BICENTENNIALIZING FREEDOM OF EXPRESSION

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I. INTRODUCTION

Among the crown jewels of the Bill of Rights are the freedoms of expression embedded in the First Amendment.[1] The words, totaling thirty-three in number, are seemingly clear and crisp: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2]

The time has now come to pay a bicentennial homage to these constitutional promises of free expression. To do so re-

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[1] At the author's request all references to the various parts of the Constitution will remain capitalized.

[2] U.S. CONST. amend. I. The four freedoms or rights specified in the First Amendment "have never been clearly differentiated; rather the First Amendment has been construed as guaranteeing a composite right to freedom of expression. The term 'freedom of speech,' therefore, in popular usage as well as in legal doctrine, has been considered roughly coextensive with the whole of the First Amendment." Emerson, *Freedom of Speech*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 790 (1986).

See Thomas v. Collins, 323 U.S. 516, 530 (1945) (citations omitted) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and therefore are united in the First Article's assurance."); Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 599 (1979) ("The framers wanted to protect expression whether in unprinted or printed form. . . . The two phrases ["freedom of speech" and "freedom of the press"] were used interchangeably, then as now, to mean freedom of expression."). *See also* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) ("We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press.").

quires more than a literal reading of the clear, crisp language, more than a search for some ephemeral "original intent" of the framers of that language. Attention must also be paid to the historical and philosophical context out of which arises the concept of the freedom to speak one's mind without governmental interference. Then add the fact that these 200-year-old words must somehow accommodate the vastly expanding modes of expression and repression that mark our modern technological society. Particularly during the past fifty years, there has been an explosive growth in the number of occasions and situations in which the legitimacy of expressive speech or conduct depends upon a new or expanded interpretation of these few words. As the second Justice Harlan once observed, "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."[3]

Sitting in brooding omnipresence over all these dynamic elements of free expression is the Supreme Court of the United States. On that Court rests the responsibility for giving ongoing life, meaning, and application to these few words written so many years ago. The result has been a rich and growing jurisprudence of free expression, thereby reconstructing the First Amendment into what Justice Scalia has called "A House with Many Mansions."[4] But within that house lies a bicentennial anomaly.

The 1789 work by the congressional drafters of the free expression provisions was virtually still-born, at least insofar as judicial respect and enforcement were concerned. Those magnificent promises lay fallow and largely untended by the federal judiciary for nearly 130 years. During the latter part of the nineteenth century and the early part of the twentieth, there were numerous cases in state and federal courts involving claimed denials of freedom of expression.[5] But the overwhelming majority of these courts

> rejected free speech claims, often by ignoring their existence. No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dis-

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[3] Cohen v. California, 403 U.S. 15, 24 (1971).

[4] This phrase is the title of Justice Scalia's remarks, delivered in 1986 prior to his elevation to the Supreme Court, at a Macalester College conference on the Constitution, freedom of expression, and the liberal arts. *See* THE CONSTITUTION, THE LAW, AND FREEDOM OF EXPRESSION 1787-1987, at 9 (J. Stewart ed. 1987) (for a printed record of the remarks).

[5] *See, e.g.*, Patterson v. Colorado, 205 U.S. 454 (1907); Davis v. Beason, 133 U.S. 333 (1890).

> senting opinion in a First Amendment case. Most decisions by lower federal courts and state courts were also restrictive, although there were some notable exceptions. . . . [T]he widespread judicial hostility to the value of free speech transcended any individual issue or litigant.[6]

Not until after the end of World War I did the nation or the Court begin to give serious heed to what was written in 1789. And only several decades thereafter did the Court begin the serious job of reconstructing the First Amendment in accord with the 1789 master plans. Thus, to celebrate the bicentennial of the free expression guarantees is to do little more than honor the foresight and the written promises of the framers, rather than to celebrate two centuries of enforcing those promises. We have not even reached the centennial mark with respect to putting judicial flesh on the bare bones of these thirty-three words.

We begin our bicentennial tale with a review of the historical and philosophical sources and justifications for recognizing and protecting the right of each individual to speak freely, to write freely, to assemble peaceably, and to petition for a redress of grievances.[7] We shall then examine which, if any, of these justifications underlie the creation of the First Amendment, and which justifications underlie the Supreme Court's stewardship of the First Amend-

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[6] Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 523 (1981). This article has done much to dispel the scholarly notion that the Supreme Court's concerns with the First Amendment did not begin until Congress passed the Espionage Act in 1917, resulting in such decisions as Schenck v. United States, 249 U.S. 47 (1919). As Rabban pointed out, in the generation preceding World War I the consequences of industrialization led to great social unrest and radical activity, such as the violence associated with the Homestead and Pullman strikes in the 1890's, the fear of anarchists generated by the Haymarket riot of 1886, and the notoriety of World War I and Emma Goldman in the early 1900's. Rabban, *supra*, at 519. Such turbulence led those involved to increase their reliance on First Amendment protections. During this pre-war period, Rabban noted:

> [The Supreme Court] refused to apply the First Amendment to state action, found no First Amendment concerns in statutes restricting the use of the mails, simply ignored free speech issues in some cases, and held that certain categories of expression did not constitute 'speech.' On those relatively few occasions when it directly addressed the meaning of the First Amendment, the Court uniformly upheld restrictions on speech. Only a few opinions contained signs of a more generous interpretation of the value of free speech and the scope of the First Amendment.

Id. at 525.

[7] For more comprehensive overviews of the theoretical and practical justifications for recognizing that all individuals should be able to express themselves freely, see F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-86 (1982); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-93 (1963).

ment in contemporary times. We shall also examine whether the Court's role in giving life to these constitutional guarantees is consistent with the root purposes of the 1789 promises. Finally, what of the efforts in 1989, the bicentennial year, to amend or repeal the so-called "flag-burning" portion of the First Amendment?

II. THE ROOTS OF FREEDOM OF EXPRESSION

What is the philosophical and realistic source of the First Amendment right to freedom of expression? We find that history answers that question by offering at least four explanations or justifications, each of which finds some support in Supreme Court jurisprudence.

A. The Search for Truth

Historically, the most frequent argument advanced to justify freedom of expression is that such freedom leads to the discovery of truth. Political truths can be found and rational judgments can be reached, so the argument goes, only if we allow open discussion, free exchange of ideas, examination and consideration of all the facts and contentions, and the full use of all schools of thought to sift the true from the false. As John Stuart Mill wrote in his 1859 essay *On Liberty*:

> [I]f any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility . . . though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.[8]

This notion that the search for truth is the *sine qua non* of the freedoms of speech and press first emerged at the Supreme Court

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[8] J. MILL, ON LIBERTY 115-16 (Penguin Books ed. 1982). Earlier, in 1644, John Milton argued, in his essay *Areopagitica*, that the prior restraint doctrine should be abandoned by Parliament because it discouraged learning and the search for truth. In Milton's words: "And though all the windes of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter." Milton, *Areopagitica*, in 4 THE WORKS OF JOHN MILTON 347 (W. Haller ed. 1931). However, Milton's reputation as the earliest great apostle of the human mind and the search for truth suffers from his other writings to the effect that freedom of inquiry and debate should be limited to Protestants. *See* L. LEVY, EMERGENCE OF A FREE PRESS 93-97 (1985).

level in the dissent of Justice Holmes in *Abrams v. United States*.[9] There he wrote that the ultimate good desired by the holders of strong opinions "is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[10] Justice Brandeis continued this "truth-seeking" dialogue in his concurrence in *Whitney v. California*,[11] writing that those who won this nation's independence "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile . . . ."[12] In more recent times, the Court has frequently accepted and reiterated the Holmes-Brandeis truth-seeking formula for justifying free speech. In *Red Lion Broadcasting Co. v. Federal Communications Commission*,[13] for example, the Court proclaimed: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[14] Similarly, in *Bose Corp. v. Consumers Union of United States*,[15] the Court emphasized that, in the contemplation of the First Amendment, freedom to speak one's mind "is essential to the common quest for truth and the vitality of society as a whole."[16]

Identifying the common quest for truth as a justification for preserving each individual's right to speak freely has several serious flaws, as Professor Schauer has so convincingly demonstrated.[17]

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9 250 U.S. 616 (1919).

10 *Id.* at 630 (Holmes, J., dissenting).

11 274 U.S. 357 (1927).

12 *Id.* at 375 (Brandeis, J., concurring). *See also* Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 956 (1919). In his book Chafee stated:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest.

Chafee also considered the First Amendment "a declaration of national policy in favor of the public discussion of all public questions." *Id.* at 934.

13 395 U.S. 367 (1969).

14 *Id.* at 390.

15 466 U.S. 485 (1984).

16 *Id.* at 503-04. This language from *Bose* was approvingly quoted by Chief Justice Rehnquist in Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988). Justice Powell in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980), similarly echoed the Holmes-Brandeis remarks regarding the search for political truths in the marketplace of free discussion.

17 *See* F. SCHAUER, *supra* note 7, at 25-34.

First, this argument rests on certain assumptions that cannot be historically or empirically demonstrated. The assumptions are: that there is such a thing as the "truth" in matters of public concern and that the "truth" will emerge and prevail over the "false" when juxtaposed; that there is such a thing as the "truth" to be uncovered in robust debates over nonpolitical matters and pursuits; and the "truth" in any of these contexts is that which ultimately prevails in the metaphoric marketplace of ideas, a marketplace in which the public, or at least those of the public who participate in the debate, rationally consider all points of view and tolerate or encourage differing and perhaps irrational arguments.[18] In short, the truth-seeking justification unrealistically equates the public processes of arriving at general policy decisions with the more rational and academic techniques of reaching scientific "truths" or conclusions.[19]

Second, the truth-seeking argument elevates the search for "truth" to a position of absolute priority over all other values. Public policy decisions involve many other values, such as compromise and overriding public concerns, that may dilute or even erase the so-called "truth." Yet, to the extent that the truth-seeking argument is forced to concede that there may be time, place, and manner restrictions on the perceived "truth," the argument becomes little more than a truism, such as the "truth" is one of the values to be considered in the course of public dialogue. It should also be noted that, in our form of government, the ultimate power to determine what is a political "truth" and to reject what is "false" often lies more in the realm of governmental bodies than in the general public. It is in those bodies that various other values may come to the fore.

