

COMMENTS

WHY THE FIRST AMENDMENT SHOULD NOT BE INTERPRETED FROM THE PATHOLOGICAL PERSPECTIVE: A RESPONSE TO PROFESSOR BLASI

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I.

In a recent article, Professor Blasi has argued that the courts, particularly the Supreme Court, should adopt what he calls "the pathological perspective" in interpreting the first amendment.¹ Blasi's starting point is that the "pathologies about which courts ought to be concerned are time-bound and exceptional."² He uses the term "pathology" to refer to a social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe.³

These dynamics may operate in the legislative or executive branches of government and may even penetrate the judicial psyche and cause judges to interpret the first amendment restrictively. Nevertheless,

[o]ne feature unites the various pathologies that first amendment doctrine should be designed to combat: a shift in fundamental attitudes or perceptions among one or another group of persons whose judgments have an important influence on the general level and vigor of public debate and private inquiry.⁴

Blasi identifies several historical examples of such pathologies, including the Salem witchcraft trials, the Alien and Sedition Acts, the anti-Masonic hysteria of the 1820's and 1830's, and the repression of anarchists

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1. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

2. *Id.* at 450.

3. *Id.*

4. *Id.* at 451.

in the aftermath of the Haymarket riots of 1886.⁵ Blasi attempts to formulate first amendment doctrines with an emphasis on "how well they would serve in the worst of times."⁶

Starting from the truism that he who in times of crisis tries to preserve everything may end up preserving nothing, Blasi stresses that "[t]he salient feature of my thesis is the overriding importance it attaches to the goal of preserving the theoretical integrity and practical effectiveness of a limited number of propositions that can be said to constitute the 'core' of the speech, press, and assembly clauses of the first amendment."⁷ The first amendment, in turn, is seen as one of the "linchpins"—part of the "core," if you will—of the system of government established by the Constitution.⁸ Blasi's ultimate methodological premise—one which by itself I find uncontroversial—is that the central norms of a constitutional system must be designed with a view toward "continuity and stability."⁹ While, in normal times, the central norms of a constitutional tradition go unchallenged, "[i]n pathological periods, at least some of the central norms of the constitutional regime are indeed scrutinized and challenged."¹⁰ Moreover, "[t]here is reason to believe that susceptibility to pathological challenge is especially characteristic of the central constitutional norms regarding free expression and inquiry. . . . The aggressive impulse to be intolerant of others resides within all of us. It is a powerful instinct."¹¹ Blasi then attempts to ascertain the judicial methods and doctrines that would best preserve the core of the first amendment from erosion under the pressure generated by pathological conditions.

Blasi states what he considers to be the "core" of the first amendment in the following paragraphs:

Most of the value commitments that comprise the core of the first amendment are relatively specific in nature: Government cannot employ coercive measures to shape the content of news coverage. Private citizens cannot be penalized for holding unpopular political opinions or for criticizing particular government policies. The communication of a fact or value judgment relating to a matter of public concern cannot be prohibited solely on the ground that the communication is false, injures reputation, erodes moral standards, or stirs people to anger; some form of culpability on the part of the speaker must be established

5. *Id.* at 451 n.2. Elsewhere he includes the "Red Scare of 1919-1920" and the "McCarthy Era." *Id.* at 451, 456, 457.

6. *Id.* at 451.

7. *Id.* at 452.

8. *Id.* at 455.

9. *Id.* at 453.

10. *Id.* at 456.

11. *Id.* at 457.

before any of these consequences can serve as a basis for regulating speech. Publicly owned areas cannot be placed off limits to private speakers simply on the basis of the prerogatives of ownership; special justifications relating to competing public uses must be invoked. A private citizen cannot be required to affirm any loyalties or beliefs unless he seeks to occupy a position of responsibility for which certain loyalties or beliefs are relevant. Government cannot inquire into the private thoughts or political affiliations of any citizen except insofar as that information is important to an investigation of patterns of antisocial conduct or fitness for positions of special responsibility. An individual cannot be held accountable for the beliefs, intentions, or actions of other persons or organizations simply on the basis of his political association or affiliation with those persons or organizations.

