

THE NEGLECTED HISTORY OF THE PRIOR RESTRAINT DOCTRINE: REDISCOVERING THE LINK BETWEEN THE FIRST AMENDMENT AND THE SEPARATION OF POWERS

MICHAEL I. MEYERSON*

INTRODUCTION

The prior restraint doctrine is in danger. Once, Oliver Wendell Holmes could declare that the main purpose of the First Amendment was "to prevent all such previous restraints upon publications as had been practiced by other governments."¹ But now, many respected commentators have concluded that the concept of prior restraints marks a "distinction without a difference."² The prior restraint doctrine has been termed "so far removed from its historic function, so variously invoked and discrepantly applied, and so often deflective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis."³

One reason for the strong antipathy toward the prior restraint doctrine is that it seems to justify the imposition of subsequent punishments on speech. Ever since Blackstone and the Sedition Act of 1798, the heavy hand of censorship has been defended on the basis that no "previous restraint" is involved.⁴ Because the prior restraint doctrine provides no substantive protection, it "leaves open the possibility that this same speech-suppressive activity might be found constitutional if sufficiently redesigned and recast in the form of a subsequent sanction."⁵

* Professor of Law and Piper & Marbury Faculty Fellow, University of Baltimore School of Law. B.A., 1976, Hampshire College; J.D., 1979, University of Pennsylvania. Support for this Article was provided by the University of Baltimore School of Law Research Stipend. I would like to thank Eric Easton and Dan Brenner for their comments and suggestions. I also wish to thank Emily Greenberg, Elizabeth Rhodes, and the rest of the University of Baltimore Law School Library staff for their invaluable assistance.

1. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (quoting *Commonwealth v. Blanding*, 20 Mass. 304, 313 (1825)). See also *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (stating that "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent prior restraints upon publication").

2. See Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1 (1989).

3. John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983). See also Note, *Prior Restraint—A Test of Invalidity in Free Speech Cases?*, 49 COLUM. L. REV. 1001, 1006 (1949) ("Whatever the value of the prior restraint doctrine in the past, it has outlived its usefulness.") (citation omitted). Not all commentators are ready to give up on the prior restraint doctrine. See, e.g., Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); Howard Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 293-95 (1982).

4. See *infra* text accompanying notes 113-18, 183-87.

5. Scordato, *supra* note 2, at 33. See also Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 185 (1981) (stating that subsequent punishment is prior restraint for all practical

Unless we inhabit a legal universe where all speech is protected, though, the doctrine of prior restraints is essential for the protection of free speech. As soon as it is conceded that some speech may be punished, procedural protection becomes essential. With its distinguished historical pedigree, the prior restraint doctrine helps to preserve the murky line between protected and unprotected speech. Even a vigorous defense of protected speech is aided by the secondary shield of the prior restraint doctrine. Moreover, the doctrine serves to restrain the overuse of arguably permissible censorship by biased, over-eager, or insensitive government officials. This protection is only possible, however, if a critical problem is solved: "prior restraint" must be given a usable legal definition.

Many share the frustration of Professor Harry Kalven who bemoaned in 1971, "it is not altogether clear just what a prior restraint is or just what is the matter with it."⁶ Without a legal definition, "prior restraint" has frequently degenerated into nothing more than a "category label."⁷ It is almost a game for

purposes because "[i]ts object is to prevent publication, not to impose punishment"); Thomas R. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L.L. REV. 519, 521 (1977) (stating that "[t]he threat of criminal and civil penalties can inhibit arguably protected expression from reaching the public just as effectively as injunctions or licensing schemes"); 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, 276 (1982) (arguing that "subsequent punishment is calculated to suppress, and does indeed suppress, the publication of speech"); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 54 (1984).

A related argument is that the prior restraint doctrine injures free expression, because it encourages subsequent punishments which are more harmful than injunctions. As Professor Scordato argued:

[B]ecause uniform, impersonal threats, while they may have less of a deterrent effect on any given individual, will have some influence on every individual in the regulated community. On the other hand, specific, personal threats, while perhaps more potent with respect to each targeted individual, are limited in their scope, by definition, to one, or at the most to a very few, such individuals. The overall societal impact of such specific, personal threats, given the large number of individuals in society, is quite small indeed.

Scordato, *supra* note 2, at 14. See also Mayton, *supra*, at 246 (stating that "the preference for subsequent punishment over injunctive relief diminishes the exercise of free speech by burdening it with costs that seem not yet comprehended").

This is an intriguing argument, but it relies on the mathematically-unresolvable question of whether a weak threat to many impacts speech more than a strong threat to a few. One problem is that the extent of the different threats is unquantifiable, so comparison of total harm is impossible. Recognizing that both prior restraints and subsequent punishment are harmful to free expression, I prefer to oppose them both, and, if truly forced to choose, prefer the security of the historically-based doctrine of prior restraints.

6. Harry Kalven, Jr., *The Supreme Court, 1970 Term—Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 32 (1971).

7. Scordato, *supra* note 2, at 10. "[T]he category has been defined in ways that bear no

attorneys defending speakers to try to affix the label "prior restraint" on whatever law is being challenged.⁸ And the game can be successful. As Professor Laurence Tribe has noted, the Supreme Court "has often used the cry of 'prior restraints' not as an independent analytical framework but rather to signal conclusions that it has reached on other grounds."⁹

The primary reason that there is currently no generally-accepted legal definition of the prior restraint doctrine comes from the fact that "[t]here exists no comprehensive study of its historical roots."¹⁰ In this Article, I attempt to conduct that comprehensive study.

To examine the history of prior restraints, it is necessary to begin with the English experience, starting from before the Star Chamber and progressing through the American Revolution. Next, the American experience, from colonial times to the drafting of the First Amendment and beyond, needs to be studied. One important discovery I made was a wealth of forgotten Nineteenth Century cases from state courts recognizing and implementing protections against prior restraints as integral components of state constitutional provisions.

What emerges from this historical study is the surprising element that has been missing from the earlier discussions of prior restraints. At its core, the doctrine of prior restraints embodies, not only principles of free speech, but principles of separation of powers as well. Each branch of government is restricted in terms of timing, both in regard to the communication itself and to the actions of the other branches of government. Separation of powers has always been a critical, if indirect, mechanism for preserving individual liberty. As Justice Kennedy remarked, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers."¹¹ Nowhere is that more true than in the doctrine of prior restraints.

The inclusion of separation of powers principles permits, for the first time, the creation of a complete definition of prior restraints. Once this definition has been given, two facts become clear. First, the doctrine of prior restraints can be easily and consistently applied to a wide range of speech-related issues. Second, it remains of critical importance for the protection of free expression that the prior restraint doctrine be preserved.

reasonable relation to the common-sense meaning of the category label." *Id.* at 30.

8. First Amendment expert Floyd Abrams once told a symposium that "he was very tempted, as an advocate, to characterize anything having the vaguest semblance to a prior restraint as a prior restraint, since prior restraints are somewhat of a taboo." Donald M. Gillmor, Prologue to *Near v. Minnesota 50th Anniversary Symposium*, 66 MINN. L. REV. 1, 8 (1981).

9. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-34, at 1040 (2d ed. 1988). See also Jeffries, *supra* note 3, at 413 (referring to the "latent plasticities" of the prior restraint doctrine).

10. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650 (1955). See also Redish, *supra* note 5, at 54 (stating that "apparent doctrinal ambiguities and inconsistencies result from the absence of any detailed judicial analysis of the true rationale behind the prior restraint doctrine").

11. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

I. THE ENGLISH HERITAGE

A. *Licensing Printing*

The first printing in England occurred in 1476, and it was not long after that restrictions began to be imposed.¹² Printing posed a new danger to the established regimes. Communication was suddenly possible with many more people. Also, because the words remained permanently affixed, rather than vanishing instantaneously, they served as a perpetual source of potential incitement.

The first official censor was the English Church.¹³ In March 1526, a printer, Thomas Berthelet, was brought before the ecclesiastical court. His work was not only unobjectionable, it actually provided nothing more than the text of a bishop's sermon given at, and in support of, a public burning of heretical books. Berthelet's offense was that the printing had occurred before the bishop had been given the opportunity to preview and approve the publication.¹⁴ King Henry VIII gave governmental sanction to this requirement, with a proclamation in June 1530, mandating that no religious book be printed until it had first been "examyned and approued by the ordinary of the diocese."¹⁵

After the King wrested control of the Church in the early 1530's, protection of the Crown became as high a priority as protection of the faith. In 1538, a new proclamation was issued, Proclamation Antiquity 2 (97), which instituted the first comprehensive licensing system.¹⁶ Religious books were still to be licensed by bishops, but all others needed the approval of members of King Henry VIII's Privy Council.¹⁷ The penalty for unauthorized publication included loss of property, fine, or imprisonment. Printers could also be required to post bond of up to 100 pounds to guarantee their compliance with the law.¹⁸

In 1546, the rules were modified to speed up the book approval process.¹⁹ Under Proclamation Antiquity 2 (171), licensors were required to decide on the merits of each book within two days of receiving their copy in order to avoid the problem of unlimited delay.²⁰

The licensing law was revised again in 1559, one year into the reign of

12. See FRED S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL* 22-23 (1965). The first English printer is believed to have been William Caxton. See *id.* at 22.

13. See *id.* at 42.

14. See *id.* at 43.

15. *Id.* at 46.

16. See *id.* at 48-49.

17. See *id.* at 49.

18. See *id.*

19. See *id.* at 51.

20. See *id.*

Queen Elizabeth.²¹ Her royal injunctions required review prior to the publication of all books, pamphlets, plays and ballads, and mandated that the name of the licenser who approved the work "be added in the end of euery such worke, for a testomonie of the allowance thereof."²²

The next major step in the regulation of printing occurred in 1586, and involved two of the most powerful forces ever created for limiting a free press, the Stationers Company and the Star Chamber.²³ The Stationers Company was the royally-authorized organization of printers and writers. Members of the Stationers Company received special privileges, most notably freedom from competition,²⁴ and the number of printers was strictly limited. In 1585, the Queen ordered that there should be no printing presses except in London, Oxford and Cambridge, with only one press allowed in each of the two universities.²⁵ The Company had two primary objectives: 1) protecting the economic interest of its members in limiting the number of printers, and 2) defending the interests of their protector, the Crown.

The Star Chamber has long symbolized the arbitrary and uncontrollable abuse of power both in England and the United States. The Star Chamber served as an unhealthy hybrid of legislature and court, issuing regulations and trying and sentencing those accused of violating its laws. A colonial journalist later described the Star Chamber as

a Court of which no Friend to his Country can speak without Emotion; and indeed it was such a cruel Engine of Oppression, that it deserves the sharpest Invectives.

It was a Tribunal in which our King antiently presided in Person; and his Assistants were his own Privy Counsellors. Its Name is owing to the Ceiling of the Chamber where it was held, which was garnished with golden Stars; and proceeding without a Jury, well might the *poor Subject* tremble before a Bar where every Circumstance inspired Terror and Confusion. . . .

. . . .

. . . They heard Witnesses, examined even the accused, and pronounced Judgment both as *Judges and Jurors*.²⁶

On June 23, 1586, the Star Chamber issued a decree which regulated every aspect of printing.²⁷ All printers were required to register their presses with the

21. See *id.* at 57.

22. *Id.*

23. See *id.* at 69.

24. See *id.* at 68-71.

25. See JAMES PATERSON, *THE LIBERTY OF THE PRESS, SPEECH, AND PUBLIC WORSHIP* 44 n.4 (1880); see also WILLIAM PIERCE, *AN HISTORICAL INTRODUCTION TO THE MARPRELATE TRACTS* 23 (1908).

26. William Smith, *Letter to Printer*, N.Y. GAZETTE; OR WKLY. POST-BOY, Mar. 19, 1770, at number 1420.

27. See SIEBERT, *supra* note 12, at 68-74.

Stationers Company and receive a license prior to the publication of any work. The number of printers was strictly limited, with the Archbishop of Canterbury and the Bishop of London empowered to determine how many master printers could be licensed.²⁸

The Stationers Company was authorized to search for illegal presses and printed material. The decree permitted the Company "to make search in all workhouses, shops, warehouses of printers, booksellers, bookbinders, or where they shall have reasonable cause of suspicion."²⁹

Violators of Company rules could face not only a fine but destruction of printing presses as well. The Company was permitted to order the "defacing, burning, breaking and destroying" of presses and type.³⁰ A typical case involved Roger Ward, who published an unauthorized book of sermons. In its order, the judicial branch of the Company, the Court of Assistants, detailed the illegal practices of this underground printer: "[H]e did also kepe & conceal a presse and other printing stuff in a Taylors house neere adioyninge to his own house and did hyde his letters in a henhouse neere St Sepulchres church exp'ssely agt the decrees of the starcha[m]ber."³¹ The Court of Assistants ordered that, "all his presses and printinge instruments shalbe defaced & made unserviceable for printing."³²

The most important defiance of the Star Chamber decree involved the Marprelate Tracts, a set of Puritan pamphlets published between 1588 and 1589. This was not a peaceful period in English history. On May 9, 1588, a large fleet of warships, the Spanish Armada, set sail from Portugal for the English Channel, only to be defeated by bad weather in late August.

A different kind of assault was launched in October 1588, when the first of several tracts was published under the pseudonym, *Martin Marprelate*.³³ This pamphlet, popularly called, *The Epistle*, satirized the existing religious establishment, particularly the Bishops.³⁴ Even the supposed author's name, marprelate, was a none-too-subtle dig at the Church. Referring to the pamphlet, Winston Churchill wrote: "Their sturdy and youthful invective shows a robust and relishing consciousness of the possibilities of English prose."³⁵

It is still not known for certain who authored the Marprelate Tracts, but several players participated in the conspiracy. Robert Waldegrave was a Puritan printer who had previously battled the religious authorities.³⁶ On April 16, 1588,

28. *See id.*

29. *Id.* at 84 (quoting Item VI of the Star Chamber Decree of 1586).

30. *Id.* at 85 (quoting Item VII of the Star Chamber Decree of 1586).

31. Order of July 4, 1590. W. GREGG, RECORDS OF THE COURT OF THE STATIONERS' COMPANY 42 (1930).

32. *Id.*

33. *See generally* PIERCE, *supra* note 25, at 148.

34. *See id.* at 148-49.

35. WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES: THE NEW WORLD 116 (1956).

36. *See* PIERCE, *supra* note 25, at 151.

the Stationers Company broke down the main walls of his house and seized his press and type.³⁷ Waldegrave was able to leave the house with a box of type hidden "under his cloke."³⁸ He then set up a secret press at the home of Elizabeth Crane, the widow of Nicholas Crane, a Puritan who had died in Newgate prison a short time before.³⁹ As the first copies of *The Epistle* left the Kingston area where Crane lived and began circulating throughout the country, the Privy Council ordered that those responsible for its publication be located and arrested.⁴⁰ By the time Church officials began questioning residents of Kingston, the press had been moved to a new location in Fawsley. The journey took almost two weeks, as the press, hidden in a cart under straw and hay, bounced along unsafe country roads.⁴¹

In Fawsley, towards the end of November 1588, the second Marprelate tract, *The Epitome*, was published.⁴² Each new publication, with its fresh attack on the Bishops of England, intensified the search for the press. As if to give new meaning to the phrase "movable type," the printing press was continually transported in secret from Fawsley to Norton to Coventry, and then on to the village of Warrington.⁴³ On August 1, 1589, as the press was being unloaded in Warrington, some type fell out of its box and spilled onto the ground.⁴⁴ Since printing presses were illegal in most of the country, the townspeople had never seen type before and were unable to identify the pieces of metal. One of the Marprelate printers, John Hodgkins, told the crowd which had assembled that "they were shott," but apparently not everyone was convinced.⁴⁵ Someone in the crowd picked up a piece of type and was finally able to have it properly identified.⁴⁶ On August 14, the local sheriff burst into their home and arrested Hodgkins and two of his assistants, Valentine Simms and Arthur Thomlyn.⁴⁷

The three men were transported to London, where they were sent to the Tower for questioning.⁴⁸ At the Tower, the three were placed on the rack and subjected to excruciating torture.⁴⁹ All confessed to their parts in the printing of the Marprelate tracts.⁵⁰ Before the Star Chamber, Hodgkins argued that the confessions should not be believed because the confessions of Simms and Thomlyn "had bene violent[ly] extorted from them," and his own confession

37. See *id.* at 152.

38. *Id.*

39. See *id.* at 154.

40. See *id.* at 159-60.

41. See *id.* at 178.

42. See *id.* at 178-79.

43. See *id.* at 178-80, 189.

44. See *id.* at 189-90.

45. *Id.* at 190.

46. See *id.*

47. See *id.*

48. See *id.* at 191, 197.

49. See *id.* at 198.

50. See *id.* at 199.

“was forced thereunto by rackinge and great torments.”⁵¹ Nonetheless, all three were kept in prison.⁵²

Most of the other Marprelate conspirators met similar fates. John Udall, whose earlier writings were the basis of some of the Marprelate publications, died in prison.⁵³ John Penry, who many suspect of being one of the primary authors of the Marprelate tracts, escaped to Scotland but was hanged for treason on his return to England in 1593.⁵⁴

Licensing of the press continued to serve as the primary, though not exclusive, means for limiting printed opposition to both the crown and church throughout the early Seventeenth Century. A second Star Chamber decree, in 1637, reiterated and expanded the licensing requirement. The difficulty of enforcing these requirements was bemoaned by the Star Chamber itself, which stated that:

divers abuses have . . . beene practised by the craft and malice of wicked and evill disposed persons, to the prejudice of the publike; And divers libellous, seditious, and mutinous bookes have beene unduly printed, and other bookes and papers without licence, to the disturbance of the peace of the Church and State.⁵⁵

The Star Chamber usually dealt only with those “wicked and evill disposed persons” who had published without prior approval, and the trial of a licensed publisher was cause for great comment.⁵⁶ For example, in 1637, William Prynne, with a questionably obtained license, published Calvinist tracts attacking the practices of the Presbyterian church. His trial in the Star Chamber was on charges of seditious libel, that is, impermissible criticism of the government.⁵⁷ The rarity of proceeding against a licensed book is illustrated by the lawyer who exclaimed to the Star Chamber, “are none brought but such as are Unlicensed.”⁵⁸

The licenser who had granted approval for the offensive work, William Buckner, pleaded in his own defense that Prynne had included unexamined pages

51. *Id.*

52. *See id.*

53. *See id.* at 214.

54. *See* Wilson, *The Marprelate Controversy*, in 3 THE CAMBRIDGE HISTORY OF ENGLISH LITERATURE 383 (1964). It is noteworthy that, as was typical of the earliest proponents of liberty of religion and speech, these early opponents of censorship had only an imperfect appreciation of the concepts of these freedoms. Even the hunted printers of the Marprelate tracts would have denied these rights to those who followed the “Antichristian pope.” PIERCE, *supra* note 25, at 194 (quoting THE PROTESTATYON OF MARTIN MARPRELAT 3 (1589)).

55. *Star Chamber Decree of 1637*, reprinted in 2 COMPLETE PROSE WORKS OF JOHN MILTON 793 (1959).

56. *Id.*

57. *See* SIEBERT, *supra* note 12, at 124.

58. Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 679 (1985).

along with the licensed work and was fined fifty pounds for his negligence.⁵⁹ Prynne was convicted in summary proceedings and sentenced to both a fine and the loss of his ears. The mutilation occurred on a platform in the center of town. The large crowd that watched the proceedings was loudly sympathetic for the victim and visibly antagonistic toward the bishops and Star Chamber.

The end of the unpopular Star Chamber, which occurred on July 5, 1641, did not mean the end to restraints on the press. On June 14, 1643, a new licensing law was enacted.⁶⁰ This time, it was the Parliament that was to serve as censor, rather than the Crown. In its order, Parliament noted "the great late abuses and frequent disorders in Printing many false forged, scandalous, seditious, libellous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and government."⁶¹ Parliament also complained that unlicensed printers had begun to "print, vend, publish and disperse Books, pamphlets and papers, in such multitudes, that no industry could be sufficient to discover or bring to punishment, all the severell abounding delinquents."⁶² Under Parliament's new order, all books and pamphlets had to be approved by licensors appointed by either the House of Commons or the House of Lords.⁶³

About this time, intellectuals began to expound on the need for freedom from prior review as an indispensable ingredient for a free society and a free press. In 1644, William Walwyn published an anonymous pamphlet, *The Compassionate Samaritane*, which conceded the appropriateness of penalizing those who attacked the State, but criticized the practice of licensing the press:

[A]n Ordinance for licensing of Books, which being intended by the Parliament for a good & necessary and (namely) the prohibition of all Bookes dangerous or scandalous to the State, is become by meanes of the Licensers (who are Devines and intend their owne interest) most serviceable to themselves (scandalous Bookes being still dispert) in the stopping of honest men writings, that nothing may come to the Worlds view but what they please, unlesse men whill runne the hazard of imprisonment, (as I now doe) so that in publike they may speake what they will, write what they will, they may abuse whom they will, and nothing can besaid agains them.⁶⁴

A few months later, on November 24, 1644, John Milton published *Areopagitica*.⁶⁵ This work has been regarded as one of the first great statements

59. See SIEBERT, *supra* note 12, at 145.

60. See *id.* at 186-87.

61. Licensing Order of June 14, 1643, *reprinted in 2 COMPLETE PROSE WORKS OF JOHN MILTON*, *supra* note 55, at 797.

62. *Id.*

63. See *id.*

64. WILLIAM WALWYN, *THE COMPASSIONATE SAMARITANE* 37-40 (1644), *quoted in SIEBERT*, *supra* note 12, at 194.

65. AREOPAGITICA; A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENC'D PRINTING, TO THE PARLAMENT OF ENGLAND, *reprinted in 2 COMPLETE PROSE WORKS OF JOHN*

for freedom of expression, though, like the author of the Marprelate tracts, Milton was unwilling to extend his tolerance to "Popery, and open superstition."⁶⁶

Milton was also willing to concede that the Government should be able to penalize offensive speech. If printers published scandalous or seditious work, Milton accepted the premise that the Government should "confine, imprison, and do sharpest justice on them as malefactors."⁶⁷ But, licensing, according to Milton, created a special and intolerable harm by preventing books from ever seeing the light of day. Prior to the imposition of licensing:

Books were ever as freely admitted into the World as any other birth; the issue of the brain was no more stifl'd then the issue of the womb . . . if it prov'd a Monster, who denies, but that it was justly burnt, or sunk into the Sea. But that a Book in wors condition then a peccant soul, should be to stand before a Jury ere it be borne to the World, and undergo yet in darknesse the judgement of *Radamanth* and his Collegues [the mythical judges of Hades], ere it can passe the ferry backward into light, was never heard before . . .⁶⁸

Another aspect of licensing that haunted Milton was his view that prior suppression of a work robbed humanity of its ideas for all time. Milton said, "who kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God, as it were in the eye[,] . . . slaies an immortality rather then a life."⁶⁹

In spite of the pleas of poets, licensing continued for most of the Seventeenth Century. New laws were passed in 1647 and 1662. The Licensing Act of 1662 both prohibited the publication of seditious and heretical works, and prohibited the publication of books without license by the Stationers' Company.⁷⁰ In 1679, the licensing statute expired, but English judges ruled that the Crown could still license even without statutory authority. In a 1680 trial for the crime of publishing a weekly newspaper without a license, the recorder for the court, George Jeffreys, stated that, "[i]t is the opinion of all the judges of England that

MILTON, *supra* note 55, at 485-570 [hereinafter AREOPAGITICA].

66. *Id.* at 565. See generally LEONARD LEVY, EMERGENCE OF A FREE PRESS 93-97 (1985). Despite its limitations, *Areopagitica* provides solid arguments for freedom of expression. Milton proclaimed his belief that open discussion, free from governmental control, would produce "Truth." AREOPAGITICA, *supra* note 65, at 561. In perhaps the most quoted passage, Milton argued:

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.

Id.

67. *Id.* at 492.

68. *Id.* at 505-06 (citations omitted).

69. *Id.* at 492-93.

70. See PATERSON, *supra* note 25, at 45-46 n.1.

it is the law of the land, that no person should offer to expose to public knowledge any thing that concerns the government, without the king's immediate license."⁷¹

Parliament, however, was not content to rely on such judicial reasoning, and passed licensing acts in 1685 and again in 1692. The 1692 Act expired by its own terms in 1695. Although the House of Lords voted to renew the law, the House of Commons refused. The reasons given for permitting the licensing law to lapse were far more practical than philosophical.⁷² The two main complaints about the licensing system were that it was ineffective in stopping scurrilous books and that poorly paid licensors were frequently bribed by aspiring publishers.

Many printers protested the special privileges and protections of law granted to the favored few. The House of Commons also complained that, while the Licensing Act banned "offensive" works, it supplied no test for offensiveness. Moreover, because the Act did not specify the penalty for violations, judges were free to impose arbitrary and excessive penalties. The House of Commons did not, however, argue that the press should be free to criticize the Government, or even that licensing itself was destructive of freedom. In the words of British historian Lord T.B. Macaulay, "[o]n the great question of principle, on the question whether liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said."⁷³

Despite the uninspired reasoning of Parliament, the expiration of the Licensing Act quickly became perceived as a monumental victory for freedom of the press. In 1701, Daniel Defoe described the "tyranny of a Licensor" as one of the great burdens ever to have been imposed on the press, and credited the English Government with the wisdom to end this evil:

This, in all Ages, has been a method so ill, so arbitrary and so subjected to bribery and Parties, that the Government has thought fit, in justice to

71. *The Trial of Henry Carr, or Care, at the Guildhall of London, For a Libel: 32 Charles II. A.D. 1680*, in 7 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1111, 1115 (1810). Lord Chief Justice William Scroggs concurred in this statement of the common law of England:

[T]o print or publish any newsbooks or pamphlets of news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicite*, and the author ought to be convicted for it. And that is for a public notice to all people, and especially printers and booksellers, that they ought to print no book or pamphlet of news whatsoever, *without authority*.

Id. at 1127 (second emphasis added). This case led to the impeachment of Justice Scroggs. See *infra* notes 92-96 and accompanying text.

72. See H.L. JOUR., XV, 545-46 (April 18, 1695); see also 11 H.C. JOUR. 306 (1695).

73. T.B. MACAULAY, III HISTORY OF ENGLAND 328 (1906).

the Learned Part of the World, not to suffer it; since it has always been shutting up the Press to one side, and opening it to the other; which, as Affairs are in England often changing, has, in its turn, been oppressive to both.⁷⁴

B. *The Distrust of Judges*

A second development in the battle for a free press involved the growing consensus in England that judges were a potential source of oppression. Thus, one of the major Eighteenth Century battles for freedom of the press in England was to give jurors, rather than judges, the power to determine whether publications were in fact defamatory. Previously, jurors had been limited to the question of whether the defendant published the material.⁷⁵

The most notorious case of penalizing independent-minded jurors involved the 1670 English trial of William Penn, later the founder and first Governor of Pennsylvania. Penn had been charged with violating the Conventicle Act, which prohibited the exercise of religion "in other manner than according to the liturgy of the Church of England."⁷⁶ Penn, a Quaker, had been preaching on a London street corner, and there was no denying that such preaching had occurred.⁷⁷ During Penn's trial, the court told the jury to ignore the defendant's plea for acquittal based on freedom of conscience. The court recorder instructed the jury that witnesses had testified to the fact of the preaching and that they were "to keep and to observe, as what hath been fully sworn, *at your peril*."⁷⁸ From the bale-dock, a prison-like cylindrical structure in the corner of the courtroom where he had been placed, Penn cried out, "I appeal to the jury, who are my judges, and this great assembly, whether the proceedings of the court are not most arbitrary, and void of all law, in offering to give the jury their charge in the absence of the prisoners."⁷⁹

The jury refused to hand down a guilty verdict.⁸⁰ Led by jurymember, Edward Bushel, the jury found Penn guilty of "preaching," but pointedly omitted any reference to guilt of unlawful preaching.⁸¹ The Recorder responded to the jury:

Gentlemen, . . . you shall not be dismissed, till we have a verdict that the

74. DANIEL DEFOE, *THE TRUE BORN ENGLISHMAN* (1703), reprinted in *LATER STUART TRACTS* 110 (1964).

75. This controversy was finally resolved by statute in 1792, when Fox's Act, 1792, 32 Geo. 3 c. 60, declared that juries may give a general verdict of guilty or not guilty on libel.

76. CATHERINE OWENS PEARE, *WILLIAM PENN, A BIOGRAPHY* 106-07 (1956) (quoting the Conventicle Act).

77. See *id.* at 109-10.

78. *Id.* at 118.

