BOOK REVIEW

ZECHARIAH CHAFEE, JR., DEFENDER OF LIBERTY AND LAW. By Donald L. Smith†

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Reviewed by Lynne Wilson*

CHAFEE, EQUITY, AND FREE SPEECH THEORY

> When I am loafing around on my boat, or taking an inordinately large number of strokes on the golf course, I occasionally think of these poor devils who won't be out for five or ten years and want to do a bit to make the weight of society a little less heavy on them.
> —Zechariah Chafee, Jr., referring to jailed members of the Industrial Workers of the World, 1923.[1]

I. INTRODUCTION

Zechariah Chafee, Jr., once achieved the singular distinction of being named to Senator Joseph McCarthy's list of seven persons "most dangerous to the United States."[2] It is difficult to imagine a more unlikely candidate for the honor. Born in 1885 into a family of wealthy Rhode Island industrialists,[3] a Harvard law professor at age 30,[4] and an author of textbooks on equity and the federal Interpleader Act,[5] Zechariah Chafee,

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1. Letter from Zechariah Chafee, Jr. to Sayre MacNeil (Oct. 9, 1923), *quoted in* D. SMITH, ZECHARIAH CHAFEE, JR., DEFENDER OF LIBERTY AND LAW 2 (1986) [hereinafter SMITH].

2. *Id.* at 270.

3. *Id.* at 2.

4. *Id.* at 7.

5. *Id.*

Jr., led a patrician's life. His closest brush with political extremism was his membership in the Providence "Radical Club," a sponsor of lectures on topics such as oleomargarine legislation.[6]

If Chafee seemed dangerous to McCarthy, the danger stemmed from Chafee's vigorous defense of those more radical than he. His commitment to free speech law and scholarship, particularly his outspoken defense of political radicals during World War I,[7] made Chafee famous. Without his classic 1920 book, *Freedom of Speech*, however, Chafee might have only merited a long footnote in legal history. With it, Chafee established himself as both "the nation's first great scholar of free speech,"[8] and incidentally as the object of a voluminous FBI file by which J. Edgar Hoover followed his movements for almost 40 years.[9]

Based in part on excerpts from Hoover's file, Professor Donald Smith's biography, *Zechariah Chafee, Jr., Defender of Liberty and Law*, chronicles Chafee's remarkable life with a thoroughness and respect that verges on, but fortunately never crosses over into, awe. It is a well-written and meticulously researched book. Smith focuses primarily on Chafee's public life, but also addresses Chafee's darker family life, addressing the latter with sensitivity. He includes, for example, descriptions of both Chafee's and his wife's nervous breakdowns, and his son's suicide, handling each in a compassionate, rather than lurid, manner.[10] Some of Smith's chapters deal, of necessity, with relatively dry topics such as the Interpleader Act.[11] But Smith's fluid, lively writing style, and his obvious affection for his subject, make for overall fascinating reading.

Professor Smith goes beyond a mere narrative of Chafee's life, however, and occasionally flounders in the attempt. Smith's personal interest in journalism and press freedoms[12] is

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6. *Id.* at 48.

7. The state of free speech during World War I was so sorry that one federal judge ordered the seizure of a film about Paul Revere's ride because it might indirectly slacken support for Great Britain, an ally. United States v. Motion Picture Film The Spirit of '76, 252 F. 946 (D.C.S.D. Cal. 1917).

8. SMITH, *supra* note 1, at 16.

9. Irons, *"Fighting Fair": Zechariah Chafee, Jr., The Department Of Justice, And The "Trial at the Harvard Club,"* 94 HARV. L. REV. 1205 (1981). Hoover kept a file on Chafee until his death in 1956. SMITH, *supra* note 1, at 270-71.

10. SMITH, *supra* note 1, at 190-93.

11. *Id.* at ch. 8, "Pushing a Stone up Capitol Hill."

12. Smith previously published an article on Chafee's ideas regarding these

reflected in the chapters he devotes to Chafee's significant contributions in these areas. As a result, the two chapters dealing with Chafee's "Public Service Theory of the Press"[13] and his work on the United Nations' Subcommission on Freedom of Information and of the Press[14] are insightful and interesting. But when Professor Smith ventures into an analysis of Chafee's free speech "balancing jurisprudence," the result is, in many respects, unsatisfying.[15]

Zechariah Chafee, Jr., was first and foremost an equity specialist. He neither studied nor taught constitutional law at Harvard.[16] Chafee's efforts, however, served as the primary catalyst in the Supreme Court's adoption of "clear and present danger" as a test for determining when speech falls outside the protection of the first amendment.[17] He did so on the basis of a balancing technique that for the most part ignored the sensitive political values and relationships that the first amendment embodies.[18]

Smith makes much of Chafee's promotion of balancing as a panacea for most legal problems, and early in the book he recognizes that since Chafee "formulated no general philosophy of law," interest balancing filled the void.[19] Smith claims that this reliance on balancing simply reflects Chafee's conservative personality and "the age in which he lived."[20] What is unsatisfying about this approach is that Smith opens, but never examines, the implications that Chafee's almost mechanical reliance on balancing had on the "clear and present danger" test and the form of free speech balancing it represents.

The purpose of this book review is not to show that this void necessarily stems from a flaw in Professor Smith's analy-

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subjects. Smith, *Zechariah Chafee, Jr. and the Positive View of Press Freedom*, 5 JOURNALISM HIST. 86 (Autumn 1978).

13. The "Public Service" theory, while not advocating government ownership of media, calls for the media to carry as many diverse views as possible in light of the dwindling number of voices in the market. SMITH, *supra* note 1, ch. 5, "A Public Service Theory of the Press." *See also* Z. CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS (1947) [hereinafter CHAFEE, GOVERNMENT]; SMITH, *supra* note 1, ch. 10, "Free Speech in the United Nations."

14. SMITH, *supra* note 1, ch. 10, "Free Speech in the United Nations."

15. *See also* Book Note, 22 HARV. C.R.-C.L. L. REV. 184 (1987).

16. SMITH, *supra* note 1, at 2.

17. Chafee's book, FREEDOM OF SPEECH (1920) is essentially a brief in support of the "clear and present danger" test. SMITH, *supra* note 1, at 32.

18. SMITH, *supra* note 1, at 32.

19. *Id.* at 5.

20. *Id.*

sis. Smith makes no pretense of being an attorney, and his book is, after all, a biography and not a treatise. Rather, this review's purpose is to fill the void in Professor Smith's book by proposing that the central problem with Chafee's free speech ideas, and perhaps one problem with the "clear and present danger" test itself, lies in Chafee's reliance on common law and equity balancing concepts, rather than political theory.

