

# IDEOLOGICAL CONFLICT AND THE FIRST AMENDMENT

STEVEN J. HEYMAN\*

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\* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. A.B. 1979, J.D. 1984, Harvard. This Essay was presented at the Symposium on Law and Cultural Conflict held at Chicago-Kent on September 27, 2002, co-sponsored by the *Chicago-Kent Law Review* and the Chicago-Kent Institute for Law and the Humanities. It was also presented at a faculty workshop at Indiana University School of Law—Bloomington. For comments, I am grateful to the participants and to Alison Baldwin, Craig Bradley, Susan Brison, Jacob Corré, Dawn Johnsen, Diana Watts, David Williams, Susan Williams, and Adrienne Zahner. Anna Bednarski and Amanda Couture provided valuable research assistance. I should also like to express my gratitude for the financial support provided by Chicago-Kent's Marshall D. Ewell Research Fund and by Dean Lauren K. Robel of Indiana University School of Law—Bloomington, where I taught during the 2002-03 year.

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“[A] constitution . . . is made for people of fundamentally differing views . . . .”

– Justice Oliver Wendell Holmes, Jr.<sup>1</sup>

## INTRODUCTION

In the ongoing culture wars, few battlegrounds are more contested than freedom of expression. In recent decades, the First Amendment has been at the heart of controversies over antiwar demonstrations,<sup>2</sup> pornography,<sup>3</sup> hate speech,<sup>4</sup> flag burning,<sup>5</sup> abortion counseling,<sup>6</sup> anti-abortion protests,<sup>7</sup> and the National Endowment for

1. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

2. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for draft card burning).

3. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (holding that regulation of indecency on Internet violates First Amendment); *New York v. Ferber*, 458 U.S. 747 (1982) (holding child pornography unprotected by First Amendment); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (reaffirming state power to regulate obscenity); *Miller v. California*, 413 U.S. 15 (1973) (same); *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (invalidating anti-pornography ordinance), *aff'd mem.*, 475 U.S. 1001 (1986).

4. *See, e.g., Virginia v. Black*, 71 U.S.L.W. 4263 (2003) (upholding prohibition on cross burning with intent to intimidate); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating ban on display of racist symbols); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (holding that First Amendment protects neo-Nazi demonstration).

5. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990) (reversing flag-burning conviction under First Amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (same).

6. *See Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding denial of funding to family planning programs that provide abortion counseling).

7. *See, e.g., Scheidler v. Nat'l. Org. for Women, Inc.*, 123 S. Ct. 1057 (2003) (denying civil RICO action for conspiracy to shut down abortion clinics); *Hill v. Colorado*, 530 U.S. 703 (2000)

the Arts.<sup>8</sup> On issues of this sort, liberals, conservatives, and progressives have often found themselves divided against one another, and even among themselves.

Amid all this controversy, there is a strong temptation to appeal to an idealized version of the First Amendment—one with a clear meaning that stands above cultural conflict. No part of the political spectrum has been immune from this temptation. Some conservatives are inclined to look for a clear meaning in the original understanding of the First Amendment.<sup>9</sup> Although liberals generally reject originalism, they often employ such rhetoric in free speech cases, or invoke the plain language of the First Amendment.<sup>10</sup> Other liberals rely upon political and moral theory to construct an ideal First Amendment, such as one based on notions of individual liberty or autonomy.<sup>11</sup> Even radical critics sometimes see the First Amendment as having a clear meaning—for example, as embodying a liberal view that must be criticized or rejected.<sup>12</sup>

As I shall show, however, ideological conflict is inevitable in the First Amendment area. This is not merely because free speech issues tend to stir strong passions. Instead, it results from the very nature of the First Amendment. As Part I demonstrates, the Bill of Rights was adopted against the background of sharp controversy over the new Federal Constitution. The Bill of Rights was intended not only to provide additional safeguards for liberty, but also to promote national unity by accommodating some of the major concerns of those who had opposed the Constitution. As the framers recognized, however, the adoption of a bill of rights would itself require a consensus. Moreover, civil liberties issues were no less controversial during the founding period than they are today. For these reasons, the Bill of

(upholding regulation of speech near abortion clinic); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (partially invalidating injunction restricting speech near abortion clinic); *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding ban on targeted residential picketing).

8. See *NEA v. Finley*, 524 U.S. 569 (1998) (holding that NEA may consider standards of decency in awarding arts funding).

9. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (“When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for ‘the Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.’”) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

10. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 295–97 (1964) (Black, J., concurring); *Smith v. California*, 361 U.S. 147, 157–58 (1959) (Black, J., concurring).

11. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); MARTIN H. REDISH, *FREEDOM OF EXPRESSION* (1984).

12. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 207 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*].

Rights was drafted in the form of general principles that could command broad support, while avoiding particular issues that might prove divisive. But such consensus was possible only on the level of general principles. When it came time to apply these principles to concrete situations, differences of opinion were bound to emerge. Thus, the First Amendment and the Bill of Rights have always been subject to competing interpretations—interpretations that are rooted in differing political, social, and cultural views.

It follows that the meaning of the First Amendment can never be wholly removed from ideological conflict. But such conflict should not be unbounded. Instead, a central task of constitutional jurisprudence is to develop a common language or framework within which to debate controversial issues. In Part II, I argue that such a framework can be found in a rights-based theory of the First Amendment. On this view, First Amendment problems should not be seen as conflicts between the right to free speech and other, incommensurable values. When understood in this way, such problems may well appear to involve intractable conflicts between opposing ideological positions. Instead, many First Amendment problems should be understood as conflicts between free speech and other rights—rights that are rooted in the same values as free speech itself. In this way, it may be possible to develop some common ground in debates over the First Amendment, or at least to develop a common language within which those debates can take place.

In the remainder of the Essay, I explore how this rights-based approach would apply to the classic cultural conflict in this area—the problem of pornography. After reviewing the debate between conservatives, liberals, feminists, and others, I argue that pornography falls within the general right to freedom of speech. The question then becomes whether pornography violates the rights of others. In Part III, I discuss the radical feminist position that pornography may be regulated to prevent harm to women. In Part IV, I address conservative concerns about pornography and its impact on the community.

## I. IDEOLOGICAL CONFLICT AND THE CONSTITUTION: THE FOUNDING PERIOD

### A. *The Madisonian Theory of Conflict*

At the time of the founding, no one had thought more deeply about the problem of political, social, and cultural conflict than James Madison. For Madison, such conflict posed the central problem for American constitutionalism—a theme that he developed in *The Federalist No. 10* and other writings and speeches.<sup>13</sup>

Common theories of democracy or republicanism, Madison observed, were founded “on the idea, that the people composing the Society enjoy not only an equality of political rights; but that they have all precisely the same interests and the same feelings in every respect.”<sup>14</sup> But it was clear that “no Society ever did or can consist of so homogeneous a mass of Citizens.”<sup>15</sup> Instead, societies were inevitably divided into distinct groups and interests.<sup>16</sup> These divisions gave rise to what Madison called the problem of “faction,” which he defined as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>17</sup>

According to Madison, “the most common and durable source of factions has been the various [sic] and unequal distribution of property.”<sup>18</sup> Divisions between rich and poor existed in every society. In modern nations, further distinctions arose from the different forms of economic activity: “A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, [and] many lesser interests.”<sup>19</sup>

13. See, e.g., JAMES MADISON, *Vices of the Political System of the United States*, in JAMES MADISON: WRITINGS 69, 76–80 (Jack N. Rakove ed., 1999); James Madison, Madison’s Notes (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION (Max Farrand ed., rev. ed. 1937); Letter from James Madison to Thomas Jefferson (Oct. 24 & Nov. 1, 1787), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 500–02 (James Morton Smith ed., 1995) [hereinafter Letter from Madison to Jefferson (Oct. 24, 1787)]; THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961).

14. Letter from Madison to Jefferson (Oct. 24, 1787), *supra* note 13, at 500–01.

15. *Id.* at 501.

16. See *id.*

17. THE FEDERALIST NO. 10, *supra* note 13, at 78 (James Madison).

18. *Id.* at 79.

19. *Id.*

In addition to conflicting interests, faction also arose from differences of opinion. Of course, such differences were inevitable: they would arise “[a]s long as the reason of man continues fallible, and he is at liberty to exercise it.”<sup>20</sup> The difficulty was that human beings tended to be passionately attached to their own views.<sup>21</sup> This led to divisions based on a “zeal for different opinions concerning religion, concerning government, and many other points,” as well as “an attachment to different leaders ambitiously contending for pre-eminence and power.”<sup>22</sup> In Madison’s view, such ideological divisions were particularly dangerous, because of their tendency to “divide[] mankind into parties, inflame[] them with mutual animosity, and render[] them much more disposed to vex and oppress each other than to co-operate for their common good.”<sup>23</sup> Economic differences also engendered ideological disagreement, especially over such issues as the distribution of property and the rights of creditors and debtors.<sup>24</sup>

The proposal in *The Federalist No. 10* for combating faction is well known. According to Madison, the effects of faction could best be controlled within a large society such as the Union, rather than smaller societies like the States.<sup>25</sup> The smaller the society, the more likely it was that particular factions would form a majority that would be able and willing to oppress the minority.<sup>26</sup> “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens,” or will have the capacity to do so.<sup>27</sup> An extended republic had another advantage as well, Madison argued. Large electoral districts were more likely to return representatives “whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>28</sup> Representa-

20. *Id.* at 78.

21. *Id.*

22. *Id.* at 79.

23. *Id.*

24. *See id.* at 79–80 (observing that the influence of economic distinctions “on the sentiments and views of the respective proprietors” leads to “a division of the society into different interests and parties”).

25. *Id.* at 83–84.

26. *Id.* at 83.

27. *Id.*

28. *Id.* at 82–83.

tives of this sort would be in the best position “to adjust these clashing interests and render them all subservient to the public good.”<sup>29</sup>

It was these views that led Madison to promote a new constitution to establish a stronger federal government. His views played an important part both in the Constitutional Convention and in explaining the proposed Constitution to those who would ratify it. For these reasons, it is reasonable to conclude that the Constitution at least partly follows the approach to political, social, and economic conflict that Madison advocated. Instead of denying or suppressing such conflict, the Constitution recognizes that it is inevitable, but seeks to control and channel it. This is particularly true of the legislative process. As Madison observed, “[t]he regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.”<sup>30</sup>

### B. *The Bill of Rights*

Madison’s argument in *The Federalist No. 10* was concerned with how a constitution, once adopted, could control the effects of faction in the operations of government and the ordinary political process. As Madison discovered, however, the same divisions over interest and ideology had an impact on the drafting and ratification of the Constitution itself.<sup>31</sup> This was true of the conflicts in the Constitutional Convention between the large states and small states over representation,<sup>32</sup> and between the northern states and southern states over slavery.<sup>33</sup> It was true of debates over the division of powers

29. *Id.* at 80.

30. *Id.* at 79.

31. See THE FEDERALIST NO. 37, *supra* note 13, at 230 (James Madison) (observing that “although this variety of interests . . . may have a salutary influence on the administration of the government when formed, yet every one must be sensible of the contrary influence which must have been experienced in the task of forming it”).

32. Delegates from the large states, such as Madison of Virginia and James Wilson of Pennsylvania, strongly opposed the small states’ demands for equal representation in the Congress, not only in the interests of their own states but also on grounds of principle—the belief that representation should be based on population. The small states refused to budge, however, and the large states ultimately were forced to agree to the compromise that granted each state an equal representation in the Senate but a proportional representation in the House. For an account of the debates over representation, see JACK N. RAKOVE, ORIGINAL MEANINGS ch. 4 (1996).

33. Delegates from some of the southern states insisted that slaves should be fully counted for purposes of representation in the national legislature. Resisting these demands, northern delegates argued that if slaves were treated as property under the law of the slave states, then they should not be counted as persons for representational purposes. Some delegates also

between the federal government and the states.<sup>34</sup> Finally, and most importantly for present purposes, it was true of the controversy that led to the adoption of the Bill of Rights.

As proposed by the Convention, the new Constitution lacked a declaration of rights. This proved to be a serious political miscalculation. Although the Antifederalists opposed the Constitution for many reasons, the objection that had the greatest resonance was the absence of a bill of rights that would protect the liberties of the people against the greatly expanded powers of the federal government.

In response, the Federalists made a variety of arguments. First, they said, however necessary a bill of rights might be in a nation like England, where the people enjoyed only such liberties as they succeeded in wresting from the monarch, the situation was entirely different in America, where governments had only such powers as the people chose to confer upon them.<sup>35</sup> Moreover, even if bills of rights were required to protect the people against the state governments, which were vested with general powers, no such protection were necessary at the federal level, for the new government would have only those powers enumerated in the Constitution—powers that the Federalists insisted did not extend to interfering with religious freedom, regulating the press, or other matters of individual liberty.<sup>36</sup> Indeed, the Federalists argued, a bill of rights would be dangerous, for it might imply that the Constitution had granted the federal government powers in these areas, powers that it was necessary to limit.<sup>37</sup> Moreover, it was impossible to enumerate all of the people's

denounced slavery on moral grounds. The southern states remained intransigent, however, and the northern delegates ultimately felt compelled to accept to a compromise, under which slaves would count as three-fifths of a person for purposes of both representation and direct taxation. *See* U.S. CONST. art. I, § 2, cl. 3. The Convention struck a similar compromise on the slave trade: Congress was barred from outlawing the interstate or international slave trade prior to 1808, but was permitted to impose a tax on the trade during this period. *See id.* art. I, § 9, cl. 1. The Constitution also included other concessions to slavery, most notably the Fugitive Slave Clause. For an account of the debates over slavery, see PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* ch. 1 (1995).

34. *See, e.g.*, THE FEDERALIST NO. 37, *supra* note 13, at 230 (James Madison).

35. *See, e.g.*, Speech of James Wilson in Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (Jonathan Elliot ed., 2d ed. 1863) [hereinafter ELLIOT'S DEBATES]; THE FEDERALIST NO. 84, *supra* note 13, at 512–13 (Alexander Hamilton).

36. *See, e.g.*, Speech of James Wilson at a Public Meeting in Philadelphia (Oct. 6, 1787), in 1 THE DEBATE ON THE CONSTITUTION 64 (Bernard Bailyn ed., 1993).

37. *See, e.g.*, THE FEDERALIST NO. 84, *supra* note 13, at 513–14 (Alexander Hamilton).



rights, and the omission of a particular right would imply that it was not one that the people meant to retain.<sup>38</sup>

During the ratification controversy, Madison made similar arguments in opposition to Antifederalist demands for a bill of rights.<sup>39</sup> But his resistance to a bill of rights also stemmed from his fundamental concern about the problem of faction.<sup>40</sup> First, as he explained in a letter to Jefferson, the effects of faction made it unlikely “that a positive declaration of some of the most essential rights could . . . be obtained in the requisite latitude.”<sup>41</sup> This was particularly true of religious liberty.<sup>42</sup> Second, experience at the state level had proven that bills of rights were ineffective when they were most needed. Factional politics had led to “[r]epeated violations of these parchment barriers . . . by overbearing majorities in every State.”<sup>43</sup> Once again, Madison cited religious freedom as an example. Recalling the battles that he and Jefferson had recently fought in Virginia, he observed that if the legislature had the support of a popular majority, it would not hesitate to establish a religion in blatant violation of the Virginia Declaration of Rights and the recently enacted Statute for Religious Freedom.<sup>44</sup> In short, the impact of faction would make it difficult to obtain a strong enough declaration of fundamental rights, or to enforce such a declaration against “overbearing majorities.”<sup>45</sup> For all these reasons, Madison resisted Antifederalist demands for a bill of rights. Indeed, he was sometimes inclined to regard those demands as themselves rooted in faction—that is, in a “zeal for [particular] opinions concerning . . . government,” or in “an attachment to [particular] leaders ambitiously contending for pre-eminence and power,”

38. See, e.g., Debate of James Wilson and John Smilie at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 1 *THE DEBATE ON THE CONSTITUTION*, *supra* note 36, at 808.

39. See, e.g., Speech of James Madison in Virginia Ratifying Convention (June 24, 1788), in 3 *ELLIOT'S DEBATES*, *supra* note 35, at 620; Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in *THE REPUBLIC OF LETTERS*, *supra* note 13, at 564–65 [hereinafter Letter from Madison to Jefferson (Oct. 17, 1788)]. For discussions of Madison's initial opposition to and subsequent support for a bill of rights, see LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 279–90 (1995); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301; Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245 (1990).

40. See Rakove, *supra* note 39, at 252–55.

41. Letter from Madison to Jefferson (Oct. 17, 1788), *supra* note 39, at 564.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

or as a camouflage for the defense of political or economic interests that might be threatened by the adoption of the new Constitution.<sup>46</sup>

As Madison soon discovered, however, the demand for a bill of rights could not be so easily dismissed. Instead, while some opponents of the Constitution made this demand for merely tactical reasons, others sincerely believed that a declaration of rights was essential to protect the liberties of the people—a view that had substantial support among the public. Under these circumstances, compromise was a political necessity. To secure ratification in several key states, the Federalists found it necessary to give assurances that the first Congress to meet under the new Constitution would consider the adoption of a bill of rights.

After making such a commitment during his campaign for election to the House of Representatives,<sup>47</sup> Madison regarded himself as duty-bound to propose a bill of rights in the First Congress and to push for its adoption, despite considerable difficulties and opposition. These efforts made him the key figure in the adoption of the Bill of Rights.

On June 8, 1789, Madison introduced his proposals in the House, in a speech that provides great insight into the nature of the Bill of Rights.<sup>48</sup> In this speech, Madison offered two major justifications for the adoption of a bill of rights. First, he emphasized the need to promote national unity by responding to the legitimate concerns of those who had opposed the Constitution. “It cannot be a secret to the gentlemen in this House,” he observed, that while the Constitution had been ratified by eleven of the thirteen states, “yet still there is a great number of our constituents who are dissatisfied with it,” because they feared that it would endanger their liberties.<sup>49</sup> However mistaken this belief might be, Madison conceded that it was sincerely

46. The quotations are taken from THE FEDERALIST NO. 10, *supra* note 13, at 79 (James Madison). For Madison’s criticisms of the Antifederalists and their motives, see Finkelman, *supra* note 39, at 320–21.

47. See Finkelman, *supra* note 39, at 335–36.

48. See Speech of James Madison to the House of Representatives (June 8, 1789), in 5 THE FOUNDERS’ CONSTITUTION 24 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Madison Bill of Rights Speech]. The debates over the Bill of Rights may be found in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 77–86 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS], which also includes a comprehensive legislative history of the Bill of Rights. (All citations to congressional debates from this volume are to debates of the House of Representatives in 1789.) For Madison’s proposed amendments to the Constitution, see Madison Resolution, in CREATING THE BILL OF RIGHTS, *supra*, at 11–14.

49. Madison Bill of Rights Speech, *supra* note 48, at 24.

held and deserving of respect.<sup>50</sup> On “principles of amity and moderation,” he argued, Congress should “conform to their wishes, and expressly declare the great rights of mankind secured under this constitution.”<sup>51</sup> In this way, Madison hoped to “render [the Constitution] as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them.”<sup>52</sup>

Second, Madison argued that the adoption of a bill of rights was justified in principle. Echoing Jefferson, he asserted that “it is proper that every Government should be disarmed of powers which trench upon” the essential liberties of the people.<sup>53</sup> In exploring those liberties, Madison invoked the theory of natural rights and the social contract—a theory that was widely accepted by Federalists and Antifederalists alike. According to that view, society was formed for the protection of life, liberty, property, and the pursuit of happiness. All political power was originally vested in the people, who had the inalienable right not only to institute a particular form of government, but also to reform or change that government whenever they found it necessary to do so.<sup>54</sup> In addition to these political powers, the people would insist on the protection of other rights. These included not only natural rights, such as freedom of speech, but also certain

50. *Id.*

51. *Id.* Earlier, this theme had been sounded in President Washington’s inaugural address, which Madison drafted. See George Washington’s Inaugural Address (April 30, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 48, at 233, 234 (urging Congress to consider amending the Constitution in a way that would reflect “reverence for the characteristic rights of freemen, and a regard for public harmony”).

52. Madison Bill of Rights Speech, *supra* note 48, at 24; see also *CREATING THE BILL OF RIGHTS*, *supra* note 48, at 73 (remarks of Rep. Madison during debate of June 8) (“The applications for amendments come from a very respectable number of our constituents, and it is certainly proper for Congress to consider the subject, in order to quiet that anxiety which prevails in the public mind.”). In addition to reconciling many individual opponents to the Constitution, Madison hoped that the adoption of a bill of rights would induce the two remaining states, North Carolina and Rhode Island, to ratify the Constitution. See Madison Bill of Rights Speech, *supra* note 48, at 24.

53. Madison Bill of Rights Speech, *supra* note 48, at 28. For Jefferson’s views, see Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in *THE REPUBLIC OF LETTERS*, *supra* note 13, at 512–13.

54. Madison’s first proposed amendment would have inserted the following declaration at the beginning of the Constitution:

[T]hat all power is originally vested in, and consequently derived from, the people.

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

Madison Bill of Rights Speech, *supra* note 48, at 25.

“positive rights,” such as trial by jury, that imposed limits on the manner in which the government could exercise its powers.<sup>55</sup> As Madison explained, “[t]rial by jury cannot be considered as a natural right, but a right resulting from a social compact, . . . but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”<sup>56</sup> Finally, eighteenth-century liberal theory included certain doctrines, such as the separation of powers, which were supposed to be necessary for the protection of liberty.<sup>57</sup> These rights and principles were contained in the declarations of rights that had been adopted in many of the states, and Madison proposed to incorporate them into the Federal Constitution as well.<sup>58</sup>

After setting forth his proposed amendments, Madison responded to the various objections to a bill of rights that had been raised during the ratification debates.<sup>59</sup> Among others, he discussed the objection that he himself had found most powerful:<sup>60</sup> that, in a republic, the “greatest danger” of abuse of power came from the community itself, “operating by the majority against the minority,” and that “all paper barriers against the power of the community are too weak to be worthy of attention.”<sup>61</sup> Although he acknowledged the force of this objection, Madison responded that declarations of rights could perform an important political and cultural function within the community: because such declarations “have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, [they] may be one means to control the majority from those acts to which they might be otherwise inclined.”<sup>62</sup> In addition to this

55. *Id.* at 26. Madison’s notes for his speech list freedom of speech as a leading example of the “natural rights . . . retained” by the people. See Madison’s Notes for Amendments Speech (1789), in 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1042 (1971).

