The Original Understanding of the Freedom of the Press Provision of the First Amendment

Philip B. Kurland

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
THE ORIGINAL UNDERSTANDING OF THE FREEDOM OF THE PRESS PROVISION OF THE FIRST AMENDMENT*

Philip B. Kurland**

I. THE CONSTITUTION, LIKE THE COMMON LAW, IS BASED ON EXPERIENCE

One of the most quoted phrases in legal literature is Oliver Wendell Holmes's proposition that "The life of the law has not been logic: it has been experience."1 Like many of Holmes's well-known aphorisms, it is usually quoted out of context. He was not saying, as some would have it, that law reflects only feelings or ideology rather than reason.2 He was rejecting the rigidity of the syllogism, which tells us how to derive a conclusion from a major and minor premise, but tells us not how to discover those premises. There are always more than major and minor premises in-

---

* Copyright 1984 by Philip B. Kurland.
This article was originally presented as the Tenth Annual Law Memorial Lecture at the University of Mississippi School of Law in March of 1984. Since 1974, the Law Memorial Lectures have been supported by the Jackson, Mississippi firm of Butler, Snow, O'Mara, Stevens & Cannada, as a memorial to founding members of the firm, George H. Butler, Sr., Charles B. Snow, and J. Morgan Stevens. Professor Kurland inaugurated the series in 1974 with Watergate, Impeachment and the Constitution, 45 Miss. L.J. 531 (1974).


2 "These philosophers believe that they have burrowed too far into the visceral origins of our beliefs and of all convictions to be fobbed off by the ingenuous assumptions of a simpler age." L. Hand, The Spirit of Liberty 207 (2d ed. rev. 1953).
volved in the framing of law. As Holmes said on that same first page of *The Common Law*, "other tools are needed besides logic . . . . The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscionous, even the prejudices which judges share with their fellowmen, have a good deal more to do than the syllogism in determining the rules by which men should be governed." And, he went on: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become." A knowledge of its history and origins, of what Alexander Bickel once called "the original understanding," is a necessary ingredient in comprehending our present law. The "original understanding" of the first amendment has generally been romanticized to the end of commanding the broadest reading of the provision in its application to today's problems. By revealing its history, however, I make no claim or assertion that it will afford solutions to our modern difficulties. History is but one element in the elucidation of the law, and usually not the most important one.

Holmes, in his famous epigram about the life of the law, was, of course, speaking about the development of the common law, a body of rules wholly created by judges in the course of adjudicating cases and controversies, usually between private parties. The materials of judicial precedents, unalloyed by constitutional mandate or statutory command, are particularly mal-

---

* Holmes, supra note 1, at 1.
* Id.
* The point of view described here is inextricably linked to the name of Justice Black, whose view of the first amendment is illustrated by the following representative statement: "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" Black, *The Bill of Rights*, 35 N.Y. Univ. L. Rev. 865, 867 (1960). Among other commentaries discussing the amendment in similarly sweeping terms, see W.O. Douglas, *Points of Rebellion* 1-3, 11 (1970)(deploring narrow interpretation); and Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 256-57 (1961)(amendment requires absolute immunity for all political speech).
FREEDOM OF THE PRESS

leable. If law school teaches nothing else, it must demonstrate that precedents are not rigid limitations on judicial judgment and that the more relevant precedents there are, the less confining they tend to be. Judges relying solely on their predecessors’ efforts from which to derive a governing rule infringe on no one else’s domain when they utilize their own intellectual resources to shape received doctrine to fit the moods and needs of their own day. But, as Holmes also said, while judges do create new rules, i.e., they are legislators, “they can do so only interstitially; they are confined from molar to molecular motions.” And yet, even in the arena of the common law, where the judge is monarch of all he surveys, it still behooves him in determining the fitness of earlier decisions to understand the reasons for their creation and the stages of their growth. Let me use Holmes’s words from *The Common Law* again:

> However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in that past which the law embodies, we must ourselves know something of the past. The history of what the law has been is necessary to the knowledge of what the law is.⁷

(To law students who may read these remarks, I feel it necessary to explain my iterated reliance on Holmes. But I have discovered that, as I grow older, Holmes seems to grow wiser. When I was a student, I cherished Holmes for his wit, for his aphorisms, for his brevity, and for his command of the English language, surpassed among judges, if at all, only by Learned Hand and the most able Supreme Court opinion writer of all time, Robert H. Jackson. But time has taught me that what once impressed me only as grand style was in fact a capacity for insights—Holmes called it, in his snobbish fashion, “apercus,”⁸—that lesser minds, such as mine, could come to appreciate only through experience.)

---

⁸ HOLMES, supra note 1, at 37.

* See M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 419-20 (1946)(Holmes’s use of the word to convey what he thought of Hegel’s philosophy of law).
Let me remind you again that, in the quotations I have thus far offered, Holmes was talking about the common law, where the judges were the voices of the sovereign. At the risk of speaking heresy in today’s world of constitutional jurisprudence, I would suggest that even federal judges, mighty as they are, have a more limited law-making power in cases involving constitutional or statutory construction. The differences may be hard to discern simply from a reading of judicial opinions. Using Holmes’s dicta or their equivalent to excuse themselves from any obligation to reasoning, judges today frequently connect their answers to the questions only by untold numbers of words among which some selection might be made by their readers to find several different explanations—sometimes inconsistent ones. And usually the most important of these words are “I believe” or some equivalent Jovian expression of personal preference. Perhaps no more than such a personal credo should be required in a common-law case. But surely some obligation is owed to recognize constitutional provisions and statutory enactments as having greater weight than mere judicial precedents. If I am not lifting myself by my own bootstraps by referring to the Constitution itself, I would note that article VI makes the Constitution and the laws of the United States “the Supreme Law of the Land,” without even a nod in the direction of prior judicial decisions. It took John Marshall in Marbury v. Madison to provide the lever by which judicial dictum became superior to constitutional or statutory language: a lever utilized far more in the twentieth century than it was in the nineteenth. Marshall’s phrase, of which the Supreme Court has become so enamored, was: “it is emphatically the province and duty of the judicial department to say what the law is.”

Of course, I do not mean to suggest that those of us who do not share the latitudinarian views of judicial authority represented by my deconstructionist colleagues would reject for constitutional adjudication Holmes’s notions of how law is made. The syllogism is still an inadequate guide, even if one were to

10 U.S. Const. art. VI, § 2.
11 5 U.S. (1 Cranch) 137 (1803).
12 Id. at 177.
find his major premise in the legislative language. The context in which it was composed, the problems to which it was addressed, and the ambiguities of language still call for the kinds of judgments that a common-law judge is called on to make, and more. Neither the syllogism nor a computer can provide a definitive answer. Judgment is invoked and judgment is a human function, not a mechanical one.

Felix Frankfurter, then a justice of fifteen years experience, once described, for the benefit of the American Philosophical Society, the demands on a judge whose principle business was constitutional and statutory construction. He wrote:

A judge whose preoccupation is with such matters should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.