II. CHAFEE, EQUITY, AND THE ROOTS OF THE "CLEAR AND PRESENT DANGER" TEST

One summer afternoon in 1919, Chafee sat down with Justice Oliver Wendell Holmes, Jr., over tea. On the table for discussion was the first amendment defense being raised by radicals in the Espionage Act cases then reaching the Supreme Court.[21] Chafee came to Holmes on a crusade to lessen the harsh sentences being imposed on those who spoke out against World War I, those who in Chafee's words, "start life with less money and get a little angrier and a little more extreme."[22]

Holmes came to tea fresh from his majority opinion in *Schenck v. U.S.*,[23] which contains the original "clear and present danger" language.[24] Chafee clearly wanted the somewhat indifferent Holmes[25] to lift "clear and present danger" from the level of a passing observation, to a test that could be given

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21. *Id.* at 30. *See also* Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 594 n.449 (1981) [hereinafter Rabban] (detailing the Holmes/Chafee meeting). English socialist Harold Laski, then at Harvard, arranged the meeting. Laski's free speech theories included complete freedom for radical left-wing ideas. H. LASKI, LIBERTY IN THE MODERN STATE (1930); H. LASKI, AUTHORITY IN THE MODERN STATE (1919) [hereinafter LASKI, AUTHORITY]. For Chafee's view of Laski, see Chafee, *Harold Laski and the Harvard Law Review*, 63 HARV. L. REV. 1398 (1950).

22. SMITH, *supra* note 1, at 2.

23. 249 U.S. 47 (1919) (upholding conspiracy convictions for mailing pamphlets opposed to the draft). The Espionage Act of June 15, 1917, 40 Stat. 217 (1917), went into effect on June 15, 1917. The Act criminalized, among other things, the mere attempt to cause disloyalty in the military forces or to obstruct recruiting. A crime that was punishable by twenty years in prison. An amendment, the Sedition Act, 40 Stat. 553 (1918), effective May 16, 1918, made simple opposition "by word or act" to the cause of the United States in the war punishable by twenty years in prison.

24. *Schenck*, 249 U.S. at 52 ("The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

25. *See, e.g.*, Letter from Oliver Wendell Holmes, Jr. to Learned Hand (June 24, 1918) (included in appendix to Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 756-57 (1975) [hereinafter Gunther] ("[f]ree speech stands no differently than freedom from vaccination")).

to juries whenever a defendant raised a first amendment defense.[26] Chafee wanted each case to rest, as in the common law of criminal attempts, on a factual finding that the words or expressions used either did or did not create a "clear and present danger" of producing an unlawful overt act.[27]

Holmes at first told Chafee that he did "not think it possible to draw any limit to the first amendment."[28] His dissenting opinion in *Abrams v. U.S.*, a few months later, however, shows that he soon yielded to Chafee's call for a more protective free speech position.[29]

Chafee, a Harvard equity professor, entered the world of World War I radical free speech by accident. His love of equity, with its flexibility and concern for individual fairness, initially drew him to the first amendment. While preparing a third year equity course at Harvard in 1916, Chafee encountered his first free speech case, *Brandreth v. Lance*.[30] With his curiosity piqued, Chafee proceeded to read the existing cases on prior restraint and free speech limitations. When the Espionage and Sedition Act cases began reaching the federal courts, Harold Laski, then visiting professor at Harvard, suggested that Chafee write an article on the subject for *The New Republic*. The article appeared as "Freedom of Speech" in the November 16, 1918 issue; a shorter version of his later law review article, "Freedom of Speech in War Time."[31]

As free speech theorists go, Zechariah Chafee, Jr., was out of the ordinary. He relied on criminal law and on equity bal-

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26. Judges' instructions then contained variations of the doctrine of "indirect causation" which gave juries, their members of whom were often in the throes of war hysteria, the discretion to convict for relatively minor moral or ethical infractions. United States v. Rose Pastor Stokes, Bulletin Dept. Justice No. 106 (W.D. Mo. 1917) (writing an objectionable letter to the sweetheart of a serviceman).

27. SMITH, *supra* note 1, at 29.

28. *Id.* at 30.

29. 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting) ("[B]y the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forth with certain substantive evils that the United States constitutionally may seek to prevent. . . ."). The dissent was joined by Justice Brandeis. *See generally* Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AMER. HIST. 37, 43-45 (1971).

30. 8 Paige Ch. 24 (N.Y. Ch. 1839). In *Brandreth*, the proprietor of "Brandreth's Vegetable Universal Pills" was denied an injunction against the circulation of a gross libel.

31. 32 HARV. L. REV. 932 (1919) [hereinafter Chafee, *War Time*]. Chafee's article reached Holmes via Laski before their summer meeting.

ancing concepts, which suggests that he had no constitutional theory at all. He premised all of his free speech arguments on the basic equity concept that only interests, and not rights, could be balanced.[32] He emphasized, as Smith notes, that it was "useless to try to define free speech in terms of rights."[33] In doing so, Chafee chose to neglect the political theories of limited governmental power and inherent individual rights on which the Constitution, and specifically, the Bill of Rights are founded.[34]

III. LAW AS EQUITY, EQUITY AS THEORY

Smith aptly titles the prologue to *Zechariah Chafee, Jr., Defender of Liberty and Law*, "The Reluctant Civil Libertarian." For although Felix Frankfurter assessed Chafee's influence in the field of civil rights as having " 'no match in the legal professoriate,' "[35] Chafee, according to Smith, once said that he originally possessed "no enthusiasm or even interest in the importance of free speech," that it was "an acquired taste like olives."[36] Further, his legal interests and passions centered for his entire life on commercial, not constitutional, law: he often stated that he cared more about Bills and Notes than about free speech.[37]

Equity was Chafee's greatest love as a teacher, and his equity courses at Harvard were those for which he is most remembered.[38] Some experts, notes Smith, argue that Chafee's contributions to equity scholarship surpass his free speech work.[39] Equitable remedies, such as injunctions, appealed to Chafee's belief that the law should be flexible in its response

32. Z. CHAFEE, JR., FREEDOM OF SPEECH 34 (1920); SMITH, *supra* note 1, at 27.

33. SMITH, *supra* note 1, at 27.

34. *See, e.g.*, J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833). For a modern definition of political theory, *see* L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 154 (1986) ("an abstract description of the world as it is or ought to be").

35. Quoted without citation in a letter from Chesley Worthington to the *Providence Journal* (June 1, 1968). SMITH, *supra* note 1, at 1.

36. SMITH, *supra* note 1, at 2.

37. *Id.* at 272. Most telling in this regard was the statement Chafee made toward the end of his life that he considered his drafting of the federal Interpleader Act of 1936, 28 U.S.C. §§ 1335, 1387, 2361 (1986), "the accomplished task to which I look back most gladly." SMITH, *supra* note 1, at 7. Smith devotes an entire chapter to Chafee's successful efforts in promoting the Act's passage. *See* SMITH, *supra* note 1, ch. 8, "Pushing a Stone up Capitol Hill."

