A Government Action Approach to First Amendment Analysis

By Ruth Walden

Most First Amendment theories focus on the values served by freedom of expression, resulting in First Amendment analysis based on the content of messages, modes of communication or identities of speakers. This article suggests that a more appropriate approach consists of focusing on the actions of government that restrict free expression. This approach is based on the premise that the courts' function is to determine when a particular government action violates the First Amendment, not whether the expression at issue is entitled to constitutional protection. The government action approach requires judicial consideration of three key factors: (1) the role government is playing at the time it engages in regulation of expression; (2) the justification for the government action; and (3) the nature of the restriction.

➤In developing theoretical frameworks within which to analyze free expression cases, most writers have focused on the values served by freedom of speech and of the press. This has led them to define First Amendment rights primarily in terms of the content of messages, modes of communication or identity of speakers.[1] This article argues that a more appropriate and fruitful approach to First Amendment analysis consists of focusing on the actions of government that restrict free expression. The distinction between the traditional approach to First Amendment theory and the approach suggested in this paper can best be illustrated by looking at the fundamental questions each approach seeks to answer. Traditional First Amendment theorists pose the questions: "What do we want the First Amendment to accomplish?" and "Is this expression protected by the First Amendment?" The approach suggested here asks: "What do we want the First Amendment to prevent?" and "Is this governmental action prohibited by the First Amendment?"

The basic premise of the government action approach is that the courts' function in applying and interpreting the First Amendment is to determine when a particular government action that affects expression violates the First Amendment, not whether the expression at issue is entitled to constitutional protection. When courts have gone most

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astray in First Amendment adjudication is when they have focused on whether particular messages, particular modes of expression or particular speakers are worthy of First Amendment protection. This has led to judicial evaluation of the value of messages,[2] strained efforts at distinguishing between expression and conduct[3] and differential application of the First Amendment based on the identity of the speaker.[4] None of these activities is — or should be — within the purview of judges. Instead, First Amendment inquiries should focus on (1) the role government is playing when it imposes restrictions on expression, (2) the justification for the government action and (3) the nature of the government action affecting expression. Before elaborating on the government action theory of the First Amendment suggested here, this article first demonstrates the historical basis for such an approach and provides a brief critique of the traditional, positive, value-seeking approaches to First Amendment theory.

Historical Support for a Government Action Theory of the First Amendment

The Bill of Rights is, above all else, an anti-authoritarian document,[5] an effort to limit the exercise of governmental power. While general beliefs about the nature of liberty and fundamental human rights formed the backdrop for creation of the Bill of Rights, fear of the "evil effect of power," the dangers of authoritarianism, provided the immediate impetus for the first ten amendments to the U.S. Constitution.[6] As historian Jackson Turner Main noted, "The mistrust of power was characteristic of American political thought" during the 18th century and became a central theme of the so-called Antifederalists,[7] whose opposition to the Constitution led to the drafting of the Bill of Rights.[8]

The Federalists contended a bill of rights was unnecessary — and perhaps even dangerous — since the Constitution created a government of limited and enumerated powers, and any powers not explicitly granted to the new national government were reserved for the states or the people.[9] "[E]very thing which is not given, is reserved," Federalist James Wilson told a public meeting in Philadelphia in October 1787.[10]

1. *See infra* notes 48-63 and accompanying text.

2. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

3. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968).

4. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990); FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

5. The term authoritarianism is used here to mean a governmental system in which all power is vested in the hands of a particular element—a monarch, a family, a social class or a political party. "Authoritarianism views society as a hierarchical organization with a specific chain of command under the leadership of one ruler or group. Command, obedience, and order are higher values than freedom, consent and involvement. Therefore, the citizen is expected to obey laws and pay taxes that he has no voice in establishing....The theory and practice of an authoritarian ruler were best expressed by Louis XIV when he declared, 'I am the state.'" R. L. Cord, J. A. Medeiros, W. S. Jones, *Political Science: An Introduction* 119 (1974).

Like all individuals and institutions in an authoritarian system, "the press is always subject to the direct or implied control of the state or sovereign....The press functions from the top down; the king or ruler decides what shall be published because truth (and information) is essentially a monopoly of those in authority....[D]iversity of views is wasteful and irresponsible, dissent an annoying nuisance and often subversive, and consensus and standardization are logical and sensible goals for mass communication." W. A. Hachten, *The World News Prism* 16-17 (1987).

6. J. T. Main, *The Antifederalists: Critics of the Constitution 1781-1788* at 9 (1961).

7. As several historians have noted, *Anti*federalist is a misnomer, which supporters of the Constitution, the so-called Federalists, attached to their opponents. The Federalists were, in fact, nationalists, supporting a strong central government, while the Antifederalists supported preservation of the federal structure. *See, e.g., id.* at xi-xiii; M. Jensen, *The New Nation* xiii-xiv (1958).

8 J. T. Main, *supra* note 6, at 9.

9. *See, e.g.*, R. A. Rutland, *The Birth of the Bill of Rights: 1776-1791* at 132-133, (1955); G. Wood, *The Creation of the American Republic: 1776-1787* at 537 (1969).

10. Wilson's speech was published in the Pennsylvania Herald, Oct. 9, 1787, and reprinted 34 times by Dec. 29. J.P. Kaminski & R. Leffler (eds.), *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution* 166-67 (1989).

Wilson expanded on this theme during the Pennsylvania ratifying convention:

> [I]n a government, consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution, is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated, is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete. On the other hand; an imperfect enumeration of the powers of government, reserves all implied power to the people; and, by that means the constitution becomes incomplete; but of the two it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government, is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people.[11]

But such an enumeration of the rights of the people was exactly what many Americans, including members of state ratifying conventions, demanded.[12] Thus, the Constitution was ratified, but only after its supporters had promised the addition of a bill of rights.

What spurred the demand for a bill of rights? Was it a desire for an articulation of fundamental human rights, a statement of general beliefs about the nature of liberty? Or was it a fear of authoritarianism based on experience and a desire to impose restrictions on the new national government? Certainly, as historians have noted, some of the Antifederalists' calls for a bill of rights were merely a smoke screen for their more fundamental objections to the Constitution,[13] a tactical maneuver to stir up opposition to what they perceived as an excessively strong central government that threatened to "destroy the states" and "deteriorate into monarchy or despotism."[14]

Although some of the Antifederalists' arguments on behalf of a bill of rights may have been disingenuous, the theme that clearly surfaces in their demands is the need to restrain government.[15] In his detailed study of the Antifederalists, Main asserted that at "the core of Antifederalist thought" were "certain key assumptions and their implications, of which the first was the danger of granting power....[T]he Antifederalists asserted that the Constitution granted power to a dangerous extent and did not restrain the wielders of that power."[16] For example, in a letter to Virginia Governor Edmund Randolph, Congressman Richard Henry Lee, whom Main characterized as a "moderate" Antifederalist,[17] urged the addition of a bill of rights by stressing the need to restrain power: "Is there not a most formidable combination of power thus created in a few, and can the most critic eye, if a candid

11. *Id.* at 171. *See also* A. Hamilton, *The Federalist No. 84* (J. Kramnick, ed., 1987) at 476; Iredell, "Answers to Mr. Mason's objections to the New Constitution," in P. L. Ford (ed.), *Pamphlets on the Constitution of the United States* 335-336 (1888).

12. L. Levy, *Original Intent and the Framers' Constitution* 159-164 (1988).

13. George Washington viewed demands for a bill of rights as a "smoke screen" raised to cover the other reasons for opposition to the Constitution, which, he said, could not withstand exposure "in open day." R. A. Rutland, *supra* note 9, at 133-134. *See also* L. Levy, *supra* note 12, at 165.

14. J. P. Kaminski & R. Leffler, *supra* note 10, at 3. *See also* J.T. Main, *supra* note 6.

15. *See, e.g.*, Gerry, "Observations On the new Constitution, and on the Federal and State Conventions," in P. L. Ford, *supra* note 11, at 1-23.