A few propositions of a more general nature have received sufficient acceptance over time to qualify for inclusion in the core of the first amendment: A regulatory system that evaluates speech prior to its initial dissemination is especially problematic. Courts should be highly reluctant to base their decisions regarding constitutional protection on ad hoc judgments regarding the truth or social worth of particular communications. Arguments for regulation that depend on the claim that audiences will be injured or induced to injure others by the message conveyed by the speech must be treated with skepticism. Harms that allegedly flow from speech not immediately but by a process that takes time to develop seldom provide a legitimate basis for suppressing the speech; whenever feasible the state must employ alternative means of preventing harms of that sort.¹²

To preserve this core, Blasi argues for a "lean, trim first amendment"¹³ rather than a first amendment characterized by "a multi-factor balancing test, a multi-stage analysis with a threshold level-of-scrutiny determination, or a standard that is highly dependent on particularistic assessments of motive, risk, or efficiency."¹⁴ As he sees it, in order to protect against the intolerant impulses that are unleashed in pathological times, judges must try, in ordinary times, "to promote an attitude of respect, devotion, perhaps even reverence, regarding those central norms."¹⁵ They must also adopt, in ordinary times, methods that will, "by virtue of their formality, rigidity, built-in delays, or strong internal dynamics,"¹⁶ withstand the sense of urgency that characterizes pathological periods. Finally, they must also adopt, in ordinary times, "methodologies and doctrines" that take into account the highly politicized nature of pathological times and thus "assume less in the way of [the] political indepen-

12. *Id.* at 460-61 (footnotes omitted).

13. *Id.* at 477.

14. *Id.* at 473.

15. *Id.* at 467.

16. *Id.* at 468.

dence" of the judiciary.¹⁷

Blasi argues that a "lean, trim first amendment" that "cover[s] only activities most people would recognize as serious, time-honored forms of communication"¹⁸ can best serve these purposes because he discerns an inverse ratio between the ambit of coverage and "the ability of the courts to keep doctrine simple, informed by tradition, and dominated by principles."¹⁹ The wider the reach of the first amendment, the greater "the judicial affinity for instrumental reasoning, balancing tests, differential levels of scrutiny, and pragmatic judgments."²⁰ Moving on to specifics, in order to achieve the trim, lean first amendment he seeks, Blasi is prepared to exclude commercial advertising from the protection of the first amendment.²¹ On the other hand, owing to the need to guard against the pressures of pathological times, Blasi seeks greater first amendment protection for "the right to know,"²² greater protection of the freedom of association²³ in the form of a "stronger principle against guilt by association,"²⁴ "greater protection against compelled disclosure of a person's political affiliations,"²⁵ and heightened "control of political surveillance."²⁶ Likewise, "the adoption of the pathological perspective should lead courts to be more willing . . . to develop first amendment limitations on the authority of school boards to control the content of school libraries and classroom teaching."²⁷

Whether, on balance, this program for an expansive first amendment in certain areas is compatible with the drive for a "lean, trim first amendment" is an interesting question. I frankly have my doubts, but that is not one of the issues that I wish to discuss here. Instead, my thesis is that the overall approach to judicial decisionmaking advocated by Blasi is fundamentally wrong and in the long run dangerous. In what follows, I hope to show why this is so. In making my case, it should be obvious that I am not challenging the laudable motives and purposes that led Blasi to propound his thesis.

17. *Id.*

18. *Id.* at 477.

19. *Id.* at 479.

20. *Id.*

21. *Id.* at 485-89. He also questions whether "vivid depictions of genitalia in action [are] instances of the expression about which the first amendment is concerned." *Id.* at 477. Symbolic conduct and the expenditure of personal funds on political contests also appear to be activities that he doubts are within the core of the first amendment. *Id.*

22. *Id.* at 489-95.

23. *Id.* at 495-500.

24. *Id.* at 496.

25. *Id.* at 497.

26. *Id.* at 500.

27. *Id.* at 503. *See also id.* at 501-06.

II.

