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Constitutional Law—Immigration: Meiklejohn Theory of the First Amendment Applied in the Immigration Context—Mandel v. Mitchell, 325 F. Supp. 620 (E.D.N.Y.), appeal docketed 40 U.S.L.W. 3035 (U.S. July 13, 1971)

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—IMMIGRATION: MEIKLEJOHN THEORY OF THE FIRST AMENDMENT APPLIED IN THE IMMIGRATION CONTEXT—*Mandel v. Mitchell*, 325 F. Supp. 620 (E.D.N.Y.), *appeal docketed* 40 U.S.L.W. 3035 (U.S. July 13, 1971).

Ernest Mandel, a noted Belgian economist and a Trotskyite Marxist, was invited to participate as a speaker and panelist in a conference at Stanford University. He was denied a visa pursuant to two subsections of the Immigration and Nationality Act of 1952.[1] Subsection 212(a)(28)(D) excludes "Aliens . . . who advocate the economic, international, and governmental doctrines of World communism; . . ."[2] and subsection 212(a)(28)(G)(v) bars "Aliens who write or publish . . . or who knowingly circulate . . . any written or printed matter, advocating or teaching . . . the economic, international and governmental doctrines of world communism. . . ."[3] Although Mandel had been granted visas for two previous visits to the United States, the Attorney General on both occasions had invoked his discretionary powers to waive the statutory disqualifications.[4] However, the Attorney General refused to waive the statutory exclusions in order to permit this proposed third visit. Distinguished citizens of the United States who had issued the invitation to Mandel, who were to participate in the confer-

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1. Act of June 27, 1952 (Immigration and Nationality Act) §§ 212(a)(28)(D), (G)(v), 8 U.S.C. § 1182(a)(28)(D), (G)(v) (1970).
2. *Id.* § 1182(a)(28)(D).
3. *Id.* § 1182(a)(28)(G)(v).
4. Such discretion has been granted to the Attorney General by the Congress in 8 U.S.C. § 1182(d)(3) (1970):

> Except as provided in this subsection, an alien (A) who is applying for a non-immigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27) and (29)), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a non-immigrant in the discretion of the Attorney General. . . .

Pursuant to this provision, Mr. Mandel had been permitted to enter the country in 1962 and 1968. However, the Attorney General did not then inform him of the statutory disqualification or of the discretionary waiver. After the initial refusal of the Justice Department to admit Mandel in 1969, the State Department recommended a third waiver of ineligibility. The Justice Department remained adamant, however, and Mandel's request for a visa was denied.

ence with him, or who merely wished to hear him speak,[5] joined with him in bringing this suit seeking a declaratory judgment that the relevant subsections of the Immigration and Nationality Act of 1952 are unconstitutional per se and as applied, and a preliminary injunction restraining the Attorney General from enforcing those parts of the Act. *Held:* The Immigration and Nationality Act, insofar as subsection 212(a)(28) disqualified Mandel, and subsection 212(d)(3)(A)[6] had been invoked to refuse him temporary admission to the United States, constitutes a forbidden legislative intrusion upon the sovereignty of the people and violates the first amendment rights of United States citizens to hear the views of a communist alien. *Mandel v. Mitchell,* 325 F. Supp. 620 (E.D.N.Y.), *appeal docketed* 40 U.S.L.W. 3035 (U.S. July 13, 1971).

I. WHAT HAVE THEY DONE TO THE REIGN?

The majority opinion of this three-judge panel dramatically restricts what was previously thought to be a generally unlimited executive prerogative in the determination of whether or not to allow aliens to enter the United States on either a permanent or temporary basis. Since the United States Supreme Court declared in 1950 that "an alien who seeks admission to this country may not do so under any claim of right," the "privilege" status has attached to permission to enter the United States.[7] Moreover, although Congress has provided legislative guidelines, the Court has nonetheless considered alien-admission decisions to be primarily within the realm of the executive. "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[8] This rigorous denial of either substantive or procedural rights to nonresi-

5. Co-plaintiffs included some of the most highly respected scholars in the United States: David Mermelstein, Wassily Leontief, Norman Birnbaum, Robert L. Heilbroner, Robert Paul Wolff, Louis Menashe, Noam Chomsky, and Richard A. Falk.

