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Injunctions for Defamation, Juries, and the Clarifying Lens of 1868

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INTRODUCTION

Over the past half century, constitutional protection for freedom of speech has broadened[1] and strengthened.[2] In

† Distinguished Research Professor and Associate Dean for Research, Scholarship, and Faculty Development, DePaul University College of Law. The author thanks Alfred Brophy, Andrew Gold, Mark Moller, and Spencer Waller for critical commentary on earlier drafts. My interest in injunctions for defamation began when I participated in the Brief Amici Curiae of Historians Alfred L. Brophy, Paul Finkelman, Kermit L. Hall, Michael I. Meyerson, and Stephen A. Siegel in Support of Petitioners, Tory v. Cochran, 544 U.S. 734 (2005). This article differs, to some extent, with the history discussed therein and adds a focus on the Reconstruction period. Any mistakes in this revised and augmented discussion are attributable to me.

1. Areas that used to be excluded from First Amendment protection have been included. Commercial speech and defamation are two examples. *Compare* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (protecting commercial speech), *with* Valentine v. Chrestensen, 316 U.S. 52 (1942) (stating commercial speech is outside First Amendment); *compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (supporting stringent protection of defamatory speech about public officials), *with* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (listing "the libelous" among unprotected types of speech).

2. *Compare, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (stating advocacy of crime protected by stringent "clear and present danger" test), *with* Dennis v. United States, 341 U.S. 494 (1951) (stating advocacy of crime protected by balancing formulation of danger test) *and* Whitney v. California, 274 U.S. 357 (1927) (stating advocacy of crime protected by "bad tendency" test). Consider also the increasing stringency of the application of the law protecting fighting words, political donations, and commercial speech. *See, e.g.*, FEC v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652, 2674-79 (2007) (Scalia, J.

only a few areas has it weakened.[3] This Article is about one of the areas of weakening protection: injunctions for defamation.

Defamation is one of the most prominent areas that generally receives far greater protection than it did a half century ago. Before *New York Times v. Sullivan*,[4] defamation was a strict liability tort.[5] Speech that was simply mistaken could be the predicate for civil liability.[6] Now there is a complex body of highly protective rules guarding defamatory speech.[7] On matters of public concern, there can be no liability without "actual malice" if a public figure or official is involved, and no liability without negligence if the remarks concern a private figure.[8] An award of presumed or punitive damages also requires

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concurring in part and concurring in the judgment) (urging strict scrutiny for campaign donations); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (urging strict scrutiny of commercial speech and applying intermediate scrutiny test stringently); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1002-08 (3d ed. 2006) (discussing Court's greater protection for fighting words). In general, on the strengthening of First Amendment protections, see Stephen A. Siegel, *The Death and Rebirth of the Clear and Present Danger Test*, *in* TRANSFORMATIONS IN AMERICAN LAW (Alfred Brophy & Daniel Hamilton eds.) (forthcoming 2008) (recounting the rise, fall, and transformation of the clear and present danger test); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 J. OF AM. LEGAL HIST. 355 (2006) (tracing strict scrutiny to First Amendment cases in the early 1960s).

3. Sexually oriented expression is the primary area. Obscenity has never been protected, but over the past-half century the conception of obscenity has broadened. *Compare* Miller v. California, 413 U.S. 15, 39 (1973) (stating obscenity is a prurient work that "lacks serious literary, artistic, political, or scientific value"), *with* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966) (stating obscenity is based on judicial determination that prurient speech is "utterly without redeeming social value"). In addition, non-obscene sexually oriented speech has become less protected as low-value expression. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

4. 376 U.S. 254 (1964).

5. *See also* DAN B. DOBBS, THE LAW OF TORTS 1120 (2000); 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:7 (2d. ed. 1999).

6. *See* DOBBS, *supra* note 5, at 1119-20; 1 SMOLLA, *supra* note 5, §§ 1:7-1:8.

7. *See* CHEMERINSKY, *supra* note 2, at 1045-55; DOBBS, *supra* note 5, at 1121, 1169-72; SMOLLA, *supra* note 5, *passim*.

8. *See* CHEMERINSKY, *supra* note 2, at 1045-55; DOBBS, *supra* note 5, at 1121, 1169-72; SMOLLA, *supra* note 5, §§ 1:17-1:20. Whether the current law for remarks about private figures and matters not of public concern differs from the traditional common law is unclear. *See* CHEMERINSKY, *supra* note 2, at 1054-55; DOBBS, *supra* note 5, at 1121; SMOLLA, *supra* note 5, § 1:20.

"actual malice."[9] In addition, judges are required to review jury determinations *de novo* and make independent determinations of whether the speech is defamatory and made with the requisite state of mind.[10]

Bucking this trend is the fact that enjoining defamation has more support today than fifty years ago. A half century ago enjoining defamatory speech was impermissible. As stated by a leading treatise on defamation: "One of the unwavering precepts of the American law of remedies has long been the axiom that equity will not enjoin a libel."[11] Now, the rule is less certain. Over the past thirty years, several state courts of last resort have upheld injunctions restraining defamatory speech.[12] So have federal appellate courts.[13] In 2005, the Supreme Court granted certiorari on the issue but issued an inconclusive opinion because the plaintiff died before an opinion could issue.[14] During oral argument, however, several Justices expressed sympathy for the plaintiff's plight and the need, if not the constitutionality, of enjoining speakers from repeating

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9. CHEMERINSKY, *supra* note 2, at 1053; DOBBS, *supra* note 5, at 1121; SMOLLA, *supra* note 5, § 1:19.

10. *See* CHEMERINSKY, *supra* note 2, at 1047; 2 SMOLLA, *supra* note 5, §§ 12:83-12:86.

11. 2 SMOLLA, *supra* note 5, § 9:85. *See also* DOBBS, *supra* note 5, at 1193-94; 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, 308-11, 324-330 (2001); Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2D 715, 715-16 (1956).

12. *See, e.g.*, Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339 (Cal. 2007); Retail Credit Co. v. Russell, 218 S.E.2d 54 (Ga. 1975); Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1 (Minn. 1984); O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753, 755 (Ohio 1975). *See also* Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 559 N.W.2d 740, 747 (Neb. 1997) (dicta) (indicating approval of post-trial injunction of defamation). Several intermediate state courts have approved injunctions for defamation. *See, e.g.*, Barlow v. Sipes, 744 N.E.2d 1, 9-10 (Ind. Ct. App. 2001); Bingham v. Struve, 591 N.Y.S.2d 156, 158 (N.Y. App. Div. 1992); Dickson v. Dickson, 529 P.2d 476, 478 (Wash. Ct. App. 1975).

13. *See, e.g.*, San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1237 (9th Cir. 1997); Brown v. Petrolite Corp., 965 F.2d 38, 50-51 (5th Cir. 1992); Lothschuetz v. Carpenter, 898 F.2d 1200, 1208-09 (6th Cir. 1990). *See also* Kramer v. Thompson, 947 F.2d 666, 677 (3d Cir. 1991) (criticizing the no-injunction rule but applying it in a diversity case because that was required by state law).

14. Tory v. Cochran, 544 U.S. 734, 736-39 (2005).

defamatory statements.[15]

This Article seeks to revise our understanding of the traditional rule's history and to discuss the implications of that revision for the current debate on the no-injunction rule's continued propriety.[16] The historiography of the rule traces back to Roscoe Pound's article *Equitable Relief Against Defamation and Injuries to Personality*.[17] Pound was the seminal critic of the traditional rule.[18] He initiated its academic criticism in 1916. He has been followed by many scholars,[19] and, in the past thirty years, by a growing

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15. Transcript of Oral Argument at 14-26, Tory v. Cochran, 544 U.S. 734 (2005) (No. 03-1488), 2005 WL 752743 (various Justices expressing sympathy toward plaintiff).

16. Although I have somewhat different conclusions and write to establish different points, my research is substantially indebted to Professor Michael I. Meyerson's earlier consideration of the topic, *supra* note 11, at 308-13, 324-33.

17. 29 HARV. L. REV. 640 (1916).

18. Pound's article was anticipated by A.C. Freeman, *Enjoining the Publication of Libels*, 4 CENT. L.J. 171 (1877). Freeman's short piece did not have nearly the same influence as Pound's far more elaborate consideration.

The article is signed "A.C.F." I attribute it to Abraham Clark Freeman because "A.C. Freeman, Sacramento, Cal." is listed as a contributing editor to the volume. *Id.* at i. The biographical material, about Abraham Clark Freeman, stating that he was living in Sacramento at the time, comes from Abraham Clark Freeman, http://freepages.genealogy.rootsweb.ancestry.com/~npmelton/sfbfre.htm (last visited April 19, 2008).

19. *See, e.g.*, William O. Bertelsman, *Injunctions Against Speech and Writing: A Re-Evaluation*, 59 KY. L.J. 319 (1971); Estella Gold, *Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?*, 48 BROOK. L. REV. 231 (1982); Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115 (1923); Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 147-66 (1964); William F. Walsh, *Equitable Protection of Personal Rights*, 7 N.Y.U. L.Q. REV. 878 (1930); Note, *Developments in the Law–Defamation*, 69 HARV. L. REV. 875, 943-45 (1956).

The scholarly attack on the no-injunction rule is related to discomfiture with the stringency of the traditional ban on prior restraints, which also has been under attack. *See, e.g.*, John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984). *But see* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981) (supporting the doctrine); L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990) (supporting the doctrine). Although it is part of the law of prior restraints, the rule against enjoining defamation is sufficiently separate to merit independent treatment.

number of courts.[20]

In Pound's view, the rule was "by no means settled by authority" at the nation's founding.[21] I will argue that it was. Also in Pound's view, the rule was founded on such anachronistic concerns as the limitation of equity's jurisdiction to the protection of property rights.[22] I will argue that it was founded on considerations that still should influence us: distrust of judges and respect for the role of juries in free speech controversies.[23]

In addition, I seek to establish a point with which Pound and subsequent scholars of the issue had no concern. Whatever the situation at the nation's founding in 1789, the rule that enjoining defamatory speech violated constitutional norms of free speech and trial by jury was clearly established by 1868 when the Fourteenth Amendment was adopted.

Pound was not an originalist. He was among leaders of the Progressive movement who believed in a living constitution.[24] Indeed, Pound began his seminal article criticizing the traditional rule by quoting Oliver Wendell Holmes's acerbic remark that

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20. *See supra* text accompanying notes 12-15.

21. Pound, *supra* note 17, at 645 (saying that as late as 1818 the rule was not settled).

22. *See id.* at 642-44. Pound discusses other rationales but emphasizes this one.

23. Pound acknowledges but downplays these considerations, *see id.* at 648-57, saying "most of the cases . . . proceed either upon the proposition that equity will not protect interests of personality or simply on authority." *But see id.*, at 656-57 (admitting that the "clear" common law policy favoring jury trials is the most "serious difficulty in the way of injunctions" for defamation).

24. *See id.* at 654 (saying "we cannot safely rely on history to give us the proper construction" of the First Amendment with regard to the no-injunction rule). Pound's objection to originalism followed from his sociological jurisprudence. *See* MARK A. GRABER, TRANSFORMING FREE SPEECH 71-74 (1991) (discussing Pound); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 220 (1997) (discussing Pound); *cf.* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 954-55 (1919). Chafee was a close follower of Pound and taught a course that used Pound's materials on injunctions for defamation. *See* ZECHARIAH CHAFEE, JR. & ROSCOE POUND, CASES ON EQUITABLE RELIEF AGAINST TORTS INCLUDING DEFAMATION AND INJURIES TO PERSONALITY (1933); Jerold S. Auerbach, *The Patrician as Libertarian: Zechariah Chafee, Jr. and Freedom of Speech*, 42 NEW ENG. Q. 511, 514, 516 (1969) (discussing Pound and Chafee).

> [i]t is revolting to have no better reason for a rule of law than that it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.[25]

That may be. But to an originalist, that a rule was in place in 1789 or 1868 is critical.[26]

Or so, to an originalist, it should be. I say "or so it

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25. Pound, *supra* note 17, at 640 (quoting O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

26. Originalism is a constitutional jurisprudence with many variants, such as "original intent," "original understanding," "original meaning," and "original objective-public-meaning textualism"; with some form of "original public meaning" originalism being the currently most-favored. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89-117 (2004); JACK N. RAKOVE, ORIGINAL MEANINGS 7-22 (1996); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 442-454 (2007); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1811-1816 (1996); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1124-48 (2003). The evidence I present in this paper should be convincing under any approach to originalism because of the extent to which "original expected applications [is] very strong evidence of original meaning, even (or perhaps especially) when the text points to abstract principles or standards." Balkin, *supra*, at 449. *See also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 265-69 (2005) (discussing extent to which contemporaneous or subsequent precedent properly determines abstract constitutional provisions).

Within intramural debates among originalists, certain terms are frequently taken as code for favoring one strand over others. A focus on the Framers implies concern for "original intent"; a focus on the ratifiers implies a concern for "original understanding"; a focus on dictionaries and surrounding legal material implies a concern for "original meaning." Yet all these various sources may be taken as evidence for other flavors of originalism. What certain terms meant to the Framers is evidence of what it meant to the ratifiers, and is also evidence of its public meaning. Accordingly, when this paper mentions an interest in the Framers, ratifiers, founding generation, expected applications, and so on, I do not mean to embrace a particular branch of the originalist school. I am giving evidence that may be used by them all. Particularly with regard to the role played by the expected applications: in certain versions of originalism, the expected applications of constitutional text by the framing and ratifying generation may not be definitive of constitutional meaning. But if in a particular instance constitutional meaning is said to depart from the expected application, that needs to be explained. Especially when the expected application harmonizes with the chosen text and coincides with principles which were thought then, and still thought today, to underlie the text. I think there is an irrebutable case that the expected application is constitutionally required—at least on originalist grounds.

should be" not as a taunt to those originalists who ignore the historic record when it presents them with outcomes with which they disagree on policy grounds.[27] Rather, I say this because contemporary originalists seem not to appreciate fully the implications of their beliefs when it comes to the nation's second founding in the aftermath of the Civil War. In determining the law of the Fourteenth Amendment, originalists focus on the intent of the Amendment's Framers and ratifiers and on the public meaning of the text in 1868 when discussing the meaning of such Fourteenth Amendment norms as "privileges and immunities," "due process," and "equal protection."[28]

At the same time, originalists generally ignore the understanding of the generation that framed and ratified the Fourteenth Amendment when it comes to such Fourteenth Amendment restrictions on the states as free speech, religious liberty and establishment, search and seizure—the entire incorporated Bill of Rights.[29] Originalists are concerned with whether the Fourteenth Amendment was originally understood as incorporating some or all of the Bill of Rights as limitations on the states.[30] Yet, when it comes to discussing the substantive content of those rights, the focus remains mired in 1789.[31]

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27. *See infra* text accompanying note 396 (discussing the faithfulness or "faint-heartedness" of some originalists).

28. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed., Liberty Fund, Inc. 1997) (1977); EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION (2003).

29. Some originalists have objected that the Fourteenth Amendment was not intended to incorporate the Bill of Rights, but the weight of current historiography is in favor of the view that it did. *Compare* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989), *with* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 193-214 (1998). Given that courts do apply the Bill of Rights through the Fourteenth Amendment, the question for originalists is whether the views of the Founding or Reconstruction era drafters and ratifiers apply.

30. *See, e.g.*, BERGER, *supra* note 29.

31. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49-51 (2004) (Thomas, J., concurring) (discussing the Establishment Clause); Minnesota v. Carter, 525 U.S. 83, 92-99 (1998) (Scalia, J., concurring) (discussing the Fourth Amendment); McIntyre v. Ohio Elections Comm'n., 514 U.S. 334, 359-69 (1995) (Thomas, J., concurring) (discussing the Free Speech Clause); Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. OF L. &

This seems an error.[32] In various areas, American constitutionalism evolved between 1789 and 1868.[33] At the least, ambiguities with regard to the content of some liberties were clarified over the seventy years that elapsed between the nation's Founding and its Reconstruction. With regard to the rule against injunctions for defamatory speech, the evidence is fuller and clearer in 1868 than it was when the Bill of Rights was initially adopted. What may have been ambiguous in 1791 was clarified by 1868. There was a line of growth consistent with the sentiments of the Founding era that defined it more clearly.

This Article contributes to the contemporary practice of originalism by illustrating the importance of shifting our focus from the meaning of the Bill of Rights in 1789 to its meaning in 1868—at least when discussing the limitations imposed by the Fourteenth Amendment. In writing the history of the rule against enjoining defamatory speech, Roscoe Pound and his followers may have been unconcerned

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POL'Y 349 (2007) (discussing Sixth Amendment); Andrew S. Gold, *Regulatory Takings and Original Intent*, 49 AM. U. L. REV. 181, 226-27 (1999) (discussing Fifth Amendment's Takings Clause). *But see McIntyre*, 514 U.S. at 372-73 (Scalia, J., dissenting) (mentioning both 1791 and 1868); AMAR, *supra* note 29, at 231-83 (focusing on Reconstruction era); Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1532-34, 1537-39 (2008) (focusing on the meaning of fundamental rights in 1868); KURT T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (focusing on developments between 1791 and 1868); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990) (focusing on both periods but reaching opposite conclusion from Lash).

32. I am unaware of any discussion by an originalist asserting, as a matter of theory, that the meaning of the Bill of Rights in 1789 should be preferred to its meaning in 1868 when the subject is the limitations the Fourteenth Amendment imposes on the states. In addition, I am unable to conceive of a persuasive originalist argument asserting the view that, with regard to the states, the meaning of the Bill in 1789 is to be preferred to its meaning in 1868. In discussions, some originalists have suggested the importance of "consistency" between the rights held against the national and state governments. The desire for consistency, however, is not justified on originalist grounds. In addition, consistency may be brought about by imposing the meaning of the Bill in 1868 on the national government, rather than vice-versa. *See* AMAR, *supra* note 29, at 243-44 (arguing that the Fourteenth Amendment, through "a doctrinal 'feedback effect'" affects the First Amendment).

33. *See, e.g.*, AMAR, *supra* note 29, at 216-17, 220-23 (discussing the Second Amendment); Lash, *supra* note 31 (discussing the Establishment Clause). *But see* Lietzau, *supra* note 31 (arguing Establishment Clause principles did not change).

with this. With contemporary originalism's growth in power and prestige, it should be of increasing importance to American constitutional debate.

Part I discusses civil and criminal liability for defamation and the history of prior restraints in both law and equity. It concludes that the weight of historical evidence strongly supports the conclusion that the Framers and ratifiers of the First Amendment would have expected that equity had no power to enjoin defamatory speech. Central to their expectation was their insistence that juries always mediate between speakers and government sanctions of their speech. Acknowledging that the conclusion of Part I is an informed historical judgment, Part II explores the same topic in the Reconstruction era to show that for the generation that framed and ratified the Fourteenth Amendment, the rule that equity had no power to enjoin defamation was established beyond a reasonable doubt. The central reason for continued adherence to the rule was the importance of jury participation in First Amendment controversies. As compared to the Revolutionary era, Reconstruction-era judges may have been trusted more and juries less. Still, the judge-jury relation was constructed to give speakers a "double protection."[34] Jury verdicts were still considered necessary for any government suppression of speech.

For originalists, the implication of Parts I and II for the current debate about the continued vitality of the no injunction for defamation rule is clear: the no-injunction rule must be retained.

Recognizing that many jurists are not originalists, Part III explores the implications for non-originalists of the jury-centered system of free speech adopted by the Founding- and Reconstruction-era constitution makers. If non-originalists conclude that it is proper to depart from the traditional no-injunction rule,[35] Part III argues for two jury-centered limitations on the recession: that no injunction issue without a jury determination that the speech was

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34. *See infra* text accompanying notes 267, 291, 392 (discussing protection from the judge and jury).

35. The paper takes no position on whether non-originalists should support any retreat from the no-injunction rule. While suggestive on the larger issue, the discussion here is directed at establishing important limitations should there be any recession.

defamatory; and that no injunction be enforced without a jury determination that the injunction was violated by speech that continues to be defamatory. By insisting on the inclusion of a jury in both the liability and enforcement proceedings, the insight of the Framers on the importance of a popular check on government regulation of speech may be retained.

In this way, the Article contributes to the substantive debate on the future of the no injunction for defamation rule while it illustrates the importance of focusing on 1868 when interpreting the restrictions the Fourteenth Amendment imposes on the states.

I. INJUNCTIONS FOR DEFAMATION IN THE FOUNDING ERA

A. *Context—Other Sanctions for Defamation.*

At the Founding, certain aspects of the law of defamation and their implications for the meaning of the First Amendment were in flux and highly controversial. Others were not. The controversial and uncontroversial areas fall into a pattern that is useful to our discussion of injunctions for defamation if we separate consideration of the government's ability to redress defamation through a system of prior restraints from its ability to impose subsequent punishment. It will also be helpful to discuss the law of subsequent punishment first, as that will lay a foundation for our focus on the Founding generation's understanding of equity's ability to enjoin defamatory remarks.

1. *Subsequent Punishment.* At the founding, as well as today, society's ability to deter and punish defamation was divided into the law of civil liability and the law of criminal liability.

a. *Civil Liability.* In the late eighteenth century, the common law system of civil remedies for defamation was not a matter of political, legal, or constitutional controversy. According to Blackstone, legal protection of reputation was an important aspect of the right to personal security.[36] Defamation encompassed any spoken or written

36. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES *119 (Thomas Cooley ed., 3d

communication published to a third party that "set [an individual] in an odious or ridiculous light, and thereby diminish[ed] his reputation," tended to "exclude him from society," "impair[ed] or hurt his trade or livelihood," or impeached his title to property.[37] Truth was an affirmative defense.[38] But if the defendant could not prove his remark to be true or privileged,[39] liability ensued. At common law, defamation was a strict liability tort.[40]

One facet of a civil suit for defamation was that it was impossible for a defendant to be found liable without a jury verdict against him.[41] In the eighteenth century, the necessity of a jury verdict was not unique to defamation suits; it was true for civil actions generally.[42] Eighteenth century trial judges, in both England and America, had the power to state their view of the facts and the law of the case to a jury. They could ask for a special verdict. If trial or appellate judges thought a jury's verdict was not

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Am. ed. 1884) (1765).

37. *Id.* at *123-126.

38. *See id.* at *125-26.

39. *See id.* at *125. Blackstone mentions words spoken as friendly advice or as part of a legal proceeding as examples of privileged communication.

40. For an overview of common law defamation, see DOBBS, *supra* note 5, at 1119-20.

41. For the remarks in this paragraph, see 3 BLACKSTONE, *supra* note 36, at *286-97, *374-78; JAMES OLDHAM, TRIAL BY JURY, THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 9-13 (2006); William Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 559-66 (1950); Leo Carlin, *Judgment* Non Obstante Veredicto, 51 W. VA. L.Q. 14, 14-19 (1948); Edith Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299-317 (1966); Renée Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth Century America*, 71 NOTRE DAME L. REV. 505, 508-22 (1996); Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 680-89 (1918); Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 706-07, 709-15, 722-25, 728-30, 732-33, 735, 737-40, 742-46 (2004). My comment assumes the defendant had pleaded his case properly, see Carlin, *supra*, at 15-16, and that he had not elected to demur to the evidence. *See infra* text accompanying note 44. Edith Henderson's views on the binding quality of eighteenth century directed verdicts have been supplanted by James Oldham's research. *Compare* Henderson, *supra*, at 302, *with* OLDHAM, *supra*, at 12-13 *and* Thomas, *supra*, at 728-29 (citing and supporting Oldham). Austin Scott's views on the judge's inability to compel a plaintiff's non-suit have been supplanted also. *Compare* Scott, *supra*, at 687, *with* OLDHAM, *supra*, at 10-11 *and* Henderson, *supra*, at 300.

42. It became unique over the course of the nineteenth century. *See infra* text accompanying notes 260-62.

sufficiently supported by the evidence, they had the power to grant a new trial. They had the power to non-suit a plaintiff. Judges had great influence and frequently got what they wanted from juries. But they had no power to compel a verdict against a defendant. Neither did they have the power to take the case from a jury and enter a verdict.[43] The only eighteenth century techniques by which a defendant might be found liable without a jury verdict involved demurring to the pleadings or the evidence. However, those procedures were elective with the defendant.[44]

Eighteenth century judge-jury relations in civil trials indicate "[a] conception of the jury as a bulwark against the unjust use of governmental power... [a] distrust of 'legal experts' and a faith in the ability of the common people."[45] Civil juries functioned as an important "check on the manipulation of the law as an instrument of royal despotism."[46]

b. *Criminal Liability.* In the late eighteenth century, defamation was a crime as well as a tort.[47] Civil

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43. The modern technique of jury control, primarily the directed verdict and entering a judgment N.O.V., did not develop until the mid-nineteenth century. *See, e.g.*, Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, WIS. L. REV. 237, 239 (1989); *infra* text accompanying note 260. Summary judgment is even more recent. *See infra* note 260 (discussing summary judgment).