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[18] "And what of falsity: is not the right to differ about what *is* 'the truth' subtly endangered by a theory that perceives communication as no more than a system of transactions for vanquishing what is false?" L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 786 (2d ed. 1988) (emphasis in original).

[19] It is hardly surprising that the search for truth was so central in the writings of Milton, Locke, Voltaire, and Jefferson. They placed their faith in the ability of reason to solve problems and distinguish truth from falsehood. They had confidence in the reasoning power of *all* people, if only that power were allowed to flourish. The argument from truth is very much a child of the Enlightenment, and of the optimistic view of the rationality and perfectibility of humanity it embodied. But the naivete of the Enlightenment has since been largely discredited by history and by contemporary insights of psychology. People are not nearly so rational as the Enlightenment assumed, and without this assumption the empirical support for the argument from truth evaporates.

F. SCHAUER, *supra* note 7, at 26 (emphasis in original).

B. Promotion of Democracy

Closely allied with the "truth-seeking" purpose of free speech is the Alexander Meiklejohn argument that the First Amendment protects free speech as being indispensable to the effective operation of a democratic form of government.[20] This argument proceeds on the theory that "We the People" are constitutional sovereigns and that government derives its just powers from the consent of these sovereigns. From that, the argument follows that full freedom of expression is necessary in order to form the individual and collective judgments of the people, judgments to which government must be responsive in a democratic society. Freedom of expression, under this theory, also serves as a check on abuse of power by public officials.

Justice Brandeis' concurrence in *Whitney v. California*[21] emphasized this "pro-democracy" justification, proclaiming that the framers believed that "public discussion is a political duty" and that the path of a safe, stable government "lies in the opportunity to discuss freely supposed grievances and proposed remedies."[22] The Court has echoed these "pro-democracy" sentiments on numerous occasions. In *Stromberg v. California*,[23] the Court opined that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[24] A unanimous

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[20] *See* A. MEIKLEJOHN, POLITICAL FREEDOM 8 (1960); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 1 (1948). *See also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (comparing Meiklejohn's views with those of Supreme Court opinions).

[21] 274 U.S. 357 (1927).

[22] *Id.* at 375 (Brandeis, J., concurring). This Brandeis celebration of free speech as a political duty that takes civic courage in our society was quoted by the Court in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). *See also* Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988) (analyzing the Brandeis opinion and concluding that it was one of the turning points in the history of First Amendment adjudication).

[23] 283 U.S. 359 (1931).

[24] *Id.* at 369. This quotation has been repeated several times by the Court. *See, e.g.*, Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). *Sullivan* also quotes the sentiment from Roth v. United States, 354 U.S. 476, 484 (1957), that the freedom of expression secured by the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Sullivan*, 376 U.S. at 269.

Court, in *De Jonge v. Oregon*,[25] stated that the preservation of the constitutional rights of free speech, free press, and free assembly, is imperative "in order to maintain the opportunity for free public discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[26]

Without in any way denigrating the importance of free speech in a democratic society, we can perceive that this "democracy-promotion" theory may prove too much in some respects. If we consider the people collectively to be sovereign, "then acceptance of this view of democracy compels acceptance of the power of the sovereign to restrict the liberty of speech just as that sovereign may restrict any other liberty."[27] Majority rule is certainly the essence of democracy. However, just as certainly, the First Amendment does not mean that the sovereign, having been fully advised by a cacaphony of free voices, can in the name of a majoritarian democracy forbid or suppress minority viewpoints.

Moreover, the "democracy-promotion" argument, like the "truth-seeking" argument, projects a national town-meeting scenario, where political and other public matters are vigorously debated and then rationally resolved. But there is no room in this scenario for free speech, or arriving at the "truth," in matters such as art, literature, drama, history, or ethics,[28] or for the various forms of commercial free speech.[29] When these arguments

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25 299 U.S. 353 (1937).

26 *Id.* at 365. *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) ("expressly guaranteed [First Amendment] freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

27 F. SCHAUER, *supra* note 7, at 40.

28 "But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977). On the other hand, certain types of expression — the obscene, the profane, the libelous, the insulting or "fighting" words — on occasion fall outside the constitutional wall of protection, the theory being that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. " Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *Cf.* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that only political speech, as opposed to scientific or literary utterances, should be protected — an argument that Bork later revised).

29 "There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.' " Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985).

are expanded to encompass freedom of expression in the non-political areas of human endeavor, the arguments are not very helpful in justifying the broad sweep of the First Amendment.

C. *Individual Self-Fulfillment*

The right of free expression has also been justified as a natural right of each of us in our individual capacities. As Professor Emerson has noted, this argument derives from

> the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. . . . From this it follows that every man — in the development of his own personality — has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account.[30]

A corollary to this notion is that the health of a nation of self-government is nurtured by the contributions of free-thinking individuals, that development of the individual is a requisite of democracy.[31]

On various occasions the Supreme Court has recognized this "self-fulfillment" theory, while refusing to give it complete dominance in the marketplace of public affairs. In *Bose Corp. v. Consumers Union of United States*,[32] for example, the Court wrote that "the freedom to speak one's mind is . . . an aspect of individual liberty — and thus a good unto itself."[33] Writing for the Court in *First National Bank of Boston v. Bellotti*,[34] Justice Powell stated that "[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge."[35] Or, as explained in *Garrison v.*

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[30] Emerson, *supra* note 7, at 879. Professor Schauer conceives the "self-fulfillment" argument to be composed of two elements: (1) free speech is "a good in itself, without need of further justification;" (2) free speech is "among the primary components of that amorphous credo that is commonly called 'liberalism,' " with its preoccupation with "individualism and individual rights, especially as against the state or against the majority." F. SCHAUER, *supra* note 7, at 48, 60. *See also* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (emphasizing the value of "individual self-realization").

[31] *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 879 (1970) (for an elaboration of the "self-fulfillment" thesis). *See generally* Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983) (advancing the notion that free speech is a protected way of pressing for one's intellectual capacity or perspective that may be of direct value elsewhere, such as in social decisionmaking).

[32] 466 U.S. 485 (1984).

[33] *Id.* at 503-04. The Court in Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988), approvingly quoted this language from *Bose*.

[34] 435 U.S. 765 (1978).

[35] *Id.* at 777 n.12. Citing this *Bellotti* footnote, Justice Powell in Consolidated

Louisiana,[36] "speech concerning public affairs is more than self-expression; it is the essence of self-government."[37]

It is somewhat unrealistic to treat the First Amendment as a therapeutic forum for individuals seeking self-fulfillment. For some individuals, that may be true. But the concept of self-fulfillment is not very helpful to an analysis of free speech. As Professor Schauer has noted, because virtually any activity may be a form of self-expression and because speech is only one of those forms, "a theory that does not isolate speech from this vast range of other conduct causes freedom of speech to collapse into a principle of general liberty."[38]

Then too, this theory becomes less and less useful in our highly complex and pluralistic society, where greater citizen obligations and greater interdependence and interactions among diverse individuals make it difficult to define freedom of expression primarily in terms of individual self-fulfillment. An orderly complex society may need to impose more constraints and obligations on individuals. Such governmental claims for constraint, legitimate or not, can no longer be intelligently assessed or resisted by a blanket reliance on an unrestricted, wholly personal right of self-fulfillment.

D. A Broader Vision of Free Expression

The three justifications for freedom of expression — "truth-seeking," "democracy-promotion," and "self-fulfillment" — are at best highly relevant on occasions and at worst incomplete. None of the three really addresses or explains the source of this great freedom. What is needed, rather, is a broader vision of the source and meaning of the First Amendment guarantees of free expression, a vision that encompasses all three of these traditional viewpoints and yet is not subject to their theoretical constrictions and limitations. An adequate theory of the purpose for protecting First Amendment freedoms must also be intertwined with the increasingly complex societal demands for an orderly way of life.

Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 n.2 (1980), noted that "[f]reedom of speech also protects the individuals interest in self-expression." The *Consolidated Edison* statement was footnoted to quotations from the Holmes-Brandeis arguments that freedom of speech is indispensable to the discovery of political truth and that the best test of truth is the power of the thought to get itself accepted in the competition of the market. *See supra* notes 10, 12.

36 379 U.S. 64 (1964).

37 *Id.* at 74-75.

38 F. SCHAUER, *supra* note 7, at 52.

Perhaps the best place to start the construction of an adequate theory is to realize that, from the dawn of our constitutional history to the present day, freedom of thought and speech has been considered "the matrix, the indispensable condition, of nearly every other form of freedom."[39] Textually, the First Amendment does not link the protection it affords with any particular objective. Protection is available whether the individual's form of expression be directed toward seeking political or other truths, participating in the processes of democracy, advancing one's own need for self-fulfillment, or achieving some other goal. The expression does not lose protection because it voices thoughts most hated by the majority, or because it is projected in coarse or vulgar terms. Additionally, the protected expression can relate to any conceivable matter, not being limited to issues of a political nature. The First Amendment literally embraces "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[40]

What, then, makes freedom of expression so all-encompassing, so much the matrix of all other freedoms? What is the source or nature of that freedom? Is it something more profound than the natural urge for self-fulfillment? Could it be that freedom of thought and conscience is one of those "unalienable rights" of individuals, "endowed by their Creator," that the Declaration of Independence proclaimed to be "self-evident?" Is freedom of expression one of those natural rights, an innate part of the human spirit, that inspired American revolutionary thinking? If so, then we come close to Professor Schauer's contempo-

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39 The phrase is that of Justice Cardozo, writing for the Court in Palko v. Connecticut, 302 U.S. 319, 327 (1937). *Compare* Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1110 (1986) (Professor Black's comment about this phrase: "I would like to look Cardozo straight in his gentle eyes and ask him to consider whether the rights to freedom from gnawing hunger and from preventable sickness may not form 'the matrix, the indispensable condition, of nearly every other form' of freedom."). *See also* L. TRIBE, *supra* note 18, at 778. ("[P]hysical survival is certainly as 'indispensable' to the enjoyment of other freedoms as are speech or voting. One must be able to express oneself to protest the violation of other rights, but to express oneself one needs at least a decent level of nourishment, shelter, clothing, medical care, and education.").

