

The Origins of Freedom of Speech and Press

David S. Bogen

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [First Amendment Commons](#)

Recommended Citation

David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429 (1983)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol42/iss3/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Maryland Law Review

VOLUME 42

1983

NUMBER 3

© Copyright Maryland Law Review, Inc. 1983

THE ORIGINS OF FREEDOM OF SPEECH AND PRESS

DAVID S. BOGEN*

The Virginia Declaration of Rights contained the first constitutional guarantee of freedom of the press. Edmund Randolph, a member of the drafting committee, stated it was one of "the fruits of genuine democracy and historical experience."¹ The organic metaphor is apt, but two centuries later the fruit is still maturing.

The adoption of a constitutional provision is a significant event. It exerts a magnetic attraction. In the perennial debate over the nature and effect of framers' intention on constitutional interpretation, discussion tends to commence with the statements made during the drafting and ratification process. Some scholars argue that adoption crystallizes a principle.² They would freeze the meaning at that point in time to prevent modern judges from imposing their personal values. For these writers, the adoption of a provision marks the end to the development of a principle.³ Others seem to find that the adoption of a provision marks the beginning of a process to give it meaning. They reject limiting the inquiry to the applications that the drafters would make on a

* B.A. 1962, LL.B. 1965, Harvard University; LL.M. 1967, New York University; Professor of Law, University of Maryland School of Law.

1. Randolph, *Essay on the Revolutionary History of Virginia*, 44 VA. MAG. OF HIST. & BIOGRAPHY 43, 46 (1936).

2. E.g., R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 288-99 (1977); Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 2-7, 26-31 (1981).

3. Berger acknowledges that some provisions may be too murky for a defined historical content and new circumstances may call for applications of the principle to unanticipated contexts. Thus, later applications inevitably "develop" the principle. He insists, however, that the Court is bound to the specific value judgments made by the framers and the specific applications that they would have made of their language. In that sense, the adoption marks the end of the evolution of the principle. R. BERGER, *supra* note 2, at 288-99.

wide variety of grounds: Original intent is impossible to determine,⁴ the framers intended later generations to infuse the language with subsequently acquired values,⁵ the original conception is too narrow to fulfill the proper function of a constitution in our society,⁶ or the judiciary is the best organ to state and uphold evolving principles.⁷

There is much to be said (and much of it has been) on behalf of all of these views, but not enough attention has been paid to the proposition that the adoption of a constitutional provision is a midpoint in the development of principles of government. Freezing the meaning of a principle or freeing it from the context in which it arose are equally false to history. When a principle becomes a part of the formal constitution, it introduces the Court to a new role in the development process, but the process is a continuing one. The confluence of ideas and events that led to the declaration of a principle are important influences in the direction it takes, but the very nature of the development of principles suggests that they should not completely control the subsequent application. This article explores one provision of the constitution in this light: the guarantee of freedom of speech and of the press.

The meaning of the words "freedom of speech and of the press" for those who adopted the first amendment was the product of many strands of thought woven over many centuries and across an ocean. Some of these strands became separate constitutional guarantees while others were mentioned either directly or indirectly in the adoption process.⁸ Among the most prominent of these sources for understanding the guarantee of the first amendment are the parliamentary privilege of freedom of debate, the abolition of prior censorship in England, the

4. *E.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Bridwell, Book Review, 1978 DUKE L. J. 907. See Schauer, *An Essay on Constitutional Language*, 29 U.C.L.A. L. REV. 797, 804-12 (1982).

5. *E.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iii (1978); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 133 (1980).

6. *E.g.*, Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Brest, *supra* note 4.

7. *E.g.*, Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981).

8. Some events, such as the Zenger trial and Wilkes' expulsion from Parliament, are important contributions to the background of the first amendment. They prove difficult to analyze, however, because each involves an individual making statements with which the successful American revolutionists agreed. Thus, support for Zenger and Wilkes is not conclusive evidence of any particular principle of free speech beyond the unhelpful proposition that "persons should be able to say things with which I agree." This ambiguity in events leads to a focus on the statements of principle rather than specific events. If an event gives rise to universal acceptance of a principle, that principle should be evidenced by incorporation in a basic document or discussion.

letters of "Cato," the theory of natural rights, the growth of religious toleration, and the limited function of a national government in a federal system.

Each thread in this constitutional tapestry has its own history. Often a thread originated in controversies only tangentially related to freedom of speech. The path followed, however, led from expedient to principle, and the interrelationship of the principles that developed formed the design of the first amendment. A closer look at each strand reveals the dynamics of the process and suggests that the first amendment itself is capable of growth and development.

I. PARLIAMENTARY PRIVILEGE

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress⁹

Articles of Confederation

A. *The Development of Parliamentary Privilege*

Before the American Revolution the only mention of "freedom of speech" in the basic charter of any colony referred to the rights of legislators during sessions of the legislature. The meaning given the term in this limited context influenced its meaning when applied to the whole society. The development of parliamentary privilege demonstrates a recognition in early America of the relationship between speech and the political process and of the importance of the procedures for enforcing limits on speech as an aspect of securing its freedom.

The privilege evolved during the struggle of the British Parliament to gain more authority at the expense of the Crown. Parliament had begun as a convocation by the King of the most influential individuals in the realm to advise him on the governance of the country. In 1215 the powerful barons went beyond advising and secured from King John in the Magna Carta a promise not to levy certain taxes upon them without their assembled consent.¹⁰ As the social and economic structure of society changed, the support of a broader group was enlisted, and in 1295 representatives from the hundreds (districts within a county) were added to the lords spiritual and temporal.¹¹ Initially, the representatives had power only in matters of taxation. The King and barons together promulgated general laws of major importance; and

9. ARTICLES OF CONFEDERATION art. 5, cl. 5.

10. F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 64 (1963).

11. *Id.* at 74-75.

minor, temporary, or special laws were the province of the King alone.¹² During the next century the representatives or Commons became the appropriate body to initiate action by petitioning the King.¹³ Fearful of royal wrath due to these petitions, the Speaker of the House of Commons prefaced his term in office with a plea for forgiveness, protesting that if he said anything in the performance of his duties that displeased the King, it was unintentional.¹⁴ Gradually during the next century, the form of the petitions changed. The general request that the King make a law to resolve a problem became a bill whose form could not be altered by the Crown and which became law if the King consented.¹⁵

The shift to the House of Commons of responsibility for the text of laws caused its members to recognize a need for debate and discussion. Participants in a drafting process readily appreciate the assistance of criticism and the need for an atmosphere that encourages it. Debate within the House became accepted practice and the Speaker dropped the plea for forgiveness. Although the strongest discussions may have arisen over measures initiated wholly within the House of Commons, debate also included limited criticism of measures proposed by the King or his ministers. Beginning in the reign of Henry VIII, the speaker revived the plea for forgiveness in a broader and more assertive form as a petition that the ruler grant the right of free speech within Parliament.¹⁶ The petition became standard practice in the Elizabethan era.

A separate development eventually affected the contours of the privilege demanded. The Commons began to punish those who interfered with its functions — at first only outsiders who attempted to arrest or otherwise interfere with members' attendance,¹⁷ but soon its own members as well.¹⁸ As the Commons were often quick to punish those who offended Queen Elizabeth,¹⁹ she was satisfied that miscreants were being dealt with and did not attempt to prevent such legislative punishment. Although the Queen never admitted that Parliament had sole power to punish its members, this exercise of power eventually

12. *Id.*

13. Neale, *The Common Privilege of Free Speech in Parliament*, in *TUDOR STUDIES* 261 (R. Seton-Watson ed. 1969).

14. *Id.* at 260.

15. *Id.* at 265.

16. *Id.* at 268-72. See also Wittke, *The History of English Parliamentary Privilege*, 26 *OHIO ST. U. BULL.* 9, 23 (1921).

17. Neale, *supra* note 13, at 266.

18. *Id.* at 272.

19. *Id.* at 285. See also Wittke, *supra* note 16, at 27.

led to claims by Parliament of exclusive jurisdiction in the struggle between the Crown and Parliament for control of the government.²⁰

The tendency of practice to become enshrined as principle was reflected in the seventeenth century confrontations over the issue of parliamentary privilege. Parliament, led by Sir Edward Coke, asserted that free speech in Parliament was a customary right, but King James maintained that it was merely a privilege which he was free to withhold.²¹ In 1629, James' successor, Charles I, ordered the arrest of three members of Parliament for their conduct in the House of Commons. The defendants unsuccessfully pleaded that such offenses were punishable only in Parliament and not by any court.²² In 1641, Parliament declared that the 1629 proceedings were a breach of its privileges.²³ Thus, by the middle of the seventeenth century, the speaker's timid plea for forgiveness had become a claim of the right to freedom of speech within Parliament and to exclusive jurisdiction to punish its abuse.