38. SMITH, *supra* note 1, at 125.

39. *Id.* at 277.

to varied and changing human activities.[40]

Smith acknowledges, as noted above, that Chafee originally ventured into free speech law through "his teaching of the venerable subject of equity,"[41] and he also focuses repeatedly on how Chafee, true to his spirit as an equity lawyer, believed "that most legal problems should be solved by balancing interests."[42] Although Smith states that "[t]hroughout his four decades of First Amendment scholarship, Chafee was unwavering in his commitment to the concept of balancing interests,"[43] he downplays equity's role in the formation of Chafee's approach to free speech. For example, although Smith acknowledges the similarity between the central process in equity proceedings known as "the balance of convenience,"[44] and Chafee's advocacy of a first amendment balancing test, he quickly dismisses any meaningful connection between the two by saying that interest balancing was developed to apply "to numerous legal problems other than those in equity."[45]

That Chafee and others, such as his mentor, Roscoe Pound, called for using equity's flexibility in other legal fields in no way negates the meaning equity had for Chafee in the field of free speech.[46] Equity's theory, according to Pound, is a "discretionary interference with the operation of general rules in order to do justice in particular cases."[47] According to Story, equity theory "is so extensive and various, that every particular case in equity may be truly said to stand upon its own par-

40. *Id.* at 165-67. Smith defines equity as "a kind of judicial sandpaper for smoothing the rough edges of the law." *Id.* at 165.

41. *Id.* at 164-65.

42. *Id.* at 5. For more on Chafee's views on balancing and legal theory, see *id.* at 87, 168.

43. *Id.* at 86.

44. In "balancing the conveniences" or "balancing the equities," a court of equity determines whether to exercise its discretion to grant or refuse an injunction. In doing so, a court balances "all of the equities, which include not only the relative hardships to the parties, but their conduct with reference to the transaction, the nature of the interests affected, and the relative proportion of the interests of each that will be lost by whichever course of action is taken." H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 144 (1948).

45. SMITH, *supra* note 1, at 166.

46. Chafee's own definition of equity illuminates its meaning to him: "Equity is a way of looking at the administration of justice; it is a set of effective and flexible remedies admirably adapted to the needs of a complex society; it is a body of substantive rules." Z. CHAFEE, JR., *foreword to* Z. CHAFEE, JR., SELECTED ESSAYS ON EQUITY iii (1955).

47. Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 21 (1905).

ticular circumstances."[48] It is, therefore, no coincidence that Chafee disregarded the concept of a constitutional right in his effort to define the boundary line of free speech, and focused instead on the need "to go behind legal rules to human facts,"[49] as well as on the notion that "clear and present danger" ought to be gleaned from the circumstances of each particular case.

Although Chafee made an effort to infuse his free speech ideas with the "discovery and dissemination of truth" as the "meaning" or core value in the first amendment,[50] he put little analytical flesh on that doctrinal skeleton. Chafee was a pragmatist, not a philosopher; he never believed in abstract standards of justice or in the various doctrines of natural law.[51] Equity was to Chafee what political theory was to Spinoza,[52] Locke,[53] Laski,[54] and Meiklejohn,[55] and what normative values were, or are, to other free speech theorists such as J. S. Mill[56] or Edwin Baker.[57] Equity, with its vague and open-ended standards, occupied the core of Chafee's approach to free speech.

IV. CHAFEE AS PRAGMATIST AND PHILOSOPHER

A. The Search for a Flexible Standard

What counted most in Chafee's world, whether he was delving into free speech, torts, interpleader, or evidence law was the search for practical standards and principles.[58] As

48. J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 11 (14th ed. 1918).

49. SMITH, *supra* note 1, at 27.

50. *Id.* at 28.

51. *Id.* at 103.

52. *See, e.g.*, Spinoza, *Tractatus Theologico-Politicus*, *reprinted in* THE POLITICAL WORKS ch. 20, "That In A Free State Everyone May Think What He Pleases, And Say What He Thinks" (A. Wernham ed. 1958).

53. *See, e.g.*, J. Locke, *An Essay Concerning Human Understanding* (1690), *reprinted in* THE WORKS OF JOHN LOCKE 103-04 (T. Tess ed. 1963) ("[i]t would me thinks become all men to maintain peace and the common offices of humanity and friendship, in the diversity of opinions.").

54. *See, e.g.*, LASKI, AUTHORITY, *supra* note 21, at 47-48 (the goal of the state is to satisfy the desires of its members; the right of free expression is essential if those desires are to be made known).

55. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1948) [hereinafter MEIKLEJOHN].

56. *See, e.g.*, J. MILL, ON LIBERTY (1859), *reprinted in* THE WORLD'S CLASSICS (Oxford Univ. Press 1971) [hereinafter ON LIBERTY].

57. *See, e.g.*, E. Baker, *Scope of The First Amendment Freedom of Speech*, *reprinted in* CONSTITUTIONAL GOVERNMENT IN AMERICA (Collins ed. 1980).

58. *See, e.g.*, Chafee, *The Reacquisition of a Negotiable Instrument by a Prior Party*, 21 COLUM. L. REV. 538, 538 (1921) ("abnormal state of facts . . . have a fascination far beyond their practical importance, for they elucidate the principles

Smith remarks, the difference between first amendment law, where the "right rule" may never be discovered, and property law, with its precise rules such as the Rule Against Perpetuities, "frustrated [Chafee] for the rest of his life."[59]

In his 1919 law review article, "Freedom of Speech in War Time,"[60] Chafee searched for such a standard and found one in the "clear and present danger" test. In terms of its influence, the article is his most significant one, especially since his later free speech writings never really developed the ideas first articulated in the 1919 article. In an effort to convince Holmes that the first amendment framers meant to do more than simply abolish prior restraints,[61] Chafee, somewhat superficially, concluded that the framers also meant to do away with the English common law of seditious libel.[62] Chafee's historic definition of free speech now seems erroneous in the face of historical evidence to the contrary.[63] But that idea is less significant than the way Chafee infused Holmes' "clear and present danger" language with a libertarian meaning it did not originally possess.[64]

An unusual aspect of "Freedom of Speech in War Time" is that it parallels the methodology Chafee set out in his first Harvard Law Review article published two years before.[65] Smith describes this methodology as an example of Chafee's "middlingness."[66] After promoting law as a "scientific" means of solving the problems of human life and social adjustment, Chafee sets out a "proper methodology for the legal text

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governing the normal situation, just as the behavior of a pigeon with a portion of its brain removed makes it easier to understand how an unmutilated bird flies straight").