79. *Id.*

80. See *id.* at 119-22.

81. *Id.* at 120.

court will accept; and you shall be locked up, without meat, drink, fire and tobacco. You shall not think thus to abuse the court. We will have a verdict by the help of God, or you shall starve for it.⁸²

The next day, the jury announced the verdict that "William Penn is guilty of speaking in Gracious Street," again refusing to term it unlawful.⁸³ After more threats by the court, William Penn said, "[i]t is intolerable that my jury should be thus menaced What hope is there of ever having justice done, when juries are threatened, and their verdicts rejected?"⁸⁴ The next morning, the jury announced that Penn was "not guilty."⁸⁵ Upon hearing the verdict, the Recorder stated, "I am sorry, gentlemen, you have followed your own judgment and opinions rather than the good and wholesome advice which was given you."⁸⁶

All twelve members of the jury were fined and sent to Newgate prison until they paid.⁸⁷ Eight paid rather quickly, but four, Edward Bushel, John Hammond, Charles Milson and John Baily, refused and stayed in prison for several months. Finally, the Court of Common Pleas ruled that jurors could not be penalized for such conduct: "It is absurd, a jury should be fined by the judge for going against their evidence"⁸⁸

More than a century later, American colonists would recite this case as an example of the need for juries to protect liberty against the overreaching of the Crown's judges. One colonial writer referred to the much respected William Penn as "the same to whom we owe one of the freest and fairest of our Colonies,"⁸⁹ and analogized his case to colonial trials for seditious libels, where juries were denied the right to determine the validity of printed complaints against the government. The obvious lesson for colonial libertarians was that juries were forever to be viewed as a "Bulwark of Saftey against Pride, Insolence and Partiality of Power."⁹⁰

In 1680, ten years after the trial of William Penn, Lord Chief Justice William Scroggs was impeached for his abuse of judicial authority.⁹¹ Under Scroggs' rulings, the House of Commons declared, "all the mischiefs and excesses of the

82. *Id.*

83. *Id.* at 121.

84. *Id.*

85. *Id.* at 122.

86. SYDNEY GEORGE FISHER, *THE TRUE WILLIAM PENN* 145 (1899).

87. See PEARE, *supra* note 76, at 123.

88. *Id.* at 124.

89. Smith, *supra* note 26, at 1420.

90. *Id.* For a more modern judicial tribute to William Penn's jurors, see *Commonwealth v. Contakos*, 453 A.2d 578, 580-82 (Pa. 1982).

91. See generally *Proceedings Against Lord Chief Justice Scroggs Before the Privy Council; and Against the Said Lord Chief Justice and Other Judges in Parliament: 32 Charles II. A.D. 1680*, in 8 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME, *supra* note 71, at 63 [hereinafter *Proceedings Against Lord Chief Justice Scroggs*].

court of Star-Chamber, by act of parliament suppressed, have been again, in direct opposition of the said law, introduced."⁹²

The House of Commons highlighted the case of Henry Carr, which Chief Justice Scroggs had presided over earlier that same year.⁹³ Carr published a periodical entitled, *The Weekly Pacquet of Advice from Rome, or, the History of Popery*.⁹⁴ According to one of the Articles of Impeachment voted by the House of Commons, Chief Justice Scroggs, "before any legal conviction of the said Carr of any crime, did . . . in a most illegal and arbitrary manner, make, and cause to be entered, a certain rule of that court against the printing of the said [periodical]."⁹⁵ In one of the first official pronouncements against what was to later become termed "prior restraints," the House of Commons voted that the Chief Justice's ruling was "most apparently contrary to all justice, in condemning not only what had been written without hearing the parties, *but also all that might for the future be written on that subject*."⁹⁶

The principle behind favoring jurors, in these cases, over judges was explained by Lord Camden:

Who shall have the care of the liberty of the press—the judges or the people of England? The jury are the people of England. The judges are independent men! Be it so. But are they totally beyond the possibility of corruption from the Crown? Is it impossible to show them favour in any way whatever? The truth is, they possibly may be corrupted—juries never can! What would be the effect of giving judges the whole control of the press? Nothing would appear that could be disagreeable to the Government.⁹⁷

C. Refusal to Enjoin Defamatory Statements

The third strand in the development of the doctrine of prior restraints is found in the well-known maxim that "equity will not enjoin a libel." The history of defamation law reveals that in England, at the time the First Amendment was

92. *Id.* at 199.

93. *See id.* at 198-99.

94. *Id.* at 198. This publication was opposed to the "superstitions and cheats of the church of Rome," and the House of Commons took Chief Justice Scroggs's suppression of it to be proof of the Chief Justice's "manifest countenancing of popery." *Id.*

95. *Id.* The Articles of Impeachment refer to the weekly publication as a "book," but it would more properly be regarded as a "periodical" today. *See, e.g.,* JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS 688 (4th ed. 1890).

96. *Proceedings Against Lord Chief Justice Scroggs, supra* note 91, at 198 (emphasis added). The judicial order banning future publication was also seen as a violation of principles of separation of powers. The House of Commons also voted that the order constituted "an encroachment and assuming to [the Court] a legislative power and authority." *Id.* at 199.

97. PATERSON, *supra* note 25, at 221 n.6.

ratified, libel was an offense that could only be punished, but could not be prevented.

There were several different roots to the English law of defamation. During the Thirteenth and Fourteenth Centuries, defamatory statements were generally considered to be matters for religious tribunals, and the ecclesiastical courts heard many cases involving imputations of crimes and sexual immorality.⁹⁸ The penalties for defamation included a public request for forgiveness and excommunication.⁹⁹

By the end of the Fifteenth Century, complaints against defamation were heard in two different courts, the Star Chamber and the common-law courts. Early in the 1600s, the Star Chamber declared that libel was a criminal offense because it tended to cause breaches of the peace, and if the libel was "against a magistrate, or other public person, it is a greater offence."¹⁰⁰ Sir Edward Coke, who authored the opinion, added that anonymous libels, which of course meant that they were unlicensed, were particularly egregious and "ought to be severely punished."¹⁰¹ The Star Chamber's penalties for those found guilty of libel were harsh:

[A] libeller shall be punished either by indictment at the common law, or by bill, if he deny it, or *ore tenus* on his confession in the Star Chamber, and according to the quality of the offence he may be punished by fine or imprisonment, and if the case be exorbitant, by pillory and loss of his ears¹⁰²

Moreover, there was no possible protection from a jury of one's peers. The Star Chamber ruled alone on both questions of law and fact.¹⁰³

About this same time, the common-law courts were wresting jurisdiction away from the ecclesiastical courts and claiming jurisdiction over defamations which caused "temporal damages."¹⁰⁴ Thus private persons who wanted to obtain

98. The local courts also heard complaints about insulting statements through the 14th century. See, e.g., R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 100-03.

99. See generally SELECT CASES ON DEFAMATION TO 1600, at xiv-xx (R.H. Helmholz ed., 1985).

100. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 565 (1903) (quoting *De Libellis Famois*, 5 Co. Rep. 125 (1606)). This ruling actually represented an expansion of the Star Chamber's jurisdiction to prosecute those who violated the statutes involving *scandalum-magnatum*. This literally means "scandal of magnates," but generally included attacks against the King or others high in the government. Dueling was a major concern of the Star Chamber, and the belief was that punishing defamation was one way to prevent private demands for retribution. See *id.*

101. *Id.*

102. *Id.*

103. See, e.g., 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 308-09 (1883).

104. William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 841 (1960). At first, the common law courts merely claimed jurisdiction over any defamatory statement that "touches or

damages for a defamatory statement quickly turned to the common-law courts. Because the Star Chamber heard claims of criminal libel and printed defamation, the common-law courts were left mostly with spoken private defamation.

When the Star Chamber was abolished in 1641, the common-law courts assumed its former jurisdiction over defamation, though the rules governing the different forms of defamation were never well-integrated. In 1670, the court formalized the division between libel, or written defamation, and slander, which is spoken.¹⁰⁵

As licensing of the press continued through 1694, the doctrine of common-law defamation developed relatively slowly. After all, most printed defamatory statements never saw the light of day. In the 1700s, absent the power to license, the English Government often attacked its critics with criminal actions for seditious libels. These were heard in the common-law courts, which also claimed exclusive power to hear private libels.

The courts of equity, accordingly, were denied authority to hear claims for defamation. As early as 1742, it was ruled in the *St. James's Evening Post Case*, that the courts of equity had no jurisdiction over claims of libel and slander: "For whether it is a libel against the publick or private persons, the only method is to proceed at law."¹⁰⁶ Since the common-law courts then had no power at all to grant injunctions, the resultant ruling meant that, in England, defamation could not be enjoined; the only permissible remedy was money damages at law.

Eventually, the inability of equity courts to enjoin libel became considered an integral part of a free press. While a few cases implied that equity could, in fact, enjoin a libellous publication,¹⁰⁷ these cases were quickly dismissed as aberrational throwbacks to a discredited era. For example, it was reported that the very contention that injunctions could in fact be granted to prevent libel "excited great astonishment in the minds of all the practitioners of the courts of equity."¹⁰⁸ According to the court reporter in *Horne's Case*, this surprise was due to the fact that

there is not to be found in the books any decision or any dictum, posterior to the 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 . . . Scroggs and his associates, in the

concerns anything determinable at the common law." *Palmer v. Thorpe*, K.B., Trin. Term, 25 Eliz. [1583], Coke's Rep., Vol. 2, p. 315, part 4, p. 20. This meant imputations of crimes, for example, were heard in common-law rather than ecclesiastical courts.

105. See *The King v. Lake*, Hardes 470 (1670), cited in Veeder, *supra* note 100, at 569-70.

106. *Roach v. Garvan*, 26 Eng. Rep. 683, 683 (1742). This case was popularly known as the *St. James's Evening Post Case*. This case was hardly a complete victory for freedom of the press. The court held that equity had jurisdictions over contempt of court, and the printers were "committed to the Fleet." *Id.* at 685.

107. See *DuBost v. Beresford*, 2 Camp. 511-12 (1810) (Chief Lord Ellenborough); *Burnett v. Chetwood*, 2 Mer. 441 (1720) (Lord Macclesfield).

108. *Horne's Case*, 20 Howell's State Trials 651, 799 (1777).

case of *Henry Care*.¹⁰⁹

The 1848 case of *Clark v. Freeman* announced a similar linkage of the concept of enjoining libels to the censorial practices of the past.¹¹⁰ In rejecting a plea to enjoin the publication of defamatory statements that alleged that a physician to the Queen, "is somehow concerned in vending quack medicines," the court stated, "I am afraid that if I were to interfere as is now asked, I should be reviving the criminal jurisdiction of the Star Chamber."¹¹¹

Thus, an extraordinarily important rule was created more as an offshoot of a jurisdictional dispute than as a calculated understanding of the needs of a free press. In fact, the creation of the rule that equity will not enjoin a libel parallels the almost anti-climatic ending of licensing of the press. These were both "historical accidents"¹¹² that became understood as invaluable steps along the road to liberty of the press.

D. Understanding England's Liberty of the Press

By the time the United States ratified the First Amendment, a consensus had developed in England that liberty of the press required the ability to put forth to the world what one wanted, as long as the printer was willing to accept the consequences of punishment for material considered illegal. No administrative licensor or censor could preview work prior to publication, and no judicial orders could prevent what could be written for the future.

This background provides context for Sir William Blackstone's famous description of liberty of the press. In his *Commentaries on the Laws of England*, Blackstone described why punishment for libels was consistent with liberty of the press:

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the

109. *Id.* In 1861, Lord Cambell discussed the cases of *Burnett v. Chetwood*, 2 Mer. 441 (1720), and *DuBost v. Beresford*, 2 Camp. 511 (1810), and declared, "I have no hesitation in saying that Lord Macclesfield was wrong . . . [and] that Lord Ellenborough was wrong." *Emperor of Austria v. Day & Kossuth*, 3 De. G.F. & F. 217, 239 (1861).

110. 11 Beav. 112 (1848) (Lord Langdale, Master of Rolls).

111. *Id.* at 117-18. For other early cases holding that equity lacked jurisdiction to enjoin libels, see *Prudential Assurance Co. v. Knott*, 10 Law Rep. 142 (1875); *Seeley v. Fisher*, 11 Sim. 581 (1841); *Martin v. Wright*, 6 Sim. 297 (1833); *Gee v. Pritchard*, 2 Swanston 428 (1818). See generally W. BLAKE ODGERS, *THE LAW OF LIBEL AND SLANDER* 334-37 (2d ed. 1887).

112. See, e.g., Veeder, *supra* note 100, at 571 ("The process of attempting to give a rational or scientific basis to legal rules which have their origin in historical accidents is familiar to students of English law; the law of defamation has been its favorite field.").

consequences of his own temerity.¹¹³

Although this statement indicates the general English opposition to "previous restraints," it does not actually say what constitutes such a restraint.¹¹⁴ Blackstone merely contrasts previous restraints with punishments that are imposed after someone "publishes what is improper, mischievous, or illegal."¹¹⁵ Later in this same section, Blackstone discusses the licensing of the previous century, but again does not purport to catalog the full array of impermissible previous restraints, but simply contrasts such a restraint with a subsequent punishment.¹¹⁶

Thus, Blackstone did not discuss, one way or another, the extent to which judicial orders could be viewed as previous restraints.¹¹⁷ Significantly, Blackstone's description of the remedy for a libel omits any reference to preventive relief: "The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender."¹¹⁸

The lesson from Blackstone is simply that previous restraints, such as licensing, violate liberty of the press. We must turn elsewhere for a fuller description of what was encompassed by the term "previous restraint."

Ten years after Blackstone's *Commentaries* appeared, another author gave an improved description. In 1775, on the dawn of the American Revolution, Jean DeLolme wrote his work, *The Constitution of England*.¹¹⁹ DeLolme was a Swiss author whose description of the English government, while largely unknown to 20th Century Americans, was well-known and well-respected by Americans at the start of the Republic. John Adams referred to DeLolme's books as "the best defence of the political balance of three powers that ever was written."¹²⁰ At the beginning of the Revolution, many American pamphleteers cited Montesquieu

113. 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52 (1979).

114. *See id.*

115. *Id.* at 152.

116. *See id.* at *152-53. Blackstone also wrote:

To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, *when published*, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order

Id. at *152 (emphasis added).

117. *See id.* at *151-53.

118. *Id.* at *151.

