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Posner, Blackstone, and Prior Restraints on Speech

Ashutosh Bhagwat *

Judge Richard Posner recently asserted that the original understanding of the Free Speech Clause of the First Amendment was to prohibit “censorship”—meaning prior restraints—but not subsequent punishments. Posner was following in the footsteps of many other eminent jurists including Oliver Wendell Holmes, Jr., Joseph Story, James Wilson, and ultimately William Blackstone.

The problem is, this claim is simply wrong. Firstly, it misquotes Blackstone. Blackstone said that the liberty of the press meant only freedom from prior restraints; he never discussed speech. When one does examine the Speech Clause, it becomes quite clear that its protections cannot be limited to freedom from prior restraints. Most importantly, this is because during the Framing era, when speech meant in-person, oral communication, no system of prior restraints on speech was remotely possible or ever envisioned. So, if the Speech Clause only bans prior restraints, it bans nothing. A broader reading of the Speech Clause is also supported by its (admittedly sketchy) history, and by an examination of the political theory underlying the American Revolution. Indeed, not only is the Speech Clause not limited to banning prior restraints, but a close examination of the historical evidence strongly suggests—though this issue cannot be definitively resolved—that a substantial portion of the Framing generation probably read the Press Clause more broadly as well.

What lessons can be learned from this? The first is a need for great caution in “translating” Framing era understandings into our modern—and very different—technological and cultural context. Second, when seeking “original understandings” of the Constitution, it is important to be aware that consensus sometimes simply did not exist. Indeed, the Framers may have given no consideration at all to specific issues, thus indicating limits on the usefulness of the entire originalist enterprise.

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INTRODUCTION

In May of 2012, a panel of the U.S. Court of Appeals for the Seventh Circuit decided *American Civil Liberties Union of Illinois v. Alvarez*, holding that an Illinois statute prohibiting the taping of conversations without the consent of all parties to the conversation, as applied to a program intending to openly record police officers performing their duties in public, violated the First Amendment.¹ Judge Richard Posner dissented. Most of his opinion concerned the impact of the proposed recordings on privacy and on police effectiveness. However, in an introductory passage Judge Posner had this to say about the broader history of the First Amendment:

Judges asked to affirm novel “interpretations” of the First Amendment should be mindful that the constitutional right of free speech, as construed nowadays, is nowhere to be found in the Constitution. The relevant provision of the First Amendment merely forbids Congress to abridge free speech, which as understood in the eighteenth century meant freedom only from censorship (that is, suppressing speech, rather than just punishing the speaker after the fact). A speaker could be prosecuted for seditious libel, for blasphemy, and for much other reprobated speech besides, but in a prosecution he would at least have the protection of trial by jury, which he would not have if hauled before a censorship board; and his speech or writing would not have been suppressed, which is what censorship boards do. Protection against censorship was the only protection that the amendment was understood to create.²

In support of his argument, Judge Posner cited Justice Holmes’s famous (or infamous) opinion in *Patterson v. Colorado*³ and Blackstone’s *Commentaries*,⁴ along with Seventh Circuit precedent⁵ and Akhil Amar’s groundbreaking work on the Bill of Rights.⁶ He then emphasized that limiting the First Amendment to condemning

1. 679 F.3d 583, 586–87 (7th Cir. 2012).

2. *Id.* at 610 (Posner, J., dissenting).

3. *Id.* (citing *Patterson v. Colorado*, 205 U.S. 454, 461–62 (1907)).

4. *Id.* (comparing with 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150–53 (1769)).

5. *Id.* (citing *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001)).

6. *Id.* (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 23–24 (1998)).

ensorship—meaning a system of prior restraints through licensing—“*is* the original understanding,” arguing that this fact should make judges hesitant to adopt aggressive expansions of the right of free speech.⁷

Judge Posner’s understanding of the First Amendment’s history as reaching only prior restraints on speech has a long pedigree and strong support. In addition to Holmes and Blackstone, he could easily have cited Joseph Story,⁸ leading Framer and later Supreme Court Justice James Wilson,⁹ and two early cases from Pennsylvania¹⁰ and Massachusetts.¹¹ The problem is that this understanding is wrong. And not only is it wrong, aspects of it are clearly and obviously wrong. How could the preeminent appellate judge of his generation (to say nothing of his illustrious sources) possibly make such a mistake?

In this brief essay, I seek to shed some light on this conundrum, and on the relationship between prior restraints and First Amendment history more generally. What emerges from this investigation is a complex set of fundamental issues, including evolving linguistic meanings and understandings due to changing culture and technology, the oversimplification by many of a very complex history, and most fundamentally, an overly aggressive push

7. *Id.* at 610–11 (emphasis in original).

8. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1880, at 610 (4th ed. 1873) (“It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government.”).

9. See LEONARD LEVY, EMERGENCE OF A FREE PRESS 204–05 (1985) (describing James Wilson adopting this position at the Pennsylvania ratifying convention); THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 99 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS] (reprinting the text of a speech Wilson gave at the convention in which he articulated the position); Philip B. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L.J. 225, 235–36 (1985).

10. *Republica v. Oswald*, 1 U.S. 319 (1788).

11. *Commonwealth v. Blanding*, 3 Pick. 304, 313–14 (Mass. 1825) (“[I]t is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practised [sic] by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.”).

by lawyers to find consensus among the Framing generation in the face of overwhelming evidence of ambiguity and disagreement.

I. MISQUOTING BLACKSTONE¹²

Our story begins with a misquotation of sorts. As noted above, in his dissent in *ACLU v. Alvarez* Judge Posner stated that the original understanding of the First Amendment was that it protected speech only against “censorship,” meaning prior restraints.¹³ In support of his argument, he cited numerous sources, including Justice Holmes’s *Patterson* opinion and Blackstone’s *Commentaries*.¹⁴ William Blackstone’s *Commentaries on the Laws of England* are the primary source of the theory that the First Amendment forbids only prior restraints, largely because of the strong influence Blackstone had on the Framing generation’s understanding of traditional English common law rights. Given the importance of Blackstone, it is worthwhile to examine the precise, oft-quoted language Blackstone uses: “The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.”¹⁵

This language is repeated almost verbatim in the 1825 *Blanding* decision from Massachusetts, though oddly without citing Blackstone,¹⁶ and by Joseph Story in his *Commentaries on the Constitution of the United States*, this time with proper attribution.¹⁷ *Blanding* in turn was the primary source of Justice Holmes’s comment in *Patterson* that “the main purpose of [freedom of speech and freedom of the press] is ‘to prevent all such *previous restraints*

12. Cf. BART D. EHRMAN, *MISQUOTING JESUS: THE STORY BEHIND WHO CHANGED THE BIBLE AND WHY* (2007).

13. 679 F.3d 583, 610 (7th Cir. 2012) (Posner, J., dissenting).

14. See *supra* notes 3–4 and accompanying text.

15. BLACKSTONE, *supra* note 4, at 151. It should be noted in passing that the actual words Blackstone and most early commentators used were “previous restraints,” not “prior restraints.” The phrase “prior restraints” was first used by the Supreme Court in 1931 in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 733 (1931). It quickly, however, became standard usage. See, e.g., Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); *New York Times v. United States*, 403 U.S. 713 (1971).

16. *Blanding*, 3 Pick. at 313–14.

