

# HOW AMERICA'S CONSTITUTION AFFIRMED FREEDOM OF SPEECH EVEN BEFORE THE FIRST AMENDMENT

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In this essay, I hope to say a little something about both constitutional substance and constitutional method.

Substantively, I shall try to bring into view a heretofore hidden argument in support of the constitutional right of Americans to engage in a robust, wide-open, virtually uncensored conversation about government and society—a conversation in which participants may let fly scathing criticisms (and tart defenses, for that matter) of the status quo. Methodologically, I hope to show how this hidden argument travels through a recognizable version of standard originalism, but with some interesting twists.

## I. STANDARD “PROOFS” OF FREEDOM OF EXPRESSION

Let us begin by reviewing several standard legal arguments in support of a robust right of free expression. As Professor Philip Bobbitt has shown, American lawyers and judges assess constitutional propositions by deploying certain well-established “modalities” of legal argument and analysis.<sup>1</sup> Text, history, structure, and precedent—these are some of the basic tools in the constitutional lawyer’s kit. Lawyers use these modalities to evaluate the legal strength of various claims made about constitutional meaning.

Take judicial precedent, the foundation of what Bobbitt labels the “doctrinal” modality. Doctrine provides strong support for a constitutional right to criticize government policy, even when such criticism includes extreme invective and strays from factual accuracy. This right lies at the heart of one of the most celebrated Supreme Court cases of the last century, *New York Times Co. v. Sullivan*.<sup>2</sup> In ringing language, the

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<sup>1</sup> See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

<sup>2</sup> 376 U.S. 254 (1964).

*Sullivan* Court proclaimed that our nation has a “profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>3</sup> According to *Sullivan*, a citizen criticizing government officials may never be criminally punished or held liable in a civil suit merely because that citizen’s denunciations contained careless falsehoods.<sup>4</sup>

Coming closer to home, consider the Supreme Court case that Professor Susan Gilles discussed in some detail, *Brandenburg v. Ohio*,<sup>5</sup> a case that turned forty years old this year and that arose in Ohio.<sup>6</sup> In *Brandenburg*, the Court made clear that even citizen speech publicly advocating illegal violence merits a strong measure of constitutional protection and cannot ordinarily be prohibited “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>7</sup>

Doctrinal protection for robust free expression—especially free expression of political opinions—is thus rock-solid today. But if only doctrine supported this right, we would be left with a puzzle. Before the 1920s, the Supreme Court had never invoked a constitutional right of free expression to invalidate a state or federal law.<sup>8</sup> On the contrary, several notable Court cases in the early twentieth century upheld sweeping forms of governmental censorship and suppression of citizen expression.<sup>9</sup> (One of these cases, *Whitney v. California*,<sup>10</sup> was not explicitly overruled until

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<sup>3</sup> *Id.* at 270.

<sup>4</sup> *See id.* at 279–80 (holding that public officials must prove actual malice to recover damages for a defamatory falsehood relating to official conduct).

<sup>5</sup> 395 U.S. 444 (1969).

<sup>6</sup> The case turned forty years old in 2009, the year this lecture and Professor Susan Gilles’s commentary were presented at Capital University Law School. Events giving rise to the *Brandenburg* suit took place at a farm in Hamilton County, Ohio. *Id.* at 445.

<sup>7</sup> *Id.* at 447.

<sup>8</sup> The rights of free expression first began to prevail in *Fiske v. Kansas*, 274 U.S. 380 (1927), *Stromberg v. California*, 283 U.S. 359 (1931), and *Near v. Minnesota*, 283 U.S. 697 (1931). In retrospect, two other cases from the 1920s may also be seen as victories for free expression. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>9</sup> *See, e.g., Whitney v. California*, 274 U.S. 357 (1927); *United States v. Schenck*, 249 U.S. 47 (1919); *United States v. Debs*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Patterson v. Colorado*, 205 U.S. 454 (1907).

<sup>10</sup> 274 U.S. 357 (1927).

*Brandenburg*,<sup>11</sup> which also undermined the logic of several other early cases.) If precedent were our only constitutional guide, we might be inclined to think that the federal constitutional right to free expression arose only in the twentieth century. We might even wonder about the correctness of *Sullivan* or *Brandenburg* to the extent that these landmark cases broke with prior case law.