119. JEAN DELOLME, THE CONSTITUTION OF ENGLAND 254 (John MacGregor ed. 1853) (1775).

120. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 575 (1969).

and later DeLolme on the “character of British liberty and on the institutional requirements for its attainment.”¹²¹ DeLolme’s book was also cited by America’s Blackstone, St. George Tucker;¹²² Justice Joseph Story, the first great writer on the American Constitution;¹²³ and, eventually the U.S. Supreme Court.¹²⁴

DeLolme’s description of liberty of the press in England stressed that such liberty meant freedom from all previous restraint, whether from the judicial branch or from licensors: “Liberty of the press consists in this: that neither courts of justice, nor any judges whatever, are authorized to take notice of writings intended for the press; but are confined to those which are actually printed.”¹²⁵

Thus, at the time of the drafting of the First Amendment, the English understanding of a free press meant, at a minimum, that neither judges nor administrators were to take notice of writings intended for the press. Battles over the permissibility of subsequent punishments persisted over the next two hundred years. But even in a repressive environment that permitted punishment for truthful criticism of the Government,¹²⁶ one element of liberty of the press was well-understood: no governmental official—not licensor, not censor, not judge—should be involved in restricting expression before it is communicated.

II. THE AMERICAN EXPERIENCE

There is an unfortunate tendency among many who study freedom of expression in America to assume that all relevant jurisprudence begins with World War I and that the doctrine of prior restraints emerges out of thin air after two centuries of dormancy with the 1931 case of *Near v. Minnesota ex rel. Olson*.¹²⁷ The reality is that by the time the U.S. Supreme Court struck down Minnesota’s “Gag Law,” there was a wealth of legal tradition and judicial decisions supporting a constitutional ban on prior restraints.

There is no doubt that the Supreme Court itself was a fallow source of

121. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967). English Prime Minister Benjamin Disraeli later described DeLolme as “England’s Montesquieu.” See JOYCE MALCOLM, *TO KEEP AND BEAR ARMS* 166 (1994).

122. See ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* 1 app. at 298-99 (1803).

123. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1878-79, at 735-37 (1833).

124. See *Near v. Minnesota*, 283 U.S. 697, 714 n.4 (1931).

125. DELOLME, *supra* note 119.

126. Blackstone wrote approvingly of jailing writers for criticizing the government or its magistrates, even if their charge be true, “since the provocation, and not the falsity, is the thing to be punished criminally.” See BLACKSTONE, *supra* note 113, at *150.

127. 283 U.S. 697 (1931). See, e.g., DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 129 (1997) (stating that “no major casebook on constitutional law includes a single decision before 1917 in its section on freedom of expression”); see also Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56 (1980).

protection for First Amendment freedoms until 1931.¹²⁸ For example, in 1897, the Court noted that a city could bar public speaking in a public park, just as “the owner of a private house [could] forbid it in his house.”¹²⁹ Similarly, the U.S. Post Office’s claim to censorial power over the mails was upheld as simply the right of Congress “to refuse its facilities for the distribution of matter deemed injurious to the public morals.”¹³⁰

With the Federal constitutional guarantee of freedom of expression viewed as a hollow promise, speakers turned to the state courts for protection of free speech rights guaranteed by state constitutions. Although many state decisions were unfavorable to speakers, one topic represented a notable exception: many state courts struck down governmental action that was perceived to be a “prior restraint.”¹³¹

Such solicitude should not be surprising, considering the history of free expression which preceded the American Revolution. From the very beginning of the legal debate over the true meaning of America’s freedom of expression, there has been a powerful consensus that the starting point for such freedom is a ban on prior restraints. Liberty of the press, as the Massachusetts Supreme Judicial Court declared in 1825, “was intended to prevent *all such previous restraints upon publications as had been practised* by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers.”¹³²

A. *The Road to the First Amendment*

In the American colonies, the concept of freedom of the press began slowly, but eventually evolved into a treasured ideal worth fighting for. The colonial experience taught that assaults on liberty of the press could come from any of the three branches of government: the legislative, executive, or judicial.

During the Seventeenth Century, colonial governments followed the English example and used licensing laws to restrict printed material. In 1668, a pamphlet written by Thomas à Kempis was approved by the official censor but then banned by the Massachusetts Bay Colony Governor because Kempis was a “popish

128. See, e.g., RABBAN, *supra* note 127, at 131 (stating that between the Civil War and World War I, “[n]o court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case”).

129. *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

130. *Ex parte Jackson*, 96 U.S. 727, 736 (1877). The Court was also insensitive to the free speech issues inherent in its contempt cases. See, e.g., *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918), *overruled in part by Nye v. United States*, 313 U.S. 33 (1941); *Patterson v. Colorado*, 205 U.S. 454 (1907).

131. See generally David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 543 (1981) (noting that although many of the state decisions were counter to free speech, some provide significantly more protection than any decision made by the U.S. Supreme Court).

132. *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313-14 (1825) (emphasis added).

minister."¹³³ In Virginia, John Bucknew was imprisoned for printing without authority in 1682.¹³⁴

The first newspaper in the colonies was published in Boston on September 25, 1690 and was entitled *Publick Occurrences Both Forreign and Domestick*.¹³⁵ Although the publisher, Benjamin Harris, had stated that the paper was to be "furnished once a month (or if any Glut of Occurrences happen, oftener)," the paper lasted only one issue.¹³⁶ Harris had criticized the Maqua tribe, allies of the English in the French and Indian Wars, because they "brought home several Prisoners, whom they used in a manner too barbarous for any *English* to approve."¹³⁷ The Massachusetts Governor and legislature were angered both by the hint of journalistic disapproval and by the fact that the publication was issued without license.¹³⁸ Four days later, noting that the paper contained "reflections of a very high nature," the Legislature voted to forbid, "any thing in print, without license first obtained from those appointed by the government to grant the same."¹³⁹ Harris published no further issues of the newspapers and apparently learned to get along with those in power, as he was appointed "Printer to His Excellency the Governor and Council" in 1692.¹⁴⁰

After the demise of *Publick Occurrences*, the colonies waited more than thirty years for a truly independent newspaper.¹⁴¹ On August 7, 1721, *The New-England Courant* began in Boston,¹⁴² and it did not take long for the established powers of church and state to be offended. In the first issue, the *Courant* attacked the giant of colonial religion, Cotton Mather.¹⁴³ Unfortunately for those who prefer to think of the press as the source of enlightenment, the *Courant* chose the wrong side in the debate over how to deal with the raging smallpox epidemic.¹⁴⁴ The paper condemned Mather for his endorsement of "the *doubtful* and *dangerous* Practice of inoculating the *Small-Pox*."¹⁴⁵

Most of the other crusades carried on by the *Courant* were not so problematic. Religious hypocrisy and governmental incompetence were frequent targets. The acute sensitivity of those in power to any form of criticism can be

133. WALTER BRASCH & DANA ULLOTH, *THE PRESS AND THE STATE* 50 (1986).

134. *See id.*

135. *See* FRANK LUTHER MOTT, *AMERICAN JOURNALISM, A HISTORY: 1690-1960*, at 9-10 (3d ed. 1962).

136. *Id.* The entire issue of *Publick Occurrence* is reprinted in FREDERIC HUDSON, *JOURNALISM IN THE UNITED STATES FROM 1690-1872*, at 44-48 (Scholarly Press 1968) (1873).

137. HUDSON, *supra* note 136, at 46.

138. *See* MOTT, *supra* note 135, at 9.

139. HUDSON, *supra* note 136, at 48.

140. *See id.* at 49.

141. *See generally* ARTHUR BERNON TOURTELLOT, *BENJAMIN FRANKLIN: THE SHAPING OF GENIUS* 232 (1977).

142. *See id.*

143. *See id.* at 234.

144. The smallpox epidemic afflicted 6000 of Boston's population of 10,500. *See id.* at 240.

145. *NEW ENG. COURANT*, No. 3, Aug. 14-21, 1721.

seen in the reaction to the paper's story on the problem of pirate ships. After two pirate vessels were spotted off the Atlantic coast, the *Courant* reported, "[w]e are advis'd from Boston, that the Government of the Massachusetts are fitting out a Ship to go after the Pirates, to be commanded by Capt. Peter Papillion, and 'tis thought he will sail sometime this Month, if Wind and Weather permit."¹⁴⁶ A modern reader might search these words long and hard for the language which constituted, in the findings of the Governor's Council, "a high affront to this Government."¹⁴⁷ Apparently, the paper was implying that the Government was not acting quickly enough in fighting the pirates.

On June 12, 1721, the day after the issue of the paper containing this dubious criticism had been distributed, the Massachusetts' House of Representatives voted to place the printer of the *Courant*, James Franklin, in jail for the duration of the legislative session.¹⁴⁸ This sentence was imposed without benefit of grand jury indictment or trial; it was simply a unilateral act of the legislature. The printer was placed in a dungeon at the Queen Street jail and after becoming ill, was allowed to go to the prison yard. On July 2, shortly before the end of the prison term, a letter was published in the *Courant* declaring defiantly, "we can easily soar above the little Vulgar, and look down on those who reproach us, with Pity and Courage."¹⁴⁹

When the paper continued its criticism of those in power, the House of Representatives responded with paradigmatic prior restraint. A special committee was created on January 14, 1723, to recommend the appropriate way to deal with the paper. One of the Committee members was the Chief Justice of the Province, Judge Samuel Sewall, who had helped pursue witches one-quarter of a century earlier in Salem. The Committee took all of one day considering the problem of the *Courant*, reporting its findings on January 15:

The Committee appointed to Consider the Paper Called the New England Courant published Monday the 14t Curr: are humbly of opinion, That the Tendancy of the Said paper is to Mock Religion, & bring it into Contempt, That the Holy Scriptures are therein prophanely abused, that the Revrd and faithful Ministers of the Gospell are Injuriously Reflected upon, his Magesties Government affronted, and the peace & Good Order of his Majesties Subjects of this Province disturbed by the Said Courant, and for prevention of the like offense for the future, -*The Committee Humbly propose that James Franklyn the Printer & Publisher thereof be Strictly forbidden, by this Court [the House of Representatives], to print, or publish the New England Courant, or any Pamphlet or paper of like Nature, Except it be first Supervised, by the Secretary of this Province. . . .*¹⁵⁰

146. NEW ENG. COURANT, No. 45, June 4-11, 1722.

147. Journals of the House of Representatives of Massachusetts, IV, 23 (1722).

148. See *id.*

149. NEW ENG. COURANT, No. 48, June 25-July 2, 1722.

150. General Court Records, XI, 493 (emphasis added).

The next day, January 15, 1723, the House approved the Committee's recommendation. James Franklin was thus prohibited from printing not only the *Courant* but any other publication, without it first being reviewed and approved by the government. Again, no court proceedings were necessary for this sanction.

The next few issues of the *Courant* were published with its printer in hiding. The first such issue used the Bible, quoting Psalm 58, in an unsubtle attack on Judge Sewall:

Have ye forgot or never knew
That God will judge the Judges, too?
High in the Heavens his Justice Reigns;
Yet you invade the Rights of God,
And send your bold Decrees abroad
To bind the Conscience in your Chains.¹⁵¹

Two weeks later, the *Courant* published the following anonymous open letter to Judge Sewall, pleading for the use of jury proceedings, rather than summary governmental action:

The end of Humane Law is to fix the boundaries within which Men ought to keep themselves; But if any are so hardy and presumptuous as to break through them, doubtless they deserve punishment. Now if this *Printer* had transgress'd any Law, he ought to have been presented by a Grand Jury, and a fair tryal brought on.¹⁵²

Finally, the pressure of living in hiding, as well the risk of another prison term, convinced James Franklin to try a new approach. Because the restrictive order only applied to him personally, a decision was made to continue printing the *Courant* but with a new publisher. The position was filled by an apprentice at the paper, James's seventeen-year-old brother. On February 11, 1723, the *Courant* appeared with its new imprint: "Boston, Printed and Sold by *Benjamin Franklin*, at his Printing-House in Queen Street, where Advertisements and Letters are taken in"¹⁵³

Other colonists realized the danger posed by the requirement of prior review of newspapers. Pennsylvania's only newspaper, the *American Weekly Mercury*, ended an attack on the treatment of James Franklin with the following fictitious caustic item: "By private Letters from Boston we are informed, that Bakers there are under great Apprehension of being forbid baking any more Bread, unless they will submit to the Secretary as Supervisor General and Weigher of the Dough, before it is baked into Bread, and offered to Sale."¹⁵⁴

The Massachusetts' legislature was not the only colonial legislature to seek

151. NEW ENG. COURANT, No. 77, Jan. 14-28, 1723.

152. NEW ENG. COURANT, No. 79, Jan. 28-Feb. 4, 1723.

153. NEW ENG. COURANT, No. 80, Feb. 4-11, 1723.

154. AMERICAN WKLY. MERCURY, Feb. 26, 1723.

to suppress criticism directly. One historian has counted at least twenty instances before 1776 where authors or printers were brought before a house of a colonial legislature to answer for their statements.¹⁵⁵

Of course, colonial Americans knew that the Executive, whether King or Governor, could well act alone to repress a free press. In 1747, for example, Governor George Clinton of New York fought with that state's Assembly.¹⁵⁶ After the governor criticized the Assembly for insufficient funding for the military, the Assembly prepared a remonstrance against the Governor. Governor Clinton then ordered James Parker, the official printer for the Assembly and editor of *Weekly Post Boy*, not to publish the remonstrance.¹⁵⁷ The Assembly voted unanimously that the remonstrance should be printed, stating that "his Excellency's Order to forbid the printing or re-printing the said Remonstrance is unwarrantable, arbitrary and illegal," and that publication was necessary to demonstrate the Assembly's "firm Resolution to preserve the Liberty of the Press."¹⁵⁸

The trial of John Peter Zenger in 1735 highlighted the colonial distrust of judicial oversight of the press.¹⁵⁹ Zenger's newspaper, the *New York Weekly Journal*, had been a leading proponent for a vigorous free press since it was first published on November 5, 1733. One of its initial issues contained an essay detailing the logic behind opposition to governmental censorship:

If Men in Power were always Men of Integrity, we might venture to trust them with the Direction of the Press, and there would be no Occasion to plead against the Restraint of it; but as they have Vices like their fellows, so it very often happens that the best intended and the most valuable Writings are Objects of their Resentment, because opposite to their own Tempers or Designs.¹⁶⁰

The *Weekly Journal* also published criticism of government officials, and Zenger was put on trial for seditious libel on August 4, 1735. The judge in the case, Chief Justice James DeLancey, ruled that under English common law the truth was not a defense,¹⁶¹ and it was for the judge to determine if a printed

155. See JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 83 (1988).

156. See Jeffrey A. Smith, *A Reappraisal of Legislative Privilege and American Colonial Journalism*, 61 JOURNALISM Q. 97, 100-101 (1984); see also LEVY, *supra* note 66, at 45-46.

157. See LEVY, *supra* note 66, at 45; Smith, *supra* note 156, at 100.

158. 1 JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW YORK 671-72 (1766); 2 JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW YORK 191-93, 198 (1766). Leonard Levy has pointed out that the New York Assembly was more than a little hypocritical, as it felt free to imprison printers whose writings criticized the Assembly. See LEVY, *supra* note 66, at 46-47.

