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DOES THE FIRST AMENDMENT PROTECT MORE THAN FREE SPEECH?

STEPHEN L. CARTER*

I. THE FIRST AMENDMENT ACCORDING TO YALE

It is the peculiar province of the First Amendment to belong to everyone, to be a part of every cause, to be cited on both sides of every legal issue and not a few political ones. Back in 1977, in the spring of my first year of law school, I had my initial encounter with what one of my professors called "the Yale theory of the First Amendment." Because I was a student at Yale, this encounter with a First Amendment theory naturally took place not in the introductory constitutional law course, which I had taken in the fall, or even in the course on freedom of expression, in which I was then enrolled, but in Property.

We were discussing a case that involved, as I recall, someone who had hung some washing to dry on an outdoor clothesline—a violation, it seemed, of some zoning regulation. The professor led us through the mysterious twists and turns of zoning law, and our every effort to find a defense for the unfortunate zoning violator ended in good-natured disaster. When we had exhausted our meager supply of ideas gleaned from the previous night's reading, the professor looked out over the room and said, "But nobody is making the obvious argument." We looked to one another in confusion and not a little terror, fearing that one of us would be called upon to supply the obvious argument and found wanting.

We need not have worried. The professor was by that time sufficiently frustrated that he had no further patience with the Socratic method. "This is Yale," he reminded us, "so naturally, the hanging of clothes on the line, like everything else, is protected by the First Amendment."

Naturally! Why not? The clothes, one might say, are a work of art, spoiling the solitude of the neighborhood that zoned them

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out, rippling subtly in the wind in order to make a statement about the oppressive regimentation of contemporary American society. Better still, the hanging of the clothes is a protest—a speech-act—a way of battling against the complexity of what should be simple—washing clothes. Best of all, the hanging of the clothes is a protest against the law itself. A protest! Classic First Amendment activity! Why not? The best way of protesting an unjust law is to break it and then, ignoring traditional theories of civil disobedience that required acceptance of punishment, to go to court and argue that the law is unconstitutional. At Yale back in the 1970's, and I suppose elsewhere as well, it did not seem a particularly fanciful argument to suggest that if one breaks the law with the intent to protest it, then the act of breaking the law is *always* protected by the First Amendment.[1] In other words, crimes committed for political reasons, notwithstanding the absence in American jurisprudence of a category of political prisoner, cannot be prosecuted.

Everything is protected by the First Amendment. This might sound like the sort of wild cynicism in which professors regularly indulge and that the public regularly ignores, but think for a moment. From the sea of law review articles that I have read over the past decade, I seem to recall authors insisting that the First Amendment protects drug use, sexual privacy, false advertising, scientific research, reproductive freedom, the theft of government documents . . . and the list goes on.

Yet, at the same time that the Free Speech Clause serves as the prop that is cited in support of a sparkling constellation of rights that are difficult to derive from the Amendment's text, structure, or history, the other freedoms that the First Amendment protects are falling into desuetude. I refer specifically to the Free Press Clause, the Free Exercise Clause, and the Free Petition Clause. As the reach of the Free Speech Clause has been expanded, the reach of these other clauses has been restricted.

At the outset, looking at the language of the First Amendment might be useful, for law professors all too rarely take the time to study the text of the document that they claim to be construing. What the First Amendment actually says is this: "Congress shall make no law respecting an establishment of religion, or

1. The literature of the era strongly implied this argument. *See, e.g.*, James E. Leahy, *"Flamboyant Protest," the First Amendment and the Boston Tea Party*, 36 BROOK. L. REV. 185 (1970); Lawrence R. Velvel, *Protecting Civil Disobedience Under the First Amendment*, 37 GEO. WASH. L. REV. 464 (1969).

prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2] Because the rights of assembly and petition are joined with "and," whereas the rights of speech and press are joined with "or," one might usefully envision the First Amendment as containing four clauses: one on religion, one on speech, one on the press, and one on assembly and petition. If they are in order of importance, religious freedom comes first; if they are not, then no textual basis supports the establishment of a hierarchy among them.

At a conference not long ago, I heard two panelists who were supposed to be debating one another end up agreeing that the Free Exercise Clause of the First Amendment might well have been made irrelevant by the Privileges or Immunities Clause[3] of the Fourteenth Amendment. That is an interesting proposition, and one that is at least supported by the "last-in-time" theory of constitutional adjudication.[4]

I want to discuss a similar but more troubling anomaly: the possibility that notwithstanding the plain language of the text, the rights enumerated in the First Amendment exist in hierarchy after all, because judicial decisions have rendered the other three clauses essentially superfluous in light of the Free Speech Clause. In the hierarchy, as the courts (and most of the commentators) seem to envision it, the right to freedom of speech is paramount and protected in extraordinary ways, sheltering a range of activities having little to do with speaking.[5] The right to freedom of the press lurks somewhere behind the right to free speech, protecting very little, if anything, that is not protected by the Free Speech Clause and not nearly so central to our democracy.[6] The freedom of religion is clearly a third-tier right, subject to reasonable regulation of many sorts.[7] Finally, the right to assemble and petition is all but a dead letter, protecting nothing in particular.[8]

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2. U.S. CONST. amend. I.

3. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1, cl. 2.

4. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that the Fourteenth Amendment, because enacted later in time than the Eleventh, necessarily abrogated the immunity from suit that the earlier amendment conferred).

5. *See infra* notes 24-31 and accompanying text.

6. *See infra* notes 50-51 and accompanying text.

7. *See infra* notes 32-47 and accompanying text.

8. *See infra* notes 52-56 and accompanying text.

