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HOW USEFUL IS JUDICIAL REVIEW IN FREE SPEECH CASES?

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INTRODUCTION

It is generally recognized that neither the federal nor the state courts were significant protectors of free speech prior to 1919, when Justices Holmes and Brandeis dissented in *Abrams v. United States.*[1] Despite periods of severe suppression, the courts made no important attempts to enforce the right of freedom of speech at the end of the eighteenth century nor throughout the nineteenth.[2] In the decades prior to World War I, the Supreme Court assumed that speech could be restricted if its content had a "bad tendency" and rejected virtually every free speech claim made during that period.[3] One scholar has even characterized the first amendment case law prior to 1919 as a "tradition of [judicial] hostility."[4] The transformation of the legal meaning of "the freedom of speech" that has gradually taken place since World War I is, therefore, remarkable. The first amendment now prohibits patronage dismissals[5] and severely limits campaign finance regulations;[6] it protects much of the expression that once was subject to regulation as obscenity[7] and defamation;[8] it applies to billboards,[9] nude dancing,[10] jacket patches,[11] and license plates;[12] it protects school children,[13] prisoners,[14] and corpora-

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1 250 U.S. 616, 624 (1919) (Holmes & Brandeis, JJ., dissenting).

2 *See* Rabban, *The First Amendment in Its Forgotten Years,* 90 YALE L.J. 514 (1981).

3 *See, e.g.,* Fox v. Washington, 236 U.S. 273 (1915); Patterson v. Colorado, 205 U.S. 454 (1907).

4 Rabban, *supra* note 2, at 559.

5 *See* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

6 *See* Buckley v. Valeo, 424 U.S. 1 (1976).

7 *See* Miller v. California, 413 U.S. 15 (1973).

8 *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

9 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

10 *See* Schad v. Mount Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). *But cf.* New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (upholding New York state law prohibiting nude dancing in establishments licensed by state to sell liquor).

11 *See* Cohen v. California, 403 U.S. 15 (1971).

12 *See* Wooley v. Maynard, 430 U.S. 705 (1977).

13 *See* Board of Educ. v. Pico, 457 U.S. 853 (1982); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

14 *See* Procunier v. Martinez, 416 U.S. 396 (1974).

tions.[15] In short, "the freedom of speech" has become a pervasive and complicated regulatory scheme frequently violated by the legislative and executive branches and industriously enforced by the judiciary.

Scholars have provided much of the theoretical underpinning for this elaborate edifice of judicial protection.[16] As section I demonstrates, both academics and judges intend these protections to create a society in which information is plentiful and vigorous dissent is tolerated. The purpose of this article is to suggest that the assumptions upon which this ambitious enterprise rests are largely unproven and often doubtful. Moreover, given the nature of the judicial process, it is implausible that judicial review can be expected to promote such systemic objectives. Much of what judges do in the guise of protecting speech, despite their efforts and good intentions, may even be dysfunctional and certainly diverts their attention from other important, if less grandiose, considerations.

I

THE SYSTEMIC OBJECTIVES OF JUDICIAL REVIEW

The dominant consensus that has prevailed for the last sixty years holds that the adjudication of individual cases can promote the level and quality of public debate. It assumes that courts can and should consciously design first amendment doctrines to achieve this objective. This view so pervades current thinking that its ambitiousness may not be appreciated at first.

The impulse underlying the modern judiciary's energetic efforts to enforce the first amendment is the desire to create a tolerant, open society. This purpose dates from Justice Holmes's dissent in *Abrams* in which he proposed a tightened clear and present danger test on the ground that the theory of the Constitution requires "free trade in ideas."[17] Under that theory, the judicial function is to help create an open "market" for ideas,[18] which, in turn, requires nothing less than for courts to "be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."[19]

The courts have indeed been vigilant in the pursuit of systemic objectives in the years since *Abrams*. The Supreme Court sharply restricted traditional defamation rules because "debate on public issues

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15 *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

16 Probably the most influential article was Chafee, *Freedom of Speech in War Time,* 32 HARV. L. REV. 932 (1919), which is discussed *infra* in the text accompanying notes 39-53. For an account of the influence of other scholars, see Rabban, *supra* note 2, at 559-79.

17 250 U.S. 616, 630 (1919).

18 *See id.* ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

19 *Id.*

should be uninhibited, robust, and wide-open."[20] It announced a "right of access" to criminal trials, asserting that the first amendment prohibits the "government from limiting the stock of information from which members of the public may draw"[21] and suggesting that without the right of access, "freedom of the press could be eviscerated."[22] The Court stated that patronage is "inimical to the process which undergirds our system of government"[23] because, by burdening belief and association, it undermines the "competition in ideas and governmental policies [which] is at the core of our electoral process."[24]

The Court has remained vigilant in seeking to shape a system of open public discussion even when it has rejected free speech claims. It approved compelled disclosure of news sources to grand juries on the ground that disclosure would not lead to "significant constriction of the flow of news to the public."[25] Before loosening the constraints on obscenity prosecutions, the Court assured itself that suppression of depictions of "hard-core" sexual conduct would not limit "expression of serious literary, artistic, political, or scientific ideas."[26] In short, the Court has designed first amendment rules to guard against the "standardization of ideas either by legislatures, courts, or dominant political or community groups."[27]

Despite the portentous tone of Supreme Court opinions, it is not self-evident that significant threats to an open society were present in any of the cases brought before the Court, nor that the legal rules adopted by the Court in those cases could have had any useful systemic consequences even if such threats had been present. Judicial review cannot be expected to have any important impact on many of the major causes of intolerance and censorship. Studies of periods of severe suppression demonstrate that the etiology of intolerance is exceedingly complex and variable.[28] Informed speculation suggests that a wide range of

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

21 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).

22 *Richmond Newspapers,* 448 U.S. at 576 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

23 Elrod v. Burns, 427 U.S. 347, 357 (1976).

24 *Richmond Newspapers,* 448 U.S. at 576 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

25 Branzburg v. Hayes, 408 U.S. 665, 693 (1972).

26 Miller v. California, 413 U.S. 15, 35 (1973).

27 Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

28 *See, e.g.,* J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (1963). Higham, for example, traced anti-Catholic repression in part to a public perception that the Roman Catholic Church was authoritarian and thus a threat to "the concept of individual freedom imbedded in the national culture." *Id.* at 6. The resulting distrust of the Church, when combined with economic and international uncertainties, *see id.* at 77-96, 194-233, often led to full-blown moods of repression against the Church. Thus, devotion to liberty can itself be one of the ingredients of intolerance. On the other hand,

factors coalesce to determine the amount of tolerance or intolerance,[29] including: educational levels,[30] methods of child-rearing,[31] economic conditions,[32] international politics,[33] institutional rivalries combined with prolonged political frustration involving a major party,[34] national character,[35] insecurities caused by flux in social status,[36] and even the weather.[37] Adjudication is an unlikely mechanism for controlling such large and complex factors. As Learned Hand contended, the causes of intolerance and censorship—as well as the cures—lie far beyond the sound and fury of particular cases.[38] Upon what, then, is the judiciary's ambitious role based?

The answer, in large measure, is faith. Zechariah Chafee's influential article, *Freedom of Speech in War Time,*[39] and the criticism that it spawned illustrate how limited the inquiry has been into the feasibility of an extensive role for the courts in promoting freedom of speech. The article suggested that the "clear and present danger" test might become the appropriate "boundary line of free speech"[40] even though the Court

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enforced outward conformity can sometimes reduce the fears that might otherwise have led to serious repression. *See infra* note 202.

29 For a study that is unusually explicit in detailing how speculative most explanations for repressive periods are, see Hyman, *England and America: Climates of Tolerance and Intolerance—1962,* in THE RADICAL RIGHT 227, 246-50 (D. Bell ed. 1963).

30 *See* S. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND 91 (1955).

31 *See id.* at 97-99 (maintaining that parental attitudes toward child-rearing reflect their level of tolerance of nonconformists); *see also* T. ADORNO, E. FRENKEL-BRUNSWIK, D. LEVINSON & R. SANFORD, THE AUTHORITARIAN PERSONALITY 337-89 (1950).

32 *See* J. HIGHAM, *supra* note 28, at 77-96.

33 *See id.* at 8, 194-263; E. LATHAM, THE COMMUNIST CONTROVERSY IN WASHINGTON: FROM THE NEW DEAL TO MCCARTHY 393-94 (1966); R. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA 1919-1920, at 12-15 (1955).

34 *See* E. LATHAM, *supra* note 33, at 373-99, 416-23.

35 One prominent example of a relevant national character trait is the disinclination to defer to elites. *See* Hyman, *supra* note 29, at 250.

36 *See* D. BELL, THE END OF IDEOLOGY 101-02 (1960); *cf.* D. POTTER, FREEDOM AND ITS LIMITATIONS IN AMERICAN LIFE 46-48 (1976) (describing pressures for conformity as function of social status and desire for advancement).

37 *Cf.* R. MURRAY, *supra* note 33, at 122 (describing how weather in Fall of 1919 exacerbated tensions between employers and labor).

38 *See* L. HAND, THE SPIRIT OF LIBERTY 189-90 (3d ed. 1963):

> 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.

Although the passage is often dismissed as unnecessarily dismal and foreboding, it actually appears as part of an impassioned and lyrical patriotic speech that concludes: "[I]n the spirit of liberty and of America I ask you to rise and with me pledge our faith in the glorious destiny of our beloved country." *Id.* at 191.

39 Chafee, *supra* note 16.

40 *Id.* at 960.

had first employed it in *Schenck v. United States*[41] to uphold a conviction under the Espionage Act. Chafee argued that the purpose of the first amendment—to promote the widest possible discussion of public matters[42]—could be properly reconciled with the interest in public safety by allowing the restriction of speech only when "safety is really imperiled."[43] The judiciary, Chafee concluded, should enforce a "broad test of certain danger."[44] Some of Chafee's critics questioned his assertion that the framers had envisioned such a broad purpose for the first amendment.[45] Others attacked his decidedly optimistic understanding of the meaning of the phrase "clear and present danger" and the case law that had preceded it.[46] But neither Chafee nor his critics seriously examined the argument's fundamental premise that adjudication can, if properly performed, be expected to protect significantly the free exchange of ideas.

At the time Chafee wrote, this premise might not have appeared as unassailable as it does today; until then, the Supreme Court had contributed almost nothing to the protection of vigorous public debate. Yet Chafee began his article by attributing broad significance to the legal analysis that his article would develop: "It is becoming increasingly important to determine the true limits of freedom of expression, so that speakers and writers may know how much they can properly say, and governments may be sure how much they can lawfully and wisely suppress."[47] After stressing the importance of ascertaining the parameters of the freedom of expression, Chafee acknowledged that the first amendment serves other purposes in addition to delineating the legal boundaries that circumscribe protected expression. He recognized that the Bill of Rights is also "an exhortation and a guide . . . . It is a declaration of national policy in favor of the public discussion of all public questions."[48] The first amendment is important, Chafee asserted, for inculcating a sensitivity—"a constant regard" for free speech—in all public officials.[49]

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41 249 U.S. 47 (1919).

42 *See* Chafee, *supra* note 16, at 946, 956, 958.

43 *Id.* at 960.

44 *Id.* Chafee elaborated on this suggested broad test of certain danger:

> Every reasonable attempt should be made to maintain [the] interests [in public safety and the search for truth] unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected.

Id.

45 *See, e.g.*, L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1963).

46 *See, e.g.*, Rabban, *supra* note 2, at 586-94.

47 Chafee, *supra* note 16, at 933.

48 *Id.* at 934.

49 *See id.* at 935.