However, when we turn from doctrine to consider other constitutional modalities, we find strong additional support for a robust constitutional right of political expression. For example, one modality directs our attention to the very structure of our system of government. And our system, based on popular sovereignty and free elections of public servants, strongly suggests that government officials—both at the state and federal level—lack the authority to prevent a robust public discourse critical of the government itself and/or existing social structures. In America, the sovereign people ultimately decide what policies we will support and which public servants we will elect. These elections would not be truly free if incumbents could entrench themselves against criticisms from challengers. The people would not truly be sovereign if our agents and servants—current government officials—could prevent us from speaking freely amongst ourselves on all matters of collective concern. From the perspective of constitutional structure, our public servants ultimately answer to us and have no authority to tell us what to say or what to think, politically.

Professor Vince Blasi has elegantly summarized this structural argument:

[F]ree speech is considered to be an essential ingredient of democratic self-government. In this view, ordinary citizens are the true governors; officials are merely their delegates. Citizens so invested with sovereign power have a duty to bring independent, informed judgment to their governing task. Persons under such a duty, the argument goes, must be free to explore the full range of ideas regarding government, even ideas that, were they to gain any measure of legitimation, could only undermine the commitments and projects of the current regime.<sup>12</sup>

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<sup>11</sup> *Brandenburg*, 395 U.S. at 449.

<sup>12</sup> Vincent Blasi, *The Pessimist's Case for Free Speech*, in *SESQUICENTENNIAL ESSAYS OF THE FACULTY OF COLUMBIA LAW SCHOOL* 26, 26 (2008).

Note that on this more structural view, a robust right of free expression was indeed part of the Constitution long before Supreme Court majorities saw the light. To the extent that early Court case law sided with self-serving government agents attempting to entrench themselves in power and muzzle their masters, the sovereign citizenry, the Justices simply goofed.

Historical arguments—another standard modality in the constitutional kit—offer additional support for a robust constitutional right of free political expression. During debates over the drafting and ratification of the Constitution, a wide assortment of Federalists (including Roger Sherman, Oliver Ellsworth, Edmund Randolph, Alexander Hamilton, James Wilson, Charles Pinckney, Charles Cotesworth Pinckney, Noah Webster, Hugh Williamson, and Richard Dobbs Spaight) sought to reassure Anti-Federalist critics by insisting that the new federal government would have no generally applicable enumerated power to censor or license the press.<sup>13</sup> In the mid-1790s, James Madison, who himself had played a pivotal role in persuading the First Congress to endorse a constitutional amendment explicitly affirming “freedom of speech [and] of the press,” explained the deep principle underlying that amendment. Under the American system of popular sovereignty, “the censorial power is in the people over the Government, and not in the Government over the people.”<sup>14</sup> Several generations later, in response to aggressive governmental efforts to suppress abolitionist speech at both the state and federal levels, a new political party took shape, and in the presidential election of 1856, this party nominated John C. Fremont for President. The campaign slogan that year made it evident to all what this new Republican Party stood for: “Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont.”<sup>15</sup> After the Civil War, Republicans infused this free-speech vision into the Fourteenth Amendment, with Congressman after Congressman in the mid-1860s making clear on Capitol Hill that free political expression was one of the sacred “privileges” and “immunities” of citizens that should never be abridged by any government, state or federal.<sup>16</sup>

And let us not forget perhaps the most obvious constitutional argument of all: the *text* of the First Amendment does explicitly guarantee “the

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<sup>13</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 36 (1998).

<sup>14</sup> 4 ANNALS OF CONG. 934 (Nov. 27, 1794).

<sup>15</sup> AMAR, *supra* note 13, at 235.

