth amendment approach is that the due process clause has mainly functioned to protect property interests while other, more specific amendments have generally protected personal liberties against state invasions. A holding that fairness requires

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61. United States v. Robel, 389 U.S. 258, 265-66 (1967). The Government's denial that the statute involved punishment is briefly and unconvincingly disposed of in a footnote: The Government has insisted that Congress, in enacting § 5(a)(D), has not sought "to punish membership in 'Communist-action... organizations'"... Rather, the Government asserts, Congress has simply sought to regulate access to employment in defense facilities. But it is clear the employment disability is imposed only because of such membership. *Id.* at 265 n.13.

62. *Brief for Appellants* at 79-87, *id.*

specific intent before sanctions can be imposed on association would also mean that this rule of intent applies in the area of business regulation. For example, if the government cannot compel Robel to forfeit his job without showing that he is “guilty” of something more than Communist Party membership, it is hard to see how the Securities and Exchange Commission can bar all employees of stock brokerages (including janitors) from employment with national banks.64

This is not to say that due process notions have no place in first amendment cases. Strict rules for imputing intent are appropriate whenever the State threatens to impose severe sanctions on behavior. However, if the rules governing the application of such sanctions in disability cases are to be more restrictive than those required by due process in cases not involving speech, they must be justified in terms of first and not fifth amendment theory.

III.

Looked at in first amendment terms, Robel and Keyishian pose two problems: first, they blithely assume what earlier decisions denied, that all civil disabilities are abridgments merely because they have an inhibitory effect. Second, they draw the line between protected and unprotected association on the basis of specific intent without any explanation more revealing than a cite to Scales.

On the basis of factors which the Court has recognized in its opinions—and quite independently of the analogy to criminal punishment—disabilities can sensibly be treated as abridging free association when they attach to certain kinds of political activity.65 Disabilities of widely different sorts are much the same in their effect on speech and association. First, those engaged in the disfavored activity must choose between some otherwise available benefit and their political associations. Second, others who might have engaged in the affected association hesitate to do so.66 Third, given the latitude and uncertainty of the fact-finding process in first amendment cases, even those not intending

65. For an attempt to construct a similar rationale for a per se rule in the area of legislative investigations, see Comment, Legislative Inquiry Into Political Activity: First Amendment Immunity from Committee Interrogation, 65 YALE L.J. 1159 (1956). Cf. Emerson, General Theory, 942-48.
to engage in association covered by the statute must "steer far wider of the unlawful zone" than they otherwise would. While a single disability may be relatively innocuous, a number of them cumulated on particular conduct can serve as a highly effective disincentive. In an organized, bureaucratic society where everyone depends to some degree on government benefits, systematic deprivation of privileges may indeed be the functional equivalent of criminal punishment. When widespread publicity and denunciation accompany the imposition of disabilities, the result may be public disgrace and ostracism having a far greater deterrent effect on speech than would the deprivation of benefits alone.

Moreover, as means to objectives other than the inhibition of political association, disabilities seem to be ineffective. State and defense secrets must in any case have the protection of elaborate screening programs in which organizational affiliation is only one of many factors considered. Where the state interest is in the competence and diligence of its employees—and especially teachers—the argument for disabilities is weaker still, since obtaining good people is as important as excluding bad ones. A single instance of misbehavior is unlikely to have catastrophic results, and normal disciplinary practices, including firing, should be adequate to deal with offenders. On the other hand, the restrictions on associational activity may eliminate badly needed applicants, qualified in every other way, who have in fact no intention to misbehave.

Since cases in which civil disabilities have an important regulatory purpose are likely to be rare, the creation of a per se rule against disabilities attached to protected associational conduct becomes desirable from the standpoint of certainty. When the extent to which the state may penalize protected association is unclear, those who engage or might engage in unpopular activities will be discouraged by the possibility of sanctions. At the same time, given the wide variety of disabilities and the many kinds of association to which they might apply, an ad hoc mode of decision could degenerate into a guessing game in which legislatures experiment until they find a formula acceptable to the Court.