56. Madison Bill of Rights Speech, *supra* note 48, at 26.

57. See *id.* (discussing doctrine of separation of powers).

58. See *id.* For some leading examples of state bills of rights, see VIRGINIA DECLARATION OF RIGHTS of 1776, in 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 48, at 3; PENNSYLVANIA DECLARATION OF RIGHTS of 1776, in 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 48, at 6; MASSACHUSETTS CONST. of 1780, pt. 1, in 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 48, at 7.

59. See Madison Bill of Rights Speech, *supra* note 48, at 27–28.

60. See *supra* text accompanying notes 43–45.

61. Madison Bill of Rights Speech, *supra* note 48, at 27.

62. *Id.* As Madison had earlier put the point in his correspondence with Jefferson, “[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment,

influence on public opinion, Madison identified two further lines of defense for the liberties set forth in a bill of rights. One was legal. Following Jefferson, Madison observed that, if such provisions

are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.<sup>63</sup>

A second defense was political: if the national government sought to exceed its bounds, it could be checked by other centers of power within the federal system. In particular, the state legislatures would “closely watch the operations of [the Federal] Government,” and would be in a position to resist encroachments on liberty.<sup>64</sup>

In conclusion, Madison returned to his original theme: the need for compromise and consensus. “[I]f we can make the Constitution better in the opinion of those who are opposed to it,” he asserted, “without weakening its frame, or abridging its usefulness, in the judgment of those who are attached to it, we act the part of wise and liberal men.”<sup>65</sup> In part, as Madison stressed, this course of action was a matter of prudence, for the success of the new government depended on public support.<sup>66</sup> Yet it was also a matter of principle. As Lance Banning has argued, Madison “believed that a republic ultimately rests on mutual respect among its citizens and on a recognition on the part of all that they are the constituents of a community of mutually regarding equals. . . .”<sup>67</sup> By deferring to those who desired a bill of rights, the Federalists would “exemplify [this] mutual respect,”<sup>68</sup> and thereby strengthen the national consensus in favor of the Constitution.<sup>69</sup>

counteract the impulses of interest and passion.” Letter from Madison to Jefferson (Oct. 17, 1788), *supra* note 39, at 565.

63. Madison Bill of Rights Speech, *supra* note 48, at 27–28. In urging upon Madison the benefits of a bill of rights, Jefferson had placed some emphasis on “the legal check which it puts into the hands of the judiciary.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in *THE REPUBLIC OF LETTERS*, *supra* note 13, at 587.

64. Madison Bill of Rights Speech, *supra* note 48, at 28.

65. *Id.* at 28–29.

66. *See id.* at 24.

67. BANNING, *supra* note 39, at 287. Similarly, Paul Finkelman remarks that Madison’s support for the Bill of Rights reflected the traditional ideal of politics as consensus. Finkelman, *supra* note 39, at 344.

68. BANNING, *supra* note 39, at 287.

69. For a concise statement combining these prudential and principled considerations, see *CREATING THE BILL OF RIGHTS*, *supra* note 48, at 113 (remarks of Rep. Madison during debate

At the same time, Madison was fully aware that the adoption of a bill of rights would itself require a consensus. Under Article V of the Constitution, amendments could be adopted only with the approval of two-thirds of each House of Congress, as well as three-fourths of the state legislatures.<sup>70</sup> In order to ensure such broad support, Madison emphasized that he was proposing to incorporate in the Constitution only “those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents.”<sup>71</sup>

Madison’s speech sounded the keynote for the congressional debates on the Bill of Rights. As many members observed, the adoption of a bill of rights was necessary to reconcile a considerable part of the community to the Constitution, and to reassure the people that their liberties would be secure under the new government.<sup>72</sup> Under the terms of Article V, amendments could be adopted only when they had broad support. For this reason, amendments should be confined

of Aug. 13) (urging the House to approve a bill of rights and “thereby promote that spirit of urbanity and unanimity which the government itself stands in need of for its more full support”).

70. U.S. CONST. art. V.

71. Madison Bill of Rights Speech, *supra* note 48, at 24; *see also* CREATING THE BILL OF RIGHTS, *supra* note 48, at 200 (remarks of Rep. Madison) (objecting to the consideration of propositions not likely to attain the necessary constitutional majority). These themes were also prominent in Madison’s private correspondence during this period. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Sept. 21, 1788), in 1 THE REPUBLIC OF LETTERS, *supra* note 13, at 552 (noting that some Federalists favored responding to the demand for constitutional amendments by “introducing those supplemental safeguards to liberty against which no objections can be raised”); Letter from James Madison to Edmund Randolph (June 15, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 48, at 250–51 (observing that “[n]othing of a controvertible nature” could be expected to attain the requisite constitutional majority); Letter from James Madison to Samuel Johnson (June 21, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 48, at 253 (same); Letter from James Madison to Tench Coxe (June 24, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 48, at 254 (noting that his proposed amendments sought to “avoid[] all controvertible points which might endanger the assent of 2/3 of each branch of Congs. and 3/4 of the State Legislatures”).

72. *See, e.g.*, CREATING THE BILL OF RIGHTS, *supra* note 48, at 94 (remarks of Rep. Sumter during debate of June 8); *id.* at 101 (remarks of Rep. Ames during debate of July 21); *id.* at 113, 117 (remarks of Rep. Page during debate of Aug. 13); *id.* at 115 (remarks of Rep. Hartley); *id.* at 161 (remarks of Rep. Hartley during debate of Aug. 15); *id.* at 169 (remarks of Rep. Gerry). By contrast, those Antifederalists who wished for more substantial amendments reducing the power of the federal government objected that the proposed amendments to protect individual rights were “little better than whip-syllabub, frothy and full of wind, formed only to please the palate, or they are like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage”—that is, that they were a mere diversionary tactic by the Federalists, intended to distract the people’s minds from the need for major structural changes in the new Constitution. *Id.* at 175 (remarks of Rep. Burke); *see also id.* at 210 (remarks of Rep. Livermore); Kenneth R. Bowling, “A Tub to the Whale”: *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988).

to those that were likely to attain the requisite constitutional majorities.<sup>73</sup>

This recognition of the need for consensus had crucial implications for the drafting of the Bill of Rights. Civil liberties issues were hardly less controversial during the founding period than they are today. To secure a consensus, then, it was necessary to draft the provisions in relatively general terms on which the great majority of people could agree, without seeking to anticipate or resolve controversial issues regarding the meaning and scope of those rights or their application to particular situations.

A striking illustration of this point may be found in the House debates over the First Amendment itself. During the course of these debates, the Antifederalist Thomas Tudor Tucker of South Carolina moved to add language to protect the right of the people “to instruct their representatives.”<sup>74</sup> This motion provoked a long, spirited, and highly illuminating discussion.<sup>75</sup> Supporters of the Tucker amendment contended that it simply recognized the right of the sovereign people to express their will through the political process.<sup>76</sup> Opponents responded that the amendment was either unnecessary or dangerous. On one hand, if it merely recognized the right of the people to communicate with their representatives, it was superfluous, for that right would be fully secured by the proposals to protect the freedoms of speech, press, and petition.<sup>77</sup> On the other hand, if the amendment meant to imply that such instructions would be binding, it would subvert the deliberative process by requiring representatives to promote local views and interests at the expense of the common good. “[W]hen the people have chosen a representative,” asserted the Federalist Roger Sherman of Connecticut, “it is his duty to meet

73. See, e.g., *CREATING THE BILL OF RIGHTS*, *supra* note 48, at 143 (remarks of Rep. Livermore during debate of Aug. 14); *id.* at 178 (remarks of Rep. Sedgwick during debate of Aug. 15) (opposing extensive debate on proposals “when there was no likelihood they would meet the approbation of two-thirds of both houses, and three-fourths of the state legislatures”); *id.* (remarks of Rep. Smith) (observing that it was “useless” to push for the adoption of “a measure . . . which was unlikely to meet the approbation of two-thirds of the house”). Conversely, those who opposed consideration of constitutional amendments denied that they were necessary to satisfy the public, or that they were likely to be adopted by the necessary majority. See, e.g., *id.* at 93 (remarks of Rep. Sherman during debate of June 6); *id.* at 98 (remarks of Rep. Sherman during debate of July 21); *id.* at 101 (remarks of Rep. Ames during debate of July 21).

74. *Id.* at 161 (motion by Rep. Tucker during debate of Aug. 15).

75. See *id.* at 161–77.

76. See, e.g., *id.* at 163, 173 (remarks of Rep. Page); *id.* at 165–66, 170 (remarks of Rep. Gerry).

77. See *id.* at 167 (remarks of Rep. Madison).

others from the different parts of the union, and consult, and agree with them to such acts as are for the general benefit of the whole community; if they were to be guided by instructions, there would be no use in deliberation. . . .”<sup>78</sup> Finally, opponents contended that instructions were often used for “party purposes,” and thus would have a strong tendency to promote factionalism.<sup>79</sup>

While Madison fully shared these objections, he also opposed the Tucker amendment on more general grounds. A bill of rights, he reminded the House, could be adopted only with the support of a strong consensus. “[I]f we confine ourselves to an enumeration of simple acknowledged principles, the ratification will meet with but little difficulty.”<sup>80</sup> But to pursue amendments of a controversial or “doubtful nature” “oblige us to run the risk of losing the whole system.”<sup>81</sup> Echoing these views, the Federalist Theodore Sedgwick of Massachusetts urged his colleagues to avoid inserting controversial propositions that were “more likely to produce acrimony, than that spirit of harmony which we ought to cultivate.”<sup>82</sup>

For these reasons, the Bill of Rights was written in general terms that could command a consensus. But this consensus could be maintained only at a general level. When the Bill of Rights came to be applied to particular issues, it would inevitably be subject to competing interpretations, reflecting different interests and ideological views. This point accords with Madison’s understanding of faction, as well as his reflections during the founding era on the drafting and interpretation of constitutions. As he observed in *The Federalist No. 37*, the difficulty in drafting constitutions arose not only from the limitations of human reason, but also from the complex

78. *Id.* at 164 (remarks of Rep. Sherman); *see also id.* at 162 (remarks of Rep. Hartley).

79. *Id.* at 161–62 (remarks of Rep. Hartley); *see also id.* at 164 (remarks of Rep. Jackson) (asserting that the effect of the Tucker amendment would be to “drive the house into a number of factions, there might be different instructions from every state, and the representation from each state would be a faction to support its own measures”); *id.* at 171 (remarks of Rep. Livermore); *id.* at 176 (remarks of Rep. Laurance); *cf. id.* at 166 (remarks of Rep. Gerry) (responding to the factionalism argument).

80. *Id.* at 167 (remarks of Rep. Madison).

81. *Id.* at 167–68. As the debate drew to a close, Madison once more argued that there was “little prospect” that amendments that would “change the principles of the government, or that are of a doubtful nature,” could obtain the constitutional majority required for ratification; “therefore, as a friend to what is attainable, I would limit it to the plain, simple, and important security that has been required,” that is, recognition of “those great and essential rights which [the people] had been taught to believe were in danger.” *Id.* at 176.

82. *Id.* at 172 (remarks of Rep. Sedgwick).



nature of political institutions.<sup>83</sup> Moreover, language was an imperfect and “cloudy medium” for articulating political ideas.<sup>84</sup> In short, as Madison remarked in a letter to Jefferson, it was impossible to draft constitutional provisions “in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial.”<sup>85</sup> Although these observations were made in the context of federalism and the separation of powers, they would appear no less applicable to the Bill of Rights.

### C. *The First Amendment and the Sedition Act*

What I have said of the Bill of Rights is true in particular of the First Amendment. The debates in the First Congress show that freedom of speech was regarded as “a self-evident unalienable right which the people possess,” and which the First Amendment was meant to secure.<sup>86</sup> At the same time, the debates make clear that the Amendment was not intended to resolve controversial issues about the scope or limits of this right. Instead, as Madison stressed in the debate over the Tucker proposal, the First Amendment was meant to be a statement of “simple acknowledged principles” on which all could agree.<sup>87</sup> Only in this way could the First Amendment and the rest of the Bill of Rights obtain the consensus necessary for adoption.

83. THE FEDERALIST NO. 37, *supra* note 13, at 228–29 (James Madison). For an illuminating discussion of *The Federalist* No. 37 and its implications for constitutional interpretation, see RAKOVE, *supra* note 32, at 156–60.

84. THE FEDERALIST NO. 37, *supra* note 13, at 229 (James Madison).

85. Letter from Madison to Jefferson (Oct. 24, 1787), *supra* note 13, at 499–500.

86. CREATING THE BILL OF RIGHTS, *supra* note 48, at 159 (remarks of Rep. Sedgwick) (“If the people freely converse together, they must assemble for that purpose; it is a self-evident unalienable right which the people possess. . . .”). Further support for this proposition may be found in Madison’s notes for his speech introducing the Bill of Rights, *see supra* note 55, and in Roger Sherman’s draft of the Bill of Rights, which included the following provision—a provision that appears to have had an important influence on the drafting of the First Amendment:

The people have certain natural rights which are retained by them when they enter into society. Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness & safety; of *Speaking, writing and publishing their Sentiments with decency and freedom*; of peaceably Assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the government of the united States.

Roger Sherman’s Proposed Committee Report (July 21–28), in CREATING THE BILL OF RIGHTS, *supra* note 48, at 267 (emphasis added). On the natural rights background of the First Amendment, see Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1282–91 (1998) [hereinafter Heyman, *Righting the Balance*].

87. CREATING THE BILL OF RIGHTS, *supra* note 48, at 167.

At the same time, however, this approach left the First Amendment open to differing interpretations—interpretations that would inevitably be shaped by ideological conflict.

Such conflict was not long in coming. During the 1790s, American politics was dominated by increasingly bitter divisions between the governing Federalists and the Republican opposition led by Jefferson and Madison.<sup>88</sup> Alarmed by what they saw as the Federalists' aristocratic or even monarchical tendencies, as well as by Alexander Hamilton's efforts to create a strong centralized economic system, the Republicans accused their opponents of seeking to undermine democracy and to erect a consolidated national government on the ruins of the states. In turn, the Federalists regarded the Jeffersonians as dangerously subversive, not only in their domestic politics but also in their sympathy with the French Revolution. In the summer of 1798, at the height of fears over incipient war with France, the Federalist-controlled Congress passed the Sedition Act.<sup>89</sup> This statute, which was intended to suppress strident criticism from the Republican press, made it a criminal offense to publish "any false, scandalous and malicious writing" against the government, the Congress, or the President of the United States, "with intent to defame [them] or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States."<sup>90</sup>

From a modern perspective, the unconstitutionality of the Sedition Act appears beyond dispute: few people would deny that the right to criticize the government and its officials is the hallmark of a democratic society and part of "the central meaning of the First Amendment."<sup>91</sup> At the time the Act was adopted, however, its constitutionality was a sharply contested issue.

At first glance, the Act would appear to violate the plain language of the First Amendment. However, as John Marshall observed in the most powerful Federalist defense of the Act, the First Amend-

88. For a comprehensive account of this period, see STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* (1993).

89. 1 Stat. 596 (1798). On the history of the Sedition Act, see MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE"* chs. 2–4 (2000); ELKINS & MCKITTRICK, *supra* note 88, ch. XV; JAMES MORTON SMITH, *FREEDOM'S FETTERS* (1956).

90. 1 Stat. 596, § 2.

91. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964); see Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

ment only barred Congress from passing laws “‘ABRIDGING the freedom of speech or of the press.’”<sup>92</sup> The issue thus turned on the meaning of this phrase. But the liberty of the press, Marshall argued, was a term that had a well-defined and “completely understood” meaning under the common law: “It signifies a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community.”<sup>93</sup>

In support of this position, Marshall and other Federalists invoked Blackstone’s *Commentaries on the Laws of England*,<sup>94</sup> the most influential legal treatise in late eighteenth-century England and America.<sup>95</sup> Under the common law, Blackstone wrote, “[e]very freemen [sic] has an undoubted right to lay what sentiments he pleases before the public.”<sup>96</sup> This right was part of the natural liberty of mankind, and was “essential to the nature of a free state.”<sup>97</sup> On these grounds, Blackstone denounced systems of prior censorship that would “subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”<sup>98</sup> For Blackstone, however, the liberty of the press, like almost all forms of liberty, was subject to regulation by law for the common good.<sup>99</sup> Speech that was defamatory, immoral, or subversive constituted an abuse of liberty or “licentiousness.”<sup>100</sup> According to Blackstone, the law could restrict such expression without violating the liberty of the press.<sup>101</sup> Indeed, such restrictions were “necessary for the preservation of peace and good order, of government and religion, the only

92. John Marshall, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 48, at 136, 138 (quoting U.S. CONST. amend. I) (emphasis added by Marshall) [hereinafter Marshall, *Report*].

93. *Id.* at 138.

94. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (St. George Tucker ed., 1803 & photo. reprint 1969).

95. For an exploration of Blackstone’s views on the liberty of the press, see Heyman, *Righting the Balance*, *supra* note 86, at 1284–87.

96. 4 BLACKSTONE at \*152.

97. *Id.* at \*151.

98. *Id.* at \*152.

99. See 1 *id.* at \*125 (defining civil liberty as natural liberty restrained by law for the common good).

100. 4 *id.* at \*151–54.

101. *Id.*

solid foundations of civil liberty.”<sup>102</sup> This was particularly true of laws against seditious libel, which undermined the authority that made law and government possible.

If the Federalists could rely upon Blackstone and the common law, however, the Republicans could draw upon another important tradition—the body of libertarian and republican thought that Americans had inherited from Locke and the English radical Whigs, and that had provided the ideological justification for the American Revolution.<sup>103</sup> This tradition held a much more expansive view of liberty of speech and press than did Blackstone. According to *Cato’s Letters*,<sup>104</sup> a leading work in this tradition, freedom of thought and speech were not merely natural rights but inalienable ones—rights that individuals would not surrender when they entered civil society.<sup>105</sup> Although these liberties were bounded by the rights of other individuals and the community itself, they were not subject to regulation whenever the legislature believed that this would promote the common good.<sup>106</sup> In this way, *Cato’s Letters* defended a stronger individual liberty of speech and thought. For Cato, freedom of speech also played an important political function in checking abuse of power by the government and its officials.<sup>107</sup> This aspect of Cato’s doctrine rested on the republican, even revolutionary, premise that the people retained the ultimate sovereignty, and that they had a right to supervise and check the actions of their rulers, who were merely the agents or “trustees of the people” in the conduct of public af-

102. *Id.* at \*152.

103. On this body of thought and its influence in eighteenth-century America, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 331–51 (enlarged ed., 1992); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969) [hereinafter WOOD, *CREATION*]; MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC* (1996).

104. JOHN TRENCHARD & THOMAS GORDON, *CATO’S LETTERS* (Ronald Hamowy ed., 1995) [hereinafter *CATO’S LETTERS*]. For fuller discussions of Cato’s views of freedom of speech, see LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 109–14 (1985); Heyman, *Righting the Balance*, *supra* note 86, at 1283–84.

105. See 1 *CATO’S LETTERS*, *supra* note 104, no. 62.

106. See *id.* no. 15, at 110 (asserting that freedom of speech is bounded only by the rights of others); *id.* no. 62, at 432 (contending that liberty includes “[t]he privileges of thinking, saying, and doing what we please . . . without any other restriction, than that by all this we hurt not the publick, nor one another”).

107. See *id.* no. 15. On this function, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

fairs.<sup>108</sup> On these grounds, *Cato's Letters* sharply criticized the common law of seditious libel.<sup>109</sup>

Whether the Sedition Act was constitutional thus depended in large part on whether one understood the First Amendment in Blackstonian or in radical Whig terms. Both traditions had deep roots in American political culture, and both were widely held at the time that the Bill of Rights was adopted. Yet the First Amendment made no effort to endorse either view, or to resolve the conflict between them. To do so would have been to take a position on a controversial issue that had not yet arisen—precisely the approach that Madison feared would jeopardize the entire project of a bill of rights. Instead of adopting a particular position, the drafters of the First Amendment confined themselves to a statement of general principles, on the ground that this was the only way to obtain the broad consensus necessary for adoption and ratification.<sup>110</sup> The effect was to leave any difficult or controversial questions on the nature and scope of freedom of speech to another day.

It follows that the constitutionality of the Sedition Act could not be definitively resolved by appealing either to the language or to the original understanding of the First Amendment. Instead, the critical question was which view—conservative or libertarian-republican—was most consistent with the American understanding of freedom of speech or (more broadly) with the nature of American society and government. On behalf of the Federalists, Marshall spoke in Blackstonian terms of the need to control the “licentiousness” of the press.<sup>111</sup> At the same time, he sought to transform Blackstone’s argument into terms more acceptable to Americans. For example, while Blackstone defended the common law’s proscription of blasphemous as well as defamatory and seditious libels,<sup>112</sup> Marshall confined his argument to defamation and sedition, stressing the way in which such speech violated the rights of individuals and the community.<sup>113</sup> Moreover, Marshall treated sedition as an injury less to the government than to the people themselves, who had established the government to promote their own safety and happiness.<sup>114</sup> In this

108. 1 CATO’S LETTERS, *supra* note 104, no. 15. The quotation appears in *id.* at 111.

109. *See id.* no. 32; 2 *id.* no. 100.

110. *See supra* text accompanying notes 70–82.

111. Marshall, *Report*, *supra* note 92, at 138.

112. *See* 4 BLACKSTONE, *supra* note 94, at \*151.

113. *See* Marshall, *Report*, *supra* note 92, at 138.

114. *See id.* at 137.

way, Marshall sought to adapt the traditional idea of sedition to American notions of popular sovereignty.

Responding on behalf of the Republicans, Madison contended that the Sedition Act was at war with popular sovereignty.<sup>115</sup> Laws against seditious libel might be appropriate in “such a government as that of Great Britain,” in which the King and the House of Lords were hereditary and not responsible to the people.<sup>116</sup> But such restrictions were much less appropriate in the United States, where both the legislature and the executive were elective and responsible.<sup>117</sup> Madison reinforced this argument by appealing to the political culture of America, where the press commonly examined the merits of public men and measures with a freedom that went beyond “the strict limits of the common law.”<sup>118</sup> Echoing the radical Whigs, Madison argued that “it is the duty, as well as right, of intelligent and faithful citizens” to oversee the government and thereby prevent abuse of power; and that if any branch of government failed “to duly discharge[] its trust[,] it is natural and proper, that, according to the cause and degree of their faults, they should [in the language of the Sedition Act] be brought into contempt or disrepute, and incur the hatred of the people.”<sup>119</sup> Although Madison acknowledged that the Sedition Act (in a concession to libertarian doctrine) had departed from the common law and allowed truth as a defense, he denied that this provided adequate protection for free speech.<sup>120</sup> Even where facts alone were at issue, it might be difficult to prove them in court.<sup>121</sup> More importantly, sedition prosecutions would often be brought on account of opinions rather than facts, and opinions were not provable before a court of law in the same way that facts were.<sup>122</sup> Finally, Madison observed “that the right of electing the members of the Government constitutes more particularly the essence of a free and responsible government,” and that the “value and efficacy of this right” depended on the ability to freely discuss “the comparative merits and demerits of the candidates.”<sup>123</sup> The Sedition Act would

115. James Madison, *Report on the Virginia Resolutions* (Jan. 1800), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 48, at 141, 142–144 [hereinafter Madison, *Report*].

