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SAVING THE PRESS CLAUSE FROM RUIN: THE CUSTOMARY ORIGINS OF A "FREE PRESS" AS INTERFACE TO THE PRESENT AND FUTURE

Patrick J. Charles* & Kevin Francis O'Neill**

Abstract

Based on a close reading of original sources dating back to America's early colonial period, this Article offers a fresh look at the origins of the Press Clause. Then, applying those historical findings, the Article critiques recent scholarship in the field and reassesses the Supreme Court's Press Clause jurisprudence. Finally, the Article describes the likely impact of its historical findings if the Court ever employed them in interpreting the Press Clause.

INTRODUCTION

On February 18, 1789, Massachusetts Chief Justice William Cushing wrote to John Adams a detailed letter concerning the "liberty of the press."[1] In particular, Cushing had questions regarding Article XVI of the Massachusetts Declaration of Rights, which reads, "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth."[2] He wondered whether a libel directed against officeholders could be punishable under

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 Associate Professor, Cleveland-Marshall College of Law, Cleveland State University. I can claim no credit for the extensive historical research that forms the heart of this Article; all of that research was performed by my co-author, Patrick J. Charles. My contribution to this paper is much more modest. It is largely confined to Parts VI and VII—a critique of the Supreme Court's Press Clause jurisprudence, viewed in light of the historical findings exhumed by Patrick J. Charles.

[1] Original Draft of Letter from William Cushing, Chief Justice, to John Adams (Feb. 18, 1789), *in* MASS. L.Q., Oct. 1942, at 12, 12 [hereinafter Letter from Chief Justice Cushing].

[2] MASS. CONST. art. XVI (annulled 1948).

the clause if "such charges are supportable by the truth of fact."[3] Cushing further elaborated on the liberty of the press in legal terms, writing:

> But the words of our article understood according to plain English, make no such distinction, and must exclude *subsequent* restraints, as much as *previous restraints* . . . .
>
> The question upon the article is this—What is the liberty of the press, which is essential to the security of freedom? The propagating literature and knowledge by printing or otherwise tends to illuminate men's minds and to establish them in principles of freedom. But it cannot be denied also, that a free scanning of the conduct of the administration and shewing the tendency of it, and where truth will warrant, making it manifest that it is subversive of all law, liberty, and the Constitution; it can't be denied. I think that the liberty tends to the *security of freedom in a State*; even more directly and essentially than the liberty of printing upon literary and speculative subjects in general. Without this liberty of the press could we have supported our liberties against British administration? or could our revolution have taken place? Pretty certainly it could not, at the time it did. Under a sense of impression of this sort, I conceive, this article was adopted. This liberty of publishing truth can never effectually injure a good government, or honest administrators; but it may save a state from the necessity of a revolution, as well as bring one about, when it is necessary . . . .
>
> But this liberty of the press having truth for its basis who can stand before it? Besides it may facilitate a legal prosecution, which might not, otherwise, have been dared to be attempted. When the press is made the vehicle of falsehood and scandal, let the authors be punished with becoming rigour.
>
> But why need any honest man be afraid of truth? The guilty only fear it; and I am inclined to think with Gordon (Vol. 3 No. 20 of Cato's Letters) that truth scarcely adhered to, can never upon the whole prejudice, right religion, equal government or a government founded upon proper balances and checks, or the happiness of society in any respect, but must be favorable to them all.
>
> Suppressing this liberty by penal laws will it not more endanger freedom than do good to government? The weight of government is sufficient to prevent any very dangerous consequences occasioned by *provocations* resulting from charges founded in truth; whether such charges are made in *a legal course or otherwise*. In either case, the *provocation* (which Judge Blackstone says is the sole foundation of the law against libels) being much the same.

[3] Letter from Chief Justice Cushing, *supra* note 1, at 12.

> But not to trouble you with a multiplying of words; If I am wrong I should be glad to be set right, &c., &c.[4]

Cushing's letter highlights many important aspects of the liberty of the press in late eighteenth-century America. First, it incorporates treatises such as William Blackstone's *Commentaries*, and *Cato's Letters*. Certainly, the practice of incorporating available legal treatises into constitutional analysis was quite common among the founding generation.[5] A close reading of Cushing's letter, however, reveals other intellectual influences that coincidently matriculated through a free press. It confirms the importance of contemporaneous books, pamphlets, and newspaper editorials when conducting any legal history, especially a constitutional provision's intellectual origins.

Second, Cushing's remembrance of the American Revolution highlights the significant event that shaped the liberty of the press.[6] Just as actual events would affect the adoption, text, and structure of the Declaration of Independence,[7] so too did they affect the founding generation's view on constitutional doctrine.[8] Thus, the importance of social history when analyzing the Constitution is evident, especially the all-important fact that the members of the founding generation were well attuned to the causes and struggles for their independence.[9]

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[4] *Id.* at 14–15.

[5] *See generally* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984) (discussing how European writers had an influence on American political thought between 1760 and 1805).

[6] Interpreting the Constitution through the events of the American Revolution is rare among legal scholars, but is crucial to understanding the evolution of eighteenth-century political and constitutional thought. *See generally* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2011). Take for instance prominent "historical" research on the First Amendment's Free Press Clause by leading First Amendment law professors. David A. Anderson and Eugene Volokh both focus on the events contemporaneous with the Constitution or following it, yet ignore the liberty of the press as an evolving intellectual, political, and constitutional right. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (providing only a glimpse of the "liberty of the press" prior to the Constitution); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2011) (starting the historical inquiry with 1791 and ignoring any revolutionary or prerevolutionary doctrine).

[7] *See generally* PATRICK J. CHARLES, IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE (2008); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 105–23 (1997).

[8] *See* Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 477–512 (2011).

[9] For an interesting eighteenth-century oration on this point, see ELIJAH WATERMAN, AN ORATION, DELIVERED BEFORE THE SOCIETY OF CINCINNATI, HARTFORD, JULY 4, 1794, at 16 (Hartford, Hudson & Goodwin 1794) ("AMERICANS should ever watch the causes

Third, and perhaps most importantly, Cushing embraced the liberty of the press as an entity that facilitates the voice of the people, which "directly and essentially" contributes to the "*security of freedom in a State*."[10] He made sure to distinguish between reporting on the "conduct of the administration and shewing the tendency of it" and the "liberty of printing upon literary and speculative subjects in general."[11] Even John Adams's reply to Cushing conveys a larger constitutional purpose for the press:

> Our chief magistrates and Senators &c are annually eligible by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is stopped and the people kept in Ignorance we had much better have the first magistrates and Senators hereditary.[12]

What this exchange illuminates is that the founding generation saw the liberty of the press as a crucial instrument to the success of the American Republic. They viewed it not merely as an extension of free speech or a right to publish through the invention of printing.[13] A *free press* meant much more. It was often referred to as the palladium or bulwark of liberty, toasted at constitutional celebrations, included in most of the state constitutions prior to the adoption of the federal Constitution,[14] and could afford distinct protections to printers. In 1755, one

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which produced their revolution, which produced the [D]eclaration of [I]ndependence. That this truth may be practically inculcated upon their minds—to preserve their rights and liberties, they must tenaciously adhere to the same principles, by which they were originated and perfected. Whatever has been the foundation of their independence, must still be preserved as the permanent basis of their security and future happiness. The mind, when it reflects that former nations have uniformly travelled in the road to ruin, is anxious to know, if there is not some way through which we may walk in safety, and continue our existence as a happy people till the time shall be no longer.").

[10] Letter from Chief Justice Cushing, *supra* note 1, at 14.

[11] *Id.*

[12] *Id.* at 16.

[13] *See generally* Volokh, *supra* note 6 (discussing how people of the framing era interpreted the right of freedom of the press as a general right).

[14] *See* GA. CONST. of 1777, art. LXI ("Freedom of the press and trial by jury to remain inviolate forever."); MD. CONST. of 1776, declaration of rights, § XXXVIII ("That the liberty of the press ought to be inviolably preserved."); PENN. CONST. of 1776, declaration of rights, § XII ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); N.C. CONST. of 1776, declaration of rights, § XV ("That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained."); VT. CONST. of 1777, declaration of rights, art. XIV ("That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not be restrained."); S.C. CONST. of 1778, art. XLIII ("That the liberty of the press be inviolably preserved."); MASS. CONST. art. XVI (annulled 1948) ("The liberty of the press

anonymous commentator even likened the liberty of the press to the "ringing of the Alarm-Bell," for it was the constitutional vehicle by which "Truths of the highest Importance" are divulged.[15]

Naturally, the constitutional significance of the liberty of the press, freedom of the press, or a free press did not originate in 1791, 1787, or 1776. It developed much earlier, through intellectual discourse and customary practice. Prior to the American Revolution, the liberty of the press was never codified in any colonial charter, the English Bill of Rights, or even a statute. It is truly one of the first customary rights; indeed, customary practice influenced the tenets of a free press, and a free press was viewed as crucial to the success of a democratic government. Despite these historical facts, the Supreme Court has never recognized the free press as a distinct and separate constitutional entity.[16] Instead, the Court's free speech jurisprudence has engulfed any constitutional protections afforded to it.[17]

Whether such muddling of First Amendment jurisprudence is consistent with the founding generation's intent has been the subject of debate since the mid-twentieth century.[18] The debate centers on whether a free press affords journalists

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is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth."); N.H. CONST. pt. 1, art. XXII (amended 1968) ("The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved."); VA. CONST. of 1776, declaration of rights, § XII ("That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.").

[15] AN ESSAY ON THE LIBERTY OF THE PRESS 16, 17 (London, J. Raymond 1755).

[16] The Supreme Court opinion in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), expounds this point. Justice Scalia thought it "strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish." *Id.* at 928 n.6 (Scalia, J., concurring). Meanwhile, Justice Stevens viewed the text and history of the Constitution as suggesting "why one type of corporation, those that are part of the press, might be able to claim special First Amendment status." *Id*. at 951 n.57 (Stevens, J., concurring in part and dissenting in part). Of course, the Supreme Court is not bound to follow past precedent if the historical record proves otherwise. *See* U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 788 (1995); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 575 (1993); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458–59 (1983); Smith v. Allwright, 321 U.S. 649, 665–66 (1944); *see also* Cohens v. Virginia, 19 U.S. 264, 399–400 (1821) (discussing the importance of weighing each constitutional question before the Court with care).

[17] For some prominent examples, see *Nebraska Press Association v. Stuart*, 427 US. 539, 559 (1976); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964); *Gitlow v. New York*, 268 U.S. 652, 664 (1925); *Abrams v. United States*, 250 U.S. 616, 618–19 (1919). *See also infra* Part VI.

[18] For the first historical controversy concerning the Press Clause, compare ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (1941), with LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960). *See also* Vikram David Amar, *From Watergate to Ken Starr: Potter Stewart's "Or of the Press" A Quarter Century Later*, 50 Hastings L.J. 711, 713–14 (1999)

and press entities any distinct First Amendment protections above and beyond or separate from those of the general people. Even today, First Amendment scholars still debate this question, and two in particular stand out as continuing this half-century debate—Professors Sonja R. West and Eugene Volokh. Sonja R. West believes to ignore any distinct free press protections is to make the First Amendment a "constitutional redundancy."[19] West finds it baffling that the Supreme Court "occasionally offers up rhetoric on the value of a free press," yet "steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause."[20] In a nutshell, West's argument for the recognition of press protections is twofold. First, the text of the Constitution prescribes that the Supreme Court divides First Amendment protections into distinct speech and press categories.[21] Second, West finds it "unsatisfying to have a Press Clause that is powerless to protect reporters who, as members of the press, endeavor to inform the public and to check the government."[22]

West's baseline arguments are nothing new in the pantheon of legal scholarship. Writing thirty-six years earlier, Justice Potter Stewart provided similar arguments in his article *Or of the Press*.[23] Stewart, too, addressed the "constitutional redundancy" of jurisprudentially combining the Speech and Press Clauses, concluding that the "publishing business is . . . the only organized private business that is given explicit constitutional protection."[24] In making this argument Stewart provided only miniscule historical support.[25] Meanwhile, West does not even attempt to reconcile her conclusions with the historical record.[26] This does not mean, however, that West is wrong to assert any unique free press protections. As this Article will convey, a detailed look at the historical record and customary origins of the Press Clause actually supports West's baseline arguments.

In contrast to West's position, Eugene Volokh asserts the Press Clause was "likely understood . . . as fitting the press-as-technology model."[27] This model secures the "right of every person to use communications technology" and is not

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(asserting the founding generation intended the Speech Clause and Press Clause to encompass the same constitutional protections); Anderson, *supra* note 6, at 534 ("That the press clause has a distinct history does not mean, of course, that it must be given a meaning different from the speech clause today, or even that it had a different meaning in 1791.").

[19] Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–28 (2011).

[20] *Id.* at 1028.

[21] *Id.*

[22] *Id.* at 1028–29.

[23] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

[24] *Id.* at 633.

[25] *Id.* at 633–34.

[26] *See* West, *supra* note 19, at 1033–41 (arguing based solely on the textual structure of the Constitution).

[27] Volokh, *supra* note 6, at 463. Volokh is not the first to assert this technology argument. *See* Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 312, 330–56 (2008) (discussing the Framers' understanding of "the press" to mean printing technology).

limited "to members of the publishing industry."[28] Volokh supports this interpretation with minor references to the historical record. The methodology Volokh employs, however, is not historical, even in the most basic sense. It is a regurgitation of New Originalism and textualism, for it ignores the social, intellectual, and customary origins of a free press and focuses intently on modern perceptions of eighteenth-century commentary. This is not to say that Volokh's thesis is without any merit. A more complete examination of the historical record provides circumstantial support for the view that a free press must protect certain technologies through which the people may write their sentiments. To properly assert such a claim, though, one must employ *proper* historical methodologies. It is not enough to merely infer a history with the use of ad hoc history and textual wordplay.

This Article sets forth to reconcile these divergent views through the use of history. Both Volokh and West employ methodologies that arguably endanger the rich history of a free press. If the Supreme Court is to ever truly acknowledge any separate and distinct press protections, it will require a proper understanding of the intellectual origins and history of a free press. It is not enough to debate the textual structure of the First Amendment, decipher a handful of historical documents, debate the meaning of those words, and incorporate eighteenth-century dictionaries to fill the legal interpretational gap. Conducting a complete social and intellectual inquiry requires employing proper historical methodologies and assembling the whole responsibly. Only then may the courts maintain their civic duty of historical consciousness[29] and use history as a guidepost to adjudicating cases and controversies.[30]

Before delving into the history of a free press, Part I of this Article briefly addresses the methodological problems employed by West's and Volokh's scholarship. Indeed, the historical findings in this Article support both scholars' theses, but the methodologies West and Volokh employ may prove disastrous to preserving the historical record of the Press Clause. Part II then discusses the Anglo intellectual origins of the Press Clause. Part III addresses the development

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[28] Volokh, *supra* note 6, at 463.

[29] In the words of Oliver Wendell Holmes,

> In order to know what [the law] is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1944) (1881).

[30] Historical guideposts require an honest use of history when adjudicating legal issues. For more on the use of historical guideposts, see Patrick J. Charles, *The Second Amendment Standard of Review After* McDonald*: "Historical Guideposts" and the Missing Arguments in* McDonald v. City of Chicago, 2 AKRON J. CONST. L. & POL'Y 7, 8–39 (2010).

of a free press in the American colonies prior to the American Revolution. Part IV then addresses the constitutional utility of a free press from the American Revolution through the pre-Constitution years. Part V addresses what the Press Clause meant at the time the Constitution was created. Lastly, Part VI weighs this history against current Supreme Court precedent and discusses what this history can provide jurists as a matter of constitutional jurisprudence. It serves to question whether the recognition of distinct free press protections should develop based on the customary origins of the Press Clause.

I. CASTING OFF OUR ANGLO-AMERICAN ORIGINS?: THE IMPROPRIETY OF DISCARDING THE HISTORY OF A FREE PRESS

In the wake of the New Originalism outcome in *District of Columbia v. Heller*,[31] legal academia continues to shift away from accepted historical methodologies and substitute originalist and textualist methodologies.[32] It is unclear why this shift is occurring except to provide an easy method for legal scholars to support their respective interpretations of constitutional text and create a constitutional framework that never existed except in the minds of the modern theorists writing it.[33] In a recent article, Barry Friedman wrote that as long as accepted historical methodologies "have reasons that support them," legal scholars

[31] 554 U.S. 570 (2008).

[32] The role of historian is to not suggest a "causal relation," but to show that events and ideas are intimately connected. *See* Quentin Skinner, *The Limits of Historical Explanations*, 41 PHILOSOPHY 199, 202 (1966); *see also id.* at 209 ("To see historical relationships in terms of repeated patterns of thought or action is to imply not merely that thinking or acting are uniformly purposive, but that they do characteristically result in patterns. There is thus a very strong predisposition, particularly evident in histories of thought, to ignore the difficulties about proper emphasis and tone which must arise in making any sort of paraphrase of a work, and to assume instead that its author must have had some doctrine, or a 'message', which can be readily abstracted and more simply put.").

[33] This is contrary to accepted historical methodologies. The goal of any historical inquiry is to understand the past for the sake of the past. *See* H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 16 (1931) ("[When a historian is engaged upon a piece of research] he comes to his labours conscious of the fact that he is trying to understand the past for the sake of the past, and though it is true that he can never entirely abstract himself from his own age, it is none the less certain that this consciousness of his purpose is a very different one from that of the whig historian, who tells himself that he is studying the past for the sake of the present. Real historical understanding is not achieved by the subordination of the past to the present, but rather by our making the past our present and attempting to see life with the eyes of another century than our own."); *see also* J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 7 (1971); J.G.A. Pocock, *The Origins of Study of the Past: A Comparative Approach*, 4 COMP. STUD. SOC'Y & HIST. 209, 211–14 (1962) (discussing the importance of a historian's "social awareness" of the past before one can ever relate history to the present).

should adhere to those methodologies.[34] In other words, legal scholars should adhere to reasonable historical "standards regarding how they search, what claims they make, on what evidence, and to what end."[35] Although Friedman is not a historian, he understands it is common sense for legal scholars to employ each discipline's methodological norms, especially those of historians.

Herein rests an ongoing problem with many of today's self-proclaimed legal histories. Legal academia continuously churns out so-called history without having a firm grasp on the proper methodologies.[36] This includes the most basic methodologies such as reading the prominent historical works on the subject, balancing divergent views, and removing modern biases.[37] These so-called legal histories focus on the modern meaning of constitutional or statutory text, often with little understanding of eighteenth-century political thought.[38] Their interpretive methods come in all forms, including popular sovereignty, public meaning, original meaning, and textualism. Each method has its benefits in

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[34] Barry Friedman, *Discipline and Method: The Making of* The Will of the People, 2010 MICH. ST. L. REV. 877, 891.

[35] *Id.*

[36] For four great articles discussing the problems with the legal academy's approach to history, see J.G.A. Pocock, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, 9 POL. THEORY 353, 362–64 (1981); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998); Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 ALB. L. REV. 91 (1998); Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095 (2009).

[37] The goal of the historical inquiry is "total historical context." *See* Skinner, *supra* note 32, at 202–04, 214; *see also* J.G.A. Pocock et al., *The History of British Political Thought: A Field and Its Futures*, *in* BRITISH POLITICAL THOUGHT IN HISTORY, LITERATURE AND THEORY, 1500–1800, at 10, 11 (David Armitage ed., 2006) ("The historian is interested in what the author meant to say, succeeded in saying, and was understood to have said, in a succession of historical contexts now distant in time."); Quentin Skinner, *Hermeneutics and the Role of History*, 7 NEW LITERARY HIST. 209, 216–17 (1975) (prescribing three rules for intellectual historical context).

[38] This improper approach was applied in the case of the Second Amendment. Numerous legal academics recast the right to "keep and bear arms" to effectuate a "well-regulated militia" as merely having arms in their hands. *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 85, 144 (Indep. Inst. 1994) (1984); Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. C.R. L.J. 229, 246–47 (2008); David T. Hardy, *Ducking the Bullet:* District of Columbia v. Heller *and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO 61, 67 n.32, http://www.cardozolawreview.com/Joomla1.5/content/denovo/HARDY_2010_61.pdf. The founding generation, however, understood such an armed people to be nothing more than a dangerous mob and in no way resembled the constitutional entity of a "well-regulated militia." *See generally* Patrick J. Charles, *The Constitutional Significance of a Well-Regulated Militia Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence*, 3 NE. U. L.J. 1 (2011).

providing answers to questions that often the historical record cannot provide. These methods are *no substitute*, however, for the accepted methodologies employed in the fields of intellectual and social history. While not always perfect, and as this Article will show, historical methodologies provide us the best means to trace the origin of political and constitutional thought from its inception through any changes and developments.

Take for instance Volokh's historical claim that the founding generation "likely understood" the Press Clause as codifying "the press-as-technology model."[39] Volokh comes to this conclusion without ever examining the Anglo origins of the right or its intellectual development prior to the ratification of the Constitution. To his credit, Volokh does pay lip service to the treatises of William Blackstone and Jean-Louis De Lolme,[40] yet ignores the evolution of eighteenth-century political thought, particularly in the constraints of Anglo-American constitutionalism as a whole. Suffice it to say the Constitution did not completely revolutionize eighteenth-century constitutional jurisprudence, nor did it cast off our Anglo origins to start the world anew.[41]

Under the guise of originalism, many self-proclaimed legal histories assert a different approach. They focus intently on the text of the 1787–1791 constitutional debates and the years immediately following.[42] While this may seem like a fair way to deduce original or public meaning of a constitutional provision, it fails to consider the intellectual origins of the text at issue and that text's evolution. For instance, are we really to believe that everyone viewed the Press Clause as solely the extension of free speech and being primarily influenced by the works of William Blackstone and a few others? The answer is no, because to understand eighteenth-century American constitutionalism is to trace the evolution of political and legal thought from its Anglo origins through its development in the American Revolution, the Articles of Confederation, the ratification of the Constitution, and its subsequent application in legal thought. Any other methodical formulation is a dangerous and ad hoc approach to history.

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[39] Volokh, *supra* note 6, at 463.

[40] *Id.* at 465–66.

[41] *See generally* GREENE, *supra* note 6 (discussing the development of American political thought in accordance with the British Constitution); Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: An Historical Perspective*, 15 TEX. REV. L. & POL. 61 (2010) (discussing the continuance of the Anglo doctrine of allegiance and international plenary power doctrine in American constitutional thought); Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. COLLOQUY 227 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/6/LRColl2011n6Charles.pdf (discussing the unquestioned continuance of English gun control statutes).

[42] In terms of the Press Clause, see Anderson, *supra* note 6, at 487 ("[A]ttempts to divine the 'original understanding' of the press clause must begin with this sketchy history of its framing.").

What is the harm in historically untrained jurists relying solely on an originalist or textualist approach, especially if the conclusion has some merit? The primary answer is it can give false impressions about the protective scope of constitutional provisions. As Parts III through V will show, Eugene Volokh's press-as-technology thesis has some historical merit, but not because of the methodology he employs. The technological vehicle of printing books, pamphlets, and newspapers remained unchanged from the late seventeenth century through the early Republic. This historical fact alone derails Volokh's approach to understanding the founding era. With only one publishing technology available circa 1791, it is impossible to ascertain how the founding generation viewed the Press Clause as an evolving technological right of the people to employ free speech. Are we to believe the founding generation had the foresight to predict other popular publishing mediums such as radio, television, and the Internet? The answer remains no.

While Volokh's textual interpretations are imprecise at best, this does not mean his entire thesis is without historical support. The founding generation may not have possessed the foresight for the development of new press technologies, but they understood that the rights a free press protects were customary in nature and evolved with society. The founding generation traced the liberty of the press, freedom of the press, and a free press from the events of the 1689 Glorious Revolution, and sometimes as far back as Greek and Roman times.[43] In other words, the protective scope of a free press did not develop overnight or in a span of a few years. It was the result of decades of debate in the public discourse. These origins reveal the framers' foresight to evolve constitutional doctrine based upon customary practice. In particular, the founders inform us of the importance of a free press in terms of utility.