Why assume, as Chafee did, that the development of legal rules to enforce the first amendment will be compatible with the kind of general understanding of free speech that enhances public discussion? Chafee admitted that legal reasoning had failed to define clear, useful limits to the freedom of speech.[50] Yet, he minimized the importance of the judiciary's discouraging record, claiming that the cases had been "too few, too varied in their character, and often too easily solved, to develop any definite boundary between lawful and unlawful speech."[51] He believed that, if afforded the right cases, the courts could develop "a rational principle" or "test" that would "solve" the problem of freedom of speech.[52] Somewhat wistfully conceding that the correct solution would lack the precision of the Rule in Shelley's Case, Chafee clearly viewed the protection of free speech as an intellectual problem;[53] his argument rested on the belief that first amendment issues are therefore amenable to traditional judicial techniques. The use of these techniques, he assumed, would not only protect "free speech" in specific cases, but would also accommodate, or at least not undermine, other factors that also serve to enhance public debate, such as the attitudes and understandings of nonjudicial public officers. The structure of Chafee's argument allowed for an invincible optimism; because he perceived free speech questions as intellectual problems, he could disregard the record of ineffective or misguided decisions. It is always possible that a newly proposed principle or test will be an improvement over the existing ones. Thus, Chafee needed only to propose a new rule to ward off any inclination to doubt the efficacy of the judicial enterprise.

To a remarkable degree, this structure—and its limitations—has characterized first amendment commentary since Chafee's time. Consider, for example, Professor Emerson's *The System of Freedom of Expression.*[54] Emerson, like Chafee, acknowledged that free speech requires nonjudicial supports:

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50 "The gradual process of judicial inclusion and exclusion," which has served so well to define other clauses in the federal Constitution by blocking out concrete situations on each side of the line until the line itself becomes increasingly plain, has as yet been of very little use for the First Amendment.

Id. at 944 (footnote omitted).

51 *Id.*

52 *See id.* at 943-44.

53 Thus Chafee asserted:

> [T]he problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts. We cannot define the right of free speech with the precision of the Rule against Perpetuities or the Rule in Shelley's Case, because it involves national policies which are much more flexible than private property, but we can establish a workable principle of classification in this method of balancing and this broad test of certain danger.

Id. at 960.

54 T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

> Obviously, the success of any society in maintaining freedom of expression hinges upon many different considerations. Some degree of fundamental consensus . . . is essential . . . . Economic institutions and economic conditions, the degree of security or insecurity from external threats, political traditions and institutions, systems of education, methods and media for forming public opinion, public attitudes and philosophy, and many other factors play a vital part.[55]

In asserting that judicial protections can complement these other forms of protection, Emerson, like Chafee, did not rely on past experience; he acknowledged that major first amendment doctrines "have proved inadequate, particularly in periods of tension, to support a vigorous system of freedom of expression."[56] Nonetheless, continuing the tradition of optimism begun by Chafee, Emerson asserted that legal doctrines can be formulated that have "an overall unity of purpose and operation"[57] with the other protections for free speech. Apparently less formalistic than Chafee, Emerson defined the problem of deciding what speech to protect as a broad question about interrelated social functions. He made no references to the Rule in Shelley's Case. He even briefly admitted that legal doctrines can be depended upon too heavily.[58] Nonetheless, he dismissed the issue of the efficacy of judicial review as a fait accompli:

> [I]n the United States today we have come to depend upon legal institutions and legal doctrines as a major technique for maintaining our system of free expression. We have developed and refined this technique more than has any other country . . . . Hence, while the other factors should not be slighted, an analysis of the legal supports for freedom of expression is a first and fundamental step.[59]

Emerson attempted to support this conclusion with a series of unexamined assertions regarding the utility of judicial review: (1) the judiciary's prestige can "legitimiz[e] and harmoniz[e]" the principle of free speech; (2) legal rules can provide the clarity and certainty that the system requires; (3) judges understand the need for the subordination of immediate self-interest and thus can provide principled, rather than ad hoc, protection; (4) judges appreciate the "sophisticated" idea of free speech and can teach that idea to the general public; (5) adjudication provides opportunity for the necessary flexibility and growth. In what is now a familiar litany, Emerson argued that judges are competent to perform these functions because they are independent of the other

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55 *Id.* at 4-5.

56 *Id.* at 16.

57 *Id.* at 4.

58 "Those who warn us not to rely too much on legal forms are entirely correct that excessive emphasis can easily be placed upon the role of law." *Id.* at 5.

59 *Id.; see also id.* at 11 ("Because of certain characteristies of a system of free expression, the role of law is of particular significance in any social effort to maintain such a system.").

branches of government, politically insulated, well-trained, and inclined to use legal procedures.[60]

Although Emerson's discussion moves a step beyond Chafee's, his central propositions constitute more an expression of faith in the legal process and in judges than an analysis. Emerson could be content with dogmatic assertions belied by his own summary of the judiciary's record because he believed, as did Chafee, in the bright hope of a better intellectual solution. And although Emerson's proposal for solving first amendment issues was perhaps more sophisticated than Chafee's "broad test of social danger," ultimately it was also conceptualistic. Emerson wrote that "[i]n constructing specific legal doctrines which . . . will govern concrete issues, the main function of the courts is not to balance the interest in freedom of expression against other social interests but to define . . . 'expression,' 'abridge,' and 'law.' "[61]

The tradition begun by Chafee and elaborated by Emerson has spawned a broad and somewhat odd consensus. This consensus routinely, and sometimes severely, criticizes the Court's first amendment decisions but never questions the possible utility of the enterprise on which the judiciary has embarked. Professor Meiklejohn, for example, castigated Holmes for employing the clear and present danger test, the same test that Chafee thought had "solved" the problem of freedom of speech. Meiklejohn argued that the test had proved disastrous to "our understanding of self-government"—a virtual "annulment of the First Amendment."[62] He also criticized another of our most eminent jurists, Justice Frankfurter, for sapping "the very foundations of our American political freedom."[63] Nevertheless, Meiklejohn, confident of the potential efficacy of the analytical principles he was to propose, adhered to the view that the "Supreme Court . . . is and must be one of our most effective teachers."[64]

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60 *See id.* at 13.

61 *Id.* at 17. Although Emerson emphasized that these distinctions were to be drawn functionally, his discussion of the difference between "action" and "expression" illustrates his conceptual approach:

> The line in many situations is clear. But at some points it becomes obscure. All expression has some physical element. Moreover, a communication may take place in a context of action, as in the familiar example of the false cry of "fire" in a crowded theater. Or, a communication may be closely linked to action, as in the gang leader's command to his triggerman. Or, the communication may have the same immediate impact as action, as in instances of publicly uttered obscenities . . . . In these cases it is necessary to decide, however artificial the distinction may appear to be, whether the conduct is to be classified as one or the other.

Id. at 18.

62 A. MEIKLEJOHN, POLITICAL FREEDOM 33 (1960).

63 *Id.* at 101 (responding to Justice Frankfurter's concurring opinion in Dennis v. United States, 341 U.S. 494, 517 (1951)).

64 A. MEIKLEJOHN, *supra* note 62, at 51.

Similarly, Professor Berns disparaged the Court's free speech record, asserting that it was incompatible with "a decent self-governing country of the sort the Founders hoped for."[65] He excoriated the Court's self-professed inability to distinguish between vulgarity and important speech.[66] Yet Berns also placed his hope in the institution of judicial review: "Of course there will be cases where the power to judge speech by its substance will be abused, but the answer to this is Supreme Court review . . . ."[67] Berns urged that if the Court would only return to respect for the framers' design, the judiciary could still promote public understanding of the kinds of decent public debate that undergird the political system.[68]

No commentator better illustrates the power of the modern consensus than Professor Commager. Writing in 1943, he dismissed the argument that the judiciary alone possesses superior learning and objectivity necessary for constitutional interpretation[69] and thus flatly rejected the view that the courts should play a special role with respect to free speech.[70] Commager concluded, after reviewing the Court's lackluster record,[71] that the Court had not played a significant role in preventing the federal government from violating the guarantee of free speech.[72]

By 1966, however, Commager too had become a believer. After criticizing prominent tests employed by the Court in first amendment analysis,[73] Commager nevertheless asserted that "the Law . . . [is] by [its] very nature . . . not only dedicated to freedom but pervaded by it."[74] And what of his earlier view that free speech depended upon popular understanding of and respect for the Constitution? Commager now echoed Chafee, asserting that courts can play "an active, even a decisive, part in the preservation of liberty" by expounding the law.[75] Yet Commager, like those before him, failed to explain how the courts could per-

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65 W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 232 (1976).

66 *See id.* at 200 (noting that argument that law cannot distinguish between vulgarity and important speech is "almost jejune").

67 *Id.*

68 *See id.* at 195-96, 201, 204-05, *passim.* Berns argued that the Framers intended to protect only decent and orderly speech. Once the Court returned to and accepted this view as to the kinds of speech that the first amendment should protect, Berns urged the Court to adhere more closely to precedent to preserve those values. *Id.* at 233-34, 236.

69 *See* H. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 46 (1943).

70 *See id.* at 82. Commager at this stage in his career placed his faith in majority rule as the chief protector of civil liberties, arguing that "men need no masters—not even judges." *Id.*

71 *See id.* at 47-53.

72 *See id.* at 47; *id.* at 55 ("[The Court's record] discloses not a single case, in a century and a half, where the Supreme Court has protected freedom of speech . . . against congressional attack.").

73 *See* H. COMMAGER, FREEDOM AND ORDER 25-29 (1966).

74 *Id.* at 48.

75 Indeed, Commager maintained that "[i]t is as an educational institution that the

form this educating function while so inclined to employ misguided constitutional doctrines.

The structure of Chafee's argument has proved virtually irresistible. Nearly everywhere criticism of the judicial product is found together with faith in the judicial process. Professor Krislov, for example, described forty years of judicial interpretations as "inadequate,"[76] but concluded nonetheless that "the Court is as uniquely fitted to articulate the values of expression as it is to defend them."[77] Professor Shapiro criticized the major judicial first amendment doctrines; yet, he too asserted that the Court could inject into the political system an appreciation for the idea of tolerance.[78] Professor Bork found most of the Court's important free speech decisions unjustifiable,[79] yet would assign to the courts the job of protecting the "freedom to discuss government and its policies."[80] Even the two most prominent and profound skeptics of the efficacy of judicial review retained some hope in that institution for free speech issues. Justice Jackson conceded that the Court could possibly play a useful role in "cultivating public attitudes."[81] And Learned Hand thought it obvious that "legislatures are more likely than courts to repress what ought to be free."[82]

In short, although participants in the modern consensus may differ on the precise scope of the judiciary's function in first amendment cases, the dominating idea in modern free speech theory and practice is that judges should shape the content of legal rules in a manner that enhances such systemic objectives as vigorous or useful public debate.[83] This rec-

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Court may have its greatest contribution to make to the understanding and preservation of liberty." *Id.* at 49.

76 *See* S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 91 (1968).

77 *Id.* at 220.

78 *See* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 103-04 (1966).

79 *See* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 23 (1971). Bork argued that the "Smith Act cases of the 1950's" represent the ideas expounded in prior dissents and concurrences by Justices Holmes and Brandeis, opinions that suffer from "the considerable handicap of being deficient in logic and analysis as well as in history." *Id.*

80 *Id.* Bork asserted that he was "looking for a theory [of freedom of speech] fit for enforcement by judges." *Id.*

81 R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 80 (1955). He did qualify that suggestion, however, stating that "it is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions." *Id.* at 81.