I would suggest that although some cases do not fit the rule, one might say that judicial interpretation has made the Free Press, Free Exercise, and Free Petition Clauses all but redundant in light of the Free Speech Clause. What I mean by this is that the principal activities protected under the other clauses would be protected even if the Free Press, Free Exercise, or Free Petition Clauses did not exist. At the same time, the public has increasingly clamored for, and the courts have shown signs that they will allow, the restriction of speech itself on the ground that allowing the speech will harm the community's sense of self in ways that its members have the right to prevent.[9] Indeed, for better or for worse (mostly, in my view, for worse), I suspect that First Amendment jurisprudence is moving in the direction of community control of speech.

I argue that both trends might be explained by pointing to the collapse of certain assumptions involving the nature and scope of federal authority that probably undergirded the original impetus for the First Amendment. In the particular case of the shift toward more community control, it may be that a worried public is trying hard to supply the homogeneity of moral vision that characterized the communities of governance, as I shall call them, in which the Founders might have imagined that free-speech activities would transpire.

II. The Role of Free Speech

In law schools, we teach—or we are taught—that free speech is central to our democracy, that unfettered political debate is essential, and that any restriction on what one can say pushes us closer to the abyss (which seems to be displacing the slippery slope as the metaphor of choice). For a time, in the 1970's and 1980's, literature on the First Amendment was dominated by theories about self-actualization, a trend that led to the bromide about everything being speech.[10] Those theories are still around, but my impression is that they are fading from favor, replaced once more by the traditional notion of speech as a means toward self-government.

Of course, there is no inherent reason that the freedom of speech, especially as that freedom is understood in the United States, must be considered either indispensable for democracy

9. *See infra* notes 68-81 and accompanying text.

10. *See supra* note 1 and accompanying text.

or absolute in its reach. We might think that our idea of freedom is the best one, but that is not the same as saying that it is impossible to enjoy the fruits of democracy without endorsing it. Think for a moment of all the countries in the world that do not protect free speech as we do; I would estimate that some 250 of them exist, which is to say, everybody else on the planet. The refusal of all of these countries to learn from our example might be evidence of the inherent moral superiority of Americans as a people, or it might be evidence that matters are a bit more problematic than the language of absolutism suggests.

My thesis is threefold: first, our First Amendment jurisprudence has fallen into a muddle; second, the muddle has two causes, each one representing a tension of life in contemporary America; third, these tensions are, in turn, in very substantial tension with each other.

Two failures cause the muddle. The first of the failures is the failure of the Founding Generation's critical assumptions about the nature of the national entity they created—a failure, I shall argue, that creates pressures to broaden the scope of many constitutional rights, surely First Amendment rights among them. The second failure is the failure of a long-held *mythos* about the nature of community and the possibility of democracy within a community, which creates a countervailing pressure to limit certain aspects of First Amendment rights in the name of community interests, as expressed by the relevant governing entity.

These failures are, as I have said, in considerable tension with each other. The first failure pushes toward expansion of rights and the second toward contraction, but that is a bit oversimplified. What I would say, rather, is this: the failures of the different assumptions of the Founding Generation have led to pressures for different models of the First Amendment, and those models are in tension. I call these two models (without claiming any originality in the titles) the Free Expression model and the Community Control model. The Free Expression model generally allows the statement of views, even symbolically, that alarm, upset, or disgust the larger body politic; the Community Control model supposes that local bodies politic should be able to regulate expressions of precisely that sort.

These two models tend to dominate our First Amendment jurisprudence and not only on the matter of free speech. The Supreme Court uses both models, albeit at different times, although the Free Expression model traditionally dominates.[11] In

11. *See infra* notes 21-31 and accompanying text.

recent years, the Court backed away from the Free Expression model and gave somewhat freer rein to the Community Control model, leading some to righteous cries of outrage.[12] I shall argue, however, that an unspoken harmony exists between the models as the Court has actually applied them.[13]

I hasten to add that these two models obviously do not sweep everything into their ambit; some cases do not fit into either. However, most of our First Amendment jurisprudence can be explained by the models, and there are sensible (although not noncontroversial) theoretical reasons for that.

A. *Word on Method*

To understand my views, one must first know something about my constitutional theory. I dispute the legal legitimacy of constitutional decisions that are not closely tied to the text, structure, and history of the document itself. When I refer to legal legitimacy, I have in mind the obligation of obedience to a decision as well as its force as precedent. I understand that many smart theorists believe that legitimacy can come from other, better sources. Although I respect their views, I am not persuaded by them. I suppose that my approach is a bit old-fashioned, but there it is.[14] I will not here go into the reasons for my preference, which I have discussed elsewhere.[15] I mention the point because it is critical to understanding what follows.

Given my methodological preference, I am reluctant to express strong views on constitutional provisions when I have not had the opportunity to study their history in detail. The First Amendment is such a provision; I currently know little of its history, and what I do know is mostly from secondary sources. What I say should therefore be treated as a very preliminary assessment and not as a settled conclusion.

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12. *See infra* notes 68-81 and accompanying text.

13. *See infra* notes 62-81 and accompanying text.

14. For some thoughtful expressions of the reasons for my caution, see, for example, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) and Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

15. A reader who is a glutton for punishment might examine, for example, Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Stephen L. Carter, *The Dissent of the Governors*, 63 TUL. L. REV. 1325 (1989); and Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985).