16. J. T. Main, *supra* note 6, at 127-128.

17. *Id.* at 177.

one, discover responsibility in this potent corps? Or will any sensible man say, that great power without responsibility can be given to rulers with safety to liberty?"[18]

Once James Madison decided to support amendments to the Constitution, he too adopted the Antifederalists' anti-authoritarian theme.[19] In his speech to the House of Representatives on June 8, 1789, Madison first reiterated the oft-heard Federalist argument that the Constitution had created a government of only limited powers. But, Madison continued, without further restraints the federal government might seek to abuse its limited powers by reliance on the necessary and proper clause. Thus, Madison proposed a bill of rights to prevent legislative and executive abuses of power, as well as abuses by "the body of the people, operating by the majority against the minority."[20]

According to Professor Ronald Cass, "Substantive constraints on federal power were not the product of general beliefs in liberty, but of more focused fears about its unjustified infringement."[21] Considering the eight substantive amendments in the Bill of Rights, Cass concluded that "the limitations on government responded to specific perceived abuses of government power....The phrasing of the amendments in the negative — as limitations on government rather than as self-contained guarantees of liberty — is emblematic of their genesis."[22] Thus, the term Bill of Rights may be a misnomer. As Leonard Levy pointed out, "[I]t was a bill of *restraints*...."[23]

Congress Shall Make No Law

The language of the First Amendment, of course, underscores its restrictive nature: "Congress shall make no law...."[24] "The Framers intended the First Amendment as an added assurance that Congress would be limited to the exercise of its enumerated powers, and therefore they phrased it as an express prohibition against the possibility that Congress might use those powers to abridge freedom of speech or press," wrote Levy.[25]

The importance of the First Amendment's wording becomes evident when it is compared to the wording of earlier drafts of the speech-press clause and the text of the free expression provisions of state constitutions. In 1789 only eight of the thirteen original states had free expression provisions in their constitutions.[26] Seven of the eight referred only to freedom of the press, while Pennsylvania's Declaration of Rights

18. Lee's letter to Randolph, dated Oct. 16, 1787, was published in the Virginia Gazette Dec. 6, 1987, and was reprinted in twelve newspapers, a pamphlet anthology and a nationally circulated magazine in the following months. J. P. Kaminski & R. Leffler, *supra* note 10, 152-153.

19. There is some evidence that support for a bill of rights was the price Madison had to pay to retain his seat in the House of Representatives when he was challenged in the 1789 election by James Monroe, a supporter of a strong bill of rights who voted against the Constitution in the Virginia ratifying convention. A month before Madison defeated Monroe by 366 votes, he wrote George Eve: "[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the states for ratification, the most satisfactory provisions for all essential rights...." C. R. Smith & S. Lybarger, *The Ratification of the Bill of Rights, 1789-91* at 45 (1991).

20. 2 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* 1023-34 (1971).

21. Cass, "The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory," 34 *UCLA L. Rev.* 1405, 1440-1441 (1987).

22. *Id.* at 1441-1442.

23. L. Levy, *supra* note 12, at 146.

24. U.S. Const., amend. I.

25. L. Levy, *supra* note 12, at 209.

26. I. Brant, *The Bill of Rights* 228 (1965). The texts of the speech/press clauses can be found in F. N. Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (1909).

referred to both speech and press.[27] Most of these provisions were of the "ought" or "ought not" variety, what Irving Brant referred to as "ethical aphorisms."[28] For example, the North Carolina Constitution of 1776 declared: "The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained."[29] The 1780 Massachusetts Constitution followed the same pattern: "The liberty of the press is essential to the security of freedom in a state it ought not, therefore, to be restricted in this commonwealth."[30] Even those constitutions that used stronger verbs failed to impose direct restraints on their state governments. For example, the Georgia Constitution of 1789 declared, "Freedom of the press and trial by jury shall remain inviolable," but imposed no direct prohibition on government action.[31]

The early drafts of what eventually became the speech and press clauses of the First Amendment largely followed the pattern of the existing state constitutions. Three states in ratifying the Constitution recommended amendments to protect freedom of the press. New York's suggested amendment adopted the "ought not" approach of most state provisions: "That the Freedom of the Press ought not to be violated or restrained."[32] Both Virginia and North Carolina suggested amendments modeled after Pennsylvania's 1776 Constitution, which asserted both free speech and press rights but did not specifically restrict government action. The Virginia version read: "That the people have a right to freedom of speech, and of writing and of publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated."[33] In the preamble to its proposed bill of rights, however, Virginia clearly demonstrated a concern for states rights and a desire to restrict the powers of the federal government with these words: "[A]mong other essential rights the liberty of Conscience and of the Press cannot be cancelled abridged restrained or modified by any authority of the United States."[34] Thus the Virginia ratifying convention was the first to propose a direct and explicit restraint on federal action vis-à-vis expression.

James Madison proposed two separate speech-press amendments to the House of Representatives. Both proposals, unlike the majority of the state constitutions, were written in imperative, rather than exhortative, terms. The first was patterned after the Pennsylvania constitutional provision and the Virginia and North Carolina proposed amendments, but contained "shall" rather than "ought" language: "The people shall not be deprived or abridged of their right to speak, write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks

27. Pa. Const. of 1776, Declaration of Rights, art. XII, in 5 F.N. Thorpe, *supra* note 26, at 3083.

28. I. Brant, *supra* note 26, 228. Brant may have been paraphrasing Alexander Hamilton, who in *The Federalist No. 84* referred to "those aphorisms which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government." *Supra* note 11, at 475-476.

29. N.C. Const. of 1776, Declaration of Rights, art. XV, in 5 F. N. Thorpe, *supra* note 26, at 2788.

30. Mass. Const. of 1789, art. XVI, in 3 F. N. Thorpe, *supra* note 26, at 1892. *See also* Md. Const. of 1776, Declaration of Rights, art. XXXVIII, 3 F. N. Thorpe 1690; N. H. Const. of 1784, Bill of Rights, art. XXII, 4 F. N. Thorpe 2456; and Pa. Const., *supra* note 27.

31. Ga. Const. of 1789, art. IV, sec. 3, in 2 F. N. Thorpe. *supra* note 26, at 789. Similarly the South Carolina Constitution of 1778 declared, "That the liberty of the press be inviolably preserved." S.C. Const. of 1778, art. XLIII, 6 F. N. Thorpe 3257. The Virginia Constitution of 1776, like the North Carolina document, declared freedom of the press to be a bulwark of liberty and then went on to state that such freedom "can never be restrained but by despotic governments." The provision did not prohibit the Virginia government from restraining freedom of the press but merely declared such action would amount to despotism! Va. Const. of 1776, Bill of Rights, sec. 12, 7 F. N. Thorpe 3814.

32. C. C. Tansill (ed.), *Documents Illustrative of the Formation of the Union of the American States* 1037 (1927).

33. 2 B. Schwartz, *supra* note 20, at 842. The only difference between the Virginia and North Carolina versions was that the latter removed the article "the" before the phrase "freedom of the press." 2 B. Schwartz 968.

34. C. C. Tansill, *supra* note 32, at 1027.

of liberty, shall be inviolable."[35] The House select committee set up to deal with Madison's proposed amendments rewrote Madison's speech-press amendment, combining it with his separate assembly and petition clause but retaining his imperative language.[36] Madison's second proposed amendment was aimed at restricting state action, which, Madison contended, presented a greater danger to liberty than the federal government. That second amendment read: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[37] A reference to freedom of speech was added to that provision by the House select committee before it was sent to the Senate for action.[38]

There are no records of the debate (if there was any) in the Senate on the Bill of Rights.[39] Madison's proposed restriction on state action failed to obtain Senate approval and never was resurrected.[40] An unsuccessful attempt to amend the speech-press clause aimed at the federal government to provide protection "in as ample a manner as hath at any time been secured by the common law" was recorded on September 3, 1789.[41] The following day, a new version of the speech-press amendment was presented to the Senate. This version began with the "Congress shall make no law" language, which already appeared in the House version of the religion clause that had been sent to the Senate.[42] Five days later the Senate combined the religion and expression clauses, resulting in the following proposal being sent back to the House: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, 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."[43] A House-Senate conference committee settled upon the language that ultimately became the First Amendment.[44]

The evolution of the First Amendment showed a constant strengthening of its language. Most early state constitutional provisions, as well as the New York, Virginia and North Carolina proposed amendments, were statements of principle, written in exhortative terms. But from Madison's initial proposal through the conference committee's final version, the speech-press clause was written in the imperative, with "shall" replacing the ineffectual "ought." The First Amendment is a prophylactic provision, unequivocally prohibiting certain congressional action. Thus, interpreting and applying the First Amendment requires an inquiry into what types of government action the amendment prohibits in light of the general theme of anti-authoritarianism and mistrust of governmental power that permeates the Bill of Rights as a whole.