40 Thornhill v. Alabama, 310 U.S. 88, 102 (1940). The Court has often said that the First Amendment was designed to secure "the widest possible dissemination of information from diverse and antagonistic sources," Associated Press v. United States, 326 U.S. 1, 20 (1945), and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957).

rary notion that individual sovereignty, or individual autonomy, provides the source and the foundation for

> a theory of freedom of speech premised on the ultimate sanctity of individual choice . . . some sort of private domain of the mind, some area that is under the exclusive control of the individual . . . [that] is off limits to the state, not only as a matter of moral right, but also as a matter of necessity . . . that portion of my personality that is an exclusive preserve against governmental interference.[41]

To premise freedom of expression on this innate sanctity of individual autonomy may strike some as a revival of natural rights philosophy, much-maligned in modern times and often treated as an historical oddity.[42] We are not, however, concerned with the whole

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41 F. SCHAUER, *supra* note 7, at 68. Justice Frankfurter, in his concurring opinion in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), expressed much the same idea. There he wrote that

> probing into men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization. The cardinal article of faith of our civilization is the inviolate character of the individual. A man can be regarded as an individual and not as a function of the state only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person.

Id. at 421.

In like vein, Professor Greenawalt has written:

> Expressions of beliefs and feelings lie closer to the core of our persons than do most actions that we perform; restrictions of expression may offend dignity to a greater degree than most other restrictions; and selective restrictions based on the content of our ideas may imply a specially significant inequality.

K. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 34 (1989).

42 Professor Ely is a preeminent maligner of natural rights. He has written that natural rights, like natural law, is a thoroughly discredited idea in our society, since natural law "can be invoked to support anything you want . . . and everybody understands that." J. ELY, DEMOCRACY AND DISTRUST 50 (1980). He adds that "the only propositions with a prayer of passing themselves off as 'natural law' are those so uselessly vague that no one will notice — something along the 'No one should needlessly inflict suffering' line." *Id.* at 51. He writes, in conclusion, that the notion of a discoverable and valid set of moral principles — or natural rights — cannot "plausibly serve to overturn the decisions of our elected representatives." *Id.* at 54.

However, the Ely thesis does not address or answer the historical fact that the various freedoms of expression were considered by the framers of the Bill of Rights to be "natural rights" to be protected against the majoritarian decisions of our elected representatives. The fact that the concept of natural rights may appear to Ely and others to be vague and open-ended in other contexts does not detract from the historical fact that at least four "natural rights" of expression were written into the First Amendment. The sooner we appreciate that empirical fact, the better we can understand the nature and the source of these freedoms. Moreover, it is not the thesis of this article that the natural rights source of these freedoms constitutes

range of natural rights or natural law. Nor are we concerned with the judicial art of recognizing or creating new natural rights out of some of the more general constitutional language, such as "liberty," "due process," and "equal protection."[43] Our task is simply to examine the "natural rights" source and nature of the four freedoms of expression expressly identified and embedded in the First Amendment.[44] If it be modern heresy to look at these four freedoms through a natural rights lens, so be it.

History teaches that "human" or "fundamental" rights are simply contemporary idioms for "natural" rights.[45] One cannot escape the fact that mankind has the ability to reason, to declare what is right or wrong, and to express thoughts and emotions to others. Those abilities distinguish mankind from animals. Aristotle understood this and so did those who drafted the Declaration of Independence and the Bill of Rights. It matters not whether we describe this fact of life as in the nature of natural rights, human rights, or fundamental rights.

The important point is that protecting this rational, thinking

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the exclusive standard for judicial review of First Amendment claims, or that a recognition of that source authorizes a judge to use his subjective notions of natural rights in the process of constitutional adjudication.

[43] *Cf.* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (The *Bowers* Court stated that it is not "inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.").

[44] The term "natural rights" is used in this discussion, rather than "natural law," because the basic socio-political principles of the American Revolution derive from the natural rights tradition of the eighteenth century. Although sometimes used synonymously, the terms "natural rights" and "natural law" must be carefully distinguished to avoid confusion and error. There are many variations of natural law concepts, ranging from St. Thomas Aquinas' idea that natural law is premised on the existence of God and thus discoverable through reason, to the Protestant view of natural law as the arbitrary will of God and thus not discoverable through reason, to the modern theories in which natural law is conceived as a process of decision making rather than a substantive doctrine. Natural law, generally speaking, is a broad, all-encompassing theory of the moral and spiritual nature of society. What is a moral or ethical society? What is a just society?

Natural rights, on the other hand, more narrowly focus on but one aspect of humankind, one's innate ability to reason, think and communicate to others. That ability translates into "rights" for purposes of the natural rights philosophy. That philosophy teaches that "rights" reflect the natural state of mankind before the formation of a civil society. The theory is that mankind entered into the social compact of government in order to establish an orderly society in which the pre-existing natural rights would be preserved and secured against undue governmental interference. *See* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928) (for an overview of the natural rights philosophy emanating at the time the Constitution was written). A more comprehensive discussion of the philosophy of natural rights is found in J. FINNIS, NATURAL LAW AND NATURAL RIGHTS, ch. 8, at 198-230 (1980).

[45] *Id.* at 198.

component of the human psyche is part of our constitutional heritage. It is that rational, thinking component that makes freedom of expression so uniquely important, so much the matrix of all other forms of freedom. The First Amendment, like the rest of the Bill of Rights, was born in the eighteenth century Age of Enlightenment, when one of the dominant themes of American political thought was an understanding that natural and unalienable rights do exist and that the uninhibited exercise of those rights is essential to one's pursuit of happiness. Freedom of speech and thought and other forms of expression were deemed the most obvious, the most significant of those natural and unalienable rights. We cannot ignore or deny that historical understanding any more than we can ignore modern insights into the nature of our reasoning and expressive powers.

It is in that historical understanding of the rational nature of human beings that we find the source of the right of free expression. The source of the rights and liberties protected by the Bill of Rights, Justice Stevens has observed, lies not in the Bill of Rights itself, but in the fact that our constitutional forefathers believed it "self-evident" that "all men are endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause, [which incorporates the First Amendment], protects, rather than the particular rights or privileges conferred by specific laws or regulations."[46] And so it is that the First Amendment is not the source of natural or fundamental rights of expression but only a series of limitations on the power of government to abridge or infringe upon the unalienable, autonomous rights endowed to all humankind. The extent to which government recognizes and protects those rights is what distinguishes a free democracy from an autocratic dictatorship.

Moreover, a recognition that freedom of expression springs from the natural and unique nature of the individual serves well in our modern complex society as a foundation or starting point for the supporting arguments — that free expression aids in the search for truth, promotes democracy and more responsible government, and helps individuals achieve self-fulfillment. Free expression, as an exercise in individual autonomy, does all that and more. As Justice Jackson once observed, the

Constitution relies on our electorate's complete ideological

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[46] Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting). The majority opinion in *Meachum* did not deny the accuracy of Justice Stevens' observation. Additionally, the Court in Smith v. Org. of Foster Families, 431 U.S. 816, 845 (1977) approvingly cited this observation.

> freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity and herd-mindedness of the masses which would foster a tyranny of mediocrity. The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will.[47]

While the Supreme Court has never fully identified the human psyche as the source of any of the rights of expression protected by the First Amendment, echoes of the natural rights theory can be heard in numerous opinions arising under the First Amendment and other portions of the Constitution.[48] The whole judicial construct of fundamental or implied rights is nothing more than the modern idiomatic expression of the natural and unalienable rights theory. As Chief Justice Burger once remarked, it is a fact that many "fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined."[49] The Court has indeed held that it is indispensable to the enjoyment of the First Amendment freedoms of expression to recognize the cognate rights to listen, to observe and learn from the speaker or writer, to associate freely with others, and to have access to information about the administration of criminal and civil justice.[50] If the freedoms enumerated in the First Amendment are of natural rights stock, how can the indispensable but unarticulated rights implied therefrom be anything other than natural and unalienable in nature?

It is not unusual to find references to the philosophy of natural or fundamental rights in other areas of the Court's jurisprudence. The first such case came in 1823, when Justice Bushrod Washington, sitting on circuit, concluded that the privileges and immunities mentioned in Article IV of the Constitution encompassed those privileges "which are in their very nature, fundamental; which belong to the citizens of all free governments."[51]

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47 American Communications Ass'n v. Douds, 339 U.S. 382, 442 (1950) (Jackson, J., concurring in part and dissenting in part).

48 *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 106 (1908) (an early example of defining procedural due process by reference to natural or inalienable rights of citizens).

49 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

50 *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 832 (1974) ("the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published"); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the "right to receive information and ideas," regardless of their social worth, is fundamental to our free society).

