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Jeffrey A. Smith

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PRIOR RESTRAINT: ORIGINAL INTENTIONS AND MODERN INTERPRETATIONS

JEFFERY A. SMITH*

I. INTRODUCTION

Nothing has been more basic to an understanding of the press clause of the first amendment than an antipathy toward government censorship. People generally associate state control of the news media with repressive regimes in other nations.¹ Yet one may describe prior restraint doctrine in the United States the way Winston Churchill described the Soviet Union at the outbreak of World War II: "a riddle wrapped in a mystery inside an enigma."² The riddle is how to define unconstitutional "prior restraint." The mystery is what type of government censorship the first amendment originally was intended to prohibit. The enigma is how much vitality the doctrine retains in the wake of recent scholarly attacks on its usefulness and increasing efforts by the federal government to obstruct the flow of information to the American public. One solution to each of these conundrums is the absolutist position that government has no authority to forbid any publication by the news media.

II. THE RIDDLE OF UNCONSTITUTIONAL PRIOR RESTRAINT

A. *Supreme Court Decisions*

The Supreme Court traditionally has given emphatic rhetorical support to the general principle that the state should not subject expression to prepublication censorship. The Court normally has

* Assistant Professor, School of Journalism and Mass Communication, University of Iowa. B.A., 1973, University of Wisconsin—Madison; M.S., 1974, Boston University; Ph.D., 1984, University of Wisconsin—Madison. The author wishes to thank Joel Rhiner for his research assistance and Mr. Erwin Knoll and Professor David Anderson for their comments on an earlier draft of this Article.

1. For brief assessments of press freedom in 70 other nations, see *Assaults on Worldwide Press Freedom Were More Subtle in '86: International Press Institute Issues Its Annual Report*, EDITOR & PUBLISHER, Feb. 14, 1987, at 20.

2. The Times (London), Oct. 2, 1939, at 10, col. 2.

limited the government's role to subsequent punishment for unlawful speech, stating that an aversion to prior restraint is "deeply etched in our law."³ In the Court's first major pronouncement on the matter, *Near v. Minnesota*,⁴ Chief Justice Charles Evans Hughes alluded to the repudiation of press censorship in England in the seventeenth century and stated that the prevention of prior restraints generally was considered the "chief purpose" of the first amendment's press guarantee clause.⁵ In its most dramatic use of prior restraint doctrine, the *Pentagon Papers* case,⁶ the Court acted with unusual speed to deny the federal government's attempt to enjoin the publication of a classified history of American involvement in the Vietnam War. In a per curiam opinion issued only four days after oral arguments, the Court stated that any system of prior restraint carried "a heavy presumption against its constitutional validity."⁷ The decision reaffirmed what Justice White described as "the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system."⁸

As venerable as prior restraint doctrine may appear, however, it is showing signs of age. Since *Near*, the Supreme Court has found prior restraint unacceptable not only in prototypical cases involving the distribution of literature,⁹ but also in areas as diverse as taxation of the press¹⁰ and "gag orders" limiting media coverage of pretrial proceedings.¹¹ On the other hand, the Court has allowed film censorship that followed certain procedural safeguards,¹² an

3. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

4. 283 U.S. 697 (1931).

5. *Id.* at 713.

6. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

7. *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

8. *Id.* at 730-31 (White, J., concurring).

9. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

10. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

11. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

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

First, the burden of proving that the film is unprotected expression must rest on the censor Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes

antidiscrimination law that forbade newspapers from printing help-wanted ads under sex-designated headings,¹³ and CIA contracts that required agency employees to seek prepublication clearance of manuscripts related to intelligence even if the manuscripts do not contain classified material.¹⁴

The Court thus has expanded the doctrine with unconventional applications in some cases while contracting it in others. In another example of the Court's shifting application of prior restraint doctrine, the Court in 1973 appeared to turn away from the principle thought to have been established in *Near* and subsequent cases—that injunctions plainly fit within the disfavored category of prior restraint.¹⁵ In a decision upholding the application of an antidiscrimination law to discriminatory newspaper advertisements, Justice Powell declared that only certain injunctions carried the “special vice” of prior restraint—to suppress communication either directly or by inducing caution “before an adequate determination that it is unprotected by the First Amendment.”¹⁶

Three years later, the Court decided that a city's interests in regulating the use of property and preserving the quality of urban life supported restrictions on the location of theaters showing non-obscene “adult” films.¹⁷ The dissent characterized the ordinances as a system of prior restraints, but did not elaborate on what criteria should apply.¹⁸ Within a week, however, all nine justices found unconstitutional prior restraint in a Nebraska judge's order limiting news coverage of pretrial proceedings in a highly publicized murder case.¹⁹ Chief Justice Burger stated that prior restraints “are the most serious and the least tolerable infringement on First

protected expression Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous decision.

Id. at 58-59 (citations omitted).

13. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

14. *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*).

15. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

16. *Id.*

17. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976).

18. *Id.* at 84 (Stewart, J., dissenting). The Court since has relied on the rationale that zoning does not ban such theaters altogether. *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 928 (1986).

19. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

Amendment rights"²⁰ and that "the barriers to prior restraint remain high and the presumption against its use continues intact."²¹ The majority opinion and a concurring opinion by Justice Brennan both maintained that the first amendment provided greater protection against prior restraint than against subsequent punishment.²²

The Supreme Court subsequently has managed to sidestep the issue of the exact place of prior restraint. In *Smith v. Daily Mail Publishing Co.*,²³ the Court held unconstitutional a West Virginia statute prohibiting the publication of the name of a juvenile offender without the written approval of the juvenile court. The unanimous decision turned not on the question of prior restraint, however, but on the law's failure to meet even the lesser standards required for subsequent punishment.²⁴ "If the information is lawfully obtained, as it was here," Chief Justice Burger wrote for the Court, "the state may not punish its publication except when necessary to further an interest more substantial than is present here."²⁵

In *Lowe v. Securities & Exchange Commission*,²⁶ the Court ruled that the publisher of a nonpersonalized investment newsletter did not have to register with the SEC to publish investment advice.²⁷ The SEC had sought to enjoin the publication of Lowe's newsletters after the Commission revoked his registration as an investment adviser under the Investment Advisers Act of 1940.²⁸ Rather than basing its decision on the clear prior restraint issue, however, the Court determined on the basis of legislative history that bona fide publications for the general public were exempt from the registration requirement.²⁹ Although the majority opinion did not discuss the prior restraint issue, Justice White, joined by Chief Justice Burger and Justice Rehnquist, stated in a concurring

20. *Id.* at 559.

21. *Id.* at 570.

22. *Id.* at 559; *id.* at 589 (Brennan, J., concurring).

23. 443 U.S. 97 (1979).

24. *Id.* at 102.

25. *Id.* at 104.

26. 105 S. Ct. 2557 (1985).

27. *Id.* at 2573-74.

28. 15 U.S.C. §§ 80b-1 to -21 (1982).