<sup>16</sup> *Id.* at 231–46.

freedom of speech [and] of the press.” The word “speech” is particularly notable because this word also appeared in the original Constitution—in Article I, section 6, protecting congressional “Speech or Debate.” This Article I clause built on still-earlier protections of legislative free speech in England and America. In 1689, the landmark English Bill of Rights proclaimed, “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.”<sup>17</sup> In the early 1780s, the Articles of Confederation echoed this idea: “Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress.”<sup>18</sup>

In all these texts—the English Bill of Rights, the Articles of Confederation, and Article I, section 6—the central focus was not commercial speech, artistic speech, or literary speech, but rather, *political* speech. Parliament—from the French *parler*, to speak—is a speaking spot.<sup>19</sup> But it is the home of a particular kind of speech: political discourse. So too with Congress. If a Senator takes the floor to advertise the low beer prices at his liquormart, such commercial speech might be protected by a broad reading of Article I, section 6—but surely we would say that it was at the outer periphery of protection, as speech of distinctly lower constitutional value.

Seen from this angle, the “freedom of speech” in the First Amendment is likewise about political discourse at its core. It is a reminder that in America, the people, not Congress, are sovereign. Our highest Parliament—our most exalted parley place—is not confined by Capitol walls. Under the Speech and Debate Clause, our servants in Congress may criticize their political adversaries free from outside censorship; symmetrically, under the other Speech Clause (the First Amendment), their adversaries may criticize incumbents free from inside censorship. This broad symmetry is one of the deep insights of *Sullivan*.<sup>20</sup> And so we come full circle, seeing how the various strands of constitutional argument—from text, from structure, from history, from precedent—can intertwine to create a strong rope of constitutional meaning.

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<sup>17</sup> 1 W. & M., sess. 2, c. 2 (1689) (Eng.).

<sup>18</sup> ARTICLES OF CONFEDERATION, art. V, § 5 (1781).

<sup>19</sup> See The American Heritage College Dictionary 994 (3d ed. 1997) (“*parliament* < *parler*, to talk”).

<sup>20</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964) (“Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen.”).

Having completed our quick summary of various standard arguments for free expression in America, let us now turn to an intriguing, if often unnoticed word in the First Amendment: “the.” The First Amendment does not purport to create a new right, but rather to recognize something pre-existing—apparently, “*the*” freedom of speech preceded even the First Amendment. But how? Eighteenth-century English common law did not recognize a broad right of ordinary Englishmen to upbraid their sovereign masters in Parliament (though English law did recognize a broad right of Parliament to malign ordinary Englishmen).<sup>21</sup> Nor did the thirteen colonies, or even the thirteen states in the midst of the Revolutionary War, officially recognize on the books or invariably respect in practice a right of free expression as sweeping as would be recognized in later cases such as *Sullivan and Brandenburg*.<sup>22</sup>

I suggest that we can indeed find deep historical roots for the *Sullivan/Brandenburg* vision—roots older and deeper even than the First Amendment. Even before the adoption of the First Amendment, America’s Constitution had already committed itself to an extraordinarily robust right of citizen speech. The evidence for this right has been hiding in plain sight for two centuries. What follows is another argument for free expression—another constitutional “proof,” if you will—based on the very process by which the Constitution itself was in fact ordained and established by the American people in the late eighteenth century.

## II. AN ADDITIONAL CONSTITUTIONAL “PROOF”: THE ARGUMENT FROM ENACTMENT

America’s Constitution sprang to life through a series of enactments. In the fateful year following the unveiling of the Philadelphia Convention’s proposed Constitution, citizens across the continent enacted that proposal into law, much as legislators might enact a statute. Like the words found in the Constitution, the enactment procedures that gave birth to the document are rich with meaning. They invite interpretation.

A striking feature of the enactment process has gone largely unnoticed—or at least untheorized—by modern lawyers, judges, and scholars. Here is the key fact: Americans in 1787–88 exercised a remarkably robust, wide-open, virtually uninhibited freedom of political expression as they pondered the constitutional text proposed by the Philadelphia framers. The point here is not merely that, as a matter of

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<sup>21</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 101–04 (2005).