6. 8 U.S.C. § 1182(d)(A) (1970). *See* note 4, *supra.*

7. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). For a critical survey of this dichotomy in American law see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

8. *Knauff,* 338 U.S. at 542.

dent aliens not present in this country has not been significantly altered.[9]

The *Mandel* court conceded that, with respect to most aspects of immigration affecting only the alien applicant, "an all but absolute discretion to exclude can be vested in the executive. . . ."[10] However, in this unique case, Mandel's exclusion, pursuant to specific provisions of a Congressional act, was deemed to affect those United States citizens who invited him into the country and who anticipated participating with him and listening to him in the proposed conference. The court found in this relationship, which it conceded to be tenuous, a sufficient interest on the part of expectant citizens to establish their standing to join in the suit. Although Mandel, as an alien, possesses no affirmative and personal right to speak in this country, United States citizens enjoy the right to hear him without improper interference by the Government. Thus the court recognized an essential paradox of the case:[11]

> Mandel's status as a party does not rest on any individual right to enter (for he has none) but exists only as against the effort to exclude him on a ground that denies to citizens of this country their primary rights to hear Mandel and debate with him.

The recognition of plaintiffs' standing to sue provides the court with the opportunity to reach the merits of the case and, thus, to strike down the relevant portions of the Immigration and Nationality Act as unconstitutional. Asserting a new judicial role in immigration matters, the court removed the statutory authority of the State Department to deny entry to Mandel and rendered inconsequential the Attorney General's refusal to waive the statutory disqualification.

II. THE STATUTE — INTOLERABLE INTOLERANCE

The Government relied upon subsections 212(a)(28)(D) and (G)(v) in its refusal to admit Mandel.[12] These subsections operate independ-

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9. *See* Jay v. Boyd, 351 U.S. 345, 356 (1956); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

10. Mandel v. Mitchell, 325 F. Supp. 620, 632 (E.D.N.Y.), *appeal docketed* 40 U.S.L.W. 3035 (U.S. July 13, 1971).

11. *Id.* at 631-32. The standing issue is more thoroughly discussed at text accompanying notes 57-59, *infra*.

12. *Mandel*, 325 F. Supp. at 626. *See* text accompanying notes 2-3, *supra*.

ently of the other subsections of the statute; each constitutes a separate basis for the disqualification of an alien seeking entry who has complied with all of the other conditions of the statute.

It must be carefully noted that subsections 212(a)(28)(D) and (G)(v) have nothing to do with subversive activities. On the contrary, they directly and exclusively prohibit the admission of aliens who advocate, teach, write, publish or circulate certain ideas, beliefs or programs and aliens who are or have been affiliated with organizations which conduct or promote such behavior or thoughts. In refusing admission to Mandel, therefore, the Government pointed to no threat and offered no justification beyond his ideas and writings. By relying exclusively on these subsections, the Government made no attempt to connect Mandel's proposed visit and speech with potential or forseeable incitement or other provocation to violent, unlawful or subversive acts by himself or by any member of his prospective audiences.[13] Therefore, the national security argument offered by the Government to support its action depends upon a cerebral inference from the ideas and writings of Mr. Mandel that he may somehow remotely constitute a threat to the safety and well-being of the nation.

The court admitted that it appears well established that the Government has the power to prevent potential acts against the nation; it may exclude aliens on the basis of justifiable anticipation of incitement or other dangerous acts. "Subsection (a)(28), however, is explicit in its direction against that which is specifically not active subversion but belief and preachment."[14] Consequently, the court found that the subsections specifically invoked by the Government conflict with the first amendment declaration that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[15]

These sweeping statutory restrictions upon thought and speech would be clearly unconstitutional if subjected to the standards applicable to restrictions of first amendment rights directly affecting the

13. Mandel's exclusion certainly could not have been based upon his nationality; at the time of the litigation he was a citizen of Belgium, a nation not noted for its belligerency toward the United States. Nor could his exclusion have been based upon affiliation with a subversive organization, since it was conceded that he was not a member of the Communist Party.

14. *Mandel*, 325 F. Supp. at 625.

