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Justice Brennan, Due Process and the Freedom of Speech: A Celebration of Speiser v. Randall, 20 J. Marshall L. Rev. 7 (1986)

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JUSTICE BRENNAN, DUE PROCESS AND THE FREEDOM OF SPEECH: A CELEBRATION OF *SPEISER v. RANDALL**

BY GEORGE ANASTAPLO**

Had any one writt'n and divulg'd erroneous things & scandalous to honest life, misusing and forfeiting the esteem had of his reason among men, *if after conviction* this only censure were adjudg'd him, that he should never henceforth write, but what were first examin'd by an appointed officer, whose hand should be annex't to passe his credit for him, that now he might be safely read, *it could not be apprehended lesse than a disgraceful punishment*. Whence to include the whole Nation, *and those that never yet thus offended*, under such a diffident and suspicious prohibition, may plainly be understood *what a disparagement it is*. So much the more, when as dettors and delinquents may walk abroad without a keeper, but unoffensive books must not stirre forth without a visible jaylor in thir title.

— John Milton, *Areopagitica: A Speech For the Liberty of Unlicenc'd Printing*
(emphases added)

I.

Due process, it has been noticed, “is the ancient core of constitutionalism.”¹ Perhaps, indeed, it is due process, more than any other right or privilege, which is intimately associated with the ways of lawyers and judges.²

The lawyerlike judge may be seen in the Opinion prepared for

* The reader is urged, as with my other publications, to begin by reading the text through without consulting the notes.

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1. 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION at 1463 (L. Levy, K. Karst, & D. Mahoney eds. 1986) [hereinafter ENCY. AM. CONST.] I do not retain in quotations from this encyclopedia the capitalization used for cross-references.

In this article, “taxpayer” refers to both human beings and to agents of taxpaying organizations; “freedom of speech” refers to both freedom of speech and freedom of the press.

2. Compare my characterization of Justice Harlan as “ungenerous” and “unlawyerlike” in his failure to give the record made in a case its due. See, e.g., Anastaplo, *Mr. Justice Black, His Generous Common Sense, and the Bar Admission Cases*, 9 SOUTHWESTERN UNIV. L. REV. 977, 993-5 (1977).

the United States Supreme Court by Justice William J. Brennan, Jr. in *Speiser v. Randall* in 1958.³ *Speiser* can be remembered thus,

3. *Speiser v. Randall*, 357 U.S. 513 (1958). A companion case, brought by a church, had been the one in which the court below (the California Supreme Court) had passed on the matters addressed by *Speiser*. See First Unitarian Church of Los Angeles v. County of Los Angeles, 48 Cal.2d 419, 311 P.2d 508 (1957), 357 U.S. 545 (1958). (The California court had divided 4-3 in upholding the prescribed oath.)

I have long been interested in the *Speiser* case because it was the only case relied upon by Justice Brennan in his two dissents in the 1961 Bar Admission Cases (366 U.S. 36, at 80-1, 366 U.S. 82, at 116 (1961)). I am delighted to be able to provide this comment upon *Speiser* in response to the Editors' invitation to contribute to their celebration of Justice Brennan's career.

Justice Brennan's two dissenting opinions in the 1961 Bar Admission Cases, in which I participated, are set forth in their entirety in this note. (Both of them are joined by Chief Justice Warren.) His first dissenting opinion is in the *Konigsberg* case from California, at 366 U.S., at 80-81:

This judgment must be reversed even if we assume with Mr. Justice Traynor in his dissent in the California Supreme Court, 52 Cal. 2d 769, 774, at 776, 344 P. 2d 777, 780, at 781-782, that "a question as to present or past membership in [the Communist Party] is relevant to the issue of possible criminal advocacy and hence to [Konigsberg's] qualifications." The [Character] Committee did not come forward, in the proceeding we passed upon in 353 U.S. 252, nor in the subsequent proceeding, with evidence to show that Konigsberg unlawfully advocated the overthrow of the Government. Under our decision in *Speiser v. Randall*, 357 U.S. 513, the Fourteenth Amendment therefore protects Konigsberg from being denied admission to the Bar for his refusal to answer the questions. In *Speiser* we held that ". . . when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." 357 U.S., pp. 528-529. "There may be differences of degree," Mr. Justice Traynor said, "in the public interest in the fitness of the applicants for tax exemption and for admission to the Bar"; yet, as to the latter also, "Such a procedure is logically dictated by *Speiser* . . ." 52 Cal. 2d, p. 776, 344 P. 2d, p. 782. And unless mere whimsy governs this Court's decisions in situations impossible rationally to distinguish, such a procedure is indeed constitutionally required here. The same reasons apply. For Mr. Justice Traynor was entirely right in saying: "Whatever its relevancy [the question as to past or present Party membership] in a particular context, . . . it is an extraordinary variant of the usual inquiry into crime, for the attendant burden of proof upon any one under question poses the immediate threat of prior restraint upon the free speech of all applicants. The possibility of inquiry into their speech, the heavy burden upon them to establish its innocence, and the evil repercussions of inquiry despite innocence, would constrain them to speak their minds so noncommittally that no one could ever mistake their innocuous words for advocacy. This grave danger to freedom of speech could be averted without loss to legitimate investigation by shifting the burden to the examiners. Confronted with a prima facie case, an applicant would then be obliged to rebut it." *Id.*, p. 776, 344 P.2d, p. 782.

The Court admits the complete absence of any such predicate by the [Character] Committee for its questions. The Court attempts to distinguish the situations in order to escape the controlling authority of *Speiser*. The speciousness of its reasoning is exposed in Mr. Justice Black's dissent. I would reverse. Justice Brennan's second dissenting opinion in the 1961 Bar Admission Cases is in the *Anastaplo* case from Illinois, at 366 U.S., at 116:

I join Mr. Justice Black's dissent. I add only that I think the judgment must also be reversed on the authority of *Speiser v. Randall*, 357 U.S. 513, for the reasons expressed in my dissent in *Konigsberg v. State Bar of California*, ante, p. 80.

"The Supreme Court invalidated on due process grounds a noncommunist oath required for a California property tax exemption. *Speiser* is a leading early case in the series breaking down the right-privilege distinction and establishing that due process must be strictly observed where fundamental rights are infringed."⁴

Justice Brennan's approach to constitutional adjudication is suggested in the course of a recent biographical sketch of him:

In his most enduring opinions, Brennan brought a unique and characteristic analysis to bear on the question of constitutional rights. Instead of inquiring into the powers of government to regulate rights, he would instead focus on the manner in which the government's regulation actually functioned. The implications of this shift were profound. They are perhaps most visible in the area of First Amendment adjudication.