29. 105 S. Ct. at 2570.

opinion that preventing unregistered persons from publishing impersonal newsletters was an unconstitutional prior restraint.³⁰

Similarly, prior restraint was a concern for three dissenting justices in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.³¹ In a five-to-four decision, the Court upheld a Puerto Rico gambling statute and regulations banning advertisements for the island's casinos within Puerto Rico and requiring regulatory approval of advertisements appearing outside the Commonwealth. The only discussion of the implications of prior restraint being used against the truthful advertising of a legal activity appeared in Justice Stevens's dissenting opinion, joined by Justices Marshall and Blackmun, which detected a "regime of censorship" in the restrictions.³²

B. Evaluations of the Doctrine

Commentators long have expressed doubts about the merits of a simple prior restraint test. As early as 1951, Professor Paul Freund suggested that the issue required "a pragmatic assessment" of the operation of restraints and a "more particularistic analysis."³³ More recently, Professor Martin Redish has pointed to apparent ambiguities and inconsistencies and has stated that the doctrine fails to deal adequately with complex issues.³⁴ "Try as the Court might, it cannot successfully substitute supposedly easily applied formulas for the careful balancing of interests necessary in first amendment analysis."³⁵

Academicians have viewed the slipperiness of the term "prior restraint" itself with varying degrees of concern. Professor Thomas Emerson remarked in 1955 that the doctrine "remains today curi-

30. *Id.* at 2586-87 (White, J., concurring). Within a year of the *Lowe* decision, 39 of the 600 registered newsletter publishers and broadcasters cancelled their registration. *SEC Asks Role on Broadcasters*, N.Y. Times, May 28, 1986, at D24, col. 1.

31. 106 S. Ct. 2968, 2980 (1986) (Stevens, J., dissenting) (Justices Blackmun and Marshall joined Justice Stevens in this dissent.).

32. *Id.* at 2986 (Stevens, J., dissenting).

33. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951); see also Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 728-30 (1978).

34. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53-55 (1984).

35. *Id.*

ously confused and unformed.”³⁶ He then listed four broad categories of prior restraints he thought were discernible upon analysis: requirements for advance approval by an executive official; judicial injunctions enforced through contempt proceedings; legislative acts making communications unlawful unless the publisher complies with specific conditions; and restraints—such as those in security programs—which are “indirect or secondary to some other immediate objective.”³⁷ Emerson argued that prohibitions by executive officials are the most serious form of prior restraint and that restraints needed for military operations in time of war and the application of precise time and place “‘traffic’ controls” where communication facilities are limited were the only clearly indicated exceptions to such restrictions.³⁸ He concluded that

the doctrine of prior restraint, while growing out of historical circumstances, finds its rationale today in the grievous impact which systems of prior restraint exert upon freedom of expression. The form and dynamics of such systems tend strongly towards over-control—towards an excess of order and an insufficiency of liberty.³⁹

Professor John Calvin Jeffries, Jr., best states the position that the doctrine is unintelligible and has outlived its usefulness. He depicts the conventional prior restraint doctrine as “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.”⁴⁰ Professor Harry Kalven, Jr., confesses more concisely that to him it is “not altogether clear just what a prior restraint is or just what is the matter with it.”⁴¹

Much scholarly criticism has questioned whether prior restraint—at least in the form of an injunction—should be considered so much worse than provisions for subsequent punishment.

36. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 649 (1955).

37. *Id.* at 655-56.

38. *Id.* at 670.

39. *Id.*

40. Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983).

41. Kalven, *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 32 (1971).

Writers have attempted to distinguish between judicial and nonjudicial prior restraints and have asserted that injunctions—the relief sought by government officials in *Near*, the *Pentagon Papers*, and other cases—do not deserve the same negative connotations historically associated with prior restraint.⁴² An injunction indeed may injure speech, but as Professor William Mayton notes, a provision for subsequent punishment of expression is also calculated to suppress, “[a]nd it does so on a broad scale, through the extensive self-censorship that it inculcates. This too is lost speech, in an amount likely to be greater than that of speech lost by the more specific suppression of an injunction.”⁴³ Arguing in a similar vein, Professor Jeffries remarks that injunctions enforced by contempt actions and suppression by subsequent penalties can be difficult to distinguish because both involve the *threat* of punishment before publication and the *fact* of punishment after.⁴⁴ He accordingly denies any “necessary or dependable relation between the form of suppression and any identifiable measure of violence to First Amendment interests.”⁴⁵ Both Jeffries and Mayton point to the narrowly targeted nature of the injunction⁴⁶ and take issue with Alexander Bickel’s often-quoted remark that “[a] criminal statute chills, a prior restraint freezes.”⁴⁷

Other commentators display less tolerance for prior restraint. Writing in a brief response to Mayton, Professor Howard Hunter insists that “an aggressive prosecutor can both freeze and chill speech” with injunctions.⁴⁸ Unlike Redish, Mayton, and Jeffries,⁴⁹ Hunter indicates little confidence in the first amendment sensitiv-

42. See O. FISS, *THE CIVIL RIGHTS INJUNCTION* 69-74 (1978); Jeffries, *supra* note 40, at 433; 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, 249 (1982); Redish, *supra* note 34, at 57-58, 77-78, 89-90, 93, 99-100. See generally Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977) (distinguishing gag orders from prior restraint).

43. Mayton, *supra* note 42, at 276.

44. Jeffries, *supra* note 40, at 427.

45. *Id.* at 430.

46. *Id.* at 429; Mayton, *supra* note 42, at 275-76.

47. A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975).

48. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 293 (1982).

49. Redish, *supra* note 34, at 67, 75-78; Mayton, *supra* note 42, at 250-53; Jeffries, *supra* note 40, at 426-27.

ity of judges' orders and takes the position that prior restraints "are to be avoided in *any* form because they are the most intrusive, most damaging, and most limiting form of state action against individual speech."⁵⁰ Professor Vincent Blasi has produced a lengthy and detailed analysis of the similarities of licensing systems and injunctions and concludes that the concept of prior restraint is "coherent at the core."⁵¹ He notes that both methods of regulation involve abstract and sometimes distorted assessments of speech value and social harm, lend themselves more easily to over-enforcement than subsequent punishment, interfere adversely with audience reception, and suggest that the censor is to be trusted more than the citizens—a position at odds with the philosophy of limited government.⁵²

If discussions and rulings on prior restraint reveal such confusion and controversy, then perhaps a fresh examination of the origins and meaning of the doctrine is in order. Scholars have been preoccupied with its costs, logic, and exceptions. They have attempted to assess the current rights of speakers and publishers in fighting prior restraints⁵³ and to consider possible biases of the officials who are responsible for them.⁵⁴ They have speculated on the extent to which prior restraint and subsequent punishment engender self-censorship.⁵⁵ Yet agreement on these issues remains the exception rather than the rule.

Unanimity exists, however, on one fundamental and very likely erroneous assumption—that government sometimes can have the authority to make content-based decisions to censor those who wish to communicate opinions and information to the public. Neither courts nor commentators have delved very carefully into the original intention of the Constitution's press clause and its

50. Hunter, *supra* note 48, at 295.

51. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 93 (1981).