Although this assertion was a milestone, parliamentary privilege was not secure until the general increase in Parliament's power during the extraordinary upheavals in British government in the succeeding decades. Charles I was beheaded in 1649 in the Puritan Revolution and succeeded by a Council of State, which in turn was followed by the Protectorate of the Cromwells. The Protectorate gave way to the restoration of the monarchy, and the Restoration itself was upset by the Glorious Revolution of 1689 which put William and Mary on the throne. This final event, at least in hindsight, gave Parliament supremacy and ended centuries of struggle over the control of speech in Parliament.²⁴ One evidence of that victory was the English Bill of Rights enacted in 1689, which stated: "That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament."²⁵

In the colonies, the local assemblies attempted to follow Parliament and to secure the same privilege for themselves.²⁶ On the whole, the attempt was successful and the guarantee of freedom of speech in legislative debate passed into fundamental law. The protection of speech often was confined to the assembly itself, but the colonists

20. Neale, *supra* note 13, at 285-86.

21. Wittke, *supra* note 16, at 28-29.

22. *Id.* at 29.

23. *Id.* at 30.

24. *Id.*

25. 1 Wm. & Mar., sess. 2, ch.2 (1688).

26. M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 62 (1971).

viewed the privilege as a fundamental value in society.²⁷ For example, the Massachusetts Declaration of Rights in 1780 stated:

The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.²⁸

Similarly, the Articles of Confederation directed that "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress"²⁹ Later, article one, section six of the Constitution embedded it in our fundamental law: "for any Speech or Debate in either House, they [senators and representatives] shall not be questioned in any other Place."³⁰

Searching for an understanding of freedom of speech in the domain of parliamentary privilege has a paradoxical aspect. Privilege was not only a weapon to gain independence and authority from the Crown, it was also a tool for Parliament to use against popular dissatisfaction. The principle that members shall not be questioned out of the legislature for any speech often was used to justify punishment of a private citizen for criticizing a legislator.³¹ Proceedings by legislative assemblies to punish imagined breaches of their privileges posed a sharp threat to the citizen's freedom to criticize government in both England and America.

The offensive use of the legislature's privilege against the people, however, was not viable in the new republic. Protecting legislators from public criticism was inconsistent with the fundamental principle that ultimate political power resides in the people. The Constitution demonstrated at least a rhetorical consensus on this principle. Its preamble began with the phrase "We, the people of the United States." This understanding even led to debate in Congress when the Bill of Rights was proposed over whether legislators should be bound to follow the instructions of the electorate on specific matters.³² One speech in Congress opposing the Bill of Rights as unnecessary illustrates the repudiation of the aggressive side of parliamentary privilege. "An honorable gentleman," Congressman Jackson said,

27. *Id.* at 68-92.

28. Declaration of Rights para. XXI (Mass. 1780), *reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 343 (1971).

29. ARTICLES OF CONFEDERATION, art. 5, cl. 5.

30. U.S. CONST. art. 1, § 6.

31. Wittke, *supra* note 16, at 49-51. *See also* M. CLARKE, *supra* note 26, at 103-31.

32. 1 ANNALS OF CONG. 732-47 (J. Gales ed. 1789) [hereinafter cited as 1 ANNALS OF CONG].

a member of this House, has been attacked in the public newspapers on account of sentiments delivered on this floor. Have Congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, although the constitution provides that a member shall not be questioned in any place for any speech or debate in the House? No, these things are offered to the public view, and held up to the inspection of the world. These are principles which will always prevail.³³

While popular sovereignty thus affected American understanding of parliamentary privilege, legislative freedom of speech in turn affected our understanding of the right of free speech in society. The extension of freedom of speech from the legislator to the individual was a large step. The new context raised new issues, but principles derived from parliamentary privilege remained relevant to the broader guarantee.

B. *Contribution to the First Amendment*

The major contribution of parliamentary privilege to the concept of freedom of speech is a recognition that protection of speech is needed for the successful operation of the political process and the preservation of self-government. The relationship between free speech and self-government, which has been a central theme of first amendment analysis,³⁴ was embedded in an understanding that arose about the parliamentary privilege of debate. An acknowledgment of the value of discussion, for example, explains in part the rejection of the power of the electorate to issue binding instructions to their representatives — a decision apparently inconsistent with the concept of popular sovereignty.³⁵

The tie between legislative privilege and the first amendment was asserted as early as 1799 by George Hay.³⁶ Hay, writing in opposition to the Sedition Act, argued that the first amendment insulated all expression from punishment because freedom of speech in the legislature applied to all expression. Hay, however, used the analogy to legislative privilege only as a makeweight and was virtually alone in making this argument. Although he was correct that the two rights were related, he

33. 1 ANNALS OF CONG., *supra* note 32, at 442-43.

34. See, e.g., A. MEIKLEJOHN, POLITICAL FREEDOM (1960).

35. *Supra* note 32. The rise of popular sovereignty was itself an important factor in developing notions of free speech. The idea that men should not be governed by laws that they had no hand in making was central to the American Revolution, as reflected in the slogan "no taxation without representation." An outline of this development would unduly prolong the text, but it is clearly reflected in *Cato's Letters*. See *infra* Section III.

36. G. HAY, AN ESSAY ON THE LIBERTY OF THE PRESS (1799).

stretched the relationship too far, ignoring the power of the legislature to censure its own members.

This privilege, which led in part to the declaration that "Congress shall make *no* law . . . abridging freedom of speech or of the press," imposed limits upon speech despite the recognized value of free debate. Parliamentary privilege did not relieve the legislator of all fear of consequences for his speech in the assembly, because his colleagues could censure him for abuses of the privilege.³⁷ Nevertheless, the setting made censure an unusual event. Within the halls of Parliament, speech could do little harm. Parliament did not publish its proceedings, and any harm from illicit publication could be attributed to the publisher rather than the speaker. If unpublished, slanderous statements could have little effect on reputation; obscenity would not corrupt the masses; and the urging of unlawful acts would pose no threat where the audience is limited to legislators. Unorthodox views present little danger within the halls of Parliament beyond the possibility that they might be adopted. Moreover, censuring a legislator for his views in Parliament would indicate a woeful lack of confidence of the body in itself.

The boundary lines of permissible speech in a legislature are vague because the limits are enforced by tacit understanding and fear of censure more than by actual censure proceedings, yet the limits do exist. The greatest concern over speech within a deliberative body is that members might engage in personal invective or other offensive remarks that would unleash personal hostility and frustrate deliberate consideration.³⁸ Only a very limited number of subjects — the existence of God, the legitimacy of the King — might be so sacred that the mere expression of opposing views would be found offensive enough to hamper deliberation. Where punishment for speech is based on its potential to injure the deliberative process, however, peer pressure within the closed body of the legislature is an effective restraint without resort to formal sanctions.

Although the existence of legislative privilege demonstrated a recognition of the importance of expression to self-government, it did not determine the meaning of freedom of speech as applied to the general public. The Congress that drafted the first amendment did not mention legislative privilege as its basis, nor was the phrase "freedom of speech" used in the constitutional provision for legislative privilege. Speech has different characteristics when engaged in outside the legislature. Legislative speech thought to harm discussion could result in censure, but

37. M. CLARKE, *supra* note 26, at 190-94.

38. *Id.*

speech confined to a legislative body was powerless to cause any other harm. Once freedom of speech was applied to society generally, it became evident that the potential of speech to cause harm greatly increased. Thus, legislative privilege contributed to a recognition of the value of discussion for self-government but did not define its proper scope.

The second contribution of legislative privilege to freedom of speech was procedural. The primary function of the privilege had been to limit jurisdiction to punish. In England, where the arena for debate was the Parliament and Parliament alone, only its members could decide what speech was allowable and what speech was an abuse. Members of Parliament were best suited to consider the contribution of criticism to discussion because their decisions would affect the ambit of their own speech. When the political process is broadened to include the whole of the population, the people themselves by analogy should set the limits. In the federal system, it follows that only Congress can set national limits on speech.

At first glance, the proposition that only Congress can control speech seems directly contrary to the language of the first amendment which literally restricts only Congress and not the other branches of government from abridging freedom of speech. A little history, however, sheds light on this apparent paradox. The clause reflects the view that under the Constitution only the whole body of the people acting through Congress even arguably has power to restrict speech.

The phrase "Congress shall make no laws" was initially proposed in New Hampshire's constitutional ratification convention as a recommendation for amending the Constitution with respect to religion.³⁹ Later, Madison's proposed amendment on religious freedom stated: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."⁴⁰ The Committee of Eleven to whom Madison's proposals were referred simplified this proposal to state that "no religion shall be established by law, nor shall the equal rights of conscience be infringed."⁴¹ When it came before the entire House, Congressman Sylvester pointed out that the clause read like an establishment of atheism.⁴² Madison noted that he only meant "that Congress should not establish a religion, and enforce the legal observation of it by law, nor

39. 1 B. SCHWARTZ, *supra* note 28, at 758.

40. 1 ANNALS OF CONG., *supra* note 32, at 434.

41. *Id.* at 729.

42. *Id.*

compel men to worship God in any manner contrary to their conscience"⁴³ and that it was feared by some states that Congress would otherwise have such power under the necessary and proper clause.⁴⁴ Huntington agreed with Madison's expression of the amendment's purpose, but argued that the language might be construed to forbid enforcement in federal court of a contract between members of a congregation to provide support for the church. Madison sought to placate Huntington's concern by suggesting the insertion of the word "national" between "no" and "religion," but others feared an implication that the constitution created a national rather than a federal system. Livermore of New Hampshire suggested his state's proposal to resolve the problem: "that Congress shall make no laws touching religion, or infringing the right of conscience."⁴⁵

Adoption of Livermore's proposal reflected a recognition by Congress that a federal court might affect religion by decisions enforcing private contract rights, but the only federal body with any arguable power to impose a national religion or coerce national religious observance was Congress. Under the constitutional framework that the framers of the first amendment understood had been created, only Congress needed to be restrained because only Congress could enact federal laws and therefore it was the only body with power to threaten the interest in religious freedom.

