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The Pathological Perspective and the First Amendment

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THE PATHOLOGICAL PERSPECTIVE AND THE FIRST AMENDMENT

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I. THESIS

Constitutions are designed to control, or at least influence, future events—political events, adjudicative events, to some extent even interactions between private parties. Yet the future is unknowable, largely unpredictable, and inevitably variable. At any moment there exists a short-run future, a long-run future, and a future in between. The future is virtually certain to contain some progress, some regression, some stability, some volatility. How is a constitution supposed to operate upon this vast panoply?

That is a question that ought to loom large in the deliberations of persons who propose and ratify new constitutions and new constitutional amendments. It is also a question that should form part of the backdrop against which particular constitutional provisions are interpreted. Here I plan to address just one small part of that inquiry: what perspective on the future should gnide courts in interpreting the speech, press, and assembly clauses of the first amendment to the United States Constitution?

My thesis is that in adjudicating first amendment disputes and fashioning first amendment doctrines, courts ought to adopt what might be termed the pathological perspective. That is, the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most

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likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.

I would not make that claim about all provisions of the federal Constitution. Certain clauses—the equal protection and cruel and unusual punishment clauses, for example—may be designed, or at least most wisely interpreted, to serve the society primarily in periods of unusual idealism or cohesion. Provisions of that sort may be more significant for their capacity to stimulate, channel, or institutionalize progressive social change than for any role they may play in preserving traditional arrangements. But the speech, press, and assembly clauses of the first amendment, as well as some other provisions of the Constitution—the religion clauses and the dormant commerce clause come to mind—are best viewed as having primarily a preservative function.[1] It is accordingly the pathological perspective that ought to inform the way those clauses are interpreted.

The central empirical proposition of my thesis is that certain segments of time are of special significance for the preservation of the basic liberties of expression and inquiry because the most serious threats to those liberties tend to be concentrated in abnormal periods. To define such periods with any degree of precision is a challenge that must await an examination of the reasons why courts ought to adopt the pathological perspective. At the outset, however, it is necessary to address a few definitional considerations that bear on any assessment of those reasons.

First, the pathologies about which courts ought to be concerned are time-bound and exceptional. "Pathology" in the sense I use the term is a social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe. Those dynamics may operate primarily in the legislative or executive branches of government and may influence only decisions relating to criminal prosecution or the distribution of government benefits. Or the repressive dynamics may penetrate the judicial psyche and cause judges to interpret the first amendment restrictively. In certain pathological periods, the most im-

1. The crucial distinction is between provisions of the Constitution that establish the basic structure of the government and the most significant relationships of the political regime, and provisions that embody more discrete, and thus less "essential" though often no less important, normative commitments or aspirations. Because the basic structures and relationships are constitutive of the political community as an entity, preservation and continuity should be viewed as the first priority when those provisions are the subject of interpretation. In addition to the protection of free expression, the constitutive provisions of the American Constitution include the systems of federalism and separation of powers, the guaranty of a republican form of government, the separation of church and state, the legitimation of private property, the abolition of slavery and race-determined citizenship, and the requirement of due process of law.

portant dynamics may relate to the way prospective dissenters perceive the risks that are entailed in identifying themselves as believers in unorthodox ideas or as opponents of particular government actions. One feature unites the various pathologies that first amendment doctrine should be designed to combat: a shift in fundamental attitudes or perceptions among one or another group of persons whose judgments have an important influence on the general level and vigor of public debate and private inquiry.

Second, pathology need not be a nationwide phenomenon. Shifts in attitudes regarding the toleration of dissent that are confined to particular regions or localities should be of major concern in the formulation of first amendment doctrine. Boss Hagne's antilabor reign of terror in Jersey City during the 1930s and the counterattacks against civil rights advocates mounted by numerous Southern communities in the 1960s figure in my analysis just as do the national Red Scare of 1919–1920 and the McCarthy Era.[2]

Third, I do not propose that the applicability of specific doctrines turn on a finding in a particular case that the situation in question is or is not pathological. That form of contingent doctrine is in fact antithetical to my thesis. I propose rather that continually applicable doctrines be formulated with emphasis on how well they would serve in the worst of times. In deciding first amendment cases, therefore, courts would always have to know roughly what evils they were gnarding against as a general matter, but never precisely whether a particular situation amounted to such an evil.

Fourth, it is important not to confuse the notion of pathology that I invoke with other types of pessimistic assumptions or worst-case projections that sometimes inform legal reasoning. For example, the familiar parade of horribles can be viewed as a worst-case scenario of logical extrapolation: the acceptance of a particular principle as the justification for a given result may support results in future cases that are intuitively unappealing or even revolting. That type of projection can operate at any time in any social context, and thus is different from the notion of pathology that I invoke. The parade of horribles need not

2. The examples in the text are of twentieth century vintage, but pathologies have occurred intermittently throughout American history. Prominent instances include: the banishment of Ann Hutchinson from the Massachusetts Bay Colony in 1637, see E. Morgan, The Puritan Dilemma (1958); the Salem witchcraft trials, see J. Demos, Entertaining Satan (1982); the Alien and Sedition Acts, see J. Smith, Freedom's Fetters (1966); the antiMasonic hysteria that gripped the nation during the 1820s and early 1830s, see A. Tyler, Freedom's Ferment 351–58 (1944); the persecution of the Mormons during the 1840s and 1850s, see L. Arrington & D. Bitton, The Mormon Experience 44–64 (1979); and the repression of anarchists after the Haymarket Riot of 1886, see J. Garraty, The New Commonwealth 166–70 (1968). For a valuable anthology of alarmist writings growing out of these and other pathologies, see The Fear of Conspiracy: Images of Un-American Subversion from the Revolution to the Present 73–84 (D. Davis ed. 1971) [hereinafter cited as D. Davis].

depend on a major shift in basic attitudes. Similarly, a pessimistic view about the dynamics of speech regulation in all eras could lead judges to adopt the analytical device of assuming the worst in attempting to reconstruct or predict particular events pertinent to litigation. That device could justify courts in taking at all times a highly skeptical attitude regarding claims by government officials that no censorial purpose lay behind a given regulation, or a generous attitude toward claims by litigants that a law is likely to have a chilling effect on unidentified potential speakers. One could employ such predispositions not as a means of guarding against the worst of times but rather in the belief that adjudicative fairness at all times would be enhanced thereby. Such an assumption is not time-bound or dependent on shifts of social attitudes. In those respects it is different from the notion of pathology that informs my thesis.

To say that our working conception of pathology relates only to temporary shifts in basic attitudes among certain influential actors is only to begin the definitional aspect of the endeavor. Within the bounds so established, one might still wonder whether "pathology" refers only to the very worst of times or also to comparatively bad but not truly rare periods. One might ask what weight proportionately should be given to such factors as the breadth of shift in attitudes, the intensity with which the new repressive attitudes are held, the apparent durability of the consequences that flow from the shift, and a host of other considerations. Moreover, exactly what kinds of "attitudes" are we to examine? Those regarding the value of dissent in general? Regarding the validity of certain premises that underlie the philosophical rationale for free expression? Regarding how certain standard instances of dissenting speech should be treated? Regarding how innovative claims of liberty of expression should be viewed? Those questions are formidable, but they cannot be addressed until it is established why as a matter of first amendment theory courts ought to be concerned at all with the concept of pathology.

II. The Argument

The salient feature of my thesis is the overriding importance it attaches to the goal of preserving the theoretical integrity and practical effectiveness of a limited number of propositions that can be said to constitute the "core" of the speech, press, and assembly clauses of the first amendment. That goal is not lexically ordered in the sense that the slightest gain in nurturing the core necessarily outweighs substantial costs regarding the quality of first amendment adjudication outside the core. Nevertheless, short of extreme trade-offs, the strengthening of the core takes priority. I place such emphasis on that endeavor because of a view I hold regarding the nature of constitutional limitations generally.

The first task of any system of constitutional limitations is to guar-

antee that the truly fundamental features of the framework of government are maintained. The function of a "constitution" is to "constitute"—to "set up," "formally establish," "give form to," or "cause to become fixed" certain structures and principles of governance.[3] Consistent with this basic understanding of function there is, of course, room for vigorous debate over the precise objectives of constitutionalism. However, the rich variation in theories of constitutionalism should not cause us to lose sight of the fact that the enterprise of constitutional government is essentially preservative in nature.

One can view a constitution as primarily a bulwark against tyranny, a force for tempering the shortsightedness and unruliness of electoral politics, a statement of ideals, a check against majority oppression of minorities, a means of pacing and ordering institutional change, a political totem, a mechanism for structuring interest group politics, or a last resort for resolving political deadlocks. Each of these characterizations, as well as others that could be posited, derives from a view regarding the various objectives that are served by constraining representative institutions by means of the device of constitutional limitations. I do not want to rest my case for the pathological perspective on a particular ordering of the objectives of constitutionalism. My own thoughts on the matter are not settled and, surprisingly, the vast literature on constitutional theory is sparse on this question of basic objectives.[4] The argument for the pathological perspective is a convergence argument: all plausible objectives of constitutionalism depend for their realization on the existence of a considerable measure of continuity and stability regarding the most basic structural arrangements and value commitments of the constitutional regime.

The reason for this convergence lies in the fact that all objectives of constitutionalism by definition share a common feature: the goal of limiting present exercises of political power by resort to some notion of superior authority. The willingness of those who exercise political power to recognize superior constitutional authority may derive from perceptions of past commitment, calculations of reciprocal advantage, or loyalties born of a sense of common endeavor. The wellsprings of political authority are culturally dependent and often mysterious. But unless the appeal to constitutionalism evokes genuine sentiments of long-term commitment or aspiration, officials and citizens cannot be expected to forego their preferences of the moment in deference to the claims of the constitutional regime. There would seem to be an impor-

3. These definitions of "to constitute" are taken from Webster's Third New International Dictionary 486 (unabridged ed. 1978).

4. All constitutional theorists assume certain objectives of constitutionalism but the only modern writers I have found who consider explicitly the various objectives that constitutional limitations can be thought to serve are Paul Brest and Carl Friedrich. See Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 226 (1980); Friedrich, Constitutions and Constitutionalism, 3 Ency. Soc. Sci. 318 (1966).

tant link, moreover, between the stability and continuity of the central tenets of a system of constitutional limitations and its capacity to evoke the requisite sentiments of commitment and aspiration in the persons whom it seeks to constrain.

Only relatively stable principles are likely to be perceived by divergent political factions as potentially working to their advantage in the long run. Only relatively stable principles are likely to be viewed as worthy of a certain respect simply on account of their capacity to endure. Only if the expositors of constitutional principles avoid being dominated by the political alignments and passions of the present can those whose preferences are backed by force of arms or popular approval be expected to take a long-term view about the nature of political obligation. Whether constitutional provisions are invoked to protect political minorities, break political deadlocks, raise the level of public debate to a more idealistic plane, or serve any of the other possible objectives of constitutionalism, the relative continuity and stability of the constitutional tradition is likely to have a major impact on the success of the endeavor.

This is not to argue that innovation should be frowned upon in developing a constitutional tradition, or that the quest for stability should dominate the process of doctrinal formulation at every level. Stability and continuity are important primarily with regard to the central structural arrangements and basic norms of the constitutional regime. It is those provisions that purport to define the political community and embody the long-term commitments and aspirations of the populace. The manner by which secondary arrangements and norms should be extrapolated from the most basic provisions of the Constitution is, of course, an intriguing and important subject of constitutional theory.[5] But the prominence and vigor of disputation at that level should not lead us to ignore the importance of continuity and stability regarding the central norms of the constitutional tradition.

A high regard for continuity and stability should not be confused with a static view of the nature of constitutional limitations. No workable system of constitutional limitations can derive even its most basic norms exclusively from the objectively perceived intentions of the original drafters and ratifiers of the constitutional text. The meaning that is ascribed to a constitutional provision cannot help but be a function in part of the intentions of the contemporary interpretors (and their audiences) as well as of the original formulators; to give meaning to any text or event we cannot help but draw upon our own values, perceptions,

5. Most of the raging debates in constitutional theory concern this question of extrapolation. See J. Ely, Democracy and Distrust (1980); L. Lusky, By What Right? (1975); M. Perry, The Constitution, the Courts, and Human Rights (1982); Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981); Sager, Rights Skepticism and Process-Based Responses, 56 N.Y.U. L. Rev. 417 (1981).

and focal mechanisms.[6] Simply as a practical matter, the past cannot control the present in the manner required by a static view of constitutionalism. There is a crucial difference, however, between respect for the past in the form of adherence to the supposed intentions of the original framers and respect for the past in the form of an appreciation of the value of continuity, stability, and tradition in the process of constitutional interpretation. The undeniable importance of adaptation and, under some views of the objectives of constitutionalism, creative innovation at the margins of application should not lead us to ignore the significant role played in a constitutional regime by a core of relatively stable and consistently enforced central norms.

The conclusion that the constitutional tradition should build upon a limited number of relatively stable central norms does not help one to identify which norms occupy the central place and thus qualify for the special attention demanded by my thesis. That determination will be a function of several factors, including the relationship of the norm to other important features of the constitutional regime, the capacity of the norm to remain both stable and efficacious over time, the extent to which the norm embodies aspirations or fears that help to explain the political community's commitment to constitutionalism in the first place, and the extent to which the norm has played an important part in the actual history of the polity. Whatever the measure adopted, however, it seems scarcely controversial to assert that at least some of the norms of the first amendment occupy such a central place in the American constitutional tradition.

The elaborate system of rights and structures set out in the text of the American Constitution makes sense only in the context of a commitment to limited government. That commitment necessarily entails some degree of conceptual separation between the state and its citizens and some practical capacity of citizens to challenge and check those who wield power in the name of the state. Certain norms regarding free expression and inquiry are integral to that conceptual separation and practical capacity.[7] In this respect, the core commitments of the first amendment serve as one of the linchpins of the entire constitutional regime. Few other provisions have so central a role to play in

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6. See Brest, supra note 4; Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469 (1981); Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033 (1981); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983).

7. I have developed the notion of conceptual separation in Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 69–85 (1981) [hereinafter cited as Blasi, Prior Restraint], and the notion of a checking capacity in Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Research J. 521 [hereinafter cited as Blasi, Checking Value]. For a specification of the norms regarding free expression that I view as integral to the scheme of limited goverument, see infra text accompanying notes 15–25.

constituting the American polity.[8]

Judged also by the measure of historical impact, the basic commitment to free expression and inquiry must be considered one of the central features of the American constitutional regime. One need not blot from vision the intermittent periods of widespread, systematic repression of dissenters to appreciate the importance of free speech in the development of the American republic. Mass movements of enduring significance have emerged and presidents have been driven from office because of expressive activities that are disallowed in many other systems of government. The most serious lapses in toleration of dissent, such as the Alien and Sedition Acts, the Red Scare, and the McCarthy Era, have acquired an aura of ignominy that says much about the importance of free speech in the pantheon of national ideals.

I conclude, therefore, that some propositions regarding freedom of expression and inquiry number among the relatively stable central norms of the American constitutional tradition. Because of their important role in the constitutional regime, it should be a matter of priority that those central norms be preserved and strengthened whenever and wherever possible.

In most periods, the central norms of a constitutional tradition are not challenged. The focus of controversy is elsewhere, on the frontiers of doctrinal expansion, on novel claims whose pedigree can be established only by means of imaginative connections. We can expect this centrifugal emphasis to be most common in mature constitutional systems, particularly those dominated by lawyers and maintained by adjudication. For lawyers, especially lawyers educated in the common law, are interested primarily in the logic of the next step, in the case just over the hill. Implications rather than premises are what lawyers are trained to evaluate. Absent unusual social pressures, the central norms of a provision like the first amendment—that news reporting cannot be controlled by government, for example, or that citizens cannot be penalized for disagreeing with government policy—are taken for granted. The core commitments that derive from those norms are not regarded as burdensome or controversial. Normally, those core commitments need no special tending; the ordinary dynamics of adjudication provide more than sufficient protection.

The trouble is that this cheery description holds true only for most periods of time, not all. In pathological periods, at least some of the central norms of the constitutional regime are indeed scrutinized and challenged. The core commitments that derive from those norms are viewed by many as highly burdensome and controversial. In such periods the times seem so different, so out of joint, the threats from within or without seem so unprecedented, that the Constitution itself is perceived by many persons as anachronistic, or at least rigidly, unrealisti-

8. See supra note 1.

cally formalistic. In times when those misgivings take hold, the central norms of the constitutional regime are in jeopardy. The strength of the political community's commitment to those norms is tested, and it may matter a great deal how well the central norms were nurtured in the periods of calm that preceded the pathology.

There is reason to believe that susceptibility to pathological challenge is especially characteristic of the central constitutional norms regarding free expression and inquiry. Most constitutional commitments are fragile in the sense that they embody ideals that are easily abandoned or tempered in times of stress. Certain distinctive features of the commitment to free speech enhance that fragility.

The aggressive impulse to be intolerant of others resides within all of us. It is a powerful instinct. Only the most sustained socialization—one might even say indoctrination in the value of free speech—keeps the urge to suppress dissent under control.[9] When the constraints imposed by that socialization lose their effectiveness, as most social constraints intermittently do, the power of the instinct toward intolerance usually generates a highly charged collective mentality. Because the instinct to suppress dissent is basic, primitive, and aggressive, it tends to have great momentum when it breaks loose from the shackles of social constraint. Aggression is contagious, and hatred of strangers for what they believe is one of the safest and most convenient forms of aggression. The problem is compounded by the fact that the suppression of dissent ordinarily is undertaken in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the supposed true values of the political community. As such, this particular type of challenge to constitutional liberties can take on the character of a mass movement; it can engage the imagination of the man on the street.

It would be a great mistake, moreover, to assume that pathologies regarding the liberties of expression and inquiry constitute mere passing tempests, rough and unsettling at the time but of only limited significance in the long run. Some historians believe that the Red Scare was a factor in the precipitous collapse during the 1920s of the once potent Socialist movement in the United States.[10] The State Department's corps of experienced specialists on the Far East was decimated as a result of firings and forced resiguations during the McCarthy Era;

9. For an insightful rumination on the control of intolerance, see Bollinger, The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory, 80 Mich. L. Rev. 617 (1982).