35. U.S. Congress, House, 1 *Annals of Congress*, 1st Cong., 1st sess., 1789, at 434.

36. The committee's version read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." *Id.* at 759.

37. *Id.* at 435.

38. *Id.* at 783.

39. *See* L. Levy, *Legacy of Suppression* 223 (1960); Anderson, "The Origins of the Press Clause," 30 *UCLA L. Rev.* 455, 489 (1983); Blanchard, "Filling in the Void: Speech and Press in State Courts prior to *Gitlow*," in B.F. Chamberlin and C.J. Brown (eds.), *The First Amendment Reconsidered* 17-18 (1982).

40. *Journal of the First Session of the Senate* 72 (1789) (J. Gales & W. Seaton printers 1820).

41. *Id.* at 70.

42. *Id.* at 70-71.

43. *Id.* at 77.

44. *Id.* at 96.

Traditional, Positive Approaches to First Amendment Theory

A common complaint about First Amendment decisions is that the judiciary has failed to develop and/or follow a consistent and coherent theory of freedom of expression. This lack of a theoretical base, critics contend, can lead to unprincipled, unclear or inconsistent rulings.[45] As Martin Redish noted, "The apparent concern of many of these commentators has been the historic manipulability that has pervaded judicial construction of the First Amendment, and the resultant reduction in protection of expression in times of crisis."[46]

Numerous theorists have offered alternatives to the judiciary's perceived atheoretical approach to First Amendment adjudication.[47] Most of these theorists focus their inquiries on the message, the speaker or the mode of communication and seek to determine what is protected by the First Amendment by analyzing *why* expression is protected. Two characteristics such positive or affirmative First Amendment theories share are: (1) they are based on the assumption that the free speech and press clauses were designed to further specific affirmative values; and (2) they focus on the content of the communication or nature of the communicative activity. Furthermore, some positive theories are reductionist; that is, they seek to "reduce the focus of inquiry to a single value served by speech."[48]

Alexander Meiklejohn was the first and is perhaps the best known of the reductionist, positive theorists. In his 1948 work, *Free Speech and Its Relation to Self-Government*, which set the tone for much subsequent First Amendment theory, Meiklejohn argued that the sole value to be served by the First Amendment was the self-government value. Thus, public speech or speech relating to self-government is entitled to absolute protection under the First Amendment.[49] Judge Robert Bork also proposed a positive, reductionist approach to the First Amendment based solely on the self-government value. The key difference, however, is that while Meiklejohn, especially in his later writings,[50] proposed a broad definition of public speech, Bork would confine the First Amendment's coverage to "speech that is explicitly political. I mean by that criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country."[51]

Other positive, reductionist theorists have focused on the self-fulfillment value or a variant thereof. These scholars use a variety of names to identify the value they champion, yet all share the common thread of

45. *See, e.g.*, M. H. Redish, *Freedom of Expression: A Critical Analysis* 2 (1984); Blasi, "The Checking Value in First Amendment Theory," 1977 *Am. Bar Found. Research J.* 521, 526; Cass, *supra* note 21, at 1410; Emerson, "Toward a General Theory of the First Amendment," 72 *Yale L.J.* 877 (1963).

46. M. H. Redish, *supra* note 45, at 2.

47. *See, e.g.*, the works cited *infra* notes 48-63.

48. Cass, *supra* note 21, at 1413. In this category Cass cites A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948); Baker, "Commercial Speech: A Problem in the Theory of Freedom," 62 *Iowa L. Rev.* 1 (1976); Baker, "The Process of Change and the Liberty Theory of the First Amendment," 55 *S. Cal. L. Rev.* 293 (1981); Baker, "The Scope of First Amendment Freedom of Speech," 25 *UCLA L. Rev.* 964 (1978); Blum, "The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending," 58 *N.Y.U. L. Rev.* 1273 (1983); Duval, "Free Communication of Ideas and the Quest for Truth: Towards a Teleological Approach to First Amendment Adjudication," 41 *Geo. Wash. L. Rev.* 161 (1972); Meiklejohn, "The First Amendment is an Absolute," 1961 *Sup. Ct. Rev.* 245; Richards, "Free Speech and Obscenity Law: Towards a Moral Theory of the First Amendment," 123 *U. Pa. L. Rev.* 45 (1974).

49. *See, e.g.*, A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, *supra* note 48; A. Meiklejohn, *Political Freedom, The Constitutional Powers of the People* (1960); Meiklejohn, "Public Speech and the First Amendment," 56 *Geo. L.J.* 234 (1966); Meiklejohn, "The First Amendment is an Absolute," *supra* note 48.

50. *See, e.g.*, Meiklejohn, "The First Amendment is an Absolute," *supra* note 48, at 256-257.

51. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J.* 1, 29 (1971).

focusing on the individual. For example, C. Edwin Baker proposed a "liberty model" of the First Amendment.

> The liberty model holds that the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions. Speech is protected not as a means to collective good but because of the value of speech conduct to the individual. The liberty theory justifies this protection because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others.[52]

Martin Redish used the term "self-realization" to refer to the value he saw underlying the First Amendment. Despite significant differences separating the views of the two scholars,[53] Redish shared Baker's focus on the individual.

> The position taken here is that the constitutional guarantee of free speech ultimately serves only one true value, which I have labeled "individual self-realization." This term has been chosen largely because of its ambiguity: it can be interpreted to refer either to development of the individuals' [sic] powers and abilities — an individual "realizes" his or her full potential — or to the individual's control of his or her own destiny through making life-affecting decisions — an individual "realizes" the goals in life that he or she has set.[54]

Other positive theorists have recognized multiple values supporting freedom of expression. Thomas I. Emerson is, of course, the seminal theorist of this type. In a 1963 *Yale Law Journal* article Emerson wrote:

> The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.[55]

While emphasizing what might be termed a diversity value in his call for a First Amendment interpretation encompassing a right of public access to the mass media, Jerome Barron also recognized a multiplicity of affirmative values underlying constitutional protection for freedom of expression, including "the creation of an informed citizenry"[56] and "the safety valve value of free expression in preserving public order."[57] Likewise, Kenneth Karst contended the self-government, search for truth and self-fulfillment values all spring from the central principle of equality, which he saw underlying the First Amendment.[58]

Other theorists such as Vincent Blasi, Lee Bollinger and Steven Shiffrin built strong theories based on a particular value but did not take the reductionist's approach of seeking to reduce all First

52. Baker, "Scope of the First Amendment Freedom of Speech," *supra* note 48, at 966.

53. *See* M. H. Redish, *supra* note 45, at 29-40 (1984); Baker, "Realizing Self-Realization: Corporate Political Expenditures and Redish's *The Value of Free Speech*," 130 *U. Pa. L. Rev.* 646 (1982).

54. M. H. Redish, *supra* note 45, at 11.

55. Emerson, *supra* note 45, at 878-879. *See also* T. I. Emerson, *The System of Freedom of Expression* (1970).

56. Barron, "Access to the Press - A New First Amendment Right," 80 *Harv. L. Rev.* 1641, 1648 (1967).

57. *Id.* at 1650.

58. Karst, "Equality as a Central Principle in the First Amendment," 43 *U. Chi. L. Rev.* 20 (1975). *See also* F. Schauer, *Free Speech: A Philosophical Enquiry* 15-72 (1982)

Amendment analysis to focus on that single value.[59] Blasi, for example, expressly eschewed exclusive reliance on his "checking value."