Although my difficulties with Blasi's thesis are much more basic, the notion that there is any such thing as a core area of the first amendment is a difficult one. There is a very strong and persuasive case that the first amendment was intended principally as a proposition about federalism.²⁸ Regulation of speech was a matter for the states, not Congress. Although Congress's right to enact the Alien and Sedition Acts may have been open to challenge, there was no consensus that the states could not enact similar legislation. If anything, the consensus was to the contrary. Jefferson for one made it clear that he believed the states could enact that kind of legislation; his contention was merely that Congress had no such authority.²⁹ In this regard, one must not forget Justice Harlan's opinion concurring in *Alberts v. California* and dissenting in *Roth v. United States*.³⁰ As he put it so eloquently:

The fact that the people of one State cannot read some of the works of D.H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to be intolerable, and violative of both the letter and spirit of the First Amendment.³¹

Furthermore, although Blasi purports to take a historical perspective in identifying the "core" of the first amendment,³² most of what Blasi identifies as the "core" is of very late genesis. The Supreme Court only started constitutionalizing the law of defamation in 1964 in *New York Times v. Sullivan*.³³ Although I would agree that this decision was

28. For a very persuasive recent presentation of this familiar thesis, see Van Alstyne, *Congressional Power and Free Speech: Levy's Legacy Revisited* (Book Review), 99 HARV. L. REV. 1089 (1986). This is a review of L. LEVY, *EMERGENCE OF A FREE PRESS* (1985), which is in effect a second edition of L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960). See also Kurland, *Public Policy, the Constitution, and the Supreme Court*, 12 N. KY. L. REV. 181, 189 (1985).

29. See Jefferson's famous and much cited letter of 1804 to Abigail Adams recognizing the power of the states to control the press that is quoted in *Dennis v. United States*, 341 U.S. 494, 522 n.4 (1951) (Frankfurter, J., concurring), and cited in Justice Brennan's opinion for the Court in *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

30. 354 U.S. 476, 496 (1957) (both cases decided *sub nom.* *Roth v. United States*).

31. *Id.* at 506 (Harlan, J., concurring in *Alberts* and dissenting in *Roth*). Justice Harlan's fear that a policy of incorporating almost all the strictures of the Bill of Rights into the fourteenth amendment might eventually lead to a watering down of the Bill of Rights has proved not to be such a chimerical apprehension. See *Williams v. Florida*, 399 U.S. 78, 117-18 (1970) (Harlan, J., concurring) ("The necessary consequence of [the Court's holding that Florida's six-member-jury statute satisfies the Sixth Amendment as carried to the states by *Duncan*] is that 12-member juries are not constitutionally required in federal criminal trials either.").

32. Blasi, *supra* note 1, at 460 ("[I]t should come as no surprise that the value commitments I regard as most significant in determining the core of the first amendment are those that are forged in the foundry of political experience.").

33. 376 U.S. 254 (1964).

a welcome development, it seems odd, from a historical perspective, to call a development that occurred some 170 years after the adoption of the first amendment part of that amendment's core, while excluding other recent developments such as the extension of first amendment protection to commercial speech³⁴ and to the definition and regulation of obscenity.³⁵ Blasi emphasizes political speech.³⁶ Those of us who can remember with Justice Harlan when D.H. Lawrence's *Lady Chatterly's Lover* was unavailable in this country, to say nothing of the works of Henry Miller, might not be disposed to focus so strongly on speech that affects public affairs. Once one abandons the historical perspective, the so-called "core" is largely in the eyes of the beholder; consequently, it is much more questionable for one person to argue that what he considers part of the "core" of the first amendment should receive protections not available to speech that is part of someone else's core. My personal view is that debate over the so-called "core" of the first amendment is ultimately fruitless. Be that as it may, however, my differences with Blasi are much more basic. It is these differences to which I now turn.

34. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980); *Bates v. State Bar*, 433 U.S. 350, 363 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976).

35. See *Roth v. United States*, 354 U.S. 476 (1957). In *Roth* the Court first held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484. It then went on to hold that "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.* at 487. Obscenity was to be determined by "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. Subsequently in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), a plurality of the Court adopted a three-pronged test: (1) whether the dominant theme of the material taken as a whole appeals to a prurient interest in sex, (2) whether the material is "patently offensive because it affronts contemporary standards relating to the description or representation of sexual matters," and (3) whether "the material is *utterly* without redeeming social value." *Id.* at 418 (emphasis added). In *Miller v. California*, 413 U.S. 15 (1973), the Court substituted for the third prong in *Memoirs* the question "whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value." *Id.* at 24. It specifically rejected the utterly-without-redeeming-social-value test of *Memoirs*. *Id.* at 24-25.