59. SMITH, *supra* note 1, at 28. *See* Chafee, *War Time*, *supra* note 31, at 960 ("We cannot define the right of free speech with the precision of the Rule against Perpetuities or the Rule in Shelley's Case, because it involves national policies which are much more flexible than private property. . . .").

60. Chafee, *War Time*, *supra* note 31.

61. Schenck v. United States, 249 U.S. 47, 51-52 (1919). In *Schenck*, Holmes reiterated his position that the "main purpose" of the free speech and press clause was only to do away with prior restraints.

62. *See* Chafee, *War Time*, *supra* note 31, at 946.

63. L. LEVY, THE EMERGENCE OF A FREE PRESS 281 (1985) (contrary to Chafee's assertion that by ratifying the first amendment, the framers meant to do away with the English common law of seditious libel, historical evidence favors the opposite conclusion).

64. Rabban, *supra* note 21, at 590, 594 n.449.

65. Chafee, Book Review, 30 HARV. L. REV. 300 (1917) (reviewing H. BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS (1916)).

66. SMITH, *supra* note 1, at 87.

writer."[67] Three steps are involved. First, the writer should gather all the case precedents as "illustrations of principle."[68] Second, the reasons for and against proposed methods should be drawn from judicial opinions, scholars, lay thinkers, and facts, and then classified.[69] Third, these reasons "should be weighed and balanced to determine a proper rule, a solution of the problem originally set."[70]

The purpose of this exercise was not illumination or knowledge, but the search for a "better solution."[71] In this sense, Chafee was more of a pragmatist and less of a philosopher. He later stated, in another context, that he saw all law as merely "a mechanical tool."[72]

Chafee's approach to legal decision-making may simply be a reflection of his identity as an "equity lawyer at heart," with a taste for "fair, simple, and effective legal machinery."[73] But it is significant that he attacked a free speech problem in the same way that he attacked a tort problem.[74] To Chafee, cases like *Debs v. United States*[75] and *Abrams v. United States*[76] posed a specific free speech "problem" that needed a specific solution: finding the proper flexible standard.[77]

At the time, Chafee could have chosen between two proposed methods: Learned Hand's direct incitement test[78] and Pound's "balancing test."[79] Hand's test was, in essence, a strict liability standard in which a defendant's first amendment

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67. Kaplan, *Zechariah Chafee, Jr., Private Law Writings*, 70 HARV. L. REV. 1345, 1346 (1957) [hereinafter Kaplan].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. CHAFEE, GOVERNMENT, *supra* note 13, at 701.

73. Kaplan, *supra* note 67, at 1349.

74. *Id.* at 1348. *See generally* Chafee, *Equitable Relief Against Torts*, 34 HARV. L. REV. 388 (1921).

75. 249 U.S. 211 (1919).

76. 250 U.S. 616 (1919).

77. Chafee, *War Time*, *supra* note 31, at 960 ("Thus our problem of locating the boundary line of free speech is solved."). Chafee meant "rule" in the sense of a "standard," to be applied not mechanically, but "upon intuition" to the facts of each case.

78. *Id.* at 960-67 (discussion of Hand's test). Hand's "direct incitement" test came from his decision in Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (only words that constituted a "direct incitement to violent resistance" could be subject to liability). On appeal, the Second Circuit reversed *Masses*, 245 F. 102 (2nd Cir. 1917).

79. Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915) [hereinafter Pound, *Interests*].

defense failed if his words, no matter what the context, directly incited some unlawful act. Pound's balancing test, on the other hand, weighed the "social interest in the security of social institutions" with the "individual interest in free belief and opinion" according to the circumstances presented in each case.[80] Chafee, according to his own prescribed method, combined the two tests into a proposed test in which speech could only be punished by the state if, under the circumstances, it created a "clear and present danger" of unlawful overt acts.[81] That he combined them in such a manner is both a measure of his pragmatism and the low priority he placed on articulating either free speech values,[82] or devising a coherent political theory.[83]

B. Chafee, Hand, and Holmes

Although Smith describes the events surrounding the 1919 Espionage Act cases,[84] he does not analyze what happened between Chafee, Holmes, and Hand. Instead, Smith merely describes how the ideas of Hand and Holmes influenced Chafee's efforts to "solve" the free speech problem of "where to draw the line between permissible and punishable speech."[85] Smith carefully summarizes Hand's proposed "direct incitement" test and the practical problems associated with it,[86] as

80. *Id.* at 454-56.

81. Chafee, *War Time*, *supra* note 31, at 967-69; *see also* Rabban, *supra* note 21, at 588.

82. Gunther, *supra* note 25, at 736 ("in its origin, clear and present danger reflected neither special sensitivity to free speech values nor special concern for tailoring doctrine to implement those values"). *See also* Frank, *Hugo L. Black: Free Speech and The Declaration of Independence*, 2 U. ILL. L. REV. 577, 593 (1977) [hereinafter Frank] ("without Holmes' personal verve and sparkle, this emotionless concept could never have achieved legal currency").

83. In contrast, Learned Hand had a political theory: Public opinion, no matter how intemperately expressed, was "the final source of government" in a democratic state. Words that have no "purport but to counsel the violation of law" fall outside the scope of that legitimate public opinion. *Masses*, 244 F. at 540.

84. SMITH, *supra* note 1, at ch. 1, "Early Years with Freedom of Speech." Of the three cases decided in April 1919, only one, *Schenck*, actually contained the "clear and present danger" language. In the other two the court arguably attempted to uphold the convictions while at the same time moving slightly away from the idea that the free speech clauses only protected prior restraints. Schenck v. United States, 249 U.S. 47, 52 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211, 214-15 (1919) (jury could find that Deb's speech opposing the war "was so expressed that its natural and intended effect would be to obstruct recruiting").

85. SMITH, *supra* note 1, at 22-25.

86. Hand's test focuses exclusively on the words spoken and ignores the surrounding circumstances. The main problem with it, as Smith notes, is "the so-

well as Holmes' "clear and present danger" test. Smith identifies the key problem associated with the "clear and present danger" test by quoting Paul Freund.