44. *See, e.g.*, Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 890 (2002); Thomas, *supra* note 41, at 709-15. Demurring to the evidence was rarely done. Thomas, *supra* note 41, at 709-10. Juries might bring in a special verdict limited to the facts of the case, but they could not be compelled to do so. *See* Scott, *supra* note 41, at 684; Thomas, *supra* note 41, at 733. To the extent juries elected to state the facts and leave application of the law to the judge, a defendant—to that limited extent—might be found liable without a general verdict against him. The salient point is that a judge could not compel such a limited verdict.

45. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964).

46. *Id.* at 171.

47. *See* 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 333-34, 336 (1925). Criminal prosecutions persisted in America throughout the nineteenth century. *See, e.g.*, State v. McKee, 46 A. 409 (Conn. 1900) (upholding prosecution of a newspaper "principally made up of criminal news"); *In re* Banks, 42 P. 693 (Kan. 1895) (upholding prosecution of newspaper "devoted largely to the publication of scandals"); State v. Boogher, 3 Mo. App. 442 (1877) (upholding criminal libel of a business corporation). Defamation still may be made a crime

liability redressed defamation's private injury while criminal sanctions redressed its public harm.[48] Criminal prosecution was appropriate, Blackstone said, because of defamation's "direct tendency" to cause breaches of the king's peace and unsettle the body politic.[49] The famous and highly politicized crime of "seditious libel" was a branch of the criminal law of defamation and shared its substantive norms and procedures.[50] Seditious libel redressed libel's ability "to breed in the people a dislike of their governors, and incline them to faction and sedition"[51] when magistrates or the system of government were held up to "public hatred, contempt, and ridicule."[52]

In one important regard criminal defamation was narrower than civil defamation: criminal defamation applied only to written communication and not to oral remarks.[53] Yet within the field of written communication, it

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today, although its constitutional contours are different. The Supreme Court upheld a criminal libel statute in Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel). Recent cases, all in the lower courts, have tended to void criminal defamation laws as vague and overbroad. 1 SMOLLA, *supra* note 5, at § 4:52. But this leaves open the possibility of a properly-drawn statute being upheld.

48. For the remarks in the following paragraphs, see 4 BLACKSTONE, *supra* note 36, at *150-51; 8 HOLDSWORTH, *supra* note 47, at 333-46; LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 4-15 (1985); Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985); Henderson, *supra* note 41, at 328-35.

49. 4 BLACKSTONE, *supra* note 36, at *150. For this reason, at common law criminal defamation encompassed obscenity and blasphemy. *See* 8 HOLDSWORTH, *supra* note 47, at 333, 337; LEVY, *supra* note 48, at 7. Criminal defamation's application to obscenity and blasphemy is beyond the scope of this Article.

50. Although I situate seditious libel as a branch of criminal defamation, I do not doubt that the branch substantially shaped the entire tree. Still, it is important to note that in theory, and occasionally in practice, criminal prosecutions could be brought for libeling a private individual. *See, e.g.*, State v. Boogher, 3 Mo. App. 442 (1877) (exemplifying an American prosecution for libeling a business corporation); Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984 1003-11 (1956) (discussing criminal defamation prosecutions resulting from "private quarrels" and "gossip . . . and general nastiness").

51. LEVY, *supra* note 48, at 8 (quoting WILLIAM HAWKINS, PLEAS OF THE CROWN (1716)).

52. 4 BLACKSTONE, *supra* note 36, at *150.

53. 8 HOLDSWORTH, *supra* note 47, at 337. In other words, criminal defamation applied to libel and not to slander. Hence the name of the crime's most noted branch was "seditious libel" rather than seditious defamation. Written communication was defined broadly to include "printing, writing, signs,

cut a broader swath.[54] Criminal libel was more encompassing than civil libel because criminal liability attached to libelous remarks that were about deceased people[55] and to remarks that were communicated only to the defamed person.[56] In addition, criminal liability attached to remarks that were critical of the government.[57] Finally, and most controversially, truth was not a defense to a charge of criminal libel.[58] Indeed, it was a maxim, if not an actual doctrine, of criminal libel prosecutions that "the greater the truth, the greater the libel."[59]

Beyond the important substantive differences with civil libel, criminal libel was prosecuted through procedures that were unique among criminal prosecutions. The most salient

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or pictures." 4 BLACKSTONE, *supra* note 36, at *150. It included manuscripts as well as printed matter. *See* Hamburger, *supra* note 48, at 665, 691-92, 697-98, 726, 734.

54. For comparisons of civil and criminal defamation, see 8 HOLDSWORTH, *supra* note 47, at 339, 347; R. C. Donnelly, *History of Defamation*, WIS. L. REV. 99, 115, 120 (1949); Leflar, *supra* note 50, at 1011-23; Clive Walker, *Reforming the Crime of Libel*, 50 N.Y.L. SCH. L. REV. 169, 173-76 (2005).

55. *See* De Libellis Famosis, (1606) 77 Eng. Rep. 250, 251 (Star Chamber); 8 HOLDSWORTH, *supra* note 47, at 339. Civil libel protected only the living. *Id.* at 347; Leflar, *supra* note 50, at 1012, 1014.

56. 4 BLACKSTONE, *supra* note 36, at *151. Civil libel required communication to a third party. *See* Leflar, *supra* note 50, at 1011-12; *supra* text accompanying note 37.

57. 8 HOLDSWORTH, *supra* note 47, at 339-41; LEVY, *supra* note 48, at 8-10; Hamburger, *supra* note 48, at 691, 695-97, 700-01, 734-35 (dating this development to 1704). There was an overlap between criminal libel of individuals and the government when the remarks concerned government officials. However, criminal libel went further and punished remarks about the government itself. For example, a remark that monarchy was not a good system of government could be criminal, but not civil, libel. *See* Hamburger, *supra* note 48, at 694-96.

58. *See* 4 BLACKSTONE, *supra* note 36, at *150-51; 8 HOLDSWORTH, *supra* note 47, at 339; LEVY, *supra* note 48, at 12; Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 43-47 (1932).

59. Walker, *supra* note 54, at 171 (attributing the remark to Lord Mansfield). *See also* 1 WILLIAM HAWKINS, PLEAS OF THE CROWN 194 (P.R. Glazebrook ed., Prof'l Books Ltd. 1973) (1716) ("[I]t is far from being a Justification of a Libel, that the Contents thereof are rrue [sic] . . . since the greater Appearance there is of Truth in any malicious Invective, so much the more provoking it is."); LEVY, *supra* note 48, at 12. Blackstone maintained that truth might mitigate punishment. 4 BLACKSTONE, *supra* note 36, at *150. It was undoubted doctrine, however, that libeling high ranking officials deserved greater punishment than libeling other people. *See* De Libellis Famosis, (1606) 77 Eng. Rep. 250, 251 (Star Chamber).

procedural difference was that the jury in criminal libel prosecutions did not bring in a general verdict. In all other criminal trials, although the jury might elect to bring in a special verdict limited to declaring the facts of the case, it had the uncontrollable right to declare generally that the defendant was either guilty or not guilty.[60] Juries had the power "to decide the law" as well as the facts in criminal prosecutions.[61] Their uncontrollable power to reach a general verdict of acquittal was seen as "the strongest safeguard available" for civil liberties.[62]

In contrast, in criminal libel trials the jury's role was confined to determining only two factual matters: did the defendant publish the writing, and, if the writing contained an innuendo, did the innuendo refer to the plaintiff.[63] Judges determined if the writing was defamatory.[64] In effect, juries in criminal libel prosecutions were limited to bringing in "a special verdict finding certain facts."[65] There is no disputing Leonard Levy's conclusion that "[a]t the trial of a seditious libel, the defendant was not... judged by his peers in any meaningful way."[66]

Moreover, the fact that criminal libel was a misdemeanor further diminished the role of Anglo-American juries in libel prosecutions. Although defendants might be pleased that felony penalties did not apply,[67] criminal libel's status as a misdemeanor also meant that

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60. 4 BLACKSTONE, *supra* note 36, at *361-62. *See also*, Henderson, *supra* note 41, at 329-30.

61. Henderson, *supra* note 41, at 328. *See also* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 582-88, 590-92 (1939).

62. Henderson, *supra* note 41, at 328 (speaking of free speech). A jury verdict of guilty might be "mercifully set aside" but a verdict of not guilty concluded the matter. 4 BLACKSTONE, *supra* note 36, at *361.

63. *See* Henderson, *supra* note 41, at 329. *See also*, 8 HOLDSWORTH, *supra* note 47, at 342-45; LEVY, *supra* note 48, at 11.

64. *See* LEVY, *supra* note 48, at 11; Henderson, *supra* note 41, at 329.

65. Henderson, *supra* note 41, at 329. *See also* 8 HOLDSWORTH, *supra* note 47, at 345 (saying criminal libel verdict "amounted merely to a special verdict that a certain writing with a certain meaning had been published by the accused").

66. LEVY, *supra* note 48, at 11.

67. The typical punishment for felony was death. As a misdemeanor, the punishment for criminal libel was fine and imprisonment. Such punishments as the pillory and mutilation had been abandoned by the eighteenth century. *See* 4 BLACKSTONE, *supra* note 36, at *17-19, *377-78.

another fundamental civil liberty protection was circumventable. Indictment by a grand jury was required for felony prosecutions. For misdemeanors, information by the Attorney General was a sufficient charging instrument.[68] Thus, in criminal libel prosecutions, the ability of juries—whether grand or petit—to stand between defendants and the government was substantially diminished.

Diminished, however, was not the same as being removed. Although juries in criminal libel trials were instructed to find only the limited facts of publication and innuendo, their formal verdict was in terms of guilty or not guilty.[69] Not often, but in a number of celebrated instances, juries defied the judges' instructions and reported verdicts of "not guilty" when the facts of publishing and innuendo were clearly against the defendant. The *Trial of the Seven Bishops* in England, and of John Peter Zenger in the American colonies, are two of most famous instances of jury nullification in Anglo-American law.[70] They were not the only defamation-related instances that were well-known at the Founding.[71]

Still, the possibility of nullification by courageous juries was insufficient to recommend the common law of criminal defamation to eighteenth century English civil libertarians and American patriots. At the Founding, seditious libel was very controversial and on the cusp of substantial reform.[72]

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68. *See* LEVY, *supra* note 48, at 11.

69. *See* Henderson, *supra* note 41, at 329-30. *See also* Stanley Nider Katz, *Introduction* to JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 15-16, 21-23 (Stanley Nider Katz ed., Harvard Univ. Press 1963) (1736). Even if a jury brought in a verdict of "guilty of printing and publishing," it was defective and did not convict the defendant. *Id.* at 101.

70. *See* Katz, *supra* note 69, (discussing the Zenger trial); LEVY, *supra* note 48, at 37-44 (same); Hamburger, *supra* note 48, at 699, 708-13 (discussing the Seven Bishops' case); Henderson, *supra* note 41, at 330-31 (same). *See also* 10 HOLDSWORTH, *supra* note 47, at 674-76 (discussing other cases). The *Seven Bishops'* case was not truly a case of jury nullification because of the split of opinion among the four judges who presided at the trial. *See* Hamburger, *supra* note 48, at 710-14. But it was a well-known example of the protective role juries could play in defiance of judicial views and the desires of the government.

71. *See* Henderson, *supra* note 41, at 331-35 (discussing other cases, including the *Wilkes*, *Almon*, and *Miller* cases from the 1770s, and the *Shipley* case from the 1780s).

72. *See* LEVY, *supra* note 48, at 144-349 (recounting the Founding-era controversy and reform movements).

In the 1780s, although many lawyers and judges on both sides of the Atlantic still supported the traditional common law of seditious libel,[73] some libertarian thinkers already had concluded that the whole concept of libeling the government violated the freedom of speech that was necessary for the proper functioning of politics in a constitutional monarchy or republic.[74] More were to reach this conclusion shortly after the adoption of the First Amendment in reaction to the English suppression of radicals sympathetic to the French Revolution, and the Federalist Party's enactment and partisan enforcement of the Sedition Act of 1798.[75]

Located somewhere between the extremes of complete acceptance and complete rejection of the common law of criminal defamation were many in the Founding generation who accepted the concept of seditious libel but thought three of its facets required reform.[76] Only one of their suggested reforms was substantive. At trial, they wanted defendants to be allowed to submit evidence of the truth of their remarks. The reformers were split as to the effect of establishing the truth of the supposedly defamatory

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73. *See* 4 BLACKSTONE, *supra* note 36, at *150-52; 10 HOLDSWORTH, *supra* note 47, at 676-80 (discussing Chief Justice Mansfield and other judges); LEVY, *supra* note 48, at 65-71, 147-48, 158 (discussing Massachusetts Chief Justice Thomas Hutchinson, who was later the colony's Governor, the English pamphleteer "Candor," who was a Gray's Inn lawyer, and Parliament's implicit approval of Chief Justice Mansfield's views); David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 169-71 (2001) (discussing Federalist arguments during the debates on the Sedition Act).

74. *See* LEVY, *supra* note 48, at 162, 208-09 (discussing an "unnamed lawyer," in 1771, and Junius Wilkes, in 1782, as the first who rejected entirely the concept of libeling the government); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 821-36 (1985) (discussing more evidence for a broad freedom of speech at the Founding).

75. Ch. 74, 1 Stat. 596 (1798) (expired 1801). *See, e.g.*, LEVY, *supra* note 48, at 282-349 (discussing James Madison, St. George Tucker, George Hay, Tunis Wortman, and John Thompson among others); Rabban, *supra* note 74, at 834-56. Not only its enforcement, but the Sedition Act itself was partisan, as evidenced by the fact that it did not cover libels against the Vice-President, who was a Republican, and was set to expire in 1801 when the enacting Congress adjourned *sine die*. *See* Sedition Act §§ 2, 4.

76. *See* LEVY, *supra* note 48, at 171. *See also* 10 HOLDSWORTH, *supra* note 47, at 680-89 (discussing the English reformers Lord Camden, Erskine, Burke, and Wedderburn).

remarks. Some said truth should be a complete defense; others thought a complete defense should require both truth and publication with good motives for justifiable ends; others thought defendants should be allowed to submit evidence of truth but leave it to the jury to determine its legal import.[77]

The other reforms were procedural and focused on augmenting the role of the jury: banning the initiation of prosecutions through information, which would require formal indictment by a Grand Jury; and allowing the trial jury to determine the facts and the law of the case as in all other criminal prosecutions.

For decades, historians have argued about the implication of these debates for the original meaning of the First Amendment.[78] Certainly, the meaning of free speech was in flux during the Founding era. In the late eighteenth century, the Anglo-American world was emerging from a conception of government in which the rulers were considered "the superior of the subject" and establishing a conception in which "the ruler is regarded as the agent and servant, and the subject as the... master."[79] The eighteenth century law of criminal defamation was a product of the older view of the relation of government and citizen. Under that view, affairs of state "are no Theames, or subjects fit for vulgar persons, or common meetings."[80] With the new conception "gathering strength during the later part of the eighteenth century,"[81] the law of seditious libel "gradually came to be wholly out of touch with current public opinion."[82] By 1792, the year after the adoption of the First Amendment, the reform position gained dominance.

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77. *See, e.g.*, Sedition Act § 3 (stating defendant may submit evidence of truth); LEVY, *supra* note 48, at 199-200 (Judge Cushing suggesting and John Adams agreeing that free speech requires that truth and publication "for the public good" be a defense). In deciding the legal import juries might elect to treat the evidence of truth as a justification which negatived liability, or only as mitigation of the damages.

78. *Compare* LEVY, *supra* note 48, *with* Rabban, *supra* note 74.

79. 8 HOLDSWORTH, *supra* note 47, at 338 (quoting 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 299-300 (1883)).

80. LEVY, *supra* note 48, at 4 (quoting King James I).

81. 8 HOLDSWORTH, *supra* note 47, at 338.

82. *Id.* at 345.

England enacted Fox's Libel Act,[83] which granted juries in criminal libel trials the right to give a general verdict.[84]

America advanced more rapidly than England. In America, within twenty years of the Founding, several states, either by constitutional provision, statute, or judicial decision, established that truth was a defense, when published with good motives, and that juries were to judge both the fact and law of the case.[85] The federal government, in the Sedition Act of 1798, also adopted these reforms.[86]

These post-ratification events may or may not be sufficient to establish that the First Amendment, when it was adopted in 1791, allowed prosecutions for seditious libel but required that truth be a defense, when published with good motives, and that juries have the power to give a general verdict.[87] In this period of rapid flux, legal materials leave it somewhat ambiguous as to exactly where

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83. 1792, 32 Geo. 3, c. 60 (Eng.).

84. *See* 10 HOLDSWORTH, *supra* note 47, at 688-92. As Holdsworth discusses, the Act also allowed juries to bring in a special verdict if they chose, and it preserved a defendant's right to appeal his conviction. *Id.* at 691. Thus defendants had a double security—both a jury and the judiciary had to agree that a conviction was warranted. It took until 1843, in Lord Campbell's Act, for England to allow truth and publication for the public benefit as a defense to a criminal libel charge. *See* The Libel Act, 1843, 6 & 7 Vict., c. 96, § 6 (Eng.).

85. *See, e.g.*, PA. CONST. of 1790, art. IX, § 7; Commonwealth v. Morris, 3 Va. (1 Va. Cas.) 176 (1811) (stating truth justifies libel of officials and mitigates libels of private citizens); Commonwealth v. Clap, 4 Mass. (1 Tyng) 163 (1808) (stating truth is a defense in cases involving public officials, candidates for office, and public affairs); LEVY, *supra* note 48, at 339 (discussing New York statute of 1805 which made the jury the judge of fact and law and provided that truth was a defense when published "with good motives and for justifiable ends"); Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian's View*, 74 AM. HIST. REV. 429, 432 (1968) (discussing the 1792 Kentucky and 1796 Tennessee constitutions). *See also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 15-20 (Da Capo Press 1971) (1826-1830) (describing the laws of three states and the federal government which provided truth as a defense, and the laws of eleven states which provided for truth and good motive as a defense).

86. *See* ch. 74, § 3 (1798). This was part of the Federalist argument for the Act's propriety and constitutionality. Jenkins, *supra* note 73, at 165-66.

87. Today, truth is a complete defense. 1 SMOLLA, *supra* note 5, at §§ 5:3-5:11. But there is no Supreme Court case requiring that juries be allowed to give a general verdict. The last case, now over a half century old, upheld a statute confining the jury to determining the fact of publication. *See* Beauharnais v. Illinois, 343 U.S. 250, 265 n.20 (1952). *See also* People v. Heinrich, 470 N.E.2d 966, 968, 971-72 (Ill. 1984) (requiring truth and publication for good motives in libel of private figure).

a constitutional majority of Framers and ratifiers stood in 1791. Also, the considerations I have discussed do not at all include a review of the rather licentious press practices that were actually permitted. The law in the books may well have been more restrictive and outdated than the law in action.[88]

But if what I have recounted is not sufficient to establish that at the Founding constitutional norms required full jury participation when the government criminally sanctioned speech, it does establish that there was a substantial and soon to be successful movement protesting the jury's limited role. It illustrates a substantial appreciation of, and a demand for, significant jury participation in judicial sanctions of defamation.

In sum, in contrast to the civil law of defamation, the eighteenth century criminal law of defamation was highly controversial. The unique configuration of judge-jury relations in criminal libel prosecutions was at the heart of the controversy. In the late eighteenth century, punishing speech without full jury participation was an anachronism. In both England and America, "it was quite inconsistent with prevalent political ideas and prevalent public opinion."[89]

2. *Prior Restraint—Licensing By the Crown, Parliament, and Common Law Courts.* At the Founding, the law regarding prior restraint was generally agreed upon. Like civil defamation, it was uncontroversial. It was simply and famously stated by Blackstone. "The liberty of the press," he said, requires "laying no *previous* restraints upon publications.... Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press."[90]

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88. *See* LEVY, *supra* note 48, at 9 (commenting that since the early eighteenth century "[a]s a matter of practice [the press] was remarkably free and unrestrained; prosecutions tended to be selective and exemplary. Judicial standards probably did not coincide with popular ones"); Rabban, *supra* note 74, at 821-36 (contrasting legal and popular attitudes).

89. 10 HOLDSWORTH, *supra* note 47, at 673.

90. 4 BLACKSTONE, *supra* note 36, at *151-52. The English bar on prior restraints, during America's Founding era, appeared to be absolute. Even the practice of restraining speech that interfered with the administration of justice, as opposed to imposing subsequent punishment for it, did not develop until the early nineteenth century. *See* W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 337-38 (London, Stevens & Sons 2d ed. 1887) [hereinafter ODGERS

In the twentieth century, some Justices and scholars have maintained that Blackstone's proscription of prior restraints was limited to a ban on administrative licensing.[91] Their view is grounded in the fact that most of the English and colonial experience of prior restraints was with either royally or legislatively authorized censors.[92]

But the founding generation understood Blackstone as writing about a ban on pre-clearance from any government official—executive, legislative, or judicial. As Jean Louis De Lolme, a Swiss-born political philosopher and commentator on the English constitution, maintained:

> The liberty of the press, as established in England, consists therefore (to define it more precisely) in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must, in these cases, proceed by the trial by jury.[93]

De Lolme, who emigrated to England in 1769 and became a naturalized subject, published his analysis of *The Constitution of England* in 1771.[94] Originally written in French, it was translated into English in 1775. De Lolme's masterwork went through four English editions before his death in 1807 and five more by the 1850s.[95] He was widely read and highly regarded both in England and America at the Founding and throughout the early nineteenth century.[96]

2d ed.] (citing no case earlier than the nineteenth century).

91. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 733-36 (1931) (Butler, J., dissenting); Jeffries, *supra* note 19, at 417-18, 426; Mayton, *supra* note 19, 247-49.

92. The history of royal and legislative licensing is recounted in FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, 41-63, 180-201, 216-59 (1965). *See also* Hamburger, *supra* note 48, at 674-91. Ecclesiastical authority to license books passed to the Crown with the reformation. SIEBERT, *supra*, at 41-47; Hamburger, *supra*, at 671. At different times, monopoly and taxation were also means of prior restraint. SIEBERT, *supra*, at 64-87, 303-22. They will not be discussed in this Article.

93. JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 288 (Baldwin & Co. 1821) (1775).

94. The biographical and bibliographical material in this paragraph is drawn from 5 DICTIONARY OF NATIONAL BIOGRAPHY 775-77 (1921).

95. There was also a German translation. *Id.* at 776.

96. *See* Meyerson, *supra* note 11, at 312-13 (discussing, *inter alia*, John

In explicitly stating that England's ban on prior restraints extended to "courts of justice [and] other judges,"[97] De Lolme was drawing from historic experience well known to the Founding generation. The Founders certainly knew of the long struggle against Crown and Parliamentary censors, and celebrated the abolition of the "odious" Court of the Star Chamber in 1642, and the final "expir[ation]" of the Licensing Act in 1695, as major steps toward establishing speech and press freedoms as a constitutional norm.[98] They also knew that in the politically tense years leading up to the Glorious Revolution, the notorious Chief Justice William Scroggs[99] had asserted, in *Henry Carr's Case*,[100] that the King's Bench had common

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Adams and St. George Tucker's praise for De Lolme). Later in the century, Joseph Story, for example, drew from De Lolme in discussing freedom of speech in 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 737 (1833). So did Thomas McIntyre Cooley in THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 420 (1868). De Lolme is cited or discussed respectfully in eleven American cases between 1800 and 1860. Westlaw, http://www.westlaw.com (search the databases "allstates" and "allfeds" for the term "Lolme") (last visited July 23, 2007).