Blasi indicates that he is not unhappy with the Court's doctrinal reformulation of the obscenity test in 1973; he comments that the reformulation "defuse[d] demands to repress speech without seriously undermining the expressive liberties in dispute." Blasi, *supra* note 1, at 478 (citing *Miller* and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)). Blasi does disapprove, however, of a strategy that opts for an expansive first amendment in normal times so that, in pathological times, the Court can placate critics by discarding the marginal excess of doctrinal development. Blasi believes that rather than placating those who would repress speech, such a strategy would actually expand their appetite for more repression of speech. That is why Blasi wants a lean, trim first amendment from which there will be no retreat. Blasi, *supra* note 1, at 476-80.

36. Blasi, *supra* note 1, at 460-61.

III.

The notion I find most troublesome in Blasi's argument is that, in deciding individual cases, courts must constantly keep in mind strategic considerations. In recent years, two ideas have taken hold of much of the academic imagination. The first is that there are "right" answers to even difficult legal cases. Professor Dworkin has made a career of propounding and reformulating this position.³⁷ The second is that legal decisions are a species of political decision not merely in the sense that they involve the application of power by state organs but more fundamentally because they are and must be motivated by basic political theories and strategies.³⁸ Dworkin subscribes to both ideas.³⁹ These views have led to his

37. Among the more important examples of Dworkin's efforts prior to 1980 are: Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*]; Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), reprinted in *TAKING RIGHTS SERIOUSLY*, supra, at 81-130; and Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978). A critical discussion of these and other essays of Dworkin, together with citations to the critical comment that Dworkin's thesis has provoked, is contained in G. CHRISTIE, *LAW, NORMS AND AUTHORITY* 8-9, 38-41 (1982). For citations to Dworkin's later work, see *infra* note 38.

38. The vast "Critical Legal Studies" literature emphasizes this point. See, e.g., Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 634-41 (1983); *Critical Legal Studies Symposium*, 33 STAN. L. REV. 1 (1984). See also R. DWORKIN, *LAW'S EMPIRE* 95-96, 248, 345-47 (1986) [hereinafter *LAW'S EMPIRE*]; R. DWORKIN, *A MATTER OF PRINCIPLE* 119-77 (1985) [hereinafter *A MATTER OF PRINCIPLE*]; Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173 (1985). Dworkin argues in these works that judicial decisions must withstand the test of "political morality." Among the passages that expressly recognize the political character of judicial decisionmaking is the following:

I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance.

A MATTER OF PRINCIPLE, supra at 146. For a perceptive criticism of *A MATTER OF PRINCIPLE*, see Letwin, Book Review, *THE AMERICAN SPECTATOR*, Jan. 1986, at 33-40. For criticism of *LAW'S EMPIRE*, see Christie, Book Review, 1987 DUKE L.J. (forthcoming).

The acceptance of the proposition that law is politics is of course not confined to Dworkin and the Critical Legal Studies school. In addition to Blasi, whose position I am about to address, many people would include those individuals who are associated with the so-called "law and economics" school who view the mission of the law to be the achievement of economic efficiencies and wealth maximization. See R. POSNER, *THE ECONOMICS OF JUSTICE* (1981); see also Easterbrook, *The Supreme Court, 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); cf. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055-56 (1984) (contending that we are, as lawyers, obliged to recognize that the Constitution has been "amended" by political events, such as the New Deal).

39. See supra notes 37-38. Dworkin does not assert that judicial decisionmaking is the same as legislative decisionmaking. In putting forth the right-answer thesis, he insists that there is a difference between the two. Although Dworkin now recognizes that legislators also have an obligation to act according to principle, see *LAW'S EMPIRE*, supra note 38, at 176-84, legislators may, nevertheless, also resort to policy considerations. Yet judges may rely only on principle. At the level of

more recent interest in the similarity he finds between the task of the literary critic trying to come up with the "best" interpretation of a literary text and the task of the judge trying to come up with the "best" decision in light of the legal traditions of his society as informed by the basic morality underpinning that society.⁴⁰ Blasi clearly subscribes to the second of these postulates, that legal decisionmaking is a form of political decisionmaking. By implication he also subscribes to the proposition that, at least in certain areas, there are clearly correct answers which the legal process must discover and propound, even at some cost to innocent third parties. In more concrete terms, Blasi is asserting that a person with a claim that may have a great deal of precedential support should nevertheless be left remediless if his claim involves "commercial speech" or the regulation of "obscenity," areas in which, for strategic reasons, the Court should adopt a lower profile. I find it a disturbing suggestion that a person's legal claim should stand or fall, not on the strength of his argument, but on some strategic view taken by the Court or on the background views of some member of the Court regarding what is good for society.