15. U.S. CONST. amend. I.

domestic affairs of residents of the United States. The Supreme Court, in *Brandenburg v. Ohio,*[16] declared the first amendment to withhold from the Government the authority "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."[17] Since no such showing was made in the principal case, and since the subsections on their face violate first amendment guarantees, the *Mandel* court concluded that the subsections could not be sustained, "unless their presence in an alien exclusion code alters the result."[18]

However, the court found no such justification either in the executive function of conducting foreign affairs or in the joint obligation of the Congress and the Executive to provide for the national security.[19] After excluding these available constitutional powers as possible excuses for governmental interference with the first amendment, the court concluded that "[t]he sole and selective effect of the statute is to operate as a means of restraining the entry of disfavored political doctrines and it is a forbidden enactment."[20] This surprising decision is the result of a novel application of Alexander Meiklejohn's theory of the first amendment, a view currently enjoying an ascendancy in the courts and among scholars, but hitherto not applied in immigration cases.

16. 395 U.S. 444 (1969) (per curiam).
17. *Id. at 447.*
18. *Mandel,* 325 F. Supp. at 626.
19. The majority determined the "balancing" test to be inapplicable in this case. That test is appropriate only when an otherwise legitimate governmental interest is directly and primarily pursued by the statute which only incidentally and secondarily produces governmental interference with first amendment rights. No such circumstances existed here. Instead, the subsections invoked by the Government directly conflict with the provisions of the first amendment. *Id.* at 627.

However, the dissent strongly advocated the propriety of the "balancing" test:

> Since subsection (a) (28) is a limited exercise of that power amply justified by the interest of national security and the exercise by the Legislative and Executive branches of the Government of their foreign relations power, I conclude that its enactment is constitutional and that any effect upon First Amendment rights of American citizens to hear aliens (if they have such a right) is only incidental and necessary to accomplish the purpose sought to be achieved.

Id. at 646.
20. *Id.* at 626.

III. THE NEW VITALITY IN THE FIRST AMENDMENT

Alexander Meiklejohn[21] theorized that, in formulating a Constitutional government, the American people granted only limited powers to the government and retained for themselves exclusive control over the remaining elements of sovereignty. In pursuit of this objective, the first amendment (in conjunction with the preamble, the tenth amendment and section 2 of article I) reserves to the citizenry the sovereign power to freely communicate among themselves — at least with respect to socio-political issues — without interference by government.[22] This precondition to a self-critical, representative democracy withholds from government the *power*[23] to "abridge the freedom of speech

21. Dr. Meiklejohn was the eminent professor of philosophy at the University of Wisconsin who pioneered much of the modern scholarship concerning the first amendment. Among his seminal works are: POLITICAL FREEDOM (1948); *Freedom to Hear and to Judge*, 10 LAWYERS GUILD REV. 26 (1950); *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245; and *Public Speech and the First Amendment*, 55 GEO. L. J. 234 (1966).

See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

22. *See* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257:

> Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

In reference to this analysis as adopted by the Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964), Professor Kalven commented:

> This is not the whole meaning of the amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected. The theory of the freedom of speech clause was put right side up for the first time.

Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208.

23. This absence of power resembles the lack of jurisdiction which removes the power of a court to entertain proposed litigation.

> The people do not delegate all their sovereign powers. The Tenth Amendment speaks of powers that are reserved "to the people," as well as of powers "reserved to the States."
>
> For the understanding of these principles it is essential to keep clear the crucial difference between "the rights" of the governed and "the powers" of the governors. And at this point, the title "Bill of Rights" is lamentably inaccurate as a designation of the first ten amendments. They are not a "Bill of Rights" but a "Bill of Powers and Rights." The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private "rights of the governed." The First and Tenth Amendments protect the governing "powers" of the people from abridgment by the agencies which are established as their serv-

or of the press," and is designed to protect and promote[24] unrestricted discussion of public affairs.[25]

The traditional interpretations of the first amendment have focused upon the private rights of specific individuals; the freedom of expression thereby "embraces the prerogative of the free citizen to express himself. . . ."[26] However, as Professor Thomas I. Emerson observed, "The natural balance of forces in society today tends to be weighted against individual expression." He concluded that "conditions in a modern democratic society demand that a deliberate, affirmative, and even aggressive effort be made to support the system of free expression."[27] Meiklejohn's public interest concept of the first amendment provides that vigorous and positive influence.