97. DE LOLME, *supra* note 93, at 288.

98. 4 BLACKSTONE, *supra* note 36, at *152 n.(a). *See also* LEVY, *supra* note 48, at 302-04 (indicating that some Founders thought the abolition of licensing was sufficient to establish press freedoms, while others thought it was not enough). Blackstone took the end of royal and legislative licensing as establishing freedom of the press. 4 BLACKSTONE, *supra*; Pound, *supra* note 17, at 650 (referring to "writers at the end of the eighteenth century"). Odgers thought it took until the enactment of Fox's Libel Act, in 1792, with its assurance of full jury participation. W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 12 (London, Stevens & Sons 1st ed. 1881) [hereinafter ODGERS 1st ed.]. St. George Tucker, and others, thought these two events were insufficient and that more restrictions on subsequent punishments were required. LEVY, *supra* note 48, at 325-32 (discussing St. George Tucker, Tunis Wortman, and Thomas Cooper). The point is that, in both England and America, the events described here were well-known and appreciated as milestones.

99. 2 JOHN CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 250-53 (3d ed. 1874) [hereinafter CAMPBELL, JUSTICES]. For a description of Scroggs's character, see 6 HOLDSWORTH, *supra* note 47, at 505. In Carr's Case, Scroggs was assisted by soon to be the equally notorious George Jefferies in his capacity as Recorder. *See Trial of Henry Carr, or Care, at the Guildhall of London, for a Libel* (1680), *in* 7 CORBETT'S COMPLETE COLLECTION OF STATE TRIALS 1111, 1114 (1810) [hereinafter *Trial of Henry Carr*]. For a description of Jefferies' reputation and character, see 3 JOHN CAMPBELL, THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 497 (2d ed. 1846); 6 HOLDSWORTH, *supra* note 47, at 505, 527-30.

100. *Trial of Henry Carr*, *supra* note 99, at 1111.

law authority to issue a "rule of [the] court"[101] restraining Carr from publishing his newspaper, *The Weekly Pacquet of Advice from Rome, or the History of Popery*.[102] Parliament's reaction was swift. Within a year, Scroggs's assertion of preventive power became an article in his impeachment.[103] Scroggs's "rule," the House of Commons said, was "contrary to all justice, in condemning... all that might for the future be written on that subject;... an open invasion of upon the right of the subject, and an encroaching and assuming... a legislative power and authority."[104]

In the eighteenth century, then, with the expiration of the licensing system standing for the principle that neither the King nor Parliament had pre-publication censorial power,[105] and with Scroggs's impeachment standing for the proposition that common law courts also lacked preventive power,[106] the only official who might pretend to preventive

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101. *See Proceedings against Lord Chief Justice Scroggs before the Privy Council; and against the said Lord Chief Justice and other Judges in Parliament* (1680), *in* 8 CORBETT'S COMPLETE COLLECTION OF STATE TRIALS, 163, 198 (1810) [hereinafter *Proceedings*].

102. See *id.* at 186-87, 198; SIEBERT, *supra* note 92, at 272-73, 297-98; Hamburger, *supra* note 48, at 687-89. Hamburger's discussion is particularly insightful, showing that when Carr's case arose, Parliament's licensing statute had temporarily lapsed. Scroggs, with support from the other common law judges, asserted that publication of news required a license as a matter of common law. He entered the order prohibiting future publication of the paper before any trial. *See id.* at 685-88.

103. *See Proceedings*, *supra* note 101, at 198-99. Though impeached by the House, Scroggs was never convicted by the House of Lords because of Parliament's dissolution. Scroggs was removed from the Bench later that year. 3 CAMPBELL, JUSTICES, supra note 99, at 267-70.

104. *Proceedings*, *supra* note 101, at 198-99. The same Article impeached Scroggs for proceeding against Carr "without hearing the parties." *Id.* Significantly, the House of Commons did not impeach Scroggs for the claim that, at common law, publication of news required royal license. In other words, prior restraint by administrative license and subsequent punishment for publishing without one did not bother the House; the assertion of judicial authority to issue preventive rules did.

105. 4 Blackstone, *supra* note 36, at *152 n.(a); Meyerson, *supra* note 11, at 305-06. There were exceptions allowing Parliament to protect its privileges without resort to jury trial, see LEVY, *supra* note 48, at 14, and Courts to summarily punish contempts even when based on out of court publications. *See* JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT 2, 4, 111-17 (1972) (arguing that a case in 1721 is the earliest instance of such summary punishment). The first equity case summarily punishing out of court publications is discussed *infra* text accompanying notes 192-99.

106. Part of the notoriety of Scroggs's "rule" in Carr's Case was that issuing

authority was the Chancellor when presiding in the High Court of Chancery.

B. *Injunctions for Defamation.*

Eighteenth century Chancellors asserted jurisdiction to restrain publications in one area: they enjoined writings that infringed copyright[107] whether based on statute, common law, or the Crown's or Parliament's prerogative monopolies over publishing on certain subjects.[108] Injunctions were issued, however, only when the infringement was clear in deference to the growing insistence on juries having a role in speech controversies.[109]

Beyond copyright, eighteenth century Chancellors exercised no preventive power over publications.[110] In a

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preventive orders, rather than imposing a subsequent punishment for publishing without a license, was something even the Star Chamber never did. *See, e.g.*, ROBERT EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 317 (1821) [hereinafter EDEN 1st ed.] (citing WILLIAM HUDSON, A TREATISE OF THE COURT OF THE STAR CHAMBER (ca. 1635)); JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL 351 (2d ed. 1872) [hereinafter TOWNSHEND 2d ed.]; Pound, *supra* note 17, at 650 (citing Hudson and other sources). *But see* Brandreth v. Lance, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839) (saying the Star Chamber "was undoubtedly in the habit of restraining . . . libels by injunction"); ODGERS 1st ed., *supra* note 98, at 13 (stating that the Star Chamber "occasionally restrained" publication of allegedly "seditious works"); *Proceedings*, *supra* note 101, at 165 (Lord North stating that the Star Chamber made "provisionary orders"); Pound, *supra*, at 650 (giving different reasons for the notoriety of Scroggs's rule).

107. EDEN 1st ed., *supra* note 106, at 264-69.

108. *See id.* at 264-84. The royal and legislative rights discussed here are only loosely called copyright. The Crown and Parliament had the exclusive privilege to print certain material. *See id.* at 269-72. Parliament's control over the reporting of its debates, when justified as a right to have its activities secret or reported accurately, trenched on restraining printing as a contempt. *See* Gurney v. Longman, (1807) 33 Eng. Rep. 379, 383-85 (Ch.); *infra* text accompanying notes 192-99 (discussing contempt by publication).

109. EDEN 1st ed., *supra* note 106, at 284-87 (discussing the rule and Eldon's modification of it in the nineteenth century). If not clear, equity would wait for law to determine that the publication was a copyright infringement. *Id.* at 285.

110. *See, e.g.*, *id.* at 316 (indicating that equity restrains publications only on the ground of "property and copyright"). Equity, along with the common law courts, did subject some out-of-court publications to summary punishment as contempts of court. *See* FOX, *supra* note 105, at 2, 4, 101-03, 111-17; Walter Nelles & Carol King, *Contempt by Publication in the United States To the Federal Contempt Statute*, 28 COLUM. L. REV. 401, 401-13 (1928). By the early nineteenth century equity enjoined publishing letters which involved breaches of trust or fraud. EDEN 1st ed., *supra* note 106, at 279.

century filled with libel suits, both civil and criminal, the general absence of equity cases discussing whether equity might enjoin libelous publications reflects an assumption that it had no such jurisdiction.[111] John Eden, the author of the first treatise on the law of injunctions, thought so.[112] Writing in 1821, he raised the question of equity's power to enjoin libel and said: "So little has it even been supposed that such a jurisdiction... belonged to the court of Chancery, that it would be difficult to find any authority in which it has been in terms denied."[113]

Supporting Eden's view is the fact that when the matter was settled in England, it was by "offhand remarks"[114] made by Chancellor Eldon "[i]n the course of a colloquy with counsel"[115] in *Gee v Pritchard*,[116] an 1818 case

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In the nineteenth century the summary punishment of contempt cases gave rise to cases, in law and equity, in which courts issued preventive orders to preserve the parties ability have to a fair trial. *See, e.g.*, The King v. Clement, (1821) 106 Eng. Rep. 918, 921-23 (K.B.). As far as I can discover, these preventive orders date from the early nineteenth century; they were not an eighteenth century, or pre-Founding, development. Even if they were, they were seen as part of the courts' inherent contempt power, not the power to enjoin libel.

Equity also involved itself in assessing the content of publication by refusing to protect libelous publications from copyright infringement. *See* Southey v. Sherwood, (1817) 35 Eng. Rep. 1006, 1008 (Ch.); 10 JOHN CAMPBELL, THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 254-59 (5th ed. 1868) (criticizing Chancellor Eldon for originating the rule "by which he erected himself into a Censor of the Press, and gave himself the power to protect or to extinguish all literary property at his pleasure"). Although this rule permitted rather than restrained publication, it did involve the Chancellor in assessing the content of a book on grounds other than copyright. Nonetheless, the rule was a nineteenth, not an eighteenth, century development. *See id.*

111. I say "general absence" because there are two cases that may be taken as addressing the point. *See infra* text accompanying notes 148-212 (discussing the cases).

112. EDEN 1st ed., *supra* note 106. There are no earlier treatises on the subject in the Harvard University HOLLIS Catalogue. *See also* CHARLES STEWART DREWRY, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS iii (1841) (saying the topic "has only been treated by one learned writer, and that was more than twenty years ago").

113. EDEN 1st ed., *supra* note 106, at 317. I am reminded of a remark Lon Fuller made during the semester I studied jurisprudence with him, something to the effect that: some of the most basic principles are never litigated because no one thinks to violate them.

114. Pound, *supra* note 17, at 645.

115. *Id.* at 642.

involving a request for an injunction to restrain the recipient of "private and confidential" letters from publishing them.[117] In the course of argument, the defendant's attorney made the claim that not even the Star Chamber restrained the publication of letters "unless the publication was libelous."[118] Interrupting him, evidently to indicate that it was unnecessary to argue that the letters in *Gee* were not defamatory, Eldon said: "It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes...."[119]

Casual dicta like Eldon's could determine such an important point only if there was a predisposition to the position,[120] an understanding that it reflected long-standing, if unwritten, commitments.[121]

Despite these considerations, Roscoe Pound, in his article criticizing the traditional rule that equity lacked power to enjoin libel, concluded that before *Gee* "foreclosed the matter... it was by no means settled by authority."[122] Pound based his analysis on three precedents: *Du Bost v. Beresford*,[123] *Burnett v. Chetwood*,[124] and *Roach v.*

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116. (1818) 36 Eng. Rep. 670 (Ch.).

117. *Gee* was decided on the basis of the copyright retained by the author of a letter. *Gee*, 36 Eng. Rep. at 670, 678; Pound, *supra* note 17, at 642-44 (criticizing Eldon's use of this principle).

118. *Gee*, 36 Eng. Rep. at 674. It is not clear that even the Star Chamber restrained the publication of libel rather than punishing it. *See supra* note 106 (discussing whether the Star Chamber restrained publications).

119. *Gee*, 36 Eng. Rep. at 674 (also, in response to the argument that publication of the letters "will be painful to the feelings of the Plaintiff," Eldon said "I will relieve you also from that argument. The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect").

120. Eldon made similar remarks the year earlier in Southey v. Sherwood, (1817) 35 Eng. Rep. 1006, 1007 (Ch.) (saying, *inter alia*, "The Court does not interfere in the way of Injunction to punish or to prevent injuries done to the character of individuals; but it leaves the party to his remedy at law"). Eldon's remarks in *Southey* were cited by Eden as one of the rare examples of equity denying, albeit in dicta, that it had power to enjoin libel. EDEN 1st ed., *supra* note 106, at 317-18.

121. Precedents holding that equity had no power to enjoin libel date from 1841 in England and 1839 in America. Seeley v. Fisher, (1841) 59 Eng. Rep. 998 (Ch.); Brandreth v. Lance, 8 Paige Ch. 24 (N.Y. Ch. 1839).

122. Pound, *supra* note 17, at 645.

123. (1810) 170 Eng. Rep. 1235 (Nisi Prius) (many citations spell the

Garvan.[125]

1. *Du Bost v. Beresford*. *Du Bost* was an action at law for damages and lost profits.[126] The plaintiff was an "artist of considerable eminence" who had painted a picture that was "a scandalous libel upon a gentleman of fashion and his lady."[127] He was exhibiting the picture for a paid admission.[128] "Great crowds went daily to see it" until the defendant, who was the lady's brother, came to the exhibition and cut the painting to pieces.[129] Chief Justice Ellenborough presided at the trial where the question arose as to whether the damages should include the sizable lost profits from the picture's exhibition or be limited to the "value of the canvas and paint which formed" the picture.[130] In the course of determining that the jury should consider only the lower value, Ellenborogh said, "If [the painting] was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition."[131]

To Pound, Ellenborough's comment "shows what some lawyers... thought" in 1810 when the case was decided.[132] To be sure, what some lawyers thought in 1810, particularly those of Ellenborough's age, is not entirely irrelevant to determining the understanding of the Founding generation.[133]

Unfortunately for Pound's argument, Ellenborough's dicta in *Du Bost* was generally thought to be wholly

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plaintiff's name "Dubost").

124. (1720) 35 Eng. Rep. 1008 (Ch.).

125. (1742) 26 Eng. Rep. 683 (Ch.) (also known as *The St. James's Evening Post Case*, *Huggonson's Case*, *Huggin's Case*, and *Roach v. Read*). The case is also reported at 21 Eng. Rep. 480.

126. Du Bost v. Beresford, (1810) 170 Eng. Rep. 1235 (K.B.).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Pound, *supra* note 17, at 645.

133. Pound was not particularly focused on the Founding generation. He was not an originalist. *See supra* text accompanying note 24.

inaccurate. Ellenborough was known to make incorrect rulings and ill-considered statements when conducting trials.[134] John Campbell, who was later to be Chief Justice and Chancellor, was Ellenborough's Nisi Prius reporter from 1807 to 1816.[135] He tells us that Ellenborough enjoyed a high reputation as a trial court judge because Campbell, as court reporter, "suppress[ed] his bad decisions."[136] "Before each number was sent to press," Campbell said, "I carefully revised all the cases I had collected for it, and rejected such as were inconsistent with former decisions or recognized principles. When I arrived at the end of my fourth and last volume, I had a whole drawer full of 'bad Ellenborough law.'"[137]

Although Campbell published *Du Bost*, he was later, as Lord Chancellor, to officially rule "without hesitation... that Lord Ellenborough was wrong when he laid down in *Dubost v. Beresford*, that 'the Lord Chancellor would grant an injunction against the exhibition of a libellous picture.'"[138]

Moreover, Ellenborough's "characteristic dictum"[139] was not well received when he made it. In 1816, Thomas Howell published a note in his State Trials series reporting that:

> I have been informed by very high authority, that the promulgation of [Ellenborough's] doctrine relating to the Lord Chancellor's injunction excited great astonishment in the minds of all the practitioners of the courts of equity, and I had apprehended that this must have happened; since I believe there is not to be found in the books any decision or any dictum, posterior to the

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134. *See* Letter from John Campbell to his Brother (Jan. 1, 1808), *in* 1 LIFE OF JOHN, LORD CAMPBELL 217-18 (Mary Hardcastle ed., 2d ed. 1881) (saying Ellenborough "is apt occasionally to blunder") [hereinafter AUTOBIOGRAPHY]. *Cf.* Anonymous, *Literary Property*, 38 EDINBURGH REV. 281, 283-84 (1823) (discussing another judge's Nisi Prius dictum saying "it has been said by nearly every Judge in the Courts of Common Law, that they wished the decisions of Judges at Nisi Prius, from the small deliberation which could be bestowed in making them, were never cited in argument").

135. As Ellenborough was Chief Justice from 1802 to 1818, Campbell reported Ellenborough's Nisi Prius decisions for most of Ellenborough's tenure. There are no other reports of Ellenborough's trials.

136. 1 AUTOBIOGRAPHY, *supra* note 134, at 215.

137. *Id.*

138. The Emperor of Austria v. Day, (1861) 45 Eng. Rep. 861, 870 (Ch. App.).

139. Pound, *supra* note 17, at 645.

> days of the Star Chamber, from which such doctrine can be deduced, either directly, or by inference or analogy: unless indeed we are to except the proceedings of Lord Ellenborough's predecessor Scroggs and his associates, in the case of Henry Care.[140]

Robert Eden, in his 1821 treatise, also described Ellenborough's remark as "a hasty *dictum*" that is "obviously erroneous."[141] Additionally, an anonymous commentator in the May 1823, issue of the Edinburgh Review disapproved Ellenborough's remark as showing "more ignorance than can be well understood in a lawyer upon a point of constitutional law."[142] Throughout the century, commentators on the law of libel echoed Howell's and Eden's reception of Ellenborough's remark.[143]

Due to its adverse reception, and not because it post-dates the Framing, we should set aside Ellenborough's comment.[144] Historically, it served to provoke Thomas Howell and Robert Eden to deny that equity had any such power.[145] Given its timing and notoriety,[146] perhaps Ellenborough's dictum also served to provoke Chancellor Eldon's casual comment in *Gee v. Pritchard* which settled the rule that equity had no power to enjoin libel.[147]

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140. *Proceedings Against John Horne, Clerk, on an Information in the King's-Bench by the Attorney-General, for a Libel* (1777), *in* 20 STATE TRIALS 799 (1810).

141. EDEN 1st ed., *supra* note 106, at 315-16.

142. Anon., *supra* note 134, at 309.

143. *See* ODGERS 1st ed., *supra* note 98, at 13-14 (describing the remark as "mere *obiter dictum*"); THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM AND FALSE RUMOURS 143 n.1 (1826) (saying "The hasty *dictum* of Lord Ellenborough is not the doctrine of the court of Chancery in England"). *See also* Mulkern v. Ward, (1872) 13 L.R.Eq. 619, 621 (Ch.) (disapproving Ellenborough's remark as "inconsistent" with nineteenth-century equity precedent).

144. Pound, who knew of Howell's remark, discounted it as "probably apocryphal." Pound, *supra* note 17, at 646 n.17.

145. *See* EDEN 1st ed., *supra* note 106, at 315-16; *supra* text accompanying note 140 (discussing Thomas Howell's reaction to Ellenborough's comment).

146. *See supra* text accompanying note 140 (discussing Thomas Howell's reaction to Ellenborough's comment); *see also* EDEN 1st ed., *supra* note 106, at 315 (saying Ellenborough's claim "attracted considerable attention").

147. It is curious, and I suggest not coincidental, that Eldon's two dicta date from 1817 and 1818, *see infra* text accompanying notes 114-19 (discussing *Gee*) and note 120 (discussing *Southey*), about the same time as Howell's and

2. *Burnett v. Chetwood. Burnett v. Chetwood*[148] was an equity proceeding in 1720 in which the executor of a deceased author of two books that had been written in Latin sought to enjoin the publication of their English translation.[149] One of the books, *De Statu Mortuorum*, had never been published, so the plaintiff had a claim based on the decedent's common law right of perpetual copyright for unpublished work.[150] *Burnett* was among the earliest cases to consider whether common law copyright survived the recently enacted Copyright Act.[151] The other book, *Archoeologia Philosophica*, had been published.[152] Thus *Burnett v. Chetwood* was also the earliest case in which an English court addressed the controversial issue of whether under the Copyright Act translations were copies or a separate original work.[153]

Chancellor Parker (later Lord Maccelsfield) enjoined the translation of both books.[154] What makes Parker's decision relevant to our topic is the reason Parker gave for enjoining the translation of the previously published *Archoeologia Philosophica*. According to the report, Parker leaned to the view that translations were not copyright violations "on account that the translator has bestowed his care and pains upon it."[155] Yet Parker granted the

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Ellenborough's remarks.

148. (1720) 35 Eng. Rep. 1008 (Ch.).

149. *Id.*

150. *Id.* at 1009. On common law copyright for unpublished work in the first half of the eighteenth century, see Tonson v. Walker, (1752) 36 Eng. Rep. 1017, 1020 (Ch.) (discussing earlier cases); EDEN 1st ed., *supra* note 106, at 275-76; BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 12, 84 (1967).

151. *Burnett* may also have been the earliest post-Statute of Anne case to consider the survival of common law copyright for unpublished work. *See Tonson*, 36 Eng. Rep. at 1018 (discussing common law copyright for unpublished work after the Statute of Anne and citing no case earlier than 1732); EDEN 1st ed., *supra* note 106, at 275-76 (same).

152. *Burnett*, 35 Eng. Rep. at 1009. The book was also called *Archoeologia Sacra. Id.* at 1008.

153. *See* KAPLAN, *supra* note 150, at 9-10 (discussing the case). On the controverted law of copyright in translations, see JAMES HIGH, A TREATISE ON THE LAW OF INJUNCTIONS 382-83 (1st ed. 1873); Erik Ketzan, *Rebuilding Babel: Copyright and the Future of Online Machine Translation*, 9 TUL. J. TECH. & INTELL. PROP. 205, 207-09 (2007).

154. *Burnett*, 35 Eng. Rep. at 1010.

155. *Id.* at 1009.

injunction on the grounds that *Archoeologia Philosophica* was

> a book which to his knowledge (having read it in his study), contained strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it, he thought it proper to grant an injunction to the printing and publishing it in English; that he lookt upon it, that this Court had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality.[156]

Chancellor Parker's comments clearly claim that equity may restrain libels.[157] Still, they should be set aside because: (1) they were not published until some time between 1817 and 1819 and were wholly unknown to the Founding generation and; (2) when finally published, their hostile reception, coupled with the utter lack of any similar precedent or dictum throughout the eighteenth century, indicates that Parker's view had little to no traction in the wider legal and political culture.[158]

As for *Burnett*'s delayed publication: *Burnett v. Chetwood* first appeared in volume two of John Merivale's Reports, published sometime between 1817 and 1819,[159] as a note to Chancellor Eldon's decision in *Southey v. Sherwood*.[160] At the note's beginning, Merivale explained

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156. *Id.*

157. That only religion and morality are instanced does not seem of moment. Neither does it matter, for my purposes, whether Parker's remarks, which "travel out of the record," should be considered *obiter dicta* for that reason. *See* Stowe v. Thomas, 23 F. Cas. 201, 206 (C.C.E.D. Pa. 1853) (No. 13,514).

158. As the following paragraphs detail, my argument is not simply based on the secrecy of the decision, but on the secrecy combined with its hostile reception. *Cf.* Kesavan & Paulsen, *supra* note 26, at 1146-48 (arguing that the views the Framers expressed in secret during the drafting convention is relevant to the Constitution's original meaning as they are evidence of the document's public meaning).

159. *See* 2 JOHN HERMAN MERIVALE, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY 441-44 (1818). *See also* CHARLES SOULE, THE LAWYER'S REFERENCE MANUAL OF LAW BOOKS AND CITATIONS 75 (1883).

160. (1817) 35 Eng. Rep. 1006 (Ch.). Most likely, Merivale appended *Burnett* to *Southey* because it contrasted nicely with Eldon's dicta in *Southey* disclaiming equity's jurisdiction to enjoin libel. *See supra* note 120 (discussing

that a Mr. Blackburne had taken the report from a manuscript "volume of cases, probably collected by *Mr. Emlyn*" who was defendant's counsel in *Burnett*.[161] Telling evidence that few if any people knew of the report of *Burnett* contained in Mr. Emlyn's manuscript is that, so far as I can tell, there is not a single citation or reference to it prior to Merivale's publishing it as a note to *Southey*.[162] The scholarly barrister Thomas Howell certainly was unaware of it in 1816, when he wrote his note criticizing Ellenborough for suggesting that equity might enjoin libels.[163]

This is not to say that *Burnett v. Chetwood* was entirely unknown in the eighteenth century. In 1752, in *Tonson v. Walker*,[164] Chancellor Hardwicke referred to the "case[]... of Dr. Burnett's treatise *de Statu morturoum* in Lord [Parker's] time" as illustrating the law of copyright for unpublished books.[165] Significantly, Hardwicke referred only to the *De Statu* book and not to *Archoeologia Philosophica*. The importance of this observation emerges if we consider the structure of the report Merivale published in 1817.

In Merivale's volume, the report of *Burnett v. Chetwood*

Southey).

161. *Burnett*, 35 Eng. Rep. at 1008.

162. *See also* 10 JOHN LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 259 (5th ed. 1868) (describing the case as "recently . . . discovered").