To appreciate Brennan's contribution to First Amendment jurisprudence, it must be remembered that the Court to which Brennan was appointed [in 1956] was still reverberating from the effects of the constitutional crisis of the 1930s. It was, for example, groping for a means of reconciling judicial protection of First Amendment freedoms with the deep respect for majoritarian decision making that was the legacy of the Court's confrontation with President Franklin D. Roosevelt's New Deal. . . . Both sides of the debate viewed government interests and individual rights as locked in an indissoluble and paralyzing conflict. Brennan's lasting contribution was to push the Court beyond this debate and to create a form of analysis in which this conflict receded from view. The essence of Brennan's approach was a precise and persistent focus on the processes and procedures through which government sought to regulate First Amendment freedoms.⁵

This quite useful account continues, drawing upon *Speiser* as a case which illustrates the Brennan approach:

Justice Brennan first used this approach in his second term on the Court in the modest but seminal case of *Speiser v. Randall* (1958). The case involved a California law which denied certain tax exemptions to those who refused to execute an oath stating that they did "not advocate the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means." Significantly, Brennan did not approach the case in

For subsequent developments in these matters, see Anastaplo, *In re Anastaplo: A Progress Report*, National L. J., June 18, 1979, at 21; Anastaplo, *What Is Still Wrong With George Anastaplo?* 35 DEPAUL L. REV. 551 (1986). See also *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971).

4. 4 ENCY. AM. CONST., *supra* note 1, at 1718. Some of the issues raised by the demand for a noncommunist oath and by related developments are encountered today in the "crusade" against drugs. See, e.g., Anastaplo, *Governmental Drug-Testing and the Sense of Community*, 11 Nova L. Rev. — (1986) (forthcoming).

5. 1 ENCY. AM. CONST., *supra* note 1, at 149-150. This biographical sketch was prepared by Robert C. Post.

terms of an "absolute" right to engage in such advocacy. Nor did he inquire into California's "interests" in controlling such speech; he was willing to assume that California could deny tax exemptions to those who had engaged in proscribed speech.

Brennan focused his analysis instead on the procedures used to determine which taxpayers to penalize. He interpreted the California scheme as placing on taxpayers the burden of demonstrating that they had not engaged in unlawful speech. This procedure was unconstitutional, Brennan concluded, because it created too great a danger that lawful speech would be adversely affected

By focusing on the manner in which California had regulated speech, rather than on its power to do so, Brennan was led to inquire into the actual, practical effects of the regulatory scheme. He thus shifted the focus of judicial inquiry away from the particular speech of the litigant, and toward the impact of the legislation, as concretely embodied in its procedural setting, on concededly legitimate speech. This change in focus was central to Brennan's First Amendment jurisprudence, and it was the foundation of many of the Warren Court's innovations in this area.⁶

I examine the *Spiser* case on this occasion, suggesting how it fits into our general constitutional scheme of things.⁷

II.

Justice Brennan has been recognized as a leader of the "liberal" wing of the United States Supreme Court for some years now.⁸ Even

6. 1 ENCY. AM. CONST., *supra* note 1, at 150.

7. Justice Brennan's best known opinions include *Baker v. Carr*, 369 U.S. 186 (1962), *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Roth v. United States*, 354 U.S. 476 (1957). See Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 Harvard Civil Rights-Civil Liberties Rev. 296 (1980). Also important have been Justice Brennan's interpretations of the Religion Clauses. For my reservations about what the Supreme Court has done about obscenity, see ANASTAPLO, HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD (1975), Anastaplo, *How to Read the Constitution of the United States*, 17 LOYOLA UNIV. CHICAGO L. J. 1, 43-49 (1985). For my reservations about what the Supreme Court has done about religion, see Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEMPHIS STATE UNIV. L. REV. 151 (1981).

I discuss our general constitutional scheme of things in ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971); *The United States Constitution of 1787: A Commentary*, 18 Loyola Univ. of Chicago L. Rev. 15 (1986).

8. See, e.g., G. R. STONE, L. M. SEIDMAN, C. R. SUNSTEIN & M. V. TUSHNET CONSTITUTIONAL LAW LVII (1986). During his first term on the Court Justice Brennan's sixteen opinions did not include a single dissent; of his fifty-six opinions twenty-seven terms later, forty-two were dissents. Brennan, *In Defense of Dissents*, 37 HASTINGS L. REV. 427 (1986). Justice Brennan's relations with his colleagues are suggested by his comment during the recent controversy about the confirmation of William H. Rehnquist as Chief Justice, "He's going to be a splendid chief justice." G. Eisasser, *Senate, groups cram for Rehnquist quiz*, Chi. Tribune, July 27, 1986, 1, at 5, col. 3. He observed that a Chief Justice's "philosophical bent" does not have much effect on the Court, adding, "It's unfortunate that people don't understand the issues that this court has to address and decide, issues which always have two, and sometimes many

so, he has managed in cases such as *Speiser* to secure the support of his much more conservative colleagues on the Court.

One remarkable feature of *Speiser* itself is that it provoked only one dissent at a time when the Supreme Court tended to be deeply divided in deciding cases about "Communism" involving loyalty or security issues.⁹ *Speiser* secured the general approval, or at least the acquiescence, of the Supreme Court despite the fact that it was obviously a First Amendment case in its implications.

However much Justice Brennan's colleagues have diverged from him during the past two decades, they have been reluctant to disavow *Speiser*. It is again and again distinguished.¹⁰ I suspect that it retains a certain vitality for the same reason that it won almost unanimous consent in 1958: it appeals to the lawyerly due-process instincts in judges.

Were not the Justices of the United States Supreme Court bothered by what California had tried to do? The California Su-

more than two, legitimate and reasonable answers." *Id.* I believe this approach to things is reflected in the legal craftsmanship Justice Brennan displays in *Speiser*. On Chief Justice Rehnquist, see *infra* note 36.

For an instructive anecdote about Justice Brennan, see Anastaplo, *Legal Realism, The New Journalism, and The Brethren*, 1983 DUKE L. J. 1045, at 1053 (1983). This anecdote has been subsequently confirmed by a letter from Justice Brennan.

9. In *Speiser*, six of the Justices supported the Brennan opinion, with two of them (Justices Black and Douglas) adding concurring opinions of their own; one of the Justices (Justice Burton) concurred in the result; one of them (Justice Clark) dissented (see *infra* Sections VII and VIII); and the Chief Justice did not participate (although he endorsed the *Speiser* doctrines in subsequent cases, such as the 1961 Bar Admission Cases). See *infra* note 22 (end).

Justice Black concluded his concurring opinion in *Speiser v. Randall* with the observation,

If it be assumed however, as Mr. Justice Brennan does for purposes of this case, that California may tax the expression of certain views, I am in full agreement with him that the procedures it has provided to determine whether petitioners are engaged in "taxable" advocacy violate the requirements of due process.