17. STORY, *supra* note 8, § 1884, at 612–13 (citing BLACKSTONE, *supra* note 4, at 151).

upon publications as had been practiced by other governments.”¹⁸ Completing the circle, in *Alvarez* Judge Posner cites *Patterson*¹⁹ and Blackstone,²⁰ as well as the Seventh Circuit’s decision in *Blue Canary Corp. v. City of Milwaukee*²¹ (an opinion which he also authored) and Akhil Amar’s *The Bill of Rights*.²² In *Blue Canary*, Judge Posner wrote that “Blackstone defined freedom of speech and the press as freedom from prior restraints.”²³ Amar’s own sources are Blackstone, the speech by James Wilson discussed above,²⁴ and Story.²⁵ Ultimately, then, it all goes back to Blackstone (assuming that Wilson’s views were shaped by Blackstone, as seems exceedingly likely).

The problem is, Blackstone himself does not say what Posner attributes to him. Blackstone speaks only of the “liberty of the press”;²⁶ he says nothing about speech. Similarly, when Wilson spoke at the Pennsylvania ratifying convention, he mentioned only freedom of the press, not speech.²⁷ There are good historical reasons for this, as we will discuss shortly, but for now the key point is that in *Alvarez* and *Blue Canary*, Posner is extending the classic Blackstonian argument beyond its original limits. Indeed, Blackstone has precisely nothing to say about freedom of speech, as opposed to the press, because his *Commentaries* concern the English common law, not the First Amendment, and the English common law of the eighteenth century did not recognize any broad right to freedom of speech.²⁸ (As we shall see, the same is true of most of the American States prior to 1789.)

To be fair, Judge Posner is in good, indeed the highest, company. As we have seen, Joseph Story made the same leap. While

18. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (quoting *Blanding*, 3 Pick. at 313).

19. 679 F.3d 583, 610 (7th Cir. 2012) (Posner, J., dissenting) (citing *Patterson*, 205 U.S. at 461–62).

20. *Id.* (citing BLACKSTONE, *supra* note 4).

21. *Id.* (citing *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001)).

22. *Id.* (citing AMAR, *supra* note 6, at 23–24).

23. *Blue Canary*, 251 F.3d at 1123.

24. *See supra* note 9 and accompanying text.

25. AMAR, *supra* note 6, at 23 n.19.

26. BLACKSTONE, *supra* note 4.

27. LEVY, *supra* note 9, at 204.

28. *Id.* at 3, 5.

Story limits himself to discussing liberty of the press in his specific discussion of Blackstone,²⁹ he had previously stated firmly (though without support) that “the language of [the First] amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint.”³⁰ Similarly, in *Patterson*, Justice Holmes refers to both freedom of speech and the press in reference to prior restraints, even though his main source, *Blanding*, refers only to “publications.”³¹ The question is whether the distinction between speech and the press really makes any difference. As it turns out, it does.

II. SPEECH VERSUS THE PRESS

The First Amendment provides, inter alia, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”³² Many commentators have noted, however, that the modern Supreme Court has failed to meaningfully distinguish between the Speech and Press Clauses, essentially subsuming the Press Clause into the Speech Clause.³³ Even in cases where a law directly regulates the press, and the plaintiff explicitly invokes the Press Clause, the Court’s habit is to refer generically to “the First Amendment.”³⁴ This blending of two distinct provisions has generally been thought not to matter because the Supreme Court has consistently rejected the view that the Press Clause gives special rights or protections to the institutional press or any other distinct group of speakers, and so

29. STORY, *supra* note 8, § 1884, at 612–13.

30. *Id.* § 1880, at 610.

31. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (quoting *Commonwealth v. Blanding*, 3 Pick. 304, 313 (Mass. 1825)).

32. U.S. CONST. amend. I.

33. Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 258 (2004) (citing David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430, 448–50 (2002); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 22-b21 (3d ed. 1996 & Supp. 2001)); Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1037 (2015).

34. See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 582–83, 591–93 (1983); *Branzburg v. Hayes*, 408 U.S. 665, 679–82 (1972); *Pell v. Procunier*, 417 U.S. 817, 821–22 (1974).

both clauses protect communications, presumably in parallel ways.³⁵ It turns out, however, that ignoring the Press Clause as a distinct source of constitutional principles has the consequence of blinding one to important differences between speech and the press.

To understand the differences clearly, it is important to bear in mind the nature of communications technologies in 1789–1791, when the First Amendment was drafted and ratified. At that time, there were essentially three methods of communication: oral, unamplified speech; hand-written correspondence; and printed materials created using a printing press. Once this is recognized, the distinct functions of the Speech and Press Clauses become clear: the Speech Clause protects oral communications, and the Press Clause protects the printing press and its products.³⁶ And indeed, the most careful modern scholarship tends to confirm the view that the Press Clause was intended and has been understood to protect a particular technology: the printing press (as opposed to a favored group of speakers, the institutional press).³⁷ Moreover, this reading fits well with Blackstone and the history of prior restraints. After all, the historical licensing regime in England and its demise in the late seventeenth century,³⁸ which engendered Blackstone's definition of press freedom as a lack of previous restraints, extended to *all* uses of the printing press, not just the printing of newspapers.³⁹ The Press Clause limits governmental regulation of the printing press, and one

35. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010); *id.* at 390 n.6 (Scalia, J., concurring); *Branzburg*, 408 U.S. at 703–05; *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 797–801 (1978) (Burger, C.J., concurring).

36. This of course leaves open the status of hand-written communications. Perhaps the Framers meant to subsume such communications in the Speech Clause, or perhaps they simply did not consider the matter; it is hard to tell, especially because, as we shall see, the Framers paid little or no attention to any aspect of the Speech Clause.

37. 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 (2012); see also Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 429–46 (2013); Anderson, *supra* note 33, at 446–47.

38. See Emerson, *supra* note 15, at 651; Michael I. Meyerson, *The Neglected History of The Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 305 (2001); *Grosjean v. American Press Co.*, 297 U.S. 233, 245–46 (1936).

39. See BLACKSTONE, *supra* note 4, at 152 n.a.

key limitation (albeit not necessarily the only one⁴⁰) is that it forbids licensing, or as Judge Posner calls it, “censorship” of the press.⁴¹

If that is what the Press Clause was understood to mean, what about the Speech Clause? This is a very difficult question to answer because, as Philip Kurland has noted, the Framers were almost entirely focused on freedom of the press, largely ignoring freedom of speech.⁴² The behavior of the colonies and early states confirms this focus. *No* colonial charter prior to the American Revolution protected a general right of free speech, though they did protect the rights of legislators during legislative sessions.⁴³ Moreover, of the original thirteen states, only one—Pennsylvania—provided protection for freedom of speech in its state constitution at the time of ratification,⁴⁴ though many state constitutions did refer to the freedom of the press.⁴⁵ Perhaps most tellingly, the *Virginia Declaration of Rights* of June, 1776 drafted by George Mason, considered the Father of the Bill of Rights, protects freedom of the press, but does not mention free speech.⁴⁶ Indeed, as late as Joseph Story, the preeminence of the press right over the speech right remained. The section of his *Commentaries* discussing the Speech and Press Clauses begins with the phrase “[t]he next clause of the amendment respects the liberty of the press,” but then quotes both the Speech and Press Clauses.⁴⁷

The pre-Framing neglect of freedom of speech might be taken to suggest that the Framers simply did not care about free speech, as opposed to a free press. But that cannot be quite right. After all, despite his omission in 1776, Mason did include an explicit freedom

40. See *infra* Part III.

41. *ACLU v. Alvarez*, 679 F.3d 583, 610 (7th Cir. 2012) (Posner, J., dissenting).

42. Kurland, *supra* note 9, at 237; see also Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 *IND. L.J.* 1, 15 (2011).

43. David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 *MD. L. REV.* 429, 431 (1983).

44. LEVY, *supra* note 9, at 5. By the time the First Amendment was ratified on December 15, 1791, a fourteenth state—Vermont—had been added which did protect freedom of speech. *Id.* at 186; Rosenthal, *supra* note 42, at 15. But the fact remains that during the Framing period, freedom of speech was almost entirely neglected.

