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THE HISTORICAL RATIONALE OF THE SPEECH-AND-PRESS CLAUSE OF THE FIRST AMENDMENT

BENJAMIN A. RICHARDS*

The first amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." No reasons for this prohibition are given in the Constitution, unless they be in the Preamble, which proclaims several purposes that could be served by the prohibition and were probably thought to be so served by those who proposed and those who ratified the Bill of Rights.¹ The freedoms of speech and press are not mentioned in the Declaration of Independence, but the political philosophy tersely set forth in its second paragraph certainly furnishes a rationale for prohibiting the abridgment of those freedoms.² Government is said to be instituted among men in order to secure their unalienable rights to life, liberty, and the pursuit of happiness and to effect their safety and happiness. According to one interpretation, the freedoms of speech and of the press may be viewed as particular forms of what Jefferson called men's "rightful liberty" to act unrestrained according to their will within the limits drawn by the equal rights of others.³ The justification of governmental protection in this case is that men have a God-given right to liberty in the sense indicated and therefore a right to the freedoms of speech and of the press as part of it. According to a second interpretation, these freedoms do not fall within the meaning of "liberty" even in the broad Jeffersonian sense, but they may nevertheless be regarded as so essential that their protection is necessary to secure that "liberty" from governmental encroachment.⁴ The justification in this case is that governments are instituted to secure the right to liberty and that in order to achieve this end they must safeguard the freedoms of speech and of the press. Whichever interpretation is correct, the passage offers a concise justification for safeguarding those freedoms.

Much more explicit reasons are to be found in some of the early state constitutions.⁵ These declare that "the people have a right to freedom of

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1. The purposes are those of establishing justice, of promoting the general welfare, and of securing the blessings of liberty. For James Madison's defense of the amendments he presented on June 8, 1789, in the first session of the House of Representatives, see 1 *ANNALS OF CONG.* 432 (1789).

2. Judge Dumbauld maintains that it was through the adoption of the Bill of Rights that the spirit of the Declaration of Independence was infused into the Constitution. E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 141 (1957).

3. Letter from Thomas Jefferson to Isaac H. Tiffany, April 4, 1819.

4. The protection of the freedoms of speech and press can be considered necessary to preserve the rightful liberty of citizens from the tyranny of unjust laws and oppressive magistrates.

5. The constitutions of eight states contained bills of rights: Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia. The bills

speech, and of writing and publishing their sentiments.”⁶ They imply that this right is among those that government is instituted to protect. They claim that “the liberty of the press is essential to the security of freedom.”⁷ And they conclude that this freedom “ought not to be restrained.”⁸ In several constitutions this conclusion is drawn from the statement immediately preceding it or from a metaphorical variant to the effect that “the freedom of the press is one of the great bulwarks of liberty.”⁹ In others it is drawn from the statement that “the people have a right to freedom of speech, and of writing and publishing their sentiments.” Thus, some look back for a justifying reason to the people’s right to speak and write and publish their sentiments, while others look forward to the consequence of not permitting infringement of liberty of the press — namely, that of securing freedom.¹⁰

That the freedom to be secured is freedom from governmental oppression can readily be gathered from the general purport of the declaration of rights and from the stated objects of specified articles. Virtually all of the declarations proclaim the right of the community to reform, alter, or totally change any government when their protection, safety, prosperity, and happiness require it.¹¹ Several of them assert that this may be done “whenever public liberty [is] manifestly endangered. . . .”¹² Most of them declare that elections ought to be free, or free and frequent, or free, certain, and regular, or all four of these. The two declarations affirming that “all elections ought to be free and frequent” give this reason: “the right in the people to participate in the Legislature, is the foundation of liberty and of all free government.”¹³ Four of the declarations contain an article that states in substance that the people have a right to return their public officers to private life and to fill the vacancies by certain and regular elections in order that those employed in the legislative and executive business of the state may be restrained from

of rights of these eight states and the constitutions of Georgia and South Carolina all contained free press provisions. But only the constitutions of Pennsylvania and Vermont contained both free speech and free press. The Maryland constitution guaranteed its legislators freedom of speech and debate.

6. *E.g.*, PA. CONST. Decl. of Rights, art. XII (1776); VT. CONST. ch. I, art. XIV (1777).

7. *E.g.*, Part the First MASS. CONST. art. XVI (1780); N.H. CONST. art. XXII, pt. I (1784).

8. The words quoted are taken from the articles cited *supra* note 6. Similar provisions appear in DEL. CONST. Decl. of Rights §23 (1776); GA. CONST. art. LXI (1777); MD. CONST. Decl. of Rights, art. XXXVIII; N.C. CONST. Decl. of Rights, art. XV (1776); S.C. CONST. art. XLIII (1778) and in constitutional articles cited *supra* note 7.

9. The “bulwarks” metaphor is used in the VA. CONST. Bill of Rights §12 (1776) and N.C. CONST. Decl. of Rights, art. XV. It is also used in Cato’s Letters No. 15 (Feb. 4, 1720). See THE ENGLISH LIBERTARIAN HERITAGE 38, 42 (D. Jacobson ed. 1965).

10. Professor Rossiter has pointed out that pamphleteers of the American Revolution considered the freedoms of speech, press, assembly, and petition “not only individual rights but social necessities, conditions essential to the conduct of representative government.” C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 121, 219, 220 (1963).