163. *See* A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 799 (saying "there is not to be found in the books any decision or any dictum supporting Ellenborough's claim since Chief Justice Scroggs left the bench"); *supra* text accompanying note 140.

164. (1752) 36 Eng. Rep. 1017 (Ch.). *Tonson* was also belatedly published. It is contained in the Appendix to the third volume of Clement Swanston's reports on *Cases Argued and Determined in the High Court of Chancery During the Time of Lord Chancellor Eldon*, which was published sometime between 1821 and 1827. *See* 3 CLEMENT TUDWAY SWANSTON, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY 672-82 (1827); SOULE, *supra* note 159, at 75. Although Swanston's Reports contain cases decided between 1818 to 1821, the Appendix covers cases dating from 1673 to 1792. SOULE, *supra*, at 79 n.32. That the only case referencing *Burnett* that was decided before the Founding also happened to be published after the Founding era has no relevance to the point I will be making.

165. *Tonson*, 36 Eng. Rep. at 1020. Demonstrating the belated publication of *Tonson*, Chancellor Hardwicke's remark is followed by a citation to *Burnett v. Chetwood* in Merivale's Reports. *Id.* at 1020. That anachronism was an editor's emendation.

has two parts.[166] The first is Mr. Emlyn's notes; the second is the official memorial of the case copied from the "register's book" in Chancery.[167] Mr. Emlyn's notes metioned and concern only the *Archoeologia* book even when stating the case's facts.[168] Essentially, Emlyn, who was the defendant's counsel,[169] covers only his argument and Parker's opinion concerning *Archoeologia Philosophica*, the book that had been published.[170] The entry in the Register's Book, in contrast, relates in detail the facts concerning both books and that "upon hearing of what was alleged on both sides, His Lordship doth order, that an Injunction be awarded against the Defendants" to restrain the printing, translating, or selling of either book.[171] As would be expected, the Registrar's official memorial does not mention the grounds for Parker's decision, it reports only the facts and the result.[172]

Apparently, Chancellor Hardwicke could have known of *Burnett v. Chetwood* from the Register's Book, to which he had constant access. Reference to unreported cases that were in the Register's Book was commonplace in the era before official court reporting.[173] Conversely, perusal of Mr.

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166. Burnett v. Chetwood, (1720) 35 Eng. Rep 1008, (Ch.).

167. *See id.* at 1008-10. The break between the two parts is on page 1009.

168. *See id.* at 1008-09.

169. *See id.* at 1008.

170. *See id.* at 1008-09. *See also* Stowe v. Thomas, 23 F. Cas. 201, 204 (C.C.E.D. Pa. 1853) (No. 13,514) (per counsel) (making this observation). This makes sense as the question whether copyright extended to preventing translations of books that had been published was the difficult part of the case. It is the part of the case a practitioner would be interested in memorializing for himself.

171. *Burnett*, 35 Eng. Rep. at 1010 (Ch.).

172. The defining characteristic of books that we call "law reports" are that they contain a "report[] of what was said in court," while the Register's Book does not. Michael Macnair, *The Nature and Function of the Early Chancery Reports*, *in* LAW REPORTING IN BRITAIN 123, 125-28 (Chantal Stebbings ed., 1995). The Register's Book is the official minutes, composed by the clerks, of the pleadings and the judgment. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 422 (A.L. Goodhard & H.G. Hanbury eds., 1966); *see also* 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 366-68 (A.L. Goodhard & H.G. Hanbury eds., 1966).

173. In *Tonson*, for example, Hardwicke also refers to similarly unreported "cases of Mr. Webb [and] Mr. Forester." *Tonson v. Walker*, (1752) 35 Eng. Rep. 1017, 1020 (Ch.). It is telling that in *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 216 (K.B.), when Justice Willes discusses the unreported *Webb* and *Forrester*

Emlyn's manuscript, if that were possible, would not have provided Hardwicke with any knowledge that the case involved Burnett's unpublished *De Statu* book.

Thus Hardwicke's reference to the "case[]... of Dr. Burnett's treatise *de Statu mortuorum*" does not establish any knowledge of Mr. Emlyn's manuscript report of Parker's opinion.[174] Harwicke's reference is accounted for by the likelihood that he drew from the Register's Book, a record that contained no mention of Parker's breathtakingly broad rationale for enjoining the translating or printing of Burnett's other book, the already published *Archoeologia Philosophica.* In sum, despite Chancellor Hardwicke's comments in *Tonson v. Walker*, it is fair to say that there is not a single reference to Parker's opinion in *Burnett v. Chetwood* prior to 1817. Certainly, the Founding generation had no knowledge of it.

As for the case's hostile reception: *Burnett v. Chetwood's* hostile reception commenced with John Merivale, who published the case with a prefatory note saying *Burnett* "may be considered as somewhat curious with reference to the principles upon which [it] was decided."[175] Robert Eden continued that criticism two years later when, in the first scholarly mention of *Burnett*, he said:

> There is, perhaps, but one instance in the books, of any judge having maintained the existence of a power in the Court of Chancery of restraining publications on any other ground, but that of property and copyright; and it was then done in language so strange and unconstitutional, as to carry with it, its own refutation.[176]

Chancellor Campbell, as he had with *Du Bost*, had "no

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cases he describes only the facts and the result. When he discusses *Pope v. Curl*, (1741) 26 Eng. Rep. 608 (Ch.), and *The Duke of Queensbury v. Shebbeare*, (1758) 28 Eng. Rep. 924 (Ch.), which were reported, Willes mentions the Court's reasoning as well as the facts and outcome even though he does not cite the reports themselves. *Millar*, 98 Eng. Rep. 201, 216 (K.B.)

174. *Tonson*, 35 Eng. Rep. at 1020.

175. Southey v. Sherwood, (1817) 35 Eng. Rep. 1008 (Ch.) (referring to Burnett v. Chetwood, 35 Eng. Rep. 1008 (Ch.)).

176. EDEN 1st ed., *supra* note 106, at 316; *see also* Anon., *supra* note 134, at 309 (Eden's contemporary referring to Parker as Lord Macclesfield and saying he "has left, in curious language, the first and last practical example . . . of the criminal interference of the Court of Chancery").

hesitation in saying that Lord [Parker] was wrong."[177] In America, lawyers on both sides in *Stowe v. Thomas*,[178] the leading American case on whether translations infringed copyrights, distanced themselves from Parker's rationale even as they interpreted the case to support their respective sides.[179]

All these criticisms assume that what Merivale published was an accurate report. William Odgers, late nineteenth century Britain's preeminent commentator on defamation, was not entirely convinced. He discounted *Burnett* on the grounds that "the whole report is of very doubtful authority, being merely a note of the case extracted from a manuscript volume of uncertain authorship."[180]

No one, it seems, ever had a kind word for Chancellor Parker's purported rationale in *Burnett v. Chetwood*. Even Roscoe Pound, a true friend of equity's power to enjoin libel, acknowledged that "[o]bviously the *dictum* went very much too far"[181]; he was at a loss to understand what could have been Parker's justification for it.[182]

Of course, the nineteenth century's hostile response to Parker's rationale in *Burnett*, even the reaction of those in the 1810s and early 1820s who might be thought to have some foundation in the thought-ways of the late eighteenth century, provides only indirect evidence of the Framing generation's views. But, when coupled with the fact that Chancellor Parker's singular dictum was unknown to the Constitution's Framers and ratifiers, a persuasive

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177. The Emperor of Austria v. Day, (1861) 45 Eng. Rep. 861, 870 (Ch. App.); *see also* 10 CAMPBELL, *supra* note 162, at 259 (referring to *Burnett* and saying "I do not rely upon it as an authority, for the *ratio dedenci* cannot be supported").

178. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

179. *See id.* at 204-06; *see also infra* note 314 (discussing the disparaging comments by an unknown editor of Alonzo Paige's New York Chancery Reports).

180. ODGERS 1st ed., *supra* note 98, at 14. Even published reports before the end of the eighteenth century were frequently inaccurate. *See* JOHN WALLACE, THE REPORTERS 6-36 (4th ed. 1882) (discussing the causes of imperfect reports); Van Vechten Veeder, *The English Reports*, 1292-1865, 15 HARV. L. REV. 1, 2 (1901).

181. Pound, *supra* note 17, at 645.

182. *Id.* (noting that "the old royal censorship, to which the chancellor might claim to have succeeded, had ceased in Tudor times").

argument emerges for setting aside *Burnett v. Chetwood* when considering whether, in the late eighteenth century, equity was thought to have any power to enjoin libel. Because Parker's dictum was unknown, it should not be considered in determining the state of authority at the time of the Founding. Because it was so thoroughly criticized when it was belatedly discovered, it is hard to conceive that it reflected a viewpoint that had even a modest following in the late eighteenth century.

Pound claimed that Parker's dictum "goes to show that when Lord Eldon foreclosed the matter by his offhand remarks in 1818 it was by no means settled by authority."[183] That claim reflects a surprisingly "mechanical jurisprudence," something which Pound generally opposed.[184] Even if Parker's opinion in *Burnett* is not spurious,[185] it most likely suggests only that in the first quarter of the eighteenth century some members of the English elite were nostalgic for the recent past when book licensing was permitted. It is too much to suggest that Parker's putative view much survived his departure from the woolsack in 1725.[186] This is especially likely given that the next case we will review, which was decided twenty years after *Burnett*, suggests a doctrine just the opposite from Parker's putative notion that equity "had a

183. *Id.* Pound shows no awareness of *Burnett's* delayed discovery, *id.*, and does not discuss how an unpublished and unknown case can create a conflict of authority. *Id.*

184. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (critiquing courts for their formal juriprudence and preferring a more sociological approach).

185. *See* ODGERS 1st ed., *supra* note 98, at 14 (questioning the report's authenticity).

186. An interesting contrast between the beginning and end of the eighteenth century is formed by contrasting Chancellors Parker and Erskine. The contrast overstates the change, perhaps, because Parker and Erskine represent the extremes of elite opinion in their day. But the fact is that Parker rose to prominence for, and was appointed Chief Justice because of, his role in prosecuting the controversial impeachment of Henry Sacheverell for preaching seditious sermons. *See* 6 CAMPBELL, *supra* note 162, at 15-16; 10 HOLDSWORTH, *supra* note 47, at 43-44. In contrast, Chancellor Thomas Erskine, who served at the turn of the nineteenth century, labored all his life to reform the law of libel, believing that constitutional norms required full jury participation in sanctioning speech. *See infra* text accompanying notes 188-91 (discussing Erskine).

superintendency over all books."[187]

Consider also as evidence of the direction of dominant opinion that from 1766-1770 the Chancellorship was held by Charles Pratt (Lord Camden) and from 1806-1807 by Thomas Erskine.[188] Both these men were life-long proponents of reforming seditious libel law to empower juries to bring in general verdicts.[189] They were instrumental in the passage of Fox's Libel Act in 1792.[190] In general, they were constant advocates of the importance of juries as guardians against governmental abuse of speech and press freedoms. As Chancellors, they would be unlikely to believe that Chancery had succeeded to the Star Chamber's censorial powers.[191]

3. *Roach v. Garvan.* Until the late seventeenth century, contempt of court was punished by summary process if the contempt was committed in the judge's presence or by an officer of the court.[192] If the contempt were committed out of court by someone who was not a court officer, it was punished through the ordinary criminal process.[193] One of the salient differences between summary

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187. Burnett v. Chetwood, (1720) 35 Eng. Rep. 1008, 1009 (Ch.). *See* 10 HOLDSWORTH, *supra* note 47, at 672-73, 675-76, 680-84, 687-88, 690-92, 694 (discussing Camden and Erskine); 13 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 422, 585 (A.L. Goodhard & H.G. Hanbury eds., 1966) (discussing Erskine); LEVY, *supra* note 48, at 282-83, 285-89 (discussing Erskine); ANON., *supra* note 134, at 290-93 (discussing Camden and Erskine).

188. For remarks in this paragraph, see 10 HOLDSWORTH, *supra* note 47, at 672-73, 675-76, 680-84, 687-88, 690-92, 694 (discussing Camden and Erskine); 13 HOLDSWORTH, *supra* note 187, at 585 (discussing Erskine); LEVY, *supra* note 48, at 282-83, 285-89 (discussing Erskine).

189. *See supra* text accompanying notes 62-89 (discussing the controversy over the jury's role in seditious libel prosecutions).

190. *See supra* text accompanying notes 83-84 (discussing Fox's Libel Act).

191. *See also Ex parte* Jones, (1806) 33 Eng. Rep. 283 (Ch.) (acknowledging that precedent allows summary proceedings to punish contempt by publication, but construing precedent narrowly to cast aspersions on summary proceedings for constructive contempts). Contempt by publication is discussed *infra* text accompanying notes 192-99.

192. For the comments in this paragraph, see 4 BLACKSTONE, *supra* note 36, at *283-88; FOX, *supra* note 105, at 2, 4, 108, 112-17; STEWART RAPALJE, A TREATISE ON CONTEMPT 1-2, 18-19, 37-44, 70-72 (1884); Nelles & King, *supra* note 110, at 401, 407-08. Blackstone states that summary punishment for out of court contempts was an ancient practice but J. Fox, *supra*, corrects him.

193. RAPALJE, *supra* note 192, at 26-27, 150.

and ordinary criminal processes was that trial by jury was not allowed in summary process.[194]

In the late seventeenth and early eighteenth centuries, English courts extended their power of summary punishment to include some out of court contempts.[195] The most common instance of this involved articles, letters, or commentaries in newspapers about pending or on-going litigation, what has come to be called "contempt by publication."[196] *Roach v. Garvan*[197] was the first case in which a Chancellor summarily punished an out of court contempt.[198] That the case involved contempt by publication only increased the case's importance and notoriety.[199]

As the seminal case on equity's power to summarily punish contempt by publication, *Roach v. Garvan* was well known in both England[200] and America.[201] The case is

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194. Nelles & King, *supra* note 110, at 138 (pointing to the "guarant[ee] . . . of trial by jury" as one of the main objections to "summary punishment" for contempt by publication).

195. *See* FOX, *supra* note 105, at 2, 4, 108, 112-17; RAPALJE, *supra* note 192, at 70-72; Nelles & King, *supra* note 110, at 407-08.

196. RAPALJE, *supra* note 192, at 70-72.

197. (1742) 26 Eng. Rep. 683 (Ch.), (1742) 21 Eng. Rep. 480 (Ch.). Some of the material in the following notes cite *Roach* by its alternative names. *See supra* note 125 and accompanying text.

198. FOX, *supra* note 105, at 101-06, 116-17. *Roach* was cited for its holding on the contempt power, not for the language quoted below, that equity had "no cognizance" of libels. *Infra* text accompanying note 208. My argument is that anyone reading *Roach* would also be familiar with Hardwicke's comments on equity and libel.

199. *Roach* also established that a publisher's denial of knowledge that the material he published was libelous is not a defense to a claim of libel. *See, e.g., Ex parte* Jones, (1806) 33 Eng. Rep. 283, 284 (Ch.) (relying on *Roach* for the doctrine). Additionally it is known for establishing, as part of the law of innuendo, that using initials will not avoid liability for libel. *See, e.g.*, JOHN C. H. FLOOD, A TREATISE ON THE LAW CONCERNING LIBEL AND SLANDER 48 (1880); MARTIN L. NEWELL, THE LAW OF DEFAMATION, LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES 262 (1st ed. 1890) (same); ODGERS 2d ed., *supra* note 90, at 131. *Roach* was also a leading precedent for using equity commissioners and translators to take evidence from overseas non-English speaking foreign nationals.

200. *See, e.g.*, Littler v. Thomson, (1839) 48 Eng. Rep. 1129 (Ch.) (counsel citing *Roach* in his argument on the contempt power); *Ex parte* Jones, (1806) 33 Eng. Rep. 283, 283-84 (Ch.) (relying on *Roach* for Chancery's contempt by publication power); FRANCIS HOLT, THE LAW OF LIBEL 157 n.(b) (1816) (discussion of *Roach*).

201. *See infra* text accompanying notes 203-04 (discussing contempt by

contained in John Atkyns's second volume of reports, which was published between 1765 and 1768.[202] It was cited, along with Blackstone's *Commentaries*, as the foundation for the prosecuting counsel's argument in the seminal American case on contempt by publication, *Respublica v. Oswald*,[203] decided by the Pennsylvania Supreme Court in 1788. The same counsel relied on *Roach* again in 1801, in his similarly successful argument in *Hollingsworth v. Duane*,[204] the first federal contempt by publication case.

Roach grew from a long-running family controversy over guardianship, education, and marriage of well-to-do wards under Chancery's protection.[205] During the litigation, several newspapers published letters libeling the parties on one side as well as some of their witnesses.[206] Chancellor Hardwicke summarily held the newspaper publishers in contempt for "prejudicing mankind against persons before the cause is heard."[207] During the contempt hearing, Lord Hardwicke made clear that the publishers' punishment was not for their libel. "[T]o be sure," he said,

> Mr. Solicitor General has put [the case] upon the right footing,

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publication in America).

202. *See* Harvard University HOLLIS Catalogue entry for John Tracy Atkyns, *Reports of Cases Argued and Determined in the High Court of Chancery (1765-68), available at* http://hollis.harvard.edu (HOLLIS # 003782970). *Roach* is also reported in a volume authored by John Dickens. *See* (1742) 21 Eng. Rep. 480 (Ch.). Dickens's report, which was posthumously published in 1803, does not concern us because it is not the source of the language quoted *infra* text accompanying note 208. *See* SOULE, *supra* note 159, at 75, n.76.

203. 1 U.S. 319, 321 (Pa. 1788). *See also* LEVY, *supra* note 48, at 206-13 (discussing *Oswald*); Nelles & King, *supra* note 110, at 410-11 (discussing *Oswald* and *Roach*).

204. 12 F. Cas. 359, 360-62 (C.C.Pa. 1801) (No. 6616). *See also* Nelles & King, *supra* note 110, at 412-13 (discussing *Hollingsworth*).

205. *See* Roach v. Garvan, (1748) 26 Eng. Rep. 954-56 (Ch.); Roach v. Garvan (1748) 21 Eng. Rep. 201 (Ch.); Roach v. Garvan (1748) 28 Eng. Rep. 464 (Ch.).

206. *Roach*, 26 Eng. Rep. at 684. The witnesses included Governors Mackray and Pitt and the newspapers accused them of "turn[ing] affidavit men." *Id.* at 683-84. An "affidavit man" is someone who will swear to something "without regarding whether they have any conusance of the facts," frequently for a fee. *Id. See, e.g.*, FOX, *supra* note 105, at 102; Jack Greenberg, *War Stories: Reflections on Thirty-Five Years with the NAACP Legal Defense Fund*, 38 ST. LOUIS U. L.J. 587, 589 (1994).

207. *Roach*, 26 Eng. Rep. at 685. Chancellor Hardwicke was particularly peeved that the publishers would not disclose the identity of the letters' authors. *Id.* (discussing why mitigation was not appropriate).

> that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the publick or private persons, the only method is to proceed at law.[208]

This declaration is the first statement of what became equity's undoubted rule. Not the exact words, but the sentiment passed from Hardwicke to Chancellors Erskine[209] and Eldon[210] and on to other judges and commentators.[211] In looking back over the development of the law, it was William Odgers's view that "as long ago as 1742, it was clearly laid down in *Roach v. Garvan*... that Courts of Equity had no jurisdiction over actions of libel and slander, whether public or private, except as contempts of their own Courts."[212]

Some commentators did not read Roach so broadly.[213] Roscoe Pound was one of them. Observing that *Roach v. Garvan* was a case about imprisonment for contempt of court, Pound read Hardwicke's remark as a comment about

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208. *Id.* at 683.

209. *Ex parte* Jones, (1806) 33 Eng. Rep. 283, 284 (Ch.) (in a contempt proceeding, saying "[b]ut, without considering, whether this is, or is not, a libel . . . the book . . . by defaming the proceedings of the Court [seeks] to procure a different species of judgment . . . [and] taint the source of justice"); *Ex Parte* Jones, (1806) 34 Eng. Rep. 1121, 1121 (Ch.) ("[I]t was agreed, that a court of equity has no cognisance of a libellous publication, unless it amounts to a contempt of the court.").

210. *See* Gee v. Pritchard, (1818) 36 Eng. Rep. 670, 674, 678 (Ch.); Southey v. Sherwood, (1817) 35 Eng. Rep. 1006, 1007 (Ch.); Pound, *supra* note 17, at 644 ("Eldon's language (as distinguished from his action) was influenced by . . . Lord Hardwicke in *Huggonson's Case.*"). *Huggonson's Case* is an alternate name for *Roach v. Garvan. See supra* note 125.

211. *See, e.g., infra* text accompanying notes 212, 276-78, 293-95 (discussing William Odgers and other commentators).

212. ODGERS 2d ed., *supra* note 90, at 351. *See also* ODGERS 1st ed., *supra* note 98, at 130 (naming the case by one of its alternate names, *Roach v. Read*); Meyerson, *supra* note 11, at 310.

213. Roscoe Pound was the first commentator to explicitly read *Roach* narrowly. Some nineteenth century commentators wrote treatises on defamation without citing *Roach* for the no injunction for libel rule. In order to err on the side of circumspection, I will consider these authors as implicitly having read the case narrowly. *See, e.g.*, TOWNSHEND 2d ed., *supra* note 106, at 91-92 n.1, 168-69 n. 2 (discussing the no-injunction rule without citing *Roach* though he knows the case because he relies on it in discussing innuendo by initials (calling *Roach* by one of its alternate names)).

equity's power of subsequent punishment.[214] Hardwicke, in Pound's view, "meant that he could not punish the publication as a libel, but only as a contempt. Nothing else was before the court, and the punishment of libels as libels belongs to the criminal law."[215]

In light of Odgers's and Pound's divergent views, it is evident that Hardwicke's remark in *Roach* is ambiguous. His comment that for "libel... the only method is to proceed at law" might have meant that equity had no jurisdiction at all over the tort or crime of libel.[216] Alternatively, it might have meant only that "the punishment of libels as libels belongs to the criminal law."[217]

There is, in short, a broad and a narrow reading of Hardwicke's remark. Without further evidence, Hardwicke's authorial intent is undeterminable. We can, however, conclude with some certainty that the late eighteenth century's politico-legal culture would read his dicta as reflecting the broad understanding.[218]

The broad reading of Hardwicke's "no cognizance" remark reflects equity's practice with regard to libel.[219] It reflects the behavior of plaintiffs in that throughout the eighteenth century there is not a single case in which a libelee asked equity to restrain publication of libelous remarks. It also accords with the notion that equity generally did not involve itself by way of injunction or any other way with crime or tort.[220]

Moreover, a "no injunction for defamation" rule would seem to accord with eighteenth century views on the strengths and weaknesses of equity procedure. On the one hand, equity's "quasi-inquisitorial"[221] trial process was

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214. Pound, *supra* note 17, at 644-45.

215. Pound, *supra* note 17, at 644.

216. Roach v. Garvan, (1748) 26 Eng. Rep. 683, 683 (Ch.) (quoted *supra* text accompanying note 208).

217. Pound, *supra* note 17, at 644.

218. The reasons are explored *infra* text accompanying notes 219-43.

219. *See supra* text accompanying notes 111-13 (discussing the absence of cases).

220. *See* Pound, *supra* note 17, at 643.

221. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1198 (2005).

widely regarded as incapable of efficiently and accurately making the factual determinations required in defamation cases. On the other hand, equity's trial process was also seen as inappropriate for speech and press controversies because a jury did not have a determinative say in a case's outcome.

In the law courts, evidence was taken, whenever possible, by oral testimony in open court where witnesses were subject to cross-examination and their demeanor was observable by the trier of fact.[222] In equity, evidence was taken "secretly, and in writing,"[223] by written answers to written interrogatories.[224] Opportunities for effective cross-examination were minimal, not only because evidence was not given *viva voce*, but also because no evidence was taken after the answers were unsealed except by special order of the court.[225] Cross-examination, which was praised at law as a central technique for eliciting truth, in equity was considered "useless if not dangerous" and was "seldom resorted to."[226]

In the main, eighteenth century equity procedure was "protracted,"[227] "inconceivably dilatory,"[228] and "not adapted to elicit the truth."[229] Equity procedure worked well for cases based on documentary evidence,[230] and perhaps was preferable to common law procedure when there were

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222. *See, e.g.*, JOHN ADAMS, THE DOCTRINE OF EQUITY 365-66 (1st ed. 1850) [hereinafter ADAMS 1st ed]; RICHARD GRESLEY, A TREATISE ON THE LAW OF EVIDENCE IN THE COURTS OF EQUITY 2 (1837).