The Meiklejohn approach to the first amendment was partially adopted in *New York Times v. Sullivan,*[28] in which the Supreme Court greatly restricted recovery for libel when the subject of the pub-

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ants. In the field of our "rights," each one of us can claim "due process of law." In the field of our governing "powers," the notion of "due process" is irrelevant.

Meiklejohn, *The First Amendment Is An Absolute,* 1961 SUP. CT. REV. 245, 254.

24. Meiklejohn calls for,

> . . . public provisions for active discussions among the members of our self-governing society. . . . In every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy. And conditions must be provided under which such meetings could be happily and successfully conducted.

Id. at 260.

This suggestion may, on its face, seem to be somewhat utopian, if not simply naive, in the context of our urbanized, mass society. However, the concept has far-reaching implications with respect to proposed public access to broadcasting media which are already regulated by government, ostensibly "in the public interest." *See* Comment, *Freedom to Hear: A Political Justification of the First Amendment,* 46 WASH. L. REV. 311, 330-31, 362 (1971).

25. However, the freedom is not considered to be "absolute." Meiklejohn cautions that:

> It must not be assumed that every governmental regulation of a public meeting is, under current conditions, destructive of political freedom. . . . [The exercise of free expression] must conform to the necessities of the community, with respect to time, place, circumstance, and manner of procedure.

Meiklejohn, *The First Amendment Is An Absolute,* 1961 SUP. CT. REV. 245, 261. A discussion of the difficulties raised by this otherwise absolute protection of speech is beyond the scope of this note.

26. H. ABRAHAM, FREEDOM AND THE COURT 125 (1967).

27. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 955 (1963).

28. 376 U.S. 254 (1964).

lication is a public official.[29] Without specific reference to Dr. Meiklejohn, the Court entertained his premise: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open. . . ."[30] The concept that the first amendment is primarily a guarantor of the public interest in unfettered discussion of public issues and in the "free flow of information"[31] was even more broadly accepted by the Court in *Red Lion Broadcasting Co. v. FCC*.[32] Upholding two FCC equal-time orders, the Court recognized "the fact that the 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public. . . ."[33] Although this observation was particularly appropriate in light of the statutory powers of the FCC to regulate broadcasting,[34] the underlying theory of the first amendment is explicitly connected with the Meiklejohn analysis. And the conclusion of the Court is not limited to any statutory language:[35]

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Subsequently, the open exchange of information doctrine has gained

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29. In what now seems to have been a prophetic analysis of the case, Professor Kalven said:

> It is not easy to predict what the Court will see in the *Times* opinion as the years roll by. . . . But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming. If the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now.

Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 (footnote omitted). For a thorough discussion of subsequent limits upon libel recovery see Rosenbloom v. Metromedia, Inc., 91 S.Ct. 1811 (1971).

30. New York Times v. Sullivan, 376 U.S. 254, 270 (1964). *See* Terminiello v. Chicago, 337 U.S. 1 (1949); DeJonge v. Oregon, 299 U.S. 353 (1937).

31. Although this phrase has not been used by the Supreme Court, it seems particularly descriptive of the objective of the *Sullivan* decision and its progeny.

32. 395 U.S. 367 (1969).

33. *Id.* at 385.

34. *See* 45 U.S.C. § 303 (1964).

35. *Red Lion*, 395 U.S. at 390.

increasing prominence in first amendment litigation.[36] However, as is characteristic of most innovations in constitutional interpretation, the expansion of the "new"[37] doctrine has been cautious and gradual.[38] Its application, therefore, has been generally limited to selective first amendment issues.[39]

The *Mandel* court clearly adopts the Meiklejohn theory[40] and applies it to the national alien-admission policy. Since Congress is denied the power to abridge directly and purposefully first amendment guarantees of open discussion of public affairs, the attempt to do so in the Immigration and Nationality Act is rendered void. The majority announces:[41]

> The prevention of the teaching and advocacy that is not incitement or conspiracy to initiate presently programmed violence is not in any degree a legitimate legislative objective but a forbidden one. It is for-

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36. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965); Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969); Molpus v. Fortune, 311 F. Supp. 240 (N.D. Miss. 1970); Smith v. University of Tennessee, 300 F. Supp. 777 (E.D. Tenn. 1969); Snyder v. Board of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968).