11. See DEL. CONST. Decl. of Rights §4; MD. CONST. Decl. of Rights art. IV; MASS. CONST. Decl. of Rights art. VII; N.H. CONST. Bill of Rights, art. X; VA. CONST. Bill of Rights §3.

12. DEL. CONST. Decl. of Rights §5; MD. CONST. Decl. of Rights art. IV; N.H. CONST. Bill of Rights art. X.

13. DEL. CONST. Decl. of Rights §6; MD. CONST. Decl. of Rights art. V.

oppression.¹⁴ It requires no special insight or familiarity with American political thought of that period to recognize the presupposition that the rights to reform a bad government and to remove oppressive officers can be intelligently and effectively exercised only if the people have unrestricted access to information about official conduct.¹⁵ In many of the early state constitutions, then, the reasons for declaring the right to freedom of expression and for seeking to preserve it are substantially set forth.

Whether the same reasons impelled those who recommended, those who formally proposed, and those who finally ratified what was to become the first amendment to the Federal Constitution, it is the purpose of this inquiry to determine. An effort will be made to assemble and canvass the reasons advanced for prohibiting Congress from abridging the freedoms of speech and press by delegates to the state conventions ratifying the Constitution, by members of the first Congress who proposed the amendments, by members of the state legislatures who ratified ten of the twelve proposed amendments, and by other public men of the generation of the framers. Taken together, these reasons can be viewed as the official justification of the first amendment's guarantee of freedom of expression.

None of the plans laid before the Philadelphia Convention included a bill of rights, nor did the resolutions that were submitted to the Committee of Detail on July 26, 1787. The first attempt to secure anything resembling a bill of rights was made on August 20, 1787, when Charles Pinckney offered thirteen propositions, one of which read: "The liberty of the Press shall be inviolably preserved."¹⁶ These propositions were referred without debate to the

14. MASS. CONST. Decl. of Rights art. VIII; PA. CONST. Decl. of Rights art. VI; VT. CONST. Decl. of Rights art. VII; VA. CONST. Bill of Rights §6.

15. The Massachusetts Constitution of 1780 was drawn up by John Adams, who much earlier had written that "liberty cannot be preserved without a general knowledge among the people. . . ." He declared that the people "have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge—I mean, of the characters and conduct of their rulers. Rulers are no more than attorneys, agents, and trustees for the people; and if the cause, the interest and trust, is insidiously betrayed or wantonly trifled away, the people have a right to revoke the authority that they themselves have deputed and to constitute abler and better agents, attorneys, and trustees." J. ADAMS, *A Dissertation on the Canon and Feudal Law*, in THE POLITICAL WRITINGS OF JOHN ADAMS 13 (G. Peek, Jr. ed. 1954). Compare the quoted passage with MASS. CONST. Decl. of Rights, arts. V, VIII, XVI. In the *Dissertation* Adams went on to say that none of the means of information is more sacred than the press; and his views call to mind those propounded in the "Address to the Inhabitants of Quebec," sent by the First Continental Congress, of which Adams was a member. Among the "five great rights" mentioned in the Address was the freedom of the press. Its importance was said to consist, "besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Letter Addressed to the Inhabitants of the Province of Quebec, Oct. 26, 1774, JOURNAL OF THE CONTINENTAL CONGRESS 1, 108 (W. Ford ed. 1904).

16. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334, 341 (3d ed. M. Farrand ed. 1937) [hereinafter cited as Farrand's RECORDS].

Committee of Detail, but that committee made no report on them. On September 12 a motion was made by Elbridge Gerry for a committee to prepare a bill of rights,¹⁷ and on September 14 Pinckney and Gerry moved to insert a declaration "that the liberty of the Press should be inviolably observed."¹⁸ Both motions were defeated,¹⁹ and debate was apparently scanty in each case.²⁰ Colonel George Mason seconded the former motion and expressed the wish that the Constitution be prefaced with a bill of rights because this would, he thought "give great quiet to the people."²¹ Roger Sherman opposed the motion on the ground that "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."²² The records do not reveal what, if anything, was said in support of the latter motion. Sherman again spoke in opposition. He pronounced the proposed declaration unnecessary because the "power of Congress does not extend to the Press."²³ The defeat of these motions suggests that most of the delegates found Sherman's arguments convincing.²⁴

In the ensuing debate over ratification, the writers of *The Federalist* were called upon to justify the absence of a bill of rights from the proposed Constitution. In No. 84 of *The Federalist* Alexander Hamilton declared a bill of rights unnecessary and even dangerous, because it would contain various exceptions to powers not granted to the general government and would thereby afford a colorable pretext to claim more than were actually granted.²⁵ "For why declare that things shall not be done which there is no

17. *Id.* at 582, 588.

18. *Id.* at 617.

19. *Id.* at 583, 588, 611, 618. Professor Holcombe states that all efforts to secure the inclusion of a bill of rights failed "either because delegates had little faith in the practical efficacy of declarations of general principles or because they believed that the fundamental rights of Americans were sufficiently protected by the declarations in the state constitutions and by the incorporation in the Federal Constitution of provisions protecting the most important rights against abridgment by the Congress." A. HOLCOMBE, OUR MORE PERFECT UNION 45 (1950).