45. LEVY, *supra* note 9, at 184–85.

46. See *The Virginia Declaration of Rights*, § 12 (1776), http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html.

47. STORY, *supra* note 8, § 1880, at 609.

of speech provision in his *Master Draft of the Bill of Rights*, which became the model for James Madison's eventual proposal for a bill of rights to the first Congress.⁴⁸ And James Madison also, of course, included free speech in his proposed constitutional amendments which eventually resulted in the Bill of Rights.⁴⁹ Indeed, during congressional debates, Madison described freedom of speech and of the press as among "the most valuable on the whole list."⁵⁰ Finally, Kurland's suggestion that free speech was simply seen as an element of free exercise also cannot be sustained.⁵¹ Free speech and free exercise are distinct rights granted separate protection in the Bill of Rights. Moreover, despite their pairing in the final text of the First Amendment, the drafting history of the First Amendment clearly reveals that the Framers did not even consider speech and religion to be particularly related to each other; the combining of speech and religion in a single amendment occurred very late in the legislative process and appears to be more a historical coincidence than anything else.⁵²

Freedom of speech, then, is a distinct right, which was consciously added to the Constitution in addition to freedom of the press (and to free exercise of religion). Moreover, Blackstone and other contemporaries defined freedom of the press as barring only prior restraints, not freedom of speech. Perhaps, however, Judge Posner's extension of Blackstone to speech can be justified on the grounds that speech and press rights are parallel rights, which mean the same thing—freedom from prior restraints, and nothing else. A brief consideration of technology and practicalities, however, demonstrates that this is a most unlikely reading.

48. See *George Mason's Master Draft of the Bill of Rights*, CONSTITUTION SOCIETY, ¶ 16, http://www.constitution.org/gmason/amd_gmas.htm [hereinafter *Mason's Master Draft*]. Interestingly, Mason's proposal extended not just to speech and the press, but also to "writing and publishing," seemingly covering hand-written correspondence as well.

49. THE COMPLETE BILL OF RIGHTS, *supra* note 9, at 83.

50. David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 832 (1985).

51. See Kurland, *supra* note 9, at 237.

52. See Ashutosh Bhagwat, *Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 91–92 (2014) (describing drafting history of the First Amendment, and noting that the Speech and Religion Clauses did not become combined in a single amendment until September 9, 1789, just weeks before final adoption, and furthermore that the Clauses were combined with no explanation).

The most obvious reason why freedom of speech, as understood in 1791, could not have been limited to a bar on prior restraints is that an actual system of prior restraints on speech was, and is, impossible. In no conceivable universe could the government require permission from censors before citizens could *speak*, or even speak on political issues (remember, for the Framers to speak meant to speak in person, without amplification). The very idea of such a system is profoundly silly. This point, of course, has been recognized before. Thomas Cooley, the author of the leading constitutional treatise of the latter nineteenth century, commented that “the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship”⁵³ Zechariah Chafee, the leading American free speech scholar of the first part of the twentieth century, quoted Cooley’s language, and described his argument as “unanswerable.”⁵⁴ And despite Posner’s citation to him, Akhil Amar in *The Bill of Rights* went so far as to describe the idea that the freedom of speech can be limited to freedom from prior restraints as “utterly outlandish,” precisely because licensing speech is impossible.⁵⁵

In short, numerous scholars over the past century and a half have pointed out that whatever the meaning of freedom of the press, the idea that freedom of speech means only freedom from prior restraints is quite obviously wrong, even “outlandish.” Nor was this objection to a narrow reading of the Free Speech Clause unknown to the Framing generation. The leading Jeffersonian politician (and later Secretary of the Treasury) Albert Gallatin, in a speech in opposition to the Sedition Act of 1798, said the following:

But that contended for, to wit, that the only prohibition was that of passing any law laying previous restraints upon either, was absurd, so far as it related to speech; for it pre-supposed that Congress, by the Constitution, as it originally stood, might have passed laws laying such restraints upon speech; and what these possibly could have been, he was altogether at a loss to conceive, unless gentlemen chose to assert that the Constitution had given Congress a power to seal the mouths or to cut the tongues of the

53. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 421 (1868).

54. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 11 (1941).

55. AMAR, *supra* note 6, at 224.

citizens of the Union; and these, however, were the only means by which previous restraints could be laid on the freedom of speech. Was it not evident, that, as speech could not be restrained, but might be punished, a Constitutional clause forbidding any abridgment of the freedom of speech must necessarily mean, not that no laws should be passed laying previous restraints upon it, but that no punishment by law be inflicted upon it?⁵⁶

Quoting this passage the scholar Leonard Levy, considered to be the leading modern defender of the view that the First Amendment was understood to bar only prior restraints, explicitly acknowledged that because previous restraints on speech were nonexistent and impossible, freedom of speech was never understood to mean “the absence of prior restraints.”⁵⁷

To be fair, despite Gallatin’s and others’ strong language, it is not quite true that speech can never be licensed. As Judge Posner himself pointed out in *Blue Canary*, there is one historical example of prior restraints on speech: the licensing of plays in Shakespearean England.⁵⁸ No one, however, could seriously argue that the sole purpose of the Free Speech Clause of the First Amendment was to prevent the licensing of plays. Such a reading is absurdly narrow,⁵⁹ and ignores the obviously *political* focus of the Free Speech Clause (as well as the Press, Assembly, and Petition Clauses which accompany it).⁶⁰ In truth, very little theater existed in colonial America, in no small part because of religious objections to it, making a theater-focused reading of the First Amendment particularly implausible.

The implication of the fact that prior restraints on speech are impossible is clear: a reading of the First Amendment limiting the Free Speech Clause to bar only prior restraints would make freedom of speech a nullity, providing *no* actual protections. To be sure, as noted earlier, the Framing generation paid little attention to freedom

56. LEVY, *supra* note 9, at 302–03.

57. *Id.* at 303–04 & n.80.

58. *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001).

59. Under this view, the entire free speech jurisprudence of the Supreme Court would consist of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (treating as an invalid prior restraint a system by which a municipality granted permission to use its theater only after reviewing the content of productions, and denying permission for *Hair*).

60. See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 991–92 (2011).

of speech, as opposed to the press.⁶¹ Nonetheless, freedom of speech *was* considered important enough by Madison and Mason to include in the Bill of Rights, and during congressional debates Madison identified the Speech and Press Clauses as “among ‘the most valuable on the whole list.’”⁶² It would be odd, to say the least, if one of the most valuable rights in the entire Bill of Rights protected nothing.

In addition to simple logic, what we know of the history of the Free Speech Clause also tends to confirm that it was understood to protect against subsequent punishment, not previous restraint. The roots of protections for free speech are a bit foggy because the English common law did not provide any general free speech protection,⁶³ free speech is not discussed in Blackstone, and speech was similarly neglected in colonial charters and early state constitutions with the exception of Pennsylvania.⁶⁴ It is not quite true, however, that early English and American law provided no speech protections—there was one specific type of speech which was protected, and that was the speech of legislators. The English Bill of Rights of 1689, an obviously foundational document, explicitly extended protection to speech and debate within Parliament, providing “[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”⁶⁵ Following this model, colonial charters similarly protected the speech rights of their members (during sessions of the legislature), and such rights were generally respected.⁶⁶ Finally, the original (unamended) United States Constitution of course provides that members of Congress “shall not be questioned in any other [p]lace” for “any Speech or Debate in either House.”⁶⁷ Obviously, these provisions were not intended to prevent only prior restraints—by their very language they protect primarily against subsequent punishment. As such, they provide a

61. See *supra* text accompanying notes 42–47.

62. Rabban, *supra* note 50, at 832.

63. LEVY, *supra* note 9, at 3, 5.

64. See *supra* text accompanying note 44.

65. English Bill of Rights (1689), http://www.constitution.org/eng/eng_bor.htm; see also LEVY, *supra* note 9, at 14.

66. David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 431–34 (1983).

67. U.S. CONST. art. I, § 6, cl. 1.

clear precedent for protecting speech against more than prior restraints.