10. See D. Shannon, The Socialist Party of America 99–125 (1955); Kolko, Decline of American Radicalism in the Twentieth Century *in* For a New America 197–200, 206–07 (J. Weinstein & D. Eakins eds. 1970); see also R. Murray, Red Scare 263–78 (1964) (general catalogue of lingering effects of Red Scare). But see J. Weinstein, The Decline of Socialism in America (1967); A. Kraditor, The Radical Persuasion 1890–1917, at 13–33 (1981).

miscalculations in American policy toward Vietnam have been attributed to that loss of expertise.[11] The Hollywood Blacklist struggle of 1947–1953 left a residue of broken careers, expatriate talents, and extreme reluctance on the part of film studios to address controversial subjects or portray social conditions of potential political significance.[12] The character of the trade union movement was permanently altered by the expulsion during the anti-Communist purges of the 1950s of some of its most skillful, uncompromising, and incorruptible leaders.[13] Pathological periods tend to be short-lived, but their consequences linger on.

So far I have argued that the central norms of the constitutional tradition, which are normally immune from serious challenge both in political debate and adjudication, tend to be placed in jeopardy during pathological periods. That claim still does not establish that adjudication in ordinary times should be heavily influenced by the goal of strengthening the central norms of the first amendment tradition against the possibility of pathological challenges. Even if the most serious challenges to those norms tend to be concentrated in pathological periods, it may be that the best way to fortify a constitutional regime against pathological challenge is to develop a strong tradition of adjudication geared to normal times.

That possibility seems to me remote. Without some sort of consciously designed corrective, there is no reason to assume that adjudication in normal times will do a good job of nurturing the central norms of the constitutional regime. When those norms are not themselves under challenge, their main function is to serve as starting points for analogy or argumentation in disputes over the outer reaches of constitutional doctrine. That process may actually undercut the authority of the central norms. Grand ideas can come to be regarded as cliches when they are repeatedly invoked for partisan, rhetorical purposes in settings far removed from those that gave birth to the ideas. The very phenomenon of adversaries discerning radically different implications from a common norm can weaken the community's understanding of and devotion to the norm. The grist of everyday legal argumentation is the manipulation of ideas. That tradition of manipulation, though perfectly appropriate in adversarial discourse, may make it more difficult for the central norms of the constitutional regime to carry the authority

11. See D. Caute, The Great Fear 303–24 (1978); D. Halberstam, The Best and the Brightest 323–25 (1972).

12. See L. Ceplair & S. Englund, The Inquisition in Hollywood: Politics in the Film Community 1930–1960, at 422 (1983).

13. See D. Caute, supra note 11, at 349–400; D. Oshinsky, Senator Joseph McCarthy and the American Lahor Movement 98–100 (1976). The persecution of Harry Bridges, colorful and effective leader of longshoremen, is recounted in detail in S. Kutler, The American Inquisition 118–51 (1982).

they must—to evoke the reverence and deep conviction they must—if those norms are to withstand pathological pressures.

It remains to be demonstrated that a conscious effort by courts to strengthen the central norms of the first amendment against the advent of pathology would have the intended effect. I shall examine in some detail several of the methodologies and doctrines that are indicated by my thesis and explain how I think they would operate in pathological periods. It must be emphasized, however, that the pathological perspective represents only a modification of emphasis, not a fundamental reordering of legal thought. The potential effect of the shift in emphasis I advocate is limited, though hardly unimportant on that account. Were courts to adopt my thesis, pathologies of repression would still occur, sometimes in virulent form. It is unlikely that first amendment doctrine, no matter how carefully constructed, could ever actually prevent a pathology. The most we can hope for is that well-prepared methodologies and doctrines might help to blunt or delay the impact of some pathological pressures, keep a pathology in certain bounds, or stimulate the regenerative forces that permit a political community to work its way out of a pathological period. Contributions of that sort should not be undervalued.

Thus, if it is true that the preservation and effectuation of a limited number of relatively stable central norms should be the first priority of a constitutional regime, the process of constitutional adjudication ought to be consciously designed to reflect that priority. The effort to structure adjudication toward the end of strengthening the central norms of the first amendment tradition must begin with the recognition that the most serious threats to those norms, and to the commitments they generate, tend to come in concentrated, unusual periods that are properly described as pathological. The impact of doctrine in those periods should accordingly be treated as a dominant consideration.

III. Defining Pathology

The foregoing discussion was designed to show in a general way that the concept of pathology ought to figure in first amendment analysis. Now it is time to develop the thesis with greater specificity. I wish to explore a few of the implications that would follow from adoption of the pathological perspective. To bring the inquiry to that plane, it is necessary to develop a more detailed understanding of what makes a particular period pathological.

The defining feature of a pathological period is the phenomenon of an unusually serious challenge to one or more of the central norms of the constitutional regime. My thesis addresses only one type of pathology: that involving a major challenge to the central norms of the first amendment. In order to identify when such a challenge exists, it is necessary to know what those central norms are. The pathological per-

spective cannot supply that information. An independent understanding of first amendment values and priorities is required.

Given the major role played by history and tradition in my view of constitutionalism in the United States, it should come as no surprise that the value commitments I regard as most significant in determining the core of the first amendment are those that are forged in the foundry of political experience. Value commitments with that pedigree tend to be simple, discrete, situation-oriented, and accessible. Because they are not especially complicated, such value commitments are capable of achieving a high degree of intuitive acceptance in the political culture. And because even the most rigorous theorists are creatures of the political culture and tradition within which they work, the value commitments I have in mind tend to find support in a wide variety of efforts by American scholars to justify free speech systematically.[14]

Most of the value commitments that comprise the core of the first amendment are relatively specific in nature: Government cannot employ coercive measures to shape the content of news coverage.[15] Private citizens cannot be penalized for holding unpopular political opinions or for criticizing particular government policies.[16] The communication of a fact or value judgment relating to a matter of public concern cannot be prohibited solely on the ground that the communication is false, injures reputation, erodes moral standards, or stirs people to anger; some form of culpability on the part of the speaker must be established before any of these consequences can serve as a basis for regulating speech.[17] Publicly owned areas cannot be placed off limits to private speakers simply on the basis of the prerogatives of ownership; special justifications relating to competing public uses must be invoked.[18] A private citizen cannot be required to affirm any loyalties or beliefs unless he seeks to occupy a position of responsibility for

14. See, e.g., Z. Chafee, Free Speech in the United States 26–35, 42–51, 80–97, 128–40, 409–38 (1941); T. Emerson, The System of Freedom of Expression 26–41, 62–70, 124–29, 159–60, 202–04, 207–15, 277–79, 292–310, 397–99 (1970); F. Haiman, Speech and Law in a Free Society 47–60, 87–99, 157–63, 267–83 (1981); M. Nimmer, Nimmer on Freedom of Speech §§ 2.05, 2.07, 3.03, 4.04, 4.09[D] (1984); F. Schauer, Free Speech: A Philosophical Enquiry 167–77, 189–99, 201–06 (1982).

15. See, e.g., Landmark Communications v. Virginia, 435 U.S. 829 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).

16. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957).

17. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974); Cohen v. California, 403 U.S. 15 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Terminiello v. Chicago, 337 U.S. 1 (1949).

18. See, e.g., United States v. Grace, 461 U.S. 171 (1983); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Edwards v. South Carolina, 372 U.S. 229 (1963); Hague v. CIO, 307 U.S. 496 (1939) (plurality opinion).

which certain loyalties or beliefs are relevant.[19] Government cannot inquire into the private thoughts or political affiliations of any citizen except insofar as that information is important to an investigation of patterns of antisocial conduct or fitness for positions of special responsibility.[20] An individual cannot be held accountable for the beliefs, intentions, or actions of other persons or organizations simply on the basis of his political association or affiliation with those persons or organizations.[21]

A few propositions of a more general nature have received sufficient acceptance over time to qualify for inclusion in the core of the first amendment: A regulatory system that evaluates speech prior to its initial dissemination is especially problematic.[22] Courts should be highly reluctant to base their decisions regarding constitutional protection on ad hoc judgments regarding the truth or social worth of particular communications.[23] Arguments for regulation that depend on the claim that audiences will be injured or induced to injure others by the message conveyed by the speech must be treated with skepticism.[24] Harms that allegedly flow from speech not immediately but by a process that takes time to develop seldom provide a legitimate basis for suppressing the speech; whenever feasible the state must employ alternative means of preventing harms of that sort.[25]

Not all of the specific and general propositions just described were part of the original understanding of the first amendment.[26] Most of

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19. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977); Cole v. Richardson, 405 U.S. 676 (1972); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

20. See, e.g., Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

21. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Scales v. United States, 367 U.S. 203, 228–30 (1961).

22. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Near v. Minnesota, ex rel. Olson 283 U.S. 697 (1931); Blasi, Prior Restraint, supra note 7; Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648 (1955).

23. See, e.g., Cohen v. California, 403 U.S. 15, 25 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

24. See, e.g., Chicago Police Dep't v. Mosley, 408 U.S. 92, 99–101 (1972); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975); Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983).

25. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969); Whitney v. California, 274 U.S. 357, 372–78 (1927) (Brandeis, J., concurring).

26. In recent years, discussion of the original understanding of the first amendment has been dominated by Leonard Levy's provocative, elaborately documented, and in my opinion, seriously flawed thesis that the framers of the Bill of Rights had a narrow and essentially nonlibertarian view of the freedoms of speech and the press. See L. Levy, Legacy of Suppression (1960); see also L. Levy, The Emergence of a Free Press (1985) (recently published, retitled, revised edition of *Legacy of Suppression*). For critiques of Levy, see Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455, 493–537

them were at one time controversial; they achieved acceptance in the political culture by first being boldly asserted by proponents, eventually endorsed by key decisionmakers, and gradually recognized over time by diverse elements of the political community. Not every serious student of the first amendment would subscribe to all of these propositions.[27] But each of them is now sufficiently well entrenched in our first amendment tradition as it has developed by means of adjudication and public debate, and each commands broad enough support among persons who critically scrutinize that tradition, that this list of propositions can properly be said to constitute the relatively stable, though always evolving, core of the first amendment.

We could define pathology simply as a period during which the rights implied by these core propositions are denied. The consequence for the formulation of doctrine in normal periods would be that no doctrine should be in conflict with any of the core propositions. Our enterprise, however, is somewhat more complicated. We are attempting not merely to identify the most serious incursions on the liberties of expression and inquiry but to develop patterns of thinking about the first amendment that minimize the occurrence and the effects of such incursions. My claim is that the most serious threats to the core commitments of the first amendment tend to be concentrated in unusual, intense periods and tend to derive from certain powerful social dynamics. It is not enough, therefore, for the definition of pathology to specify the incursions that violate the core commitments. It is important also that the definition of pathology identify, at least in broad outline, the social dynamics that generate concentrated, synergistic threats to the basic liberties of expression. Only then can first amendment doctrines and methodologies be developed that are designed especially to counter such threats.

As explained above, the central norms of the constitutional regime in the United States derive their authority initially from public acceptance and depend for their continued effectiveness on the attitudes of the political community.[28] The central norms are threatened when public attitudes shift in significant ways. In the case of the core commitments of the first amendment, the attitudes that matter most are those regarding the practical wisdom and moral propriety of tolerating unorthodox, disrespectful, potentially disruptive ideas. We must seek to understand, therefore, how a political community that ordinarily val-

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(1983); Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 91 (1984).

27. See, e.g., FCC v. Pacifica Found., 438 U.S. 726 (1978) (Stevens, J.); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (Stevens, J.); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971); Jeffries, Rethinking Prior Restraint, 92 Yale L.J. 409 (1983); Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981).

28. See supra note 5 and accompanying text.

ues tolerance and diversity of political opinion comes to insist at times on conformity of expression and belief.

As Holmes so mischievously explained, toleration of unorthodox ideas is hardly a natural impulse.[29] A special type of outlook on life is necessary before one can justify the decision to allow proponents of uncongenial points of view free rein to attempt to win converts. Holmes emphasized fatalism.[30] Brandeis stressed courage.[31] John Stuart Mill rested his argument for toleration on the empirical claim that unorthodox thinkers contribute a great deal to social progress.[32] Others have identified respect for the autonomous individual as the linchpin of tolerance.[33] Whatever the differences that divide philosophers, at the level of popular belief the commitment to toleration of dissent tends to depend upon two crucial variables: respect for individuality and distrust of government. Intolerance is likely to be most prevalent when the force of events causes increasing numbers of persons to value conformity over individuality and to identify with the government, particularly in its historic role of attempting to maintain a certain social order.

Despite significant crosscurrents, vicissitudes, and regional variations, the political traditions and historic social conditions of the United States have by and large favored the development of a tolerant attitude toward dissent. Many of the original settlers were refugees from religious persecution. The nation was conceived at a time when new ideas, scientific and political, influenced the thinking of ordinary persons; seldom have reason and experimentation seemed so closely related to social progress as in the late eighteenth century. The colonial experience left a legacy of distrust of government and a constitutional structure designed to forestall the concentration of power. The vast frontier and the patterns of social mobility that are possible in a migratory culture helped to generate an ethic of individualism. The immigration waves created a polyglot community that made pluralism the only feasible organizing principle for political life. The blessings of abundant economic resources, peaceful neighbors, oceanic protection from foreign attack, and success in military exploits made Americans a self-confident people—and self-confidence may be *the* critical variable in the calculus of toleration.[34]

Occasionally, however, even tolerance-engendering forces and tra-

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

30. Id. at 630–31.

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

32. See J. Mill, On Liberty 55–59, 85–90 (Bobbs-Merrill ed. 1956).

33. See Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978); Leader, Free Speech and the Advocacy of Illegal Action in Law and Political Theory, 82 Colum. L. Rev. 412 (1982); Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204 (1972).

34. See C. Bay, The Structure of Freedom 303–07 (1965); D. Davis, supra note 2, at xiii–xiv, 1–22; H. McClosky & A. Brill, Dimensions of Tolerance: What Americans Be-

ditions such as these can be overshadowed by other developments that undermine respect for individualism and distrust of government. One situation that can stimulate a highly conformist, collectivist, potentially intolerant mentality is when the goverument embarks upon an important undertaking that is thought to require an unusual amount of social cooperation. The waging of war is the best example. The stakes are high, the commitment of the political community to a specific objective is great, and even the speculative possibility that internal dissent might prevent the nation from maximizing its chances of success is troubling. If the issue is defined as a choice between national self-defense and the full realization of basic constitutional ideals, few persons would choose the latter. The staunchest civil libertarian must concede the point that the very existence of constitutional liberties depends on the maintenance of political independence. And as Zechariah Chaffee has demonstrated so well,[35] when the collectivist thinking that is necessary for a war effort takes hold, officials, judges, and the public at large tend to overestimate dramatically either the level of cooperation required to effectuate the goals of the community or the extent to which the achievement of sufficient cooperation requires the stifling of dissent.

Disorienting disruptions of established patterns of thinking can also bring about a shift in attitudes regarding toleration. A political community that suddenly finds itself in a state of rapid change, or unsure of its policies due to inexplicable disappointments, may feel a special need to reaffirm its basic tenets, by coercing consensus if necessary. Political disorientation can stem from diverse sources. A major frustration in foreign policy—victory in World War I followed by the "loss" of Russia, victory in World War II followed by the "loss" of China—can be one cause. A sudden disturbance of a comfortable way of life—the challenge to racial hegemony in the South, the sudden loss of a cheap and compliant labor supply in a bastion of industry—can be another. Vivid reminders of a group's or nation's vulnerability can shake self-confidence to a degree not remotely warranted by the actuality of the threat posed; the response in Skokie, Illinois to the proposed Nazi march[36] and the nation's response to the Hiss and Rosenberg cases illustrate this phenomenon.[37] A societal sense of bewilderment or vulnerability can engender pathology just as can the purposeful adoption of an urgent agenda.

Important shifts of attitudes regarding dissent can result from in-

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lieve About Civil Liberties 365–70 (1983); S. Stouffer, Communism, Conformity, and Civil Liberties 100–03 (1966).

35. See Z. Chafee, supra note 14.

36. See D. Hamlin, The Nazi-Skokie Conflict: A Civil Liberties Battle (1980); A. Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979); Bollinger, supra note 9.

37. See W. Ewald, Who Killed Joe McCarthy? 63–66 (1984); W. Goodman, The Committee 275–82 (1968); A. Weinstein, Perjury: The Hiss–Chambers Case 505–23 (1978).

ternal political developments as well as external pressures and from popular reactions that are less than traumatic. Some of the most serious Red-baiting of the post World War II period took place in 1947 and 1948—prior to the dramatic espionage revelations, prior to the triumph of the Communists in the Chinese Civil War, and prior to the emergence of Senator McCarthy as a major political figure.[38] A long-standing desire of conservatives to discredit the entrenched New Deal bureaucracy apparently lay behind the various efforts during those years to sensationalize the issue of Communist infiltration of American institutions.[39] The highly-charged hysteria of the Red Scare did not last long; the dominant rhetoric of the early 1920's proclaimed a return to "normalcy." Yet that period witnessed a massive campaign to exterminate the I.W.W. in California,[40] the emergence of the Ku Klux Klan as an electoral force,[41] the Scopes trial,[42] and the successful culmination of the nativist campaign to exclude immigrants.[43] Tolerance seems to be a somewhat cyclical phenomenon in politics. General weariness of dissent, or even the periodic ascendency of political factions that simply do not value diversity and individuality, sometimes explains why persons with unconventional views can be treated as curiosities one day and scapegoats the next.

Some shifts of social or official attitudes are issue-specific. Because of a certain experience, one or another type of liberty required by the central norms of the first amendment may be viewed by an important segment of the political community as too costly to be extended under current conditions. That judgment need not spill over to other core liberties. For example, one could decide that the power of the press to disseminate information relating to national security must be severely restricted without changing one's view at all regarding the tolerable limits of revolutionary advocacy or organizational activity. Issue-specific shifts in basic attitudes about the core commitments of the first amendment are likely to be rare—the forces that cause people to doubt the efficacy of one form of speech will seldom have such a confined impact—but when such shifts occur the situation can be regarded as pathological with regard to the capacity of the constitutional regime to abide by the particular core commitment that is the subject of the shift. A doctrinal heritage fashioned to withstand that type of pathology, as

38. See W. Goodman, supra note 37, at 186–271.

39. See T. Reeves, The Life and Times of Joe McCarthy 209–212 (1982); A. Theoharis, Seeds of Repression: Harry S. Truman and the Origins of McCarthyism 14-16 (1971).

