Freedom of Speech

Constitutional Protection Reconsidered

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> The First Amendment

Two hundred years of experience and eighty years of determined scholarship have failed to yield a consistent and coherent theory of what the First Amendment means and how it is to be interpreted. No proposal has yet survived the rigors of logical examination, and, despite some highly imaginative efforts in recent years, matters remain about where they stood in 1971 when Robert Bork concluded that "the law has settled upon no tenable, internally consistent theory of the scope of the constitutional guarantee of free speech. Nor have many such theories been urged upon the courts by lawyers or academicians" (Bork 1971, 20). A fresh approach to First Amendment thinking is warranted at this juncture, not only because traditional scholarship has failed to produce robust results, but also because the "information economy" has drawn attention to the fact that the divergent First Amendment doctrines presently applied to the press, broadcasting, advertising, the Internet, and other channels of communication are ill suited to contemporary needs.

I approach the problem of theory-building by exposing the "first amendment" rule of constitutional contract that a society of rational (i.e., utility-maximizing)

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The Independent Review, v.III, n.3, Winter 1999, ISSN 1086-1653, Copyright © 1999, pp. 327–354

individuals would adopt in order to protect private expression rights against arbitrary and coercive abridgment by the state. My essay differs from most other work in this area because it largely avoids traditional themes of constitutional theory, case law, and original intent. It is grounded instead in the methodology of positive economics, which is characterized by its freedom from ideology, ethical positions, and normative judgments, and by the falsifiability of its explanations and implications (Friedman 1953). Specifically, the essay builds upon constructs of public choice and constitutional economics, two branches of mainstream economics that have emerged in recent years as tools for analyzing government structure and decision making. The overarching focus of public choice is "the economic study of non-market decision making [i.e., social and collective choice], or simply the application of economics to political science" (Mueller 1989, 1). The constitutional rules that define the framework within which nonmarket issues are decided, and which constrain the scope of collective decision-making, are the focus of constitutional economics (Buchanan 1991). This approach to theory-building avoids many of the criticisms leveled at traditional First Amendment scholarship. It also provides an exogenous and noncircular point of reference from which to analyze alternative First Amendment theories, doctrines, interpretations, precedents, and remedies.

The "first amendment" rule of constitutional contract that is exposed here has three defining characteristics. First, the rule protects all forms of expression that serve, and are the object of, the voluntary exchange of private property rights, including "commercial" speech, which is not fully protected under prevailing First Amendment doctrine. The rule protects private expression rights per se, and also protects the process by which property rights of all sorts (including expression rights) are exchanged in economic, political, and social markets. Second, the rule excludes from constitutional protection those forms of expression that hinder the market process, such as perjury, fraud, and libel. Expression of this sort reduces the welfare of all individuals in the long run, and so is left vulnerable both to private tort action and to statutory abridgment in situations where abridgment is more efficient on balance than piecemeal litigation. And third, the rule declares presumptively unconstitutional any statutory abridgment of private expression rights that overtly benefits some individuals at the expense of others.

This rule, and the principles that emerge from it, are astonishingly simple and parsimonious, and yet they cover the gamut of legitimate First Amendment issues. The rule is transparent to the manner and technology of communication, and so is ideally suited to any open society whose economy and social structure are information based. It protects the expression rights of all individuals against predation by political majorities (distributional coalitions) that periodically gain control over the coercive machinery of government. It requires no imputation of social costs and benefits. It squares with the notion, advanced by John Locke and Thomas Jefferson, that the protection of private property is the first duty of government. And it squares with the

principle that every law's claim to validity is rooted in the unanimous consent of the governed, something that is given only when state action promotes the rational, long-term self-interest of every individual.

The "first amendment" rule that emerges here does not provide a comprehensive doctrine for information-age policies, notwithstanding its broad and beneficial sweep. A comprehensive doctrine must deal not only with private rights of expression but also with the many and varied collateral property rights that are complementary to the exercise of expression rights. That is, distinctions must be drawn between rights of expression, which are protected by the "first amendment" rule of constitutional contract, and property rights in communications facilities, which are protected by a separate "fifth amendment" rule that limits the taking of this property to public purposes and requires payment of just compensation. To characterize that dichotomy in more memorable terms, it is necessary to distinguish between the sewage, on one hand, and the sewers through which it flows, on the other. Points of tangency and overlap obviously exist between the two sets of property rights and their covering constitutional rules (Epstein 1992), a point of interest and importance that lies beyond the scope of this essay.

In what follows, I first identify the need for rational and coherent First Amendment theory by illuminating the failure of traditional legal scholarship to provide it. I then establish the principles of communication theory, public choice, and constitutional economics from which the rational "first amendment" rule is drawn. Then I take up the rule itself.

Traditions of First Amendment Theory and Doctrine

Politicians, bureaucrats, judges, scholars, and special interests of all stripes have sought, since the debate over the Sedition Act of 1798 (which effectively criminalized both public criticism of incumbent Federalists and public praise for Jefferson's competing Republicans), to find substantive meaning in—and to pour meaning into—the enigmatic nature of the First Amendment's black-letter protection of speech, press, and assembly (collectively, "rights of expression"). The framers placed little stock in the amendment, believing that the Constitution itself protected private expression rights by withholding the public authority necessary to abridge them. The Constitution's principal author, James Madison, thought that passing the Bill of Rights was a trivial exercise, agreeing in the end to support the first ten amendments "not because they are necessary, but because they can produce no possible danger, and may gratify some gentlemen's wishes" (quoted in Rutland 1971, 173). Alexander Hamilton (who, as a lawyer, won jury nullification of the common law of seditious libel on behalf of publisher John Peter Zenger), writing in *Federalist 84,* viewed constitutional protection for the press as "impracticable," arguing that press freedom, "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on

public opinion, and on the general spirit of the people and of the government" (Hamilton, Madison, and Jay [1787–88] 1961, 514).

Scant attention was paid to the First Amendment between 1801, when the Sedition Act expired, and World War I (Rabban 1981). Interest was rekindled when the Espionage Act of 1917 prohibited and punished political speech that allegedly posed a "clear and present danger" to the American form of government (*Schenck v. United States,* 249 U.S. 47 [1919]). The Supreme Court of the day held that the First Amendment protected, at most, the discussion of "legitimate" political issues.[1] A minority of the Court believed, however, that the proper scope of the First Amendment was substantially broader. According to this view, first articulated by Justice Louis Brandeis (the "people's lawyer" of the Progressive era), the amendment not only protected political expression but also provided broad protection for the exercise of all expression rights that advanced intellectual development and personal happiness (*Whitney v. California,* 274 U.S. 357 [1927], at 376). Brandeis observed that individuals create private value by expressing themselves in various ways (e.g., rooting for the home team, writing letters to journals, creating and reading literary works), and he considered such activities to be among the fundamental rights and liberties constitutionally protected by the First and Fourteenth Amendments. That view subsequently was adopted by the Court's majority, and it has remained at the core of First Amendment doctrine ever since.