Although there is no record of the Senate discussion that produced the fusion of religious freedom and freedom of speech into a single amendment, it seems likely that it reflected this same perception that only Congress had power to threaten the underlying concern. In this light, the final form of the first amendment — "Congress shall make no law . . . abridging the freedom of speech or of the press" — protects against the only body on the federal level that can restrict speech.⁴⁶

43. *Id.* at 730.

44. *Id.*

45. *Id.* at 731.

46. George Mason complained in the Virginia Senate debate over ratification of the proposed amendment:

The amendment does not declare and assert the right of the people to speak and publish their sentiments nor does it secure the liberty of the press. Should these valuable rights be infringed or violated by the arbitrary decisions of judges or by any other means than a legislative act directly to that effect, the people would have no avowed principle in the constitution to which they might resort for the security of these rights.

2 K. ROWLAND, *GEORGE MASON* 321 (1892). Mason, however, had not participated in the congressional debates, nor did anyone take alarm at his comments here. With respect to judicial power, the rejection by the Supreme Court of any federal criminal common law in *United States v. Hudson*, 2 U.S. (7 Cranch 32) 445 (1812), later made it clear that judicial restraint of speech could not extend further than congressional will. The discussions re-

Many of the Supreme Court's first amendment ancillary doctrines are attempts to be certain that the legislature has decided that the speech restriction is necessary. For example, a canon of statutory interpretation is that statutes, where possible, should be construed to avoid application that would restrict expression.⁴⁷ Similarly, the Court often invalidates administrative action that impairs speech by construing narrowly the legislature's delegation of power to the administrator.⁴⁸ Although these practices have been defended as part of a general policy of avoiding unnecessary constitutional decisions,⁴⁹ they may be equally justified on the basis of the historic insistence that only Congress has power to restrict speech — an assumption with roots in the legislative privilege of debate.

Further, albeit tenuous, support for the proposition that speech restrictions are imposed appropriately only by one's peers lies in the guarantees to a jury trial in the sixth and seventh amendments to the Constitution. Not only are laws restricting speech to be made by Congress, a body representative of the speaker's peers, but their enforcement also involves a decision by those peers. The people as a whole cannot act as a tribunal, but they can decide particular cases through a representative body — the jury. From Zenger's trial until the Revolution, the refusal of juries to convict the critics of royal government had been an effective protection for the colonists.⁵⁰ Although the demand for a right to jury trial had many antecedents besides the controversies over free speech, the idea that the jury should determine whether the matter was libelous as well as the fact of publication had connections, however loose, with the privileges of Parliament.

Thus, the legacy of the struggle for parliamentary privilege was an appreciation of the role of discussion in the process of government and a recognition that the procedures for enforcing limits on expression are an important facet of protecting its freedom.

II. THE ABOLITION OF PRIOR CENSORSHIP

The liberty of the press . . . consists in laying no previous

ferred to in the text demonstrate that the drafters saw no threat to freedom other than from Congress. See G. ANASTAPLO, *THE CONSTITUTIONALIST* 53-89 (1971).

47. See Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 696-701 (1978).

48. See, e.g., *Schneider v. Smith*, 390 U.S. 17, 26-27 (1968); see also Bogen, *supra* note 47, at 701-03.

49. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring), contains the classic statement of narrow construction as a tool to avoid passing on constitutional questions.

50. L. LEVY, *LEGACY OF SUPPRESSION* 126-75 (1960).

restraint upon publications, and not in freedom from censure for criminal matters when published.⁵¹

William Blackstone,
Commentaries on the Laws of England (1769)

The abolition of prior censorship in England nearly a century before the drafting of the first amendment permeated the eighteenth century understanding of the phrase "freedom of the press" and contributed to the perception that protection for expression should not be confined to legislators. Although some people may have understood the term "freedom of the press" only in the limited sense of an absence of prior restraint, the first amendment encompassed a broader concept.⁵² It also protected freedom of speech as a separate related right.

51. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (1769).

52. Blackstone's definition is impossible to square with several statements by others involved in the ratification process. It applies easily to freedom of the press, but insistence on a clause protecting freedom of speech makes little sense in the context of a definition limited to prior restraint. In Maryland, a minority report at the ratification convention proposed the addition of several amendments to the constitution, including one that stated: "That the freedom of the press be inviolably preserved." 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 552 (1937). The report went on to note: "In prosecutions in the federal courts for libels, the constitutional preservation of this great and fundamental right may prove invaluable." *Id.* If freedom of the press means merely the absence of prior restraint, its value in a libel suit would be nil. Thus, at least some Maryland delegates thought that freedom of the press meant more than the absence of prior restraint. New York's Ratification Convention proposed an amendment that stated that "Freedom of the Press ought not to be violated or restrained." 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 193 (U.S. Dept. of State ed. 1894). The disjunctive indicates that something other than restraint would be a violation of freedom of the press. Indeed the language of the amendment throughout its journey in Congress never used the word "restrained" and eventually came up with the very different "abridged."

When Jefferson heard of Madison's proposed amendments, he suggested his own alteration: "The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations." 15 THE PAPERS OF THOMAS JEFFERSON 367 (J. Boyd ed. 1958). The suggestion in the proposal that people could be denied or abridged their right to speak or publish false facts cannot have as its predicate that freedom to publish refers only to prior restraints. It assumes that all materials would be published without prior censorship, but some material would not be protected from being the basis of a subsequent punishment. All these statements made contemporaneously with the proposal of the first amendment by persons associated with the process point to a definition of freedom of speech and of the press much broader than Blackstone's. From Mason to Madison, the development of charter language protecting freedom of speech and of the press was in the hands of politicians who studied government rather than lawyers. The Federalists were quite correct that there was no threat of nor apparent authority for instigating a federal system of prior restraint of expression. This merely reinforces the point that the proponents of a constitutional guarantee understood the touchstone for freedom of speech and of the press to be something quite different from Blackstone's conception.

Nevertheless, the frequent references to the abolition of prior censorship in England in the debates over ratification of the Constitution demonstrate its importance to the people's understanding of the first amendment. A major impact of that abolition was to extend public participation in political debate from among the privileged few to the general populace.

When the anti-federalists launched their attacks on the proposed new Constitution, charging that it did not secure freedom of the press, several of the proponents of the Constitution replied in a manner that showed they understood the term to mean no more than the absence of prior restraint. In his *Remarks on the New Plan of Government*, Hugh Williamson wrote:

There was a time in England, when neither book, pamphlet, nor paper could be published without a license from government. That restraint was finally removed in the year 1694 and, by such removal, their press became perfectly free, for it is not under the restraint of any license. Certainly the new government can have no power to impose restraints.⁵³

Similarly, in Virginia's ratification convention, George Nicholas said:

The liberty of the press is secured. What secures it in England? . . . In the time of King William, there passed an act for licensing the press. That was repealed. Since that time, it has been looked upon as safe. The people have depended on their representatives. They will not consent to pass an act to infringe it, because such an act would irritate the nation. It is equally secure with us.⁵⁴

Centuries of press regulation in England and the abolition of prior censorship there impressed upon Americans the need for protection against prior restraints. Although ten of the states had made some form of declaration of rights or constitutional provision protecting liberty of the press, only two states — Pennsylvania and Vermont — also mentioned freedom of speech.⁵⁵ Those two states mentioned the right of freedom of speech only as a premise, from which a conclusion was drawn: "Therefore the freedom of the press ought not to be

53. H. WILLIAMSON, *REMARKS ON THE NEW PLAN OF GOVERNMENT*, 1788, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 550-51.

54. 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 246-47 (1937).

55. Decl. of Rights para. XII (Va. 1776); Decl. of Rights para. XII (Pa. 1776); Decl. of Rights para. XXIII (Del. 1776); Decl. of Rights para. XXXVIII (Md. 1776); Decl. of Rights para. XV (N.C. 1776); GA. CONST. art. LXI (1777); Decl. of Rights para. XIV (Vt. 1777); S.C. CONST. art. XLIII (1778); Decl. of Rights para. XVI (Mass. 1780); Bill of Rights para. XXII (N.H. 1783).

restrained."⁵⁶

Prior restraint is an integral part of the history of the printing press. In 1476, William Caxton introduced the art of printing to England.⁵⁷ The early years of printing saw the small number of printers publishing only noncontroversial matters.⁵⁸ During the next century, the expansion of the trade evoked a series of commercial regulations.⁵⁹ Initially, printers obtained the privilege of the King in a primitive form of copyright for each book printed.⁶⁰ Later, some printers were granted monopolies for the publication of books dealing with specific subject matter.⁶¹ But when the Reformation made headway in Europe and found printers in England, the King reacted by requiring religious works to be submitted to church officials before publication.⁶²

When Henry VIII established himself as head of the Church in England, religious controversy inevitably headed for entanglement with political issues.⁶³ The devices of monopolies and limited licensing were supplemented constantly with new laws and regulations that sought both to control content and to regulate commerce.⁶⁴ The peak of restrictive practices was reached in 1586 under Elizabeth I when a Star Chamber decree specifically limited the number of printing establishments and required all books to be reviewed before publication by the Archbishop of Canterbury or the Archbishop of London.⁶⁵ Control was exerted through the Stationers Company, a guild of the licensed printers. In exchange for monopolistic power, these printers toed the line of submission to the licensor. In one form or another the licensing system established by the Star Chamber persisted until 1641, but there were constant evasions and enforcement difficulties. Skilled printers unable to secure a position under the established quotas turned to secret publishing of unlicensed works.