116. *Id.* at 142.

117. *Id.*

118. *Id.* at 142–43.

119. *Id.* at 144.

120. *Id.* at 145.

121. *Id.*

122. *Id.*

123. *Id.*

interfere with this right by shielding incumbents from criticism during elections.<sup>124</sup>

Ultimately, then, the debate over the Sedition Act involved a clash between two different visions of the American political, social, and cultural order. The Federalists adhered to the traditionalist ideal of a strong, well-ordered society that was governed (in the name of the people) by a virtuous and enlightened elite, and in which individual liberty was tempered by the values of order, morality, religion, and respect for authority.<sup>125</sup> The Republicans, on the other hand, viewed their opponents as antirepublican and inclined toward aristocracy.<sup>126</sup> Republicans tended to exalt the values of individual liberty, small government, and popular sovereignty.<sup>127</sup>

Although Federalists on the federal bench consistently upheld the Sedition Act,<sup>128</sup> the political controversy over the Act played an important role in the “Revolution of 1800,” in which Jefferson and his supporters won control of the national government.<sup>129</sup> Acting on the view that the Act was unconstitutional, Jefferson pardoned those convicted of violating it.<sup>130</sup> In this way, it may be said that the controversy over the Sedition Act was resolved in favor of the Republican position. Yet the debate between the Blackstonian conservative and the libertarian view on seditious libel continued for much of the following two centuries.<sup>131</sup> The Sedition Act was finally laid to rest only in *New York Times v. Sullivan*,<sup>132</sup> which declared that “the attack upon [the Act’s] validity has carried the day in the court of history.”<sup>133</sup>

124. *Id.*

125. *See, e.g.,* ELKINS & MCKITRICK, *supra* note 88, at 702–03, 727.

126. *See id.* at 724.

127. *See, e.g.,* THOMAS JEFFERSON, *First Inaugural Address*, in WRITINGS 494–95 (Merrill D. Peterson ed., 1984).

128. *See, e.g., In re Fries*, 9 F. Cas. 826, 839–40 (C.C.D. Pa. 1799) (No. 5,126) (charge of Iredell, J., to grand jury).

129. *See* ELKINS & MCKITRICK, *supra* note 88, ch. XV.

130. *See* SMITH, *supra* note 89, at 268.

131. *See, e.g.,* St. George Tucker, *Of the Right of Conscience; and of the Freedom of Speech and of the Press*, in 1 BLACKSTONE, *supra* note 94, app. G, at 14–30 (condemning the Sedition Act as a violation of First Amendment); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1878–83 (Boston, Hilliard, Gray, & Co. 1833) (criticizing Tucker and defending Blackstonian view of liberty of the press); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (rejecting the government’s “argument . . . that the First Amendment left the common law as to seditious libel in force”).

132. 376 U.S. 254 (1964).

133. *Id.* at 276.

### D. Reflections

This brief exploration of the founding period suggests the following reflections on ideological conflict, constitutional interpretation, and the First Amendment.

1. *Diversity*—As Madison recognized, diversity is inevitable in modern societies, and especially in free ones. This diversity arises from differences in religious, moral, and political beliefs, in social status, and in economic interests, as well as other differences that Madison did not focus on, including race, ethnicity, gender, and sexual orientation. For Madison, a central challenge for American constitutionalism was how to respond to such diversity and the conflicts that arise from it—an observation that seems even truer now than at the time he wrote.

2. *Should diversity and conflict be regarded as evils?*—Although Madison regarded diversity as inevitable, he tended to assimilate it to social division and faction, which he (in common with the prevailing view in the eighteenth century) regarded as evils. Madison's fear that faction would divide society into opposing groups, "inflame[] them with mutual animosity, and render[] them much more disposed to vex and oppress each other than to co-operate for their common good"<sup>134</sup> continues to have a powerful resonance in contemporary society. Few people would wish to live in a society riven by unrestrained social, cultural, and political conflict. Nevertheless, I believe that Madison's view of social division and conflict is darker than the view that prevails, or that ought to prevail, in contemporary America. This is true for several reasons.

a. *Social unity vs. diversity*—Although Madison's empirical analysis of modern society led him to conclude that diversity was inevitable, his condemnation of faction presupposed a more traditional normative view that emphasized the value of social unity and harmony.<sup>135</sup> But the foundations of this traditional view were increasingly undermined by many developments, including the Reformation and the religious and political conflicts to which it gave rise; the settlement of America by many diverse national, ethnic, cultural, and religious groups; and the economic developments that Madison himself described.<sup>136</sup> By the nineteenth century, liberal political

134. THE FEDERALIST NO. 10, *supra* note 13, at 79 (James Madison).

135. See ELKINS & MCKITRICK, *supra* note 88, at 263–64 (describing the traditional view).

136. See THE FEDERALIST NO. 10, *supra* note 13, at 79 (James Madison).



theorists such as Tocqueville and Mill were more likely to stress the value of diversity than its evils.<sup>137</sup> Likewise, contemporary American society often views diversity in a positive rather than a negative light.

b. *Materialism*—While Madison disapproved of all forms of faction, he considered those based on economic interests to be “natural” in the sense that they arose from real and substantial factors.<sup>138</sup> By contrast, his attitude toward other sources of division was scathing. Writing to Jefferson, he described them as mere “artificial [distinctions] . . . founded on accidental differences in political, religious and other opinions. . . .”<sup>139</sup> “However erroneous or ridiculous,” he added, “these grounds of dissention and faction may appear to the enlightened Statesman, or the benevolent philosopher, the bulk of mankind who are neither Statesmen nor Philosophers, will continue to view them in a different light.”<sup>140</sup> This suggested some of the reasons why factions based on opinion were so unnecessary and dangerous, and why it was essential to control them.

Undeniably, this sort of materialism, or anti-idealism, has been an important strand in American constitutional theory. For example, it is prominent in the jurisprudence of Justice Oliver Wendell Holmes, including his free speech opinions.<sup>141</sup> There is, however, another equally important strand of American constitutional thought that holds that social, cultural, and religious life have value for their own sake, and that this is an important reason why they should receive constitutional protection.<sup>142</sup> Similarly, while some forms of

137. See JOHN STUART MILL, *ON LIBERTY* ch. 3 (David Spitz ed., W.W. Norton & Co. 1975) (1859); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds., 2000); ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* (Francois Furet & Francoise Mélonio eds., Alan S. Kahan trans., University of Chicago Press 1998).

138. Letter from Madison to Jefferson (Oct. 24, 1787), *supra* note 13, at 501.

139. *Id.*

140. *Id.*

141. For example, much of Justice Holmes’s defense of free speech depends on the notion that “time has upset many fighting faiths,” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and that truth is ultimately a function of what is accepted by “the dominant forces in the community,” *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). For a critique of Holmes’s materialism, see ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* ch. 3 (1960).

142. For example, in *Olmstead v. United States*, Justice Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

modern social science take a materialist approach, others hold that human beings are essentially cultural beings. As Madison recognized, many ordinary people also regard these areas of life as having important value.<sup>143</sup> But differences in opinion may give rise to political and constitutional controversy. For these reasons, we may be less inclined than Madison to regard ideological conflict as illegitimate.

c. *The nature of truth*—In *The Federalist No. 10*, Madison attributed differences in opinion to the fallibility of human reason.<sup>144</sup> As this passage implies, Madison was inclined to hold an objective conception of truth. This was true not only of his political analysis, which aspired to scientific rigor, but also of his normative views, which generally accorded with the self-evident truths of the Lockean tradition. For example, Madison had no doubt that laws authorizing paper money, debtor relief, and other interferences with the rights of property were unjust.<sup>145</sup> When he spoke of faction in this connection, it was the supporters of such measures that he generally had in mind. By contrast, he would not use this term to describe those who, like himself, opposed such measures and sought to proscribe them in the new Constitution.

In more recent times, some historians have reversed Madison's account, and have described the Federalists as a faction motivated by their own interests.<sup>146</sup> The most reasonable approach, however, is to see both groups as having their own interests and their own conception of justice and the common good. On this view, it cannot be said that either position was simply factious and improper. Instead, the social and political controversy over this issue appears not only inevitable but also legitimate.

277 U.S. 438, 478 (1927). As the above quotations from Madison suggest, however, while this passage reflected Brandeis's own view, not all of the framers would have endorsed it in unqualified terms.

143. See *supra* text accompanying note 140.

144. See *supra* text accompanying note 20.

145. See, e.g., Speech of Mr. Madison (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 13, at 134–36 (arguing that interferences with “the security of private rights,” such as debtor relief laws, “were evils which had more perhaps than any thing else, produced this convention”); Letter from Madison to Jefferson (Oct. 24., 1787), *supra* note 13, at 500 (asserting that proposed Constitution's prohibitions on state issuance of paper money and laws impairing obligation of contracts, see U.S. CONST. art. I, § 10, did not go far enough in preventing injustice); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 22–38 (1990).

146. See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935). For a collection of essays debating this view, see ESSAYS ON THE MAKING OF THE CONSTITUTION (Leonard W. Levy ed., 1969).

More generally, from a modern perspective, we are more inclined than Madison was to believe that diversity of thought and belief has positive value, and that truth is most likely to emerge from discussion and debate among those who have different perspectives. Of course, this is an important theme in modern free speech theory. As Mill wrote in *On Liberty*:

In politics, . . . it is almost a commonplace, that a party of order or stability, and a party of progress or reform, are both necessary elements of a healthy state of political life; until the one or the other shall have so enlarged its mental grasp as to be a party equally of order and of progress, knowing and distinguishing what is fit to be preserved from what ought to be swept away. Each of these modes of thinking derives its utility from the deficiencies of the other; but it is in a great measure the opposition of the other that keeps each within the limits of reason and sanity. Unless opinions favourable to democracy and to aristocracy, to property and to equality, to co-operation and to competition, to luxury and to abstinence, to sociality and individuality, to liberty and discipline, and all the other standing antagonisms of practical life, are expressed with equal freedom, and enforced and defended with equal talent and energy, there is no chance of both elements obtaining their due. . . . Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners. . . . [O]nly through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth.<sup>147</sup>

Clearly, this view is far more receptive to political and ideological controversy than is Madison's view.

d. *Reason vs. passion*—For Madison, justice and the common good could be discerned only through reason, while the most dangerous factions were animated by passion. As eighteenth-century thinkers such as Adam Smith recognized, however, emotion or sentiment plays an important role in moral life<sup>148</sup>—a point that feminist theorists and others have recently reminded us of.<sup>149</sup> While

147. MILL, *supra* note 137, at 46.

148. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., Oxford University Press 1976) (6th ed. 1790).

149. See, e.g., MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT* (2001); SUSAN H. WILLIAMS, *TRUTH, AUTONOMY AND SPEECH: FEMINIST THEORY AND THE LAW OF FREE EXPRESSION* ch. 3 (forthcoming 2003) (on file with author); *WOMEN AND MORAL THEORY* (Eva Feder Kittay & Diana T. Meyers eds., 1987). For an important collection of essays on law and emotion, see *THE PASSIONS OF LAW* (Susan Bandes ed., 1999).

some passions are harmful and destructive, others—such as compassion or a love of justice—may be beneficial and even indispensable, so long as they are properly regulated.<sup>150</sup> For this reason, it is difficult to share Madison's disapproval of all political movements that are animated in some measure by passion.

e. *Elitism vs. democracy*—Madison's views on reason were connected with his views on representation. As we have seen, Madison hoped that the creation of large electoral districts in an extended republic would result in entrusting legislative power to "a chosen body of citizens, whose wisdom may best discern the true interest of their country. . . ."<sup>151</sup> In this way, he wrote, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."<sup>152</sup> Within only a few years, however, Madison himself came to believe that the rule of an elite could pose grave dangers to the liberty and welfare of the people.<sup>153</sup> For this reason he became instrumental in forming a mass political party that would represent the true interests of the people. In so doing, he helped to sweep away the traditional ideal that held that politics was best entrusted to an elite.<sup>154</sup> This democratization of American politics inevitably led to the growth of a party system—a development that was antithetical to the view of the inherent evils of "party and faction" set forth in *The Federalist No. 10*.<sup>155</sup>

f. *Stability vs. progress*—By holding a balance between competing factions, the Madisonian model of *The Federalist No. 10* sought to achieve a relatively stable constitutional order. By contrast, progress often can be achieved only through ideological conflict. Madison's own career provides several striking examples. It was only through a willingness to engage in highly charged ideological battles that Madison and his various allies were able to enact the Virginia Statute

150. Madison himself seemed to recognize this point when he expressed the hope that the representatives elected under the new Constitution would be characterized not only by "wisdom" but also by "patriotism and love of justice," which would prevent them from sacrificing the public good to private or temporary considerations. THE FEDERALIST NO. 10, *supra* note 13, at 82 (James Madison).

151. *Id.*

152. *Id.*

153. See, e.g., James Madison, *A Candid State of Parties*, NATIONAL GAZETTE, Sept. 26, 1792, reprinted in JAMES MADISON: WRITINGS, *supra* note 13, at 530.

154. On the decline of this ideal, see GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 358–69 (1991).

155. THE FEDERALIST NO. 10, *supra* note 13, at 79 (James Madison).

for Religious Freedom, to secure the ratification of the Constitution, to adopt the Bill of Rights, and to advance a broad understanding of free speech that was inconsistent with the Sedition Act. For contemporary examples, we may look to the civil rights movement and the women's rights movement. Of course, the question of what constitutes progress is an inherently controversial one. Whatever conception one holds, however, it seems clear that progress toward a good social order will often require conflict. Conversely, insofar as one believes that a good social order already exists, conflict will often be necessary to preserve it.

g. *Conclusion*—For all of these reasons, I believe that while Madison was right to regard faction as inevitable, he was wrong to regard it as an unmitigated evil—or at least that we should not view it in such a light today. American society is characterized by a high degree of social, cultural, and other forms of diversity. This diversity gives rise to differing views of justice and the common good. Such views tend to be partial and one-sided, stressing some values at the expense of others. As a result, these different views often come into conflict with each other. Such conflict is an inherent part of law and politics in a liberal democratic society. To be sure, unrestrained conflict is destructive and must be guarded against as much as possible. If kept within appropriate bounds, however, conflict can be beneficial, for it is only through a struggle between partial conceptions of justice and the common good that a more comprehensive view can emerge. In short, justice and the common good cannot be attained by standing above conflict, as Madison tended to believe, but only through argument between competing groups and views.

3. *Controlling conflict: The Federalist's Approach*—Although Madison's view of faction may have been overly pessimistic, he was surely right about the need to control it. A wide range of constitutional doctrines and institutions can be seen to serve this function: not only representation and the extended republic, but also federalism, separation of powers, and judicial review. As *The Federalist* explains, all of these facets of the Constitution are based on the premise that conflict and controversy are inevitable, and that rather than suppressing them, constitutions should seek to confine them within institutional bounds.<sup>156</sup>

156. See, e.g., THE FEDERALIST NO. 9, *supra* note 13, at 72–73 (Alexander Hamilton) (observing that disorders of faction may be controlled by separation of powers, checks and balances, an independent judiciary, representative institutions, and an enlarged society); *id.* No.

4. *The adoption of the Bill of Rights as an alternative model for responding to conflict*—However much the Constitution might seek to control ideological conflict, such conflict inevitably played a major role in the debates over the drafting and ratification of the Constitution itself. In particular, it was only in response to the ideological demands of the Antifederalists that the Constitution came to include a bill of rights. Although Madison initially resisted these demands, he came to believe that a bill of rights would strengthen the Constitution, both by providing additional safeguards for liberty and by reinforcing its legitimacy in the eyes of a large number of fellow citizens. In this way, Madison sought to develop common ground between differing ideological positions and groups within the community. The adoption of the Bill of Rights represents an alternative approach to the problem of conflict: rather than seeking to neutralize and stand above conflict, as in *The Federalist No. 10*, this alternative model seeks to reconcile the opposing views by adopting what is most persuasive in each. As I shall suggest below, this approach provides an attractive model for constitutional adjudication in many cases.

5. *The Bill of Rights as a statement of general principles*—As the debates in the First Congress show, the framers of the Bill of Rights were acutely aware that it could be adopted only if it reflected a broad consensus not only in Congress and the state legislatures, but also among the people at large. For this reason, the framers declined to address difficult or controversial issues that might endanger the project as a whole. Instead, the Bill of Rights took the form of “an enumeration of simple acknowledged principles” on which all could agree.<sup>157</sup>

6. *Ideological disagreement and the Bill of Rights*—At the same time, however, those who framed and ratified the Bill of Rights could hardly have expected it to put an end to all controversy over the rights that it contained. While they were able to agree on general statements of principle, Americans nevertheless held differing

10 (James Madison) (emphasizing representation and an extended republic); *id.* NOS. 45, 46 (James Madison) (explaining how structure of federal system allows the people and states to control and check power of federal government); *id.* NO. 51 (James Madison) (discussing how separation of powers, checks and balances, federalism, and the extended republic operate to preserve liberty, channel conflict, and control faction); *id.* NO. 78 (Alexander Hamilton) (urging that an independent judiciary and judicial review are essential to check expansion of legislative and executive power, and to protect individuals and groups against oppression stemming from faction); *cf. id.* NO. 49 (James Madison) (arguing that constitutional questions should not be submitted to the people because the issues would become embroiled in factional politics).

157. CREATING THE BILL OF RIGHTS, *supra* note 48, at 167 (remarks of Rep. Madison).

conceptions of the meaning and scope of those rights—conceptions that were rooted in different political beliefs, as well as different forms of social and cultural experience. This is no less true now than it was at the time of the founding. Inevitably, these different views will come into conflict with each other, particularly when we come to apply general principles to particular issues, or to new and unforeseen circumstances.

7. *Resolving conflicts*—In seeking to resolve conflicts between competing views, we must consider two different issues. On one level, the question is which view has more support in, or represents a more accurate view of, our own social order. On another level, the question is which view reflects a better understanding of the value of free speech, as well as the values with which it conflicts. In this way, free speech cases call for complex judgments both about the nature of our own community, and about the substantive values at stake.

8. *Seeking common ground*—On some issues, one position clearly appears to be superior in its understanding of free speech and its place within American society. At least from a modern perspective, for example, the Republican condemnation of the Sedition Act was clearly correct. In many other contexts, however, none of the competing ideological positions appears to have a monopoly on truth, or to represent a fully satisfactory interpretation of the First Amendment. In such cases, ideological conflict is best resolved by seeking to reconcile the opposing positions, and to find common ground between them, as well as between the different political, social, and cultural groups that they represent.

This “common ground” approach is valuable for two reasons. First, however far it may fall short of this ideal, the American constitutional order is based on the principle of consent. The legitimacy of the Constitution depends on its acceptance by the broad majority of the American people. As Madison discovered during the ratification debate, in order to obtain broad acceptance, it is necessary to accommodate reasonable differences of opinion as much as possible.<sup>158</sup> Only in this way is it possible for the Constitution to achieve one of its principal goals: to unify diverse elements within a broader community. Second, as Mill argued, particular opinions rarely, if ever, contain the whole truth, especially in the social and political realm.<sup>159</sup>

158. See *supra* Part I.B.

159. See *supra* text accompanying note 147.

Instead, it is only by accepting what is most persuasive in each of the opposing views, and rejecting what is unpersuasive, that one can form a more comprehensive view of the truth about individual rights and the common good.

9. *The role of rights discourse*—One of the most important tasks for constitutional theory is to develop a common language within which disputes can take place. Ideally, this language should enable individuals to articulate divergent views in such a way that they do not represent incommensurable discourses, but rather in such a way that there is some basis for resolving the conflict between them—either by determining that one view ought to prevail over another, or by allowing for the development of common ground.

During the founding period, this function was performed by the language of natural rights and the social contract. It was this language (among others) that Madison appealed to in order to reach an accommodation between the Federalists, with their desire for strong government, and the Antifederalists, with their concern for securing the liberties of the people.<sup>160</sup> Natural rights theory was able to perform this function not only because it was widely accepted during this period, but also because it was sufficiently broad and flexible to accommodate a wide range of political views, from Blackstonian conservatives to liberals and radicals.

In Part II, I shall argue that a theory of rights can serve a similar function in our time, by providing a common language or framework for ideological conflicts over the meaning of the First Amendment. Under this approach, the different positions will be expressed in terms of competing rights within a more comprehensive theory of rights. To be sure, this theory will not be able to resolve all ideological conflict, for different views will continue to place differing values on free speech and the rights with which it conflicts. Instead, my hope is that this approach will illuminate the nature of many conflicts over the First Amendment, and enable us to develop some common ground between what often seem to be incommensurable views.

10. *Law, politics, and culture*—Insofar as debates over the meaning of the First Amendment and other constitutional provisions turn on political, social, and cultural disagreements, they should play out not only in the legal system but also in other institutions and the

160. See *supra* Part I.B.



community at large.<sup>161</sup> Courts should not be too quick to cut off an ongoing political and cultural debate and impose their own views on the subject. Yet law is an extremely important element of American culture, and adjudication is one of the central ways that our society addresses issues of this kind. It is not the case, then, that the courts should refrain from deciding highly charged cultural issues. When they do decide such cases, however, they should be aware of the broader cultural context. They should not apply the law as though it were a closed system that could be applied without regard to the broader cultural issues at stake. Nor should they seek to resolve an issue purely within a single ideological framework; instead, they should recognize the force of arguments that are rooted in competing positions.

11. *The nature of constitutional interpretation*—This discussion has important implications for the nature of constitutional interpretation. According to the prevailing view, which has been most fully defended by Ronald Dworkin, constitutional interpretation (and legal interpretation in general) should ideally consist of the development and application of a single, unified, coherent set of principles.<sup>162</sup> On this view, constitutional interpretation may be described as *monological*, in the sense that it reflects a single perspective.

As we have seen, however, the Bill of Rights did not reflect a single, unified point of view.<sup>163</sup> Instead, the framers sought to reconcile conflicting views. They did so by drafting the Bill of Rights in the form of general principles and by appealing to the widely held theory of natural rights and the social contract. At the same time, it was inevitable that ideological debates would re-emerge when the time came to apply general principles to concrete situations. Debates of this sort are an essential and inescapable part of the interpretation of the Bill of Rights.