Despite this train of ad hoc developments, the quest for coherent First Amendment theory has come up empty, although the quest itself has transformed the amendment into a cultural symbol and metaphor for individual liberty that is asserted to protect every form of expression from political commentary to nude dancing.[2] The result is a present tangle of conflicting ideas about what the First Amendment represents and, in a normative vein, what it ought to represent. The frequency of five-to-four Supreme Court majorities in First Amendment cases, and the tortured reasoning that characterizes many of the Court's opinions and dissents, attests to this confusion.

First Amendment scholarship has produced a broad spectrum of theories and normative premises reflecting romance and practical reason, economics, consequentialist social theory, and disparate notions of original intent. Many scholars, like the Court itself, initially viewed the amendment as a limited device for protecting the political speech of private individuals against censorship and prior restraint by the state, a position that paralleled the classical writings of John Milton and John Stuart Mill. In this

1. The "clear and present danger" test developed in *Schenck* subsequently gave way to a looser "balancing of interest" test. See *American Communications Association v. Douds,* 339 U.S. 382 (1950); *Dennis v. United States,* 341 U.S. 494 (1951). The Court's conception of protected political speech was expanded further in *New York Times v. Sullivan,* 376 U.S. 254 (1964), which characterized the First Amendment as protecting the "uninhibited, robust, and wide open" discussion of public issues. The background and significance of *Sullivan* are examined by Lewis (1991).

2. Protection of political speech is a well-settled matter of constitutional law. However, a splintered Supreme Court held in *Barnes v. Glen Theater,* 111 Sup. Ct. 2456 (1991), that the First Amendment does not protect "expressive" nude dancing, overruling lower courts.

view, "the guarantee given by the First Amendment is . . . assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment" (Meiklejohn 1948, 98).[3] This approach to theory ultimately collapsed when its proponents realized that virtually all speech bears in some way on matters of public interest and self-government (Meiklejohn 1961).[4] The asserted distinction between private and public speech not only fails to provide a firm basis for distinguishing between protected and unprotected speech but also makes possible the conversion of garden-variety speech into constitutionally protected speech through the addition of some gratuitous political content. This narrow approach to First Amendment theory now stands abandoned, although the notion of constitutional protection for political speech remains a touchstone for other, more comprehensive theories and doctrines.

Many scholars presently believe that "no single value or interest explains the speech clause [of the First Amendment] and no simple formula [i.e., no "grand" or "unified" theory] can implement it" (Cass 1987, 1490; Shiffrin 1984). This belief has cleared the way for theories, such as those of Justice Brandeis, driven by "romantic" notions of what the amendment ought to protect (Shiffrin 1990). Critics of constitutional romance correctly point out that the approach is shallowly rooted in the subjective values dearest to the interpreter, including such values as individual development, democratic government, social stability, and the search for political and philosophical truths (Cass 1987, 1411).

Some scholars, also laboring in a romantic vein of sorts, argue that First Amendment issues must be decided on a fluid bed of "practical reason," because "foundationalism cripples our ability to resolve constitutional issues by limiting our analytical tools to deductive reasoning. Practical reason allows the use of the full range of cognitive abilities. Solving constitutional problems . . . requires no less" (Farber and Frickey 1987, 1617). The difficulty with both constitutional romance and practical reason is that they are rhetorical rather than logical methods, consisting of little more than "a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, [and] experience" (Posner 1990, 73). Theories developed from such foundations necessarily represent a skillful weave of desired outcomes. For example, "To have pragmatic value, a theory of First Amendment construction must ensure stable protection of fundamental speech and press liberties, must be directed against

3. Alexander Meiklejohn viewed nonpolitical speech as a "liberty" protected by the Fifth Amendment. Robert Bork (1971) similarly believed at one time that the First Amendment protected only political speech.

4. Robert Bork reached a similar conclusion after moving from academia to the bench. See Bork 1990, 333.

the actual threat posed to those liberties, and must not upset the delicate balance of power among the branches of government and between the public and private sectors" (Emord 1991, 119).

In sum, romantic traditions contribute relatively little to the formulation of robust First Amendment theory, although they are highly descriptive of contemporary First Amendment doctrine. The existence of that descriptive power correctly suggests that the scope of speech freedom enjoyed today is not so much a product of substantive First Amendment principle as it is a product of substantive due process wrought through the Ninth and Fourteenth Amendments, a point to be developed shortly. Methodological difficulties aside, however, constitutional romance clearly has resulted in private expression rights being protected to a far greater extent than property rights in general have been protected by other, more restricted constitutional theories. So great is this disparity that classical liberals (economists mostly) cite the high protection accorded expression rights as the appropriate constitutional standard for protecting all property rights, while neoliberals (lawyers and social scientists mostly) conversely cite the low protection accorded property rights as the appropriate standard for protecting expression rights.[5]

Despite neoliberal recommendations that expression rights be taken down the same path as other property rights, the Court maintains a presumption that the First Amendment protects most expression rights a priori against taking by the state. The only glaring exception to this general presumption is the Court's exclusion of "commercial" speech from full constitutional protection. Like many constitutional scholars, the Court presently favors the position that "government should have authority to protect politically adopted visions of proper market behavior" (Baker 1989, 224). The shortest route to excluding commercial speech is to argue that the constitutional authority to regulate commerce trumps First Amendment protection. A more scholarly argument runs as follows:

> Given existing economic structures, commercial speech is not a manifestation of the liberty of the speaker. Market determination breaks the connection between commercial speech and individual choice. More generally, when an owner uses property purely instrumentally to exercise power over others, that usage and the related commercial speech should be subject to legislative control. This is the key difference between constitutionally unprotected property claims and constitutionally protected expression or liberty rights. (Baker 1989, 224)[6]

This conclusion, which can be reached in many different ways, presently guides First Amendment doctrine.

5. The classic case is presented by Director (1964), Coase (1974, 1977), and Epstein (1992). Some countervailing arguments are presented by Sullivan (1995). The neoliberal case is made by Sunstein (1993a, 1993b) and MacKinnon (1993), among others.

The "law and economics" tradition, whose followers view legal rules through the lens of positive economics, has contributed relatively little to the development of doctrine. The relevant literature falls into two groups (see Spitzer 1998). In one group, where the focus is descriptive political economy, analysts explain First Amendment doctrine in terms of the private interests of distributive political coalitions. In their view, First Amendment law constitutes "a form of protective legislation extracted by an interest group consisting of publishers, journalists, pamphleteers, and others who derive pecuniary and non-pecuniary income from publication and advocacy of various sorts" (Landis and Posner 1975, 875; see also Owen 1975; Sowell 1980, 238–46; McChesney 1988; and Mink 1989).