357 U.S., at 532. Did Justice Black, as the senior Justice on the prevailing side, assign the writing of the Opinion of the Court to Justice Brennan, recognizing that the more technical Brennan formulation was better suited in the circumstances for enlisting a majority than the more First Amendment-oriented Black-Douglas position? If so, he reserved to himself the privilege of staking out "higher ground" in a concurring opinion. See *infra* notes 22 and 39.

Something of the "more technical" (and hence less controversial) approach may be seen as well in the Harlan opinion in *Yates v. United States*, 354 U.S. 298 (1957) and in the Warren opinion in *Watkins v. United States*, 354 U.S. 178 (1957). Thus, Justice Brennan can be said to have perfected in *Speiser* the approach anticipated in *Watkins* and *Yates*. For comments on these cases, see ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 7, at 449-51, 468, 630-31.

10. See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36, 53-56 (1961) (Harlan, J.); *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983) (Rehnquist, J.); *Bose Corporation v. Consumers Union*, 466 U.S. 485, (1984) (Stevens, J.); *Wainwright v. Paul*, 469 U.S. 412, (1985). See also *supra* note 3; *infra* notes 18, 22 and 36.

preme Court, in defending what the State had done, interpreted the challenged statute as requiring an oath disavowing criminal conduct only, not disavowing the holding of opinions.¹¹ But in resorting to this defense, the State made it possible for its critics to argue, with some plausibility, that the burden of proof on what was substantially a criminal determination had been shifted from the State to beleaguered citizens.

Thus, the very maneuvers executed by the California Supreme Court in order to avoid the appearance of penalizing the expression of unpopular opinions contributed to the vulnerability of this State action to elementary due-process challenges.

III.

This controversy began in California with the adoption, by the people of that State, of the following amendment (as Section 19 of Article XX of the California Constitution) at the general election of November 4, 1952:

Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

.....

(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

The Legislature shall enact such laws as may be necessary to enforce the provisions of this section.¹²

It should be noticed that this constitutional amendment did not

11. See, *Speiser v. Randall*, 357 U.S. 513, 519; *First Unitarian Church of Los Angeles v. County of Los Angeles*, 311 P.2d 508, 513. On the relation of controversial opinions to criminal conduct, see *Spies v. People*, 122 Ill. 1, 11-79, 12 N.E. 865 (1887)(the Haymarket case).

12. See *First Unitarian Church*, 311 P.2d, at 511; *Speiser*, 357 U.S., at 516. The 1952 general election was the one in which Dwight D. Eisenhower was selected for the Presidency. It was he who appointed William J. Brennan, Jr. to the Supreme Court.

The constitutional amendment quoted from in the text also included this provision:

(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; or . . .

First Unitarian Church, 311 P.2d, at 511. The United States Supreme Court was far less sympathetic to challenges of loyalty oaths for government employees, bar admission applicants, etc. than it was to challenges of such oaths for tax-exemption claimants. See *infra* note 20. On the "purpose" of the people in ratifying this constitutional amendment, see *infra* note 17.

require that any oath be provided for its implementation. It was the State legislature which devised an oath for those claiming certain exemptions. This was done in 1953 pursuant to its powers to enforce the provisions of the recent amendment to the State constitution. The required oath certified that the taxpayer claiming the exemption did not engage in the activities described in the constitutional amendment. The relevant California statute provided,

Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution.¹³

Thereafter the taxpayer claiming certain exemptions had to subscribe this oath: "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities."¹⁴

If the State legislature had simply made it a crime to claim these exemptions if one did the things described in the amendment, the issues posed in this case would have been considerably different. Such a provision would not have required any taxpayer to say anything about overthrowing the Government. In fact, nothing need have happened until some government officer brought a civil suit or pressed for a criminal indictment on the basis of information suggesting that the law had been violated by an unqualified taxpayer's claim of a tax exemption. This need never have happened, but if it had, the burden of proof would then have rested upon the State to prove its case either in attempting to deny or to recover benefits or in prosecuting for perjury.

The oath required by the statute was recognized by the California court to go too far if taken literally, since it seemed to penalize

13. Revenue and Taxation Code of California, Stats. 1953, p. 3114. See *First Unitarian Church of Los Angeles*, 311 P.2d, at 511; *Speiser*, 357 U.S., at 516, n.2.

14. *Speiser*, 357 U.S., at 515.

those who did no more than hold certain opinions. Therefore, the statute had to be construed so as to make it consistent with the then-current First Amendment rulings of the United States Supreme Court. The Brennan Opinion reports,

The Supreme Court of California construed the constitutional amendment as denying the tax exemptions only to claimants who engage in speech which may be criminally punished consistently with the free-speech guarantees of the Federal Constitution. The court defined advocacy of "the overthrow of the Government . . . by force or violence or other unlawful means" and advocacy of "support of a foreign government against the United States in event of hostilities" as reaching only conduct which may constitutionally be punished under either the California Criminal Syndicalism Act . . . or the Federal Smith Act. . . . It also said that it would apply the standards set down by [the United States Supreme] Court in *Dennis v. United States* . . . in ascertaining the circumstances which would justify punishing speech as a crime.¹⁵

Justice Brennan's Opinion for the Court in *Speiser* does not challenge *Dennis* and related cases. It is willing to assume, at least for this occasion, that people may be fined or imprisoned for the activities (including speech) punished in those cases. It is also willing to assume, without deciding, "that California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned."¹⁶

The question remained, however, whether the power to deny tax exemptions in these circumstances could be exercised by a State's requiring from exemption-claiming taxpayers the disavowal called for by the prescribed oath.

IV.

To say, as Justice Brennan did in *Speiser*, that the California statute shifted the burden of proof with respect to the consequences of criminal liability from the State to the taxpayer is to emphasize the fact that the State is not looked to for the next step (such as an indictment) once a statute penalizing certain activities is enacted. Rather, the taxpayer is required to certify he is not violating the law proscribing illegal advocacy (whatever such advocacy may be interpreted by the courts to be).

Thus, the taxpayer is called upon to say something he may not want to say. Not only is he required explicitly to testify that he has

15. *Speiser*, 357 U.S., at 519. The statutes and case referred to here are the following: Smith Act (Alien Registration Act), 54 STAT. 670 (1940); California Syndicalism Act, Cal. Stat. 1919, ch. 188; *Dennis v. United States*, 341 U.S. 494 (1951). On the *Dennis* case, see *infra* notes 20 and 22.