223. 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 227 (1853).

224. *See* ADAMS 1st ed., *supra* note 222, at 366-71; WILLIAM FLETCHER, A TREATISE ON EQUITY PLEADING AND PRACTICE 674-77 (1902); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 354-55 (1966).

225. ADAMS 1st ed., *supra* note 222, at 371; 9 HOLDSWORTH, *supra* note 224, at 356; HENRY MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 29 (2d ed. 1948).

226. 9 HOLDSWORTH, *supra* note 224, at 355.

227. 3 GREENLEAF, *supra* note 223, at 228. *See also* ADAMS 1st ed., *supra* note 222, at 367 (same); FLETCHER, *supra* note 224, at 676 (same).

228. 9 HOLDSWORTH, *supra* note 224, at 360 (speaking, in particular, of cases requiring masters).

229. MCCLINTOCK, *supra* note 225, at 29. *See also* 3 GREENLEAF, *supra* note 223, at 228 (stating equity procedure "furnishes the temptation to . . . false testimony . . . [and] afford[s] facilities to perjury").

230. *See* GRESLEY, *supra* note 222, at 2-3.

"numerous parties and intermingled issues,"[231] or where the proceedings required preservation of evidence.[232] Yet, Holdsworth captured the professional consensus when he wrote: "It may safely be said that a more futile method of getting at the facts of a case, than the system in use in the court of Chancery from the seventeenth century onwards, never existed in any mature legal system."[233]

In recognition of "the unsatisfactory method of taking evidence in equity,"[234] Chancellors developed, by the eighteenth century, a process of referring cases to law to get the facts settled by a jury trial.[235] Still, in these cases, the jury's verdict was "advisory"[236] and the "Chancellor [was]... at liberty... to treat it as a mere nullity, and to decide against it...."[237]

The Chancellor's right to disregard a jury verdict, if one were even asked for, raises the second procedural concern that would support a broad reading of Hardwicke's "no cognizance" remark in *Roach v. Garvan*. As Jean Louis De Lolme pointed out in his analysis of free speech principles, free speech depended not only on the rule against prior restraints but also on trial by jury.[238] Indeed, in De Lolme's view, it was trial by jury, rather than the ban on prior restraints, "which more particularly constitutes the freedom

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231. MCCLINTOCK, *supra* note 225, at 29. This is an example of "complex litigation," which is exempt from the Seventh Amendment requirement of a jury trail. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 661-64 (6th ed. 2002).

232. ADAMS 1st ed., *supra* note 222, at 366; FLETCHER, *supra* note 224, at 673-74.

233. 9 HOLDSWORTH, *supra* note 224, at 353. *See also id.* at 371-76 (comparing the strengths and weaknesses of common law and equity procedure and concluding the "advantage rests with the common law procedure"); MCCLINTOCK, *supra* note 225, at 29 ("[I]t is manifest that the [equity] procedure was not adapted to elicit the truth where there was conflict in the testimony of the witnesses.").

234. POUND, *supra* note 17, at 644.

235. *See* ADAMS 1st ed., *supra* note 222, at 366; FLETCHER, *supra* note 224, § 657 at 673; 3 GREENLEAF, *supra* note 223, at 236; MCCLINTOCK, *supra* note 225, at 29.

236. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 259 (Boston, Little, Brown, & Co. 1898).

237. 3 GREENLEAF, *supra* note 223, at 237. *See also* ADAMS 1st ed., *supra* note 222, at 377; MCCLINTOCK, *supra* note 225, at 29.

238. DE LOLME, *supra* note 93, at 213.

of the press."[239] Judges needed the check of a jury because, like all magistrates, they were prone to partiality with regard to any publication that "highly excites the jealously of the governing powers."[240] For that reason, De Lolme emphasized that for the press to be free, juries must stand between the defendant and the judge and have a decisive role in the adjudication of speech controversies.

Finally, whatever mistrust there might be in leaving speech and press decisions entirely to a judge would be amplified with regard to a Chancellor. In the eighteenth century, judges of the common law courts had achieved a measure of independence because the 1701 Act of Settlement mandated that judges serve "during good behavior."[241] This provision did not encompass the Chancellor. Despite his judicial role, the Chancellor remained an important political figure who served at the King's discretion.[242]

In sum, in the eighteenth century, there was a growing, and by the century's end, dominant aversion to entrusting speech and press controversies entirely to judges operating without the constraint of a jury. In the eighteenth century, for political as well as procedural reasons, the factual determinations required in libel controversies were considered "adapted peculiarly to trial by jury."[243]

The Founding generation's expectation with regard to whether equity had jurisdiction to enjoin defamation is a question of historical judgment. Eighteenth century assumptions about the requirements for speech and press

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239. *Id.*

240. *Id.*

241. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.) ("[q]*uam diu se bene gesserint*"). England's establishment of an independent judiciary did not extend to America where colonial judges continued to serve "at the King's pleasure" and judicial decisions were subject to review by the Privy Council whose members also did not have good-behavior tenure. *See* Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 27 (1998).

242. *See* Anon., *supra* note 134, at 307-11 (describing the Chancellor as a "member" of the government and comparing his role in adjudicating libel unfavorably to the jury).

243. Pound, *supra* note 17, at 644. *See also* 10 HOLDSWORTH, *supra* note 187, at 680-88 (discussing Camden and Erskine); LEVY, *supra* note 48, at 282-83, 285 (discussing Erskine).

freedoms, as well as the casual and quick development of the rule after the turn of the century, strongly support the inference that late-eighteenth century politico-legal culture believed equity lacked power to enjoin defamation. This would be especially true in America where equity was even more identified with arbitrary Crown power than in England.[244] In this context, Hardwicke's declaration that equity takes "no cognizance" of libel would likely be read to encompass preventive orders as well as subsequent punishment.

If there is any lack of certainty, it is only because, as Roscoe Pound maintained, the facts of *Roach v. Garvan*,[245] which involve subsequent punishment for contempt of court, prevent us from insisting that the question of preventive orders had been "settled by authority."[246] My argument in the next section is that even that lacuna was cleared up over the next three-quarters of a century. By the 1860s, when the Fourteenth Amendment was proposed and adopted, the answer was perfectly clear: the no injunction for defamation rule was undoubtedly established as an aspect of speech and press freedoms.

II. INJUNCTIONS FOR DEFAMATION IN THE RECONSTRUCTION ERA

A. *Context—Other Sanctions for Defamation.*

1. *Criminal Liability.* Established by English and colonial practice, criminal liability for defamation continued throughout the nineteenth century.[247] For a while, even prosecutions for seditious libel continued, most famously

244. *See, e.g.*, Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century, in* LAW IN AMERICAN HISTORY 257, 257-58 (Donald Fleming & Bernard Bailyn eds., Little, Brown & Co. 1971).

245. (1742) 26 Eng. Rep. 683 (Ch.).

246. Pound, *supra* note 17, at 645.

247. *See, e.g.*, *In re* Banks, 42 P. 693 (Kan. 1895); Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825); State v. Van Wye, 37 S.W. 938 (Mo. 1896); Respublica v. Dennie, 4 Yeates 267 (Pa. 1805); State v. Lehre, 6 S.C.L. (1 Tread.) 809 (1811). Criminal libel prosecutions persisted as late as the mid-twentieth century. *See* Kelly, *supra* note 85, at 434 n.21 (counting criminal libel prosecutions in the *Decennial Digests*).

under the federal Sedition Act of 1798.[248] In his 1833 treatise on constitutional law, Joseph Story gave a vigorous defense of the doctrine, at least when prosecutions were brought by state governments.[249] Other commentators argued that criminal prosecutions for criticizing the government or system of government were unconstitutional.[250] Eventually criminal prosecutions for seditious libel became obsolete.[251] Nevertheless, criminal prosecutions for libeling public officials persisted, as did prosecutions for libels of private citizens.[252] Some modern commentators doubt that criminal libel prosecutions would be permissible in twenty-first century America.[253] Still, there was no doubt of their constitutionality at the time the Fourteenth Amendment was adopted.

Criminal libel was an accepted part of nineteenth century law, but it survived subject to the reforms introduced by Fox's Libel Act in England and adopted by

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248. Act of July 14, 1798, ch. 74, 1 Stat. 596 (titled "An act for the punishment of certain crimes against the United States"). *See also* Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 529 n.45 (1970) (discussing extensive enforcement of Fox's Libel Act in England during the Napoleonic wars). *See generally* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 159-418 (1956) (reviewing the Sedition Act's enforcement).

249. 3 STORY, *supra* note 96, at 732-33, 738-43. Story "abstain[ed] from expressing any opinion" of the national government's power to criminalize seditious libel. *Id.* at 743.

250. *See, e.g.*, COOLEY, *supra* note 96, at 429; LEVY, *supra* note 48, at 325-27 (discussing St. George Tucker).

251. *See* COOLEY, *supra* note 96, at 429; ERNST FREUND, THE POLICE POWER 509 (1904).

252. *See* State v. Boogher, 3 Mo. App. 442 (1877); State v. Burnham, 9 N.H. 34 (1837); FREUND, *supra* note 251, at 506; CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (St. Louis, F.H. Thomas Law Book Co. 1886). Public officials also were protected, like any other citizens, by their ability to bring a civil action. *See* Root v. King, 7 Cow. 613 (N.Y. Sup. Ct. 1827); COOLEY, *supra* note 96, at 435-39; Kelly, *supra* note 85, at 439-40. State courts did not begin imposing more stringent requirements on suits by public officials until the late nineteenth century. *See* Kelly, *supra* note 85, at 440-42.

253. *See* Kelly, *supra* note 85, at 434 n.21 (discussing Thomas Emerson and John Kelly); Clive Walker, *Reforming the Crime of Libel*, 50 N.Y.L. SCH. L. REV. 169, 196-200 (2005-06); Note, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521 (1952). *See also* Leflar, *supra* note 50 (finding no utility in criminalizing defamation).

the national government in the Sedition Act of 1798.[254] By state constitutional provision, statute, or judicial decision, it became the near universal rule in early America that truth was a defense to criminal prosecution when the remarks were published for "'good motives and justifiable ends.'"[255] So too, states generally adopted the reform that juries had power to bring in a general verdict and to determine the law and facts of the case.[256]

In other words, in 1790 the law of criminal libel was in flux. The reform of free speech protections, which focused on augmenting the role of the jury, was not clearly part of constitutional law at the Founding. Nonetheless, the jury's enlarged role was part of the Reconstruction Era's understanding of the Anglo-American system of free speech. As Ernst Freund concluded in his 1904 treatise on the Police Power: "It... appears that freedom of political discussion and criticism was sought to be secured, not by altering the substantive law of libel, but by providing for a popular control of its administration."[257]

2. *Civil Liability.* Civil liability for defamation continued along the lines established by the pre-Revolutionary common law. Truth continued as a "complete defen[s]e."[258] So too did popular control, which had been established by the requirement of a jury verdict before civil liability could be imposed on defamation defendants.[259]

In maintaining the tradition of not imposing liability on

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254. *See supra* text accompanying notes 83-84 and 86 (discussing Fox's Libel Act and the Sedition Act).

255. COOLEY, *supra* note 96, at 464. *See also id.* at 463-65 (discussing truth as a defense and the role of the jury); FREUND, *supra* note 251, at 506-07; 2 KENT, *supra* note 85, at 15-22; 3 STORY, *supra* note 96, at 733, 742; Kelly, *supra* note 85, at 431-33.

256. *See* COOLEY, *supra* note 96, at 462-63; FREUND, *supra* note 251, at 507. In some states the jury had independent power to determine the law. In other states, the jury had only the unreviewable power to apply the law as stated by the judge. *See, e.g.*, COOLEY, *supra* at 462-63.

257. FREUND, *supra* note 251, at 508. Nevertheless, in its last pronouncement on the subject, the Supreme Court upheld a statute allowing the trial judge, not the jury, to determine whether an utterance was libelous. *See* Beauharnais v. Illinois, 343 U.S. 250, 254 (1952).

258. COOLEY, *supra* note 96, at 464. *See also supra* text accompanying note 38.

259. *See supra* text accompanying notes 41-46; *see also infra* text accompanying notes 260-67.

defamation defendants without a jury verdict, nineteenth century judges resisted extending to defamation the new understanding of judge-jury relations that they were imposing on most other areas of the civil justice system. In the nineteenth century, judges asserted more control over juries through development of such tools as directed verdicts and judgments N.O.V.[260] This development, which represented erosion of popular control over civil justice, was a slow and piecemeal development that is difficult to trace out fully. Suffice it to say that even if judicial control over civil verdicts was sufficiently established by the Reconstruction Era to make directed verdicts and judgments N.O.V. aspects of due process for Fourteenth Amendment purposes in most civil actions, it does not follow that defamation suits were part of this development. In fact, by the Reconstruction period, and even by the end of the century, the newly enlarged jury control devices had not been extended to impose verdicts on defendants in libel cases.[261] Indeed, it is likely that up to the present day no court has ever concluded a case by granting a defamation

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260. *See* Blume, *supra* note 41, at 562-75 (discussing development of directed verdicts in state and federal trials); Frank Warren Hackett, *Has a Trial Judge of the United States Court the Right to Direct a Verdict*, 24 YALE L.J. 127, 127-29, 134-44 (1914); Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 890-92 (2002) (discussing development of directed verdicts and judgments N.O.V. in federal trials); Schnapper, *supra* note 43, at 239; Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 443-45, 489-91 (1996) (discussing directed verdicts and judgments N.O.V.); Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 592-624, 629-32 (2003) (discussing development of directed verdicts and judgments N.O.V.); Note, *Changing Role*, *supra* note 45, at 183-85 (discussing development of directed verdict in Massachusetts).

I do not consider summary judgments as they were not generally authorized in civil trials until the 1870s in England, and the 1930s in America. *See* John A. Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act*, 31 IND. L.J. 329, 339-40, 343-45 (1956); Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 424, 440 (1929).

261. *See* Lupkey v. Weldon, 419 S.W.2d 91, 93 (Mo. 1967) (discussing late nineteenth and early twentieth century precedent). *See also infra* text accompanying notes 266-67 (discussing principle that libel liability required both judicial and jury approval). In an extended look at the nineteenth century *Decennial Digests* and an exhaustive look at nineteenth century treatises on defamation I have failed to find a single case in which a defamation plaintiff prevailed on a motion for directed verdict or judgment N.O.V.

plaintiff's motion for directed verdict or judgment N.O.V.[262]

Significantly, with regard to taking defamation cases away from the jury, nineteenth century judges treated defamation plaintiffs and defendants quite differently. In marked contrast to their refusal to impose liability on defamation defendants without a jury verdict, nineteenth century judges frequently granted involuntarily non-suits or directed verdicts against defamation plaintiffs.[263] The most a nineteenth century judge might do when he thought the evidence clearly supported a defamation plaintiff was grant a new trial after the jury had (incorrectly, in the judge's view) ruled in favor of the defendant.[264] Moreover, in some states the grounds for awarding new trials to defamation plaintiffs were subject to uniquely stringent criteria, such as evidence of jury corruption.[265]

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262. Modern treatises on defamation law fail to mention any case and emphasize the role of these devices in protecting defendants. *See, e.g.*, ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 557-59 (1980); 2 SMOLLA, *supra* note 5, §§ 12:78-12:82. *See also* Kramer v. Thompson, 947 F.2d 666, 679 (3d Cir. 1990) (noting that the trial court directed a verdict of liability against defamation defendant, leaving only assessment of damages to jury, was among several reasons for reversal); *Lupkey*, 419 S.W.2d at 93 (discussing Missouri's continuing refusal to direct verdicts against defamation defendants). These comments also apply to motions for summary judgment. *See, e.g.*, SACK, *supra* at 535-56; 2 SMOLLA, *supra* at §§ 12:69-12:77.

Dean Rodney Smolla suggests several reasons for the absence of successful motions for directed verdict or judgments N.O.V. by defamation plaintiffs. Among them are the complexity of modern defamation law, the high doctrinal burden plaintiffs confront, and, most important to this paper's thesis, the cultural ethos dating to the Zenger case that defendants have a right to a jury trial. The possibility of jury nullification "stands as a bulwark against censorship." Email from Rodney A. Smolla, Dean, Washington & Lee School of Law, to Stephen A. Siegel (n.d.) (on file with author).

263. *See, e.g.*, Hazy v. Woitke, 48 P. 1048, 1049-50 (Colo. 1897) (stating defendants may be non-suited, but not granted directed verdicts); NEWELL 1st ed., *supra* note 199, at 281, 830-32.

264. *See, e.g.*, FRANKLIN FISKE HEARD, A TREATISE ON THE LAW OF LIBEL AND SLANDER 351-53 (Lowell, Fisher A. Hildreth 1860). English practice was similar. *See* JOSEPH R. FISHER & JAMES ANDREW STRAHAN, THE LAW OF THE PRESS 100-01 (London, William Clowes & Sons, Ltd. 1st ed. 1891) [hereinafter FISHER & STRAHAN 1st ed.].

265. *See* Clark v. Hatfield, 88 Ill. 440, 441 (1878) (describing this position as "[t]he general rule"); Rundell v. Butler, 10 Wend. 119, 120-22 (N.Y. Sup. Ct. 1833); JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL 386 (N.Y., Baker, Voorhis & Co. 1868) [hereinafter TOWNSHEND 1st ed.]; JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL 526-27 (4th ed. 1890) [hereinafter TOWNSHEND 4th ed.]. *But see* Johnson v. Scribner,

In other words, the continuation throughout the nineteenth century of the Revolutionary era understanding that it was impossible for a defamation defendant to be found liable without a jury verdict against him stands as an exception to the general trend toward greater judicial control of juries. In the eighteenth century, the power of the civil defamation jury was in line with the power of civil juries generally. By the end of the nineteenth century, it was an exception that illustrates the unique importance of juries in defamation litigation.

Two considerations underlay the judiciary's refusal to extend the new jury control devices to compel verdicts against defamation defendants. One was that defamation actions, though civil, were sufficiently "penal" or "vindictive in their nature" to call for importing criminal justice norms allowing juries to function as a buffer between defendants and state power.[266] The other was the view that the free speech reform movement, which culminated in the passage of Fox's Libel Act in England and in similar constitutional provisions, statutes, and judicial decisions in America, applied broadly to both criminal and civil liability. According to this view, the late eighteenth-century reforms stood for the constitutional principle that in criminal or civil actions

> [T]he prosecutor or plaintiff must... satisfy a jury that the words are such, and so published, as to convey the libelous imputation. If the defendant can get either the court or the jury to be in his favor, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the court and the jury to decide for him.[267]

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6 Conn. 185, 189-90 (1826) (criticizing and rejecting the rule); Harton v. Reavis, 4 N.C. (Car. L. Rep.) 256, 256-57 (1815) (rejecting the rule but acknowledging English precedent in support of it).

266. Paddock v. Salisbury, 2 Cow. 811, 815 (N.Y. Sup. Ct. 1824). *See also* sources cited *supra* note 265. Consider also cases in both American and England holding that equity would not compel discovery in aid of libel actions at law because of the principle that discovery was available only for actions that were "entirely civil," which excluded "actions penal in their nature." 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 189-90 (San Francisco, A.L. Bancroft & Co., 1st ed. 1881) (citing cases). *See also* GEORGE JEREMY, A TREATISE ON THE EQUITY JURISDICTION OF THE HIGH COURT OF CHANCERY 266 (N.Y., Halsted & Voorhies, Law Booksellers, 2d Am. ed. 1840) (explaining equity "will not compel a disclosure of circumstances which may subject the defendant to any criminal prosecution").

267. *Hazy*, 48 P. at 1049 (quoting Capital & Counties Bank v. Henty, 7 L.R.

B. *Injunctions for Defamation.*

In the period between the Founding and Reconstruction, respect for the role of juries in defamation controversies manifested itself not only in the law courts' refusal to compel verdicts against defamation defendants, but also in equity's continued adherence to the tradition that it would not restrain defamation. Between 1789 and 1868, any ambiguity about the status of the no-injunction rule was resolved. The no injunction for defamation rule was a clearly established aspect of the Reconstruction Era's system of free speech.

1. *England.* If there was any ambiguity about England's rule on enjoining defamatory speech, it was erased in the tide of opinions after Chancellor Eldon's casual remark on the subject.[268] In six cases between 1818 and 1861, the English judiciary, in both the equity courts[269]

App. Cas. 741, 776 (H.L. 1882) (per Lord Blackburn)). *See also* Harrington v. Butte Miner Co., 139 P. 451, 451-52 (Mont. 1914); Heller v. Pulitzer Publ'g Co., 54 S.W. 457, 459 (Mo. 1899); Snyder v. Andrews, 6 Barb. 43 (N.Y. Gen. Term 1849); PAUL MITCHELL, THE MAKING OF THE MODERN LAW OF DEFAMATION 37 (2005) (discussing English and American views); ODGERS 2d ed., *supra* note 90, at 362-63 (discussing English law). Thus, in some states, the principles of the Revolutionary era free speech reforms extended beyond criminal libel prosecutions and counseled that in civil suits,

> [W]hile the court may sustain a demurrer to the plaintiff's petition, or non-suit the plaintiff on the trial, or sustain a motion in arrest of a judgment against the defendant, it cannot direct a verdict for the plaintiff in a libel case. In this respect libel cases differ from other cases.

Heller, 54 S.W. at 459. *See also* Ukman v. Daily Record Co., 88 S.W. 60, 64 (Mo. 1905) (stating that in libel actions "the court may direct a non-suit, but cannot coerce a verdict for plaintiff").

In this regard, it should be noted that throughout the nineteenth century, and into the twentieth century, England continued to provide a right to jury trial in defamation actions even as it was abandoning that right in civil actions generally. *See* MITCHELL, *supra*, at 56-57 (discussing juries); Pound, *supra* note 17, at 656-57 (noting that even though juries are rarely allowed any more in England, defamation trials remain as one of the few exceptions).

268. *See supra* text accompanying note 115-20 (discussing Eldon's remark in *Gee v. Pritchard*).

269. Emperor of Austria v. Day, (1861) 45 Eng. Rep. 861, 870 (Ch.) (per Ch. Campbell); Gee v. Pritchard, (1818) 36 Eng. Rep. 670, 674 (Ch.) (per Ch. Eldon); Clark v. Freeman, (1848) 50 Eng. Rep. 759, 762 (M.R.) (per M.R. Langdale); Seeley v. Fisher, (1841) 59 Eng. Rep. 998, 999 (V. Ch.) (per Ch. Cottenham); Martin v. Wright, (1833) 58 Eng. Rep. 605, 606 (V. Ch.) (per V.C. Shadwell).

and the House of Lords,[270] repeatedly asserted that equity could not enjoin defamation. Shortly after 1868, three more cases asserted the same rule.[271]

Among the reasons given for England's course of decision is that if equity were to enjoin libel it would "be reviving the criminal jurisdiction of the Star Chamber."[272] In addition, as was said in a House of Lords case, it was impossible for the

> exercise of such a jurisdiction [to] be reconciled with the trial of... libel and defamation by juries... or indeed with the liberty of the press.... [T]he liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels.... But if the publication is to be anticipated and prevented by the intervention of the Court... , the jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed.[273]

These were considered "very strong reasons,"[274] and the result was that, in reaffirming the rule in 1875, Chancellor Cairns could accurately say,

> [A]s I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain [a] publication merely because it is a libel.... [N]o case can be produced in which... the Court of Chancery has interfered. Not merely is there no authority for [an injunction], but the books afford repeated instances of the refusal to exercise jurisdiction.[275]

Drawing from these cases, numerous English treatise

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270. *See* Fleming v. Newton, (1848) 9 Eng. Rep. 797, 803 (H.L.) (per Ch. Cottenham).

271. *See* Fisher & Co. v. Apollinaris Co., (1875) L.R. 10 Ch. App. 297, 302 (per W.M. James, L.J.); Prudential Assurance Co. v. Knott, (1875) L.R. 10 Ch. App. 142, 145 (per Ch. Cairns); Mulkern v. Ward, (1872) 13 L.R.Eq. 619, 621 (Ch.) (per V.C. Wickens).