82 L. HAND, THE BILL OF RIGHTS 69 (1958).

83 Different theorists, of course, think that maintaining the amount and variety of information in the system is relevant to different objectives. Emerson, for example, believes that a system of free expression serves four separate but interrelated values: individual self-fulfillment, discovering truth, allowing for participation in decisionmaking, and achieving a more adaptable and therefore stable community. *See* T. EMERSON, *supra* note 54, at 6, 7. A number of theorists emphasize the protection of the democratic decisionmaking process. *See, e.g.,* W. BERNS, *supra* note 65, at 233; J. ELY, DEMOCRACY AND DISTRUST, ch. 5 (1980); A. MEIKLEJOHN, *supra* note 62, at 33; M. SHAPIRO, *supra* note 78; Bork, *supra* note 79; *see also*

ommendation, although at first intuitively simple and appealing, is actually a complicated judgment that the benefits of judicial review, as measured by free speech values, will outweigh the costs as measured by the same values.

An intricate mix of assumptions and beliefs underlies this judgment. First, it is usually thought that the nonjudicial supports for free speech values are brittle and of questionable utility, so that little will be lost by judicial efforts to protect free speech values and much might be gained. Second, it is thought that legal rules can coexist with and supplement the nonjudicial supports, especially by enriching the public understanding and appreciation of the value of free speech. This assumption, of course, presupposes that judges can devise such rules, a belief that rests upon two further assumptions: (1) that the creation and implementation of legal rules that enhance systemic objectives are consistent with other judicial objectives, such as doing justice between the parties, and (2) that systemic free speech issues can be resolved by the methods of legal analysis. Third, it is frequently asserted that judges are inclined to protect free speech or, at least, are more inclined to do so than other officials.

Although "[v]irtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech,"[84] the widespread belief that judges are personally and institutionally competent to resolve free speech questions is usually expressed in conjunction with serious criticisms of the courts' actual performance. Aside from conclusory affirmations about the virtues of political insulation,[85] commentators pay almost no attention to the possibility, certainly suggested by the barrage of criticism, that both judges and adjudication are unsuited for the broad task being urged upon them.[86] It is past time to consider this possibility.

Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RESEARCH J. 521. Professor Redish centers the justification on the value in "individual self-realization." Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591, 593 (1982).

84 J. ELY, *supra* note 83, at 105. Similarly, Professor Perry stated that modern freedom of expression cases "ha[ve] served, on balance, as . . . instrument[s] of moral growth." Asserting that these cases have not been the "focus of significant controversy," Perry stated that "[o]nly a few persons . . . upon surveying the broad features of the Court's work product . . . would today take issue with much of what the Court has done." Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification,* 56 N.Y.U. L. REV. 278, 314-15 (1981). Perhaps by "persons" Professor Perry intended to exclude anyone not a law professor.

85 *See, e.g.,* T. EMERSON, *supra* note 54, at 13 ("[The courts'] competence to . . . [maintain our system of freedom of expression] rests upon their . . . relative immunity to immediate political and popular pressures . . . .").

86 *But see* Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1, 54 (1951) ("The great battles for free expression will be won . . . not in the courts but in committee rooms and protest-meetings, by editorials and letters to Congress . . . . The proper function of courts is narrow.").

II

THE INADEQUACY OF NONJUDICIAL SUPPORTS: REACTION AND OVERREACTION

It may seem too obvious to warrant discussion that if instances of unconstitutional suppression are discovered, the general level of public discussion is in jeopardy. It is only natural, then, that judges who are frequently exposed to claims of illegal suppression will think that more is at stake in a given case than the correction of a particular injustice. Professor Emerson offers the most vivid account of the generalized importance of correcting individual instances of suppression. Writing of "the powerful forces that impel men towards the elimination of unorthodox expression,"[87] Emerson asserted that "[m]ost men have a strong inclination, for rational or irrational reasons, to suppress opposition."[88] He spoke of government censors with "excessive zeal" and "ulterior purposes," and of the limitations placed on free speech in "atmosphere[s] of public fear and hysteria."[89] In preventing each instance of suppression, Emerson portrayed the courts as a wall standing against the flood of repression, for "the limitations imposed on discussion . . . tend readily and quickly to destroy the whole structure of free expression."[90] Hence, in his view, "the issue at stake is nothing less than the maintenance of the democratic process."[91]

Such assertions are, no doubt, bracing for the self-image of judges. Although it would be foolish to deny that Emerson's pessimistic view might sometimes be justified, it would be equally foolish to suppose that Emerson's forebodings are an inevitable description of the world. Indeed, because he failed to provide a single example of the destruction of a whole system of free expression after the imposition of a few limitations upon discussion, Emerson's purpose was probably more rhetorical than descriptive or historical.[92] The image he created of a fragile right existing in a threatening world elevated the importance of the judicial role he proposed while obscuring its risks. In effect, Emerson suggested that there is nothing to lose by aggressive judicial efforts to protect the freedom of speech.

If, however, the urge to speak out is under certain conditions powerful and self-sufficient, the connection between the protection of speech in individual cases and the systemic enhancement of free expression is more problematic. Because individual instances of suppression can gen-

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87 *Id.* at 9.

88 *Id.*

89 *Id.* at 10-11.

90 *See id.* at 11.

91 *Id.* at 14.

92 This seems likely, although Emerson did purport to base his fears on "[t]he lesson of experience." *See id.* at 11.

erate vigorous countermeasures and evasions, judicial efforts to enhance the general level of public discussion may be unnecessary. Moreover, much might be lost by judicial effort under such circumstances. Emerson's proposed rules, for example, provided the broadest possible protections and the narrowest exceptions.[93] His prescription would overprotect speech; it requires protection in the particular instance regardless of the foolishness of the consequences.[94] If not for the brooding threat of the imminent collapse of the whole system of free expression, the infliction on society of the costs of Emerson's rules would be plainly disproportionate and unnecessary. And by undermining the public's patience for the idea of free speech, overprotecting speech would jeopardize important nonjudicial supports for tolerance.

History provides striking examples of the resilience of freedom of expression and the occasional futility of suppression. Newspaper editors arrested and prosecuted by the military during the Civil War sometimes found their papers more popular after their prosecution because of the notoriety they had gained.[95] The aftermath of the prosecution and con-

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93 *See id.* at 10. He further observed that "such exceptions must be clear-cut, precise and readily controlled. Otherwise the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule." *Id.*

94 *See infra* text accompanying notes 111-12. It is, of course, easy to dismiss those who are willing to recognize the occasionally heavy costs of protecting speech on the grounds that they have not fully analyzed the problem or have neglected to consider some long-term policy considerations. Thus Emerson wrote:

> [T]he longer-run logic of the traditional [free speech] theory may not be immediately apparent to untutored participants in the conflict. Suppression of opinion may thus seem an entirely plausible course of action; tolerance a weakness or a foolish risk.
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> Thus it is clear that the problem of maintaining a system of freedom of expression . . . is one of the most complex any society has to face. Self-restraint, self-discipline, and maturity are required. The theory is essentially a highly sophisticated one.

Id. at 9-10.

95 The exercise of this form of newspaper control [the arrest of editors], however, was usually unfortunate. The more prominent the editor, the greater was the newspaper's gain in prestige in the eyes of its readers and sympathizers because of the martyr's pose which the editor invariably assumed. When, for example, F. Key Howard, editor of the *Baltimore Exchange,* was arrested and confined in Fort Lafayette and elsewhere, he sent a vigorous letter to the Secretary of War demanding instant and unconditional release. He stood his ground heroically and demanded, not pardon, but vindication. He refused to appear before an "irresponsible tribunal," and would not seal his lips to obtain discharge. The paper continued publication for a time while its editor and proprietor were in prison, and the net result was simply to afford this journal a more conspicuous rostrum from which to hurl its anathemas against the Government. On the morrow of Howard's arrest the *Exchange* declared in an indignant editorial that the unrestricted right of the press to discuss and condemn the war policy of the Government is identical with the freedom of the people to do the same thing, and thus the trumpet blasts for journalistic freedom were added to the general chorus of anti-war sentiment.

J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 503-04 (1963) (footnotes omitted).

viction of Eugene Debs for some of his ideas provides a further example:

> Two days after the Supreme Court decision, [Debs] called Lenin and Trotsky the "foremost statesmen of the age" and . . . denounced the Supreme Court justices as "begowned, bewhiskered, bepowdered old fossils." Two weeks later, when the mayor of Toledo refused Socialists admission to Memorial Hall to hear Debs . . . , 5000 of his followers stormed the building, broke doors and windows, and shouted "To hell with the mayor." . . . [Later] his cell in the Atlanta penitentiary became the virtual headquarters of the Socialist party.[96]

Civil libertarians emphasize that loyalty oaths usually catch principled constitutionalists rather than radicals.[97] The use of trespass laws against sit-ins, police attack on marchers, the prohibition of draft-card burning, and other similar efforts at suppression often invite expression by publicizing it and by investing it with moral significance.[98]

Not only are isolated efforts at suppression often ineffective, but even systematic waves of suppression often vanish suddenly, jarring the democratic system but not destroying it. Jefferson's election to the presidency, which was assisted by public reaction against the prosecutions under the Sedition Act of 1798,[99] abruptly quelled the suppressions of that period.[100] The use of a wide array of censoring devices during the Civil War failed to constrict the publication of dissenting, even traitorous, views and information, including detailed reporting about military plans.[101] The notorious red scare of 1919 essentially dissipated by 1920

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96 R. MURRAY, *supra* note 33, at 26.

97 *See, e.g.*, R. BROWN, LOYALTY AND SECURITY—EMPLOYMENT TESTS IN THE UNITED STATES 475-76 (1958) ("[O]ur current experience with loyalty oaths shows once again that those who refuse to subscribe to them are more often than not people of stout conscience whom we should cherish rather than punish."); *see also id.* at 95 (detailing lack of evidence that any of University of California faculty members dismissed for refusing to submit to loyalty oath were Communists).

98 For other examples, see *infra* note 104.

99 Act of June 25, 1798, ch. 58, 1 Stat. 570.

100 The severity of the Sedition Law failed to prevent the "overthrow" of the Adams administration by the Jeffersonian "disorganizers." Indeed, the law furnished a ready text which the Democratic-Republicans used to incite the American people to legal "insurgency" at the polls; the election resulted in the repudiation of the party which tried to protect itself behind the Sedition Law. It elevated to power a party whose leaders stressed the concept that freedom of opinion is an essential part of an all-encompassing freedom of the mind . . . .

J. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 431 (1956).

101 Efforts at news suppression during the war included: government control and censorship over the telegraph lines from Washington, D.C., which, in turn, led to the excision of comments representing the opinions of writers and news reports addressing diplomatic issues and criticizing Cabinet officers, *see* J. RANDALL, *supra* note 95, at 482-83; prosecutions under the military code against anyone "holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly," *id.* at 490; numerous instances of the military suspending publication of specific newspapers, *see id.* at 492-93; seizure of particular editions and blanket

after its excesses induced opposition among moderate Republicans.[102] Senator McCarthy's prominence and power, which had become significant by 1950, ended abruptly in 1954 after he was condemned by the Senate.[103] In short, none of our most serious periods of repression was influenced significantly by judicial enforcement of the first amendment, yet each ended well short of destroying the system of free expression.[104]

The limited effectiveness of efforts at suppression does not, of course, require the courts to approve of them. But neither should the courts formulate rules based upon an exaggerated sense of the stakes. If conditions might exist under which a society could slide from one isolated instance of suppression to the next toward the general extinction of free expression, the relevant inquiry is into the nature of those conditions. Once they are described, it might be possible to determine whether judicial efforts to resolve individual cases can ever counteract such conditions and, also, whether such efforts may sometimes inadvertently contribute to those conditions.

A milder version of Emerson's pessimism has infiuenced the development of first amendment law. The Court has imposed restrictions on

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prohibitions against circulating particular papers, *see id.* at 499-500; and arrest of editors, *see id.* at 502.

Despite these efforts at suppression, the press continued to relay effective news and opinions to the public. Randall described the period as one "of remarkable activity in journalistic enterprise." *Id.* at 484. Not only criticism, but also specific military plans were widely publicized. *Id.* at 484-85, 489, 508, 521.