159. See SMITH, *supra* note 155, at 83 ("Court trials for seditious libel were seldom attempted in America between the Zenger case in 1735 and the Sedition Act of 1798.")

160. James Alexander, N.Y. WKLY. J., Nov. 19, 1733.

161. See FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 47 (Leonard W. Levy ed.,

statement "make a Lybel" against the government.¹⁶² The sole job of the jury was to decide if the accused had printed the material before the court.¹⁶³ Zenger's attorney, Andrew Hamilton, conceded that Zenger had published the material,¹⁶⁴ but argued both that the making of a truthful charge should not be a crime¹⁶⁵ and that the jury, not the judge, should decide whether a statement is libelous.¹⁶⁶ He explained his distrust of the judiciary's deciding on the criminality of those who complain against the government:

I think it will be agreed, That ever since the Time of the Star Chamber, where the most arbitrary and destructive Judgments and Opinions were given, that ever an *Englishman* heard of, at least in his own Country: I say, Prosecutions for Libels since the Time of that arbitrary Court . . . have generally been set on Foot at the Instance of the Crown or its Ministers; and . . . these Prosecutions were too often and too much countenanced by the Judges, who held their Places at Pleasure, (a disagreeable Tenure to any Officer, but a dangerous one in the Case of a Judge.)¹⁶⁷

Hamilton argued that existing law not only presented a danger by giving too much power to judges, it weakened the protection of the innocent by depriving juries of the right to make the critical determination on the criminality of a publication.¹⁶⁸ Finally, he pleaded directly to the jury "as Men who have baffled the Attempt of Tyranny."¹⁶⁹

The judge instructed the jury to ignore Hamilton's argument and find Zenger guilty for printing the material he had previously admitted to printing.¹⁷⁰ The jury quickly returned a verdict of not guilty, "[u]pon which there were three Huzzas in the Hall which was crowded with people."¹⁷¹

It became an article of faith for those in the colonies that the jury was an essential buffer against abuses of authority, whether by governors, parliaments, or judges. One colonial writer described the principle that there be no conviction without a jury verdict as "the glorious Security thereby given for Freedom in writing and speaking."¹⁷²

1966) [hereinafter FREEDOM OF THE PRESS].

162. *Id.* at 60.

163. *See id.* at 51.

164. *See id.* at 44.

165. *See id.* at 46.

166. *See id.* at 50-51.

167. *Id.* at 55.

168. *See id.* at 51. "This [practice] of leaving it to the Judgment of the Court, *whether the Words are libellous or not*, in Effect renders Juries useless (to say no worse) in many Cases . . ."
Id.

169. *Id.* at 59.

170. *See id.* at 60-61.

171. *Id.* at 61.

172. Smith, *supra* note 26, at 1420.

Liberty in America was seen as protection *from*, not by, colonial judges. In the Declaration of Independence, Thomas Jefferson included the symbiotic relationship between the judiciary and the King in the list of grievances: "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."¹⁷³ By the time of the Revolution, Americans were well aware that their liberty, especially their liberty of the press, could be attacked by all branches of government.

When the Constitution for the new United States was drafted, there was, naturally, no provision protecting a free press because there was no Bill of Rights. It was argued that because the Constitution limited the areas in which the new federal government could act, there was not only no need for a Bill of Rights, but that its very inclusion might imply greater, and more ominous power, for the national government.¹⁷⁴

While no one spoke against the need for "liberty of the press," many felt it was an invaluable, but undefinable concept. Benjamin Franklin wrote in 1789: "Few of us, I believe, have distinct Ideas of Its Nature and Extent."¹⁷⁵ Alexander Hamilton agreed, and wrote in the Federalist Papers: "What signifies a declaration that 'the liberty of the press shall be inviolably preserved?' What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?"¹⁷⁶

The reality was somewhat different than this pessimistic assessment.¹⁷⁷ It is true that the outerlimits of liberty of the press were ill-defined and improperly understood.¹⁷⁸ The most significant question, which was to dominate discussion of the constitutionality of the Sedition Act of 1798, was the protection given for criticism of the government, specifically whether the English concept of seditious libel could co-exist with freedom of the press.¹⁷⁹ There was, however, wide-

173. THE DECLARATION OF INDEPENDENCE para. 10-11 (U.S. 1776).

174. See, e.g., THE FEDERALIST NO. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "For why declare that things shall not be done which there is no 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?" *Id.* at 515.

175. BENJAMIN FRANKLIN, THE COURT OF THE PRESS (1789), reprinted in 10 THE WRITINGS OF BENJAMIN FRANKLIN 37 (Albert Smyth ed., 1907).

176. THE FEDERALIST NO. 84, *supra* note 174, at 514.

177. See, e.g., David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 537 (1983) ("[M]ost of the Framers perceived, however dimly, naively, or incompletely, that freedom of the press was inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed.").

178. See, e.g., LEVY, *supra* note 66, at 348 ("The First Amendment's injunction, that there shall be no law abridging the freedom of speech or press, was boldly stated if narrowly understood.").

179. An early awareness of this issue can be seen in a 1789 letter from William Cushing to John Adams, where Cushing argued that liberty of the press:

spread consensus on at least one critical principle: Liberty of the press must mean, at a bare minimum, no prior restraint. In other words, the substance protected by the First Amendment was not always clearly understood, but all appreciated that limitations imposed prior to publishing were simply unacceptable.

One of the earliest comprehensive definitions of liberty of the press came from James Wilson at the Pennsylvania state convention ratifying the Constitution. On December 1, 1787, Wilson, who was later to serve as a Justice on the first United States Supreme Court, declared:

The idea of the liberty of the press, is not carried so far as this [permitting libels to go unpunished] in any country—what is meant by the liberty of the press is, that *there should be no antecedent restraint upon it*; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual.

With regard to attacks upon the public, the mode of proceeding is by a prosecution. . . . [I]t must be tried where it was published, if the indictment is for publishing; and it must be tried likewise by a jury of that State.¹⁸⁰

When Justice Joseph Story described the scope of liberty of the press protected by the First Amendment, he built on works concerning the English experience by William Blackstone and Jean DeLolme.¹⁸¹ Justice Story condemned “previous restraints,” whether coming from a licensor or a judge:

must exclude *subsequent* restraints, as much as *previous restraints*. In other words, if all men are restrained by the fear of jails, scourges and loss of ears from examining the conduct of persons in administration and where their conduct is illegal, tyrannical and tending to overthrow the Constitution and introduce slavery, are so restrained from declaring it to the public *that* will be as effectual a restraint as any *previous* restraint whatever.

Id. at 199.

180. Statement at Pennsylvania ratifying convention, PENNSYLVANIA AND THE FEDERAL CONSTITUTION: 1787-1788, at 308-09 (John Bach McMaster & Frederick D. Stone eds., Da Capo Press 1970) (1888) (emphasis added).

181. See STORY, *supra* note 123, §§ 1878-79 (quoting BLACKSTONE, *supra* note 122; DELOLME, *supra* note 119). Blackstone’s famous description of prior restraints shows his preference, if not enthusiasm for “subsequent punishment” of the press:

To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the revolution [of 1688], is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, *when published*, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order

BLACKSTONE, *supra* note 122, at 152.

[T]he liberty of the press, as understood by all England, is the right to publish *without any previous restraint, or license; so that neither the courts of justice, nor other persons, are authorized to take notice of writings intended for the press; but are confined to those which are printed.* And, in such cases, if their character is questioned, whether they are lawful, or libelous, is to be tried by a jury, according to the due proceedings of law.¹⁸²

The understanding of the full scope of liberty of the press underwent a revolution a few years after ratification of the First Amendment, with the enactment of the Alien and Sedition Acts. This revolution continues today. However, from the beginning, there has been universal understanding that there could be no liberty of the press without a prohibition against previous restraints. No government official, judicial or otherwise, may be permitted to restrict the press prior to publication.

B. The Consensus Surrounding the Sedition Act

The Sedition Act of 1798 made it a crime to write "any false, scandalous and malicious" statements against either the President or Congress.¹⁸³ While the law permitted a defendant to escape penalty by proving the truth of the writing, and juries were permitted to decide critical questions of law and fact, there was no doubt that the Act was intended to silence critics of the entrenched political powers.

Supporters of the Act stated that the law was constitutional because it did not involve a prior restraint, but merely penalized speech after it had occurred:

[T]he liberty of the press consists not in a license for every man to publish what he pleases without being liable to punishment, if he should abuse this license to the injury of others, but in a permission to publish, without previous restraint, whatever he may think proper, being answerable to the public and individuals, for any abuse of this permission to their prejudice.¹⁸⁴

John Marshall also defended the Sedition Act in his Report on the Minority on the Virginia Resolutions, as being consistent with the First Amendment because it did not impose a prior restraint.¹⁸⁵ "It is known to all," he wrote, that

182. *Id.* (emphasis added). It is noteworthy that in his treatise on equity, Justice Story equated injunctions on libel with the Star Chamber. See JOSEPH STORY, II COMMENTARIES ON EQUITY JURISPRUDENCE 136-37 (12th ed. 1887) (stating that courts of equity "have never assumed, at least since the destruction of the Court of Star Chamber, to restrain any publication which purports to be a literary work, upon the mere ground that it is of a libellous character").

183. The Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798).

184. 5 ANNALS OF CONG. 2987-2990, 3003-14 (1799), reprinted in FREEDOM OF THE PRESS, *supra* note 161, at 1173-74.

185. See John Marshall, *Report of the Minority on the Virginia Resolutions*, J. House of

those who publish libels or who "libel the government of the state," may "be both sued and indicted."¹⁸⁶ However, he added:

[T]he liberty of the press is a term which has a definite and appropriate signification, completely understood. It signifies a liberty to publish, *free from previous restraint*, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community.¹⁸⁷

The opponents of the Sedition Act did not disagree with the contention that prior restraints were prohibited under the First Amendment. They instead argued that protection against prior restraints was a necessary, but insufficient, condition to guarantee freedom of expression.

James Madison, for example, criticized the Act declaring: "It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."¹⁸⁸ Madison argued that freedom of the press meant not only a ban on prior restraints, but much more as well:

This security of the freedom of the press requires that it should be exempt *not only from previous restraint* by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.¹⁸⁹

The Sedition Act expired by its own terms in 1801. In 1964, the Supreme

Delegates (Va.) 6:93-95 (Jan. 22, 1799), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 136-38 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added); *see also* *Respublica v. Dennie*, 4 Yeates 267 (1805). Judge Jasper Yeates instructed a jury on a charge of seditious libel:

There shall be no licenses of the press. Publish as you please in the first instance without control; but you are answerable both to the community and the individual, if you proceed to unwarrantable lengths. . . . [I]f the consciences of the jury shall be clearly satisfied that the publication was seditiously, maliciously, and willfully aimed at the independence of the United States, the constitution thereof, or of this state, they should convict the defendant.

Id. at 269, 271. The defendant, publisher Joseph Dennie, was eventually acquitted after a jury trial. *See* LEVY, *supra* note 66, at 341.

186. THE FOUNDERS' CONSTITUTION, *supra* note 185, at 138 (quoting John Marshall).

187. *Id.* (quoting John Marshall).

188. James Madison, *The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws*, *reprinted in* THE FOUNDERS' CONSTITUTION, *supra* note 185, at 141-42.

189. *Id.* (emphasis added). This reasoning was repeated by St. George Tucker, who annotated the work of Blackstone for application to the American system. *See* St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and the Commonwealth of Virginia* (1803), *reprinted in* FREEDOM OF THE PRESS, *supra* note 161, at 324.

Court finally agreed that Madison's fuller understanding of the First Amendment was correct, and the Court explicitly granted constitutional protection to criticism of government officials: "[T]he attack upon [the Sedition Act's] validity has carried the day in the court of history."¹⁹⁰

The primary lesson of the Sedition Act is that the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"¹⁹¹ requires that discussion of public issues be free from subsequent punishment. Opponents of the Sedition Act, however, uniformly acknowledged that such freedom was needed in addition to freedom from prior restraint. Both are necessary for the preservation of free expression.

C. *Judicial Understanding of Prior Restraints Before Near v. Minnesota*

1. *Injunctions Against Libels as Prior Restraints.*—After the end of the Sedition Act, prosecutions for seditious libel ceased to be a serious threat to Nineteenth Century freedom of expression. While common law libel actions were often successful, state court judges throughout the country recognized what modern scholars had forgotten: A fundamental connection exists between the traditional rule that courts may not enjoin libels and the doctrine of prior restraints.¹⁹²

It had long been a maxim in English common law that "equity will not enjoin a libel."¹⁹³ In 1827, New York enacted a law codifying the similar prevailing American view that the press, even when guilty of libel, should not be subject to restraints in advance of future publication.¹⁹⁴ The law, which permitted criminal courts to require guilty parties to "give security to keep the peace," explicitly exempted libels and other writing offenses.¹⁹⁵ It stated, "this section shall not extend to convictions for writing or publishing any libel; nor shall any such security be hereafter required by any court, upon any complaint, prosecution or conviction, for any such writing or publishing."¹⁹⁶ It was later remarked that this provision reflected the legislature's determination that, in regards to a free press, "a power of preventive justice . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government."¹⁹⁷

The first state court decision to recognize explicitly the link between injunctions on libel and prior restraints was the 1839 New York case of

190. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

191. *Id.* at 270.

192. These libel cases only involved state causes of actions, because the U.S. Supreme Court ruled in 1812 that there was no common law jurisdiction in the federal courts. *See United States v. Hudson & Goodwin*, 11 U.S. 32 (1812).

193. *See supra* notes 106-11 and accompanying text.

194. 2 N.Y. REV. STAT. 737, § 1 (1827-88).

195. *Id.*

196. *Id.*

197. *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. 1839).

Brandreth v. Lance.¹⁹⁸ The seller of “Brandreth’s Vegetable Universal Pills,”¹⁹⁹ had sought to enjoin publication of a made-up “autobiography.”²⁰⁰ The court dismissed the complaint, stating that it could not assume jurisdiction “without infringing upon liberty of the press.”²⁰¹ Chancellor Walworth’s opinion stressed that for a court to enjoin a publication would mark a dangerous return to the days of the Star Chamber:

The court of star chamber in England, once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages. And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction.²⁰²

Chancellor Walworth then stated that, since the end of the Star Chamber, only one 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, as such, in anticipation.”²⁰³ He added with evident satisfaction that “[t]he house of commons, however, considered this extraordinary exercise of power on the part of [the notorious] Scroggs as a proper subject of impeachment.”²⁰⁴

In 1876, the Missouri Court of Appeals denied an insurance company’s request to enjoin a libel, stating that such an injunction would violate Missouri’s constitutional guarantee of free speech.²⁰⁵ The court held that even if the insolvency of the defendant meant that there was no adequate remedy at law, the constitutional guarantee forbade injunctions against speech:

It is obvious that, if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured, by the Constitution of Missouri, to all its citizens, will be

198. *Id.* at 24.