272. Clark v. Freeman, (1848) 50 Eng. Rep. 759, 762 (M.R.) (per M.R. Langdale). Related to this was the idea that equity had no criminal jurisdiction and civil defamation was partially penal in nature. *See* Gee v. Pritchard, (1818) 36 Eng. Rep. 670, 674 (Ch.). *See also supra* text accompanying note 266 (discussing view that civil defamation is penal and vindictive).

273. *Fleming*, 9 Eng. Rep. at 803 (per Ch. Cottenham).

274. *Mulkern*, 13 L.R.Eq. at 621 (per V.C. Wickens).

275. *Prudential Assurance Co.*, L.R. 10 Ch. App. at 144-45.

writers, whether they wrote about defamation,[276] injunctions,[277] or equity jurisprudence,[278] unambiguously stated the rule that "[t]he Court of Chancery... could not interfere by injunction to stay the publication of a libel. And therefore, whether it was a libel against the public, or of any private person, the only method was to proceed at law."[279]

These cases and treatises were well known to American judges and lawyers.[280] To the extent that English law influenced the expectations of the generation that adopted the Fourteenth Amendment, and nineteenth century English law frequently did influence American developments, the expectation would be that equity should not enjoin defamation. Moreover, the reasons for the no-injunction rule would include the bar on prior restraints and the respect for the jury's role in adjudicating free speech controversies.

This conclusion regarding the Reconstruction generation's understanding of English law stands despite

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276. *See* HENRY COLEMAN FOLKARD, THE LAW OF SLANDER AND LIBEL 551 (London, Butterworths, 4th ed. 1876).

277. *See* EDEN 1st ed., *supra* note 106, at 315-18; 1 WILLIAM JOYCE, THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY AND AT COMMON LAW 715 (Cincinnati, Robert Clarke & Co. 1872); WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 1-2 (London, William Maxwell & Son 1st ed. 1867).

278. *See* ADAMS 1st ed., *supra* note 222, at 216; JOHN SMITH, A TREATISE ON THE PRINCIPLES OF EQUITY 79 (1856).

279. FOLKARD 4th ed., *supra* note 276, at 551 (footnote omitted). *See also* sources cited *supra* notes 276-78. Treatises from the 1880s, which draw from developments in England in the late-1870s, state modifications of the rule. *See* FLOOD, *supra* note 199, at 257-58 (stating that an injunction is permissible); ODGERS 1st ed., *supra* note 98, at 13-16 (explaining that an injunction is permissible after a jury verdict). *See also infra* text accompanying notes 281-91 (discussing the developments in England).

280. For cases discussing nineteenth-century English precedent see Singer Mfg. Co. v. Domestic Sewing Mach. Co., 49 Ga. 70, 73-74 (1873); Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 70 (1873); Brandreth v. Lance, 8 Paige Ch. 24, 26-28 (N.Y. Ch. 1839). *See also* Freeman, *supra* note 18, at 171-72 (discussing the English cases). Some of the treatises were well-known because they were published in American editions. *See, e.g.*, JOHN ADAMS, THE DOCTRINE OF EQUITY 426 (Philadelphia, T. & J.W. Johnson Co., 5th Am. ed. 1868); ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 372-74 (N.Y., Gould, Banks & Co., 2d Am. ed. 1839); HENRY FOLKARD, THE LAW OF LIBEL AND SLANDER 729-30 (New York, Banks, 1st Am. ed. 1877); KERR 1st ed., *supra* note 277, at 2, 507; ODGERS 1st ed., *supra* note 98, at 13-16.

the fact that in 1878 England began cutting back on the traditional no-injunction rule and abandoned it by the end of the century.[281] England's departure from the rule has little significance for an understanding of Reconstruction-era American views. First, the English departure did not begin until a decade after the ratification of the Fourteenth Amendment and, therefore, could not have had any influence on the understanding of its Framers and ratifiers.

Second, America's protections of free speech were unlike England's in that they were embodied in written constitutions. The no-injunction rule rested on a stronger foundation in America than in England. American courts specifically pointed to their written constitutions' protection of free speech and jury trial as the basis for their refusal to follow England's lead.[282] Indeed, England's late nineteenth century departure from the no-injunction rule was the first step in the separation of English and American defamation law. Today, the English law of defamation is far less protective of speakers than American law.[283] The English

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281. *See, e.g.*, Monson v. Tussauds, Ltd., (1894) 1 Q.B. 671, 692-94; Thorley's Cattle Food Co. v. Massam, (1879) 14 Ch.. 781, 776-78 (Ct. App.); Saxby v. Easterbrook & Hannaford, (1878) 3 C.P.D. 339, 342-43 (Div. Ct.); JOSEPH FISHER & J. STRAHAN, THE LAW OF THE PRESS 228-31 (2d ed. 1898) [hereinafter FISHER & STRAHAN 2d ed.]; W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 386-96 (London, Stevens & Sons, Ltd., 3d ed. 1896) [hereinafter ODGERS 3d ed.]. Vice Chancellor Malins had begun a campaign against the rule in 1868. *See* Dixon v. Holden, (1869) 7 L.R.Eq. 488 (Ch.); Springhead Spinning Co. v. Riley, (1868) 6 L.R.Eq. 551 (Ch.). His initiative was soundly reversed by Prudential Assurance Co. v. Knott, (1875) L.R. 10 Ch. App. 142. In any event, Malins' efforts were unlikely to have had any influence on the expected meaning of free speech under the Fourteenth Amendment as his efforts began just before its ratification was complete.

282. *See, e.g.*, Balliet v. Cassidy, 104 F. 704, 705-06 (C.C.D. Or. 1900); Corliss v. E.W. Walker Co., 57 F. 434, 435 (C.C.D. Mass. 1893); Kidd v. Horrey, 28 F. 773, 774-76 (C.C.E.D. Pa. 1886); Flint v. Hutchinson Smoke Burner Co., 19 S.W. 804, 805-06 (Mo. 1892). *See also* 2 CHARLES FISK BEACH, JR., COMMENTARIES ON MODERN EQUITY JURISPRUDENCE 850-51 (N.Y. Baker, Voorhis, & Co. 1892) (noting that American courts are not following the recent English decisions); 3 POMEROY, *supra* note 266, at 390-91 (same).

283. *See* MITCHELL, *supra* note 267, at 101-22 (tracing the rise of strict liability in English defamation law to the late nineteenth century in response to the rise of mass-media journalism); 1 SMOLLA, *supra* note 5, at § 1:9. For example, English defamation law is today still based on strict liability while in America there must be negligence and malice in public figure cases. *See* CHEMERINSKY, *supra* note 2, at 1046, 1050, 1052-53; MITCHELL, *supra*, at 113-16 (comparing England and America). England also allows interim injunctions and America does not. *See infra* notes 289, 418 (discussing interim injunctions).

departure from the no-injunction rule was the initial example of a defamation law development that American courts did not consider appropriate for their polity.

Finally, the English departure stemmed from a new development in English jurisprudence: the 1873 Judicature Act's merger of law and equity into a single court that exercised all the powers of the formerly separate tribunals.[284] After 1873, a court operating with a jury, a jury whose verdict was binding and not just advisory, might grant injunctions.[285] Appreciation of juries was essential to the reasoning that justified English courts, after merger, in issuing injunctions against defamation. The presence of a jury in a court with power to grant injunctions provided both a warrant and a limit to the new departure. Among the limits was the rule that to be entitled to an injunction the plaintiff had to "establish[ ] a complete cause of action."[286] This included proof of actual damages when the libel was not actionable per se.[287] In addition, the judge could enjoin no more than what the jury had found to be defamatory.[288] And, there had to be a jury verdict.[289]

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284. *See* Kidd v. Horry, 28 F. 773, 774-75 (C.C.E.D. Pa. 1886) (discussing English developments); ODGERS 3d ed., supra note 281, at 390 (citing Monson v. Tussauds, Ltd., (1894) 1 Q.B. 671).

285. ODGERS 3d ed., *supra* note 281, at 386. In England, after 1854, there might be a bench trial, but either the plaintiff or the defendant could demand a jury. *See* FISHER & STRAHAN 1st ed., *supra* note 264, at 164; MITCHELL, *supra* note 267, at 56-57.

286. ODGERS 3d ed., *supra* note 281, at 386.

287. *See id.* at 386-87.

288. *Id.* at 386.

289. I am discussing permanent injunctions. In the 1880s, English judges began to grant interlocutory injunctions before a jury's verdict. *Id.* at 388, 390. These orders, however, were interim; their permanence depended on the trial's outcome. *Id.* at 388. In addition, the issuance of interim injunctions was subject to a number of safeguards designed to "reconcile[ ]" their "availability . . . with the role of the jury." MITCHELL, *supra* note 267, at 92. For example, interlocutory injunctions were inappropriate "[u]nless the words [were] so clearly libellous, that if a jury found them not to be libellous, the Court of Appeal would set the verdict aside as unreasonable." ODGERS 3d ed., *supra* note 281, at 389. *See also* FISHER & STRAHAN 2d ed., *supra* note 281, at 228-31 (discussing safeguards on interim injunctions); MITCHELL, supra note 267, at 91-93 (same); ODGERS 3d ed., *supra*, at 388-94 (same); TOWNSHEND 4th ed. *supra* note 265, at 693 (discussing an English case allowing an injunction "until the trial of the action [for libel]"). Under modern American law, interim injunctions would seem to be an impermissible prior restraint absent the most compelling reasons. In defamation cases, this standard is unlikely to be met.

Nineteenth century English judges might grant new trials but they could not compel verdicts for defamation plaintiffs.[290] England, in fact, was the source of the comment, quoted by nineteenth century American courts, that for defamation plaintiffs to prevail they had to satisfy both a judge and a jury.[291]

2. *America.*

a. *Before 1868.* Before the ratification of the Fourteenth Amendment in 1868, the rule that equity did not enjoin defamation appeared not only in English cases and treatises that were well known in America,[292] it also appeared in leading American treatises on libel,[293] injunctions,[294] and equity jurisprudence.[295] No publication

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See infra note 418 (discussing interim injunctions in America).

290. *See* FISHER & STRAHAN 1st ed., *supra* note 264, at 100-01; ODGERS 3d ed., *supra* note 281, at 389; TOWNSHEND 4th ed., *supra* note 265, at 689.

291. *See supra* text accompanying note 267 (citing American cases). For the English case see Capital & Counties Bank v. Henty, (1882) 7 App. Cas. 741, 776 (H.L.) (per Lord Blackburn). *See also* 10 HOLDSWORTH, *supra* note 47, 691-92 (tracing the establishment of the tradition, in both criminal and civil trials, of providing defamation defendants with a double protection to Fox's Libel Act).

292. *See, e.g.*, FRANCIS HILLIARD, THE LAW OF INJUNCTIONS 398 (1st ed. 1865) (citing an English case); TOWNSHEND 1st ed., supra note 265, at 46 n.26 (discussing English cases); *supra* note 280 (citing English treatises with American editions). *Gee v. Pritchard*, (1818) 36 Eng. Rep. 670 (Ch.), was a particularly noted case. Besides grounding the no-injunction rule, see *supra* text accompanying notes 114-20, it famously suggested that letters are the literary property of the writer, and contained Eldon's reiteration of Selden's famous "reproach that the equity of this Court varies like the Chancellor's foot." *Gee*, 36 Eng. Rep. at 674. For examples of pre-1868 cites to *Gee*, see Bartlett v. Crittenden, 2 F. Cas. 967, 970 (C.C.D. Ohio 1849) (No. 1076); Pierpont v. Fowle, 19 F. Cas. 652, 658 (C.C.D. Mass. 1846) (No. 11,152); Folsom v. Marsh, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4901); Gresham v. Webb, 29 Ga. 320, 321 (1859); Grigsby v. Breckenridge, 65 Ky. (2 Bush) 480, 487, 505 (1867) (in majority and dissenting opinion); Brandreth v. Lance, 8 Paige Ch. 24, 27-28 (N.Y. Ch. 1839); N.Y. Printing & Dying Establishment v. Fitch, 1 Paige Ch. 97, 98 (N.Y. Ch. 1828) (per counsel); Eyre v. Higbee, 35 Barb. 502, 504 (N.Y. Gen. Term 1861); JOHN ADAMS, THE DOCTRINE OF EQUITY 410, 414 (2d Am. ed. 1852); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 263 n. 1 (Boston, Charles C. Little & James Brown, 3d ed. 1843).

293. *See* STARKIE, *supra* note 143; TOWNSHEND 1st ed., *supra* note 265, at 46. Starkie's treatise went through multiple American editions before 1868.

294. *See* EDEN 2d Am. ed., *supra* note 280, at 372-74; HILLIARD 1st ed., *supra* note 292, at 398. Eden's treatise went through multiple American editions before 1868.

295. *See* ADAMS 2d Am. ed., *supra* note 292, at 413; JAMES P. HOLCOMBE, AN

stated any other rule.[296]

In addition, the no-injunction rule was forcefully stated in the only reported American case addressing whether equity could enjoin defamatory remarks. That case, *Brandreth v. Lance*,[297] was decided in 1839 by New York's well-respected Chancellor Walworth. In the nineteenth century, *Brandreth* was regarded as a leading case. It was widely cited as authoritative in the pre-Reconstruction treatise literature[298] as well as in post-Reconstruction treatises and cases.[299] Among the many reasons for its stature[300] is that in *Brandreth* Chancellor Walworth gave a resounding affirmation of the no-injunction rule premised on "the liberty of the press" and "principles of a free government."[301]

INTRODUCTION TO EQUITY JURISPRUDENCE 168 (Cincinnati, Derby, Bradley & Co. 1846); STARKIE, *supra* note 143; STORY, *supra* note 292, at 263; 2 THOMAS W. WATERMAN, THE AMERICAN CHANCERY DIGEST 539 (N.Y., Banks, Gould & Co. 3d ed. 1851); JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 361-62, 387 (N.Y., Banks & Brothers 1863). Many of these treatises went through multiple editions before 1868.

296. Edward Ingraham, the American editor of Thomas Starkie's 1813 treatise, went so far as to correct the misleading impression left by Starkie's quotation of Lord Ellenborough's "hasty dictum" in *Du Bost v. Beresford*. *See* STARKIE, supra note 143, at 143 n.1. Starkie's English editors subsequently corrected him also. *See* FOLKARD 4th ed., *supra* note 276, at 162 n.r, 551-52.

297. 8 Paige Ch. 24. *See also* Meyerson, *supra* note 11, at 324-25 (discussing *Brandreth*).

298. *See, e.g.*, OLIVER BARBOUR, AN ANALYTICAL DIGEST OF THE EQUITY CASES 294, 580 (Springfield, G. & C. Merriam 1843); 2 STORY, *supra* note 292, at 263 n.1; TOWNSHEND 1st ed., *supra* note 265, at 46 n.26; 2 WATERMAN, *supra* note 295; WILLARD, *supra* note 295.

299. *See, e.g.*, Kidd v. Horry, 28 F. 773, 775 (C.C.E.D. Pa. 1886); Carleton v. Rugg, 22 N.E. 55, 57 (Mass. 1889); Life Ass'n of Am. v. Boogher, 3 Mo. App. 173, 179 (Ct. App. 1876); Hovey v. Rubber Tip Pencil Co., 57 N.Y. 119, 122 (1874) (arguments of counsel of both sides); 1 CHARLES FISK BEACH, JR., MODERN EQUITY: COMMENTARIES ON THE LAW OF INJUNCTIONS, 73 n.4 (Albany, H.B. Parsons 1895); HIGH 1st ed., *supra* note 153, at 377 n.7; 2 JOSEPH STORY WITH REVISIONS AND ADDITIONS BY F.V. BALCH, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 150 n.2 (Boston, Little, Brown, & Co., 11th ed. 1873); TOWNSHEND 2d ed. , *supra* note 106, at 91 n.1. *See also* Freeman, *supra* note 18, at 172 (describing *Brandreth* as the "leading American case").

300. Other reasons include the stature of the New York court and its Chancellor, the celebrity of the plaintiff, and the extreme nature of the libel that Chancellor Walworth refused to enjoin. On the plaintiff's notoriety, see *infra* note 303 (discussing Benjamin Brandreth).

301. *Brandreth*, 8 Paige Ch. at 26. These comments are from the opening

Brandreth involved a pamphlet written by Lance, who was a "disgruntled former employee"[302] of Brandreth's Vegetable and Universal Pill company. Brandreth's company produced a patent medicine that was wildly popular in the mid-nineteenth century.[303] Lance's pamphlet purported to be the autobiography of Benjamin Brandling who was described as a "child of many fathers,... [a] bagman,... [a] pill vendor, [and a] money broker."[304] Brandling was readily identifiable as Benjamin Brandreth, Lance's former employer. The pamphlet was admittedly "racy"[305] and filled with "[a]morous [i]ntrigues."[306] Because it was, in Brandreth's view, a "highly injurious libel... intended to... bring him into public disgrace and contempt,"[307] Brandreth applied to New York's Court of Chancery to restrain the pamphlet's publication and distribution.

Chancellor Walworth dismissed Brandreth's request in a concise opinion that is worth quoting at some length to convey its force, principles, and depth of familiarity with the history of the point. Walworth began his opinion by announcing:

> It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the Legislature has decided, cannot safely be entrusted to any tribunal

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sentence of the Walworth's opinion, quoted *infra* text accompanying note 308.

302. Jerold S. Auerbach, *The Patrician as Libertarian: Zechariah Chafee, Jr. and Freedom of Speech*, 42 NEW ENG. Q. 511 (1969). *See also Brandreth*, 8 Paige Ch. at 24.

303. *See* JAMES YOUNG, THE TOADSTOOL MILLIONAIRES: A SOCIAL HISTORY OF PATENT MEDICINES IN AMERICA BEFORE FEDERAL REGULATION 75-89 (1961) (discussing Brandreth and his pills). Brandreth, who was born in England, came to America in 1835 with little money. *Id.* at 76. His pills, a powerful purgative, proved so popular that by 1839 his net worth was $200,000. *Id.* at 77. By 1839, Brandreth was the "*ne plus ultra* of American nostrum-making," *id.*, and remained so throughout his life. *See id.* at 88-89; *see also Funeral of Dr. Brandreth*, N.Y. TIMES, Feb. 23, 1880, at 8; Amy Wilentz, *In Cold Type: Head for the Hills*, THE NATION, Sept. 16, 2002, at 37 (discussing Brandreth Park, a 24,038 acre Adirondack preserve bought by Brandreth in 1851).

304. *Brandreth*, 8 Paige Ch. at 25 (in table of contents of pamphlet).

305. *Id.* (in subtitle of pamphlet).

306. *Id.* (in title of pamphlet).

307. *Id.*

consistently with the principles of a free government.[308]

After describing Brandreth's bill, Walworth continued by describing the cruel punishments inflicted on libelers by the Star Chamber,[309] voiced his belief that the Star Chamber "was undoubtedly in the habit of restraining the publications of... libels by injunction,"[310] and observed: "Since that court was abolished,... I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel."[311]

That case was *Henry Carr's Case*,[312] which Walworth discounted as a precedent decided by "the notorious Scroggs" that "no judge or chancellor from that time to the present has attempted to follow."[313]

Having described and accounted for the absence of precedent favoring Brandreth, Walworth proceeded to raise and contemptuously dismiss Chief Justice Ellenborough's dicta in *Du Bost v. Beresford* as "a hasty declaration, made without reflection during the progress of a trial... and... not entitled to any weight whatever."[314] After going so far as to wonder whether Eldon's practice of restraining the

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308. *Id.* at 26. For support for his comment about the legislature, Walworth cited 2 R.S. 737 § 1 and Revisers' note. That statute allowed judges to require bonds for good behavior from "any person . . . convicted of any criminal offen[s]e" but exempted "convictions for writing or publishing any libel." 2 REV. STAT. OF THE STATE OF N.Y. 617-18, § 1 (1836).

309. *Brandreth*, 8 Paige Ch. at 26 (listing punishments such as cutting off ears, branding foreheads, and slitting noses).

310. *Id.* Walworth voiced a widely-shared, but historically inaccurate view here. *See supra* note 106 (discussing whether the Star Chamber restrained publications).

311. *Brandreth*, 8 Paige Ch. at 26-27.

312. *See supra* text accompanying notes 100-04 (discussing *Carr's Case*).

313. *Brandreth*, 8 Paige Ch. at 27.

314. *Id.* The Westlaw version of *Brandreth* has a footnote just after the quoted material that gives similarly disparaging treatment to Chancellor Parker's remarks in *Burnett v. Chetwood*. That footnote does not appear in the first edition of Alonzo Paige's report of the case, published in 1842, so I do not attribute it to Chancellor Walworth. I have not been able to locate the footnote's original source. Most likely, it is a mid-nineteenth century addition by an editor of a subsequent edition of Paige's reports that reflects the mid-nineteenth century's disparaging view of *Burnett*.

publication of letters on the ground of copyright infringement might "to some extent endanger the freedom of the press,"[315] Walworth concluded his pithy opinion by saying,

> [A]lthough [the pamphlet] is unquestionably intended as a gross libel upon the complainant personally, this court has no jurisdiction or authority to interfere for his protection. And if the defendants persist in their intention of giving this libelous production to the public, [Brandreth] must seek his remedy by a civil suit in a court of law or by instituting a criminal prosecution, to the end that the libelers, upon conviction, may receive their appropriate punishment, in the penitentiary or otherwise.[316]

One state case, even one as emphatic as *Brandreth*, usually is insufficient to support a claim that there was a nation-wide understanding of a particular point of law. But, as previously discussed, *Brandreth's* forceful pronouncement was mixed into a supporting context of English case law and English and American scholarly commentary that uniformly agreed with it.[317] This unanimity of opinion across the legal profession in both America and England must be taken as determinative of the expectations of the generation that wrote and ratified the Fourteenth Amendment. As Joseph Story wrote in the edition of his *Equity Jurisprudence* treatise published shortly after the *Brandreth* decision:

> Courts of Equity... have never assumed, at least, since the destruction of the Court of the Star Chamber, to restrain any publication, which purports to be a literary work, upon the mere ground, that it is of a libellous character, and tends to the degradation or injury of the reputation or business of the plaintiff, who seeks relief against such a publication. For, matters of this sort do not properly fall within the jurisdiction of Courts of Equity to redress; but are cognizable, in a civil or criminal suit, at law.[318]

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315. *Brandreth*, 8 Paige Ch. at 28.

316. *Id.* at 28-29.

317. *See supra* text accompanying notes 268-80, 292-96 (discussing English case law and English and antebellum American treatises on defamation, injunctions, and equity).

318. 2 STORY, *supra* note 292, at 263. Story's comment, which clearly was added in light of the *Brandreth* decision, did not appear in earlier editions. *See id.* at n.1 (citing *Gee v. Pritchard* and *Brandreth*). It was included in all subsequent editions.

b. *After 1868.* The claim that by Reconstruction the no injunction for defamation rule was the American rule is evidenced not only by the *Brandreth* case and Story's and other antebellum treatise writers' commentaries, but also by a plethora of American decisional law and scholarly commentary published just after the Fourteenth Amendment's ratification. This tide of post-ratification material is so uniform and close to the ratification period that it should be taken to reflect—as it instantiates—the understanding of the generation that framed and ratified the Fourteenth Amendment.[319]

After the Civil War, American treatises on libel,[320] injunctions,[321] and equity jurisprudence[322] uniformly continued to assert the no-injunction rule. After 1877, this assertion regarding the American position was made with knowledge of, and comparison to, England's recession from the rule.[323] The English recession, they thought, did not

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319. In addition, in some approaches to originalism contemporaneous precedent may properly determine the meaning of ambiguous or vague constitutional text. *See* Barnett, *supra* note 26, at 265-69.

320. *See* TOWNSHEND 2d ed., *supra* note 106, at 90-91. This treatise had multiple editions before 1900.

321. *See* HIGH 1st ed., *supra* note 153, at 377, 404; FRANCIS HILLIARD, LAW OF INJUNCTIONS 480 (Philadelphia, Kay & Brother, 2d ed. 1869); WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 2, 507 (London, William Maxwell & Son, 1st Am. ed. 1871). These treatises had multiple editions before 1900.

322. *See* POMEROY, *supra* note 266, at 351 n.3; 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 138 (Boston, Little, Brown, & Co., 10th ed. 1870). These treatises had multiple editions before 1900.