20. I say "apparently" because neither the journal of the convention nor the notes of various of its members show that any more was said in debate on these motions than what is indicated above. It may well be, however, that the whole matter of the liberty of the press was debated at considerable length, as Charles Pinckney implied in a speech made before the House of Representatives of South Carolina on January 18, 1788. See THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION IV, 315-16 (2d ed. J. Elliott ed. 1836) [hereinafter cited as Elliott's DEBATES].

21. 2 FARRAND'S RECORDS, *supra* note 16, at 587-88.

22. *Id.* at 588.

23. *Id.* at 618.

24. The defeat of these motions is not the sole evidence that the delegates either were convinced by or agreed with Sherman's contentions. Some of them later made use of similar arguments during the ratification debate, e.g., Alexander Hamilton in THE FEDERALIST No. 14, James Wilson in a speech before the Pennsylvania Convention, Edmund Randolph before the Virginia Convention and Charles Pinckney before the South Carolina House of Representatives. See 2 ELLIOT'S DEBATES 436, 468; 3 ELLIOT'S DEBATES 204, 469; 4 ELLIOT'S DEBATES 315.

25. James Wilson told a meeting of the citizens of Philadelphia that the omission of a bill of rights was no defect "for it would have been superfluous and absurd, to have stipulated with a Federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence." PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 155 (P. Ford

power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"²⁶ Similar arguments were presented by James Wilson to the Pennsylvania convention, by Theophilus Parsons to the Massachusetts convention, by Governor Randolph to the Virginia convention, by James Iredell to the North Carolina convention, and by Charles Pinckney to the South Carolina House of Representatives.²⁷ Having taken the position that the freedom of the press and other rights were in no need of special protection, the Federalists had no cause to consider what values would be realized or what evils would be averted by providing such protection.

Many of those who opposed ratification thought the omission of a bill of rights meant that there was "no security in the profered system, either for the rights of conscience or the liberty of the Press . . ." ²⁸ It was feared that Congress might trample on these rights under guise of exercising "an indefinite power to provide for the general welfare"²⁹ and a power to make "all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers.³⁰ George Mason asked the delegates to the Virginia convention why, if oppressions arose under the new government and such abuses were exposed by any writer, Congress could not say that such disclosures were "destroying the general peace, encouraging sedition, and poisoning the minds of the people?"³¹ Patrick Henry insisted that the presence of various restrictions on Congress plainly demonstrated that Congress could exercise powers by implication and, consequently, that negative clauses were needed to prevent the exercise of powers not expressly given.³² Henry demanded a bill of rights to protect the great objects of religion and the liberty of the press. But neither he nor any other delegate to the Virginia convention undertook to specify those "great objects" in any detail. In fact, their speeches give no more indication of the nature of the evils they sought to avert than do the statements quoted or paraphrased above. These opponents of ratification found it sufficient to their purposes to issue dark warnings of how the people's liberties might suffer at the hands of an arbitrary Congress.³³

ed. 1888). He pointed out that inasmuch as no power had been granted to regulate literary publications "it would have been merely nugatory to have introduced a formal declaration" prohibiting its exercise. *Id.* at 157.

26. THE FEDERALIST No. 84, at 559 (Mod. Lib. ed. 1937) (Hamilton).

27. See 2 Elliot's DEBATES 161-62, for Parson's argument; 4 Elliot's DEBATES 164 for Iredell's; and references cited note 24 *supra* for the others.

28. The words quoted are from a pamphlet entitled *Observations on the New Constitution, and on the Federal and State Conventions* by Mercy Otis Warren and long attributed to Elbridge Gerry. PAMPHLETS *supra* note 25, at 6.

29. 3 Elliot's DEBATES 449.

30. *Id.* at 441. Such fears were expressed by delegates to various of the state conventions, e.g., by William Grayson and George Mason in the Virginia Convention. See generally 3 Elliot's DEBATES 441-49.

31. *Id.* at 442.

32. *Id.* at 445.

33. See J. MAIN, THE ANTIFEDERALISTS, CRITICS OF THE CONSTITUTION, 1781-1788, at 160-61 (1961).

Seven of the state conventions recommended in their ratifications that certain amendments be made to the Constitution.³⁴ Two of these seven declared and made known various rights that could not, as they put it, "be abridged or violated";³⁵ and two others recommended the addition of a declaration of rights.³⁶ All four included freedom of the press among the rights they listed. Three of the four offered an article that asserted both that "the people have a right to freedom of speech, and of writing and publishing their sentiments" and that "the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated." These passages announce the very same beliefs that were expressed by various articles of the state declarations of rights. In fact, the first one seems to have been taken verbatim from section 12 of the Pennsylvania Declaration of Rights, and the latter employs the same "bulwarks" metaphor that was first used in section 12 of the Virginia Bill of Rights.

Among the amendments that James Madison presented during the first session of the first Congress was one that read: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."³⁷ Madison met the argument that a bill of rights was unnecessary by pointing out that even if the general government kept within the limits of its prescribed authority "it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, because . . . there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States. . . ."³⁸ In urging the House of Representatives to propose amendments designed to secure "the great rights of mankind," he told the members:³⁹

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist ever encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

After a brief debate Madison's propositions were referred to a select committee that was appointed to consider and present proposed amendments. Among the propositions that it reported to the House was one reading:

34. Massachusetts, 1 ELLIOTT'S DEBATES 319; New Hampshire, *id.* at 325-27; New York, *id.* at 327-31; North Carolina, *id.* at 331-32, Rhode Island, *id.* at 334-37; South Carolina, *id.* at 325; Virginia, *id.* at 327.