Contrary to the methodological approach Professor David A. Anderson employs, the historical inquiry into the freedom of the press *should not* begin with the "sketchy history of its framing" in the federal Constitution.[44] Understanding the intellectual origins and protective scope of constitutional provisions works the other way around. It is not enough to simply play hypothetical word scenarios.[45] For instance, the fact that eighteenth-century commentators frequently referred to the freedom of the press as the right of every "freeman," "citizen," or "individual"

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[43] *See infra* text accompanying notes 182–183.

[44] Anderson, *supra* note 6, at 487.

[45] POCOCK, *supra* note 33, at 7 ("The non-historical practitioner is not concerned with what the author of the statement made in a remote past meant by it so much as with what he in his present can make it mean."). Such explaining away the historical record is inconsistent with accepted historical methodologies. *See* BUTTERFIELD, *supra* note 33, at 100–02; WILLIAM KELLEHER STOREY, WRITING HISTORY: A GUIDE FOR STUDENTS 44 (1999) ("Real historical writers probe factual uncertainties but they do not invent convenient facts and they do not ignore inconvenient facts. People are entitled to their own opinions, but not to their own facts.").

does not solely lead to a press-as-technology conclusion.[46] The fact remains that there was the intermediate step of obtaining the permission of the printer or editor before any writing became published.[47] In contrast, Volokh finds any interpretation incorporating this step as an "odd understanding" of the freedom of the press.[48] Just because it is "odd" to Volokh, and perhaps others, does not wash away a century of intellectual and social history. The constitutional significance of a free press, as an entity, must be reconciled in the constraints of historical context, not simply brushed away as difficult to understand.[49]

Volokh is not alone in deducing meaning from text and structure. His intellectual counterpart, Sonja R. West, seeks solace in a similar approach, albeit in a different form. West invokes arguments on the founding generation's use of commas, distinctive conjunctions, and even semicolons to conclude that the Constitution's Speech and Press Clauses are to be "logically read as related in nature but properly assigned different tasks."[50] Other than this brief incorporation of eighteenth-century constitutionalism, West avoids the historical record, for she believes the "historical evidence . . . is, at best, conflicting."[51] In history's place, West argues that the Press Clause should offer "protections only for information gathering."[52] West supports this definition because it would provide us with a "dynamic" Press Clause that ensures numerous journalistic protections.[53]

West's ahistorical approach to providing modern day journalistic protections is not without merit. Although she divorces the Press Clause from its historical pedigree, the customary origins and constitutional significance of a free press provide a historical vehicle by which distinct journalistic rights can be recognized. Naturally, before identifying any customary protections afforded to a free press, the historical origins and significance of the press must be explored.

II. THE ANGLO ORIGINS AND DEVELOPMENT OF A FREE PRESS IN EIGHTEENTH-CENTURY CONSTITUTIONALISM

When legal commentators speak of the Anglo-American origins of a free press they often refer to the popular works of William Blackstone, Jean-Louis De Lolme, Thomas Gordon, and John Trenchard. Certainly these works were

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[46] *See* Volokh, *supra* note 6, at 465–71.

[47] A virtuous eighteenth-century printer did not publish anything and everything. There were professional guidelines that were expected to be followed. Even writers of editorials requested the printer's permission under the liberty of the press. *See infra* notes 250–251 and accompanying text for a discussion on these facets of eighteenth-century print culture.

[48] Volokh, *supra* note 6, at 470.

[49] *Id.* at 470–74.

[50] West, *supra* note 19, at 1034.

[51] *Id.* at 1040.

[52] *Id.* at 1057.

[53] *Id.* at 1043–44.

influential among the founding generation. To focus solely on these works, however, is to do a historical injustice to the origins of a free press, for such late-to mid-eighteenth-century views did not develop out of thin air. Blackstone, De Lolme, Gordon, and Trenchard unquestionably borrowed their views from other sources, which asserted that the events of the Glorious Revolution confirmed the necessity for press liberties.[54]

Unlike most Anglo-American rights, the development of a free press stems from customary practice.[55] It had not been statutorily codified in the Magna Carta, 1689 English Bill of Rights, or even the 1701 Act of Settlement. Instead, its origins developed from the bowels of the print culture itself.[56] Press advocates asserted the need for press liberties as a vehicle for political and religious dialogue, to spread knowledge and virtue, provide a check on tyrannical government, and even to prevent licentiousness and libel.[57] There were even cogent arguments against taxing the press, licensing, and any prior restraint.[58] At the same time, there were counter arguments asserting the need for a return to licensing and some prior restraints.[59] Needless to say a constitutional right to a free press was a hot topic in the popular print culture, yet slow to develop in terms of jurisprudence.

It was not until 1770 that an English jury was charged with the instruction that there was, in fact, a "liberty of the press."[60] The case was *Rex v. Woodfall*,[61] in which Lord Mansfield delivered the following charge to the grand jury:

> As for the liberty of the press, . . . I will tell you what that is; the liberty of the press is, that a man may print what he pleases without a licenser: as long as it remains so, the liberty of the press is not restrained. It is the same as in all other actions a man may use his arm; but he must not strike his neighbour: a man may use his tongue, but he must not speak blasphemy.[62]

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[54] For a history of the press and the Glorious Revolution, see Lois G. Schwoerer, *Press and Parliament in the Revolution of 1689*, 20 THE HISTORICAL JOURNAL 545 (1977).

[55] *See* Douglas M. Ford, *The Growth of the Freedom of the Press*, 4 THE ENGLISH HISTORICAL REVIEW 1 (1889); Edward A. Bloom, *Neoclassic "Paper Wars" for a Free Press*, 56 MOD. LANGUAGE REV. 481 (1961); FREDERICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476–1776, at 346–92 (1965).

[56] *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 89–118 (Oxford University Press, New York 1965) (discussing the development of the liberty for the press from Milton to Cato).

[57] *See id.* at 104.

[58] *See id.*

[59] *See id.* at 89–118.

[60] Rex v. Woodfall, (1770) 20 Howell's State Trials 895, 897–903.

[61] *Id.*

[62] *Id.* at 903.

Although Mansfield acknowledged the existence of the liberty of the press, the actual court opinion did not weigh its interests.[63] This does not disparage the fact that the liberty of the press was identified as a constitutional right. Its recognition in the pantheon of constitutional jurisprudence can be solely attributed to custom, but Mansfield was not the first justice to identify the right in the English Empire. In 1749, Thomas Marlay, the Lord Chief Justice of the King's Bench in Ireland, charged a Dublin grand jury on the issue of libels. Marlay reminded the jury of its duty to "present all seditious Libels, the Authors, Printers, and malicious Publishers of them, in your several Counties."[64] As for the nature of libels, Marlay proceeded as follows:

> A LIBEL is a malicious Defamation of any Person dead or living, express'd by Writing, Printing, or Picture, and is most severely punish'd by the Law, because of the direct Tendency to the Breach of the Peace.
>
> THIS was always a dangerous Offence; but is more so, since the Invention of Printing, and since Printing-Presses have been so common. And let me observe to you, Gentlemen, *That nothing can preserve the Liberty of the Press, but an effectual Restraint on the Licentiousness of Printing*.[65]

Marlay queried, "DOES not [a libel] tend to the Subversion of all Morality, the very Tie and Bond of Human Society?"[66] His point being that the liberty of the press does not extend to vilifying the very government that protects said liberty. It was unlawful to direct publications towards the subversion of government. If this were otherwise, Marlay wrote, "Force and Violence must prevail, and Mankind must live in the Condition of Beasts of Prey."[67]

Fourteen years later, Richard Aston, the Chief Justice of the Court of Common Pleas, delivered similar sentiments to a Dublin grand jury. Aston viewed libels as "a gross Abuse of the Liberty of the Press, as it perverts that valuable Privilege in Favour of Public Liberties, into a mischievous Attack on the Happiness of private Persons."[68] Aston did not view liberty of the press as a free license to print on any topic. Instead, it was subject to the "Law of Reason":

> [Libel] is therefore deemed an Indictable Offence; for the Liberty of the Press, is, like all other Liberties, to be used and enjoyed according to Law, which being a Law of Reason, and guarding against Force, Violence and Licentiousness in every Branch of it, will no more admit an

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[63] *See id.* at 917–21.
[64] CHARGES TO THE GRAND JURY 1689–1803, at 349 (Georges Lamoine ed., 1992).
[65] *Id.*
[66] *Id.*
[67] *Id.* at 350.
[68] *Id.* at 402.

> injurious Insult on a Man's Reputation than a forcible one on his Person or Property.[69]

Thus, as a matter of mid-eighteenth-century legal custom, the liberty of the press was seen as a fairly limited privilege. Other than the doctrine against prior restraint, the judiciary did not see any other protections afforded to the press. This included the power to impose laws concerning seditious libel and to prevent a breach of the peace.[70] In the words of William Mainwaring:

> The Liberty of the Press is one of the glorious Privileges of Englishmen—it is essential to the Liberty of the Subject, to the Existence of a free State, while exercised for lawful and just Purposes; but when it is made use of as the Instrument of Slander and Detraction, to destroy the Comfort and Happiness of Individuals, or to disturb the Harmony and good Order of the State . . . it becomes the most mischievous and destructive Engine that can be put into the Hands of wicked and ill-designing Men.[71]

The liberty of the press as a *popular right*, however, was seen as protecting much more than prior restraint during the late-seventeenth to mid-eighteenth century. To cover each and every political tract from this period would be impossible. Thus, this Article will focus on some of the more notable publications to convey the divergent views of the era. One prevalent late eighteenth-century tract is John Toland's *A Letter to a Member of Parliament*. Toland opposed "the Restraining of the Press, as inconsistent with the Protestant Religion, and dangerous to the Liberties of the Nation."[72] It was "Mens mutual Duty" to educate each other on all matters, including any matters that may be inconsistent with the church.[73]

Toland's argument was laid out simply in terms of "Truth and Falsehood."[74] He believed any restraint on the press deprived "Men of the most proper and best means to discover Truth," and hindered them from "seeing and examining the different Opinions, and the Arguments alledg'd for them."[75] Concerning the belief that licensing prevents "fallacious Arguments and specious Pretences," Toland responded as follows:

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[69] *Id.*

[70] *See id.* at 105, 204, 220, 236–37, 262, 276, 291–92, 296, 299, 303, 306–07, 309, 313, 340, 342, 349, 360, 369, 374, 382, 395.

[71] *Id.* at 452.

[72] JOHN TOLAND, A LETTER TO A MEMBER OF PARLIAMENT, SHEWING, THAT A RESTRAINT ON THE PRESS IS INCONSISTENT WITH THE PROTESTANT RELIGION, AND DANGEROUS TO THE LIBERTIES OF THE NATION 3 (London, F. Darby 1698).

[73] *Id.* at 4.

[74] *Id.* at 3–4.

[75] *Id.* at 5.

> [T]he more apt Men are to mistake and to be deceiv'd [by false arguments], the less reason there is for their relying on any one Party, but the more to examine with all care and diligence the Reasons on all sides, and consequently for the Press being open to all Parties, one as well as the other. So that those that are for allowing Men the liberty of judging for themselves . . . are very unhappy in their Arguments, because they all make against themselves, and out of their own Mouths they are condemned.[76]

Another way to articulate Toland's viewpoint is to characterize the liberty of the press as a pendulum of truth. Whenever the pendulum would swing one way with an argument, the counter viewpoint would swing it to the other side. This allowed the discovery of knowledge to perpetuate and facilitate a balance between truth and falsehood. In other words, a true liberty of the press was continuously self-correcting until the truth was illuminated. Toland viewed this pendulum as particularly helpful in correcting controversies:

> [T]he more important any Controversy is, the more Reason there is for the Liberty of the Press, that [the people] may examine with all diligence imaginable the Tenets of their Adversaries as well as of their Guides; and that the more they heard the one Party, the more they should read the other; and that if they should fall into any Error by so doing, they would not be accountable for it.[77]

Of course, the liberty of the press was not to remain unregulated. Even Toland felt the press required regulation in terms of civil matters when it "relates to Sedition and Treason."[78] These types of publications were to be "severely punished" because they are "pernicious to humane Societies."[79] Toland's stance was that he merely opposed licensing and prior restraints. It was deemed a contradiction in terms for a free government to place prior restraints on the press, yet claim it a protected liberty. To Toland, the press was the means that "secure[d] all other Liberty," and once it "falls into the hands of ill designing Men, nothing that we hold dear or precious is safe."[80]

Another prevalent late seventeenth-century tract is Charles Blount's *A Just Vindication of Learning and the Liberty of the Press*. Blount was advocating the end of licensing even prior to the Glorious Revolution and was a firm advocate of

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[76] *Id.* at 10.
[77] *Id.* at 14–15.
[78] *Id.* at 32.
[79] *Id.* at 18.
[80] *Id.* at 27.

the idea that a free press guaranteed liberty.[81] He hoped for the end of all licensing and the freedom to write as one may speak:

> Why should not I have the same freedom to Write, as to speak? If I speak any thing that is evil, I am liable to be punished, but yet I am never examined before I speak what I am about to say: So let not my Book be censured by one Interested Man alone in private, till it hath tried the publick Test; and then if there be any thing ill in it, I am ready to answer for it.[82]

To Blount, the purpose of a "Free Press" was to tailor political "Fame and Ambition," for it "hurries men into a necessity of acting Virtuously."[83] A free press without prior restraint ensured the dissemination of knowledge on history, divine worship, and philosophy, among others.[84] Blount never advocated for an unbridled right to publish anything. He felt that publishing the truth should be a defense,[85] yet hoped falsehoods would still be punished according to the "present Laws of the Land subject to Fine and Imprisonment."[86] Blount also was the first to suggest that a free press would self-correct libels, for licentiousness was "more likely to be silenc'd by Liberty than by restraint."[87] In other words, the free discourse of ideas would counter and expose licentiousness as a means to reveal the truth.

In 1704, Matthew Tindal expressed a similar view on the constitutional significance of a free press. He asserted that "there's no Freedom either Civil or Ecclesiastical, but where the liberty of the Press is maintain'd; so wherever that is secur'd, all others are safe."[88] Tindal's emphasis on civil and ecclesiastical matters is significant in that these subjects were the most regulated through the seventeenth century.[89] The general fear was that an unbridled liberty to print on civil and ecclesiastical matters would lead to numerous abuses in misleading popular opinion. Tindal combated these fears by querying, "But how can these Abuses be discovered, if the Press be in their Hands that gain by them? What can be more useful than History, especially of ones own Country? and can we expect a true Information, when only one side is to print?"[90]

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[81] Bloom, *supra* note 55, at 482; J.A. Redwood, *Charles Blount (1654–93), Deism, and English Free Thought*, 35 J. HIST. IDEAS 490, 496, 498 (1974).

[82] CHARLES BLOUNT, A JUST VINDICATION OF LEARNING AND THE LIBERTY OF THE PRESS 15 (London 1695).

[83] *Id.* proem.

[84] *See id.* at 3–7.

[85] *See id.* at 13.

[86] *Id.* at 23.

[87] *Id.* at 22.

[88] MATTHEW TINDAL, REASONS AGAINST RESTRAINING THE PRESS 14 (London 1704).

[89] *See* SIEBERT, *supra* note 55, at 134–43, 269–88.

[90] TINDAL, *supra* note 88, at 9.

To be clear, Tindal viewed the "natural Right" of "Learning and Knowledg[e]" as extending to all subjects, including civil and ecclesiastical matters.[91] The "Freedom of the Press contributes not only to endear Truth when discovered," wrote Tindal, "but to the discovery of it; and if that fails, to make even Error itself innocent."[92] Like those before him,[93] Tindal viewed the truth as a self-correcting principle. This included any false accounts affecting the government:

> And no Ministry can be hurt by the liberty of the Press, since they have a number of Dependents, ready upon all occasions to write in justification of their Conduct; nay, to gild over the worst of their Actions, and give a fair Colour to their most pernicious Designs . . . .
>
> The liberty of the Press must keep a Ministry within some tolerable Bounds, by exposing their ill Designs to the People, with whom if they once lose their Credit, they will be very unfit Tools for a Court to work with.[94]

Tindal's view of the press as the people's check on government coincided with the works of Toland and Blount, but Tindal took it a step further. Unlike his predecessors,[95] at no point did Tindal acquiesce to any form of libel. He believed that "all good Governments" consisted of the people "having the liberty of thinking on what Subject they please, and of as freely communicating their Thoughts."[96] Tindal also differentiated himself from Toland and Blount in that he was against any law that required authors to submit their names. Tindal thought such a regulation could "only serve to hinder the publishing [of] the most useful Books, *viz*. those designed to rectify Abuses" by the government.[97] Meanwhile, Toland viewed the setting of names of "either the Printer or Bookseller" to all books as "the most effectual way to prevent publishing" libelous and treasonous books.[98] Similarly, Blount recommended that if "Prudence" dictates any prior restraint on the press, it should be "provided that the Printer's and the Author's Name, or at least the Printer's be registered."[99]

It is interesting that laws requiring the printing of the author's name to curb licentiousness divided free press advocates. In 1712, John Asgill thought a name requirement to be a "most just and natural Remedy," for libel prosecutions acted as "Paper Inquisition[s]; by which any Man may be arraign'd, judg'd, and condemn'd

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[91] *Id.*
[92] *Id.* at 7.
[93] *See* TOLAND, *supra* note 72, at 10, 15.
[94] TINDAL, *supra* note 88, at 13.
[95] *See* BLOUNT, *supra* note 82, at 22–23.
[96] TINDAL, *supra* note 88, at 13.
[97] *Id.* at 14.
[98] TOLAND, *supra* note 72, at 18.
[99] BLOUNT, *supra* note 82, at 24.

. . . without ever knowing his Accusers."[100] However, other than this prior restraint, Asgill advocated for a virtually unrestrained free press:

> The Use and Intent of Printing, is (the same with that of Preaching) for communicating our Thoughts to others.
>
> And there is equal Reason (in it self) for suppressing the one as the other.
>
> But this Communication being the natural Right of Mankind (as sociable Creatures, and all embark'd in one common Salvation) the suppressing of either of these, is *taking away the Childrens Bread*.
>
> And in this Communication, Printing is more diffusive than Speaking.
>
> . . . .
>
> And tho several Errors have and will be vented by the Occasion of this Invention; this is no more an Argument against the Invention itself, than the growing of Tares among Wheat, is an argument against sowing of Corn.
>
> Nor any more Reason for suppressing it by a Law, than it would be for shutting up the Church-Doors, because Hypocrites cro[w]d the Church with true Worshipers.[101]

Up to this point, commentators such as Toland, Blount, Tindal, and Asgill had attributed the origins of a free press to the principles of natural law, God's will, and the belief that all free governments must maintain an open discourse of political ideas and knowledge.

It was not until Joseph Addison penned *Thoughts of a Tory Author* that the liberty of the press was given any distinctive historical origins.[102] In particular, Addison traced the origins of a free press to Rome,[103] and he may have been the first to lay claim to the argument that a constitutional free press developed as a result of the Glorious Revolution.[104] At no point did Addison directly attribute the origins of a free press to government action. Thus, one can assume that Addison knew the liberty of the press developed out of government inaction, for Parliament let the licensing bills expire.[105]

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[100] JOHN ASGILL, AN ESSAY FOR THE PRESS 7 (London, A. Baldwin 1712).

[101] *Id.* at 2–5.

[102] JOSEPH ADDISON, THOUGHTS OF A TORY AUTHOR, CONCERNING THE PRESS: WITH THE OPINION OF THE ANCIENTS AND MODERNS, ABOUT FREEDOM OF SPEECH AND WRITING (London, A. Baldwin 1712).

[103] *See id.* at 10, 13–14.

[104] *See id.* at 5–6, 17–18, 22–25, 27.

[105] *See* 6 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 540 (Liberty Fund 1983) (1778); SIEBERT, *supra* note 55, at 260–63.

Perhaps it is this brief historical analysis that explains why Addison presented a "more representative position" than his predecessors.[106] Addison advanced a position on the press that legitimately took into account "Legal Liberty" or the constitutional structure of popular government.[107] Other commentators seemed to glance over the fact that government and its laws are instituted to ensure the public good, but not Addison:

> I believe all we mean by Restraining the Press, is to hinder the Printing of any Seditious, Schismatical, Heretical or Antimonarchical Pamphlets. We do not intend to destroy Printing itself or to abridge any one Set of Men of the Liberties of *Englishmen*; that is, of Writing and Printing what the Law allows; what may be consistent with our Loyalty to the Q—n, and our Love to the Publick Peace; what is not against Morals or Good Manners. And surely there may be a Restraint put upon such Things without striking at the Press itself, and ruining a Trade which has been so serviceable to Liberty and the Reformation.[108]

At the time of Addison's tract, truth was not a defense to seditious libel. Authors and printers could still be held accountable if their writings were deemed licentious or dangerous to the public peace. However, Addison believed that truth should serve as a defense. If a writing does "no Injury to the Reputation of any Man, but strikes at a Publick Grievance, a Reigning Vice, or Prevailing Folly," wrote Addison, "why . . . shoul'd [we] make the Studies of such Men useless[?]"[109]

Addison also argued for the defense of truth when criticizing government officials. He believed the best way to suppress libels was to remove any prior restraints, for this would require Ministers to give "as good an account of their Words and Actions as they can."[110] Seemingly borrowing from Toland's argument on men's duty to educate each other,[111] Addison thought it "the Duty of every Man in a Free Nation to offer his Sentiments" on the government so long as it is done with "Modesty and Submission" to the law.[112] He knew that "Printing is one of the Supports of Liberty," but also that liberty requires "reasonable Regulations as the Royal Wisdom shall think convenient."[113] Regulations could even punish speculative truths and limit the liberty of the press to exactly "what is True, what every Body knows to be True, and no more."[114]

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[106] LEVY, *supra* note 56, at 107.
[107] ADDISON, *supra* note 102, at 8.
[108] *Id.* at 1–2.
[109] *Id.* at 3.
[110] *Id.* at 13.
[111] TOLAND, *supra* note 72, at 4.
[112] ADDISON, *supra* note 102, at 16.
[113] *Id.* at 32.
[114] *Id.* at 26.

Even opponents of a legally robust liberty of the press did not discount its customary existence. For instance, the conservative tract entitled *Arguments Relating to a Restraint on the Press* recognized a free press as an identifiable liberty, albeit on very limited terms.[115] The tract's author is unknown, but its legal analysis comports with early eighteenth-century practice. It concluded that the liberty of the press did not prevent any restraints that were consistent with the "Publick Good" and necessary to prevent injuries.[116] In the words of William Blackstone, this would have meant that Parliament could pass any law that was "essentially interested . . . in the protection of every individual's private rights, as modelled by the municipal law."[117]

Thus, in the interests of the public good, the eighteenth-century legislature could "compel the individual to acquiesce" to restraints on liberty.[118] It permitted the legislature to balance the public "*Necessity*" of the press with its "*Inconveniencies.*"[119] According to *Arguments Relating to a Restraint on the Press*, this meant it was within parliamentary authority to pass any laws concerning licensing, libel, authorship, and content without offending a free press.[120] To interpret the English Constitution otherwise, it argued, was to prevent the enactment of any new laws except those that are merely "Explanatory of former ones," which would be inconsistent with the rule that "The End of Parliaments is to amend the Kingdom."[121]

The anonymous author even disagreed with the notion that the press served any constitutional purpose in exposing political controversies. The English Constitution, he asserted, already provided a constitutional vehicle for this purpose:

> The law is open, said you, let them implead one another; Appeals to the People are of the most dangerous Consequence to all Magistracy: But that every Man may appeal to the Representatives of the People, the Triennial Act hath provided.
>
> . . . .
>
> . . . Are not the Lords and Commons a sufficient Bulwark against any Designs of arbitrary Power? Are not They better acquainted with the Boundaries of Royal Prerogative, and better prepar'd to resist any

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[115] *See* ARGUMENTS RELATING TO A RESTRAINT UPON THE PRESS, FULLY AND FAIRLY HANDLED IN A LETTER TO A BENCHER, FROM A YOUNG GENTLEMAN OF THE TEMPLE 5 (London, R. & F. Bonwicke 1712) [hereinafter ARGUMENTS RELATING TO A RESTRAINT UPON THE PRESS].

