

The “gravity of the evil, discounted by its improbability” was found to justify the convictions.⁵⁰²

Balancing.—Clear and present danger as a test, it seems clear, was a pallid restriction on governmental power after *Dennis*, and it virtually disappeared from the Court’s language over the next twenty years.⁵⁰³ Its replacement for part of this period was the much disputed “balancing” test, which made its appearance the year before *Dennis* in *American Communications Ass’n v. Douds*.⁵⁰⁴ There the Court sustained a law barring from access to the NLRB any labor union if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government.⁵⁰⁵ Chief Justice Vinson, for the Court, rejected reliance on the clear and present danger test. “Government’s interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes, the substantive evil at which § 9(h) is aimed, are the

⁵⁰² In *Yates v. United States*, 354 U.S. 298 (1957), the Court substantially limited both the Smith Act and the *Dennis* case by interpreting the Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine, and by finding the evidence lacking to prove the former. Of *Dennis*, Justice Harlan wrote: “The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to ‘action for the accomplishment’ of forcible overthrow, to violence as ‘a rule or principle of action,’ and employing ‘language of incitement,’ id. at 511–12, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.” Id. at 321.

⁵⁰³ Cf. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965). See *Garner v. Louisiana*, 368 U.S. 157, 185–207 (1961) (Justice Harlan concurring).

⁵⁰⁴ 339 U.S. 382 (1950). See also *Osman v. Douds*, 339 U.S. 846 (1950). Balancing language was used by Justice Black in his opinion for the Court in *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), but it seems not to have influenced the decision. Similarly, in *Schneider v. Irvington*, 308 U.S. 147, 161–62 (1939), Justice Roberts used balancing language that he apparently did not apply.

⁵⁰⁵ The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person “who is or has been a member of the Communist Party” during the preceding five years to serve as an officer or employee of any union. § 504, 73 Stat. 536 (1959); 29 U.S.C. § 504. It was held unconstitutional in *United States v. Brown*, 381 U.S. 437 (1965).