35. New York, *id.* at 329 and Rhode Island, *id.* at 335.

36. Virginia, 3 ELLIOTT'S DEBATES 657 and North Carolina, 1 ELLIOTT'S DEBATES 331.

37. 1 ANNALS OF CONG. 451 (1789). Representative James Jackson of Georgia contended that the amendments were "unnecessary if not dangerous." Securing the liberty of the press was unnecessary, he said, because Congress was given no power to regulate this subject. *Id.* at 442.

38. *Id.* at 438.

39. *Id.* at 439.

"The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." This article was accepted in this form by the House and was debated at length, but attention focused almost entirely on the second clause.⁴⁰ No Representative found it necessary to advance reasons for protecting the freedoms of speech and press from infringement. The Senate modified the House article and added two clauses dealing with religion, the first of which was reworded in conference.⁴¹ Since the Senate Journal contains a record only of motions made and the affirmative or negative action taken on them, we do not know what, if anything, was said on the subject of speech and press. The same is true of the journals of the state legislatures for the sessions in which ten of the twelve amendments submitted to the states were ratified.

Professor Levy has observed that in the controversy over the Sedition Act public men of the generation of the framers for the first time expressed themselves with force, clarity, and detail on the meaning and the limitations of the freedoms of speech and press.⁴² Most of the discussion concerned the import and intent of the speech-and-press clause and the nature and scope of the protection it provides.⁴³ But some attention was given to the rationale of the constitutional guarantee. For example, Representative John Nicholas of Virginia, in the course of questioning the constitutionality of the Sedition Bill, told members of the House that no definition of freedom of press would, as he put it, satisfy the inquiry, because it had been the object of all regulation of the press to destroy the only means by which the people can examine and become acquainted with the conduct of public persons.⁴⁴ In partial

40. A convenient account is to be found in B. MITCHELL & L. MITCHELL, *A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 195-97* (1964). See also R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 206-08* (1955).

41. See E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 45, 49 (1957).

42. L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 246 (1963).

43. Defenders of the Sedition Act argued that "the liberty of the press consists not in a license for every man to publish what he pleases" and was never thought to extend to the publication of false, scandalous, and malicious writings injurious to individuals or to the Government. From this they concluded that "a law to punish seditious and malicious publications is not an abridgment of the liberty of the press, for it would be a manifest absurdity to say, that a man's liberty was abridged by punishing him for doing that which he never had a liberty to do." See Report of a House Committee, Feb. 25, 1799, 9 *ANNALS OF CONG.* 2985-93. John Marshall appears to have been the only Federalist who openly disapproved of the Alien and Sedition Laws. See 2 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 451 (1916). Every Federalist who expressed an opinion on the subject regarded these laws as constitutional, and Clinton Rossiter thinks they were right. See C. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 100 n.163 (1964). On the other hand, Irving Brandt credits Madison with exposing these Acts "as blatant violations of rights guaranteed by the Constitution." I. BRANDT, *JAMES MADISON, FATHER OF THE CONSTITUTION, 1787-1800*, at 470 (1941).

44. 8 *ANNALS OF CONG.* 2140 (1798). In *THE FEDERALIST* No. 84, at 560 (Mod. Lib. ed. 1937), Hamilton had asked "What is the liberty of the press?" He declared it impracticable for anyone to give it "any definition which would not leave the utmost latitude for evasion." *Id.* Both the raising of this question and the nature of the comment suggest that he did not then understand "the liberty of the press" to signify mere exemption from prior

answer to the contention that freedom of the press did not extend to the publication of false, scandalous, and malicious writings against the Government or its officers, Nicholas said:⁴⁵

If there could be safety in adopting the principle, that no man should publish what is false, there certainly could be no objection to it. But it was not the intention of the people of this country to place any power of this kind in the hands of the General Government — for this plain reason, the persons who would have to preside in the trials of this sort, would themselves be parties, or at least they would be so far interested in the issue, that the trial of the truth or falsehood of a matter would not be safe in their hands. On this account, the General Government has been forbidden to touch the press.

Nicholas warned of the chilling effect such a bill would have on printers. He asked the members “to reflect on the nature of our Government” and not to forget:⁴⁶

[T]hat all its officers are elective, and that the people have no other means of examining their conduct but by means of the press, and an unrestrained investigation through them of the conduct of the Government. Indeed, the heart and life of a free Government, is a free press; take away this, and you take away its main support. . . . to restrict the press, would be to destroy the elective principle, by taking away the information necessary to election, and there would be no difference between it and a total denial of the right of election, but in the degree of usurpation.

This line of argument was followed in the Virginia Resolutions and elaborated in the report of the special committee to which the Virginia House of Delegates referred the replies of the other state legislatures. The Virginia Resolutions protested against the Sedition Act because it was “levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.”⁴⁷ The Act was said to exercise a power not delegated by the Constitution and to be, in fact, expressly forbidden by the first amendment.⁴⁸ The Virginia convention, which had ratified the Federal Constitution, was said to have recommended an amendment for the very purpose of guarding the liberty of conscience and of the press “from every possible attack of sophistry or ambition.”⁴⁹ To those who defended the Sedition Act by maintaining that it forbade only publications that were false, malicious, and intended to defame, the special committee answered as follows. First, it pointed out the difficulty in some, and the

restraint, although at that time he was talking as if the Blackstonian definition were the correct answer to his original question.