52. *Id.* at 49-75.

53. See *id.* at 20, 32, 58-59, 83; Hunter, *supra* note 48, at 286-87, 293; Jeffries, *supra* note 40, at 433; Mayton, *supra* note 42, at 260-61, 264-65; Redish, *supra* note 34, at 93-99.

54. See Blasi, *supra* note 51, at 33, 52, 55; Hunter, *supra* note 48, at 287-95; Jeffries, *supra* note 40, at 426-27; Mayton, *supra* note 42, at 250-54, 265, 274; Redish, *supra* note 34, at 99-100.

55. See Blasi, *supra* note 51, at 24-30; Hunter, *supra* note 48, at 284-86, 292-95; Mayton, *supra* note 42, at 263-65, 267, 269, 276-77.

straightforward statement that Congress shall make "no law" abridging the freedom of the press.⁵⁶

III. THE MYSTERY OF THE ORIGINAL INTENTION

A. *The Absolutist Interpretation*

When interpreting a constitutional guarantee such as the press clause, the Supreme Court is obliged to understand the document's original meaning as well as possible. The history may be incomplete and the values not clearly defined,⁵⁷ but fundamental principles are discernible. A court overly concerned with creating its own doctrine or with making pragmatic or ethical choices⁵⁸ in effect will be a continuous constitutional convention rewriting a "living" document.⁵⁹ That court will be more likely to balance away the force of a right or administer to it the death of a thousand cuts⁶⁰ if the court does not begin with the essential premises of the constitutional protection.⁶¹

If the Constitution was written and ratified to place limits on future exercises of governmental power, then the Supreme Court, which traces its own authority to the Constitution, cannot be indifferent to intent.⁶² James Madison, who as one of the authors of *The Federalist* struggled to convince the public that the Constitution effectively could control government, introduced his proposed Bill of Rights to the First Congress with a speech expressing his belief that

independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an

56. U.S. CONST. amend. I.

57. See Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 429-30 (1983); Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 595-98 (1973).

58. For a discussion of the various approaches used in interpreting the Constitution, see P. BOBBITT, *CONSTITUTIONAL FATE* (1982); J. ELY, *DEMOCRACY AND DISTRUST* (1980).

59. For a defense of the "living document" approach, see L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 17, 71 (1972).

60. See Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

61. See Gard, *The Absoluteness of the First Amendment*, 58 NEB. L. REV. 1053 (1979).

62. See R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363-72 (1977).

impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.⁶³

Madison in later years insisted that the Constitution be interpreted according to "its true meaning as understood by the nation at the time of its ratification."⁶⁴ Thomas Jefferson similarly thought it necessary to go "back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."⁶⁵

With few exceptions, Supreme Court justices have not been inclined to think of the first amendment's protection as absolute. The absolutist position, usually associated with Justices Black and Douglas, suggests that the rights of expression are not subject to balancing. Justice Black, who maintained that "no law" meant "no law,"⁶⁶ believed that "the First Amendment forbids any kind or type or nature of governmental censorship over views as distinguished from conduct."⁶⁷ Justice Douglas likewise contended: "Whatever may be the reach of the power to regulate *conduct* . . . the First Amendment leaves no power in government over *expression of ideas*."⁶⁸ Professor Emerson similarly argues that "society must withhold its right of suppression until the stage of action is reached."⁶⁹ The absolutist position, then, posits that the first

63. J. MADISON, *Amendments to the Constitution*, in 5 THE WRITINGS OF JAMES MADISON 370, 385 (G. Hunt ed. 1900-1910) [hereinafter WRITINGS OF MADISON].

64. Letter from James Madison to John G. Jackson (Dec. 27, 1821), reprinted in 9 WRITINGS OF MADISON, *supra* note 63, at 70, 74; see also Letter from James Madison to Spencer Roane (May 6, 1821), reprinted in *id.* at 55, 59; Letter from James Madison to M. L. Hurlbert (May 1830), reprinted in *id.* at 370, 372.

65. Letter from Thomas Jefferson to Judge Johnson (June 12, 1823), reprinted in 7 THE WRITINGS OF THOMAS JEFFERSON 290, 296 (H. Washington ed. 1853-1854).

66. See E. DENNIS & D. GILLMOR, *Hugo L. Black: "no law" means "no law"*, in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 3 (1978); Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).

67. *Ginzburg v. United States*, 383 U.S. 463, 481 (1966) (Black, J., dissenting).

68. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 433 (1966) (Douglas, J., concurring).

69. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 9 (1970).

amendment leaves "no room for governmental restraint on the press."⁷⁰ It does not rule out necessarily the possibility of individuals filing lawsuits against the press, although some justices have held that in libel cases the Constitution affords an absolute privilege for criticism of official conduct.⁷¹

The absolutists, of course, never have comprised more than a minority on the Supreme Court. As Chief Justice Burger noted, the Court "has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed."⁷² The Court has been particularly willing to justify prior restraint in the areas of obscenity and direct and immediate harm to life or national security.⁷³ In dicta the Court has suggested more than once that traditional prior restraint doctrine might not apply to commercial speech because it is "such a sturdy brand of expression" that regulation is less likely to have a chilling effect upon it.⁷⁴ The Court nevertheless has found some limited areas of absolute protection under the first amendment. The Court has stated, for instance, that "there is no such thing as a false idea" in libel⁷⁵ and that the Constitution prohibits "making mere private possession of obscene material a crime."⁷⁶

70. *New York Times Co. v. United States*, 403 U.S. 713, 720 (1971) (Douglas, J., concurring).

71. *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring); *id.* at 298 (Goldberg, J., concurring). Professor Alexander Meiklejohn offers the view that the first amendment provides an unqualified protection for speech related to self-government. A. MEIKLEJOHN, *POLITICAL FREEDOM* 24-28 (1965). Justice Douglas questioned whether state libel laws could restrict speech on "public issues." *Rosenblatt v. Baer*, 383 U.S. 75, 90 (1966) (Douglas, J., concurring). Justice Black eventually concluded that "the First Amendment was intended to leave the press free from the harassment of libel judgments." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 172 (1967) (Black, J., dissenting).

72. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

73. See Litwick, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 542-45 (1977). For discussion of the use of injunctions to regulate obscenity as a public nuisance, see Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616 (1984); Comment, *Regulation of Obscenity Through Nuisance Statutes and Injunctive Remedies—The Prior Restraint Dilemma*, 19 WAKE FOREST L. REV. 7 (1983); Note, *Injunctions Pursuant to Public Nuisance Obscenity Statutes and the Doctrine of Prior Restraints*, 61 WASH. U. L.Q. 775 (1983).

74. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 n.13 (1980); see also *Friedman v. Rogers*, 440 U.S. 1, 10 (1979); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976).

75. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

76. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

B. Historical Evidence on Intent

The Supreme Court's reluctance to accept the absolutist position is difficult to reconcile with what is known about the origins of the press clause. A significant amount of historical evidence suggests that the first amendment was meant to preclude the possibility of future government-initiated actions aimed at stopping or punishing mere expression. Such a conclusion is consistent with the findings of scholars who have documented strongly antiauthoritarian themes in early American political thought.⁷⁷

Among the Enlightenment principles eighteenth-century Americans espoused and at least initially embraced was that society should not punish words, but only overt acts.⁷⁸ Faced with the first major test of its authority, for example, the new national government suppressed the Whiskey Rebellion in 1794, but Congress stopped short of censuring the democratic societies which Federalists blamed for inflaming the public. "Opinions are not the objects of legislation," James Madison told the House of Representatives.⁷⁹ He said that in a republican system "the censorial power is in the people over the Government, and not in the Government over the people."⁸⁰ Madison contended that truth would prevail over error where free discussion was allowed.⁸¹

Madison thus employed another basic tenet of seventeenth- and eighteenth-century libertarian thought: truth will emerge when opinions compete freely. Polemicists such as John Milton and political theorists such as Thomas Jefferson relied on this concept and found it axiomatic that government should not seek to license the press or to suppress opinion.⁸² Jefferson told a friend who had been attacked in the press to think that "liberty depends on the

77. See, e.g., B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); see also Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (3d ser. 1982).

78. For a largely depreciative account of this concept in American and European thought, see L. LEVY, *EMERGENCE OF A FREE PRESS* 150-53, 163-67, 193-95, 322-23 (1985).

79. 4 ANNALS OF CONG. 934 (1793-1795).

80. *Id.*

81. *Id.* at 935.

82. See Smith, *Freedom of Expression and the Marketplace of Ideas Concept From Milton to Jefferson*, 7 J. COMM. INQUIRY 47 (1981).

freedom of the press, and that cannot be limited without being lost."⁸³ He went as far as to say that newspapers without government would be preferable to government without newspapers.⁸⁴ He advised President Washington that no government ought to be without its critics and that where the press is free the truth will be sifted out in "the fair operation of attack & defence."⁸⁵ In his first inaugural address, Jefferson declared that even those who would wish to dissolve the union or change its republican form should be left "undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."⁸⁶

The Supreme Court has stated that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."⁸⁷ Yet the Court has imposed certain qualifications on the marketplace of ideas rationale in cases of libel⁸⁸ and commercial speech.⁸⁹ Additionally, the Court has held that obscenity is unprotected by the first amendment,⁹⁰ despite arguments by dissenting justices that sexually explicit material could be left to the marketplace of ideas.⁹¹

Some of the current exceptions to freedom of expression would have been largely alien notions to those who wrote and ratified the

83. Letter from Thomas Jefferson to James Currie (Jan. 28, 1786), *reprinted in* 9 THE PAPERS OF THOMAS JEFFERSON 239, 239 (J. Boyd ed. 1950-1958) [hereinafter PAPERS OF JEFFERSON]; *see also* Letter from Thomas Jefferson to John Jay (Jan. 25, 1786), *reprinted in* *id.* at 215, 215.

84. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* 11 *id.* at 48, 49.

85. Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), *reprinted in* 7 THE WORKS OF THOMAS JEFFERSON 136, 146 (P. Ford ed. 1904-1905).

86. Inaugural Address by Thomas Jefferson (Mar. 4, 1801), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 1, 3 (P. Ford ed. 1897).

87. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *see also* *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

88. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (Public officials may recover damages for a defamatory falsehood relating to their official conduct if they can prove the statement was made with knowledge of its falsity or with reckless disregard of its truth or falsity.).

89. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) (states may ensure that commercial speech flows "cleanly as well as freely"); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

90. *Roth v. United States*, 354 U.S. 476, 485 (1957); *see also* *Miller v. California*, 413 U.S. 15, 36 (1973).

91. *See, e.g.,* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 87-88 (1976) (Stewart, J., dissenting); *Roth*, 354 U.S. at 513-14 (Douglas, J., dissenting).

Bill of Rights. As a general rule, obscenity and advertising did not fall under government scrutiny. Although individual buyers might sue sellers for misrepresenting merchandise, English and American courts rigorously applied the principle of caveat emptor.⁹² At the beginning of the eighteenth century ecclesiastical courts had jurisdiction over obscenity, but few cases of spiritual punishment had ever been reported.⁹³ In 1708, the Court of the Queen's Bench issued a per curiam opinion stating that obscene books were not punishable in temporal courts.⁹⁴ Only with considerable doubt and confusion about the legitimacy of such trials did the same court eventually hold that the publication of obscene literature was an indictable offense.⁹⁵ Pornographic publications, including erotic directories of prostitutes, continued to circulate freely in England.⁹⁶ The first reported conviction for obscene literature in America did not occur until 1821.⁹⁷ State and federal governments passed legislation later in the nineteenth century as sexual morality became a more apparent social concern.⁹⁸ As Justice Douglas pointed out in *Roth v. United States*,⁹⁹ "there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment."¹⁰⁰

If a clear exception to press freedom in eighteenth-century libertarian thought existed, it was personal libel. Seditious libel was not a threat to colonial printers after the Zenger trial,¹⁰¹ the sporadic and largely ineffectual attempts to use breach of legislative privi-

92. See I. PRESTON, *THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING* 30-80 (1975).

93. N. ST. JOHN-STEVAS, *OBSCENITY AND THE LAW* 12 (1956).

94. *The Queen v. Read*, 11 Mod. Rep. 142 (1708), reprinted in *CENSORSHIP LANDMARKS* 3 (E. De Grazia ed. 1969).

95. *Dominus Rex v. Curl*, 93 Eng. Rep. 849 (1727), reprinted in *id.* at 3. Here Justice Fortescue stated that he knew no law which has been transgressed by the publisher of *Venus in the Cloister, or The Nun in Her Smock*, but the majority of justices seem to have accepted arguments that such works undermined morality and public order. *Id.* at 4-5.

96. N. ST. JOHN-STEVAS, *supra* note 93, at 25.

97. *Commonwealth v. Holmes*, 17 Mass. 336 (1821); see Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 53 (1938).

98. See H. NELSON & D. TEETER, *LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA* 347-48 (5th ed. 1986); Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 324-25 (1954).

99. 354 U.S. 476 (1957).

100. *Id.* at 514 (Douglas, J., dissenting).