102 *See* J. HIGHAM, *supra* note 28, at 232-33; R. MURRAY, *supra* note 33, at 239, 242-44.

103 Here again, the mood of suppression proved self-limiting because its excesses engendered effective opposition. *See* E. LATHAM, *supra* note 33, at 358-59; A. THEOHARIS, SEEDS OF REPRESSIONS, HARRY S. TRUMAN AND THE ORIGINS OF MCCARTHYISM 182-92 (1971).

104 Another period of serious repression was the prolonged effort to suppress antislavery sentiment in the South before the Civil War. Beginning in earnest after Nat Turner's insurrection in 1831, these efforts consisted of a variety of censorship devices, often buttressed by mob action. *See generally* H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW, CONSTITUTIONAL DEVELOPMENT 1835-1875, at 91-92 (1982); R. NYE, FETTERED FREEDOM, CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1930-1980, at 153 *passim* (1963).

> Though these statutes served to hamper free expression of antislavery opinion in the South, they did not fully suppress it. Most of the laws dealt out punishment for "incendiary" talk, or "opinions tending to incite insurrection,"—terms vaguely defined and charges difficult to establish—a fact recognized by Southern courts, whose verdicts were usually lenient. Legal processes were often slow, loopholes could be found . . . .

R. NYE, *supra,* at 176. In the North the effect was to bolster the abolitionists' position by allying their cause with the "firm moral ground" of free speech. *Id.* at 215.

> The abolitionists . . . were the martyrs, the oppressed and persecuted, the defenders of free speech and free criticism. When the abolitionists emerged as guardians of white liberties . . . their cause gained immeasurably in moral strength. The infiuence of the era of mob violence . . . was a significant factor in cementing support in the North for the antislavery movement.

Id. at 218. Efforts to "gag" debate in Congress over slavery as well as efforts in the South to block the distribution of antislavery mail had similar perverse results, legitimizing and strengthening the antislavery movement. *See id.* at 41-85; *see also* H. HYMAN & W. WIECEK, *supra,* at 118-19; *infra* note 203.

the government's regulatory power in important areas, such as defamation and patronage, on the largely unsubstantiated assumption that those regulatory powers pose a significant risk to the formation and publication of ideas and ultimately to the political system itself.[105] The Court has inferred the risk from the existence of sanctions without serious attention to the possibility that the urge to speak might be vigorous enough to survive the sanctions. Because the Court has largely assumed that the sanctions posed grave risks to the system, it has never seriously considered whether its rules might be unnecessary or even dysfunctional. Whatever the risks to the system under special conditions, it is clear that the courts cannot justify a *general* sustained program of judicial protections, such as the one that has evolved since *Abrams,* without undertaking this assessment.

III
LEGAL RULES AND NONJUDICIAL SUPPORTS

A. Useful Rules and Judicial Ideals

Judicial enforcement of the right to freedom of speech might be modestly justified on the ground that courts have a duty to apply the law, including the first amendment, when resolving cases. This justification requires no assumptions about the utility of judicial review in promoting an overall system of public debate. There is no reason to think that the judiciary's efforts to do justice in individual cases will necessarily foster the vigor or quality of public discussion generally. If, for example, just application of the laws requires the use of "neutral" constitutional rules, courts presumably could not afford any more protection to civil rights protests by the disenfranchized than they afford to communications by the powerful.[106] If justice requires that courts formulate constitutional doctrines strictly in accordance with the intent of the framers, then perhaps the only permissible legal protections are prohibitions against prior restraints,[107] which, in turn, would leave the courts no choice but to legitimize as "constitutional" the many other forms of censorship. Unless "justice" is defined as achieving the outcome that best promotes free discussion generally, the attempt to do jus-

105 *See generally* Wellington, *On Freedom of Expression,* 88 YALE L.J. 1105 (1979)(absence of empirical evidence makes it difficult to determine whether increased protection of defamatory speech has contributed to a more efficient political process); *supra* text accompanying notes 20-24; *infra* note 113. The lack of empirical substantiation is evident in the opinions. *See, e.g.,* Elrod v. Burns, 427 U.S. 347, 359 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

106 This problem was given sensitive treatment in H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 132-35 (1964); *see also id.* at 135 (making analogous comparison between protecting civil rights protestors but not labor union members).

107 *See, e.g.,* Kurland, *The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses,* 29 DRAKE L. REV. 1 (1979).

tice in individual cases always entails the risk of unfortunate consequences for the general level of public debate.

Alternatively, judicial enforcement might be justified as a method of enhancing public debate, even if at the expense of doing justice between the parties to the dispute. For example, courts might protect civil rights protestors from trespass convictions for staging a "sit-in" on the plausible theory that such sit-ins effectively generate an important political message.[108] If, however, the only available *legal* explanation for the outcome were an exceedingly unlikely interpretation of a state trespass statute,[109] then the judicial effort to create an appropriate level of public discussion has triumphed at the expense of normal concepts of legal justice. Similarly, a judge might employ an absolutist interpretation of the first amendment, not because such an explanation is historically, textually, or logically convincing, but because the rhetorical emphasis sends out a salutary message about the importance of tolerance.[110] There is no obvious reason to assume that decisions designed to maximize the level and diversity of public debate are also compatible with notions like honesty and impartiality in particular cases.

In at least one important respect, however, the ideals of judicial review and the broad requirements of freedom of expression may be thought to coincide conveniently. The modern first amendment consensus holds at least to some degree that "expression must be protected against governmental curtailment at all points, even where the results of expression may appear to be in confiict with other social interests that the government is charged with safeguarding."[111] This is because the "theory [of free speech] rests upon subordination of immediate interests in favor of long-term benefits . . . [that] can be achieved only through the application of principle . . . ."[112] Thus, the habit of disciplined self-denial so necessary to the fair application of the law is asserted to be the judiciary's major qualification for its present role. But even the ideal of disciplined adherence to principle has drawbacks, at least if the goal is to achieve systemic objectives as well as individual justice.

The difficulty is that, by definition, the use of principle requires courts to protect speech even in cases in which the immediate advantages are questionable and the social disadvantages are clear. For exam-

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108 *Cf.* H. KALVEN, *supra* note 106, at 133 (permitting civil rights protest gives black community powerful communicative resource they might not otherwise have).

109 *See id.* at 165-66.

110 *Cf.* M. SHAPIRO, *supra* note 78, at 111-15 (concept of preferred position for speech is statement about interests court should represent and should not be understood as ranking of values); Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights,* HARPER'S MAGAZINE, Feb. 1961, at 63, 66-68 (emphasizing increase in personal freedom that would result from absolutist view of first amendment).

111 T. EMERSON, *supra* note 54, at 17.

112 *Id.* at 12.

ple, no court has ever relied on more than its own guess as to whether traditional defamation rules significantly reduced the amount and quality of information published.[113] But the relatively new constitutional doctrine that defamation against public figures may exist only with proof of reckless disregard for the truth has created obvious costs for personal privacy and reputation. Similarly, the predominantly Jewish community of Skokie must permit a Nazi march despite the emotional anguish that such a march would inflict on its residents.[114] A town must make some provisions in its zoning laws for nude dancing establishments despite the ease with which potential customers could satisfy their tastes in surrounding communities and despite the clear damage to the tone of that municipality.[115] Although these examples of principled judicial self-discipline may be consistent with the idea of free speech in the abstract, it is unclear whether social tensions, and the accompanying urge to suppress speech, are thereby increased or decreased. Is public acceptance and respect for the first amendment increased or decreased by the constant message sent out by principled adjudication? So entrenched is the judicial role and so identified is the judiciary's methodology with the substance of the first amendment, that such questions are now lightly dismissed as reflecting a misunderstanding of the "sophisticated" principle of free speech.[116] But these questions simply acknowledge the existence of long-term, nonjudicial supports for free speech. It is unlikely that courts can foster public support and appreciation by developing the

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113 In *New York Times Co. v. Sullivan,* for example, the Court's entire support for enunciating the new defamation doctrine was contained in one paragraph:

> Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true . . . . Under such a rule, would-be critics of official conduct *may be deterred* from voicing their criticism . . . because of doubt whether it can be proved in court or fear of the expense of having to do so . . . . The rule *thus dampens* the vigor and limits the variety of public debate.

376 U.S. 254, 279 (1964) (footnotes and citations omitted) (emphasis added). In short, the Court moved from a plausible hypothesis to a firm certainty without reference to any evidence other than previous judicial pronouncements.

114 *See* Village of Skokie v. National Socialist Party of Am., 69 Ill. 2d 605, 373 N.E.2d 21 (1978). This decision was made in a timely fashion after the Supreme Court ordered the village to grant an expedited review or face dissolution of the injunction prohibiting the march. *See* National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (per curiam).

115 *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 73-76 (1981) (because first amendment protects nonobscene, live nude dancing, municipality must justify as reasonable any restriction).

116 *See supra* note 94; *infra* note 149. Indeed, one prominent scholar dismissed as a "bizarre proposition" the idea that the public's understanding of rights like the freedom of speech might be relevant to the proper legal definition of those rights. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 146 (1978).

meaning of the freedom of speech most frequently and authoritatively in contexts in which it appears to be a foolish or costly idea.

The judiciary implicitly acknowledges the dangers of principled decisions by creating exceptions. The Court has modified its general protection of "nonobscene" literature—as that term is artificially defined by the courts—to exempt nonobscene pornography involving children.[117] It has carved out an exception to the rule that the public has a right of access to criminal trials to allow for "compelling circumstances."[118] The existence of such exceptions suggests a second difficulty with principled decisionmaking: every principle implicitly pinpoints where censorship may be legitimate. A principle that forbids prior restraints implies that subsequent restrictions may be permissible. A rule that forbids overbreadth may permit precisely drawn restrictions. Even a blanket principle that all "speech" must be protected irrespective of the social costs directs attention to the possibility of restricting "behavior." Where meaning must be principled (i.e., obviously costly) it is only natural that justifications will tend to emphasize the limits to the principle and thereby focus attention on how speech might be restricted. Therefore, even judicial decisions that protect free speech in the case at hand will often indirectly legitimize and invite suppression more generally.

Without judicial intervention, the scope of the first amendment remains unclear and, perversely, perhaps more secure in the long run. The prolonged disinclination to adopt seditious libel laws[119] might have been due, in part, to the absence of a formal ruling announcing their unconstitutionality. Without a formal ruling, no court focused attention on the costs of a prohibition against seditious libel laws and no court articulated the limits to the prohibition. By the same token, when the political process does suppress speech and no judicial pronouncement is made, the suppression is not rationalized and no formal precedent is established. Without an authoritative judicial declaration, the censorship may be submerged in the public awareness or mislabeled or simply forgotten, permitting a quick return to a norm of relative tolerance. For example, the extra-legal quality of many of the military's acts of suppression during the Civil War may well have been linked to their short duration. The courts made no significant attempt to control the military's excesses during the war.[120] Thus, the claim that extreme public exigencies could justify censorship was never addressed, and the public was spared both the implausible conclusion that no amount of emergency can justify suppression and the provocative promulgation of

117 *See* New York v. Ferber, 456 U.S. 962 (1982) (dictum) (New York statute did not prohibit enough nonobscene material to merit striking it down on overbreadth grounds).

118 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (dictum).

119 *See infra* note 151.

120 *See* J. RANDALL, *supra* note 95, at 518-19.

a rule that some amount of emergency can. Instead, the suppressions remained illegitimate and irregular and did not lead to any prolonged, general breakdown of free speech.[121]

Courts, of course, must deal in intellectualized principles. Those who value abstractions feel insecure about relying on informal, inarticulate protections. Yet, there is a real question whether courts actually promote free speech by engaging in principled decisionmaking or whether they merely provide an emotional safe-harbor for the educated classes.