The decisions in the cases that really give trouble rest on judgment, and judgment derives from the totality of a man’s nature and experience. Such judgment will be exercised by two types of men, broadly speaking, but of course with varying emphasis—those who express their private views or revelations, deeming them, if not vox dei, at least vox populi; or those who feel strongly that they have no authority to promulgate law by their merely personal view and whose whole training and proved performance substantially insure that their conclusions reflect understanding of, and due regard for, law as the expression of the views and feelings that may fairly be deemed representative of the community as a continuing society.\(^\text{13}\)

If the Constitution is not a code of laws with a rule to meet every contingency, neither is it merely a set of moral precepts

derived from the political philosophers whom the writers and ratifiers of the Constitution invoked so frequently in their arguments over the merits and demerits of various provisions. The Constitution was not, in 1787, a recapitulation of John Locke or Baron Montesquieu, any more than in 1904 it could be derived from Herbert Spencer’s *Social Statics* or in the 1970’s from John Rawl’s *Theory of Justice*, so that one cannot simply resort to the writings of such savants to determine its meaning. As Felix Frankfurter once said when he was still professing law, “the Constitution . . . was a response to the practical problems and controversies of our early history.” While it is not sufficient to know what those “practical problems and controversies” were in order to determine the meaning of the words that were used, such knowledge can shed some light on how the terms are to be applied even today. For some, like Mr. Justice Black, “it is language and history that are crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by justices of the Supreme Court.”

Thus, the Constitution can be seen to have been created largely to resolve two kinds of problems with which the statesmen of the time had more than adequate experience. The first was the set of abuses imposed on the American colonists and their antecedents by royal governments. Many of these may be found detailed in the bill of indictment contained in the Declaration of Independence. I do not mean Jefferson’s sonorous phrases about “self-evident truths.” (As law students learn

14 H. SPENCER, SOCIAL STATICS (1851). This book may now be better known to law students than to the general public, thanks to Holmes’s famous statement that the fourteenth amendment did not enact it. See Lochner v. New York, 198 U.S. 45, 75 (1905)(Holmes, J., dissenting). But in the late nineteenth and early twentieth centuries, Spencer’s argument against state economic regulation enjoyed tremendous popularity. Discussions of his influence appear in S. FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE 30-46 (1956); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT passim, esp. 31-50 (1955); and 3 V.L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 197-211 (1927).

15 J. RAWLS, A THEORY OF JUSTICE (1971). Rawls attempts to use the time-honored notion of the social contract to support his vision of a society striving to enhance the position of the materially disadvantaged, subject to provisions guaranteeing “equal liberty” for all citizens.


17 H. BLACK, A CONSTITUTIONAL FAITH 8 (1968).
quickly, when a brief or an opinion suggests that a proposition needs no authority to support it, it usually means that there is no such authority.) I speak rather of the specific complaints about such things as trial beyond the vicinage and a judiciary beholden to the executive. The second set of experiences which engaged the framers in a search for cures were the defects in the government established under the Articles of Confederation, not least of which was the incapacity of the central government to raise funds and to protect commerce among the several states. The first problems were those of government too strong to preserve the liberties of the people. The second were those of a government too weak to survive. A way had to be found between Scylla and Charybdis.

Nor were the answers devised by the Constitution writers ad hoc innovative solutions to perceived problems. Between 1776 and 1787, and even before, the states had experienced self-government of their own, affording examples of how best to deal with some of the basic issues that confronted the Founding Fathers. An examination of the state charters and constitutions demonstrates that a very large part of the American Constitution was derivative rather than original, not least in the area of the Bill of Rights. For example, even before the Declaration of Independence, the Virginia Bill of Rights asserted that "the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." The founders did not need to imagine the dangers of allowing the quartering of troops in private homes. They did not need to guess at the necessity for a rein on the judiciary through a guaranty of jury trial. Whether true of the common law or not, certainly the creation of the Constitution was based on experience rather than logic.

18 The Second Continental Congress's catalogue of grievances against George III contains, inter alia, charges that he "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries," and that he consented to laws providing for "transporting us beyond seas to be tried for pretended offenses . . . ." The Declaration of Independence, para. 11, 21.

19 Virginia Bill of Rights, § 12 (June 12, 1776), reprinted in 1 H.S. Commager, Documents of American History 103-04 (9th ed. 1973).
II. AMERICAN PRECONSTITUTIONAL EXPERIENCE: THE BLACKSTONIAN CONCEPT OF THE FREEDOM OF THE PRESS

The Constitution was the capstone of a unique political revolution. The American Revolution was not a contest between rival political or religious factions seeking hegemony over the people. Nor was it a contest between economic classes or social strata, for the American states were—if we ignore the question of slavery, which is exactly what the Founding Fathers did—still essentially classless societies. It was a revolution to bring about self-government in a geographic area of a dimension never before the subject of democratic or republican rule, self-government that would afford its constituents protection for life, liberty, and property and perhaps, even for the Jeffersonian notion of "the pursuit of happiness." But, as one of the patron saints of the new American Government, John Locke had written: "The business of law is not to provide for the truth of opinion, but for the safety and security of the commonwealth and of every particular man's goods and person."\(^{20}\) The restoration of the rights of Englishmen—including no taxation without representation—was the battle cry of the American Revolution of 1776. By the time the War of Independence was won, and certainly by 1787 when the Constitution was framed, the rights of Englishmen were probably not enough.

Among the pre-Revolutionary rights of Englishmen was what was termed "freedom of the press." Since there was no written constitution in England—there still is none—English freedom of the press was somewhat amorphous in nature and, in any event, subject to change at the will of Parliament. The nature of this right was described by David Hume in an essay of 1742, with all his usual enthusiasm for British liberty. In Of the Liberty of the Press, he wrote: "Nothing is more apt to surprise a foreigner, than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers."\(^{21}\) Hume saw no inconsistency between this


right of Englishmen and the "general laws against sedition and libeling [which] are at present as strong as they possibly can be made." The theme was one that would recur throughout the eighteenth- and early nineteenth-century discussions of the subject: freedom to say what you will, but responsibility for what was said. Is speech or press free when the speaker or publisher may be held liable in penal or civil sanctions for it? Certainly the English liberals of the day seem to have thought so.