199. *Id.*

200. *See id.*

201. *Id.* at 26.

202. *Id.* at 24 (citation omitted). While it was perhaps technically inaccurate to say that the Star Chamber issued formal “injunctions” against libels, *see* Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 650 (1916), the Star Chamber unquestionably exercised coercive preventative power over printing both through its licensing authority and its ability to prosecute offenders without a jury. *See supra* notes 27-58 and accompanying text.

203. *Brandreth*, 8 Paige Ch. at 26.

204. *Id.* (citation omitted). Lord Chief Justice William Scroggs had imposed a ban on the publication of a book in 1680. *See* *Trial of Henry Carr*, 7 State Trials 1111, 1115 (1680). Scroggs was impeached by the House of Commons ten years later. Proceedings against Lord Chief Justice Scroggs were brought before the Privy Council. *See* 8 State Trials 163, 199 (1680).

205. *See* *Life Ass’n of Am. v. Boogher*, 3 Mo. App. 173 (1876). Missouri’s constitutional free speech provision stated: “[E]very person may freely speak, write, or print on any subject, being responsible for the abuse of that liberty.” *Id.* at 180.

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.²⁰⁶

Finally, the court rejected the plea for a temporary injunction while the merits of the defamation action were being considered, explaining that "[w]e have no power to suspend that right for a moment, or for any purpose."²⁰⁷ The court ended by explaining that a judicially imposed injunction was the equivalent of the censor's licensing power as a forbidden prior restraint on speech.²⁰⁸ "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."²⁰⁹

One year after the Missouri decision, the New York Court of Common Pleas agreed that a temporary injunction against an alleged libel would violate the state's constitutional guarantee of free speech.²¹⁰ The New York Juvenile Guardian Society had sued to enjoin Teddy Roosevelt, a commissioner of the State Board of Charities, from publishing the results of an investigation which found misuse of the charity's funds. The court declared that a court of equity had no power to restrain defamatory publications and linked this rule to freedom of expression:

[T]he exercise of any such jurisdiction being repugnant to the provision of the Constitution, which declares (art. I, § 8) that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the *abuse* of that right; and that no law shall be passed to restrain [sic] or abridge the liberty of speech or of the press.²¹¹

This principle was reaffirmed by the New York Court of Appeals in 1902, which stated the enjoining of libels interfered with both freedom of the press and the right to a jury trial.²¹² The court stated that:

[Enjoining libels] would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge

206. *Id.* at 176.

207. *Id.* at 180.

208. *See id.*

209. *Id.* (emphasis added). This principle was reaffirmed by the Missouri Supreme Court in *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804 (Mo. 1892). The Missouri Supreme Court stated that there were "exceptions in star chamber times, but such exceptions serve to make firm the general rule that a court of equity possessed no such power." *Id.* at 806. The court in *Flint* concluded that enjoining libels violated both freedom of the press and the right to a jury determination. *See id.* at 805; accord *Wolf v. Harris*, 184 S.W. 1139 (Mo. 1916); *Hamilton-Brown Shoe Co. v. Saxey*, 323 S.W. 1106 (Mo. 1895).

210. *See N.Y. Juvenile Guardian Soc'y v. Roosevelt*, 7 Daly 188 (N.Y. Ct. Common Pleas 1877).

211. *Id.* at 191.

212. *See Marlin Fire Arms Co. v. Shields*, 64 N.E. 163 (N.Y. 1902).

by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require²¹³

Probably the most extensive discussion of the link between injunctions against defamation and prior restraints in the Nineteenth Century, came from an 1882 decision of the Louisiana Supreme Court in *State ex rel. Liversey v. Judge of Civil District Court*.²¹⁴ In that case, W. Van Benthuyzen obtained an injunction against a newspaper, *The Mascot*, ordering it not to publish libelous cartoons against him. When the paper published more cartoons, its publisher was held in contempt. The Louisiana Supreme Court not only declared the injunction unconstitutional, the court also annulled the publisher's contempt conviction on the ground that the injunction was void.²¹⁵

The Louisiana Supreme Court began by stating that even though the language of its constitutional guarantee that "no law shall be passed abridging the freedom of the press" differed in language from the U.S. Constitution and like provisions in other states,²¹⁶ "they all signify the same thing, and convey the general idea which is crystallized in the common phrase, 'liberty of the press.'"²¹⁷ Quoting a law dictionary, the court acknowledged the link between injunctions and other forms of prior restraints: "The favorite idea in England and America has been that every person may freely publish what he sees fit, and any judgment of the law upon it shall be reserved till afterwards."²¹⁸ After describing the prohibition against all forms of prior restraint, the court stated, "[p]erhaps in the whole range of legal propositions, susceptible of dispute, there is not one that commands so unanimous a concurrence of judges and jurists."²¹⁹

The court then noted the difficulty in ascertaining whether particular statements were defamatory or not, and whether or not they were privileged. Because of this lack of certainty, "[t]here would be no safe course, except to take the opinion of the judge beforehand, or to abstain entirely from alluding to the plaintiff. What more complete censorship could be established?"²²⁰ The court concluded that such a scheme would have a devastating effect on freedom of the press: "Under the operation of such a law, with a subservient or corrupt

213. *Id.* at 165.

214. 34 La. Ann. 741 (La. 1882).

215. *See id.* at 742.

216. *Id.* at 743 (quoting the Louisiana Bill of Rights). The court noted that Maine's constitutional provision was typical of states such as New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, and Illinois: "Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty." *Id.* at 744 (quoting the Maine Constitution). The court stated that although these provisions "are fuller in expression" than Louisiana's, they "are merely intended to convey the recognition of the same general principle, 'liberty of the press' as a fundamental right of the citizen." *Id.*

217. *Id.* at 743.

218. *Id.* (citation omitted).

219. *Id.*

220. *Id.* at 745.

judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed."²²¹

Upon concluding that an injunction against defamatory statements violated liberty of the press, the court then ruled that the publisher could not be punished for violating the injunction: "[W]here the court had no power to grant the injunction, and where the mandate is, therefore, absolutely void, the defendants cannot be punished for contempt for its alleged violation."²²²

Similarly, two Texas state courts' injunctions against defamatory statements were also found to violate that state's constitutional protection for freedom of expression. In a 1909 case, *Mitchell v. Grand Lodge, Free & Accepted Masons of Texas*,²²³ the court ruled that the state's "constitutional guaranty of liberty of speech furnishes an additional reason for the application in Texas of the general rule that an injunction will not issue to restrain the publication of a libel."²²⁴ In 1923, another Texas court agreed, stating that the purpose of that constitutional provision "is to preserve the liberty of speech . . . and to inhibit a court of equity from supervising one person's opinion of another or from dictating what one person may say of another. . . ."²²⁵

The Alabama constitutional guarantee of freedom of the press was similarly held to bar injunctions against defamation.²²⁶ In 1909, a U.S. District Court held

221. *Id.*

222. *Id.* at 746 (citations omitted). The court explained that the publisher could be punished pending final review of his violation of the injunction, but the punishment would end thereafter:

He must endure the consequences of his disobedience until, in some orderly course of procedure, he procures from competent authority the annulment of the mandate claimed to be unconstitutional and void; but the moment such annulment is pronounced, his condemnation for contempt falls with it, and his sentence, though not completely executed, expires.

Id. Some courts, however, held that even if an injunction against a libel was improper, a party violating that injunction could still be held in contempt. See *Christian Hosp. v. People ex rel. Murphy*, 79 N.E. 72, 74 (Ill. 1906). This was also the position of the U.S. Supreme Court in adopting the collateral bar rule. See *Walker v. City of Birmingham*, 388 U.S. 307, 317-21 (1967).

223. 121 S.W. 178 (Tex. Civ. App. 1909).

224. *Id.* at 179. The relevant Texas constitutional provision stated:

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . . And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

TEX CONST. art. I, § 8 (2000).

225. *Strang v. Biggers*, 252 S.W. 826, 826 (Tex. Civ. App. 1923). The court went on to add that although libels could not be enjoined, they could be punished, because the law held "all persons accountable for the misuse of this right of free speech." *Id.*

226. The Alabama Constitution states that "no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." ALA CONST. art. I, § 4.

that the Alabama state constitution forbade enjoining a libel defaming the plaintiff's credit and business standing.

The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the court were allowed to take the alleged slanderer or libeler by the throat, in advance.²²⁷

Eight years later, another U.S. District Court in Alabama refused to enjoin a defamatory attack on the maker of an alcohol-laced medicine, stating, "it is not within the authority of any court, or of any other governmental agency, by any sort of censorship to abridge the right belonging to every man to freely speak and publish his sentiments."²²⁸

Similar holdings were reached by other federal courts. In a 1900 case from Oregon, an injunction for a libel was denied: "The court cannot assume to supervise the publication of offending newspapers, or otherwise constitute itself a press censor."²²⁹ In a 1907 case interpreting South Dakota's constitutional right to free expression, the court concluded, "[i]n the jurisprudence of the United States there is no remedy for the abuse of this right . . . except an action at law for damages or a criminal proceeding by indictment or information."²³⁰

In 1916, the Nebraska Supreme Court joined the list of courts which explicitly linked the equitable ban on enjoining defamations with the constitutional prohibition on prior restraints.²³¹ The court, in refusing to enjoin publication of a false statement that a candidate was not actually running for Governor, declared: "The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government."²³²

The cases detailed in this section prove, that from the very beginning of the Republic, American courts have understood that permitting libels to be enjoined gave judges the same censorial control over prospective speech as had been wielded by licensors of old.²³³ The following few sections of this Article

227. *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 556 (M.D. Ala. 1909).

228. *Willis v. O'Connell*, 231 F. 1004, 1010 (S.D. Ala. 1916).

229. *Balliet v. Cassidy*, 104 F. 704, 706 (D. Or. 1900).

230. *Montgomery Ward & Co. v. S.D. Retail Merchs.' & Hardware Dealers' Ass'n*, 150 F. 413, 418 (D. S.D. 1907) (citations omitted). The South Dakota Constitution states, "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." S.D. CONST. art. VI, § 5.

231. *See Howell v. Bee Pub. Co.*, 158 N.W. 358 (Neb. 1916).

232. *Id.* at 359.

233. Many of the courts that denied injunctions for defamatory statements merely cited the equitable rule without mentioning the constitutional interest in free expression. Some judges, such as Supreme Court Justice Bradley, sitting on circuit in *Kidd v. Horry*, 28 F. 773, 776 (E.D. Pa.

illustrate questions about enjoining speech intertwined with conduct, such as picketing or parades, which have been difficult for courts to resolve. Nonetheless, there remained wide-spread agreement that an injunction against pure speech was an impermissible prior restraint.

2. *Prior Restraints and Labor Disputes.*—Labor disputes around the turn of the 20th century presented courts with the challenge of applying principles of free expression in a novel and volatile context. While many courts focused primarily on the threat of violence or potential harm to businesses, a number of courts did understand that injunctions against the speech and protests of unions could very well violate the traditional prohibition against prior restraints.

When “boycotting” a business was held to be an illegal conspiracy, injunctions against speeches and circulars in support of such boycotts were freely granted. In 1911, the U.S. Supreme Court upheld the one-year jail term for Samuel Gompers for violating an injunction that had barred the urging of a boycott against Buck’s Stove and Range Company or publishing the name of the company on “Unfair Lists.”²³⁴ The Court said that the injunction did not violate freedom of expression because the prohibited words were a signal to implement an illegal conspiracy.²³⁵ Thus, the injunction was not against pure speech, but against “verbal acts,” which, the Court added, were as much subject to being enjoined “as the use of any other force whereby property is unlawfully damaged.”²³⁶

There were many similar decisions. As Felix Frankfurter and Nathan Greene wrote in their 1930 book, *The Labor Injunction*, the injunction became the

1886), tied the ban on enjoining defamations to the constitutional requirement of a jury trial. Most judges, however, just cited the rule that equity will not enjoin a libel. *See, e.g.,* Francis v. Flinn, 118 U.S. 385 (1886); Robert E. Hicks Corp. v. Nat’l Salesmen’s Training Ass’n, 19 F.2d 963 (7th Cir. 1927); Vassar Coll. v. Loose-Wiles Biscuit Co., 197 F. 982 (W.D. Mo. 1912); Edison v. Thomas A. Edison, Jr. Chem. Co., 128 F. 1013 (D. Del. 1904); Computing Scale Co. v. Nat’l Computing Scale Co., 79 F. 962 (N.D. Ohio 1897); Baltimore Car-Wheel Co. v. Bemis, 29 F. 95 (D. Mass. 1886); Donaldson v. Wright, 7 App. D.C. 45 (1895); Singer Mfg. Co. v. Domestic Sewing Mach. Co., 49 Ga. 70 (1873); Allegretti Chocolate Cream Co. v. Rubel, 83 Ill. App. 558 (1899); Everett Piano Co. v. Bent, 60 Ill. App. 372 (1895); Raymond v. Russell, 9 N.E. 544 (Mass. 1887); Whitehead v. Kitson 119, Mass. 484 (1876); Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Flint v. Hutchinson Smoke Burner Co., 19 S.W. 804 (Mo. 1892); Mayer v. Journeymen Stone-Cutters’ Ass’n, 20 A. 492 (N.J. Ch. 1890); Owen v. Partridge, 82 N.Y.S. 248 (Sup. Ct. 1903); Mauger v. Dick, 55 How. Pr. 132 (N.Y. Sup. Ct. 1878). One such court ruled that the equity rule was not based on constitutional reasons and could be changed by statute. *See* Chamber of Commerce of Minneapolis v. FTC, 13 F.2d 673 (8th Cir. 1926). A small minority of courts actually ruled that libels could be enjoined. *See* Warren Featherbone Co. v. Landauer, 151 F. 130 (E.D. Wis. 1903); Emack v. Kane, 34 F. 46 (N.D. Ill. 1888); *see also* Palmer v. Travers, 20 F. 501 (S.D.N.Y. 1884) (permitting injunction for libel if defendant threatens repetition).

234. Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

235. *See id.* at 439.