<sup>22</sup> See *generally* LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

constitutional structure and logic, American-style popular sovereignty should be understood to entail a muscular right of citizens to discuss political ideas and political proposals among themselves. The point is also that, on this issue, enactment history strongly reinforces logic and structure. In actual fact, the Constitution was born in a land awash with speech and through a process that teemed with talk of the freest sort, including lots of talk harshly critical of existing officials and institutions. In an extraordinary efflorescence of accusations, addresses, allegories, analyses, appeals, arguments, assemblies, books, cartoons, complaints, conversations, costumes, debates, deliberations, denials, diatribes, disquisitions, effigies, encomiums, essays, exaggerations, flags, harangues, insults, letters, misstatements, opinions, paintings, pamphlets, parades, petitions, pleas, poems, prayers, prophecies, puns, quips, sermons, songs, speeches, squibs, symbols, toasts, and writings of every sort,<sup>23</sup> Americans *in the enactment process itself* exercised and exemplified an amazingly vigorous freedom of expression. Sharp-elbowed political maneuvering there was aplenty; widespread punishment of exuberant expression there was not.<sup>24</sup>

Though much of the continental conversation took place prior to the ratification conventions held in the several states, the conventions themselves were speech spots par excellence. Assembling outside the confines of ordinary government institutions, these specially elected, single-purpose conventions embodied the American people themselves, with a superior democratic mandate to say yea or nay to the Constitution than could be claimed by mere state legislatures filled with ordinary lawmakers elected in the ordinary way.<sup>25</sup> Even in conventions where one side—Federalist or Anti—entered with an apparently decisive majority, delegates on the other side freely spoke their piece, as a rule. Often, a speech or argument on a particular issue prompted an apt counterargument. At times, delegates even pronounced themselves persuaded by something said by men on the other side. Indeed, as I shall explain a bit more in my concluding comments, the very ideas that a textual Bill of Rights should be added to the Philadelphia plan, and that such a textual Bill should

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<sup>23</sup> See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L. J. 1057, 1058 (2009) (discussing the importance and legal protection in the Founding era of “symbolic expression”—paintings, flags, processions, liberty poles, costumes, effigies, etc.).

<sup>24</sup> This is not to say that the speech situation was perfect. I am indebted to Matt Kelly for this reminder.

<sup>25</sup> See AMAR, *supra* note 13, at 5–7, 308–12.

guarantee free citizen expression, gained dramatic momentum in these ratifying conventions, as moderate Federalists and moderate Anti-Federalists began to speak, *and listen*, to each other.

Americans understood what they were doing as they were doing it, exulting in the luxuriant freedom of expression being acted out before their eyes and ears by their mouths and hands.<sup>26</sup> America's pre-eminent theorist of popular sovereignty, the lawyer and later Supreme Court Justice James Wilson, put it best at the outset of the Pennsylvania ratifying convention, before any state had said yes to the Philadelphia plan: "In our governments, the supreme, absolute, and uncontrollable power remains in the people[,] . . . [who] possess over our constitutions control in act, as well as right. . . . *These important truths, sir, are far from being merely speculative. We, at this moment, speak and deliberate under their immediate and benign influence.*"<sup>27</sup> Note Wilson's particular emphasis on how the enactment process unfolding all around him and his audience was a system featuring a truly remarkable freedom of ordinary citizens to "*speak and deliberate.*"

Wilson returned to this enactment theme a week later. America's sovereign—the people—had "vested certain proportions of . . . power in the state governments" but the wellspring of power

continues, resides, and remains, with the body of the people. *Under the practical influence of this great truth, we are now sitting and deliberating, and under its operation, we can sit as calmly and deliberate as coolly, in order to change a constitution, as a legislature can sit and deliberate under the power of a constitution, in order to amend a law.*<sup>28</sup>

With this imagery analogizing the sovereign citizenry at large to a sitting legislature, Wilson foreshadowed the ultimate text of Amendment I, which,

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<sup>26</sup> Contemporary foreign observers also took note of the extraordinarily intense and extensive continental conversation unfolding before them. See, e.g., Letter from Diego de Gardoqui to Conde de Floridabalanca (Dec. 6, 1787), in 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 205; Letter from Louis-Guillaume Otto to Comte de Montmorin (Nov. 26, 1787), in 14 *id.* at 229.

<sup>27</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 432 (Jonathan Elliot ed., 2d ed., William S. Hein & Co 1996) (1836) (emphasis altered) [hereinafter ELLIOT'S DEBATES].

<sup>28</sup> *Id.* at 458 (emphasis added).

as we have seen, tracks the letter and spirit of Article I's protection of the "speech" and "debate" of sitting Congressmen.