51 Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D.Pa. 1823) (No. 3,230) (on circuit). Among the fundamental rights mentioned by Justice Washington were the

Liberty and due process jurisprudence have also been productive of references to the natural or fundamental rights philosophy. Thus, when the Court indicated, in *Griswold v. Connecticut*,[52] that the First Amendment constitutes an element of personal privacy from which other privacy rights may emanate,[53] it recognized that at the core of freedom of expression is individual sovereignty or autonomy, an area of innate privacy that extends beyond the bounds of the First Amendment. But when the Court tries to articulate some natural right, some privacy right, other than the ones specifically mentioned in the First Amendment or some other portion of the Bill of Rights, the Court enters a most controversial field. Then it must weave a natural right out of broad constitutional cloth, such as the Fourteenth Amendment's protection of liberty and due process of law.[54]

The seminal example is *Meyer v. Nebraska*,[55] in which the Court spoke of the constitutionally protected

> right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common

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right of a citizen of one state to pass through or reside in another state for purposes of trade or otherwise, to claim the benefit of the habeas corpus writ, to institute and maintain actions of any kind in courts of the state, to take, hold and dispose of property, and an exemption from taxes higher than paid by other citizens of the state. *Id.* The Supreme Court later rejected the natural rights theory as respects the Article IV Privileges and Immunities Clause. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873); Gressman, *The Unhappy History of Civil Rights Legislations*, 50 MICH. L. REV. 1323, 1332-33 (1952) (describing the original intent of the framers of the Fourteenth Amendment to incorporate fundamental or natural rights into the Privileges and Immunities Clause). But some aspects of the *Corfield* holding seemingly live on in later cases. *See* Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 387-88 (1978) (citing *Corfield* as "seemingly" based on notions of fundamental rights "in the modern as well as the 'natural right' sense," and holding that elk hunting in Montana by non-residents is not a "fundamental" or "basic" or "natural" right); Austin v. New Hampshire, 420 U.S. 656, 661 (1975) (relying on *Corfield* to invalidate a state tax that violated the out-of-state citizen's "fundamental" right to be exempt from taxes higher than those paid by citizens of the state); McCready v. Virginia, 94 U.S. 391, 396 (1876) (right to acquire common property does not "belong of right to the citizens of all free governments").

[52] 381 U.S. 479 (1965).

[53] *Id.* at 483.

[54] *Cf.* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (The Court was not "inclined to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

[55] 262 U.S. 390 (1923).

> law as essential to the orderly pursuit of happiness by free men.[56]

While only the right to worship freely is specifically mentioned in the Bill of Rights, all of this *Meyer* language certainly resonates with the sounds of the Declaration of Independence and the natural or fundamental rights philosophy. The modern Court has ascribed[57] the survival and frequent reaffirmance of this *Meyer* language to what Justice Harlan conceived to be the essence of due process — "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[58] That too is of the essence of the natural or fundamental rights theory.

The Court has expanded this natural rights concept of liberty to encompass freedom of the individual's autonomous "choice with respect to childbearing, . . . the rights of parents to the custody and companionship of their own children, . . . [and] traditional parental authority in matters of child rearing and education."[59] Indeed, most of the non-First Amendment rights of privacy and individual choice recognized by the Court, including a woman's choice to seek an abortion, have been carved out of the fundamental or natural rights that have been incorporated into the Fourteenth Amendment's liberty and due process concepts.[60] So too, in *Rochin v. California*,[61] the Court ruled that the forcible extraction of defendant's stomach contents violated due process because such illegal "breaking into the privacy" of the defendant "shocks the conscience" and is "offensive to human dignity."[62] Human privacy and dignity, as

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56 *Id.* at 399. This *Meyer* statement was approvingly quoted in Board of Regents v. Roth, 408 U.S. 564, 572 (1972). *See also* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (applying *Meyers* to "liberty of parents and guardians to direct the upbringing and education of children under their control").

57 Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 501 n.8 (1977) (plurality opinion).

58 Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). In his *Poe* dissent, Justice Harlan also wrote that the "liberty" guaranteed by the Constitution

> is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Id. at 543 (Harlan, J., dissenting).

59 *Moore*, 431 U.S. at 500-01.

60 *See* Smith v. Org. of Foster Families, 431 U.S. 816, 843 & n.49 (1977).

61 342 U.S. 165 (1952).

62 *Id.* at 172-74. Justice Frankfurter, who wrote the Court's opinion in *Rochin*, took pains to answer the complaint of Justices Black and Douglas, expressed in

well as the conscience of society, are thus embedded in the natural-fundamental rights philosophy that permeates the Bill of Rights.

Justice Harlan came close to articulating the individual autonomy theory of free speech when he penned *Cohen v. California*.[63] There he wrote, on behalf of the Court, that the constitutional right of free expression

> is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, 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.[64]

Justice Harlan, at the end of this statement, referenced Justice Brandeis' much-admired concurrence in *Whitney v. California*.[65] In somewhat narrower political terms, Justice Brandeis defended "freedom to think as you will and to speak as you think" as a means indispensable to the discovery and spread of political truth and as essential both to "stable government" and to "political change."[66] Those who won our independence, he said, "did not fear political change" and "did not exalt order at the cost of liberty."[67] Thus,

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their concurring opinions in *Rochin*, that placing the decision on the Court's view of what shocks the conscience or offends a sense of justice is a revival of "natural law." Justices Black and Douglas preferred to find that such police conduct violated the self-incrimination provisions of the Fifth Amendment, which are incorporated into the Fourteenth Amendment's Due Process Clause. In Justice Frankfurter's view, the concept of due process is not final or fixed in time, or bounded by the specific provisions of the Bill of Rights. Rather, the concept involves "considerations deeply rooted in reason and in the compelling traditions of the legal profession." *Id.* at 171. Such considerations, said Justice Frankfurter, include the privacy and the dignity of the individual, a privacy and a dignity that may be invaded by government to the point of offending a court's conscience and the community's sense of fair play and decency — all quite apart from, if not in addition to, the constitutional proscription of coerced self-incrimination. Justice Frankfurter had earlier elaborated his due process views in his concurring opinion in Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring). Additionally, Justice Murphy's dissent in *Adamson* argued that the due process concept is not "entirely and necessarily limited by the Bill of Rights" and that occasions may arise "where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." *Id.* at 124 (Murphy, J., dissenting).

63 403 U.S. 15 (1971).

64 *Id.* at 24.

65 274 U.S. 357, 375-77 (1927) (Brandeis, J., joined by Holmes, J., concurring).

66 *Id.*

67 *Id.* at 377 (Brandeis, J., joined by Holmes, J., concurring).

"[r]ecognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[68] What is most helpful about the Brandeis statement is the vision of the First Amendment as primarily protecting the expression of minority or unpopular views against "the occasional tyrannies of governing majorities."

One final element must be added to this individual autonomy theory. Freedom of expression, as the Court has consistently recognized, cannot be exercised in a manner "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[69] The human ability to express oneself, whether orally or in writing, or as symbolized by conduct, is necessarily modified and conditioned by the society in which the expression occurs, modifications that we often refer to as reasonable time, place, and manner restrictions. But only the most compelling governmental interest can justify the imposition of such restrictions. In that sense only can we say that freedom of expression is not an absolute human right and that the state has the power to confine such expression within the bounds of an orderly society — all of which is quite consistent with the natural or autonomous rights moorings of the constitutional concept of freedom of expression.[70]

What emerges from this search for the purpose or root of the First Amendment guarantees of free expression is that the most compelling and comprehensive rationale is found in the historic field of natural and fundamental rights. Freedom of expression is by definition a natural right and is so identified by the First Amendment. The ability to think, to rationalize, and to express those

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[68] *Id.* at 376 (Brandeis, J., joined by Holmes, J., concurring). In Madison's memorable speech of June 8, 1789, before the House of Representatives, he introduced amendments that were to become the Bill of Rights, arguing that the

> prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But it is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.

2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1029 (1971).

[69] Time, Inc. v. Hill, 385 U.S. 374, 390 (1967) (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)).

[70] Even John Stuart Mill conceded that "opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act." J. MILL, *supra* note 8, at 119. When a person's expression of opinion becomes associated with some kind of conduct, Mill wrote, and that person's conduct "affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion." *Id.* at 141.

thoughts constitutes the most natural, the most fundamental aspect of a person's autonomous self. The so-called "truth-seeking," "democracy-promotion," and "self-fulfillment" rationales are more in the nature of explanations or descriptions of the societal and individual benefits that ensue from a society of free and uninhibited discussion. They do not reflect or explain the generative source or ultimate justification of those benefits. That source is found in the innate characteristics — the need for individual dignity and autonomy, and the need to think and reason and express oneself freely — of those who live in a free society. There is nothing in modern psychology or the other sciences that disputes those characteristics. Nor is it necessary to ascribe a divine source for the innate characteristics that lead to human needs for freedom of expression. The natural-fundamental rights theory can accommodate both religious and nonreligious adherents.[71]

We now turn to an examination of the extent to which this natural-fundamental rights approach to free expression may have influenced the creation of the Bill of Rights, including the First Amendment, in 1789.

III. The Creation of the First Amendment

The First Amendment, like all the Bill of Rights, was a compulsory afterthought, added to the 1787 Constitution as a political ploy to secure ratification of the Constitution by several crucial states and to quiet the loud clamor in other states for protection of individual freedoms against intrusions by the new federal government. The amendments constituting the Bill of Rights, originally twelve in number, were drafted by the First Congress in 1789 and submitted to the states, which ratified only ten of them. The proposed Third Amendment thus became the First Amendment, and the ten amendments, as we know them today, became effective on December 15, 1791.

As a leading historian has stated, however,

> the history of the framing and ratification of the Bill of Rights indicates slight passion on the part of anyone to enshrine personal liberties in the fundamental law of the land. We know almost nothing about what

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71 Compare Judge Learned Hand's *arguendo* assumption that the Constitution and the Bill of Rights "neither proceed from, nor have any warrant in, the Divine Will, either as St. Thomas [Aquinas] or Jefferson believed; but on the contrary that they are the altogether human expression of the will of the state conventions that ratified them." L. Hand, The Bill of Rights 2-3 (1958).