40. See Z. Chafee, supra note 14, at 326–42.

41. See A. Rice, The Ku Klux Klan in American Politics 13–37 (1962); K. Jackson, The Ku Klux Klan in the City 1915-1930, at 235–49 (1967).

42. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927); see Kalven, A Commemorative Case Note: *Scopes v. State*, 27 U. Chi. L. Rev. 505 (1960).

43. See J. Higham, Strangers in the Land: Patterns of American Nativism (1955).

well as the more common form of broad-based pathology, is indicated by my thesis.

As might have been expected, no formulaic definition of pathology has emerged from this effort to consider the notion in detail. One cannot achieve much precision in identifying the causes, the symptoms, or the antidotes of something so diffuse as a social pathology regarding dissent. What does emerge from the foregoing observations is an emphasis on core commitments and attitude shifts, and a working definition of pathology that reflects that emphasis: A period is pathological when social or political conditions in the relevant community (national, regional, or local) generate a shift in attitudes regarding toleration that places in jeopardy one or more of the commitments that comprise the core of the first amendment.

We are now in a position to answer some of the definitional questions posed earlier. The degree of attitude change required to mark a period as pathological has been infrequent but not truly rare in the American experience; if the future resembles the past in this regard, a limited but not minuscule portion of the time spectrum would be included in our conception of pathology. Both the breadth and intensity of the shift toward an attitude of intolerance are relevant in determining whether a period is truly pathological. The apparent durability of the consequences of any time-bound shift toward higher levels of intolerance is not a variable in the definition of pathology; durability is assumed. The attitudes that are the measure of pathology are those regarding the social value of dissent, the moral claim to toleration in general, and the inviolability of certain traditional rights of expression. How people view novel, expansive claims of expressive liberty is of no concern in identifying a period as pathological.

IV. Implications

Adoption of the pathological perspective would affect both the methodological and the doctrinal dimensions of first amendment adjudication—both *how* judges reason about free speech as a general matter and *what* specific doctrines and case outcomes courts decree. Neither type of implication can be explored in a meaningful way, however, without first addressing some strategic considerations pertaining to the process by which abstract conceptions and priority judgments of the sort generated by my thesis come to be translated into operational methodologies and doctrines, the working tools of the judge's trade.

A. *Strategic Considerations*

In deriving operational methodologies and doctrines from theoretical commitments, the analysis is predominantly instrumental. To develop the implications of my thesis, we must determine what judicial methods and doctrines would best serve the objectives that have priority in light of the pathological perspective. As the preceding discussion

indicates, the most important general objective is the strengthening, during normal times as well as during pathological periods, of the central norms of the first amendment tradition. How is that strengthening best accomplished?

It would be a mistake to assume that the strategy for protecting the central norms of the first amendment must emphasize the tactic of doctrinal compulsion—the fashioning of specific, highly protective tests that would bind lower courts and officials in times of stress. It is doubtful that legal standards could ever be designed with sufficient prescience and precision to achieve that type of behavioral effect to any great degree. This is not to suggest that legal standards are likely to have no or little impact in the worst of times, or that a focus on the fear of pathology would not yield different standards than adjudication from other perspectives. My only point here is that the process by which courts influence future pathologies by means of adjudication in normal times is complicated, and the formulation of legal standards that embody and are protective of the central norms of the first amendment is only one, and probably not the most important, aspect of that process. To understand what my thesis really would entail in the way of methodological and doctrinal implications, one must consider how the distinctive social dynamics of pathological periods bear on this question of potential judicial impact.

The defining feature of a pathological period is a shift in basic attitudes, among certain influential actors if not the public at large, concerning the desirability of the central norms of the first amendment. It seems evident, therefore, that one of the most important ways in which adjudication in ordinary times might influence the course of pathology would be by helping to promote an attitude of respect, devotion, perhaps even reverence, regarding those central norms. That is a goal not easily achieved, for the capacity of judges to shape public attitudes is extremely limited. On occasion, however, the bench can serve as a pulpit, and in the past the constitutional commandment to tolerate threatening ideas has been preached rather effectively by such eloquent ministers as Holmes,[44] Brandeis,[45] Roberts,[46] Black,[47] and Stewart.[48] At least in this area of political controversy, skepticism regarding the judicial capacity to influence attitudes should not deter judges from seeking to instill in other members of the legal and political community

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44. See, e.g., Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

45. See, e.g., Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

46. See, e.g., Hague v. CIO, 307 U.S. 496 (1939) (plurality opinion).

47. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (Black, J., concurring); Barenblatt v. United States, 360 U.S. 109, 134 (1959) (Black, J., dissenting).

48. See, e.g., Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (Stewart, J.).

an attitude of strong conviction regarding the enduring desirability and importance of the central norms of the constitutional tradition. It may seem a vacuous recommendation to urge upon judges the pursuit of such an uncontroversial goal, but as I shall demonstrate later in this section,[49] an emphasis on the inculcation of general attitudes may have some notable implications regarding judicial methodology.

In addition to important shifts in attitudes about free speech, many pathological periods are characterized by a sense of urgency stemming from societal disorientation if not panic. Sometimes that sense of urgency unites otherwise antagonistic political factions and makes monolithic, speedy political responses feasible. Both the formal system of checks and balances represented by the separation of powers and federalism and the informal system of checks and balances represented by the conflicting objectives and priorities of interest groups exert much less of a restraining influence under such conditions. Judicial methods and doctrines designed to function well in the worst of times must take into account that sense of urgency and the reduced effectiveness of traditional checks. Those features of pathology suggest an emphasis in adjudication during normal times on the development of procedures and institutional structures that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics. Substantive legal standards, no matter how thoughtfully constructed, will probably be less resistent to that sort of pressure than most procedures and many institutional structures.

A third common feature of a pathological period is a comparatively high level of politicization regarding the question of toleration of dissent. Often because of a felt need for scapegoats, a substantial segment of the political community focuses on the activities of dissenters and on the response of government, including the courts, to those activities. Courts are never wholly immune from political scrutiny, nor should they be. In pathological periods, however, that scrutiny is intensified. Methodologies and doctrines that may be efficacious for a judiciary operating with the degree of independence that prevails during normal times may not work well for a judiciary that is subject to the political pressures and constraints that characterize pathological periods. Methodologies and doctrines that assume less in the way of political independence may better serve the goals of the constitutional regime.

This survey of strategic considerations suggests that in our elaboration of methodological and doctrinal implications we should pay special attention to the inculcation of basic attitudes regarding free speech, the development of procedures and institutional structures, and the impact of political pressures on the vindication of adjudicative authority. Now it is time to put this strategic wisdom to work and determine what

49. See infra pp. 469–74, 478–79, 486, 488, 503.

particular methodologies and doctrines would best equip the first amendment to function in the worst of times.

B. *Methodological Implications*

Legal reasoning patterns would be affected in a myriad of ways, at many different levels, were the pathological perspective to become a dominant feature of first amendment analysis. My thesis has implications regarding which justifications for a constitutional decision should carry the most weight, what kinds of doctrinal standards should be preferred, how innovative courts should be in adapting the law of the first amendment to changing conditions and perceptions, what range of controversies relating to communication should be considered within the ambit of first amendment concern, which issues should elicit a high level of judicial involvement, and what social phenomena courts should most take into account in resolving disputes over free expression.

1. *Sources of Justification.* — A preference for the pathological perspective should lead lawyers and judges to analyze modern issues with reference to the central understandings of the constitutional framers and the teachings of classic, time-honored precedents. The realization that those sources of authority can be manipulated, and indeed cannot be drawn upon at all without resort to contemporary perceptions and preferences,[50] should not lead the legal culture to eschew reference to the landmarks of the past. As a source both of rhetoric and understanding, those landmarks should be mined for all they are worth.

In pathological periods judicial authority is often threatened. The mysterious admixture of respect, self-interest, fear, and inertia that typically leads persons and institutions to obey the dictates of courts is disturbed. Under such conditions, courts need to be able to invoke sources of authority that carry weight with unsophisticated, resistant would-be regulators of speech. Rightly or wrongly, in our legal culture the appeal to history and tradition, even to the legendary wisdom of the Founding Fathers, seems to carry more weight than arguments from philosophical first principles or from the implications of dynamic lines of precedent.[51] Most of the time, the obedience calculus is not much

50. See supra note 6 and accompanying text.

51. As Judge Bork has observed:

> The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

Bork, supra note 27, at 3–4. It is striking how heavy is the reliance on history in the Supreme Court opinions construing the first amendment that have proven to be the most influential. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 269–77 (1964); Bridges v. California, 314 U.S. 252, 263–68 (1941); Hague v. CIO, 307 U.S. 496, 515–16 (1939); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713–20 (1931). Note-

affected by what reasons judges cite for the results they decree. When judicial authority is under serious challenge, however, those reasons enter public debate and the appeal to history can be important. The appeal to history is likely to be more convincing, moreover, if it is not reserved for occasions when judicial authority is under challenge but rather constitutes at all times a consistent feature in the interpretation of the first amendment.

Respect for the understandings of the framers and for classic, time-honored precedents can also assume special importance in pathological periods as the source of a stable perspective for judges who otherwise would be swept up in the disoriented, fearful mentality of the times. Pathological periods are characterized by the perception in some quarters that pressing, unprecedented problems require an alteration in normal patterns of tolerance. One function a constitutional tradition can serve in such times is to institutionalize object lessons, to keep in the forefront of public debate the memory of earlier eras when the community's temporary loss of self-confidence engendered policies that in retrospect seem benighted. In this regard, the thrust of constitutional rhetoric, and where possible doctrine as well, should be to emphasize the parallels between historical experiences, to distill "lessons" of history as it were.[52] Necessarily, judicial reflections on the past offered in that spirit will be oversimplified. The purpose is not to control the society's understanding of its past—no court, no matter how authoritative and respected, could achieve that objective—but to give officials and judges pause before they act on the assumption that the unique character of the present threat requires a repudiation of traditional commitments.

Simplicity of analysis has yet another function under the pathological perspective. Even when addressing issues for which the original understanding and the classic precedents provide little guidance, courts

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worthy in this regard is the rhetoric employed by Holmes and Brandeis in their classic opinions on the subject of free speech. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentence for the Sedition Act of 1798, by repaying fines that it imposed."). In Whitney v. California, 274 U.S. 357, 375–77 (1927), Brandeis attributed the powerful philosophical justification for free speech he expounded not to himself but to "[t]hose who won our independence . . . . *They* valued liberty both as an end and as a means. *They* believed liberty to be the secret of happiness and courage to be the secret of liberty. *They* believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . ." Id. at 375 (emphasis added).

52. A model of judicial reasoning in this respect is New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (drawing support from the fact that the attack on the validity of the Sedition Act of 1798 has "carried the day in the court of history"); see Kalven, The New York Times Case: A Note on The "Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191.

that adopt the pathological perspective should search for methods of justifying their judgments that appeal to the common, unsophisticated understanding of what law is. Complicated, subtle, imaginative legal arguments are not calculated to convince resistant officials and their constituencies that tolerance of threatening dissenters is a constitutional imperative. In overheated periods what is needed is a style of legal argumentation that appeals as little as possible to contemporary judgments of priority or efficacy that many persons will dispute. Both because judicial authority is threatened in times of stress and because the most important phenomenon during such periods is a shift in attitudes, a judicial heritage targeted for the worst of times must speak to persons who are neither first amendment specialists nor devotees. The heritage must speak, moreover, in confident tones that do not invite critical reflection and doubt regarding the importance of free speech.

The problem is that absent historical benchmarks that achieve their simplicity by means of selective, romanticized retrospection, simplicity of analysis is not easily achieved in the realm of first amendment adjudication. Over the years, Supreme Court justices have tried, collectively and individually, to develop relatively simple tests and principles to guide first amendment adjudication. There is good reason to believe that courts, if not scholars, have long placed a premium on avoiding over-complexity and over-refinement in this particular corner of constitutional law.[53] At the moment, however, the endeavor has broken down, and the doctrinal idiom abounds with talk of levels of scrutiny and ambits of application.[54] One perceptive observer has expressed the fear that first amendment doctrine is beginning to rival the Internal Revenue Code in its complexity.[55] I view the current state of affairs in this regard with considerable apprehension, but I discern no simple way to achieve simplicity of analysis. The two methodologies that have been developed systematically in the service of that worthy goal, Hugo Black's literalism[56] and Thomas Emerson's speech-action distinction,[57] have not survived critical scrutiny.[58]

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53. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971) (Black, J., concurring); Terminiello v. City of Chicago, 337 U.S. 1 (1949); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

54. See, e.g., Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984); Connick v. Myers, 461 U.S. 138 (1983); New York v. Ferber, 458 U.S. 747 (1982); Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

55. See Schauer, Codifying the First Amendment: *New York v. Ferber*, 1982 Sup. Ct. Rev. 285, 309.

56. See Cahn & Black, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. Rev. 549 (1962).

57. See T. Emerson, supra note 14.

58. See, e.g., A. Meiklejohn, Political Freedom 21 (1960); Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 1009-12 (1978); BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 306 (1978); Mendelson, On the Meaning of the First

2. *Precepts and Principles.* — From the standpoint of influencing attitudes regarding the desirability of free speech, we might begin the quest for simplicity by recognizing the valuable role played by some of the simple precepts of the judicial heritage. I have in mind well-worn homilies such as: "the fitting remedy for evil counsels is good ones";[59] "the best test of truth is the power of the thought to get itself accepted in the competition of the market";[60] "debate on public issues should be uninhibited, robust, and wide-open";[61] "[u]nder the first amendment there is no such thing as a false idea";[62] "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism or other matters of opinion or force citizens to confess by word or act their faith therein";[63] "one man's vulgarity is another's lyric."[64] It is easy to demonstrate how precepts such as these have questionable resolving power in contested cases, and may even rest on disputable premises.[65] Nevertheless, simple precepts can have a strong intuitive appeal, and it is just that kind of emotional force that may be most effective in reversing or containing the dangerous attitude shifts that take place in pathological periods. Were the grand, gallant, necessarily simple precepts of the first amendment tradition to be abandoned, denigrated, or qualified in the effort to achieve philosophical rigor or sensitivity to nuance, the restraining power of that tradition in pathological periods would be compromised.

Simple precepts are significant as a source both of rhetoric and wisdom, but the search for simplicity cannot end there. In all but the rarest of cases, even during pathological times, it would be disingenuous for a judge to claim that simple precepts dictated the result. I do not think that disingenuous judicial behavior is indicated by my thesis. There must be a middle ground methodologically between exclusive reliance on simple precepts and resort to the enervating contingencies and complexities of contemporary first amendment doctrine. The solution to this problem may lie in a renewed appreciation of the efficacy of principles.[66]

Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821 (1962); Scanlon, supra note 33, at 207–08.

59. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

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

61. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

62. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

63. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

64. Cohen v. California, 403 U.S. 15, 25 (1971).

65. A perceptive critique of some of the standard precepts of the first amendment tradition can be found in Bollinger, Free Speech and Intellectual Values, 92 Yale L.J. 438 (1983). For a careful demonstration that several of these precepts rest on dubious philosophical underpinnings, see F. Schauer, supra note 14.

66. Though they do not agree completely on what principles are, Herbert Wechsler, Alexander Bickel, and Ronald Dworkin have each argued that judges must decide constitutional cases largely on the basis of principles lest the courts' claim to resolve

By a legal "principle" I mean a value proposition of sufficient generality and thrust that for a fair number of particular cases acceptance or rejection of the proposition constitutes a major variable in determining how the case is resolved.[67] Familiar first amendment principles include the prohibitions against content distinctions,[68] prior restraints,[69] restrictions analogous to seditious libel,[70] and regulatory justifications grounded in the paternalistic claim that audiences will act contrary to their own best interests if exposed to certain arguments or information.[71] Excepting perhaps the antiseditious libel principle, none of these principles is "absolute" in character in the sense that countervailing considerations cannot outweigh it. None is so precisely delimited that numerous, vexing definitional problems will not remain even after the principle has been fully embraced and repeatedly applied. But principles such as these have thrust: adoption of any one of them represents a notable value commitment that says much about how particular disputes will be adjudicated. In contrast, when first amendment doctrine is fashioned in a different idiom such as a multi-factor balancing test, a multi-stage analysis with a threshold level-of-scrutiny determination, or a standard that is highly dependent on particularistic assessments of motive, risk, or efficiency, adoption of the doctrinal scheme in question does not provide a strong indication of how a particular dispute will be resolved.

The requirement that preferences be expressed in the idiom of principles forces the integration of potentially divergent notions. That process can demand a good deal of conceptual clarification and the making of difficult judgments of compatibility and priority. A judge who goes through that process is likely at the least to focus on the is-

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constitutional disputes founder on the shoals of the countermajoritarian difficulty. See A. Bickel, The Least Dangerous Branch 49–65 (1962); R. Dworkin, Taking Rights Seriously 90–100 (1977); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). Critics, including Bickel in his later years, have objected that judges cannot discharge anything like the adjudicative authority they have come to possess without utilizing thinking patterns that are more eclectic, diffuse, and flexible than can be comprehended under a strict regime of principles. See A. Bickel, The Supreme Court and the Idea of Progress (1970); J. Ely, supra note 5, at 54–60; Wright, Professor Bickel, the Scholarly Tradition and the Supreme Court, 84 Harv. L. Rev. 769 (1971). I have nothing to contribute to this familiar debate over methodological *legitimacy*. I do believe, however, that the pathological perspective should lead one to favor on grounds of *efficacy* an adjudicative method that emphasizes the role of principles, whether or not one believes that some, perhaps even many, cases that simply must be resolved by courts could never be decided on the basis of principles.

67. For an illuminating discussion of the concept of principle in legal reasoning, see Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982 (1978).

68. See Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972).

69. See Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).

70. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

71. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

sues in dispute and develop enough of a stake in the decision as not to be swept along by first-level reactions. In times of pathology, it is just those first-level reactions that corrupt adjudiction. A mode of analysis that emphasizes principles, much like one that emphasizes history, can broaden the perspective of the decisionmaker and make the regulatory concerns of the moment seem less monumental. While other modes of analysis also can have that effect depending on the factors they require judges to consider, the idiom of principles is especially well suited to the goal of broadening perspective. The effort to integrate complex strands of analysis into a relatively concise proposition is, after all, an exercise in simplification that exalts thrust and focus over qualification and detail for the very purpose of dignifying and clarifying a value judgment. A legal culture that talks and thinks in terms of principles is somewhat less likely, by virtue of that mode of discourse, to trivialize its ideals in the process of case-by-case application, or lose the capacity to subject its ad hoc, pragmatic impulses to some form of discipline.