B. Useful Rules and Judicial Capacity

1. *The Problem of Indeterminacy*

The use of judicial decisions to protect the general level of free speech assumes that an adequate or proper amount of free speech is a condition that can be described and roughly attained. The general presumption is that more information is better than less. Certain types of suppression devices, such as prior restraints and content-discriminatory restrictions, are thought to reduce the amount of free discussion too much. Commentators and courts implicitly conceive of free speech as a "thing" that can be observed, measured, and achieved. Starting from these assumptions, it is but a short step to the conclusion that skillful judicial intervention in discrete cases might improve the overall system.

Legal rules are, however, often inadequate to shape a society having the characteristic of freedom of speech because many different forms of a society are consistent with that principle. The concept of "freedom of speech" is too complicated and indeterminate to be a useful guide in resolving many specific disputes. For example, it is naive to think that a rule that increases the availability of information always promotes free speech. Information must be received, sorted, and stored before it can be utilized. At some level, excessive information may interfere with the capacity to process and utilize information.

Although the Court has recognized this fact, it has failed to acknowledge its broader significance. In *Gibson v. Florida Legislative Investigation Committee*[122] for instance, the Court prevented a state legislative committee from discovering through examination of membership records whether Communists had infiltrated the local chapter of the NAACP. The Court's rationale was that the right to free speech implies a right to associate, which is important for free speech purposes because

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121 *See id.* at 515-22. The pattern of suppression during the Civil War was in sharp contrast with that which accompanied World War I and the beginnings of active judicial protections of freedom of speech. The suppression accompanying World War I resulted from statutes and judicial enforcement rather than from executive decrees and military actions. *See id.* at 524-28.

122 372 U.S. 539 (1963).

individuals often learn of and assess information in group discussions.[123] The Court concluded that the right to associate and participate in subsequent discussions could be stifled by exposure of membership lists.[124] Viewed from this perspective, decisions like *Gibson* protect free speech values. This protection, however, is achieved only at the cost of limiting the information available to the public and its representatives. In *Gibson,* the Court did not deny that knowledge of whether Communists had infiltrated the NAACP would have been of great importance to the public, to the state legislature, and to the NAACP itself.[125] The information might have been important not only for possible legislation, but also for evaluating both the membership in the organization and the messages coming out of the organization.[126] In short, the Court "protected" free speech by denying the public access to important information. Moreover, the Court's reasons for doing so sharply conflicted with traditional first amendment theory. The Court feared that potential exposure of membership lists would burden associational rights because the public might misunderstand or misuse the information.[127] The decision thus rested on the belief that an "open market" of ideas could not be trusted.

In decisions like *Gibson* the Court implicitly recognizes the complexity of the idea of the freedom of speech without acknowledging the corollary proposition that free speech principles can justify either outcome. The NAACP needed privacy to function; the public needed information to assess the NAACP and its activities. One could argue that the first amendment accords priority to the former consideration because associational privacy produces more or better public debate than would disclosure of membership lists. This tangled empirical judgment is, however, an unlikely basis for judicial decisionmaking. Can a court claim to know how much information about private associations a decision like *Gibson* will shield from the public or what that information might be?[128] Can a court know how important the information might

123 The Court's explanations, however, have been remarkably general. *See, e.g.,* NAACP v. Alabama, 357 U.S. 449, 460 (1958). For efforts to provide a fuller rationale for the judicial doctrines, see Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1 (1964); Raggi, *An Independent Right to Freedom of Association,* 12 HARV. C.R.-C.L. L. REV. 1, 2-11 (1977).

124 372 U.S. at 544 (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

125 The Court did, however, strain to show "the utter failure [of the state] to demonstrate the existence of any substantial relationship between the N.A.A.C.P. and subversive or Communist activities." 372 U.S. at 554-55. The Court could not find sufficient justification for burdening associational rights in the absence of "any indication of present subversive infiltration . . . ." *Id.* at 555. Thus, the Court implied that the government's interest would have sufficed if a substantial basis for suspecting Communist infiltration had existed.

126 *See id.* at 584-85 (White, J., dissenting) (discussing Graham v. Florida Legislative Investigation Comm., 126 So. 2d 133, 134-35 (Fla. 1960)).

127 *See* 372 U.S. at 548 n.3; *see also* NAACP v. Alabama, 357 U.S. 449, 462-63 (1958).

128 Justice Harlan argued in dissent that the Court, in effect, required "an investigating agency to prove in advance the very things it is trying to find out . . . ." 372 U.S. at 580. To

turn out to be or even what it might be used for? Understandably the Court in *Gibson* did not rely on these bases but purported instead to weigh a single first amendment value, association, against the nonconstitutional value of pursuing Communists.[129] The Court was able to justify the outcome on first amendment grounds only because it did not acknowledge that the principle of free speech pointed in both directions.

The problem of indeterminacy is common. Forced exposure to political messages on public buses increases the amount of information available to the public, but it also reduces the insulation and selectivity necessary for full utilization of information.[130] The Fairness Doctrine might increase the variety of available messages, but it also prevents a broadcaster from speaking as he chooses. Traditional defamation rules might have inhibited the publication of useful information, but the absence of those rules reduces the quality of information published by limiting the availability of a jury's judgment as to the truth or falsity of some accusations. In each of these cases, and in many others, the concept of freedom of speech could be used to justify either outcome. Absent complicated and costly empirical judgments that no court is equipped to make[131] and that courts seldom seriously purport to make, these cases represent judicial choices between two versions of the same set of values.

Adjudication requires a winner and thus it is largely incompatible with acknowledging the complexity of the idea of freedom of speech. Courts often can assert confidently that they are protecting the first amendment only because, in reality, they are simplifying the concept. In the case involving forced exposure to information on a bus, for example, the plurality framed the issue as a conflict between free speech and the state's interest in such matters as protecting its revenue, avoiding "sticky" administrative problems, and reducing unpleasant "blare."[132] In its early consideration of the Fairness Doctrine, the Court emphasized the rights of the viewers rather than those of the broadcasters, who the Court labeled mere licensees.[133] In the defamation case, the interests that competed with freedom of speech were the principle that states

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the extent that parts of the majority's opinion reflected the Court's judgment that Communists had not actually infiltrated the NAACP, *see id.* at 554, the Court was simply prejudging an issue made complicated not only by some evidence of infiltration, but also by the nature of clandestine infiltration itself, *see id.* at 583 (White, J., dissenting). The Court's holding ultimately was based on its judgment that the legislative committee had not laid an adequate foundation demonstrating that Communists had infiltrated the NAACP. *See id.* at 557.

129 *See id.*

130 Justice Douglas, for example, expressed concern about forcing information "upon an audience incapable of declining to receive it." Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring).

131 *See* Wellington, *supra* note 105, at 1119.

132 *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).

133 *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

should define for themselves appropriate liability standards and the interest of a private citizen in his reputation.[134] In none of the cases did the Court pose the issue in terms of competing systemic free speech interests.

Such decisions might protect free speech by happenstance, if the implicit empirical judgments prove to be correct. It is difficult, however, to see how those decisions could educate the public about the importance and meaning of the first amendment. In fact, they deprive the public of an understanding of the richness of freedom of speech and obscure its various possibilities and difficulties. Moreover, they deprive many citizens of a sense of a stake in the principle. Although the interests represented by each side in a lawsuit may all be first amendment interests, only one side can emerge from the lawsuit wearing that mantle. The losers are left to wonder if the freedom of speech, as it has been narrowed and simplified by the courts, is as valuable as it is supposed to be.

2. *The Effect of Fancy Talk*

The idea that judicial opinions are useful educational devices stems, in part, from admiration for the inspiring rhetoric found in many decisions. The ringing words in some of the dissents of Justice Holmes or Black, for example, have become part of our political culture.[135] But admiration should not be confused with usefulness; rhetoric, even when memorable, is not always of value for educating the public about complex issues.

Consider, for instance, *Cohen v. California.*[136] The issue in *Cohen* was whether a breach of the peace conviction based on the wearing of a jacket that displayed the words, "Fuck the Draft," violated the wearer's freedom of speech. The Court, in a decision notable for the seriousness and care of its analysis, overturned the conviction on the ground that it was based solely on the offensiveness of the message rather than on any conduct.[137] The Court noted that, under existing law, a state may not punish a speaker for the content of a message in the absence of a showing of intent to incite a violation of the law. Because such intent was not present in the case, the Court reasoned that the conviction could only be justified as a regulation of the method of communication, rather than the content of communication.[138] The Court then rejected as inapposite a number of permissible grounds for regulating speech:[139] (1) the regu-

134 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (White, J., dissenting).

135 Professor Shapiro has commented that "Justice Black's opinions get anthologized and Justice Frankfurter's get explained." M. SHAPIRO, *supra* note 78, at 109.

136 403 U.S. 15 (1971).

137 *See id.* at 18.

138 *See id.* at 18-19.

139 *See id.* at 19-22.

lation was not aimed solely at protecting the decorum of a courtroom, (2) the phrase was not erotic, hence, there was no obscenity, and (3) the message was too impersonal to constitute "fighting words." The Court concluded that

> [a]gainst this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse . . . upon the theory . . . that . . . the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.[140]

Having "flushed" the issue, the Court proclaimed:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is desigued and intended to remove governmental restraints from the arena of public discussion . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[141]

Reasoning from such heights, the Court found that under our system of freedom of speech there is necessity for, even virtue in, discord and offensiveness, "verbal cacophony."[142]

My reason for summarizing so much of the *Cohen* opinion is not to criticize the analysis. Indeed, it is vintage first amendment reasoning, familiar and perhaps convincing to any reader of Emerson who warned that even though suppression may often seem "entirely plausible . . . [and] tolerance a weakness or foolish risk, . . . society must be willing to sacrifice individual and short-term advantage for . . . long-range goals."[143] The *Cohen* opinion is methodical and, in a way, unanswerable. The dissenters described Cohen's behavior as an "antic" and dismissed the Court's "agonizing over First Amendment values . . . [as] misplaced and unnecessary."[144] Yet, reassuring as it may be to hear a note of common sense amidst first amendment doctrine, this response is too easy. As a judicial opinion, precisely where did the majority go wrong? There is no exception to the first amendment for immature antics; any such exception would, in principle, be highly dangerous. The majority was clearly right to label the words "speech" rather than "conduct" and to distinguish the "offensive speech" cases. Step-by-step the majority opinion is correct. It does as much as can be expected from a

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140 *Id.* at 22-23.

141 *Id.* at 24 (citation omitted).

142 *See id.* at 24-25.

143 T. EMERSON, *supra* note 54, at 10.

144 403 U.S. at 27 (Blackmun, J., dissenting).

judicial opinion and provides an excellent example of why the protection of free speech is so widely thought well entrusted to the courts.

The dissent, however, is surely correct in asserting that there is an embarrassing incongruity in the majority's serious tone and lavish attention to the issue, which was, after all, only whether there is a right to deliver a message consisting of three tasteless and almost contentless words by displaying them on an article of clothing. But the dissent is mistaken to suggest that this inappropriate highmindedness is a unique and unfortunate exception. Similar incongruities can be found in any number of cases. The Court, for example, has intoned the grand principles of free speech to protect the right to show nudity on an outdoor movie screen without the disadvantage of having to build a visual barrier,[145] the right to display noncommercial billboards if some commercial billboards are permitted,[146] and the right to put on nude dancing shows as long as there are no representations of "masturbation, excretory functions, and lewd exhibition of genitals."[147]

The problem so graphically illustrated by *Cohen* is endemic to judicial review. It arises because courts necessarily determine the meaning of the first amendment in the context of specific factual disputes. Attempts to apply to highly particularized fact situations principles that are abstract, formulated to achieve long-term objectives, and that purportedly lie at the foundation of democratic society necessarily produce some strain. The more trivial or outlandish the facts, the greater the strain becomes.