323. *See* 1 BEACH, *supra* note 299, at 73, 87-88; 2 JAMES HIGH, A TREATISE ON THE LAW OF INJUNCTIONS 968-70 (4th ed. 1905); MARTIN L. NEWELL, THE LAW OF LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES 246a-b (Chicago, Callaghan & Co., 2d ed. 1898); W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 12-16 (Boston, Little, Brown, & Co. 1st Am. ed. 1881); 3 CARTER PITKIN POMEROY & JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 2091-92 (2d ed. 1892); CHRISTOPHER G. TIEDEMAN, A TREATISE ON EQUITY JURISPRUDENCE 565 (St. Louis, F.H. Thomas Law Book Co. 1893); TOWNSHEND 4th ed., *supra* note 265, at 687-93. Most commentators simply described the difference, tracing the English practice to Parliament's specific authorization through legislation enacted in the 1870s. One early twentieth century commentator, after discussing the English practice, went on to say, "In this country, courts of equity have generally refused to enjoin trade libels, on the ground that the courts cannot abridge the constitutional right of free speech; and in accordance with the rule, that equity cannot enjoin the crime of publishing a libel or slander." 1 HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS 784 (1909) (footnotes omitted). *See also* THOMAS C.

rest "on general principles of equity," but on special Parliamentary statutes that had not been "introduced... into our jurisprudence."[324]

Similarly, between 1868 and 1890, three state supreme courts[325] and two federal circuit courts[326] asserted the no-injunction rule. Between 1890 and 1900, five more state supreme courts and federal courts followed suit.[327] As with the treatise writers, after 1877 the American judiciary made their rulings with full awareness of English developments.[328]

In adopting the no-injunction rule, some American judges, even in their initial rulings in the early 1870s, simply relied on authority and treated the no-injunction position as "well settled."[329] Others explained that the recent English recession from the rule was based on "statutory provisions conferring such jurisdiction"[330] that had not been adopted in this country. Still others explained that any position other than the no-injunction rule was

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SPELLING, A TREATISE ON THE LAW GOVERNING INJUNCTIONS 266 (1926).

324. 2 BEACH, *supra* note 282, at 850. *See also* 3 POMEROY, *supra* note 266, at 390 (English recession "not based" on "inherent powers of equity"). *But see* Robert P. Clapp, Note, *Hermann Loog v. Bean*, 32 AM. L. REG. 701, 707-11 (1884).

325. *See* Singer Mgf. Co. v. Domestic Sewing Machine Co., 49 Ga. 70, 73-74 (1873); State *ex rel.* Liversey v. Judge of the Civil Dist. Ct., 34 La. Ann. 741, 745-46 (1882); Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 70-71 (1873). Several lower state courts did so, too. *See, e.g.*, Life Ass'n of Am. v. Boogher, 3 Mo. App. 173, 174-80 (1876); N.Y. Juvenile Guardian Soc'y v. Roosevelt, 7 Daly 188 (N.Y. Ct. C.P. 1877) (following *Brandreth v. Lance*).

326. *See* Balt. Car-Wheel Co. v. Bemis, 29 F. 95, 95 (C.C.D. Mass. 1886); Kidd v. Horry, 28 F. 773, 775-76 (C.C.E.D. Pa. 1886).

327. *See* Balliet v. Cassidy, 104 F. 704, 705-06 (C.C.D. Or. 1900); Daily v. Super. Ct., 44 P. 458, 460 (Ca. 1896); Reyes v. Middleton, 17 So. 937, 939-40 (Fla. 1895); Corliss v. E.W. Walker, 57 F. 434, 436 (C.C.D. Mass. 1893); Flint v. Hutchinson Smoke Burner Co., 19 S.W. 804, 806 (Mo. 1892). Several lower state courts applied the no-injunction rule also. *See, e.g.*, Everett Piano Co. v. Bent, 60 Ill. App. 372; Jordan v. O'Connor, 17 N.Y.S. 462 (N.Y. Sup. Ct. 1891).

328. *See, e.g., Kidd*, 28 F. at 774-76; *Flint*, 19 S.W. at 805-06; Green v. U.S. Dealers' Protective Ass'n & Mercantile Agency, 39 Hun. 300, 301 (N.Y. Sup. Ct. 1885).

329. *Singer Mfg. Co.*, 49 Ga. at 73. *See also Balt. Car-Wheel Co.*, 29 F. at 95 ("settled law"); *Boston Diatite Co.*, 114 Mass. at 70 ("well settled principles"); *N.Y. Juvenile Guardian Soc'y*, 7 Daly at 189-90 (relying on *Brandreth* and its free speech rationale).

330. *Balt. Car-Wheel Co.*, 29 F. at 95.

prohibited by constitutional principles of free speech and jury trial.[331]

Three cases well illustrate the Reconstruction-era judiciary's appreciation of the constitutional dimensions of the no injunction for defamation rule. The first is *Life Association of America v. Boogher*[332] decided by the Missouri Appellate Court in 1876.[333] In *Boogher*, the insurance company petitioned for an injunction restraining Boogher and others from continuing to write and circulate libels about the company that injured its credit and business reputation.[334] After coming to the conclusion that common law precedent clearly did not support the grant of an injunction,[335] the Missouri court added

> In Missouri, where we are expressly forbidden by the Constitution to assume the power we are asked by the plaintiff to exercise, our answer cannot be doubtful. It is hardly necessary to quote the familiar language of our organic law, which has always declared "that every person may freely speak, write, or print on any subject, being responsible for the abuse of that liberty."
> If it be said that the right to speak, write, or print, thus secured to every one, cannot be construed to mean a license to wantonly injure another,... our answer is that we have no power to suspend

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331. *See infra* text accompanying notes 332-71. For cases outside my time period, but still expressly relying on constitutional norms, *see infra* note 366 (citing early twentieth century federal cases).

332. 3 Mo. App. 173 (1876).

333. The Appellate Court's principles were endorsed by the state Supreme Court in *Flint*, which relied on free speech and jury trial arguments saying, in part:

> We live under a written constitution which declares that the right of trial by jury shall remain inviolate; and the question of libel or no libel, slander or no slander, is one for a jury to determine. Such was certainly the settled law when the various constitutions of this state were adopted, and it is all-important that the right thus guarded should not be disturbed. It goes hand in hand with the liberty of the press and free speech.

19 S.W. at 806. I emphasize the Appellate Court decision, however, because it is closer in time to the Fourteenth Amendment's framing and ratification and, therefore, more persuasively reflects the understanding of that time.

334. *See Life Ass'n*, 3 Mo. App. at 174-76; State v. Boogher, 3 Mo. App. 442, 443 (1877) (discussing Boogher's appeal from his criminal libel conviction, discussed *infra* text accompanying notes 340-44).

335. *Life Ass'n*, 3 Mo. App. at 177-79 (reviewing precedent in England and America and finding that there is "no case . . . in which the jurisdiction here claimed has been exercised").

> that right for a moment, or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right except by the fear of the penalty, civil or criminal, which may wait on abuse.[336]

Highlighting the court's commitment to the principles it laid down was the fact that, according to the insurance company, Boogher was "wholly insolvent" and not amenable to an action for damages.[337] Yet, to the Missouri court, Boogher's insolvency did not matter. According to the court, "the freedom to speak and write, which is secured, by the Constitution of Missouri, to all its citizens" should not be "enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution."[338] Concluding that "this discrimination was not intended by the Framers of the organic law," the court pointed to the availability of criminal punishment.[339]

The court's gesture to criminal punishment was not idle. Boogher was, in fact, prosecuted for criminal libel, fined $150, and sentenced to two months in the St. Louis work-house for the same facts upon which the Court had denied an injunction.[340] When Boogher appealed his criminal conviction, the Missouri Appellate Court evidenced no problem with the propriety of criminal libel prosecutions[341] even though the underlying facts involved defamatory comments contained in a petition "by policy-holders to the State Insurance Department, praying an

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336. *Id.* at 179-80.

337. *Id.* at 175.

338. *Id.* at 176. *See also* Reyes v. Middleton, 17 So. 937, 939 (Fla. 1895) (also holding that insolvency does not alter the rule).

339. *Life Ass'n*, 3 Mo. App. at 176. The Court hinted that criminal punishment might be preferable because, unlike civil libel where truth was a complete defense, truth was not a defense to a criminal charge if the libel was circulated maliciously. *Id.* Boogher was criminally prosecuted. *See infra* text accompanying notes 340-44. *See also* State *ex rel.* Liversey v. Judge of Civil Dist. Ct., 34 La. Ann. 741, 747 (1882) (adopting no-injunction rule but commending criminal prosecution).

340. State v. Boogher, 3 Mo. App. 442, 443 (1877).

341. *Id.* at 444-45. The Court reversed Boogher's conviction and ordered a new trial. But this was due to the fortuity that the trial judge had died soon after Boogher appealed his conviction. Under Missouri procedure, the trial judge's untimely death denied Boogher an opportunity to perfect the bill of exceptions required for appellate review. *Id.* at 448.

examination of the affairs of the Life Association."[342] Reflecting the legal culture of its time, which frequently upheld criminal libel prosecutions,[343] the Missouri Appellate Court could not plausibly be said to be libertarian by modern standards. Still, the Missouri court had no doubt that even though Boogher abused his right of free speech, he did not expose himself to an injunctive remedy. Free speech norms required that Boogher be subject only to subsequent punishment, not prior restraint.[344] He could not be enjoined from continuing to circulate his defamatory petition.

The second case is *State ex rel. Liversey v. Judge of Civil District Court*,[345] decided by the Louisiana Supreme Court in 1882. *Liversey* involved a request by W. Van Benthuysen for an injunction restraining a newspaper, *The Mascot*, from continuing to publish "false, malicious and libellous cartoons and editorial[s]... defaming" him.[346] Citing numerous sources, and quoting Benjamin Abbott and Jean De Lolme, the Louisiana court ruled that the injunction could not be granted because the state constitution's free speech clause meant that "every person may freely publish what he sees fit, and any judgment of the law upon it shall be reserved till afterwards."[347] Enjoining libels, the Court said, would allow a "court... to decide for itself, without trial by jury" what was "libellous and defamatory, in contravention of the injunction."[348] This "would establish a complete censorship over the press so enjoined" and "[u]nder... a subservient or corrupt judiciary, the press might be completely muzzled, and its just

342. *Id.* at 443.

343. *See id.* at 445 (citing treatises and cases); *infra* text accompanying notes 350-51 (discussing criminal prosecutions of scandal-sheet newspapers). *See also* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 23-57, 136-39, 149-52 (1997) (general discussion of free speech norms in the late-nineteenth century).

344. In 1892, the Missouri Supreme Court suggested that an injunction might be awarded after a jury determination that a publication was libelous. Flint v. Hutchinson Smoke Burner Co., 19 S.W. 804, 806 (Mo. 1892). However, I am unaware of any case in which this dicta was acted on.

345. 34 La. Ann. 741 (1882).

346. *Id.* at 741.

347. *Id.* at 743 (quoting Abbott's Law Dictionary). For the text that the Court quoted from De Lolme, see *supra* text accompanying note 93.

348. *Liversey*, 34 La. Ann. at 745.

influence upon public opinion entirely paralyzed."[349]

Late nineteenth century legal culture had no hesitation in permitting newspapers to be civilly sued or criminally prosecuted for the libels they published.[350] Gilded Age courts even upheld statutes making it a crime to publish newspapers "especially devoted to the publication of scandals and accounts of lecherous and immoral conduct."[351] But, as illustrated by *Liversey* and other cases,[352] on all the "nice[ ]"[353] questions involved in the law of defamation, defendants "were entitled... to a trial by jury, if they so desired."[354] Therefore, as the Louisiana Supreme Court said:

> It has passed into a settled rule of jurisprudence, that courts of equity will not lend their aid to enjoin the publication of libels or works of a libellous nature; even though the libellous publication is calculated to injure the credit, business or character of the person against whom it is directed.[355]

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349. *Id.*

350. *See, e.g.*, Post Publ'g Co. v. Hallam, 59 F. 530 (6th Cir. 1893); Gibson v. Cincinnati Enquirer, 10 F. Cas. 311 (C.C.S.D. Ohio 1877) (No. 5392); Kelly, *supra* note 85, at 439-40 (discussing cases but noting the beginning of a liberalizing trend); TIEDEMAN, *supra* note 252, at 192-93 (advocating criminal prosecution); J. TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL 166-68 (N.Y., Baker, Voorhis & Co., 3d ed. 1877) (discussing liability of newspaper and book publishers and book sellers). *Cf.* United States v. Harmon, 45 F. 414 (D.C.D. Kan. 1891) (upholding conviction for mailing newspaper considered obscene).

351. *In re* Banks, 42 P. 693, 694 (Kan. 1895). *See also* State v. McKee, 46 A. 409 (Conn. 1900); State v. Van Wye, 37 S.W. 938 (Mo. 1896).

352. *See, e.g.*, Ulster Square Dealer v. Fowler, 111 N.Y.S. 16, 18 (Spec. Term 1908) (awarding an injunction to a newspaper to prevent public officials from interfering with its publication, noting that for any offense "it ought to be a very easy matter . . . to secure prompt and adequate punishment"); *Ex parte* Neill, 22 S.W. 923 (Tex. Crim. App. 1893). *Cf.* Dailey v. Super. Ct., 44 P. 458 (Cal. 1896) (refusing to enjoin the performance of a play depicting events in a pending murder trial). As Professor Meyerson points out, these cases anticipated the Supreme Court's landmark ruling in *Near v. Minnesota*, 283 U.S. 697 (1931). Meyerson, *supra* note 11, at 334-36.

353. *Liversey*, 34 La. Ann. at 745 ("No legal distinctions are nicer than those concerning libellous and defamatory publications.").

354. *Id.* at 742 (summarizing argument of counsel).

355. *Id.* at 745 (internal quotation marks removed). *See also Ex parte* Neill, 22 S.W. 923, 924 (Tex. Crim. App. 1893) ("The power to suppress one concedes the power to suppress all.").

The third case, *Kidd v. Horry*,[356] decided in 1886 by Supreme Court Justice Joseph Bradley while riding circuit, made the connection between free speech and jury trial even more explicit. The facts of *Kidd* are not fully stated.[357] Apparently, Kidd and Horry were involved in a patent infringement controversy. Pending trial of the patent claim, Horry continued to seek business. This required Horry to assure customers that dealing with him did not violate Kidd's patent. Believing that Horry's denial of Kidd's patent was a libel injurious to his business, Kidd asked that Horry be enjoined from "publishing... circular letters" making the claim at least until the patent suit's resolution.[358]

Justice Bradley regarded Kidd's request as "altogether a novel one" that "is urged principally upon a line of recent English authorities" that, for the first time, granted injunctions for libel.[359] These English precedents, Bradley said, "depend... not on the general principles of equity jurisprudence" but "on certain peculiar acts of parliament of Great Britain."[360] It was a "new branch of equity" that neither legislatures nor courts "ha[d] introduced... into our jurisprudence."[361] Nor could they. For "charges of slander," Bradley said,

> are peculiarly adapted to and require trial by jury; and exercising, as we do, authority under a system of government and law which by a fundamental article secures the right of trial by jury in all cases at common law, and which by express statute declares that suits in equity shall not be sustained in any case where a plain, adequate, and complete remedy may be had at law, as has always heretofore been considered the case in causes of libel and slander we do not think that we would be justified in extending the remedy of injunction to such cases.[362]

Kidd v. Horry was the first federal case to squarely

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356. 28 F. 773 (C.C.E.D. Pa. 1886).

357. My understanding of the facts comes from what is said in *Kidd* and from other suits at the time, both in England and America, involving controversies in which competing businessmen brought libel actions.

358. *Kidd*, 28 F. at 774.

359. *Id.* at 774. All the cases referred to by Justice Bradley arose from business controversies.

360. *Id.*

361. *Id.* at 775.

362. *Id.* at 776.

address equity's power to enjoin defamation.[363] Justice Bradley discussed the question "so fully and clearly"[364] that the no-injunction rule was quickly adopted by most other federal courts with little more than a quotation from, or citation to, his opinion in *Kidd*.[365] Before the century's end, it was clear that Justice Bradley had stated the federal rule.[366]

No doubt, *Kidd*'s acceptance was furthered by the fact that a few months before Justice Bradley stated his view, the full Supreme Court had signaled a similar position in *Francis v. Flinn*.[367] *Francis* was a diversity suit over piloting rights. In denying Flinn's application for an injunction restraining an allegedly wide-spread conspiracy from injuring his piloting business, Justice Field had written,

> If the publications in the newspapers are false and injurious, [Flinn] can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.[368]

Some federal courts treated *Francis* as authoritatively settling the no injunction for defamation rule.[369] However, *Francis*'s discussion was thin. Justice Field asserted his conclusion in passing and never explicated why he thought

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363. A few months before *Kidd*, the United States Supreme Court mentioned the subject in dicta that supported the no-injunction rule. *See infra* text accompanying notes 367-68 (discussing *Francis v. Flinn*, 118 U.S. 385 (1886)).

364. Balt. Car-Wheel Co. v. Bemis, 29 F. 95 (C.C.D. Mass. 1886).

365. *See, e.g.*, Balliet v. Cassidy, 104 F. 704, 705 (C.C.D. Or. 1900); Corliss v. E.W. Walker Co., 57 F. 434, 435 (C.C.D. Mass. 1893) (citing other authorities also); *Balt. Car Wheel Co.*, 29 F. at 95.

366. Justice Bradley's view remained the federal view well into the twentieth century. Some subsequent cases are noteworthy for their strong affirmation of the free speech and jury trial basis for the rule. *See* Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 556-57 (C.C.M.D. Ala. 1909); Montgomery Ward & Co. v. S.D. Retail Merch. & Hardware Dealers' Ass'n, 150 F. 413, 418 (C.C.D.S.D. 1907); Willis v. O'Connell, 231 F. 1004, 1010-11 (S.D. Ala. 1916).

367. 118 U.S. 385 (1886).

368. *Id.* at 389.

369. *See, e.g.*, A.B. Farquhar Co. v. Nat'l Harrow Co., 99 F. 160, 161-62 (C.C.D.J. 1900); Int'l Tooth-Crown Co. v. Carmichael, 44 F. 350, 351 (C.C.E.D. Wis. 1890).

defamation litigation "properly belong[ed]" in the law courts.[370] Courts tended to draw from *Kidd v. Horry*'s more elaborate discussion.[371] *Kidd* was the leading decision; but *Francis*'s off-hand dicta, proceeding as it did from a greater authority, surely complemented it.[372]

Admiration of the traditional no-injunction rule was not universal in post-Reconstruction America. In 1877, Abraham Clark Freeman, a prominent lawyer and legal commentator published a short Note in *The Central Law Journal* that was bitterly critical of the rule.[373] In his Note, Freeman reviewed the course of English and American precedent and frankly, "[c]onced[ed]... as we must, that the authorities overwhelmingly establish the proposition that equity has no jurisdiction to restrain the publication of a libel, even though its publication threatens to prove ruinous to personal reputation, or to rights of property, or to both."[374]

Freeman also allowed that among the reasons the authorities had for adopting the no-injunction rule were the beliefs that enjoining libel "would impair the right to trial by jury" and that "it would be dangerous to concede to equity any control over the liberty of speech and of the press."[375]

Yet to Freeman, these considerations were insufficiently persuasive. The jury argument failed because

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370. *Francis*, 118 U.S. at 389.

371. Between 1886 and 1900, federal and state courts cited *Kidd* twenty times and *Francis* nine times. Westlaw, http://www.westlaw.com (separate searches of the databases "allstates" and "allfeds" with the terms "'Kidd v. Horry' & date(aft 1885 & bef 1901)" and "'Francis v. Flinn' & date(aft 1885 & bef 1901)") (last visited July 23, 2007). The "Kidd v. Horry" search produced 24 hits, 20 of which cited *Kidd* for the no-injunction rule. The "Francis v. Flinn" search produced 10 hits, 9 of which cited *Francis* for the no-injunction rule.

372. Courts often cited them together. *See, e.g., Citizens' Light, Heat & Power Co.*, 171 F. at 557; Edison v. Thomas A. Edison, Jr. Chem. Co., 128 F. 957, 963 (C.C.D. Del. 1904); Coeur D'Alene Consol. & Mining Co. v. Miners' Union of Wardner, 51 F. 260, 265 (C.C.D. Idaho 1892); Mitchell v. Grand Lodge Free & Accepted Masons of Texas, 121 S.W. 178, 179 (Tex. Civ. App. 1909); Marlin Firearms Co. v. Shields, 64 N.E. 163, 166 (N.Y. 1902).

373. *See generally* Freeman, *supra* note 18. *See also* Clapp, *supra* note 324, at 705 (criticizing the rule).

374. Freeman, *supra* note 18, at 173.

375. *Id.* Freeman also noted that the rule was alternatively grounded on the principles that equity did not enjoin crime or intervene when there was an adequate remedy at law. *Id.*

"if injunctions [were] refused in every case in which an issue of fact can be formed, then they must soon become obsolete."[376] The free speech concern was insufficient because "[t]he power of the press is so great, and the necessity... of permitting... fair... criticism of public and private persons is so obvious, that, were the power to enjoin libels conceded, we might rest assured that it would be exercised in none but the clearest cases."[377]

Apparently, few in Freeman's generation were as ready as he to trust the judiciary and to discount the jury's role in protecting defamation defendants from governmentally imposed liability. Although Freeman's criticism anticipated Roscoe Pound's seminal article by forty years,[378] it had little to no impact in its own day.

More influential was the critique offered in 1888 by Judge Henry Blodgett when he decided *Emack v. Kane*.[379] *Emack* involved a dispute between two businessmen who made competing "'noiseless' or 'muffled' slates for [the] use of school children."[380] Kane held a patent that he claimed Emack's slate infringed.[381] Rather than sue Emack to establish the validity of his patent claim, Kane repeatedly sent letters and circulars to Emack's potential customers threatening to hold them "responsible for royalty and damages" should they use Emack's slate.[382]

In Blodgett's view, it was likely that Kane chose this course of action because of the doubtful validity of his patent.[383] Yet even with a doubtful patent, threatening Emack's customers with infringement actions could serve Kane's purpose because businessmen typically try to "avoid[ ]...

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376. *Id.* Freeman's claim that the jury argument proved too much fails to realize that the jury's role in free speech controversies was unique and, therefore, distinguishable from other civil actions.

377. *Id.* Freeman did compliment the free speech argument by saying "if there is any reason why equity ought not to interfere, this is the true one." *Id.*

378. *See infra* text accompanying notes 401-07 (discussing Pound's analysis).

379. 34 F. 46 (C.C.N.D. Ill. 1888).

380. *Id.* at 47.

381. *Id.*

382. *Id.* at 48.

383. *See id.* at 51-52. Kane's slate may not have been sufficiently original to qualify for a patent given the existing state of the art. *Id.* at 52.

lawsuit[s] of any kind" and "a suit for infringement of a patent is so far outside of the common man's experience that he is terrorized by even a threat of such a suit."[384] In applying to Blodgett's court for an injunction, all Emack was asking for was to prevent Kane from "threatening"[385] Emack's customers under a pretextual claim of patent infringement. "[S]uch acts of intimidation," Blodgett said, "should fall within the preventive reach of a court of equity.... I cannot believe that a man is remediless against persistent and continued attacks upon his business.... It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this."[386]

With these words, Judge Blodgett carved an exception out of the no-injunction rule premised on Kane's intimidation of Emack's customers. This was a limited exception based on unfair competition and not what a later court called "mere libels."[387] As explained in a subsequent case,

> [w]here notices are given or circulars distributed in good faith to warn against infringement, no wrong whatever is committed; but where... they are not made or issued with such intent, but in bad faith, and solely for the purpose of destroying the business of another, a very different case is presented. In such a case property rights are fraudulently assailed, and a court of chancery, whose interposition is invoked for their protection, should not refuse to accord it.[388]

Soon, the exception Blodgett made for enjoining speech intended to intimidate a competitor's customers was expanded beyond patent disputes and applied to what the late nineteenth century judiciary conceived as the inherently threatening and coercive speech involved in

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384. *Id.*

385. *Id.* at 50.