It follows that, at least in the context of the Bill of Rights, constitutional interpretation is best viewed not as monological but as *dialectical*: it involves debate, and even conflict, between competing positions, as well as an effort to reconcile these positions within a more comprehensive view. This account is consistent with the way in

161. This was a major theme in the work of Alexander M. Bickel. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

162. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW* (1996) [hereinafter RONALD DWORKIN, *FREEDOM'S LAW*]; RONALD DWORKIN, *LAW'S EMPIRE* (1986).

163. See *supra* Part I.B.

which constitutional issues are debated (through adversarial argument), as well as the way in which they are decided (either through an effort to build a consensus among the justices, or through the expression of disagreement in competing judicial opinions—disagreement that is often as deep and ideological as in any other forum). This account is also consistent with the nature of American legal education. In law, as in many other disciplines, students are taught that truth is complex and multisided, and can be understood only by considering differing views.

## II. A CONTEMPORARY DEBATE: THE PROBLEM OF PORNOGRAPHY

In Part I, I showed that, in an effort to achieve broad consensus, the framers of the Bill of Rights focused on general statements of principle, and made no effort to resolve controversial issues of scope and application. For this reason, the First Amendment and other provisions of the Bill of Rights have always been open to competing interpretations—interpretations that are rooted in different political beliefs and forms of social and cultural experience. It follows that the meaning of the First Amendment can never be wholly separated from ideological controversy. Instead, it is through such controversy that the meaning of the First Amendment develops. In some cases, resolving the controversy requires determining which of the competing views represents a better understanding of the principle of freedom of speech, as that principle is understood within the American political, social, and cultural order. In many cases, however, no one ideological position will fully capture our conception of free speech. Instead, the best approach will be to take what is most persuasive in each of the contending views, and unify them within a more comprehensive view. In a sense, this effort to seek common ground follows the approach taken by Madison and others, who secured the adoption of the Bill of Rights in an effort to unify different groups and views within the community.

In the remainder of this Essay, I explore how this approach to constitutional interpretation should apply to the classic cultural battle in the First Amendment area: the problem of pornography. After describing the ongoing controversy between conservatives, liberals, feminists, and others, I argue that the language of rights can be used to bring together these apparently incommensurable positions, in a

way that seeks to acknowledge and incorporate what is most persuasive in each.

#### A. *Multisided Debate*

In many ways, the traditional debate over obscenity parallels the eighteenth-century debate between Blackstonian conservatives and Jeffersonian libertarians.<sup>164</sup> The conservative position is well represented by the Supreme Court's decisions in *Miller v. California*<sup>165</sup> and *Paris Adult Theatre I v. Slaton*,<sup>166</sup> which reaffirmed the authority of the States to regulate obscenity "to protect 'the social interest in order and morality.'"<sup>167</sup> State legislatures, the Court contended, could reasonably conclude that the distribution of obscene material had a corrupting and debasing effect on individual character, as well as "a tendency to injure the community as a whole, to endanger the public safety, [and] to jeopardize . . . the States' 'right . . . to maintain a decent society.'"<sup>168</sup>

In opposition to this conservative view, liberals argue that, under the First Amendment, individuals should have a right to control the content of their own expression, as well as to decide for themselves what materials they wish to read or view.<sup>169</sup> To be sure, many liberals would allow the state to regulate the distribution and display of sexually oriented materials in order to protect children and unwilling viewers.<sup>170</sup> From the liberal perspective, however, any broader effort

164. See *supra* Part I.C.

165. 413 U.S. 15 (1973).

166. 413 U.S. 49 (1973).

167. *Id.* at 61 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))) (emphasis added in *Roth*).

168. *Id.* at 69 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)). For a sophisticated defense of the conservative view, see HARRY M. CLOR, *PUBLIC MORALITY AND LIBERAL SOCIETY* (1996); HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* (1969).

169. See, e.g., *Paris*, 413 U.S. at 107–13 (Brennan, J., dissenting); RONALD DWORKIN, *Do We Have A Right to Pornography?*, in *A MATTER OF PRINCIPLE* 335 (1985) [hereinafter Ronald Dworkin, *Right to Pornography*]; 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* chs. 10–12 (1985).

170. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 496 (1970) (arguing that exposing a person to erotic material against his wishes may cause "direct [and] immediate" emotional harm and also "constitutes an invasion of his privacy"); FEINBERG, *supra* note 169, at 189 (suggesting that pornography may be regulated only for "prevention of the corruption of children, protection of captive audiences from offense, and the preservation of neighborhoods from aesthetic decay"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12–16, at 909–10 (2d ed. 1988) (stating that "obscene speech . . . is subject—as is all speech—to regulation in the interests of unwilling viewers, captive audiences, young children, and beleaguered neighborhoods") (footnotes omitted); *Paris*, 413 U.S. at 106 (Brennan, J.,

to suppress such materials violates the right to free expression and represents an illegitimate attempt to impose the majority's own moral views on others.

Over the past two decades, the traditional debate over obscenity has been transformed by the rise of a new perspective, which holds that pornography should be regulated in order to prevent harm to women.<sup>171</sup> This position is best represented by the anti-pornography ordinance drafted by Catharine A. MacKinnon and Andrea Dworkin, which declared pornography to be a violation of women's civil rights.<sup>172</sup> At times, anti-pornography feminists have joined with conservatives to support the regulation of pornography.<sup>173</sup> Some other feminists oppose the censorship of pornography, either out of concern for freedom of expression, or on the ground that the free circulation of sexually oriented materials tends to promote sexual

joined by Stewart & Marshall, JJ., dissenting) (suggesting agreement with Emerson's view, and with the "view that the state interests in protecting children and . . . unconsenting adults may stand on a different footing from the other asserted state interests"). *But cf. id.* at 106 & n.29 (declining to definitively address these issues until squarely presented to the Court).

171. See, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979); CATHARINE A. MACKINNON, *ONLY WORDS* (1993) [hereinafter MACKINNON, *ONLY WORDS*]; MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, chs. 11–16; *PORNOGRAPHY: WOMEN, VIOLENCE & CIVIL LIBERTIES* (Catherine Itzin ed., 1992); *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* (Laura Lederer & Richard Delgado eds., 1995) [hereinafter *THE PRICE WE PAY*]; Rae Langton, *Speech Acts and Unspeakable Acts*, 22 *PHIL & PUB. AFF.* 293 (1993).

172. See MODEL ANTI-PORNOGRAPHY LAW, in Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 *HARV. WOMEN'S L.J.* 1, 24–28 (1985). The model ordinance defined pornography as

the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; (vi) women's body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented as being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

*Id.* at 25. A version of the ordinance was enacted by the Indianapolis City Council, and was struck down under the First Amendment in *American Booksellers Association v. Hudnut*, 771 F.2d 323, 324–25 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). See *infra* text accompanying notes 285–96 (discussing *Hudnut*).

173. See, e.g., E.R. Shipp, *A Feminist Offensive Against Exploitation*, N.Y. TIMES, June 10, 1984, § 4, at 2 (describing the alliance between radical feminists and conservatives that led to the enactment of the Indianapolis ordinance). For strong criticism of such an alliance, see NADINE STROSSEN, *DEFENDING PORNOGRAPHY* 77–79 (1995); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 *AM. B. FOUND. RES. J.* 681.

equality or liberation by undermining traditional moral views that have been harmful to women.<sup>174</sup> In this way, the opposition to regulation comes not only from traditional liberals,<sup>175</sup> but also from liberal feminists and other feminists. On the other hand, support for regulation comes from communitarians who are concerned with the impact of pornography on communities,<sup>176</sup> as well as from neorepublicans whose conception of freedom of speech focuses on its importance for democratic deliberation and self-government.<sup>177</sup>

### B. *A Rights-Based Approach to the Problem of Pornography*

#### 1. *A Rights-Based Theory of the First Amendment*

In short, conservatives, liberals, and feminists have taken sharply divergent positions on the issue of pornography. These different views appear incommensurable with one another. As a result, the debate over pornography often seems deeply unsatisfactory.

In the remainder of this Essay, I want to see whether it is possible to bring these conflicting views together within the framework of rights discourse. As we have seen, Madison took this approach in the First Congress, when he showed that the Federalist desire for stronger government and the Antifederalist demand for a bill of rights could be reconciled within the framework of natural rights and

174. See, e.g., Nan D. Hunter & Sylvia A. Law, Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in *Am. Booksellers Ass'n v. Hudnut*, 475 U.S. 1001 (1986), reprinted in 21 U. MICH. J.L. REFORM 69 (1987–88); STROSSEN, *supra* note 173; Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097 (1994). For an excellent collection of writings from all sides of the feminist debate, see *FEMINISM AND PORNOGRAPHY* (Drucilla Cornell ed., 2000).

175. For some liberal critiques of the anti-pornography feminist position, see RONALD DWORKIN, *FREEDOM'S LAW*, *supra* note 162, chs. 9–10; 2 FEINBERG, *supra* note 169, at 143–64. For a thoughtful exploration of the conflict between the liberal individualist approach to the First Amendment and a feminist approach focusing on harm to groups, see ROBERT C. POST, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, in *CONSTITUTIONAL DOMAINS* 89 (1995).

176. See, e.g., MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT* 89 (1996) (maintaining that “self-governing communities” should be permitted to restrict pornography to protect “the good of communal respect”).

177. See, e.g., Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603 *et passim* (arguing that pornography should be unprotected because it causes serious social harm, especially to women, and because it constitutes “low-value” speech, in part because it is “far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs”); see also Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 295–96, 304 (1989) (suggesting that pornography “silences women,” and that regulation may be justified to allow full participation in democratic deliberation).

social contract theory—a theory which was widely shared, and which was flexible enough to accommodate a variety of political, social, and cultural views.<sup>178</sup> My thesis is that rights discourse can perform a similar function in the contemporary debate over pornography, as well as other controversial First Amendment issues.

In earlier work, I have developed a rights-based theory of the First Amendment, drawing both on classic natural rights theory and on our modern understanding of fundamental rights.<sup>179</sup> According to this view, rights are rooted in respect for persons and their capacity for autonomy or self-determination. Personhood can be understood on several different levels, each with a corresponding set of rights. (1) To begin with, persons are embodied beings who exist in the external world. As such, they have *external rights* to life and personal security; to liberty of movement; and to acquire, control, and dispose of external things. In other words, they have the traditional rights to life, liberty, and property. (2) In addition to this external side, persons have an inner self or personality. This gives rise to *rights of personality*, which enable individuals to realize and express themselves and to interact with others. Among other things, individuals have a right to be free from unjustified psychic injuries, such as those covered by the torts of intentional and negligent infliction of emotional distress; a right to privacy, which allows the individual to develop a rich inner life, free from unjustified interference by others; and a right to reputation, which constitutes the social aspect of personality. (3) Human beings have rights not merely as independent individuals, but also as members of society. These *rights of community* include the right to belong to the society and to participate in its political, social, and cultural life. (4) As *intellectual and spiritual* beings, human beings have an inherent right to freedom of thought, belief, and expression. Finally, in all of these respects, persons are equal to one another: thus, in addition to these four categories of substantive rights, persons also have a *right to equality*.

The freedoms protected by the First Amendment can be understood in all of these ways. First, liberty of thought and speech may be understood as external rights, that is, as part of the right to control one's own person. Second, freedom of thought and speech may be viewed as rights of personality, allowing an individual to determine her own inner life of thought and feeling and to express herself to

178. See *supra* Part I.B.

179. Heyman, *Righting the Balance*, *supra* note 86.

others. Third, expression is one of the most important ways in which individuals participate in the political process, as well as in the social and cultural life of the community. Fourth, intellectual and spiritual freedom lie at the core of the First Amendment. In these ways, the theory brings together and unifies the major justifications that have been offered for freedom of expression: that it is an aspect of liberty in general;<sup>180</sup> that it is essential to individual autonomy and self-fulfillment;<sup>181</sup> that it is central to participation in a democratic society;<sup>182</sup> and that it is necessary for intellectual well-being and the search for truth.<sup>183</sup> Finally, as the Supreme Court's recent jurisprudence has emphasized, unjustified regulations of speech also may constitute a form of discrimination by according unequal treatment to different speakers and ideas.<sup>184</sup>

Thus, the theory of rights that I have sketched provides strong support for freedom of speech. At the same time, it allows us to discern the limits of that freedom. The same principles that justify free speech also give rise to other fundamental rights. In general, individuals have no right to exercise their freedom of speech in a way that violates the fundamental rights of others. Under the rights-based approach, speech may be regulated when necessary to protect those rights, except in cases where the value of the speech is so great that it should be protected despite the injury that it causes.

This account of the scope and limits of free speech has a strong basis in American constitutional history. As we have seen, eighteenth-century Americans regarded freedom of speech as one of the natural rights of mankind.<sup>185</sup> Although the scope of this right was controversial, there was broad agreement that freedom of speech (like all rights) was bounded by the rights of others.<sup>186</sup> For example,

180. See, e.g., 1 CATO'S LETTERS, *supra* note 104, no. 62.

181. See, e.g., BAKER, *supra* note 11; REDISH, *supra* note 11, ch. 1; DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION chs. 6–7 (1986); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991). For a critique of autonomy-based theories of free speech, see Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312 (1998).

182. See, e.g., MEIKLEJOHN, *supra* note 141; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

183. See, e.g., MILL, *supra* note 137, ch. 2.

184. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972). For an assessment of the Court's content neutrality jurisprudence, see Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647 (2002) [hereinafter Heyman, *Spheres of Autonomy*].

185. See *supra* Part I.B.

186. See Heyman, *Righting the Balance*, *supra* note 86, at 1288, 1295–96.

the principle of free speech afforded no protection to speech that unjustifiably defamed others, in violation of the right to reputation.<sup>187</sup> This understanding of free speech was consistent with a constitutional order that was deeply informed by the natural rights tradition.

During the late nineteenth and early twentieth centuries, natural rights jurisprudence was eclipsed by utilitarianism, legal positivism, sociological jurisprudence, and legal realism—theories that maintained that law was based on social needs and interests rather than on a recognition of inherent rights.<sup>188</sup> Under the influence of scholars like Zechariah Chafee, free speech problems were reconceptualized as conflicts between the social interest in free speech and other social interests.<sup>189</sup> But balancing of this sort afforded only unreliable protection for freedom of speech.<sup>190</sup> In more recent decades, we have come once more to view free speech as a fundamental right that is deserving of strong protection. Unfortunately, however, the revival of rights in First Amendment jurisprudence has not extended to the other values that may be injured by speech, such as reputation. As a result, free speech problems have come to be understood as conflicts between *the right to free speech* and various *social interests*. But there is no clear way to weigh individual rights against social interests. For this reason, modern First Amendment theory finds itself in a quandary, with no coherent framework for resolving clashes between free speech and other values. The result is heightened ideological conflict over the First Amendment. In debates over whether to regulate particular forms of expression, the supporters and opponents of regulation tend to talk past each other, taking positions that are not merely opposed to, but incommensurable with, one another. It is small wonder, then, that First Amendment controversies typically generate more heat than light.

As I have argued elsewhere, a solution to these difficulties may be found in a return to a rights-based approach to the First Amend-

187. See, e.g., Madison, *Report*, *supra* note 115, at 144 (asserting that, while the First Amendment deprived the federal government of all jurisdiction over libel, those injured by defamation could seek “a remedy, for their injured reputations, under the same laws, and in the same tribunals [*i.e.*, those of the states], which protect their lives, their liberties, and their properties”); Tucker, *supra* note 131, app. at 28–30.

188. See Heyman, *Righting the Balance*, *supra* note 86, at 1299–1301.

189. See, e.g., ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 31–35, 149–50 (1941) (formulating a balancing approach to freedom of speech).

190. The balancing approach reached its nadir in *Dennis v. United States*, 341 U.S. 494, 510 (1951), which upheld the convictions of Communist Party leaders under a broad balancing test.



ment.<sup>191</sup> By reconceptualizing many First Amendment problems as conflicts between the right to free speech and other rights, this approach allows us to express the competing values in more commensurable terms, and to assess the strength of each value within a comprehensive framework based on the idea of rights.

## 2. Collective Rights and the Liberal Tradition

This approach may seem promising in cases where speech impacts upon other individual rights, such as personal security or privacy. Some feminist proposals to regulate pornography focus on harm to particular individuals.<sup>192</sup> For the most part, however, feminist arguments for regulation are based on the harms that pornography is said to cause to women as a group.<sup>193</sup> Similarly, the conservative case for regulation is based less on injury to individuals than on harm to the community as a whole.<sup>194</sup> In response, civil libertarians deny that pornography causes such harms, or at least that they provide an adequate justification for restricting pornography.

As I have said, my hope is that a rights-based theory of the First Amendment can provide a common language or framework within which to debate these competing perspectives. In order to perform this function, however, the theory must be broad enough to accommodate the core insights of each view. In particular, the theory must have a conception of rights that is rich enough to encompass not only individual rights, but also rights of communities (which are central to the conservative view) and rights of groups (which are important to the feminist position).

At first glance, the idea of collective rights may appear to be at odds with the liberal tradition, with its strong emphasis on individual rights. Yet the liberal tradition has a communitarian dimension that is generally overlooked. For example, while Locke described individuals in a state of nature as “free, equal and independent,”<sup>195</sup> he also

191. See Heyman, *Righting the Balance*, *supra* note 86.

192. For example, the Indianapolis ordinance included provisions making it unlawful to coerce a person to perform in pornography; to force pornography on a person; or to assault a person “in a way that is directly caused by specific pornography.” *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325–26 (7th Cir. 1985) (quoting Indianapolis ordinance), *aff’d mem.*, 475 U.S. 1001 (1986).

193. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, at 156–57.

194. See *infra* text accompanying notes 304–05.

195. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, bk. II, § 95 (Peter Laslett ed., student ed., Cambridge University Press 1988) (3d ed. 1698) [hereinafter *LOCKE, GOVERNMENT*].

held that human beings were naturally “sociable” and destined to live in society.<sup>196</sup> By nature, all human beings constitute “*one Community*”—what Locke called the “great and natural Community” of “*Mankind*.”<sup>197</sup> Acts that injure others constitute a wrong not only to the injured party, but also to this community.<sup>198</sup> This is the natural origin of both tort and criminal law.<sup>199</sup> Because rights would not be secure in a state of nature, individuals agree to unite into a particular society for the preservation of their rights.<sup>200</sup> Under the social contract, they give up some of their natural rights and transfer them to the community.<sup>201</sup> Thus the powers that the community has are simply the rights that individuals have transferred to it.<sup>202</sup> Locke emphasizes that, through the social contract, the parties become “*one Body, One Community*,” which has both the right and the duty to act for the good of the whole.<sup>203</sup> In this way, the people come to have rights not only as individuals, but also as a community.<sup>204</sup>

196. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, bk. III, ch. I, § 1, at 402 (Peter H. Nidditch ed., Clarendon Press 1975) (4th ed. 1700). Locke writes: “GOD having designed Man for a sociable Creature, made him not only with an inclination, and under a necessity to have fellowship with those of his own kind; but furnished him also with Language, which was to be the great Instrument, and common Tye of Society.” *Id.*; see also LOCKE, GOVERNMENT, *supra* note 195, bk. II, § 77 (making a similar point). This account of language suggests that, rather than understanding speech in strictly individualist terms, Locke believed that speech was essential to human community—a view that traces back to Aristotle’s *Politics*. According to Aristotle, “man is by nature a political animal” because man “has speech.” Speech “serves to reveal . . . [what is] good and bad and just and unjust . . . and partnership in these things is what makes a household and a city [*polis*].” ARISTOTLE, POLITICS, bk. 1, ch. 2, 1253a1-18 (Carnes Lord trans., 1984).

197. LOCKE, GOVERNMENT, *supra* note 195, bk. II, § 128.

198. *See id.* § 8.

199. *See id.* §§ 10–11.

200. *See id.* §§ 123–31.

201. *See id.* §§ 87, 128–30.

202. *See id.* § 135; see also WOOD, CREATION, *supra* note 103, at 24 (observing that, in eighteenth-century Whig political theory, “[p]ublic liberty was . . . the combining of each man’s individual liberty into a collective governmental authority, the institutionalization of the people’s personal liberty, making public or political liberty equivalent to democracy or government by the people themselves”).

203. LOCKE, GOVERNMENT, *supra* note 195, bk. II, § 96.

204. Clear insight into this point may be derived from a close reading of the Massachusetts Declaration of Rights, which draws a consistent distinction between the rights of individuals and the collective rights of the people. *See* MASS. CONST. of 1780, pt. I, in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 48, at 7. Among other collective rights, the people are said to have “the sole and exclusive right of governing themselves as a free, sovereign, and independent State,” *id.* art. IV; the inalienable right to institute or reform the government, *id.* art. VIII; the right to freely elect public officers, *id.* arts. VIII–IX; the right to be subject only to those laws or taxes made with “the consent of the people, or their representatives in the legislature,” *id.* arts. X, XXIII; and the “right, in an orderly and peaceable manner, to assemble to consult upon the common good,” and to petition the legislature for redress, *id.* art. XIX. For further analysis of the Massachusetts Declaration and its distinction between individual and collective rights, see

This is not the place for a full exploration of the notion of collective rights in American constitutionalism. It is important to observe, however, that free speech itself has traditionally been understood in part as a right of the community as a whole. As I have noted, in the eighteenth-century libertarian tradition, free speech was not only an inalienable right of individuals, it was also a right that the people as a whole retained when they established a government—a right that was essential if they were to supervise the government and to exercise their own political rights within a representative system.<sup>205</sup> Similarly, free speech is understood in terms of public freedom in one of the leading modern theories of free speech: the Meiklejohnian view that the First Amendment protects discourse essential to democratic self-government<sup>206</sup>—a view that has had a powerful impact on the Supreme Court's understanding of the First Amendment.<sup>207</sup>

Thus far, we have been discussing collective rights belonging to the community as a whole. Do other groups also have rights? Of course, the law recognizes rights of voluntary associations. But the question here is whether there are rights that belong to other sorts of groups, such as those defined by race, ethnicity, religion, or gender.

The question of group rights in the liberal state is a complex and multifaceted one.<sup>208</sup> One point is clear, however: liberalism recognizes a right to be free from mistreatment because of group membership. Once more, this idea has deep roots in American constitutional history. As we have seen, a central theme of *The Federalist No. 10* was the need to prevent majorities from oppressing minorities.<sup>209</sup> For Madison, a classic case of such oppression was that directed against

Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 260–63, 284–90 (2000).

205. See *supra* text accompanying notes 107–09 (discussing *Cato's Letters*).

206. See MEIKLEJOHN, *supra* note 141.

207. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *supra* note 91, at 209.