3. *Doctrinal Standards.* — As indicated above, I view principles, precepts, and historical benchmarks as more important weapons in the battle against pathology than legal standards, despite the fact that by their very nature principles, precepts, and lessons of history must be more open-ended and less binding than at least some legal standards can be. It would be wrong, however, to neglect completely the methodological implications of my thesis at the level of doctrinal standards.

In crafting standards to govern specific areas of first amendment dispute, courts that adopt the pathological perspective should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense. Constitutional standards that are highly outcome-determinative of the cases to which they apply are thus to be preferred. This observation would counsel against standards such as the clear-and-present-danger test and its many variants that require in their application a contemporary assessment of social conditions.[72] More mechanistic measures for taking into account legitimate regulatory interests are preferable from the pathological perspective. Learned Hand's test in *Masses Publishing Co. v. Patten*,[73] which turns on the meaning of the speaker's words rather than the quality of the dangers they create, is one example.

It may be objected that mechanistic, highly outcome-determinative standards have the disadvantage of demarcating with relative clarity not only what would-be regulators of speech cannot do but also what they *can* do without fear of judicial invalidation. In pathological times, a high degree of uncertainty regarding the exact boundaries of constitutional rights could be salutary because then the defenders of free

72. See, e.g., Dennis v. United States, 341 U.S. 494 (1951); Debs v. United States, 249 U.S. 211 (1919).

73. 244 F. 535 (S.D.N.Y. 1917).

speech might have more opportunity to invoke arguments about the meaning of the first amendment that derive at least a modicum of support from the state of judicial doctrine.

I am not swayed by this point for two reasons. First, I doubt that during pathological periods arguments derived from relatively indeterminate legal doctrines carry much weight either in public or bureaucratic debate or in lower court adjudication.[74] When public anxieties about the costs of toleration are high, defenders of free speech in these various forums usually will have to couch their arguments in terms of legal imperatives. Second, the dominant objective under the pathological perspective is to protect the central norms of the first amendment tradition. The cost of clarity regarding legal standards is most likely to be borne by those who advance novel, imaginative claims of liberty that go beyond those central norms. Even when a mechanistic legal standard appears to invite some speech regulation, that invitation is not likely to be read as extending to the very activities the standard was desigued to protect.

4. *The Role of Innovation.* — So far in this exploration of methodological implications, a focus on the worst of times seems to lead one toward rather primitive styles of legal reasoning. First amendment doctrines should be historically grounded if possible. They should be simple. Judges should speak with deep conviction in confident, unqualified tones. Legal standards should be mechanistic and highly outcome-determinative. These prescriptions smack of fundamentalism, and indeed the opinions of Hugo Black come closest (though not all that close) to satisfying the methodological ideal I have sketched.[75] Yet the great benchmarks in the history of first amendment interpretation, the very

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74. Lower courts presented with first amendment claims during the McCarthy Era had recourse to a rich but indeterminate doctrinal heritage supporting the importance of free speech and the right to advocate revolutionary doctrines. See, e.g., Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931). The classic separate opinions of Holmes and Brandeis in Abrams v. United States, 250 U.S. 616 (1919), Whitney v. California, 274 U.S. 357 (1927), and Gitlow v. New York, 268 U.S. 652 (1925), must also be counted as part of that heritage. In the most significant lower court decisions of the McCarthy Era, the indeterminate strands in Supreme Court doctrine that supported strong protection for free speech had very little influence. See, e.g., Dennis v. United States, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951); Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949), cert. denied, 339 U.S. 933 (1950); Lawson v. United States, 176 F.2d 241 (D.C. Cir. 1949); Morford v. United States, 176 F.2d 54 (D.C. Cir. 1949), rev'd on other grounds, 339 U.S. 258 (1950); Barsky v. United States, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948); Josephson v. United States, 165 F.2d 82 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948).

75. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971); Mills v. Alabama, 384 U.S. 214 (1966); Memoirs v. Massachusetts, 383 U.S. 413 (1966) (Black, J., concurring); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Black, J., concurring); In re Anastaplo, 366 U.S. 82 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109 (1959) (Black, J., dissenting); Beauharnais v. Illinois, 343 U.S. 250 (1952) (Black, J., dissenting); Feiner v. New York, 340 U.S. 315 (1951) (Black, J., dissent-

benchmarks I would make the centerpiece of my doctrinal strategy, have been instances of brilliant and highly sophisticated judicial innovation. Holmes' dissents in *Abrams*[76] and *Gitlow*,[77] Brandeis' concurrence in *Whitney*,[78] Roberts' plurality opinion in *Hague v. CIO*,[79] and the magisterial majority opinions in *Near v. Minnesota*,[80] *West Virginia Board of Education v. Barnette*,[81] and *New York Times Co. v. Sullivan*[82] were not the outgrowths of a fundamentalist mentality. How then can I reconcile my respect for simplicity and tradition with my equally strong appreciation of the need for innovation? What exactly is the attitude toward doctrinal innovation that should guide judges who interpret the first amendment from the pathological perspective?

Plainly, relatively stable principles and standards are to be desired, since the major task of restraining repression in the worst of times falls to doctrines that were established in earlier, calmer eras. If the prevailing ethic were for legal doctrines to be reformulated at every turn, there would be nothing to prevent timorous judges in pathological periods from employing their skills of creative analysis to lend sanction to repressive government actions. So innovation inspired by a desire to tailor doctrine to the perceived needs of the day would be discouraged in a system targeted for the worst of times.

On the other hand, it is a challenging enterprise to fashion doctrine for the worst of times. Innovative engineering is almost certainly required if the doctrinal product of normal times is to do service in pathological periods. Basic liberties must not only be reaffirmed and persuasively glorified; they must also be encased in a mantle of protective, derivative, and facilitative rights. The procedures for invoking first amendment rights effectively may themselves have to be accorded constitutional stature, a notion that Henry Monaghan has persuasively developed.[83] Long-term technological and sociological developments must be taken into account in the formulation of principles and legal standards if the central norms of the first amendment are to retain their restraining power in a changing world. An indiscriminate disdain for doctrinal innovation is not one of the implications of adopting the pathological perspective. A cautious, selective approach to innovation is.

5. *The Ambit of First Amendment Coverage.* — This concern about innovation surfaces in another way. One strategy for combatting the stresses of pathological periods would be to extend first amendment

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ing); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (Black, J., dissenting); United Public Workers v. Mitchell, 330 U.S. 75 (1947) (Black, J., dissenting).

76. Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

77. Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

78. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

79. 307 U.S. 496 (1939) (plurality opinion).

80. 283 U.S. 697 (1931).

81. 319 U.S. 624 (1943).

82. 376 U.S. 254 (1964).

83. See Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970).

protection as widely, fully, and creatively as possible in normal times so that the retrenchments that might be demanded in the worst of times would sacrifice only doctrinal fat. But since judicial credibility cannot be taken for granted in pathological periods, that strategy could be counterproductive. Better equipped for the storms of pathology might be a lean, trim first amendment that covered only activities most people would recognize as serious, time-honored forms of communication.

It is an intriguing and difficult question, well worth pausing over, whether adoption of the pathological perspective should lead courts to favor an expansive or a narrowly confined but heavily fortified set of first amendment principles. The question has implications for a wide variety of disputes. Should commercial advertising be included under the umbrella of the first amendment?[84] Symbolic conduct?[85] Is the expenditure of personal funds on a political campaign, one's own or another's, a first amendment activity?[86] Are vivid depictions of genitalia in action instances of the expression about which the first amendment is concerned?[87] What about the sale or rental of mechanisms such as video games that in the hands of users can stimulate a form of cognitive engagement?[88]

An expansive first amendment that extended to all such activities would have certain advantages in periods of pathology. Most significant would be the absence of any tradition of courts making value-laden distinctions among acts of communication based on prescriptive notions of how communicators should influence their audiences. To exclude commercial speech and obscenity from the ambit of first amendment concern—even to accord such forms of expression a diminished level of protection—it is necessary to look beyond the form of the communication (words, pictures) and find something in its subject matter, type of impact on recipients, or the motivation of its disseminators, that distingnishes it from the communications that warrant full first amendment protection. Symbolic conduct, money contributions, and games differ in form from words and pictures, but their impact and the motivation for their creation may be comparable (disseminating a view of the world, provoking a cognitive response). Courts working within a first amendment tradition that authorized judicial inquiry into motivation, impact, and form would be tempted in pathological periods to find *something* distinctive in the speech of the most unpopular dissenters (concerted or surreptitious conduct, indoctrination, nihilistic moti-

84. See Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 Nw. U.L. Rev. 1212 (1983).

85. See Note, Symbolic Conduct, 68 Colum. L. Rev. 1091 (1968).

86. See Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001 (1976).

87. See Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1.

88. See Note, The First Amendment Side Effects of Curing Pac-Man Fever, 84 Colum. L. Rev. 744 (1984).

vation, coercive or selective impact) that would place it outside the ambit of first amendment protection. An expansive tradition regarding the reach of the first amendment would make it more difficult for judges to invoke such characteristics as a basis for suppressing speech.

Other considerations also favor an expansive conception of the first amendment as a preparation for pathology. The more universal a principle, the broader is the constituency of persons who gain from the principle. Political dissenters may benefit from finding themselves in the same boat with commercial advertisers, campaign contributors, and filmmakers interested in artistic freedom. There may also be a "muscle tone" argument for expanding the ambit of first amendment concern. In normal times, the bulk of disputes will not be over restrictions on speech growing out of political movements but over the conflicts that are endemic to everyday life, especially everyday economic life. A first amendment that figures in adjudication only rarely may not develop the doctrinal refinements, and the specialized bar, that may be needed in times of pathology.

The foregoing arguments, while not conclusive on the question, carry some weight. I am not impressed, however, by the argument that the first amendment should be construed expansively in normal times so as to provide judges with fodder for concessions that might be demanded by insistent political forces in pathological periods. Admittedly, doctrinal retrenchments can occasionally defuse demands to repress speech without seriously undermining the expressive liberties in dispute. The Supreme Court's 1973 reformulation of the test for obscenity[89] appears to have had just such an effect, at least for a time. In pathological periods, however, concessions are more likely to stimulate than forestall demands for further repression. It is a shift in attitudes regarding the desirability of free speech that marks a period as pathological. Judicial retrenchments that authorize a break with tradition in the direction of permitting greater regulation of speech can only serve to legitimate such an attitude shift, no matter how insignificant in the grand scheme of things the particular speech in dispute may be.

In fact, a focus on the role of concessions suggests a stringent rather than expansive approach to the question of coverage. In pathological periods, courts need to present the forces of repression with strict, immutable legal constraints. That kind of implacable judicial posture is easier to assume when the basic reach of the first amendment is modest and compatible with widely shared intuitions regarding the natural ambit of the commitment to expressive liberty. If courts are ever to contribute to the stemming of destructive political tides, what judges say must ring true, at some level of consciousness, with the most influential shapers of public opinion. Just as history, simplicity, and a

89. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973).

sense of conviction can enhance the intuitive appeal of judicial pronouncements, modesty of reach can be an important factor in the credibility calculus.

Probably the strongest argument for a lean first amendment derives from considerations more internal to the adjudicative process. There appears to be a close correlation between the ambit of coverage and the ability of courts to keep doctrine simple, informed by tradition, and dominated by principles. The wider the reach of first amendment coverage, the greater seems to be the judicial affinity for instrumental reasoning, balancing tests, differential levels of scrutiny, and pragmatic judgments.[90] For the reasons spelled out above, within any given area of doctrinal formulation courts that adopt the pathological perspective should strive to emphasize the role of tradition, simple precepts, and principles. The feasibility of that demand will depend in part on how numerous and various are the disputes for which doctrine must be formulated.

To my mind, the arguments just developed for a carefully confined ambit of first amendment protection outweigh those presented earlier for a more expansive view of expressive liberty. Adoption of the pathological perspective should lead courts to think carefully before extending the protective principles of the first amendment to types of communication that have not traditionally been considered essential to the maintenance of an open society. That does not mean that the ambit of first amendment concern should remain fixed. As recently as 1957 our first amendment tradition did not protect the freedom to form political associations or the freedom to speak anonymously.[91] The constitutional right to resist wide-ranging interrogation regarding one's political beliefs was not established until the 1960s, if then.[92] The coverage of the first amendment must continue to develop. But the pathological perspective counsels that this development will best serve the constitutional regime if it proceeds cautiously, with careful attention to the costs of expanding the amendment's reach. Those costs seem highest when the activities encompassed by a doctrinal innovation bear little intuitive resemblance in terms of social function or moral siguificance to the activities that have been at the center of the traditional under-

90. For examples of these modes of analyses achieving prominence at the outer ambit of first amendment concern, see Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182 (1981). On the relationship between breadth of coverage and strength of protection for the principle of free speech, see F. Schauer, supra note 14, at 134–35.

91. Those rights were established respectively in NAACP v. Alabama, 357 U.S. 449 (1958), and Talley v. California, 362 U.S. 60 (1960).

92. See DeGregory v. Attorney Gen. of New Hampshire, 383 U.S. 825 (1966); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Barenblatt v. United States, 360 U.S. 109 (1959).

standing of the first amendment. We must constantly take care not to trivialize the meaning of free speech.[93] Particularly to be avoided is the attitude, all too prevalent in our recent constitutional experience, that doctrinal expansion is a good in itself, that creative analogy is its own reward.[94]

6. *Priorities of Doctrinal Involvement.* — The conclusion that judicial innovation must be rationed sugests a rather deliberate approach to determining what might be called the priorities of doctrinal involvement. It is the case that the annotated first amendment contains numerous decisions on the subject of advocacy of revolution[95] but very few on the structure of the mass communications industry,[96] many decisions about the privacy rights of government employees[97] but few about the interplay of copyright and free speech,[98] many cases on the right to distribute leaflets in public places[99] but few on the right to be free from ideological indoctrination by government.[100] Patterns such as these can be explained to some degree by theoretical priorities, and perhaps to a greater degree by the nature of the social conflicts that have spurred disputants to invoke the first amendment. It would be a mistake, however, to assume that the role of courts is entirely passive regarding the priorities of doctrinal involvement. In fashioning principles and standards, judges do more than determine how contested cases are resolved. How the principles and standards are fashioned also influences what types of disputes and aspirations develop into contested cases, one of the most important determinants of any doctrinal tradition.

The pathological perspective brings to the fore certain considerations that ought to influence which types of free speech disputes generate a high level of doctrinal involvement. It will be recalled that one common feature of a pathological period is a sense of urgency that weakens normal mechanisms of checks and balances.[101] When that dynamic operates, methods of speech regulation that can be rapidly mo-

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93. On this trivialization phenomenon, see Nagel, How Useful Is Judicial Review in Free Speech Cases?, 69 Cornell L. Rev. 302, 329–34 (1984).

94. For development of this theme, see Monaghan, supra note 5; Nagel, Book Review, 127 U. Pa. L. Rev. 1174 (1979) (reviewing L. Tribe, American Constitutional Law (1978)).

95. See W. Lockhart, Y. Kamisar & J. Choper, Constitutional Rights and Liberties 273–91, 295–306, 325–53, 361–75 (5th ed. 1981) (collecting cases).

96. See, e.g., I. Pool, Technologies of Freedom (1983).

97. See W. Lockhart, Y. Kamisar & J. Choper, supra note 95, at 409–22 (collecting cases).

98. See, e.g., Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Calif. L. Rev. 283 (1979).

99. See Kalven, The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 14–21.

100. See, e.g., M. Yudof, When Government Speaks (1983); Shiffrin, Government Speech, 27 UCLA L. Rev. 565 (1980).

101. See supra pp. 463–64, 467–68.

bilized and/or implemented on a broad scale become far more threatening to first amendment values than is true in normal times, when the pace and scope of regulation are constrained by countervailing forces and institutional dynamics. Thus, such regulatory techniques as licensing systems, injunctions, subpoenas, record keeping, and seizures of persons and materials deserve special attention in light of the pathological perspective. The strong presumption against prior restraint, for example, may be defensible only by virture of its efficacy in the worst of times.[102]

My thesis also has implications regarding how receptive courts should be to claims that challenge structural arrangements rather than discrete actions or policies. Judicial interpretation of the first amendment has done little to influence the institutional structures that determine what Americans read and hear.[103] Occasionally, notions of journalistic autonomy[104] or academic freedom[105] creep into court opinions, but seldom in ways that suggest a major influence on the resolution of the case, let alone impact on the future development of institutional structures. Yet the quality of public debate and private inquiry has been affected enormously by the way educational and mass communications institutions have evolved. There are of course serious, perhaps insurmountable, limitations on the capacity of courts to shape the society at that level. The effort to do so, moreover, may be in tension with the important methodological goal of simiplicity of analysis: how could the idiom of principles ever suffice, for example, to determine the basic structure of the telecommunications industry? Despite these powerful constraints, adoption of the pathological perspective suggests a certain priority of doctrinal involvement regarding institutional structures. Those structures do much to shape the social dynamics of stressful times, yet are for the most part sturdier, less easily abandoned or eviscerated, than legal standards and principles, and thus constitute a stronger potential source of stability and restraint. Particularly when the sacrifice in doctrinal simplicity is not prohibitive—as it need not be with the recognition of various rights of institutional autonomy but surely would be with the effort to draw out of the first amendment norms of distributive justice regarding communicative power and opportunity[106]—the pathological perspective counsels a methodological emphasis on institutional structures.

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102. I have developed this idea in Blasi, Prior Restraint, supra note 7, at 55.

103. See I. Pool, supra note 96.

104. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

105. See, e.g., Healy v. James, 408 U.S. 169 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (Frankfurter, J., concurring).

106. Compare Blasi, "Journalistic Autonomy" as a First Amendment Concept *in* In Honor of Justice Douglas (R. Keller ed. 1979) (journalistic autonomy instrumental to fundamental first amendment checking value), with Barron, Access to the Press—A New

7. *Social Phenomena to be Taken into Account.* — Some free speech issues assume special significance in pathological periods because of the radiating impact any judicial decision may have on private as well as official patterns of behavior. Shifts in attitudes regarding the moral imperative of tolerance are especially important in times of pathology, and the high degree of politicization that often surrounds constitutional adjudication on such occasions tends to augment the symbolic impact of what both courts and regulatory officials say and do about dissent. As a result, courts that adopt the pathological perspective should be predisposed to develop doctrines that might affect the way discretionary patterns of private and official behavior influence the general level of expression and inquiry.