A point then that should be quickly made is that the Americans were fully conversant with the English law when they were going about the business of their constitution-making. In this day and age, when lawyers are so ill used, even by such eminent as the Chief Justice of the United States and the President of Harvard University, both of whom are members of the profession, I am fond of resorting to Edmund Burke's speech, "On Conciliation with America," as evidence of the role of the law and lawyers in bringing liberty to this continent. There Burke told Parliament:

Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller that in no branch of

---

22 Id. at 98 n.1.
23 See, e.g., Rex v. Shipley, 4 Douglas 73, 170, 99 Eng. Rep. 774, 824 (K.B. 1784)(Mansfield, J.)("[t]he liberty of the press consists in printing without any previous license, subject to the consequences of law"). Lord Ellenborough was of the same mind a generation later: "The law of England is a law of liberty, and consistently with this liberty, we have not what is called an imprimatur; there is no such preliminary licence necessary. But, if a man publish a paper, he is exposed to the penal consequences." Rex. v. Cobbett, 29 How. St. Tr. 1, 49 (K.B. 1804).
his business, after tracts of popular devotion, were so many as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear they have sold nearly as many of Blackstone's Commentaries in America as in England.26

What then was the Blackstonian description of freedom of the press? In the fourth volume of the Commentaries, published in 1769, he wrote:

The liberty of the press is indeed essential to the nature of a free State; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the revolution, is to 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. But to punish (as the law does at present) any dangerous or offensive writings which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects . . . .27

The American preconstitutional experience was not dissimilar to that of the English. Here, too, the writers and the courts treated the notion of freedom of the press as the right not to have expressions censored before publication. It was as well ac-

26 E. BURKE, Speech on Moving his Resolutions for Conciliation with the Colonies, in 2 WRITINGS AND SPEECHES OF EDMUND BURKE 124-25 (1901).
27 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *152-53.
cepted—however much we have since sought to mythologize Cato's Letters and John Peter Zenger—that a free press did not preclude post-publication prosecutions. And this was true in states where constitutional provisions had been made to ensure freedom of the press as well as where the reliance was solely on the common law. Thus, as late as the year before the Congress offered the first amendment for ratification, 1788, the Supreme Court of Pennsylvania decided Respublica v. Oswald. The Pennsylvania Constitution provided that "the freedom of the press shall not be restrained" and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government." Nevertheless, the court ruled that "[t]he true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motive of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity." James Wilson, one of the foremost legal scholars of his time, later to be a justice of the Supreme Court of the United States, had expressed the same views at the Pennsylvania ratifying convention on December 1, 1787, where he said:

I presume it was not in the view of the honorable gentleman to say that there is no such a thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or

28 1 Dall. 319 (Pa. 1788).
29 Pa. Const. of 1776, art. XII, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3083 (F. Thorpe ed. 1909) [hereinafter cited as Thorpe].
31 Oswald, 1 Dall. at 325.
the safety, character, and property of the individual. 2

These and the other authorities to which I shall refer are not exhaustive but rather representative of the legal opinion of the era.

There was controversy in the United States, as in England, but not over the question whether freedom of the press foreclosed punishment for publication that could not be censored. The issues that were fiercely mooted were two: should the judge or the jury determine whether the words used constituted a libel, and could truth be introduced as a defense? Those questions were put to rest in England by Fox's Libel Act of 1791 33 in favor of jury adjudication, and in this country to the same result sometimes by judicial decision, 34 sometimes by constitution or statute, as the terms of the Sedition Act 35 law reveal.

When the first amendment was proposed to the states for ratification, it was against this background of accepted law. Further enlightenment as to its meaning was not forthcoming from the First Congress by way of legislative history. The usual reliable sources for construing the original constitution—the debates at the Federal Convention and at the ratifying conventions, The Federalist 36 and the Anti-Federalist Papers 37—all offer some commentary on freedom of press, but not much that is helpful. Hamilton's proposition in the eighty-fourth Federalist suggests that the various state constitutional provisions for a free press are meaningless and only afford aid and comfort to those who would prefer to read things into the Constitution rather than to derive meaning from it. He wrote:

What is the liberty of the press? Who can give it any definition

---

2 Elliot's Debates 449 (1861 ed.).
33 An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, 1791, 32 Geo. 3, ch. 60.
34 See, e.g., Respublica v. Dennie, 4 Yeates 267, 271, 2 Am. Dec. 402, 406 (Pa. 1805)(jury shall determine whether publication constituted libel); State v. Lehre, 2 Brew. 446, 446, 4 Am. Dec. 596, 596 (D.C. 1811)(jury decides whether statement was libelous as well as fact questions concerning publication and truth).
35 An Act for the Punishment of Certain Crimes against the United States, 1 Stat. 596 (1798)(expired 1801).
36 The Federalist (Henry Cabot Lodge ed. 1888).
which would not leave the utmost latitude for evasion? I hold it to be impracticable, and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. 38

Thomas Jefferson, on the other hand, when returning his comments on the proposed first amendment, expressed views more in keeping with the Blackstonian notion of the concept. “[T]he following alterations and additions would have pleased me,” he wrote to Madison. “The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations.” 39 Surely this was less of a license than even Blackstone’s definition would afford. If his federalist foes could have known of it when they were locked in battle with him over the Alien and Sedition Laws, how they would have thrown it in his face. But his proposed emendation had come too late to effect a change in the language of the amendment, even though it was to find some echoes in the law as it later developed.

Thus was the attitude toward the “liberty” of publishers at the time of promulgation of the first amendment forbidding Congress to make any law “abridging the freedom of the press.” I have spoken only about freedom of the press, largely because it was freedom of press and not of speech that was the concern of the colonists and their heirs. Insofar as speech was a problem, it tended to be subsumed under the religious question, which is a different but not necessarily separable provision of the first amendment. I have not tried to parse the words used by the First Congress. For, as an erudite word-monger once wisely said: “The great difficulty for historians is to find out what a certain sentence really meant in a particular year. Nothing is as unstable as speech; misunderstanding of what an earlier generation really meant is so easy as to be almost inevitable.” 40

---

40 Bryher, Days of Mars 51 (1972).
Rather, let us undertake a pragmatic exegesis of the meaning of "freedom of press" as explicated in the controversy over the Alien and Sedition Laws and what followed.

III. THE SEDITION LAW CRISIS: PRESS FREEDOM AS AN ISSUE

The great constitutional crisis of the Federalist period surrounded the Alien and Sedition Laws and was in part—if only in part—concerned with the meaning of the first amendment. The Sedition Act of July 14, 1798 was, indeed, of broad scope, providing:

SEC. 2. That if any person shall write, print, utter, or publish ... any false, scandalous and malicious writing ... against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them ... the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States ... or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person being thereof convicted before any court of the United States having jurisdiction thereof shall be punished, . . . .

The issues that had vexed the English and American courts in criminal libel cases, whether evidence of truth could be offered in defense and whether judge or jury were to determine whether the published language constituted a libel, were resolved in favor of defendants by section 3:

That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause,
shall have the right to determine the law and the fact, under
the direction of the court, as in other cases.\textsuperscript{43}

That the Alien and Sedition Laws were purposeful political
machinations by John Adams and his cohorts, aimed at the Jeff-
ersonian press and the Republicans' francophile partisans can-
not be gainsaid.\textsuperscript{44} That the statute trampled civil liberties, few
doubted. Whether the powers asserted went beyond what the
Constitution allowed was a more difficult question. The reaction
of the Jeffersonians was strong. The Kentucky\textsuperscript{45} and Virginia\textsuperscript{46}
Resolutions, drafted respectively by Jefferson and Madison, as-
serted that there was no constitutional authority in Congress to
enact these laws and that, as parties to the Constitution, the
states had the right to reject laws that were inconsistent with
the terms of the compact. These two states called on their sister
states to join them in declaring the statutes ineffective and com-
manding the representatives in Congress to withdraw them. This
was one of the three or four major crises in our history in which
some of the states sought to assert rights as contracting parties
to the Constitution. They all failed.\textsuperscript{47} The 1787 Constitution was

\textsuperscript{43} Id. § 3.