[116] *See id.* at 3–7.

[117] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (Oxford, Clarendon Press 1765).

[118] *Id.*

[119] *See* ARGUMENTS RELATING TO A RESTRAINT UPON THE PRESS, *supra* note 115, at 5.

[120] *See id.* at 47–51.

[121] *Id.* at 6.

> Invasion of their own, and the People's Rights and Liberties, than every wanton and malevolent *Boutefeu*, that cries Fire, Fire, when there is most Danger of an Inundation?[122]

As unfortunate as it may seem, this understanding of the free press was the living legal reality in the early eighteenth century. Since intellectuals were still debating whether "free-thinking" was a natural right,[123] it is understandable why the liberty of the press was simply viewed as the ability to write and print as allowed by law.[124] This does not dispel the fact that the philosophical and intellectual origins of a free press were developing in political thought.

Clearly, the tracts of Toland, Blount, Tindal, and others were influential in the public discourse. And it should not be surprising that every argument Thomas Gordon and John Trenchard made on the subject of a free press in *Cato's Letters* was borrowed from each of these early treatises. For instance, similar to Joseph Addison's views on the historical relationship between infringing free speech and maintaining a free press,[125] Thomas Gordon framed Roman history to argue that restraining free speech is what made the "wits" of "great and numerous authors . . . no more."[126] Gordon also borrowed from his predecessors on the subject of public libels. He asserted that truth should serve as a defense, writing:

> Nothing ought to be so dear to us as our country, and nothing ought to come in competition with its interests. Every crime against the publick is a great crime, though there be some greater than others. Ignorance and folly may be pleaded in alleviation of private offences; but when they come to be publick offences, they lose all benefit of such a plea: We are then no longer to consider what causes they are owing, but what evils they may produce, and here we shall readily find, that folly has overturned states, and private ignorance been the parent of publick confusion.[127]

Thus similar to John Toland and Joseph Addison,[128] Gordon viewed the exposing of "publick wickedness" as a "duty."[129] Although the law did punish

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[122] *Id.* at 14–15.

[123] *Compare* FREE THOUGHTS UPON THE DISCOURSE OF FREE THINKING (London, Pemberton 1713), *with* PHILELEUTHERUS LIPSIENIS, REMARKS UPON A LATE DISCOURSE OF FREE-THINKING IN A LETTER TO F.H.D.D. (London, Morphew 1714).

[124] *See* ADDISON, *supra* note 102, at 1–2.

[125] *See id.* at 5–6, 9–10, 13–14, 17–18, 22–25, 27.

[126] Thomas Gordon, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty* (February 4, 1720), *in* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 110, 114 (Ronald Hamowy ed., Indianapolis, Liberty Fund 1995) (1733).

[127] Thomas Gordon, *Reflections upon Libelling* (June 10, 1721), *in* 1 TRENCHARD & GORDON, *supra* note 126, at 228, 228.

[128] *See* ADDISON, *supra* note 102, at 16; TOLAND, *supra* note 72, at 5, 10.

individuals for public libels, and the truth did not serve as a defense to treason, Gordon believed this should no longer be the case. He understood that "libels against government" were "base and unlawful, and often mischievous; especially when governments are impudently charged with actions and designs of which they are not guilty."[130] Like Matthew Tindal and John Asgill before him,[131] however, Gordon argued that this was an "evil arising out of a much greater good."[132] He argued, "[R]ather many libels should escape, than the liberty of the press should be infringed."[133] Gordon's rationale was that a free press would require politicians to maintain honest dealings and individual virtue:

> Corrupt men, who have given occasion for reproach, by their base and dark practices with the late directors, being afraid of truths that affect them from the press, may be desirous of shutting it up: But honest men, with clear reputations, which they know foul mouths cannot hurt will always be for preserving it open, as a sure sign of liberty, and a cause of it.[134]

At the same time, Gordon understood there had to be a legal line that no writer or printer could cross.[135] Indeed, Gordon viewed a free press as providing a strong constitutional purpose, but it could not be completely unregulated. It is here that Gordon's coauthor of *Cato's Letters*, John Trenchard, turned the constitutional analysis of *Arguments Relating to a Restraint on the Press* on its head. Instead of the *inconveniences* from libels resulting in the *necessity* of press regulation,[136] Trenchard viewed most press regulations as inconveniencing religion, liberty, virtue, and knowledge.[137] To Trenchard, the "Liberty of Writing" secured all other liberty.[138] Hence the balance of liberty and libels worked the other way around.[139] Laws regulating the press were not to be given "more Indulgence to Detraction than is necessary to secure" liberty, for "it is certainly of much less Consequence

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[129] Gordon, *supra* note 127, at 228.

[130] *Id.* at 231.

[131] *See* ASGILL, *supra* note 100, at 4–5; TINDAL, *supra* note 88, at 13.

[132] Gordon, *supra* note 127, at 252.

[133] *Id.* at 253.

[134] *Id.*

[135] *Id.* at 254 ("The best way to escape the virulence of libels, is not to deserve them; but as innocence itself is not secure against the malignity of tongues, it is also necessary to punish them.").

[136] ARGUMENTS RELATING TO A RESTRAINT UPON THE PRESS, *supra* note 115, at 5.

[137] John Trenchard, *A Discourse on Libels*, *in* 2 CATO'S LETTERS 292, 295 (Russell & Russell, 3d ed. 1969) (1733).

[138] *Id.* at 294.

[139] *Id.* at 299 ("I would not be understood by what I have said, to argue that Men should have an uncontrolled Liberty to calumniate their Superiors, or one another; Decency, good Manners, and the Peace of Society, forbid it: But I would not destroy this Liberty by Methods which will inevitably destroy all Liberty.").

to Mankind, that an Innocent Man should be now and then aspersed, than that all Men should be enslaved."[140]

In summary, Gordon and Trenchard were not articulating any new argument on the liberty of the press. Just as John Toland believed that prior restraint kept the people "more or less stupid and ignorant,"[141] Trenchard asserted it would eventually overrun the world with "Barbarism, Superstition, Injustice, Tyranny, and the most stupid Ignorance."[142] Trenchard also borrowed from Toland to assert that the dissemination of innocent or minor libels was self-correcting:[143]

> [I]t is senseless to think that any Truth can suffer by being thoroughly searched, or examined into; or that the Discovery of it can prejudice right Religion, equal Government, or the Happiness of Society in any Respect: Truth has so many Advantages above Error, that she wants only to be shewn, to gain Admiration and Esteem; and we see every Day that she breaks the Bonds of Tyranny and Fraud and shines through the Mists of Superstition and Ignorance . . . .[144]

As a matter of legal influence, Gordon and Trenchard's essays seemingly had little, if any, effect on the English liberty of the press. Throughout most of the eighteenth century, English jurists did not acknowledge that such a right existed; thus it is understandable why Gordon and Trenchard's writings on a free press never appeared in English court opinions or prominent legal treatises, nor were they restated in newspaper editorials. In the American colonies, however, Gordon and Trenchard's free press writings would prove more influential.

III. THE ZENGER TRIAL AND THE DEVELOPMENT OF A FREE PRESS IN EARLY COLONIAL THOUGHT

Despite having little to no influence in English jurisprudence, Thomas Gordon and John Trenchard's writings on a free press became influential in the infamous Zenger trial. This influence can be traced to the dissemination of *Cato's Letters* throughout the American colonies.[145] It was not due to any form of originality that *Cato's Letters* gained notoriety, for just as historians can trace the intellectual origins of the Second Amendment to John Toland and others,[146] so too do the

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[140] *Id.* at 294.

[141] TOLAND, *supra* note 72, at 8.

[142] Trenchard, *supra* note 137, at 297.

[143] *See* TINDAL, *supra* note 88, at 13; TOLAND, *supra* note 72, at 10, 15.

[144] Trenchard, *supra* note 137, at 298–99.

[145] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 35–37 (1967); CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN 115–25 (1959); CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF AMERICAN TRADITION OF POLITICAL LIBERTY 141, 492 (1953).

[146] *See* Charles, *supra* note 38, at 9–21.

intellectual origins of a free press begin with late seventeenth-century commentary.[147]

The Zenger trial originated from a power struggle between New York Governor William Cosby and a political faction led by the former New York Chief Justice Lewis Morris, whom Cosby had recently fired.[148] To combat his new political rival, Morris employed John Peter Zenger's *New-York Weekly Journal* to publish a series of editorials vilifying Cosby as an opponent to law, liberty, and private property.[149] It is here that the trial came to fruition, for the editorials would be the reason Zenger was prosecuted for seditious libel.[150]

It all began with the series of editorials published in Zenger's *New-York Weekly Journal*. Zenger did not write the editorials, but rather James Alexander, a member of Morris's political party and the lawyer who would later represent Zenger, was the writer.[151] In particular, the editorials argued in favor of a free press and echoed the political thought of Gordon, Trenchard, and his intellectual predecessors. In fact, Alexander's first editorial begins by acknowledging "CATO," that "excellent writer" on the "liberty of the press."[152] Alexander then wrote on the importance of a free press in checking tyranny:

> Exposing the exorbitant Crimes of wicked Ministers under a limited Monarchy, makes the Liberty of the Press, not only consistent with, but a necessary part of the Constitution itself.
>
> It is indeed urged, that the Liberty of the Press ought to be restrained, because not only the Actions of evil Ministers may be exposed, but the Character of the good ones traduced.[153]

As a matter of positive law, liberty of the press did not exist in the American colonies.[154] The tenets of libel extended to criticisms against government as well as

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[147] LEVY, *supra* note 56, at 89–118.

[148] *Id.* at 38.

[149] *Id.* at 38–39.

[150] It must be noted that the Zenger trial itself did little to change the legal landscape of libel or the liberty of the press. FREDERICK SEATON SIEBERT, THE RIGHTS AND PRIVILEGES OF THE PRESS 6–7 (1934). Chief Justice James DeLancey, who presided over the court proceedings, informed the jury multiple times that truth *could not* serve as a defense to seditious libel and that the jury could only decide matters of fact, not law. Despite these legal affirmations, the jury returned a verdict of not guilty. LEVY, *supra* note 56, at 43–44. Thus, the common law rules respecting libel remained intact, but the story of the Zenger trial and the popular print culture surrounding it would forever alter American political discourse on a free press. For an excellent historical discussion on this point, see Paul Finkelman, *Politics, the Press, and the Law: The Trial of John Peter Zenger*, *in* AMERICAN POLITICAL TRIALS 25 (Michal R. Belknap ed., rev. & expanded ed. 1994).

[151] Finkelman, *supra* note 150, at 26.

[152] CATO, Letter to the Editor, N.Y. WKLY. J., Nov. 12, 1733, at 1.

[153] *Id.*

the people. However, Alexander invoked the writings of Gordon, Trenchard, and his predecessors to assert truth as a defense. "Truth will always prevail over Falsehood," wrote Alexander.[155] He believed the benefits of revealing the truth outweighed the inconveniences of a few potential falsehoods:

> Inconveniences are rather to be endured than that we should suffer an entire and total Destruction. . . . The Loss of Liberty in general would soon follow the Suppression of the Liberty of the Press; for as it is an essential Branch of Liberty, so perhaps it is the best Preservative of the whole.[156]

Using history as a guidepost, Alexander further argued that virtuous politicians need not worry about a free press. "If Men in Power were always Men of Integrity, we might venture to trust them with the Direction of the [Press], and

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[154] *See* LARRY D. ELDRIDGE, A DISTANT HERITAGE: THE GROWTH OF FREE SPEECH IN EARLY AMERICA 23 (1994); Larry D. Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America, 1607–1700*, 39 AM. J. LEGAL HIST. 337 (1995).

[155] CATO, *supra* note 152. Although truth did not serve as a defense against seditious libel, this legal doctrine came under fire in the eighteenth century as incompatible with the liberty of the press. The 1770 pamphlet *A Dialogue Between a Country Farmer and a Juryman, on the Subject of Libels* illustrates this perfectly:

> C. Pray, where is the mighty difference between writing and speaking the truth.
>
> J. by writing the truth, it circulates more freely than speaking.
>
> C. Is that the reason why it is more criminal to write than to speak it?
>
> J. Yes.
>
> C. Then the law is made for the suppression of truth.
>
> J. I hope not. The law considers what is written, as the cool deliberate act of the mind, but imputes speaking to indiscretion and passion.
>
> C. This is no reason why a man may not both write and speak the truth.
>
> J. Most certainly not. But the law saith, truth may be defamatory.
>
> C. I cannot entertain so absurd an idea of the law. . . .
>
> C. Suppose a great man had betrayed his trust, embezzled the public treasure, sacrificed the rights of his fellow-subjects, or imposed upon his sovereign to induce him to exercise that prerogative which was vested in him for the benefit of the people in favor of the most abandoned wretch—Would it be criminal to state this man's conduct to the public?
>
> J. I hope not—that doctrine might suit an arbitrary government, but it seems irreconcil[able] to the principles of a free state, and the genius of the English people.

A DIALOGUE BETWEEN A COUNTRY FARMER AND A JURYMAN, ON THE SUBJECT OF LIBELS 18–20 (London, Holborn 1770).

[156] CATO, Remainder of the Letter to the Editor, N.Y. WKLY. J., Nov. 19, 1733, at 1.

there would be no Occasion to plead against the Restraint of it."[157] Alexander even advanced John Toland's stance that falsehoods would rectify themselves:

> I think, every Man of common Sense will judge that he is an Enemy to his King and Country who pleads for any Restraint upon the Press; but by the Press, when Nonsense, Inconsistencies, or personal Reflections are writ, if despised, they die of Course; if Truth, solid Arguments, and elegant, just Sentiments are published, they should be met with Applause rather than Censure . . . .[158]

Naturally, Alexander's editorials received a series of responses.[159] In William Bradford's *New-York Gazette*, Zenger's newspaper rival, an anonymous editorial agreed that there should be no prior restraint of the press, yet felt that the "licentiousness of the press" should still be regulated.[160] "Tis the abuse not the use of the press that is criminal and ought to be punished," wrote the author.[161] The *South-Carolina Gazette* published similar sentiments, stating that no restraint should be put on the press "in a nation that pretends to *Liberty*, but what is just sufficient to prevent Men from writing either *Blastemy* of the *Treason*."[162] Meanwhile, in the *American Weekly Mercury*, Andrew Bradford[163] may have been the first to claim that the liberty of the press was the "great *Palladium* of all our other *Liberties*":

> But, by the Freedom of the Press, I mean a Liberty, within the Bounds of the Law, for any Man to communicate to the Public, his sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be the Good of his Countrey, and to applying for the Repeal of such, as he Judges pernicious. I mean a Liberty of detecting the wicked and destructive Measures of certain Politicians; of dragging Villany out of its obscure lurking Holes, and exposing it in its full Deformity to open Day; of attacking Wickedness in high Places, of disentangling the intricate Folds of a wicked and corrupt Administration, and pleading freely for a redress of Grievances: I mean a Liberty of examining the great Articles of our Faith, by the lights of

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[157] *Id.*

[158] *Id.*

[159] See Lawrence H. Leder, *The Role of Newspapers in Early America "In Defense of Their Own Liberty,"* HUNTINGTON LIBR. Q. 1, 6–8 (1966).

[160] *Id.* at 6.

[161] *Id.*

[162] S.C. GAZETTE (Charleston), Feb. 9, 1734.

[163] Andrew Bradford was the son of William Bradford. *See* LEVY, *supra* note 56, at 48–49.

> Scripture and Reason, a Privilege derived to us in its fullest Latitude, from our most excellent Charter.[164]

Bradford's reference to the liberty of the press as the "palladium of liberty" must be clarified, for the description is often used out of context or loosely by legal commentators to assert broad individual rights separate from government.[165] The terminology is not intended to be broad or independent of government. In the eighteenth century, the "palladium of liberty" distinctly described rights or governmental checks that balanced the Constitution in favor of the people. These rights and governmental checks included political representation,[166] freedom of election,[167] the writ of habeas corpus,[168] the right to trial by jury,[169] the right to keep and bear arms in a well-regulated militia,[170] and the freedom of the press.[171]

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[164] Andrew Bradford, *Sentiments on the Liberty of the Press*, AM. WKLY. MERCURY (Phila.), Apr. 25, 1734, *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 38, 41–42 (Leonard W. Levy ed., 1966).

[165] In the case of the Second Amendment, the term "palladium of liberty" has been improperly used out of context and loosely to assert broad individual rights. *See* Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1220 (1996) (arguing that the "true palladium of liberty" was in reference to armed individual self-defense); Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty,"* 3 TENN. J.L. & POL'Y 120, 142–45 (2007); Edward Lee, *Gun and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1051–52 (2009) (explaining that "the right to bear arms was important to self-defense" and was described as the "palladium of liberty"); Ian Redmond, *The Second Amendment: Bearing Arms Today*, 28 J. LEGIS. 325, 329 (2002) (stating that Judge Henry St. George Tucker suggested his "agreement with the idea that citizens ought to possess an individual right to own guns"). This interpretation ignores that the "palladium of liberty" is in reference to something more distinct that connects the people to their government. The "palladium of liberty" referenced the right's ability to balance the operation of government. *See* Charles, *supra* note 38, at 71–85.

[166] *See* TO THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL, THE HUMBLE PETITION AND MEMORIAL OF THE ASSEMBLY OF JAMAICA 6 (1774) (describing Parliament as the "Palladium of Liberty").

[167] *See* BENJAMIN AUSTIN, CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALLACIOUS FEDERALISM 89 (Boston, Adam & Rhoades 1803) (describing the freedom of election as the "palladium of liberty").

[168] *See* Letter from John Hancock to William Livingston (Aug. 30, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 572, 574 (Paul H. Smith ed., 1981) (describing Pennsylvania's writ of habeas corpus as the "palladium of liberty"); 2 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 225 (Bird Wilson ed., Phila., Bronson & Chauncey 1804) (describing the writ of habeas corpus as the "great palladium of all liberty").

[169] *See* 3 THE RECORDS OF THE FEDERAL CONVENTION 221 (Max Farrand ed., 1911) (describing the right to trial by jury as the "palladium of liberty"); JOHN GRAHAM, SPEECHES, DELIVERED AT THE CITY-HALL OF THE CITY OF NEW-YORK 20 (N.Y.C.,

The press was especially termed the "palladium of liberty" because it was linked to the government of a free state, provided a vehicle by which the people learned about government, and could communicate the people's thoughts to government officials. One anonymous editorial described the "*Liberty* of the *Press*" as the "Barrier of all the rest" or "in the highest Sense the Palladium of all other Liberty."[172] In other words, the press provided the people a means to lay "their own Sentiments by *Reason* and *Argument*" on the subject of "preserving" government, not destroying or dissolving it.[173] This distinction is important, for even strong proponents of free press admitted that any "Abuses that dissolve Society, and sap the Foundations of Government, are not to be sheltered under the Umbrage of the Liberty of the Press."[174]

Perhaps the most intriguing aspect of this debate was the identification of the liberty of the press as a customary right. One of Zenger's editorials chastised the *New-York Gazette* for claiming the liberty of the press to be "*one of the sacred and ESSENTIAL Priviledges of our Constitution*."[175] Certainly, a free press preserved "any Political Constitution from being destroyed, and goes very far towards preventing Men of arbitrary and corrupt Principles" from overturning "any good Constitution, be it ecclesiastical or civil."[176] However, the anonymous editorial made sure to correct any notion that the constitution and liberty of the press were both "sacred."[177] There was a "Constitution in *England* long before Printing was known; and . . . long before we had a Printer."[178]

This begets the question, How did the liberty of the press qualify as a customary right in early eighteenth-century American constitutional thought? A right to a free press did not exist in any colonial or English charter, yet it was identified as one of the palladiums of liberty. Perhaps the answer rests with the Anglo-American view that "every *Free Government*" must "keep to its original Principles."[179] Given that one of these principles was affording the people the

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M'Gillda & Co. 1812) (describing the right to trial by jury as the "grand palladium of all liberty and justice").

[170] *See supra* note 165 and accompanying text.

[171] *See* 10 ANNALS OF CONG. 81–82 (1799) (statement of Sen. Charles Pinckney) (describing the freedom of the press as the "great palladium of our liberties"); 23 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 815 (1914) (statement of David Howell) (describing freedom of the press as the "palladium of liberty"); GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS 25 (Richmond, Samuel Pleasants, Junior 1803) (describing the freedom of the press as the "palladium of liberty" and "bulwark of freedom").

[172] Britannus, Letter to the Examiner, *Of the Principles of British Government*, BOS. EVENING-POST, Mar. 15, 1736, at 1.

[173] *Id.*

[174] Philalethes, Letter to Editor, N.Y. WKLY. J., Nov. 4, 1734, at 3, col. 2.

[175] Letter to Editor, N.Y. WKLY. J., Oct. 21, 1734, at 2, col. 2.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] Britannus, *supra* note 172, at 1.

means to preserve liberty, it was believed that a free press afforded this capability of governmental preservation better than free speech or petitioning representatives ever could.[180] A free press gave authors the medium to express their concerns on balancing individual and collective liberty with governmental restraint. At the same time, however, the liberty of the press was subject to this very balancing. As one editorial under the penname Solon described it:

> No Country therefore, not even this Country, the freest of all others, can permit an universal Latitude of Speaking and Writing, and the *Liberty of the Press*, so highly and so justly valued amongst us, is and must be subject to certain Bounds. . . .
>
> The *Liberty of the Press*, is, therefore, no more, even in *England*, than the reasonable Liberty of Writing and Publishing whatever is consistent with the *English* Laws and Constitution.[181]

Naturally, free press commentators deduced different customary origins. One commentator found the liberty of the press, "this Palladium of our Rights," to originate from the "Principles" of the Glorious Revolution.[182] Another traced it to the ancient constitutions of the Greeks and Romans to assert that the liberty of the press was an "inherent principle" for the preservation of the English constitution.[183] The commentator claimed that when any system of government restricts the people "from the power of deciding" directly, "the '*Liberty of the PRESS*' becomes much more necessary for preserving the liberties of the people."[184] Meanwhile, a third commentator viewed press freedom as derived from the "common right of Mankind," and an integral part of "mix'd Government," for it was deemed an extension of the people's voice.[185]

Though they may have differed in identifying its constitutional origins, almost all free press advocates viewed the right as essential to the preservation of the English constitution. In the words of one advocate, the liberty of the press was a "peculiar Privilege" that "must last as long as our Government remains, in any

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[180] Philalethes, *supra* note 174, at 3.

[181] *A General View of Liberty*, BOS. EVENING-POST, July 4, 1737 at 2. The irony of the government's power to regulate the very instrument that may constitutionally check it did not go unnoticed by free press advocates. *See* Philalethes, *supra* note 174, at 4 ("Glorious Liberty of the Press! We may write what we please; but then we must take Care that what pleases us pleases our Masters too.—We may Write! but if we do not Write as they think fit, they'll make us smart for it O glorious Liberty!").

[182] *The Great Importance of the Liberty of the Press*, BOS. EVENING-POST, Apr. 20, 1747, at 1.

[183] *An Apology for the LIBERTY of the PRESS*, BOS. GAZETTE; OR COUNTRY J., May 26, 1755, at 1, col. 3.