Still, it would be a mistake to think about the original understanding of the First Amendment as something entirely apart from the original understanding of the structure of the federal government and the scope of federal authority.[16] As devised in 1787, the original plan called for a federal government of limited and delegated authority; the principal lawmaking bodies in the new nation were to be the states themselves, acting in their sovereign capacities. Indeed, one argument that was pressed frequently against the addition of a bill of rights to the Constitution was that the Framers had not delegated to the federal government the power to do the things against which a bill was commonly supposed to protect. The explicit protection of the free press from congressional restriction, for example, was opposed by some Federalists precisely on the ground that the national government had no power to regulate the press.

Because the First Amendment (like the entire Bill of Rights) was adopted against a background that presumed a limited space for the exercise of federal legislative power, it is useful to think about the consequences for the original understanding if the underlying assumption fails. The reason that it is useful to think about these consequences is that the underlying assumption *has* failed. The breadth and intrusiveness of federal authority have grown far beyond what the Founders anticipated. The Interstate Commerce Clause has grown from its relatively humble beginnings to a general police power.[17] The states have eroded as independent sovereignties, principally because, as the events leading up to the Civil War demonstrated, the idea of a union of free and independent entities was unrealistic.

The Fourteenth Amendment, of course, has been the greatest force in altering the original expectation about the relative status of the federal and state sovereignties.[18] By the terms of the first

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16. *See* Stephen L. Carter, *Originalism and the Bill of Rights*, 15 HARV. J.L. & PUB. POL'Y 141 (1992).

17. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that the Civil Rights Act can be applied to a hotel because it involves interstate travelers, and Congress has the right to regulate interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that the Civil Rights Act applies to a restaurant serving food that traveled through interstate commerce).

18. For the argument that the events leading to the adoption of the Fourteenth Amendment constituted a constitutional revolution not unlike the Founding and therefore *necessarily* altered the proper understanding of what had gone before, see Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 488-89 (1989) and Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1065 (1984).

section of the Amendment, Americans became citizens not only of their own states but also of the United States. By the terms of Section One in concert with Section Five, the federal government suddenly shed its mantle as a creature of the states and became instead the protector of its citizens, the citizens of the United States, against the predations of the citizens' own formerly sovereign states. From then until now, state power has continued to wane (despite a brief flowering under the weakly conceived federalism doctrine of *National League of Cities v. Usery*[19]), and federal power has continued to grow. That is why I contend that the original assumptions of the federal government as a creature of the states and as an entity with limited, delegated power have essentially collapsed.[20]

The collapse of the original assumptions about the nature of federal authority necessarily affects the original assumptions about the amendments designed to limit that authority. If the entity that we now call the federal government is not, after all, substantially continuous with the entity that the Founders thought they were regulating, it becomes difficult to know what to make of their original understanding. It is precisely this difficulty, I suggest, that has led our First Amendment jurisprudence into the muddle that now exists. To see why this is so, it is worth considering in detail the dominant Free Expression model of the First Amendment and then assessing the rise of the Community Control model. Both models, I argue, are related to the collapse of the original assumptions, as both seek to respond to it; however, the two models emphasize different aspects of the original understanding to strike a new balance on the constitutional protections of speech, press, religion, and assembly.

B. The Dominant Model: Free Expression

The Free Expression model presupposes the necessary link between the democratic ideal and a broad expressive right.[21] At

19. 426 U.S. 833, 840-52 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

20. I hasten to add that I am simply reporting the collapse of the original assumptions, but my report should not be taken to imply that I mourn their passing. Although a strong national government has its problems, and we have seen many of these in action, the failure of the original assumption of limited federal authority and of the conception of the federal government as a creature of the states generally has been to the good.

21. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Donald Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966).

the same time that the other freedoms in the First Amendment seem to have been, as I shall explain, reduced in scope, the freedom of speech has been read broadly to encompass a good deal more than simply speaking. So well established is this trend that Robert Bork, once known as the principal apostle of the notion that the freedom of speech should be limited to the "political" realm because of its connection with self-government,[22] has abandoned the idea and pronounced it unworkable.[23]

One who doubts that the understanding of what constitutes speaking has undergone a steady enhancement should simply think of the examples. The expenditure of money has been protected as speech in such cases as *Buckley v. Valeo*[24] and *First National Bank v. Bellotti*.[25] This argument has a certain charm, for, in this day and age, how can we speak without spending?[26] Freedom of association has been protected as a concomitant of speech, for how can we speak effectively without first organizing? And of course, symbolic gestures continue to be protected, although tenuously, as, for example, in the case of *Texas v. Johnson*,[27] in which the Court sustained by a vote of five-to-four the right to express an opinion by burning the American flag.[28] Again,

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22. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 24-35 (1971).

23. For Judge Bork's discussion of his own change of mind, see SENATE COMM. ON THE JUDICIARY, Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, S. EXEC. REP. No. 7, 100th Cong., 1st Sess. 56 (1987) (quoting Bork's statement that he would "gladly" accept Supreme Court decisions protecting nonpolitical expression) and ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 333 (1990).

24. 424 U.S. 1, 39-59 (1976); *see also* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 493-96 (1985) (holding that a statute making it a criminal offense for an independent "political committee" to expend more than $1000 to further the election of a candidate receiving public financing violates the First Amendment).

25. 435 U.S. 765, 768, 775-95 (1978) (holding that a statute prohibiting corporations from making contributions to influence voters on questions not "materially affecting any of the property, business or assets of the corporation" violates the First Amendment).

26. *Compare* Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581 (1984) (arguing that the critical problem for contemporary First Amendment is that those with wealth have access to the media, and those that do not have wealth cannot communicate their ideas) *with* MARK V. TUSHNET, RED, WHITE, AND BLUE 103-06 (1988) (suggesting that American politicians survive by creating favorable economic conditions, and that they create these conditions by catering to the needs of business and discounting the needs of workers) *and* Steven Shiffrin, *Government Speech and the Falsification of Dissent*, 96 HARV. L. REV. 1745 (1983) (discussing Mark Yudof's book which examines whether the government, as an institution with massive wealth, has the ability to unduly influence the marketplace of ideas).