\textsuperscript{44} For discussions of the historical context of the Alien and Sedition Laws, see J.
 MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 26-32 (1951)(detailing Feder-
alists' fear of Republican newspapers) and J.M. SMITH, FREEDOM'S FETTERS: THE ALIEN
AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 11-13 (1956)(discussing Federalists' fear
of "Jacobinism"). For the partisan application of the laws, see R. BUEK, SECURING
THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS 1789-1815 235-36 (1972)(asserting that
Federalist judges and officials used the laws against Jeffersonians).

\textsuperscript{45} Resolutions of the General Assembly of the Commonwealth of Kentucky, November
16, 1798 [hereinafter cited as Kentucky Resolutions], reprint in 4 ELLIOT'S DE-
BATES 540-45 (1836 ed.).

\textsuperscript{46} Resolutions of the General Assembly of the Commonwealth of Virginia, December
24, 1798 [hereinafter cited as Virginia Resolutions], reprint in 4 ELLIOT'S DE-
BATES 528-29 (1836 ed.).

\textsuperscript{47} See, e.g., M. SMELSER, THE DEMOCRATIC REPUBLIC 1801-1815 296-99 (1968) (dis-
cussing Hartford Convention of 1814-1815, at which delegates called for "parochialism
and privilege" and maintained that "unconstitutional federal acts should be countered
by the states to shield their citizens"); G. DANGERFIELD, THE AWAKENING OF AMERICAN
NATIONALISM 1815-1828 13-15, 279-83, 299-300 (1965) (controversy surrounding Tariff of
1816 and Tariff of 1828); and G. VAN DEUSEN, THE JACKSONIAN ERA 1828-1848 71-80
(1959) (discussing South Carolina's 1832 Ordinance of Nullification, which declared that
"we [the People of South Carolina] will consider the passage, by Congress, of any act
. . . to coerce the State . . . to be null and void [and] inconsistent with the longer con-
not a compact between the states but among the peoples of the states. That is what made it unique.

It must be remembered that the Kentucky and Virginia Resolutions were promulgated several years before the Supreme Court first declared a national statute to be unconstitutional so that the road of state proclamation seemed more certain to the Republicans than a course of action through the courts. John Marshall, even then, however, suggested that the issue be presented for resolution in the federal courts. Both sides to the controversy knew that the national courts were largely manned by strong Federalist judges who could be predicted to support—as they ultimately did—the actions of the Federalist Congress and the Federalist President.

The pleas of Kentucky and Virginia to their sister states were rebuffed. They brought about complete rejection of the notion of a power of nullification and, for some, a clear affirmation of the validity of the Alien and Sedition Laws. Delaware, Rhode Island, Massachusetts, New York, Connecticut, New Hampshire, and Vermont through their legislatures, all

48 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
50 See Miller, supra note 44, at 135-39 (entire federal bench joined crusade against “Jacobinism”); M. SMELSER, THE DEMOCRATIC REPUBLIC 64-67 (1968)(judiciary remained federalist bastion well into Jefferson’s administration).
51 Resolution of the Delaware General Assembly, February 1, 1799, reprinted in 4 ELLIOT’S DEBATES 532 (1836 ed.) (“very unjustifiable interference with the general government”).
52 Resolution of the General Assembly of the Commonwealth of Rhode Island and Providence Plantations, February [n.d.], 1799, reprinted in 4 ELLIOT’S DEBATES 533 (1836 ed.) (General Assembly expressed concern over “many evil and fatal consequences which may flow” from passage of Virginia Resolutions).
53 Resolution of the General Court of the Commonwealth of Massachusetts, February 9, 1799, reprinted in 4 ELLIOT’S DEBATES 533-37 (1836 ed.) (legislature refused to sanction the Virginia Resolutions for fear “the Constitution would be reduced to a mere cipher’ai.”).
54 Resolution of the Legislature of New York, March 5, 1799, reprinted in 4 ELLIOT’S DEBATES 537-38 (1836 ed.) (“inflammatory and pernicious sentiments”).
56 Resolution of the General Court of New Hampshire, June 14, 1799, reprinted in 4 ELLIOT’S DEBATES 538-39 (1836 ed.) (“state legislatures not proper tribunal” to adjudicate
responded by chastising Virginia and Kentucky—rather than the national government—for their actions.

It is a mistake, however, to assume that free speech and press was the central feature of the Kentucky and Virginia Resolutions. Their principal arguments were that the United States had only delegated powers, that these powers were not enhanced by the “necessary and proper” clause, indeed, that the limitation on national powers reserving powers over seditious libel was particularly preserved by the tenth amendment. Thus, the Kentucky Resolutions asserted that “libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals.” But they also claimed that aliens came within the protection of the states and that the President could be given no power of deportation, especially without jury trial. (These positions, of course, have since been stood on their heads by the Supreme Court.)

The Alien and Sedition Laws, however, certainly roiled the nation. Congress spent much time on the question, generally showing no more objectivity in its debates than did the press, which violently took sides pro and con, depending on their loyalties to the rising fortunes of the Jeffersonians or the declining ones of the Federalists. To review the entire debate would be inappropriate here. But the controversy did evoke some of the best advocacy our learned forefathers ever produced—not least constitutional questions).

Resolution of the General Assembly of Vermont, October 30, 1799, reprinted in 4 ELLIOT'S DEBATES 539 (1836 ed.) (“unconstitutional in their nature, and dangerous in their tendency”).

See Kentucky Resolutions, No. 1, supra note 45, reprinted in 4 ELLIOT'S DEBATES at 540 (federal act void unless power expressly delegated by states); Virginia Resolutions, supra note 46, reprinted in 4 ELLIOT'S DEBATES at 528 (federal government lacks powers beyond those specifically enumerated).

See Kentucky Resolutions, No. 6, supra note 45, reprinted in 4 ELLIOT'S DEBATES at 540 (liberal construction of necessary and proper clause subverts entire instrument).

Id., No. 3, reprinted in 4 ELLIOT'S DEBATES at 541.

Id.

Id., Nos. 4-6, reprinted in 4 ELLIOT'S DEBATES at 541-42.

See Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1891) (federal government has plenary power over alien affairs); see also Zakonaite v. Wolfe, 226 U.S. 272, 275 (1912) (Congress may delegate power of deportation to executive branch; not criminal proceeding, so no trial necessary).

For detailed treatment, see Smith, supra note 44, at 112-30.
by John Marshall, soon to be the great nationalist jurist, and by James Madison, the most astute politician our nation has ever produced. A few quotations will suffice to give both the flavor and substance of the arguments insofar as they related to the issue of freedom of the press.