> No matter how rapidly we utter the phrase "clear and present danger" or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.[87]

Unfortunately, Smith's treatment is cryptic, merely noting the existence of the problem before moving on. Implied in the 1918-1921 correspondence among the three[88] is that Chafee and Holmes on the one side, and Judge Hand on the other, spoke two different philosophical languages with regard to free speech. On the surface, their dialogue appeared to deal with the question of which test, "clear and present danger" or "direct incitement," was better.[89]

On a deeper level, however, Chafee and Holmes spoke the language of pragmatic utilitarianism: a tenuous belief in attaining both "truth through discussion" and the ability of fact-finders to apply contextual standards in the individual case to identify when speech is dangerously close to causing an unlawful overt act.[90] In contrast, Hand based his "direct incitement" approach on both a more skeptical view of the structure of the democratic state and a deep distrust of juries and judicial review.[91] To Hand, a democratic government derived its authority from the public will. Therefore, as long as free speech expresses the public will, the government is obligated

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called Mark Anthony" situation, "in which words that do not directly incite nevertheless lead to incitement because of the context." SMITH, *supra* note 1, at 23. The "direct incitement" test is, however, considered as more protective of speech by some. Gunther, *supra* note 25, at 729.

87. SMITH, *supra* note 1, at 24 (quoting P. FREUND, THE SUPREME COURT OF THE UNITED STATES 44 (1961)).

88. *See* Gunther, *supra* note 25, app. at 755-73 (letters between Holmes and Hand, and Chafee and Hand).

89. *Id.* at 773. Letter from Chafee to Hand (March 28, 1921) ("[w]e ought to take the best test we can even though it will sometimes break down").

90. Both Chafee and Holmes intended juries to apply the "clear and present danger" test as a rule of evidence. That was not true for Hand. Strong, *Fifty Years of 'Clear and Present' Danger: From Schenck to Brandenburg and Beyond*, 1969 SUP. CT. REV. 41, 44-45 (1969).

91. Gunther, *supra* note 25, app. at 765-66. Letter from Hand to Chafee (January 8, 1920) ("I think it is precisely at those times when the freedom of speech becomes important as an institution, that the protection of a jury on such an issue is illusory.").

to tolerate the most extreme forms of speech. The only speech that is outside the scope of constitutional protection is speech that counsels a direct violation of the state's law.[92]

Although Learned Hand was less of a free speech absolutist than Hugo Black, William O. Douglas, or Alexander Meiklejohn, his early correspondence with Chafee clearly indicates that Hand proposed a core of protected political speech on what commentators have called "idealist" or "contractarian"[93] grounds. In his early theory, Hand, unlike Chafee, gave no credence to historical intent or balancing.[94] Hand's overriding value was maintaining and strengthening the contract between the government and the governed in a democratic state.

This was not the case with Chafee. While Hand used philosophy and structure to determine the meaning of free speech, Chafee used the basic tools of equity balancing.[95] Although Chafee attempted to infuse meaning into the free speech clause through historical intent, the effort ultimately proved to be illusory.[96] Chafee's "clear and present danger" test lacked substance from other sources as well. In contrast to absolutists such as Black,[97] he ignored the text,[98] and paid little

92. *Id.*

93. Frank, *supra* note 82, at 590; A. BICKEL, THE MORALITY OF CONSENT 3 (1975).

94. Hand transformed his test into a much less protective one by the time of Dennis v. United States, 341 U.S. 495 (1951). *See* Gunther, *supra* note 25, app. at 752.

95. SMITH, *supra* note 1, at 86 ("Throughout his four decades of first amendment scholarship, Chafee was unwavering in his commitment to the concept of balancing interests.").

96. Regarding history, see LASKI, AUTHORITY, *supra* note 21; Chafee, *War Time*, *supra* note 31, at 945. *See also* Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949) (reviewing A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)) [hereinafter Chafee, Book Review] ("The truth is, I think that the framers had no very clear idea as to what they meant by 'the freedom of speech or of the press.' ").

97. Black first openly announced his absolutist approach to free speech in Dennis v. United States, 341 U.S. 494, 579-81 (1951) (Black, J., dissenting). The *Dennis* majority used what Chafee called a "clear and probable danger" test to uphold convictions of communist party members under the Smith Act. CHAFEE, GOVERNMENT, *supra* note 13, at 59. Although Smith briefly notes that Chafee did not view the first amendment's "no law" commandment as an absolute, he does not mention Justice Black's absolutism or its relationship to "clear and present danger." SMITH, *supra* note 1, at 22. Evidence supports the idea that *Dennis* was the case that made Black an absolutist. *See, e.g.*, Collins, *Mr. Justice Black, Some Passing Observations* (Book Review), 9 PEPPERDINE L. REV. 287, 292 (1981).

98. Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 404 (1941) ("When those [i.e., the framers] who used words contemplated their long continued application, these words must eventually acquire a new content, [like] Robert Browning, [who, when asked about whether an obscure early poem had a certain meaning] said, 'I didn't mean that when I wrote it, but I mean it now.' ").

attention to the more "contractarian" theories of Hand and others. With so little to give the test meaning, free speech for Chafee came down to balancing, or in a word, equity. Thus, the first amendment was reduced to a variation of common law.

C. Truth, Equity, and Balancing

Chafee encapsulated what he considered the "true meaning of freedom of speech" in one paragraph that never varied from his 1918 *New Republic* article to his final 1941 version of *Free Speech in the United States*.[99] In two sentences, Chafee stated the key elements of his free speech philosophy: first, that "the discovery and spread of truth" was one of the most important purposes of the state; and, second, that if government throws force into the argument, then "it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest."[100]

Chafee's version of a "truth" contest seems to be a simplistic combination of the thought of Milton[101] and his own rendering of Walter Bagehot's evolutionary notion of truth as that obtained through public discourse.[102]

Throughout the remainder of his career, Chafee, unlike his somewhat equivocal statements about historical intent, never backed away from an idealistic notion of truth.[103] Unlike Holmes,[104] Locke,[105] and Mill,[106] for whom "truth" was

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99. SMITH, *supra* note 1, at 27.

100. Chafee, *War Time*, *supra* note 31, at 956.

101. J. MILTON, AREOPAGITICA (1644) ("Let [Truth] and Falsehood grapple; whoever knew Truth, put to the worst, in a free and open encounter."). *See also* Comisky, Book Review, 90 U. PA. L. REV. 636, 637 (reviewing Z. CHAFEE, JR., FREEDOM OF SPEECH IN THE UNITED STATES (1941)). Comiksy attributes Chafee's view of truth to Milton.

102. Chafee, *War Time*, *supra* note 31, at 956 n.79, (citing W. BAGEHOT, THE METAPHYSICS OF TOLERATION (1884)) ("No government is bound to permit a controversy which will annihilate itself; it is a trustee for many duties, and if possible it must retain the power to perform those duties."). *See also* F. CANAVAN, FREEDOM OF EXPRESSION 108 (1984) [hereinafter CANAVAN] ("To Bagehot, truth is the goal and discussion is the mode of arriving at it.").

103. *See, e.g.*, Z. CHAFEE, JR., THE BLESSINGS OF LIBERTY (1956) ch. 4, "Does Freedom of Speech Really Tend to Produce Truth?" (advocating that freedom of discussion "contributes indirectly to truth by hastening a sound decision on a public issue").