27. 491 U.S. 397 (1989).

28. *Id.* at 420.

the argument is apparent, for how can one speak effectively without using what I might call, in my guise as a teacher of the patent law, the "best mode"?[29]

Of course, in any sense that accords with our ordinary understanding of such things, characterizing any of these cases as actually being about "speech" is difficult, and a great deal of sophisticated but ultimately unconvincing arguments can be avoided by conceding that point. If these cases are not really protecting speech, how can they be justified? I would suggest that perhaps—and I emphasize the conditional—perhaps they can be explained as a response to the collapse of the assumptions about the nature of federal authority. With the shift of massive power to the federal government, the thin shield that the Founders probably imagined when they wrote the First Amendment might no longer be sufficient to permit the robust debate on matters of public moment that they plainly anticipated. The expansion of the understanding of what counts as speech thus might represent an effort to restore the balance between citizen speech and sovereign power that the original design anticipated.

This justification, however, contains a subtle but important flaw. The trouble is that most of the leading cases involving expansive readings of the meaning of "speech" are cases involving the authority of the states or local government entities,[30] not the power of the national government. If, as I have suggested, the states are weaker, not stronger, than the original plan anticipated, it is not immediately clear why the citizen's rights against these weak entities need enhancement. Indeed, when one considers that the original design was clearly intended to preserve state power to limit speech, the argument becomes, if anything, even more attenuated.

The flaw is not unanswerable, but the answer is not simple. One must begin by assuming that the First Amendment—or, at least, the protection for freedom of speech—is one of the rights (or, if one prefers, the privileges or immunities) incorporated through the Fourteenth Amendment to apply against the states.

29. It may be that the Justices are preparing to retreat from the protection of symbolic speech, at least if the future is portended by the Court's recent decision that nude dancing, even when not obscene, may be banned if offensive to the community. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460-63 (1991).

30. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding that the state could not prosecute a person for burning an American flag); Cohen v. California 403 U.S. (1971) (holding that it was a violation of the First Amendment for the state to prosecute a person for wearing a jacket bearing the words "fuck the draft" in the courtroom).

One can then at least imagine the possibility (I confess that I have not yet come to an assessment) that the constitutional rights of citizens against the state and federal sovereignties should be equivalent—that this is the very meaning of incorporation. Thus, if a particular regulation of speech would not be permissible were Congress to do it, it would not be permissible for a state to do it either.

One might believe that this is obviously the significance of incorporation, but that is not quite so, once one considers my principal thesis. If the *reason* that a right exists against the federal government is the collapse of the assumption of limited federal authority, the same reason cannot possibly apply to the regulation of speech by the states. Consequently, the move to apply all rights against the states simply because they exist against the federal government is, in this instance, a rather unconvincing formalism and likely to founder on almost any counterargument. Of course, escape hatches exist: one might, for example, follow Bruce Ackerman up the ladder to a wonderful world in which the Civil War and Reconstruction rewrote the Constitution; for then the expansion of the freedom of speech necessary to check enhanced federal power is treated like an amendment to the original text of the First Amendment and, through incorporation, applies without any need to work through all of the reasons.[31] At that point, however, we have reached rather esoteric regions of legal reasoning, leaving the vaguely dissatisfied sense that maybe, just maybe, the expansion of the speech right is on shaky ground.

III. The Contraction of Rights

No matter which theory is used to explain the expansion of the right to free speech, explaining the contraction of the rest of the rights in the First Amendment is difficult. Although they are sometimes forgotten, the Amendment contains three other rights: the right to free exercise of religion, the right to freedom of the press, and the right to freedom of assembly and petition. Nothing in the text suggests a hierarchy in which these are subordinated to the right of free speech.

Yet, the Supreme Court, with rare exception, has treated each of these other rights as adjuncts to, or perhaps variations on,

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31. *See supra* note 18.

the freedom of speech. By this I mean that these three additional clauses have been given very little content independent of the content of the Free Speech Clause. A claim to a right under one of the other clauses is most likely to succeed when it resembles one of the rights protected by free speech and is least likely to succeed when it is very different.

A. *The Free Exercise Clause*

Consider first the Free Exercise Clause. The rights that the clause protects traditionally have been strongest when they looked like speech. Courts have protected, for example, the right to proselytize or solicit contributions,[32] the right to give sermons without a license,[33] and the right to meet and worship without regard to state permission.[34] All of these are rights that nonreligious groups may exercise under the Free Speech Clause, except that they will then be thought of as fund raising, public speaking, and assembling or organizing.

To be sure, the Free Exercise Clause has been the vehicle for some very un-speech-like protections, particularly the insulation of the Old Order Amish from compulsory education laws for their children in *Wisconsin v. Yoder*[35] and a series of cases requiring unemployment benefits to be paid to people who are discharged from private employment because their religious practices or beliefs will not allow them to do their employers' bidding.[36] These cases, however, are at best small exceptions to a general trend. No group other than the Amish has been given so broad an exemption from generally applicable laws, and were the *Yoder* case to arise today, it is not at all clear that the outcome would be the same.[37] The lower courts, moreover, have struggled un-

32. Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940).

33. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

34. *Cf.* Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university could not bar a student religious group from using its property for religious worship or teaching, under the view that such groups deserve "equal access" to university facilities).

35. 406 U.S. 205, 234 (1972).