In the other group of "law and economics" literature, analysts seek to prescribe "optimal" First Amendment doctrine by internalizing, through legal process, the external (public) effects of private communication so as to maximize aggregate social welfare. Richard Posner (1986), for example, presents a preliminary maximizing calculus; Daniel Farber (1991) focuses more broadly on public-choice doctrine. The asserted "public goods" (communal) aspects of speech and information are central to this body of work. The basic approach, as presented by Farber (1991), is as follows: "The critical insight of Public Choice theory is that, because information is a public good, it is likely to be undervalued by both the market and the political system" (555). Therefore, "the market will underproduce information, [and] the political system is likely to overregulate information" (560).[7]

Three conclusions flow from these premises: (1) "It is . . . [the] tendency [of the political system] to overregulate speech activities that requires constitutional protection of speech" (Farber 1991, 561); (2) "It is the communal benefits derived from speech that justify greater protection for speech than for other forms of personal activity" (583);[8] and (3) "Our polity responds to this undervaluation of information by providing special constitutional protection for information-related activities. This simple insight explains a surprising amount of First Amendment doctrine" (555).[9] Freedom of speech is regarded in this context "not as something particularly desirable in itself but as providing motivation for individuals to engage in socially useful conduct: the

6. This view misses the point that rational individuals would not surrender voluntarily the right to acquire unfettered, truthful, commercial information. Also ignored is that the "power over others" test is a springboard for abridging expression rights in areas that extend far beyond commercial speech, potentially reaching into areas of everyday public and private discourse. Furthermore, protecting the commercial (for-profit) press under this approach entails a further complication: it requires "an instrumental argument for an interpretation of the press clause that is independent of the speech clause, an argument that recognizes special rights for the press and for occupants of press roles" (Baker 1989, 225). For a different line of reasoning that arrives at the same conclusion regarding the constitutional status of commercial speech, see Shiffrin 1984.

7. This assertion is perplexing. The undervaluation of information provides no obvious incentive for the state to overregulate. If information is undervalued, then the expected benefit from regulating (i.e., restricting) it must be relatively small. Regulation, on the other hand, is costly, and overregulation is even more costly. Accordingly, overregulation is an irrational response to undervaluation. More likely, as will be shown shortly, the state regulates information for the purpose of generating private rents, and so is likely to value with some precision the expression rights it abridges.

production of information. . . . Society must rely on non-financial motivations to encourage the production of information" (579–80). Consequently, "if the government intervenes in the market at all, it should *subsidize* speech rather than limit it. Legal restrictions on information only further reduce a naturally inadequate supply of information" (559, emphasis in original; accompanying footnote omitted).

The "law and economics" approach to theory and doctrine is remarkable partly because its essential premise is exactly contrary to the well-worn view (mine as well) that "speech or other self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual" (Baker 1989, 5). Farber's view in particular is remarkable because many of its premises and conclusions are of dubious validity. Information is costly to produce, and so it tends naturally to be produced as a "private" (i.e., price-excludable) good rather than as a public good. Producers rely on legal rules of patent, copyright, and trademark to protect private property rights in the most valuable sorts of speech and information, a reality that undercuts the argument that prevailing policy promotes publicness. Public policy in fact promotes privateness in order to ensure the continued flow of information.[10] Accordingly, Farber implicitly redefines the public-goods concept so that the degree of publicness is determined not according to economic characteristics but by the extent to which speech pertains to public issues (compare Meiklejohn 1948 on the foundations of "political speech" theory). Consequently, political speech is deemed highly public whereas commercial speech (i.e., advertising) is not considered public at all.

Posner (1986), in contrast, distinguishes between public and private speech according to how well their costs and benefits are internalized in the absence of corrective law. But from almost every perspective, the costs and benefits considered by "law and economics" scholars tend to be pecuniary. Nonpecuniary benefits such as the utility gains recognized by Justice Brandeis are ignored, presumably because they cannot be quantified. This constraint severely limits the usefulness of the analysis.

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8. It is not apparent why the "communal benefits" of speech and information should be singled out for special constitutional consideration. Many forms of private action give rise to communal benefits, which are more commonly called positive externalities. As Adam Smith observed, "By pursuing his own interest [an individual] frequently promotes that of the society more effectively than when he really intends to promote it" ([1776] 1976, 1: 477–78). Nothing in Farber's argument uniquely distinguishes speech from private economic activity and other aspects of rational human behavior. Rather, speech is distinguished for purely normative reasons.

9. That the Court holds in mind some idea of public goods when deciding First Amendment cases certainly cannot be ruled out, but the strong conclusion that consideration of public goods "explains a surprising amount of First Amendment doctrine" seems unwarranted. A correlation between public goods and First Amendment doctrines proves only that the two are not necessarily inconsistent over a fairly wide range.

10. If the Supreme Court truly sought to promote speech and information on public-good grounds, then evidence would be manifest in patent and copyright rulings tending to favor appropriators over property-right holders. The prevailing silence of property owners suggests, however, that the Court's decisions do not significantly undercut private property rights in information and ideas, rights that are post-political and do not exist under natural and common law. Evidently the Court does not emphasize public-goods considerations as a rule.

Perhaps the most practical conclusion to be drawn from arguments about public goods and communal benefits is that some expression rights reside in a "commons" where no single individual or distributional coalition has a sufficient interest to defend them against arbitrary abridgment by the state. Flat constitutional protection of expression rights in these circumstances is itself a public good in the true economic sense.

A final group of contemporary scholars avoids the conventional debate over First Amendment doctrine by rejecting the notion that constitutional protection for private rights of expression is warranted (Sunstein 1993a, 1993b; MacKinnon 1993). These scholars argue, in part, that such protection is anachronistic given the disregard for private property rights that has characterized constitutional law for most of the twentieth century. They justify a disparate array of normative policy proposals on the grounds that the susceptibility of expression rights to political manipulation

> does not distinguish regulation of speech from regulation of anything else; all regulation is vulnerable to interest-group pressures in this way. Hence this kind of bias provides no special reason to be suspicious, under the Constitution, of all government regulation of speech; and post-Lochner, we are not suspicious of all government regulation. (Sunstein 1993a, 390)[11]

This approach to First Amendment doctrine, which places all expression rights into play as political footballs, rests on three pillars of rationalization: (1) the "natural" distribution of expression rights actually is law-made, arbitrary, unjust, and without moral foundation; (2) redistribution of expression rights through a process of "deliberative democracy" would bring about a superior state of society; and (3) a constitutionally protected system of property rights and markets unduly constrains the sort of "free" speech needed to foster deliberative democracy. The concern embodied by these arguments is neither about efficiency and public goods per se, nor is it necessarily about the fact that First Amendment doctrine is noticeably a product of rent-seeking by distributional coalitions. Rather the concern is that broad constitutional protection for expression rights has social consequences that are normatively undesirable; it may serve, for example, to maintain the domination of white males over women and ethnic minorities (MacKinnon 1993). At bottom, these arguments rest tenuously on naive and quite possibly disingenuous assertions to the effect that comprehensive regulation of expression rights necessarily would produce results that are fair and just for all.

This approach also rests on a "positive freedom" interpretation of the Constitution whose adherents argue that the state is affirmatively obliged to promote the welfare of individuals in ways that foster such goals as individual personhood and social equality. Accordingly, proponents of the approach seek to remove private expression

11. *Lochner v. New York,* 198 U.S. 45 (1905), marked the high point of constitutional protection for private property and contracting rights. The ruling was subsequently overturned; see Epstein 1985.

rights—as well as other property rights that are collateral and complementary to the exercise of expression rights—from the realm of constitutional protection and to subject them instead to the compulsions of politics and law. The intrinsically negative thrust of the Constitution and the First Amendment is asserted to have "prompted an excessive focus on avoiding restrictions on speech at the expense of the equally important goal of actively promoting speech" (Farber 1991, 568). As a result, "First Amendment speech and Fourteenth Amendment equality have never contended on constitutional terrain. The reason is largely that both have been interpreted more negatively than positively, prohibiting violations of government more than chartering legal intervention for social change, even as governmental inaction and the more extended consequences of governmental action undermine this distinction in both areas" (MacKinnon 1993, 73).