101. Nelson, *Seditious Libel in Colonial America*, 3 AM. J. LEGAL HIST. 160 (1959).

lege actions against journalists met with public derision and various legal objections,¹⁰² and civil suits for libel occasionally were protested as a violation of the marketplace of ideas principle.¹⁰³ Defamation, however, had a long common law history as an offense of person against person.¹⁰⁴ Early American legal definitions of press freedom therefore could recognize personal libel actions while evidently rejecting government restrictions on the press. In his proposed Virginia Constitution drafted in 1776, Thomas Jefferson wrote, "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."¹⁰⁵ Benjamin Franklin, who used the marketplace of ideas concept to justify his actions as a newspaper editor,¹⁰⁶ wrote in an essay published as the first amendment was being ratified that he endorsed legal protection for reputation. "If by the *liberty of the press* were understood merely the liberty of discussing the propriety of public measures and political opinions, let us have as much of it as you please," he wrote. "But if it means the liberty of affronting, calumniating and defaming one another, I, for my part, own myself willing to part with my share of it"¹⁰⁷

Understandings of the meaning of press freedom were not confined to abstract, risk-free discussions of political options, however. Juries and libertarian polemicists were supporting an expanded liberty to criticize the conduct of individuals in office.¹⁰⁸ In its address to the inhabitants of Quebec in 1774, the Continental Con-

102. Smith, *A Reappraisal of Legislative Privilege and American Colonial Journalism*, 61 JOURNALISM Q. 97, 103 (1984).

103. See, e.g., "A FRIEND TO HARMONY," CANDID CONSIDERATIONS ON LIBELS (Boston 1789) (anonymous).

104. See generally Veeder, *The History of the Law of Defamation*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446 (1909) (history of the development of English defamation law).

105. 1 PAPERS OF JEFFERSON, *supra* note 83, at 350, 363 (third draft of the Virginia Constitution).

106. See, e.g., Pennsylvania Gazette (Philadelphia), June 10, 1731, at 1, col. 1.

107. Federal Gazette (Philadelphia), Sept. 12, 1789, at 2, col. 1. For a discussion of personal libel as an exception to press freedom and the rejection of seditious libel in America, see J. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM (forthcoming); Smith, *Legal Historians and the Press Clause*, COMM. & LAW, Aug. 1986, at 69. For a contrary view see, L. LEVY, *supra* note 78, at xii.

108. See C. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS: THE EVOLVING LAW OF LIBEL 1-56 (1971).

gress listed freedom of the press as one of five "invaluable rights" Americans would die to protect in the colonial struggle with England.¹⁰⁹ The importance of press freedom, Congress said, lay in its "advancement of truth, science, morality, and arts in general" as well as its publication of sentiments "whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."¹¹⁰ As they limited the powers of government through the state and federal constitutions, Americans employed absolutist language in press guarantees. Nine of the eleven revolutionary-era state constitutions declared that the press ought to be "inviolably preserved" or not "restrained."¹¹¹ The Massachusetts Declaration of Rights, for example, stated that "[t]he liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth."¹¹² Maryland's Declaration of Rights simply stated "[t]hat the liberty of the press ought to be inviolably preserved."¹¹³ Such guarantees apparently were understood as restrictions on government. They did not end libel trials for attacks on personal character, but libertarian lawyers and political essayists continually maintained that official conduct could be scrutinized freely if private reputation was not attacked.¹¹⁴

If the belief that government was to have no direct authority over the press was widely held, then the rude reaction that the public gave the federal Constitution—without a guarantee of press freedom—becomes easier to comprehend. The Constitutional Convention unanimously voted down a motion to prepare a bill of rights,¹¹⁵ and then defeated, seven to four, another motion that the Constitution include a declaration "that the liberty of the Press

109. 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 108 (W. Ford ed. 1904).

110. *Id.*

111. 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 235, 266, 278, 284, 287, 300, 335, 342, 378 (1971).

112. *Id.* at 342.

113. *Id.* at 284. For a discussion of the language in early American press guarantees, see Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

114. See Baldasty, *Toward an Understanding of the First Amendment: Boston Newspapers, 1782-1791*, 3 JOURNALISM HIST. 25 (1976); Smith & Baldasty, *Criticism of Public Officials and Government in the New Nation*, 4 J. COMM. INQUIRY 53 (1979).

115. 1 COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE 197 (J. Kaminski & G. Saladino eds. 1981).

should be inviolably observed."¹¹⁶ In that debate, Roger Sherman of Connecticut argued what was later to become the standard Federalist position. "It is unnecessary," he told the delegates. "The power of Congress does not extend to the Press."¹¹⁷

The public clamor for a bill of rights and, in particular, for a press clause, rested on a long tradition of Anglo-American distrust for government and support for the role of the press in checking abuses of power.¹¹⁸ "An Old Whig" told the readers of a Philadelphia newspaper that "the press which has so long been employed in the cause of liberty . . . may possibly be restrained of its freedom, and our children may possibly not be suffered to enjoy this most invaluable blessing of a free communication of each others sentiments on political subjects."¹¹⁹ The correspondent warned about officials who thought that the public had no business meddling in government affairs, and added, "Should the freedom of the press be restrained on the subject of politics, there is no doubt it will soon be restrained on all other subjects, religious as well as civil."¹²⁰ Other Antifederalist writers were more definite about the consequences of having no press guarantee. "As long as the liberty of the press continues unviolated . . . it is next to impossible to enslave a free nation," observed "Centinel" in another Philadelphia newspaper. "The state of society must be very corrupt and base indeed, when the people in possession of such a monitor as the press, can be induced to exchange the heavenborn blessings of liberty for the galling chains of despotism."¹²¹ "A Son of Liberty" warned readers in New York that if the proposed Constitution were adopted, press freedom would be "totally suppressed" and that Americans could expect "odious and detestable" stamp taxes to be imposed on newspapers.¹²²

116. *Id.* at 198. The vote may have been six to five. See *id.* at 199 n.4.

117. *Id.* at 198.

118. See generally R. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788* (1966); Smith, *Public Opinion and the Press Clause*, *JOURNALISM HIST.* (forthcoming).

119. *Independent Gazetteer* (Philadelphia), Oct. 12, 1787, reprinted in 1 *COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE*, *supra* note 115, at 378.

120. *Id.*

121. *Freeman's Journal* (Philadelphia), Oct. 24, 1787, reprinted in *id.* at 457, 457.

122. *N.Y. Journal*, Nov. 8, 1787, reprinted in *id.* at 482. Alexander Hamilton answered the objection about taxes by arguing that "duties of any kind . . . must depend on legisla-

The Federalists argued in return that a press guarantee might do little to control a popularly elected government. Madison predicted that the chief danger to personal rights would be the kind of "overbearing majorities" that repeatedly had violated the "parchment barriers" of state declarations of rights.¹²³ Madison doubted that constitutional guarantees could define or protect all rights effectively. "I am inclined to think that *absolute* restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided," he wrote to Jefferson. "The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy."¹²⁴ He noted as an example that a strict prohibition on government-imposed monopolies could eliminate copyrights "as encouragements to literary works."¹²⁵

Jefferson insisted that it was better to establish freedom of the press "in all cases, than not to do it in any"¹²⁶ although he argued for liability for false statements of fact damaging to the life, property, or reputation of others.¹²⁷ Jefferson said of the contemplated Bill of Rights: "The inconveniences of the Declaration are that it may cramp government in its useful exertions. But the evil of this is shortlived, moderate, and reparable. The inconveniences of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse."¹²⁸

tive discretion, regulated by public opinion." THE FEDERALIST No. 84, at 580 n.* (A. Hamilton) (J. Cooke ed. 1961).

123. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 5 WRITINGS OF MADISON, *supra* note 63, at 269, 272. Madison continued: "In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current." *Id.*

124. *Id.* at 274.