> the state legislatures thought concerning the meanings of the various amendments, and the press was perfunctory in its reports, if not altogether silent.[72]

Despite the absence of much indicia of the philosophy and intent that motivated the framers and the ratifiers of the First Amendment, it is useful to examine the philosophical background and context in which freedom of expression found its way into the First Amendment.

To begin with, it is clear that the First Amendment, like the body of the Constitution, was written at a time when American political thought was dominated by the Lockean social compact theory.[73] That theory postulates an original state of nature in which people were governed only by the laws of nature, free of human restraints. It follows, according to this argument, that a person comes into the world with God-given or natural rights. The person thus has a natural right to possess liberty, freedom, property, and equality — all subsumed under the rubric of a right to the pursuit of happiness. As John Dickinson declared in 1766, these natural rights

> are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short, they are founded on the immutable maxims of reason and justice.[74]

Thomas Jefferson certainly reflected this natural rights, or call it fundamental rights, philosophy when he wrote the preamble to the Declaration of Independence, a document that was a crucial step in the developments leading to the Bill of Rights. Jefferson adhered to Locke's philosophy in stressing the natural rights of man as the foundation of the political order. He accordingly wrote into the preamble that it was self-evident that all men are created equal and that "they are endowed, by their Creator, with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."[75] That is pure natural or fundamental rights language.

Significance also lies in the fact that, prior to the adoption of the Constitution, at least eight of the post-revolutionary states had written declarations that grounded certain individual rights in "the immutable laws of nature," rights which today we call fundamental.

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72 L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 172 (1988).

73 *See generally* A. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 63-84 (1932) (discussing the social compact theory).

74 Dickinson, *An Address to the Committee of Correspondence in Barbados*, in 1 WRITINGS OF JOHN DICKINSON 261 (P. Ford ed. 1895).

75 U.S. CONST. preamble.

They too followed the Lockean concept of man's natural autonomy, modifiable only by his consent to the rule of others in a social compact; it was a concept that had long adhered in congregational church polity. The Virginia Constitution of 1776, for example, started its Declaration of Rights by proclaiming that:

> [A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[76]

Virginia's Declaration, while mentioning freedom of the press and the free exercise of religion, inexplicably omitted freedom of speech, assembly, and petition from its list of inherent rights.[77] Adhering to Virginia's natural rights philosophy, Pennsylvania created a more comprehensive Declaration of Rights in 1776 that specifically included freedom of speech and freedom of the press, as well as the right to assemble and petition the government, among the "natural, inherent and inalienable rights" of mankind.[78] An even more comprehensive Declaration of Rights emerged from Massachusetts in 1780, recognizing the "natural, essential, and unalienable rights" of inhabitants "to the freedom of speaking, writing and publishing their sentiments."[79] Delaware, Maryland, and North Carolina proclaimed similar Declarations of Rights, premised either on the concept of natural rights or on the notion that government emanates from a compact with the people. Vermont, not officially admitted as a state until 1791, also issued a Declaration of Rights in 1777, proclaiming the freedoms of speech and press and the rights of assembly and petition to be among man's "natural, inherent and unalienable rights."[80]

In 1787, when the Constitution was composed at the Philadelphia Convention, the framers largely ignored this rich lode of natural rights set forth in the various state declarations. True, they did write certain individual liberties into the body of the Constitution, such as a ban on religious tests as a qualification for federal office

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76 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234 (1971).

77 *Id.* at 235-36. James Madison, who later drafted the federal Bill of Rights, was a member of the Virginia Convention of 1776 that adopted this Declaration.

78 *Id.* at 264, 266.

79 *Id.* at 370, 372. John Adams was the author of the Massachusetts Declaration.

80 *Id.* at 322, 324. New Jersey, Georgia, New York, and South Carolina proclaimed no separate bills of rights; they simply protected certain rights in their constitutions without identifying the source of those rights.

and a guarantee of the writ of habeas corpus. But the Convention summarily rejected a proposal to add a full Bill of Rights, as well as a more limited proposal to insert a guarantee of a free press. While it is difficult to say precisely why these proposals were rejected, Roger Sherman argued that "[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."[81] As to the free press proposal, Sherman found it "unnecessary" because "[t]he power of Congress does not extend to the Press."[82] Alexander Hamilton elaborated on this latter argument when, in 1788, he wrote in the *Federalist No. 84* that bills of rights

> are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things should not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.[83]

While certainly not opposed to the idea of a written enumeration of the natural rights of mankind, Madison initially opposed adding a bill of rights to the Constitution. He was appalled by the frequency of instances where states had violated their own noble declarations. He considered the state Declarations of Rights to be but "parchment barriers" that collapsed when "overbearing majorities in every State" violated individual liberties.[84] Madison also regarded a federal declaration "as unnecessary and dangerous — unnecessary because the general government had no power but what was given it,[85] dangerous because an incomplete declaration

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81 *Id.* at 438.

82 *Id.* at 439.

83 *Id.* at 581.

84 Letter of Madison to Jefferson (Oct. 17, 1788), *reprinted in* 1 B. SCHWARTZ, *supra* note 76, at 616.

85 Madison argued that, because the Constitution did not vest any affirmative power in Congress to interfere with individual rights, Congress had no power whatever to interfere with those rights. That argument is quite specious. For example, the power to tax, which is vested in Congress, could be used to destroy or inhibit a free press. *See generally* Grosjean v. American Press Co., 297 U.S. 233, 251 (1936) (Congress may not, consistent with the First Amendment right of the press, levy a tax that is measured solely by the extent of the publication for the purpose of curtailing a select group of newspapers.). In Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), the Court noted that Richard

was unsafe."[86]

Thus, for whatever reason, the Convention deliberately omitted a bill of rights, an omission that history has viewed as unwise and mistaken. Indeed almost immediately after the Constitution was sent to the states for ratification, a cry arose for a bill of rights. Opponents of the new Constitution seized on the omission as an argument for not ratifying the document. Others proposed adding a declaration as a matter of principle. Some states either conditioned their ratification on a bill of rights being added or refused to ratify unless and until such a bill was added. Ratification, particularly by some of the crucial states, was thus put in the arena of doubt.

It was in the context of this ratification furor that the First Congress undertook the task of drafting a series of amendments to codify and protect the unalienable individual rights from intrusion by the new federal government. As a member of the first House of Representatives, James Madison took the lead in proposing amendments.[87] Introducing his first draft of the amendments, Madison spoke and wrote in the context of his awareness and acceptance of the then-prevalent natural or fundamental rights philosophy. He knew full well the philosophy that had dictated the preamble of the Declaration of Independence. He knew full well the philosophy that had dictated the various state Declarations of Rights, as well as what motivated the ratification furor over the absence of a bill of rights. Madison had also written the *Federalist No. 43*, where he argued that the Constitution should be ratified because it was built on "the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be

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Henry Lee, a prominent Anti-Federalist, refuted this specious argument by observing that Congress was not restrained by the Constitution "from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed." *Id.* at 584 (quoting R. Lee, *Observation Leading to a Fair Examination of the System of Government*, Letter IV, *reprinted in* 1 B. SCHWARTZ, *supra* note 76, at 466, 474.

86 3 I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800, at 226 (1950). This argument that the specification of particular individual rights implies a power to abridge those rights not named is equally specious. The Federalists had agreed to insert into the body of the Constitution the protection of trial by jury in criminal cases and the proscription of religious tests, *ex post facto* laws, and bills of attainder. Yet not even the Federalists claimed that the protections afforded those rights implied a power to violate all other unnamed rights.

Madison later abandoned his arguments against adding a bill of rights fathering the 1789 bill of rights proposal in the House of Representatives. *See infra* notes 88-89 and accompanying text.

87 For an account of the legislative maneuvering leading to the drafting and submission to the states of what was to become the First Amendment, *see* Denbeaux, *The First Word of the First Amendment*, 80 NW. U.L. REV. 1156, 1164-71 (1986).

sacrificed."[88]

When Madison spoke to the House in June of 1789 in support of his proposals, not surprisingly he larded his speech with natural law references. The rights that he proposed be protected were referred to as "positive rights," as "natural rights," as "the pre-existent rights of nature," rights that he said were different from those that are part of the compact between citizen and government, such as the right to a jury trial.[89] Freedom of the press and the rights of conscience, he added, were the "choicest privileges of the people."[90]

In July of that year, the congressional drafters created specific, numbered amendments, much in the manner of the final ten amendments. In the first draft of what is now the First Amendment, a draft written by Representative Roger Sherman of Connecticut, the protection of freedom of expression was expressly premised on the natural rights theory:

> The people have certain natural rights which are retained by them when they enter into Society. Such are the rights of Conscience in matters of religion; of acquiring property, and of pursuing happiness & Safety; of Speaking, writing, and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they shall not be deprived by the Government of the United States.[91]

While the natural rights language does not appear in the final draft of the First Amendment, the Sherman draft is persuasive evidence of the nexus between natural rights and freedom of expression, at least in the minds of the framers.

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88 THE FEDERALIST No. 43, at 279 (J. Madison) (C. Rossiter ed. 1961).

89 2 B. SCHWARTZ, *supra* note 68, at 1029.

90 *Id.* at 1028. During this House debate, Representative Gerry urged adoption of the Bill of Rights in order to secure ratification of the Constitution by Rhode Island and North Carolina, which had publicly declined to ratify without the amendments. *Id.* at 1037.