208. There is a rich and growing literature on the subject. See, e.g., ETHNICITY AND GROUP RIGHTS (Ian Shapiro & Will Kymlicka eds., 1997); GROUP RIGHTS (Judith Baker ed., 1994); JOSEPH RAZ, THE MORALITY OF FREEDOM ch. 8 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Leslie Green, *Two Views of Collective Rights*, 4 CAN. J.L. & JURIS. 315 (1991); Peter Jones, *Group Rights and Group Oppression*, 7 J. POL. PHIL. 353 (1999); James Morauta, *Rights and Participatory Goods*, 22 OXFORD J. LEGAL STUD. 91 (2002); Denise Réaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. TORONTO L.J. 1 (1988); JEREMY WALDRON, *Can Communal Goods Be Human Rights?*, in LIBERAL RIGHTS: COLLECTED PAPERS, 1981–1991 (1993).

209. See THE FEDERALIST NO. 10, *supra* note 13, at 80–81, 83–84 (James Madison).

religious minorities.<sup>210</sup> Similarly, in a speech during the Constitutional Convention, Madison observed that “the mere distinction of colour” had been made “a ground of the most oppressive dominion ever exercised by man over man.”<sup>211</sup> Of course, the idea that people should not be mistreated on the basis of group membership lies at the heart of the Fourteenth Amendment and of modern equal protection doctrine.

As I will suggest below, it is largely in this sense that pornography affects groups. Rather than being a violation of any special rights belonging to group members, some sorts of pornography (in particular, pornography that depicts violence against women) may be regarded as violating rights that belong to all human beings.<sup>212</sup> To put it another way, what is at stake is not so much group-based rights as group-based wrongs, that is, injuries inflicted on people who belong to a particular group.

### 3. Conclusion

Under the rights-based approach, freedom of expression is a fundamental right. Like all rights, however, free speech must be exercised with due respect for the rights of others. When speech infringes those rights, it may be regulated by law unless the value of the speech is so great that it justifies the infringement. Speech also may be regulated in cases where it does not constitute a fundamental right.

To determine whether pornography should receive constitutional protection, then, we should ask the following questions. (1) Does the liberty to make, distribute, and view pornography fall within the fundamental right to freedom of expression? If not, then this liberty is subject to regulation for the common good, like other ordinary forms of liberty. On the other hand, if this liberty is fundamental, then it may be restricted only to protect the rights of others. (2) That leads to the second inquiry: Does pornography violate the rights of others? If not, it should be protected under the First Amendment. (3) If a particular sort of pornography does violate other rights, then

210. See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 48, at 82; Letter from Madison to Jefferson (Oct. 17, 1788), *supra* note 39, at 564; Speech of James Madison in the Virginia Ratifying Convention (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 35, at 330.

211. See Remarks of Mr. Madison (June 6, 1787), in 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 13, at 135.

212. See *infra* Part III.

balancing is in order to determine the relative force of the conflicting rights. If the value of the speech outweighs that of the other right, then the speech should be regarded as privileged under the First Amendment. Otherwise, the speech should be subject to regulation to protect the other right.

In the following section (Part II.C), I will argue that, *prima facie*, the fundamental right to freedom of expression does extend to pornography. The remainder of the Essay will explore whether pornography should be held unprotected on the ground that it violates the rights of others. In Part III, I consider whether, as radical feminists claim, pornography violates the rights of women; and if so, whether it should nevertheless be protected under the First Amendment. In Part IV, I discuss the conservative contention that pornography affects the rights of the community. In particular, I explore whether certain sorts of pornography violate the basic principles of the community; whether the community should have a right to exclude pornographic material from public places, or to shield children from exposure to pornography; and whether the community may decline to subsidize speech that violates its standards of decency.

*C. Does Pornography Fall Within the Fundamental Right to Freedom of Expression?*

In this Essay, I shall use the term “pornography” in a broad sense to refer to all material whose predominant purpose is to stimulate or satisfy the sexual desires of its audience. Under the rights-based approach, the threshold question is whether material of this sort falls within the fundamental freedoms of speech and press protected by the First Amendment.

Writing for the majority in *Roth v. United States*,<sup>213</sup> Justice Brennan declared that obscene materials “were utterly without redeeming social importance” because they did nothing to advance the purpose of the First Amendment: “[T]o assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>214</sup> Balancing the social interests involved, the Court concluded that obscene materials should receive no constitutional protection, for they were “of such slight social value as a step to truth

213. 354 U.S. 476 (1957).

214. *Id.* at 484.

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>215</sup>

In contrast to *Roth*, the rights-based theory holds that freedom of expression has intrinsic as well as instrumental value: free speech is not merely a means to promote social welfare, but also an inherent right. In addition to allowing citizens to participate in democratic deliberation—a value that Brennan more fully developed in *New York Times v. Sullivan*<sup>216</sup>—this right is also rooted in other values, including individual autonomy and self-realization. As the Court has come to recognize, the First Amendment protects the individual’s “autonomy to choose the content of his own [speech],”<sup>217</sup> as well as “the right to read or observe what he pleases.”<sup>218</sup> And free speech serves not only “[t]o permit the continued building of our politics and culture,” but also “to assure self-fulfillment for each individual.”<sup>219</sup>

If these are the values that underlie the First Amendment, it is difficult to see how pornography can be excluded from its scope. The choice to make or view pornography falls within the notion of individual autonomy—the right to determine the content of one’s own expression and to decide for oneself what to see or hear. In addition, some individuals derive self-fulfillment from pornography.<sup>220</sup> Moreover, while the acts of making and viewing pornography may contribute little to democratic deliberation, they do influence the society and its culture. (Indeed, this is one of the main concerns that motivate the regulation of pornography.)<sup>221</sup> Thus, these acts may be regarded as a form of participation in, or shaping of, the social and cultural life of

215. *Id.* at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (emphasis added by *Roth* omitted).

216. 376 U.S. 254 (1964).

217. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573–74 (1995).

218. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

219. *Police Dep’t v. Mosley*, 408 U.S. 92, 95–96 (1972).

220. This is not necessarily to say that the self-fulfillment to be derived from pornography is of great value. Although an individual may derive physical and psychic pleasure from the use of pornography, this experience does little to satisfy what may be the deepest aspect of sexual desire—the desire to enter into relations with another person. *See infra* text accompanying note 263. For present purposes, however, the quality of this fulfillment is beside the point. As Mill observes, freedom consists of the right to pursue one’s own good in one’s own way, so long as one refrains from injuring others. MILL, *supra* note 137, at 14. If one does injure others, however, the value of the activity is relevant to determining whether it should be protected despite the injury that it causes. *See infra* Part III.B.

221. *See infra* text accompanying notes 304–05.

the community.<sup>222</sup> Finally, the search for truth does not take place only on a social level. Instead, the individual's pursuit of self-knowledge constitutes an important aspect of the search for truth.<sup>223</sup> It has been persuasively argued that, for some people—especially sexual minorities—pornography can play an important role in promoting self-knowledge.<sup>224</sup>

### III. PORNOGRAPHY AND THE RIGHTS OF WOMEN

For these reasons, I believe that pornography falls within the fundamental right to freedom of speech. Under a rights-based approach to the First Amendment, the next question is whether this form of expression violates the rights of others. In this Part, I consider whether pornography infringes the rights of women; and if so, whether this injury is outweighed by the value of the speech. Part IV discusses whether the community as a whole has rights that justify regulation of pornography.

#### A. *Does Pornography Infringe the Rights of Women?*

In an earlier section I sketched a general theory of rights that was informed by the natural rights tradition as well as by our modern understanding of rights.<sup>225</sup> According to this view, rights are rooted in respect for persons and their capacity for autonomy or self-determination. Human beings have several categories of rights: (1) external rights to life, liberty, and property; (2) rights of personality, including privacy, reputation, and freedom from unjustified infliction of emotional distress; (3) rights to belong to the community, and to participate in its political, social, and cultural life; and (4) intellectual and spiritual freedom. In addition to these substantive rights, human beings have a right to equality.

All of these rights are inherent in personhood. Yet it is impossible for a person to possess and enjoy these rights unless she is recognized as such. Thus, the most fundamental of all rights is the *right to recognition* as a person, with all the rights that flow from this status.

222. See, e.g., BAKER, *supra* note 11, at 121 (suggesting that the protection of unconventional forms of speech and conduct may contribute to the process of social change).

223. See Heyman, *Righting the Balance*, *supra* note 86, at 1350–51.

224. See, e.g., Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995).

225. See *supra* Part II.B.1.

As I have shown elsewhere, this notion of recognition was implicit in the natural rights theory that influenced the Constitution and the Bill of Rights.<sup>226</sup> The right to recognition also lies at the heart of the Thirteenth and Fourteenth Amendments,<sup>227</sup> which repudiated the declaration of *Dred Scott* that (whether slave or free) blacks were “beings of an inferior order” who “had no rights which the white man was bound to respect,”<sup>228</sup> and which instead recognized all human beings within the jurisdiction of the United States as persons with rights.

### 1. The Right to Recognition

We are now in a position to explore the question of whether pornography violates the rights of women. According to MacKinnon and Dworkin, pornography is a form of sex discrimination, which subordinates women and denies them equality. This denial of equality is not merely a matter of treating women less favorably than men, or even of according women inferior status and power in society. Instead, at the most fundamental level, the radical feminist claim is that pornography denies women recognition by treating them not as human beings, but as mere sexual objects.<sup>229</sup>

In my view, this is not true of all forms of pornography. To represent a woman as a sex object is not necessarily to represent her as a *mere* sex object rather than a person. In this way the radical feminist claim seems too broad. And the same is true of any definition of pornography that would include all material that portrays women as sex objects.<sup>230</sup>

226. See Steven J. Heyman, *Hate Speech and the Theory of Free Expression*, in *HATE SPEECH AND THE CONSTITUTION* ix, xli–xlii, xlviii–l (Steven J. Heyman ed., 1996) [hereinafter Heyman, *Hate Speech*].

227. U.S. CONST. amends. XIII, XIV.

228. *Scott v. Sandford*, 60 U.S. 393, 407 (1856) (opinion of Taney, C.J.) (stating that, at the time of the founding, blacks “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit”).

229. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, at 158–61 (discussing the ways in which pornography dehumanizes women); Andrea Dworkin, *supra* note 172, at 15–16 (same).

230. The MacKinnon-Dworkin anti-pornography ordinance is susceptible of this interpretation, insofar as it extends to sexually explicit material that shows women in “postures or positions of sexual submission, servility, or display.” See *supra* note 172 (quoting model ordinance).



Nevertheless, I believe that the radical feminist claim contains an essential core of truth. Some pornography does represent women as mere sex objects and not as persons. In particular, this is true of violent pornography—pornography that portrays women being abused, raped, tortured, or killed, in a way that is intended to be sexually appealing to the viewer.<sup>231</sup> Representing women in this way does violate the right to recognition.

This is clearly true in the case of pornography that represents a specific woman in this way. In one notorious case, for example, a student at the University of Michigan wrote, and posted to the Internet, a pornographic story describing in horrific detail how he wished to sexually torture, rape, and murder one of his classmates—a woman whom he identified by name.<sup>232</sup> Surely, this act of speech violated the woman's rights by representing her in a way wholly inconsistent with her dignity as a human being.<sup>233</sup>

Of course, the Michigan case is highly unusual. Most works of violent pornography portray the infliction of such acts on fictional characters rather than on real individuals. Such works may employ women as actresses, however. According to MacKinnon, women often are coerced into performing in pornographic films, and the violence that is done to them often is real, not simulated.<sup>234</sup> Of course, insofar as this is true, pornography presents an easy case: no one would deny that to coerce an individual in this way, or to inflict actual violence on her, is wrongful, nor would anyone claim that the First Amendment's protections extend to such conduct. The difficult problem arises only when a work of violent pornography is fictional, and is made without coercion or violence against real individuals. In such a case, the work does not seem to deny recognition to the individual women involved in its production.

231. Some of the arguments that I shall make in this Part also have a bearing on the category of nonviolent but degrading pornography. For discussions of this category, see *Butler v. Regina*, [1992] 1 S.C.R. 452, 484–85 (Can.); 1 THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 329–35 (1986) [hereinafter ATTORNEY GENERAL'S COMMISSION REPORT]. This category is, however, more controversial and more difficult to define than violent pornography. See, e.g., West, *supra* note 173, at 705–06 (criticizing the way this category is defined in the Attorney General's Commission Report). For purposes of clarity, my discussion in this Part will focus on violent pornography.

232. See *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997); *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995). The story is reproduced in Judge Krupansky's dissenting opinion in *Alkhabaz*, 104 F.3d at 1497–98 n.1.

233. For a brief analysis of this case, see Heyman, *Righting the Balance*, *supra* note 86, at 1277–78, 1391–92.

234. See, e.g., MACKINNON, ONLY WORDS, *supra* note 171, at 3–5, 10–12, 15.

I believe, however, that a strong argument can be made that violent pornography is wrongful in that it violates the right to recognition of women in general. This argument rests on the following contentions. First, what is represented in pornography is not merely the image of *this* woman (the individual who performs in a film), but also the image of women in general—the physical features that characterize female sexuality. This is what the viewer desires to see, and what the producer seeks to provide. Although a pornographic work also may represent a woman as having some personality or other individuating characteristics, as a rule this is strictly secondary to the portrayal of her body, which is attractive precisely because, and insofar as, it displays these female characteristics.

Second, the image of women in general is something that is shared by all women. Thus, representations that are contained in pornography implicitly refer not only to the particular woman who is portrayed, but also to women in general and to all members of the group.

Third, as I have argued above, violent pornography infringes the rights of those it portrays to recognition as human beings. The conclusion to which we are led is that violent pornography infringes women's fundamental right to recognition.<sup>235</sup>

Clearly, the notion of groups plays an essential role in this argument. But it is important to consider exactly how it does so. The argument does not rest on an assertion that women as a group have

235. A deeper understanding of the problem of pornography can be derived from Hegel's account of recognition and the development of self-consciousness. See, e.g., 3 G.W.F. HEGEL, *PHILOSOPHY OF SUBJECTIVE SPIRIT* §§ 424–37 (M.J. Petry ed., 1978) (Part II of Hegel's *Encyclopedia of the Philosophical Sciences*). For Hegel, the development of self-consciousness begins with desire. The subject asserts itself in relation to external objects by possessing and consuming them, and thereby making them its own. See *id.* §§ 427–28. Thus, desire “is generally *destructive* in its satisfaction, just as it is generally *self-seeking* in respect of its content.” *Id.* § 428. When the subject comes face to face with another self, it finds its self-hood threatened. See *id.* § 430. This gives rise to a struggle for recognition, in which each party seeks to assert his own superiority, and to destroy or dominate the other. See *id.* §§ 431–33. According to Hegel, this struggle can be resolved only through *mutual recognition*, a condition of “reciprocity” in which each one knows itself in the other self. *Id.* § 436. Such recognition becomes the basis of “[u]niversal self-consciousness” and “reason.” *Id.* §§ 436–37.

This account throws considerable light on both pornography and hate speech. Hate speech may be understood to correspond to the stage in which the subject, threatened by the selfhood of others, denies them recognition and seeks to annihilate them. Pornography, on the other hand, corresponds to the stage of desire: it represents those it portrays as objects for the satisfaction of the viewer's sexual desires, that is, as a sex object. As I have suggested, to represent someone as a sex object is not necessarily to view her *solely* as an object. See *supra* text accompanying note 230. But violent pornography represents another *solely* as an object to be consumed and even destroyed. In this way, it denies those whom it portrays recognition as human beings.

some special rights that others do not have. Instead, the argument is predicated upon the fundamental right of all human beings to recognition and dignity. The thrust of the argument is that, in the case of violent pornography, this right is being denied to all of the members of a particular group. To put it another way, what is at issue here is not so much a group right as a group-based wrong. We may describe this either as a wrong to women as a class, or as a wrong to all of the individuals who belong to the class. In either case, the basic point is that an injury is being done to a class of people on the basis of group membership. In this way, the argument is analogous to a claim that the government or a private party is discriminating against all the members of a group on the basis of race, religion, gender, or other invidious grounds, in violation of the Equal Protection Clause or the civil rights laws—provisions that also protect people against injury based on group status. For these reasons, I believe that the way in which the idea of groups is used in the argument is consonant with a broad understanding of liberal constitutional theory.

## 2. Rights of Personality

Because violent pornography infringes the right to recognition—which lies at the foundation of all other rights—it is hardly surprising that such material also has an impact on other rights of women, including their rights of personality and personal security.

As we have seen, the traditional rights of life, liberty, and property protect the external interests of individuals. But these rights are ultimately rooted in the view that individuals are not merely external beings, but that they also have inner selves with the capacity for self-determination. Respect for this aspect of the self gives rise to the rights of personality. In addition to free speech, this category includes several other rights. First is the right to be free from unjustified psychic injuries, such as those covered by the torts of intentional and negligent infliction of emotional distress. Second is the right to privacy, which protects the boundary between the inner life of the individual and the external world. Third is what I shall call the right to one's image. Human beings relate to one another only on the basis of the *images* that they have of each other. Thus a person's image may be said to constitute her social personality, or her personality in relation to others. The right to one's image includes several specific rights under the common law: the right to reputation; the right not to be placed in a false light before the public; and the right to control the

use of one's name and likeness. More generally, the right to one's image should be taken to include all legitimate claims that an individual has with respect to the way that she is portrayed by others.<sup>236</sup>

Are these rights of personality infringed by pornography? It is easy to see how this could be true of pornography that portrays a particular woman without her consent. A striking example is provided by *Boyles v. Kerr*,<sup>237</sup> in which the defendant secretly videotaped a sexual encounter with his girlfriend and then screened the video at his fraternity house.<sup>238</sup> Arguably, this conduct violated all of the personality rights that I have mentioned: it constituted intentional or reckless, as well as negligent, infliction of emotional distress; it invaded the woman's privacy, both by intruding into her private life and by exposing it to others; it appropriated her likeness without her consent; and finally, it may have injured her reputation and placed her in a false light. In all these ways, the conduct clearly was wrongful.

Once again, however, this does not seem to be true of all forms of pornography. If a pornographic work is made with the consent of the individuals who are portrayed, it would not seem to violate their rights. And while (as I argued above) pornography may be taken to portray not only those individuals but also women in general, the way in which it portrays them is not necessarily wrongful.

Again, however, the case is different with regard to violent pornography. In particular, I would argue that such pornography violates the right of women in general to their image. To see this point, it is necessary to explore the nature of personality.<sup>239</sup>

On one level, each person is unique. Yet every individual also has some characteristics that she shares with others. The most basic of these is her status as a human being. Indeed, it is on the basis of this status that she is entitled to human rights. In addition, each individual possesses many other characteristics in common with others, such as race, nationality, religion, gender, and so on. Thus, to

236. For a fuller exploration of rights of personality, see Heyman, *Righting the Balance*, *supra* note 86, at 1323–44. The notion of social personality and the right to one's image are discussed in *id.* at 1336–40.

237. 855 S.W.2d 593 (Tex. 1993).

238. *See id.* at 594.

239. The following view of personality as a unity of the general and the particular is drawn in part from Hegel's account of the will. *See* G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* §§ 5–7 (Allen W. Wood ed., H.B. Nisbet trans., 1991) [hereinafter HEGEL, *PHILOSOPHY OF RIGHT*].

give a full account of an individual's personality, we must include not only what makes her unique, but also the general characteristics that constitute part of her identity. And if this is true of an individual's personality in general, it is also true of her social personality or image.

It follows that an individual's image includes not only what is unique to her, but also the view that is commonly held of the characteristics that she shares with others, such as gender. As I have argued, however, what is represented in pornography includes the image of women in general, and violent pornography portrays this image in a way that is inconsistent with human dignity. It follows that violent pornography violates the rights of women in general to their image.

This wrong can be understood in two somewhat different ways. One is to say that violent pornography violates the right of each individual woman to her own image—an image that includes, as one of its constituent elements, the image of women in general. Alternatively, we could say that because the specific right at issue—the right to that part of one's image that constitutes the image of women in general—is one that is held in common by all the members of the group, the right is best understood as a group right, that is, a right that is held by the group itself.<sup>240</sup> The first formulation is more consistent with a liberal, individualist view, while the second is more in accord with a view that focuses on group identity. Whichever formulation one prefers, however, the basic point is the same—violent pornography portrays women in a way that is inconsistent with human dignity, and in this way violates their rights to their image. Such pornography also tends to inflict unjustified psychic injury on women, at least in situations where they are exposed to such material without their consent.<sup>241</sup>

### 3. The Right to Personal Security

Thus far, we have been focusing on the claim that violent pornography inflicts dignitary injury on women. But radical feminists also argue that pornography injures women in another way, by

240. Compare, e.g., RAZ, *supra* note 208, at 207–09 (viewing rights to collective goods as collective rights), and WALDRON, *supra* note 208 (same), and Réaume, *supra* note 208 (same), with Morauta, *supra* note 208 (challenging this view).

241. See, e.g., DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY & SEXUAL HARASSMENT* 103–05, 147–58 (1995). Although Cornell generally would protect pornography, she would allow regulation of public display on the ground that forced viewing of pornography assaults one's self-respect by showing one's gender as an "object of violation" that is "unworthy of personhood." *Id.* at 147–49.

promoting sexual assault and other forms of abuse.<sup>242</sup> In the language that I am using, the claim is that pornography undermines the right to personal security or immunity from violence—one of the most fundamental rights that people possess.

In assessing this claim, it is important once again to distinguish between different forms of pornography. The claim that pornography in general promotes violence against women may be too broad.<sup>243</sup> As applied to violent pornography, on the other hand, it may well have some force. As I have said, violent pornography portrays women not as human beings with rights, but as mere objects that can be violated, abused, or even killed, and it presents this violence in an erotically powerful way. It is reasonable to suppose that material of this kind has a tendency to promote violence against women, by stimulating or reinforcing viewers' desires to commit violence, while weakening their moral and psychological inhibitions against doing so. This view finds support in some social science research that suggests that "exposure to violent pornography [tends to] increase aggression against women."<sup>244</sup> This evidence is far from conclusive, however,<sup>245</sup>

242. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, at 184–89.

243. See, e.g., Michelle Chernikoff Anderson, *Speaking Freely About Reducing Violence Against Women: A Harm Reduction Strategy from the Law and Social Science of Pornography*, 10 U. FLA. J.L. & PUB. POL'Y 173, 187 (1998) (citing studies suggesting that "nonviolent and nondegrading sexually explicit materials appear unrelated to violence against women").