Moreover, there can be little doubt that the Speech and Debate Clause and its forebears, notably in the English Bill of Rights, had an important influence on the First Amendment, and more generally on understandings of what the phrase “freedom of speech” meant. It cannot be a coincidence that the phrase “freedom of speech” in the First Amendment exactly matches the words of the English Bill of Rights, and as David Bogen notes, prior to the American Revolution the phrase “freedom of speech” in colonial charters inevitably referred to the rights of legislators, which surely must have influenced assumptions about what the right meant when extended to all citizens.⁶⁸ Similarly, Philip Kurland recognizes that the term “freedom of speech” in pre-Revolutionary America was used to refer to immunity from subsequent punishment on the part of legislators.⁶⁹ Finally, Akhil Amar has elaborated more extensively on the connections between legislative “freedom of speech” and the First Amendment. He points out that the Parliamentary privilege of freedom of speech was closely tied to the English Whig theory that sovereignty rested in Parliament.⁷⁰ When the American Revolutionaries adopted a theory of popular sovereignty, it followed logically that the parliamentary privilege should be extended to sovereign citizens⁷¹—and to reiterate, that privilege was *not* freedom from prior restraints; it was a bar on subsequent prosecution.

In light of the overwhelming evidence set forth above that the phrase “freedom of speech” in the First Amendment was not limited to a bar on prior restraints, from where does this misunderstanding originate? The answer must lie in the seemingly parallel treatment of speech and the press in the language of the First Amendment (“Congress shall make no law . . . abridging the freedom of speech, or of the press”).⁷² Presumably, the reasoning is that given this formulation, surely the rights must be coextensive. That quick assumption, however, is suspect for three distinct reasons. The first is that this verbal parallelism was not always a part of the proposed

68. Bogen, *supra* note 43, at 431.

69. Kurland, *supra* note 9, at 255.

70. AMAR, *supra* note 6, at 223.

71. *Id.* at 24–25; *see also* Kurland, *supra* note 9, at 255.

72. U.S. CONST. amend. I.

amendment. James Madison's original proposal to Congress did *not* describe the right to speech and the "freedom of the press" in identical or even parallel language. It read, in its entirety, as follows: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."⁷³

This language, which is essentially identical to the language in George Mason's *Master Draft of the Bill of Rights*,⁷⁴ quite clearly treats "freedom of the press" as a concept quite distinct from the separate protections for the "right to speak, to write, or to publish." During the drafting process this language was shortened to its current form and combined with the Assembly and Petition Clauses (as well as, much later, with the Religion Clauses).⁷⁵ But there is absolutely no indication that these changes were intended to change the substantive content of the amendment, or to create an identity between the speech and press rights.

Second, focusing on the connection between speech and the press ignores the broader context of the First Amendment, an unfortunately common occurrence.⁷⁶ The Free Speech Clause is paired in the First Amendment not only with the Press Clause, but also with the Assembly and Petition Clauses.⁷⁷ Speech, press, assembly, and petition are all (in the words of the Supreme Court) "cognate" rights that protect parallel, interconnected political functions essential to democratic self-governance.⁷⁸ Yet no one

73. THE COMPLETE BILL OF RIGHTS, *supra* note 9, at 83.

74. Mason's language read, "That the People have a right to Freedom of speech, and of writing and publishing their Sentiments; that the Freedom of the Press is one of the great Bulwarks of Liberty, and ought not to be violated." See *Mason's Master Draft*, *supra* note 48, at ¶ 16.

75. THE COMPLETE BILL OF RIGHTS, *supra* note 9, at 84–92.

76. See, e.g., JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 61–62 (2012) (noting that the Supreme Court has not invoked the Assembly Clause of the First Amendment in over thirty years, essentially merging the freedom of assembly into speech).

77. It also appears in the company of the Religion Clauses, but as noted earlier, that juxtaposition, unlike the combining of the political rights of speech, the press, assembly, and petition, appears to have been a product of historic accident. See *supra* note 52 and accompanying text.

78. See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). For a broader discussion of the connections between the political rights in the First Amendment, see Bhagwat, *supra* note 60, at 984–85.

would argue that the assembly and petition rights mean no more than freedom from prior restraints. The petition right is based directly on the petition right granted in the English Bill of Rights (though its roots are much older⁷⁹), the language of which explicitly protects against subsequent prosecution.⁸⁰ And as Tabatha Abu El-Haj has extensively demonstrated, assemblies were understood through the first century of the American Republic to be protected from both permitting requirements and subsequent prosecution, unless they were disruptive or violent.⁸¹ Thus, of the four interlinked political rights protected by the First Amendment, only the press right was associated with freedom from prior restraints, an association that arose because of the historical prominence of the battle over press licensing from its imposition in the sixteenth century to its abandonment by Parliament in 1694–95, following the Glorious Revolution.⁸²

The third and final reason why simple parallelism between the Speech and Press Clauses is unwarranted is more fundamental: when drafted, the two clauses protected fundamentally different human activities. As noted earlier,⁸³ during the Framing era there was a fundamental difference between what the speech clause protected—unamplified, in-person oral communication—and what the press clause protected—printed products created using the printing press. These were distinct forms of communication, indeed two of the only three forms of communication (along with hand-written notes and letters) available given eighteenth-century technology, and they had very different social significance. Oral speech, by its nature, could reach only small audiences, especially given the lack of amplification. The power of speech to organize and persuade, and thus the risks speech posed to society, were inherently limited. On the other hand, the press was a form, indeed the only form, of *mass* communication capable of reaching thousands. Books and pamphlets could shape

79. See Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1299–1300 (2008).

80. English Bill of Rights, *supra* note 65 (“That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.”).

81. See Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics and Culture*, 16 U. PA. J. CONST. L. 949, 992–93 (2014); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 42–45 (2011).

82. See Meyerson, *supra* note 38, at 298–305.

83. See *supra* Part II, para. 2.

opinion and engender mass action in ways that no other form of communication could even come close to doing. That, of course, is why England imposed licensing on the press prior to the Glorious Revolution, and it is also why the Framing generation focused on freedom of the press and largely ignored freedom of speech. Speech just was not that important, and had not historically been subject to anything like the social controls, censorship, and suppression as had products of the printing press.

Indeed, even Blackstone appears to concede this point. In the passage in which Blackstone defines freedom of the press as a lack of previous restraints, he clarifies that this means the law is permitted to “punish . . . any dangerous or offensive *writings*.”⁸⁴ He then goes on to defend this rule: “Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.”⁸⁵ At least one natural reading of this passage is that what the law condemns is the *public* distribution of “bad sentiments” through the press; but freedom of conscience and private speech remain in place. The reason, of course, is that mass dissemination of dangerous ideas threatens “the preservation of peace and good order,”⁸⁶ whereas private activities do not.