Perhaps the strongest argument against a per se rule is Justice Frankfurter's warning that

69. Cf. Comment, Legislative Inquiry into Political Activity, supra note 60, at 1179-80.
Civil Disabilities and the First Amendment

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. 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.⁷⁰

One exception to the rule against disabilities, for example, might be the Hatch Act,⁷¹ which bars federal employees from active participation in political campaigns. Elfbrandt, Keyishian, and Robel, however, have already seriously weakened the authority of United Public Workers v. Mitchell,⁷² which determined by semiovert balancing that the Hatch Act was constitutional. If the holdings of those cases have now crystallized in a per se rule, it is hard to see how Mitchell can stand. Active Republicans without intent to subvert the federal bureaucracy for partisan purposes are not likely to pose a more serious problem than active Communists without intent to overthrow the government.⁷³

The matter of classified information presents a stronger case for an exception. An unchallenged section of the McCarran Act⁷⁴ makes it a crime for a member of a “communist organization” to receive classified material, apparently on the reasoning that the statute will deter Communists with intent to misuse the information by exposing them to the risk of conviction even where the government cannot prove any misuse occurred or was attempted. Such a provision must be evaluated in the light of the effectiveness of existing laws against espionage and sabotage,⁷⁵ and of administrative screening and security programs. It is possible that the only effect of the law has been to stigmatize the Communist Party.⁷⁶ Yet even if the Court upheld the measure, it is by no means clear that the “exception would eventually corrode the rule.” A method of decision close to the per se end of the continuum need not aim at rules which are “absolute” in the sense of having unlimited applicability.⁷⁷ Where the government interest is of truly unusual magnitude and the effect on speech close to the de minimis level, the Court can admit an exception without in any way undermining the rule.

⁷⁴. 50 U.S.C. § 783(c) (1964).
⁷⁶. Apparently no prosecutions have been brought under 50 U.S.C. § 8783(c) (1964).
⁷⁷. Some dispute exists as to whether it is meaningful at all to speak of such principles. Cf. Deutsch, supra note 39, at 178-97.
The wisdom of the Court’s use of specific intent to draw the line between protected and unprotected association is difficult to assess. Essentially, the Court is asserting that organizations with both legal and illegal goals have active members, even leaders, who do not adhere to the unlawful part of the program. Arguably, it is not only unfair but also impolitic to treat such members as being equally dangerous as members who have illegal aims. Given the tendency of radical organizations in America to assimilate themselves to the democratic process, the interest in orderly change may be best served by encouraging rather than discouraging the more moderate members of groups with both legal and illegal aims. The rule of specific intent may, however, make it difficult for legislatures to use civil disabilities at all. Statutes aimed at “active membership with intent” may still be passed, but to enforce them the state will have to go through all the procedures presently required for a Smith Act conviction, with the burden of proving the crucial mental element on the government.

While from the prosecutor’s point of view the rule of intent may seem to draw the bounds of protected association too broadly, it is a line that provides little guidance to those engaged in political activity. Both “intent” and “illegal goals” are ill-defined concepts at best. Even with intensive appellate review of findings of fact, no intelligible standard for either has emerged from the criminal cases following Scales; there is no reason to expect that the courts will do any better in civil disability decisions. If the principal requirement of first amendment doctrine is that it give political activists a clear idea of what is and is not permitted, the rule is inadequate.

A final objection to the rule is that in some cases it would afford too little protection to speech. Commentators on Scales have argued that mere association—with or without intent—is “speech,” not “action,” and therefore protected by the first amendment:

To make proof of knowledge and intent, shown to the satisfaction of a jury, a sufficient link with illegal action to sustain the criminal penalty, does not draw the line with the necessary precision and does not, realistically or effectively, prevent impairment of “legitimate political expression.” Under the circumstances, only a requirement of actual participation in the illegal action would serve to separate action and expression in a manner consistent with the maintenance of free expression.

If this argument is accepted with respect to criminal punishment, one finds it hard to reject in the case of disabilities.

While a rule of specific intent has disadvantages, the alternatives are even less desirable. To permit imposition of disabilities on bare membership is both inequitable and dangerous for the political process. On the other hand, to forbid imposition of disabilities on any form of membership would be inconsistent with Scales: it makes no sense to protect conduct against a relatively minor sanction when it can be criminally punished. Furthermore, if the Court is indeed moving toward a classificatory approach to the first amendment, the adoption of a rule of intent is virtually compelled. The essence of classification is the attempt to define an area of “protected” conduct which may be engaged in without fear of governmental interference of any kind. In order for such an area to exist, it must be defined independently of particular forms of “abridgement,” that is, in terms of general rules applicable whether the abridging action is civil or criminal. The requirement that there be a single definition of protected association posed a problem for a classificatory treatment of disabilities. One solution would have been to disregard Scales and develop a new rule applicable to both kinds of sanctions. The more sensible course was the one adopted: Scales is preserved and its rule extended to cover civil disabilities as well as criminal punishment.