45. *Id.*

46. 2 ABRIDGMENT OF THE DEBATES OF CONGRESS 316 (1957) [hereinafter cited as ABRIDGMENT]. See also 8 ANNALS OF CONG. 2140-41 (1798).

47. 4 ELLIOT'S DEBATES 529.

48. *Id.* at 528.

49. *Id.* at 529.

vexation in all, cases of proving in a court of law that the allegedly seditious statements were nevertheless the truth; and, second, it remarked that opinions, inferences, and conjectural observations do not constitute the most persuasive evidence before a court of law.⁵⁰ Last and most important, it observed that, quite apart from the question of to what extent actual malice may be inferred from the mere fact of publication, it is impossible to punish the intent to bring public officers into contempt or disrepute without striking at the right of freely discussing public characters and measures, because those who discuss them must expect and intend to excite unfavorable sentiments so far as they are thought to be deserved.⁵¹ Since the Act operates to prohibit discussions tending to excite such sentiments, it is, said the committee, "equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their character and conduct."⁵² The committee again urged that the right of electing officers constitutes the essence of a free and responsible government. "The value and efficacy of this right," it noted, "depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."⁵³

Although Madison and other Republicans argued that the Sedition Act would operate to deprive the people of information on public issues and to protect incumbent officers from adverse criticism, they did not directly give reasons for constitutionally forbidding the abridgment of freedom of expression. They did so indirectly, however, because their statements were made to support the contention that the Act violated the free-press guarantee of the first amendment. And to point out that the Act would suppress information and protect public officials was relevant to this question only if suppression and protection were among the dangers that the speech-and-press clause was intended to prevent.⁵⁴ Thus, the arguments of Representative Nicholas and

50. *Id.* at 575.

51. *Id.* In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Mr. Justice Black said, concurring, that "freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion." *Id.* at 296-97. Against the opinion of the Court that the Constitution gives only a "conditional privilege," Mr. Justice Goldberg took the position that "the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses . . ." The theory of our Constitution, he said "is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious." *Id.* at 298-99.

52. 4 *Elliot's DEBATES* 575.

53. *Id.*

54. This statement is too sweeping. To point out that the Act would have the effects described is also relevant if the intent of the clause is unclear, for then the issue is not whether the clause was intended to prevent evils of the kinds indicated, but whether the clause should be construed in such a way as to prevent evils of those kinds. And to show

the Madison committee presuppose that this clause was meant to prevent just the sorts of evil they believed would result from the application of the Sedition Act. Whether it was in fact intended to prevent evils of these kinds is worth looking into, and investigation reveals that the evidence is rather inconclusive on this point. If the clause was intended to prevent evils of the kinds mentioned by Republican opponents of the Sedition Act, this cannot be inferred from the language of the clause itself.⁵⁵ The record of the debates of the first Congress sheds little light on the subject. And since records of the debates in the state legislatures are nonexistent, there is no way of knowing exactly what the first amendment freedoms were understood to comprise by those who ratified the first ten amendments, much less what sorts of evils the speech-and-press clause was supposed to prevent. Once the proposed amendments were sent to the states, they appear to have been discussed very little either in or out of the legislatures. They are seldom mentioned in official records, in newspapers, or in private correspondence.⁵⁶

that the evil consequences of penalizing utterances or publications of the kinds specified by section 2 of the Sedition Act are likely to be worse than those brought about by the utterances or publications themselves is surely to give a good reason for construing the clause as prohibiting the punishment of utterances and publications of that kind. Concerning the actual intent of the speech-and-press provision, such evidence as there is indicates that it was to prohibit Congress from passing any law that would restrict oral or printed expression of any kind. Therefore, Mr. Justice Black is probably right in maintaining that "the First Amendment sought to leave Congress devoid of any kind or quality of power to direct any type of national laws against the freedom of individuals to think what they please, [and] advocate whatever policy they choose . . ." *Barenblatt v. United States*, 360 U.S. 109, 151 (1959). Professor Levy states categorically: "The framers meant Congress to be totally without power to enact legislation respecting the press." L. LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* lvi-lvii (1966). That the speech-and-press clause was motivated by libertarian sentiments of the sort expressed by certain Republican critics of the Sedition Act or on various occasions by Justice Black himself appears more than doubtful in the light of Professor Levy's recent research. See generally L. LEVY, *LEGACY OF SUPPRESSION* ch. 5 (1960).