Elizabeth's successors were less successful in fending off both religious and secular criticism despite the Stationers Company's attempts to protect its monopoly. In 1641, a rebellious Parliament abolished the Star Chamber,⁶⁶ thus incidentally ending the mechanism for enforcing

56. Decl. of Rights para. XII (Pa. 1776); Decl. of Rights para. XIV (Vt. 1777).

57. F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 23 (1952).

58. *Id.* at 25.

59. *Id.* at 31.

60. *Id.* at 35.

61. *Id.* at 38.

62. *Id.* at 46.

63. *Id.* at 48-49.

64. *Id.* at 50-61.

65. *Id.* at 61-62.

66. *Id.* at 187.

the licensing system. For several years the press was left without both an effective censor and an effective copyright protection. The vitriolic verbal battles and the disarray of the printing trade that ensued finally moved Parliament to enact a new censorship enforcement regime. It established a board of Licensors in 1643 and restored enforcement authority to the Stationers Company through the courts. Censorship shifted from royal and episcopal control to parliamentary and puritan control. The monopolies of the Stationers Company were cut back, but licensing continued. With the Restoration, the Printing Act of 1662 established the licensing system under parliamentary authority with far greater specificity in the requirements for a license. A Surveyor of the Press under the secretaries of state was set up, but it was a precarious job: The approval of books that proved offensive to the Crown would lead to his swift removal. The Glorious Revolution of 1689 effected no immediate revolution in the system of licensing, but in 1694 Parliament permitted the licensing act to expire.⁶⁷

The basis for refusal to renew the Act was no grandiose theory of free speech, but practical considerations arising from the difficulties of administration and restraints of trade. For more than a century maintenance of a licensing system had depended on the alliance between the Stationers Company and the government. By the late seventeenth century, however, the printers sought protection of their rights of exclusivity in the courts rather than from the King. Secure in existing rights and anxious to secure more business, the Stationers Company no longer was zealous in aiding enforcement of the licensing law. Independent tradesman — booksellers, bookbinders, and printers — attacked the Printing Act for impairing the exercise of their trade. There could be no rights in unlicensed books or pamphlets, yet their publication was very profitable. The House of Commons perceived the restrictions as driving up the price of books with no corresponding gain in effectively suppressing offensive ones. The censors often had been unsatisfactory, delaying unobjectionable books, allowing offensive ones, and all too prone to accept bribes. For these reasons, the Act was not renewed.⁶⁸

The death of the licensing system ended prior restraints, but it did not signal the end of punishment for speech offensive to the authorities. Prosecutions for seditious libel and proceedings by the House of Commons and the House of Lords against publishers for breach of parliamentary privilege were major vehicles of suppression during the

67. *Id.* at 260-63.

68. *Id.*

eighteenth century.⁶⁹ Despite the existence of limits on what safely might be said, the abolition of the licensing system enabled everyone with access to a printing press to publish their thoughts. The eighteenth century saw the growth and flowering of political journals and journalists.⁷⁰ The independent tradesmen who had benefited from the expiration of the Printing Act extolled the virtues of its abolition.⁷¹ By the middle of the eighteenth century, the absence of prior censorship had advanced from a simple statement of fact to a principle. This principle was stated in its most familiar form by Sir William Blackstone in his *Commentaries on the Laws of England*:

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.⁷²

Although licensing had expired at the end of the seventeenth century in England, sporadic attempts to impose prior restraints continued in the colonies until the 1720's.⁷³ After that point all threat of a licensing system appears to have vanished. In this area, the colonists again successfully obtained for themselves the privileges that existed in England.

The direct legacy of the expiration of the licensing act and the concomitant absence of prior restraints was the belief that expression was not reserved for the privileged few but was common property for all people. Despite the restraints imposed by seditious libel laws, discussion of the wisdom of government measures spread from Parliament to populace.

III. THE LETTERS OF "CATO"

Freedom of Speech is the great Bulwark of Liberty; they prosper and die together.⁷⁴

Cato's Letters No. 15

69. *Id.* at 368.

70. *Id.* at 369-74.

71. *See id.* at 260-63.

72. W. BLACKSTONE, *supra* note 51, at 152 (emphasis in original).

73. *See* L. LEVY, *supra* note 50.

74. 1 J. TRENCHARD & T. GORDON, *CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS* 96, 100 (1755) [hereinafter cited as 1 *CATO'S LETTERS*].

As the mass media grew, it became a vehicle for both the government and its opponents. The political opposition, particularly during the ministry of Robert Walpole, began to claim that public criticism of government was both a right and a duty. The colonists, growing increasingly disenchanted with transoceanic rule, paid particular attention to the writings of these critics.⁷⁵

The original form of the guarantee of freedom of speech and of the press proposed by Madison reveals a reliance on this source: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty shall be inviolable."⁷⁶ One phrase in this proposal — "one of the great bulwarks of liberty" — sticks out like a sore thumb; it adds nothing to the operative force of the sentence. The Committee of Eleven to whom Madison's proposals were referred must have seen this, for they omitted the phrase in their new draft. Like a fossil preserved in amber, however, the inclusion of the phrase in the original proposal is an important clue in reconstructing the past.

Madison lifted the phrase directly from the 1776 Virginia Declaration of Rights which states: "The freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments."⁷⁷ In turn, the phrase "bulwark of liberty" is almost certainly taken from the whig pamphleteers, John Trenchard and Thomas Gordon, who, writing under the pseudonym Cato, said "Freedom of Speech is the great Bulwark of Liberty; they prosper and die together."⁷⁸

Cato's Letters were among the most familiar essays printed in America. According to Clinton Rossiter, they were "the most popular, quotable, esteemed source of political ideas in the colonial period."⁷⁹ Benjamin Franklin first published Cato's Essay on Freedom of Speech in 1722 after his brother had been imprisoned by the Massachusetts legislature for his criticism of government.⁸⁰ This essay was reprinted by John Peter Zenger in 1733 shortly before his criticism of New

75. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

76. 1 *ANNALS OF CONG.*, *supra* note 32, at 434.

77. Decl. of Rights (Va. 1776), *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 235. Madison was a member of the committee when Mason proposed this language. His own later proposals clearly drew from existing state language.

78. 1 *CATO'S LETTERS*, *supra* note 74, at 100. *See* Anderson, "The Origins of the Press Clause," 30 *U.C.L.A. L. REV.* 455, 491-92, 524 (1983).

79. C. ROSSITER, *SEEDTIME OF THE REPUBLIC* 141 (1953).

80. *Id.* at 298-99.

York's Governor resulted in the famous seditious libel trial.⁸¹ In Massachusetts, after one judge had charged a grand jury on libel by limiting the term "liberty of the press" to the absence of prior restraint, the Boston Gazette responded by reprinting Cato's essay. Soon thereafter, when the Governor asked the General Assembly to proceed against the Gazette for a vituperous attack on him, the lower house refused to act, responding with language drawn from Cato's Letters — "The Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it."⁸²

Thus *Cato's Letters* are essential to an understanding of the first amendment. The crucial essays focused upon the relationship between speech and the political process and the concern about the procedures of speech limitation drawn from parliamentary privilege, and united these lessons with the extension of rights of speech to all people derived from the abolition of censorship. They maintained that every citizen has a right to engage in honest and accurate criticism of government, and pleaded for caution in the punishment of unprotected speech.⁸³

Cato's Letters acknowledged the legitimacy of many of the restrictions on publication.⁸⁴ They were a product of their time — the 1720's — and must be understood in that context. The Hanoverian Succession in 1714 had brought England a king more concerned with German affairs than with England.⁸⁵ The ensuing years witnessed the growth of political power in Parliament, but Parliament was very different from its modern successor. The House of Lords began the century as at least the equal of the House of Commons, which was the province of a small group who were elected by a severely restricted electorate in malapportioned boroughs.⁸⁶ Although the lawmakers may have considered legislation to be in the "public interest," there was no belief within Parliament that the public should be part of the process. Debates were not officially reported, and attempts to report parliamentary proceedings were forced to use indirection and allusion because of threats of censure from that body.⁸⁷ Additionally, government feared a possible Jacobean uprising while the Pretender held court in exile in France.

81. V. BURANELLI, THE TRIAL OF PETER ZENGER 31-32 (1957); New York Weekly Journal, February 18, 1733, at 1.

82. L. LEVY, *supra* note 50, at 67-69.

83. 1 CATO'S LETTERS, *supra* note 74, at 247, 252-54.

84. *Id.* at 246-51.