It would be foolish to claim that law is totally divorced from politics or that the personal preferences of judges never intrude into judicial decisionmaking. The question is whether law is the same thing as politics, or if one wants to talk in the more elevated language of Dworkin, whether law is the same thing as the search for moral perfection. In many ways the current dispute brings to mind the controversy Professor Wechsler generated when he called for a Court that would decide constitutional issues on the basis of "neutral principles."⁴¹ Of course, there is no such thing as a "neutral principle," but Wechsler's point was that the Court

generalization on which Dworkin places his discussion, the distinction between policy and principle is quite difficult to grasp. Nonetheless, he insists upon the distinction. For example, in discussing *McLoughlin v. O'Brian*, [1983] 1 A.C. 410, a case in which the House of Lords held that a mother who first viewed her battered family in the hospital an hour and a half after the accident could recover for negligent infliction of emotional distress, Dworkin asserts that a principled decision of such a case must choose among a number of principles that the institutional history of the law suggests as possible determinants of the correct decision. These include:

(5) People have a moral right to compensation for emotional or physical injury that is the consequence of careless conduct, but only if that injury was reasonably foreseeable by the person who acted carelessly. (6) People have a moral right to compensation for reasonably foreseeable injury but not in circumstances when recognizing such a right would impose massive and destructive financial burdens on people who have been careless out of proportion to their moral fault.

LAW'S EMPIRE, *supra* note 38, at 241. The difference between these sorts of motivating considerations, especially number 6, and what most people would call policy, frankly escapes me. The difference seems largely verbal. On the question whether judges can or should eschew policy considerations, see Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977).

40. See *supra* note 38.

41. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

was doing things that were clearly unprincipled, such as dismissing a challenge to an antimiscegenation statute on what Wechsler called "procedural grounds that I make bold to say are wholly without basis in law."⁴² The late Professor Bickel answered Wechsler by distinguishing the Court's control of its docket and its decisions as to which issues it would address in a case from actual decisions on the merits.⁴³ As a player in the game of government, the Court had to conserve its capital. It could thus engage in realpolitik in managing its docket and in using other techniques to avoid sensitive questions—indeed it had no choice but to do so. According to Bickel, however, the Court could not resort to such stratagems in deciding an issue on the merits; in its decision on the merits, the Court could not ignore Wechsler's thesis. Whether Congress in 1925 would have given the Court as much control over its docket had it realized that the Court would adopt such instrumental and politicized views in the management of its appellate as well as of its *certiorari* docket is an interesting question. Indeed, one might well ask how the present Congress—or the public at large—would react if the Court were to announce that it followed such a politicized strategy in managing its docket.

The forces underlying the controversy over the correct perspective in constitutional adjudication manifest themselves in many other guises. Blasi is not alone among currently active scholars in urging the Court to engage in "strategic" thinking in its decisionmaking process. Some of the most recent important work in constitutional law has been written from a strategic perspective. We have been told that judicial review should be at its most rigorous when the Court perceives that the interests of certain groups are insufficiently represented in the legislative process.⁴⁴ At the same time we have been told that the Court should avoid deciding cases concerning the respective powers of the President and the Con-

42. *Id.* at 34. The case was *Naim v. Naim*, 350 U.S. 985 (1956), in which the Court, after having previously remanded the case to the Supreme Court of Appeals of Virginia, dismissed the case on the ground that the decision on remand left the case "devoid of a properly presented federal question." *Id.*

43. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). The key portion of this work for the present discussion is chapter four, "The Passive Virtues," where Bickel discusses the Court's control over its docket. Bickel also discusses in this chapter the uses—or the manipulation, if you will—of the doctrine of "ripeness" to decline to hear appeals as well as the principle of deciding cases on the narrowest possible grounds. It should be mentioned that Wechsler, *supra* note 41, at 5-6, rails against the idea that the Court can base a decision as to whether to decide a case on "how importunately it considers the occasion to demand an answer." For a good response to Bickel's thesis, see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

44. See J. ELY, *DEMOCRACY AND DISTRUST* 146-65 (1980); see also Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69-72 (1985).