55. It cannot be inferred because the clause simply forbids Congress to pass any law abridging the freedom of speech or of the press. For some interesting thoughts on interpreting this clause, see the discussion following C. CURTIS, *The Role of the Constitutional Text*, in *SUPREME COURT AND SUPREME LAW* 72-73 (E. Cahn ed. 1954). If the phrase "the freedom of the press" was used in such a way that the clause was to be understood as requiring only exemption from prior restraint upon publication, as H. G. Otis and other supporters of the Sedition Bill insisted it was, then one might reasonably doubt that the clause was really intended to prevent the kinds of evils pointed out by opponents of the bill. The Blackstonian definition, as Nicholas remarked, does not at all distinguish between publications of different sorts, but leaves all to regulation by law provided only that the Government refrains from interfering until publication is actually made. To give the clause such a construction, he said, would bring it to a mere nullity. 2 *ABRIDGMENT* 381. Another Republican, Albert Gallatin, called it "preposterous to say, that to punish a certain act was not an abridgment of the liberty of doing that act." He declared it "an insulting evasion of the Constitution" for proponents of the bill to say: "We claim no power to abridge the liberty of the press; *that*, you shall enjoy unrestrained. You may write and publish what you please, but if you publish anything against us, we will punish you for it. So long as we do not prevent, but only punish your writings, it is no abridgment of your liberty of writing and printing." 8 *ANNALS OF CONG.* 2159-60 (1798).

56. "Considering the importance of the first ten amendments, it is astonishing how

Returning to the controversy over ratification of the Constitution, one finds that the debate over the omission of a bill of rights was very general. In Levy's words: "Freedom of the press was everywhere a grand topic for declamation, but the insistent demand for its protection on parchment was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited."⁵⁷ One reason for this was that the anti-Federalists wanted a provision that would simply make clear that the general government had no power whatsoever respecting speech and publication, while the Federalists insisted that such a provision was unnecessary since no power over these matters was conferred by the Constitution in the first place.⁵⁸ There was no "reasoned analysis" of the nature and extent of the freedom of the press at least partly because the actual dispute centered on the narrow issue of whether the national government had any power at all over the press. The Federalists maintained that it did not, and the anti-Federalists demanded that all doubts be removed by an explicit prohibition.⁵⁹ Evidently the speech-and-press clause of the first amendment was inspired by a desire to make an absolute reservation of power respecting speech and the press, and not to forbid only such laws as were deemed *unduly* restrictive.⁶⁰

little one can find about them in the documentary sources or in the writings on the Constitution and the works of those who secured their consideration and adoption." 4 E. CHANNING, A HISTORY OF THE UNITED STATES 157 n.1 (1917).

57. L. LEVY, LEGACY OF SUPPRESSION 214-15 (1960).

58. I. BRANDT, THE BILL OF RIGHTS 231 (1965). See notes 25, 26, 27 and accompanying text *supra*.

59. As Professor Levy has remarked: "The Federalists who expressed themselves on the subject concurred in stating that Congress, or the 'general government,' had no power whatever . . . to legislate on matters respecting speech or press. . . ." L. LEVY, LEGACY OF SUPPRESSION 225 (1960). During the debate on the Sedition Bill, Nathaniel Macon of North Carolina quoted statements made by leading members of several of the ratifying conventions in order to show from the opinions of friends of the Constitution that it was understood that prosecutions for libel could not take place under the general government, but could only be carried on in state courts. Macon averred that not a single member of any of the conventions ever expressed an opinion to the contrary. 2 ABRIDGMENT 318, See also 8 ANNALS OF CONG. 2151 (1798).

60. Professor Levy is convinced that the first amendment injunction against abridging the freedom of the press was "intended and understood to prohibit any congressional regulation of the press, whether by means of a licensing law, a tax, or a sedition act." Though the framers assumed that Congress was totally without power to enact legislation respecting speech or the press, the first amendment was added to quiet public apprehension that Congress might exceed the bounds of its delegated powers. And the words "Congress shall make no law . . . abridging the freedom . . ." were intended to bar the possibility that those powers might be used to curb oral or printed expression. "From this viewpoint," writes Levy, "the Sedition Act of 1798 was unconstitutional." Levy, *Liberty and the First Amendment 1790-1800*, 68 AM. HIST. REV. 22, 28 (1962). From this viewpoint, it is difficult to see what sort of federal statute restricting speech or press would be constitutional. During the course of the House debate on July 10, 1798, Albert Gallatin asserted that only the "elastic" clause gave color to the constitutional authority claimed for the Sedition Bill; and then he pointed out that it was to remove fears regarding the possible misuse of that clause that the first amendment was proposed and adopted. 8 ANNALS OF CONG. 2158-59 (1798). That this claim is correct is borne out by the speech made by Madison on June 8, 1789, the day he introduced his amendments. See 1 ANNALS OF CONG. 435 (1789).

It is therefore not surprising that no distinctions were made between permissible kinds and impermissible kinds of speech and publication,⁶¹ and that no discussion implied or suggested that the phrase "the freedom of the press" was used in some definite and restricted sense that was understood to leave Congress free to punish the kinds of writings that defenders of the Sedition Act were later to call "the licentiousness of the press" and "the abuse of that liberty."⁶² On the contrary:⁶³

[T]he Framers themselves, whatever they understood freedom of speech or press to mean, had given the public specific assurances again and again that neither speech nor press could be the subject of repressive legislation by a government bereft of authority as to that subject. . . . It was only after the new government had gone into operation and the First Amendment was ratified that many of the Framers and their associates spoke and acted as if freedom of speech and press could be prosecuted in federal courts and be abridged by Congress as well.