Marshall drafted the report of the minority on the Virginia Resolutions. The report had every bit of the style and command that was later to grace his constitutional opinions as Chief Justice of the United States:

To constitute the crime, the writing must be false, scandalous, and malicious, and the intent must be to effect some of the ill purposes described in the act.

To contend that there does not exist a power to punish writings coming within the description of this law, would be to assert the inability of our nation to preserve its own peace, and to protect themselves from the attempt of wicked citizens, who incapable of quiet themselves, are incessantly employed in devising means to disturb the public repose.

Government is instituted and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to adopt measures for its security, as well against secret plots as open hostility. But government cannot be thus secured, if, by falsehood and malicious slander, it is to be deprived of the confidence and affection of the people. It is in vain to urge that truth will prevail, and that slander, when detected, recoils on the calumniator. The experience of the world, and our own experience prove that a continued course of defamation will at length sully the fairest reputation, and will throw suspicion on the purest conduct. Although the calumnies of the factious and discontented may not poison the minds of a majority of the citizens, yet they will infect a very considerable number, and prompt them to deeds destructive of the public peace, and dangerous to the general safety.65

So much for the tenth amendment. Marshall turned to the meaning of the freedom of the press which the first amendment

---

said should not be abridged. His emphasis was on the word "abridged":

If by freedom of the press is meant perfect exemption from all punishment for whatever may be published, that freedom never has, and most probably never will exist. It is known to all, that the person who writes or publishes a libel, may be both sued and indicted, and must bear the penalty which the judgment of his country inflicts upon him. It is also known to all that the person who shall libel the government of the state, is for that offense punishable in a like manner. Yet this liability to punishment for slanderous and malicious publications, has never been considered as detracting from the liberty of the press. In fact the liberty of the press is a term which has a definite and appropriate signification, completely understood. 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.

If this definition of the term be correct, and it is presumed that its correctness is not to be questioned, then a law punishing the authors and publishers of false, malicious and scandalous libels can be no attack on the liberty of the press.66

James Madison relied heavily on the limited powers of the national government,67 on rejection of the common law being any part of the national law,68 on a false but tempting equation between the religion clauses and the speech and press clause,69 and on the difference in the form of government between England and the United States as justification for a difference in the law.70 He gave the game away, however, when he made clear that what he was objecting to was trial of offenders under federal law in the federal courts by federal judges appointed by the very President who had invoked the Alien and Sedition Laws to be-

66 Id. at 46-47.
67 See Madison, Report on the Virginia Resolutions, reprinted in 4 ELLIOT'S DEBATES 546-50 (1861 ed.).
68 Id. at 561-67.
69 Id. at 571.
70 Id. at 569-70.
gin with, and by juries drawn by Federalist marshals. He acknowledged that published slanders were subject to sanction in state courts in which freedom of the press was equally sacrosanct under constitutional provisions. Calumniators of the national government, it was implicit in his argument, would receive more sympathetic treatment in the state courts which were not beholden to the American President. In his Address on the Sedition Law, Madison said:

> It is vicious in the extreme to calumniate meritorious public servants; but it is both artful and vicious to arouse the public indignation against calumny in order to conceal usurpation. Calumny is forbidden by the laws, usurpation by the Constitution. Calumny injures individuals, usurpation, States. Calumny may be redressed by the common judicatures; usurpation can only be controlled by the act of society. Ought usurpation, which is most mischievous, be rendered less hateful by calumny, which, though injurious, is in a degree less pernicious? But the laws for the correction of calumny were not defective. Every libellous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers or private citizens . . . .

The contest then was not so much over the freedom of the press from punishment for the publication of libels as between the appropriate realms of the state and national governments. This was the first big battle over the necessary and proper clause as a multiplier of the powers specified in the first seventeen clauses of article I, section 8. The next one would come with the Bank of the United States, when Marshall would put the imprimatur of the Supreme Court on the expansive reading of the necessary and proper clause for which he contended in the

---

71 Id. at 570-71. Madison argued that Congress should make laws only where it has the specified power to do so or else the judiciary will not be able to control Congressional authority. Madison, supra note 67, at 568.

battle over the Alien and Sedition Laws.\textsuperscript{73}

Madison, did, however, make a solid point about the logical
deficiency in an interpretation of "the freedom of the press"
which barred only prior restraint but not consequent punish-
ment. In his Report on the Virginia Resolution he wrote:

The freedom of the press under the common law, is, in the
defences of the Sedition Act, made to consist in an exemption
from all previous restraint on printed publications, by persons
authorized to inspect or prohibit them. It appears to the com-
mittee, that this idea of the freedom of the press, can never be
admitted to be the American idea of it, since a law inflicting
penalties on printed publications, would have similar effect
with a law authorizing a previous restraint on them. It would
seem a mockery to say, that no laws should be passed, prevent-
ing publications from being made, but that laws might be
passed for punishing them in case they should be made.\textsuperscript{74}

Of course, such a distinction was not unknown to the com-
mon law, which denied power to enjoin criminal acts before they
were committed but did not prevent their punishment after the
event.\textsuperscript{75} But that was hardly a satisfactory answer to the
Madison objection that the practical effect of threatened pun-
ishment could be as stifling of free expression as a prior restraint.
The writings of the time do not seem to have dealt with the
question, although the rule against prior restraint does suggest a
distinction between publication, which is to be free, and the con-
sequences of publication, for which the writer or publisher may
be held responsible.

Recently there was celebrated the twentieth anniversary of
the Supreme Court's decision in New York Times Co. v. Sulli-
van,\textsuperscript{76} certainly a landmark decision in the development of the
law of the first amendment. In that decision, the Court sug-

\textsuperscript{73} See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

\textsuperscript{74} Madison, supra note 67, at 569.

\textsuperscript{75} See, e.g., Commonwealth v. Blanding, 3 Mass. (3 Pick.) 304, 313 (1825) ("The lib-
erty of the press was to be unrestrained, but he who used it was to be responsible in case
of its abuse; like the right to keep firearms, which does not protect him who uses them
for annoyance or destruction.").

\textsuperscript{76} 376 U.S. 254 (1964).
gested that the Sedition Act was unconstitutional ab initio.\textsuperscript{77} But that conclusion was as devoid of reason as it was of authority. That the Act should be declared unconstitutional if it were reenacted tomorrow takes little clairvoyance. But, unlike the rulers of Oceania, even in 1986, neither we nor our judges have any legitimate authority to rewrite history to our liking. As of the Federalist period and beyond, court after court sustained and applied the Blackstonian reading of the meaning of freedom of the press.\textsuperscript{78} (It should be remembered that the statute itself by its terms became ineffective two years after its enactment, so that if the Jeffersonians wanted similar protection for themselves from a vicious press, they would have to frame their own law to that end. The Jeffersonians did not do so. They were perfectly satisfied with the relief that could be had in the state tribunals under state laws, especially since the federal judiciary continued to be manned by Federalist judges long after the Federalists were replaced by true-blue Virginians in the national executive, first by Jefferson, then by Madison, and then by Monroe. The Jeffersonians tried but failed to displace the Federalist judges: the removal of Samuel Chase by impeachment narrowly failed in the Senate.\textsuperscript{79} But it did put the fear of the new gods even into Marshall himself. Jefferson did all he could by pardoning those whom the Federalists had convicted and remitting their fines.\textsuperscript{80})

\textsuperscript{77} Id. at 276.