[184] *Id.*

[185] Letter to the Editor, N.Y. MERCURY, Sept. 2, 1754, at 1.

degree, free and independent."[186] Interestingly enough, another stated that the "Freedom of the Press" did "*not* proceed from any Peculiarity in the Frame of the English Constitution," but agreed it is "essential to and coeval with all free Governments, into which it is not adopted, but born."[187]

It is a historical point of emphasis that a free press was ideologically viewed as an extension of government itself. It was the means that provided people an "early, just, and complete information of the abuses of government."[188] It also served as the ultimate protection of liberties:

> The LIBERTY of the PRESS is the great Barrier of all LIBERTIES: For, How can any Branch of our LIBERTIES be said to be safe, if we have not the LIBERTY of Complaining of any Attempt to take it away? Though LIBERTY be Joint Stock, in Respect to the Nation, yet every Individual has a Property therein; and the Security he has for it, is his Right of Appealing to the Publick, if it's invaded, or taken away.[189]

As insightful as these affirmations of a free press may be, they do little to settle the debate of whether this "palladium of liberty" rests with the individual people, the collective people, the press as an industry, or all of the above.[190] It is certainly arguable that the custom of print technology led to the development of an individual right for everyone to print their sentiments before the public. In 1749, Irish Chief Justice Thomas Marlay attributed the increase of libels to the "Invention of Printing" and "Printing-Presses" being so "common."[191] In 1712, John Asgill argued that regulating the liberty of the press was no more than regulating the "Invention itself."[192] In the same year, Joseph Addison took the opposite stance, arguing that regulations in the interests of the "Public Peace" were constitutional so long as they did not "destroy *Printing itself* or . . . abridge any one Set of Men of the Liberties of Englishmen."[193]

Conversely, we must consider that the liberty of the press protected the industry too. Just as the technological resources to print were growing in the eighteenth century, so too was the press industry. Nonetheless, the fact remains

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[186] *Id.*

[187] *An Apology for the LIBERTY of the PRESS*, *supra* note 183, at 1, col. 1 (emphasis added).

[188] *Id.*

[189] SUPPLEMENT TO N.Y. GAZETTE, Oct. 2, 1752, at 1.

[190] The convoluted structure of the First Amendment does not aid in this endeavor. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or 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.").

[191] CHARGES TO THE GRAND JURY, 1689–1803, *supra* note 64, at 349.

[192] ASGILL, *supra* note 100, at 4.

[193] ADDISON, *supra* note 102, at 1–2 (emphasis added).

that not everyone could be a printer due to costs and market demand. Establishing a newspaper or print shop required sufficient capital and a demographic base to derive readership. It was not a trade that all could maintain.

Volokh is probably correct that anyone with sufficient capital could have invested in the then-expensive print technology,[194] but this fails to take into account the economic risks associated with the venture, and, more importantly, whether each press was the embodiment of a constitutional *free press* or complied with rules respecting the "art of printing" as understood in eighteenth-century political thought. In other words, the underlying problem with Volokh's textualist approach is that it does not take into account the growing customs of eighteenth-century print culture. Is it really conceivable that eighteenth-century printers viewed themselves as only the maintainers of a press technology? Or did they view the liberty of the press as protecting their trade?

These are difficult questions that textualism and ad hoc history cannot answer. It is important to note that as the liberty of the press grew as a customary popular right, so too did the perception of the constitutional roles of the printer or newspaper. Take for instance a 1753 essay by William Livingston[195] entitled *Of the Use, Abuse, and Liberty of the Press*.[196] A member of the 1787 Constitutional Convention, the First and Second Continental Congresses, and the first governor of New Jersey, Livingston wrote how the "Public has the Advantage of Sentiments of all its Individuals" through the medium of the press.[197] The press was the "one common Center" that diffused "the bright Beams of Knowledge, with prodigious Dispatch, thro' the vast Extent of the civilized World."[198] Livingston never discounted the liberty of all to write their sentiments or how the "Art of *Printing*" provided the means for individuals to "write undiscovered, as it is impossible to detect [the author] by the Types of the Press."[199] Also, like those political philosophers before him, Livingston did not view the liberty of the press as an unfettered right for all to publish whatever sentiments:

> We are so besotted with the Love of Liberty, that running into Extreams, we even tolerate those Things which naturally tend to its Subversion. And what is still more surprising, an Author justly chargeable with Principles destructive of our Constitution, with Doctrines the most abject and slavish, may proceed even with inveterate Malice, to vilify, burlesque and deny our greatest Immunities and Privileges, and shall yet be suffered to justify himself under the unrestrainable Rights of the

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[194] Volokh, *supra* note 6, at 470.

[195] LEVY, *supra* note 56, at 138 (confirming Livingston as the author).

[196] William Livingston, *Of the Use, Abuse, and Liberty of the Press*, INDEP. REFLECTOR, Aug. 30, 1753, *reprinted in* THE INDEPENDENT REFLECTOR 336 (Milton M. Klein ed., 1963).

[197] *Id.* at 336.

[198] *Id.* at 337.

[199] *Id.*

> Press. An Absurdity grossly stupid and mischievous. What! Sap the Constitution, disturb the public tranquility, and rule the State, and yet plead a Right to such Liberty derived from the Law of that State![200]

Certainly, the laws against libel curbed such licentiousness, but Livingston also understood the intermediary role the press served in this process. Every printer had to first consider whether to publish articles in the interests of the public good. This free press function not only served the "Promotion of the public Welfare," wrote Livingston, but was also a "political Virtue" among printers.[201] The true constitutional purpose of a free press did not include a right to "publish every Thing that is offered" to a printer.[202] Instead, the "true Limits" and "rightful Extent" of a free press was the truth or that which is "conducive of general Utility."[203] Livingston viewed printers that did not follow these constitutional guidelines as "Enemies to the *Press* and the *Public*," and mocked them as having the "Impudence to talk of the *Liberty of the Press*."[204]

Livingston's *Of the Use, Abuse, and Liberty of the Press* was of such influence that *The New England Magazine of Knowledge and Pleasure* reprinted it with modifications in 1758. Following Livingston's lead in denouncing unvirtuous printers as the "Tool[s] of a [political] Party,"[205] the modified reprint established guidelines for a free press run by virtuous printers:

> [Printers should] open their Presses to every Writer whose Opinions have not a natural Tendency to hurt the Societies of which they are Members; preserve sacred and inviolate the Secrets of their Correspondents; abstain from publishing any Thing that may prove injurious to the Characters of honest Men; and, whenever the Reputation of their Fellow-Creatures is attacked, give them the fairest Opportunity of defending themselves through their Presses; and above all, be ready to print any Thing that is advancive of the Public Weal, without regarding the narrow Resentments of Party: But towards their own Security, I would have them remember the Danger of *libeling*; and endeavor to acquire that Medium of *Discretion* through which the Public may be *well* served, the People *well* informed, and Them-selves *well* secured.[206]

The delicate balance to be struck between a newspaper's liberty to print on a story and the benefits the story imposed upon the community was a serious issue in

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[200] *Id.* at 339.
[201] *Id.* at 340.
[202] *Id.* at 341.
[203] *Id.* at 341–42.
[204] *Id.* at 342.
[205] *Id.*
[206] *On the Use, Abuse, and Liberty of the Press, with a Little Salutary Advice*, NEW ENG. MAG. KNOWLEDGE & PLEASURE, Aug 1, 1758, at 33, 38.

mid-eighteenth-century political discourse. Printing anything and everything did not advance the liberty of the press virtuously. The liberty of the press was never a carte blanche to "defame and slander the Proceedings of Government" because it may "injure[] the Publick by defaming what [the author] does not understand and can't mend."[207] For the liberty of the press to "answer any true and valuable End" of government, it must "promote the Welfare of Mankind, [or] it's good for nothing; and when perverted to a contrary Purpose, is as pernicious and criminal, as any other Sort of Licentiousness."[208]

As long as the press followed these basic tenets, the role it could play in advancing the public good of society was immeasurable.[209] For instance, John Holt's *The New-York Journal, or General Advertiser* discussed the role a competing Virginia press played in removing a government monopoly.[210] With the introduction of "another Printer, not dependent on the Governor's Favour," wrote Holt, it became "vain to continue the Restraint" on the government press and resulted in "two free Presses."[211] The *Providence Gazette* also published an editorial classifying the print media as crucial to the success of liberty. The editorial was a reprint from a London newspaper, which argued that the "Rise of NEWS-PAPERS" was a "chief Barrier of our Liberty."[212] The editorial continued:

> NEWS-PAPERS, not only convey Instruction and Amusement, but when properly conducted, secure to us the Liberty of the Press.—There is another great Advantage which the Increase of News-Papers has procured us:—Ignorance is not so prevalent; News-Papers have given People a Taste for Reading; this occasions all useful Knowledge to be cultivated and encouraged . . . .[213]

The editorial's reference to "properly conducted" conveys the all-important role that the press served in ensuring the truth, veracity, and impartiality of its contents. Printers were cognizant of the role they played in disseminating news. Indeed, printers sought to make a profit, but to virtuous members of the press industry a free press was not merely the right of individuals to publish anything. In the words of one editorial, "The liberty of the Press is not an indivisible quantity; but a quantity composed of a great number of parts."[214]

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[207] A LETTER TO MR. D'ANVERS CONCERNING THE LIBERTY OF THE PRESS 10 (London, J. Roberts 1729).

[208] *Id.*

[209] For an example of the liberty of the press in the constraints of the public good, see Charles, *supra* note 8, at 506.

[210] NEW-YORK J., OR GEN. ADVERTISER, Nov. 27, 1766, at 1.

[211] *Id.*

[212] PROVIDENCE GAZETTE; & COUNTRY J., Jan. 15, 1763, at 4, col. 2.

[213] *Id.*

[214] *Points of View for the People of England*, GA. GAZETTE, Aug. 16, 1764, at 1.

Undoubtedly, numerous printers viewed their trade as one of the "parts" the liberty of the press protected. For instance, William Goddard, owner of the *Providence Gazette*, wrote an editorial conveying this very point:

> The Printer thinks he may here observe, without an Appearance of Ostentation, that during the small Progress of his Business, in this Place, it has in many Respects proved beneficial to the true Interest of the whole Colony.[215]

Goddard made sure to remind his readers that the "Liberty of the Press is [styled] the very Basis and Bulwark of [the British] Constitution, and its truest Safeguard, amidst the rude Attacks of Arbitrary Power." [216] He even felt the *Providence Gazette* contributed to this end:

> [I]ts Circulation has been rendered very extensive, and has happily met with general Approbation of the Public, for its useful and agreeable Contents, as well as for its Freedom and Impartiality. . . . A Public Paper, *well conducted*, is allowed by the most sensible People to be very serviceable to a Community . . . .[217]

The view of the press as a constitutionally protected entity reached new proportions from the late 1760s through the adoption of the Declaration of Independence. In particular, the press played a significant role in criticizing the Stamp Act and ultimately contributed to its repeal.[218] Virtually no one doubted the role that printers, editors, and newspapermen played in unifying colonial opposition to the Stamp Act. "Had it not been for the continual information from the Press," remarked one editorial, "a junction of all the people on this northern continent . . . would have been scarcely conceivable."[219] Another editorial commented, "The press hath never done greater service since its first invention."[220] Meanwhile, one editorial was even so bold to exclaim that the press and the maintainers of its freedom were the "ark of God, for the safety of the people."[221]

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[215] *To the Public*, PROVIDENCE GAZETTE; & COUNTRY J., Jan. 12, 1765, at 1.

[216] *Id.*

[217] *Id.* (emphasis added).

[218] *See* Arthur M. Schlesinger, *The Colonial Newspapers and the Stamp Act*, 8 NEW ENG. Q. 63, 63–83 (1935) [hereinafter Schlesinger, *Colonial Newspapers*]; Arthur M. Schlesinger, *Politics, Propaganda, and the Philadelphia Press, 1767–1770*, 60 PENN. MAG. HIST. & BIOGRAPHY 309, 309 (1936).

[219] A Countryman, Letter to the Editor, PROVIDENCE GAZETTE EXTRAORDINARY, Mar. 12, 1766, at 2.

[220] Schlesinger, *Colonial Newspapers*, *supra* note 218, at 81 (citing A Countryman, *supra* note 219, at 2).

[221] *Id.* (quoting A Son of Liberty, *A Short View of Some Interesting Matters*, PROVIDENCE GAZETTE EXTRAORDINARY, Mar. 12, 1766).

Suffice it to say, the constitutional significance of the liberty of the press was at its height leading up to the outbreak of the American Revolution. In fact, the press was often toasted, especially during celebrations commemorating the repeal of the Stamp Act. In 1768 it was reported that the people in New York not only toasted the "patriotic Author of the Farmer's Letters," John Dickinson, but also the "Liberty of the Press."[222] Five years later, New York would again toast the "LIBERTY of the PRESS," and such memorable free press supporters as Alexander McDougall, John Wilkes, Andrew Hamilton, John Peter Zenger, and even "Zenger's Jury, who regardless of the Directions of the Court, refused to bring in a special Verdict, and acquitted the Prisoner."[223] Meanwhile, in 1768 in Boston, a toast was made to "*The Farmer*," "*The Boston Gazette, and the Worthy Members of the House who vindicated the Freedom of the Press*."[224]

Toasts to the liberty of the press were not limited to commemorating the repeal of the Stamp Act.[225] On August 14, 1768, Boston celebrated the "first Opposition to the Stamp Act," and toasted the Federal Farmer, John Wilkes, the "Republic of Letters," and the "LIBERTY of the PRESS."[226] On November 1, 1769, New York celebrated its opposition to "surrender[ing] their Rights to arbitrary Power," toasting the Federal Farmer, the "Authors of the Boston Journal of Occurrences," John Wilkes, the "Liberty of the Press, and Confusion to all Imprimaturs," and the "Printers who nobly disregarded the detestable Stamp Act, preferring the public Good to their private interest."[227]

As these examples show, American colonists not only viewed the press as a technological advancement to publish the people's sentiments. They toasted writers, newspapers, free press advocates, and even the printers who fought the Stamp Act. Sometimes the word "press" was capitalized, emphasizing the significance of a *free press* in eighteenth-century constitutionalism. To the Americans who waded through the constructs of the revolution, the press advanced the public good by exposing the ministry and publishing the views of the colonies.

IV. THE CONSTITUTIONAL UTILITY OF A FREE PRESS: THE AMERICAN REVOLUTION AND THE PRE-CONSTITUTION YEARS

The role of the press in thwarting the Stamp Act is often understated, yet crucial to understanding the evolution of the liberty of the press in American constitutionalism. In fact, Alexander McDougall used the role that a free press

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[222] PROVIDENCE GAZETTE; & COUNTRY J., Apr. 9, 1768, at 3, col. 1.

[223] N.Y. GAZETTE, OR, WKLY. POST-BOY, Mar. 26, 1770, at 1.

[224] MASS. GAZETTE & BOS. NEWS-LETTER, Mar. 24, 1768, at 3.

[225] *See, e.g.*, N.Y. GAZETTE, OR, WKLY. POST-BOY, Oct. 22, 1770, at 3, col. 2; *Friday, September 16th*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.1046/ (last visited Dec. 27, 2012).

[226] POSTSCRIPT TO BOS. NEWS-LETTER, Aug. 25, 1768, at 1.

[227] MASS. GAZETTE & BOS. WKLY. NEWS-LETTER, Nov. 9, 1769, at 2, col. 2.

played in repealing the Stamp Act to assert his defense against libel.[228] He reminded the people that for five years "the American Press has been boldly imployed in asserting the Right of this Country, to an Exemption from British Taxation."[229]

The public discourse concerning the Stamp Act, however, was just the beginning. Throughout the imperial crisis, proponents and opponents of American liberty both claimed that their stance fell within the legal restraints of the liberty of the press, while arguing that their counterparts had overstepped the bounds of its doctrine. Those who prematurely spoke of American independence were often deemed English traitors, and the same held true for printers who took the counterpoint, though the latter experienced far more public persecution.

One such printer was Samuel Loudon, who decided to publish a reply to Thomas Paine's *Common Sense*.[230] Loudon was hauled off in the middle of night and witnessed the plates, impressions, and manuscript of the tract burned before his eyes.[231] Upon inquisition, Loudon asserted the privilege to not divulge the manuscript's source.[232] He was appalled with how the liberty of the press was so "boldly attacked," and his written defense reveals the role each printer served in confirming the truth and veracity of their prints:

> As a publication of this nature required mature deliberation, I did not incline, nor did the gentlemen [who supplied the manuscript] require me, to comply with his proposal till I should be convinced that the manuscript was written with decency, or did not express, or even imply, any disapprobation of the proceedings of the honorable Continental Congress, or the glorious cause in defence of which *Americans* are spending their blood and treasure. Being satisfied as to these particulars, I agreed to print the manuscript on my own account.[233]

Loudon also defended his actions on account of America not yet declaring independence. "*American* Independence hath not, to the best of my knowledge,

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[228] The trial of McDougall was second only to the Zenger trial as the most important libel case to advance the liberty of the press in the American colonies. McDougall later served in both the First and Second Continental Congresses, and was a Major General during the American Revolution. For a summarized history of McDougall and the trial, see LEVY, *supra* note 56, at 77–83. For a full history of McDougall, see ROGER J. CHAMPAGNE, ALEXANDER MCDOUGALL AND THE AMERICAN REVOLUTION (1975).

[229] SUPPLEMENT TO NEW-YORK J., OR GEN. ADVERTISER, Feb. 15, 1770, at 2, col. 2.

[230] LEVY, *supra* note 56, at 175.

[231] *Id.*

[232] *Samuel Loudon's Address to the Publick*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.13647/ (last visited Dec. 27, 2012).

[233] *Memorial of Samuel Loudon to the New-York Committee of Safety*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.13646/ (last visited Dec. 27, 2012).

been decided by the Continental Congress, nor by any legal subordinate Convention," he wrote.[234] Clearly, Loudon understood that the law of seditious libel prevented him from publishing anything treasonous. However, he questioned why he could not challenge the issue of American independence if it had not yet been settled. Certainly, at the time, it was a question of the "greatest importance" and "should not [have been] decided before [the] arguments [were] fully discussed" in the public discourse:

> The publick will determine whether, by not suffering any persons to publish their sentiments but the author of [*Common Sense*], and such as have adopted this way of thinking, many thousands of steady friends to the common cause of *America* are not deprived of one of their essential privileges—the liberty of declaring their opinion upon a subject of the greatest moment, and in which they are unspeakably more interested than the supposed author of that pamphlet?[235]

Overall, Loudon's point was a simple one: the liberty of the press ensures the open discourse of political measures that are not adverse or treasonous to constitutional government. In the future, Loudon hoped the true "freedom of the Press" would ensure that "all political publications" would be "legally and impartially tried, by the publickly avowed principles of the Colonies," not by "nocturnal assaults upon printers."[236]

Similar plights faced moderate or loyalists printers throughout the American colonies. In March 1775, over a year before the outbreak of hostilities at Lexington and Concord, James Rivington was charged with spreading "jealousies, fear, discord, and disunion" throughout the colonies.[237] Particularly, he was accused of having "disgorged from his infamous Press, the most virulent, foul abuse, on the Members of the late Continental Congress," and the Newport Committee recommended his publication be banned from dissemination.[238] The Committee's reasoning being:

> [T]he freedom of the Press is of the utmost importance to civil society; and that its importance consists, "besides the advancement of truth, science, morality, and arts in general, its diffusion of liberal sentiments on the administration of Government, its ready communication of

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[234] *Samuel Loudon's Address to the Publick*, *supra* note 232.

[235] *Id.*

[236] *Id.*

[237] *Camillus to the Printers of the Pennsylvania Gazette*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2006#/ (last visited Dec. 27, 2012).

[238] *Resolutions of the Committee of Inspection for Newport, Rhode-Island*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2007/ (last visited Dec. 27, 2012).

> thoughts between subjects, and its consequential promotion of union among them . . .” [and] therefore it is the duty of every friend of Civil Government to protect, and preserve from violation, that invaluable right, that noble pillar, and great support of Public Liberty; and to countenance and encourage the Press, so long as it shall be employed in promoting those beneficial purposes.[239]

New Windsor, New York followed the steps taken by the Newport Committee and banished Rivington's newspaper. It was resolved, "[W]e consider the Freedom of the Press as the great palladium of English liberty; therefore we will do all in our power to encourage and support the same."[240] The town accused Rivington's paper of lacking "every principle of honour, truth, or modesty," and having its "pieces replete with falsehoods and mere chicanery, only designed . . . to divide and lead astray the friends of our happy Constitution . . . ."[241]

Naturally, not all colonists agreed with the banishing of Rivington's paper. One letter chastised the Committee as making a "most flagrant attack upon the liberty of the press" and taking "infinite pains . . . to stop the circulation of moderate publications . . . ."[242] Meanwhile, Major Benjamin Floyd and "a great number of others" responded that the revolutionaries were suppressing the free press:

> Do you really mean to immure the Colonies in Popish darkness, by suppressing the vehicles of light, truth, and liberty? Are none to speak, write, or print, but by your permission? Does a conscience of guilt and tyranny hurry the Committees to starve and murder our virtuous Printers? . . . A free Press has been the honour and glory of *Englishmen*; by it our most excellent Constitution has been raised to greater perfection than any in the world. But we are become the degenerate plants of a new and strange vine; and now it seems ignorance must be the mother of both devotion and politicks.[243]

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[239] *Id.*

[240] *Meeting of Freeholders and C., in New-Windsor, (Ulster County,) New-York*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2136/ (Dec. 27, 2012).

[241] *Id.*; *see also Letter from a Gentleman in Connecticut to Mr. Holt, New-York, Dated March 29, 1775*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2100/ (last visited Dec. 27, 2012) (attacking Rivington as being "partial" and publishing "falsehoods tending to disunite" the American colonies).

[242] *Letter from an Englishman in New-York*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2227/ (last visited Dec. 27, 2012).

[243] *Letter from Major Benjamin Floyd, of Brookhaven, Suffolk County, New-York, to Mr. Rivington*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2036/ (last visited Dec. 27, 2012).

The case of James Rivington was just one example of how the free press divided revolutionaries and loyalists. Numerous proclamations and editorials were published debasing the other side as violators of a free press, especially those who did not support prorevolutionary governments.[244] To many, the liberty of the press was thought to extend only to printers and writers in support of their side. Still, both the Newport and New Windsor Committees were clear that the "freedom of the Press" was more than just writing and publishing what individuals pleased; the press in itself was an entity that needed to be encouraged to promote beneficial purposes such as the advancement of truth and knowledge.[245]

Following the Stamp Act, the press was seen as particularly important in defending liberty against usurpation. As one editorial described it:

> The liberty of the press [is] . . . a privilege ever dear to *Englishmen*, as it is an engine fruitful of mighty events, in battering down the strong holds of the powerful. It should always be viewed with jealousy, and defended at every hazard. Tyrants have often felt its force, and wreaked their malice against it. Says the ingenious [*David*] *Hume*, "It is sufficiently known that arbitrary power would steal in upon as," we're we not extremely watchful to prevent its progress, and were there not an easy way of conveying the alarm from one end of the Kingdom to the other. The spirit of the people must frequently be roused, in order to curb the ambition of the Court, and the dread of that spirit's being roused must be employed to prevent that ambition. Nothing [is] so effectual to this purpose as the liberty of the press . . . . It is equally open to the Court and the Country, to the man in publick life, and the private speculator, who may have the world for his theatre, and the publick for the object of his

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[244] *See Camillus to the Printers of the Pennsylvania Gazette*, *supra* note 237, at 391 (discussing how it would "destroy[] the liberty of the press" should anything be published "which controverted the measures of Congress"); *Captain Sterret Directed to Bring Somerville to the Committee Room, He Is Convicted of an Attempt to Influence the Liberty of the Press, and Censured by the Chairman*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.18117/ (last visited Dec. 27, 2012) (accusing George Somerville of tending to negatively "influence the freedom of the Press, which in every free country should be inviolably maintained"); *To the Printers of the Massachusetts Gazette*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2091/ (last visited Dec. 27, 2012) (discussing how the Committees of Correspondence must "keep [the Tories] down by continued threats, and now and then a little chastisement; the Printers we have got under our thumbs; they dare not print any thing but what is on the side of liberty").

[245] *Resolutions of the Committee of Inspection for Newport, Rhode-Island*, *supra* note 238.