386. *Id.*

387. Lewin v. Welsbach Light Co., 81 F. 904, 907 (C.C.E.D. Pa. 1897).

388. A.B. Farquhar Co. v. Nat'l Harrow Co., 102 F. 714, 715 (3d Cir. 1900). In deciding *Emack v. Kane*, Judge Blodgett made the same point about distinguishing good and bad faith notice of potential liability to the competitor's customers. *See Emack*, 34 F. at 50 ("[N]otice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the *gravamen* of this case is the attempted intimidation . . . of complainant's customers by threatening them with suits which defendants did not intend to prosecute.").

labor boycotts and strikes.[389] Still, by the turn of the century, and for many years after, these were the only inroads made into the traditional no injunction for defamation rule.[390]

In sum, the Reconstruction Era understood the no injunction for defamation rule as firmly established and premised on precedent, the right of free speech, and the right to a jury trial.[391] No exceptions arose until twenty years after the Fourteenth Amendment's adoption. The no-injunction rule was part of a system of free speech that included a prominent role for a jury of one's peers. To protect speech and press freedoms, Reconstruction Era constitutional norms provided speakers with a double protection that barred either criminal or civil liability unless "'[t]he prosecutor, or plaintiff,... gets both the court and the jury to decide for him.'"[392]

III. CONCLUSION: JURIES AND INJUNCTIONS FOR DEFAMATION

Originalists, whether they focus on 1789 or 1868, should find that the Constitution's protection of free speech includes a bar on injunctions for defamation. Their view should be that the only remedies for defamation are damages, both compensatory and punitive, and criminal prosecution. In addition, they should hold that no liability

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389. *See, e.g.*, Casey v. Cincinnati Typographical Union No. 3, 45 F. 135, 144 (C.C.S.D. Ohio 1891) (relying on *Emack*); Beck v. Ry. Teamsters' Protective Union, 77 N.W. 13, 20-23 (Mich. 1898).

390. *See* MARTIN L. NEWELL & MASON H. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 214-16, 244-45, 247 (4th ed. 1924) (summarizing American law); Meyerson, *supra* note 11, at 330-33 (discussing labor injunctions); Note, *The Jurisdiction of Equity in Cases of Libel*, 2 COLUM. L. REV. 175, 176 (1902) (stating exceptions to the rule). In addition, there was a suggestion, made in *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804, 806 (Mo. 1892), that libel plaintiffs might be entitled to an injunction after a jury verdict if it banned only that which the jury found defamatory, but this suggestion was never acted upon.

391. Again, there were additional reasons, such as the force of precedent and the principle that equity had no jurisdiction to enjoin criminal activity. *See supra* text accompanying notes 329, 374-75 (discussing Reconstruction Era precedent and Abraham Freeman's article).

392. Hazy v. Woitke, 48 P. 1048, 1049 (Colo. 1897) (quoting Capital & Counties Bank v. Henty, 7 App. Cas. 741, 776 (H.L. 1882) (per Lord Blackburn)). *See also supra* note 267 (citing and discussing other material employing this quote).

can be imposed in a defamation action without a jury verdict against the defendant. Consistent with the understanding of the First and Fourteenth Amendments' Framers and ratifiers, judges may non-suit defamation plaintiffs and grant directed verdicts and judgments N.O.V. against them.[393] But it is inconsistent with the Constitution's original meaning for judges to take cases away from juries and rule against defamation defendants. In defamation suits, the First and Fourteenth Amendments require an exception to the symmetrical use of modern jury control devices.

Admittedly, these conclusions are not as clear for the Founding era as they are for the Reconstruction period. Yet, in determining the constitutional limitations imposed by the Fourteenth Amendment, originalists should focus on the experiences, principles, and expectations of the Civil War generation. Even if the Framers and ratifiers of the Fourteenth Amendment misconceived the free speech principles of the Founding era (which, in this case I do not believe they did), it is an example of "*communis error facit jus*."[394] It was, after all, their understanding of speech and press freedoms that they were constitutionalizing.

However, not everyone is an originalist[395] and some originalists are "faint-hearted."[396] For non- or faint-hearted

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393. There is also no free speech impediment to judges granting summary judgment motions against defamation plaintiffs. *See* 2 SMOLLA, *supra* note 5, §§ 12:69-12:75.

394. For historical and normative explorations of the "*communis error*" maxim, see Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 20 (1984) and Michael P. Healy, Communis Opinio *and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539 (2001).

395. *See, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 129-41 (1987) (discussing "open-ended modernism"); JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 1-25 (2001) (discussing "constitutional creativity"); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1750-57 (2007); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 9, 862, 864 (1989). *But see* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (arguing that "the debate between originalism and living constitutionalism rests on a false dichotomy").

396. Scalia, *supra* note 395, at 862. Some jurists are also inconsistently originalist. *See, e.g.*, Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 428 (2007) (discussing affirmative action); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1416-17 (1999) (discussing

originalists, the constitutionality of the no-injunction rule is an open question with strong arguments on both sides.[397] Concern for the chilling (if not freezing) effect of a prior restraint[398] and the inevitable overbreath of any effective injunction[399] need to be balanced against concern for the maligned plaintiff who is likely suffering economic, reputational, and emotional injury from an unending stream of untruthful invective.[400] As an historical exploration, this Article cannot settle the argument among non-originalists. However, by emphasizing the importance of juries in the system of free speech that underlay the adoption of the rule, this Article establishes some additional normative support for the no-injunction rule. In addition, this Article indicates that if there is to be a retreat from the no-injunction rule, the First Amendment should be interpreted to require that certain limits and safeguards centered on jury participation accompany it.

Pound and subsequent commentators recognized jury trial as an important rationale for the no-injunction rule.[401] As Pound acknowledged, there was "a clear policy in favor of jury trial of an issue of truth in a charge of defamation"[402] and this policy was "a serious difficulty in the way of injunctions in [defamation] cases."[403] Still, Pound argued,

> where it is admitted that the publication is false, or the falsity is

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originalists on a variety of issues).

397. *See, e.g.*, Balboa Island Vill. Inn v. Lemen, 156 P.3d 339, 354-57 (Cal. 2007) (Kennard, J., concurring and dissenting) (supporting no-injunction rule); Bertelsman, *supra* note 19, at 320 (supporting injunctions); Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 163-72 (2007) (supporting no-injunction rule); Gold, *supra* note 19, at 231-41 (supporting injunctions); Sedler, *supra* note 19, at 159-60 (supporting injunctions).

398. *Balboa Island*, 156 P.3d at 354, 357.

399. *See* Chemerinsky, *supra* note 397, at 171-72.

400. *See* Emack v. Kane, 34 F. 46, 50 (C.C.N.D. Ill. 1888); Transcript of Oral Argument at 7-12, Tory v. Cochran, 544 U.S. 734 (2005), 2005 WL 752743 (showing various Justices expressing sympathy for plaintiff); Bertelsman, *supra* note 19, at 320; Gold, *supra* note 19, at 232; Pound, *supra* note 17, at 668.

401. *See* Bertelsman, *supra* note 19, at 323; Pound, *supra* note 17, at 642, 655-57; Sedler, *supra* note 19, at 153-54. *See also* Freeman, *supra* note 18, at 173 (commentator anticipating Pound's recognition of the jury trial rationale).

402. Pound, *supra* note 17, at 656.

403. *Id.* at 657.

> so clear that there is really nothing for a jury to try, then, trial by jury being a mere form—there being no substantial occasion for it—the policy in question should not stand in the way of an injunction.... Hence the requirement of trial by jury is no more an obstacle here than in the case of equity jurisdiction to enjoin trespass, disturbance of easements, or nuisance.[404]

Although Pound's response to the jury trial rationale has been treated by subsequent commentators as definitive,[405] it is insufficient. What Pound's analysis misses is that, unlike in other civil actions, the jury's function in defamation actions traditionally was understood to be more than fact determination, even if we extend fact determination to include the answer to that mixed question of law and fact: *libel vel non*. Traditionally, the jury's function was to act as a tribune of the people; to be a popular institution with veto power over government sanctions for speech. It was, as Jean Louis De Lolme and others of the Revolutionary Era pointed out, the absence or presence of the jury that accounted for England's different approach to prior and subsequent restraints.[406] The no injunction for defamation rule was part of a system of free speech that barred government from censoring or punishing speech without popular participation and approval. In other words, if Pound thought it was appropriate to enjoin defamation when the facts were so clear that a judge would direct a jury verdict against the defendant, the answer is that there is no such case.[407]

This is not to say that the jury's check on governmental sanctions of speech is an entirely satisfactory protection.[408] Juries may protect popular speakers from suppression and punishment by unpopular or faithless officials. But they tend not to protect speakers of whom the majority disapproves. The Founding generation learned this bitter

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404. *Id.*

405. *See* Bertelsman, *supra* note 19, at 323; Sedler, *supra* note 19, at 154. Abraham Freeman, after recognizing the jury trial rationale, made a similar rebuttal. He argued that the rationale proved too much because it would prevent injunctions in all cases. Freeman, *supra* note 18, at 173. His response is insufficient for the same reasons discussed here.

406. *See supra* text accompanying notes 93-97 (discussing De Lolme).

407. *See supra* text accompanying notes 40-45, 259-67.

408. For the comments in this paragraph see Amar, *supra* note 29, at 242-44; Monaghan, *supra* note 248, at 526-360

lesson during the Sedition Act trials. The South's treatment of abolitionist speakers before the Civil War and in the treatment of speakers advocating African-American rights and equal treatment after that conflict repeated this lesson for Reconstruction Era lawmakers. A century later, it was reiterated during the Civil Rights struggles of the 1960s.

The inadequacy of juries as a protector of minority speakers was addressed by the growth in the nineteenth-century of judicial power to grant directed verdicts and judgments N.O.V. against defamation plaintiffs.[409] In the 1960s, these powers were expanded to provide a panoply of devices by which judges checked juries.[410] The power of judges to closely supervise defamation juries on behalf of defamation defendants is appropriate on both originalist and non-originalist grounds. It provides the double protection expected by the Fourteenth Amendment's Framers and ratifiers.[411]

Although the contemporary chastened view of the jury in free speech litigation is welcome, it goes too far if taken to require "the contraction... of the jury's functions" in defamation controversies.[412] Excluding the jury is as inappropriate as entirely relying on it.[413] Under the Fourteenth Amendment, if not the First, a defamation plaintiff should not "succeed unless he gets both the court and the jury to decide for him."[414]

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409. *See supra* text accompanying note 260.

410. *See* 2 SMOLLA, *supra* note 5, §§ 12:83-12:86 (describing expanded judicial review appropriate in defamation cases); Monaghan, *supra* note 248, at 528-30 (describing a variety of devices).

411. *See supra* text accompanying notes 266-67, 391-92. I note that the "double protection" was less clearly intended by the First Amendment's Framers and Ratifiers and is another aspect of the Reconstruction Era's clarifying light.

412. Bertelsman, *supra* note 19, at 323 n.19. Bertelsman relies on Monaghan's analysis which suggests, incorrectly in my view, that "any expansive conception of the jury's role is inconsistent with a vigorous application of the first amendment." Monaghan, *supra* note 248, at 527. I advocate an expansive, but closely supervised role for First Amendment juries.

413. *But see* Redish, *supra* note 19, at 63-66 (discounting the importance of the jury).

414. *See supra* text accompanying note 267 (quoting and citing American cases). The Court has neglected this principle in litigation involving film licensing where it finds sufficient protection in the provision of prompt judicial review. *See* Freedman v. Maryland, 380 U.S. 51 (1965) (voiding licensing scheme, not because of absence of jury, but for absence of prompt judicial

For both originalists and non-originalists there is a First Amendment[415] right to a jury trial in civil defamation suits.[416] The right applies whether the suit is for damages or an injunction.[417] No permanent[418] injunction for

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review).

415. In deference to conventional usage and to avoid cumbersome phrases, here and for the remainder of the paper, my use of the term "First Amendment" includes the constitutional norms of free speech and press imposed on the states through the Fourteenth Amendment. My claim is that the import of the Fourteenth Amendment on the issues I discuss is clearer, not that the First and Fourteenth Amendments are in conflict.

416. The defamation defendant's right to a jury trial requires a First Amendment basis because the Seventh Amendment's civil jury provision has not been incorporated by the Fourteenth Amendment. There is no general federal constitutional right to a jury trial in civil actions tried in state court. *See* CHEMERINSKY, *supra* note 2, at 505. State constitutions or statutes may provide for it. *Cf.* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.6(2), at 153-54 (Practitioner Treatise ser., 2d ed. 1993).

Should a defamation action be brought in federal court either because it involves parties living in a federal territory, such as Washington, D.C., or because of diversity of citizenship, the Seventh Amendment jury trial guarantee would apply. However, it would not have all the ramifications discussed in this article. *See infra* text accompanying notes 417-34 (discussing jury trial for injunction actions and injunction enforcement actions). Thus, even in federal court, it is important that the rights I discuss be understood as First Amendment rights.

417. Especially with regard to actions brought only for an injunction, the defamation defendant's right to a jury trial requires a First Amendment basis. The Seventh Amendment jury trial right applies only to legal actions and not to suits, such as suits requesting injunctions, that trace their origin to equity. *See* WRIGHT & KANE, *supra* note 231, at 656-58.

It is unclear whether the recent *Balboa Island Vill. Inn v. Lemen*, 156 P.3d 339 (Cal. 2007), case violated this prescription. The plaintiff asked only for an injunction which was awarded after a bench trial. Probably because the defendant did not raise the issue, no opinion indicates whether California procedure would have allowed her to insist on a jury.

418. Interim injunctions pending the outcome of litigation are a different subject. Interim injunctions in speech controversies are highly disfavored. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (reversing grant of interim injunction); Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 559 N.W.2d 740 (Neb. 1997) (overturning defamation injunction issued before trial because of absence of jury determination but indicating approval of post-trial injunctions); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169-78 (1998) (reviewing a wide variety of preliminary injunction speech cases). It is difficult to imagine a defamation case, especially when the action seeks to prevent repetition of the remarks, that can meet the burden for interim orders. In addition, it should be noted that late nineteenth-century England allowed interim injunctions of libel pending trial but carefully circumscribed their

defamation is permissible unless a jury has determined that the defendant's speech is defamatory or the defendant has waived his First Amendment right to a jury trial.

The rule that defamation cannot be enjoined without a jury verdict is not entirely novel. It is the converse of the suggestion that after a jury has found certain remarks to be defamatory, equity may act to prevent their repetition.[419] The view that a jury verdict removes the constitutional impediments to enjoining defamation was the primary rationale for the cases initiating the current retreat from the no-injunction rule.[420] All I am pointing out is that the warrant for the new departure is also a limit; and emphasizing, more clearly than the recent cases,[421] that injunctions for defamation are impermissible if the defendant did not have a right to a jury trial.

It is more novel, however, to assert that the role of the jury as a double protection for defamation defendants is not exhausted by a verdict on liability. It extends, as well, to the injunction's enforcement proceedings.[422] The rationale

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issuance out of concern for maintaining the role of juries. *See supra* note 289 (discussing interim injunctions in England).

419. The proposition traces in England to *Clark v. Freeman*, (1848) 50 Eng. Rep. 759, 761 (M.R.), and in America to *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804, 805 (Mo. 1892). However, the proposition was not acted on in England until the late 1870s and in America until the mid-twentieth century.

420. *See, e.g.*, Kramer v. Thompson, 947 F.2d 666, 675-77 (3d. Cir. 1991); Retail Credit Co. v. Russell, 218 S.E.2d 54, 62 (Ga. 1975); Advanced Training Sys. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984). *See also* Sedler, *supra* note 19, at 154 (noting "[I]f the state constitution . . . requir[es] a jury trial, the court can summon a jury to pass on these questions"). *Kramer* describes one of the early cases, *O'Brien v. University Community Tenants Union*, 327 N.E.2d 753, 755 (Ohio 1975), predicated on there having been a jury trial, but this does not appear expressly in the Ohio Supreme or Appellate court reports. *Kramer*, 947 F.2d at 677.

421. *See, e.g.*, *Balboa Island*, 156 P.3d at 344-45 (speaking of a "determin[ation] at trial"); Cochran v. Tory, No. B159437, 2003 WL 22451378, at *2 (Cal. Ct. App. Oct. 29, 2003) (speaking of a "full trial"), *vacated*, 554 U.S. 734 (2005). *Balboa Island* is particularly ambiguous because it involved a suit only for an injunction and I have been unable to determine whether California procedure allowed for a jury trial. *Cochran* was a suit for damages and an injunction; the defendant did not ask for a jury trial.

422. Typically, injunctions are enforced without the intervention of a jury if they are civil, and if criminal, no jury is required if the punishment is less than six months in jail or a fine of $500 or less. 1 DOBBS, *supra* note 416, § 2.8(1), at 187, § 2.8(3), at 196-97, § 2.(4), at 204-06; Travis J. Ketterman, *The Demands of a Jury Demand*, 51 FED. LAW. 16, (2004) (discussing civil and criminal contempt); Note, *Authority of the Trial Judge*, 35 GEO. L.J. ANN. REV. CRIM.

for this extension follows from an inherent problem in drafting injunctions that restrain defamation.[423]

Courts and commentators generally agree that if defamation is to be enjoined, the injunction must be narrowly tailored to prohibit only the remarks that were determined to be libelous at trial.[424] Enjoining only what has been found defamatory is problematic for a variety of interrelated reasons. In most cases a prohibition limited to exactly what has been found defamatory would be "useless because a defendant can avoid its restrictions by making the same point using different words."[425] In addition, whether a remark is defamatory depends on a variety of contextual factors, including state of mind, which cannot be adequately delimited in a court order.[426] Finally, facts change and what was false at one point, or stated with an actionable state of mind, may no longer be false or stated with that mens rea.[427]

It is true that some cases might involve facts and contexts that cannot change. The earliest cases departing from the no-injunction rule involved claims of patent

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PROC. 553, 563-71, 575 (2006) (discussing civil and criminal contempt).

423. Indeed, the drafting problem is a significant part of the argument for the continued propriety of the no-injunction rule. *See Balboa Island*, 156 P.3d at 356-57 (Kennard, J., concurring and dissenting); Chemerinsky, *supra* note 397, at 171-72.

424. *See, e.g.*, *Tory*, 534 U.S. at 738; *Balboa Island*, 156 P.3d at 351-53; Bertelsman, *supra* note 19, at 322; Chemerinsky, *supra* note 397, at 171; Gold, *supra* note 19, at 253-54.

425. Chemerinsky, *supra* note 397, at 171. *See also Balboa Island*, 156 P.3d at 356 (Kennard, J., concurring and dissenting) (discussing how "[s]ubtle differences in wording can make it exceptionally difficult to determine whether a particular utterance falls within an injunction's prohibition"). For example, in *Balboa Island*, the trial court's order prohibited the defendant from saying, *inter alia*, the "[p]laintiff stays open until 6:00 a.m." and "[p]laintiff encourages lesbian activities." *Id.* at 354. Does it violate the injunction if defendant were to say the plaintiff "doesn't close until 5:45 and promotes homosexual practices"?

426. *See, e.g.*, *Balboa Island*, 156 P.3d at 356 (Kennard, J., concurring and dissenting) (giving example of the defendant responding to an inquiry by a reporter that inquired about what the court had prohibited her to say; and discussing how shouting fire in a crowded theater may or may not violate legal constraints); Chemerinsky, *supra* note 397, at 171-72 (discussing the problem generally).

427. *See Balboa Island*, 156 P.3d at 356 (Kennard, J., concurring and dissenting); Chemerinsky, *supra* note 397, at 171-72.

infringement by existing products.[428] That those claims could not possibly change may have encouraged the grant of an injunction.[429] Still, defamation suits in which the facts or context cannot change are rare.

Accordingly, to be effective, an injunction restraining defamation cannot be limited exactly to what has been found actionable. It must cover a broader range of remarks and be drafted somewhat abstractly. Inevitably, the injunction's enforcement will require discretionary determinations of what the injunction meant and whether it has been violated.[430] It may be that this problem is sufficiently severe to counsel retention of the no-injunction rule;[431] or it may be that the harm to the maligned plaintiff is sufficient to make the inevitable overbreadth constitutionally permissible. My observation, however, is that if enjoining defamation is to be permitted, the discretionary judgments necessarily exercised in enforcing any effective injunction calls for the double protection that is provided by the involvement of a jury as well as a judge. Indeed, the protection of a jury may be even more appropriate in the enforcement phase, since it is the judge's

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428. *See, e.g.*, Emack v. Kane, 34 F. 46 (C.C.N.D. Ill. 1888) (discussed *supra* text accompanying notes 379-88); Thorley's Cattle Food Co. v. Massam, (1880) L.R. 14 Ch. D. 763 (Ct. App.) (trade-secret infringement); Clapp, *supra* note 324, at 707. Consider also that in England, the courts preferred to enjoin the continued circulation of documents, rather than oral remarks, that had been found libelous. *See* MITCHELL, *supra* note 267, at 91-92.

429. Consider, on similar grounds, the Supreme Court's willingness to grant an injunction after a book had been found obscene, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), or uphold an administrative order prohibiting newspapers from labeling help wanted ads as male or female after the practice had been found to be gender discrimination, *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376 (1973). *But see Kingsley Books*, 354 U.S. at 446-47 (Douglas, J., dissenting) (observing that what is obscene depends on context, so there can be no prospective restraint; jury verdicts are always required); *id.* at 447 (Brennan, J., dissenting) (noting that the absence of a right to a jury trial was a fatal defect in the statute).

430. In a state like California, which does not apply the collateral bar rule, *Balboa Island*, 156 P.3d at 353-54 (Baxter, J., concurring), there is an additional reason to require participation of a jury in the injunction's enforcement proceeding. When the collateral bar rule does not apply, the defamation defendant is allowed to argue the remarks which violate the injunction are constitutionally protected because they never were, or are not now, defamatory. Because it is like a trial de novo, the protections of such a trial should apply.

431. *See Balboa Island*, 156 P.3d at 356-57 (Kennard, J., concurring and dissenting); Chemerinsky, *supra* note 397, at 171-72.

own order that the defendant has been seeking to circumvent.[432]

There should be, in other words, a First Amendment right to a jury trial in proceedings seeking to enforce injunctions that restrain defamatory speech. Without such a right, an injunction is an impermissible prior restraint. Modern commentators find the prior restraint / subsequent punishment distinction overdrawn because both regimes deter and chill speech. Historically, the evil of prior restraint was a matter of adjudicative structure as well as timing.[433] The presence or absence of a jury was central to the considerations that sensibly distinguished the impermissible regime of prior restraints from the permissible regime of subsequent punishment.

As a matter of statutory, if not constitutional law, the generation of English and American reformers of the late-eighteenth century focused on guaranteeing full jury participation in criminal and civil proceedings against defamatory speech. In the Reconstruction and Civil Rights eras of the 1860s and 1960s, constitutional reformers focused on expanding judge-centered protections for defamation defendants. Any retreat from the traditional rule that equity cannot enjoin defamation is a legal innovation that calls for application of the First and Fourteenth Amendment principle that defamation defendants have a double protection in which the judge checks the jury and the jury checks the judge.[434]

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432. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764-66 (1994) (discussing the reasons for more active appellate review of injunctions restricting speech); Bloom v. Illinois, 391 U.S. 194, 202-05 (1968) (holding that a jury verdict is required in criminal contempt proceeding where there is a significant penalty in part because defiance of a judge's order "often strikes at the most vulnerable and human qualities of a judge's temperament").

433. For a discussion tracing prior restraints to a different structural concern, see Michael I. Meyerson, *Rewriting* Near v. Minnesota*: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087 (2001) (prior restraints and separation of powers); Meyerson, *supra* note 11, at 339-42 (same).

434. Retreat from the no-injunction rule, if it occurs, would bring to the bar of constitutional adjudication other doctrines besides the ones discussed here. For example, in defamation cases, does the First Amendment constitutionalize the principle that injunctions may issue only when the remedy at law is inadequate? This is especially important when the plaintiff asks only for an injunction and, therefore, the issue of damages is not otherwise brought before the trier of fact. In *Balboa Island*, the California court upheld an injunction

against a defendant who owned a home next to the inn without any showing that she would not have been deterred from continuing her defamatory speech by an award of damages. (Kennard, J., concurring and dissenting). In addition, there is the principle that no injunction should issue when the defamatory speech involves a matter of public interest. That principle is of such obvious constitutional dimension that it was recognized by the *Balboa Island* court, *id.* at 352, and is recommended by all commentators who oppose the no-injunction rule. *See* Bertelsman, *supra* note 19, at 322; Gold, *supra* note 19, at 257-58, 261; Sedler, *supra* note 19, at 159.