36. For some idea of the complexity of the unemployment benefit cases, try to follow the reasoning and limitations in Employment Division v. Smith, 485 U.S. 660 (1988); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987); Thomas v. Review Board, 450 U.S. 707 (1981); and Sherbert v. Verner, 374 U.S. 398 (1963).

37. The Court has declined to extend the special status of the Old Order Amish to an exemption from social security taxes of general application. *See* United States v. Lee, 455 U.S. 252 (1982); *see also* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384-92 (1990) (declining to exempt sales of religious materials from state sales tax); Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (holding that schools with racially discriminatory standards based on religious beliefs do not qualify as tax-exempt organizations).

happily with the matter of unemployment benefits for those refusing work for religious reasons.[38] Dicta in the Court's most recent case on the subject, *Frazee v. Illinois Department of Employment Security*,[39] suggest a balancing test under which, if the claims are too costly, the result might go the other way.[40] The Justices in *Frazee* were at pains to note that matters might be different if, because of religious objections to employment, "Sunday shopping, or Sunday sporting, for that matter, w[ould] grind to a halt."[41] On its face, this might simply be a concern about the slippery slope. At some level, however, the hypotheticals suggest a dissatisfaction with the rule itself.

Beyond the Amish and unemployment benefits, Free Exercise claims for un-speech-like religious activities are almost routinely denied on the ground that they conflict with important (and not, in all cases, compelling) state interests. Thus neutral state policies have overridden religious claims of rights to engage in polygamy,[42] to use drugs[43] or snakes[44] in religious ceremonies, to wear religious headgear while on active military duty,[45] to attend services mandated by one's religion while in prison,[46] and to refuse to obtain a social security number for one's child.[47] One might respond that the state interests at stake in these cases are unusually weighty, and one might be right, but is it really so obvious that the state's interest in requiring social security numbers is weightier than its interest in avoiding desecration of its flag? Besides, even if the state interests do appear sufficient in every case, it is, shall we say, a peculiar coincidence that the moment at which the interests become compelling is the moment at which the individual claim ceases to resemble speech.

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38. *See, e.g.*, EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1281-82 (9th Cir. 1982) (declaring Free Exercise Clause does not exempt religious organizations from Title VII); South Ridge Baptist Church v. Industrial Comm'n, 676 F. Supp. 799, 804-08 (S.D. Ohio 1987) (rejecting claim that forcing contribution to workers' compensation fund makes church subservient to the state and is therefore unconstitutional under the Free Exercise Clause), *aff'd*, 911 F.2d 1203 (6th Cir. 1990); *cf.* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1067 (6th Cir. 1987) (declining to extend scope of *Yoder*), *cert. denied*, 484 U.S. 1066 (1988).

39. 489 U.S. 829 (1989).

40. *Id.* at 835.

41. *Id.*

42. Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

43. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1606 (1990).

44. State v. Massey, 51 S.E.2d 179, 180 (N.C. 1949); State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 107-11 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976).

45. Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986).

46. Cruz v. Beto, 405 U.S. 319, 322 (1972).

47. Bowen v. Roy, 476 U.S. 693, 707-12 (1986).

B. The Free Press Clause

The 1970's, perhaps because of the brouhaha over the *Pentagon Papers* case,[48] saw a great flurry of scholarly attention to the question of whether the Free Press Clause adds anything to the Free Speech Clause.[49] The courts have long since made clear that the answer is no—the rejection of the claim for a special right of access to the news took care of that question.[50] Commentators have accommodated themselves to this result by proposing that the Free Speech and Free Press Clauses be thought of as unitary, a single expressive right created by two joined clauses. In short, if you can say it, you can publish it, and if you can publish it, you can say it. If you can be kept from doing one, however, you can be kept from doing the other, which implies that the trial court in *United States v. The Progressive, Inc.*,[51] which issued an injunction, later dissolved, to prevent the publication of an article about the construction of the hydrogen bomb, should have been equally willing to enjoin the teaching of the same material in a college classroom. If that concept seems ridiculous, then either the case is wrongly decided and the first injunction should never have issued, or the theory of the unitary clause does not work because the press is treated *worse* than other speakers.

C. Freedom to Petition

If you can say it and you can print it, one might suppose that you could tell the government about it, because this is the point of the Petition Clause. However, what might seem on its face to be a vital provision of the First Amendment turns out, on closer inspection, to contain no substantive content that is not already covered by the Free Speech Clause. True, the idea of a Petition Clause with independent content flowered briefly as the Supreme Court fashioned the *Noerr-Pennington* exception to the antitrust laws, allowing corporations otherwise prohibited from cooperating to work together to seek government action.[52]

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48. New York Times Co. v. United States, 403 U.S. 713 (1971).

49. *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631 (1975).

50. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972).

51. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

52. *See* United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

Since those halcyon days, however, the Petition Clause has virtually dropped out of the First Amendment. This point is nowhere better illustrated than in *McDonald v. Smith*,[53] a libel case in which a unanimous Supreme Court ruled that a comment included in a petition to the government (in this case, a letter to the President and the Attorney General) enjoys no greater protection than it would enjoy by virtue of the Free Speech Clause alone.[54]

The Court rejected the possibility that a petition to the government might be privileged from a libel action, thereby excluding the attractive republican or communitarian vision of free communication between citizens and their government.[55] Such an enhancement of speech rights because of the nature of the recipient—the government—might seem anathema to a supporter of the trend of treating all First Amendment activity as deserving the same level of constitutional protection. It is worth noting, however, that an analogous privilege is already in place: in most situations, the pleadings that one files in a lawsuit, or the testimony that one gives on the stand, *are* privileged, and treated as superior to other forms of speech, even if, in other circumstances, they would be libelous. The only explanation for the privilege is that the desired communication from ordinary citizens to the courts of law would be discouraged if parties or witnesses feared a libel lawyer lurking nearby. That is not a bad argument, but the Supreme Court in *McDonald* mysteriously rejected it for citizens' communications to other branches of the government.[56]