> beneficence, while buried in obscurity, and confined to the smoke of his own chimney.[246]

What this statement reveals is that a free press had constitutional layers or parts outside of its capabilities as a technology. This included the role of newspapers as the bulwark of liberty. In the words of one contemporaneous commentator, newspapers were the "common channel of conveyance for modern addressers to Governours, Generals, and Kings."[247] They were of central importance to the exercise of the freedom of the press.[248] In particular, a newspaper's distribution made the newspaper available to all who were willing to read or subscribe to it. Its contents were capable of being influenced by all sides and all professions through the submission of editorials or advertisements. In the words of printer William Goddard, "[O]ur newspapers, those necessary and important alarms in time of publick danger, may be rendered of little consequence" without the freedom to circulate.[249] This did not mean that a free press permitted the publication of anything or everything. Virtuous printers subscribed to the tenets of impartiality and ensured their newspaper's contents were respectable.[250] As Goddard wrote in his own newspaper, the liberty of the press did not include "publishing all the Trash which every rancorous, illiberal, anonymous Scribbler" might send to the printer, for it may be inconsistent "with the Gratitude, Duty, and Reverence [a printer] owes to the Public."[251]

Other contemporaries agreed with this understanding of a free press and sought to maintain a truthful, open, and impartial discourse. An "entirely free" press was supposed to be "open to all Parties, but influenced by none."[252] The hypocritical stance by extralegal colonial assemblies did not go unnoticed. It made little sense for said assemblies to claim violations of the press, yet not be

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[246] *Cosmopolitan, No. III*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.8458/ (last visited Dec. 27, 2012).

[247] *Letter to Peyton Randolph from an Inhabitant of Massachusetts*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.1085/ (last visited Dec. 27, 2012).

[248] Jeffrey A. Smith, *Impartiality and Revolutionary Ideology: Editorial Policies of the South-Carolina Gazette*, 1732–1775, 49 J. S. HIST. 511, 511 (1983).

[249] *Mr. Goddard's Proposal for Establishing an American Post Office*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.562/ (last visited Dec. 27, 2012).

[250] For interesting articles on this topic, see Smith, *supra* note 248 (exploring the changing slant of revolutionary newswriting from the perspective of a colonial newspaper); *On the Use, Abuse, and Liberty of the Press, with a Little Salutary Advice*, *supra* note 206, at 38 (addressing the rules of a virtuous printer and free press).

[251] PENN. CHRON., & UNIVERSAL ADVERTISER (Phila.), Mar. 9–16, 1767, at 3, col. 1.

[252] BOS. EVENING-POST, Aug. 26, 1771, at 3, col. 1.

transparent in their own proceedings.[253] It was firmly believed that the liberty of the press, the "peculiar excellency of the *British* Constitution," required the "proceedings of all publick bodies should be freely discussed" and be laid before the people.[254]

These arguments, however, did little to prevent extralegal colonial assemblies from suppressing moderate and loyalist printers.[255] On the other hand, for the purposes of historical context, many members of Congress were open to dissenting points of view in newspapers. They understood the liberty of the press to protect this. For instance, when Eldridge Gerry and Henry Laurens sought to charge John Dunlap with libeling Congress, Merriweather Smith, Thomas Burke, and John Penn opposed this attempt on free press grounds.[256] Smith commented he had read Dunlap's paper and "thought it contained several good things."[257] He believed that when the "liberty of the Press shall be restrained . . . the liberties of the People will be at an end."[258] Burke thought such a charge was "lowering and disgracing the dignity of the Congress to take any notice of the Printer or Author," asking, "[W]hat shall we get by the enquiry?"[259] Meanwhile, Penn agreed with Smith, stating, "The liberty of the Press ought not to be restrained."[260] Indeed this came with the caveat that Dunlap's publication had "good designs," but it conveys that there was some discussion over the propriety of silencing the opposition.[261]

Furthermore, Edward Langworthy, a Continental Congress member from Georgia, wrote to William Dauer that he would "rejoice to see more publications on the proceedings of Congress, [for] a little gentle Satyr will be useful on many

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[253] *See To the Committee of Inspection for the City and County of New-York*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2205/ (last visited Dec. 27, 2012).

[254] *Id.*; *see also Address to the People of Pennsylvania*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.813/ (last visited Dec. 27, 2012) ("Those writers who have appeared to treat the subject with an aspect of fair and disinterested examination, have yet seemed to allow themselves to suppress momentous truths, under the general notion, that the truth is not to be spoken at all times. . . . [M]y fellow-*Americans*, as to suppose you are yet to be informed that after every subtile political refinement has had full examination and experiment, honesty, truth, and integrity in individuals, must be recurred to as the sure ground-work of a right publick spirit; and in all matters, both private and publick in nature, will, most certainly be found the very best of all policy.").

[255] LEVY, *supra* note 56, at 173–77.

[256] Henry Laurens, *Notes of Debates* (July 3, 1779), *in* 13 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 139 (Paul H. Smith ed., 1986).

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

occasions & will restrain the Spirit of Intrigue & Cabal."[262] Langworthy was not the only member to take notice of the importance of a truly free press. In the midst of the imperial crisis, William Hooper wrote how it made little sense to silence the Tory opposition:

> Strange Infatuation that while we contend with enthusiastick ardor for the liberty of the press ourselves that we should with such an intolerating spirit deny it to others. It is a strange freedom that is confined to one side of a Question! Doctrines in politicks that will not bear a freedom of discussion carry with them more than a suspicion of being erroneous, and I am confident that the world will not be so easily gulled in these as in the unquestionable mysteries of Church faith. They will take the freedom to think for themselves, & even to condemn what will not upon fair dispassionate enquiry stand the test of solid reason & sound Criticism. I do not mean to insinuate that the [opposition] . . . has merit . . . . Be that as it will, Neglect would be [their] greatest punishment. Let [them] speak in obscurity, Persecution is what [they] covet[].[263]

Thus, contrary to the practice of many extralegal colonial assemblies, cooler heads understood the constitutional purpose of a free press. Truth, impartiality, and the free discourse of the news were its tenets. John Adams conveyed the importance of *truth* while serving on a diplomatic mission in Paris. Adams commented that the "liberty of the press by no means includes a right of imposing on mankind . . . detestable forgeries."[264] He was against printers "artfully perform[ing]" political lies upon the world, for they poison the "morals of the people, the pure and single source of which is truth . . . ."[265] Adams felt it important that America's "character for truth, sincerity, and candor" not be tarnished by false claims of the press.[266] Perhaps most importantly, Adams did not solely view the liberty of the press as an invention for the people to convey their sentiments. He also knew that newspapers, printers, and editors maintained a significant role in public opinion and could even influence international relations. Adams felt a free press was the means by which elected representatives' "characters and conduct" were known to the people.[267]

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[262] Letter from Edward Langworthy to William Duer (Dec. 18, 1778), *in* 11 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 355, 356 (Paul H. Smith ed., 1985).

[263] Letter from William Hooper to James Duane (Nov. 22, 1774), *in* 1 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 263 (Paul H. Smith ed., 1976).

[264] Letter from John Adams to William Lee (July 20, 1780), *reprinted in* 3 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 871 (Francis Wharton ed., 1889).

[265] *Id.*

[266] *Id.*

[267] Letter from Chief Justice Cushing, *supra* note 1, at 16.

Future U.S. Supreme Court Justice William Cushing also viewed a free press as embodying more than the freedom to write and publish. He queried to Adams, "Without this liberty of the press could we have supported our liberties against [B]ritish administration? or could our revolution have taken place?"[268] Here, Cushing was referring to the utility of newspapers to influence public opinion during the imperial crisis and in support of American independence. Undoubtedly the liberty to publish one's sentiments was part of this utility, but printers could not publish anything and everything without violating the law and public trust.[269]

After assuming the Supreme Court bench, Cushing personally conveyed this legal fact in a charge to the grand jury, which defended the constitutionality of the controversial 1798 Sedition Act. While acknowledging the liberty of the press was placed upon a "just and equitable foundation," its equity only extended to "truths . . . essential to the preservation of any free government," not to "malicious lies and slander, which no man possessed of any principle of virtue or honesty, would indulge himself in."[270] To be clear, Cushing was not denouncing the utility of a free press to legitimately criticize government. The liberty of the press protected the "undoubted right" of the people to "express their opinion upon public matters, in a decent manner."[271] To be decent, however, meant that the opinion must be both candid and true. As Cushing put it, the liberty of the press ceases when presses "print and propagate scandalous and malicious falsehoods, to the injury of the public, which no man of virtue or modesty will pretend, any more than liberty of action admits of committing murder, theft, or any other crime."[272]

The doctrines of constitutional equity and utility and their interrelationship with the purpose of a free press were deeply intertwined in late eighteenth-century thought and practice. A virtuous printer understood the utility a free press served in American society.[273] It was not by chance that on the front page of every *Freeman's Journal* was the popular free press creed, "OPEN to ALL PARTIES,

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[268] *Id.* at 14.

[269] Those that wrote editorials to printers of newspapers and periodic publications understood this. For an example, see A Member of Convention, Letter to Editor, 2 WORCESTER MAG. (Worcester, Mass.) Oct. 1786, at 320 (asking printer Isaiah Thomas to "give the following [editorial] a place in your weekly publication; as the liberty of the press . . . must ever be the barriers of liberty").

[270] William Cushing, *A Charge Delivered to the Federal Grand Jury for the District of Virginia*, *reprinted in* J. RUSSELL'S GAZETTE: COMMERCIAL & POLITICAL (Bos.) Dec. 27, 1798, at 1, col. 4.

[271] *Id.* col. 2.

[272] *Id.* col. 4.

[273] *See* PENN. CHRON., & UNIVERSAL ADVERTISER (Phila.), Feb. 9, 1767, at 9, col. 1 ("[The printer] perfectly coincides in Opinion with 'THE PUBLIC,' in Regard to the Liberty of the Press, and the Duty of the Printer, and that he is determined to adhere, in the strictest Manner, to the solemn Engagements he has made, by conducting his PAPER, and his Business in general, on the Principles of Honour and Virtue, ever holding the PUBLIC GOOD superior to all private Considerations, and inseparable from his own Interest.").

but INFLUENCED by NONE."[274] Following the repeal of the Stamp Act, the statement began appearing in the headlines of numerous colonial newspapers[275] and reflected the role of the eighteenth-century press as the purveyor of truth, impartiality, and liberty. The same can be said for *The Independent Gazetteer*, which included on the top of every edition of the newspaper Article XII of the 1776 Pennsylvania Declaration of Rights[276] and the popular Junius quote, "Let it be impressed upon your Minds, let it be instilled into your Children, that the Liberty of the Press is the PALLADIUM of all the civil, political, and religious Rights of Freemen."[277] The inclusion of both references shows the constitutional role that printers placed upon their presses in American society as an entity, not merely as holders of a technology.[278] Similarly, the *New Hampshire Mercury* always included Section XXII of the 1784 New Hampshire Bill of Rights on its front page: "The Liberty of the Press is essential to the Security of Freedom in a State—It ought therefore to be inviolably preserved."[279] It conveys the printer's view that newspapers were to be "inviolably preserved" to the utility of the Republic.

Arguably newspaper printers, editors, and writers did not see themselves as any more protected by the liberty of the press than the right to publish without

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[274] For an example, see FREEMAN'S J. (Phila.), Dec. 23, 1789, at 1. The creed can be found in many earlier newspapers. *See, e.g.*, BOS. EVENING-POST, Aug. 26, 1771, at 3, col. 1; MASS. SPY, Mar. 14, 1771, at 1 (advertising the contents of *The Massachusetts Spy*).

[275] *See, e.g.*, MASS. SPY, Mar. 14, 1771, at 1; N.Y. CHRON., June 8, 1769, at 1.

[276] PA. CONST. of 1776, declaration of rights, art. XII ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.").

[277] For an example, see INDEP. GAZETTEER & AGRIC. REPOSITORY (Phila.), Nov. 20, 1790, at 1.

[278] The founding generation indeed recognized the benefits and burdens of the press as a technology, but this is only one aspect of the Press Clause. *See Liberty of the Press*, TIME PIECE (N.Y.C.), July 13, 1798, at 1 ("All those means which render the progress of the human mind more easy, more rapid, more certain, are also the benefits of the press. Without the instruments of this art such books could not have been multiplied as are adapted to every class of readers, and every degree of instruction. To the press we owe those continued discussions which alone can enlighten doubtful questions and fix upon an immovable basis, truths too abstract, too subtle, too remote from the prejudices of the people, or the common opinion of the learned, not soon to be forgotten or lost."); Republicus, *Observations on the Liberty of the Press*, AM. MONITOR (N.Y.C.), Oct. 1785, at 5–6 ("I must acknowledge the LIBERTY of the PRESS has been greatly abused by many, and this useful Machine has often been subservient to the worst of purposes, by being made an Engine of ushering much obscenity, nonsense and folly into publick view . . . .").

[279] N.H. MERCURY, & GEN. ADVERTISER, Mar. 15, 1785, at 1. It should be noted that the *New Hampshire Mercury*'s punctuation and formatting did not coincide with section XXII of the 1784 New Hampshire Bill of Rights, which read, "The liberty of the press is essential to the security of freedom in a state: It ought, therefore, to be inviolably preserved." N.H. CONST. pt. 1, art. XXII (amended 1968).

prior restraint. Such an argument, however, fails to take into consideration the ideological and philosophical origins of a free press and its development by the late eighteenth century. In the midst of the American Revolution, nine states included variations of the liberty of the press in their respective constitutions.[280] It was the first time in the pantheon of Anglo-American history that the liberty of the press, free press, or the freedom of the press was codified as a constitutional right.[281] From its origins in the Glorious Revolution, the liberty of the press in England had only been recognized in the popular print culture.[282] It had gained acceptance through government inaction, not affirmative recognition,[283] and it was not until 1770 that the King's Bench recognized the right, albeit limiting its tenets to prior restraint.[284]

The American perception of a free press seemingly evolved much faster than it had in England. Years before William Blackstone penned his *Commentaries* on the liberty of the press,[285] the American colonies had already recognized the

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[280] *See* GA. CONST. of 1777, art. LXI ("Freedom of the press and trial by jury to remain inviolate forever."); MD. CONST. of 1776, declaration of rights, § XXXVIII ("That the liberty of the press ought to be inviolably preserved."); MASS. CONST. art. XVI (annulled 1948) ("The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth."); N.H. CONST. pt. 1, art. XXII (amended 1968) ("The liberty of the press is essential to the security of freedom in a state: It ought, therefore, to be inviolably preserved."); N.C. CONST. of 1776, declaration of rights, § XV ("That the freedom of the press is one of the great bulwarks of liberty; and therefore ought never to be restrained."); PA. CONST. of 1776, declaration of rights, art. XII ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); S.C. CONST. of 1778, art. XLIII ("That the liberty of the press be inviolably preserved."); VT. CONST. of 1777, declaration of rights, art. XIV ("That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained."); VA. CONST. of 1776, declaration of rights, § XII ("That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.").

[281] In light of the Supreme Court's recent jurisprudence, this evidence alone supports recognizing distinct press rights. As seen in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3037 (2010), the Court incorporated a right to armed self-defense in the home with only four contemporaneous state analogues, compared to the nine press analogues. Out of these four, only three can be read as supporting a right to armed self-defense in the home. *See* Charles, *supra* note 30, at 42–46. Certainly, the press analogues satisfy this burden.

[282] *See supra* text accompanying note 56.

[283] *See supra* text accompanying note 105.

[284] *See infra* note 295 and accompanying text.

[285] Blackstone's fourth volume, which discussed the liberty of the press, was not published in England until 1769. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford, Clarendon Press 1769) [hereinafter BLACKSTONE, COMMENTARIES (Oxford)]. It was first reprinted in the American colonies in 1771. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Phila., Robert Bell 1771). It is uncertain when the founding generation began to take notice of Blackstone's

constitutional significance of a free press.[286] In particular, the Stamp Act and subsequent British measures had affirmed the importance of newspapers in checking tyrannical government.[287] By 1769 the liberty of the press was dubbed by one commentator as a "jewel of inestimable value," which "ought to be defended with our lives and fortunes, for neither will be worth enjoying, when freedom is destroyed by arbitrary measures."[288] Another commentator described it as the "one eye" that had the "public view" of liberty in mind.[289]

The American victory in the war for independence only further cemented the constitutional significance of a free press. Indeed, a major part of this freedom was the ability of the people to publish their sentiments without prior restraint, but the liberty of the press had also developed into an industrial right as well. Take for instance the view of the *Massachusetts Spy* and its role as a free press:

> The *Free* Use of the PRESS, has ever been acknowledged one of the greatest Blessings of Mankind, especially when its PRODUCTIONS tend to defend the GLORIOUS CAUSE of LIBERTY; and to point out to the world, those base and wicked arts of designing men, who fain would set nations together by the ears, and involve the whole kingdoms in slavery!
>
> Part of the design of this paper, is, to assist in detecting, and exposing to public view, those miscreants who, for the sake of private or public advantage to themselves, would sacrifice both their King and Country. And to help, as much as possible, in maintaining and supporting that LIBERTY for which our Fathers suffered in transferring it to us. To effect which, a great regard will always be paid to such political pieces as tend to secure to us our invaluable rights and priviledges.
>
> The other part of the publisher's design is, to give as copious a view as possibly can be obtained, of all Foreign Affairs, and the freshest

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liberty of the press analysis, but the first newspaper editorials appeared in 1773. *See, e.g.*, PROVIDENCE GAZETTE; & COUNTRY J., July 10, 1773, at 3, col. 2; MASS. SPY, July 22, 1773, at 1, cols. 2–3. Nevertheless, as this Article shows, Blackstone was not articulating anything novel in terms of the liberty of the press. He was merely regurgitating all the political and philosophical writers before him. *Compare* 4 BLACKSTONE, COMMENTARIES (Oxford), *supra*, at 151–53, *with supra* text accompanying note 55.

[286] *See supra* notes 154–155 and accompanying text. An editorial written by the *Craftsman* illuminates that this was the origin of the liberty of the press. *See* N.Y. GAZETTE, OR, WKLY. POST-BOY, Mar. 12, 1770, at 1, col. 3 ("[E]very *Act of Parliament* for restraining the *Liberty of the Press*, is a Proof of their *prior right to that Liberty*. Again, the Expiration *of such Acts*, revives *those Rights*; and the particular Act for restraining it, in the Case of the *Protestant Succession* only, seems to be a Confession of our Right to exercise, upon all other *public Subjects*."). Blackstone agreed with these origins. *See* 4 BLACKSTONE, COMMENTARIES (Oxford), *supra* note 285, at 151–53.

[287] *See supra* notes 154–155 and accompanying text.

[288] N.Y. GAZETTE, OR, WKLY. POST-BOY, July 10, 1769, at 1, col. 1.

[289] Letter to the Editor, NEW-YORK J.; OR, GEN. ADVERTISER, Sept. 13, 1770, at 145, col. 1.

> Intelligence from Great-Britain, as it may from time to time arrive; and that which concerns the colonies, shall be particularly noticed in this paper.[290]

Here, the free press included open access, *productions* in support of the people's liberty, and easy access to world news. The eighteenth-century public viewed a free press as more than just a technological medium. The founding generation, particularly printers, foresaw the constitutional evolution of a free press in terms of utility.[291] Inspired by Jean De Lolme's *The Constitution of England*, the *State Gazette* included the following:

> FROM the great utility . . . which every man is enabled to communicate his sentiments to the public, and the general concern which matters relative to government are always sure to create; a prodigious number of publications are continually making their appearance; so as to communicate to several measures adopted by administration, as well as whatever is advanced by either the advocates or judges, concerned in the management and decision of any cause or suit of importance in any court of law or equity. By that means the public are made acquainted with the nature of the subject that have been deliberated upon in the assembly of their representatives . . . .[292]

The editorial then quoted De Lolme's treatise directly:

> It will, I am aware, be thought that I speak in too high terms, of the effects produced by public newspapers. I indeed confess that every piece they contain are not patterns of good reasoning, or of the true attic wit: On the other hand, it never fails but that a subject in which the laws, or the welfare of the community, are really concerned; calls forth some able writer, who communicates to the public his observations and complaints.[293]

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[290] Editorial, MASS. SPY, Dec. 7, 1770, at 1, col. 2.

[291] *See* INDEP. REFLECTOR (N.Y.C.), Aug. 30, 1753, at 162 (discussing the scope of a free press as that which is "conducive of general Utility"); PENN. GAZETTE, Apr. 23, 1767, at 2, col. 1 ("To prevent an Evil which has so frequently prevailed within the Course of two Centuries, the Liberty of the Press has ever been found the most effectual Method. To this we owe the Security of every thing that is valuable in Life. By this Mist of public Prejudice has been removed from the Lyes of a deluded People. They have been enabled to discover, under the specious Appearance of general Utility, the most dangerous Invasion of their Rights and Privileges . . . .").

[292] ST. GAZETTE S.C., July 3, 1786, at 2, col. 2.

[293] *Id.* cols. 3–4 (quoting JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 205 (David Liebermann ed., Liberty Fund, Inc. 2007)).

Through "the assistance of the Press," the editorial concluded, "every individual may, at his leisure and in retirement, inform himself of everything worth knowing."[294]

De Lolme's understanding of the liberty of the press is of particular significance, for he attributed its origins to custom. It was a "privilege" that was "obtained by the English Nation, with the greatest difficulty, and *latest* in point of time, at the expence of the Executive power."[295] Although De Lolme did not use the word "utility," he described the benefits of a free press in utilitarian terms: as that which is in the interest of the public good.[296] He understood the constitutional benefits of newspapers in advancing the liberty of the press, as well as those standardized daily, weekly, and monthly publications.[297] One of these benefits was that a free press provided the people with the advantage of preserving their "important rights," what De Lolme referred to as the right of "ultimate resistance."[298] The medium of the press, "this right of *resisting*, itself," wrote De Lolme, is "vain, when there exists no means of effecting a general union between the different parts of the People."[299]

Perhaps most importantly, it was this interpretation that eighteenth-century Americans took from De Lolme's treatise. Other contemporaneous articles and editorials conveyed the constitutional utility afforded by newspapers. For instance, borrowing from De Lolme, the *Vermont Gazette* commented on how the liberty of the press, particularly newspapers, formed a "counterpoise to the power" of government.[300] The writer believed De Lolme's analysis proved "the great advantages that people derive from Newspapers, in which the most important political subjects are publicly discussed."[301] To be more succinct, a free press not only offered a technological medium for the people to convey their sentiments, but also was an entity that "roused," "united," and "animated" the people with information.[302]

The *Freeman's Journal* also published an editorial on the utility of the press. Newspapers were seen as providing essential information to the people and their representatives: "Every man who feels interested in his own fate . . . should apply to the NEWSPAPER, the faithful register of the transactions of the day; its pages

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[294] *Id.* cols. 2–3.

[295] DE LOLME, *supra* note 293, at 201 (emphasis added). The use of the term *latest* was likely in reference to Parliament discontinuing the laws on publishing its proceedings and the recent recognition of the liberty of the press by the King's Bench in 1770. *See* R v. Woodfall, (1770) 20 Howell's State Trials 895, 903; SIEBERT, *supra* note 55, at 356–63.

[296] *See* DE LOLME, *supra* note 293, at 199.

[297] *Id.* at 204.

[298] *Id.* at 216.

[299] *Id.* at 216–17.

[300] VT. GAZETTE, July 18, 1785, at 1, col. 3.

[301] *Id.* at 1, col. 4.