85. I. KRAMNICK, BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE 113 (1968).

86. H. COMMAGER, THE EMPIRE OF REASON 135 (1977).

87. F. SIEBERT, *supra* note 57, at 346-63.

Under these circumstances a wholly free press was not to be expected nor did it exist. Nevertheless, papers and weekly political journals abounded and vigorous debate occurred within these limited political confines.⁸⁸

Political criticism had new reason to be vitriolic when, in 1720, the "South Sea Bubble" burst and economic disaster hit England. The stock of the private South Sea Company, which had taken over the national debt in exchange for trading rights, skyrocketed and then plummeted. The crash spelled disaster not only for individual shareholders, but also for the nation whose debts the company had pledged to pay.⁸⁹ This event was the starting point for a series of letters in the *London Journal* written by John Trenchard and Thomas Gordon under the name of Cato. Calling for vengeance against those responsible for the losses, and attacking by historical parallels those ministers who sought to rescue the South Sea Company or to allow profiteers (many of whom had broken no law) to go free, *Cato's Letters* stepped on important toes. Assailed as the voice of the mob, Trenchard and Gordon replied: "The Word *Mob* does not at all move me, on this Occasion, nor weaken the Grounds which I go upon. It is certain, that the whole People, who are the Publick, are the best Judges, whether Things go ill or well with the Publick."⁹⁰ The letters were careful to name no names and to praise constantly the wisdom and virtue of the King, Parliament, and the ministers. The praise, however, was couched in terms of expectation of wise future action, so that contrary measures subsequently taken would bear the imputation of being taken by stupid and evil persons. Buffeted by attacks in the government press and buoyed by popular response, Trenchard and Gordon discussed in several essays the nature of government and specifically the proper role of free speech.

Number 15 of *Cato's Letters*, entitled "Of Freedom of Speech: That the same is inseparable from Publick Liberty," focused on the contribution of free speech to the preservation of liberty. The essay begins:

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech: Which is the Right of every Man, as far as by it he does

88. B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 31-52 (1965).

89. See 1 *CATO'S LETTERS*, *supra* note 74, at 5-15.

90. *Id.* at 1 *CATO'S LETTERS*, *supra* note 74, at 86-87. One number of the *London Journal* was proceeded against for publishing an account of a secret minister's meeting, but ultimately the government stopped publication by obtaining ownership of the paper. L. HANSON, *GOVERNMENT AND THE PRESS 1695-1763* 106-07 (1936).

not hurt and controul the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know.⁹¹

The essay argues that only wrongdoers need fear the press: "Freedom of speech is the great Bulwark of Liberty; they prosper and die together: And it is the Terror of Traytors and Oppressors, and a Barrier against them."⁹²

Issue number 32 in this series, "Reflections upon Libelling," revealed that the freedom that the authors urged was the freedom to criticize public actions accurately, not protection for all criticism:

A Libel is not the less a libel for being true. This may seem a Contradiction; but it is neither one in Law, or in common Sense: There are some Truths not fit to be told; where, for Example, the Discovery of a small Fault may do great Mischief; or where the Discovery of a great Fault can do no Good, there ought to be no Discovery at all: and to make Faults where there are none, is still worse.

But this Doctrine only holds true as to private and personal Failings; and it is quite otherwise when the Crimes of Men come to affect the Publick

The exposing therefore of publick Wickedness, as it is a Duty which every Man owes to Truth and his Country, can never be a Libel in the Nature of Things.⁹³

The proposition that the exposure of maladministration is not libelous was rooted in political theory. "Let it be remembered," the essay continues, "for whose Sake Government is, or could be, appointed; then let it be considered, who are more to be regarded, the Governors or the Governed."⁹⁴

Cato's Letters provided intellectual support for criticism of government, yet acknowledged a very broad scope for application of libel laws. The licensing laws had expired less than three decades earlier, and England had little experience with a free press. The furthest Trenchard and Gordon could safely go was to advocate freedom for the type of abstract reflections of their previous essays. Seditious libel, false charges, and personal attacks should be punished:

As to Libels against Government, like all others, they are always base and unlawful, and often mischievous; especially when

91. 1 CATO'S LETTERS, *supra* note 74, at 96.

92. *Id.* at 100.

93. *Id.* at 246-47.

94. *Id.* at 249.

Governments are impudently charged with Actions and Designs of which they are not guilty

In Truth, most Libels are purely personal; they fly at Men rather than Things; which Proceeding is as injudicious as it is unmanly. It is mean to be quarreling with Faces, Names, and private Pleasures; Things perfectly indifferent to the World, or Things out of a Man's own Power; and 'tis silly, as it shows those whom we attack, that we attack them not for what they do, but for what they are: And this is to provoke them without mending them. All this therefore is Libelling⁹⁵

Despite this somewhat restrictive view of the substantive content of protected speech, Trenchard and Gordon recognized the importance of limiting the procedures by which even libellous speech may be checked in order to assure that legitimate criticism is published. "I must own," they wrote, "that I would rather many Libels should escape, than the Liberty of the Press should be infringed."⁹⁶ In the "Second Discourse Upon Libels," number 101, they pointed out the need for liberal construction of allegedly libelous words:

For since no Law can be invented which can give Power enough to their Magistrates to reach every Criminal, without giving them, by the Abuse of the same Law, a Power to punish Innocence and Virtue, the greater Evil ought to be avoided: And therefore when an innocent or criminal Sense can be put upon Words or Actions, the Meaning of which is not fully determined by other Words or Actions, the most beneficent Construction ought to be made in favour of the Person accused.⁹⁷

In addition to urging caution in libel law, the Letters of Cato reiterated the reasons for the abolition of prior restraint. "The subjecting the Press to the Regulation and Inspection of any Man whatsoever, can only hinder the Publication of such Books, as Authors are willing to own, and are ready to defend; but can never restrain such as they apprehend to be criminal, which always come out by stealth."⁹⁸

The liberal message of Cato might be distilled to the proposition that truthful criticism of public measures is not punishable, and that to assure inquiry and discussion it is important both to avoid prior censorship and to apply subsequent punishment with extreme caution. In this regard, *Cato's Letters* provide a link between the parliamentary privi-

95. *Id.* at 250-51.

96. *Id.* at 253.

97. 3 J. TRENCHARD & T. GORDON, *CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS* 300, 303-04 (1975) [hereinafter cited as 3 *CATO'S LETTERS*].

98. *Id.* at 305-06.

lege of debate and the fall of licensing schemes. These popular essays moved freedom from Parliament into the streets by claiming a right for all men to criticize public measures, and drew attention to the need for a breathing space to permit the right to flourish.

IV. NATURAL RIGHTS

We hold these truths to be self-evident: that all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, & the pursuit of happiness: that to secure these rights, governments are instituted among men, deriving their just Powers from the consent of the governed.⁹⁹

Declaration of Independence

The common understanding in early America that the people are imbued with certain natural rights contributed to the meaning of the freedom of speech. While the doctrine of parliamentary privilege and *Cato's Letters* linked freedom of speech to processes of government, the doctrine of natural rights had a much broader base. By insisting that government must justify any restrictions on the freedom of action which predated the formation of society, the concept of protected speech was extended to all utterances. This principle, however, placed no precise limits on the appropriate governmental justifications.

Political theory in the new nation was rooted in the contractarian writings of John Locke. To Americans Locke was the most important of the many British and European writers in the seventeenth and eighteenth centuries who discussed social contract theory and the related concept of natural rights. Locke supported the idea of a monarchy, but his essays justified the Glorious Revolution by which William and Mary supplanted James II on the throne of England.¹⁰⁰ The colonists used a similar method of analysis to justify their rebellion against George III.¹⁰¹ Although individual thinkers differed in the conclusions to be drawn, discussion began by positing a state of nature in which people contracted to form governments to improve their lot.

A critical issue was the extent to which natural liberty could be restrained in forming society. Social contract theory influenced *Cato's Letters*, which, as the preceding section illustrated, contributed significantly to the American theory of freedom of speech. Letter number 62 proceeded from Locke's thesis. Man in a state of nature has a natural

99. Declaration of Independence para. 2 (U.S. 1776).

100. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 149-85, 365-409 (1955).

101. *Id.* at 399-402.

power to act and society is justified in restraining those actions only insofar as they injure others.

By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, so far as by it he hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys

The entering into political Society, is so far from a Departure from his natural Right, that to preserve it was the sole reason why Men did so; and mutual Protection and Assistance is the only reasonable Purpose of all reasonable Societies

True and impartial Liberty is therefore the Right of every Man to pursue the natural, reasonable and religious Dictates of his own Mind; to think what he will, and act as he thinks, provided he acts not to the Prejudice of another¹⁰²

The concept of natural rights pervaded early American political thought. It is the theoretical basis for the Virginia Declaration of Rights drafted by George Mason¹⁰³ and the Declaration of Independence drafted by Thomas Jefferson.¹⁰⁴ The Constitution hints at this theory by stating in the preamble that one of the document's purposes is to "secure the blessings of liberty to ourselves and our posterity."

Despite the pervasiveness of natural rights theory it was not until the initial amendments were adopted that natural rights found expression in our fundamental law. The framers apparently focused on institutions and assumed that the people would not deprive themselves of such rights and that power to destroy those rights had not been given.¹⁰⁵

The language that Madison used in proposing the amendment which became the guarantee of free speech reflects the concept of pre-existing rights: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments."¹⁰⁶ His speech

102. 2 J. TRENCHARD & T. GORDON, CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 244, 248 (1775) [hereinafter cited as 2 CATO'S LETTERS].