244. EDWARD DONNERSTEIN ET AL., *THE QUESTION OF PORNOGRAPHY* xi (1987). As the authors explain, "there are good theoretical reasons to assume that exposure to violent pornography will increase aggression against women[.]" and "the research has borne out these assumptions." *Id.* They summarize these reasons as follows:

First, the antisocial effects—for example, the imitation of aggressive behavior and desensitization to violence—that researchers have found for individuals who observe mass media violence on television are expected to occur when this violence is presented within a sexual context. But aggressive pornography may be more potent than televised violence because it pairs both sex and violence. Coupling of sex and aggression in violent pornography may result in a conditioning process. Aggressive acts become associated with sexual acts in the viewers' minds. The result of this conditioning process would be that viewers become sexually aroused by violence. Several researchers already believe that this conditioning process is responsible for rapist behavior.

*Id.* at 92 (citing several works by Neil Malamuth and others) (additional citation omitted). In addition, frequent exposure to violent pornography may increase male viewers' acceptance of "the myth that women enjoy rape," and encourage men to believe that they will not be caught if they commit rape. *Id.* (citations omitted).

For some summaries of the research that tends to support these hypotheses, see *id.* at 91–107; Anderson, *supra* note 243, at 183–91; Diana E.H. Russell, *Pornography and Rape: A Causal Model*, in *FEMINISM AND PORNOGRAPHY*, *supra* note 174, at 48. As Donnerstein et al. make clear, the negative effects of depictions of sexual violence are not limited to violent pornography, but also result from materials that are violent but not sexually explicit, such as "slasher" movies. See DONNERSTEIN ET AL., *supra*, at 108–36.

245. In particular, researchers do not yet "know if repeated exposure to violent pornography has a cumulative effect in producing aggression, or if such effects are only temporary."

and the question whether violent pornography leads to increased violence against women remains a deeply controversial one.<sup>246</sup>

This is not the only important question, however. For personal security includes not only the right to be free from violence, but also the right to feel secure against violence.<sup>247</sup> For example, the law protects personal security against assaults and threats of violence, even when they do not involve or lead to actual violence.<sup>248</sup>

Whether or not it can be convincingly shown that violent pornography actually causes violence, a reasonable argument can be made that it impinges upon the right to feel secure against violence.<sup>249</sup> Of course, to feel such security, one must believe that one is reasonably safe from harm. But the sense of security runs much deeper than that. It consists in a sense of trust in others, rooted in the belief that they recognize oneself as a person with a right to immunity from violence. But violent pornography denies such recognition to women, and instead portrays violence against them as desirable and acceptable. Insofar as those who make or consume such pornography

DONNERSTEIN ET AL., *supra* note 244, at 100. Even more importantly, while many studies have found that male subjects who are exposed to violent pornography show increased levels of aggression against females in laboratory settings, it is controversial whether the same holds true in the real world. *See id.* at 174. For discussion of the limitations of the social science research in this area, see William A. Fisher & Guy Grenier, *Violent Pornography, Antiwoman Thoughts, and Antiwoman Acts: In Search of Reliable Effects*, 31 J. SEX RES. 23 (1994); Daniel Linz et al., *The Attorney General's Commission on Pornography: The Gaps Between "Findings" and Facts*, 1987 AM. B. FOUND. RES. J. 713; Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737, 754–60, 763–67.

246. For a sampling of the debate, see MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, at 184–86, 186–89; Anthony D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 WM. & MARY L. REV. 575 (1990); Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?"*, 53 OHIO ST. L.J. 1037 (1992); David A.J. Richards, *Pornography Commissions and the First Amendment: On Constitutional Values and Constitutional Facts*, 39 ME. L. REV. 275, 301–09 (1987); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1176–85 (1993); Sunstein, *supra* note 177, at 597–601; *Symposium on the Attorney General's Commission on Pornography*, 1987 AM. B. FOUND. RES. J. 639. Much of this debate was sparked by the 1986 Report of the Attorney General's Commission on Pornography, which concluded that the available evidence strongly supported a causal link between sexually violent materials and sexual violent acts. *See* 1 ATTORNEY GENERAL'S COMMISSION REPORT, *supra* note 231, at 323–29.

247. *See* Heyman, *Righting the Balance*, *supra* note 86, at 1320. For the liberal tradition, this sense of security is a fundamental aspect of liberty. As Montesquieu puts it, "Political liberty in a citizen is that tranquillity of spirit which comes from the opinion that each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen." MONTESQUIEU, *THE SPIRIT OF THE LAWS* pt. 2, bk. 11, ch. 6, at 157 (Anne M. Cohler et al. trans. & eds., Cambridge University Press, 1989) (*Oeuvres* Completes ed., 1758).

248. *See* Heyman, *Righting the Balance*, *supra* note 86, at 1323–24.

249. I am grateful to Susan Williams for suggesting this line of argument.

accept the view that it presents, they do not recognize women as persons with a right to freedom from violence. It is reasonable for women not to trust such individuals to respect their right to bodily security. In this way, by violating the right to recognition, violent pornography also tends to undermine women's right to security against violence. This effect does not seem powerful enough, standing alone, to make the pornography wrongful. But it does reinforce the other reasons for reaching this conclusion.

#### 4. The Right to Equality

Up to this point, we have been exploring the impact that violent pornography has on the substantive rights of women—rights of recognition, personality, and personal security. Now I want to show that rights theory also lends support to the radical feminist claim that such pornography subordinates women and denies them equality.

In modern thought, equality and substantive rights (such as liberty) are often seen as distinct from—and even opposed to—one another. In classical liberal thought, by contrast, these two kinds of rights were regarded as two sides of the same coin.<sup>250</sup> From a substantive perspective, human beings have a right to recognition as persons, with all the rights that derive from this status.<sup>251</sup> Because all human beings are the same in this respect, they are obligated to recognize and treat one another as equals who are entitled to the same rights.<sup>252</sup> According to Locke, this fundamental principle of equality would be violated by any effort to impose domination or “[s]ubordination” on others, by treating them as though they were mere “inferior” beings who were “made for [our own] uses” rather than “equal and independent” persons.<sup>253</sup>

As we have seen, by treating women as mere sexual objects who can be used or even “destroy[ed]” at the “[p]leasure” of others,<sup>254</sup> violent pornography denies them recognition as human beings. In this way, it violates the right to equality. This right is also violated

250. See, e.g., LOCKE, *GOVERNMENT*, *supra* note 195, bk. II, §§ 4, 6 (describing the state of nature as one of “*perfect Freedom*” and “*Equality*”); IMMANUEL KANT, *THE METAPHYSICS OF MORALS* \*237 (Mary Gregor trans., Cambridge University Press 1991) (explaining that the most fundamental human right, that of freedom, includes within it an “innate [right to] *equality*” and other rights “which are not really distinct from it,” but rather implicit in it).

251. See *supra* Part III.A.1.

252. See LOCKE, *GOVERNMENT*, *supra* note 195, bk. II, §§ 4, 6.

253. *Id.* bk. II, § 6.

254. *Id.*



insofar as violent pornography infringes women's substantive rights on the basis of gender.

*B. Are These Infringements Outweighed by the Value of the Speech?*

1. Violent Pornography in General

In the preceding section, I argued that violent pornography infringes the rights of women in several ways—by denying them recognition as human beings, inflicting injury to personality, threatening personal security, and undermining equality. This is not the end of the analysis, however. Under the rights-based approach, speech sometimes should be protected despite the injury that it causes to other rights. A classic example is *New York Times v. Sullivan*,<sup>255</sup> which held that speech regarding the conduct of government officials was so central to the democratic process that it should receive First Amendment protection so long as it was made in good faith, even if it turned out to be false and damaging to an individual's reputation. In that situation, the value of the speech outweighed the injury to other rights.<sup>256</sup> The question is whether this is also true of violent pornography.

As I suggested above, the strongest argument for extending some First Amendment protection to pornography is that it promotes self-fulfillment for some individuals.<sup>257</sup> An opponent of regulation might say, then, that even if violent pornography infringes women's rights, this injury is outweighed by the contribution that it makes to the self-fulfillment of those who produce or consume it.

This argument is unconvincing for several reasons. First, the balancing of rights that I have described is subject to a crucial constraint: an alleged right can derive no value from its negation of another right.<sup>258</sup> For example, if personal security is a right, then threats of violence are wrongful, and this conclusion cannot be overcome merely by asserting that one enjoys causing others to fear for their safety. Similarly, if individuals have a right to reputation, this right cannot be defeated simply by arguing that one derives fulfillment from defaming them. In short, speech or conduct that infringes

255. 376 U.S. 254 (1964).

256. *Id.* at 279–80.

257. See *supra* Part II.C.

258. See Heyman, *Righting the Balance*, *supra* note 86, at 1356.

another right cannot be privileged on account of the very reason that makes the speech or conduct wrongful in the first place, but only because it promotes some other value (such as the value of democratic self-government in *New York Times*).

The implications of this point should be clear. If individuals derive fulfillment from viewing violent pornography, this fulfillment must derive either from what is distinctive to such pornography (the portrayal of violence), or from what is not distinctive to it. In the latter case, there is no reason to protect violent pornography, because the fulfillment can be derived in ways that do not violate the rights of other people. On the other hand, if the fulfillment derives from what is distinctive to violent pornography, this must be due to the fact that it portrays women in a violent and degrading way. But this is precisely what makes the pornography wrongful in the first place.

It follows that even if some viewers obtain fulfillment from violent pornography, this cannot count as a reason to protect it. Some analogies should make the point crystal clear. No one would argue that an individual's right to be free from rape should be balanced against the pleasure that a rapist might derive from it. If individuals have a right to be free from compelled sex, then the desire to force sex on another is wrongful in itself and cannot count as a reason to protect the conduct. To do so would be to allow an act to be justified by the very thing that makes it wrongful in the first place. This point is not limited to physical wrongs but extends to dignitary ones as well. Thus, no one would argue that an individual's right to privacy should be balanced against the pleasure that a voyeur might take in invading it. The same is true of violent pornography: if it violates women's rights, then the fact that some individuals derive pleasure from that violation cannot count as a reason to protect it.

On one level, this discussion merely underlines the idea that individuals have no right to pursue self-fulfillment in a way that depends on denying the legitimate self-fulfillment of others. But one may also question the value of the fulfillment that can be derived from violent pornography. As I have suggested, the self is a unity of the general and the particular: the self consists not only of what makes a particular individual unique, but also of those general qualities she shares with others.<sup>259</sup> The most basic of these qualities is the individual's humanity. In turn, one of the most fundamental

259. See *supra* Part III.A.2.

aspects of humanity is the requirement that one recognize the humanity of others. But violent pornography disrespects the humanity of others, and therefore is at odds with the individual's own humanity. While viewing violent pornography may satisfy the particular desires of an individual, it does so only at the expense of another, deeper aspect of self-fulfillment, that is, the realization of one's nature as a human being. For this reason, the value of violent pornography for self-fulfillment is at best deeply ambivalent.

To put the point in a different way, the self has not only an individual but also a social side. As Mill observes, on balance, rules that require individuals to respect the rights of others do not undermine human development, but rather promote it.<sup>260</sup> Of course, such rules are necessary to protect the capacity of others to engage in self-development.<sup>261</sup> And while such rules may limit an individual's ability to gratify his own desires, he receives "a full equivalent in the better development of the social part of his nature, rendered possible by the restraint put upon the selfish part," for such restraints tend to "develop[] the feelings and capacities which have the good of others for their object."<sup>262</sup>

Finally, the self-fulfillment argument is unconvincing for another reason—one that has to do with the nature of sexual freedom and desire. Unlike some other kinds of desire, such as hunger or thirst, sexual desire is not (at least characteristically) a desire for a nonhuman object, but a desire for another human being. In other words, sexual desire is *relational*—it is a desire to enter into relations with another person. Similarly, the right to seek the fulfillment of one's sexual desires through relations with another person is what may be called a *relational right*—a right to interact with others in a certain way, or to participate in a common activity or good.<sup>263</sup> As a relational right, it must be exercised in a way that is consistent with the rights of the other participants.<sup>264</sup> It follows that the idea of sexual freedom does not include a right to fulfill one's desires in a way that violates the rights of other persons who are the objects of those desires. Once again, this is clear in the case of rape and invasion of privacy. It is also true of violent pornography, which portrays women collectively

260. MILL, *supra* note 137, at 60.

261. *Id.*

262. *Id.*

263. See Heyman, *Righting the Balance*, *supra* note 86, at 1347–48 (discussing concept of a relational right).

264. See *id.*

in a way that is inconsistent with their fundamental rights to dignity and recognition.<sup>265</sup>

For these reasons, we may conclude that violent pornography in general does not have sufficient value to outweigh the injuries that it causes to the rights of others. It follows that, in general, such material should not be protected by the First Amendment.

## 2. Material that Has Serious Value

But what of sexual material that portrays violence against women, but which, to use the language of the Supreme Court's obscenity test, reasonably may be thought to have "serious literary, artistic, political, or scientific value"?<sup>266</sup> Should such material be entitled to protection under a rights-based approach to the First Amendment?

In many cases, works with serious value do not violate the rights of women at all. Consider a film or novel that graphically portrays rape for the purpose of showing how brutal and dehumanizing it is. Although this work depicts violence against women, it does not do so in a way that is intended to show such violence as legitimate or desirable.<sup>267</sup> For this reason, the work does not violate the right to recognition or the related rights to personality, personal security, and equality.

The same is true of many other works with serious value. In general, such works portray people not as generic types, but as individual characters with distinctive traits and personalities.<sup>268</sup> Because we tend to care about such characters, serious works generally do not portray violence against them as legitimate or desirable (except in cases where violence is legally or morally justified).<sup>269</sup> Moreover, even in cases where unjustified violence is portrayed as

265. The concept of relational rights also provides a response to another argument for protecting violent pornography. As we have seen, one reason for holding that pornography generally falls within the fundamental right to free expression is that it influences the society and its culture. See *supra* text accompanying notes 221–22. But the right to participate in and contribute to the common culture is a relational right, which must be exercised with due regard for the rights of other citizens. See Heyman, *Righting the Balance*, *supra* note 86, at 1347–48. Because violent pornography infringes those rights, it has no general claim to protection as an exercise of social liberty.

266. *Miller v. California*, 413 U.S. 15, 24 (1973).

267. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, at 176 (making a similar argument under the model ordinance).

268. See CLOR, *OBSCENITY AND PUBLIC MORALITY*, *supra* note 168, at 236–38.

269. See *id.* at 231–32.

being legitimate or desirable, if this violence is directed against individualized characters, the work is generally best understood as a story about *those particular characters*, rather than *women in general*. Because the work does not explicitly or implicitly refer to women in general, it does not violate their rights. Nor does the work violate the rights of any individual woman (unless the character portrayed is an actual person, as in the University of Michigan case discussed above<sup>270</sup>).

In these cases, the work does not injure the rights of others at all, and so there is no need to reach the question of whether such an injury is outweighed by the value of the speech. Suppose, however, that there are some works that do portray women in a generic way, and that represent violence against them as legitimate and desirable, but that nevertheless have serious literary, artistic, or other value. Should works of this sort (say, those of the Marquis de Sade) be protected by the First Amendment? On one side, it may be argued that the right to recognition is the foundation of all other rights, including that of free speech. Because recognition is the most fundamental right, it should prevail in case of conflict with other rights. To put it in a slightly different way, all the rights that an individual has, including freedom of speech, ultimately depend on his right to recognition. But such recognition carries with it an obligation to recognize others as persons. Individuals can have no rights that are inconsistent with this basic obligation. It follows that the right to free speech does not extend to speech that denies recognition to others.<sup>271</sup>

However convincing these arguments may be as applied to violent pornography in general, I believe that the opposing view is more persuasive as applied to works that have serious literary or artistic value, in the sense that they seek to affect our basic understanding of human life and the world. Such works have relatively limited impact on the rights of others (at least in a direct or immediate way), while they make some contribution to intellectual life. Under these circumstances, it is reasonable to conclude that they should be protected despite the injury that they may cause to the rights of others.

I should make clear that, in saying this, I do not mean to imply that such works should be protected because they may turn out to be

270. See *supra* text accompanying notes 232–33.

271. MacKinnon reaches a similar conclusion based on the overriding importance of equality. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, at 152–53 (“[I]f a woman is subjected, why should it matter that the work has other value?”).

true. As I have argued elsewhere, recognition is not only the most fundamental right, it is also a basic condition for the search for truth.<sup>272</sup> This search requires a willingness to move beyond the bounds of one's own subjective viewpoint and to engage in dialogue with others in an effort to develop a more objective, or at least shared, understanding of ourselves and the world. To engage in this dialogue, it is necessary to recognize others as human beings capable of taking part in this activity. Indeed, mutual recognition is not merely an essential condition for the search for truth; it will also be an integral part of any truth that is arrived at through this process.

There are strong reasons, then, to believe that recognition-denying speech is contrary to the fundamental truth about human beings. Thus, speech of this sort should not be protected on the ground that it might turn out to be true. Nevertheless, as Mill argues, even false speech can make a contribution to the search for truth, if only by leading to a clearer perception of the truth, and by giving us greater assurance that all viewpoints have been considered.<sup>273</sup> Moreover, serious works of art or literature generally express some truths, at the same time that they falsely deny recognition to other persons. In this way, they contribute to a more comprehensive understanding of truth. In addition, engaging with such works in a critical way promotes the development of our intellectual and moral faculties. Finally, in addressing the reader or viewer as an intelligent person, a serious work of art or literature may be said to recognize that individual's humanity in a practical way—even when she turns out to be one of the very people whose humanity the work is intended to deny. In this deeply ironic way, serious works of art or literature are compelled to recognize the humanity of other people, even when they are intended to do the opposite.

In short, while violent pornography generally should be unprotected, protection should be accorded to works that have serious value, either on the ground that they do not injure the rights of others, or on the ground that the injury they cause is outweighed by their value. Of course, this does not imply that feminists are not justified in criticizing such works and combating their influence. Indeed, the Millian arguments for freedom of speech and thought depend on the notion that false beliefs will be subjected to vigorous criticism. Although serious works have a right to protection under

272. See Heyman, *Hate Speech*, *supra* note 226, at lxii–lxiii.

273. See MILL, *supra* note 137, at 34–44.

the First Amendment, those works that deny recognition to others are properly regarded as contrary to morality and injurious to the social and cultural life of the community. These effects should be combated through moral, social, and cultural means, even though the works cannot be regulated by law. To put it another way, the struggle for recognition is one that takes place on many different levels—legal, political, moral, social, and cultural. Law plays an essential part in this effort, but other forms of action are no less important.

### C. Conclusion

Although the radical feminist critique of pornography is too sweeping, it is fundamentally true as applied to violent pornography. In this Part, I have shown that this critique can be expressed within the framework of a rights-based approach to the First Amendment—an approach that seeks to present a principled and coherent account of the foundations and limits of freedom of speech. Violent pornography infringes the rights of women to personality, personal security, and equality, as well as the foundational right to recognition. Moreover, violent pornography generally does not have any important value that justifies the injuries that it causes. For this reason, such pornography should not receive protection under the First Amendment. However, an exception should be made for works of serious value. In general, such works do not violate the rights of others, and in cases where they do, it is reasonable to hold that they should be privileged despite the injuries that they cause.

In *Butler v. Regina*,<sup>274</sup> the Supreme Court of Canada followed a similar line of reasoning in upholding a federal anti-pornography law. Although the law was originally based on the traditional conservative view that obscene materials contravene public morality, the court held that this rationale was no longer sufficient to justify the law after the adoption of the Canadian Charter of Rights and Freedoms in 1982.<sup>275</sup> Because the statute restricted expression on the basis of its content, the Court found that the law infringed the right of free expression protected by section 2(b) of the Charter.<sup>276</sup> The dispositive question then became whether this restriction was allowable under section 1, which provides that all Charter rights are subject to “such

274. [1992] 1 S.C.R. 452 (Can).

275. *Id.* at 492–93.

276. *Id.* at 488–89.

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>277</sup> On this point, the Court ruled that while a ban on all pornography could not be justified, the law could properly ban violent and degrading pornography.<sup>278</sup> On one hand, such pornography generally had little value.<sup>279</sup> On the other hand, Parliament reasonably could believe that such material caused substantial harm to women by undermining their rights to dignity, equality, and freedom from violence—values that were “of fundamental importance in a free and democratic society.”<sup>280</sup> In this way violent and degrading pornography also violated the fundamental norms of the community.<sup>281</sup> For these reasons, the Court concluded that such pornography fell outside the Charter’s protection. However, the Court recognized an exception for works of serious value.<sup>282</sup>

In the United States, the courts have taken a very different approach to the problem of pornography. In *Miller v. California*<sup>283</sup> and *Paris Adult Theatre I v. Slaton*,<sup>284</sup> the Supreme Court reaffirmed the traditional morality-based approach. At least thus far, however, the courts have rejected an approach based on harm to women. The leading case is *American Booksellers Association v. Hudnut*,<sup>285</sup> in which Judge Easterbrook, writing for a panel of the Seventh Circuit, ruled that an Indianapolis ordinance based on the MacKinnon-Dworkin model violated the First Amendment. Remarkably, Easterbrook did not deny that pornography causes serious harm to women. Instead, he wrote:

[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic prac-

277. CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 1 (1982).

278. *Butler*, [1992] 1 S.C.R. at 484–85.

279. *Id.* at 499–501, 509.

280. *Id.* at 478–81, 493–99, 509.

281. *Id.* at 493.

282. *Id.* at 505–06; see also *id.* at 481–83 (discussing the nature of this defense). For a variety of perspectives on *Butler*, see Daniel O. Conkle, *Harm, Morality, and Feminist Religion: Canada’s New—But Not So New—Approach to Obscenity*, 10 CONST. COMMENT. 105 (1993); Kathleen E. Mahoney, *Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propaganda*, in *THE PRICE WE PAY*, *supra* note 171, at 277; Thelma McCormack, *Censorship in Canada*, 38 N.Y.L. SCH. L. REV. 165 (1993).

283. 413 U.S. 15 (1973).

284. 413 U.S. 49 (1973).

285. 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).



tice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]."<sup>286</sup>

"Yet this," Easterbrook continued, "simply demonstrates the power of pornography as speech."<sup>287</sup> Under the First Amendment, this is a matter for the people to determine: "[A]n idea is as powerful as the audience allows it to be."<sup>288</sup> To be sure, ideas can be "pernicious": "The beliefs of the Nazis led to the death of millions, those of the Klan to the repression of millions."<sup>289</sup> Under the First Amendment, however, speech may not be restricted on this ground. Any other approach "leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us."<sup>290</sup>

In general terms, then, Easterbrook's objection to the Indianapolis ordinance was that it restricted speech because of the ideas it contained, or because of fear that those ideas would lead to "unhappy consequences" such as violence and discrimination.<sup>291</sup> But Easterbrook's objection also took a more specific form. By defining pornography in terms of the subordination of women, the ordinance had "establishe[d] an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not."<sup>292</sup> In this way, the ordinance discriminated between different perspectives in violation of the fundamental First Amendment rule against viewpoint discrimination.<sup>293</sup>

The rights-based theory provides a response to both of these objections. It is certainly true, as Easterbrook argues, that under the First Amendment government may not restrict speech merely be-

286. 771 F.2d at 329 (footnote omitted) (quoting Indianapolis Code § 16-1(a)(2)). In a footnote, Easterbrook qualified this statement, observing that the evidence on the effects of pornography was conflicting and "very difficult to interpret." *Id.* at 329 n.2. "In saying that we accept the finding that pornography . . . leads to unhappy consequences," he explained, "we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions." *Id.* (citation omitted).