[302] *Id.*

testify concerning public men and public measures."[303] Newspapers were the "true and only sure channel" by which representatives could "study the interest of their constituents, and consult the good of the great whole" in passing laws.[304] It was the entity that must "sound an alarm when danger is at hand; for the destruction of a FREE PRESS will be the first object with men determined to enslave their fellow citizens."[305]

American newspapers sometimes even reprinted the English editorials on the utility of newspapers in effectuating a free press. For instance, the *New Hampshire Mercury* reprinted the following:

> What is a News-paper? When under the direction of a prudent, experienced conductor, it is a centinel placed upon the out-posts of the constitution, and should never be punished but for sleeping or neglect of duty. The freedom of thinking, speaking, and writing is one of the great principles of liberty, and a news-paper is by far the most eligible medium for men to convey their opinions to the public ear.[306]

The editorial went on to covey the roles of a free press, including checking the monarchy, ministers, and senators.[307] It was not the only one. On November 20, 1790, the *Independent Gazetteer* published an editorial on how newspapers were the medium by which the people informed the representatives of their wishes and the representatives gained the support of the people:

> It is with great reason that the English boast of the liberty of the press, and regard it as the palladium or safe-guard of their civil liberty. . . . The liberty of the press is also favorable to those popular assemblies so necessary in a free state; for the newspapers inform the public of the time, the place, and generally the object of those meetings, which they detail in particular manner to the whole nation. In them every one enjoys the most entire liberty of speech; the Members of Parliament themselves, who often go to them, sometimes find matters better discussed there than in either House of Parliament. The statesmen whose measure have been disapproved, there find free access; there they employ their friend and their credit, and bring all the arts they are masters of into play to gain the people to their interests.[308]

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[303] FREEMAN'S J. (Phila.), Dec. 23, 1789, at 1, col. 1.

[304] *Id.*

[305] *Id.*

[306] *On News-Papers*, N.H. MERCURY, & GEN. ADVERTISER, Mar. 15, 1785, at 1, col. 3.

[307] *Id.*

[308] *On the Liberty of the Press in England*, Editorial, INDEP. GAZETTEER & AGRIC. REPOSITORY (Phila.), Nov. 20, 1790, at. 2, col. 2.

Certainly this historical evidence reveals that newspapers were seen as something more than just some technological innovation to convey free speech. Throughout the eighteenth century they became known as the customary means by which information was relayed. The utility of the press—as both an entity and an invention—guaranteed liberty.[309] An April 15, 1774 editorial in the *Massachusetts Spy* perfectly captures this understanding of a free press for "the public":

> It has with justness been frequently remarked by some of the most eminent patriots in the British dominions, and especially by some in this province, that the liberty of the press is one of the greatest privileges we can enjoy; and is that, which, every true Englishman will ever try to support at the risque of all that is dear to him. I suppose the *utility of the press* consists in this, viz. that as long as tyrannical usurpers are not entirely beyond a blush, an exhibition of the injustice of their conduct, to the public, may possibly have some tendency to reclaim them; Or to encourage the oppressed to oppose them, and publish to the world the illegality and wickedness of what they oppose. One or the other of these points, I apprehend, is what various writers for American liberty constantly aim at.[310]

In terms of constitutional utility, the significance of newspapers was also pronounced in opposition to the 1785 Massachusetts Stamp Act. The Act imposed a two-penny tax for every copy of a newspaper or almanac. The tax was repealed the same year and was then replaced with a tax on advertisements, which remained in force for two years amidst heavy protest and little revenue.[311] The newspaper editorials concerning it reveal how printers viewed themselves as maintainers of a free press. For instance, the *Hampshire Herald* published an editorial claiming that the "detestable tax" sought to place "a curb on free discussion" and impede a free press.[312] The editorial stated, "It is universally agreed, that the utility of newspapers to the common people, and of course to the majority by far of the community, arises, from, or is at least wonderfully enlarged and diffused by [newspapers'] cheapness."[313] Thus, the thrust of the argument was that any tax on newspapers would raise the price as to "exclude" the "body of the people" from the "benefit of the press."[314]

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[309] *See, e.g.*, Philomathes, Editorial, GENTLEMEN & LADIES' TOWN & COUNTRY MAG. (Phila.), June 1789, at 265 ("The utility of periodical publications, particularly Magazines, is indisputable: With an ardent wish that these may flourish, and that the Liberty of the Press may never be infringed in this land of liberty . . . .").

[310] Editorial, MASS. SPY, Apr. 15, 1774, at 3, col. 3 (emphasis added).

[311] LEVY, *supra* note 56, at 214.

[312] Editorial, HAMPSHIRE HERALD OR, WKLY. ADVERTISER (Portsmouth, N.H.), Aug. 30, 1785, at 1, col. 3.

[313] *Id.*

[314] *Id.*

The *Massachusetts Centinel* published a similar editorial, claiming a "*Stamp on news-papers*, can be considered in not other light, than as a *stab to the freedom of the people*."[315] It was deemed the people's "invaluable privilege, to know everything that is transacting, to examine for themselves, and publickly to express their sentiments respecting it" through the press.[316] The Stamp Act was viewed as impeding that freedom:

> By the publick print—By that sacred palladium of freedom, *a free press*, we are informed of the situation of our comm[ittee], and when our great men behave unworthy, and *sometimes* we are awakened from the *very brink of destruction*—Every measure then that has the *most minute* tendency to *prevent*, *suppress*, or *restrain* the publick papers, or the liberty of the press, is repugnant to the *constitution*.[317]

Lastly, Isaiah Thomas, the printer and editor of the *Massachusetts Spy*, took the virtuous stance of discontinuing his newspaper until the Stamp Act was repealed.[318] Thomas emphasized the role that a free press played in the American Revolution and could not see how such a "tax on News-Papers comports" with the Massachusetts Constitution.[319] His rationale being that any law "which takes away the means of printing and circulating News-Papers" was an "*unconstitutional restraint* on the Liberty of the Press."[320]

Given these affirmations of the utility of newspapers in effectuating a free press, it is difficult to argue that the liberty of the press was limited to the invention of printing. The liberty of the press was something greater. It was held out to be one of the "great and fundamental principles of a free government" along with "liberty of conscience, trial by juries, . . . annual elections, and the division and rotation of offices."[321] As early as 1774, in requesting an alliance with Quebec, the Continental Congress stressed the importance of the "Freedom of the Press."[322] Probably borrowing from early eighteenth-century English writers, Congress

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[315] Lucius, MASS. CENTINEL, May 18, 1785, at 2, col. 1.

[316] *Id.*

[317] *Id.*

[318] Isaiah Thomas, AM. RECORDER, & CHARLESTOWN ADVERTISER (Charlestown, Mass.), Apr. 14, 1786, at 4, col. 3.

[319] *Id.* Thomas was referring to Article XVI of the 1780 Massachusetts Constitution's Declaration of Rights. *See* MASS. CONST. art. XVI (annulled 1948) ("The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth.").

[320] Thomas, *supra* note 318.

[321] *Address to the Inhabitants of the City and Liberties of Philadelphia*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.26568/ (last visited Dec. 27, 2012).

[322] *Address to the Inhabitants of the Province of Quebeck*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.1081/ (last visited Dec. 27, 2012).

stressed that a free press advances "truth, science, morality, and arts in general," as well as diffuses "liberal sentiments on the administration of Government."[323] It was of such importance that Congress described the freedom of the press as one of five "invaluable rights that form a considerable part of our mild system of Government."[324] Two years later, Congress would again instruct their Canada peace delegation—Benjamin Franklin, Samuel Chase, and Charles Carroll—to establish there a "free Press," which would frequently publish "such pieces as may be of service to the cause of the United Colonies."[325] These instructions came three months before the adoption of the Declaration of Independence, thus affirming the crucial role a free press played in the American Revolution and the development of our state republican governments.

V. THE HISTORY OF THE CONSTITUTION'S PRESS CLAUSE AS INTERFACE TO THE PRESENT AND FUTURE

In 1777, David Hume highlighted the constitutional significance of a free press in his work *Essays: Moral, Political, and Literary*. He believed that all mixed governments required "foregoing observation" through the "liberty of the press."[326] In other words, a free press served to check "arbitrary power" and provided an "easy method of conveying the alarm from one end of the kingdom to the other."[327] It ensured the "spirit of the people" could be aroused "in order to curb the ambition" of government.[328] The founding generation viewed a free press in much the same light through newspapers. They were the founders' *easy method* of alarming the people.

In terms of the actual constitutional debates, little can be garnered concerning the constitutional breadth of the Press Clause.[329] This fact, however, does not detract from the significance placed on including a free press in the Bill of Rights. The mention of the press was not something just added in the list of First Amendment rights, but was arguably the gravitas of the amendment itself. The writings of Thomas Jefferson and James Madison confirm this historical fact.

Beginning with the former, in 1802 Jefferson wrote to Joseph Priestly to correct any notion that Jefferson, "more than any other individual," had "planned

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[323] *Id.*

[324] *Id.*

[325] *Instructions to the Commissioners*, AM. ARCHIVES, http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.13600/ (last visited Dec. 27, 2012).

[326] DAVID HUME, ESSAYS: MORAL, POLITICAL, AND LITERARY 11–12 (Eugene F. Miller ed., 1987).

[327] *Id.* at 12.

[328] *Id.*

[329] *Cf.* Anderson, *supra* note 6, at 466–86. Although this Article disagrees with David A. Anderson's methodological approach to analyzing the constitutional meaning of the Press Clause, his findings on the legislative history are sound to support this conclusion.

and established" the Constitution.[330] Jefferson confirmed the fact that he was in "Europe when the Constitution was planned and established, and never saw it till after it was established."[331] The only contribution Jefferson could claim was the push for a Bill of Rights:

> On receiving it I wrote strongly to Mr. Madison, urging the want of provision for the freedom of religion, *freedom of the press*, trial by jury, habeas corpus, the substitution of militia for a standing army, and an express reservation to the States, of all rights not specifically granted to the Union. [Madison] accordingly moved, in the first session of Congress for these amendments, which were agreed to and ratified by the States as they now stand. This all the hand I had in what related to the Constitution.[332]

Jefferson's request for a right protecting the "freedom of the press" was one of only six suggestions, with the "freedom of religion" being the only other First Amendment item included.[333] Perhaps what is most intriguing about Jefferson's 1802 letter is that his memory served him correct. Frequently, when a person recollects past events there are historical inconsistencies, but this was not so for Jefferson. His memory was rather exact and on point, for example, in a letter dated December 20, 1787, Jefferson indeed urged Madison to include the press in the Bill of Rights:

> There are other good things [in the Constitution] of less moment. I will now tell you what I do not like. First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, *freedom of the press*, protection against standing armies, restriction of monopolies, the eternal and unremitting force of habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land, and not by the laws of nations.[334]

Jefferson was just one of numerous founders to push for a free press; therefore, it is impossible to peg him as influencing Madison to include it.[335] Given Madison's notes, however, we do know that Madison believed the freedom of the press to be instrumental in the new republic. He annotated that the freedom of the

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[330] Letter from Thomas Jefferson to Joseph Priestly (June 19, 1802), *in* 2 LIFE AND CORRESPONDENCE OF JOSEPH PRIESTLY 483, 485 (John Towill Rutt ed., London, Hunter 1832).

[331] *Id.*

[332] *Id.* (emphasis added).

[333] *Id.*

[334] 2 WRITINGS OF THOMAS JEFFERSON 329 (H.A. Washington ed., N.Y.C., John C. Riker 1853) (emphasis added).

[335] *See infra* notes 339–340 and accompanying text.

press was not included in the 1689 Declaration of Rights, Magna Charta, or Petition of Rights.[336] Yet this lack of an English constitutional guidepost did not stop Madison from using the freedom as a reason to argue the Bill of Rights was "ergo proper."[337]

Even if evidence of Jefferson and Madison's need to include the press in the Bill of Rights is inconclusive, the debates undoubtedly confirm the constitutional significance of the liberty of the press.[338] For one, the debates show that the encouragement of a free press was vital to all republican governments.[339] It is also apparent that the founding generation often referred to it as the palladium or

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[336] James Madison, *Notes for a Speech in Congress*, CONSOURCE, http://www.consource.org/document/notes-for-speech-in-congress/ (last visited Dec. 27, 2012).

[337] *Id.*

[338] As a matter of historical or originalist interpretation of the Constitution, it should be pointed out that the published debates only reveal so much. Just because the debates lack an affirmation of the drafters' intention regarding a right, provision, or constitutional doctrine, it does not mean their intent did not exist. Take for instance federal plenary power over immigration and citizenship. Just because the debates reveal little, does not mean this legal doctrine was not understood. *See generally* Charles, *supra* note 41. The same holds true for understanding the constitutional significance of a "well-regulated militia." *See id.* In short, understanding the Constitution requires understanding the evolution of political thought in historical context, not textual wordplay.

[339] *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 462 (Jonathan Elliot ed., Phila., J.B. Lippincott & Co., 2d ed. 1891) (statement of Patrick Henry) ("I trust that gentlemen, on this occasion, will see the great objects of religion, liberty of the press, trial by jury, interdiction of cruel punishments, and every other sacred right, secured, before they agree to that paper. These most important human rights are not protected by that section, which is the only safeguard in the Constitution. My mind will not be quieted till I see something substantial come forth in the shape of a bill of rights."); Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 503 (Jonathan Elliot ed., Phila., J.B. Lippincott & Co., 2d ed. 1866) (writing that the Constitution does not include what "Doctor Blackstone" refers to as the "residuum of human rights which is not intended to be given up to society," which included the "rights of conscience, the freedom of the press, and trial by jury"). At the New York State Convention, Thomas Tredwell, stated:

> I could have wished, sir, that a greater caution had been used to secure to us the freedom of election, a sufficient and responsible representation, the freedom of the press, and the trial by jury both in civil and criminal cases. These, sir, are the rocks on which the Constitution should have rested; no other foundation can any man lay, which will secure the sacred temple of freedom against the power of the great, the undermining arts of ambition, and the blasts of profane scoffers . . . .

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 399 (Jonathan Elliot ed., Phila., J.B. Lippincott & Co., 2d ed. 1863).

bulwark of liberty, indicating its interrelation with government.[340] Undoubtedly, this palladium not only rested with the people being able to write and publish their sentiments without prior restraint, but also with the press as an entity.[341]

While the Constitution's debates do not illuminate or confirm the constitutional utility of newspapers in this regard, a contemporaneous 1790 debate in the First Congress does.[342] The debate concerned whether Congress should provide its members with newspapers at the public expense and whether it should confine the printing of congressional debates to a few select printers.[343] This debate confirms that the press, particularly newspaper media, was seen as the medium through which the people could obtain a wealth of public information. The government often facilitated this information itself through the publishing of laws, resolutions, and proceedings.[344]

Before recreating the debate, it is important to point out that there are two accounts of this short, yet important exchange. The *Gazette of the United States*

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[340] *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 339, at 610 (statement of John Dawson) ("That sacred palladium of liberty, the freedom of the press, (the influence of which is so great that it is the opinion of the ablest writers that no country can remain long in slavery where it is unrestrained) has not been expressed [in the Federal Constitution]; nor are the liberties of the people ascertained and protected by any declaration of rights . . . ."); *see also* Editorial, INDEP. GAZETTEER; OR, CHRON. FREEDOM (Phila.), November 16, 1787, at 2, col. 2–3 (replying to James Wilson on the "liberty of press" as the "sacred palladium of public liberty"). At the South Carolina State Convention, Charles Pinckney argued against inclusion of freedom of the press in the Constitution, stating:

> With regard to the liberty of the press, the discussion of that matter was not forgotten by the members of the Convention. It was fully debated, and the impropriety of saying any thing about it in the Constitution clearly evinced. The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing, which deserves all the encomiums the gentleman has justly bestowed upon it, is secured by all our state constitutions; and to have mentioned it in our general Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it.

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 315 (Jonathan Elliot ed., Phila., J.B. Lippincott & Co., 2d ed. 1863).

[341] *See supra* note 278 and accompanying text.

[342] *See generally* Michael Bhargava, *The First Congress and the Supreme Court's Use of History*, 94 CALIF. L. REV. 1745 (2006) (illustrating how proceedings of the First Congress have been quite influential in Supreme Court precedent).

[343] 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791, at 361–63 (Linda Grant De Pauw, Charlene Bangs Bickford & Lavonne Marlene eds., 1977).

[344] *See generally* Rollo G. Silver, *Government Printing in Massachusetts, 1751–1801*, 16 STUDIES IN BIBLIOGRAPHY 161 (1963) (emphasizing the importance of the press in an efficient government in Massachusetts).

published one account and the *New-York Daily Gazette* published the other, both of which were published in New York.[345] Each account varies in language, but both confirm the constitutional utility of newspapers. For purposes of recreating that debate, the *New-York Daily Gazette*'s account provides the most detail, conveying the views of Eldridge Gerry, William L. Smith, and John Page. Meanwhile, the *Gazette of the United States* provides the most detailed account of the views of Egbert Benson and Roger Sherman.

Eldridge Gerry started the debate by objecting to the measure that would limit publishing congressional debates to select printers. He believed such a measure would lead to the "discontinuance of the newspapers."[346] Gerry stated newspapers were the "means" that "knowledge of public measures is generally diffused throughout the union," and argued that the citizens in "distant parts" have as "good a right to such information as those who are near Congress."[347] Indeed, newspapers sometimes made "misrepresentations" of congressional debates.[348] However, Gerry thought Congress needed to encourage the press as an industry, for newspapers "now print freely on both sides of every question":

> [If the] debates will be confined to the papers of one or two printers of Congress, who will be under the influence of the members, and these forming a faction, may misrepresent the conduct of particular members, and make any impressions they please for misleading the public . . . that the state of politics in the several states, and much useful information on subjects under the consideration of Congress, were obtained by the papers; and as he conceived that the public could not be too well informed of the measures of Congress . . . .[349]

Gerry reminded his fellow Congressmen that it was through their "liberal encouragement" that printers established the "freedom of the press, which was essential to liberty."[350] John Page agreed that Congress should not show any "partiality" to respective printers.[351] It was important to "encourage them generally."[352] Certainly misrepresentations and mistakes would occur, but Page felt this was a self-correcting evil given the "good disposition amongst the printers to correct them."[353]

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[345] *See* GAZETTE U.S. (N.Y.C.), Apr. 17, 1790, at 2, col. 1; N.Y. DAILY GAZETTE, Apr. 16, 1790, at 2, col. 4. Congress convened at Federal Hall in New York during the first two years of George Washington's presidency.

[346] N.Y. DAILY GAZETTE, *supra* note 345, at 2, col. 4.

[347] *Id.*

[348] *Id.*

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] *Id.*

[353] *Id.*

Roger Sherman concurred because he felt that printers had "always aimed to be impartial."[354] Furthermore, Sherman argued, "it was for their interest to be so; it is true [printers] are liable to commit errors, and some have been printed in the debates, but when they have been pointed out, they were willing to publish corrections, and in many cases have done it."[355] Meanwhile William L. Smith expanded on the constitutional utility of newspapers, stating:

> [T]he publication of newspapers, and their extensive circulation, ought to receive every possible encouragement from Congress: they were a useful vehicle for conveying valuable intelligence from the seat of government to the remotest parts of the continent. Many of the citizens, from their particular stations of life, had few other modes of obtaining information, and were obliged therefore to derive it from this source. From newspapers they acquired a knowledge of the proceedings of the government; and should Congress take any step at this time, which might in any manner tend to check their circulation, such a measure would carry with it an improper aspect. . . . [Not to mention,] newspapers [are] beneficial to the community in another respect; they formed a sort of bond of union among the different states, by transmitting reciprocal information from one to the other.[356]

Regarding the subject of the United States paying for its members' newspaper subscriptions, Egbert Benson viewed the custom as only a means to ensure the former Confederation Congress remained punctual;[357] an observation that did not gain any support.[358] Eldridge Gerry conceded to Benson that each member could pay the cost. He thought the expense to the United States was small, however, when compared to the "great benefit" it provided.[359] He also wondered whether this new policy would lessen public information transmitted between the several states.[360]

Roger Sherman replied to Gerry that he thought this last conclusion was overstated. Sherman argued that the dissemination of information in newspapers was not so much from the "members sending the papers to their constituents," as much as "the republications which took place in consequence of the printers

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[354] GAZETTE U.S., *supra* note 345, at 2, col. 1.

[355] *Id.*

[356] N.Y. DAILY GAZETTE, *supra* note 345, at 2, col. 4.

[357] GAZETTE U.S., *supra* note 345, at 2, col. 1.

[358] According to the *New-York Daily Gazette* account, Eldridge Gerry chastised Egbert Benson for making such a conclusion. Gerry stated if Benson's comments were true it would be "worthy of record in the annals of the revolution." N.Y. DAILY GAZETTE, *supra* note 345, at 2, col. 4.

[359] *Id.*

[360] *Id.*

sending their papers to each other."[361] In response to the United States paying for the newspapers, Sherman remained neutral so long as the newspapers were not read during sessions of Congress.

In the end, the House of Representatives voted against employing select printers, but voted in favor of providing a variety of state newspapers at the expense of the United States. As the debates reveal, the constitutional utility afforded to an open and free press outweighed any interest of preventing misrepresentations. The industry of newspapers, it was believed, was self-correcting. Similar to John Toland and other early English press advocates,[362] the First Congress viewed the press as a pendulum of truth that corrected falsehoods. This constitutional utility also included the assurance of divergent views on important subjects. In the words of William L. Smith, if congressmen supplied their own papers "each member would give the preference to some particular paper, which would be a discouragement to the others."[363]

A number of editorials contemporaneous with the adoption of the Constitution also confirm the constitutional utility of newspapers in facilitating the free press.[364] Each conveys that the press, as an entity, was just as constitutionally significant as the right of individuals to write and publish their sentiments. To be clear, consistent with the historical record preceding the adoption of the Constitution,[365] there is substantiated evidence to show that printers viewed themselves as an integral cog in the freedom of the press. Take for instance Andrew Brown of the *Federal Gazette and Philadelphia Daily Advertiser,* who assured his readership:

> [In order to publish] such articles of domestic, and foreign intelligence, as, are calculated to disseminate useful information, or gratify rational curiosity, I shall, therefore, endeavor to add, an early, a concise and a faithful abstract of the proceedings and debates of the federal, as well as

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[361] GAZETTE U.S., *supra* note 345, at 2, col. 1.

[362] *See* TOLAND, *supra* note 72, at 4 (describing men's mutual duty to inform each other in order to discover truth).

[363] N.Y. DAILY GAZETTE, *supra* note 345, at 2, col. 4.

[364] *See The Freedom of the Press*, HERALD FREEDOM (Bos.), May 21, 1790, at 77, col. 3 ("It was the saying of an ancient and wise Englishman [Matthew] Tindal who lived at the time of the glorious revolution in 1688, that 'While the FREEDOM OF THE PRESS is preserved unchecked and uncontrouled, all other liberties, both civil and religious will be secured to us under so faithful a guardian.' And it was also declared by the enlightened Virginians, at the commencement of the American revolution, that, 'The freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by DESPOTIC governments.' . . . [T]he liberty of the press should be freely exercised, when changes in government are taking place . . . ."); DAILY ADVERTISER (N.Y.C.), Dec. 22, 1791, at 2, col. 4 ("Whatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a free press, and particularly a *circulation of news-papers through the entire body of the people* . . . .").

[365] *See supra* Part IV.

> the state, legislature. From this source, the freedom of the press pours its noblest stream.[366]

Brown made it clear to his patrons that his paper sought to "obtain applause rather for the utility, than the quantity, of the information" it supplied.[367] He took great pride in his newspaper's "accuracy, diligence, and impartiality."[368] Furthermore, to emphasize the importance of newspapers in general, Brown included a personal recommendation signed by the likes of political figures Thomas Mifflin, Robert Morris, and Tench Coxe, reading, "Newspapers are in all countries, but especially free ones, of importance. When conducted with decency and industry, they are the vehicles of much pleasing and useful intelligence to ever[y] order of society."[369]

A few other editorials contemporaneous with the adoption of the Constitution convey the constitutional utility of newspapers in a free press. In the *Gazette of the United States*, an editorial claimed that the "adoption of the Federal Constitution" would not have been possible without the "Freedom of the Press," an "event unparalleled in the annals of mankind."[370] At the time, this was an astute observation. It was firmly believed that the "independency and free state of the press" in the community offered "degrees of freedom of safety," which affected "publick men, and publick measures."[371]

Before the inclusion of the Bill of Rights, another editorial in the *New York Daily Gazette* commented on the lack of a provision ensuring the freedom of the press. It described the freedom as "not only a noble right of individual citizens, but also an excellent means to enlighten, refrain, animate, and improve the government."[372] The *means* inferred the constitutional utility of printers in disseminating useful and periodic information in newspapers. The circulation and reliability of their contents were viewed as vital to the new Republic. As the anonymous Philadelphiensis wrote:

> In America the freedom of the press is peculiarly interesting: to a people scattered over such a vast continent, what means of information or redress have they, when a conspiracy has been formed against their sacred rights and privileges? *None but the press*. This is the herald that sounds the alarm, and rouses freemen to guard their liberty. . . . And

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[366] CITY GAZETTE, OR THE DAILY ADVERTISER (Charleston, S.C.), Nov. 27, 1790, at 4, col. 2.