The difficulties with translating historical understandings into contemporary law arise from the fact that the sharp historical distinctions between speech and the press have blurred in modern times. Doctrinally, as noted earlier, the Press Clause has been largely subsumed into the Speech Clause in the past century (almost a reversal of the Framing era).⁸⁷ But doctrine and the Court are not the cause of the confusion; they merely reflect a more basic driving force, which is changing technology. While drawing a clear distinction between speech and the press was easy in 1791, it obviously no longer is today. Even by the end of the nineteenth century, with the invention of the telegraph and telephone, distinctions were blurring as speech gradually ceased to be limited to in-person communication. But more modern inventions, such as

84. BLACKSTONE, *supra* note 4, at 152 (emphasis added).

85. *Id.*

86. *Id.*

87. *See supra* Part II, para. 1.

broadcasting, cable television, and now the Internet, have utterly broken down any clear lines. Are television and radio broadcasts more analogous to speech, or to the press? Both are forms of mass communication, after all, but much of the communication is oral (all of the communication in the case of radio). And what of a website? Does it matter if a website consists of written words or video clips? Should it? And what about a tweet, or a Facebook post?

These questions seem absurd because they are—today, all forms of communications are merging with each other, and they tend to share common traits with both historical speech and the historical press. In particular, much communication has potentially mass audiences, paralleling the historical press, but its ubiquity (and so its inability to be controlled *ex ante*) makes it more like speech. The modern judicial solution has been to abandon the speech/press distinction and call everything “speech.” This collapsing is perhaps inevitable given technological developments, and it is probably wise as a matter of social policy. It, however, has absolutely no historical basis. Whatever our current practice, neither the Framers nor the generation that ratified the Fourteenth Amendment (who had the telegraph, but no other modern communications technology)⁸⁸ equated speech and the press.

III. WHAT OF THE PRESS?

For all of the above reasons, it seems reasonably clear that the Free Speech Clause of the First Amendment was *not* understood to be limited to freedom from “censorship” or “previous restraints.” But what about the press? Is it true that the original intent of the First Amendment’s Press Clause was to adopt the limited, Blackstonian definition? These questions matter because, for the reasons noted at the end of Part II, there is at least an argument to be made that much of modern communication, because of its potential to reach mass audiences, is more analogous to the Framers’ understanding of the press than their understanding of speech. If so, then a purported strict originalist⁸⁹ would presumably feel obliged to

88. The Fourteenth Amendment was ratified in 1868. This timing matters, of course, because the “freedom of speech and of the press” applies to the states because it has been incorporated into the Due Process Clause of the Fourteenth Amendment. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

89. This strict originalist presumably shares an apartment with those other elusive characters, the reasonable person and the rational economic actor.

protect such communications only from licensing or other prior restraints.

In fact, however, even with respect to the press, Judge Posner's assertion that freedom from prior restraints "is the original understanding"⁹⁰ of the First Amendment moves too fast. First, consider his sources. Recall that Posner cites in support of his assertion an opinion by Justice Holmes, one of his own earlier opinions, Akhil Amar, and Blackstone.⁹¹ Leaving aside the citation to his previous opinion, which did not truly address the question of whether freedom of the press meant *only* no prior restraints, let us consider each of these sources.

Posner's first citation is to Justice Holmes's opinion in *Patterson v. Colorado*.⁹² There are, however, two clear problems with this use of Holmes. First, Holmes does not say in *Patterson* that freedom from previous restraints is the *only* purpose of the First Amendment, but that freedom from previous restraints was "the main purpose."⁹³ It should be added that even in *Patterson*, the first Justice Harlan wrote a powerful dissent explicitly rejecting the Blackstonian position.⁹⁴ Second, and more fundamentally, Holmes of course famously recanted this view, first explicitly in the *Schenck* decision announcing the clear and present danger test,⁹⁵ and then more definitively, albeit implicitly, in his separate opinions that became the foundation of modern free speech law.⁹⁶ Thus, Holmes is a weak source for such a strong assertion.

Posner also relies on Akhil Amar, and in particular on his book *The Bill of Rights*.⁹⁷ Amar, however, is also a problematic source. Although Amar does discuss the importance of juries as a shield against unjust prosecutions of the press and notes that prior

90. *ACLU v. Alvarez*, 679 F.3d 583, 610–11 (Posner, J., dissenting).

91. *See supra* notes 3–6 and accompanying text.

92. *Alvarez*, 679 F.3d at 610 (Posner, J., dissenting) (citing *Patterson v. Colorado*, 205 U.S. 454, 461–62 (1907)).

93. *Patterson*, 205 U.S. at 462.

94. *Id.* at 465 (Harlan, J., dissenting).

95. *Schenck v. United States*, 249 U.S. 47, 51–52 (1919) ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson*.").

96. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

97. *Alvarez*, 679 F.3d at 610 (Posner, J., dissenting) (citing AMAR, *supra* note 6, at 23–24).

restraints were troublesome because they removed jury protections, later in his book Amar explicitly rejects the narrow Blackstonian reading of the Press Clause.⁹⁸ He does this in part based on theories of popular sovereignty, but also because he considers the Speech and Press Clauses to be “*in pari materia*.”⁹⁹ Amar argues that since limiting the Speech Clause to “freedom from prior restraint is utterly outlandish,” it must also be true that the Press Clause is not so limited.¹⁰⁰

That leaves Blackstone as the ultimate and only independent source of the narrow reading of the Press Clause. Blackstone did say that freedom of the press meant only freedom from previous restraints. However, Blackstone, writing in 1769, was not referring to the meaning of the First Amendment, drafted twenty years later, but was talking about the English common law. To assume that Blackstone’s meaning was adopted wholly by the Framers of the First Amendment is a major leap, and as we shall see, a contested one. Nevertheless, there can be no doubt that Blackstone had some influence on the thinking of the Framers. Consequently, he cannot be discounted entirely.

Even if Posner’s sources do not fully support his assertion this does not mean he is wrong. Furthermore, Amar’s argument that the Speech and Press Clauses are *in pari materia* (which is essentially identical to an argument made two centuries earlier by Albert Gallatin against the Blackstonian reading of the Press Clause¹⁰¹) is not altogether satisfying. For all of the reasons stated above, whatever the linguistic parallelism in the text of the First Amendment, speech and the press were very different means of communication in the eighteenth century with very different histories. So, while it is possible that freedom of the press meant the same thing to the Framers as freedom of speech, one cannot so assume.

What is needed, then, is a close examination of the history of press regulation and freedom before and during the Framing era. Leonard Levy has engaged in precisely such a close examination in

98. See AMAR, *supra* note 6, at 23–24, 223–24.

99. *Id.* at 224.

100. *Id.* at 223–24.

101. See LEVY, *supra* note 9, at 303–04.

*Emergence of a Free Press*¹⁰² (which is a revised and expanded version of his groundbreaking book *Legacy of Suppression*¹⁰³). When one reads Levy's recitation of history, the overwhelming impression is one of confusion and uncertainty. There were undoubtedly some members of the Framing generation, notably James Wilson during the ratification debates and many Federalists during the debates over the Sedition Act, who whole-heartedly defended the narrow, Blackstonian reading of the Press Clause.¹⁰⁴ However, there is a rich intellectual history predating the First Amendment suggesting that a broader, albeit somewhat inchoate, understanding of freedom of the press had evolved by 1789. Moreover, there is no dispute that during the Sedition Act debates (i.e., by the end of the eighteenth century), a very large number of prominent thinkers, all associated with Jefferson's Democratic-Republican Party, were articulating a clear, intellectually coherent, and broad vision of press freedoms that went well beyond freedom from prior restraints.¹⁰⁵ A brief examination of the history of press freedoms in the colonies and after independence demonstrates why a simple assertion that the Blackstonian view of the Press Clause constituted "the original understanding"¹⁰⁶ is so problematic.