The familiar and oft-criticized chilling effect doctrine,[107] which holds that fearful and overly risk-averse reactions of potential speakers to a particular type of regulatory authority must be considered in the constitutional calculus, represents one example of such a doctrine. The chilling effect doctrine is unsatisfying in its reliance on crude behavioral speculation and in its tendency to be indiscriminately employed both by judges and advocates. The pathological perspective cautions us not to be swept away by those undesirable features of the doctrine. In the worst of times, the chilling effect is a phenomenon of surpassing significance. It is no coincidence that the chilling effect doctrine was forged in the judicial effort to repudiate McCarthyism[108] and forestall repression of the civil rights movement[109] and has lost much of its appeal in the calmer times since.

Another social phenomenon that is especially important from the standpoint of the pathological perspective is legitimation. As Charles Black has noted,[110] courts may have their greatest impact not when they invalidate legislation but when they uphold it. A major function of judicial review is to legitimate the actions of government—to explain their fidelity to basic traditions and principles, to assuage constitutional doubts that could hamper the enforcement or extension of the disputed policies. In the context of controversies over the regulation of speech, legitimation is a dangerous phenomenon. When other social dynamics generate demands for repression, a judicial green light can intensify those demands. Even abstact ideas or concessions that add balance to a libertarian tradition in normal times—the idea, for instance, that speech

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First Amendment Right, 80 Harv. L. Rev. 1641 (1967) (courts and perhaps Congress should fashion first amendment right of access to press).

107. See Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U.L. Rev. 685 (1978); Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808 (1969).

108. See, e.g., Speiser v. Randall, 357 U.S. 513 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

109. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

110. See C. Black, The People and the Court 56–86 (1960).

can be regulated when the danger is great enough,[111] or that reckless falsehoods are not within the ambit of protected expression[112]—may have adverse consequences by virtue of their legitimating function in pathological times.

This is not to say that the choice of the pathological perspective implies that regulatory interests should never be considered in the process of doctrinal formulation. Absolutism at that methodological level, as contrasted with an occasional preference for unqualified principles or standards on tactical grounds, cannot be justified under any plausible view of the process of constitutional interpretation.[113] The pathological perspective does suggest, however, that the dynamics of legitimation, not just the immediate impact of a regulation viewed in isolation, should determine how regulatory interests are taken into account in first amendment adjudication.

A doctrine has an undesirable legitimating effect when it does more than simply fail to restrain pathological assaults on the central norms of the first amendment but actually stimulates or sustains those assaults. It is difficult to predict which judicial doctrines are likely to have that kind of impact. One strong candidate for condemnation from the standpoint of the legitimation phenomenon would seem to be any doctrine that directs courts to focus on the quality or quantity of danger generated by dissenting speech.[114] Dissent *can* create dangers, and the avoidance of certain dangers can be a legitimate regulatory interest.[115] But the effect of the clear-and-present-danger test has been to promulgate the view that the nature of the danger generated by certain forms of speech constitutes the dominant, indeed sole, determinant of first amendment protection.[116] Such a legitimation of risk aversion can only lend support to the forces of repression in times of widespread worry about internal or external threats to the society.[117]

Concern about the dynamics of legitimation in pathological periods also explains why the natural, and indeed often rational, social impulse to enforce canons of good taste must not be permitted to serve as

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111. See Brandenburg v. Ohio, 395 U.S. 444 (1969).

112. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

113. See M. Nimmer, supra note 14, §§ 2.01–2.03 (1984) (discussion of absolutism and balancing).

114. See, e.g., Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925); Debs v. United States, 249 U.S. 211 (1919).

115. For a trenchant critique of the view that speech deserves extraordinary immunity from regnlation because it seldom generates significant harms, see F. Schauer, supra note 14, at 7-12.

116. The Supreme Court's current standard for determining whether subversive advocacy is protected by the first amendment is not a danger test as such because in addition to the likelihood that the speech will cause lawless action, courts must also consider whether the speech is "directed to" that end. See Brandenburg v. Ohio, 395 U.S. 444 (1969).

117. See, e.g., Dennis v. United States, 341 U.S. 494 (1951).

a justification for speech regulation.[118] Particularly when a political community feels threatened, persons who challenge prevailing standards of taste come to be viewed as alien, unsocialized, ill-motivated, in some ways even subhuman. The legitimation of regulation on grounds of taste would reinforce those attitudes and thereby support one of the strongest causes of the intolerance of unorthodox ideas.

C. *Doctrinal Implications*

The pathological perspective is not a formula for deciding particular cases or generating specific doctrines. Many considerations other than the choice of perspective go into determining what legal standard should govern any given dispute, as well as how such a dispute should be resolved under the applicable standard. Nevertheless, some exploration of the more concrete implications of my thesis seems necessary before it can be properly evaluated. My aim here is to identify the ways in which a conscious adoption of the pathological perspective would influence the development of first amendment doctrine in some areas of important modern controversy.

1. *Commercial Advertising.* — In the last decade, the Supreme Court has held, first, that commercial advertising is entitled to the protection of the first amendment[119] and, second, that the level of first amendment protection accorded commercial advertising should not be as great as that accorded most forms of noncommercial speech that qualify for first amendment protection.[120] In accepting the first proposition, the Justices were strongly influenced by their distaste for the paternalistic nature of the rationale for regulating certain advertising: consumers, it was claimed, would make ill-advised choices regarding prescription drugs and legal services if exposed to advertising by high volume-low service entrepreneurs.[121] In accepting the second proposition, the Court cited the comparative hardiness of speech prompted by the profit motive and the comparative narrowness of the first amendment interests served by commercial advertising.[122] A four-step test was adopted by the Court to govern disputes over commercial advertising. That test requires courts to decide, among other things, whether the advertisement is more likely to mislead than inform and whether prohibition of the advertisement "directly advance[s]" a substantial government interest.[123]

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118. See Cohen v. California, 403 U.S. 15 (1971). For a vigorous challenge to the majority's reasoning in *Cohen*, and to the claim advanced in the text, see Nagel, supra note 93, at 324–26.

119. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

120. Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

121. *Virginia State Board*, 425 U.S. at 769–70.

122. *Central Hudson*, 447 U.S. at 564 n.6.

123. Id. at 564.

The middle-of-the-road approach adopted by the Court in this area is undesirable from the standpoint of the pathological perspective. Under current doctrine, judges are expected as a routine matter to assess the potential of commercial advertising to mislead audiences even when it is not inaccurate in any demonstrable, objective sense.[124] That judges view such a task as normal in the commercial realm does not mean that they will feel free in every setting to consider how speech might mislead audiences; the situations are distinguishable. Nonetheless, one has to wonder whether in times of stress, when a diminution in societal self-confidence may generate concern about the ill effects of "misleading" speech in the political realm, the precedent from the area of commercial speech will not help to weaken the taboo against case-by-case judicial evaluation of the "truth" of unpopular political expression.

Apart from that threshold inquiry into potential deceptiveness, the Court's doctrine regarding commercial speech is troublesome in its legitimation of an ad hoc balancing methodology. Any ad hoc assessment of the benefits and costs of speech that is made during pathological times is bound to be tilted in the direction of regulation; that is an inevitable consequence of the shift in attitudes regarding the desirability of free speech that characterizes such periods.[125] Of course, ad hoc balancing has long been an integral feature of first amendment doctrine for many types of disputes.[126] The realistic goal must be to contain such balancing, not eliminate it; even Justice Black recognized in disputes over the timing and location of demonstrations an appropriate sphere for a case-by-case judicial comparison of communicative and regulatory interests.[127] The problem with the Court's decisions regarding commercial speech is that they constitute a counter-example to what has been the most widely recognized principle for containing the methodology of balancing—that ad hoc balancing is only appropriate when the costs generated by speech are not a function of the speaker's message but rather arise in some other manner as when a meeting or protest march displaces competing uses of public property.[128] Again, the exception to this principle could be confined to the realm of commercial speech; there are some features of commercial

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124. See, e.g., Friedman v. Rogers, 440 U.S. 1 (1979).

125. A good example of such a balancing effort in a pathological context is American Communications Ass'n v. Douds, 339 U.S. 382 (1950), in which the Court upheld a requirement that officers of labor unions file non-Communist affidavits.

126. See, e.g., Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984); Connick v. Myers, 461 U.S. 138 (1983); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Branzburg v. Hayes, 408 U.S. 665 (1972); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); Cox v. New Hampshire, 312 U.S. 569 (1941).

127. See, e.g., Kovacs v. Cooper, 336 U.S. 77, 102–04 (1949) (Black, J., dissenting).

128. For elaborations of this distinction, see Ely, supra note 24; Stone, supra note 24.

speech that distinguish it from all other types of communication.[129] But a court operating in pathological times that views the dangers generated by an unpopular speaker's message as "substantial" and "disproportionate" to the value of the message might be sorely tempted to carve out a second exception to the principle against message balancing.

Even if the judgments that have been legitmated for commercial speech disputes were never transplanted to other areas of first amendment controversy, the Court's decision to accord commercial speech an intermediate level of protection may have other costs from the standpoint of the pathological perspective. Commercial advertising was never a concern in any of the historic political struggles over freedom of expression. The first amendment claimants in disputes over commercial advertising often are sophisticated and driven by the profit motive. The speech in question is brief and intended to evoke a reflexive, even if somewhat delayed, response from listeners. There is a strong tradition of government regulation of advertising and, in the federal government and most states, an administrative regulatory apparatus in place. These considerations suggest that no first amendment doctrine protecting commercial speech could be either uncomplicated or historically grounded. Perhaps more important, it seems unquestionable that any such doctrine would undercut for a substantial segment of the population the belief that first amendment freedoms represent a noble commitment well worth preserving even in the face of serious anxieties, risks, and costs. The best preparation for pathology is widespread conviction about the importance of free speech. The spectacle of voluminous litigation over degrees of suggestiveness in product advertising, conducted in the name of the first amendment, is likely to weaken that conviction.

Thus, in several respects adoption of the pathological perspective should lead one to doubt the wisdom of treating commercial advertising as any different than fighting words, deliberate lies, hard-core pornography, or threats—categories of communication that are regarded as simply outside the ambit of first amendment concern.[130] On the other hand, the decision to view commercial advertising as worthy of first amendment protection may strengthen one of the most appealing

129. Commercial advertising is formulated with the aim of inducing a very specific behavioral response that would redound to the economic profit of the "speaker." Save perhaps political advertising, no other form of speech draws upon such voluminous data regarding patterns of audience response and is so systematically tailored to achieve the desired effect. For no other form of speech are there comparable economic pressures on the speakers to succeed in inducing their audiences to respond in the desired way. Few if any other forms of speech involve messages on subjects about which the speakers are so much more knowledgeable than their audiences.

130. See Watts v. United States, 394 U.S. 705 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

and straightforward of free speech principles, that the regulation of communication can never be based on the judgment that audiences will be better off if kept ignorant of certain advocacy or information they may be incapable of properly evaluating.[131] This antipaternalism principle surely would be a candidate for a central place in a simple, straightforward, principle-based doctrinal tradition of the sort favored under the pathological perspective. In striking down state prohibitions on accurate price advertising by pharmacists and lawyers, the Court explicitly inveighed against the paternalistic premises of the restrictions, thus giving the antipaternalism principle a position of new prominence in first amendment doctrine.[132]

There can be little doubt that a strong tradition of disallowing paternalistic rationales for the regulation of speech would be a constraining force in a pathological period. A common source of anxiety regarding the dangers of speech is the belief that audiences cannot properly evaluate the passionate appeals of disaffected demagogues. Regulatory efforts that spring from that anxiety have an unmistakably paternalistic character. One must ask, however, how much the antipaternalism principle has been strengthened by the Court's invocation of the principle in commercial speech cases. The net effect of the Court's response to paternalism in the regulation of advertising may actually have been to dilute the principle that audience iguorance can never be considered a virtue.

Just four years after the Court embraced the antipaternalism principle in the drug advertising case, the Justices declared in dictum that the harm of consumers being made indifferent to energy conservation as a result of advertising by a public utility promoting electricity consumption provided a valid ground for prohibiting such advertising.[133] The cases can be reconciled: the claim of the regulators in the drug and lawyer advertising cases was that consumers would be influenced by the advertising to act against their own self-interest; in the promotional advertising case, the fear was that consumers would act against the public interest in pursuit of their own short range self-interest. The rationale in the first type of case is more paternalistic because it necessarily assumes that listeners cannot evaluate the message even when they have every incentive to try to do so. The rationale in the promotional advertising case is consistent with respect for the message-screening capacities of listeners; what the rationale doubts is the capac-

131. For a systematic defense of this antipaternalism principle, see Scanlon, supra note 58. But see Scanlon, Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 532–34 (1979).

132. See Bates v. State Bar, 433 U.S. 350, 375 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 769–70 (1976); see also Linmark Assocs., Inc. v Willingboro, 431 U.S. 85, 96–97 (1977) (extending antipaternalism principle beyond context of price advertising).

133. Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

ity of listeners to behave as public-spirited citizens when prompted to act selfishly by sophisticated advertising techniques. In pathological times, however, it is this last form of distrust of audiences that is most likely to surface as a rationale for regulating speech. And there is good reason to suspect that a lack of enthusiasm concerning the social value of commercial advertising had something to do with the Court's willinguess to countenance the kind of paternalism that was at issue in the utility advertising case.[134] Had the Court worked through the implications of the antipaternalism principle in some other realm of free speech controversy, a more robust principle would probably have emerged.

These speculations suggest at the least that adoption of the pathological perspective counsels against the Court's middle-of-the-road approach to commercial speech. Either no first amendment protection for commercial speech or fuller protection is indicated. But which is it?

The no-protection alternative gains support from the general methodological preference for a lean, trim first amendment and from the concern about weakening public respect for the first amendment by bringing under its umbrella some forms of communication commonly perceived as manipulative and unimportant. But the exclusion of commercial advertising from the first amendment's ambit would place courts in the position of denying protection based on a judicial characterization (and denigration) of the motivations of the speaker and/or the importance of the subject of the communication. From the standpoint of the pathological perspective, it would be best if the judicial system never made such category judgments, for they are judgments that will not be made carefully and fairly in times of stress. Both the no-protection approach and the current middle-level approach require that "commercial speech" be defined, identified, and accorded less protection than noncommercial speech. In contrast, were commercial speech to be treated the same as political speech, courts would not have to pass judgment on the worth of the speaker's motivation or message.

On balance, I think adoption of the pathological perspective constitutes a reason to exclude commercial advertising from the protection of the first amendment. Category judgments supporting exclusions of other sorts—for fighting words and threats, for example—are entrenched in the first amendment tradition and will remain so whatever is done about commercial advertising. Were courts to grant commercial speech the same high level of protection now accorded political speech, regulatory objectives long considered important and legitimate would be frustrated, engendering in all probability a weakening of public respect for the first amendment quite a bit more severe than that now caused by the Court's middle-of-the-road approach. Many other considerations must be taken into account in determining the exact

134. Id. at 561–63.

constitutional status of commercial advertising, but from the pathological perspective the burden of persuasion should be on those who would bring that category of communication anywhere within the ambit of first amendment concern.

2. *The Right to Know.* — If the right to speak is important in large part because of the benefits audiences derive from the information and ideas disseminated by speakers, then a right of potential speakers "to know," that is to have access to noteworthy information and events, would seem a natural complement to the right to speak.[135] There is no shortage of rhetoric in the first amendment tradition extolling the right to know,[136] but only recently has that rhetoric ripened into judicial doctrine. The Court has granted journalists a constitutional right of access to various trial proceedings[137] and a highly contingent right to investigate certain prison conditions,[138] but those rights have been extended cautiously and with great attention to limiting principles.

In recognizing a first amendment right to observe criminal trials, the Court placed heavy reliance on the Anglo-American tradition of open courtrooms.[139] The functional importance to the democratic process of the information the plaintiffs sought to obtain was not emphasized, quite plainly for fear that a functional right to know would intrude into many areas of government decisionmaking not marked by a tradition of openness.[140] In the prison access cases, the Court made the jourualists' right to know dependent on the degree of access volun-

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135. See Emerson, Legal Foundations of the Right to Know, 1976 Wash. U.L.Q. 634.

136. Perhaps the best known item in that tradition is Madison's observation: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 Writings of James Madison 103 (G. Hunt ed. 1910); see also Emerson, supra note 135 (collecting authorities); infra note 146 (listing examples of right to know rhetoric).

137. See Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion).

138. Houchins v. KQED, Inc., 438 U.S. 1 (1978). The Court divided three-one-three, with Justice Stewart writing the pivotal opinion. He read the first amendment to require that the public and press be granted "equal access once government has opened its doors." Id. at 16 (Stewart, J., concurring). He concluded that the obligation to grant equal access entailed some effort by prison officials to accommodate the special professional needs of journalists, such as for interviews with prisoners on a flexible schedule and opportunities to use cameras and sound recording equipment.

139. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564–75 (1980) (plurality opinion).

140. Id. at 576 n.11. Even Justice Brennan, who has argued for a "structural" theory of the first amendment, see Address, 32 Rutgers L. Rev. 173 (1979), expressed conceru regarding the right to know that "the stretch of this protection is theoretically endless . . . ." *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring) (quoting Address, 32 Rutgers L. Rev. at 177). He concluded that the right to know "must be invoked with discrimination and temperance," id., and observed that "[t]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information." Id. at 589.

tarily granted by prison officials to the public at large.[141] The Justices even left open the issue whether a prison could be sealed off entirely from public scrutiny as a routine matter. This ambivalent and tentative attitude toward the right to know also seems to have played a part in the Court's unsympathetic response to the claim of journalists to first amendment protection from subpoenas inquiring into confidential relationships with news sources.[142] It is evident that the Court views a first amendment right to know as potentially important in certain situations but so expansive in nature as to be viewed with the greatest suspicion.