37. This approach to the first amendment has been traced to the formulation of the Bill of Rights. *See Mandel,* 325 F. Supp. at 629; New York Times v. Sullivan, 376 U.S. 254, 273-77 (1964).

38. Mr. Justice Brennan discussed this institutional inertia in an article devoted to Dr. Meiklejohn's theory. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965). With reference to the *New York Times v. Sullivan* decision, he commented:

> At least one distinguished first amendment scholar, Professor Kalven of the University of Chicago Law School, senses in that opinion a departure from, if not the discard of, the "redeeming social value," "clear and present danger," and "balancing" tests in the area of criticism of government and the official conduct of public officials, and the adoption, not of Mr. Justice Black's "absolute" reading of the first amendment, but of a reading in substantial agreement with that which Dr. Meiklejohn has urged. Of course, if Professor Kalven is right, this is an event of considerable importance. . . . But a caveat is in order. Radical shifts in judicial doctrine are rare. They usually occur over long periods step-by-step in a series of decisions.

Id. at 10 (footnotes omitted).

39. Thus, the thrust of the expansion of the Meiklejohn doctrine has been in the areas of libel (*Sullivan*), the rights of students at public universities to hear speakers (*Brooks, Molpus, Smith* and *Snyder*), and the right of an individual to possess or receive written material (*Lamont* and *Stanley*). *See* cases cited note 36, *supra.*

40. The court, specifically citing Meiklejohn, restates his theory in adept and explicit language:

> The First Amendment, thus, guarantees to the people as sovereign as the retained attribute of their ultimate sovereignty, their right, in open and wide-ranging debate, publication and assembly, to review the government they have created, the adequacy of its functioning and the presence or absence of a need to alter or displace it.

Mandel, 325 F. Supp. at 629.

41. *Id.* at 632.

> bidden, in ultimate analysis, because the public interest — expressed in the First Amendment — requires that the citizens as sovereign have access to, evaluate and accept or reject that teaching as well as every other teaching and advocacy.

Accordingly, the *Mandel* decision represents an unprecedented expansion of Meiklejohn's public interest doctrine into the judicial examination of governmental regulation of immigration.

The Meiklejohn interpretation creates a new and vital dimension in the first amendment, transforming the freedom of expression into a uniquely positive social impulse. "The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government."[42] This "presence of self-government" is not merely the personal attribute of individuals who wish to speak or write, or to listen or read. The essential nature of the first amendment transcends such individualized interests. Far more significantly, it reserves to the people — the entire body politic — that open exchange of information which is indispensable to the preservation of a free society.[43] This affirmative and dynamic role contrasts with the traditional interpretation of the first amendment.

Of course, the public interest aspect of the first amendment has long been recognized by the courts. However, while the justices frequently have spoken of the "free trade of ideas"[44] as being "of the very essence of a scheme of ordered liberty,"[45] and of "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society,"[46] these words too often served as inspirational bunting without much legal substance. Simulta-

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42. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 252. This concept was paraphrased in Garrison v. Louisiana, 379 U.S. 64, 74-75: "For speech concerning public affairs is more than self-expression; it is the essence of self government."

43. That this "public interest" nature of the first amendment transcends its individualized elements is clearly propounded by Meiklejohn:

> The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.

Meiklejohn, *supra* note 42, at 255.

44. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J.) (dissenting opinion).

45. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

46. Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J.) (concurring opinion).

neously, the effect of the unfortunate "clear and present danger" test[47] was to remove the protection of individualized first amendment rights upon the showing of a relatively slight social inconvenience produced by their self-expression.[48] Although this weakness has led to the general demise of the "clear and present danger" test,[49] the tendency of that test to shift the public interest away from free expression and toward the governmental interest in restricting that expression has persistently lingered.

Traditionally, therefore, the "freedom of speech and of the press" was used primarily in a negative context, as a restraint upon government from interfering with individual rights of expression. But this fundamentally responsive and regulatory approach continues to produce inevitable difficulties. When viewed as merely providing personal rights to specific individuals, the first amendment is too often susceptible to compromise under the pressure of powers affirmatively dele-

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47. The question in every case is whether the words used 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.

Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.). *See* Abrams v. United States, 250 U.S. 616, 624-31 (1919).