Let us start by discussing the law of seditious libel, because that is Levy's focus, and it created the key confrontation between narrow and broad readings of the Press Clause in 1798. The crime of seditious libel was, of course, brought to the colonies from England, along with the principle that truth was no defense to such a charge and various procedural rules designed to favor the prosecution (notably the rule that the judge, not the jury, was to determine if the charged words were seditious).¹⁰⁷ Seditious libel prosecutions, however, were almost unknown in colonial America, and they ended completely after the famously unsuccessful prosecution of Peter

102. See LEVY, *supra* note 9.

103. LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1964).

104. See Kurland, *supra* note 9, at 235–36 (describing Wilson's speech at the Pennsylvania ratifying convention); LEVY, *supra* note 9, at 204–05 (doing the same); *id.* at 301 & n.75 (discussing speeches by Federalists during the Sedition Act debates).

105. *Id.* at 301–04.

106. *ACLU v. Alvarez*, 679 F.3d 583, 610–11 (7th Cir. 2012) (Posner, J., dissenting).

107. LEVY, *supra* note 9, at 7–12.

Zenger in 1735.¹⁰⁸ It is noteworthy that during Zenger's prosecution, his attorney, Andrew Hamilton, explicitly argued that freedom of the press required proof of falsity for a charge of seditious libel, and that the question of libel must be sent to the jury—that is, he urged the jury to reject the traditional English rule as tyrannical.¹⁰⁹ And whatever the legal merits of Hamilton's argument, he did convince the jury, which refused to convict.¹¹⁰ Levy concedes that the Zenger prosecution became a symbol in colonial America of the unjustness of the law of seditious libel and of the importance of a free press,¹¹¹ indicating that as early as 1735 a broader understanding of freedom of the press was emerging in American thought and popular consciousness, even if legal precedents had not been altered.¹¹²

Moreover, this broader understanding did not emerge out of the ether, nor did its evolution end with the Zenger case. In the two decades prior to the Zenger case, two English journalists writing under the name "Cato" had set forth a well-developed theory of freedom of speech and of the press, which recognized the essential role of such freedom in checking the abuse of official authority, and which specifically criticized aspects of the law of seditious libel, notably that truth was not a defense.¹¹³ These arguments, published in book form under the title "Cato's Letters," were extensively distributed and quoted in the colonies, and were explicitly referred to by many leading members of the Framing generation, including John Adams, Thomas Jefferson, and Benjamin Franklin.¹¹⁴ That John Adams was aware of and approved of Cato's arguments is particularly significant because of a later episode. In 1789, Chief Justice William Cushing of Massachusetts initiated a correspondence with John Adams regarding the meaning of the free press clause of the Massachusetts Constitution, which Adams had drafted. In his letter, Cushing raised and explicitly repudiated Blackstone's understanding limiting freedom of the press to an absence of prior restraints, and he cited Cato in support of his view in particular that the clause

108. *Id.* at 17–18.

109. *Id.* at 41–43.

110. *Id.* at 43–44.

111. *Id.* at 37–38.

112. See Rosenthal, *supra* note 42, at 17.

113. LEVY, *supra* note 9, at 109–13.

114. *Id.* at 113–14.

required that truth may not be prosecuted as seditious libel.¹¹⁵ Adams agreed in his reply, arguing that whatever the law in England, the democratic Constitution of Massachusetts required that citizens be able to truthfully criticize government officials.¹¹⁶

Nor was Adams alone or unusual in his views, as illustrated by a sequence of incidents twenty years earlier in Massachusetts involving another (colonial era) Chief Justice and another Adams. In 1768, then Governor Francis Bernard sought the support of the lower house of the Massachusetts legislature in initiating a seditious libel prosecution based on a newspaper story which vilified the governor. The house refused, adopting (for the first time) a resolution in favor of the “Liberty of the Press.”¹¹⁷ Chief Justice Hutchinson of Massachusetts sought to nonetheless obtain an indictment, citing in support the narrow Blackstonian definition of liberty of the press. The grand jury also refused to give its support. And in response to these events, the leading patriot (and John Adams’s cousin) Samuel Adams published a series of articles extolling the freedom of the press as the essential “bulwark of the People’s Liberties.”¹¹⁸ Adams’s language is particularly interesting because it is so closely echoed in the eventual language, twenty years later, of both George Mason’s Master Bill of Rights that provided the key model for the Bill of Rights,¹¹⁹ and (reflecting Mason) James Madison’s original proposal to Congress, which eventually lead to the Bill of Rights.¹²⁰ It is essential to note that Adams’s arguments were triggered *not* by a proposal to impose prior restraints, but by a subsequent prosecution of speech.

It should be no surprise that this broader reading of press freedoms was not limited to either the Adams cousins or to Massachusetts. Indeed, such opinions can be found much earlier than the two episodes just recounted. To give just two examples

115. *Id.* at 199–200.

116. *Id.* at 200. There is, of course, some irony in this given the Adams Administration’s later support for and enforcement of the Sedition Act; but, as we shall see, this irony does have an explanation.

117. *Id.* at 66.

118. *Id.* at 67 (quoting Adams, BOS. GAZETTE, Mar. 14, 1768).

119. See *Mason’s Master Draft*, *supra* note 48, at ¶ 16 (“[T]he Freedom of the Press is one of the great Bulwarks of Liberty, and ought not to be violated.”).

120. THE COMPLETE BILL OF RIGHTS, *supra* note 9, at 83 (“[T]he freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”).

among many, in 1722, a young printer named Benjamin Franklin reprinted one of Cato's essays in defense of his brother James who had been imprisoned by the legislature (so again, not in response to a prior restraint).¹²¹ Nine years later, in 1731, Ben Franklin published a more extensive defense of press freedoms, this time in his own voice.¹²² At about the same time, James Alexander, a well-known lawyer and friend of Peter Zenger, published articles strongly defending press freedoms as essential in a limited, as opposed to an absolute, monarchy, and explicitly extended his definition to include some immunity from subsequent prosecution.¹²³

There is thus little doubt that a substantial school of thought had developed in the American colonies, brought to the forefront by the 1735 Zenger prosecution and continuing to develop afterwards, that defined the freedom of the press to mean more than freedom from prior restraints.¹²⁴ What exactly that meant was no doubt underdeveloped and somewhat inchoate in the minds of most. However, at a minimum, as Levy concedes, it appears to have encompassed permitting truth as a defense, permitting general jury verdicts, and requiring proof of malicious intent in seditious libel prosecutions.¹²⁵ Indeed, in 1804 none other than Alexander Hamilton argued that freedom of the press required truth as a defense in a seditious libel prosecution.¹²⁶ This is no doubt why in his 1985 book, *Emergence of a Free Press*, Levy explicitly repudiated the notion hinted at in his 1960 book, *Legacy of Suppression*, that the original intent of the Press Clause of the First Amendment was to prevent prior restraints and nothing more.¹²⁷

The reason for Levy's original mistake was simple—it was not truly the question he was addressing. The question that Levy was focused on, both in 1960 and in 1985, was whether the First Amendment eliminated entirely the crime of seditious libel. And on

121. LEVY, *supra* note 9, at 119.

122. *Id.* at 119–120. Franklin, unsurprisingly, continued to defend freedom of the press into his later years. See CHAFEE, *supra* note 54, at 17.