91 This bills of rights draft, in Roger Sherman's handwriting, was discovered in 1987 by the chief of the manuscript division of the Library of Congress, pasted in a volume of James Madison's papers. *See* New York Times, July 29, 1987, at A1, col. 4. This draft of what Sherman had designated as the Second Amendment is also reproduced in D. CRUMP, E. GRESSMAN, & S. REISS, CASES AND MATERIALS ON CONSTITUTIONAL LAW 520 (1989).

Sherman was the only person to have signed all three of the founding documents, i.e., the Declaration of Independence, the Articles of Confederation and the Constitution. He was obviously well schooled in the natural rights philosophy. Had his version prevailed, that philosophy would have been expressly incorporated into the Bill of Rights.

Further evidence of the natural rights theory in action came when the congressional committees refined and honed the proposal to protect freedom of expression. In August of 1789, Representative Benson reported to the House that "[t]he committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government."[92] Madison later stated to the House that he conceived this protection to be "the most valuable amendment in the whole list," so valuable that it should also "be secured against the State Governments."[93] Unfortunately, Madison's suggestion of extending the First Amendment to the states was voted down. Over 135 years were to elapse before Madison's suggestion came to fruition. That occurred in the 1920's, when the Supreme Court first began to apply the First Amendment to the states by incorporating it into the Due Process Clause of the Fourteenth Amendment.[94]

In sum, the First Amendment protection of freedom of expression is historically and thoroughly permeated with the concept of natural, human, or fundamental rights, rights that stem from the unique human capacity to think, to reason and to communicate rationally with others. This concept has been reaffirmed repeatedly in modern times, both in Court opinions and otherwise. In 1948, for instance, the General Assembly of the United Nations adopted and proclaimed the *Universal Declaration of Human Rights*, which recognizes in its preamble "the inherent dignity" and "the equal and inalienable rights of all members of the human family." It then proceeds to proclaim in Article 1 that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Articles 18 and 19 accordingly declare that "everyone" has "the right to freedom of thought, conscience and religion" and "the right to freedom of opinion and expression . . . to seek, receive and impart information and ideas" and to peaceably assemble and associate.

No better summary could be made of the philosophy and the

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92 2 B. SCHWARTZ, *supra* note 68, at 1090.

93 *Id.* at 1113.

94 *See* Fiske v. Kansas, 274 U.S. 380, 382 (1927); Whitney v. California, 274 U.S. 357, 363, 371 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporation of the free speech provision). *See also* Hague v. Committee for Indus. Org., 307 U.S. 496, 514 (1939) (incorporating the right to petition); DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (incorporating the peaceable assembly provision); Near v. Minnesota, 283 U.S. 697, 707 (1931) (incorporating the free press provision).

purpose that guided the framers of the First Amendment in 1789. That philosophy and that purpose are timeless. It is there that we find the true source, the true nature of the four freedoms of expression.

IV. THE GUARDIANS OF THE FIRST AMENDMENT

Our final inquiry concerns the administration and execution of the 1789 promises of expressive freedoms. Has the Supreme Court, as the judicial arbiter of our constitutional freedoms, kept faith with the natural-fundamental rights philosophy that underlies the First Amendment guarantees? To begin, those who crafted the First Amendment clearly intended to put the judiciary in administrative charge. James Madison, the chief architect, emphasized that point. Once these natural rights are embedded in the Constitution, he told the House of Representatives in 1789,

> independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[95]

But the framers of the First Amendment could not and did not attempt to dictate the manner in which "the guardians of these rights" should interpret and apply the guarantees of freedom of expression. That problem had to await the development of the newly created Judicial Branch, as well as the development in the federal courts of a "case or controversy" involving a First Amendment interpretation and application. The latter development was particularly *longum tempus*. The Bill of Rights, particularly the first eight amendments, was originally designed to apply only to intrusions on freedom by the federal government, not by the state governments.[96] Further,

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95 2 B. SCHWARTZ, *supra* note 68, at 1031. Jefferson had earlier written Madison that one argument in favor of a bill of rights "which has great weight with me" was "the legal check which it puts into the hands of the Judiciary." L. LEVY, *supra* note 72, at 120-21. *See also* THE FEDERALIST No. 78, at 466 (A. Hamilton) (C. Rossiter ed.) (courts of justice must have the duty "to declare all acts contrary to the manifest tenor of the Constitution void," for without that duty "all the reservations of particular rights or privileges would amount to nothing").

96 Chief Justice Marshall, writing for the Court in Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), ruled that the provisions of the Bill of Rights "contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. . . . [They are limitations solely] on the exercise of power by the government of the United States." *Id.* at 250-51.

until the First Amendment was made applicable to the states more than a century later, there were relatively few occasions to interpret the amendment or to create standards of review.[97]

Despite the delayed development of the First Amendment, the basic rules of its construction and interpretation were in place early. They are the rules that apply to the construction and interpretation of any constitutional provision, be it in the body of the document or in any amendment thereto. For, as Chief Justice Marshall said in *McCulloch v. Maryland*,[98] "[w]e must never forget that it is a constitution we are expounding,"[99] "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[100] Marshall elaborated on the enduring nature of the Constitution in *Cohens v. Virginia*,[101] where he wrote that the basic rule of constitutional construction must recognize that

> a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as nature will permit, with the means of self-preservation from the perils it may be destined to encounter.[102]

The key to creating an "immortal" Constitution, one that will

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97 The First Amendment was first made applicable to the states in 1925, by way of the incorporation doctrine, *see supra* note 94. It was not until 1965 that the Supreme Court had occasion to use the First Amendment as originally intended, i.e., to assess the validity of a federal law in light of First Amendment guaranteed rights. Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965).

The Alien and Sedition Act of 1798, 1 Stat. 596 (1978), was indeed a patent violation of the First Amendment. But the validity of that short-lived Act never came before the Supreme Court. One hundred sixty-six years later, however, the Court went out of its way to observe, *obiter dicta*, that the attack on the validity of this Act "has carried the day in the court of history . . . [reflecting] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

During the congressional debates leading to the enactment of the Alien and Sedition Act, Congressman Albert Gallatin was among those who argued that the Act was "subversive of the principles of the Constitution itself," for "if you thus deprive the people of the means of obtaining information of their [government representatives'] conduct, you in fact render their right of electing nugatory." 8 ANNALS OF CONG. 2110 (1798). Congressman Edward Livingston also argued that the liberty of slandering and libelling government, if it be deemed evil, "is an evil perpetuated by the Constitution." *Id.* at 2153.

98 17 U.S. (4 Wheat.) 316 (1819).

99 *Id.* at 407.

100 *Id.* at 415.

101 19 U.S. (6 Wheat.) 264 (1821).

102 *Id.* at 387.

exist for ages to come, is to write the non-self-executing provisions in broad general language, capable of being interpreted, expanded and applied to what Marshall called "the various crises of human affairs[,] . . . exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[103] In an earlier Court opinion, written by Justice Story in 1816, the observation was made that

> [t]he constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which these powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.[104]

Or, as Marshall put it, the very nature of an enduring constitution demands that it not "partake of a prolixity of a political code" but requires, rather, "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[105]

This broad vision of the Constitution was viewed by Marshall and Story as a principle of construction, broadly construing the "general language" of the document so that the various crises of future generations could be accommodated within the purview of the textual terminology. Marshall also said that this principle of broad construction had been entertained by the "framers of the American constitution," a proposition "not only to be inferred from the nature of the instrument, but from the language."[106]

Now it is true that Marshall and Story were talking of this principle of construction in the context of the broad affirmative powers that the body of the Constitution confers on Congress and the judiciary, such as the broad Article I power to regulate commerce or the broad Article III power to review all cases arising under the Constitution. But the broad construction trail does not end there. The trail continues on into the area of the Bill of Rights, including the

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[103] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

[104] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

[105] *McCulloch*, 17 U.S. at 407. *See* The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531-34 (1870).

[106] *McCulloch*, 17 U.S. at 407.

First Amendment. What principle of construction are we to apply to such broad words as freedom of speech and freedom of the press? Are these broad promises of freedom capable of protecting diversified and non-traditional forms of expression that so often mark our modern, increasingly pluralistic society? Are these broad promises capable of adapting and balancing these protected freedoms, weighing them against new forms of governmental intrusion and new governmental concerns and interests generated by our increasingly electronic age? In short, are the natural rights of expression specified in the First Amendment capable of adaptation to meet the modern speech and press "crises" that the framers could not possibly have foreseen?

Justice Brandeis is among the many who have observed that the Court has consistently followed the *McCulloch* principle of broad construction and has "repeatedly sustained the exercise of [the] power by Congress . . . over objects of which the Fathers could not have dreamed."[107] However, Justice Brandeis is preeminent in his recognition that the same principle of broad construction also applies to the guarantees of individual freedom expressed in the Bill of Rights. In his words, "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."[108] In support of his recognition that the words of the Bill of Rights must have the capacity of adaptation, Brandeis turned to the Court's earlier ruling in *Weems v. United States*.[109] There the Court, in the context of a cruel and unusual punishment case, again reiterated Marshall's broad construction principle, adding that the general language in any part of a constitution should not

> be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be

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107 Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

108 *Id.*

109 217 U.S. 349 (1910).

> converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[110]

Thus, in Brandeis' view, the broad words of the Fourth and Fifth Amendments were capable of being interpreted and adapted so as to outlaw invasions of a man's home by the "[s]ubtler and more far-reaching means of invading privacy [that] have become available to the Government."[111] When Brandeis wrote these sentiments in 1928, and even more so today, the advances in what he called "psychic and related sciences" had produced governmental means of invading privacy that the framers of these amendments could not have foreseen. Hence the appropriateness of applying these provisions, in the words of *Weems*, in contemplation "not . . . only of what has been, but of what may be."