104. Gunther, *supra* note 25, app. at 757. Letter from Holmes to Hand (June 24, 1918) ("I don't bother about absolute truth or even inquire whether there is such a thing . . . .").

105. J. LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING (P. Nidditch rev. ed.

a relative, contingent, or perhaps even an irrelevant concept, for Chafee, truth gave staying power to an idea of free speech largely devoid of any theory. Nevertheless, "truth" was never a normative value for Chafee, either in the sense of serving a moral purpose, i.e., the uplifting of mankind, or in the sense of imposing definitional limits; the attainment of "truth" served only an instrumental need of the state, that of making "sounder decisions."[107] Since for Chafee, the purpose of speech was solely instrumental, a government's need for "truth" or "better decisions" may be outweighed by other purposes.[108]

The individual's interest in free speech was never completely eliminated from Chafee's balancing scheme. But Chafee's crude version of balancing, especially as reflected against that of J. S. Mill or the more modern "ad hoc" balancers, illuminated the lack of importance of the individual component. By contrast, Mill made individuality, and with it free expression, the core of his balancing methodology.[109] For Mill, the majority could suppress speech[110] only when the individual expressing himself through speech imposed significant harms on someone else, or destroyed another's individuality. Even then, Mill only permitted the state to suppress speech if it were useful to do so under the circumstances.[111] Some commentators call Mill an "ad hoc" balancer, but Mill threw nearly all the weight on the side of the individual, rather than the state.

This was not so with Zechariah Chafee, Jr. Although Chafee supported individual expression for its own sake, he sliced what others would call a free speech "right" in half: on

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1978) ("[i]ntuition and demonstration are the degrees of our knowledge; whatever comes short of one of these, and what assurance soever embraced it, is but faith, or opinion . . .").

106. ON LIBERTY, *supra* note 56, at 36 ("The dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat . . ., but which all experience refutes.").

107. Chafee, *War Time*, *supra* note 31, at 956-57. Not surprisingly, Chafee devotes little discussion to Plato's classic work, THE APOLOGY, on the tension between the pursuit of truth and the maintenance of any given political order.

108. *Id.* ("Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech.").

109. CANAVAN, *supra* note 102, at 93.

110. SMITH, *supra* note 1, at 95 (noting that Mill "anticipated the 'clear and present danger' test by distinguishing between 'other-regarding' actions that the state may regulate and 'self-regarding' ones that it may not").

111. CANAVAN, *supra* note 102, at 98-99.

one side, Chafee put the individual's need to express himself on "matters vital to [him] if life is to be worth living"; on the other, he placed what he labeled a "social interest in the attainment of truth," that would enable the country to take the wisest course of action, especially during time of war when the government was most in need of cross-examination.[112]

As Smith effectively documents in his chapter called "Interest Jurisprudence,"[113] Chafee borrowed this idea almost verbatim from Pound.[114] Pound's inspiration, in turn, came from the German legal scholar Rudolph von Jhering, who believed not in inherent, natural rights or individualism, but that the law "was something created by society through which the individual found a means of securing his interests."[115]

For Chafee, then, "balancing" meant weighing three competing interests: first, the individual interest in expression; second, the state's interest in obtaining the "truth" in order to make good decisions; and third, the state's other purposes, including that of securing national safety in time of war. He asserted that "the great trouble with most judicial construction of the Espionage Act is that . . . free speech has been regarded as merely an individual interest, which must readily give way . . . the moment it interferes with the social interest in national safety."[116]

Most striking, and bothersome, about Chafee's shift from a rights-based conception of free speech to "interest jurisprudence" is that it is based on the idea that an individual free speech "interest," as opposed to a "right," exists, in Pound's chilling words, "only so far as society recognizes" it.[117] The

112. Chafee, *War Time*, *supra* note 31, at 958.

113. SMITH, *supra* note 1, at 93.

114. Chafee, *War Time*, *supra* note 31, at 958 n.85 (citing Pound, *Interests in Personality*, 28 HARV. L. REV. 445, 453-56 (1915)).

115. Pound, *The Scope and Purposes of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 143 (1911).

116. Chafee, *War Time*, *supra* note 31, at 959. Unfortunately, Chafee never explores the inherent tension between the individual's interest in expressing him or herself, and the state's interest in hearing it. Chafee's main attack on Holmes during their early discussions was that Holmes paid no attention to the second interest and too much to the third. "[I]t is regrettable that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time." Chafee, *War Time*, *supra* note 31, at 968-69 (referring to Holmes' opinions in *Schneck*, *Frohwerk*, and *Debs*; *see supra* note 84). Holmes' dissent in Abrams v. United States, 250 U.S. 616 (1919), however, showed a greater awareness of the social purpose of free speech, as opposed to the individual purpose. *Id.*

117. Pound, *Interests*, *supra* note 79, at 143.

construed law, as written, seemed to matter little. Compared to Mill, Chafee focuses almost exclusively on the state and society; the individual, his free speech right now shrunken into a mere "interest," even if derived from equity, seems dwarfed. Moreover, when Chafee talks about balancing as a means of fixing the "true boundary line of the first amendment," he means balancing one state interest, that of obtaining "truth," against another, that of public safety.[118] Although this form of "balancing" is preferable to simply weighing the individual interest against that of national security, in an important sense, the analytical improvement is a minor one: the individual's needs are not only dwarfed, they are either irrelevant or the individual becomes simply a means to an end, rather than an end in himself.

D. Chafee and Modern Balancing Theory

The relative crudeness of Chafee's balancing methodology can be seen more clearly when it is compared with that of other "balancers." Professor Steven Shiffrin, for example, proposes that "balancing is nothing more than a metaphor for the accommodation of values."[119] By that, he means not only to describe what he calls the Supreme Court's "eclectic approach" to free speech law, but to applaud the Court's use of a "general balancing methodology."[120]

Although similarities exist between Chafee and Shiffrin,[121] the latter's balancing is more intricate and refined. Shiffrin "recognizes that the nature of social reality is too complex to expect that any single vision, value, or technique could meet the needs of society."[122] Unlike Chafee who holds out for some vague and largely undefined pursuit of "truth," Shiffrin holds that no single value, whether instrumental or normative,

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118. Chafee, *War Time*, *supra* note 31, at 959-60. *See also* Pound, *Interests*, *supra* note 79, at 455 n.99 (supporting holdings that restricted handbills, social meetings, news reports of crime, and salvation army parades as having sufficient social interests to outweigh individual ones).

119. Shiffrin, *Commentary*, 78 NW. U.L. REV. 1025, 1028 (1983) [hereinafter Shiffrin, *Commentary*].

120. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1251 (1983).