103. Decl. of Rights para. 1 (Va. 1776), *reprinted in* B. SCHWARTZ, *supra* note 28, at 234-36.

104. Garry Wills has argued that Jefferson was influenced more by Francis Hutcheson and his school of Scotch philosophers, see G. WILLS, *INVENTING AMERICA* 229-39 (1978), but both Hutcheson and Locke adopted a social contract theory. The Lockean phrasing of the Virginia Declaration of Rights and the specific enumeration of life, liberty, and *property* in the fifth amendment indicate, however, that Locke had the most widespread impact.

105. *See infra* Section V.

106. *Supra* note 76.

introducing the proposed amendments referred to the different sorts of rights to be found in state Declarations of Rights:

In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact.¹⁰⁷

In his notes for this speech, Madison indicated that freedom of speech was to be categorized as a natural right retained by the people when powers were given the legislature.¹⁰⁸ In the brief debate on the first amendment, Congressman Benson reiterated this understanding of the "right" of free speech: "The 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."¹⁰⁹

In this vein, Jefferson wrote, "There are rights which it is useless to surrender to the government, and which yet, governments have always been fond to invade. These are the rights of thinking and publishing our thoughts by speaking or writing; the right of free commerce; the right of personal freedom."¹¹⁰ Although a staunch believer in natural rights, Jefferson's conception of the inalienable natural right of free speech and press was not unbounded. In his draft Constitution for Virginia, he had proposed "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."¹¹¹ Similarly, in a letter to Madison, Jefferson suggested that Madison's proposed amendment regarding speech and press be qualified expressly as follows: "The people shall not be deprived or abridged of their right to speak or to write or *otherwise* to publish any thing but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign

107. 1 ANNALS OF CONG., *supra* note 32, at 437, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 1029.

108. V WRITINGS OF MADISON 389-90 (Hunt 1901), *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 1042. The broader base for free speech has often been noted in the address to the Inhabitants of Quebec of 1774.

109. 2 ANNALS OF CONG., *supra* note 32, at 731-32, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 1090.

110. Letter from Jefferson to David Humphreys, (Mar. 18, 1789), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 678 (J. Boyd ed. 1958).

111. 1 THE PAPERS OF THOMAS JEFFERSON 363 (J. Boyd ed. 1950).

nations."¹¹²

The natural rights theory extended the protection of freedom of speech to cover all the subjects of expression, but it failed to mark the line between protected liberty and punishable license. Proponents of natural rights failed to focus on the questions of when speech acts "to the prejudice of another" and who should make that determination. Cato's essay "On Freedom of Speech" argued that accurate criticism of government actions is not hurtful to society.¹¹³ Jefferson's proposals, on the other hand, assumed that any criticism of government is legitimate except the statement of false facts which cause personal injury or international tension.¹¹⁴ These indications of protected speech, however, merely illustrate the problem. Until specific proposals to limit speech were made, there was no need to determine specifically what justification would be adequate. Thus natural rights doctrine resolved no issues, it only contributed to a broader definition of the interests of the individual which must be considered under the rubric of free speech.

V. THE GROWTH OF RELIGIOUS TOLERATION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof¹¹⁵

U.S. Constitution, Amendment I.

Although freedom of religion, another inalienable natural right, receives separate mention in the first amendment, it is intimately tied to the natural rights background of freedom of speech. Like many other sources for the first amendment, the principle of religious toleration has pragmatic roots.

Religious intolerance was virtually a hallmark of English life in the seventeenth century. Many of the colonies were founded by settlers fleeing a climate inhospitable to their religion: the Puritans founded Massachusetts; the Quakers, Pennsylvania; and the Catholics, Maryland. When the objects of English intolerance established their settlements in the new world, however, not all were tolerant of other religions. For example, Rhode Island resulted from the expulsion of Roger Williams from Massachusetts.¹¹⁶ Nevertheless, in some colonies, circumstance or principle produced guarantees of religious tolera-

112. Letter from Jefferson to James Madison (Aug. 28, 1789), *reprinted in* 15 THE PAPERS OF THOMAS JEFFERSON 367 (J. Boyd ed. 1958).

113. 1 CATO'S LETTERS, *supra* note 78, at 96-103.

114. *Supra* note 112.

115. U.S. CONST., amend. I.

116. L. PFEFFER, CHURCH, STATE AND FREEDOM 84-85 (1967).

tion. In Maryland, it was circumstance. Had Lord Baltimore, the Catholic proprietor of the colony, attempted to establish an exclusively Catholic settlement, he would have lost potential immigrants and exposed himself to sharp attacks in protestant England.¹¹⁷ The result was the Maryland Act Concerning Religion in 1649 which provided that "noe person or psons whatsoever within this Province . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor any way compelled to the beleife or exercise of any other Religion against his or her consent."¹¹⁸

In a few colonies toleration was a product of principle. Roger Williams in Rhode Island held religion to be a matter of private conscience and, having been persecuted himself, abjured persecution. The tradition he established was reflected in the Charter granted the colony in 1663 — "noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any difference in opinione in matters of religion."¹¹⁹ In Pennsylvania, the Quakers held a similar view of religion, and the Frame of Government in 1682 contained a guarantee that all persons who acknowledge God to be the creator of the world "shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship."¹²⁰

The task of creating one nation out of the religious profusion of colonial America demanded religious toleration and made the establishment of a national church unthinkable.¹²¹ While religious toleration was firmly established in the middle colonies, the Puritans held sway in the north and the Anglican Church was established in the south. The Great Awakening in America during the mid-eighteenth century brought out religious fervor but contributed to the proliferation of sects.¹²² Thus, at the dawning of the new nation, even states with established religions found themselves confronted with large and impor-

117. W. MARNELL, *THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA* 66-68 (1964); L. PFEFFER, *supra* note 116, at 81-84.

118. Maryland Act Concerning Religion (1649), in 1 *ARCHIVES OF MARYLAND, PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 1637-1664* 244-47, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 93.

119. Charter of Rhode Island and Providence Plantations, 1663, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 97.

120. Pennsylvania Frame of Government, 1682, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 143.

121. W. MARNELL, *supra* note 117, at 111-14.

122. *Id.* at 93-104.

tant groups of citizens who did not subscribe to the beliefs of the established church.

Although the need for toleration may have been a pragmatic one, a principled basis for religious freedom soon developed within the framework of natural rights. Pennsylvania, New Jersey, and Rhode Island provided a model, and Virginia, under the leadership of Madison and Jefferson, followed.¹²³ The two Virginians argued that religious belief and its expression did no harm to others, and therefore could not be regulated by the state. It was in a realm reserved for the individual. The Virginia Bill for Religious Freedom, drafted by Jefferson and guided through the state legislature by Madison, stated: "The opinions of men are not the object of civil government, nor under its jurisdiction." In a now-familiar argument, the Bill continued, "It is a dangerous fallacy to restrain the profession of opinions because of their ill tendency; it is enough for the rightful purpose of Civil Government for its officers to interfere when principles break into overt acts against peace and good order."¹²⁴

Madison's proposed amendment to the Constitution effectuated on a national level the principle that he had championed within Virginia, but its successful passage may have owed as much to pragmatism as to principle. Once more experience led to the emergence of principle from an action with roots in expediency. The acquiescence of New Hampshire, Connecticut, and Massachusetts — states that maintained an established church throughout this period¹²⁵ — protected their state churches and religious practices from interference by national laws. But even states that financially supported one religion recognized the impracticality of controlling other religions and gave them grudging recognition.¹²⁶ The subsequent withering of established churches over the next half century,¹²⁷ however, diminished the importance of the establishment clause as a support of federalism. This left the principle of religion as a matter of private conscience rather than public concern as the most significant justification for the first amendment provisions on religion.

The principle that religious opinion is not a concern of the state has more than a limited application to freedom of speech. Although some people who agreed that religious opinions posed no threat to the

123. *Id.* at 106-09.

124. Bill for Establishing Religious Freedom 1786, *reprinted in part in* L. PFEFFER, *supra* note 116, at 113-14.

125. W. MARNELL, *supra* note 117, at 112.

126. *Id.* at 111-14.

127. W. MARNELL, *supra* note 117, at 115-44.

secular state could find political opinions a threat to government,¹²⁸ the stylistic innovation that led to the coupling of free speech and religious freedom in a single amendment led to a perception that they are related. The notion that ideas and opinions generally are only of private concern unless they "break into overt acts against peace and good order"¹²⁹ readily complements the guarantee of "free exercise" of religion. Once it was acknowledged that the offensiveness of religious beliefs did not justify suppression, it became easier to argue that the offensiveness of ideas did not make their expression an "abuse" of liberty.

VI. THE NATURE OF FEDERALISM

The general government has no powers but what are expressly granted to it: it therefore has no power to take away the liberty of the press.¹³⁰

Charles Pinckney

Part of the meaning of freedom of speech and press is found in the negative implications drawn from a determination of the legitimate functions of government. Despite an early perception that a delineation of the rights of the people was unnecessary, Congress eventually decided that freedom of speech needed explicit protection against infringement by the federal government.