287. *Id.* at 329.

288. *Id.* at 327-28.

289. *Id.* at 328.

290. *Id.* at 330.

291. *Id.* at 328, 329 & n.2.

292. *Id.* at 328.

293. *Id.* at 324, 328, 332.

cause it disapproves of the ideas expressed, or because it fears that the speech may be persuasive or effective. But the Amendment should not be interpreted to protect speech that unjustifiably invades the rights of others. The central question in cases like *Hudnut* should be whether particular forms of pornography infringe those rights without adequate justification. If so, then the speech may be regulated without violating either the general principles of the First Amendment or the rule against viewpoint discrimination in particular.

Thus, *Hudnut*'s rationale for rejecting the harm-based approach to pornography is unpersuasive.<sup>294</sup> Before we conclude that *Hudnut*'s position is mistaken, however, we should consider whether it can be defended in a different way. My argument in this Part has been directed toward showing that the regulation of violent pornography can be justified in principle. As we have seen, however, constitutional interpretation also has an important cultural dimension. In determining the scope of free speech, what is important is not only how rights should be understood in theory, but also how they are understood within a particular social and cultural order.<sup>295</sup>

The thrust of my argument has been that violent pornography inflicts collective injury to women by violating their rights to dignity and recognition as human beings. In response, some might object that the American understanding of rights focuses on the traditional rights of life, liberty, and property, and that the notion of dignitary rights provides too tenuous a basis for restrictions on free speech. Moreover, it might be said that regarding women as a group would run contrary to the strong American commitment to individualism, and that the best way to secure the dignity and equality of women is to view them as individuals, not as a group. On these grounds, it could be argued that *Hudnut* was right to conclude that a harm-based approach to pornography was inconsistent with the American understanding of freedom of speech.

This argument has considerable force. Among other things, it does much to explain why American and Canadian courts have taken such divergent positions on the pornography issue. Nevertheless, the

294. For fuller criticism of this rationale, see Heyman, *Spheres of Autonomy*, *supra* note 184, at 698–703; Sunstein, *supra* note 177. For a defense of Easterbrook's view, see Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

295. See *supra* Part I.D.7.

argument is flawed, for it rests upon an overly unitary and static view of American society and culture.<sup>296</sup> Although it is true that many Americans hold the positions that the argument attributes to them, many others would disagree—that is, they would be more willing to protect people against dignitary and emotional injury, and to believe that society should be concerned with harms to groups. On issues such as these, no clear consensus exists within American society. Instead, individuals and groups hold divergent views, reflecting differing beliefs, values, and experiences. Moreover, the views that people take on such issues are capable of changing over time.

For these reasons, it cannot be said that the harm-based approach to pornography conflicts with a single, broadly accepted “American understanding” of freedom of speech. Instead, as we have seen, the validity of that approach depends on whether a particular form of pornography violates the rights to recognition and dignity. The answer to this question depends in turn on whether our society does or should recognize those rights. Insofar as this is an issue of principle, judges can legitimately rule on it. On the other hand, to the extent that it is a question of the society’s particular understanding, the issue should be determined through political, social, and cultural debate. As I have argued, restrictions on some forms of pornography are justifiable in principle. In cases like this, courts should not interpret the Constitution in such a way as to cut off an ongoing social debate, or to prevent new rights from emerging and being recognized by the community.

If the argument of this Part is correct, then as a matter of substantive right, violent pornography should be regarded as outside the protection of the First Amendment. Under the rights-based theory, however, this is not the only important issue. Instead, even when a regulation is justifiable on substantive grounds, it may be improper for other reasons. In particular, laws that regulate speech must be carefully reviewed for vagueness and overbreadth, to ensure that they demarcate the boundary between lawful and unlawful speech in a reasonably clear manner, and that they sweep no more broadly than necessary to protect the rights of others.<sup>297</sup> In my view, the Indian-

296. For a critique of conceptions of culture as “stable, coherent and singular,” see Robert C. Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 487 (2003).

297. See Heyman, *Righting the Balance*, *supra* note 86, at 1316–17 (explaining that even where regulation is substantively justified, it nevertheless may be improper for practical and institutional reasons of this sort).

apolis ordinance was objectionable on these grounds.<sup>298</sup> Would the same be true of laws that were limited to violent pornography? Like so many aspects of the pornography debate, this issue is certain to be controversial.<sup>299</sup> One point seems clear, however: the approach that I am advocating is less problematic in this regard than the current doctrine. Under the *Miller* test, a work may be banned on grounds of obscenity if

(a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>300</sup>

The restrictions that I have defended would regulate only material that falls within the *Miller* definition, and would further be limited to material that portrays *sexual violence* against a group of people.<sup>301</sup> Moreover, any ban on violent pornography should draw an exception for works with serious value.<sup>302</sup> A law of this sort would not only be

298. In addition to raising substantial vagueness problems, see *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1337–39 (S.D. Ind. 1984), *aff'd mem.*, 475 U.S. 1001 (1986), the ordinance made no exception for works with serious value, and thus might well have extended to material that should be constitutionally protected under both traditional doctrine and a rights-based approach.

299. Indeed, many civil libertarians would doubt whether it is possible to regulate pornography in a way that does not violate the vagueness and overbreadth doctrines. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) (concluding that “none of the available formulas . . . can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance” between First Amendment freedoms and “the asserted state interest” in regulating obscene materials); Strossen, *supra* note 246, at 1103–04 (suggesting that definitions of obscenity and pornography are inherently “vague and subjective”).

300. *Miller v. California*, 413 U.S. 15, 24 (1973) (internal quotations and citations omitted).

301. A law of this sort should not be held unconstitutional under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, the Court took the position that, although the government could properly ban an entire category of unprotected speech, such as fighting words or obscenity, the government generally could not choose to ban only a subset of such material. According to Justice Scalia, such selective regulation generally runs afoul of the First Amendment rule against content discrimination. See *id.* at 382–90. However, Scalia acknowledged that selective regulation was permissible “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” *Id.* at 388. For example, “[a] State might choose to prohibit only that obscenity which is the most patently offensive in its *prurience*.” *Id.* Similarly, it would appear that a state could reasonably choose to prohibit only that obscenity that depicts sexual violence, on the ground that, in contemporary society, such portrayals are the most patently offensive to community standards. For a critique of *R.A.V.*’s extension of the content neutrality doctrine to unprotected speech, see Heyman, *Spheres of Autonomy*, *supra* note 184, at 710–14. This Term, the Supreme Court retreated from the rigid formalism of *R.A.V.* in *Virginia v. Black*, 71 U.S.L.W. 4263 (2003) (upholding a ban on cross burning with the intent to intimidate others).

302. See *supra* Part III.B.2.

consistent with the *Miller* standard, it would be *narrower* than the anti-obscenity laws that are permitted by that standard. Thus, even from a civil libertarian perspective, this approach would appear to represent an advance over current doctrine.

As this discussion shows, laws that are designed to prevent harms to women from pornography need not conflict with the traditional doctrine set forth in *Miller*. To put it another way, the approach that I am advocating would seek some common ground between the traditional and feminist views, by contending that the portrayals that are most contrary to contemporary community standards are those that glorify sexual violence. In addition to the theoretical reasons that I have given for seeking common ground, an approach of this sort is likely to be far more effective in moving the law in a feminist direction than a position that emphasizes the differences between the feminist view and traditional law.<sup>303</sup>

#### IV. PORNOGRAPHY AND THE RIGHTS OF THE COMMUNITY

In the previous Part, I explored whether pornography could be regulated because it causes injury to women. In this Part, I turn to conservative concerns about obscenity and pornography.

Traditionally, obscenity regulation is said to be justified to protect “*the social interest in order and morality.*”<sup>304</sup> Insofar as this means preventing moral harms to willing viewers, the justification is at odds with a rights-based approach. Under that view, speech may not be restricted simply because the community regards it as immoral or desires to prevent moral harms to those who choose to view it.

In this Part, I explore whether, and to what extent, the conservative case for obscenity regulation can be accommodated within a rights-based approach. When recast in rights-based terms, the conservative view focuses on the rights of communities. It asserts that

303. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 12, at 147 (insisting that the traditional concept of obscenity and the feminist concept of pornography “represent two entirely different things”). By contrast, it was by reinterpreting a traditional anti-obscenity law to focus on harm to women that the Canadian Supreme Court was able to reach the result it did in *Butler*. See *supra* text accompanying notes 274–82.

I should note that, while my argument in this Part has focused on the impact of violent pornography on the rights of women, the argument is not necessarily limited to those rights. Thus, if there are genres of violent pornography that deny recognition to men or other groups (or that otherwise violate their rights), such material should be regarded as wrongful for the same reasons.

304. *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (emphasis added in *Roth*).

communities should have some power to regulate pornography in order to protect the community's rights and to promote its good. Although this approach is primarily identified with moral conservatives, it also may be regarded as a communitarian position.<sup>305</sup>

This view is likely to be highly controversial, not only in its application to the pornography debate, but also because of its reliance on the notion of community rights. As I have suggested, however, such rights are deeply rooted in the liberal tradition.<sup>306</sup> Indeed, in both classical and modern liberal thought, free speech itself has a collective dimension.<sup>307</sup> If the rights of the community provide part of the justification for free speech, however, they may also justify certain limitations on that right. In the following sections, I consider whether this is true with respect to pornography. First, I shall argue that *violent* pornography constitutes a wrong not only to women, but also to the community as a whole. Such material may be banned without violating the First Amendment. Second, I shall argue that pornography may be excluded from public places in order to protect the rights of unwilling viewers as well as those of the community itself. Third, I shall contend that the community has a right to shield minors from exposure to pornography. Under the second and third points, the state may not ban sexually oriented material, but may regulate the ways in which it is displayed and distributed. Finally, I shall argue that the state may properly take decency into account when it provides subsidies for expression, such as public funding for the arts. In these four ways, the conservative position can be accommodated within the framework of the rights-based approach, without undermining the fundamental right to free expression.

#### A. *Violent Pornography*

In Part III, I argued that, by portraying women as mere sex objects that can be used or destroyed at will, violent pornography denies them recognition as human beings. In this way, violent pornography infringes the rights of women. But recognition is not only a right of individuals, it is also a bond of community. As Locke and other classic social contract theorists realized, individuals cannot live in peace, or security, or community with others unless they recognize

305. See *supra* text accompanying note 176.

306. See *supra* Part II.B.2.

307. See *supra* text accompanying notes 205–07.

one another as human beings.<sup>308</sup> In Lockean terms, a denial of recognition “undermine[s] the Foundations of Society.”<sup>309</sup> For this reason, it constitutes a wrong to the community itself, as well as to the particular people who are affected.

Part III further showed that violent pornography undermines other rights of women. But wrongs to individuals often constitute wrongs to the community as well. From a rights-based perspective, the deepest explanation for this is that fundamental rights belong not only to particular individuals, but to all persons or members of the society. Accordingly, an act that violates such a right strikes at all who share that right—the entire community—and not merely the particular individual who is injured.<sup>310</sup> It is for this reason that many violations of individual rights constitute not merely torts (wrongs against private persons), but also crimes (wrongs against the community).

As I argued in Part III, it is reasonable to believe that violent pornography diminishes women’s sense of personal security; represents them in a way that contravenes basic standards of human dignity; and undermines their right to equality. In these ways, pornography infringes rights that belong not merely to women but to all members of the society. For this reason as well, violent pornography may be regarded as a wrong against the community as a whole. Moreover, in most cases, violent pornography lacks any value that would outweigh the injuries that it causes. In such cases, the rights-based approach would allow a ban on violent pornography to protect the rights of the community itself, as well as those who are portrayed by it.

### B. Public Places

Another concern that is shared by conservatives and communitarians relates to the impact that pornography may have on the public environment. I believe that this concern too can be met, at least in part, under a rights-based approach. In particular, communities should have the right to outlaw pornographic displays in public places.

308. See Heyman, *Hate Speech*, *supra* note 226, at xli–xlii, xlviii–l.

309. See, e.g., JOHN LOCKE, A LETTER CONCERNING TOLERATION 49 (James Tully ed., 1983) (1st ed., William Popple trans., 1689).

310. This argument is based on HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 239, §§ 95, 218.

To develop this argument, it is useful to begin with a simple model of speech and other activity protected by the First Amendment.<sup>311</sup> The Amendment protects inward thought and feeling as well as outward expression and communication. In turn, communication includes the following elements: (1) an act of expression by the speaker; (2) the speech itself; and (3) its reception by the listener. In this way, communication involves individual acts by the speaker and the listener. But in many cases it involves more than this. As Charles Taylor has explained, communication transforms what is initially a matter of individual awareness into a matter of common awareness.<sup>312</sup> In other words, the function of communication is not merely to convey thoughts from one individual to another, but also to develop a shared understanding. At the same time, communication forms (or takes place within) a *relationship* between the participants. In this way, communication has not only an individual but also a social dimension. Of course, this social dimension is present in ordinary social life. It is also exemplified by the political discourse that Meiklejohn describes, as well as by art, literature, religion, science, and other forms of social and cultural discourse.

As I have shown elsewhere, this account of communication can serve to illuminate our understanding of the rights protected by the First Amendment.<sup>313</sup> As the Supreme Court emphasized in *Stanley v. Georgia*,<sup>314</sup> under the First Amendment the government may not invade the autonomy of the individual by seeking to regulate the content of her inward thoughts and feelings. In addition, speakers have a right to determine the content of their own expression, while listeners have the right to decide what expression they wish to be exposed to.<sup>315</sup> When the government interferes with those rights, it invades a sphere of autonomy surrounding the individual speaker or listener. Similarly, when the government seeks to control public discourse, it invades the autonomy of the community as a whole, as well as the rights of the individuals involved.

311. The following discussion is more fully developed in Heyman, *Spheres of Autonomy*, *supra* note 184, at 653–66.

312. See CHARLES TAYLOR, *Cross-Purposes: The Liberal-Communitarian Debate*, in PHILOSOPHICAL ARGUMENTS 189–90 (1995); CHARLES TAYLOR, *Irreducibly Social Goods*, in *id.* 138–39; CHARLES TAYLOR, *Theories of Meaning*, in 1 PHILOSOPHICAL PAPERS 259–60, 263–66 (1985).

313. See Heyman, *Spheres of Autonomy*, *supra* note 184, at 653–66.

314. 394 U.S. 557 (1969).

315. See *supra* text accompanying notes 217–18.



On the account that I have just sketched, the activity protected by the First Amendment begins with the individual's subjective thoughts and feelings. The individual may choose to keep these to herself or to communicate them to others. In the latter case, she must translate her thoughts and emotions into a form that can be understood by, and that is of interest to, others as well as herself; that is, she must transform them into a matter of common interest. This account further implies that communication can be of common interest to smaller or larger circles of people—from two or more individuals, to the society at large, to human beings in general. Thus, whether speech is “private” or “public” is a matter of degree. In rough terms, however, we may distinguish between expression that is public, in the sense that it is of common interest to a substantial portion of the community, and expression that is private, in the sense that it is of legitimate interest solely, or at least primarily, to the individual herself or those with whom she chooses to share it.

I should emphasize that, in saying this, I do not mean to imply that a bright line can be drawn between the public and private realms. The difficulty is not merely a practical one, but inheres in the very notions of public and private. The community is composed of individuals, and their goods make up the common good. An essential function of public discourse is to bring the concerns of individuals and groups to the attention of the community, and thereby to transform matters that were once regarded as private (such as domestic violence or workplace safety) into matters of public concern.<sup>316</sup> Indeed, even the most personal matters can be made of common interest, especially through art and literature.<sup>317</sup> For this to take place, however, the individual must transform her thoughts, feelings, and experiences into a form that is not merely personal, but that is understandable by and of interest to others. Moreover, as I have observed, different kinds of expression are of interest to different numbers of people.

In general, pornography may be regarded as falling on the private side of the spectrum. There are few things more deeply personal than an individual's sexual thoughts and desires. Insofar as sexually explicit material is calculated to stimulate or satisfy such desires, it relates to a matter that is intensely personal and private. Material of this sort is of interest to the individuals who choose to view it, but it is

316. See Heyman, *Righting the Balance*, *supra* note 86, at 1352–53.

317. See CLOR, *OBSCENITY AND PUBLIC MORALITY*, *supra* note 168, at 230.

not a matter of common or public interest in the way that political, literary, artistic, scientific, and other forms of discourse are.

Several important conclusions follow. First, as the Supreme Court held in *Stanley*, the state may not ban the mere private possession of pornography. The First Amendment, as well as the right to privacy, protects the individual's right "to read or observe what he pleases" and "to satisfy his intellectual and emotional needs in the privacy of his own home."<sup>318</sup>

Second, just as individuals should be free to view sexual material, they also should be free *not* to. In particular, there is no right to expose other individuals to such material without their consent. Precisely because such material is so deeply personal, individuals should have the right to decide for themselves whether to view it. To put the point another way, viewing such material may be regarded not only as a sort of speech, but also as a sort of sexual experience. But no one has a right to force a sexual experience on another against her will. In the present context, such conduct infringes the other's rights of personality. In particular, exposing others to sexual material against their will may be regarded as an invasion of privacy, or the right to be free from highly offensive intrusions into one's personal life. Such conduct may also violate the right to be free from unjustified infliction of emotional distress.<sup>319</sup> In a workplace setting, such conduct may constitute a form of sexual harassment.<sup>320</sup> Finally, far from being protected by the First Amendment, such conduct contravenes the basic principle of *Stanley*—that respect for autonomy dictates that individuals should be free to decide for themselves what they wish to read or view. In this instance, then, the law is clearly justified in protecting what the Supreme Court has called "[t]he unwilling listener's interest in avoiding unwanted communication."<sup>321</sup>

Third, and somewhat more controversially, the right of individuals to be free from unwanted exposure to sexual material should apply not only in the private but also in the public sphere. It is true,

318. *Stanley v. Georgia*, 394 U.S. 557, 564–65 (1969). Of course, this right should not apply if the possession or use of the material itself causes or perpetuates wrongful injury to another, as the Supreme Court has recognized in the context of child pornography. See *Osborne v. Ohio*, 495 U.S. 103, 108–11 (1990).

319. See *supra* note 170 (citing views of Thomas Emerson and Justice Brennan to this effect).

320. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

321. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

as the Court remarked in *Cohen v. California*,<sup>322</sup> “that ‘we are often “captives” outside the sanctuary of the home and subject to objectionable speech.’”<sup>323</sup> But the Court made this statement in the context of speech that was public in nature. When expression is directed toward the community on political, social, cultural, or other matters of common interest, it may not be restricted merely because some individuals are unwilling to be exposed to it or consider it offensive. Speech that is properly public, and that does not violate the rights of others, may not be restricted for merely private reasons. But pornography presents a very different case. As a general matter, such material is private rather than public in nature. Its predominant purpose is not to contribute to political, social, and cultural debate, but to stimulate or fulfill the sexual desires of individuals. Contrary to the view that is sometimes taken, this does not mean that such material should receive no protection under the First Amendment. But this point does have critical implications for whether there is a right to display such material in public places. On one hand, the public display of such material infringes the rights of other individuals by exposing them to sexual material without their consent. To be sure, it is sometimes possible to avoid such material by averting one’s eyes.<sup>324</sup> Yet individuals who are in public places should have a right to enjoy the public environment and to participate in the life of the community without averting their eyes from intensely personal matters that they do not wish to see. Thus the public display of pornographic material infringes the rights of others. On the other hand, because it is private, such material is not entitled to the same immunity as public speech in public places. While public speech may not properly be restricted to protect the sensibilities of private persons, there is no persuasive reason to hold that the First Amendment imposes the same limitation on the regulation of private speech. For these reasons, the law should be allowed to restrict the display of pornographic material in public places.

It is important to note that, up to this point, the argument that I have developed has been based on individual rights—in particular, the right to be free from unwanted exposure to sexual material. It is

322. 403 U.S. 15 (1971).

323. *Id.* at 21 (quoting *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970)).

324. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975).

for these reasons that many liberals would support a ban on public display.<sup>325</sup>

Can such a policy also be justified by reference to the rights of the community, as some conservatives and communitarians would urge? One argument to this effect would proceed as follows. What is seen or done in public places affects the public environment. That environment is a matter of common awareness, and therefore a matter of concern to the entire community. For this reason, the community generally should have a right to regulate things that affect the public environment, for example, by adopting various forms of aesthetic regulation. But public displays of sexual material may reasonably be thought to have an adverse impact on the public environment. Therefore, the community has a right to restrict such displays. Of course, the community's power to regulate the public environment may not be exercised in a way that violates the First Amendment or other constitutional rights. Under the public forum doctrine, citizens have a right to engage in public speech in public places,<sup>326</sup> and the First Amendment generally bars the government from restricting such speech on the basis of its content, or because it finds the speech offensive.<sup>327</sup> Once again, however, these doctrines apply to speech that is public in nature, not to private speech such as sexually explicit material. Therefore, the First Amendment should not bar the community from regulating the public display of such material in the interest of the public environment.

A more controversial argument would contend that the public display of sexual material may be regulated because it contravenes the substantive values or norms of the community. In its most general form, such an argument might proceed as follows. In addition to being individuals, human beings also belong to various communities, ranging from personal relationships and families, to workplaces, to other organizations within "civil society," to the community as a whole. Each community is instituted for a particular good, and is characterized by certain norms of conduct.<sup>328</sup> These norms define the conduct that the community considers to be appropriate in the relations of individuals toward one another. At the same time, these

325. See *supra* note 170.

326. See *TRIBE*, *supra* note 170, § 12-24.

327. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

328. See, e.g., *ARISTOTLE*, *supra* note 196, bk. I, ch. 1; *LOCKE*, *GOVERNMENT*, *supra* note 195, bk. II, §§ 2, 77-89.

norms constitute the way of life of the community. In the case of the society as a whole, these norms may be referred to as civility.