The Court generally has dismissed "positive freedom" arguments on grounds that the Constitution "is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people, but that it might do too much for them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services" (*Jackson v. City of Joliet,* 715 F. 2d 1200 [1983], at 1203).[12] The Court's hostile view has caused arguments asserting public "rights" of media access[13] and the state's obligation to promote a diversity of ideas[14] to fall by the way.

One reason for the great diversity of contemporary First Amendment thinking is the amendment's peculiar provenance, which precludes legal reasoning as the means to enlightenment. Above all else, the parchment First Amendment was a statement of federalist principle that protected the right of self-government at the state and local levels (Levy 1985). As written, it prevented the national government from tampering with common-law principles of speech, press, and religion (principles that arguably were less hospitable toward individual liberty than the First Amendment principles in play today). Delegates to the Constitutional Convention ensured that the First Amend-

12. On the foundations and scope of "positive" constitutional rights, see Currie 1986.

13. This position has been advocated extensively by Jerome Barron (1967, 1973) and continues to find favor with influential scholars; see Haiman 1981, 333–39; Bollinger 1991; and MacKinnon 1993. The courts, however, have held that the right of free speech does not entail "a right to use the other fellow's printing press" and so have rejected the novel theory of media access advanced by these and other scholars: *Chicago Joint Board Amalgamated Clothing Workers of America AFL-CIO v. Chicago Tribune,* 307 F. Supp. 422 (N.D. Ill. 1969). See also *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

14. The Court has favored this position from time to time. See, for example, *Associated Press v. United States,* 326 U.S. 1 (1944). It has gone so far as to hold that "when we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of the press . . . we remain mindful of the fact that the latter occupy a preferred position"; see *Marsh v. Alabama,* 326 U.S. 501 (1946), at 504. The crescendo occurred in the declaration that "property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held"; see *Amalgamated Food Employees v. Logan Valley Plaza,* 319 U.S. 308 (1968).

ment would not alter the laws and customs of the states, in part by rejecting a draft amendment which provided that "the equal rights of conscience, *the freedom of speech or of the press,* and the right of trial by jury in criminal cases *shall not be infringed by any State*" (*Annals of Congress,* August 17, 1789, 1: 755).[15] The framers' position was not that "no law" should be made and enforced but simply that Congress was not going to make it. The Supreme Court, following the framers' design, resisted for more than a century the temptation to apply the First Amendment against the states.[16]

The common law of the framers' time protected private rights of expression in the same way that all other property rights were protected, a point that was not lost on the authors of the Constitution and the Bill of Rights. James Madison, the principal architect of both documents, reasoned that property "embraces everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage," including not only "a man's land, or merchandise, or money" but also "*his opinions and the free communication of them*" (Madison [1792] 1906, 6: 101, emphasis added).[17] Just as rights in physical property comprise a myriad of separate rights to acquire, consume, protect, and exchange resources, rights of expression comprise an indefinite number of rights to acquire, create, consume, protect, and transfer control over information and ideas.

Expression rights differ in only two relevant ways from rights in land, merchandise, money, and other physical property. First, expression rights are rarely subject to conflicting claims of ownership. Scholars reasonably may dispute whether first possession and use provide an adequate moral and legal basis for establishing property rights in naturally occurring resources (e.g., land and wildlife) and whether control over a property right was acquired through voluntary exchange or through force or fraud. But there is essential agreement that all individuals have a proprietary claim of some sort to their thoughts and an inalienable "right" to express them. The second difference between the two sorts of rights is that expression rights do not lend themselves to eminent domain treatment as other property rights do. Private expression rights cannot be uniquely valued, in part because their value is substantially nonpecuniary and also because their taking rarely is restricted to specific, identifiable individuals. Consequently, the notion of a compensated taking of expression rights is a nullity. Compensation for lost expression rights

15. Several states had adopted constitutional provisions covering speech and press freedom by the time of the Constitutional Convention. Moreover, a few states also had adopted official religions, some had established religious requirements for holders of public office, some had enacted laws covering blasphemy, Sabbath observance, and compulsory church attendance, and some taxed individuals according to their religious affiliation (Smith 1995, 38–39).

16. The Court held generally that "the Constitution was ordained and established by the people of the United States for their own [national] government, and not for the government of the individual states"; see *Barron v. Baltimore,* 32 U.S. 243 (1833).

17. Madison's conception of property is on all fours with modern libertarian theory, which holds that "there is no such thing as a separate `right to free speech'; there is only a man's property right: the right to do as he wills with his own or to make voluntary agreements with other property owners" (Rothbard 1998, 113). It also is consistent with the legal argument that the Constitution should be read as providing equally strong protection for property rights of all sorts (Epstein 1992).

must, therefore, be delivered in kind; all individuals whose rights are taken by the law must be left unambiguously better off in the long run, as occurs, for example, when the law proscribes and punishes fraud, perjury, and libel.

The "nationalization" of the First Amendment, which resulted from the amendment's judicial incorporation into the Fourteenth Amendment, stood the principle of national federalism on its head and so constituted a tacit repeal of the parchment First Amendment.[18] Incorporation drained the amendment of its intrinsic meaning (a prohibition against federal meddling with the common law), leaving behind an empty vessel that jurists, lawyers, scholars, and other interested coalitions proceeded to fill with a rich variety of conflicting meanings. The doctrines in place today are easily seen to have arisen ad hoc and in the absence of any positive theoretical framework. It is impossible, therefore, to distill coherent theory and meaning from First Amendment case law, although it is possible at times to identify the private interests that have conspired to shape First Amendment doctrine.

The confused state of First Amendment doctrine is exacerbated by the factional, redistributive, and collectivist political environment that has arisen over the past one hundred years (Lowi 1979). The philosophical foundation for this evolution is "neo-Kantian" political thought, which extrapolates from a line of political theory running through Kant, Hegel, and Marx. These ideas, which are evident in many "romantic" and "positive freedom" constitutional theories, focus on notions of social justice, human dignity, personhood, and fairness (Shiffrin 1990; Radin 1993). Lost in translation is that Kant and Hegel (but not Marx) viewed private property as essential to the achievement of these worthy philosophical goals.

Few of the muscularly humanitarian and egalitarian social doctrines advocated in recent years have taken firm root in the collective American conscience. If they had, because of their compelling sophistication or their something-for-nothing promises or (against all evidence) their ability to deliver the goods, then most questions about First Amendment theory and doctrine would be moot. Despite the stubborn persistence of these doctrines among the intellectual elite, however, the political and jurisprudential pendulum is swinging back to the view that constitutional protection for property rights of all sorts is both appropriate and necessary. There is a renewed faith that the Founding Fathers, who regarded property rights as the basis for all other freedoms, actually got it right by establishing constitutional protection for those rights. By the lights of constitutional scholar James Ely:

> Protection of property and enhancement of commerce were at the heart of the constitution-building process. To achieve these objectives, the framers

18. In *Gitlow v. New York,* 268 U.S. 652 (1925), the Court held that "freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the 14th Amendment from impairment by the states" (666).