There is substantial evidence demonstrating that although the public approves of civil liberties in the abstract, it generally disapproves of them in concrete situations.[148] Although some regard this as evidence of the public's ignorance,[149] it is a fact that must be contended with in

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145 *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

146 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

147 Miller v. California, 413 U.S. 15, 24-25 (1973). Nude dancing apparently is a protected activity, *see supra* note 10, but only if it does not violate the obscenity standard set forth in *Miller*.

148 *See* S. STOUFFER, *supra* note 30, at 39-47, 78-79.

149 *See supra* note 94. Thus, Stouffer took a benign view of American attitudes toward civil liberties:

> Many of them . . . are simply drawing quite normal and logical inferences from premises which are false because the information on which the premises are based is false. They have been as yet sufficiently motivated by responsible leaders . . . to give "sober second thought" to the broader and long-range consequences of specific limitations of freedom.

S. STOUFFER, *supra* note 30, at 223. The idea that the public is unable to understand or appreciate the principle of free speech is often reflected in a denigration of the purposes underlying short-term suppressions. When, for example, the Court justified the FCC sanctions imposed on stations airing George Carlin's "Filthy Words" monologue as an effort to protect unwilling listeners and their children from offensive intrusions, *see* FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978), Justice Brennan dissented, asserting that the majority's professed reliance on these objectives did not reflect the actual reasons for approving the rule: "In this

attempting to build popular support for the freedom of speech. Whether or not first amendment theory is correct in positing that any minor deviation from the wall of protection for free speech is potentially dangerous, judicial protection inherently creates problems for public appreciation of the importance of free speech. If judicial protection, as the chief mechanism for giving effective meaning to the first amendment, continuously creates that meaning by attempting to fit specific facts to grand theory, public sympathy for free speech will decline.

The Court could minimize this difficulty by reserving its power, not for the hardest cases, but for the most obviously important ones. It is not clear, however, that there are many such important cases. Professor Kalven asserted that the guarantee of free speech most fundamentally forbids punishment of seditious libel;[150] yet, there have been very few relatively unambiguous opportunities to establish this principle.[151] Thus, a court intent upon teaching this lesson might have to seize upon some approximation of the proper occasion—which Professor Kalven argued was *New York Times Co. v. Sullivan*[152]—but then the lesson received might be ambiguous, arguable, and even lost.[153]

Important occasions for the use of judicial power often turn out to be "hard" cases, a fact that tends to reduce the persuasiveness of the desired lesson. Because the *Pentagon Papers* case[154] involved an instance of prior restraint on a matter of great importance to political debate, it apparently presented the Court with an opportunity to expound important first amendment principles in a grand setting rather than in the trivial and oftentimes seamy factual situations common to so much first amendment litigation. The case was important, however, precisely because it raised many difficult, unresolved issues. Should the outcome

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context, the Court's decision may be seen for what . . . it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking." 438 U.S. at 777 (Brennan, J., dissenting) (citation omitted).

150 *See* H. KALVEN, *supra* note 106, at 15-16.

151 The Sedition Act of 1798, Act of June 25, 1798, ch. 58, 1 Stat. 570, led to some prosecutions but to no Supreme Court decisions. It expired two years after enactment—§ 6 of the Act provided that it would expire at the end of two years—and President Jefferson pardoned those who had been convicted. *See* H. KALVEN, *supra* note 106, at 17-18. The next opportunity to deal with seditious libel did not occur until the Sedition Act of 1918, and Kalven asserts that the Court did not directly confront the issue until 1964. *See id.* at 17.

152 376 U.S. 254 (1964).

153 *See* H. KALVEN, *supra* note 106, at 17. Although Professor Kalven does not state expressly that he believed the *New York Times Co. v. Sullivan* case was the proper occasion, it is clear that that was his belief given his reference to March 1964—the date of the decision in the case—as the proper occasion. Even if *Sullivan* was the proper occasion, the Court certainly failed to avail itself fully of the opportunity; its opinion in some respects went far beyond what was neeessary to deal with seditious libel and in other respects did not altogether prohibit that form of repression. *See id.* at 53-64.

154 New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

have been affected by the special need for secrecy in foreign affairs,[155] or by the absence of authorizing legislation,[156] or by the failure of the President to act without the aid of the judiciary?[157] Could publication of the papers lead to military losses or damage to important alliances?[158] Confronted by such questions, the Court understandably sounded no clarion call for freedom of the press.[159] Instead, the several opinions drifted off

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155 See, for example, Justice Stewart's concurring opinion in the *Pentagon Papers* case, in which he stated that the Court should have considered the need for secrecy in foreign affairs. New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). Even so, Justice Stewart voted against allowing the government to suppress publication of the papers on the facts of the case stating that "I cannot say that disclosure of any of [the Pentagon Papers] will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730.

156 *See id.* at 732 (White, J., concurring).

157 *See id.* at 730 (Stewart, J., concurring). Although Stewart observed that the judiciary should act in conjunction with the executive branch in certain situations, he did not find this to be one of them.

158 At least one Justice believed that publication "could clearly result in . . . the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, [and] the inability of our diplomats to negotiate . . . ." 403 U.S. at 762 (Blackmun, J., dissenting) (quoting with approval the dissenting opinion of Judge Wilkey in United States v. The Washington Post Co., 446 F.2d 1327, 1329 (D.C. Cir. 1971) (Wilkey, J., dissenting in part, concurring in part)).

159 Even the argument made by the *New York Times* before the Court was notably short of a ringing endorsement for freedom of the press:

Justice Stewart:

. . . .

Q. Mr. Bickel, it is understandably and inevitably true that in a case like this, particularly when so many of the facts are under seal, it is necessary to speak in abstract terms, but let me give you a hypothetical case. Let us assume that when the members of the Court go back and open up this sealed record we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of 100 young men whose only offense had been that they were 19 years old and had low draft numbers. What should we do?

A. Mr. Justice, I wish there were a statute that covered it.

Q. Well there is not. We agree, or you submit, and I am asking in this case what should we do.

. . . .

A. No, sir, but I meant it is a case in which the chain of causation between the act of publication and the feared event, the death of these 100 young men, is obvious, direct, immediate.

Q. That is what I am assuming in my hypothetical case.

A. I would only say as to that that it is a case in which in the absence of a statute, I suppose most of us would say—

Q. You would say the Constitution requires that it be published, and that these men die, is that it?

A. No, I am afraid that my inclinations to humanity overcome the somewhat more abstract devotion to the First Amendment in a case of that sort . . . .

Q. I get a feeling from what you have said, although you have not addressed yourself directly to it, that you do not weigh heavily or think that the courts should weigh heavily the impairment of sources of information, either diplomatic or military intelligence sources. I get the impression that you would not consider that enough to warrant an injunction.

A. In the circumstances of this case, Mr. Justice, I think, or I am per-

on such issues as separation of powers and the hurried procedures through which the case had come to the Court.[160] The Court actually resolved the matter in a short per curiam opinion in which it simply held that only compelling circumstances could justify prior restraints.

Even if the Court should articulate convincingly a grand principle on a proper occasion, the dynamics of litigation are such that subsequent cases often dilute the message by stretching principles and rules to their limit. For example, courts may limit the application of the principle that there is a right of public access to criminal trials[161] as they determine what circumstances can justify exceptions to the principle,[162] or they may extend it into dubious, far-fetched settings at the prodding of litigators eager to expose to public scrutiny other forums of governmental decisionmaking.

Consequently, the judiciary's use of elaborate explanations and high-sounding principles to resolve specific cases, including many that are extreme and difficult, erects obstacles to an enhanced public appreciation of free speech. A public exposed to the judiciary's lessons will inevitably ask certain troubled questions. Why, for example, if the first amendment's guarantee of freedom of speech is so important, is it so often invoked to protect seemingly silly, unsavory, or dangerous activities? Why does its application so often seem strained, difficult, and doubtful? Although these may be, as some civil libertarians suggest, un-

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> fectly clear in my mind, that the President, without statutory authority, no statutory basis, goes into court, asks an injunction on that basis, that if Youngstown Sheet and Tube Co. v. Sawyer means anything, he does not get it. Under a statute, we don't face it in this case, and I don't really know. I would have to face that if I saw it. If I saw the statute, if I saw how definite it was—
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> *Justice Douglas:*
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> Q. Why would the statute make a difference, because the First Amendment provides that Congress shall make no law abridging freedom of the press. Do you read that to mean that Congress could make some laws abridging freedom of the press?
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> A. No, sir. Only in that I have conceded, for purposes of this argument, that some limitations, some impairment of the absoluteness of that prohibition is possible, and I argue that, whatever that may be, it is surely at its very least when the President acts without statutory authority because that inserts into it, as well—
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> Q. That is a very strange argument for The Times to be making . . . .

Transcript of Oral Argument in Times and Post Cases Before the Supreme Court, N.Y. Times, June 27, 1971, § 1, at 25, col. 4 (transcript of oral argument by Alexander M. Bickel), *reprinted in* 2 THE NEW YORK TIMES V. UNITED STATES, A DOCUMENTARY HISTORY 1226 (J. Goodale ed. 1971).

160 The dissenters were particularly concerned about the hurried procedures through which the case came before the Court. *See* 403 U.S. at 748 (Burger, C.J., dissenting); *id.* at 752 (Harlan, J., dissenting); *id.* at 759 (Blackmun, J., dissenting).

161 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

162 Although the Court specifically stated in *Richmond Newspapers* that "overriding considerations" might justify some exceptions, 448 U.S. at 581, it did not specify the situations in which an exception would be appropriate. *Id.* at 581 n.18.

sophisticated questions, they are questions that will arise and ultimately undermine public support for the idea of free speech. This is a cost, unmeasured and largely unconsidered, of using judicial review to protect the systemic objectives of the first amendment. It would be difficult but important to determine whether this threat to free speech is greater than that posed by indictments of the sort involved in *Cohen.* The courts, however, preferring naive confidence to serious assessments of usefulness, have for the most part ignored the issue.

3. *The Relevance of Categorization*

Cohen illustrates another problem with attempting to use judicial review to enhance the general level of free speech. The Court, in *Cohen,* offered as a "particularized consideration" for its holding the proposition that "the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?"[163] This nicely confounds the methods of legal analysis with the systemic requirements of freedom of speech. The search for containable categories is familiar to every first year law student after encountering a slippery slope argument. A basic assumption of modern first amendment theory is that the kind of explicit categorization so often used in legal thinking can effectively resolve free speech questions and can provide the bridge that links individual cases to the whole system. Because each case is resolved by reference to principles applicable to whole classes of behavior, the protection afforded in a particular case has more general significance:

> A system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions. And *any such exceptions must be clear-cut, precise, and readily controlled.* Otherwise the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule.[164]

Accordingly, first amendment case law is replete with lawyer-like efforts at precise classification: obscene speech, track-one speech, track-two speech, malicious defamation, and so on. Yet, there are reasons to doubt that categorical clarity actually promotes free expression.

If anything is certain from the development of first amendment law since 1919, it is that categorical solutions can only crudely resolve free speech issues. Chafee and others thought that the concept of "clear and present danger" solved the problem of separating protected from unprotected speech. It is uncertain, however, whether this concept would prohibit the government from trying to prevent remote but catastrophic

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163 403 U.S. at 25.