> Throughout the analysis, one must keep in mind that the checking value is to be viewed as a possible supplement to, not a substitute for, the values that have been at the center of twentieth-century thinking about the First Amendment....I do not purport to offer a comprehensive ordering of First Amendment values or to suggest that the checking value should form the cornerstone of all First Amendment analysis. My only purpose is to further the understanding of one basic value which has been under-emphasized in this century and which, I believe, should be a significant component in any general theory of the First Amendment.[60]

Both Bollinger and Shiffrin also suggested values that ought to be significant components in First Amendment theory without purporting to articulate uni-value theories. Bollinger emphasized tolerance as a central intellectual value underlying the First Amendment.[61] He described his work as focusing "on the intellectual attributes people bring to the enterprise of truth-seeking, self-governance, or self-realization."[62] Shiffrin contended "the dissent value" deserves a much more prominent role in First Amendment theory and decision making, yet championed an eclectic approach to First Amendment value identification.

> I favor a deliberately schizophrenic approach. For purposes of rhetoric and romance, I believe courts, commentators, and Fourth of July speakers would best serve the interests of the country by associating the First Amendment with the metaphor of dissent, with dissenters and the dissent value. For purposes of First Amendment decisionmaking and social engineering, dissent should be afforded a far more prominent place in the Court's understanding of the First Amendment and should be afforded substantially greater protection. But the Supreme Court and the lower courts should follow a thoroughly eclectic approach. When social engineering is the issue, the First Amendment needs all the help it can get. It deserves the support of any and all values that can be mustered in its support whether singly or in combination.[63]

All of the values identified by First Amendment theorists are worth pursuing in a democratic society, and all are served by preventing governmental abridgements of freedom of expression.[64] Each theorist was able to identify Supreme Court rulings and rhetoric to support the primacy of his favorite value or values.[65] Yet none has been adopted by the Court to serve as an umbrella framework for analysis in First Amendment cases; none has succeeded in achieving the goal of theory identified by Redish: "to replace chaos with order."[66]

In a 1987 *UCLA Law Review* article, Cass addressed the pragmatic

59. Cass contends that Blasi's and Bollinger's theories are distinguishable from those of the positive theorists because "[n]either reduces his forces exclusively to *promotion* of the value. In part, this may reflect the fact that in both cases, the value identified is peculiarly bound up with *constraining* government speech regulation to a much greater extent than values supporting other strong theories." Cass, *supra* note 21, at 1414 n.23.

60. Blasi, *supra* note 45, at 528.

61. Bollinger, "Free Speech and Intellectual Values," 92 *Yale L.J.* 438 (1983).

62. *Id.* at 445.

63. S. H. Shiffrin, *The First Amendment, Democracy, and Romance* 169 (1990).

64. "There is evidence of concern, both historical and modern, for each of these values. Moreover, restraint on government regulation of speech protects each of these values." Cass, *supra* note 21, at 1422-23. *See also* F. Schauer, *supra* note 58.

65. The use of the pronoun "his" is not a sexist slip but a recognition that all of the authors discussed above are males.

66. Redish, *supra* note 45, at 3.

deficiencies of what he referred to as the "positive," "affirmative," or "value-promoting" theoretical styles.[67] First, he said, these theories have failed to describe or predict judicial behavior. Cass conceded this criticism "may be a consequence, rather than a cause of the courts' aversion to the theories," but in light of the other defects he perceived in the positive theories, Cass concluded the lack of predictive power reflected more the weaknesses of the theories than "erratic, unprincipled decisionmaking by the courts."[68] The second defect Cass identified is prescriptive; the theories, he contended, fail to accomplish their primary goal of replacing uncertainty with certainty. "The theories provide few clear guidelines for decisionmakers and fewer clear rules for decision."[69] Cass's third criticism was that "to the extent clear guidance is given, the solutions suggested by the theorists are unfortunate.... Nearly all of the affirmative theories lend themselves to outcomes that, to me, seem dramatic departures from the commonly understood and commonly accepted purposes of the First Amendment, that is, the understanding of ordinary citizens and the general view of academics not writing First Amendment theory."[70] As examples of such "dramatic departures" from common understanding Cass cited Meiklejohn's suggestion that the First Amendment protects pornography but not the speech of paid lobbyists, Baker's opinion that speech by non-media corporations is unprotected because it does not advance personal liberty, and Emerson's and Barron's contentions that "in order to promote widespread access to diverse opinions, the government is obligated by the First Amendment to regulate speech in at least some instances."[71]

Cass's criticisms of the so-called positive First Amendment theories, however, are equally applicable to any legal theory until it becomes converted into doctrine by the judiciary. For example, prior to 1954 the theory that separate was inherently unequal under the Fourteenth Amendment certainly did not describe or predict judicial decisions, nor did it coincide with the "understanding of ordinary citizens and the general view of academics" not writing Fourteenth Amendment theory.[72] Neither did the theory of equality "replace uncertainty with certainty," at least not until scores of cases had served to convert the general framework for analysis into specific rules and tests for dealing with an array of factual situations.

The heart of the problem, therefore, is not the predictive, prescriptive and normative defects of particular First Amendment theories but the fact that most First Amendment theories are incongruent with the negatively worded text of the First Amendment itself, the legislative history of the amendment and the approach to free speech issues the Supreme Court first undertook in its early 20th-century cases, an approach the Court has continued to follow, to a greater or lesser extent, ever since.[73] It is an approach that asks not what the First Amendment was designed to encourage but what the First Amendment was designed to prevent. This judicial focus on identifying forbidden

67. Cass, *supra* note 21, at 1412.
68. *Id.* at 1416.
69. *Id.* at 1417.
70. *Id.* at 1417-1418.
71. *Id.* at 1419.
72. In Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court declared that providing separate schools for black children was inherently unequal and a violation of the Fourteenth Amendment's equal protection clause.
73. *See* Cass, *supra* note 21, at 1423-1424.

government action, rather than the scope of protected speech and the value of that speech, led Meiklejohn to develop his positive, value-promoting theory, which, in turn, set the pattern for much subsequent First Amendment theory building.

For Meiklejohn the clear and present danger test, enunciated by Justice Holmes in *Schenck v. United States*[74] and championed by Zechariah Chafee,[75] was simply wrong. It was wrong, said Meiklejohn, because it failed to provide a positive, value-promoting theory of the First Amendment: "The test...does not tell us in positive terms what forms of speech can rightly claim freedom, and on what ground they can claim it."[76] Meiklejohn then went on to recognize the clear and present danger test for what it was, a negative approach to First Amendment analysis, but he misrepresented the test's negative focus. Meiklejohn said the test declared "that certain forms of speech, under the Constitution, are not entitled to freedom."[77] But that characterization was not accurate. In *Schenck* the Court did not declare certain categories of speech unprotected, as it did in later decisions involving commercial speech and obscenity.[78] In fact, Justice Holmes admitted that under different circumstances Schenck's circular would have been protected by the First Amendment.[79] Instead, the Court began to define what government action would not constitute a violation of the First Amendment's prohibitions. Meiklejohn himself acknowledged that the "Bill of Rights...is a series of denials....It lists, one after the other, forms of action which, however useful they might be in the service of the general welfare, the legislature is forbidden to take."[80] Punishment of Schenck was not one of those forms of action the government was forbidden to take, the Court concluded. Obstruction of recruitment and conspiracy to obstruct recruiting, prohibited by the 1917 Espionage Act and its 1918 amendments, were among "the substantive evils that Congress has a right to prevent." Schenck's pamphlets, perceived as presenting a "clear and present danger" of bringing about those evils were thus subject to government prohibition.[81]

This is not to suggest the *Schenck* decision was correct. Undoubtedly the Court showed excessive deference to legislative determinations and inadequate consideration of whether the circulars at issue truly presented a clear and present danger to military recruitment. But the point is that in its first forays into First Amendment interpretation, the Supreme Court saw its function as evaluating the legitimacy of the government's actions, not analyzing the value of particular content. The primary reason affirmative, value-seeking approaches to the First Amendment have had minimal success with the courts is that such approaches are inconsistent with the decision making pattern the Court first established in its earliest cases.