> fashioned an instrument of government that limited state authority over property and trade. They further crafted institutional arrangements in order to curtail the power of the political majority to infringe on the rights of the property-owning minority. Not content to rely solely on the basic design, however, the framers also inserted many specific provisions in the Constitution and the Bill of Rights to safeguard economic rights. Utilizing the contract and due process clauses, the federal judiciary in time became a conservative bulwark of economic liberty against legislative attempts to regulate the use of property and to redistribute wealth. (Ely 1992, 57–58)

This characterization of original intent is widely accepted in scholarly circles; it is even accepted grudgingly and apologetically by scholars who would prefer that it were not true (Nadelsky 1990). There also is grudging acknowledgment today that the coercive taking and redistribution of property rights in general—undertaken ostensibly to further normative egalitarian and humanitarian social goals, but in truth more frequently to serve the private interests of distributional coalitions—has done significant damage to the fabric of American society (see Olson 1982).

The "first amendment" rule that emerges in the following discussion is consistent with the framers' view that private rights of expression require constitutional protection against arbitrary taking by the state. The rule emerges naturally from consideration of the nature of communication and of the perverse incentives of government. The framers understood correctly the nature of both, and their interrelationship. That understanding, which has been lost over the years, I now undertake to resurrect and examine.

Toward a Positive First Amendment Rule

The quest for First Amendment theory has given way in recent years to the promotion of ad hoc doctrine. The central issue of contemporary thinking (naked rent-seeking aside) is whether individuals are better served by a constitutional doctrine that places private rights of expression up for political grabs (along with most other property rights) or, alternatively, by a doctrine that protects expression rights against arbitrary abridgment by the state. The black letter of the First Amendment provides no guidance on this question because, as I have explained, the issue was irrelevant to the amendment's intended purpose. The present obstacle to coherent First Amendment doctrine is that the doctrinal question, which can be reduced to a balancing of social costs and benefits, demands an empirical answer that cannot be supplied until social science discovers a way to measure, aggregate, and compare the private utility functions of individuals across a large and heterogeneous population. Contemporary approaches to theory, which attempt to settle the issue in muscular command-and-control fashion, predictably have failed to produce coherent and robust ideas. An alternative approach, which arguably is the better one at this juncture, is to aban-

don legalistic investigations into "what the First Amendment means" and to inquire instead into the scope of expression rights that a rational citizenry would seek to protect through constitutional contract. I take up two fundamental aspects of this inquiry: first, the nature of human communication; and second, the incentives of distributional coalitions, including the state itself, to abridge the expression rights of private individuals.

The Nature of Communication

Whether considered at the verbal, behavioral, or biochemical level, communication is an evolved means by which intrinsically selfish individuals compete for scarce, utility-generating resources by interacting with, manipulating, and modifying their environment. Human communication, like all human action, is purposeful behavior (von Mises 1949, 11; von Neumann and Morgenstern 1953; Becker 1976).[19] To paraphrase Adam Smith's famous dictum: It is not from the benevolence of individuals that we expect communication, but from their regard to their own interest.

Communication behavior involves the acquisition, creation, consumption, exchange, and distribution of information, and so facilitates the processes of everyday life. It entails, among other things: (1) negotiating voluntary and mutually beneficial exchanges of property rights, (2) deciding nonmarket (political) issues, (3) coordinating joint activities, (4) resolving conflicts, (5) searching for objective and philosophical truths, (6) strengthening interpersonal bonds, and (7) venting emotion. These activities serve to increase private utility; they also help individuals to maintain psychological health and equilibrium.[20] Private communication also creates public (communal) benefits, although usually in unintended ways. Social cohesion, for example, is promoted spontaneously by private communication that contains elements of culture, values, and feedback (Habermas 1970); and the engine of the market process, through which the wealth of society is created and distributed, is fueled by the private creation, discovery, and exchange of information (see Hayek 1988; Eatwell, Milgate, and Newman 1991; and Kirzner 1992). In sum, communication is an integral part of human behavior and social organization. It helps individuals to acquire more of the things they value most highly by increasing the stock and flow of data, information, and knowledge and thereby increasing the potential gains from cooperation and voluntary exchange. These utility-creating attributes of communication give objective value to private expression rights, which in turn provides the incentive for individuals to protect those rights against artificial impediments to their free exercise.

19. On the behavioral foundations of communication, see Wilson 1975, 171–241; Dawkins 1989, 63–65, 282; Smith 1977; Rothschild 1990; Agosta 1992; and Hauser 1996.

20. Values of this sort are among those entertained by Justice Brandeis in *Whitney v. California,* 274 U.S. 357 (1927), at 376. They are discussed in most treatises on language and free speech, including Emerson 1970, 6–7; Hayakawa 1978, 62–138; and Bollier 1991.

Just as expression rights create private value for the individual, the power to abridge those rights through state action creates private value (rents) for individuals and coalitions wielding that power. Rents are created in two ways: first, by decreasing generally the efficiency with which economic, political, and social markets transmit information; and second, by strategically augmenting the expression rights of some individuals and restricting those of others. The Court correctly responded to the second of these issues by holding that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" (*Buckley v. Valeo,* 424 U.S. 1 [1976], at 48–49). On the other hand, by "discovering" fairly broad constitutional authority for the state to regulate some forms of political, commercial, and personal expression, the Court has permitted the state to impair the ability of markets to transmit information efficiently and has enriched some individuals at the expense of others.

Public Choice and Constitutional Economics

Public decision makers have a private incentive to bargain away the property rights and liberties of individuals under their jurisdiction. Such bargaining places First Amendment theory in the wheelhouse of the Virginia school of public choice.

Adherents of Virginia public choice consider public decision makers, like all individuals, to be rational, self-interested, and motivated toward choices that promote their own private wealth and personal preferences (the economist's term "utility" typically is used to denote the private value of pecuniary and preference outcomes). They view politicians and bureaucrats as entrepreneurs, and political parties as business organizations that produce economic rewards for their creators and patrons (Buchanan and Tullock 1962, 334–35). Laws and administrative regulations are viewed as enforceable contracts between public decision makers and private factions (Landis and Posner 1975). Decision makers are seen to supply redistributive rules, regulations, and monopoly franchises through a market-like process in response to the demands of competing coalitions. In return, decision makers receive votes and other remunerations such as campaign contributions, side payments in money or kind, reappointment to office, complimentary travel and vacations, book deals, speaking fees and other honoraria, private-sector employment, and (to borrow a bit of thunder from sociobiology) enhanced reproductive opportunities, which may be real, simulated, or only imagined (Stigler 1971; Peltzman 1976; Ridley 1993). The judiciary is removed somewhat from these incentives due to the greater degree of individual responsibility and accountability that attaches to judicial decisions and, in the federal courts, to lifetime tenure. Even so, judges (and their law clerks) have an incentive to transform society in ways that satisfy personal pecuniary, moral, ethical, cultural, aesthetic, professional, and political preferences (Berger 1977; Bork 1990; Lazarus 1998). Of course, judges also may derive private utility by deciding issues strictly within established legal bounds

(Posner 1995, 109–44). Nevertheless, the utility function of *all* public decision makers, including judges, responds to the same basic incentives.