Although most of the delegates to the Constitutional Convention came from states that had guarantees of freedom of press, a proposal that the federal constitution contain a similar guarantee did not occur until extremely late in the session.¹³¹ An understandable desire to finish the document and go home rather than explore new issues was partially responsible for the proposal's swift and inglorious defeat.¹³² Another factor, however, was the argument of Roger Sherman of Connecticut who said, "It is unnecessary — The power of Congress does not extend to the Press."¹³³ When opponents of ratification hit hard at the absence of a guarantee for the press, the supporters of the Constitution invariably replied that it would be superfluous.¹³⁴ Even Charles Pinckney, who had proposed the guarantee in the federal convention,

128. See Levy, *supra* note 49, at 191.

129. *Supra* note 124.

130. 4 J. ELLIOT, DEBATES ON THE RATIFICATION OF THE FEDERAL CONSTITUTION 315 (1937).

131. R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 120-21 (1962); 2 RECORDS OF THE FEDERAL CONVENTION II 587-88 (M. Farrand ed. 1966).

132. I B. SCHWARTZ, *supra* note 28, at 436.

133. M. FARRAND, *supra* note 131, at 617-18.

134. R. RUTLAND, *supra* note 131, at 36. See Speech of James Wilson (Oct. 6, 1787),

told his fellow delegates to the South Carolina ratification convention, "The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press."¹³⁵ In Virginia's convention, Governor Randolph read the powers of Congress in article one of the Constitution, and declared, "Go through these powers, examine every one, and tell me if the most exalted genius can prove that the liberty of the press is in danger."¹³⁶

The danger came, as Jefferson persuaded Madison, from the possibility that the federal government would assume virtually complete discretion over the means used to exercise its granted powers. "This instrument," he wrote, "forms us into one state as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power within the field submitted to them."¹³⁷ Madison took up this theme in his speech introducing the amendments. "Now," he said, "may not laws be considered necessary and proper by Congress, (for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation) which laws in themselves are neither necessary nor proper."¹³⁸

In the argument over adoption of the Bill of Rights, although neither side defined "the freedom of speech and of the press," both sides agreed that the lion's share of governmental power rested with the states and that the power of the central government should be limited to prevent oppression.¹³⁹ Opponents of the Bill of Rights argued that the grants of authority to Congress in article one were already narrowly confined and that a statement of restrictions on government might lead to an inference that Congress had greater power than the constitution conferred.¹⁴⁰ They claimed that no amendment was needed because restrictions on freedom of speech were unnecessary for the accomplish-

reprinted in PAMPHLETS ON THE CONSTITUTION 155-57 (P. Ford ed. 1888); THE FEDERALIST No. 84 (A. Hamilton).

135. *Supra* note 130.

136. 3 J. ELLIOT, DEBATES ON THE RATIFICATION OF THE FEDERAL CONSTITUTION 203 (1937).

137. 14 THE PAPERS OF THOMAS JEFFERSON 662 (J. Boyd ed. 1967).

138. 1 ANNALS OF CONG., *supra* note 32, at 438, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 1030.

139. *See supra* notes 133-36. Neither federalist nor antifederalist writers claimed that government should be primarily national. Opponents of the Constitution pointed to possible expansions of power while defenders initially disclaimed the possibility. In modern terms, no one foresaw the federal government becoming the powerful body it is, but the antifederalists at least feared it.

140. Madison responded to these arguments with the proposals that became the ninth and tenth amendments. *See* 1 ANNALS OF CONG., *supra* note 32, at 435-36, *reprinted in* 1 B. SCHWARTZ, *supra* note 28, at 1031.

ment of the limited legitimate objectives of national government.¹⁴¹ Proponents responded that the amendments should be adopted to prevent the improper assertion of necessity. Madison argued that if the proposed amendments were adopted,

independent tribunals of justice will consider themselves in a peculiar manner the guardians of those 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.¹⁴²

No one who discussed the need for a constitutional guarantee defined freedom of speech with any precision, but the nature of the public controversy over a Bill of Rights between the proposal of the constitution and Madison's proposed amendments to it indicated that the guarantee was merely complementary to a definition of the legitimate scope of government action.¹⁴³ At a minimum, the freedom of speech meant that restrictions on speech are impermissible unless necessary to accomplish a legitimate function of government, and that the courts rather than the legislature should ultimately determine that necessity.

141. See *supra* notes 133-36. Initial opposition to the Bill of Rights arose in the context of the push to ratify the Constitution. Thus Federalists downplayed its significance. After the Constitution was adopted, Madison and other Federalists then accepted the need for amendment. Opposition to proposed amendments remained, but the passion was drained from debate. See R. RUTLAND, *supra* note 130.

142. 1 ANNALS OF CONG., *supra* note 32, at 439.

143. Despite Madison's position in 1799 during the Alien and Sedition Act controversy, see *infra* note 148, much of the evidence that shows that the guarantee of speech went beyond the prior restraint definition of Blackstone suggests simultaneously that it was not intended to insulate all speech. See *supra* note 51. Maryland's delegates envisioned that prosecutions for libel would exist consistently with freedom of the press, but that it would place some limit upon them. Jefferson's suggested amendment indicated also that free speech was consistent with some forms of libel. Because no one spoke against the adoption of a guarantee of freedom of speech and of the press as placing too strong a limit on government (although the assemblies that passed the amendment and those that ratified it were filled with individuals who believed in subsequent punishment and the appropriateness of libel actions), any notion that the framers intended all statements to be immune from federal prosecution is hard to credit. Irving Brant argues that no concern for preserving federal power to restrict speech was felt because the states retained all their power to halt undesirable speech. I. BRANT, *THE BILL OF RIGHTS* 223-36 (1965). This is unlikely because Madison had proposed and the House had passed an amendment stating that "No state shall infringe . . . the freedom of speech or of the press." See 1 B. SCHWARTZ, *supra* note 28, at 1123. Consequently, the definition of freedom of speech and press must have been one that the House was comfortable with as it applied to their own states. Further, states that had language in their own constitutions from which Madison derived the language of the first amendment had found no impediment to punishing various forms of speech, including seditious libel. See L. LEVY, *supra* note 49, at 183-214.

VII. THE FABRIC OF FREEDOM

Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth — of expansion and adaption to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things.¹⁴⁴

Justice Louis D. Brandeis

These six strands of free speech create a minimal content for the protection of freedom of speech and press. Government may regulate physical, verbal, or printed expression only where the expression is harmful to others. There are at least two limits on the procedures used to regulate even “abuses of liberty.” First, a system of previous restraints may not be introduced. Second, the determination whether the expression is an abuse must be made by the speaker’s peers. Substantively, at least two types of expression are not “abuses of liberty” even when they offend some people. Honest, accurate criticism of government produces a greater public good in democracy than artificial respect fostered by suppression. Further, religious convictions are a private matter the expression of which does not harm others in any way that government is entitled to consider. Finally, any restriction of speech must further an end confided to government.

This limited consensus by no means exhausts the potential meaning of the guarantee of freedom of speech and of the press. The ideas that the guarantee reflects illustrate the way in which principles may develop. Each strand might have been confined to the circumstances that give it birth — parliamentary privilege as a tool to attain legislative supremacy; the abolition of prior censorship as a commercial boon to the printing trade; *Cato’s Letters* as a justification for abstract discussions of government where the wisdom, integrity, and virtue of existing authority is given at least lip service; theories of natural rights to justify successful revolutions; religious toleration as a concession to the practical problems of uniting people of diverse religious beliefs in a single political body; and restrictions on central power as a reflection of claims of state sovereignty. The benefits realized from the specific applications, however, produced broader justifications and thus broader principles supporting each development. Similarly, the right of free speech and press contains the seeds for future growth.

For at least some of the framers and ratifiers of the first amend-

144. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 20 (1970) (unpublished passage in Brandeis’ dissent to *United States v. Moreland*, 258 U.S. 433, 441 (1922)).

ment, freedom of speech meant the liberty to say things that were not an abuse of liberty.¹⁴⁵ At this level of abstraction it is difficult to oppose freedom of speech. There may be a dispute over what constitutes an abuse or what abuses must be tolerated to preserve liberty, but no one can be found to argue that it is proper to abridge speech or writing that is not an abuse of liberty. The amendment did not define "freedom of speech and of the press," and its proposal did not prompt any discussions of the meaning of the phrase. The general agreement that certain types of speech were protected and that a few specific government procedures were improper did not demonstrate any agreement on the amendment's application to other types of speech or other procedures. A problem of specific application was necessary in order to provoke debate over whether particular speech can be an abuse of liberty or whether a governmental process itself abuses liberty.

The first occasion to address these issues arose upon the enactment of the Sedition Act in 1798.¹⁴⁶ Proponents of the Sedition Act pointed out that the Act did not facially violate any of the universally understood limits of the first amendment. It did not establish prior censorship. It permitted a jury to decide whether the statements were libelous. It punished malicious statements that harmed the government by bringing it into disrepute, but truth was a defense. It preserved respect for government and was therefore a means to carry out government's powers. Consequently, proponents argued, the Act did not violate the constitutional protection for accurate criticism of government.¹⁴⁷

Despite apparent compliance with these elements of liberty which comprise the first amendment, the inherent nature of the Sedition Act was one-sided. The Act gave the federal government, but not its opponents, protection from criticism. Whether false, malicious, and scandalous statements about those out of power were actionable was left to the vagaries of local state laws. Vituperation against the Adams government was a punishable offense, but vitriol hurled by the Federalists against Jefferson went unquestioned under the Act. Although both sides might claim with equal justification that they were only replying in kind, it was Jefferson's supporters who were threatened with imprisonment.¹⁴⁸

Jefferson, Madison, and their ally, Albert Gallatin, defended their supporters by attacking the Act. A portion of their response was di-

145. *See supra* Sections II and IV.