In addition to the practical problems associated with the positive, value-promoting theories of the First Amendment, such approaches have a serious philosophical defect: They invite the courts to condition

74. 249 U.S. 47 (1919).
75. Z. Chafee, *Free Speech in the United States* (1941).
76. A. Meiklejohn, *Political Freedom*, *supra* note 49, at 43.
77. *Id.*
78. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942); Roth v. United States, 354 U.S. 476 (1957).
79. 249 U.S. at 52.
80. A. Meiklejohn, *Political Freedom*, *supra* note 49, at 44.
81. 249 U.S. at 52.

First Amendment protection on the content of the communication. They invite the courts to draw distinctions among the most valuable speech, less valuable speech and worthless speech. They invite an arm of government itself, the judiciary, to determine what is worth saying and what the public needs or ought to hear. Meiklejohn himself pointed out the key deficiency of the positive, value-promoting theories when he declared, "What is essential is not that everyone shall speak, but that *everything worth saying* shall be said."[82]

A Government Action Approach to First Amendment Analysis

The central thesis of this paper is that the First Amendment was designed to prohibit government from taking certain actions, actions that abridge freedom of expression, actions that smack of the sort of authoritarianism the 18th-century supporters of the Bill of Rights feared and thus sought to prohibit. But as every First Amendment scholar and judge have recognized, the First Amendment does not prohibit government from taking all actions that affect expression. As Cass has noted, the problem is separating legitimate regulation from illegitimate regulation.[83] Or as McKay has stated, "[W]here should the line be drawn between 'abridging,' which is flatly forbidden, and reasonable regulation, which may in some circumstances be permissible?"[84]

This paper is not the first to suggest a negative approach as the best means of separating legitimate regulation of expression from illegitimate abridgements of free speech. "[F]reedom of speech is best characterized as the absence of governmental interference," wrote Professor Frederick Schauer.[85] After a detailed review of the positive justifications for protecting freedom of speech,[86] Schauer concluded "that the most persuasive argument for a Free Speech Principle is what may be characterized as the argument from governmental incompetence."[87] Because of bias, self-interest, and the general urge to suppress that with which one disagrees, "governments...are less capable of regulating speech than they are of regulating other forms of conduct."[88] Thus, determining the scope of freedom of speech requires inquiry into governmental justifications for regulation. "[T]he question is one that is best looked at not in terms of the object of the regulation, but instead in terms of the purpose or the intent of the regulation."[89]

Cass, contending "the appropriate goal for First Amendment scrutiny [is] preventing speech restraint motivated by personal interest or intolerance," also proposed a negative First Amendment theory.[90] Cass characterized government regulation affecting speech as a continuum "from message regulation, to subject regulation, to regulation of the particular way in which the message is formulated, to regulation of the form in which a message is conveyed, to context-based regulation. At some point along this continuum, the likelihood that regulation serves illegitimate ends diminishes sufficiently that even relatively 'soft,' aesthetic

82. A. Meiklejohn, *Political Freedom*, *supra* note 49, at 26 (emphasis added).
83. Cass, *supra* note 21, at 1476.
84. McKay, "The Preference for Freedom," 34 *N.Y.U. L. Rev.* 1182, 1194 (1959)
85. F. Schauer, *supra* note 58, at 129.
86. *Id.* at 15-72.
87. *Id.* at 86.
88. *Id.* at 81.
89. *Id.* at 203.
90. Cass, *supra* note 21, at 1479.

concerns will suffice to sustain a speech restraint against challenge."[91]

Both Schauer and Cass focused primarily on government motives as the test for distinguishing between legitimate and illegitimate speech regulation. While government motivation is an important factor, and often the crucial factor, in determining the validity of restrictions on expression, this article suggests government's reason for regulating is just one of three key criteria courts must evaluate in applying the First Amendment's prohibitions. Determining the legitimacy of government regulation that impacts on speech requires consideration of (1) the role government is playing at the time it engages in regulation, (2) the justification for the government action and (3) the nature of the restriction on expression.

Government's Role

Three distinct, but at times overlapping, government roles are apparent in First Amendment disputes: (1) government as ruler, governor, protector of public safety and welfare; (2) government as proprietor, operator of public property and facilities; and (3) government as arbitrator of private disputes. In each of these roles government enjoys different powers, bears different responsibilities and is subject to different restraints.

Government as ruler is clearly the role the Antifederalists had in mind when they demanded the Constitution be amended to protect freedom of speech and press. The 17th- and 18th-century history of freedom of expression in England and the American colonies is replete with examples of government using its sovereign powers to license, censor, tax and punish speech deemed dangerous to government and society.[92] It is government as aggressor, seeking to control expression for its own ends or the good of society, that is at issue here.[93] Many of the earliest First Amendment cases to reach the Supreme Court were of this sort — federal and state agencies and officials seeking to use their governing power to achieve governmental objectives. The string of sedition cases decided between World War I and World War II involved governmental attempts to use criminal statutes to restrict expression deemed dangerous to the state.[94] *Near v. Minnesota*[95] resulted from an attempt by government officials to stifle criticism of their performance through a prior restraint in the form of a court order, while in *Grosjean v. American Press Co.*,[96] Louisiana legislators used a tax on newspapers to achieve a similar end. Of course, examples of government as aggressor seeking to control expression to protect itself and/or the public safety and welfare continue to abound today — prosecutions for flag desecration,[97] injunctions on publications aimed at protecting national security,[98] military-imposed restrictions on press coverage of the Gulf War,[99] obscenity laws,[100] regulation of commercial speech,[101] restrictions on campaign spending[102] and so on.

91. *Id.* at 1479 (footnotes omitted).

92. *See generally* L. Levy, *supra* note 39; and F. Siebert, *Freedom of the Press in England, 1476-1776* (1952).

93. Cass contends that suppression prompted by the self-interest of officials was the key concern of the framers of the First Amendment. Cass, *supra* note 21, at 1449.

94. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); and DeJonge v. Oregon, 299 U.S. 353 (1937).

95. 283 U.S. 697 (1931).

96. 297 U.S. 233 (1936).

97. *See, e.g.*, United States v. Eichman, 110 S.Ct. 2404 (1990); Texas v. Johnson, 109 S.Ct. 2533 (1989).

Identifying a particular restriction on expression as falling within the category of government acting as ruler, though, is not sufficient to determine the legitimacy or illegitimacy of the action. That requires further inquiry into the nature of the restriction and its justifications. However, as history has taught us, situations in which government acts as the aggressor against speech, seeking to restrict expression to serve its own interests or its perception of the public's interest, are those of which we should be most wary. Thus, such cases deserve the highest degree of judicial scrutiny.

When government acts as proprietor, its key responsibility is to operate public facilities and property in an efficient manner. Efficiency requires government to ensure that a facility it operates effectively performs the function for which it was established. In its development of public forum doctrine and its test for determining the validity of time, place and manner restrictions, the Supreme Court has recognized this fundamental requirement of governmental proprietorship:

> The nature of a place, the pattern of its normal activities, dictate the kind of regulations of time, place and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library...making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.[103]

But efficiency is not the only concern facing the judiciary when government functioning in its role of proprietor restricts expression. The first inquiry must be whether government is using its proprietary role to mask an attempt to control speech because of the speech's perceived dangers to government itself or society, rather than its perceived interference with the proper functioning of the public property or facility. This is of special concern since public facilities such as parks, streets and airports are often the only communication channels available to dissident speakers. The requirements that a time, place and manner restriction be content-neutral and leave open alternative channels of communication[104] are the means by which courts can identify government as ruler attempting to masquerade as government as proprietor. In *Ward v. Rock Against Racism*, the Court explained:

> The principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys....The government's purpose is the controlling consideration.[105]

If indeed a particular restriction on expression is an effort to achieve

98. *See, e.g.*, New York Times v. United States, 403 U.S. 713 (1971); United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed* 610 F.2d 819 (7th Cir. 1979).