gress, or concerning the powers of Congress with regard to the states.⁴⁵ Whatever one thinks of the merits of these proposals, can one honestly disagree with Professor Van Alstyne's suggestion that, had these special theories of constitutional adjudication been expressly written into the Constitution or raised in debate at the Constitutional Convention, they would have been emphatically and overwhelmingly rejected?⁴⁶

My principal criticism of Blasi and the "strategic" point of view that he espouses is that some sacrifice of individual litigants is inevitable so long as one believes either that there are right answers to legal issues given by a broader moral perspective or that there are broad strategic considerations that must motivate a politically astute court. A clever person, of course, can always "explain" to a DeFunis or a Bakke that *Sweatt v. Painter*⁴⁷ really does not control the disposition of his case because, according to a "correct" background moral theory, denying admission to him does not demigrate his right to equal respect as a person, whereas denying Sweatt admission to law school does.⁴⁸ If one eschews the model of moral gymnastics, however, one can more candidly argue, as does Blasi, that some things are just more important than other things and that sometimes, for the sake of the greater good, the lesser good must be sacrificed. Blasi is interested in sacrificing commercial speech or in

45. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175, 263 (1980).

46. See Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983); see also Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933.

47. 339 U.S. 629, 635 (1950).

48. This is precisely the argument made by Dworkin to explain his disagreement with those who claimed that had *DeFunis v. Odegaard*, 416 U.S. 312 (1974), been decided on the merits, DeFunis would have prevailed. The Court, with Justice Douglas arguing in dissent that DeFunis should have prevailed on the merits, dismissed the case as moot since DeFunis, who had been admitted to the University of Washington while the litigation was running its course, had entered his last semester of study. Dworkin argued that, despite *Sweatt*, DeFunis did not have a valid claim. R. DWORKIN, *Reverse Discrimination*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 37, at 223-39. Subsequently, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978), the Court upheld the Supreme Court of California's order that Bakke be admitted to medical school and its invalidation of the procedures for special admissions to the University of California at Davis Medical School under which Bakke had been denied admission and minority candidates with lower academic statistics had been granted admission. A majority of the Court was unwilling to hold, however, that race could *never* be a consideration in the admissions of a state university. *Id.* at 272, 319 n.53, 320, 379. The *Bakke* case also attracted Dworkin's attention. Two essays, one written before the Court decided the case, the other after the decision, are reprinted in *A MATTER OF PRINCIPLE*, *supra* note 38, at 293-315. He also discussed *Bakke* in *LAW'S EMPIRE*, *supra* note 38, at 393-97. His argument is basically that neither Bakke or anyone else has a right to be admitted to medical school: the only right Bakke has is not to be discriminated against because of prejudice. According to Dworkin, denying Bakke admission because of an affirmative-action program does not reflect any prejudice against him.

accepting a moderate amount of regulation of obscenity not because he is unsympathetic to these claims for first amendment protection, but because he realizes, as a rational, prudent man, that one cannot have everything. He tries to save what is most important. Blasi's candor in accepting the inevitable consequences of his position is refreshing, although it is precisely that candor that has brought forth this riposte.

Given the perspective from which he is writing, presumably Blasi would applaud the result, although not necessarily the reasoning, of the recent *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁴⁹ In this case, which involved a commercial credit report, the Court decided, in the words of Justice Powell, that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern."⁵⁰ Perhaps Blasi might also approve of the reasoning in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,⁵¹ an even more recent case in which the Court held that since Puerto Rico could prohibit casino gambling, if it wished, it could adopt the less restrictive alternative of severely limiting even truthful and nonmisleading advertising of casino gambling on the ground that merely commercial speech is involved. I frankly am appalled by both decisions and the reasoning upon which they are based. In particular, how *Dun & Bradstreet* can be reconciled with *Gertz v. Robert Welch, Inc.*,⁵² in which Justice Powell wrote for the Court, completely escapes me.⁵³ The only comprehensible justification of *Dun & Bradstreet* seems to be a strategic perspective such as the one put forth by Blasi.

49. 105 S. Ct. 2939 (1985).

50. *Id.* at 2948. Justice Powell wrote for a plurality of himself and two other Justices. Chief Justice Burger and Justice White concurred in the Court's judgment but they took the more coherent, though I would argue misguided, approach that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), should be overruled. *Id.* at 2948-54. See *infra* note 53.