146. Act for the Punishment of Certain Crimes, July 14, 1798, 1 Stat. 596.

147. J. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 80-83 (1951).

148. *Id.* at 92-142.

rected at specific provisions. “[I]t is manifestly impossible,” wrote Madison, “to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures.”¹⁴⁹ The defense of truth appeared almost inapplicable to critical political writings that contained reasoning and deductions drawn from facts. It was impossible to prove the “truth” of a malicious and scandalous opinion. Further, the jury selection procedure was controlled by Federalist judges who could and did carefully stack the juries against defendants. Taken together, these factors, in the Jefferson view, enabled the Federalists to punish honest, accurate criticism of their administration.¹⁵⁰

The heart of Jeffersonian criticism was a more sweeping proposition. Both Madison and Jefferson argued that expressions of opinion, whether true or false, were beyond the jurisdiction of the federal government.¹⁵¹ In short, the regulation of expression was not a function that the national government was created to perform. This position derives support from the controversy over the adoption of the Bill of Rights and the theory of “natural rights.” First, individual libel or slander was punishable by the states, so there was no need to grant the federal government further power to restrict expression. Second, society may limit the individual’s natural powers only so far as necessary to provide for good government. Consequently, attempts by the federal government to restrict speech were a violation of the inherent right of freedom of speech and of the press.¹⁵²

The Federalist response was predictable. A democratic government, they conceded, has no need to establish a system of prior censorship nor to punish truthful criticism and therefore has no power to do so. Nevertheless, lies about government impair its ability to function properly. Therefore, the suppression of false, scandalous, and malicious libels is within federal power.¹⁵³

In the short run the Federalists prevailed, the Sedition Act was enacted, and the Kentucky and Virginia Resolves — authored by Jefferson and Madison respectively — which attacked the Act¹⁵⁴ were repudiated by the legislatures of all the states that responded.¹⁵⁵ Even

149. J. MADISON, THE VIRGINIA REPORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS, *reprinted in* L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 225 (1966).

150. J. MILLER, *supra* note 147, at 84-85.

151. *Supra* note 149, at 198-212; 4 J. ELLIOT, *supra* note 130, at 540-41.

152. L. LEVY, *supra* note 149, at 212-20.

153. *Supra* note 147.

154. *See* L. LEVY, *supra* note 149, at 197; 4 J. ELLIOT, *supra* note 130, at 540-41.

155. J. MILLER, *supra* note 147, at 171-77.

the justices of the Supreme Court who heard seditious libel cases in their capacity as Circuit Court judges upheld the constitutionality of the law.¹⁵⁶

In the end, however, the Sedition Act was repudiated. It died a quiet death in 1800 when Jefferson was elected president. The new chief executive immediately pardoned all who had been convicted under the Act,¹⁵⁷ and there was no further attempt by the federal government to enact legislation punishing criticism of government officials for more than a century. Finally, in the war hysteria of 1918, when Congress passed a law making it a federal crime to cast contempt on the form of government of the United States, Justice Holmes wrote "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion."¹⁵⁸

Despite the current belief that seditious libel laws are unconstitutional,¹⁵⁹ history does not show that the framers of the first amendment intended to outlaw seditious libel. It shows instead that the people of the new nation had learned through experience that a seditious libel law was inconsistent with the maintenance of the public debate and honest criticism of government which even the drafters of the Sedition Act conceded to be the basis of the constitutional guarantee.

Later perceptions of the problems of assuring protection for honest criticism of government provide the basis for a synthesis of the Jeffersonian and Federalist views of the first amendment. Under the view that Jefferson expressed in the Kentucky Resolves, the federal government had no business punishing even falsehoods. Private matters such as libel and obscenity were matters of state law unrelated to powers given the general government. Statements on public issues could be controverted in the public forum. Thus, speech could never harm the legitimate interests of the federal government.

The Federalists believed that only truthful criticism of the federal government deserved protection, but the procedures necessary to preserve the uninhibited exercise of speech protected under the federalist view meld imperceptibly into the substance of the Jeffersonian principle. Complete protection for truthful criticism requires rules that assure that criticism is not punished simply because an individual or

156. Justice Paterson in the trial of Matthew Lyon, J. MILLER, *supra* note 147, at 108, and Andrew Haswell, *id.* at 125-26; Justice Chase in sentencing David Brown and Benjamin Fairbanks, *id.* at 116-23; Justice Washington at the trial of Charles Holt, *id.* at 129.

157. L. LEVY, *supra* note 149, at 365; J. MILLER, *supra* note 147, at 231.

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

159. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

group disagrees with its accuracy. The Sedition Act enforcement demonstrates that neither government nor juries have a monopoly on truth. Any content-based restriction on speech may be rooted in a majority view both strongly and wrongly held. Moreover, the expression of a prohibited idea is, at least indirectly, a criticism of the government policy that banned its expression. Thus, only if government cannot act to suppress ideas may it be assured that the government is not repressing honest criticism.

This fusing of historically antagonistic lines of thought grows out of the principles that contributed to the adoption of the first amendment: *Cato's Letters* targeted suppression of honest political criticism as an improper purpose of government; the free exercise clause placed expression of religious belief beyond federal reach. Jefferson's position followed this focus on the kinds of protected speech to generalize that all speech is protected from federal regulation. A more limited view of the kinds of speech protected by the first amendment may lead to the same result by focusing on the mechanism of protection. It emphasizes the necessity to allow some abuses to be sure the individual's right survives, a principle that may be derived from the procedural concerns behind the first amendment.

The Congress that proposed the Bill of Rights and the state legislatures that ratified it were composed of individuals with differing perceptions and desires respecting each clause. Some minimum agreement may have been common to all those who considered the meaning of "the freedom of speech and of the press," but passage was secured without ever discussing the guarantee's application or even its basic function. The differing intentions and understanding of the participants in the drafting and ratification process help justify the refusal of the Supreme Court to be bound by a static conception of constitutional clauses that use language of general principle. It does not, however, justify a decision that cannot find its roots in an understanding drawn from the language and history of the clause.¹⁶⁰

The drafters of the Sedition Act of 1798 adopted one logically justifiable method of interpreting the guarantee of freedom of speech and of the press. The Federalists read freedom of speech to be a category distinct from abuses of speech. They then confined the category of freedom to those situations where a majority of those who participated in the adoption of the first amendment would have agreed it was applicable. Substantively, under their views freedom encompasses truthful, respectful criticism of government measures. The guarantee would

160. See Schauer, *An Essay on Constitutional Language*, 29 U.C.L.A. L. REV. 797 (1982).

also apply to expression that could be demonstrated to cause no harm of any kind to any person. Procedurally, freedom would be inconsistent with a universal system of prior censorship or the determination of the criminality of utterances other than by a jury. Intemperate language, personal remarks that harm others, discussion of sexual matters, incorrect statements attacking the government, and advocacy of any harmful activity could all be condemned as abuses of speech and punished if within the purview of matters confided to government.

The method of interpretation that the Court has chosen to follow also respects the language of the first amendment, but regards it as capable of growth and development just as the sources from which it is drawn grew and developed. This approach begins with the specific applications on which there is widespread agreement. It searches for a broader principle that justifies the specific applications and is consistent with, though not necessarily identical to, the reasons that led to the agreed application. If reflection and experience support the broader principle, it is then applied to situations that those involved in creating the original specific applications may not have foreseen or where they may not have grasped the implications.¹⁶¹

The substantive and procedural aspects of freedom of speech together give rise to the principle that suppression of ideas is not a legitimate government function. Substantively, the suppression of ideas is illegitimate because it is inconsistent with the presupposition that a democratic society bases its decisions on full and open discussion of all points of view. Procedurally, it is illegitimate because the possibility that government may decide wrongly poses an unacceptable danger to the expression of valuable ideas. Although the language and history of the first amendment support this interpretation, they do not compel it. The principle that suppression of ideas is not a legitimate government purpose is only one alternative of many readings equally well rooted in language and history. The choice of that principle has been the result of experience and reflection as the Court confronted the problems of applying the uncertain admonitions of the amendment to concrete cases.¹⁶²

161. This method of proceeding is very close to traditional common-law adjudication. The Supreme Court's use of the method is not surprising because the principles of government have evolved in a common-law system under a judiciary used to that mode of reasoning. It differs, however, because reasoning must proceed from specific language and historic applications. The language and history may not be dismissed as inappropriate today, nor may the Court create new principles that cannot be derived from that language and history.

162. See, e.g., Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 MD. L. REV. 555 (1976); Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679 (1978); Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387 (1979). This

brief essay does not sketch the limits on judicial discretion to apply new principles, or take one very far in understanding the process. Its modest goal is simply to establish that principles grow and develop as they are affected by experience and complementary principles. The synthesis that has produced the present conceptions of the first amendment may in turn be replaced by a new synthesis that respects the same developmental process. Thus, scholars today invoke a right to know and to compel access to information, and to wrestle with government's role in facilitating communication. Such proposals for new syntheses should be recognized as proposals rather than historically compelled results and should be subject to searching scrutiny regarding their impact on society before we are willing to adopt them.