For an excellent study of the change in Holmes' attitude toward his test which occurred between the *Schenck* decision and his dissenting opinion in *Abrams* see Ragen, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr. and the Clear and Present Danger Test for Free Speech: The First Year, 1919,* 58 J. AM. HIST. 24 (1971).

For a survey of the use of the test in the courts, see Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond,* 1969 SUP. CT. REV. 41.

48. *See* Dennis v. United States, 341 U.S. 494 (1950). It is an example of this effortless sacrifice. Therein Chief Justice Vinson quoted approvingly the comment of Judge Learned Hand in the opinion of the court below:

> In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasions of free speech as is necessary to avoid the danger.

Id. at 510.

49. Many scholars have concluded that *Brandenburg* merely delivered the *coup de gras* to the already atrophied and discredited "clear and present danger" doctrine. Professor Emerson wrote in 1963 that, "as a general test of the limits of the first amendment, the clear and present danger test must be regarded as unacceptable." Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 912 (1963). Professor Kalven thought the fall occurred before *Brandenburg:* "But it is clear that as of this judgment in the *Times* case, it has disappeared." Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

Whatever one believes the specific and doctrinal effect of *Brandenburg* to be, it cannot be doubted that the case demonstrates that the once hallowed doctrine is no longer of much utility, especially in the advocacy cases. *See generally* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto,* 22 STAN. L. REV. 1163 (1970); and Strong, *Fifty Years of "Clear and Present Danger". From Schenck to Brandenburg—and Beyond,* 1969 SUP. CT. REV. 41.

gated to the Government. The "balancing test"[50] is the classic example of this process whereby a "substantial governmental interest"[51] is weighed against interference with the right of an individual — or of an identifiable group — to exercise the freedom of expression. The traditional interpretation of the first amendment subtly tends to establish the "public interest" in opposition to the first amendment guarantees.

In Meiklejohn's analysis, however, this alignment is frequently reversed, or at least substantially altered. The primary public interest plainly rests in the vigorous exchange of information and opinion. Since the government is thereby without power to violate this sovereignty in the absence of a pre-emptive power within the Constitution, explicitly and justifiably shifting the "public interest" to the governmental interest, the burden upon the government to convince courts of the constitutional propriety of its interruption of free expression is greatly increased.

This analytical distinction produces notable effects when applied to actual controversies. The Court of Appeals for the Ninth Circuit recently demonstrated the impact of the public interest interpretation of the first amendment in *Caldwell v. United States,*[52] in which a newspaper reporter was granted immunity from a federal grand jury subpoena on the grounds that his participation in the investigation would jeopardize his relationship with his news sources.[53] In the absence of a clear showing of a "substantial government interest" (one which might supersede that of the open exchange of information), the Government was not permitted to compel the attendance of Caldwell before the grand jury. The outcome of the case did not arise from the journalist's

50. Professor Emerson defined this test:
> The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression.

Emerson, *supra* note 49, at 912.

51. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

52. 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 402 U.S. 942 (1971).

53. The fear of this "chilling effect" was particularly justifiable since Mr. Caldwell's news sources—members of the Black Panther organization which was the object of the Grand Jury investigation—were extraordinarily sensitive to the possibility that he might reveal information which had been conveyed to him in a relationship of trust and confidence. Upon the slightest indication that Caldwell had broken that trust, the sources would no longer be available to Mr. Caldwell or to the public through the newspaper media. *Id.* at 1084.

personal privilege to refuse to respond to the subpoena. Such an argument had been frequently rejected by other courts prior to *Caldwell*.[54] Instead, the immunity arose from the public interest in the preservation of Caldwell's continued access to his news sources in order to maintain the free flow of news in areas of public interest and concern:[55]

> [W]e hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance.

Nor did Caldwell's claim rely upon the private interest of an identifiable audience in the "right to hear." If in fact he had argued such an individualized right, the "public interest" might have been shifted to support the governmental interest. This raises the possibility that the Meiklejohn analysis must be distinguished from the right to hear. Although these two doctrines have been frequently equated,[56] a close examination indicates that the right to hear may be more appropriately categorized as a personal right — the corollary of the freedom of speech — to be exercised individually. Therefore, it falls short of the other doctrine which focuses upon the benefit which the public as a whole derives from unfettered communication.