123. LEVY, *supra* note 9, at 124–27.

124. For further support of for this position, see CHAFEE, *supra* note 54, at 17–18.

125. LEVY, *supra* note 9, at 169–70.

126. CHAFEE, *supra* note 54, at 28 & n.60.

127. LEVY, *supra* note 9, at xi. Levy's recantation probably explains why Judge Posner did not cite Levy in his *ACLU of Illinois v. Alvarez* opinion, despite the fact that Levy is the leading modern voice for a narrow reading of the original intent of the First Amendment's speech and press clauses.

that question, he held to his belief that it had not, albeit it may have required the modifications described previously regarding truth as a defense, general jury verdicts, and proof of malice.¹²⁸ In so arguing, Levy notes, he is rejecting the contrary statements of such luminaries as Justice Holmes,¹²⁹ Justice Black,¹³⁰ Justice Brennan speaking for a unanimous Court in *New York Times v. Sullivan*,¹³¹ and Professor Zechariah Chafee.¹³² As to whether Levy is right in this regard, it is very difficult to say. He may well be correct that, at least until the controversy over the Sedition Act of 1798, opinions had not fully formed on the subject, and as such there was no clearly crystalized “intent” on that issue. This is not to say, however, that if someone had *asked* leading Framers such as James Madison in 1791 whether seditious libel prosecutions were consistent with the First Amendment that they would have agreed that they were—there is simply no way to know the answer to the latter question. But the notion that a large part of the Framing generation understood the First Amendment at least to limit, if not to eliminate, seditious libel is supported by the fact that the Sedition Act of 1798, drafted, after all, by arch Federalists, incorporated the restrictions described previously, including truth as a defense, general jury verdicts, and a requirement of proof of malice.¹³³

Much of the support for the narrow Blackstonian reading of the Press Clause appears to be built on the premise that the only alternative is to permit *no* subsequent punishment of speech, even if libelous or otherwise dangerous. But this is a straw man at best. It is true that even prior to the adoption of the First Amendment some thinkers, including notably Montesquieu, had raised the possibility that only overt acts, not speech, should be subject to punishment;¹³⁴ and more recently there were times when Justice Black seemed to

128. *Id.* at xiii.

129. *Id.* at xiii & n.5 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

130. *Id.* at xiii & n.6 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1951) (Black, J., dissenting)).

131. *Id.* at xiii & n.7 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

132. *Id.* at xiii–xiv & n.10 (citing CHAFEE, *supra* note 54, at 21).

133. *Id.* at xi; GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH DURING WARTIME* 43–44 (2004).

134. *See* LEVY, *supra* note 9, at 151–53, 163–68.

hint at such a broad reading.¹³⁵ But that has never been the mainstream view, either in the judiciary or among commentators. Indeed, when the Supreme Court addressed the issue of libel against public officials—the modern cousin of seditious libel—in *New York Times v. Sullivan*, it did not entirely forbid such lawsuits; instead, it merely required proof of falsehood and “actual malice,” meaning that the speaker knew the statement was false or recklessly disregarded the truth.¹³⁶ The real question, as Levy recognizes, is not whether the First Amendment permitted any punishment for publication or speech—of course it did—but where the line was to be drawn between protected speech on the one hand, and “abuse” or “licentious” speech on the other.¹³⁷ And on that question, there was probably little thought given before the controversy of 1798, which exposed deep divides.

This takes us to the Sedition Act of 1798, undoubtedly the formative moment in early American thinking about freedom of speech and the press. Geoffrey Stone accurately describes the Sedition Act as “[t]he centerpiece of the Federalists’ legislative program of 1798,” adopted in response to concerns about impending war with France and Jacobinism within the rival Democratic-Republican Party of Thomas Jefferson.¹³⁸ Moreover, Federalist supporters of the Act defended it by adopting Blackstone’s narrow understanding of press freedoms.¹³⁹

As noted previously, however, the Sedition Act did not simply replicate the English common law; rather, it incorporated the liberal restrictions advocated for during and after the Zenger prosecution.¹⁴⁰ By this time, however, it had become clear to the Republicans that these “reforms” were going to prove wholly illusory because prosecutions were generally directed at political opinions, whose truth it was impossible to prove (the burden lay on the defendant), and because Federalist juries were anxious to convict their political opponents.¹⁴¹ And indeed, the protections were entirely ineffective,

135. *Smith v. California*, 361 U.S. 147, 157–59 (1959); *New York Times v. Sullivan*, 376 U.S. 254, 293, 295 (1964) (Black, J., concurring).

136. *New York Times*, 376 U.S. at 279–80.

137. LEVY, *supra* note 9, at 273–74, 303–04.

138. STONE, *supra* note 133, at 36, 43, 67.

139. LEVY, *supra* note 9, at 301–02; STONE, *supra* note 133, at 40–41.

140. STONE, *supra* note 133, at 43–44.

141. *Id.* at 44.

placing no obstacles to the Federalists' use of the Act to harass and suppress their political opponents.¹⁴²

The passage of the Sedition Act, its biased enforcement, and the failure of the limitations written into the Act to prevent its abuse forced the intellectual leaders of the Republican Party, for the first time, to confront key questions regarding the role of free speech and freedom of the press in a republic based on popular sovereignty, as well as whether seditious libel prosecutions were consistent with that role. What emerged was a sophisticated theory linking freedom of the press to democracy and rejecting seditious libel as inconsistent with the concept of popular sovereignty.¹⁴³ In the congressional debates over the Sedition Act, Republican congressmen John Nicholas and Albert Gallatin rejected the argument that providing truth as a defense was sufficient to protect political opinion and, in the course of doing so, rejected the Blackstonian reading of either the Speech or Press Clauses.¹⁴⁴ In a debate over repealing the Sedition Act in 1799, Nicholas took the argument one step further. He argued that the entire law of seditious libel was based on the British system of hereditary monarchy and simply had no place in the United States, where the people were sovereign and government officers were their servants.¹⁴⁵ A number of other Republican politicians and authors followed suit, expounding the developing theory that popular sovereignty required strong protections for the press and that prosecutions for seditious libel violated those protections.¹⁴⁶

The most famous Republican attack on the Sedition Act was undoubtedly Madison's *Report on the Virginia Resolutions*, issued by the Virginia House of Delegates in 1800.¹⁴⁷ In it, Madison fully explicates the Republican reading of the First Amendment, explaining that the common law of seditious libel was based on the British system of government, in which only the King was seen as a threat to liberty.

142. *Id.* at 44, 46–48, 67–68.

143. *Id.* at 43.

144. LEVY, *supra* note 9, at 301–04.

145. *Id.* at 310–11.

146. *Id.* at 311–15.

147. James Madison, *Report on the Virginia Resolutions*, in 1 THE FOUNDERS' CONSTITUTION 293 (Univ. of Chi. Press 2000) (Jan. 1800), http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. . . . This security of the freedom of the press requires that it be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.¹⁴⁸

He then went on to argue that press freedoms were intrinsically tied to “governments elective, limited, and responsible, in all their branches” because of the need for the press to “canvass[] the merits and measures of public men.”¹⁴⁹ In short, by 1800 Madison had developed and expounded a fully formed theory of free expression, tied to democratic government and popular sovereignty, which repudiated not only Blackstone but also the view that the crime of seditious libel only needed reform, not abandonment.

One final Republican thinker that is worthy of particular attention is St. George Tucker. Tucker was Professor of Law at the College of William and Mary in Virginia, and in 1803 he published an extremely influential American version of Blackstone along with an appendix in which he considered how the Constitution and Bill of Rights altered the English common law.¹⁵⁰ In it, Tucker built on Madison’s Report, arguing that Blackstone’s reading of freedom of the press was only the English understanding, and that in America, because of the principle of popular sovereignty, the press and the people must enjoy an absolute right to inquire about and criticize their agents.¹⁵¹ Regarding individual libel or slander, Tucker’s view was that, again, Congress lacked all authority, but recourse to state courts remained open.¹⁵²

148. *Id.*; see also STONE, *supra* note 133, at 45; LEVY, *supra* note 9, at 316–17.

149. *Report on the Virginia Resolutions*, *supra* note 147.

150. St. George Tucker, *Appendix to Volume First, Part Second*, in BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND THE LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., 1803).

151. *Id.* at 15, 17–20, 24, 28–29; St. George Tucker, *Appendix to Volume First, Part First*, in BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND THE LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA 297–98 (St. George Tucker ed., 1803).