The thirty-three words that embody such freedoms are capable of interpretation and application so as to protect the individual not only against the majoritarian intrusions that could be identified or foreseen in 1789, but also against intrusions that could not have been foreseen. As *Weems* and the earlier opinions of Marshall and Story make clear, we have a Constitution — and a Bill of Rights — deliberately designed and worded to be capable of wider application than the mischiefs which gave it birth. The First Amendment is no exception to that capability.

What gives the First Amendment freedoms of expression the capability of protecting one from types of governmental intrusions not foreseen in 1789? The answer is the historical fact that the framers designed these freedoms as natural or fundamental rights, reflective of the human spirit. The dimensions of a natural right are capable of growth as the human spirit, as well as the modes of expressing that spirit, respond and interact in new and differing ways to the exigencies of each generation. A natural right is flexible enough to adjust to the changing and evermore sophisticated demands of our increasingly pluralistic and urban society.

The freedoms of expression, moreover, are not designed solely as a means of protection against eighteenth century limitations on truth-seeking. Nor are they designed solely to protect those who the framers anticipated would seek to participate in the democratic-representative processes, or would seek political change. Moreover, it is questionable whether the prime motive of the framers was to protect minority groups that might be systematically disadvantaged

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[110] *Olmstead*, 277 U.S. at 472-73 (Brandeis, J., dissenting) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

[111] *Id.* at 473 (Brandeis, J., dissenting).

or excluded from what John Hart Ely calls "the representation-reinforcing" values at the base of "the American system of representative democracy."[112] Nor are these freedoms designed solely to promote the eighteenth century needs of self-fulfillment.

The framers were concerned with protecting much broader and more adaptable values, the values of being a free human being capable of living in an ever-developing democratic society. To protect those values and to identify the elements of humanity that should remain uninhibited is the historic purpose of the First Amendment freedoms. As Professor Tribe has put it, it is the constitutional text identifying such positive freedoms "that invites a collaborative inquiry, involving both the Court and the country, into the contemporary contents and demands of freedom, fairness, and fraternity."[113]

Accordingly, it is to the text of the First Amendment that we must first turn. There we find express references to the natural or fundamental rights known as freedom of speech, press, assembly, and petition, rights that have their own historic and human values. Those are the values, the rights, that must be balanced against any effort by government to restrict or inhibit those values. As we have seen, those are also the rights and the values that are capable of change and adjustment in terms of new modes of human expression and new societal conditions that may justify new kinds of restriction. That capacity to change and grow, moreover, is triggered by use of the historic rule of broad construction, making the First Amendment a provision "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[114]

The ultimate point is that it is the awesome responsibility of the Supreme Court to identify and understand the human values implicit and written into the First Amendment freedoms, and then to protect those values in assessing any form of official intrusion. That is not to say that a recognition of the natural rights underlying these freedoms justifies the injection of a judge's own "natural rights" predilections and sympathies into First Amendment adjudication. However, it is to say that a judge must begin the adjudication process with an understanding of the competing values that underlie the freedom in controversy, as well as an understanding of the contemporary contents and obligations of that particular freedom.

Whether the judge describes those values in terms of "natural rights," "fundamental rights," or "preferred rights" is of no mo-

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112 J. ELY, *supra* note 42, at 101-02.

113 L. TRIBE, *supra* note 18, at 771.

114 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

ment. What is important is an appreciation of the historical fact that the freedoms enshrined in the First Amendment were built upon the framers' intention permanently "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[115] No one can say that this judicial task is easy, particularly that part which calls upon the judge to determine which of the underlying "elements of being human" are "left entirely to politics to protect, and which are entrusted to protection by judicial decree."[116]

That task is made no easier by the raucous and not too helpful debate among those who critique the judicial function of interpreting and applying the Constitution in terms of originalism, interpretivism, non-interpretivism, textualism, original intent, activism, restraint, and the like. We are dealing here with a portion of the Constitution that is designed to endure, to be adaptable to situations and crises that the 1789 framers of the First Amendment could not possibly have foreseen. The strength and vitality of these expressive freedoms stem from the fact that they are natural rights, and natural rights and principles are adaptable to changing events. Justice Cardozo, in his magnificent little volume on *The Nature of the Judicial Process*,[117] has captured and explained the nature of the judicial process in dealing with what he calls the "great generalities of the constitution [that] have a content and a significance that vary from age to age[,] . . . a *constitution* [that] states or ought to state not rules for the passing hour, but principles for an expanding future."[118] The judicial function flourishes in this constitutional context, says Cardozo, only if the judge understands that the provision in question must be kept flexible, adaptable, and supple. To do that, the judge must draw upon and use the methods of philosophy, history, tradition, and sociology. At times the judge must act as a legislator to fill in the interstices of these "great generalities" and the judge must always be mindful of the effect of precedent. This is no easy task.

At least during the past fifty years or so, the Supreme Court has performed well this "task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials

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115 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

116 L. TRIBE, *supra* note 18, at 778-79.

117 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16 (1921).

118 *Id.* at 17, 83 (emphasis in original).

dealing with the problems of the twentieth century . . . ."[119] Without attempting to summarize the whole of First Amendment jurisprudence, it suffices here to contrast two Supreme Court rulings, one old, one new.

The older case is *Patterson v. Colorado*,[120] a decision written by Justice Holmes in 1907, more than a decade before the beginning of the modern reconstruction of the First Amendment. In that case, a Colorado newspaper editor had been held in contempt for having published certain articles and a cartoon that allegedly "reflected upon the motives and conduct of the Supreme Court of Colorado in cases still pending, and were intended to embarrass the court in the impartial administration of justice."[121] Because the free press provisions of the First Amendment had not yet been incorporated into the Fourteenth Amendment, Justice Holmes wrote the Court's opinion on the gratuitous assumption that freedom of speech and press "were protected from abridgment on the part not only of the United States but also of the States."[122] He then ruled against Patterson on an unduly narrow view of the free press provision of the First Amendment, stating:

> In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.[123]

In his opinion, Justice Holmes gave no recognition to the motivations of the 1789 framers of the free speech and free press provisions. He did not recognize the values or purposes embodied in those provisions, and he made no inquiry into whether the criminal libel doctrine was any longer relevant to the America of 1907. Nor

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119 *Barnette*, 319 U.S. at 639.

120 205 U.S. 454 (1907).

121 *Id.* at 459.

122 *Id.* at 462.

123 *Id.* (citation omitted) (emphasis in original). Holmes' opinion cites only two ancient state court opinions in support of this Blackstonian criminal libel analysis: Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825); Respublica v. Oswald, 1 Dall. 319 (1788). Yet, it is clear that the America of the revolutionary period generally accepted Blackstone's exposition of the common law restrictions on freedom of expression, which included the punishment of those who wrote false opinions or malicious scandals against the government. Only a few states recognized truth as a defense to a criminal or seditious libel charge. *See* L. LEVY, *supra* note 72, at 201-03.

is there any indication that he considered or used the broad rule of construction that Justices Marshall and Story said were necessary to keep the Constitution in shape for ages to come.[124]

Contrast *Patterson* with *Texas v. Johnson*,[125] the most recent First Amendment case. By a 5-4 vote, the Court held that Johnson's burning of the American flag constituted expressive conduct, designed and intended to express his opposition to our government's nuclear war policies.[126] He viewed and treated the flag as symbolic of those policies, rather than as a symbol of national patriotic values. Johnson was thus held entitled to the protection of the First Amendment's free speech clause. The result was to void his conviction under a Texas law punishing intentional desecration of "venerated objects" such as the national flag.[127]

The majoritarian reaction to the *Johnson* decision was swift and angry. One dramatic instance was a visceral demand by the President of the United States that the Constitution be amended to grant

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[124] *See* Gilbert v. Minnesota, 254 U.S. 325 (1920). The Court affirmed Gilbert's conviction, under a state statute, for having made a public anti-war speech, protesting America's involvement in World War I. In rejecting Gilbert's First Amendment arguments, the Court conceded "for the purposes of this case" that the right of free speech is a natural and inherent right that was regarded, at the time the nation was born, "as among the most sacred and vital possessed by mankind." However, the Court held that this natural or inherent right is "not absolute" and is "subject to restriction and limitation." *Id.* at 332 (Holmes, J., concurring). It then found a limitation in the fact that "every word that [Gilbert] uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted." *Id.* at 333 (Holmes, J., concurring). In dissent, Justice Brandeis found that the state law and the conviction thereunder were "inconsistent with the conceptions of liberty hitherto prevailing . . . ." *Id.* at 336 (Brandeis, J., dissenting).

[125] 109 S. Ct. 2533 (1989).

[126] Johnson's expressive conduct consisted of burning an American flag at the end of a political demonstration in Dallas during the 1984 Republican National Convention, apparently at the precise time when Ronald Reagan was being renominated for President. The state conceded that the purpose of the demonstration, of which the flag-burning was a constituent part, was to protest the nuclear war policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, stopping at targeted corporate locations to dramatize the consequences of nuclear war by staging "die-ins," spray-painting building walls, and overturning potted plants. Johnson himself took no part in such activities. The demonstration ended in front of the Dallas city hall. At that point, Johnson accepted an American flag handed to him by a fellow protestor who had taken it from a flag pole outside one of the targeted buildings. Johnson unfurled the flag, doused it with kerosene, and set it on fire. While the flag burned, the demonstrators chanted, "America, the red, white, and blue, we spit on you." No one was injured or threatened with injury, although several onlookers testified they were seriously offended by the flag-burning. The demonstrators then dispersed without further incident. *Id.* at 2536-37.

[127] TEX. PENAL CODE ANN. § 42.09 (Vernon 1989).

the power to Congress and the States to prohibit any physical desecration of the flag, a proposal that died in the Senate.[128] At the same time, by an overwhelming majority, Congress voted to "strengthen" the 1968 flag desecration statute.[129] Neither the proposed amendment nor the statutory changes purport to address the problem of flag-burning or desecration as a mode of political expression. Nor does either appear sufficient to preclude application of the First Amendment, as interpreted and applied in *Johnson*, to a political act of flag-burning.