99. *See, e.g.*, Boot, "Covering the Gulf War: The Press Stands Alone," *Columbia Journalism Review* 23-24 (March/April 1991).

100. *See, e.g.*, Pope v. Illinois, 481 U.S. 497 (1987); Miller v. California, 413 U.S. 15 (1973); Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990).

101. *See, e.g.*, State Board of Trustees v. Fox, 109 S.Ct. 3028 (1989); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

102. *See., e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).

103. Grayned v. Rockford, 408 U.S. 104, 116 (1972).

104. *See, e.g.*, Ward v. Rock Against Racism, 109 S.Ct. 2746, 2753-54 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

105. 109 S.Ct. at 2754.

proprietary efficiency, the test of its validity is one of effectiveness and reasonableness. Once again the nature of the restriction and government's justifications must be analyzed to determine the effectiveness and reasonableness of the regulation. This, of course, is the aim of the other prongs of the time, place and manner test. Determining whether the restriction is designed to serve a significant governmental interest assesses government's justifications for regulation, while determining if the regulation is narrowly tailored to serve the governmental interest is an evaluation of the nature of the restraint on expression.[106]

The final role of government to be discussed is that of arbitrator of private disputes, the role it plays in civil libel, invasion of privacy, infliction of emotional distress and copyright lawsuits. The key consideration here is that government cannot aid private individuals in achieving that which it cannot constitutionally do itself. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel," the Court declared in *New York Times v. Sullivan*.[107] This was the critical point of the Court's discussion of seditious libel in the *Sullivan* case. The libel judgment against the New York *Times* looked suspiciously like a conviction under the Sedition Act of 1798, which, the Court said, "because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[108]

In cases involving government as arbitrator of private disputes, then, the first question is whether civil law is being used to achieve impermissible ends; that is, does the case truly involve merely a private dispute or is it, in reality, an effort by government to punish certain messages because of their alleged deleterious effects on society or government itself? Is the case more correctly categorized as government acting as aggressor rather than government as arbitrator? If government is using civil law and private suits to achieve that which it cannot constitutionally achieve through criminal prosecutions and prior restraints, the case then falls in the category of government acting as aggressor against expression and must be subjected to the highest level of judicial scrutiny.[109]

If government is indeed acting as arbitrator of private disputes, the fundamental considerations of the court must be fairness, justice and equity, necessitating a balancing of interests. But when courts are faced with civil lawsuits involving First Amendment rights, it is not just the interests of the litigants that must enter into the balance. Here is where the positive societal values served by free expression must be considered as part of the balance. The public's interest in the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[110] must be given adequate weight in the balancing process.

106. *Id.* at 2756-59.

107. 376 U.S. 254, 277 (1964) (footnote omitted).

108. *Id.* at 276.

109. *See, e.g.*, American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 32 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

110. This passage from Roth v. U.S., 354 U.S. 476, 484 (1957) was quoted by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) to explain, in part, the Court's imposition of the actual malice requirement in public official libel suits.

Justifications for Government Restrictions on Expression.

As both the Court and commentators have noted, regulatory motivations cannot be the sole determinant of the legitimacy of restrictions on expression.[111] In the first place, it is not always possible to ascertain the true motives underlying restrictions on expression. Furthermore, the Supreme Court traditionally has been suspicious of "the end justifies the means" arguments in First Amendment cases. For example, in *Schneider v. Irvington*[112] the Court struck down an ordinance outlawing leafletting that was aimed at preventing littering, not prohibiting dissemination of certain messages or content. The Court relied on *Lovell v. Griffin*,[113] which it described as holding that "whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship."[114] More recently in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Court struck down a tax on newspapers but noted it did not intend to "impugn the motives of the Minnesota legislature" in enacting the use tax on paper and ink. "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."[115]

Pronouncements regarding the unimportance of government motivations, however, have come primarily in cases in which governmental motives were "pure" but the Court nonetheless found the regulation invalid under the First Amendment. Far more commonly, the Court does consider governmental motives. Most of the tests the Court has devised over the past few decades to evaluate the constitutionality of restrictions on expression contain a prong requiring judicial evaluation of government motives or justifications for regulation. As discussed above, the time, place and manner regulation test demands a "significant government interest,"[116] as does the *O'Brien* test for determining when government can punish symbolic speech or nonverbal communication[117] and the *Central Hudson* test for determining when commercial speech can be regulated.[118] The test for determining when criminal judicial proceedings can be closed to the press and public consistent with the First Amendment requires "a compelling governmental interest" to justify closure,[119] as does the test for determining when restrictions on political expression by nonmedia corporations are valid.[120] Thus, the Supreme Court regularly uses governmental justifications for restrictions on expression as a key criterion in its First Amendment analysis.

Under the government action approach to the First Amendment suggested here, regulatory motive is not the sole criterion for determining constitutionality, although in many cases it will be the critical factor. It becomes the critical factor because, as discussed above, a key purpose of the Bill of Rights was to prevent authoritarianism. "To the authoritari-

111. *See* cases cited *infra* notes 112-116; S. H. Shiffrin, *supra* note 63, at 18-21; Cass, *supra* 21, at 1482-86.
112. 308 U.S. 147 (1939).
113. 303 U.S. 444 (1938).
114. 308 U.S. at 162.
115. 460 U.S. 575, 592 (1983).
116. Ward v. Rock Against Racism, 109 S.Ct. 2746, 2756 (1989).
117. United States v. O'Brien, 391 U.S. 367, 376 (1968). In Clark v. Community for Creative Non-Violence, the Court acknowledged that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." 468 U.S. 288, 298 (1984) (footnote omitted).
118. Central Hudson Gas & Electric v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).
119. Press-Enterprise Co. v. Riverside County Superior Court, 464 U.S. 501, 510 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).
120. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978).

an, diversity of views is wasteful and irresponsible, dissent an annoying nuisance and often subversive, and consensus and standardization are logical and sensible goals for mass communication."[121] Criticism of authority and challenges to leadership are prohibited. The mass media "must support the status quo and not advocate change, criticize the nation's leadership, or give offense to dominant moral or political values."[122] Thus, the anti-authoritarian nature of the First Amendment indicates that certain governmental justifications are constitutionally impermissible.

Four broad categories of governmental justifications for infringements on expression exist: (1) protection of public safety and welfare; (2) protection of individual interests; (3) protection of government itself from criticism or embarrassment; and (4) protection of dominant political or moral values.

Perhaps the most succinct statement of government's power to protect public safety and welfare is the Preamble to the U.S. Constitution, listing the reasons for adoption of the Constitution: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity."[123] As First Amendment history has shown us, government frequently has perceived expression as a threat to achieving these constitutional goals. Bans on picketing,[124] marches[125] and flag desecration[126] have been justified as means of insuring domestic tranquility; prior restraints on publication as necessary for the common defense;[127] and judicial gag orders as necessary to protect the fair administration of justice.[128] However, justifying infringements on expression on the basis of protecting public safety and welfare does not guarantee governmental success in First Amendment disputes, as the outcomes of the cases demonstrate. The reason, of course, is that government is also charged with "securing the Blessings of Liberty," including the liberty of speech and press expressly protected by the First Amendment. Government must strive to ensure domestic tranquility, justice, national security and the general welfare without resort to authoritarian measures that trample upon liberty. But the governmental obligation under the Constitution cuts both ways. Just as government cannot sacrifice liberty on the altar of tranquility, justice, national security or public welfare, it cannot sacrifice those goals on the altar of liberty.

Thus, when determining whether an abridgement of expression is necessary to protect public safety or welfare, a court must analyze the sufficiency of government's justifications for regulation, whether government's goals can be achieved through other means that do not impact on First Amendment rights and the nature of the regulation being imposed. As Franklyn Haiman has explained, "Our real dilemma, then, in interpreting the First Amendment is not in deciding whether

121. W. A. Hachten, *supra* note 5, at 17.

122. *Id.*

123. U.S. Const., Preamble.

124. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Thornhill v. Alabama, 310 U.S. 88 (1940). *Cf.* Frisby v. Schultz, 108 S.Ct. 2495 (1988).

125. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

126. *See, e.g.*, United States v. Eichman, 110 S.Ct. 2404 (1990); Texas v. Johnson, 109 S.Ct. 2533 (1989).

127. *See, e.g.*, New York Times v. United States, 403 U.S. 713 (1971); United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

128. *See, e.g.*, Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

speech should *ever* be abridged but in determining the circumstances which may justify restrictions on communication."[129] The question, though, is not whether the content of the speech or identity of the speaker or the mode of expression places the communication in some "lesser value" category, thereby making it easier for government to justify restrictions. The question is whether under the circumstances a restriction on expression is necessary to achieve one of government's legitimate functions. This in turn requires a fivefold inquiry:

> 1) What is government's stated justification for the regulation?
> 2) Is the stated justification directly related to achieving the legitimate governmental goal or is it a mask for achieving an impermissible goal?
> 3) Does the regulation of expression directly achieve the legitimate governmental goal?
> 4) Are there alternative means of achieving the governmental objective that would not impinge on free expression?
> 5) Is the regulation no more extensive than necessary to achieve the governmental goal?

The framework for analysis suggested here is similar to that used by the courts in many types of First Amendment cases.[130] It focuses solely, however, on the legitimacy of government's motives and actions and allows no inquiry into the value of particular messages, modes of communication or speakers.

The second governmental justification for infringements on expression, protection of individual interests, arises primarily in those cases in which government acts as arbitrator of private disputes. Libel law is justified as a means protecting individual reputation, privacy law as a means of protecting the individual's right to be left alone, infliction of emotional distress law as means of protecting individuals from mental and emotional harm, and copyright law as a means of protecting the property rights of authors and artists. As discussed above, however, when government acts to protect the personal or property rights of individuals in a manner that abridges the free expression rights of others, the governmental justification for regulation must always be weighed against not only the rights of the individual defendant but also the rights of the public to enjoy the fruits of free expression. The need to protect the public's interest in the free flow of information and ideas has continually been recognized by the courts as they have arbitrated private disputes. The need to temper government protection of individual interests with concern for the public interest has been recognized in a variety of ways: the actual malice requirement in public official and public figure libel actions,[131] false light invasion of privacy suits,[132] and intentional infliction of emotional distress actions;[133] the requirement that defendants prove falsity in libel suits arising from the discussion of matters of public interest;[134] the protection for reports on matters of public interest in disclosure of private facts lawsuits;[135] and the fair use defense in copy-

129. F. S Haiman, *Speech and Law in a Free Society* 38-39 (1981).
130. *See, e.g.*, the cases cited *supra* notes 116-120, 124-128.
131. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); and New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
132. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967).
133. *See, e.g.*, Hustler Magazine v. Falwell, 108 S.Ct. 876 (1988).
134. *See, e.g.*, Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

right law.[136]

The last two justifications for government regulation of expression — protection of government itself from criticism and embarrassment and protection of dominant political or moral values — are simply impermissible motives. They are inconsistent with the anti-authoritarian goals of the Bill of Rights. The self-protection motivation is akin to, and perhaps the same as, what Cass and Schauer referred to as government's "self-interest" motivation.[137] In addition, the prohibition on government suppression of speech as a means of self-protection is intimately related to Blasi's "checking value" of the First Amendment.[138]

Through the decades the Supreme Court has frequently recognized the illegitimacy of government attempts to regulate expression as a means of protecting itself from criticism and embarrassment. For example, in *Near v. Minnesota* the Court repeatedly characterized the Minnesota gag law as a vehicle for suppressing criticism of government officials and "charges against public officers of corruption, malfeasance in office, or serious neglect of duty."[139] Chief Justice Hughes wrote:

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter — in particular that the matter consists of charges against public officers of official dereliction — and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.[140]

Hughes said a primary purpose of the First Amendment was to provide "immunity...from previous restraint of the publication of censure of public officers and charges of officials misconduct."[141]

This same theme of preventing government from suppressing and punishing criticism of itself permeates the Court's opinion in *New York Times v. Sullivan*.[142] Justice Brennan repeatedly characterized the case as involving criticism of official conduct.[143] Penalizing the critic of government "strikes at the very center of the constitutionally protected area of free expression," Brennan wrote.[144] In his concurring opinion in *New York Times v. United States*, Justice Douglas noted the illegitimacy of government attempts to suppress expression to save itself from embarrassment:

> The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-

135. *See, e.g., Restatement (Second) of Torts* § 652D (1977).
136. *See* 17 U.S.C.A. § 107 (1977).
137. *See infra* notes 88-90 and accompanying text.
138. Blasi, *supra* note 45.
139. 283 U.S. 697, 710 (1931).
140. *Id.* at 711.
141. *Id.* at 717.
142. 376 U.S. 254 (1964).
143. *E.g., id.* at 264, 266, 268, 279, 282, 283, 291, 292.
144. *Id.* at 292 (footnote omitted).

> be....The present case will, I think, go down in history as the most dramatic illustration of that principle.[146]

While the Supreme Court has quite consistently rejected self-protection as a governmental motive for speech regulation, it has been exceedingly inconsistent in its handling of governmental attempts to protect dominant political or moral values through speech regulation. The early sedition cases were blatant examples of government attempting to punish political heresy under the guise of protecting public safety and welfare.[146] In *West Virginia State Board of Education v. Barnette*, in which the school board's compulsory flag salute was declared unconstitutional, the Court finally recognized the illegitimacy of government attempts to protect dominant values through regulation of expression: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[147] Not until *Yates v. United States*[148] in 1957, however, did the Court fully recognize that political dissent was not one of the "substantive evils that Congress has a right to prevent."[149]

In the area of morality, the Court has not yet reached that recognition. While the Court has long acknowledged the impermissibility of government attempts to suppress perceived religious heresy,[150] it has continued to allow governments to protect dominant moral values by banning obscenity[151] and regulating non-obscene sexual expression.[152] Yet, as discussed above, a key attribute of authoritarian governments is their suppression of expression that offends dominant moral values.[153] The very definition of obscenity, depending on contemporary community standards to determine what may be banned by government, is an affront to the fundamental anti-authoritarian goals of the First Amendment. As Justice Douglas noted in his dissent in *Roth v. United States*, community standards are not allowed to determine what expression may be prohibited or punished in other areas, such as religion, philosophy and politics, and, therefore, should not be permitted to determine what is permissible in the area of sexual communication.[154] Louis Henkin noted almost three decades ago: "The history of obscenity legislation points...to origins in aspirations to holiness and propriety. Laws against obscenity have appeared conjoined and cognate to laws against sacrilege and blasphemy....Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not a crime. Obscenity is a sin."[155] Stamping out sin is not a permissible justification for government regulation of expression.[156]

145. 403 U.S. 713, 723-724 (1971) (Douglas concurring).
146. See *supra* note 94.
147. 319 U.S. 624, 642 (1943).
148. 354 U.S. 298 (1957).
149. Schenck v. United States, 249 U.S. 47, 52 (1919).
150. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968); Burstyn v. Wilson, 343 U.S. 495 (1952).
151. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).
152. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)
153. *See supra* notes 121-122.
154. 354 U.S. 476, 512 (Douglas dissenting).
155. Henkin, "Morals and the Constitution: The Sin of Obscenity," 63 *Colum. L. Rev.* 391, 393-395 (1963).

The Nature of the Restriction.