Many of the concerns that make first amendment protection for commercial speech problematic from the standpoint of the pathological perspective also operate with regard to the right to know. Important, time-honored regulatory interests compete with the desire of inquisitive journalists and citizens to learn all they can. It is difficult to imagine how an expansive right to know could be implemented without some form of ad hoc balancing comparing in each particular context the estimated importance of the sought-after information with competing values of personal privacy, comprehensive and undistorted record-keeping, and candid counsel. Because disputes over the right to know often concern efforts to monitor and criticize the conduct of government, the legitimation of ad hoc balancing and judicial assessments of speech value in this realm could be invoked to justify the use of those analytic techniques in other types of disputes relating to the criticism of government. And precisely because the comparative importance of knowledge and secrecy varies greatly from one setting to another, one despairs of developing a set of stable, concise principles to govern adjudication regarding the right to know. In the absence, moreover, of highly outcome-determinative principles, the amount of adjudication over claims of access to information is likely to be considerable, with the attendant cost of trivializing the first amendment.

To this point, the analysis parallels that developed previously regarding commercial advertising. However, the right to know differs from the right to advertise in at least one siguificant respect: some propositions that fall under the rubric of the right to know may qualify as core commitments of the first amendment.

That is not a self-evident contention. The process by which certain propositions achieve the status of core commitments is evolutionary in nature and determined largely by judgments made in response to the press of events.[143] Only recently has the right to know received more than passing attention in the realm of first amendment adjudication. The Supreme Court decisions recognizing rights to attend various trial proceedings represent a major development,[144] but it is doubtful that

141. Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978).

142. See Branzburg v. Hayes, 408 U.S. 665 (1972).

143. See supra text preceding note 14.

144. See cases cited supra note 137. For a valuable analysis of the implications of

cases so recent and so tentative in their reasoning should be regarded as establishing the right to know as a core commitment of the first amendment.

On the other hand, basic assumptions that over time have shaped adjudication and public debate can achieve the status of core commitments before they are explicitly validated by judicial decision. It is noteworthy how careful courts have always been, even when rejecting specific right to know contentions, not to question the assumption that the first amendment is implicated when the government interferes with efforts by private citizens to gather information.[145] The very familiarity of right to know rhetoric suggests, moreover, that in public debate it has long been assumed that the first amendment commands some measure of openness in government.[146] That the institution of judicial re-

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those cases, see Note, Access to Pretrial Documents Under the First Amendment, 84 Colum. L. Rev. 1813 (1984).

145. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 586 (1980) (Brennan, J., concurring). The closest the Court has come to denying the existence of a right to know is Zemel v. Rusk, 381 U.S. 1 (1965), which upheld the Secretary of State's refusal to validate passports for travel to Cuba. Petitioners claimed that the refusal deprived them of their first amendment right to gather information about Cuba by means of personal observation, but the Court characterized the State Department's policy as "an inhibition of action" and noted that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." Id. at 16–17. "The right to speak and publish," said the Court, "does not carry with it the unrestrained right to gather information." Id. at 17. The inclusion of the adjective "unrestrained" would seem to indicate an unwillingness to deny the existence of some form of right to gather information, especially by means not so easily classified as "action."

In Branzburg v. Hayes, 408 U.S. 665 (1972), the Court denied the claims of several news reporters to be immune from the obligation to testify regarding information learned from confidential sources. The majority opinion recognized in dictum, however, that the information gathering interests raised by the news reporters' claims were of constitutional stature: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 681.

In Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), the Court rejected claims of a first amendment right of journalists to conduct face-to-face interviews with prison inmates, holding that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Saxbe*, 417 U.S. at 850; *Procunier*, 417 U.S. at 834. However, the Justices did not state or suggest that the general public has no right to know, and indeed implied quite the contrary. Moreover, the Court cited the *Branzburg* dictum regarding the existence of first amendment protection for news gathering, *Procunier*, 417 U.S. at 833, and emphasized how much the prison regulations at issue afforded meaningful opportunities for the press and public to investigate prison conditions. See *Saxbe*, 417 U.S. at 848; *Procunier*, 417 U.S. at 830.

146. For examples of right to know rhetoric, see Providence Journal Co. v. FBI, 460 F. Supp. 762, 776 (D.R.I. 1978) ("In the originial floor debate [on the Freedom of Information Act], Representative Moss affirmed that: 'Inherent in the right of free speech and of free press is the right to know. It is our solemn responsibility as inheritors of the cause to do all in our power to strengthen those rights.' ") (quoting 112 Cong. Rec. 13,002 (1966)); Aaron Burr's Trial, Robertson's Rep. II, 517 (1808) ("In a government of responsibility like ours, where all the agents of the public must be responsible for

view has not heretofore been necessary to maintain the requisite minimal level of openness is not determinative on the issue of the existence *vel non* of some form of right to know, however circumscribed, as a core commitment of the first amendment.

A complication in the analysis is introduced, however, by the fact that any central norm of the first amendment relating to the right to know would derive largely from long-held operating assumptions rather than from historically significant resolutions of hard-fought disputes. Because of that derivation, it is difficult to specify what particular rights to inquire into the workings of the government should qualify for inclusion in the core of the first amendment. In fact, the argument for treating the right to know as a core commitment depends on considerations of aggregate impact: if government is able to shield its operations from public scrutiny on too many fronts, essential expectations of accountability will cease to guide the behavior of both officials and private citizens. As important as those expectations may be to the success of the governmental enterprise, few if any rights of inquiry viewed in isolation can be regarded as essential to the maintenance of the requisite expectations.

I conclude that the absence of greater specification from the historical processes that determine the core of the first amendment should not be a controlling factor in the analysis. The adjudication of novel claims of access to information should proceed on the assumption that at least some traditional prerogatives of inquiry concerning the conduct of government are of such aggregate importance in the constitutional scheme as to represent core commitments. It would be anomalous for a constitutional regime founded on the principle of limited government not to impose some fundamental restrictions on the power of officials to keep citizens ignorant of how the authority of the state is being exercised. That conclusion, it should be emphasized, does not gain support from the pathological perspective. The role of the pathological perspective is only to suggest some priorities and strategic considerations that help to protect a set of core commitments determined independently of the choice of perspective.

Whatever the exact contours of tbe various rights to gather information that qualify as core commitments of the first amendment, there is reason to believe that in pathological periods those rights will be threatened. The degree to which outsiders have access to information about government is a function of numerous discretionary official practices that could be altered unilaterally in times of stress. Whenever a

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their conduct, there can be but few secrets. The people of the United States have a right to know every public act . . . .") (statement of Burr's attorney, Benjamin Botts); T. Wortman, Treatis Concerning Political Inquiry and Liberty of the Press 29 (1800) ("[T]he government which attempts to coerce the progress of opinion, or abolish the freedom of investigation into political affairs, materially violates the most essential principles of the Social State.").

major shift occurs in the attitudes of officials regarding the desirability of informed scrutiny of their work, those officials typically have at their disposal the practical capacity to impair such scrutiny considerably. No statutes need be passed; no injunctions need be obtained. The control the military has exerted recently over press coverage of its operations may be an extreme example but a revealing one all the same.[147] Fifteen years ago, when some law enforcement officials were disturbed by news coverage of their treatment of certain dissidents, large numbers of journalists were subpoenaed and searched, to the apparent detriment of their ability to gather information from fearful news sources.[148] The right to know is vulnerable to informal, widespread encroachment. In particularly stressful periods, that encroachment could be severe.

In addition, the constitutional system's capacity to abide by its other core commitments may be partly a function of its capacity to maintain a meaningful right to know. Those within government who are tempted in the grip of pathology to make incursions on the core commitments of the first amendment may be checked most effectively by well informed critical scrutiny of their plans. The elusive, fragile ethic of accountability that can be nurtured by the right to know may in the last analysis be the lifeblood of any successful system of constitutional limitations.

The upshot of these speculations, somewhat to my surprise, is that the Supreme Court's current approach to the right to know makes a good deal of sense from the standpoint of the pathological perspective. The most significant concern ought to be that in a future pathology the fears of the populace will make politically feasible a closing up of the processes of government to such an extent that officials will be unaccountable for their actions in some important spheres. That development can be warded off by a strict insistence, as a matter of constitutional doctrine, that traditional standards of openness in government be maintained. Accordingly, the fact that a certain government activity has historically been open to public inspection should weigh heavily in the judgment whether in a particular context claims of confidentiality outweigh claims of critical scrutiny. So long as tradition is given its due, so much of the right to know as can properly be considered a core commitment of the first amendment should remain intact.[149] A more expansive right to know derived from functional as well

147. See Castro, Keeping the Press from the Action, Time, Nov. 7, 1983, at 65–66; Friedrich, "Anyhody Want to Go To Grenada?," Time, Nov. 14, 1983, at 70–73.

148. See Blasi, The Newsman's Privilege: An Empirical Study, 70 Mich. L. Rev. 229 (1971).

149. Thus, the traditional reluctance of litigants to subpoena news reporters, see id., would weigh heavily in the judgment whether the first amendment grants journalists a testimonial privilege not to reveal their confidential sources. But see Branzburg v. Hayes, 408 U.S. 665 (1972). The prerogatives journalists traditionally have enjoyed to observe military operations would also be relevant to first amendment claims they assert in that context.

as historical considerations might have certain advantages, but if the introduction of functional reasoning were to weaken the regime's capacity to protect the core aspects of the right to know, the pathological perspective should lead us to view the trade-off as undesirable.[150]

Of course, some of the advantages of an expansive right to know are not unrelated to the goal of protecting the core of the first amendment. The more outsiders can scrutinize official conduct, the more difficult it is for any part of the government to violate the most basic commitments of the Constitution. If the practical capacity of outsiders to detect and forestall incursions on the core commitments of the first amendment hinged on the difference between a functional and an historical conception of the right to know, the argument for preferring the potentially more expansive functional approach would be powerful. It is not evident, however, how important to the successful investigation of government misconduct is the relative breadth of the constitutional right to know. Surely the ingenuity and dedication of the investigators matters far more than the level of support provided by the slow-moving adjudicative apparatus of the constitutional regime. Moreover, it is only a certain type of official behavior that concerns us here: plans, practices, or shifts in attitude that threaten the core commitments of the first amendment. Whatever the value of an expansive right to know for exposing the full range of government activity to public view in ordinary times, it is doubtful that the breadth of the right to know is an important variable in the specialized constitutional struggles that occur in pathological periods.

Most pathological challenges to the core commitments of the first amendment are quite overt. Those challenges often flow from and feed upon popular hysteria. It is true that details regarding the repressive measures that are being employed may not be known to the public, and may be more easily discovered with the help of an expansive right to know. But the incremental effect in this regard of an expansive rather than tradition-based right to know remains highly speculative. Given the anxieties and regulatory impulses that operate during pathological periods, exposure of the details of repressive programs often will not have the constraining effect on government that such exposure could have in normal times. No doubt a right to know determined by functional as well as historical considerations would contribute somewhat to the protection of the core commitments of the Constitution, but not

150. Even a strong commitment to a tradition-based view of the right to know would not eliminate certain fundamental problems of interpretation. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the petitioner claimed that the general tradition of open criminal trials supported its claim of a right to observe the testimony of a juvenile sex offense victim. The respondent argued that the more specific tradition of intermittently excluding the public from sex offense trials supported its contention that the press had no first amendment right to observe the testimony in question. The Court ruled that the tradition of open criminal trials in general was the more appropriate benchmark, and granted the petitioner's constitutional claim.

enough in my judgment to justify the methodological costs outlined above that would accompany such an expansive approach.[151]

This is not to say that adoption of the pathological perspective commits one to a restrictive, tradition-dominated view of the right to know. As one who accords special priority to the value of free speech as a check on abuses of official power of all sorts, not just those that threaten the core commitments of the Constitution, I would interpret the first amendment to require a more expansive, more functionally determined right to know than that so far recognized by the Supreme Court.[152] That I hold such a view despite the foregoing analysis only serves to illustrate how the pathological perspective is just one of several considerations that should figure in the formulation of first amendment doctrine.

3. *Freedom of Association.* — Nowhere does the constitutional text mention the freedom of association, but the Supreme Court has decided that the freedoms of speech, press, and assembly imply a right to join together with others to exchange ideas or promote causes.[153] The first amendment freedom of association restricts the power of government to make individuals vicariously responsible for the unlawful actions and intentions of their political confederates,[154] protects individuals from being coerced into joining political associations with which they prefer not to be affiliated,[155] and limits the extent to which public employment and government benefits can be withheld from persons on account of the political company they keep.[156] In addition, the freedom of association prohibits government from seeking to prescribe the membership, internal structure, and basic character of certain types of organizations,[157] and in some circumstances immunizes from official inquiry information relating to these matters.[158]

The freedom of association takes on a special significance during pathological periods. Such periods are characterized by a search for scapegoats, and unpopular organizations serve that social need well. In order to justify a suspension of traditional levels of tolerance, would-be regulators typically must identify a threat to the values of the community that can be described as unusual in its magnitude or intensity.[159] Uncoordinated developments regarding the beliefs and behavior pat-

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151. See supra p. 490.

152. See Blasi, Checking Value, supra note 7, at 591–611.

153. See NAACP v. Alabama, 357 U.S. 449, 460–61 (1958).

154. Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203, 219–24, 228–30 (1961).

155. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232–37 (1977); Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion).

156. Branti v. Finkel, 445 U.S. 507 (1980); Baird v. State Bar, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

157. Cousins v. Wigoda, 419 U.S. 477 (1975).

158. NAACP v. Alabama, 357 U.S. 449, 461–66 (1958).

159. For a valuable anthology of writings in this vein, see D. Davis, supra note 2.

terns of the populace can of course threaten social stability, but not in so vivid and frightening a way as a "conspiracy" or a movement orchestrated by well-organized groups. It may almost be considered a defining feature of a pathological period that public or official attention is focused to an unusual extent on the machinations of dissident political groups.

Not only is the freedom of association especially prone to be challenged in times of stress, the distinctive dynamics of pathological periods make such challenges likely to be effective. Private sanctions—shunning, ridicule, employment discrimination in the private sector—tend to play a special role in pathological times due to the high level of shared anxiety and the consequent forging of a communal mentality that exalts orthodoxy. When the pack is running, the mere disclosure of a person's vague, attenuated association with a scapegoated group can generate private sanctions that only the hardiest souls would not temper their convictions to avoid. Precisely because associational involvements tend to be flexible and intermittent, they are among the most readily abandoned of first amendment activities. Yet the collective effect of countless individual decisions to opt for discretion over valor can be devastating to the quality of the nation's political life.

Thus, from the standpoint of the pathological perspective a strong, resilient interpretation of the freedom of association is indicated. Without the benefit of explicit consideration of the pathological perspective, the Supreme Court has already developed some innovative, quite protective doctrines in this area.[160] Nevertheless, acceptance of my thesis would counsel that the freedom of association be strengthened even further.

First, a stronger principle against guilt by association is needed. The Court has held that an individual can be punished for membership in an organization that advocates the violent overthrow of the government if the organization advocates such an overthrow as speedily as circumstances permit and the individual knows of that advocacy, is an active member of the organization, and has a specific intent to forward its illegal aims.[161] Insofar as it permits persons to be held criminally liable for public advocacy engaged in by their political confederates, that doctrine should be overruled. Even when a member actively participates in the affairs of an organization and knows about and shares its illegal objectives, vicarious criminal responsibility for the speeches and writings of others is not warranted.[162] In pathological periods,

160. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Noto v. United States, 367 U.S. 290 (1961).

161. See Scales v. United States, 367 U.S. 203, 228–30 (1961).

162. Criminal responsiblity should not be considered "vicarious" when it is based on specifically defined conduct by the defendant, including verbal solicitation to illegal advocacy, that is prohibited because of its significant causal connection to harmful con-

factfinding processes cannot be relied upon to make discriminating judgments regarding the intentions of persons who carry the stigma of any kind of affiliation with a highly unpopular organization. Moreover, given the inherent imprecision of any standard keyed to the quality of one's membership or state of mind, in times of stress the only standard of criminal liability that would not massively deter legitimate political association is one based on personal rather than vicarious responsibility. Government has power enough to prevent its violent overthrow if it can punish those who themselves do the advocating and the planning.

Second, adoption of the pathological perspective should lead one to favor greater protection against the compelled disclosure of a person's political affiliations than the Court has so far recognized. For example, as part of a general investigation into character and fitness, a state may demand that an applicant for admission to the bar disclose whether she has ever been a member of an organization that she knew to be advocating the violent overthrow of the government.[163] Several persons with exemplary credentials and recommendations have been denied admission to the bar for refusal to reveal their political associations of bygone years, and the Supreme Court has upheld those denials.[164] Any kind of regnlarized, formal inquiry into political affiliation, particularly for positions to which large numbers of persons aspire, is bound to have an adverse impact on the willingness of all but the most zealous and fearless to attach themselves to unpopular, or even potentially unpopular, causes and organizations. The marginal contribution that information relating to political affiliation is likely to make to the state's capacity to predict future behavior as a lawyer or public employee cannot justify what the pathological perspective suggests must be counted a very heavy cost.

Occasionally, governments seek to discover the names of members and financial supporters of political organizations not to screen applicants for positions of public responsibility but to determine whether and how to regnlate those organizations.[165] Laws designed to reduce corruption in the financing of political campaigns, for example, typi-

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sequences. The type of liability that is problematic under the pathological perspective is that which permits persons to be convicted for nothing more than failing to prevent, repudiate, report, or disassociate themselves from the illegal advocacy of their political associates. For an invaluable overview of the interaction between principles of criminal liability and principles of free expression, see Greenawalt, Speech and Crime, 1980 Am. B. Found. Research J. 645.

163. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971).

164. See In re Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961).

165. See NAACP v. Alabama, 357 U.S. 449 (1958); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 71–77 (1928).

cally require the disclosure of the names of financial contributors.[166] The Supreme Court has held that organizations that demonstrate special reason to fear harassment of their members have a first amendment right to keep their membership and contribution lists private absent a compelling need for government to learn the information.[167] In case-by-case adjudication, the Court has been sympathetic to claims of controversial groups that harassment would follow disclosure, and unsympathetic to claims by government investigators of a compelling need to have access to membership and contribution lists.[168] From the standpoint of the pathological perspective, the confidentiality of membership and contribution lists should not depend on so fragile a shield as sympathetic case-by-case adjudication under standards that call for highly speculative, particularized judgments. In the worst of times, judges cannot be expected to view the NAACP as the Court did in 1958, or the Socialist Workers Party as the Court did in 1982. An absolute principle forbidding the compelled disclosure of information revealing lawful political affiliations and contributions is warranted given how readily that information tends to be misused in pathological periods.