164 T. EMERSON, *supra* note 54, at 10 (emphasis added).

dangers. If it does, the category seems dangerous and unwise;[165] if it does not, this apparently hard category dissolves into highly discretionary judicial assessments of the severity of various possible disasters.[166] Others have thought it obvious that commercial speech should not be protected.[167] But, if it is permissible to censor commercial information, consumers may be deprived of information that is as important to them as any other category of information.[168] If commercial speech is protected, however, then perhaps billboard regulation must become a subject for first amendment law.[169] The first amendment does not protect "obscenity."[170] But, as dissenters never tire of pointing out, the concept of obscenity—like the concept of "offensiveness" under scrutiny in *Cohen*—is potentially boundless because what constitutes obscenity is ultimately a judgment based on personal reaction and taste. Because of these and many other difficulties, first amendment law has been characterized by the proliferation of increasingly complex categories.[171]

The Court's focus in *Cohen* on the question, "How is one to distinguish this from any other offensive word?" is misleading. That question is unimportant from a systemic viewpoint unless it is presumed that free speech will be continuously reduced if distinctions are analytically impossible. According to the modern first amendment consensus, only a society that "understands" that it is dangerous to make such distinctions will adequately protect free speech. Thus, the Court has announced many times that regulations based on content are especially suspect. A town may not apply special restrictions to drive-in movie theaters that display nudity.[172] It is even doubtful that school boards may consider the appropriateness of the content of the books in school librarics[173] or that town officials may control the content of the plays put on in a town theater.[174] The Court contends that it is dangerous to attempt to sepa-

165 The Court's decisions in Gitlow v. New York, 268 U.S. 652 (1925), and Dennis v. United States, 341 U.S. 494 (1951), are representative of the Court's attempt to avoid the potentially dangerous result of absolutely principled application of the doctrine.

166 This concern underlies much of the dissatisfaction with cases like *Gitlow* and *Dennis*. For a delineation of the complex judgments underlying the apparently "hard" test, see P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27 (1949).

167 The Court apparently took this position in Valentine v. Chrestensen, 316 U.S. 52 (1942).

168 The Court has observed that the consumer's interest in the free flow of commereial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976).

169 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (invalidating as unconstitutional under first amendment San Diego's ban on billboards).

170 *See* Miller v. California, 413 U.S. 15 (1973).

171 *See* Van Alstyne, *A Graphic Review of the Free Speech Clause,* 70 CALIF. L. REV. 107 (1981).

172 *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

173 *See, e.g.,* Board of Educ. v. Pico, 457 U.S. 853, 871-72 (1982).

174 *See, e.g.,* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

rate truths from falsehoods[175] or useful information from drivel.[176] Thus, advertisements must receive the same protection as political tracts and nonmalicious defamations the same protection as accurate reporting. All this assumes that categorization is the only relevant basis for limitation. It may even be true that a court could not explain a decision approving such distinctions without adopting a term that impliedly permitted "boundless" suppressions. But to assume that this difficulty for the judiciary is also a problem for the freedom of speech generally is to assume that there are no nonjudicial restraints on censorship. Lines, however, can be drawn not only by verbal categories, but also by the sense of proportion and taste created by acculturation and education. People offended by the wearing of "fuck the draft" in public places may not be offended by the same message delivered in a different place or manner. A slippery conceptual slope simply does not mean that every suppression based on a judgment of unsuitability will lead to the stifling of political dissent.

If cultural brakes on suppression do exist, the fundamental concern should be the cultural consequences of resolving so many first amendment issues through legal analysis. Does the predominance of judicial solutions build a culture that values new information and dissent? It is doubtful that a society that has internalized the level of self-doubt taught by the judiciary could make the kinds of elementary judgments of degree, context, and proportion that make vigorous public debate tol-

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175 New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) ("Authoritative interpretations of the First Amendment . . . have consistently refused to recognize an exception for any test of truth . . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ."') (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). More recently, the Court said: "[T]here is no constitutional value in false statements of fact . . . . [Nevertheless, t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974).

176 When the Court approved a zoning ordinance designed to disperse motion picture theaters that showed sexually explicit "adult" movies, the plurality's efforts to take note of the kind of movies subject to the regulation elicited portentious reminders of the standard judicial wisdom:

> The fact that the "offensive" speech here may not address "important" topics . . . does not mean that it is less worthy of constitutional protection.
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> . . . .
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> . . . Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

Young v. American Mini Theatres, Inc., 427 U.S. 50, 87-88 (1976) (Stewart, J., dissenting). At times, some Justices have become so entranced with the idea that it is dangerous for a court to try to distinguish the useful from the useless that they appear to believe that it is an impossible task. Thus, Justice Brennan defended a radio broadcast of George Carlin's long and tasteless monologue of "filthy words" on the ground that "some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy . . . . It is only an acute ethnocentric myopia that enables the Court to approve the censorship . . . ." FCC v. Pacifica Found., 438 U.S. 726, 770, 775 (1978) (Brennan, J., dissenting).

erable or desirable.[177] It is questionable whether such a society could even remember the purposes of vigorous debate, which after all include both responsible self-government[178] and the capacity to form judgments, to make moral and aesthetic discriminations. When judges teach that it is dangerous or inappropriate to make decisions about the kinds of books that should be kept in school libraries[179] or the kinds of plays that should be staged in public theaters,[180] they effectively strip the first amendment of much of its moral utility.

The kinds of distinctions that courts do permit—those hard enough to ensure that all potentially useful ideas will be safe from suppression—are based on abstractions that do not track the more subtle sensibilities taught by the culture. For example, the Court has defined obscenity mechanically and artificially,[181] drawing precisely the kind of "legal" distinction that renders the judiciary's "constitution" foreign to the public. It is not a sign of any dangerousness in the culture, but of the awkwardness of legal thinking that the public should not easily understand a Supreme Court decision involving "nonobscene" pornographic pictures of children.[182] If the only distinctions the Court finds permissible under the Constitution are specialized and nonintuitive, the public will inevitably perceive the first amendment as foolish and undesirable.

In some cases the Court has succumbed to the constant pressure to soften its categories. For instance, the Court now acknowledges a gray area between the obscene and the nonobscene, an area that might be termed "the moderately useless and disgusting."[183] When categories soften and thereby threaten to become "boundless," the Court warns that it will not accept just *any* regulation in the area, but rather will scrutinize the regulation and weigh and balance the competing interests. The resulting judicial decisions may over- or under-protect speech, depending upon one's assessment of the balance struck by the Court. While opinions will differ with respect to any given decision, these techniques will enhance the general level of freedom of expression only if the judges' sensibilities are as good as, or better than, the sensibilities of

177 For an argument that "the law should teach civility," see W. BERNS, *supra* note 65, at 201.

178 *See id.*

179 *See* Board of Educ. v. Pico, 457 U.S. 853, 871-72 (1982).

180 *See* Southeastern Promotions v. Conrad, 420 U.S. 546, 561 (1975).

181 The current standard permits governments to regulate or prohibit any works that "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). For an account of the different obscenity standards applied by individual Justices, see B. WOODWARD & S. ARMSTRONG, THE BRETHREN 192-204 (1979).

182 *See* New York v. Ferber, 102 S. Ct. 3348 (1982).

183 Examples of this category include "adult movies," *see* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and an extended radio monologue entitled "Filthy Words," FCC v. Pacifica Found., 438 U.S. 726 (1978).

other potential decisionmakers, a matter that also deserves more skepticism than it has received.

IV
THE INCLINATIONS OF JUDGES

The increasingly pervasive role of the courts in promoting freedom of speech depends heavily on the belief that, notwithstanding any drawbacks in the methods of judicial review, judges can be trusted with the first amendment more than other officials.[184] The common belief, however, that the training and professionalism of judges actually make them especially attuned to free speech values should not be accepted on faith. Judges undeniably are more likely than other officials to assume that free speech issues are problems susceptible to "solution" by the traditional methods of legal analysis. In addition, judges, because of their institutional perspectives, are likely to assume that free speech requires judicial protection from irrational and uncontrolled forces. But, as I have tried to suggest, these predispositions may reflect as much professional complacency as special competence.

Notwithstanding assertions to the contrary, the actual training and experience of judges are of dubious value for preparing them to understand or protect the freedom of speech. Many judges exhibit extraordinary degrees of intolerance every day in their courtrooms and virtually all of them exercise broad and abrupt powers of suppression in discharging their duties. It is at best unclear why the normally sedate and highly controlled atmosphere of a courtroom is thought to be a good training ground for appreciating the dynamics of vigorous public debate. In contrast, political involvement and accountability provide much of the experience that one might expect would lead to a useful understanding of the requirements of a system of free speech. It is, of course, political candidates who engage in open political debate. They should understand the needs of political organization and private association because they work in these settings. Indeed, to assume that politicians do not understand or appreciate the needs and values of a system of free expression is to assume that they are blind to the world they inhabit and on which they depend.

The judiciary's record in freedom of expression cases does not evince any special competence or sensitivity for promoting the freedom of speech; indeed, the contrary appears closer to the truth. Some judges have freely used injunctions to censor criticism of their decrees,[185] and

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184 *See, e.g.*, T. EMERSON, *supra* note 54, at 13-14. For a recent variation on the theme, see Perry, *supra* note 84, at 295-96, 314-15. For a similar but more cautious view, see J. ELY, *supra* note 83, at 107, 112.

185 In seeking to protect a school desegregation order, for example, one federal judge issued the following order:

many have blocked access to or publication of news about judicial processes.[186] There have been significant episodes in which military officers under the stress of battle have shown considerable restraint in dealing with dissent[187] and others in which judges, removed and safe, have displayed very little.[188] Politicians, not judges, have had the major role in terminating each of the most serious periods of repression.[189]

A general assessment of free speech cases is not reassuring. Judicial coolness and even hostility to free speech claims prior to 1919 is well-documented.[190] Even since then, much of the admiration for judges as

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> 1. All protest areas are hereby abolished;
> 2. No persons shall assemble in or near any public school building not authorized by the school authorities;
> 3. Persons more than three in number shall not gather or assemble along any bus route in this . . . county while school buses are being operated along them.

Newberg Area Council, Inc. v. Board of Educ., Nos. 7045, 7291 (W.D. Ky., Sept. 6, 1975) (interim order). Similarly, in Boston, Judge Garrity issued an order that, in addition to prohibiting racial slurs and epithets, also prohibited

> all gatherings of three or more people and all violent conduct, noise audible within the school, picketing, signs or other conduct likely to disturb classes, within 100 yards of any public school building in South Boston and within 50 yards of any other public high school or middle school building elsewhere in the City of Boston at any time between 7:00 a.m. and 4:00 p.m. on a school day; and . . . all gatherings of three or more people engaged in or threatening to engage in violent conduct on or along any route used to transport students into or out of South Boston between 7:00 and 9:30 a.m. and between 1:00 and 4:00 p.m. on a school day and at any other time when such routes are used.

Morgan v. Kerrigan, No. 72-911-G (D. Mass. Dec. 17, 1974) (order on motion for relief concerning security). Although most orders are more general, they are potentially no less chilling on the exercise of freedom of speech. *See, e.g.,* Kasper v. Brittian, 245 F.2d 92, 94 (6th Cir. 1957) (prohibiting all persons from in any way interfering with carrying out of court's orders); Mims v. Duval County School Bd., 338 F. Supp. 1208 (M.D. Fla. 1971) (prohibiting anyone from disrupting operations of schools); Stell v. Board of Educ., No. 1316 (S.D. Ga., Mar. 16, 1972) (order prohibiting interference with plan of desegregation). *See generally* Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class,* 44 U. CHI. L. REV. 111 (1976).

186 The Reporters Committee for Freedom of the Press found 63 orders restraining statements by participants in trials between 1967 and 1975 and 39 restraints on publication. *See* Landau, *Fair Trial and Free Press: A Due Process Proposal,* 62 A.B.A. J. 55, 57 (1976). The same organization claims that from July 2, 1979, until May 30, 1981, some 400 motions to close some part of a criminal proceeding were made of which 241 were successful. *See Court Watch Summary,* 5 NEWS MEDIA AND THE LAW, June-July 1981, at 53.