The final factor to be considered in evaluating the constitutionality of government actions that abridge expression is the nature of the restriction itself. The courts have long considered the nature and form of governmental regulations of expression a critical factor in First Amendment analysis. The most obvious illustration of this judicial concern is the prior restraint doctrine.[157] "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," the Supreme Court declared in *Organization for a Better Austin v. Keefe*.[158] That "heavy presumption" is the result of the Court's determination that prior restraint is a "form of regulation that creates hazards to press freedom markedly greater than those that attend reliance upon the criminal law."[159] Professor Redish summarized these special hazards: "[P]rior restraints (1) shut off expression before it has a chance to be heard, (2) are easier to obtain than criminal convictions and therefore are likely to be overused, (3) lack the constitutional procedural protections inherent in the criminal process, (4) require adjudication in the abstract, (5) improperly affect audience reception of messages, and (6) unduly extend the state's power into the individual's sphere."[160] Furthermore, as Justice Hughes noted in *Near*, prior restraints were the traditional tool of suppression of the authoritarian British governments of the 16th and 17th centuries and were the primary target of the framers of the First Amendment.[161]

Seditious libel, another traditional authoritarian tool of suppression, was soundly rejected by the Supreme Court in *New York Times v. Sullivan*.[162] And in *Grosjean v. American Press Co.* Justice Sutherland relied on the history of taxes on the press in 18th-century England to reach the conclusion that taxation was another traditional device of authoritarian governments to suppress expression and, therefore, one of the "modes of restraint" the First Amendment was designed to outlaw.[163] Thus, the Supreme Court has consistently recognized that the three primary tools of suppression of authoritarian regimes — prior restraints, seditious libel and taxation — are inherently suspect forms of regulation.

Further evidence of the Court's concern over the nature of speech restrictions has been its application of overbreadth doctrine in First Amendment cases.[164] Essentially overbreadth doctrine requires that when government restricts expression to achieve some substantial, legitimate government interest, it must choose the "least drastic means" to accomplish its goal, that is, the method that least impacts on free expression.[165] In *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, the Court held a ban on "First Amendment activities"

156. Legitimate governmental justifications for regulating the distribution of obscene materials to juveniles and unconsenting adults may exist, however, under the government's power to promote the general welfare.

157. *See, generally*, Emerson, "The Doctrine of Prior Restraint," 20 *Law & Contemp. Prob.* 648 (1955); Redish, "The Proper Role of the Prior Restraint Doctrine in First Amendment Theory," 70 *Va. L.Rev.* 53 (1984).

158. 402 U.S. 415, 419 (1971) (citations omitted).

159. Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

160. M. H. Redish, *supra* note 45, at 132.

161. 283 U.S. at 733-35.

162. 376 U.S. 254, 273-77 (1964).

163. 297 U.S. 233, 245-48 (1936).

164. *See, e.g.*, Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.,482 U.S. 569 (1987); Houston v. Hill, 482 U.S. 451 (1987); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). *See also* M. H. Redish, *supra* note 45, at 213-257.

within the central terminal area of Los Angeles International Airport unconstitutional because of overbreadth. "On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual 'First Amendment Free Zone' at LAX. The resolution does not merely regulate expressive activity...that might create problems such as congestion or the disruption of the activities of those who use LAX," wrote Justice O'Connor.[166] Related to the overbreadth doctrine is the requirement that regulations of commercial speech and content-neutral time, place and manner restrictions be "narrowly tailored" to meet First Amendment requirements.[167] The Court also has held that exceptions to the First Amendment requirement that criminal judicial proceedings be open to the public be "narrowly tailored to serve" the overriding interest justifying closure.[168]

Another example of judicial recognition of the need to consider the nature and form of government restrictions is periodic reliance on vagueness doctrine in First Amendment litigation.[169] A law is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application."[170] For example, in *Jews for Jesus*, in addition to finding the LAX ban on First Amendment activities overbroad, Justice O'Connor also described as unconstitutionally vague the regulation's distinction between "airport-related speech and nonairport-related speech."[171] And in 1989 a federal district judge held unconstitutionally vague a University of Michigan policy designed to halt racist, sexist and anti-gay expression on campus by banning speech that might "stigmatize or victimize" an individual.[172]

The special concern courts have shown toward restrictions on expression that fall into one of the traditionally suspect categories — prior restraints, seditious libel and taxation — or that are overbroad or vague demonstrates that the nature of the restriction is an integral part of First Amendment analysis. Certain types of regulation, regardless of the role government is playing or its justification for acting, are subject to heightened judicial scrutiny because they are the traditional controls of authoritarian governments or because they sweep too broadly, unnecessarily chilling expression.

Conclusions

The language and history of the First Amendment both indicate that the primary concern of the authors and ratifiers was restraining certain government actions, not promoting affirmative values. The First Amendment, along with the rest of the Bill of Rights, was a device to

165. Redish has noted that some scholars distinguish between overbreadth doctrine and the least drastic means test. I agree with Redish, however, that "[t]he Supreme Court...appears to view 'less drastic means' as merely one means of articulating the elements of overbreadth analysis." M.H. Redish, *supra* note 45, at 217 n. 28.

166. 482 U.S. at 574.

167. *See, e.g.*, Board of Trustees v. Fox, 109 S.Ct. 3028 (1989); Ward v. Rock Against Racism, 109 S.Ct. 2746 (1989); Frisby v. Schultz, 108 S. Ct. 2495 (1988); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986). In *Fox* the Court held that "narrowly tailored" was not the same as "least restrictive means." The Court said that the first amendment only required a reasonable "fit" between the governmental interest and the regulation used to meet the interest. 109 S.Ct. at 3033-35.

168. Press-Enterprise v. Riverside County Superior Court, 464 U.S. 501, 510 (1984).

169. *See, e.g.*, Smith v. Goguen, 415 U.S. 566 (1974); Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989). *See generally* Note, "The Void for Vagueness Doctrine in the Supreme Court," 109 *U. Pa. L. Rev.* 67 (1960).

170. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

171. 482 U.S. at 576.

172. 721 F. Supp. at 867.

ensure the new federal government did not resort to the hated authoritarian ways of the 16th-, 17th- and 18th-century English governments.

Most modern First Amendment theorists, however, have sought to analyze the First Amendment from a positive, value-promoting perspective, asking what the First Amendment was designed to protect, rather than what it was designed to prohibit. These theories present both practical and philosophical problems. Practically, these positive theories are incongruent with both the negatively worded text of the amendment and with the general approach to First Amendment adjudication the Supreme Court embarked upon in its earliest free expression cases when it sought to determine whether such government actions as prosecutions for sedition, prior restraints and taxes on newspapers constituted forbidden government actions.[173] The Court, though, has often strayed from the negative approach to First Amendment analysis. Those cases in which the Court utilized a positive, value-seeking approach to interpreting the First Amendment demonstrate the key philosophical defect of that approach: It invites judicial evaluation of the value of messages, speakers and modes of communication.

The government action approach to First Amendment analysis suggested in this article is premised on the belief that, in applying the First Amendment, courts ought not consider whether some speech is more valuable than other speech, or whether one speaker deserves greater First Amendment protection than another, or whether one mode of communication is entitled to greater protection than another. Instead, courts should focus on the government action being challenged to determine whether it constitutes an abridgement of free expression or legitimate regulation. This determination requires consideration of three factors: the role government is playing when it restricts expression, government's justification for its action and the nature of the restriction itself.

This article provides only an overview of the government action approach to First Amendment analysis. Admittedly, much more explication and analysis are needed, most notably a thorough review of cases in which the Supreme Court used a negative, government action approach and application of the government action approach to cases in which the Court relied on positive, value-promoting modes of analysis.

The main goal of this article, however, has been to argue that the focal point of First Amendment analysis is often misplaced. Perhaps one of the best illustrations of this point is *Young v. American Mini Theatres*, in which the Court upheld stringent zoning restrictions on businesses specializing in nonobscene, sexually explicit materials. In explaining the Court's decision, Justice Stevens' wrote:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammeled political debate....[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[174]

173. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Near v. Minnesota, 283 U.S. 697 (131); Grosjean v. American Press Co., 297 U.S. 233 (1936).

Contrast that statement to the following one from *Police Department of Chicago v. Mosley*, in which the Court followed a negative, government action approach to reach the conclusion that a ban on all picketing, except labor picketing, near schools violated the First Amendment: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[175] The government action approach to First Amendment analysis stems from a belief that the *Mosley* view is the correct one, the one that embodies both the letter and spirit of the First Amendment.

174. 427 U.S. 50, 70 (1976).
175. 408 U.S. 92, 95 (1972).