IV. The Reduction to Speech

Despite what my professor told me my first year at Yale, not everything is speech, and not everything should be treated as speech. Yet the drive really does seem relentless: we are well on our way to a world in which religious worship and petitioning the government for redress are "just" speech. Although, as I indicated, I have not done the history in detail, I would be surprised to discover that this is, in fact, what the Founders anticipated; if they wanted only to protect speech and things

53. 472 U.S. 479 (1985).
54. *Id.* at 485.
55. *Id.*
56. *Id.*

just like it, they could have written a much shorter First Amendment.

So why this reduction of all First Amendment rights to speech rights? Paradoxically, I would venture to suggest that this reduction, this leveling, is linked to the same cause that perhaps brought about the expansion in the sorts of acts that are understood as speech—the growth of federal power and, with it, the evolution of the idea of national citizenship. The link, however, is not as coherent as it might be, and we might label it, for lack of a better term, ideological: both sets of cases, those on expansion and those on reduction, reflect an effort (whether or not intended) to align expressive rights and thereby align the people in their relationship to the government, especially, but not exclusively, to the national government.

Those we might think of as members of the reasoning class—the readers of this law review, for instance—share a conceit that liberal democracy requires a public dialogue in order to work. One can view the progressive expansion in the acts that count as speech and the simultaneous reduction in the scope of other First Amendment rights until they equal speech, as an effort to bring order to the dialogue and to put every participant, as it were, on an even footing. Thus, no citizen is allowed claims of special privilege—an appeal to religious faith, for instance, or to the unique estate of the press—but must make arguments on the same terms and in the same language as everyone else.[57]

This project might be viewed as replacing another failed assumption that undergirded state sovereignty in the original plan—the assumption that the communities of governance would be comprised of relatively homogenous individuals. Perhaps the Framers of the Constitution felt comfortable strictly curtailing the power of the Congress to regulate speech while consciously allowing the states to regulate freely because they supposed that each state was run by a relatively small group of essentially similar people who were unlikely to wreak oppressive horrors on each other—that is, on others like themselves.[58] The founding period had its reasoning class too, and the members were sub-

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57. For critiques of this approach, see MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 72-73 (1988) and Michael J. Perry, *Neutral Politics?*, 51 REV. POL. 479 (1989).

58. *Cf.* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 16 (1985) (noting that Colonial Americans held extraordinarily diverse opinions on religion, politics, social structure, and other vital subjects, but every community had its own orthodoxy and eagerly banished or extralegally punished unwelcome dissidents).

stantially aligned in their position before their governments, both local and national. That situation could hardly continue, and after the Civil War, the Industrial Revolution, and the rise of fascism in Europe, the matter of the position of citizens before their governments became sharply discontinuous with the original assumptions. It is, I suspect, no accident that *Terminiello v. Chicago*[59] was decided after World War II, or that the right to freedom of association was not discovered to have teeth until the civil rights movement needed it.[60]

These newly developing rights are useful to democracy, and one can hardly condemn them. Yet, there is something frightening in this project of alignment—this effort, in effect, to replace the local communities of governance envisioned by the Founders with a national community in which all will participate in the dialogue in the same way because the state is free to forbid other ways. Elsewhere, I have suggested that the use of the Establishment Clause as a cudgel to restrict the permissible arguments in public debate is particularly disturbing, and its forceful separation of the permissible self from the permissible argument is terribly frightening.[61] This destruction of the public aspect of the religious self, however, may be a small part of the larger and perhaps unintended project that I have described, the homogenization of the voices in which debate is made, creating a national community in which all speech is of only one kind.

V. THE FIRST AMENDMENT AS SWORD

The project of repairing the bonds of community by limiting the range of dissenting voices does not rely entirely on the existence of a state interest adequate to justify the control of speech. Sometimes the Free Speech Clause is used the opposite way, not as shield but as sword—not as a means for protecting one's own speech directly, but as a weapon to restrict the speech of others. For example, regulation of what is sometimes called

59. 337 U.S. 1, 4 (1949) (striking down restrictions on free speech unless such speech is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest").

60. *See* NAACP v. Button, 371 U.S. 415 (1963) (upholding petitioner's right of association for the purpose of challenging racial discrimination).

61. *See* Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977 [hereinafter Carter, *Evolutionism*]; Stephen L. Carter, *The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law*, 69 OR. L. REV. 495 (1990).

"hate speech" is sometimes supported by the claim that if members of historically disadvantaged groups are subjected to name-calling and harassment, their own ability to speak—to participate in public debate within the community—will be compromised and perhaps destroyed. The racist speech that some would like to regulate is thus described as a method of silencing. Consequently, so the argument runs, because the state cannot absolutely protect both the speech rights of the harasser and the speech rights of the harassed, it must make a choice. The balance, it is said, should be struck in favor of the member of the putatively oppressed group.[62]

In a similar vein, Mark Yudof argued a few years back that the First Amendment rights of citizens to free and open debate might be used as a device to restrict the speech of the government.[63] The theory is that when the government speaks, it often does so with a force and authority that swamps dissenting voices, thus stifling debate on the issue in question.[64] Government speech is held to be coercive, or at least opinion-shaping, in a way that private speech is not. Consequently, in order to protect the robust public debate that the First Amendment is said to contemplate, the free speech rights of government officials must necessarily be limited.