16. *Speiser*, 357 U.S., at 520.

not conducted himself illegally with respect to advocacy, but also he is required implicitly to concede that the State's proscription and oath requirement are justified. For the ordinary citizen, this kind of rule immediately comes to view as concerned with what one has said and is willing to say, not with what one has done or is doing.¹⁷

The answer was made, in response to the Brennan argument that the burden of proof has been shifted to the taxpayer, that a bare oath would suffice in almost all cases, that the taxpayer who subscribed the oath would rarely have to do anything more in order to show that he had not engaged in the illegal activity aimed at. It can be argued, therefore, that there was something artificial in the way Justice Brennan saw the issues here.¹⁸

17. That is, most citizens take "advocacy" literally. It is hardly likely that the people of California, when they ratified the proposed amendment, had any notion of what the United States Supreme Court had been saying about "advocacy." What, then, did they intend to strike out against? Was it proper for the California Supreme Court to salvage as it did what the people had intended to do and had done? We are accustomed to restricted interpretations of dubious measures in order to protect individual rights, but not in order to permit or to justify repression.

18. Justice Black returned in the 1961 Bar Admission Cases to the burden-of-proof approach in *Speiser*: "I think the majority has once again misapplied its own 'balancing test,' for the interests it purports to 'balance' are no more at stake here than in *Konigsberg*, 366 U.S. 36 (1961). Moreover, it seems clear to me that Illinois, like California, is placing the burden of proof upon applicants for the Bar to prove they do not advocate the overthrow of the Government. Thus the decision here, like that in *Konigsberg*, is contrary to *Speiser v. Randall*, 357 U.S. 513." *In re Anastaplo*, 366 U.S. 82, at 111 n.8 (1961) (Black, J., dissenting). See also *supra* note 10; *infra* note 22.

Related to the burden-of-proof problem is what Justice Brennan has to say in *Speiser* about the importance of the factfinder:

To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding the rights. Cf. *Powell v. Alabama*, 287 U.S. 45, 71 (1932). 357 U.S., at 520-21. See also *Engle v. Isaac*, 456 U.S. 107, 149 (1982) (Brennan, J., dissenting) (quoting from *Speiser*, 357 U.S., at 525: "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome.").

Other issues raised by the taxpayers (the appellants) are noticed in the Brennan opinion in *Speiser* but are not dealt with:

The appellants attack [the constitutional amendment, the statute and the oath requirement], inter alia, as denying them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment. [n.3]

[n.3] This contention was raised in the complaint and is argued in the brief in this Court. The California Supreme Court rejected the contention as without merit, 48 Cal.2d 472, 475, 311 P.2d 544, 545, 546.

Appellants also argue that these provisions are invalid (1) as invading liberty of speech protected by the Due Process Clause of the Fourteenth Amendment; (2) as denying equal protection because the oath is required only as to property-tax and corporation-income-tax exemptions, but not as to the householder's personal-income-tax, gift-tax, inheritance-tax, or sales-tax exemptions;

It can be said in justification of the Brennan approach, however, that it was no more artificial than what the California Supreme Court had done in interpreting its troublesome statute and oath to make them fit the prevailing constitutional opinions of the United States Supreme Court. The term "advocacy" was turned into "activity" in order to explain what the people of California, and thereafter the State legislature, had tried to do. But was it not apparent to everyone that what had been aimed at both by the people of California and by the State legislature was primarily a set of unpopular opinions?

The State court, in finding that an activity and not mere advocacy was the target, permitted Justice Brennan to dramatize this substitution of "activity" for "advocacy" as a means for executing the criminal law. Such execution, without benefit of an intervening indictment, trial and conviction, meant that a shift in the burden of

and (3) as violating the Supremacy Clause because this legislation intrudes in a field of exclusive federal control, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Our disposition of the cases makes consideration of these questions unnecessary.

357 U.S., at 517.

Justice Brennan also delivered the Opinion of the Court in the companion case, *First Unitarian Church of Los Angeles v. County of Los Angeles*, 357 U.S. 545 (1958). It was there observed by him,

In addition to the contentions advanced by the appellants in *Speiser v. Randall*, the petitioners argue that the provisions are invalid under the Fourteenth Amendment as abridgments of religious freedom and as violations of the principle of separation of church and state. Our disposition of the cases, however, makes consideration of these questions unnecessary. For the reasons expressed in *Speiser v. Randall*, we hold that the enforcement of Sec. 19 of Art. 20 of the State Constitution through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process.

357 U.S., at 546-547. The California Supreme Court had devoted most of its effort in these cases to the *First Unitarian Church* case. Perhaps the United States Supreme Court shifted its emphasis to *Speiser* in order to get altogether away from the Religion Clauses in its primary consideration of the issues here.

There is in *Speiser* still another critical issue, but one which is not commented upon at all, and that is the problem of *Erie v. Tompkins*, 304 U.S. 64 (1938). There is a problem, that is, in the required deference of our National courts to the interpretation by State courts of state constitutions and statutes. See, e.g., *Speiser*, 357 U.S., at 519, 523 n.7, 537, Compare Anastaplo, *How to Read the Constitution of the United States*, supra note 7, at 20-22.

There may also be a self-incrimination problem in the use seen here of oaths. Consider the general resistance there would be to a comparable oath required of applicants for driver-license renewal, certifying that one had not broken specified traffic laws since one's last renewal. (This would be in addition to listing traffic violations for which one had been cited or convicted). See *infra* note 39. Related to all this may be the traditional reluctance of our courts to attempt to enjoin the commission of crimes.

In any event, do we not see reflected in the general Brennan approach the experience of a Justice who had served as a State court judge and who was very much aware (in his bones, so to speak) of what the common law means and requires? On the common law, see Anastaplo, *The United States Constitution of 1787*, supra note 7, Lectures No. 10 and No. 11.

proof with respect to criminal liability could be detected here. Consider how different the case would have been if the statute had merely provided that anyone convicted of designated felonies should forfeit various tax exemptions. Did not the requirement of an oath, insofar as it did anything, ignore the need at some stage for a proper criminal trial if sanctions of this character were to be imposed? Still another way of putting this question is to ask whether the oath requirement represented a considerable change in the sequence as well as in the forms of pleading, and hence a critical change in the traditional relation between the State and the citizen.

V.

I have been suggesting that the recourse here by California to an oath raised questions that take us to the heart of due process. It is one thing for a government to suppress certain activities; it is somehow quite another thing for a government to try to do so by requiring citizens to disavow those activities and implicitly to endorse such suppression.

A government which attempts in this way to implement its program of suppression invites having done to it what Justice Brennan and his colleagues did here. They could condemn the "endorsement" requirement as questionable without having to consider explicitly the issue of whether or how the proscribed advocacy may properly be suppressed. It is only natural that Justice Brennan should raise here the question of elementary fairness:

But the question remains whether California has chosen a fair method for determining when a claimant is a member of that class to which the California court has said the constitutional and statutory provisions extend.¹⁹

This approach permitted Justice Brennan to avoid reviving the questions already decided in cases such as *Dennis v. United States* and *American Communications Association v. Douds*²⁰—and de-

19. *Speiser*, 357 U.S., at 520. Of course, the taxpayer requesting an exemption must certify that he is a member of a class entitled to that exemption. But is not that a quite different kind of burden to carry, since it is not a crime to be (or not to be) a member of that class? See *infra* note 31.