\textsuperscript{78} See, e.g., Near v. Minnesota ex rel. Olson County Attorney, 283 U.S. 697, 720 (1931)(possibility that freedom of press may be abused does not make immunity from prior restraint any less needed; subsequent punishment for abuse is proper remedy); Patterson v. Colorado, 205 U.S. 454, 462 (1907)(purpose of freedom of press is to prohibit prior restraint but not to prohibit subsequent punishment); Dailey v. Superior Court of City and County of San Francisco, 44 P. 458, 459-60 (Cal. 1896)(California Constitution provided that there could be no prior restraint on right to free speech, but speaker was responsible for abuse of that right); Ex parte Neill, 22 S.W. 923, 924 (Tex. Crim. App. 1893)(Texas Constitution granted one freedom to write or publish his opinion on any subject, but he accepted responsibility and punishment for such publication if proved to be improper).

\textsuperscript{79} The impeachment of Justice Chase is described in 2 H. Adams, A History of the United States during the First Administration of Thomas Jefferson 147-59 (1962). For a detailed treatment from a different perspective, see 1 W. C. Bruce, John Randolph of Roanoke 200-21 (1922). Randolph, as Republican floor leader, managed the impeachment effort.

\textsuperscript{80} See Letter, Thomas Jefferson to Abigail Adams (July 22, 1804), in 11 Writings of
Nor is there any doubt of the partisanship of the federal judges in administering the Sedition Law. Nevertheless, it is clear that the judicial opinions of the time accepted Marshall's explication of the meaning of the freedom of the press clause in the first amendment. And, however appealing the principles sought to be invoked in their defense, there can be little doubt that the roster of defendants in these cases was made up of rascals, rogues, scamps, and scalawags, publishers whose sentiments were for sale to the highest bidder. But we are no less grateful to John Wilkes for his contributions to our liberties because he was a reprobate and sinner of no mean proportions. So, too, those convicted under the Sedition Law wear the laurels of history.

That the Marshallian notion of the meaning of freedom of the press continued to prevail long after the controversy over

THOMAS JEFFERSON 43-46 (A. Lipscomb ed. 1904).

* See J. Miller, supra note 44, at 136 ("crusade" of federal bench); M. Smelser, supra note 50, at 70 (Chase described as "the Jeffreys of the Sedition Act prosecutions" because of his unrestrained partisanship). See generally Smith, supra note 44, at 189-417 (detailed accounts of individual cases).

* See, e.g., Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (1788) ("The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publication, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.").

* J.M. Smith recounts the stories of these worthies in his book, supra note 44. They include Benjamin Bache, who reprinted certain letters the British had forged during the Revolution to discredit Washington, id. at 189, and James Callender, "one of the leading scandal-mongers . . . of the day," id. at 335-36. Nor should we forget Luther Baldwin. After being told that a twenty-one gun salute was being fired in honor of John Adams, he remarked that he "did not care if they fired through his . . ."). He was prosecuted for seditious libel. Id. at 270-76.

* John Wilkes became notorious for making scurrilous attacks on King George III and his ministers through his journal, the North Briton. The general tone of Wilkes' writings may be inferred from his charge that George III's friend and prime minister, the Earl of Bute, was having an affair with the King's mother. But Wilkes' prosecution for seditious libel was based not on this but on his charge that Bute's successor, Grenvile, had caused the King to lie in his speech proroguing Parliament in 1763. Justice Charles Pratt (later Lord Camden) ordered Wilkes discharged a week after his arrest because of the government's unlawful use of general warrants. A good account of this affair can be found in R. J. White, THE AGE OF GEORGE III 62-80 (1969). For a more dramatic account of Wilkes' character and career, see R. Postgate, THAT DEVIL WILKES (1929).
the Sedition Law had died is evidenced by another phenomenon, the provisions in the newly emerging state constitutions. It will be recalled that the early provisions, such as that in the Virginia Bill of Rights, extolled the values of freedom of the press in the broadest terms. The Maryland Constitution of 1776 and the Delaware Declaration of Rights of the same year, for example, used equally extravagant language: "That the liberty of the press ought to be inviolably preserved." When the new constitutions came to be written, the importance of a free press was no less emphasized, but the Blackstonian qualification and that of the Sedition Act itself were specifically written in. For example, the Kentucky Constitution of 1799, with the heat of the controversy over the Sedition Law still little abated, provided in article X:

Sec. 7. That printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

Sec. 8. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

IV. LESSONS FROM HISTORY

There are, indeed, lessons to be learned from the history of the origins of the freedom of press clause of the first amendment. And the first of them is that suggested in New York

---

85 See supra text accompanying note 19.
87 Ky. Const. of 1799, §§ 7-8, reprinted in 3 Thorpe, supra note 29, at 1289 (emphasis added).
Times Co. v. Sullivan, that the focus of the amendment was on seditious libel. Indeed, there is very little to the historical record that was not concerned with justifying the constitutional restraint in terms of the necessity for allowing dissemination of information about government and providing criticism of government behavior. It was protection of political speech that was the objective to be served by the free press clause. And this was all the more necessary for government which was republican in form, where “we, the people” were sovereign, and the government only a means to self-rule.

It does not follow, of course, that the first amendment went beyond prevention of prior restraint. There is no substantial evidence that criminal libels were intended to be freed from consequent sanctions. Except when the wish becomes father to the thought, as it does so often in the writings of Supreme Court Justices and law professors, the first amendment was not in its origins the expansive license it has since become. Grateful as we must be for the improvements that the Court has made in the Bill of Rights, we must give the credit—and the blame, if there is any—where it is due, not to Madison and his confreres who framed it but to the Justices of the Supreme Court, who, while making the proper genuflections to history, frequently observe its teaching more in the breach than in the observances.

It must be remembered, however, that the Justices of the Supreme Court are not today composing a Constitution for 1787 or 1789 to forestall the evils of those days. They are extrapolating new principles from old to frame a Constitution to guard against the tribulations of our own time. I regret only that they do not go about their tasks with the honesty that their high office demands. Better they should tell us what they are really about than to pretend they are merely the voices of the great men who originally composed the document now entrusted to their care.

It is a long time from yesterday to today. Since 1789, the earth has spun on its axis more than 70,000 times; the earth has

---

made its orbit around the sun almost two hundred times. But the revolutions within our society during this time are countless. We have learned things about the need for a free press that none could have foreseen when provision for it was made in the first amendment. Government is no longer a handful of men in a national or state capital. And the news media is not a few small letterpresses available to vent the spleen of any who would hire them. Government is a giant octopus with its tentacles everywhere in the lives of the citizenry. And the media are sprawling empires of highly technical machinery that are at least as pervasive in their direct effects on our lives. The contest between government and press for control of our lives makes us grateful that they are adversaries. Should they join forces, what freedom we have left should be certain to perish. It would be a mistake to assume that one is hero and the other villain. The freedom-seeking man must look askance at both.