In the perspective of Virginia public choice, individuals pursue private interests by forming into temporary political majorities in order to gain control over the coercive, decision-making machinery of government. Madison too focused on this process in his oft-noted warnings against "factions" in *Federalist 10.* Elsewhere he observed that "the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of constituents" (letter to T. Jefferson, reproduced in Schwartz 1980, 3: 616). Concern about the ability of entrepreneurial factions, both inside and outside the government, to orchestrate the taking and redistribution of private property rights through state action is key to understanding the "original intent" that underlies the Constitution in general and the First Amendment in particular.

Followers of Virginia public choice focus on the incentive of public decision makers to acquire property rights of all sorts by confiscating ("taking") them, and they criticize the courts for continuously augmenting the state's taking authority over the years (Epstein 1985). The windfall private benefits created through the arbitrary taking and redistribution of property rights by state action are termed "rents" in the argot of public choice, and the systematic pursuit of rents by political means is termed "rent seeking" (Buchanan, Tollison, and Tullock 1980). Rents are pursued by public decision makers and private factions alike. Decision makers pursue rents in two forms: (1) pecuniary rents (e.g., campaign contributions, reappointment to office, and future employment); and (2) nonpecuniary rents (e.g., self-esteem and moral, ethical, and aesthetic preferences). Private coalitions similarly pursue rents both pecuniary (e.g., monopoly franchises, legal restrictions on competition) and nonpecuniary (e.g., public policies that favor certain moral, ethical, aesthetic, and cultural orientations). Rent seeking is a predatory and nonproductive activity that yields private benefits worth less than the aggregate value of the property rights taken; that is, winners in the rent-seeking game gain less value than the losers sacrifice. This imbalance arises in part because winners and losers alike must invest economic resources in political activities (e.g., lobbying, political contributions) in order to capture rents, while simultaneously incurring costs to protect their own property rights against rent-seeking predation by others. In sum, rent seeking is a publicly wasteful, though privately rational, activity (see Posner 1975; Bhagwati 1982; and Becker 1985).

The dark view of the governmental process that emerges from Virginia public choice differs dramatically from the sunny textbook model of decision making in the "public interest." The public-interest model presumes that government decision makers are benevolent and omniscient and that legislative, administrative, and judicial rules represent honest, disinterested, and narrowly focused attempts to maximize the welfare of all individuals. Candor sometimes compels proponents of the public-interest

school to admit that state intervention does not always deliver the goods as promised, although they also are prone to assert that intervention would be more efficacious *if only* regulations were more numerous and invasive and *if only* enforcement efforts and funding levels were increased. Problems of information limitations and contrary human nature are muted, as much out of ignorance as by design. The Virginia public-choice tradition, in contrast, perceives the public-interest model to be fatuous and naive. Public-choice theory explains the motivations, failures, and fluctuations of policies in terms of the self-interest of public decision makers and the political influence of outside factions. The explanatory and predictive power of public-choice theory accounts for its wide and growing acceptance by economists and political scientists and, more recently and reluctantly, by legal scholars.

A rational "first amendment" rule of constitutional contract would shield private expression rights a priori against arbitrary taking by the state, and so would reduce the extent of socially wasteful rent seeking. The organic basis of the rule lies in the incentive of private individuals to formulate rules that minimize the cost of social interaction of all kinds, including the incentive to economize on the cost of protecting and exchanging property rights through the market process.

Individuals have an incentive to accept certain restraints on private behavior because they realize that the alternative is a Hobbesian state of nature in which most individuals would be worse off in the long run. The upshot, in concept, is a *voluntary surrender* of those expression rights whose unfettered exercise would produce negative net benefits. Expression rights that involve perjury, fraud, and libel are obvious candidates for surrender. This arrangement develops from behind a "veil of ignorance" in the sense that baseline rules are fashioned in anticipation of situations that may never arise, and so it resembles somewhat the Rawlsian construct of a hypothetical population designing principles of justice (Rawls 1971, 12, 136-42). The end result, however, is not the normative scheme of moral claims and distributional justice that Rawls's theory produces. Instead, the result is a "first amendment" constitutional rule that reduces for everyone the cost of social interaction, cooperation, and voluntary exchange.

A unanimous surrender of expression rights would not occur if the expected result were an asymmetrical redistribution of rights that would reduce the utility of some individuals in the long run. Rational individuals would choose instead to negotiate private, voluntary, and mutually beneficial exchanges of rights as specific needs and opportunities allowed. Individuals also would agree to bear privately the external (public) costs that result from the exercise of private expression rights. An efficient mix of formal and informal rules of social conduct would emerge spontaneously from these considerations, with formal rules being enforced by the state and informal rules being enforced through the workings of taboos, stigmas, and standards of etiquette. The resulting mix of laws and norms would maximize the spread between private costs and benefits over the long run (Ellickson 1991).

In the context of expression rights, rational laws and norms internalize the costs of self-interested behavior, and so help to prevent opportunistic individuals from (1) depriving others of their expression rights for the purpose of reducing market efficiency; (2) exercising private expression rights in ways that devalue the property rights of others through libel, perjury, and so forth; and (3) using speech to acquire the property rights of others through force, deception, and fraud. All individuals have an incentive to accept these baseline constraints, not out of some nebulous sense of altruism and fairness, but out of a recognition that any alternative arrangement would render every individual worse off in the long run.

The task of enforcing formal social rules falls to the coercive power of the state. Coercive power is potentially corrupting, and so must be constrained lest the state transform itself into a super-predator. Once vested, the authority to take private property rights by force becomes a property right that decision makers, as rational utility-maximizing individuals, have an incentive to exercise in ways that increase their own utility. At the limit, the unconstrained use of coercive state power would leave individuals worse off then they would be in a Hobbesian state of nature. Society solves the problem of "who watches the watchers" by establishing a social contract called a constitution. The constitution vests selected individuals (collectively, "the government") with authority to protect the property rights of everyone living under its jurisdiction, and to improve the welfare of all through the production of public goods (Buchanan 1975; Ely 1992).

Communication, Public Choice, and the First Amendment Rule

The Constitution's framers, like today's public-choice economists, were overtly concerned about the inherent incentive of government to abuse its monopoly of decision-making power in order to maximize the private value inherent in the authority to make choices on behalf of the public. They were concerned in particular about government's inherent incentive, facilitated at that time by the common law of seditious libel, to build rents by abridging private rights of expression; hence the insistence by some framers on First Amendment proscriptions.

Government's incentive to abridge expression rights has three roots. First, the free expression of "political" information, ideas, and sentiments bids away decision-making rents. This result is contrary to the self-interest of public decision makers; hence their incentive to abridge the "political" expression rights of private individuals. Sedition laws and campaign-spending limits are examples of restrictions that have advantaged some political competitors and disadvantaged others. The Supreme Court's recent record in this area is mixed. While paying tribute to the robust, wide-open, and uninhibited discussion of public issues, the Court also has upheld statutory restrictions on political advertising and fund-raising, restrictions that have altered the structure of political debate and encouraged self-interested politicians to press for further regula-

tion (see *Buckley v. Valeo,* 424 U.S. 1, [1976]). The 1998 McCain-Feingold proposal to reform campaign practices, for example, effectively prohibits criticism of public officials seeking reelection within sixty days of the election (the Sedition Act of 1798 revisited), whereas milder proposals seek only to restrict "issue" advertising.