20. *American Communications Association v. Douds*, 339 U.S. 382 (1950). For the *Dennis* case, see *supra* note 15; *infra* note 22. *Douds* has been identified as "the first major opinion on Cold War-inspired litigation. . . ." See ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 7, at 454. Justice Frankfurter, in the course of his concurring opinion in *Dennis*, described *Douds* as recognizing

that the exercise of political rights protected by the First Amendment was necessarily discouraged by the requirement of the Taft-Hartley Act that officers of unions employing the services of the National Labor Relations Board sign affidavits that they are not Communists. But we held that the statute was not for this reason presumptively invalid. The problem, we said, was "one of weighing

cided there in a way which Justice Brennan may have personally considered dubious. That he did succeed in raising a question about fundamental fairness is suggested by the fact that he could say and do what he did here for a virtually unanimous court, whereas a revival of the issues of *Dennis* and *Douods* would probably have produced once again a bitterly divided court.²¹

Justice Brennan, in proceeding as he did, appealed to the common-law practitioner in his colleagues. It is the common-law jurist who is open to the old-fashioned proposition that if one is to be penalized for an activity, then the government should at least be willing to acknowledge that that is what it is doing. Instead, the California Supreme Court had been "too clever by half." And so a blow could be struck here for freedom of speech without having to raise explicitly the relevant free-speech issues suggested by this case. In

the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce . . . " 341 U.S., at 532. Justice Black protested in *Douods*, "Never before has this Court held that the Government could for any reason *attaint* persons for their political beliefs or affiliations. It does so today." 339 U.S., at 449. On the connection between *Dennis* and subsequent prosecutions and loyalty cases, see ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 7, at 630. I had occasion to observe in 1971, "Many [repressive] activities, by both the States and the General Government, would have been discouraged had the Supreme Court ruled for the petitioners on First Amendment grounds in [*Douods*] and in [*Dennis*] and thereby educated the public as it subsequently did in the politically sensitive segregation cases and the reapportionment cases." *Id.* See *infra* notes 22 and 39.

The principal threat today, however, is not that of suppression but rather that of corruption. And the most obvious source of a pervasive corruption is television. Consider, for example, the implications, for a people which depends upon genuine self-government, of the following observation: "Fifteen minutes is such a long lonely stand for anybody [making a political talk on television]." Manchester Guardian Weekly, Oct. 8, 1959, p. 3; ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 7, p.555. For arguments advocating the abolition of broadcast television in the United States, see Anastaplo, *Self-Government and the Mass Media: A Practical Man's Guide*, in *The Mass Media and Modern Democracy* 161 (H. M. Clor, ed., 1974); *An Interview with George Anastaplo: Education, Television, and Political Discourse in America*, The Center Magazine, July/August 1986, at 20.

Vital to our virtue as a self-governing people is the need to combine classical thought with the principles of the American polity. See BERNS, ARISTOTLE AND THE MODERNS ON FREEDOM AND EQUALITY, IN THE CRISIS OF LIBERAL DEMOCRACY: A STRAUSSIAN PERSPECTIVE 156-159 (K.L. Deutsch & W. Soffer, eds., 1987).

21. The 5-4 division which the Court was repeatedly capable of thereafter is illustrated by *Barenblatt v. United States*, 360 U.S. 109 (1959) and by the 1961 Bar Admission Cases, *supra* note 3. Another bar admission case, *Schwartz v. Board of Examiners*, 353 U.S. 232 (1957), could readily be seen by the Court as an uncontroversial due process problem. *Schwartz* thus anticipated *Speiser*. See *infra* notes 31 and 37. See also *supra* note 9.

The difference between the free-speech emphasis of the First Amendment and the due-process emphasis of the Fifth Amendment is drawn upon by the Chairman of the Arts Council and a former editor of *The Times* (of London) in discussing British practices, "We are a Fifth Amendment country and they [the United States] are a First Amendment country." *Christian Science Monitor*, Dec. 17, 1986, p. 19, col. 1. See *infra* note 23.

the process, some lawyers and judges might even have been spurred to wonder whether the doctrines relied upon in *Dennis* and *Douds* were themselves above reproach.²²

VI.

Justice Brennan's approach permitted traditional due-process concerns and principles to be vindicated in a quiet way. We can be reminded thereby of how much the freedom of speech and of the press has always depended upon a considerable respect for due

22. Justices Black and Douglas, in their *Speiser* concurrences, reaffirm their dissents in *Douds* and *Dennis*. 357 U.S., at 530. In *Dennis*, Justice Black had said, At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date. The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. 341 U.S., at 579. And Justice Douglas had said in *Dennis*, "I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment." 341 U.S., at 584.

Harry Kalven considered Justice Brennan to have devised "a creative opinion" in *Speiser*, ably expressing First Amendment concerns "without directly challenging official motivation." KALVEN, A WORTHY TRADITION (J. Kalven, ed.) (to be published by Harper & Row in 1987), chap. 38. (See *infra* note 35.) Mr. Kalven went on to say about *Speiser*,

The Brennan opinion is a triumph of judicial statesmanship. He has found a way to avoid the impasse created by what is so often a stubbornness on both sides over symbols—the state stubbornly insisting on the symbol of the oath, the claimant stubbornly insisting on the symbol of freedom. *Speiser v. Randall* thus emerges as a prime example of what might be called the modern First Amendment case both in the complexity of its issues and in the subtlety of its analysis.

Even among those who applaud the result it yields, Justice Brennan's statesmanship may not be universally admired. It may seem too meticulous, too legalistic, and a failure to go to high enough ground. Thus both Justice Black and Justice Douglas, while concurring and joining the Brennan opinion, elect to file separate opinions.

Id. Even so, as Mr. Kalven himself appreciated, Justice Black could complain of the 1961 Harlan Opinion for the Court in *Konigsberg* that it had so used the "balancing test" in distinguishing *Speiser* as "to cut the heart out of one of the very few liberty-protecting decisions that this Court has rendered in the last decade." 366 U.S., at 75. See *supra* note 9, *infra* note 39. See also *infra* note 23. Consider as well this comment on *Speiser*:

The *Speiser* case was thus an extraordinary commitment to the values of free speech. One might well prefer the policy of allocating the burden of proof to the state where a penalty is involved, but what is striking is that the Court raises this policy to the level of a constitutional requirement. What is striking, too, is that, although the sanctions on speech here would seem to be indirect and nonconsequential, Justices Harlan and Frankfurter concur silently and find no need to talk of balancing.

Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 *Law in Transition* 155, 181 (1961).

process.²³

The due-process component here is most critical perhaps in the traditional "no previous restraint" rule associated with freedom of the press. So important is this rule that some have gone so far as to insist that the principal purpose of the latter half of the First Amendment was to preserve the established common-law guarantee of no previous restraints.²⁴

It is not usually appreciated that what is important in the no-previous-restraint rule is the issue of where the burden of proof rests. There is all the difference in the world, except in the most tyrannical regimes, between a publisher's having to persuade a censor that his not-yet-published manuscript is worthy of publication and a prosecutor's having to persuade a tribunal that an already-published manuscript had been so unworthy of publication as to be criminal.²⁵

23. See Anastaplo, *Freedom of Speech and the Silence of the Law*, 64 TEXAS L. REV. 443 (1985). Consider how Justice Brennan, in his Opinion for the Court in *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963), can present *Speiser* and other cases as contributing to the due-process underpinning of First Amendment freedoms:

These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith v. California*, 361 U.S. 147, at 151-54 (1959); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) Broad prophylactic rules in the area of free expression are suspect. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremlion v. N.A.A.C.P.*, 366 U.S. 293 (1961). Cf. *Schneider v. Irvington*, 308 U.S. 147, 162 (1939). Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

See also *supra* note 21 (end).

24. See, e.g., BERNIS, FREEDOM, VIRTUE & THE FIRST AMENDMENT 251 (1957): "The writer suspects, but cannot yet prove, that the intention of the First Amendment was merely to outlaw previous restraints on the freedom of speech and press." Compare Anastaplo, *The Constitutionalist*, *supra* note 7, at 505 n.23.

The no-previous-restraint guarantee meant that there could be no effective licensing system or system of censorship. See Anastaplo, *Due Process of Law—An Introduction*, 42 Univ. Detroit L. J. 195, 205-208 (1964). That article includes discussions of Milton's *Areopagitica* and of the federal loyalty programs of the 1940's and 1950's. See also ANASTAPLO, CENSORSHIP, *ENCYCLOPEDIA BRITANNICA*, 15th ed. (since 1985 printing); Anastaplo, *Freedom of Speech and the Silence of the Law*, 64 TEX. L. REV. 443 (1985).

25. I had occasion, during a visit in the summer of 1967 in Athens with Helen Vlachou (the Greek publisher who had refused to publish her newspapers under the Colonels' censorship) to prepare at her request the following memorandum:

Anyone familiar with the Anglo-American tradition of "liberty of the press" appreciates the importance for friends of liberty of an insistence upon "no previous restraints." That is, the effort in the 18th and 19th Centuries to establish and secure the liberty of the press was, in large part, an effort to protect the right of anyone to publish whatever he chose without any prior control by government of the contents of such publication. It was accepted that there could be, when something was published contrary to the law of the

Another facet of the due-process component here may be seen in the concern with "unconstitutional conditions."²⁶ But this concern makes more, than does the routine burden-of-proof issue, of questions about what opinions may properly be suppressed—and thus moves the primary issue more toward *Dennis* and *Douds*. For the tendency is, when a consideration of unconstitutional conditions is paramount, to assess constitutionality in substantive rather than in procedural terms, something which Justice Brennan preferred to avoid in *Speiser*.

VII.

The lone dissenter in *Speiser* assumed that no question either of burden of proof or of unconstitutional conditions should have been taken seriously by the United States Supreme Court since there was no property interest or other constitutional right threatened here but merely a bounty or gratuity.²⁷ But the right-privilege distinction upon which this kind of argument rests had already been considerably eroded by that time.²⁸

Particularly important for our immediate purposes is what is said in the Dissenting Opinion about the kind of case this is *not*. We

time or disliked by the government of the day, prosecution of the offending publisher. But it was nevertheless thought that such prosecution was not as destructive of the common good or as offensive to personal dignity as a prior review by the government of the contents of publication. Indeed, some publishers have always preferred the safety of censorship to the risk of undertaking the obligation of deciding in each case what could be responsibly and safely published.

What is or should be prosecuted after publication depends on particular circumstances, both social and personal. It should be remembered that the censor's prior restraint may be completely arbitrary and without any challenge, while the punishment for publication has at least the safeguard (except in the most oppressive regimes) of some judicial process in open court. It should be remembered as well that self-regulation recognizes the dignity and sense of responsibility of the publisher.

In the best of all worlds, there would be neither censorship (previous restraint) nor any punishment for honest publication. But it is certainly important that there at least be no censorship, leaving the publisher free to run the risks of honest publication.

See ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 7, at 680.

26. The doctrine of "unconstitutional conditions" is often associated with *Speiser*. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 288 n.12 (1973) (Marshall, J., dissenting); *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983) (Rehnquist, J.); *Thomas v. Union Carbide Agricultural Products*, 105 S. Ct. 3325, 3341 n.1 (1985) (Brennan, J., dissenting). On the doctrine, see 4 *Ency. Am. Constn.*, *supra* note 1, at 1934; G.C. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, chap. VIII (1918). See also *infra* note 36.

27. *Speiser*, 357 U.S., at 541 (Clark, J., dissenting). See the text accompanying *infra* note 30.

28. See *Speiser*, 357 U.S., at 518. See also, 3 *ENCY. AM. CONST.*, *supra* note 1 at 1583; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (Brennan, J.); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (Brennan, J.).

have seen that Justice Brennan had made much of the shift in the burden of proof effected by the California statute and oath. His dissenting colleague was driven to argue,

. . . I cannot agree that due process requires California to bear the burden of proof under the circumstances of this case. This is not a criminal proceeding. Neither fine nor imprisonment is involved. So far as . . . the California Constitution and . . . the California Tax Code are concerned, appellants are free to speak as they wish, to advocate what they will. If they advocate the violent and forceful overthrow of the California Government, California will take no action against them under the tax provisions here in question. But it will refuse to take any action *for them*, in the sense of extending to them the legislative largesse that is inherent in the granting of any tax exemption or deduction.²⁹

But it must have seemed obvious to the United States Supreme Court that there was something unpersuasive in the insistence that California was not taking (criminal-code-like) action against specified advocacy under "the tax provisions here in question." On the contrary, was it not at least arguable that California was substituting tax deprivations for the penalties provided by its criminal code, but without the protections of a criminal proceeding?

The Dissenting Opinion continued in its effort to justify California's resort to a penalty which was labeled as anything but a penalty:

In the view of the California court, "An exemption from taxation is the exception and the unusual . . . It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn." . . . The power of the sovereign to attach conditions to its bounty is firmly established under the Due Process Clause . . . Traditionally, the burden of qualifying rests upon the one seeking the grace of the State. The majority suggests that traditional procedures are inadequate when "a person is to suffer a penalty for a crime." But California's action here, declining to extend the grace of the State to appellants, can in no proper sense be regarded as a "penalty."³⁰

And yet, must it not have seemed apparent to everyone who stopped to think about it that an attempt had been made to penalize those taxpayers who held certain opinions, however the State supreme court interpreted what had been done? If that is so, to speak of "the burden of qualifying rest[ing] upon the one seeking the grace of the State" is to permit placing the burden of proof with respect to the consequences of criminal conduct upon the taxpayer rather than upon the State.