187 For example, during the Civil War the Military Code prohibited newsmen from communicating with the enemy. Although the prescribed punishments included death and although many newsmen apparently did give intelligence to the enemy, courts-martial for these offenses were extremely rare and usually resulted in mere exclusion from the lines of a military command. *See* J. RANDALL, *supra* note 95, at 506-07.

188 *See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Citlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

189 *See supra* text accompanying notes 100-03.

190 *See, e.g.,* Rabban, *supra* note 2.

protectors of free speech is predicated upon eloquent dissents,[191] occasioned (it bears mentioning) only because a majority of the Justices have voted to sanction some form of suppression. There are numerous major decisions in which the Court has subordinated free speech values to other social interests; they involve nearly every form of suppression and have issued from both liberal and conservative Courts.[192] Even in the cases that ultimately protect free speech, the Court often achieves the protection by indirection—by statutory construction or by the use of doctrines like overbreadth, vagueness, and procedural due process—and these techniques manifest distrust of the other branches and levels of government more clearly than outright approval of the free speech values involved.[193] In the relatively few decisions resting directly on free speech considerations, the Court often hedges its rulings with enough cautions and limitations to put into question the scope of the Court's commitment to free speech.[194]

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191 The dissents of Justices Holmes and Black are of particular note. *See, e.g.,* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting); Dennis v. United States, 341 U.S. 494, 579 (1951) (Black, J., dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950) (Black, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

192 *See, e.g.,* New York v. Ferber, 102 S. Ct. 3348 (1982); Gannett Co. v. DePasquale, 443 U.S. 368 (1979); FCC v. Pacifica Found., 438 U.S. 726 (1978); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Hudgens v. NLRB, 424 U.S. 507 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Pell v. Procunier, 417 U.S. 817 (1974); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); Laird v. Tatum, 408 U.S. 1 (1972); Law Student Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Walker v. Birmingham, 388 U.S. 307 (1967); Adderly v. Florida, 385 U.S. 39 (1966); Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Roth v. United States, 354 U.S. 476 (1957); Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Valentine v. Chrestensen, 316 U.S. 52 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

193 *See, e.g.,* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (prior restraint permissible only after proper procedural safeguards); Miller v. California, 413 U.S. 15 (1973) (states may regulate or forbid obscenity by specific statutory definitions); United States v. Robel, 389 U.S. 258 (1967) (states may exclude individuals from public employment based on their associational ties if statute is narrowly drawn).

194 *See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (courts may justifiably close criminal trials to public upon finding of "overriding interest"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (prior restraints on reporting about criminal trial can be justified by sufficient showing of threat to fair trial and lack of alternative precautions); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (government may justify prior restraint on publication of material allegedly related to national security if

It is true, however, that the Court has struck down many restrictive laws and practices in the last sixty years; it is this record to which proponents of the modern judicial role point as justification for their high regard for judges as protectors of free speech. Routine judicial policing of the political arena, however, means less than is commonly assumed. Legalistic conceptions of freedom of speech, perhaps inevitably, do not conform to common beliefs or intuitions. Judicial rules are complicated and specialized. It is not surprising, therefore, that nonlawyers might find it hard to understand why corporations have first amendment rights[195] or how a person who obtained a job through political patronage is said to be punished if he subsequently loses it for political reasons.[196] Certainly, the legal meaning of terms like "obscenity" and "defamation" no longer track the common understanding of those terms. A system in which judges first erect a body of law that is unfamiliar and unintuitive to laymen and then invalidate numerous acts of the political branches for being incompatible with that law does not necessarily demonstrate any special judicial sensitivity to first amendment values.

Special judicial appreciation for systemic free speech values might be inferred from the presumed success of the modern program of judicial protection. An enormous volume and variety of information is available today. Criticism of government is pervasive. Any school child can obtain revolutionary tracts or scatological pictures. One might suppose that today's booming information markets stand as testament to the Court's efforts over the last six decades to enforce the first amendment.

This inference is, however, far less persuasive than might initially appear. First, the inference depends upon the assumption that the judicial efforts are primarily responsible for the present climate. It is more likely, however, that the current mood of tolerance was caused by fundamental educational and cultural shifts, some of which might themselves have produced the elaborate effort at judicial protection.[197] For example, no Supreme Court decision either legitimized or encouraged early criticism of the war in Vietnam,[198] yet the eventual success of that criticism in discrediting the war might not only have legitimized polit-

"heavy presumption" is overcome); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation against public official actionable if showing of reckless disregard for truth is made).

195 *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

196 *See* Elrod v. Burns, 427 U.S. 347 (1976).

197 *See supra* notes 28-37.

198 The early Supreme Court decision involving dissent over the war was United States v. O'Brien, 391 U.S. 367 (1968), which upheld a statute rather plainly aimed at preventing one of the major forms of protest against the war, the burning of draft cards. By that year there had already been four years of active protests and demonstrations against the war. Some of the most vocal and massive protests occurred in 1969, the year immediately following *O'Brien.*

ical dissent generally, but also emboldened the courts to attempt to protect such dissent.[199] It is as unreasonable to conclude on the basis of timing alone that the Court's efforts at protection caused the present culture of free and open communication as it would be to conclude that the failure of the Court to protect free speech during the Civil War caused the fiery dissent so common at that time.[200]

Second, the inference papers over important difficulties in defining "success" in promoting first amendment values. The defamation decisions presumably encouraged increased criticism of government officials. But how much of this new information is false? The patronage decisions presumably have at least marginally protected an individual's private decisions regarding political affiliation. But at what cost to party organization and ultimately to political accountability? More information is not necessarily better information.

Finally, even if it were possible to identify reasonably unambiguous areas in which judicial activity has actually promoted systemic free speech values, it is still too early to declare them a success. Just as overprotection of states' rights once helped to discredit the principle of federalism,[201] overprotection of the freedom of expression might gradually discredit the value of free speech. Judicial efforts—such as those to protect corporate expenditures, nude dancing, and advertising—erode popular support by breeding resentment and bringing into question the utility of free speech. A successful system of free speech must be maintained over long periods of time. Success in the short run might be counterproductive in the long run.

Proponents of the judicial role also assert that even if judges do not have special sensitivity to first amendment values, their political insulation means at least that they will have different values and will respond to different pressures than executive and legislative officials. This view emphasizes that judicial review is useful because it injects into public decisionmaking ideas and priorities that otherwise would be shortchanged or missing altogether. Because it is undeniably true that politicians are vulnerable to sudden shifts in mood and to occasional dark impulses to suppress, it may be that the judiciary—subject at least to *different* moods and impulses—might, at times, provide a useful brake

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199 It was *after* five years of vigorous public protest that the Court protected students' right to wear armbands, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), and it was after fully seven years of caustic public criticism of the war that the Court protected the publication of the Pentagon Papers, New York Times Co. v. United States, 403 U.S. 713 (1971); *cf.* Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,* 6 J. PUB. L. 279 (1957) (suggesting that Court follows and lends legitimacy to, only occasionally leading, national policies).

200 *See supra* note 95.

201 *See* Nagel, *Interpretation and Importance in Constitutional Law: A Re-Assessment of Judicial Restraint,* in LIBERAL DEMOCRACY 181, 196 (J. Pennock & J. Chapman eds. 1983).

against the political process. This is a relatively modest justification, however, and does not require a routine or pervasive judicial program of protections. Even so, it has gone untested. It does not necessarily follow from the supposition that judges react to different pressures that their reactions will be useful. Whether their reactions are useful depends on the nature of the suppressive moods that sweep the political arena. The psychological and social functions of the waves of suppression that arise (often during periods of warfare or economic instability) are complex and mysterious. They feed on personal insecurities and their main effect is sometimes to provide symbolic solidarity and reassurance—the psychological preconditions for tolerance.[202] Accordingly, these moods, if permitted to reach their extreme, sometimes generate their own political checks.[203] When such suppression would otherwise occur if unchecked, the judiciary's success in stopping specific forms of suppression will only cause a relocation of the urge to suppress or postpone the natural termination of the period of censorship. It is surely simplistic to assume that judicial review serves the larger purpose of reestablishing a climate for tolerance merely because judges respond differently than do the other institutions. Before concluding that a particular decision will actually provide long-term, systemic benefits, a court would have to understand many imponderables. Certainly the modern regime of pervasive judicial intervention in the political process is too reflexive to be responsive to its complexity.

CONCLUSION

In this essay I have questioned the belief that an extensive, detailed

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202 Higham, for example, describes how demands for outward conformity by recent immigrants during World War I resolved insecurities and greatly reduced nativistic intolerance:

> Yet, despite the indiscriminate anti-foreign suspicions omnipresent in the war mood, incidents of this kind [lynchings] were unusual . . . . The average non-German alien passed through 1917 and 1918 unscathed by hatred, and often touched by sympathy. The logic of 100 per cent Americanism was against him, but the war also created powerful forces which held that logic in check . . . . This was the paradox of American nationalism during the First World War. On the one hand it created an unappeasable and unprecedented demand for unity and conformity. On the other, it saved the foreigner from the persecutory or exclusionist consequences of this demand as long as he was non-German and showed an outward compliance with the national purpose. To a remarkable degree the psychic climate of the war gave the average alien not only protection but also a sense of participation and belonging.

J. HIGHAM, *supra* note 28, at 215.

203 Efforts to suppress abolitionist journalism in the North prior to the Civil War provide an example. Despite these widespread attempts, "abolitionist journalism expanded and flourished, and after 1840 it encountered little significant difficulty . . . ." R. NYE, *supra* note 104, at 124. One of the major reasons for the cessation of efforts at suppression was that the censorship had gone so far as to "take on dangerous implications" even to those who did not share the abolitionists' cause. *See id.* at 125-37. For other examples, see *supra* notes 100, 103, 104.

system of judicial protection can be expected to maintain an open system of public debate. At a minimum, the systemic utility of judicial review in free speech cases has been a matter characterized far too much by convenient assumptions and cheery faith. I suspect that few are willing to take the next step and accept my gloomy view that the Court's program, taken as a whole, has done great damage to the public understanding and appreciation of the principle of free speech by making it seem trivial, foreign, and unnecessarily costly. Probably even fewer will agree that these drawbacks are, for the most part, inherent in the judicial process and therefore can be avoided only by generally avoiding judicial review, not by using more skillfully contrived rules and doctrines. After decades of dependence, it is difficult to imagine *not* depending heavily on the courts to protect free speech.

I do not, however, intend to suggest that the courts can have no important role to play. Although the modern edifice of protections is not justified in systemic terms, careful analysis of many complex factors might, on rare occasions, lead a court to enhance significantly the level of public debate. More importantly, in many cases, doing justice to individuals may demand judicial protection against censorship.[204] Perhaps courts can convincingly explain why this is so if they turn their attention away from systemic objectives and focus instead on political legitimacy and the effects of censorship on the individual. It would at least be possible to assess the propriety of such decisions without an exaggerated sense of the stakes. Courts might decide cases on such a basis even in the face of their admitted ignorance about the potential systemic consequences and despite the possibility that doing justice in individual cases might sometimes actually be at odds with the maintenance of a general system of free debate.

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204 *See, e.g.*, Scanlon, *A Theory of Free Expression*, 1 PHIL. & PUB. AFF. 204 (1972); *cf.* Wellington, *supra* note 105, at 1105. Professor Scanlon analyzes freedom of expression in the context of the proper limitations of governmental power and the requirements of individual autonomy but not as a purely constitutional right. He suggests that, except in extreme situations like wartime, government should not place legal restrictions on expression even where such expression: (1) advances false beliefs; or (2) incites others to independent harmful acts. Professor Wellington, unlike Professor Scanlon, uses a constitutional analysis in which he discusses the importance of freedom of expression to individual autonomy and the political process. Although Wellington too would bar government from restricting expression that advances false beliefs, he would permit government to restrict advocacy that creates a clear and present danger of unlawful action.