For the freedom of association issues discussed thus far, the pathological perspective counsels the adoption of extremely protective, absolute standards in areas already characterized by a high level of judicial involvement and fairly protective first amendment doctrines. For a different set of freedom of association problems, the contribution of the pathological perspective lies mainly in suggesting that the role of constitutional principles and judicial standards should be much more prominent than has been the case heretofore. I refer to the issues that arise when law enforcement and military authorities engage in the systematic surveillance of groups that are organized, at least in part, around a set of political commitments.

In *Laird v. Tatum*,[169] the Supreme Court rnled that no justiciable controversy was created by the mere existence of a system of political surveillance conducted by the United States Army. The plaintiffs alleged that their exercise of associational rights was chilled by the Army's practice of sending undercover agents to public rallies and compiling files on political activists from local police records and newspaper clippings. The Court held, however, that there was no cognizable injury absent an allegation that the government was collecting or using the information in a manner that was "regulatory, proscriptive, or com-

166. See Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. 1, 60–84 (1976) (per curiam).

167. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); NAACP v. Alabama, 357 U.S. 449, 463–66 (1958).

168. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); NAACP v. Alabama, 357 U.S. 449, 463–66 (1958).

169. 408 U.S. 1 (1972).

pulsory" in its impact on the plaintiffs.[170] Subsequent to that decision, lower courts have rejected first amendment challenges to such practices as the use of informers and infiltrators to report on private meetings of political organizations,[171] the monitoring of the bank and telephone records of such groups,[172] and the dissemination within the law enforcement community of information about lawful political activities.[173] When plaintiffs have alleged, however, that surveillance practices were undertaken not to solve or prevent crimes but to disrupt or defame political organizations, or to provoke members into committing crimes that would discredit their organizations, a number of lower court judges have distinguished *Laird v. Tatum* and treated the constitutional claims as cognizable.[174]

The unwillingness of courts to recognize first amendment limits on political surveillance absent "bad faith" on the part of the investigating authorities can be explained by a number of considerations. So long as the surveillance is reasonably discreet, one might question whether enough persons will be convinced of its existence to generate a meaningful chilling effect. Even were the chilling effect demonstrable, courts understandably would be reluctant to prevent the state from collecting data it deems relevant to crime prevention by methods that are considered legitimate when used against nonpolitical groups. The judicial inclination to defer to professional expertise must be strong when law enforcement authorities claim that data concerning seemingly innocuous political rhetoric and affiliation may someday be significant in reconstructing the trail of a crime that is anything but innocuous. Because a wide variety of political ideologies justify the selective use of force if only as a last resort, no clean distinction can be made between groups that are essentially "political" in nature and those that are "violent" or "criminal." And even if appropriate standards could be devel-

170. Id. at 11.

171. See Socialist Workers Party v. Attorney Gen., 510 F.2d 253 (2d Cir. 1974); Handschu v. Special Servs. Div., 349 F. Supp. 766 (S.D.N.Y. 1972); see also Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (en banc) (consent decree interpreted narrowly to bar FBI from conducting investigations "solely on the basis of activities protected by the First Amendment," but not to prohibit investigations of political conduct having a "basis in a genuine concern for law enforcement"; dictum stressing the social importance of surveillance).

172. See Reporters Comm. for Freedom of the Press v. AT&T, 593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973).

173. See Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975).

174. See ACLU v. City of Chicago, 431 F. Supp. 25 (N.D. Ill. 1976); Alliance to End Repression v. Rochford, 407 F. Supp. 115 (N.D. Ill. 1975); Handschu v. Special Servs. Div., 349 F. Supp. 766 (S.D.N.Y. 1972). See generally Chevigny, Politics and Law in the Control of Local Surveillance, 69 Cornell L. Rev. 735 (1984) (overview of actions in several jurisdictions challenging political surveillance and comparison of various regulatory approaches).

oped in this area, the fact that most surveillance is surreptitious would make it almost impossible for courts and successful parties to determine whether judicial orders were being obeyed. An unfounded but necessarily irrefutable rumor that police are not complying with a court order restricting surveillance could resurrect the very type of chilling effect on association that judicial intervention was designed to prevent. Finally, the difficulty of devising appropriate legal standards and remedies underscores how institutionally ill-equipped courts are to deal with the problem of improper surveillance. In contrast, numerous congressional investigations and the carefully drafted and revised Attorney General's Guidelines apparently have produced in recent years a marked increase in self-restraint in surveillance practices at the federal level, a change more substantial than could ever have been achieved by judicial decrees.[175]

From a conventional perspective, these considerations would suggest that the laudable goal of controlling political surveillance should not be one of the Court's priorities of doctrinal involvement. Viewed from the pathological perspective, however, the problem of political surveillance assumes such importance that every effort should be expended to overcome the barriers to effective judicial intervention just outlined. In the worst of times, the odds of a chilling effect actually operating greatly increase. Methods of speech regulation that depend on largely discretionary administrative decisions are especially problematic during pathological periods. The political sentiments that have apparently produced some significant reforms in surveillance practices in recent years cannot be expected to endure; when the body politic suffers its next pathology, congressional investigators and Justice Department officials will demand more political surveillance, not less. And the costs generated by political surveillance in stressful times cut to the core of the first amendment: large numbers of persons are deterred from exercising one of the most fundamental of expressive liberties, the right to gather together with others to exchange ideas or promote shared ideals. Methodological strains notwithstanding, the control of political surveillance ought to be one of the Court's priorities of doctrinal involvement.

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175. See Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations (March 7, 1983), reprinted in Department of Justice Press Release, March 7, 1983; The Attorney General's Guidelines on Domestic Security Investigations (Nov. 4, 1976), reprinted in FBI Statutory Charter: Hearings on S.1612, Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 18–26 (1978). See generally R. Morgan, Domestic Intelligence: Monitoring Dissent in American (1980) (discussing post-Watergate efforts at reform while cautioning against excessive limitations on domestic intelligence gathering); Elliff, The Attorney General's Guidelines for FBI Investigations, 69 Cornell L. Rev. 785 (1984) (analyzes various sets of Attorney General's guidelines on domestic security investigations in light of their first amendment implications).

4. *Political regulation of public school classroom discussion and library contents.* — Democratically elected school boards and legislatures set educational standards and determine curricular priorities for the public schools. Occasionally that authority is exercised to exclude certain books or topics of discussion that some students, parents, or teachers believe should be included in the particular educational program.[176] Few would dispute the general power of school boards and legislatures to make priority judgments regarding how scarce educational resources are to be expended. When the circumstances indicate, however, that the decision to exclude material was based not on scarcity but on a desire to shield students from disapproved ideas or forms of expression, some courts have recognized first amendment limitations on the authority of school boards to remove books from school libraries or to dismiss teachers for discussing forbidden topics in class.[177]

The Supreme Court has confronted the issue only twice. In *Epperson v. Arkansas*[178] the Justices held unconstitutional under the first amendment an Arkansas law that made it a crime for a public school teacher to teach the theory that mankind evolved from a lower order of animals. Justice Fortas, writing for the majority, alluded to the potential conflict between the freedom of speech and political regulation of the school curriculum but preferred to resolve the case on a "narrower" ground: he found the Arkansas law sufficiently motivated by "fundamentalist sectarian conviction"[179] to amount to an impermissible establishment of religion. Justice Stewart rejected the religious motivation rationale; he concurred on the ground that the state law might well "make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought," a result he thought "would clearly impinge upon the gnarantees of free communication contained in the First Amendment . . . ."[180]

Board of Education v. Pico[181] presented the issue whether a school board has unlimited discretion to remove from a school library books that offend the moral or political sensibilities of board members and their constituents. After receiving a list of objectionable books at a political conference, members of a school board instituted a review of eleven books in the school library by such authors as Kurt Vonnegut, Desmond Morris, Richard Wright, Eldridge Cleaver, and Bernard

176. See generally Note, Schoolbooks, School Boards, and the Constitution, 80 Colum. L. Rev. 1092 (1980) (suggesting standards for federal court review of educational reasonableness of school board exclusions of material).

177. See, e.g., Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980), aff'd, 457 U.S. 853 (1982); Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976).

178. 393 U.S. 97 (1968).

179. Id. at 104–08.

180. Id. at 116 (Stewart, J., concurring in result).

181. 457 U.S. 853 (1982).

Malamud. In a press release, the board characterized the books as " 'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.' "[182] A committee of parents and teacbers was appointed to evaluate the educational suitability and good taste of the books, but its recommendation that five of the books be returned to their shelves was rejected by the board. Several students sued, alleging that the board had violated their first amendment rights by making social, political, and moral taste rather than educational value the criterion for book retention.

The Supreme Court held five-to-four that the trial judge erred in dismissing the action at the summary judgment stage. Four justices concluded that if the school board intended by its removal of the books to deny students access to ideas with which board members disagreed, and if that intent was the decisive factor in the board's decision, a violation of the students' first amendment rights would be established. Justice White joined the judgment on the ground that a fuller record on the issue of the motivations of the school board had to be developed before the courts could decide the difficult issue of what, if any, motivation would establish a violation of the first amendment.[183]

Four dissenters argued in *Pico* that any right of students to be free from politically motivated book removal decisions would necessarily be formless. Given the acknowledged function of the public schools to inculcate community values, "an elected school board *must* express its views on the subjects which are taught to its students."[184] No distinction is viable, in this view, between judgments based on vulgarity or educational unsuitability and judgments based on political disapproval because "virtually all educational decisions necessarily involve 'political' determinations."[185]

One might be tempted to think that disputes of the sort represented by cases like *Epperson* and *Pico* only arise during periods of local pathology. That is not true. Given the quite special political passions that surround the administration of the public schools, as well as the remarkable regional and local diversity in traditions and attitudes concerning elementary and secondary education, one cannot say that the exclusion of authors such as Charles Darwin and Bernard Malamud can only ensue from a breakdown in normal patterns of ideological toleration.[186] A serious movement in any local commumity to ban *The Origin of Species* or *The Fixer* from bookstores and general circulation public libraries would surely mark the moment as pathological, but the nation's traditions are not such that the same can be said about a move-

182. Id. at 857.

183. Id. at 883–84 (White, J., concurring).

184. Id. at 889 (Burger, C.J., dissenting) (emphasis in original).

185. Id. at 890 (Burger, C.J., dissenting).

186. For a general discussion of the problem, see R. O'Neill, Classrooms in the Crossfire (1981).

ment to purge those works from the public schools. None of the rights of students and teachers that may be abridged by such exclusions—a right to have convenient access to the excluded ideas, perhaps, or a right to be free of a government-imposed orthodoxy—is sufficiently well established and validated by tradition to constitute a core commitment of the first amendment. Indeed, a common feature of curriculum-content and book-removal disputes is that one's sense of indignation at the school board's narrow-mindedness tends greatly to outrun one's capacity to identify the source and shape of the constitutional right allegedly infringed.

Despite these observations, adoption of the pathological perspective should lead courts to be more willing than would otherwise be the case to develop first amendment limitations on the authority of school boards to control the content of school libraries and classroom teaching. For the motivations and assumptions that lead a school board or legislature to banish controversial ideas from the public schools are motivations and assumptions that courts cannot afford to legitimate lest the core commitments of the first amendment be placed in jeopardy. As noted above, the capacity of the political community to abide by those commitments in periods of unusual anxiety is highly dependent on the deep-seated attitudes of the populace regarding the morality and efficacy of toleration.[187] Because the governance of the public schools tends in this country to be a focal point for civic involvement, judicial legitimation of intolerance of ideas in that setting cannot help but legitimate intolerance in other settings. If a defiant or unsettling idea is too dangerous to be tolerated in a high school during periods of social stability, why is that idea not also too dangerous to be permitted to circulate among discontented persons in the society at large during periods of social unrest? One can argue, of course, that schoolchildren are special by virtue of their youth, or that the school setting is special by virtue of the inculcative mission of elementary and secondary education.[188] As an anlytical matter, censorship in the school setting can be considered a distinct and isolated phenomenon, the legitimation of which ought not to have consequences outside that unique setting. It is most unlikely, however, that a populace that witnessed ideas being banished from the educational process on account of their dangerousness, invalidity, or bad taste would internalize a strong taboo against the repression of ideas that challenge and threaten other institutions or endeavors. And it is just such a taboo that must operate among substantial segments of the political community if the core commitments of the first amendment are to be respected during the worst of times.

To say that courts ideally should not legitimate school board ac-

187. See supra pp. 456–57, 467.

188. See Board of Educ. v. Pico, 457 U.S. 853, 889–92, 894–97, 910–15 (1982) (dissenting opinions of Chief Justice Burger and Justices Powell and Rehnquist).

tions that reflect a fear of ideas is not to say that this problem area ought to be a priority of doctrinal involvement for courts. Certain forms of judicial involvement could be worse than no involvement at all in terms of legitimating such school board actions. It is no small challenge to identify the source and contours of any constitutional right that would constrain school board decisions regarding curriculum and library contents. If the right were developed in such a way that litigation over school board decisions was common but school boards often prevailed even when widely perceived to be acting out of censorial motives, the net result could be to weaken the taboo against intolerance of threatening ideas. From the standpoint of the pathological perspective, a high level of judicial involvement in curriculum and library disputes would be salutary only if courts were to make meaningful assessments of school board motivation, and not simply presume proper motivation absent egregious evidence to the contrary. Yet a doctrine that depended so much on judicial inferences concerning school board motivation might be difficult to justify given the amorphous nature of the injuries suffered by the complainants in disputes like *Pico*, the formidable evidentiary problems that plague any kind of inquiry into motivation,[189] and the lack of any tradition in free speech jurisprudence of treating illicit motivation as the gravamen of a constitutional violation.[190]

Whether these obstacles preclude the development of a robust doctrine of motive review regarding curriculum and school library decisions depends on a number of considerations both theoretical and practical. The contribution of the pathological perspective to the analysis would appear to be twofold. First, the importance during the worst of times of general public attitudes regarding toleration strengthens the argument for constitutional principles that focus on official motivations as well as identifiable individual injuries. From the pathological perspective, judicial review in normal times exists as much to foster cer-

189. See Brest, *Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 119–24.

190. See, e.g., United States v. O'Brien, 391 U.S. 367, 382–83 (1968) (first amendment challenge to draft card statute rejected on grounds that congressional purpose "not a basis for declaring this legislation unconstitutional"); Barenblatt v. United States, 360 U.S. 109, 132–33 (1959) (judiciary without power to intervene in congressional investigation based on legislature's motive). The major instance of motive review in free speech jurisprudence is Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (state tax on newspaper receipts unconstitutional because real purpose was "to limit the circulation of information"). In other areas of constitutional law such as equal protection and freedom of religion, motive review is an integral feature of the doctrinal tradition. See, e.g., Stone v. Graham, 449 U.S. 39, 41 (1980) (state requirement that ten commandments be posted in public schools unconstitutional since without "secular legislative purpose"); Washington v. Davis, 426 U.S. 229, 240 (1976) (claim of racial discrimination "must ultimately be traced to a racially discriminatory purpose"); Epperson v. Arkansas, 393 U.S. 97, 107–08 (1968) (state law forbidding teaching of evolution unconstitutional because based on "fundamentalist sectarian conviction").

tain attitudes about the importance of free speech as to redress particular grievances. To the extent the judiciary has any influence on the attitudes of the public regarding toleration, the way courts respond to the phenomenon of censorial motivation on the part of government would seem to be at least as important as the way courts respond to traditionally cognizable injuries suffered by persons whose speech is regulated.

Second, several of the practical considerations that have made courts reluctant to base constitutional doctrine on the motivations of regulators have less force if the frame of reference is pathological times. It is often said, for example, that judicial review of motivation cannot be effective because officials can always disguise their motives and in any event can reenact an invalidated regulation taking care the second time to profess proper motives.[191] But if the concern is that the legitimation of censorship in the specialized setting of the schools will lay the groundwork for more pervasive efforts to censor ideas during periods of pathology, it matters how overt are the efforts to banish threatening ideas. It would be no small contribution to the preservation of the central norms of the first amendment if a robust doctrine of motive review were to force would-be censors of ideas in the schools to rein in their rhetoric and forego appeals to ideological intolerance.

Moreover, although efforts to banish threatening ideas from the schools can occur in non-pathological contexts, sometimes it may indeed be a pathological shift in attitudes that engenders political regulation of the school library and curriculum. On such occasions, those who would suppress heresy tend to be rather explicit if not demogogic about their motivations. A robust doctrine of motive review is not likely to be thwarted by the circumspection of the censors. And even if a court decision invalidating a regulation on grounds of motive can in theory be overcome by a reenactment of the regulation with professions of noble motivation, the delay created by the initial invalidation may be important in light of the volatility and rapid pace of events that characterize many pathological periods.

I have not established in this brief discussion that a robust doctrine of motive review would be workable in the context of disputes over classroom topics and library contents. And it bears repeating that were a full analysis to reveal that only a deferential doctrine of motive review would be workable, the pathological perspective would counsel a judicial doctrine that severely discouraged constitutional challenges to school board decisions, lest unsuccessful challenges have the effect of legitimating censorial attitudes. There is, however, some reason to believe that a robust doctrine of motive review would be workable in this area,[192] and one implication of the pathological perspective is to make

191. See Brest, supra note 189, at 119–27.

192. For two efforts to develop meaningful standards of motive review for disputes

the development of such a doctrine a matter of high priority.

V. Practical Objections

A perspective is not a legal theory. Nor is it an analytical system. It is a way of looking at issues that is designed to improve adjudication by bringing into focus certain considerations that otherwise might be overlooked or underemphasized. As such, my thesis cannot be defended entirely on the basis of its coherence, its logical derivation from accepted normative premises, or its suggestiveness at the level of methodological and doctrinal implications. Ultimately, the argument for the pathological perspective depends on the claim that the society's adherence to the central norms of the first amendment would increase were courts to target doctrine for the worst of the times. For that reason, my thesis rests on certain empirical premises regarding the capacities of courts and the effects of judicial decisions, and is vulnerable to practical objections that challenge those premises.