The *Mandel* court appears to have reached a similar conclusion. Although the majority opinion repeatedly obscures the precise relationship between the two doctrines and vacillates as to whether to regard them as separate or identical, that very indecision attests to the necessity of resolving the dilemma. The question of whether the plaintiffs have standing to sue provides the setting for the conceptual

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54. *See* Garland v. Torre, 295 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

55. Caldwell v. United States, 434 F.2d 1081, 1089 (1970).

56. *See* Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311, 339-40 (1972). Therein the author observes:

> Clearly either the personal or the political rationale for the freedom of speech can justify a freedom to hear. . . . [T]he Supreme Court has generally failed to articulate which rationale it is relying upon, or to differentiate between the two interests which may be at stake. Specifically, the failure to isolate the political-justification theory has foreclosed the opportunity to take advantage of broader protections which are available once this line of analysis is identified.

struggle. The court initially attempts to circumvent the standing issue by declaring it to be eclipsed by the Meiklejohn analysis which invalidates the statute:[57]

> Since the First Amendment is not in its primary and most significant aspect a grant by the Constitution to the citizens of individual rights of self-expression but on the contrary reflects the total retention by the people as sovereign to themselves of the right to free and open debate of political questions, the issue of "standing to sue" is immediately seen to be unreal.

Nevertheless, aware of the impropriety of ignoring the conflict, the court ultimately attempted to reconcile the two doctrines in a particularly cogent and provocative conclusion:[58]

> In this case the admission of Mandel is but a lever by which the constitutional rights of his prospective citizen audience are to be given effect; they, as the articulately concerned portion of the sovereign people assert a very high title to support Mandel's admission.

The use of the phrase "articulately concerned portion of the sovereign people" indicates that the lesser doctrine of right to hear is merely the vehicle for delivery of the issue before the tribunal. However, the statute falls not simply because certain prominent United States economists have rightfully sued for the personal privilege of hearing Mr. Mandel. Subsections 212(a)(28)(D) and (G)(v) are unconstitutional as impermissable trespasses upon the public domain of the first amendment.

But isn't this somewhat strange? There seems to be a supreme sovereignty of the people which has been violated by the Government in its direct assault which is void from the outset because of the lack of sovereign power of Congress to enact the statute. Yet, in order to establish the requisite standing to sue, the court turns to the right to hear, an affirmative and specific right held by a discrete number of individuals endowing them with sufficient interest in the application of the statute to challenge its validity by asserting the sovereignty of the people. This reasoning may be self-defeating. If the primary law—the sovereignty of the people—prohibits the zealous excesses of a

57. *Mandel*, 325 F. Supp. at 631.
58. *Id.* at 633.

government stripped of certain sovereign prerogatives, then reliance upon the lesser "right" affirmatively assertable by individuals as a prerequisite to the vindication of the primary public interest seems to reduce the supremacy of the supreme.

Although the two doctrines remain undoubtedly related,[59] the distinctions evident in the majority opinion appear to compromise what otherwise constitutes a thorough adoption of the Meiklejohn theory of the first amendment. However, this disappointing paradox is arguably characteristic of the "standing to sue" requirement in our legal system which often leads to the dichotomy between general and specific injury in order to comply with the constitutional requirement of "case and controversy."

IV. THE OPEN END

Perhaps the enigma of *Mandel* is merely the product of the unique factual and legal circumstances surrounding the case. Nevertheless, in adopting the Meiklejohn analysis, the court provides a convincing argument for the "public interest" interpretation of the first amendment and reveals possible distinctions between that theory and its cousin, the right to hear.

Although the Supreme Court recently failed to invoke the Meiklejohn theory of the first amendment when presented the opportunity in the case of the Pentagon Papers,[60] it will re-encounter the issue early this term when it hears the appeals of *Mandel* and *Caldwell.* A glimmer of hope remains that the Court will elect to broaden its acceptance and application of Meiklejohn's analysis. If such be the case, perhaps it will thereby provide more certainty in the relationships among the traditional freedom of speech and of the press, the right to hear, and the public interest doctrine of free flow of information concerning public affairs.