Second, the free flow of information in goods-and-services markets prevents rents from accruing to private-sector entrepreneurs; hence the incentive to abridge rights of "commercial" speech. As a practical matter, private factions seeking to build profits by restricting the flow of market information must do so through political action because private action is at once (1) difficult and costly to organize, (2) prone to cheating, and (3) illegal per se under antitrust law. Consequently, factions trying to control the stock and flow of market information must engage the state as cartel manager. Decision makers and bureaucrats realize that they can secure (extract) for themselves, in the form of campaign contributions, future employment, and other benefits, a portion of any private rents generated by means of state action; hence their incentive to act (McChesney 1987, 1997; Epstein 1993). Legal restrictions against competitive advertising by licensed professionals (e.g., pharmacists, opticians, and lawyers) are examples of factions using the coercive machinery of government to generate private rents.

The Court has declared some abridgments of this sort to be unconstitutional, correctly recognizing in passing that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener, than his interest in the day's most urgent political debate" (*Virginia Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 [1976], at 763).[21] Other abridgments nevertheless have been upheld. Government agencies, for example, are permitted to regulate truthful advertising under the state's broad constitutional authority to regulate commerce, an authority originally intended to enhance the flow of commerce, not to restrict it (Ely 1992). The Court routinely upholds the statutory authority of federal regulatory agencies, such as the Food and Drug Administration, the Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission, to direct—and in some cases to dictate—the content of commercial speech "in the public interest."[22] Court-sanctioned authority now extends so far as to permit a ban on advertising by private gambling casinos that compete against government-sponsored lotteries (*Posadas de Puerto Rico Associates v. Tourism Authority,* 478 U.S. 328, [1986]). The odds of winning at casino gambling are more favorable than the odds of winning a state lottery; hence the value of advertising restrictions

21. For classic "law and economics" articles on the value of commercial speech and the Court's unwillingness to protect it fully against arbitrary abridgment, see Director (1964) and Coase (1974, 1977).

22. The scope of agency authority ebbs and flows with the mood of Congress. The Court has pruned many obvious rent-seeking regulations in recent years (e.g., the FCC's so-called Fairness Doctrine); less obvious abuses, which promote the professional interests of agency personnel and appear merely to be foolish administrative policy, typically are permitted to stand.

(Epstein 1993, 206-10). The Court also has upheld restrictions against the dissemination of certain kinds of information (e.g., legal and medical information) by individuals unlicensed by the state. At bottom, the state presently may abridge rights in truthful and informative commercial speech so long as any "legitimate" (however defined) state interest is served in the process. The Court requires only that the taking of expression rights be "incidental" to the policy being pursued (see *United States v. O'Brien,* 391 U.S. 367 [1968], and *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

Third, decision makers and private parties alike have an incentive to capture ideological rents by imposing private moral preferences on others through the abridgment of private rights in everyday speech. In polite company, rent-seekers of this sort are called "busybodies." Individuals (including public decision makers themselves) who are intolerant of other peoples' beliefs and values seek to gain control over their public and private behavior through political means. The incentives to do so frequently are rooted in the dark side of human nature—jealousy and envy (Schoeck 1966) as well as "fear, anger, paranoia, prejudice, power-seeking, paternalism, infantilism, pettiness, vindictiveness, and self-righteousness" (McWilliams 1993, 291). Rent seeking of this sort is typified by legislation that (1) restricts or bans the advertising of lawful products and services deemed "sinful" (e.g., alcohol, tobacco, gambling); (2) restricts or bans the display and sale of allegedly indecent, obscene, racist, misogynistic, and blasphemous materials; (3) censors "politically incorrect" information and ideas; and (4) grants public subsidies and preferential access to "politically correct" speech. The state accommodates this kind of rent seeking under the rubric of policing public morals.

The First Amendment Rule Considered

The need for a rational and coherent "first amendment" rule of constitutional contract is evident, and the essence of that rule flows easily from an understanding of human communication and public-choice principles. A constitutional society composed of rational individuals protects expression rights as a matter of first principle in order to foster a market-based social system structured around the voluntary and mutually beneficial exchange of information, ideas, and other property rights. Because expression rights are essential to the working of a market system, it follows that all speech that fosters, or is the subject of, free and orderly market process has a positive claim to constitutional protection against impairment and abridgment by the state. Conversely, speech that hinders market process (e.g., fraud) or damages the property rights of others (e.g., libel and perjury) has no legitimate claim to constitutional protection. In all cases, the abridgment of expression rights for the purpose of creating private rents is presumptively unconstitutional. Private rights of expression may be abridged under a rational "first amendment" rule only with the unanimous consent of all individuals, in which case abridgment is tantamount to a voluntary surrender of a private expression right (making formal abridg-

ment appear in some cases to be superfluous). The rule thus provides a constitutional shield against the abuse of decision-making power for rent-seeking purposes by prohibiting the state from mitigating competitive tension in political, commercial, and social markets. The consequences of the rule are largely consistent with results obtained through tedious analyses of legal concepts, precedents, and intent (see, for example, Greenwalt 1989). The rule and prevailing First Amendment doctrine diverge wildly only with respect to "commercial" expression rights, a sad irony given the Court's plain recognition that individuals are more likely to benefit from robust commercial speech than from robust political speech.

Private rights of political expression would always be retained by a rational citizenry, and so the "political speech" rule once advocated by such commentators as Meiklejohn and Bork is valid as far as it goes. Unfettered political expression dissipates decision-making rents because voters rationally favor the candidates who are most likely to place the interests of voters ahead of their own. The uninhibited flow of political information reduces the cost of acquiring potentially relevant voting information and also precludes incumbents from restricting the expression rights of others in ways that create artificial barriers to competitive entry into political markets (recall the Sedition Act of 1798). The "first amendment" rule fosters political competition by protecting the right of individuals to exchange information concerning, among other things, (1) the substance of formal behavioral rules, (2) the nature and cost of public undertakings, (3) the allocation and disposition of property rights held by the state in "public trust" (e.g., radio frequencies, public lands), and (4) the job performance of public decision makers. The rule promotes the private utility of all individuals, both by helping to bring about the statutes and collective choices that individuals have a legitimate right to prefer and to expect and, conversely, by helping to prevent decision makers and private coalitions from perverting state power to private ends. For these reasons, individuals rationally would choose to retain political expression rights in perpetuity. The "first amendment" rule establishes a presumption that the abridgment of political expression rights is per se unconstitutional.