152. *Id.* at 298–99.

It is thus obvious that by the end of the eighteenth century, one of the dominant political movements in the United States, which as of the election of 1800 was to take control of the entire elected federal government, had developed a capacious understanding of freedom of the press, rooted in strong views about democratic politics and popular sovereignty, which went far beyond the narrow vision of Blackstone, and even beyond the reforms proposed in the wake of the Zenger prosecution. The response of defenders of the Blackstonian position appears to be that this reading of the First Amendment was made up out of whole cloth in response to the Sedition Act and has no relevance to the understandings of 1789–1791.¹⁵³ This may, of course, be true, but there are reasons to be skeptical. First of all, it should be noted that the criticism of Republican theories of free speech in 1798 as partisan and opportunistic are equally applicable to the Federalists who defended the Sedition Act on Blackstonian grounds. Moreover, it is particularly dubious to accept the Federalists' interpretation of the First Amendment as gospel in light of their original opposition to the entire Bill of Rights. In truth, given the viciously partisan atmosphere of 1798–1800, it is hard to imagine anyone on either side adopting positions based on thoughtful contemplation, as opposed to hopes of partisan advantage.

It is also not true that there were simply no precedents for the broad, Republican theory of free speech before 1798. As early as 1794 Madison, in congressional debates over the Democratic-Republican societies, articulated a broad vision of free speech and freedom of the press, rooted in popular sovereignty, that provides a clear antecedent to his Report of 1800.¹⁵⁴ Furthermore, while St. George Tucker's version of Blackstone was not published until 1803, it was based on lecture notes that he began developing in 1790. Obviously, the references to the Sedition Act had to have been written after 1798, but there is no way to know if he had begun developing his theories at an earlier date. Most fundamentally, as David Rabban has pointed out, English Whig Radicals had developed theories of free expression based on popular sovereignty

153. *See, e.g.*, LEVY, *supra* note 9, at 321–22.

154. *Id.* at 293–94, 322.

long before the American Revolution,¹⁵⁵ and while these radicals had little influence in England, highly respected modern scholarship that Rabban cites demonstrates their profound influence on American Revolutionary thought.¹⁵⁶ Certainly it is true that in the early 1790s, long before the Sedition Act, the Democratic-Republican societies had linked free speech with popular sovereignty, laying the groundwork for the later Republican position.¹⁵⁷ At an intellectual level, Rabban points out that Blackstone's conservatism was rooted in his rejection of the Radical Whig theory of popular sovereignty in favor of parliamentary sovereignty.¹⁵⁸ Given that the Framers unequivocally rejected Blackstone's theory of sovereignty (even James Wilson condemned Blackstone),¹⁵⁹ it seems highly implausible that the Framers, creators of a Constitution whose first words were "We the People," intended to accept his narrow view of freedom of the press that was premised on that theory.¹⁶⁰

None of this is to say that there *was* in 1791, when the Bill of Rights was ratified, a well-accepted understanding that the Press Clause eliminated the law of seditious libel—among the wealth of issues faced by the nation's leaders in the early Republic, this was surely not one to which they would have given much thought. Indeed, it cannot be definitively proven that the Framers accepted that the First Amendment required reform of seditious libel, though the evidence here is more compelling. Benjamin Franklin probably came closest to stating the truth of the matter when he said in 1789 regarding the First Amendment that "few of us" had any "distinct Ideas of its Nature and Extent."¹⁶¹ Hamilton said much the same thing in the *Federalist Papers*.¹⁶² Levy probably says it best when he

155. Rabban, *supra* note 50, at 823–24 (giving a brief synopsis of existing scholarship on the influence of English Whig Radicals in America).

156. *Id.* at 801, 821–22, 827–28 (citing, *e.g.*, Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM & MARY Q. 334 (1982); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967)).

157. Rabban, *supra* note 50, at 845–46; *see also id.* at 821.

158. *Id.* at 826–27.

159. *See* STONE, *supra* note 133, at 42–43; Rabban, *supra* note 50, at 828–29.

160. *See* Rabban, *supra* note 50, at 829–30.

161. STONE, *supra* note 133, at 42 (quoting Benjamin Franklin, *An Account of the Supreme Court of Judicature in Pennsylvania, viz. The Court of the Press* (Sept. 12, 1789), in 10 *THE WRITINGS OF BENJAMIN FRANKLIN* 37 (Albert Henry Smyth ed., 1907)).

162. *See* Meyerson, *supra* note 38, at 320 & n.176 (quoting *THE FEDERALIST* NO. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

comments: “Whether the Framers themselves knew what they had in mind is uncertain. At the time of the drafting and ratification of the First Amendment, few among them clearly understood what they meant by the free speech-and-press clause, and we cannot know that those few represented a consensus.”¹⁶³ What is clear—indeed the only thing that is clear—is that any firm statements about the original intent of the First Amendment should be met with extreme skepticism given the paucity and contradictory nature of the historical evidence.

CONCLUSION

The question this essay sought to answer was whether Judge Posner was correct in flatly asserting that “the original understanding” of the Free Speech Clause of the First Amendment was to bar censorship—i.e., previous or prior restraints—and nothing else. A perusal of the historical record, as well as the scholarship, fairly clearly indicates that while there are no clear answers to exactly what the First Amendment meant to the Framers, some conclusions are possible. It is probably true that the Free Speech Clause was *not* limited to barring prior restraints because that would denude the clause of all meaning, but given the Framers’ lack of attention to speech, no smoking-gun evidence can be found either way. As for the Press Clause, again the better reading is probably that it was not so limited, but here even greater uncertainty reigns, especially because there were undoubtedly differences of opinion among the Framers. Given this paucity of certain answers, can any lessons be drawn here? I think that two themes do emerge.

The first concerns the difficulties of “translation”—to use Larry Lessig’s metaphor¹⁶⁴—of constitutional meaning from the Framing era to the present, given the massive technological and societal changes that separate us. Today, we generally describe all forms of expression as “speech,” and as such treat the Press Clause as largely subsumed by the Speech Clause. Given modern communications technology, that conflation makes sense; indeed, it seems unavoidable. In the Framing era, however, speech and the press were very different things, with different social and political roles. Furthermore, for the Framers it was the press that most mattered

163. LEVY, *supra* note 9, at 268.

164. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

and was the center of controversy; free speech barely entered their consciousness. The result is that looking back, we fail to see that freedom of speech and freedom of the press did not mean the same thing in 1791, and we thus cannot assume that something said about the press applies to speech, or vice-versa. More generally, it is necessary to be extremely cautious about how we understand casual statements from a very different era without giving careful thought to the social and technological context they reflect.

The second theme concerns the occasionally problematic nature of the entire originalist enterprise. There is no doubt that there are good, principled arguments in favor of interpreting the Constitution based on its original meaning. The difficulty, as this short essay has demonstrated, is that there is often no there there.¹⁶⁵ With many important constitutional provisions, including notably the Speech and Press Clauses of the First Amendment, the Framers adopted broad language stating abstract principles where there was broad consensus, but they thought little of the details of what those principles meant in practice. As Levy puts it, “the Constitution was purposely made to embody first ideas and sketchy notions.”¹⁶⁶ To make matters worse, when they were finally forced to consider specific questions, as happened during the Sedition Act controversy, the Framers turned out to have sharply different views regarding the proper answers, and even regarding basic political theory.¹⁶⁷ What, in that situation, is an originalist to do? Perhaps it is to concede that while original meaning is sometimes a useful guide, often it simply is not.

165. Cf. GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 289 (1937).

166. LEVY, *supra* note 9, at 348.

167. See STONE, *supra* note 133, at 43 (discussing the very different political theories of the Federalists and Republicans).