51. 106 S. Ct. 2968 (1986).

52. 418 U.S. 323 (1974).

53. The Court expressly held in *Gertz* that in an action against a "publisher or broadcaster," neither presumed nor punitive damages could be awarded absent a finding of constitutional "malice"—either knowledge of falsity or reckless disregard of truth or falsity. It made this ruling in a case in which it adopted a set of distinctions based on the status of the plaintiff—whether he was a private person as opposed to a public official or public figure—in place of the "public or general interest" distinction enunciated by a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971). The reason for rejecting the *Rosenbloom* test was that "[w]e doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of *New York Times* privilege and the common law of strict liability for defamatory error." 418 U.S. at 346. After this supposedly landmark decision, it seems astounding that the Court would decide in *Dun & Bradstreet* that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Dun & Bradstreet*, 105 S. Ct. at 2948.

If one accepts, as I do, that the rule of law is not merely rule by courts and that the rule of law is more important than the right answer to any legal question, one might find another model of the legal process not only more plausible but also more desirable. (1) It goes against experience to contend that there are always correct decisions to legal cases. At the same time, it seems clear that there are decisions of legal cases that are incorrect.⁵⁴ (2) The litigants in any given case are entitled to feel that their case is being taken seriously by a court that will decide the case on the basis of proofs and arguments put forward by the parties and not on the basis of some preconceived idea of what is good for the country, or the world, or the universe, or on the basis of some prudential strategy of judicial decisionmaking. In other words, the correct decision in any particular case must be one that is primarily determined by the dynamics of the legal argument in that particular case rather than by a theory of the good encompassing the whole of society.⁵⁵ (3) In a world of diverse social, moral, and political perspectives, sometimes the most a legal decisionmaking procedure can achieve is consistency; and certainly that is the least it should seek to achieve. A society that claims it operates by the rule of law is pledging to its citizens that it will treat them all in a consistent manner. I have elsewhere described a model of consistency in legal decisionmaking,⁵⁶ and I do not wish to lengthen this response to Blasi by describing that model here. Suffice it to say, however, that if one despairs of the possibility of coming up with an adequate model of consistency in the law, then one must abandon any claim for objectivity in legal decisionmaking. Law becomes not merely politics but politics with a cynical vengeance because it is dressed in a robe of hypocrisy.⁵⁷

As Blasi recognizes, our society has survived many pathological periods. Indeed, it has more than survived. Despite some recent cases like *Dun & Bradstreet* and *Posadas*, the first amendment is as strong today as it has ever been. Pathological times will have to take care of themselves. We should not sacrifice litigants in normal times in order to create some speculative, and, for all we know, ineffective bars to repressive action in pathological times. The pathological perspective is not justified by

54. For a model of judicial decisionmaking that incorporates this and the following two postulates, see Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1314, 1330 (1969).

55. The theories of Judge Posner and others who insist that the common law is and must be driven by notions such as economic efficiency or the maximization of wealth, see *supra* note 38, are vulnerable to the same criticism.

56. See Christie, *supra* note 54. This model has been incorporated into a more wide-ranging discussion of the relationship of law to authority and of the relationship of consistency to the broader issues of the normative nature of law. G. CHRISTIE, *supra* note 37.

57. This of course is the charge made by members of the Critical Legal Studies school, for whom strategic theories of constitutional adjudication provide ample ammunition.

Blasi's fear that being too solicitous of free speech claims in normal times may lead people to believe that all free speech claims, from the most unusual or frivolous to the most traditional, are cut from the same cloth.

Fiat justitia, ruat coelum may be unachievable and, in some situations, perhaps even dangerous,⁵⁸ but it is still the best maxim anyone has come up with to describe the ideal of the rule of law. I have yet to see strategic considerations for which I would sacrifice it.

58. In the film *Fail-Safe* (Columbia 1964), the President of the United States orders the dropping of an atomic bomb on New York, where his wife and daughter are shopping, to convince the Soviet Union that the dropping of an atomic bomb on Soviet territory was in fact accidental. When the stakes are high enough, we are led to consider, perhaps, that the killing of the innocent may be a moral necessity. The film was based on E. BURDICK & J. WHEELER, *FAIL-SAFE* (1962).