236. *Id.*

central lever in the administration of justice between employer and employee.²³⁷ While some courts enjoined publications which were accompanied by “threats, express or covert, or intimidation and coercion,”²³⁸ others went so far as to bar speech that was merely “annoying” or “indecent,” or that contained “opprobrious epithets.”²³⁹

One of the first steps in recognizing that picketing and persuasion in the labor context could be protected without sanctioning violence and illegality came in a dissent by Oliver Wendell Holmes in an 1896 Massachusetts case.²⁴⁰ The Massachusetts Supreme Judicial Court upheld enjoining, as a nuisance, a two-person picket in front of a factory.²⁴¹ Holmes condemned as “unwarranted” the “assumption that the patrol necessarily carries with it a threat of bodily harm.”²⁴² Holmes also criticized the use of the word “threats” in labor injunctions, noting that a threat is not necessarily unlawful; “it depends on what you threaten.”²⁴³

The most eloquent defense of freedom of expression in the labor context came from the Montana Supreme Court in 1908. In *Lindsay & Co. v. Montana Federation of Labor*,²⁴⁴ the court struck down a lower court order enjoining a labor union from distributing written materials “containing opprobrious or injurious epithets.”²⁴⁵ The court said that for a judge to tell an individual what not to publish, even regarding a “conspiracy to boycott,” is analogous to if the court were to “determine in advance just what the citizen may or may not speak or write upon a given subject—is, in fact, to say that such court is a censor of speech as well as of the press.”²⁴⁶ Referring to the state’s constitution,²⁴⁷ the court declared:

It cannot be said that a citizen of Montana is free to publish whatever he will on any subject, while an injunction preventing him from publishing a particular item upon a particular subject hangs over his head like a sword of Damocles, ready to fall with all the power which can be invoked in contempt proceedings²⁴⁸

237. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 52 (1930).

238. *Beck v. Ry. Teamsters’ Protective Union*, 77 N.W. 13, 24 (Mich. 1898).

239. FRANKFURTER & GREENE, *supra* note 237, at 89-106; *see also* RABBAN, *supra* note 127, at 169-73.

240. *See* *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896).

241. *See id.* at 1078.

242. *Id.* at 1080 (Holmes, J., dissenting).

243. *Id.* at 1081 (Holmes, J., dissenting).

244. 96 P. 127 (Mont. 1908).

245. *Id.* at 128.

246. *Id.* at 131.

247. The relevant constitutional provision stated: “No law shall be passed impairing the freedom of speech; every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty.” *Id.* (quoting MONT. CONST. OF 1884, art. III, § 10).

248. *Id.*

A similar decision was announced in 1902 by the Missouri Supreme Court.²⁴⁹ In refusing to enjoin a union from proclaiming or conveying a boycott to others, the court stated that such an injunction would be an unconstitutional prior restraint: "The two ideas, the one of absolute freedom 'to say, write or publish whatever he will on any subject,' coupled with responsibility therefor, and the other idea of *preventing* any such free speech, free writing or free publication *can not coexist*."²⁵⁰

The Texas Supreme Court also condemned an injunction against a labor union, under which union organizers were arrested for contempt for "villifying, abusing, or using opprobrious epithets" to telephone company employees.²⁵¹ Equating the injunction to "a system of only licensed speech or licensed printing[.]"²⁵² the court declared:

Let it once be admitted that courts may arrogate the authority of deciding what the individual may say and may not say, what he may write and may not write, and by an injunction writ require him to adapt the expression of his sentiments to only what some judge may deem fitting and proper, and there may be readily brought about the very condition against which the constitutional guaranty was intended as a permanent protection. Liberty of speech will end where such control of it begins.²⁵³

Courts continued to enjoin picketing and other labor-related expression that involved threats of violence or intimidation.²⁵⁴ However, a growing number of courts realized that "[u]nder the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished."²⁵⁵ Enjoining such persuasion, according to a 1924 Illinois Supreme Court decision, would result in labor speech being "subject to the supervision of a censor."²⁵⁶ In reversing a contempt citation for violating an injunction banning the use of the word "'scabs,' or other offensive, scurrilous or opprobrious names," the court

249. See *Marx & Hass Jeans Clothing Co. v. Watson*, 67 S.W. 391 (Mo. 1902).

250. *Id.* at 393.

251. *Ex parte Tucker*, 220 S.W. 75, 75 (Tex. 1920) (quoting the District Court of Anderson County).

252. *Id.* at 76.

253. *Id.*

254. See *Am. Malting Co. v. Keitel*, 209 F. 351, 363 (2d Cir. 1913) (enjoining false statements designed to cause customers to breach contracts); *accord Am. Law Book Co. v. Edward Thompson Co.*, 84 N.Y.S. 225 (Sup. Ct. 1903).

255. *Iron Molders' Union No. 125 v. Allis Chalmers Co.*, 166 F. 45, 51 (7th Cir. 1908); see also *Everett Waddey Co. v. Richmond Typographical Union*, No. 90, 53 S.E. 273, 278 (Va. 1906) ("The evidence, we think, fails to make a case showing that appellees have in any way so molested, annoyed or damaged the appellants in the conduct of their business as to entitle them to the extraordinary relief by injunction.").

256. *Vulcan Detinning Co. v. St. Clair*, 145 N.E. 657, 659 (Ill. 1924).

stated that no court of equity "has the power to restrain and punish members of a labor union from speaking, writing or publishing on the subject of a dispute between the union and the employer."²⁵⁷

3. *Parades and the Perils of Unlimited Discretion.*—Unlike "pure speech," the use of public streets for parades or demonstrations necessitates some kind of government involvement. Cities have the right to regulate their public thoroughfares, both for traffic and for avoiding conflicts with the rights of others.²⁵⁸ However, beginning in the mid-1880s, many courts recognized that granting government officials unlimited discretion in determining who may use the public streets was a dangerous infringement on freedom of expression.

Many of these early cases involved the Salvation Army, which sought to parade and play music in cities throughout the country. From 1884 through 1886, the Salvation Army paraded through Grand Rapids, Michigan, much to the dismay of the local government.²⁵⁹ After repeated prosecutions for public nuisance ended with acquittals, the city passed an ordinance banning all parades, except for funeral and military processions, "without having first obtained the consent of the mayor."²⁶⁰ The Michigan Supreme Court ruled that it was unconstitutional to make the right to communicate on public streets subject "to an unregulated official discretion."²⁶¹ The court held it impermissible for "a mayor or council to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ. When men in authority have arbitrary power, there can be no liberty."²⁶²

A similar parade law was struck down by the Kansas Supreme Court in 1888.²⁶³ That court ruled that unlimited discretion over which groups could parade violated the right of the people to communicate on political or religious issues, and that any regulation must apply in an even-handed manner to every speaker:

All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets,

257. *Id.*

258. For an early discussion of this, see *State v. White*, 5 A. 828 (N.H. 1886). For a fascinating discussion of weaknesses of this rule, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 138-60 (1989).

259. See *In re Frazee*, 30 N.W. 72, 74 (Mich. 1886).

260. *Id.* at 73.

261. *Id.* at 76.

262. *Id.* A similar parade law was upheld in Massachusetts in *Commonwealth v. Plaisted*, 19 N.E. 224 (Mass. 1889). That court incorrectly distinguished the *Frazee* case on the mistaken ground that the Michigan court had merely ruled that the city council lacked "legislative authority" to pass such an ordinance. *Id.* at 383.

263. See *Anderson v. City of Wellington*, 19 P. 719 (Kan. 1888). In *Anderson*, members of the Salvation Army were arrested for parading in violation of a local ordinance which made it "unlawful . . . to parade any public street . . . without having first obtained in writing the consent of the mayor." *Id.* at 720.

expressly and intelligently; . . . and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he does not agree on controverted questions from calling public attention to the principles of their party²⁶⁴

In Illinois, it was held unconstitutional to grant unlimited discretion over parades to either the chief of police or the city council.²⁶⁵ As one court noted: "When men in authority are permitted in their discretion to exercise power so arbitrary, liberty is subverted, and the spirit of our free institutions violated. And it is all the same whether that discretion is exercised by one man or several."²⁶⁶

The most impassioned decision striking down a law granting city officials unlimited discretion over parades was the Wisconsin Supreme Court in its 1893 decision, *State ex rel. Garrabad v. Dering*.²⁶⁷ The court stated that authorizing such discretion resembled "a petty tyranny, the result of prejudice, bigotry, and intolerance, [more] than any fair or legitimate provision in the exercise of the police power of the state."²⁶⁸ The court concluded with a powerful denunciation of the evils of unlimited discretion:

It is entirely un-American and in conflict with the principles of our institutions and all modern ideas of civil liberty. It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws²⁶⁹

4. *Banning Newspapers*.—Of all the attempts to control free expression, none is a more blatant violation of the traditional ban on prior restraints than the direct legislative ban on a particular publication. Prior to *Near*, several localities tried to enact such bans, which were uniformly rejected by the courts.

In 1893, the city council of Seguin, Texas, voted that the *Sunday Sun* was a public nuisance and thus could not be sold within the city limits.²⁷⁰ In finding this action unconstitutional, the Texas Court of Criminal Appeals stated that, "[t]he power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise."²⁷¹ Thus, declared the court, "[t]he power to prohibit the publication of newspapers is not within the compass of legislative action in this State, and

264. *Id.* at 723.

265. *See City of Chicago v. Trotter*, 26 N.E. 359 (Ill. 1891); *Rich v. City of Naperville*, 42 Ill. App. 222 (1891).

266. *Rich*, 42 Ill. App. at 224-25.

267. 54 N.W. 1104 (Wis. 1893).

268. *Id.* at 1107.

269. *Id.*

270. *See Ex parte Neill*, 22 S.W. 923 (Tex. Crim. App. 1893).

271. *Id.* at 924.

any law enacted for that purpose would clearly be in derogation of the Bill of Rights.”²⁷²

In 1908, a New York court enjoined the police of the city of Kingston from repeating their seizure and destruction of copies of the *Ulster Square Dealer*.²⁷³ While conceding that the newspaper had published “reckless and scurrilous” libels, the court stated, “[t]wo wrongs can never make a right.”²⁷⁴ Recognizing the similarity between the police seizure of newspapers and a traditional prior restraint, the court declared: “No one can take unto himself the right of suppressing in advance the publication of the printed sentiments of another citizen on any public or private question.”²⁷⁵

During World War I, another New York city, Mount Vernon, voted to ban two papers, the *New York American* and the *New York Evening Journal*, until the end of the war.²⁷⁶ In striking down this ban, the court recognized that the ban constituted an impermissible prior restraint: “It would seem that the legislature itself . . . would have no authority to prohibit in advance the plaintiff or any other accused person from printing and issuing newspapers or other publications.”²⁷⁷

In 1921, a federal court struck down the attempt by the mayor of Cleveland, Ohio, to ban the *Dearborn Independent* as tending to cause breach of peace due to its anti-Semitic articles.²⁷⁸ The court reiterated that the only remedy for offensive publications were prosecutions for specific offenses after publication, rather than “the establishment of a censorship in advance of future publications.”²⁷⁹ Otherwise, the court declared the freedom of the press “would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace, and the right to a free press would likewise be destroyed.”²⁸⁰

272. *Id.* at 923-24.

273. *See Ulster Square Dealer v. Fowler*, 111 N.Y.S. 16 (Sup. Ct. 1908).

274. *Id.* at 17.

275. *Id.* at 17-18. The court concluded: “The plaintiff has the right to publish a newspaper; and defendants cannot determine for themselves in advance as to the propriety of that publication” *Id.* at 18.

276. *See Star Co. v. Brush*, 170 N.Y.S. 987 (Sup. Ct. 1918).

277. *Id.* at 990. The court quoted from an earlier New York case declaring that liberty of the press prevents injunctions against defamation: “Individuals are free to talk and the press is at liberty to publish, and neither may be restrained by injunction, but they are answerable for the abuse of this privilege in an action for slander or libel under the common law” *Id.* (quoting *Stuart v. Press Publ’g*, 82 N.Y.S. 401, 408 (App. Div. 1903)). The court’s finding that the ban was unconstitutional was affirmed on appeal. *See Star Co. v. Brush*, 172 N.Y.S. 851, 851-52 (App. Div. 1918) (stating “[i]t is clear that such a ban on a newspaper by a city or municipality is beyond its powers, as it would thereby invade the constitutional rights of a free press”).

278. *See Dearborn Publ’g Co. v. Fitzgerald*, 271 F. 479, 480 (N.D. Ohio 1921).

279. *Id.* at 482.

280. *Id.* at 485.

5. *The Road to Near*.—It may well be true, as many have stated, that “[s]ince the 1931 release of the Supreme Court’s opinion in *Near v. Minnesota*, the doctrine of prior restraint has been an essential element of first amendment jurisprudence.”²⁸¹ However, as a review of the many cases cited in this section shows, the doctrine of prior restraint has been an essential element of American jurisprudence since the end of the Revolutionary War. If this history is ignored, modern commentators will overestimate the novelty of *Near v. Minnesota* and, more dangerously, underestimate the solidity of its holding.

For one final example, consider the 1896 case from the California Supreme Court, *Dailey v. Superior Court*.²⁸² In *Dailey*, a trial court had enjoined the showing of a play, *The Crime of a Century*, which was based on the facts of a pending murder case. The California Supreme Court ruled that such an injunction would be an unconstitutional prior restraint.²⁸³ The state court declared the injunction was invalid because the “petitioner’s mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance.”²⁸⁴

The road to *Near* was a virtual straight path from the Star Chamber and common law courts, through the colonial and Revolutionary period, from the drafting of the First Amendment through the start of the Twentieth century. Whatever else freedom of communication means to Americans, it has always included freedom from all prior restraints. Neither licensors nor governors, police nor judges, may attempt to halt speech before it is communicated.

D. A Near-Great Decision

In its landmark 1931 decision, *Near v. Minnesota ex rel. Olson*,²⁸⁵ the Supreme Court struck down a Minnesota law which permitted the State to obtain a court order abating defamatory newspapers as a nuisance.²⁸⁶ A state court issued an injunction barring *The Saturday Press* from publishing or distributing “any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.”²⁸⁷ That state court noted that *The Saturday Press* was not barred from all publishing; it was still permitted to operate “a newspaper

281. Scordato, *supra* note 2, at 2.

282. 44 P. 458 (Cal. 1896).

283. *See id.* at 460. The relevant California constitutional provision read: “Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” CAL. CONST. app. I, art. I, § 9.

284. *Dailey*, 44 P. at 460.

285. 283 U.S. 697 (1931).

286. *See id.* at 698.