125. *Id.*

126. Letter from Thomas Jefferson to James Madison (July 31, 1788), reprinted in 13 PAPERS OF JEFFERSON, *supra* note 83, at 440, 442.

127. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), reprinted in 15 *id.* at 364, 367. Here, in a unique twist, Jefferson included false facts affecting the peace with other nations in the category of unprotected expression. Perhaps realizing the implications of such a limitation, he does not seem to have stated it at any other time. *Id.*

128. Letter from Thomas Jefferson to James Madison (March 15, 1789), in 14 *id.* at 659, 660-61.

When James Madison introduced proposed amendments to the Constitution in 1789, some of the liberties he listed were qualified—such as the right of “peaceably assembling”¹²⁹—and others were not. His proposal for protecting expression was unqualified: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”¹³⁰ Madison noted public alarm about the lack of protection for “the great rights” in the Constitution and stated that freedom of the press and liberty of conscience are the “choicest privileges of the people.”¹³¹ A declaration of rights, he told the House of Representatives, would indicate where “Government ought not to act, or to act only in a particular mode.”¹³² Such a declaration could be “one means to control the majority,”¹³³ he added, and would be enforced by “independent tribunals of justice.”¹³⁴ The amendment as eventually adopted in the First Congress and ratified by the states simply stated that “Congress shall make no law . . . abridging the freedom of . . . the press.”¹³⁵

The thought which preceded the first amendment thus indicates strongly that the Framers intended the press clause to be an absolute prohibition of government action against the press. Public fears and libertarian theory both pointed toward a need to protect not only political debate, but other categories of expression as well. Even without the press guarantee, Federalists asserted, Congress would have no authority over the press except the power to grant copyrights included in article I, section 8 of the Constitution. “If the Congress should exercise any other power over the press than this,” argued James Iredell, who was soon to serve on the Supreme

129. J. MADISON, *Amendments to the Constitution*, in 5 WRITINGS OF MADISON, *supra* note 63, at 370, 377.

130. *Id.*

131. *Id.* at 380.

132. *Id.* at 381.

133. *Id.* at 382.

134. *Id.* at 385.

135. U.S. CONST. amend. I.

Court, "they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny."¹³⁶

IV. THE ENIGMA OF PRIOR RESTRAINT

A. Initial Interpretations

Although the modern Supreme Court has assumed that a main purpose of the first amendment was to prevent prior restraint, discussion of government censorship as such largely was absent from the ratification debates. Licensing of the press had been discontinued in England in the wake of the Glorious Revolution of 1688 and denounced by the House of Commons as oppressive and unworkable.¹³⁷ The last serious attempt to impose censorship in America failed in 1723 when a Massachusetts grand jury refused to indict Benjamin Franklin's brother James, a printer charged with defying a General Court order to submit issues of his newspaper, the *New-England Courant*, for prior approval by the Secretary of the province.¹³⁸ Very few Americans alive at the time of the ratification would have had any firsthand experience with prior restraint.¹³⁹ Some Antifederalists did employ vague accusations that government would attempt to "fetter" the press in the absence of a constitutional guarantee,¹⁴⁰ but prior restraint in the form of prepublication censorship long was interred by the time Benjamin Franklin's popular *Poor Richard's Almanack* declared in 1757 that an unlicensed press was the "Nurse of Arts and Freedom's Fence" which "None silence who design no Wrongs."¹⁴¹

136. J. IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (Newbern, 1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 361 (P. Ford ed. 1888).

137. 11 H.C. JOUR. 305-06.

138. Smith, *James Franklin*, in 43 DICTIONARY OF LITERARY BIOGRAPHY, AMERICAN NEWSPAPER JOURNALISTS 1690-1872, at 217 (P. Ashley ed. 1985).

139. England enforced theater censorship from 1737 to 1968, however. Parliament passed the Licensing Act of 1737 after traditional methods of control had failed and Robert Walpole's government grew insecure about stage attacks on his leadership. See V. LIESENFELD, THE LICENSING ACT OF 1737 (1984).

140. See, e.g., *A Son of Liberty*, N.Y. Journal, Nov. 8, 1787, reprinted in 1 COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE, *supra* note 115, at 482.

141. B. FRANKLIN, POOR RICHARD: THE ALMANACKS FOR THE YEARS 1733-1758, BY RICHARD SAUNDERS 271 (V. Brookens ed. 1964). Some Americans nevertheless voiced fears that the new government would use its power of taxation to control the press. See, e.g., LETTERS

The press clause, however, created a new problem which the opponents of a bill of rights accurately had foreseen. The problem was outlined in *The Federalist* where Hamilton argued that stating limitations on the power of government in a bill of rights was unnecessary and even dangerous because it would contain exceptions to powers not granted and therefore would be a pretext to claim authority not given.¹⁴² "For why declare that things shall not be done which there is no power to do?" he asked. "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?"¹⁴³ He questioned how a guarantee for press freedom could be written. "Who can give it any definition which will not leave the utmost latitude for evasion?"¹⁴⁴

Seven years after its ratification, the Federalist party used the first amendment to justify a federal statute outlawing virtually any writing against the government of the United States. Relying on the definition of press freedom set forth by Sir William Blackstone,¹⁴⁵ Federalist supporters of the Sedition Act of 1798 maintained that liberty of the press meant freedom from restraints prior to publication, but not freedom from subsequent punishment. In the ensuing turmoil, which lasted until the election of

FROM THE FEDERAL FARMER TO THE REPUBLICAN 112 (W. Bennett ed. 1978) (ascribed to Richard Henry Lee).

142. A. HAMILTON, *supra* note 122, at 579.

143. *Id.*

144. *Id.* at 580. Interestingly, both Hamilton and Justice Iredell, who were opponents of the Bill of Rights, later supported the notion that seditious libel could be tried as a common law crime. This suggests that the suspicions of the Antifederalists were not unwarranted. See L. LEVY, *supra* note 78, at 276-79; Smith, *Alexander Hamilton, the Alien Law, and Seditious Libels*, 16 REV. POL. 305 (1954).

145. 4 W. BLACKSTONE, COMMENTARIES *151-52. Blackstone said:

The liberty of the press is essential to the nature of a free state; but this consists in laying no *previous* restraint 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 consequences of his own temerity.

Id.

1800, most of the leading Jeffersonian Republican editors were forced out of business.¹⁴⁶

The fact that Jefferson won the election of 1800—partly because of public outrage at the Federalist prosecution of printers and politicians¹⁴⁷—and the fact that the heated debate over the statute followed straight party lines at a time of war hysteria¹⁴⁸ suggest that the law was not a reliable guide to early American thought on the constitutional guarantee. In one of a series of protests of the Sedition Act issued by the Virginia legislature, James Madison observed that “an amendment universally designed to quiet every fear is adduced as the source of an act which has produced general terror and alarm.”¹⁴⁹ He said that individuals could turn to state courts when their reputations were injured, but that the federal government had no authority to legislate against the press.¹⁵⁰ “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.” Madison added that “this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.”¹⁵¹ Madison denounced Blackstone’s definition of press freedom as a “mockery.”¹⁵² When he took office in 1801, Jefferson granted full pardons to those convicted under the

146. For an account of the Sedition Act debates and prosecutions, see generally J. SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956).