121. Shiffrin (like Chafee) recognizes the need for balancing a multiplicity of interests, not simply that of the state versus that of the individual. *Id.* at 1251-52.

122. *Id.* at 1252.

underlies first amendment methodology.[123] To Shiffrin, it is the concrete case that serves as a foundation, not some single abstraction.[124] While Chafee used interest balancing as a way to devise a flexible standard or guide to be applied in all free speech cases, Shiffrin uses balancing as an alternative to such "tests."[125] Although Shiffrin recognizes that a test such as "clear and present danger" might fit and even be useful in a particular context, it would only do so if it promoted or protected the values involved.[126]

While Shiffrin and Chafee both offer the flexibility of balancing as an approach to free speech, Chafee's flexibility was ultimately illusory. It was essentially derived from the equitable concept of balancing individual interests in each case rather than the accommodation of carefully articulated values. Furthermore, the flexibility Chafee offered was all too easily lost by the rigid, and questionable, distinctions he drew between the state's interests on one side and the individual's interest on the other. The interests of public safety, obtaining truth through public discussion, making wise decisions, and the expression of public opinion are not so easily capable of being conceptually enclosed for purposes of balancing.

V. CHAFEE, MEIKLEJOHN, AND THE COLLAPSE OF EQUITY AS THEORY

As a professional philosopher, Alexander Meiklejohn sensed these problems with Chafee's free speech ideas. Ironically, as Chafee himself noted,[127] Meiklejohn served as dean at Brown University while Chafee was an undergraduate there.[128] When Meiklejohn emerged late in life as a major first amendment theorist, he, the absolutist, and Chafee, the balancer, stood far apart on first amendment interpretation.[129]

In 1948, Meiklejohn attacked Chafee's free speech ideas

123. Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 955 (1978) [hereinafter Shiffrin, *Defamatory Non-Media Speech*].

124. Shiffrin, *Commentary*, *supra* note 119, at 1254 (the eclectic approach rejects all theories that exclude *any* free speech values, that give speech itself a premium value, and that require accommodation at a high level of abstraction).

125. Shiffrin, *Commentary*, *supra* note 119, at 1252.

126. Shiffrin, *Defamatory Non-Media Speech*, *supra* note 123, at 949-50 (analysis of the multiplicity of values involved in the context of advocacy of criminal law violations, i.e., cathartic release).

127. Chafee, Book Review, *supra* note 96, at 891.

128. SMITH, *supra* note 1, at 70-71.

129. *Id.* at 71.

and, in the process, demolished them.[130] For Meiklejohn, just as for Black and Douglas, the Constitution itself rejected Chafee's "common-law" type of balancing.[131] Meiklejohn was able to support the "clear and present danger" test as a free speech standard only when[132] he felt that it ceased to have any real political meaning.[133]

While it is true that Meiklejohn's own distinction between public and private speech[134] is itself problematic, once he entered the realm of absolutely protected public speech "the integrity of public discussion and the care for the public safety [were] identical."[135] Furthermore, Meiklejohn's development of the public-private distinction is, arguably, derived from the structure and substance of the Constitution itself; from a construction of the first and fifth amendments, as well as art. I, sec. 6.[136] Thus, whereas Meiklejohn identified the Constitution as a touchstone, Chafee's touchstone was equity.

Meiklejohn based his free speech theory on the idea "that the first amendment is centrally concerned with the protection of speech relating to self-government."[137] For Meiklejohn, unlike Chafee, balancing public discussion against public safety was impossible since, in a democracy, the party doing the speaking and the party doing the listening were one and the same.[138] For him, public safety is always strengthened, not threatened, by speech, even when those who were speaking, "if

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130. MEIKLEJOHN, *supra* note 55.

131. *Id.* at 56-57. *See* W. DOUGLAS, THE COURT YEARS 48 (1980) ("Black and I thought that all of the 'balancing' had been done by those who wrote the Constitution and the Bill of Rights."); *In re* Anastopolo, 366 U.S. 82, 111 (1961) (Black, J., dissenting) ("To 'balance' an interest in individual liberty means almost inevitably to destroy that liberty.").

132. Whitney v. California, 274 U.S. 357, 377 (1927) (J. Brandeis, concurring)

> No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for free discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify suppression.

133. MEIKLEJOHN, *supra* note 55, at 49 (If an emergency is required to justify suppression, by definition, public discussion has already broken down and "the moderator may, without violating the first amendment, declare the meeting adjourned."). *See also id.* at 48, "Mr. Justice Brandeis . . . has abandoned the idea of 'clear and present danger.' "

134. *Id.* at 34-38.

135. *Id.* at 57.

136. *Id.* at 34-35.

137. Shiffrin, *Defamatory Non-Media Speech*, *supra* note 123, at 916-17.

138. MEIKLEJOHN, *supra* note 55, at 57.

they had the power, would destroy our institutions."[139]

Meiklejohn went beyond critiquing Chafee's distinction between public interest and public safety. For him it was not simply that under a democratic system of self-government "the freedom of public discussion shall never be abridged,"[140] no matter how extreme the perceived danger. What Meiklejohn found most defective about Chafee's argument, what was most dangerously "hostile to the purposes of the Constitution,"[141] was that underlying Chafee's balancing was hidden a belief that men are simply incapable of governing themselves. Self-governing people can only self-govern if knowledge and understanding are elevated over every other possible interest, including public safety. Although Meiklejohn and Chafee both stressed the "search for truth" as a paramount free speech value, Meiklejohn elevated it to a position of unique and absolute authority.[142]

How little Chafee actually valued "truth" in the real world is illustrated by the astonishing examples of "hateful" or "bad" speech that he confidently asserted did not deserve protection: a newspaper that charges a mayor with bribery, or Ezra Pound broadcasting from "an Italian radio station that our participation in the war is an abominable mistake."[143] In a tribute to Chafee, a Harvard colleague, Ernest Angell, put it well when he said: "One might wish he had more boldly stated the case for the partial character of truth—the argument that modern societies function best, if haltingly, in a pluralism of choices, no one of which offers any guarantee of attaining immunity from error."[144]

Smith, in his discussion of Chafee and Meiklejohn, criticizes Meiklejohn's ideas, as Chafee did, on the basis that Meiklejohn was a philosopher, not a lawyer.[145] There is, however, a deeper distinction between the two. Chafee reacted defensively to Meiklejohn's critique of his ideas, and it is not

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139. *Id.*

140. *Id.* at 60.

141. *Id.* at 59.

142. *Id.* at 75. "The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."