Listen to the words of warning of Judge Learned Hand, delivered in 1942, before World War II was resolved, in his tribute to Mr. Justice Brandeis, and see if you find no analogy to our own problems:

[T]he day has clearly gone forever of societies small enough for their members to have personal acquaintance with one another, and to find their station through the appraisal of those who have any first-hand knowledge of them. Publicity is an evil substitute, and the art of publicity is a black art; but it has come to stay; every year adds to its potency and to the finality of its judgments. The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it. And yet it is the power of reiterated suggestion and consecrated platitude that at this moment has brought our entire civilization to imminent peril of destruction. The individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means to shape his tastes, his feelings, his desires and his hopes; but it is possible to convert him into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact, and morally monstrous. This, the vastest conflict with which mankind has ever been faced, whose outcome still remains undecided, in the end turns upon whether the in-
individual can survive; upon whether the ultimate value shall be
this wistful cloudy, errant, You or I, or that Great Beast, Levi-
athan, that phantom conjured up as an ignis fatuus in our
darkness and a scapegoat for our futility.88

And that, too, is a lesson of the history of the origins of the
first amendment, the commitment to freedom for the individual.
And we know now, better than they knew then, that freedom for
the individual consists no less of freedom of thought than free-
don of action. As Mr. Justice Jackson once told us: "If there is
any fixed star in our constitutional constellation, it is that no
official, high or petty, can prescribe what shall be orthodox in
politics, nationalism, religion, or other matters of opinion or
force citizens to confess by word or act their faith therein."90 He
told us this in what remains one of the great first amendment
opinions of our times, the second Flag Salute Case. It was in
that case, too, however, that he afforded an explanation of the
meaning of the rule against prior restraint, although he was
speaking in broader terms. He said there:

The very purpose of a Bill of Rights was to withdraw cer-
tain subjects from the vicissitudes of political controversy, to
place them beyond the reach of majorities and officials and to
establish them as legal principles to be applied by the courts.91

That is exactly the way that the freedom of the press clause
was read by its initiators. It removed all questions of the right to
publish from the discretion of government censors. It left the
question of the propriety of punishment for abuse of the privi-
lege to the judicial process with the full panoply of protections
afforded by the concepts of the rule of law and due process, in-
cluding trial by jury.

You may, at this time, feel like Winston Churchill when
once served with a not untypical English pudding that seemed
to have neither form nor substance. He reportedly beckoned the
waiter and said: "Pray, take this pudding away. It has no
theme." Alas, I cannot take back what I have already proffered.

90 Id. at 638.
But perhaps I can make its outlines a bit more certain.

What then are the lessons that might be learned from the history of the origins of the first amendment? The clearest is the least palatable, for it is the opposite of what our nine masters purported to learn from that history in 1964. It is that freedom of press did not preclude punishment of seditious libel, but only its prior restraint.

The Founding Fathers taught us more than this, however. Jefferson would have us learn that newspapers were an extraordinarily important element in the self-government on which the new nation had embarked. There were times when he embarked on hyperbole, first on one side of the question and then on the other. Thus, he wrote to Edward Carrington on January 16, 1787:

The people are the only censors of the governors: and even their errors will tend to keep these to the true principles of the institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

On the other hand, in a letter to John Norvell in 1807, his euphoria for the press was more than a little dampened. There he wrote:

It is a melancholy truth, that a suppression of the press could not more completely deprive the nation of its benefits, than is done by its abandoned prostitution to falsehood. Nothing can now be believed which is seen in a newspaper. Truth itself be-

---

92 See New York Times Co., 376 U.S. at 270-277 (criticism of government and officials was permitted as necessary to first amendment right of free communication).

93 Letter, Thomas Jefferson to Edward Carrington (June 16, 1787), in 6 WRITINGS OF THOMAS JEFFERSON 57-58 (A. Lipscomb ed. 1904).
comes suspicious by being put into that polluted vehicle. The real extent of this state of misinformation is known only to those who are in situations to confront facts within their knowledge with the lies of the day. I really look with commiseration over the great body of my fellow citizens, who, reading newspapers, live and die in the belief, that they know something of what has been passing in the world in their time; whereas the accounts they have read in newspapers are just as true a history of any other period of the world as of the present, except that the real names of the day are affixed to their fables... no details can be relied on. I will add, that the man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehood and errors. He who reads nothing will still learn the great facts, and the details are all false.9

It should be remembered that, however often Jefferson is cited as condemning the constitutionality of the Alien and Sedition Laws, it was basically because, like Madison whose words I have already quoted, he thought the subject beyond the ken of the national government, not because newspapers were beyond chastisement by government for what they published. In the Kentucky Resolutions themselves, Jefferson wrote that it was for the States to determine “how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use destroyed. . . .”95

For all his talk about freedom of the press, it must be remembered, too, that, both as Governor of Virginia and as President of the United States, Jefferson found prosecution of his political enemies for criminal libel to be a wholesome endeavor. Thus, he wrote to Governor McKean of Pennsylvania, in 1803: “[A] few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the

---


95 Kentucky Resolutions, No. 3, reprinted in 4 ELLIOT’S DEBATES at 541.
presses."

This, however, need not denigrate the Jeffersonian idea that the necessity for freedom of the press rested on the need for government to be subjected to the severest scrutiny by its critics who were to inform the public of its behavior. Neither for Jefferson any more than for Madison were men angels. Those in government were no more to be trusted than those in trade. (Only small farmers were likely to be virtuous.) Some of the wisest men in America in those times—and some even today—regard government as a necessary evil. A system of checks and balances within government was an essential means of avoiding concentration of power. The press was but a part of this system, reporting directly to the sovereign people. Who was to watch this watchdog? Obviously that was to be the role of the judiciary—the state judiciary if Jefferson and Madison were to have their way.

Benjamin Franklin, the patron saint of the American press, frequently referred to alternatively as the wisest and most dangerous man in America, did not look kindly on the inclination of the press to claim a privilege to pass judgment with impunity on any and all, a claim not unlike the one later made for it by Mr. Justice Black. In 1789, shortly after he helped make the Constitution of the United States possible by his mere attendance at the framing convention, Franklin published a satirical paper that deserves your enjoyment in toto. I extract here a small item:

If by the Liberty of the Press were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming

---

96 Letter, Thomas Jefferson to Thomas McKean (Feb. 19, 1803), in 8 WRITINGS OF THOMAS JEFFERSON 218 (P.L. Ford ed. 1897).