They now argued that the Sedition Act was a law necessary and proper for carrying into execution certain expressly delegated powers, and that it was not contrary to the first amendment inasmuch as the freedom of the press secured against congressional abridgment did not extend to seditious and malicious publications.⁶⁴ No wonder the Madison committee found it "painful to remark how much the arguments now employed in behalf of the Sedition Act, are at variance with the reasoning which then justified the Constitution, and its ratification!"⁶⁵ To adopt the Federalist position regarding the constitutionality of the Act, the committee commented caustically:⁶⁶

61. An exception to this generalization is a statement respecting the meaning of the phrase "the liberty of the press" made by James Wilson before the Pennsylvania ratifying convention. 2 ELLIOT'S DEBATES 449.

62. In the House debate over the Sedition Bill, Gallatin stated that he and other opponents of the bill understood the first amendment to mean that "Congress could not pass any law to punish any real or supposed abuse of the press," while "the construction given to it by the supporters of the bill was, that it did not prevent them to punish what they called the licentiousness of the press, but merely forbade their laying any previous restraints upon it." 8 ANNALS OF CONG. 2160 (1798). The evidence respecting the framers' views of the powers of Congress even prior to the adoption of the first amendment and the evidence respecting the aims of those who sought and supported a speech-and-press guarantee sustains Gallatin's interpretation, which is best summed up in his own words: "Congress were by that amendment prohibited from passing any law abridging [the freedom of speech and of the press]; they were, therefore, prohibited from adding any restraint, either by previous restrictions, or by subsequent punishment . . . in short, they were under the obligation of leaving that subject where they found it—of passing no law, either directly or indirectly, affecting that liberty." *Id.* at 2159-60.

63. L. LEVY, LEGACY OF SUPPRESSION 237-38 (1960). *Cf.* I. BRANDT, THE BILL OF RIGHTS 224-31 (1965).

64. The press clause was, in fact, said, to prohibit only previous restraints upon publication. *See* the speeches of Representatives H. G. Otis and R. G. Harper in 8 ANNALS OF CONG. 2147-48, 2167-68 (1798).

65. 4 ELLIOT'S DEBATES 572.

66. *Id.* Professor Mendelson has defended the Supreme Court's recent use of the so-called "balancing" test by pointing out that "the language of the first amendment is highly ambiguous, and that this ambiguity is at best compounded by history." Mendelson, *On the*

[W]ould exhibit a number of respectable states, as denying, first, that any power over the press was delegated by the Constitution; as proposing, next, that any amendment to it should explicitly declare that no such power was delegated; and, finally, as concurring in an amendment actually recognizing or delegating such a power.

The question concerning the aim of the speech-and-press clause might well be answered by arguing that, since it was apparently intended to make clear that Congress was forbidden to pass any laws that would in any manner restrict oral or written expression, it must have been intended to forbid the enactment of any law that would either restrain publishers from, or punish them for, reporting on the qualifications or the conduct of public officers or commenting adversely on them. Indeed this reply is not supported by this inference alone, for those who found fault with the omission of a bill of rights from the original Constitution had clearly expressed the fear that Congress might abuse or exceed its power and then seek by repressive laws to prevent disclosure or to silence criticism.⁶⁷ Moreover, those state ratifying conventions that included the freedom of the press among the rights whose protection they recommended offered the same reason that had been given for the free-press provisions of certain of the state declarations of rights: the freedom of the press is one of the greatest bulwarks of liberty. Of course, the beliefs and aims of those who demanded and recommended an amendment to protect the freedom of the press are not necessarily indicative of the intent of those who later proposed or ratified the first amendment. However, what we know about both groups supports a supposition that the latter group shared the same beliefs as the former. Thus, it seems safe to conclude that the intended purpose of the speech-and-press clause was just what Republican critics of the Sedition Act said it was: to safeguard the free discussion of public characters and measures to the end that capable and honorable men should be elected to public office and governmental power be scrupulously and responsibly exercised.⁶⁸

Meaning of the First Amendment: Absolutes in the Balance, 50 CALIF. L. REV. 821 (1962). He quotes with approval Zechariah Chafee's statement that "the framers had no very clear idea as to what they meant by 'the freedom of speech or of the press.'" *Id.* at 823. Granting Chafee's point and Mendelson's truism regarding the equivocal character of the word "freedom," I would nevertheless insist that the framers seem to have had a much clearer idea concerning the import of the speech-and-press clause taken as a whole: that it deprived Congress of any power it might otherwise be supposed to have respecting oral or printed expression. If this is so, then it cannot very well be maintained either that the "freedom of speech and of the press," as that phrase is used in the speech-and-press clause, signifies only the liberty from prior restraint, as Federalists found it convenient to argue in 1798, or that its meaning is rendered uncertain by reason of its extreme ambiguity, as Mendelson argues in 1962. Far from compounding its ambiguity, history, if it does anything, lessens it. See notes 54, 58, 59, 61, and accompanying text *supra*.

67. For pertinent statements by delegates to the state ratifying conventions, see 2 Elliot's DEBATES 177; 3 Elliot's DEBATES 441, 445; 4 Elliot's DEBATES 167, 312, 314, 337.