143. Chafee, Book Review, *supra* note 96, at 898-99.

144. Angell, *Zechariah Chafee, Jr. Individual Freedoms*, 70 HARV. L. REV. 1341, 1344 (1957).

145. SMITH, *supra* note 1, at 90.

difficult to see why. While Meiklejohn's absolutist theory was based on structured, contractarian principles of self-government, Chafee's was based on an open-ended notion of equity balancing.

VI. CHAFEE AND THE LIMITS OF "CLEAR AND PRESENT DANGER"

Ultimately, as Smith notes, Chafee grudgingly recognized self-government as a value to be considered in balancing. In sharp contrast to Meiklejohn, however, Chafee would rate self-government as "only a small part of our lives."[146] By the time, Chafee came to this realization, his free speech ideas were the object of increasing attacks from others besides Meiklejohn.[147] In 1947, after one commentator expressed his disappointment that Professor Chafee had "chosen a canvas which is too small to include the whole of the scene with which he is concerned,"[148] Chafee was forced to concede that "the clear and present danger test is perhaps not generally valid" outside situations involving "political discussion and the fear of revolution."[149] It was left to others to show its validity beyond the arena of political discussion.

Thus, Chafee provided the catalyst for the "clear and present danger" test, but it was Holmes and Brandeis who did the difficult doctrinal work. After Chafee's publication of *Freedom of Speech* in 1920, which essentially reiterated his earlier views, Chafee ceased his involvement in its development.[150] It was Justice Brandeis, not Chafee, who first infused the test with a normative value, that of making men "free to develop their faculties."[151] As Smith notes, after assisting in its inception, Chafee—inexplicably, it seems, after such passionate involve-

146. Chafee, Book Review, *supra* note 96, at 900. *See also* SMITH, *supra* note 1, at 91.

147. *See, e.g.*, Howe, Book Review, 55 HARV. L. REV. 695 (1942) (reviewing Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941)).

148. *Id.* at 699.

149. CHAFEE, GOVERNMENT, *supra* note 13, at 57-58.

150. Whitney v. California, 274 U.S. 357 (1927). Brandeis sent Chafee a copy of the opinion with a note saying, "[Y]ou will see how much I have borrowed from you." Rabban, *supra* note 21, at 594 n.450.

151. *See, e.g.*, Fierst, Book Review, 51 YALE L.J. 708, 709 (1942) (reviewing Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941)). "Chafee's basic views on free speech during wartime have not changed in the eventful twenty-one years since his first book appeared." *Id.* at 709.

ment—ignored the area of civil liberties.[152]

Chafee's indifference, however, may be viewed in part as an understandable reaction to the unwarranted attacks he suffered in 1921[153] as a result of his earlier article criticizing the U.S. Justice Department's handling of *United States v. Abrams*.[154] In the article, Chafee made the statement that federal district Judge Henry Clayton[155] deliberately misled the jury. A number of Clayton's friends, influential Harvard alumni, mounted a vociferous effort to discredit Chafee,[156] resulting in a "trial" before a Harvard Law School Committee.[157] Chafee was narrowly cleared of the charges, by a vote of six to five. One more negative vote would have cost him his position, if not his career.

One detail illustrates the profound impact this experience had on Chafee's deepening interest in "clear and present danger" as an idea, perhaps blocking that interest forever. Immediately before the attack, Chafee wrote Learned Hand a letter[158] in which he proposed that Holmes' "clear and present danger" test be combined with Hand's "direct incitement" test to define the constitutional limits of free speech.[159] "Political agitation," urged Chafee in tones somewhat reminiscent of Meiklejohn, could never be the basis for criminal liability. Incitement to violation of the law, if non-political, could be criminally punished if it satisfied some form of "clear and present danger."[160]

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152. SMITH, *supra* note 1, at 3.

153. SMITH, *supra* note 1, ch. 2, "Justice Department Critic."

154. Chafee, *A Contemporary State Trial—The United States Versus Jacob Abrams, Et Al.*, 33 HARV. L. REV. 747 (1920).

155. Justice Clayton was a former United States Senator who during his tenure as a member of Congress drafted the Clayton Antitrust Act of 1914. *See* SMITH, *supra* note 1, at 38-39.

156. SMITH, *supra* note 1, at 40-41 (citing Irons, *"Fighting Fair": Zechariah Chafee, Jr., The Department Of Justice, And The "Trial at the Harvard Club,"* 94 HARV. L. REV. 1205 (1981)). The attacks were partly the result of a secret investigation of Chafee by the ambitious J. Edgar Hoover, who then headed the Justice Department's General Intelligence Division.

157. SMITH, *supra* note 1, at 55. The Committee included Justice Cardozo, who cast the deciding vote to clear Chafee of the charges.

158. Gunther, *supra* note 25, app. at 764 (Letter dated January 6, 1920).

159. *Id.* Hand responded by saying that he "prefer[red] a test based on the nature of the utterance itself." *Id.* at 765. Hand's test has been criticized as rigid and unworkable, since it would, for example, protect shouting " 'the men inside that jail tortured and killed my mother' in front of an unruly mob outside a jail." M. REDISH, FREEDOM OF EXPRESSION 188 (1984).

160. Gunther, *supra* note 25, at 754-55. Gunther argues that this test is now what is embodied in Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("the constitutional

This appeared to be the beginning of a new language. Less than a year after the public attacks began to mount, however, Chafee ceased the deepening discussion.[161] The irony is that Zechariah Chafee, Jr., defender of liberty and law, should succumb to silence.

VII. CONCLUSION

Whether Chafee was, or had the potential for becoming, a real free speech theorist may, at this point, be irrelevant. That he pushed the Supreme Court beyond "no prior restraint" as a measuring line for free speech was a monumental triumph. Professor Smith's book is worth reading if only for the story of Chafee's fascinating life.

Although Professor Smith emphasizes the importance of equity balancing in Chafee's life, he fails to recognize its importance in developing the free speech test for which Chafee is most remembered. "Clear and present danger," as a concept, as a standard, as a way of measuring the constitutional limits of protected speech, has led a difficult life since its inception.[162] At least part of this problem stems from its roots, through Chafee, in equity. Equity, with its flexible standards, its balancing process, and its open-ended "rules," may provide an excellent practical method of achieving "justice in the individual case." It was simply never meant to be a substitute for constitutional or political theory. It is this connection, this link, that Professor Smith fails to explain.

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guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

161. *Id.* at 721. Hand, too, in the early 1920's "gave up." Ironically, Hand's "direct incitement" test is now accepted by the United States Supreme Court. *See* National Association for the Advancement of Colored People, et al. v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (unless strong language actually and effectively incites lawless action, it "must be regarded as protected speech").

162. One commentator argues that the "clear and present danger" test should be used in individual cases only as an affirmative defense, rather than as a means of attacking the constitutionality of an otherwise valid statute. Linde, *"Clear and Present Danger" Re-examined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).