The refusal to recognize the obvious penalty aspect of this intended deprivation tacitly concedes how much like a measure

29. *Speiser*, 357 U.S., at 540-41 (emphasis in the original).

30. *Speiser*, 357 U.S., at 541.

against criminality this California statute truly was.³¹

VIII.

The Dissenting Opinion had another major argument. The condition laid down by the State is justified as having been designed to protect an interest that the State is entitled to try to serve:

Refusal of the taxing sovereign's grace in order to avoid subsidizing or encouraging activity contrary to the sovereign's policy is an accepted practice. We have here a parallel situation to federal refusal to regard as "necessarily and ordinary," and hence deductible under the federal income tax, those expenses deduction of which would frustrate sharply defined state policies.³²

But what would a tax exemption here subsidize or encourage? If anything is promoted by this modest subsidy it is honorable service in the military forces or the social contributions of charitable organizations, not the advocacy of certain opinions. Nor would these opinions be enhanced by such a subsidy, since the community at large is not dispensing its largesse because of the opinions one may be known to have. Rather, what is enhanced is the status of veterans or of charitable organizations (or whatever else qualifies for an exemption), perhaps even more so when it should be noticed that not even one's unpopular opinions serve to cancel the gratitude of the community for the honorable service that had been rendered.³³

The Dissenting Opinion goes on to argue that the "primary thrust" of "the interest of the State" here "is summed up in an understandable desire to insure that those who benefit by tax exemp-

31. The Brennan Opinion in *Speiser* finds support here in far less controversial taxation matters than the one before the Court in 1958:

It is, of course, familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector. *Phillips v. Dime Trust & S. D. Co.*, 284 U.S. 160, 167 (1931); *Brown v. Helvering*, 291 U.S. 193, 199 (1934). But while the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. *Lipke v. Lederer*, 259 U.S. 557 (1922); cf. *Helwig v. United States*, 188 U.S. 605 (1903). The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue. Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech.

357 U.S., at 524-25. See *supra* note 19.

32. *Speiser*, 357 U.S., at 543 (Clark, J., dissenting). *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958) is cited here.

33. On the rationale of the tax exemptions here, see *First Unitarian Church*, 311 P.2d, at 520. Of course, whether someone holds certain dubious opinions or claims a tax exemption is not apt to be known by the community at large.

tion do not bite the hand that gives it."³⁴ The punitive spirit of this observation was anticipated by the observation, "[t]he interest of the State that justifies restriction of speech by imposition of criminal sanctions surely justifies the far less severe measure of denying a tax exemption, provided the lesser sanction bears reasonable relation to the evil at which the State aims."³⁵

34. *Speiser*, 357 U.S., at 544 (Clark, J., dissenting).

35. *Speiser*, 357 U.S., at 542-43 (Clark, J., dissenting). Justice Brennan dealt in this fashion with the "interest of the State" argument and with three cases relied upon (at 357 U.S. 541) by Justice Clark:

[The California authorities] rely on cases in which this Court has sustained the validity of loyalty oaths required of public employees, *Garner v. Board of Public Works*, 341 U.S. 716 (1951), candidates for public office, *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951), and officers of labor unions, *American Communications Assn. v. Douds*, 339 U.S. 382 (1950). In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The purpose of the legislation sustained in the *Douds* Case, the Court found, was to minimize the danger of political strikes disruptive of interstate commerce by discouraging labor unions from electing Communist Party members to union office. While the Court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The congressional purpose was to achieve an objective other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially. The evil at which Congress had attempted to strike in that case was thought sufficiently grave to justify limited infringement of political rights. Similar considerations governed the other cases. Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evily motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas. "Encouragement to loyalty to our institutions . . . [is a doctrine] which the state has plainly promulgated and intends to foster." 48 Cal.2d, 439, 311 P.2d, at 420 (1957). The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter the unlawful conduct.

357 U.S., at 527-528. We can see here what Harry Kalven said about Justice Brennan's ability to express First Amendment concerns "without directly challenging official motivation." *Supra* note 22.

The Brennan observation that the veteran denied a tax exemption remains a veteran reminds me of an encounter that Robert Maynard Hutchins, as Chancellor of the University of Chicago, had with a State legislative investigating committee. (This was about 1950.) A professor emeritus of the university had been publicly condemned as a subversive. Mr. Hutchins rather enjoyed explaining to an indignant legislator that the university could do nothing about the emeritus status, that nothing could be done to deny that this professor had in fact served at the university, that a professor emeritus remains a professor emeritus just as a former Vice-President of the United States remains a former Vice-President, no matter how he behaves himself.

If "the lesser sanction" resembles "criminal sanctions" and serves the same purpose, then it would seem that the guarantees of a criminal proceeding are surely called for. The Dissenting Opinion, in the effort to justify what California had tried to do, continues,

the general aim of the constitutional and legislative provisions in question is to restrict advocacy of violent or forceful overthrow of State or National Government; the particular aim is to avoid State subsidization of such advocacy by refusing the State's bounty to those who are so engaged. The latter has been denominated the "primary purpose" by the California Supreme Court.³⁶

Mr. Hutchins's wit was such, however, that it was difficult for him to make such points "without directly challenging official motivation." His spectacular accomplishments at the University of Chicago would have been more impressive, and considerably more enduring, if he could have conducted himself somewhat more with that political art exhibited by Justice Brennan in dealing with his colleagues in *Speiser* and in many other cases. The Brennan approach can be usefully contrasted to the Hutchins approach as described by one of Mr. Hutchins's most gifted lieutenants (who was also a very young man in the formative years of the Hutchins administration at the University of Chicago in the early 1930s):

Only from the vantage point of retrospection, many years removed, can I now see how far from the truth the *Nation* was in attributing to Bob Hutchins a "zest for all the academic intrigue and machinations" and an "ability to wangle his way through the most intricate academic politics." He had more than enough intelligence and energy to play the game of academic politics, but he was too young and, therefore, too inexperienced in that arena to play it well. In addition, his youthful impetuosity and impatience found all delays irksome; his superabundant intelligence, habituated to being as reasonable as possible, sought to bring things about by rational persuasion rather than by intrigue or machination. He wanted to build Rome in a day and he felt that if he openly laid a well-designed blueprint on the table for his colleagues to examine, they would, with equal frankness, either tell him how to improve the plan or else enthusiastically cooperate in carrying it out. He had not learned from his brief experience as dean of the Yale Law School that professors do not operate that way, least of all when their vested interests are threatened.