97 The classic expression of Jefferson's agrarianism occurs in Notes on Virginia: "Those who labor in the earth are the chosen people of God, if ever He had a chosen people, whose breasts He has made His peculiar deposit for substantial and genuine virtue." T. JEFFERSON, Notes on the State of Virginia, in 2 WRITINGS OF THOMAS JEFFERSON 229 (A. Lipscomb ed. 1904).

one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abus'd myself.  

There were other concerns about the press. Some were worried about the subservience of the press to the government. For example, an anti-Federalist wrote to John Wilson in 1787: "It is an easy step from restraining the press to make it place the worst actions of government in so favorable a light, that we may groan under tyranny and repression without knowing from whence it comes."\footnote{Letter, "Cincinnatus" to John Wilson, New York Journal, Nov. 8, 1787, cited in J. T. Main, The Anti-Federalists 160 n.72 (1961).}

We learn from this history, too, that the founders were conversant with laws that protected speech not only from censorship but from post-publication sanctions. Thus, in affording such protection to Congress in the Constitution, they provided for an absolute, not a conditional, privilege: "for any Speech or Debate in either House, they shall not be questioned in any other Place."\footnote{U.S. Const. art. I, § 6, cl.1.} The common law also spoke in terms of freedom of speech when it was affording absolute protection and not merely prepublication immunities. Thus, as James Burgh put it in his Political Disquisitions in 1775: "In a petition to parliament, a bill in chancery, and proceeding at law, libellous words are not punishable; because freedom of speech and writing are indispensably necessary to the carrying on of business."\footnote{3 J. Burgh, Political Disquisitions: Or, An Enquiry into Public Errors, Defects and Abuses bk. I, ch. IX, at 247 (1775).} But these protections, whether of legislators or petitioners, or litigants, were accepted as special, not general, rules of free speech and press, i.e., speech or writing could not invite government sanctions if exercised in the conduct of government affairs. Indeed it was this special license to government activity that precipitated in part the decision in New York Times Co. v. Sullivan, which, twenty years ago brought the law of libel under the

\footnote{B. Franklin, An Account of the Supremest Court of Judicature in Pennsylvania, viz., the Courts of the Press (Sept. 12, 1789), reprinted in Benjamin Franklin: Representative Selections 502 (F. Mott & C. Jorgenson ed. 1936).}
umbrella of the first amendment,\textsuperscript{103} although its implications are still not completely resolved.

This history also teaches us that there was a patent if not necessarily real anomaly in providing that a person may publish what he chooses, but that government may punish him for what he published. Perhaps the answer to the anomaly lies in the fact that the doctrine of prior restraint distinguishes between publication, which cannot be inhibited, and injuries resulting from such publication, for which sanctions can be invoked. But shifting the emphasis of constitutional scrutiny to the effects rather than the words did not come to the forefront of first amendment theory until Holmes formulated his "clear and present danger" doctrine,\textsuperscript{104} at which modernists now tend to sneer,\textsuperscript{105} but which may remain the only principle on which first amendment theory may ultimately be rationalized.

Perhaps the clearest teaching of the history of the origins of the first amendment is the lesson I already quoted from Hamil-


\textsuperscript{104} Schenck v. United States, 249 U.S. 47, 52 (1919). The defendants challenged their conviction for distributing literature directed toward disrupting the selective service process in violation of the Espionage Act of June 15, 1917. Id. at 48-49. The defendants' claim to first amendment protection fell upon deaf ears as Justice Holmes wrote the opinion for a unanimous Court. Justifying this impingement upon freedom of expression as being in the interest of national security Holmes stated:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

\textit{Id.} at 52. Schenck was followed closely by two other cases where the Court upheld the conviction of defendants under the Espionage Act of 1917. Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919). However, Holmes's clear and present danger doctrine did not receive any significant notice until 1927 in Whitney v. California, 274 U.S. 357 (1927). For a discussion on the evolution of the clear and present danger doctrine, see Strong, Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg and Beyond, 1969 Sup. Ct. Rev. 41, 42-44 (1969); Corwin, Bowling Out "Clear and Present Danger," 27 Notre Dame L. 325, 356-95 (1952); Mendelson, Clear and Present Danger—From Schenck to Dennis, 52 Colo. L. Rev. 313 (1952); J. Nowak, Constitutional Law 874-86 (2d ed. 1983).

\textsuperscript{105} See Rabban, The First Amendment in Its Forgotten Years, 90 Yale L.J. 514, 584-94 (1981)(influence of Zachariah Chafee upon the development of the clear and present doctrine after Schenck, Frohwerk and Debs); Gunther, Learned Hand and The Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 735-41 (1975)(Judge Hand was critical of Justice Holmes's clear and present danger doctrine at its inception, viewing it as an impingement on free speech).
ton's eighty-fourth Federalist. Freedom of the press will rest not on words in a constitutional document, but on a mood of tolerance that will ebb and flood, probably at its lowest when our need for it is greatest, when we do not feel as secure as we should like to feel. For, as Learned Hand once put it:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.107

And this explains the importance of freedom of press and speech in a free society. The spirit of liberty, about which Hand was speaking, will be nurtured by freedom of ideas and communication of those ideas, or it will perish from lack of sustenance.

If, however, a free press is a necessary, it is not a sufficient, condition to a free society. The McCarthy Era, the Vietnam War, the imperial presidency were as much the creatures of the press as the objects of their scrutiny. And we still lack the means of making the press both free and responsible. Until it becomes responsible as well as free, there is always the danger that the price of its freedom will be our freedom. But responsibility for the press, like responsibility for the courts, i.e., responsibility for fulfilling their functions competently and honestly, cannot be imposed from outside. And, as each of us knows from his own experience, self-restraint, unaided by external force, is the most difficult of achievements.

But, the reader might think, the pudding has still not gelled. All I have reported of the origins of the first amendment remains a disorganized glop. Well, perhaps that is the nature of the pudding, and neither we nor Winston Churchill should have expected more. To recur once more to Learned Hand,

Nor need it surprise us that these stately admonitions refuse to subject themselves to analysis. They are the precipitates of

106 See supra note 38 and accompanying text.
‘old, unhappy, far-off things, and battles long ago,’ originally cast as universals to enlarge the scope of victory, to give it authority, to reassure the very victors themselves that they have been champions in something more momentous than a passing struggle. Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and became moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in light of its own experience.\textsuperscript{108}

Perhaps, then, all we can learn from this history of the origins of the first amendment is how little history has to teach us by way of particular solutions to the particular problems of our own day, problems that history never faced and, so far as I can discover, never contemplated. At least, this study should make us skeptical of the prepackaged histories that we are constantly offered to prove that our side of the controversy is on the side of history or vice versa. Such history tends to be selected as legal precedents are selected, for their rhetorical rather than their substantive values.

Benjamin Franklin said when he emerged from the 1787 Convention, and was asked the nature of the new government: "A republic, if you can keep it."\textsuperscript{109} Whether future generations of Americans can keep it depends on them, not on Franklin, or Jefferson, or Hamilton, or Madison. I am sorry to predict that the job will be an even harder one than theirs was.

\textsuperscript{108} Id. at 163.