speech cases, Justice Souter wrote: "It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established . . . . But we must be careful about substituting common assumptions for evidence when the evidence is as readily available as public statistics and municipal property evaluations, lest we find out when the evidence is gathered that the assumptions are highly debatable." [558]

Is There a Present Test?.—Complexities inherent in the myriad varieties of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any single standard for determining the presence of First Amendment protection. For certain forms of expression for which protection is claimed, the Court engages in "definitional balancing" to determine that those forms are outside the range of protection.[559] Balancing is in evidence to enable the Court to determine whether certain covered speech is entitled to protection in the particular context in which the question arises.[560] Use of vagueness, overbreadth, and less intrusive means may very well operate to reduce the number of occasions when questions of protection must be answered squarely on the merits. What is observable, however, is the re-emergence, at least in a tentative fashion, of something like the clear and present danger standard in advocacy cases, which is the context in which it was first developed. Thus, in *Brandenburg v. Ohio*,[561] a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terrorist means to achieve political change was reversed. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such

---

[558] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 459 (2002) (Souter, J., dissenting).

[559] Thus, obscenity, by definition, is outside the coverage of the First Amendment, Roth v. United States, 354 U.S. 476 (1957); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), as are malicious defamation, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court must, of course, decide in each instance whether the questioned expression, as a matter of definition, falls within one of these or another category. *See*, *e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

[560] *E.g.*, the multifaceted test for determining when commercial speech is protected, Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566 (1980); the standard for determining when expressive conduct is protected, United States v. O'Brien, 391 U.S. 367, 377 (1968); the elements going into decision with respect to access at trials, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–10 (1982); and the test for reviewing press "gag orders" in criminal trials, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–67 (1976), are but a few examples.

[561] 395 U.S. 444 (1969).