On this issue, American constitutional theory and practice broke sharply with English constitutional law à la Blackstone. In England, Parliament, not the citizenry, was sovereign, and citizens did not in law or in fact enjoy a broad freedom to criticize incumbent officials or the government as a whole. As Blackstone explained, English freedom of the press meant only that printers were free from government licensing schemes and other sorts of prior restraints and pre-publication censorship.<sup>29</sup> If English printers in the late 1780s upbraided powerful men or institutions, these printers were vulnerable—both in theory and in practice—to post-publication criminal punishment and civil liability. Across the Atlantic, by contrast, citizens criticized officials, officialdom, and social institutions (including slavery, it should be noted) with abandon. In the years between winning independence and ratifying the Constitution, Americans faced few legal sanctions that actually operated to limit boisterous political expression.<sup>30</sup> And most important of all for my purposes, this regime of boisterous political expression was the milieu in which the Constitution itself was enacted in the remarkable window of 1787–88.

In a famous Virginia tract penned during the Adams administration—a tract sharply contesting the constitutionality of the infamous Sedition Act of 1798—James Madison argued that

*[t]he practice in America must be entitled to . . . respect. In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of [English] common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . .*<sup>31</sup>

As an exclamation point to his observations about actual American practice, Madison reminded his audience that without this robust freedom of expression, perhaps the Constitution itself would not have come into being.

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<sup>29</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*151–52.

<sup>30</sup> See LEVY, *supra* note 22, at 186; David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 510 (1983).

<sup>31</sup> James Madison, Madison's Report on the Virginia Resolutions, in 4 ELLIOT'S DEBATES, *supra* note 27, at 570 (emphasis added).

Had Sedition Acts, forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation?<sup>32</sup>

Though the Philadelphia drafters had incautiously failed to include an explicit clause affirming a sweeping right of free speech for the American people, such a right was nonetheless an intrinsic and indispensable, if unwritten, element of the Constitution as actually enacted. In this context, let us not forget the language of the Ninth Amendment, which reminds us that not all the rights of the people require textual enumeration to enjoy legal validity.<sup>33</sup> As prominent members of the First Congress noted in considering companion language to the Ninth Amendment, certain rights that the people had recognized “in practice” were thereby “better asserted than [they could] be by any words whatever.”<sup>34</sup>

### III. A FEW THOUGHTS ON METHOD

Exactly what sort of constitutional argument is this argument from enactment? I would ultimately classify this argument as a subspecies of historical argument. However, the argument from enactment history is a particularly interesting variant of general historical argument, partaking of some of the strengths more typically associated with textual and structural argument.

Many standard historical arguments are only loosely connected to the actual constitutional text. For example, if I inform you—as I indeed informed just a few pages ago<sup>35</sup>—that several leading Federalists in 1787–88 said that the Philadelphia plan would not threaten liberty of the press because Congress had no general enumerated power on this topic, you might ask if there were other men who said something different. You might ask how many people in the ratification process actually heard these Federalist apologists. You might ask how many people were persuaded by the Federalist argument. You might ask where the Constitution’s text

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<sup>32</sup> *Id.* at 571.

<sup>33</sup> U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

<sup>34</sup> 1 ANNALS OF CONG. 741 (Joseph Gales & William W. Seaton eds., 1834); *id.* at 746.

<sup>35</sup> See discussion *supra* Part II.

prevents Congress from using those powers that are enumerated—such as powers to govern the territories and the national seat, to regulate interstate commerce, and to adopt tax laws—in ways that threaten the press.

By contrast, the argument from enactment offers a tighter, more intrinsic connection to the Constitution itself. My point is not that free speech generally prevailed on the ground in post-colonial America. (In fact, loyalist speech was suppressed during the Revolution itself.<sup>36</sup>) Rather, my point is that the very act of constitutional ordainment occurred in and through a regime of boisterous, virtually uncensored free speech. In this respect, the argument from enactment history is rather like textual argument, which also focuses tightly on the Constitution itself. But the enactment approach understands the Preamble's self-reference to "this Constitution" as a deed as well as a text—a doing, an ordainment, a constituting, a performative, "We . . . do" utterance. In short, an *enactment*, reflected in the text itself: "We, the People . . . do ordain and establish this Constitution." Exactly who did this ordaining/enacting and how? These are the questions highlighted by the enactment approach.