The *Johnson* decision constitutes a climactic, albeit controversial, chapter in the 200-year history of the First Amendment. Unlike the 1907 decision in *Patterson*, the *Johnson* ruling is a culminating exercise in First Amendment jurisprudence. It is firmly grounded on precedents, established over the past fifty or more years, that hold: (1) conduct intended to express an idea may be subject to First

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128 The proposed amendment provided: "The Congress and the States shall have the power to prohibit the physical desecration of the Flag of the United States." S.J. Res. 180, 101st Cong., 1st Sess. (1989). On October 19, 1989, the Senate voted in favor of the proposal by a 51 to 48 vote. But because an amendment requires a two-thirds vote of approval, the joint resolution proposing the amendment was rejected. *See* 135 CONG. REC. S13733 (1989). The rejection effectively killed the proposed amendment, at least for the present.

During the Senate debate on the amendment, Senator Mitchell pointed out that "the language of the proposed flag amendment does not specify which provision of the Bill of Rights it is intended to supercede or which element of the right of free speech it is intended to suspend." 135 CONG. REC. S13732 (1989). Any legislation enacted pursuant to the proposed amendment, as Senator Mitchell noted, would have to comply with the First Amendment and, unless the Court were to change its mind, the rule of Texas v. Johnson, 109 S. Ct. 2533 (1989), would still prevail.

129 The Flag Protection Act of 1989, Pub. L. No. 101-31, effective on October 28, without the Presidents' signature, amended the 1968 flag desecration statute, 18 U.S.C. § 700, in several respects:

1. The 1968 statute punished "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it . . . ." The 1989 amendment changes this provision so as to punish "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States . . . ." The amendment also adds that this provision "does not prohibit any conduct consisting of the disposal of the flag when it has become worn or soiled."

2. The 1989 amendment re-defines the term "flag of the United States" to mean "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."

3. The 1989 amendment adds a new provision authorizing a direct appeal to the Supreme Court from any interlocutory or final judgment of a district court ruling upon the constitutionality of the punishment provision. The Court is directed "to accept jurisdiction over the appeal" if it has not previously ruled on the constitutional question, and to expedite the appeal to the greatest extent possible.

Amendment protection;[130] (2) conduct involving use of the American and other flags can be a symbolic form of communicating an idea and expressing a political statement;[131] (3) government cannot make the communicative nature of conduct the basis for proscription without the very substantial showing of need that the First Amendment requires, a need not demonstrated in *Johnson*; (4) governmental proscription cannot be based on the fact that an audience takes serious offense at particular symbolic conduct; (5) an individual cannot be prosecuted for conduct that symbolically expresses dissatisfaction with the policies of this country, "expression situated at the core of our First Amendment values";[132] (6) the First Amendment outlawry of punishment for that with which government or the popular majority disagrees "is not dependent on the particular mode in which one chooses to express an idea";[133] and (7) government cannot foster its own view, or the public's view, of the flag by prohibiting expressive conduct relating to it.[134]

Thus, *Johnson* is faithful not only to precedent but to the values embedded in the First Amendment. It preserves something at the central core of what it is to be human — the human urge and need on occasion to speak unorthodox thoughts and to express these thoughts in unorthodox ways. The Court once said that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[135] It follows that if it is the speaker's *mode* of expression that gives offense — and both the government and the public have been grossly offended by Johnson's flag-burning mode — "that consequence is a reason for according it constitutional protection."[136] After all, the First Amendment is part

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130 While the Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," United States v. O'Brien, 391 U.S. 367, 376 (1968), it has insisted that conduct must be "sufficiently imbued with elements of communication" to fall within the scope of the First Amendment. Spence v. Washington, 418 U.S. 405, 409 (1974).

131 *See, e.g.*, Spence v. Washington, 418 U.S. 405, 409 (1974) (attaching a peace sign to the flag); Smith v. Goguen, 415 U.S. 566, 568 (1974) (treating flag "contemptuously" by wearing small flag in seat of pants); Street v. New York, 394 U.S. 576, 594 (1969) ("state may not criminally punish a person for uttering words critical of the flag"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (saluting the flag); Stromberg v. California, 283 U.S. 359, 368-69 (1931) (displaying a red flag). Other flag desecration cases are collected and analyzed in M. NIMMER, NIMMER ON FREEDOM OF SPEECH at 3-49 to 3-64 (1984).

132 Texas v. Johnson, 109 S. Ct. 2533, 2543 (1989).

133 *Id.* at 2544.

134 *Id.* at 2545.

135 FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

136 *Id.*

of a bill of rights for those with minority viewpoints and interests, a bill of rights designed to protect minorities against the occasional tyrannies and condemnations of governing majorities.

Finally, we ask: what are the source, nature, and purpose of Johnson's right to express his opposition to the government's nuclear war policies by burning the American flag? What First Amendment values are at stake in this case? The majority opinion in *Johnson* did not overtly attempt to address these questions. The unarticulated premise of the decision, however, was that the First Amendment's values and purposes must protect Johnson's right to express himself in this unpopular manner. Under the natural or fundamental rights theory that we have examined, Johnson as a human being has a natural right, an individually autonomous right of choice, to express himself in a peaceable manner in opposition to majoritarian or governmental policies. Here, Johnson chose to express that opposition by burning a flag that he believed symbolized policies that he opposed, a flag that served as a patriotic symbol to virtually all other Americans. If we are faithful to the natural rights underpinning of the First Amendment, we can only conclude, as did the Court, that the government cannot force Johnson to change his opinion as to what the flag symbolized to him.

Consider for a moment the inadequacy of any other First Amendment justification for Johnson's expressive conduct:

1. Johnson's conduct contributes little if anything to the search for truth with respect to our government's nuclear war policies. Nor can we confidently say, in the words of Justice Holmes, that the best test of truth as to those policies "is the power of the [flag-burning] thought to get itself accepted in the competition of the market."[137]

2. It is equally difficult to find very much "democracy-promotion" in Johnson's expressive act of burning the flag. We must of course maintain the opportunity for free public discussion of political issues "to the end that [representative] government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[138] It is unlikely that government or the public will be very responsive to Johnson's form of discussing our nuclear issues. Indeed, the public abhorrence of flag-burning could prove counter-productive, at least from Johnson's political viewpoint.

3. Finally, it is difficult to premise Johnson's expressive burning of the flag on his innate desire for self-fulfillment, or realization of

[137] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[138] De Jonge v. Oregon, 299 U.S. 352, 365 (1937).

his character, or advancement of potentialities as a human being.[139] We can doubt whether the First Amendment was designed primarily to create a public therapeutic forum wherein Johnson can satisfy his self-fulfillment needs of expression by way of a flag-burning. There must be more value to the First Amendment than that.

And so perforce we return to the original purposes and values that inspired the framers to draft the First Amendment. What Johnson did was an articulation of the idea of freedom that is latent in all human consciousness. He gave expression to his natural and fundamental right to speak freely, to criticize governmental policies, to utilize a mode of expression that is unorthodox, and to the extreme — but not to the point of creating an imminent threat of violent reaction or being in violation of some other reasonable time, place, or manner restriction. Some people may exercise this innate right in an "uninhibited, robust, and wide-open" manner, making "vehement, caustic, and sometimes unpleasantly sharp attacks . . . ."[140] Some people may use their innate, natural right to express ideas in an extreme manner that society finds offensive or disagreeable or unpatriotic. That is precisely what the First Amendment is designed to protect. As the Court once observed: "Constitutional provisions are based on the possibility of extremes."[141]

In short, *Johnson* properly treats the First Amendment as preservative of the individual's natural right to speak out in unorthodox ways, to speak in the form of expressive conduct distasteful to the majority. The First Amendment is directed toward protection of that natural right, not toward preservation of venerable or patriotic symbols, not toward prescribing or forcing orthodox forms of expressive conduct. That the content of the individual's political statement or the mode of making such a statement may be overwhelmingly contrary to majoritarian beliefs only makes it the more appropriate to invoke First Amendment protections.[142]

It is unfortunate to celebrate the bicentennial of the First Amendment by trying to create a "patriotic symbol" exception, the first effort ever made to dilute any part of the Bill of Rights. If such

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139 *See* Emerson, *supra* note 7, at 879.

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

141 General Oil Co. v. Crain, 209 U.S. 211, 226-27 (1908).

142 As Justice Kennedy noted in his concurring opinion in *Johnson*, the Court was dealing with "a pure command of the Constitution" and, regardless of whether Johnson could appreciate the enormity of the offense he gave, "the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution." He also observed that it is "poignant but fundamental that the flag protects those who hold it in contempt." Texas v. Johnson, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring).

an effort were to succeed, we would then be dimming one of the fixed stars in our constitutional constellation — "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[143] We would then be adding to the Constitution the offensive notion that, whenever "overbearing majorities" have been passionately and patriotically upset by a Supreme Court interpretation of the First Amendment, "We the People" disavow the moral and natural right values underlying the First Amendment to the extent that those values lead to the result reached by the Court.

Despite these inept and so far unsuccessful efforts to overrule it, the decision in *Johnson* represents the most enduring values and purposes of the First Amendment guarantees of freedom of expression. By definition, it is a natural right to express one's political dissent by means of burning what one views as a symbol of governmental policies with which one disagrees. The ability to think, to rationalize, and to express unpopular thoughts through one's conduct constitutes the most natural, the most fundamental aspect of the autonomous self. That such an act produces widespread public condemnation only underscores the wisdom of the framers, who sought to protect unpopular expressions from abridgement by occasional "overbearing majorities." The framers did so by framing a natural right in terms that will endure for ages to come. Let it remain that way.

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