These arguments about free speech as a shield, stunning though they must seem to orthodox First Amendment theorists, have the peculiar virtue of equalizing the status of the clauses of the First Amendment by reducing the protection of speech to something more akin to the already reduced status of protection of religion and, in a different sense, protection of the press.

They equalize treatment in two ways, one of which relates only to the religion clauses, the other of which relates to both the Free Press and Free Exercise Clauses. The similarity to the religion clauses comes because the anti-hate-speech and anti-government-speech theories both create what is in effect an Establishment Clause within the hitherto sacrosanct territory of free speech. The notion of restricting government speech because it inhibits the free speech of others neatly tracks the theory that holds the Establishment Clause to be a vehicle for free exercise,

62. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

63. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 157 (1983).

64. *See id.* at 156-57.

that is, that the reason the government cannot establish a church is that such a move would be anticompetitive.[65] The banning of hate speech because it interferes with the freedom of others to speak is akin to the traditional theory that the reason for the Establishment Clause is to protect religious pluralism by shielding marginal and unpopular religious faiths against a more powerful and sometimes malevolent religious mainstream—although, to be sure, the anti-hate-speech rules regulate private, not official, speech and speech-acts.

The Free-Speech-Clause-as-sword theories further import an element that is common to jurisprudence under both the Free Exercise and Free Press Clauses but, until recently, was less common in garden variety free speech cases. That element is the idea of balancing—that one weighs the infringement on the protected right against the importance of the government interest at stake in order to decide the case. Balancing tests are not entirely foreign to free speech cases, but the balances have generally worked out in ways that make restrictions on speech quite difficult to maintain. In free press cases, too, the balance is usually struck in favor of the press, but the counterexamples, such as *United States v. Progressive, Inc.*,[66] are rather spectacular. In free exercise cases, as I have already suggested, the government does not have to show much of an interest as long as the effect on religious exercise is unintended, perhaps because religion is not considered very important.[67]

The implicit leveling in the Free-Speech-Clause-as-shield theories that I discussed earlier suggests that free speech is not very important either; certainly it turns out to be less important than many other values. To many of those who are struggling to preserve or recapture the ideal of community, this is probably true. For increasing numbers of people, legal theorists, politicians, and lay citizens alike, the more important value is the re-creation of the moral bonds that marked the homogeneous communities in which the Founders expected their First Amendment to function. That project, too, involves response to the collapse of one of the original assumptions.

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65. *Cf.* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989) (concluding that religion is a market with too many ties to governmentally regulated markets to permit complete separation from the state).

66. 467 F. Supp. 990 (W.D. Wis.) (enjoining a magazine from publishing an article describing how to manufacture a hydrogen bomb), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

67. *See supra* text accompanying notes 32-47.

VI. The Community Control Model

If I am right, all of this suggests a future in which the Free Expression model of the First Amendment slowly loses its dominance and is replaced, perhaps by popular demand, by the Community Control model. The Community Control model, long at work in the obscenity cases, holds that communities must be left free to express their jointly held values, even if this sometimes has the effect of preventing other people from expressing their singularly held values.

Even after two decades, the classic statement of the Community Control model remains the one proferred by Chief Justice Burger in *Miller v. California*,[68] the case that currently defines the constitutional law of obscenity:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. . . .
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> . . . .
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> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[69]

As a law of obscenity, this might seem unwieldy; in fact, it has worked reasonably well, if what matters is practicality. For all of its line-drawing problems, the Community Control model is an effort to respond to the sense of moral collapse that accompanies an unfettered freedom to speak. In a nation in which fascism, racist murder, sex with children, and rape are all freely advocated (often as important parts of popular culture), it is not unreasonable to suppose that something has gone badly wrong. It is all very well to talk endlessly about the need to defend free speech to the utmost precisely when the speech in question is most threatening, but that is a philosophy that often must seem best suited to a warm, secure classroom and a world in which threatening speech-acts are few. As the frightening speech-acts in-

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68. 413 U.S. 15 (1973).
69. *Id.* at 30, 32 (citation omitted).

crease, however, the community begins to sense that something is amiss.

The so-called republican revival in legal and political scholarship reflects the notion that the moral, and perhaps conversational, bonds of community matter and are, perhaps, a part of the democratic ideal that has been forgotten.[70] However, the calls for attention to the republican heritage (which, as we tend to forget, was horribly oppressive, at least for those who were not white male property owners) does not quite strike at the heart of the move toward the Community Control model and the fear of something amiss. What is amiss may be (or seem to be) that the community has become *too* heterogeneous: the reason that so many outrageous ideas are being discussed is, quite simply, that there are too many people of too many different backgrounds all pretending to be a single community in the sense that the Framers of the First Amendment must have envisioned. Perhaps, in such a community, the Amendment does not work quite as it was supposed to. Yes, it protects all voices, but in a more heterogeneous community, the different voices might seem cacophonous, so that suddenly there is no debate, but only noise. The way that the worried community escapes this difficulty, then, is to regulate. The point of the regulation is to reestablish community, essentially by legislating away some of the more troubling voices—even, sometimes, the voice of the majority.[71]

This, I think, is what is really at issue in the cases on the teaching of scientific creationism in the schools.[72] The worried parents want to see their children's schools reflect their worldview instead of someone else's. They want to preserve their sense of community, a sense engendered in part through their shared religious faith. Their chosen method is to regulate the curriculum to prevent the expression of ideas that they think

70. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

71. Short of regulation, the worried community might also try to drown out the objectionable voices, through concerted speech or through government speech. The possibility that the government's ability to speak might drown opposing voices motivated Mark Yudof's very interesting book, *When Government Speaks: Politics, Law, and Government Expression in America*. YUDOF, *supra* note 63. Yudof calls for use of the First Amendment as a shield against some government speech, particularly when the government's message is likely to drown the competition. This notion, of course, runs directly counter to the Community Control model. For my general reaction to Yudof's thesis, see Carter, *supra* note 26.