M. ADLER, *PHILOSOPHER AT LARGE: AN INTELLECTUAL AUTOBIOGRAPHY* 127 (1977). This is not to deny the stature of Mr. Hutchins: the calibre of the remarkable men close to him over many years (such as Mortimer Adler, Harold Swift, William Benton, and Milton Mayer) testifies to the powerful attraction of the man.

36. *Speiser*, 357 U.S., at 543 (Clark, J., dissenting). It is instructive to notice how Justice Rehnquist, in a 1984 opinion dissenting from an Opinion for the Court delivered by Justice Brennan, rejected the Clark position in accepting and applying the *Speiser* precedent:

. . . I find this [1984] case entirely different from the so-called "unconstitutional condition" cases, wherein the Court has stated that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry v. Sinderman*, 408 U.S. 593 (1972). In those cases the suppressed speech was not content-neutral in the same sense as here, and in those cases, there is at best only a strained argument that the legislative purpose of the condition imposed was to avoid subsidizing the prohibited speech. *Speiser v. Randall*, 357 U.S. 513 (1958), is illustrative of the difference. In that case California's decision to deny its property tax exemption to veterans who would not declare that they would not work to overthrow the government was plainly directed at suppressing what California regarded as speech of a dangerous content. And the condition imposed was so unrelated to the benefit to be conferred that it is difficult to argue that California's property tax exemption actually subsidized the dangerous speech.

Did not this recognition of the "general aim" of these California provisions again expose the character of these arrangements as substitutes for criminal proceedings?

The character of what a State is doing cannot be transformed merely by "denominating" it something else. Due process requires that a spade should be called a spade, especially if it is to be used to dig somebody's grave.³⁷

IX.

Speiser accomplished what it did, and remains a salutary influence, because it drew so well upon elementary common-law notions about due process and the rule of law. The common-law practitioner in judges could thus be appealed to, and in a relatively uncontroversial way. On the other hand, invocations of the First Amendment are likely to be controversial, especially since the exercise of freedom of speech can sometimes seem to threaten the safety of the very regime which makes freedom of speech possible.

Of course, the reliance upon elementary due-process principles in *Speiser* was itself prompted by Justice Brennan's own dedication to freedom of speech. Thus, he took a roundabout way of serving freedom-of-speech interests by condemning as he did the roundabout way California had taken in imposing criminal sanctions upon advocacy.³⁸

Even so, there is a limit to how much due process should be depended upon to advance freedom of speech concerns. First Amendment issues do have to be faced up to directly from time to time if there is to be developed and preserved among lawyers and judges, as well as in the community at large, that dedication to free-

Federal Communications Commission v. League of Women Voters, 468 U.S. 364, at -408 (1984) (emphasis added). See *supra* note 26.

For a comparison of the Brennan and Rehnquist readings of the First Amendment, see *Denvir, Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NORTHWESTERN U.L. REV. 285 (1985). I have suggested that Chief Justice Rehnquist "can well become, among the members of the Supreme Court during the next decade, perhaps the closest on First Amendment issues (except on the issue of obscenity) to Hugo L. Black, the first (and probably the greatest) of the New Deal justices." Anastaplo, *William H. Rehnquist and the First Amendment*, Spring 1987 INTERCOLLEGIATE REVIEW, 31.

37. "Denominating" an action as something other than what it is can lead to what Justice Rehnquist has called "a strained argument." See *supra* note 36. A bar admission controversy is apt to be more complicated than the typical recourse to loyalty oaths: the State interest claimed is probably more like the *Douds* than like the *Speiser* situation; and there is usually a hearing to develop a record, not a bare oath.

38. Justice Brennan spoke in *Speiser* of the "short-cut procedure" with which California replaced its ordinary criminal-law process. 357 U.S., at 528-29. A particularly unfortunate instance of such evasion of established processes may be seen in *Cohen v. Hurley*, 366 U.S. 117 (1961) (a disbarment case). See ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 7, at 682 n.19; Anastaplo, *Mr. Justice Black*, *supra* note 2, at 985 n.10, 988 n.13, 991 n.20.

dom of speech which can find useful expression in the legal craftsman's insistence upon due process and upon other traditional standards. Justice Brennan was himself privileged to speak directly to First Amendment issues in his celebrated Opinion for the Court in *New York Times v. Sullivan*, which even repudiated the Sedition Act of 1798 in the course of trumpeting "the principle that debate on public issues should be uninhibited, robust, and wide-open."³⁹ Had not the way been preserved for this dramatic reaffirmation of the First Amendment in 1964 by the traditional respect for the rule of law so competently exhibited in 1958 by that "modest but seminal" case of *Speiser v. Randall*?

39. *New York Times v. Sullivan*, 376 U.S. 254, 270, 272-76. There were no dissents. The three concurring Justices (Black, Douglas and Goldberg) wanted to go even further than Justice Brennan was able to lead the others to go. (*Speiser* is cited twice, once on the burden-of-proof point. 376 U.S., at 271, 279.) The Sedition Act of 1798 has been condemned as "the darkest blot on freedom of expression in the history of the United States." 3 ENCY. AM. CONST., *supra* note 1, at 1312.

Little if anything is said in *Speiser* about those who resent being compelled to disavow things of which they are innocent. Thus, President Lincoln could observe, "I have found tht men who have not even been suspected of disloyalty are very averse to taking an oath of any sort as a condition to exercising an ordinary right of citizenship." ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 7, at 732. This is related to the quotation from Milton's *Areopagitica* used as the epigraph to this article. For a compendium of statements against loyalty oaths, see the dissenting opinion of Justice Carter of the California Supreme Court in *First Unitarian Church of Los Angeles v. County of Los Angeles*, 311 P.2d 508, 527 (1957). Related to this is what Justice Brennan had to say about the free exercise of religion in his concurring opinion in *School District of Abington v. Schempf*, 374 U.S. 203, 230 (1963) and in his Opinion for the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) (citing *Speiser* in both opinions). See *supra* note 7.

The career of Justice Brennan on the United States Supreme Court testifies to the usefulness of having highly competent common-law lawyers on that Court, without regard to their doctrinal attachments. See *supra* notes 8 and 18. Harry Kalven said of the decision in *New York Times v. Sullivan* that it "may prove to be the best and most important opinion [the Court] has ever produced in the realm of freedom of speech." Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964). On the fruitful collaboration between Justice Black and Justice Brennan, see *supra* notes 9 and 22. William J. Brennan was the most illustrious speaker at the 1986 celebration held at the University of Alabama School of Law on the occasion of the centenary of the birth of Hugo L. Black.

On the United States Supreme Court as educator, see *supra* note 20.