The rule also precludes government from taking expression rights that are not related directly to the political process but which rational individuals would not surrender voluntarily in any event: rights to acquire, create, consume, protect, and transfer control over information and ideas of all sorts, including information of a commercial nature. Many scholars argue that a protective constitutional rule should not extend so far. Bork in particular argues that the scope and limitation of most property rights, including expression rights, are properly decided by majority rule because "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities" (Bork 1990, 139; see also Bork 1971, 30–31). In this view, government has constitutional authority to strike legislative bargains involving expression rights, and the Court must defend these bargains so long as they are not patently outrageous. Once legislation has survived the system of constitutional checks and balances and has

become law, the argument goes, the courts are obliged to defer to legislative primacy, if for no other reason than that courts are incompetent to second-guess decisions affecting the public welfare. The Court itself reasons that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . . With the wisdom of the policy adopted . . . the courts are both incompetent and unauthorized to deal" (*Nebbia v. New York,* 291 U.S. 502 [1934], at 537). This dictum has become a cornerstone for the proposition that private individuals have no property rights that cannot be taken, virtually on whim, by the state. It also underpins the abridgment of "commercial" expression rights and has been broadened ad hoc to permit the abridgment of other expression rights. The Court, for example, has upheld federal regulation of broadcasting content on the grounds that the electromagnetic spectrum is a scarce resource, notwithstanding that the relative scarcity of broadcast spectrum is wholly an artifact of arbitrary regulatory policy (see *Red Lion Broadcasting Company v. Federal Communications Commission,* 395 U.S. 367 [1969]).[23]

The Court's conclusion regarding its competence and authority to second-guess legislative decisions surely is correct, but it is also irrelevant in this context. The Court's constitutional duty under a rational "first amendment" rule is to protect the expression rights of individuals against arbitrary and involuntary taking by the state; it is not constitutionally obliged to defend arbitrary legislative bargains involving those rights. The Court need not second-guess legislative wisdom to fulfill this constitutional duty. Under the rule, a taking of expression rights is deemed legitimate only when it flows from the unanimous consent of the governed, something that will be given only in situations where all individuals expect to be made better off as a result. Accordingly, the Court needs merely to look at whether a taking statute has been enacted with virtually unanimous legislative approval and whether the taking benefits all individuals about equally. If the answer to either part of this test is negative, then the taking presumptively violates the terms of rational constitutional contract and so violates the Ninth Amendment's protection of those unenumerated rights "retained by the people." This test may seem like an odd constitutional basis for protecting expression rights, but it is fundamentally no different from the de facto substantive due process approach to First Amendment doctrine that the Court has employed, since Justice Brandeis's 1927 concurrence in *Whitney v. California,* to assess the strength and scope of constitutionally protected rights of expression. The "first amendment" rule merely contributes the benefit of rationality and consistency, ingredients missing in the Court's ad hoc approach to First Amendment jurisprudence.

23. In the economic sense, all resources are scarce, and so scarcity alone does not distinguish the radio spectrum from any other resource (Coase 1959). On the rent seeking that underlies the scarcity of the broadcast spectrum, see Hazlett (1990, 1998) and Twight (1998).

Conclusion

As the creation, acquisition, exchange, and consumption of information become increasingly important aspects of social, economic, and political activity, it is essential that the property rights with which individuals engage in those activities be recognized, in some cases delineated, and in all cases protected against arbitrary abridgment by the state. Expression rights presently are protected by an interpretive tapestry of "romantic" traditions stretched over a constitutional frame of substantive due process. The lack of consensus over the tapestry's optimal design is driven both by the First Amendment's peculiar provenance and by the self-interest of factions that benefit privately from arbitrary First Amendment doctrine. The "first amendment" rule of constitutional contract exposed here overcomes the problems of traditional First Amendment theory and doctrine while providing comprehensive and robust protection for private rights of expression.

Prudence at this juncture suggests the need to anticipate some likely criticisms of this baseline constitutional rule. Some critics surely will argue that the rule reflects normative ideals of private utility maximization and economic efficiency and, therefore, is not obviously superior to other "romantic" approaches to constitutional theory. This conclusion is unwarranted. The approach taken here is nonconsequentialist: it does not trade off economic efficiency for other potentially worthy goals, such as a kinder and gentler, more just, or less strident society. Rather, it seeks only to demonstrate that legislative and judicial abridgments of most expression rights would be proscribed a priori by a rational rule of constitutional contract.

Other critics may argue that the "first amendment" rule fails to protect the interests of social groups that are "abused" and "dominated" through the unfettered exercise of private expression rights. Arguments of that sort also are poorly taken. In the first place, a good portion of the alleged harm actually results from the public discussion of legitimate social issues. The free flow of speech, ideas, and information in this context leads to the discovery and correction of policy errors, and so must be tolerated within an open society even though it inevitably discomforts some individuals who have a stake in the outcome (Rauch 1993). Furthermore, the freewheeling exercise of private expression rights is constrained effectively by the natural processes of human interaction, including cooperation (Axelrod 1984; Ellickson 1991), reciprocity (Becker 1986), virtue (Ridley 1996), trust (Fukuyama 1994), and rational passion (Frank 1988). Relatively little speech takes place simply for the sake of its unpleasantness. Furthermore, the most intense forms of abusive speech occur under de jure social structures (e.g., apartheid) that protect selected individuals against the natural consequences of intemperate behavior. State action changes the cost and benefit structure of private communication, and so alters the incentives

of all individuals to behave civilly. Such policies are best minimized, a result that occurs naturally under the "first amendment" rule.

Finally, some critics may reject the "first amendment" rule on the grounds that it is an optimal policy prescription and, as such, not well suited to a highly imperfect world. Criticism along this line raises a valid point. Government already has breached the Constitution's parchment barriers to a significant extent, and so second-best considerations might appear to warrant some tinkering with expression rights in order to level an undulated playing field. Though the argument is attractive, it is ultimately faulty. The asserted need to abridge expression rights on these grounds is best interpreted as a prima facie indication of serious policy errors elsewhere in the political system. The best policy approach is to eliminate those errors directly. The only alternative is to paper over existing errors with additional layers of flawed policies, a tactic that is a hallmark of poor (and perhaps evil) government. Salving bad public policies with redistributive palliatives reduces attainable levels of wealth and utility for all individuals. The failure to pursue optimal policies leaves everyone worse off on balance.

The Court presently permits the state fairly broad latitude to take and redistribute property rights arbitrarily in the course of engineering social welfare. Such judicial permissiveness is—or at least ought to be—an overarching concern of an open, information-based society that rationally desires to protect private property rights related both directly and indirectly to rights of expression, including property rights in communications facilities. The "first amendment" rule exposed here pertains only to the rights of private individuals to formulate, acquire, possess, exchange, and earn income from private property rights in speech, beliefs, ideas, data, information, and knowledge. It does not deal directly with the broader issues raised by the taking and redistribution of property rights in communications facilities. However, by constraining rent seeking that involves rights of expression, the rule removes many of the private incentives that fire collateral takings.

In sum, a rational "first amendment" rule provides an appropriate benchmark for an information-based society concerned about its ability to be both free and productive.

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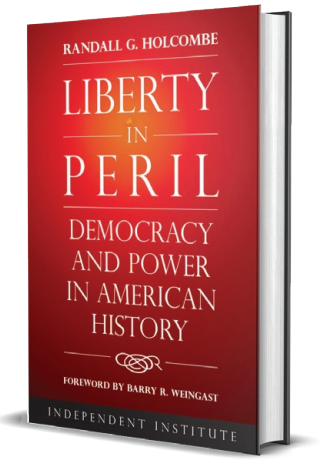

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