One objection concerns the unorthodox nature of the decision to think systematically about the elusive dimension, "perspective." The perspective that informs legal reasoning is not ordinarily the subject of conscious, reasoned choice. Advocates, of course, frequently sketch worst-case scenarios as a scare tactic, but the common tendency among disinterested observers is to view such efforts as a species of rhetoric, not an element of rigorous analysis. The notion of perspective is distressingly imprecise. Even if the legal culture were to agree that a particular perspective is appropriate for a certain class of cases, one must wonder whether individual thought patterns that were even roughly similar would result from such a consensus.

In my judgment, doubts about the efficacy of thinking explicitly about perspective are more a function of the novelty of the endeavor than of the inherent imprecision of the concept of perspective. Whether consciously or not, judges, litigants, and critics who reason about constitutional questions do so by adopting *some* perspective. It is not as though perspective is an entirely new dimension in the analytical calculus. In fact, the notion of perspective, as I use the term, relates to one of the more familiar and concrete (albeit speculative) aspects of legal reasoning: the assessment of future consequences. It would not be an unintelligible injunction for an authoritative court to instruct its inferiors to imagine future social dynamics of a certain distressing character and to estimate how the legal principles under consideration would operate in the face of those dynamics. Such an injunction commands a shift of emphasis, and it may be that a duty to give emphasis is no more enforceable than a duty to bargain in good faith. But the mea-

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over book regulation in the schools, see Note, supra note 176; Note, Judicial Clairvoyance and the First Amendment: The Role of Motivation in Judicial Review of Book Banning in the Public Schools, 1983 U. Ill. L. Rev. 731.

sure of doctrinal efficacy should not be exclusively a function of susceptibility to coercive enforcement. In the complex, hierarchical social system that is the American judiciary, signals often play a role that cannot be explained entirely by the sanctions that stand behind them. The signal to give careful consideration to certain worst-case scenarios, and not dismiss them as rhetorical ploys, is likely to command attention among the various actors in the legal culture.

Moreover, my thesis could have an important practical impact even if lower courts would not be induced to alter their thought patterns by a higher court's general command to employ the pathological perspective. As I have shown, a focus on the worst of times should lead the higher court to embrace certain methodologies and doctrines that would in turn bind lower courts in the conventional fashion. Ideally, advocates throughout the judicial system should be able to appeal directly to the pathological perspective in fashioning their arguments. If, however, lower courts were only receptive to appeals to intermediate concepts such as the chilling effect, journalistic autonomy, or a presumption against balancing standards, the indirect practical impact of the pathological perspective would nonetheless be considerable.

That argument, however, speaks only to the possible impact of the choice of perspective on the decisions of courts. For the pathological perspective to make a practical contribution to the maintenance of a constitutional tradition, the judicial decisions that result from that choice of perspective must be enforceable. To be truly effective, those decisions should also have a deterrent and hortatory influence on the destructive social patterns of pathological periods. There is reason to doubt whether courts have the influence that my thesis presupposes.

Learned Hand put it this way:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[193]

If Hand is not saying that courts have no role to play in the preservation of liberty, he is saying that courts can make a difference only in relatively tranquil times. In the worst of times, social forces simply engulf the courts. It would be foolish to target doctrine for pathological periods if, when those periods arrive, judicial decisions do not have much impact. If that is true, it would make more sense to formulate legal principles with an eye to those stable periods when law *can* help to shape the society, if only in marginal ways.

Need we be so despairing about the role of law in pathological pe-

193. L. Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand 89–90 (Dilliard ed. 1960).

riods? It is true that in the two most significant periods of national pathology in this century, the Red Scare and the McCarthy Era, the courts did very little to stem the tide of intolerance.[194] Those experiences, however, say far more about judicial unwillingness to confront pathology than about judicial incapacity to do so. Had the core commitments of the first amendment been better developed in 1919 and 1951, and had the judges of those eras had recourse to a doctrinal tradition informed by the pathological perspective, the courts might well have played a constructive role.

Perhaps not. Perhaps the most carefully prepared doctrines would be abandoned by the judiciary in the face of the pressures that were rampant in 1919 and 1951. Or if the pathological perspective had its intended effect on judges, perhaps the society would simply ignore what courts had to say. These are genuine possibilities. But I require more than the easily distinguished lessons of the Red Scare and McCarthy periods, and more than the pessimism of Learned Hand, before I am willing to regard judicial ineffectiveness in pathological periods as an historical imperative.[195] The issue, it is worth remembering, is not whether "[l]iberty lies in the hearts of men and women . . . ," but whether what courts do, both before and during a pathology, can have an impact on whether liberty continues to lie there. Under the pathological perspective, one of the most important objectives of adjudication is the inculcation throughout the political culture of a deep and abiding respect for the core commitments of the first amendment.

Moreover, national pathologies are not the only instances of the worst of times. The nation's checkered history regarding civil liberties provides affirmative evidence that *local* pathologies can indeed be con-

194. The judicial performance preceding and during the Red Scare is brilliantly documented in Z. Chafee, supra note 14, at 36–282. The outstanding example of a courageous judge resisting pathological pressures is the opinion of District Judge George W. Anderson in Colyer v. Skeffington, 265 F. 17 (D. Mass 1920). For a sampling of judicial decisions upholding repressive regulatory measures during the McCarthy Era, see supra note 74.

195. One might be tempted to cite the domestic controversy over the Vietnam War as an example of judicial capacity to protect the rights of unpopular speakers in the face of urgent calls for conformity. The Supreme Court upheld the first amendment claims of war protestors on numerous occasions. See, e.g., Spence v. Washington, 418 U.S. 405 (1974); Hess v. Indiana, 414 U.S. 105 (1973); Cohen v. California, 403 U.S. 15 (1971); Watts v. United States, 394 U.S. 705 (1969); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); Bond v. Floyd, 385 U.S. 116 (1966); see also New York Times Co. v. United States, 403 U.S. 713 (1971) (unsuccessful government attempt to enjoin publication of classified documents relating to Vietnam policy). But see United States v. O'Brien, 391 U.S. 367 (1968). However, it is questionable whether concern about dissent over the Vietnam War reached pathological proportions in many parts of the country, and it is not likely that a national pathology of repression would have ensued had those cases gone the other way. The courts no doubt played some role during that period in preserving the basic liberties of expression, but the political power of the constituency that claimed the right to criticize the war was almost surely the predominant factor.

strained by courts. In fact, the roll call of landmark Supreme Court decisions interpreting the first amendment includes a remarkable number of cases that arose in the context of local pathologies. *Meyer v. Nebraska*,[196] *Near v. Minnesota*,[197] *Grosjean v. American Press*,[198] *Herndon v. Lowry*,[199] *Hague v. CIO*,[200] *NAACP v. Alabama*,[201] *Sweezy v. New Hampshire*,[202] *Kingsley Pictures v. Regents*,[203] *Epperson v. Arkansas*,[204] and *New York Times Co. v. Sullivan*[205] each defused or effectively repudiated a program of systematic repression of unpopular speakers by local officials. Precisely because these were local pathologies, the national judiciary was for the most part immune from the pressures and fears that so exercised local officials. And whether out of respect for the rule of law, fear of the massive power of the federal government, or lack of continuing interest in the project of repression, the local officials whose actions triggered those disputes did not defy the Supreme Court. Even if courts had little practical capacity to effect the course of a national pathology, my thesis would be important because of its potential impact on local pathologies.

If we focus for a moment longer on these success stories, however, a different objection to adopting the pathological perspective can be discerned. In the cases just mentioned, the Supreme Court not only protected unpopular speakers in stressful situations, but did so by means of dramatic innovations in doctrine. Those cases are not examples of the Court staying true to established principles in difficult times; they are cases of the Court reaching out boldly to fashion new principles to meet newly perceived and presently felt threats to liberty. There may be a lesson in this. As a practical matter, courts may do a better job of combatting pathologies by adopting an approach to constitutional adjudication that is more ad hoc and reactive than that indicated by my thesis.

A strategy of flexible, ad hoc response has the advantage of requiring less speculation and generalization by courts. Such a strategy has the disadvantage of depending on the capacity of judges operating without the benefit of doctrinal prompting to perceive the advent of a particular pathology and avoid being swept up in the fearful mentality of the day. If the only concern were local pathologies and if all first amendment disputes that grew out of such experiences reached the

196. 262 U.S. 390 (1923) (decided under the rubric of due process at a time when the first amendment had not yet been incorporated against the states).
197. 283 U.S. 697 (1931).
198. 297 U.S. 233 (1936).
199. 301 U.S. 242 (1937).
200. 307 U.S. 496 (1939).
201. 357 U.S. 449 (1958).
202. 354 U.S. 234 (1957).
203. 360 U.S. 684 (1959).
204. 393 U.S. 97 (1968).
205. 376 U.S. 254 (1964).

Supreme Court, an ad hoc approach to combatting pathology might well be preferable. It required no special perspective for the Supreme Court to perceive and stand up to the threats to free speech posed by the petty tyrants of Jersey City[206] and Montgomery.[207] A certain amount of doctrinal innovation was required before those threats could be thwarted, but no special theory of pathology was needed to stimulate the necessary innovations.

The desirability of a more systematic approach to pathology stems from the fact that most instances of pathological repression do not fit this model of local excess subject to review in a geographically remote and politically insulated Supreme Court. Most local pathologies must be combatted by district and circuit judges who have closer ties to the political communities that are gripped by pathological anxieties and a weaker warrant to innovate in the formulation of first amendment doctrine.[208] Some pathologies, moreover, are of such scope and intensity as to call into question the capacity of the Supreme Court to respond wisely if its mode of operation is predominantly reactive and ad hoc. Under those conditions, the long-range perspective demanded by my thesis is more likely, as a practical matter, to generate in judges the awareness and fortitude that is needed.

The benefits that derive from a systematic, long-term consideration of pathology must be discounted, however, to the extent that courts are incapable of estimating what kinds of doctrinal fortifications will be most effective in combatting the pathologies of the future. One might question whether courts have that capacity. It would make no sense to design doctrine in light of the pathological perspective simply as a means of retrospectively repudiating past regulatory experiences; prospective impact is what justifies courts in adopting the pathological perspective. Any judicial effort to abort or temper the excesses of the future may be doomed because we lack the foresight to know what the next pathology will look like. The tendency of generals to prepare for the previous war should give judges pause.

These concerns regarding the judicial capacity to generalize and project are understandable, but they should not be viewed as controlling. It is true, of course, that no two pathologies look alike. Variations on the theme of anxious repression abound, even regarding such fundamental matters as the types of scapegoats that capture the public imagination (alien workers, disloyal public employees, liberal journalists, outside agitators) and the types of regnlatory mechanisms that are most heavily employed (deportations, legislative investigations, civil damage

206. See Z. Chafee, supra note 14, at 409–31 (discussing Hague v. CIO, 307 U.S. 496 (I939)).

207. See H. Kalven, The Negro and the First Amendment (1966).

208. On the pressures that district and circuit judges must confront during periods of local pathology, see J. Bass, Unlikely Heroes (1981); J. Peltason, Fifty-Eight Lonely Men (1961).

actions, conspiracy prosecutions). There are nonetheless some general patterns that can be discerned in the nation's experience with pathology, and a decision to focus on those patterns can have some significant methodological and doctrinal implications, as I have tried to demonstrate. Some future pathologies no doubt will be so utterly novel and unpredictable as to confound the most careful doctrinal planners. But that experience is likely to prove exceptional. Our analysis of methodological and doctrinal implications was governed by practical considerations that can be expected to come into play in a wide variety of pathological situations. Whatever the exact shape of a future pathology, for example, discretionary regulatory authority is likely to be much more problematic than it is in normal times. The chilling effect is likely to merit serious examination in such a period. And so on. Precise scenarios were not the basis for our analysis of implications, nor were precise scenarios important in developing the theoretical argument for adopting the pathological perspective. A certain amount of judicial foresight and capacity to generalize is indeed a prerequisite for successful employment of the pathological perspective, but not so much as to render my thesis untenable on practical grounds.

The last objection I shall consider derives from the observation that alarmist thinking is often the cause of pathological repression. If worst-case scenarios were to guide judges in measuring the dangers various regulatory powers pose to free expression, might not worst-case scenarios also then be employed in assessing the potential social costs of speech? If so, the pathological perspective could have the effect of reinforcing the alarmist thinking that engenders repressive excesses in difficult times. The implications for the familiar, cornerstone issue of subversive advocacy are particularly disturbing. The worst-case scenario regarding the effects of revolutionary speech—with emphasis on such items as foreign domination, secret cells, training in terror tactics, and the like—could provide a justification for extensive regulation.[209] As a practical matter, can the pathological perspective function as a one-way street?

I do not believe judges should employ the pathological perspective in assessing the dangers of unregulated expression. Nor do I think that acceptance of my thesis would compel such a course in theory or generate such a course in practice. The harms that flow from communication can be adequately appreciated and guarded against by means of conventional legal reasoning; there is no need for courts to structure their analysis in a special way to ensure proper emphasis in evaluating those harms.

The pathological perspective is justified because the first priority of the constitutional system is to preserve the integrity and credibility of its core commitments. When courts fail to enforce the core commit-

209. See Dennis v. United States, 341 U.S. 494 (1951).

ments, rarely do other social or political forces serve to mitigate the harm. Members of the political community whose rights are infringed are left with no recourse. The damage to the constitutional system is incalculable when its most basic commitments turn out to be inoperative in stressful times.

In contrast, even if there really are exceptional moments during which the costs of free expression are dramatically greater than in normal times, strict speech-protective judicial doctrines are not likely to cause severe harm on such occasions. When the day arrives that the price of adherence to the core commitments of the first amendment is more than the society truly can bear, we can be sure that some powerful correctives will operate. Judges will search desperately and often successfully to find ways to distinguish or reformulate the protective constitutional principles. Public officials will simply ignore unrealistic constitutional constraints. Martial law may be declared. A constitutional amendment could be passed. No political community will ever let its constitution serve as a suicide pact. No legal principles formulated with pathological scenarios in mind are needed to reinforce society's instinct toward self-preservation.

It may seem incongruous to invoke the possibility of a suspension or repudiation of basic liberties in the midst of an argument that the pathological perspective should be employed precisely to fortify those liberties. However, no legal principle is invulnerable to reconsideration and possible evisceration, no matter what perspective governs adjudication. It serves no purpose to pretend otherwise. The conscious choice of a perspective is to some degree an exercise by the legal culture in self-paternalism. The point of targeting first amendment doctrine for the worst of times is to check the tendency of judges (and most other actors) too ready to opt for the suspension of basic liberties, by subtle undermining and niggardly construction if not by forthright decree.

Viewed as an exercise in self-paternalism, the pathological perspective can only be a one-way street. If the problem is that in stressful times courts tend to overestimate the dangers posed by unorthodox ideas and threatening speakers, that tendency would be exacerbated, not mitigated, were first amendment doctrine to be formulated with an eye to those periods when dissenting speech is indeed most damaging. Only with regard to the dangers of excessive regulation of speech is the pathological perspective likely to serve its self-paternalistic function.

Good reasons therefore exist for not extending the preference for worst-case analysis to the project of estimating the dangers posed by threatening speech. However, those reasons are unlikely to be appreciated during the worst of times, and thus do not put to rest the concern that adoption of the pathological perspective could boomerang. If as a result of their familiarity with the pathological perspective judges or other important decisionmakers were to develop a temperamental re-

ceptivity to speculative, alarmist arguments of all sorts, the practical impact of my thesis could be the opposite of what I intend.

I do not believe that the adoption of the pathological perspective as a strategy for safeguarding the core commitments of the first amendment in stressful periods is likely to stimulate more general patterns of alarmist thinking. The rationale for the pathological perspective is quite specific, and the implications I have explored add up to a fairly detailed set of methodological and doctrinal norms. The rhetoric demanded by my thesis would emphasize particular object lessons of the past. Concern about the tendency of the society to overreact to threatening speech permeates that rationale, those norms, and that rhetoric. It is difficult to imagine how a legal culture that adopted the reasoning process I envision would be more likely on that account to engage in precisely the type of overreaction the process is designed to prevent, simply because one feature of that process is the employment of worst-case analysis. In practice, the specific discrediting of a particular type of alarmism figures to have a greater impact than the legitimation of something so abstract as an analytical method.

CONCLUSION

Ultimately, the argument for my thesis reduces to four basic propositions: (1) The protection and full realization of the core commitments of the first amendment is an objective that deserves especially high priority in constitutional adjudication. (2) The core commitments of the first amendment tend to be jeopardized most seriously during certain periods that may be regarded as pathological due to their unusual social dynamics regarding the tolerance of dissent. (3) The adjudicative methodologies and doctrines that can best protect the core commitments of the first amendment in pathological periods are those that are consciously designed to counteract the unusual social dynamics that characterize such periods. (4) The strategy of targeting first amendment doctrine for the worst of times in the manner suggested by my thesis does not generate unacceptable costs to the quality of adjudication in periods that are not pathological.

The first three propositions have been elaborated and defended in the pages above. The last proposition, however, has not been addressed directly. The reason for that omission is that the proposition embodies a priority judgment of the most basic sort that can only be defended by reference to the strength of the thesis as a whole.

There can be no doubt that the methodologies and doctrines that are implied by my thesis would not be ideally suited to the task of resolving first amendment disputes in normal times. From any standpoint other than that of the pathological perspective, those methodologies and doctrines could be considered misdirected and coarse. Some parties who would prevail in first amendment adjudication conducted

from a more traditional perspective would lose their cases if courts were to adopt the pathological perspective.

One must be careful, however, not to exaggerate the impact of adoption of the pathological perspective on adjudication in normal times. Because a perspective is neither a normative theory nor a rigorous analytical method, seldom would the obligation to consider pathological scenarios force judges to abandon strongly held views regarding how a particular dispute should be resolved. The choice of perspective is likely to have its greatest impact at the level of methodology, rhetoric, and abstract doctrinal formulation. My exploration of concrete doctrinal implications did indeed suggest that numerous case outcomes would be affected by the adoption of the pathological perspective, but mostly in areas already marked by a high degree of judicial ambivalence.

Nevertheless, it is not an unfair characterization to say that in normal times my thesis sometimes requires courts to do injustice today in order to prepare to do justice tomorrow. But that is precisely the point. The debate is over priorities. For the reasons I have specified, I believe "justice tomorrow," that is in periods of pathology, must take priority over "justice today." The central function of first amendment adjudication is not to resolve everyday disputes over communication but rather to protect and implement the core commitments of the freedoms of speech, press, and assembly in moments when those commitments are most in jeopardy.