However, even if the Supreme Court refuses to adopt the comprehensive Meiklejohn interpretation, subsections 212(a)(28)(D) and

59. Both guarantee the availability of certain information, either to the individual recipient or to the society at large. *See* Lamont v. Postmaster General, 381 U.S. 301 (1965); and Stanley v. Georgia, 394 U.S. 557 (1969) (Brennan, J.) (concurring opinion). *But see* United States v. Thirty-seven (37) Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).

60. New York Times Co. v. United States, 91 S. Ct. 2140 (1971).

(G)(v) of the Immigration and Nationality Act should be struck down, if only as unacceptable prior restraints on free speech and press which are not excused by intervening state interests.[61]

It cannot be doubted that the temporary admission of an alien into this country and his subsequent departure involve governmental difficulties which transcend those connected with the mere passage of printed material through the mails.[62] Yet the problems produced by the presence of an active and articulate alien are mitigated by the peculiar benefits to be derived from direct contact and conversation between United States citizens and an advocate of alternative views on public issues.[63]

Moreover, the decision in *Mandel* does not open the national portals to every alien merely because the public interest may in some way be served by his presence. The decision preserves for the government great latitude in excluding aliens while it encourages full disclosure of the proposed visit and of the visitor. Although it seems probable that a bona fide subversive agent could enter this country clandestinely, an open application for a visa by the legitimate invitee of United States citizens serves notice upon the government and affords the opportunity to subject the alien to a thorough scrutiny. Since he would be subject to a comprehensive border search, his potential role as a courier would be limited to his perceptions, his memory, and his imagination. In addition, the government could reasonably require the applicant to provide a projected itinerary, a list of sponsoring organizations,[64] and a summary of his background and his previous activi-

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61. Such reasoning was employed by the Court in the recent decision regarding the publication of the "Pentagon Papers" by the *New York Times* and the *Washington Post*. *Id.* at 2141.

62. *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301 (1965).

63. Nor can the difficulties arising from the visiting alien be equated with the problems produced by the responsibility of the United States government to protect its citizens in their travel abroad. *See* Zemel v. Rusk, 381 U.S. 1 (1965). In *Zemel* the Supreme Court upheld a State Department refusal to permit United States citizens to travel to Cuba to gather information on the social experiments there. The majority in *Mandel* distinguished *Zemel* as a general restraint on travel arising from diplomatic necessities and unconnected with Zemel's beliefs or publications. Neither the necessities of foreign affairs nor the burden of governmental protection of citizens abroad justifies Mandel's exclusion.

64. This requirement may raise some well-founded objections by United States citizens. However, a balance must somehow be struck between the necessity of the Government to regulate alien admission and the right of the people to have access to information. This requirement, if properly administered, would hopefully provide a workable compromise.

ties. If this information or other investigation reveals that the applicant has acted unlawfully in a previous visit to the United States, he could be justifiably excluded. If he were to act unlawfully during his visit, he could be deported. If he were reasonably anticipated to incite or provoke violence, then other subsections of the Immigration and Nationality Act provide ample power for the government to prevent his entry.[65] These alternative methods of exclusion sufficiently protect the national interests while they do not unduly interfere with the public interest in the open exchange of information.

Dissenting in *Mandel,* Judge Bartels contended that the first amendment should not interfere with the powers of the government to preserve the national security or to conduct foreign affairs. However, his perception of Mandel's admission as an interference with these governmental powers seems to arise from a fear of the doctrines which the applicant candidly espouses. Thus, in the opinion of Judge Bartels:[66]

> The loss of thousands of lives and the expenditure of billions of dollars attest to the fact that the Federal Government has reached the judgment that the continued world-wide growth of the world Communist movement as practiced in its tyrannical form is inimical to the best interests of this nation.

In an era marked by increased confidence in the benefits of free expression and by improved communication among nations previously separated by mutual suspicion and hostility, Judge Bartels' justification of Mandel's exclusion seems strikingly inappropriate and unpersuasive. Certainly those lives and those billions were dedicated far less to the prevention of those who openly advocate contrary economic and political views from reaching our shores, than to the promotion of those human values which this nation has long deemed to be essential to the preservation of a free society.

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65. Act of June 27, 1952 (Immigration and Nationality Act) §§ 212(a)(27), (29), 8 U.S.C. §§ 1182(a)(27), (29) (1970).
66. *Mandel,* 325 F. Supp. at 647.