[367] *Id.*

[368] *Id.*

[369] *Id.* col. 3.

[370] GAZETTE U.S. (N.Y.C.), Apr. 15, 1789, at 4, col. 2.

[371] *Id.*

[372] N.Y. DAILY GAZETTE, June 16, 1789, at 2, col. 2.

> through the medium of the press, the *good and the patriotic* citizen receives the thanks of his grateful countrymen.[373]

It is perhaps possible to substitute every instance of the founding generation's reference to the utility of "the press" and "newspapers" with the phrase "technological medium to publish." This, however, would provide a historical disservice to the intellectual history concerning what the Press Clause embodied. Indeed, although playing textual word games with eighteenth-century punctuation and the different state constitutional provisions could result in a different interpretation of free press, this too detracts from the customary origins of a free press. It is a historical point of emphasis that there is no evidence to suggest the founding generation viewed the phrase "freedom of the press" any different from the phrases "liberty of the press" or "free press." The phrases were used interchangeably from the late seventeenth century through the adoption of the Constitution, which emphasizes how untenable it is to rely on textual wordplay and dictionaries to ascertain constitutional meaning.[374]

Too often legal scholars turn to these interpretational approaches when deducing original meaning, original understanding, or whatever the respective originalist wishes to dub his form of interpretation. To date, not one historian or legal scholar has shown that the founding generation frequently cited to, relied on, referenced, or walked around with the dictionaries of Samuel Johnson[375] or Timothy Cunningham when interpreting eighteenth-century constitutions, federal or state.[376] The legal principles embodied by constitutional provisions are best

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[373] FREEMAN'S J. (Phila.), Jan. 23, 1788, at 2, col. 3 (first emphasis added).

[374] This does not prevent prominent originalists from taking this approach, which is detrimental to constitutional interpretation. For some examples of improperly using Samuel Johnson's dictionary, see Randy Barnett, *The Origins of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113–14 (2001); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Approach to Justice Scalia*, 107 COLUM. L. REV. 1002, 1016–17 (2007); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 245 (2005); Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 255–56 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002)).

[375] Historical problems that arise with the use of Samuel Johnson's dictionary are political biases and viewpoints. For an intriguing study of Johnson's political bias, see Robert DeMaria, Jr., *The Politics of Johnson's* Dictionary, 104 PMLA 64, 64–74 (1989).

[376] For anyone seeking to use the aid of a legal dictionary to ascertain eighteenth-century original meaning, we recommend tracing the word or legal principle through the different editions of Giles Jacob's *The Law-Dictionary*. Editions were published throughout the eighteenth century, and the first American edition comprised six volumes. *See* 1 GILES JACOB, THE LAW-DICTIONARY (T.E. Tomlins ed., N.Y.C., I. Riley, & P. Byrne, 1st Am. ed. 1811). Thus, Giles Jacob's dictionary shows additions or modifications to a legal term or premise through time. For an example of the use of Giles Jacob's

deduced through accepted historical methodologies, particularly intellectual and social history.

The hidden danger in substituting proper historical methodologies with textual approaches can be summed up in terms of legal repercussions. For instance, in preemption cases the Supreme Court frequently relies on the tools of textualism, including the use of dictionaries, to determine congressional purpose.[377] In such cases, should the Court misunderstand congressional intent, a majority of Congress may remedy the disparity by amending the law—a minor repercussion. But in cases concerning the Constitution, a misunderstanding of constitutional text essentially amends the Constitution. The principles of stare decisis can hinder the Supreme Court from overruling or expanding on that decision.[378] Thus, in such constitutional cases it may require the people to amend the Constitution itself, which has proven quite difficult in the past half century.

Hopefully, should the Supreme Court reinvigorate the Press Clause, it will not solely resort to textualist approaches.[379] The Court should rely on the Press Clause's evolving customary origins based upon the principles of utility that the founding generation understood. This does not supersede the historical pedigree of the people's right to think, write, and publish their sentiments[380] consistent with the laws concerning libel.[381] The First Amendment undoubtedly protects such a right.

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dictionary to understand the evolution of the law, see Patrick J. Charles, *"Arms for Their Defence"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in* McDonald v. City of Chicago, 57 CLEV. ST. L. REV. 351, 357 n.30 (2009).

[377] For a recent example, see Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1978, 1988 (2011).

[378] For a great discussion on the role of stare decisis, see Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Enumerated Rights*, 9 U. PA. J. CONST. L. 155 (2006).

[379] Although this Article and historians in general do not agree with this approach, it is worth noting that a *pure* textualist approach supports unique press protections. *See* West, *supra* note 19, at 1033–41 (arguing solely on the textual structure of the Constitution).

[380] *See generally* Amar, *supra* note 18 (conveying concerns with affording "the press" distinct protections not afforded to the general "people").

[381] As understood by the founding generation, governments could prescribe any laws restricting the freedom of the press to prevent a breach of the peace—including preventing murders and revenge. *See* 4 BLACKSTONE, COMMENTARIES (Oxford), *supra* note 285, at 150–51; *Trial for Libel*, CONCORD HERALD, Apr. 6, 1791, at 1, col. 3 (statement of Judge Israel Sumner) (stating that freedom of the press does not include those activities that "undermine the very principles of freedom, and strike[] at the foundation of the publick peace and happiness"); William Mainwaring, *Charge to the Grand Jury Delivered to the County of Middlesex*, Dec. 10, 1792, *in* CHARGES TO THE GRAND JURY 1689–1803, *supra* note 64, at 451, 452 ("The Liberty of the Press is one of the glorious Privileges of Englishmen—it is essential to the Liberty of the Subject, to the Existence of a free State, while exercised for lawful and just Purposes; but when it is made use of as the Instrument of Slander and Detraction, to destroy the Comfort and Happiness of Individuals, or to disturb the Harmony and good Order of the State . . . it becomes the most mischievous and

But this is not the only protection the Press Clause affords. There are also basic press entity rights that originate in the founding era as well.

This leaves open the question: What protections should the Press Clause offer that it does not already protect? Using the founding era as a historical guidepost, a free press maintained the right to acquire and print information on matters of public concern. Naturally, this excludes issues requiring secrecy or national security,[382] but Sonja R. West's view that the Press Clause should provide protections for "information gathering" is historically sound.[383] The constitutional utility that the founding generation placed on receiving and disseminating information is too strong to ignore. The Anglo origins of the liberty of the press confirm it. Early seventeenth-century advocates understood that the truth would self-correct while being processed in the public discourse—a pendulum of truth, so to speak.[384]

At the same time, this does not completely negate Volokh's thesis either. There may have been only one printing technology available in the eighteenth century, but the utility of receiving and disseminating information requires that any free press protections evolve with the technology to facilitate it. This does not mean that any and every person who blogs or publishes his thoughts falls under the embodiment of a free press. Indeed, the Press Clause protects an individual's right to publish without prior restraint, but the general person does not maintain the industrial credibility to disseminate useful information to the community.

The following sections discuss these issues in more detail. In line with the founding generation's views on the public utility[385] of a free press, the following

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destructive Engine . . . ."); Thomas McKean, *Charge to the Grand Jury Delivered Before the Supreme Court of Pennsylvania on November 27, 1797*, *reprinted in* TIMES: ALEXANDRIA ADVERTISER (Alexandria, Va.), Dec. 11, 1797, at 2, col. 1 (limiting the freedom of the press to "decent, candid and true [publications] . . . for the purpose of reformation, and not of defamation; [so] that they have an eye solely on the public good"). It is questionable whether the Supreme Court's current First Amendment doctrine comports with this view. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1211, 1216–17 (2011).

[382] *See* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 7 ("The Congress of the United States . . . shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgement require secrecy."); *New York Ratification of the Constitution*, IMPARTIAL GAZETTEER, & SATURDAY EVENING'S POST (N.Y.C.), Aug. 2, 1788, at 2, col. 2 ("That the Journals of Congress shall be published at least once a year, with the exception of such parts relating to treaties of military operations, as in the judgment of either house shall require secrecy; and that both houses of Congress shall always keep their doors open during their sessions, unless the business may in their opinion require secrecy.").

[383] West, *supra* note 19, at 1057.

[384] *See supra* Part II.

[385] Perhaps Pennsylvania Judge Alexander Addison summed up the link between "virtue" and "public utility" best, writing:

sections will address the problems with current Press Clause jurisprudence, and how to correct these problems moving forward.

VI. CURRENT PRESS CLAUSE JURISPRUDENCE VIEWED THROUGH THE LENS OF HISTORY

The Supreme Court's interpretation of the Press Clause is sharply at odds with the historical findings outlined above.[386] The Court has consistently refused to give the Press Clause any independent significance.[387] The Court decided all of the great victories for press freedom, including *New York Times Co. v. Sullivan*[388] and

> To produce virtue or public utility is the true end of government. Virtue is most effectually produced, by making it the interest of each individual to promote the public good. That form of government must be good which necessarily combines the individual with the general interest, and that form of government must be bad which necessarily disjoins them. That therefore must be the best form of government which most effectually and inseparably combines and unites the general and individual interest, and this is most effectually done in a democratic republic.

ALEXANDER ADDISON, CHARGE TO GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT IN THE STATE OF PENNSYLVANIA 93 (Phila., Kay & Brother 1883). For the importance of Alexander Addison in American constitutional jurisprudence, see Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529, 529–74 (2010).

[386] A number of important articles have pointed out the inconsistencies with the Supreme Court's use and abuse of history. *See* Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555 (1938) (discussing the use of history for constitutional interpretation); Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 538–40 (2006); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 809 (1997); Robert M. Spector, *Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method*, 12 AM. J. LEGAL HIST. 181, 181 (1968).

[387] *See, e.g.*, Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) (rejecting the notion that the Press Clause affords the news media any greater protection from search and seizure than it does for other citizens); First Nat'l Bank v. Bellotti, 435 U.S. 765, 797–801 (1978) (Burger, C.J., concurring) (dictum) (rejecting the notion that the Press Clause affords any special protection to the institutional press); Pell v. Procunier, 417 U.S. 817, 833–34 (1974) (rejecting the notion that the Press Clause affords journalists any greater right of access to prisons than that enjoyed by the public generally); Branzburg v. Hayes, 408 U.S. 665, 690–91 (1972) (rejecting the notion that the Press Clause affords reporters any greater protection from grand jury subpoenas than it does for other citizens).

[388] 376 U.S. 254 (1964) (reversing a $500,000 libel award to a Southern official who, following a clash with civil rights demonstrators, identified certain factual inaccuracies in an advertisement the demonstrators published in *The New York Times* recounting the event; the Supreme Court here established qualified protection for defamatory falsehoods uttered

the Pentagon Papers case,[389] under the Speech Clause, not the Press Clause. Under the Court's interpretation of the First Amendment, the press enjoys no special power or privilege to gather information,[390] the press enjoys no greater right of access to government information or proceedings than that enjoyed by the general public,[391] and the press enjoys no special immunity from governmental demands for information in its possession.[392]

Perhaps the most thoughtful discussion of the Press Clause ever penned by a Supreme Court justice appears not in a judicial decision but in a law review article: Potter Stewart's *Or of the Press*.[393] When Justice Stewart wrote it, the press had just concluded an epic duel with President Richard Nixon, investigating and

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by critics of official conduct); *id.* at 279–80 (holding that public officials are precluded from recovering damages for such statements unless they can prove that the statement was uttered "with knowledge that it was false or with reckless disregard of [its truth]").

[389] N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (striking down injunctions that barred the *New York Times* and *Washington Post* from publishing excerpts from the "Pentagon Papers," a top secret Defense Department study of the Vietnam War).

[390] Branzburg v. Hayes, 408 U.S. 665, 707, 727–28 (1972) (acknowledging that "news gathering is not without its First Amendment protections," but rejecting a broad right to gather news proposed by Justice Stewart in dissent); Pell v. Procunier, 417 U.S. 817 (1974) (rejecting a Press Clause challenge to a California penal provision that barred face-to-face interviews between a reporter and any individual inmate whom the reporter specifically named and requested); *id.* at 833–34 ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, [the Supreme Court's] own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." (first alteration in original) (citation omitted) (internal quotation marks omitted)).

[391] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–76 (1980) (invoking the Speech, Press, Assembly, and Petition Clauses of the First Amendment, in combination, to support a broad public "right to know" about governmental proceedings, the Court recognized a general right of public and press access to criminal trials—but the press enjoys only that degree of access possessed by the public generally).

[392] *Zurcher*, 436 U.S. at 547 (1978) (upholding unannounced police raid and search of student newspaper's offices, where police had a warrant to search for photographs of student protesters who assaulted police while seizing control of administrative offices of university hospital—holding that so long as a police search satisfies the Fourth Amendment, the First Amendment affords the news media no special protection from search and seizure); *Branzburg*, 408 U.S. at 665 (holding that reporters can be compelled to disclose their investigative findings and the identities of their confidential sources when subpoenaed to testify before grand juries, with no offense to the First Amendment).

[393] *See* Stewart, *supra* note 23.

exposing the Watergate affair, which resulted in Nixon's resignation.[394] Focusing on "the role of the organized press—of the daily newspapers and other established news media—in the system of government our Constitution created," Justice Stewart asserted that "investigative reporting [by] an adversary press" is "precisely the function" intended for the press "by those who wrote the First Amendment."[395] Specifically citing Nixon's fall from office, he argued that when the press serves as a government watchdog—"exposing official wrongdoing at the highest levels of our national government"—it is playing a *constitutional* role envisioned by the Press Clause.[396] Invoking the separation of powers as a structural feature of the Constitution, one that creates checks and balances among the three branches of government, Justice Stewart argued that the Press Clause likewise operates as "a *structural* provision,"[397] whose "primary purpose" was "to create a fourth institution outside the Government as an additional check on the three official branches."[398] As the Press Clause envisioned, this "Fourth Estate" would be more than "just a neutral vehicle for the balanced discussion of diverse ideas."[399] Instead, it would offer "organized, expert scrutiny of government."[400]

A government watchdog providing organized, expert scrutiny of public officials—*this* is a role for the press that comports quite closely with the historical

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[394] DAVID HALBERSTAM, THE POWERS THAT BE 702 (1979). President Nixon resigned from office on August 9, 1974. *Id.*

[395] Stewart, *supra* note 23, at 631.

[396] *Id.* Differentiating between the Speech and Press Clauses, Justice Stewart observed:

> It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.

Id. at 633.

[397] *Id.* at 633.

[398] *Id.* at 634.

[399] *Id.* Focusing on the constitutional role of the press, Justice Stewart observed:

> It is also a mistake to suppose that the only purpose of the [Press Clause] is to insure that a newspaper will serve as a neutral forum for debate, a "market place of ideas," a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee.

Id.

[400] *Id.*

findings set forth in this Article. But as a basis for interpreting the Press Clause, this view has never captured a Supreme Court majority.

Three years after the appearance of Justice Stewart's article, Chief Justice Warren Burger offered a response in *First National Bank v. Bellotti*.[401] Though Chief Justice Burger never mentions Justice Stewart by name and never cites Justice Stewart's law review article, he is responding directly to "[t]hose [who] interpret[] the Press Clause [as] creating a special role for the 'institutional press.'"[402] Staking out a position that has since become the Court's longstanding majority view, the Chief Justice argued that the Press Clause is essentially synonymous with the Speech Clause, that the Press Clause confers no special status or privilege upon the news media, and that the press enjoys no greater freedom from governmental restraint than any other speaker.[403]

Chief Justice Burger offered two basic reasons for his interpretation of the Press Clause: (1) the *history* of the Clause does not suggest that the Framers contemplated a special role for the press;[404] and (2) in our modern era, there are insuperable difficulties in *defining* the institutional press.[405]

The Chief Justice's first reason—that there is "no supporting evidence"[406] that the Framers envisioned a special role for the press—is refuted by the historical findings set forth in this Article.

His second reason—the difficulty of *defining* the institutional press—is probably a greater problem today, given the explosion of blogging,[407] than it was in 1978 when the Court decided *Bellotti*. For Chief Justice Burger, the key problem in defining the press was "[t]he evolution of traditional newspapers into modern corporate conglomerates in which the daily dissemination of news by print is no longer the major part of the whole enterprise."[408] "Corporate ownership," he observed, "may extend, vertically, to pulp mills and pulp timberlands to insure an adequate, continuing supply of newsprint and to trucking and steamship lines for

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[401] 435 U.S. 765 (1978) (invoking the Speech Clause to strike down a Massachusetts statute making it a crime for banks and business corporations to spend or contribute money to influence voters on any ballot measure not affecting the corporation's property, business, or assets). Justice Powell wrote the majority opinion in *Bellotti*; Chief Justice Burger made independent observations on the Press Clause. *Id.* at 795–803 (Burger, C.J., concurring). Chief Justice Burger's remarks on the Press Clause are all dictum because the Massachusetts statute at issue did not restrict the news media. But it did impose a ban on *corporate* speech—and the Chief Justice, noting the existence of large media conglomerates, wrote separately to address the Press Clause implications of restricting speech of media corporations. *Id.* at 796.

[402] *Id.* at 799 (Burger, C.J., concurring).

[403] *Id.* at 798–802.

[404] *Id.* at 798–801.

[405] *Id.* at 801–02.

[406] *Id.* at 799.

[407] *See* Paul Horwitz, *"Or of the [Blog],"* 11 NEXUS 45, 45 (2006).

[408] *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring).

the purpose of transporting the newsprint to the presses."[409] Today, two simultaneous trends exacerbate this definitional problem: the concentration of media ownership in the hands of a few gigantic companies, and the decentralization of reporting through cable television and the Internet.[410] But the difficulty of defining the press can hardly justify the Court's refusal to give independent significance to the Press Clause. The difficulty of defining due process has not deterred the Court from finding both procedural and substantive protections in that constitutional clause.[411] In our Conclusion, we will return to the problem of *defining* the press.

In the years surrounding *Bellotti*, the Supreme Court issued a series of rulings that transformed Chief Justice Burger's reading of the Press Clause from dictum[412] to precedent. Two cases—*Branzburg v. Hayes*[413] and *Zurcher v. Stanford Daily*[414]—upheld the government's power to pry information from reporters' hands through grand jury subpoenas and search warrants, respectively.

In *Branzburg*, a newspaper reporter in Louisville, Kentucky, was subpoenaed to reveal the identities of confidential news sources for a series of articles he had written on illegal drug activity. In performing his investigative work, the reporter interviewed several dozen illegal drug users, who spoke to him only on condition that he conceal their identities.[415] After the publication of these stories, the reporter

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[409] *Id.* at 796.

[410] *See* LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 53 (2010) ("The definitional problem—who constitutes 'the press'—has seemed intractable.").

[411] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1, at 557–58 (4th ed. 2011) (explaining the distinction between procedural and substantive due process).

[412] *See supra* note 401 and accompanying text (explaining why Chief Justice Burger's concurrence in *Bellotti* was dictum).

[413] 408 U.S. 665 (1972) (holding that reporters can be compelled to disclose their investigative findings and the identities of their confidential sources when subpoenaed to testify before grand juries, with no offense to the First Amendment).

[414] 436 U.S. 547 (1978) (upholding unannounced police raid and search of student newspaper's offices, where police had a warrant to search for photographs of student protesters who assaulted police while seizing control of administrative offices of university hospital—holding that so long as a police search satisfies the Fourth Amendment, the First Amendment affords the news media no special protection from search and seizure).

[415] Paul Branzburg was a staff reporter for a newspaper called the *Louisville Courier-Journal*. He published some feature stories on illegal drug activity. One story focused on two young men who were synthesizing hashish and thereby earning $5,000 over a three-week span. The other story resulted from a two-week investigation into widespread drug use occurring in Frankfort, Kentucky. The story involved the reporter in interviews with several dozen drug users. Branzburg was able to get these people to talk to him by promising not to reveal their identities in the newspaper stories he would publish about them. And Branzburg kept his promise; he published these stories without revealing the identities of his subjects. *Branzburg*, 408 U.S. at 667–71.

found himself subpoenaed to testify before the county grand jury.[416] When he refused to answer questions about the identities of his subjects, he was held in contempt of court.[417] The U.S. Supreme Court agreed to hear his appeal—but in a 5–4 ruling, it handed him a defeat.[418]

Writing for the majority, Justice White flatly refused to recognize a reporter/news source privilege emanating from the Press Clause. He asserted that nothing in the First Amendment immunizes a reporter from the duty to appear and answer questions, like any other citizen, in response to a grand jury subpoena.[419] Suggesting that many confidential informants seek anonymity to "escape criminal prosecution,"[420] he declared, "[W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source . . . on the theory that it is better to write about crime than to do something about it."[421] Finally, like Chief Justice Burger in *Bellotti*, he recoiled at the difficulty of *defining* "those categories of newsmen who qualif[y] for the privilege."[422] He exaggerated that difficulty by lumping reporters together with "lecturers, political pollsters, novelists, academic researchers, and dramatists"—professing to find them indistinguishable under the Press Clause because they all "contribut[e] to the flow of information to the public."[423]

In a dissent joined by Justices Brennan and Marshall, Justice Stewart urged the Court to give independent significance to the Press Clause, expressly recognizing a right to gather news and a corresponding privilege for confidential communications between a reporter and his source.[424] By leaving reporters with no privilege by which to protect their sources, he argued, the majority opinion "invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."[425]

The true holding of *Branzburg* remains ambiguous because Justice Lewis Powell, the 5–4 swing vote, wrote a separate concurrence "to emphasize . . . the limited nature of the Court's holding."[426] Justice Powell seized upon language near the end of Justice White's majority opinion[427] suggesting that First Amendment protection for reporters *would* arise if it appeared that the grand jury investigation

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[416] *Id.* at 668.
[417] *Id.* at 678.
[418] *Id.* at 708.
[419] *Id.* at 682.
[420] *Id.* at 691.
[421] *Id.* at 692.
[422] *Id.* at 704; First Nat'l Bank v. Belotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring).
[423] *Branzburg*, 408 U.S. at 704–05.
[424] *Id.* at 725–30 (Stewart, J., dissenting).
[425] *Id.* at 725.
[426] *Id.* at 709 (Powell, J., concurring).
[427] *Id.* at 708–09 (majority opinion).

were *not* being conducted in good faith.[428] Due to Justice Powell's opinion, there now exists a circuit split over how to interpret *Branzburg*. Some Second Circuit cases recognize that reporters enjoy a qualified privilege regarding compelled disclosure of their confidential sources—a privilege that *survived* the 5-4 *Branzburg* decision due to Justice Powell's concurrence.[429] The D.C. Circuit flatly rejects this proposition.[430]

Under Justice White's opinion in *Branzburg*, reporters are just as vulnerable as other citizens to grand jury subpoenas; under *Zurcher*, reporters are just as vulnerable to search warrants.