In a liberal society (the argument might continue) the community's power to enforce such standards is limited. But the community should have the power to uphold standards of civility within the public sphere.<sup>329</sup> The display of pornographic material may be regulated because it violates these communal standards. At this point, different rationales would be offered. For moral conservatives, the problem would be that the display of such material is inconsistent with the norms of appropriate sexual conduct that a good society seeks to promote. Many feminists would hold that the display of such material is improper because it depicts women in an inappropriate and degrading manner. Some communitarians and neorepublicans also would be concerned that the display of such material would undermine the focus on public discourse and the common good that should characterize the public sphere.

My own inclination is to believe that regulation of public display of sexually explicit material is justified not only by individual rights, but also by some of the more communitarian considerations that I have mentioned. The issues involved are both deep and complex, however, and I shall not attempt to fully resolve them here. Instead, the point that I want to stress is this: although liberals, communitarians, neorepublicans, feminists, conservatives, and others may deeply disagree about the underlying rationale, there is a relatively broad consensus on the ultimate issue—that is, that a ban on the public display of pornography is justified in order to protect other rights, whether those rights are understood to belong to individuals, groups, or the community as a whole. In this way, the issue provides a striking example of how a rights-based approach may allow us to develop some common ground among sharply differing ideological positions.<sup>330</sup>

329. See, e.g., Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281.

330. Of course, any regulation of pornography in public places would have to satisfy concerns about vagueness and overbreadth. See *supra* text accompanying notes 297–302. But this is a challenge that has to be faced not only by a rights-based approach, but also by any view—conservative, liberal, or progressive—that would allow the community to regulate pornography in public places. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84, 113 (1973) (Brennan, J., dissenting) (rejecting traditional obscenity law, partly because of vagueness and overbreadth concerns, but nevertheless suggesting that state may regulate the manner of distribution of sexually oriented material to protect children and unconsenting adults).

### C. *Shielding Children from Pornography*

The community also should have authority to protect children from exposure to pornography—not only by restricting the public display of such material,<sup>331</sup> but also by regulating the manner in which it is distributed.

As a general matter, individuals should have the right to see or hear what they choose. But this right does not apply with the same force to children. For the liberal tradition, rights are grounded in autonomy, or the capacity for rational self-direction.<sup>332</sup> Because children do not fully possess this capacity, they lack full autonomy. Instead, others must care for them, not only to safeguard their physical well-being, but also to promote their intellectual, emotional, and moral development, and to enable them to develop into autonomous individuals.<sup>333</sup> In a liberal society, this responsibility rests primarily with parents, who have both a duty and a right “to direct the upbringing and education of [their] children.”<sup>334</sup> It follows that parents should have some authority to determine what forms of expression their children are exposed to.

In our society, many parents believe that certain kinds of material—such as those containing graphic sex or violence—are harmful to children. As I shall suggest below, this belief is a reasonable one, and parents therefore should have a right to shield their children from such material.

It might seem that such authority should rest solely with parents, and that the state should have no role. But the widespread availability of such material in the larger society makes it virtually impossible for parents to act effectively on their own. Instead, if parents are to have meaningful rights in this area, the community must have the power to regulate the manner in which such material is distributed.<sup>335</sup>

331. *See supra* Part IV.B.

332. *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 195, bk. II, § 63.

333. *See, e.g., id.* §§ 55–67; MILL, *supra* note 137, at 11, 97.

334. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

335. To put the point in traditional social contract terms, although the responsibility for educating children naturally belongs to parents, *see* LOCKE, GOVERNMENT, *supra* note 195, bk. II, § 56, it would be reasonable for them to delegate some of this power to the community in order to enable them to exercise their rights more effectively.

Moreover, it is important to remember that, for the liberal tradition, the rights of parents are rooted in their duty to promote the well-being of their children. *See id.* § 67. In situations where parents neglect or violate this duty, the state may and should act to protect the children's well-being. *See, e.g.*, MILL, *supra* note 137, at 97–98 (arguing that the state should require parents to educate their children). It follows that, although parents should have substantial

Moreover, because human nature has a social dimension, the society and its culture inevitably have a powerful impact on the character of its members. Although liberalism presumes that adults are sufficiently autonomous to resist harmful social and cultural influences, this assumption cannot be made with respect to children. For these reasons, the society should have a duty to restrain itself and its members (such as those who make and sell pornography) from exposing minors to material that the community reasonably believes to be harmful. This duty applies with special force in areas where the society has undertaken a positive responsibility with regard to children, such as public education. But the duty also applies more generally.

In short, the community's authority to shield children from harmful material rests on two interrelated justifications: (1) it is legitimate for the state to assist parents in the exercise of their own right to protect their children against material they reasonably consider to be harmful; and (2) the society has an independent duty to restrain itself and its members from exposing children to material it reasonably regards as harmful. In both cases, the community must make a judgment about what material is harmful to children. It is also necessary to consider how much value a particular form of material has, for regulation is justified only where it is reasonable to believe that the harm that flows from the material outweighs its value. Restrictions that cannot be justified in this way are not only improper, they may also violate the First Amendment rights of older minors to decide for themselves what forms of expression they wish to see or hear.<sup>336</sup> Although children lack full autonomy, their capacity for self-determination increases over time. As they near adulthood, they develop an increasing ability to exercise rights to self-expression and to receive information and ideas. Although parents and the state retain the authority to impose reasonable restrictions, regulations that are unreasonable may violate the First Amendment.

authority to determine what expression their children are exposed to, this authority is not unlimited. It seems clear, for example, that the state reasonably could determine that preteens should not be admitted to theaters showing sadomasochistic pornography, regardless of parental consent. In short, while authority in this area should rest largely with parents, *see Reno v. ACLU*, 521 U.S. 844, 877 (1997) (emphasizing parental responsibility), it would be a mistake to conclude that the state has no legitimate role. *See Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (recognizing that the state "has an independent interest in the well-being of its youth").

336. *See, e.g., Reno*, 521 U.S. at 895 (O'Connor, J., concurring in the judgment in part and dissenting in part) (recognizing that unjustified restrictions would violate the rights of minors under the First Amendment).

Of course, the question of what material is harmful to children is a controversial one. This is particularly true in the area of sexuality. Some people are skeptical that minors are harmed by exposure to sexually explicit material, or that such material can reasonably be distinguished from other expression (such as information on contraception, reproductive health services, and sexually transmitted diseases) that minors should have access to.<sup>337</sup> However, it is fair to say that most people in American society, including most parents, believe that children should not be exposed to pornography. To be sure, they would give differing explanations for this position. Conservatives maintain that pornography conflicts with appropriate moral attitudes toward sexuality, while many feminists disapprove of such material on the ground that it degrades women. Finally, while liberals are less inclined to regard pornography as harmful in general, many would regard it as inappropriate for children—for example, on the ground that it portrays sexuality in a depersonalized way which undermines the connection between sex and love. Although these views differ in their rationale, they agree in holding that it is inappropriate for children to be exposed to pornography. This strengthens the case for regulation, by showing that multiple perspectives lead to the same result.<sup>338</sup> Moreover, these views are not mutually exclusive: many people believe that pornography is harmful to children for several (or even all) of these reasons. Once again, this provides a good example of how it is possible to reach some common ground in the culture wars.

The view that I have outlined is generally consistent with the Supreme Court's decisions on the subject. In *Ginsberg v. New York*,<sup>339</sup> Justice Brennan, writing for the Court, declared that a state "legislature could properly conclude that parents and others, teachers for example, who have . . . primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."<sup>340</sup> In addition, he asserted that "[t]he State . . . has an

337. See, e.g., MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN (2001); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 501–06 (2000).

338. See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1642–43 (1987) (arguing that positions that are supported by a "web" of diverse values "provide[] a basis for broader social consensus" than those that are supported by a single value).

339. 390 U.S. 629 (1968).

340. *Id.* at 639.



independent interest in the well-being of its youth.”<sup>341</sup> Deferring to the legislature’s determination that exposure to pornography tended to “‘impair[] the ethical and moral development’” of young people,<sup>342</sup> the Court sustained the constitutionality of a statute that barred the sale to persons under the age of seventeen of material that met the Supreme Court’s obscenity test, as adapted to apply to minors.<sup>343</sup> In subsequent cases, the Court has repeatedly recognized that the state has “a compelling interest in protecting the physical and psychological well-being of minors,” and that “[t]his interest extends to shielding minors from the influence of [material] that is not obscene by adult standards,” but that is reasonably thought to be harmful to minors.<sup>344</sup> At the same time, however, the Court has made clear that this “interest does not justify an unnecessarily broad suppression of speech addressed to adults.”<sup>345</sup>

How should the First Amendment apply in cases where the interests of both adults and children are involved? In some contexts this problem poses little difficulty. For example, it is possible to require identification for entry to adult bookstores and establishments, and in this way to effectively exclude most minors.<sup>346</sup> In other contexts, however, such as the Internet, it is not yet technologically feasible to shield children from exposure to sexual material without imposing some burdens on access by adults.<sup>347</sup> In some recent cases, the Court has shown an inclination to protect adult speech in this situation.<sup>348</sup> Treating laws intended to protect children as content-

341. *Id.* at 640.

342. *Id.* at 641–43 (quoting N.Y. PENAL LAW § 484-e (1965)).

343. Under the New York statute, material was deemed “harmful to minors” if it predominantly appealed to the prurient interest of minors, was “‘patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,’” and lacked “‘redeeming social importance for minors.’” *Id.* at 633 (quoting N.Y. PENAL LAW § 484-h (1965)).

344. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (citations omitted).

345. *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

346. *See id.* at 887, 889 (O’Connor, J., concurring in judgment and dissenting) (citing Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 886 (1996)).

347. *See id.* at 856–57 (opinion of Court).

348. *See, e.g., United States v. Playboy Entm’t Group*, 529 U.S. 803 (2000) (invalidating provision of Telecommunications Act of 1996 requiring sexually explicit cable television channels to fully scramble or block those channels, or to limit transmission to late-night hours when children were unlikely to be viewing); *Reno*, 521 U.S. 844 (striking down Communications Decency Act of 1996, Congress’s first effort to shield children from “indecent” and “patently offensive” material on Internet). *But cf. Ashcroft v. ACLU*, 535 U.S. 564 (2002) (reversing a decision holding that a subsequent statute enacted for this purpose, the Child Online Protection

based restrictions on expression, the Court has subjected such laws to “the most stringent review,” and has struck them down if they are unable to meet the demanding requirements of strict scrutiny.<sup>349</sup> In my view, however, a more nuanced approach is called for. From a rights-based perspective, the problem is one of reconciling competing rights: the rights of adults to view pornography, on one hand, and the rights of parents and the community to shield children from such material, on the other. Resolving this problem calls for a careful consideration of the nature and value of the rights on both sides, as well as the alternative ways in which each interest could be satisfied.<sup>350</sup>

On this view, the Court in *Reno v. ACLU*<sup>351</sup> was clearly justified in striking down the Communications Decency Act, Congress’s first effort to regulate Internet pornography, for the statute was far broader than necessary to shield children from harmful material.<sup>352</sup> It does not necessarily follow, however, that all such efforts should be held unconstitutional.<sup>353</sup> Although adults should have a right to view pornography, it is not unreasonable to require them to bear some burdens to prevent that activity from resulting in harm to children—for example, by paying the cost of placing such material behind “identification screens” intended to exclude minors.<sup>354</sup>

Act, was unconstitutional, and remanding for consideration of a wide range of First Amendment issues).

349. *Reno*, 521 U.S. at 868.

350. See Heyman, *Spheres of Autonomy*, *supra* note 184, at 709.

351. 521 U.S. 844 (1997).

352. For example, the statute’s prohibitions were not limited to material that would be “harmful to minors” under *Ginsberg v. New York*, *see supra* note 343, and made no exception for material with serious value. *See Reno*, 521 U.S. at 865, 877.

353. *See ACLU v. Reno*, 929 F. Supp. 824, 877 (E.D. Pa. 1996) (opinion of Dalzell, J.) (three-judge court) (asserting that under the First Amendment “Congress may not regulate indecency on the Internet at all”), *aff’d on other grounds*, 521 U.S. 844 (1997).

354. On remand from the Supreme Court’s decision in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the Third Circuit recently reaffirmed its holding that Congress’s most recent attempt to regulate Internet pornography, the Child Online Protection Act, is probably unconstitutional. *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003) (upholding preliminary injunction). The issue is likely to return to the Supreme Court. The Court also recently heard arguments in a case on the constitutionality of the Children’s Internet Protection Act, which requires public libraries (and public schools), as a condition of receiving federal subsidies, to use filtering software designed to prevent “patrons from accessing ‘visual depictions’ that are ‘obscene,’ ‘child pornography,’ or in the case of minors, ‘harmful to minors’” under *Ginsberg*. *Am. Library Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 407 (E.D. Pa.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 551 (2002).

#### D. State Subsidies for Expression

In recent years, one of the sharpest disputes over free expression has focused on the National Endowment for the Arts (NEA). The conflict erupted in 1989 after it was learned that the NEA had provided funding for exhibitions of work by two controversial artists: Andres Serrano, whose “Piss Christ” showed a crucifix submerged in urine, and Robert Mapplethorpe, whose work included a series of explicit photographs portraying homosexuality, sadomasochism, and child nudity.<sup>355</sup>

The controversy came to a head the following year during a congressional debate over legislation reauthorizing the NEA. Turning back efforts by the Endowment’s strongest opponents, Congress rejected amendments that would have “zeroed out” the agency’s budget or strictly limited the type of works that could receive funding.<sup>356</sup> However, in a compromise between supporters and critics of the NEA, Congress adopted language providing that, in awarding grants, the agency should consider not only “artistic excellence and artistic merit,” but also “general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>357</sup> A First Amendment challenge to this provision was brought by Karen Finley and several other performance artists.<sup>358</sup>

To decide the case, the Supreme Court had to confront a more general question: how should the First Amendment apply in situations where the state acts not to regulate speech, but rather to subsidize or support it? Although the justices have struggled with this issue for nearly two decades, they have never been able to satisfactorily resolve it.<sup>359</sup> Instead, the Court has found itself torn between two opposing positions, which I shall call the governmental power and individual rights views. According to the former view, the Constitution imposes few if any limits on the state’s power to determine what

355. See *NEA v. Finley*, 524 U.S. 569, 574 (1998).

356. See Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1176 [hereinafter Heyman, *State-Supported Speech*].

357. Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 103(b)(1), 104 Stat. 1960, 1963 (codified at 20 U.S.C. § 954(d) (1994)). The legislation further instructed the NEA to make clear that works that meet the legal standard for obscenity are “without artistic merit, [are] not protected speech, and shall not be funded.” *Id.* § 103(b)(2).

358. See *Finley*, 524 U.S. at 577–78.

359. For a critique of Court’s jurisprudence in this area, see Heyman, *State-Supported Speech*, *supra* note 356, at 1122–42.

expression to support.<sup>360</sup> By contrast, the latter position holds that the First Amendment applies to subsidy decisions in much the same way that it applies to laws that restrict or penalize expression.<sup>361</sup> Both positions had forceful advocates in *NEA v. Finley*. On one side, Justice Scalia contended that the NEA decency clause posed no First Amendment issue at all, for there was a fundamental “distinction between ‘abridging’ speech” and merely declining to fund it.<sup>362</sup> On the other side, Justice Souter argued that to deny funding for offensive art effectively “penalizes” such expression, in violation of the First Amendment rule against viewpoint discrimination.<sup>363</sup>

Writing for the majority, Justice O'Connor attempted to steer a middle course between these two positions. Emphasizing that the decency clause did not forbid the NEA to fund indecent art, but merely stated that decency ought to be taken into consideration,<sup>364</sup> O'Connor found that there was no “realistic danger” that the clause would lead to discrimination against any particular set of ideas.<sup>365</sup> Accordingly, she declined to hold the statute unconstitutional on its face.<sup>366</sup> At the same time, she cautioned that the Court “would confront a different case” if “the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints.”<sup>367</sup> Yet this nod to the individual-rights position was soon followed by an appeal to the opposite view: “[I]n the subsidy context,” O'Connor noted, “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”<sup>368</sup>

In *Finley*, then, the majority sought to stake out a middle position in the arts funding debate: the government may consider decency in awarding NEA grants, but does not have carte blanche to deny funding to controversial art. To my mind, this position is an attractive

360. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

361. See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust*, 500 U.S. at 203 (Blackmun, J., dissenting).

362. *Finley*, 524 U.S. at 599 (Scalia, J., joined by Thomas, J., concurring in judgment) (quoting U.S. CONST. amend. I).

363. *Id.* at 600–01, 606 (Souter, J., dissenting).

364. *Id.* at 580–81.

365. *Id.* at 583.

366. *Id.*

367. *Id.* at 587.

368. *Id.* at 587–88.

one. Yet the majority was unable to articulate a persuasive rationale for its position, or to formulate a coherent approach to the problem of subsidized speech and the First Amendment.

How should we think about the problem? On one hand, denials of funding cannot reasonably be equated with traditional censorship or “affirmative suppression of speech.”<sup>369</sup> Public programs such as the NEA are established for public purposes; they involve an exercise of our freedom as a community, in which we institute a program and direct how its resources are to be used to promote the public good. On the other hand, such programs do have an impact on individual freedom of expression. For this reason, they must be subject to constitutional constraints: under the First Amendment as well as equal protection doctrine, the government cannot be permitted to arbitrarily distribute opportunities to engage in expressive activities. It follows that both the individual rights and the governmental power views are inadequate. Instead, the problem of subsidized speech is best understood as an issue of distributive justice in the modern liberal state: the government should be required to distribute funds in a fair and evenhanded way consistent with the purposes of the program.

Under this approach, which I have developed in depth elsewhere,<sup>370</sup> laws that prescribe standards for funding within a public program should be reviewed under a form of intermediate scrutiny. Such standards should be upheld if the following requirements are satisfied. First, the criteria must be substantially related to the purposes of the program. Second, those purposes must be constitutionally legitimate. Third, the criteria must treat the program’s beneficiaries (and others) in a way that accords with constitutional norms of respect for individual liberty and equality. Finally, the program must not have the purpose or effect of undermining other aspects of the constitutional order.<sup>371</sup>

How would the NEA decency clause fare under this approach? To answer this question, we must consider the purposes that the

369. *Id.* at 601 (Souter, J., dissenting).

370. Heyman, *State-Supported Speech*, *supra* note 356.

371. This analysis, it should be noted, should apply only to laws or policies that seek only to direct the way that funds should be used *within a public program*. By contrast, if applicants are denied funding because of expression *outside the scope of the program*, the funding denial should be treated in the same way as a restriction or penalty on expression. In the absence of adequate justification, such action should be held invalid under the doctrine of unconstitutional conditions.

Endowment was intended to serve. If its only purpose was to promote artistic self-expression, the clause should be struck down, for indecent art can be no less expressive than other art. As the 1965 debates over the NEA's enabling act show, however, the Endowment was created for several other purposes as well: to promote public appreciation for the arts, and thereby afford citizens "new opportunities for self-improvement and fulfillment"; to build and enhance a common culture; and to "enrich . . . the core of human life" by "preserv[ing] and develop[ing] our human values."<sup>372</sup> The adoption of the decency clause in 1990 may be said to reflect a legislative judgment that artistic works or performances that violate the community's standards of decency or civility tend to detract from, rather than to enhance, the common culture. Although this judgment is a profoundly controversial one, I do not believe that it is unreasonable. A reviewing court should therefore find the decency clause to be substantially related to the purposes of the NEA. Unless one is willing to hold that these purposes are themselves illegitimate—in which case the NEA itself would be unconstitutional—the second requirement is also satisfied. Third, the decency clause does not disrespect constitutional norms of individual liberty or equality. The clause does not prevent individuals from making their own choices about what art to create or view. Instead, it simply reflects a legislative judgment about which forms of artistic activity should receive public support. Finally, because the NEA is responsible for a relatively small share of arts funding in the United States, it seems unlikely that the agency will come to dominate American culture or to undermine freedom of artistic expression within the private sphere. For these reasons, the Supreme Court was right to sustain the facial validity of the decency clause in *NEA v. Finley*.

More generally, while the rights-based theory holds that sexual material may be regulated only to protect the rights of others, the community should have a substantial degree of authority to determine what forms of expression should receive public support. At the same time, this authority must be bounded by respect for individuals. In particular, public programs may not distribute funds in a way that discriminates between different speakers or forms of expression in a way that is not justified in light of the program's purposes, or in a way

372. Heyman, *State-Supported Speech*, *supra* note 356, at 1181–82 (quoting H.R. REP. NO. 618, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.A.N. 3186, 3190; 111 CONG. REC. 23,943, 23,948 (1965) (statements of Rep. Rivers and Rep. Moeller)).

that conflicts with constitutional notions of liberty and equality. In this way, the theory once more seeks to reconcile competing values, the rights of individuals and those of the community.

### CONCLUSION

In recent years, the debate over pornography has been dominated by three perspectives: conservative, liberal, and radical feminist. Although each position has force, none fully captures our intuitions on the subject. Instead, we should seek to reconcile these conflicting perspectives within a more complex view. This function can best be performed by a comprehensive theory of rights—a theory that is broad enough to encompass the rights of individuals, groups, and the community as a whole. Under this approach, individuals should enjoy considerable freedom to make and view sexually oriented materials. But this protection should not extend to material that invades the rights of others. In particular, I have argued that violent pornography may be banned because it violates the rights of women to personality, personal security, and equality, as well as the most fundamental right of all—the right to recognition. In this regard, violent pornography also infringes the rights of the community as a whole, by undermining the mutual recognition that constitutes the community. The community also should have the right to exclude pornography from the public sphere, to shield children from such material, and to decline to subsidize such material. Contrary to the Supreme Court's traditional doctrine, however, the community should have no general power to ban material that it considers to be obscene, for such a power is inconsistent with the autonomy of individuals to determine the content of their own thought and expression.

In these ways, the rights-based theory seeks to recognize and incorporate the core values of each position: the liberal focus on autonomy, the feminist demand for equality, and the conservative concern for community. Of course, any particular effort to reconcile these conflicting views is bound to be controversial. As I have stressed, ideological disagreement is inevitable in this area, and no theory can put an end to it. Instead, the aim of constitutional theory should be to develop a common language within which we can reasonably debate issues of this sort. In this respect, I believe that rights theory has much to offer.

In discussing the issue of pornography, this Essay has also explored the nature of constitutional interpretation. Contrary to the accepted view, such interpretation does not involve the articulation and development of a unitary, coherent set of principles. Instead, it calls for an effort to reconcile opposing positions, and to incorporate them into a more comprehensive view. In many ways, this dialectical approach would transform the way we approach constitutional theory. At the same time, it would bring such theory much closer to the real world of legal and political argument, in which constitutional meaning emerges from the clash of conflicting perspectives.