72. *See* Edwards v. Aguillard, 482 U.S. 578 (1987); McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. 1982).

will destroy the community that they are struggling to preserve.[73]

Mozert v. Hawkins County Board of Education[74] involved a similar situation. Unable to restrict the curriculum directly, parents tried to restrict the books that would be available to their children.[75] Their motive must have been exactly the same, the preservation of their homogeneous community from the cacophony of voices thought to pose a threat to its survival.

The efforts to prosecute the exhibitors of the Mapplethorpe exhibit and the rap group 2 Live Crew might be explained in a similar fashion.[76] So might the antipornography ordinance struck down by the Seventh Circuit in the case of *American Booksellers Ass'n v. Hudnut*[77] and the anti-hate-speech and antiharassment rules many colleges have adopted.[78] All of these cases involve efforts to substitute local for national judgment on the issue of what counts as the sort of speech in which a public-spirited citizen ought to engage—the effort, in short, to re-create the community of relatively homogeneous ideas that the Founders probably anticipated.

In the particular matter of the antiharassment rules, supporters often describe the issue as involving the question of which stands higher in the hierarchy, the commitment to expressive freedom or the commitment to equality. That is a weighty question indeed; for my purposes, however, the rules are better viewed as instances of the community deciding what must be prohibited in order for the community itself to survive. This view suggests the importance of venue: the antiharassment rules exist principally on college campuses. Now that the campuses are more fully integrated, the preservation of the campus community might, in this vision, require an attitude of tolerance and respect toward fellow students that hate speech and harassment do not display. Consequently, the best analogue to the antiharassment rules might actually be the scientific creationism statutes.

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73. For an elucidation of this proposition, see Carter, *Evolutionism*, *supra* note 61, at 981-82 (noting that a Christian fundamentalist may consider a so-called neutral curriculum to in fact constitute a challenge to his or her most deeply held beliefs).

74. 827 F.2d 1058 (6th Cir. 1987).

75. *Id.* at 1062.

76. *See* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

77. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). For a critical commentary on the *Hudnut* case, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 213 (1989).

78. For more detail on my view of the anti-hate-speech rules, see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY ch. 8 (1991).

Recent evidence suggests that the Supreme Court is turning in the direction of the Community Control model, although the Justices seem to be refusing to choose between the local and national models of what forms of dialogue are appropriate for the public-spirited citizen. Two cases from the 1990-1991 Term exemplify the Community Control approach. First, in a case much of the public missed, *Barnes v. Glen Theatre, Inc.*,[79] the Justices concluded that local communities, just as they have the power to ban what they consider obscene, may also forbid nude dancing that is not obscene.[80] In *Rust v. Sullivan*,[81] the Justices determined that the federal government has the power to prohibit family planning clinics that receive federal funds from discussing the option of abortion with their clients.[82]

Both cases have been thunderously condemned as infringing upon First Amendment rights, and it is true that they are at sharp variance with the precedents. However, the nude dancing case, and, to a lesser extent, *Rust*, seem entirely consistent with the view that the First Amendment is designed to allow debate in relatively homogeneous moral and political communities rather than to ensure that all voices are heard.

VII. CONCLUSION

Where all of this will lead, of course, I do not know. I suspect, however, that as federal authority continues to become more intrusive and the bonds of community continue to weaken, we will see cries for more categories of protected speech side-by-side with calls for more authority in the community to redress the symptoms—and that is all speech is, a symptom—of the collapse of the moral homogeneity of the local governing community.

If moral disintegration is indeed progressing, the push away from the Free Expression model toward the Community Control model might prove irresistible. The desire to return to relatively homogeneous communities cuts across political lines: one can hardly identify it as left or right. Instead, it is a desire among all people of strong commitments to live in communities in which those commitments are valued rather than attacked at every turn. After all, a sharp experiential difference exists between

79. 111 S. Ct. 2456 (1991).
80. *Id.* at 2461.
81. 111 S. Ct. 1759 (1991).
82. *Id.* at 1772.

giving occasional ear to a dissenting voice and hearing the sounds of angry disagreement or rejection all the time.

Still, the trouble with the Community Control model remains the trouble for all communitarian models of law or politics: it leaves little space for the dissenter, the individual valued in liberal theory, who must adhere to the community's line, even on the matter of how a public-spirited citizen should conduct debate, or else cease to participate in governance. The dissenter is asked, in effect, to hide a portion of the self from public view. Whether the self that is split off from the public persona is deeply religious, deeply racist, or deeply risqué, he or she is still a human being that the community wants to isolate. One might suppose that the Constitution exists to prevent the community from squelching the dissenter who is thought to spew forth the rhetoric of moral evil, but under the Community Control model, one would be wrong.

The growing ascendancy of the Community Control model poses an important challenge to First Amendment absolutists as well as to those somebody once called the "almost-abs"—theorists who will allow regulation of some very carefully delineated circle of speech or speech-acts based on only the most compelling justifications. The Free Expression model may not survive the upsurge in public desire to regulate speech. True, it has always survived in the past, but sometimes only after a long period of constitutional hibernation. It may be that the newest period of hibernation is about to begin, and the only weapon available to fight the new surge of community control might in the end be an appeal to a community that refuses to listen or appeal to a court system that no longer seems to care.