68. If the purpose of the clause was as stated, it cannot be maintained with much credibility that the phrases "the freedom of speech" and "the freedom of the press" are so ambiguous or indefinite in meaning as to defy reasonable judicial interpretation. Judge Cooley long ago pointed out that one extrinsic aid to be used in determining the meaning

Unfortunately, this conclusion can be safely drawn only if it is duly qualified. Most probably the clause was intended and expected to stop Congress from interfering with political discussion, but it does not follow that those who sought to restrain Congress also wished to halt all governmental restrictions upon political discussion. For one thing, it is not at all clear that the framers did not suppose that federal courts would have common law jurisdiction and thereby be able to try persons charged with committing common law crimes such as seditious libel.⁶⁹ Second, it should not be forgotten that the first amendment imposes limitations only upon Congress, and that the Senate had failed to pass a House-approved amendment that would have prohibited the states from infringing upon the freedoms of speech and of the press. Third, it now appears, as Professor Levy says, that:⁷⁰

[T]he prohibition on Congress was motivated far less by a desire to give immunity to political expression than by a solicitude for states' rights and the federal principle. The primary purpose of the First Amendment was to reserve to the states an exclusive legislative authority in the field of speech and press.

This latter purpose would not of course be incompatible with a desire to safeguard political expression if it were true that the states accorded, and were known to accord, considerable protection to speech and press. But the fact is that the states did not, and there is no reason to think that those who recommended, or those who proposed, or those who ratified the First Amendment were unaware of this. Twelve states afforded no constitutional protection at all to the freedom of speech, and the eight states that constitutionally

of an otherwise doubtful constitutional provision is "a contemplation of *the object to be accomplished or the mischief to be remedied or guarded against* by the phrase in which the ambiguity is met with." T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 80 (6th ed. 1890). Various opinions of the Supreme Court have undertaken to state the rationale of the speech-and-press clause, and those coming closest to expressing what appears to have been the position of the framers were written by Chief Justice Charles Evans Hughes. See *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Near v. Minnesota*, 283 U.S. 697, 716-22 (1931).

69. The common law jurisdiction of federal courts was asserted by John Jay, first Chief Justice of the Supreme Court, and his view was held by most members of the bench and bar. F. WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 1 (1849). Prosecutions for seditious libel against the federal government or its officers began before the passage of the Alien and Sedition Laws. C. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835*, at 159 (1944). For an account of the controversy over whether the United States has a common law giving federal courts authority to punish crimes other than those defined by federal statute, see I C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* ch. 9 (rev. ed. 1926). This question was answered affirmatively by *United States v. Ravara*, 2 U.S. (2 Dall.) 297 (1793), but the Court later reversed itself in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

70. Levy, *Liberty and the First Amendment: 1790-1800*, 68 AM. HIST. REV. 22, 30 (1962). Essentially the same view was expressed several decades ago by Edward S. Corwin. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resumé*, 30 YALE L.J. 1062 (1920). See also J. ROCHE, *COURTS AND RIGHTS* 58-59 (1961); Howe, Book Review, 13 WM. & MARY Q. 573, 575-76 (3d ser. 1956).

safeguarded the freedom of the press did not thereby abrogate longstanding common law restrictions on "abuses" such as seditious libel.⁷¹ Few men of the day stopped to consider whether state practices were inconsistent with securing that full and free examination of public men and measures that was generally acknowledged to be essential to the effective popular control of government. Those who did ponder the matter believed that the freedom of the press was sufficiently protected if prior restraints were prohibited and if those prosecuted in state courts for criminal libel were allowed to give evidence of the truth of their accusations and the jury were empowered to decide whether the utterances were criminal.⁷² This view is obviously open to the very objections that Nicholas and the Madison committee leveled against the Sedition Act itself. However, it must be remembered that Republican critics of the Act would gladly have reserved the cognizance of seditious libels to state courts and that Jefferson himself held that state legislatures had full power to curb the excesses of the press.⁷³ Men of the generation of the framers generally believed that certain forms of expression merited punishment, and they seem to have taken for granted that state courts and legislatures could be trusted to recognize and deal with them without unduly jeopardizing that "elective principle," which the first amendment was thought necessary to safeguard from encroachment by the federal government. If they were mistaken about this, the mistake is understandable in view of their preoccupation with the dangers of federal power and their failure to consider the possibilities of encroachments by the states. It has taken subsequent history to teach the painful lesson that freedom of expression is threatened more by state governments than by the federal government.

71. It was these common law restrictions and certain state constitutional qualifications that Justice Frankfurter was referring to when he declared that "the historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest." *Dennis v. United States*, 341 U.S. 494, 521-25 (1951). This kind of evidence may tend to support Frankfurter's general pronouncement that "Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid," but it is insufficient to establish his contention regarding the purpose of the first amendment. As has been shown, independent evidence indicates that the speech-and-press clause was intended to give expression unqualified immunity from congressional restriction. That it was not supposed to give expression immunity from limitation by the states is obvious from its very language.

72. In 1789, William Cushing and John Adams corresponded over the construction to be given to the free-press article in the Massachusetts Constitution. For a discussion of the views they exchanged, see L. LEVY, *LEGACY OF SUPPRESSION* 192-96 (1960). Another example is provided by Justice James Iredell's charge to the grand jury in the trial of the Northampton insurgents. F. WHARTON, *supra* note 69, at 478-79.

73. 8 *ANNALS OF CONG.*, 2142, 2152, 2163 (1798). Jefferson expressed this opinion in various places, e.g., in a letter to Abigail Adams dated September 11, 1804. *THE ADAMS-JEFFERSON LETTERS* 279 (L. Cappon ed. 1959).