Zurcher upheld the newsroom search of a college paper's editorial offices, holding that so long as the search satisfies the Fourth Amendment, the First Amendment affords the news media no special protection from search and seizure.[431] In *Zurcher*, a student newspaper published articles and photographs concerning a violent clash on campus between demonstrators and police.[432] Seeking negatives and photos that might help them identify those demonstrators, police obtained a search warrant and then conducted a surprise raid on the paper's editorial offices, where they rifled filing cabinets, desks, wastepaper baskets, and photographic laboratories.[433] The Supreme Court, in an opinion by Justice White, rejected proposed restrictions on governmental searches of newsrooms—restrictions that would have limited the police to using a subpoena duces tecum rather than a search warrant.[434] Under this arrangement, the editorial staff—*not* the police—would perform the task of combing through the files. Justice White held that the First Amendment does nothing to diminish the government's power to search newsrooms, so long as those searches are conducted in strict accordance with the Fourth Amendment.[435]

In dissent, Justice Stewart emphasized the stark contrast between a subpoena and a search warrant in extracting evidence from a newsroom:

> A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant, while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of

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[428] *Id.* at 709–10 (Powell, J., concurring).
[429] *See* N.Y. Times Co. v. Gonzales, 459 F.3d 160, 172–73 (2d Cir. 2006).
[430] *In re* Grand Jury Subpoena (Miller), 397 F.3d 964, 970 (D.C. Cir. 2005).
[431] Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978).
[432] *Id.* at 550–51.
[433] *Id.* at 551.
[434] *Id.* at 563–66.
[435] *Id.* at 565.

> confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.[436]

Taken together, *Branzburg* and *Zurcher* leave the press vulnerable to government invasion of a reporter's communications with confidential news sources. In both of these cases, the government squeezed the press for information, and yet a majority of the Justices found no role for the Press Clause to play.

In contrast to *Branzburg* and *Zurcher*, *Pell v. Procunier*[437] did not deal with governmental efforts to extract information from the press; instead, it questioned whether the government must treat the press more favorably than the general public in affording access to information in the government's possession. Once again, the Court's majority showed scant enthusiasm for breathing life into the Press Clause, but here Potter Stewart, normally a stalwart supporter of the press, authored the majority opinion.[438]

In *Pell*, the Supreme Court rejected a Press Clause challenge to a California penal provision that barred face-to-face interviews between a reporter and any individual inmate whom the reporter specifically named and requested. Writing for the majority, Justice Stewart rejected the notion "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[439] "That proposition," he wrote, "finds no support in the words of the Constitution or in any decision of this Court."[440] Propounding what has since become a well-established limitation on press freedom, Justice Stewart observed:

> It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, [the Supreme Court's] own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded. . . . Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.[441]

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[436] *Id.* at 573 (Stewart, J., dissenting).

[437] 417 U.S. 817 (1974) (upholding a California penal provision that barred face-to-face interviews between a reporter and any individual inmate whom the reporter specifically named and requested).

[438] *Id.* at 819.

[439] *Id.* at 834.

[440] *Id.* at 834–35.

[441] *Id.* at 833–34 (citations omitted).

Justice Douglas, joined by Justices Brennan and Marshall, wrote an eloquent dissent that offers valuable insight into the nature of the Press Clause. He asserted that the principle adopted by the majority—restricting press access to the same low level as public access—ignores the fact that the press *represents* the public, that it ventures into prisons so that the public *won't have to*: "The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the [news] media for information."[442] Restricting press access to public access makes no sense under a Constitution that "*specifically selected* [the press] to play an important role in the discussion of public affairs."[443] The majority's analysis was flawed, suggested Justice Douglas, because it failed to bear in mind the true focus of the Press Clause—to fulfill *the public's right to know*:

> In dealing with the free press guarantee, it is important to note that the interest it protects is not possessed by the media themselves. [When the district court judge struck down the regulation below, he] did not vindicate any right of the Washington Post, but rather the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner. The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people.[444]

Six years later, in *Richmond Newspapers v. Virginia*,[445] the Court paid lip service to this public "right to know"—but not as a basis for breathing life into the Press Clause, and not as a basis for abandoning its linkage of press access to public access. In *Richmond Newspapers*, the Court recognized a general right of public and press access to criminal trials.[446] But this right is *not* a special Press Clause right enjoyed by the news media; it is a general First Amendment right of *public access*. Invoking the Speech, Press, Assembly, and Petition Clauses of the First Amendment, the Court asserted that "[t]hese expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the *functioning of government*."[447] Thus, the First Amendment confers upon the public a broad *right to know* about governmental proceedings:

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[442] *Id.* at 841 (Douglas, J., dissenting).

[443] *Id.* (emphasis added) (quoting Mills v. Alabama, 384 U.S 214, 219 (1966)).

[444] *Id.* at 839–40 (citations omitted) (internal quotation marks omitted).

[445] 448 U.S. 555, 580 (1980) (holding that "the right to attend criminal trials is implicit in the guarantees of the First Amendment").

[446] *Id.* at 580.

[447] *Id.* at 575 (emphasis added).

> [T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. Free speech carries with it some freedom to listen. In a variety of contexts, this Court has referred to a First Amendment right to receive information and ideas.[448]

Based, then, on this broad right to know, the Court has issued a series of decisions guaranteeing public access to criminal proceedings: striking down restrictions on public access to rape trials,[449] guaranteeing public access to voir dire examinations in criminal proceedings,[450] and recognizing a qualified First Amendment right of public access to preliminary hearings in criminal trials as conducted in California.[451]

Ultimately, though, the *press* enjoys only that degree of access enjoyed by the *public* generally—and such access is by no means derived specifically from the Press Clause. It is derived instead from the public's right to know—a right that emanates from the Speech, Press, Assembly, and Petition Clauses in *combination*.[452]

VII. RECONCILING MODERN PRESS CLAUSE JURISPRUDENCE WITH HISTORY

Looking back at this tour through the case law, what are we to make of the Press Clause? As the Supreme Court has construed it, the Press Clause is almost void of independent content. The press enjoys no greater right of access to government information or proceedings than the general public, reporters are just as vulnerable to search warrants and grand jury subpoenas as their fellow citizens, and the press enjoys no special power or privilege to gather information. Thanks to the *Speech* Clause, the press enjoys extraordinary protection from censorship and prior restraint, but the Press Clause appears bereft of independent significance.

Conspicuously absent from Press Clause jurisprudence is any sustained emphasis on *history*. This may best explain how the Press Clause came to play such an insignificant role in constitutional law. Viewed through the lens of history

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[448] *Id.* at 575–76 (citations omitted) (internal quotation marks omitted).

[449] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[450] Press-Enterprise Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501 (1984).

[451] Press-Enterprise Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1 (1986). In deciding whether the First Amendment confers a right of public access to certain governmental proceedings, the Supreme Court has examined "two complementary considerations": (1) whether the proceedings "have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8. If, based on this analysis, the public *does* enjoy a right of access, any governmental restriction on such access will be gauged under strict scrutiny. *Id.*

[452] *Richmond Newspapers*, 448 U.S. at 575.

(as this Article has shown), the Press Clause was certainly *not* regarded as an empty reiteration of the Speech Clause. With the Roberts Court displaying a heightened interest in history (as discussed below[453]), perhaps there is hope for a fresh interpretation of the Press Clause. But first, let's consider an early prior restraint case where the Supreme Court specifically examined "the conception of the liberty of the *press* as historically conceived and guaranteed."[454]

In *Near v. Minnesota*,[455] the Supreme Court struck down an injunction that perpetually enjoined the *Saturday Press* from publishing any "malicious, scandalous, or defamatory" material.[456] The paper had been sharply critical of the Minneapolis police chief for allowing "a Jewish gangster" to control all "gambling, bootlegging, and racketeering" in the city.[457] The paper accused the police chief of "gross neglect of duty, illicit relations with gangsters, and . . . participation in graft."[458] In this early decision, handed down in 1931, the Supreme Court was not yet speaking interchangeably of Speech and Press, and was not yet treating the Press Clause as merely synonymous with the Speech Clause. Instead, the Court referred consistently to the "liberty of the *press*" and the "freedom of the *press*."[459]

For our purposes, the majority opinion (authored by Chief Justice Charles Evans Hughes) has two significant features. First, the Court consulted a wide number of eighteenth-century sources—ranging from Blackstone and De Lolme on English law, to James Madison on the early state constitutions, to the journal of the Continental Congress[460]—all in an effort to grasp the early historical conception of press freedom. Second, in marshaling these authorities, the Court singled out the principal value of press freedom: the role of the press as government watchdog, exposing official misconduct to public view.[461] By monitoring the actions of public officials, the press performs so valuable a service that its immunity from prior restraint should be preserved even at the risk that such immunity might be abused:

> The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape.

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[453] *See infra* notes 474–475 and accompanying text.
[454] Near v. Minnesota, 283 U.S. 697, 713 (1931) (emphasis added).
[455] *Id.*
[456] *Id.* at 706.
[457] *Id.* at 704.
[458] *Id.*
[459] *See id.* at 716–17 (emphases added).
[460] *Id.* at 713–18.
[461] *Id.* at 716–17 ("The conception of the liberty of the press in this country . . . was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct.").

> Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.[462]

In the years since *Near v. Minnesota*, the Supreme Court has lapsed into treating the *Speech* Clause as the prime guarantor of press freedom, losing sight of the Press Clause's distinct history. But from time to time, the modern Court *has* consulted history when construing other clauses of the First Amendment.

In 1995, invoking the Speech Clause to strike down a ban on anonymous political leafleting,[463] the Court examined both literary and American Revolutionary history. Writing for a 7–2 majority, Justice Stevens surveyed the broad range of literary and political authors who chose to publish anonymously or under pseudonyms—including Mark Twain, Voltaire, George Sand, George Eliot, Charles Dickens, and, during the period surrounding the American Revolution and Founding, "Publius," "Junius," "Cato," "Centinel," and "The Federal Farmer."[464] In a separate concurrence, Justice Thomas delved even more deeply into the revolutionary and ratification periods, examining the historical evidence at length[465] and concluding that "the Framers relied upon anonymity" to a "remarkable extent" in the newspapers and pamphlets of that era.[466]

In 1992[467] and 1995,[468] the Court devoted considerable attention to the historical origins of the Establishment Clause, with Justice Souter[469] and Justice

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[462] *Id.* at 719–20.

[463] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." (citation omitted)).

[464] *Id.* at 341–43.

[465] *Id.* at 360–70 (Thomas, J., concurring).

[466] *Id.* at 367.

[467] Lee v. Weisman, 505 U.S. 577 (1992) (striking down a policy that authorized prayer at public school graduation ceremonies).

[468] Rosenberger v. Rector, 515 U.S. 819 (1995) (holding that a student religious journal was entitled to the same subsidy from student activity funds that the university furnished to secular student journals).

[469] *Lee*, 505 U.S. at 612–31 (Souter, J., concurring).

Scalia[470] painting conflicting visions of Founding era sentiments, and Justice Souter[471] and Justice Thomas[472] squaring off in a duel over the correct interpretation of James Madison's famous *Memorial and Remonstrance Against Religious Assessments*.[473]

More recently, the Roberts Court has shown a genuine willingness to be guided by early American history when interpreting the Constitution. In two recent First Amendment cases—*United States v. Stevens*[474] and *Brown v. Entertainment Merchants Association*[475]—the Court refused to recognize new categories of unprotected speech absent a longstanding historical tradition of *treating* the speech as unprotected.

In *Stevens* the Court struck down, as substantially overbroad, a federal statute that criminalized depictions of animal cruelty. In the process, the Court rejected the government's invitation to hold that depictions of animal cruelty are categorically unprotected by the First Amendment, and the Court stressed that it is disinclined to recognize new categories of unprotected speech.[476] The government proposed a test for recognizing new categories of unprotected speech—"[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs"[477]—that prompted the following reaction from Chief Justice Roberts, writing for an 8–1 majority:

> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution

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[470] *Id.* at 631–42 (Scalia, J., dissenting).

[471] *Rosenberger*, 515 U.S. at 868–72 (Souter, J., dissenting).

[472] *Id.* at 854–59 (Thomas, J., concurring).

[473] James Madison, *Memorial and Remonstrance Against Religious Assessments*, 8 THE PAPERS OF JAMES MADISON 298–304 (William T. Hutchinson ed., Chi. & London, Univ. of Chi. Press 1973) (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82, 82–84 (Philip B. Kurland & Ralph Lerner eds., 1987).

[474] 130 S. Ct. 1577 (2010) (striking down, as substantially overbroad, a federal statute that criminalized depictions of animal cruelty). The challenged statute—18 U.S.C. § 48—was aimed primarily at the interstate market for "crush videos," which depict women slowly crushing small animals like mice or hamsters to death "'with their bare feet or while wearing high heeled shoes,' sometimes while 'talking to the animals in a kind of dominatrix patter.'" *Id.* at 1583 (quoting H.R. REP. NO. 106-397 at 2–3 (1999)).

[475] 131 S. Ct. 2729 (2011) (holding that video games qualify for First Amendment protection, and invoking strict scrutiny to strike down a California law that banned the sale or rental of violent video games to minors).

[476] *Stevens*, 130 S. Ct. at 1586.

[477] *Id.* at 1585 (internal quotations omitted).

> forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[478]

The Chief Justice went on to suggest that speech will be deemed categorically unprotected only if it has so been treated by longstanding historical tradition:

> Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.[479]

In *Brown*, the Court reasserted its reluctance to recognize new categories of unprotected speech, invoking strict scrutiny to strike down a California law that banned the sale or rental of "violent video games" to minors. Writing for a 7–2 majority, Justice Scalia rejected as "unprecedented and mistaken" California's effort "to create a wholly new category of content-based regulation that is permissible only for speech directed at children."[480] States certainly possess "legitimate power to protect children from harm," he wrote, "but that does not include a free-floating power to restrict the ideas to which children may be exposed."[481] Justice Scalia asserted that the holding in *Stevens* "controls this case," because in both cases the government sought to justify categorical restrictions on violent speech by analogizing that speech to obscenity.[482] He stressed that the Court will be unwilling to recognize any new categories of unprotected speech "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) *tradition* of proscription."[483]

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[478] *Id.*

[479] *Id.* at 1586.

[480] *Brown*, 131 S. Ct. at 2735.

[481] *Id.* at 2736.

[482] *Id.* at 2734.

[483] *Id.* (emphasis added). Justice Scalia concluded that the California statute, as a content-based restriction on protected speech, must be analyzed under strict scrutiny. *Id.* at 2738. Justice Alito, in a separate concurrence joined by Chief Justice Roberts, disagreed with the broad sweep of the majority's holding and argued that the statute should have been struck down on the narrower ground of vagueness. But he wrote separately for another reason—to stress the extraordinary realism and power of video games, suggesting that a child's experience in playing them is far more vivid and visceral than reading a book, so the Court should proceed cautiously in affording unqualified protection to this new medium of expression. Justice Alito then recounted the "astounding" violence to be encountered in some video games:

In *Stevens* and *Brown*, the Roberts Court relied upon historical tradition in *rejecting* the creation of new Speech Clause doctrines; but the Roberts Court has also used history as a guide in *reinterpreting* the Constitution. *Crawford v. Washington*[484] exemplifies the Court's willingness to take a long, thoughtful look at eighteenth-, seventeenth-, and sixteenth-century history in tearing down and rebuilding its Confrontation Clause jurisprudence under the Sixth Amendment.

Crawford addresses the conflict between a criminal defendant's confrontation rights and the admissibility against him of hearsay statements by nontestifying witnesses. In *Crawford*, the Supreme Court overruled a twenty-four-year-old precedent,[485] replacing it with a new analytical approach that Justice Scalia, writing for the Court, grounded upon the Framers' original understanding of the Confrontation Clause.

Performing an extensive historical review of English and American colonial practices leading up to the adoption in 1791 of the Sixth Amendment, Justice Scalia concluded, "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[486]

> Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . There are games in which the player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in 'ethnic cleansing' and can choose to gun down African-Americans, Latinos, or Jews.

Id. at 2749–50 (Alito, J., concurring) (citations omitted). Justice Scalia readily agreed that these illustrations were disgusting—"but disgust is not a valid basis for restricting expression." *Id.* at 2738.

[484] 541 U.S. 36 (2004).

[485] Ohio v. Roberts, 448 U.S. 56 (1980), *overruled by Crawford*, 541 U.S. at 36.

[486] *Crawford*, 541 U.S. at 50. Carefully examining the English common law experience in the centuries leading up to the Revolutionary and Founding eras, Justice Scalia wrote, "English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." *Id.* at 43 (citing 3 BLACKSTONE, COMMENTARIES, 373–74 (Oxford, Clarendon Press 1768)). "Nonetheless," he continued,

> England at times adopted elements of the civil law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face."

Id. (quoting 1 SIR JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (London, MacMillan & Co.1883)).

"The most notorious instances of civil-law examination," he observed, "occurred in the great political trials of the 16th and 17th centuries."[487] Here, Justice Scalia singled out the infamous treason trial of Sir Walter Raleigh in 1603.[488] Raleigh was convicted and sentenced to death largely on the basis of out-of-court statements by his alleged accomplice, Lord Cobham, who never appeared or testified at Raleigh's trial.[489] Cobham's statements, which shifted the blame to Raleigh, were made in a letter and in an examination before the King's Privy Council. They were read to the jury over Raleigh's objection: "The Proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face . . . ."[490]

It was in reaction to abuses like this that the Framers adopted the Confrontation Clause. As Justice Scalia explained,

> The historical record [demonstrates] . . . that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. . . . [T]he common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.[491]

If the Roberts Court found it acceptable to reinvent its Sixth Amendment jurisprudence in accordance with the unique history of the Confrontation Clause, it might be willing to do the same for the Press Clause.

VIII. CONCLUSION—REINVIGORATING THE PRESS CLAUSE

If the Supreme Court *were* to reinterpret the Press Clause in accordance with the historical findings set forth in this Article, what would be the result? As explained more fully below, the Court would alter current Press Clause jurisprudence in three significant respects. First, the difficulty of *defining* the institutional press would be alleviated: the definition would focus on newsgathering organizations that investigate and report on the activities of government. Second, the leading Press Clause precedents outlined above—particularly *Branzburg*, *Zurcher*, and *Pell*—would be overruled as wrongly

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[487] *Id.* at 44.

[488] R v. Sir Walter Raleigh, (1603) 2 Cobbett's State Trials 1, 15–16, 24 (K.B.)

[489] *Id.*

[490] *Id.* at 15–16.

[491] *Crawford*, 541 U.S. at 53–54. Thus, the Court held that out-of-court statements by a witness that are testimonial are barred, under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness, regardless of whether such statements are deemed reliable by the court. *Id.* at 61.

decided. Third, a new doctrine—recognizing greater press access to newsworthy events and information under government control—would have to be developed.

In *Bellotti*, Chief Justice Burger cited the difficulty of *defining* the institutional press as a key reason for rejecting any special Press Clause protection for the news media.[492] But the difficulty of defining the press is no reason for treating the Press Clause as an empty promise. Defining the institutional press becomes easier if we are guided by the historical findings sketched above, in which newspapers were valued primarily for their role as government watchdogs, gathering and disseminating information about the conduct of public officials. This theme accords with Justice Stewart's conception of the press as the "Fourth Estate," providing "organized, expert scrutiny" of public officials,[493] and it is a theme that continues even now to define the role of the press. Envisioning a role for the institutional press in the twenty-first century, Lee C. Bollinger observes:

> [A]s long as there is democracy or government based on some even minimal level of consent of the people, the press is a necessity. Someone must provide us with factual information and analysis of what is happening in the world while upholding values of—in the language of the Pulitzer Prize—"honesty, accuracy, and fairness."[494]

And Bollinger adds that the institutional press must include "organizations large and powerful enough to be able effectively to monitor and check the authority of the state."[495] When defining the institutional press, these two functions—newsgathering and government monitoring—must reside at the center of any definition.

What does this mean for bloggers and other opinion writers? Don't they more closely resemble the printers and pamphleteers of the Revolutionary era than a modern media giant like the *New York Times*? In many respects, yes, but news analysis and editorial opinion bear the stamp of *individual* expression that is more readily associated with the *Speech* Clause. A revitalized *Press* Clause would afford protections—like increased access to newsworthy events and information, and immunity from newsroom searches and grand jury subpoenas—more pertinent to an *investigative, fact-gathering* organization.

This leads to our second point: if the Press Clause *were* reinterpreted in accordance with the historical findings outlined in this Article, then *Branzburg*,[496]

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[492] 435 U.S. 765, 801–02 (1978) (Burger, C.J., concurring).

[493] Stewart, *supra* note 23, at 634.

[494] BOLLINGER, *supra* note 410, at 109.

[495] *Id.*

[496] Branzburg v. Hayes, 408 U.S. 665, 690–91 (1972) (rejecting the notion that the Press Clause affords reporters any greater protection from grand jury subpoenas than other citizens).

Zurcher,[497] and *Pell*[498] would be overruled. *Branzburg* and *Zurcher* are wrongly decided under the historical interpretation of the Press Clause because, as a government watchdog with a *structural* role[499] to play in the separation of powers, the institutional press must be protected from government "ransack[ing]"[500] of newsrooms (through search warrants) and government-compelled disclosure of confidential sources and information (through grand jury subpoenas).

Pell is wrongly decided for limiting press access to the same low level as public access vis-à-vis government-controlled information and events. As Justice Douglas explained,[501] this linkage completely misunderstands the institutional role of the press as *representing* the public, venturing into prisons and other government institutions on the public's *behalf*. Because the *role* of the press is to keep the public informed, individual members of the public will not likely undertake their own investigations of the prison system or other government institutions. So it makes no sense, under the Press Clause, to define press access in terms of public access. Though *Richmond Newspapers*[502] and its progeny have afforded meaningful press access to criminal trials, they bear the same fundamental flaw as *Pell*, linking press access to public access. By rejecting an independent, affirmative right of press access, the Supreme Court has given the press an unseemly incentive to encourage unlawful leaks of secret information by government employees.[503]

Finally, a reinterpreted Press Clause would reject the linkage between press and public access, and would instead recognize greater press access to newsworthy events and information under government control. Contemplating a twenty-first-century role for the institutional press, Lee C. Bollinger has called[504] for such a doctrine:

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[497] Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) (rejecting the notion that the Press Clause affords the news media any greater protection from search and seizure than other citizens).

[498] Pell v. Procunier, 417 U.S. 817, 833–34 (1974) (rejecting the notion that the Press Clause affords journalists any greater right of access to prisons than that enjoyed by the public generally).

[499] *See* Stewart, *supra* note 23, at 633.

[500] *Zurcher*, 436 U.S. at 573 (Stewart, J., dissenting).

[501] *Pell*, 417 U.S. at 841 (Douglas, J., dissenting).

[502] Richmond Newspapers v. Virginia, 448 U.S. 555, 577–78 (1980) (recognizing a general right of public and press access to criminal trials, but treating press access as *dependent upon* public access).

[503] BOLLINGER, *supra* note 410, at 122. "Under the current state of the law," writes Bollinger, "the press has an incentive to encourage leaks so that it and the public can reap the benefits of publication, while the leaker is left to face possible prosecution and punishment." *Id.* at 123.

[504] Bollinger calls specifically for "a Doctrine of Access to Newsworthy Events and Information." *Id.* at 124.

> When a new case comes along involving the public interest in knowing about information under the government's control, the [Supreme] Court should take the next step and announce a general right of access. A good example that could have been used this way was the dispute between the government and the press over access to the war zone in Afghanistan. Another example was the request by the press to visit military prisons in Iraq.[505]

Bollinger acknowledges the likely criticism of such a doctrine—that press demands will overwhelm the courts and overburden the government—but "[w]e can take comfort," he says, "from the fact that we have successfully managed exactly this state of affairs under the freedom of information acts that have existed now for several decades."[506] And he sees an existing First Amendment doctrine that can serve as a model:

> The Court has often recognized a First Amendment right in situations that seem to open up endless problems of definition. The Public Forum Doctrine is a good analogy. The Public Forum Doctrine exemplifies how the Court has developed an affirmative duty under the First Amendment requiring the government to help expand the opportunities for speech. This doctrine compels the government to allow speech to take place on some public property, such as streets, parks, and sidewalks. The Public Forum Doctrine is a precedent for protections on the newsgathering side of freedom of the press.[507]

Though Bollinger proposes this doctrine while envisioning a *future* role for the institutional press, the doctrine's adoption will depend on the Supreme Court's willingness to be guided by the *past*—specifically, by the unique history of the Press Clause revealed in this Article.

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[505] *Id.* at 124–25.
[506] *Id.* at 123.
[507] *Id.* at 123–24 (citation omitted).