To put the point a slightly different way, perhaps the enactment argument can be seen as the ultimate textual argument—an interpretation of the tiny but all-important workhorse word "do" in the Preamble. The argument from enactment prompts us to understand what exactly the people did through the very process of ordaining and establishing the Constitution. And what was done, I submit, was a remarkable embodiment of free speech, speech that was inextricably intertwined with the very deed of ordainment itself.

The argument from enactment history also shares one of the great strengths of various classic structural arguments: the argument from enactment history focuses on the Constitution as a whole, rather than on some clause or part. Whereas many standard textual arguments are small-bore and clause-bound, the argument from enactment is panoramic, drawing our attention to how the entire Constitution came into being—and, indeed, became the supreme law of our land. In this sense, my enactment argument is the ultimate structural argument, with a historical twist.

#### IV. CONCLUSION

A few words by way of conclusion about what I have and have not done in this lecture. I began by promising to say a little something about constitutional substance and constitutional method. I hope that I have kept

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<sup>36</sup> See LEVY, *supra* note 22, at 183–85.

my promise. In my early conversations with the organizers of the Sullivan Lecture, I fear I lapsed into my usual tendency to self-aggrandize: I boasted that I would present a “new theory” of free expression. Some people may have come to the lecture hall expecting nothing less. But my thoughts about free speech are not wholly new; James Wilson and James Madison said it first. I am simply trying to bring their enactment theory back into the spotlight where it belongs.

So far as I know, in the vast literature on the right of free expression, the remarkable statements of Wilson and Madison have never been brought together for the benefit of modern readers. Nor, in the ocean of books and articles about free expression, have I ever found so much as a single page attempting to deduce a right to free speech simply from the actual free-speech circumstances surrounding the federal Constitution’s enactment in the Great Continental Debate of 1787–88. The statements of Madison that I have quoted first appeared in a particularly prominent place—the Virginia Report of 1799. These words were part of a momentous defense of free expression and came from the pen of the man who himself is widely viewed as the father of the Constitution and the driving force behind the Bill of Rights. Yet this part of Madisonia has rarely even been noticed by modern scholars, much less showcased. In a recent computer search, I found fewer than a dozen articles from the last quarter century that have ever quoted, even in passing, any of Madison’s key language.<sup>37</sup> One of these articles, I might add, is a very fine essay by Professor Blasi.<sup>38</sup>

Most Americans associate the right of free expression with the First Amendment. It is helpful to remember how that Amendment came to pass. The original Philadelphia plan had no explicit guarantee of citizen free speech and no standard Bill of Rights resembling various state constitutional bills of rights already on the books.<sup>39</sup> In the Great National Debate of 1787–88, Anti-Federalists highlighted this defect. Federalists

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<sup>37</sup> The scholarly lapse is all the more notable because Madison’s words as I have quoted them appear nearly in full in two of the most significant and most closely analyzed free expression cases ever decided: *Near v. Minnesota*, 283 U.S. 697, 717–18 (1930), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

<sup>38</sup> See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 41 n.142 (2005).

<sup>39</sup> For example, Pennsylvania’s first constitution, enacted in 1776, contained “A Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania,” which included language affirming that “the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained.” PA. CONST. OF 1776, Pt. I, art. XII.

listened, and some were persuaded. A consensus began to emerge that a Bill of Rights should indeed be added once the Constitution came into effect.

The text that we call the Bill of Rights—and the subset of that text that we call the First Amendment—thus came about precisely as a result of the epic national conversation that I have tried to emphasize here. Poetically, the textual guarantee of freedom of speech arose precisely because of the actual practice of freedom of speech. The textual enactment (the legislation) of free speech in 1789–91 followed the embodied enactment (the acting out) of free speech in 1787–88. The textual guarantee itself harks back to this earlier experience by referring to “*the*” freedom of speech and of the press as a pre-existing right that is merely affirmed and declared—not created—by the First Amendment itself.