287. *Id.* at 712. *See also* FRED W. FRIENDLY, MINNESOTA RAG: THE SCANDAL SHEET THAT SHAPED THE CONSTITUTION (1981) (giving a classic description of *The Saturday Press* and the *Near* case).

in harmony with the public welfare to which all must yield.”²⁸⁸

The Supreme Court, in a 5-4 decision, ruled the law an unconstitutional prior restraint. The opinion by Chief Justice Hughes declared that “it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press] to prevent previous restraints upon publication.”²⁸⁹ Unfortunately, the Court did not attempt to define the meaning of the phrase “prior restraint,” but instead directed attention to the statute’s “operation and effect.”²⁹⁰ Noting that the “object and effect” of the statute was to “suppress” future publication, the Court described the operation of the statute as putting “the publisher under an effective censorship.”²⁹¹

The primary offending feature of the statute, according to the Court, was that upon a finding that a publisher had distributed a “malicious, scandalous and defamatory” newspaper, the “resumption of publication is punishable as a contempt of court by fine or imprisonment.”²⁹² The court’s injunction, “would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication.”²⁹³ Whether future publications would be free from punishment would depend upon whether the publisher was able “to satisfy the judge that the charges are true and are published with good motives and for justifiable ends.”²⁹⁴ This, explained the Court, “is of the essence of censorship.”²⁹⁵

The strength of the *Near* decision is the historical accuracy and practical relevance of its holding that an injunction against expression should be viewed as an unconstitutional prior restraint. The fact that a judge’s order directed against the future communication of a particular speaker would have the same debilitating effect on free communication as the censorship of the Star Chamber’s licensors had long been recognized in England and America, in numerous court decisions, and by treatise writers. *Near* was a declaration that

288. *Near*, 283 U.S. at 712.

289. *Id.* at 713. For its description of “the conception of the liberty of the press as historically conceived and guaranteed,” the Court cited both Blackstone and DeLolme. *Id.* at 713-14. For an analysis of the work of both Blackstone and DeLolme, see *supra* notes 113-25 and accompanying text.

290. *Id.* at 708.

291. *Id.* at 712.

292. *Id.*

293. *Id.*

294. *Id.* at 713.

295. *Id.* The Court made a point of declaring that the constitutional ban on prior restraints was not “absolutely unlimited,” but was subject to limitation “only in exceptional cases.” *Id.* at 716. The Court listed four such cases: 1) “actual obstruction to [the Government’s] recruiting service or the publication of the sailing dates of transports or the number and location of troops”; 2) “the primary requirements of decency . . . against obscene publications”; 3) “incitements to acts of violence and the overthrow by force of orderly government . . . words that may have all the effect of force”; 4) “to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.” *Id.* (citations omitted).

such an infringement on free expression would not be permitted under the First Amendment.

The primary weakness in the *Near* decision results from its failure to precisely define what constitutes a "prior restraint." Absent such a definition, the path of future decisions was bound to be uncertain, and respect for the doctrine was liable to be transient. Indeed, many recent scholars have questioned whether injunctions should be treated as prior restraints at all.²⁹⁶ Others have argued that the entire prior restraint doctrine has become "so far removed from its historic function, so variously invoked and discrepantly applied, and so often deflective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis."²⁹⁷

III. USING HISTORY TO DEFINE PRIOR RESTRAINTS

With an accurate understanding of the doctrine's history, a precise and clear definition of "prior restraint" is finally possible. An appropriate starting point is Justice Story's description of liberty of the press: "[N]either the courts of justice, nor other persons, are authorized to take notice of writings intended for the press; but are confined to those, which are printed."²⁹⁸ This description accurately captures the reality that the dangers of prior restraints can come from either judges or licensors. The description is not complete, though, because it overlooks the difference between restraints emanating from "the courts of justice" and those emanating from "other persons." Specifically, the description omits the fundamental difference between restraints imposed by the judicial as opposed to the executive branch of government.

The critical element of finally solving the puzzle of defining prior restraints is the recognition that the *same* constitutional harm will necessitate *different* safeguards, when different branches of government can inflict the injury. The evil of prior restraints can be inflicted by both the executive branch, through the discretionary granting of permits or the creation of licensing boards, and the judicial branch, through issuing injunctions. However, in a system of government where the judiciary is supreme, the methods for dealing with judicial encroachment on freedom must be different from those for preventing executive encroachment. In particular, one of the primary ways to prevent executive overreaching is with judicial review. By contrast, the fundamental protection against judicial overreaching in our constitutional system is structural: Judicial action is limited to a specified role at a specified time in any particular case. The court does not resolve disputes that it institutes itself, only those brought by

296. See Jeffries, *supra* note 3, at 419-20; Scordato, *supra* note 2, at 30. Not all commentators are ready to give up on the prior restraint doctrine. See, e.g., Blasi, *supra* note 3, at 11; Hunter, *supra* note 3, at 293-95.

297. Jeffries, *supra* note 3, at 437; see also Note, *supra* note 3, at 1006 (stating that "[w]hatever the value of the prior restraints doctrine in the past, it has outlived its usefulness").

298. STORY, *supra* note 123, § 1879, at 737.

either the executive branch or private parties.²⁹⁹

The concept of "prior restraint," thus, has two distinct components: one temporal, the other embodying the principle of separation of powers. This is not the separation of powers principle that was at stake in the *Pentagon Papers* case, involving congressional authorization of presidential activity.³⁰⁰ Rather, this is the literal separating of power, envisioned by Madison and Montesquieu:

"When the legislative and executive powers are united in the same person or body," says [Montesquieu], "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."³⁰¹

Each branch has a specifically delineated, independent role before punishment is inflicted. The "prior" in the prior restraint doctrine refers not only to regulatory activity which is undertaken before the specific expression is communicated, but also when the executive or judicial branch acts out of its "constitutional order" vis-à-vis the other branches of government.

It is easier to understand what is meant by a prior restraint by starting with an illustration of a permissible *subsequent punishment*. This in no way contradicts the reality that in a free society most restrictions on speech, whether prior restraint or subsequent punishment, are unconstitutional. Because the doctrine of prior restraint presupposes a sphere of permissible subsequent punishment, though, visualizing the distinction is essential.³⁰² In those limited cases where a subsequent punishment, is permitted, it must follow the traditional time line:³⁰³ First, the legislature enacts a general law, defining the prohibited speech or conduct. For states, this could also be a common law prohibition. Second, the speech is communicated. Third, the executive branch enforces the law by initiating legal proceedings, either through arresting the alleged law breaker or filing a complaint in court. For a private action, such as libel or invasion of privacy, the individual who is alleging harm institutes the legal proceedings. Finally, the judicial branch rules on the legality of the communication. This includes, but is not limited to, jury determinations of guilt,

299. See *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 90 (1947) ("Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination."); see also *Flast v. Cohen*, 392 U.S. 83, 97 (1968) ("Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers . . .").

300. See *N.Y. Times Co. v. Sullivan*, 403 U.S. 713 (1971).

301. THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961).

302. See, e.g., *Alexander v. United States*, 509 U.S. 544, 550 (1993) (referring to "the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments").

303. Cf. *INS v. Chadha*, 462 U.S. 919 (1983).

fault for libel, and community standards for obscenity. Upon a finding of illegality, the punishment for a criminal offense is imprisonment or a fine and damages for a civil violation.

Fundamentally, therefore, the only permissible governmental activity restricting speech prior to communication is that of the legislature creating a general rule applying to all speakers.³⁰⁴ Such a rule, subject to the substantive limits of the First Amendment, could penalize such areas as defamation, obscenity, and breaches of the peace. There is no role for either the executive branch or the judicial branch in the creation of a general rule; both are barred from taking action on expression before communication.

Once expression is communicated, the legislature, of course, has no further role. The next governmental actor is the Executive Branch; police may arrest and prosecutors or government attorneys may file complaints. In the case of private causes of action, such as defamation, private citizens may initiate lawsuits.

Finally, in response to these filings, the courts may hear the case. With the jury making the appropriate decisions, the courts rule directly on whether the expression is constitutionally protected and whether it violated the law.

With this structure in mind, we can finally give a two-part definition for prior restraint: (1) A "prior restraint" occurs whenever judges or executive branch personnel are authorized to take notice of specific expression intended for communication, rather than that which has actually been communicated; (2) For those rare cases when the Constitution permits the regulation of expression before it is communicated, a "prior restraint" also occurs if the judiciary can initiate enforcement or the executive can make a final determination of illegality.

The connection between separation of powers and the prior restraint doctrine can be completed by noting that there is one way for the legislative branch to impose a prior restraint directly. It could correctly be considered a prior restraint were the legislature to enact a law directed at silencing a particular speaker or banning a particular publication.³⁰⁵

In summary, the doctrine of prior restraints restricts the ability of all three branches of government to regulate expression. Each branch is prohibited from either: (a) restricting specific speech or speakers prior to communication, or (b) formulating or implementing rules on speech other than in that branch's appropriate constitutional chronological order.

The vast majority of Supreme Court cases dealing with prior restraints fits comfortably within this definition. Injunctions such as those preventing the publication of the Pentagon Papers,³⁰⁶ or of "facts 'strongly implicative' of [an]

304. Obviously, the general rule must precede the communication. If a general rule was applied to communication that had already occurred, it would be an unconstitutional *ex post facto* law.

305. For examples of such legislative prior restraints, see *supra* notes 148-53, 270-77 and accompanying text. Legislative action of this sort might also be regarded as an unconstitutional bill of attainder.

306. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

accused,³⁰⁷ would still be unconstitutional prior restraints. Because licensing schemes that give discretion to regulate expressive activity without “reasonable and definite standards for the officials to follow”³⁰⁸ prevent meaningful judicial review, they, too, would still be deemed unconstitutional prior restraints. Moreover, the procedural safeguards of *Freedman v. Maryland*,³⁰⁹ would still be viewed as essential to prevent the dangers of a censorship system.³¹⁰

Certain restrictions, though, would not be treated as “prior restraints.” For example, judicial orders limiting the speech of trial participants and of persons while they are inside the courtroom are so fundamentally different from classic prior restraints, such as restrictions against the media covering the trial, that they should not be considered prior restraints.³¹¹ Because of the “inherent ‘equitable powers of courts of law over *their own process*, to prevent abuses, oppression, and injustices,”³¹² restrictions inside the courtroom and applied against trial participants do not threaten the separation of powers.

Similarly, many governmental employers, such as the Central Intelligence Agency, require their employees obtain permission before communicating with the public.³¹³ While some courts have evaluated the constitutionality of such requirements against the “general presumption against prior restraints on speech,”³¹⁴ the restrictions on speech imposed by the executive branch on its own

307. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 541 (1976) (quoting the respondent judge).

308. *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

309. *Freedman v. Maryland*, 380 U.S. 51 (1965).

310. *See id.* at 58-59.

311. Numerous cases from lower federal courts and state courts can be found on both sides of the question of whether to term these orders “prior restraints.” *See United States v. Salameh*, 992 F.2d 445, 446-47 (2d Cir. 1993); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970); *Breiner v. Takao*, 835 P.2d 637, 640-41 (Haw. 1992); *Kemner v. Monsanto Co.*, 492 N.E.2d 1327, 1336 (Ill. 1986); *Twohig v. Blackmer*, 918 P.2d 332 (N.M. 1996); *Davenport v. Garcia*, 834 S.W.2d 4, 9-11 (Tex. 1992) (finding such an order to be a prior restraint). *But cf. Radio & Television News Ass’n of S. Cal. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 781 F.2d 1443, 1446 (9th Cir. 1986); *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975) (finding such orders not to be a prior restraint). Some courts have even treated the exact same order as a prior restraint if challenged by the gagged party, but not if challenged by the media. *See e.g., Dow Jones & Co. v. Simon*, 842 F.2d 603, 609 (2d Cir. 1988). *Contra CBS, Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975).

312. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (quoting *Int’l Prods. Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (quoting *Gumbel v. Pitkin*, 124 U.S. 131, 145-46 (1888)) (emphasis added)).

313. *See, e.g., Snepp v. United States*, 444 U.S. 507 (1980) (upholding requirement that CIA employees obtain the Agency’s prior approval before publishing information about the CIA); *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998) (striking down ban prohibiting employees of the Administration for Children’s Services from speaking with the media regarding any activities of the agency without first obtaining permission from the agency’s media relations department).

314. *Harman*, 140 F.3d at 119; *see also Zook v. Brown*, 865 F.2d 887, 890 (7th Cir. 1989) (upholding a regulation despite it being “a prior restraint on the free speech of a public employee”);

employees do not present the separation of powers difficulties of traditional prior restraints. Restrictions imposed in furtherance of the interests of "an employer in regulating the speech of its employees"³¹⁵ simply do not encroach on the law-making function of the legislative branch.

Although judicial orders against trial participants and government employment contracts should not be considered "prior restraints," they are still subject to the stringent commands of the First Amendment. The Supreme Court held that a ban on disclosing discovery information needed to further a "substantial governmental interest unrelated to the suppression of expression," and must limit, "First Amendment freedoms no greater than is necessary."³¹⁶ Similarly, courts uphold limits on the speech of government employees if the speech interests both of employees and of their potential audiences are "outweighed by that expression's 'necessary impact on the actual operation' of the Government."³¹⁷ The prior restraint doctrine is not the only means to protect free expression.

CONCLUSION

There is much to be learned from the neglected history of the prior restraint doctrine. From English common law, to colonial times, to the drafting of the First Amendment, it was understood that no government official was to have power over speakers prior to communication. Throughout the Nineteenth century, judges equated injunctions against defamatory statements with prior restraint and equated prior restraints with the absence of freedom. Thus, the Supreme Court correctly held in *Near* that an injunction against speech should be treated as a prior restraint.

The most important lesson from history, though, is the need to incorporate the concept of separation of powers into the definition of prior restraints. The evil of prior restraints can be caused by different branches of government, the judicial as well as the executive branch. The structure of our constitutional system provides different safeguards for preventing each branch from abusing its power. With a proper definition of "prior restraint," we will be able to ensure that prior restraints are forever treated as "the most serious and the least tolerable infringement on First Amendment rights."³¹⁸

prior restraint"); *Spain v. City of Mansfield*, 915 F. Supp. 919, 923 (N.D. Ohio 1996); *Zook v. Brown*, 865 F.2d 887, 890 (7th Cir. 1989) (upholding a regulation despite it being "a prior restraint on the free speech of a public employee") (same).

315. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

316. *Seattle Times*, 467 U.S. at 32 (quoting *Procurier v. Martinez*, 416 U.S. 396, 413 (1974)).

317. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) (quoting *Pickering*, 391 U.S. at 571) (striking down a ban on federal employees receiving honoraria for appearances, speeches, or articles). This balancing test applies only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

318. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).