147. See, e.g., Koch & Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 WM. & MARY Q. 145 (3d ser. 1948); Smith, *The Grass Roots Origins of the Kentucky Resolutions*, 27 WM. & MARY Q. 221 (3d ser. 1970).

148. Stevens, *Congressional History of the 1798 Sedition Law*, 43 JOURNALISM Q. 247 (1966).

149. J. MADISON, ADDRESS OF THE GENERAL ASSEMBLY TO THE PEOPLE OF THE COMMONWEALTH OF VIRGINIA, in 6 WRITINGS OF MADISON, *supra* note 63, at 332, 335.

150. *Id.* at 334.

151. J. MADISON, REPORT ON THE RESOLUTIONS, in *id.*, at 341, 387. Chief Justice Hughes used this statement in his *Near* opinion, but without the highly significant second half of the sentence. *Near v. Minnesota*, 283 U.S. 697, 714 (1931).

152. J. MADISON, REPORT ON THE RESOLUTIONS, in 6 WRITINGS OF MADISON, *supra* note 63, at 341, 386. Blackstone’s oligarchical principles were widely rejected in the United States. See D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF LAW: AN ESSAY ON BLACKSTONE’S COMMENTARIES* (1941); Jezierski, *Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, 32 J. HIST. IDEAS 95 (1971); Waterman, *Thomas Jefferson and Blackstone’s Commentaries*, 27 ILL. L. REV. 629 (1933).

Sedition Act¹⁵³ and, as the Supreme Court noted in 1964, the attack on the constitutional validity of the statute "has carried the day in the court of history."¹⁵⁴

Blackstone's distinction underlying the law fared better, however. State courts in the nineteenth century interpreted the press clauses of state constitutions to guarantee freedom from prior restraint but not from postpublication punishment.¹⁵⁵ Madison's rejection of Blackstone's definition apparently was unknown to generations of judges familiar with Blackstone's *Commentaries* as a source for eighteenth-century law. In a 1907 case, *Patterson v. Colorado*,¹⁵⁶ the United States Supreme Court followed the states and adopted the view that constitutional press guarantees were aimed at prior restraint and "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."¹⁵⁷

Justice Holmes, who wrote the *Patterson* decision, eventually was weaned from Blackstone by the scholarship of Zechariah Chafee, Jr.,¹⁵⁸ and was convinced that the soundest approach to the first amendment was to accept the marketplace of ideas concept.¹⁵⁹ Holmes's *Patterson* interpretation nevertheless remained and formed the basis for the most influential of twentieth-century prior restraint cases, *Near v. Minnesota*.¹⁶⁰ In *Near*, Chief Justice Hughes stated that the press clause of the first amendment "has meant, principally although not exclusively, immunity from previous restraints or censorship."¹⁶¹ Yet in dicta, Hughes enunciated four exceptions to prior restraint doctrine. He wrote that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing

153. J. SMITH, *supra* note 146, at 268.

154. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

155. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to Gitlow*, in *THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS* 14, 25-30 (B. Chamberlin & C. Brown eds. 1982).

156. 205 U.S. 454 (1907).

157. *Id.* at 462.

158. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971).

159. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

160. 283 U.S. 697 (1931).

161. *Id.* at 716.

dates of transports or the number and location of troops."¹⁶² In addition to words impeding a war effort, Hughes included exceptions for obscene publications, incitements to the overthrow of government, and expressions that have the effect of force.¹⁶³ The protection against prior restraint, the Court declared, "is not absolutely unlimited."¹⁶⁴

B. Current Interpretations

If the purpose of the first amendment was to prohibit government actions against the press, then the *Near* decision rewrote the Constitution. Starting with a distinction proffered by Blackstone at a time when England prohibited prepublication censorship but provided little additional protection for the press,¹⁶⁵ the Court retreated to a position of endorsing restraints on wartime expression, which it claimed no one would question¹⁶⁶ and of assuming—without citing any authority—that the distribution of obscene publications was similarly unprotected.¹⁶⁷ Instead of applying the first amendment as a strict limitation on government, the Court since has interpreted the amendment as an authorization to consider censorship on a case-by-case basis and to apply whatever balancing formulas or presumptions seem reasonable.¹⁶⁸ The resulting potential for harm to civil liberties is as obvious as attempts to find interpretive standards are problematical; in the *Pentagon Papers* case,¹⁶⁹ for example, each of the nine justices wrote an opinion. In any event, prior restraints are not uncommon. Under the current interpretation, for example, cities may suppress obscenity under general public nuisance laws¹⁷⁰ and Con-

162. *Id.*

163. *Id.*

164. *Id.*

165. Under English law, for instance, truth was not a defense in libel prosecutions. 4 W. BLACKSTONE, COMMENTARIES *150.

166. *Near*, 283 U.S. at 716.

167. *Id.* For a discussion of the Court's precipitous acceptance of exceptions to prior restraint, see Emerson, *supra* note 36, at 660-61. For the view that the *Near* decision was a victory for the press, see F. FRIENDLY, MINNESOTA RAG (1981).

168. See Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 203 (1981).

169. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

170. See Hughes, *Abating Obscenity As a Nuisance: An Easy Procedural Road for Prior Restraints*, 5 COMM. & LAW 39 (1983).

gress—despite the explicit language of the first amendment—may pass legislation making criminal the publication of some kinds of national security information.¹⁷¹

The difficulties with present doctrine are evident particularly when the pragmatic rationales used to impose prior restraint fail under even the most casual scrutiny. In *United States v. The Progressive, Inc.*,¹⁷² a small political journal with limited resources fought a costly legal battle¹⁷³ against a preliminary injunction issued to prevent its publication of an article on the physics of the hydrogen bomb. The author maintained that he had not had access to classified material,¹⁷⁴ but the Justice Department went ahead with its case until the case began to look hopeless. Among other arguments made on appeal, the government contended that the first amendment does not protect technical information.¹⁷⁵

The government's lawyers, apparently anticipating an adverse decision, announced their capitulation shortly after arguing the appeal. Their ostensible reason was that a Madison, Wisconsin, newspaper had mooted the issue by printing a letter purporting to describe the H-bomb.¹⁷⁶ The *Chicago Tribune* had a copy of the

171. See, e.g., Note, *The Constitutionality of the Intelligence Identities Protection Act*, 83 COLUM. L. REV. 727 (1983). See generally Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) (lengthy study of the legislative history and application of the espionage statutes); Edgar & Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349 (1986) (expressing concern over a trend toward executive empowerment in the area of secrecy).

172. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

173. Soloski & Dyer, *The Cost of Prior Restraint: U.S. v. The Progressive*, 6 COMM. & LAW, Apr. 1984, at 3, 6-7.

174. See Morland, *The H-Bomb Secret: To Know How is to Ask Why*, 43 PROGRESSIVE 14 (Nov. 1979).

175. A. DeVOLPI, G. MARSH, T. POSTOL, & G. STANFORD, *BORN SECRET: THE H-BOMB, THE PROGRESSIVE CASE AND NATIONAL SECURITY* 76-81, 210-11 (1981); see also Comment, *The Unexploded Bomb: The Progressive and Prior Restraint*, 1980 S. ILL. U.L.J. 199; Note, *A Journalist's View of the Progressive Case: A Look at the Press, Prior Restraint, and the First Amendment From the Pentagon Papers to the Future*, 41 OHIO ST. L.J. 1165 (1980). See generally Wilson, *National Security Control of Technological Information*, 25 JURIMETRICS J. 109 (1985) (identifying government objectives in controlling scientific communication and the effects of these policies on the university research community).

176. A. DeVOLPI, G. MARSH, T. POSTOL, & G. STANFORD, *supra* note 175, at 8, 106-07, 183. The letter, which was only partially accurate, came from a California computer programmer who studied weaponry as a hobby. He had followed the *Progressive* controversy and ran a contest soliciting H-bomb designs based on material in the public domain. Entries were to

letter and had challenged officials to prevent publication.¹⁷⁷ Other newspapers and magazines also had begun to publish pieces of the thermonuclear puzzle in defiance of the government.¹⁷⁸ The article that *The Progressive* finally published was not a blueprint for a bomb and was not correct in every detail, but the government, in effect, verified the content by bringing the action.¹⁷⁹

The folly of prior restraint in such circumstances not only is that it confirms and advertises secret material and does not prevent others inside or outside the country from publishing the information, but also that it promotes the illusion—but only an illusion—of enhanced safety. When Judge Warren issued the injunction, he cited *Near's* exemption for military threats¹⁸⁰ and spoke of a “freedom to live” which outweighed freedom of the press.¹⁸¹ Judge Warren’s logic is undermined by the fact that equally lethal chemical and biological weapons are widely known, much less expensive, and easier to obtain.¹⁸² As James Madison remarked in condemning the Sedition Act of 1798, “Exhortations to disregard domestic usurpation, until foreign danger shall have passed, is an artifice which may be forever used”¹⁸³

One can make strong arguments both for and against government secrecy,¹⁸⁴ but once the press obtains information the govern-

be submitted to the Department of Energy and the winner was to be the first to be classified. *Id.*

177. *Id.* at 10.

178. *Id.* at 102-03, 182. Information comparable to that in the *Progressive* article had already appeared in encyclopedias. *Id.* at 99-100.

179. *Id.* at 82-109; see also Knoll, *The Recipe We Didn't Print*, 49 THE PROGRESSIVE 4 (Oct. 1985) (memo from editor supporting *The Progressive's* publication of article describing the hydrogen bomb).

180. *The Progressive, Inc.*, 467 F. Supp. at 996 (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

181. *Id.* at 995.

182. See generally N. LIVINGSTONE & J. DOUGLASS, CBW: THE POOR MAN'S ATOMIC BOMB (1984).

183. J. MADISON, ADDRESS OF THE GENERAL ASSEMBLY TO THE PEOPLE OF THE COMMONWEALTH OF VIRGINIA, in 6 WRITINGS OF MADISON, *supra* note 63, at 332-33.

184. Compare Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 806 (1985) (stating that “executive branch secrecy is not inherently at war with the ethos of the Constitution”), with Koffler & Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 817-18 (1984) (stating that “[t]o penetrate this secrecy state for the purpose of public discussion would seem, on democratic principles, a duty of the highest order”).

ment can argue only awkwardly that the information actually is confidential and that it should be suppressed.¹⁸⁵ An official secrets act which would authorize punishment for publishing facts which already exist in the public domain would conflict with American democratic tradition.¹⁸⁶ Proposals for measures to discourage leaks to the press must take into account the fact that such disclosures often are made for political purposes by top officials and by others to expose questionable or illegal practices.¹⁸⁷ In recent years, the administration has fired lower level leakers,¹⁸⁸ tried to limit the number of persons with access to classified documents,¹⁸⁹ and made a practice of negotiating with news organizations before the publication of sensitive stories.¹⁹⁰

The Framers apparently believed that government need not keep all its activities in the open. The Constitutional Convention

185. See Linde, *supra* note 168, at 196.

186. Journalists contend that officials do not distinguish properly between spies who sell secrets and reporters who tell the story after the damage is done. See *Can Anything Stay Secret?*, NEWSWEEK, June 9, 1986, at 16. For an argument in favor of tighter controls, see Lewy, *Can Democracy Keep Secrets? Do We Need an Official Secrets Act?*, 26 POL'Y REV. 17 (1983). Interestingly, government officials may reclassify information which has been previously declassified. Exec. Order No. 12,356 § 1.6(c), 7 C.F.R. 244 (1986). For an example of the application of this Executive Order, see *American Library Ass'n v. Faurer*, 631 F. Supp. 416 (D.D.C. 1986). In addition, the government has attempted to withhold sensitive information which it legally cannot classify. See Peck, *A Freeze on Facts: They Need Not Be Classified to be Kept Secret*, 49 THE PROGRESSIVE 28 (1985); Sanger, *Rise and Fall of U.S. Directive on Sensitive Data*, N.Y. Times, Mar. 19, 1987, at A18, col. 1.

187. See Linde, *supra* note 168, at 196; *F.B.I. Will Seek Aide Who Cited News Deception*, N.Y. Times, Oct. 4, 1986, at A1, col. 1; Gelb, *Use of Disclosures: Administration Often Unveils Secrets, At Risk to Security, for Sake of Policy*, N.Y. Times, June 2, 1986, at A15, col. 1; Gelb, *All About Leaks*, N.Y. Times, May 22, 1986, at B10, col. 3; Reston, *The Plumber's Game*, N.Y. Times, May 21, 1986, at A31, col. 5; *A Crackdown on Leaks: Casey Warns the Press, But Not the Leakers*, NEWSWEEK, May 19, 1986, at 66; *Leaks vs. Public Service Announcements*, N.Y. Times, May 11, 1986, at E4, col. 1; Simons, *Government and National Security*, EDITOR & PUBLISHER, Apr. 26, 1986, at 80. See also Peterzell, *Can the CIA Spook the Press?*, 25 COLUM. JOURNALISM REV. 29 (Sept./Oct. 1986).

188. See Roper, *Plugging the Holes*, EDITOR & PUBLISHER, May 24, 1986, at 16; *Schultz Dismisses Official for Leak*, N.Y. Times, May 17, 1986, at A3, col. 1; *Pentagon Deputy Ousted Over a Disclosure of Secret Information*, N.Y. Times, Apr. 30, 1986, at A17, col. 1.

189. See *Curbs on Secrets Planned by Aides*, N.Y. Times, June 3, 1986, at D27, col. 1; *Pelton Case Called Example of Big Spying Problem*, N.Y. Times, May 29, 1986, at A1, col. 1; *Steps Weighed to Limit Disclosure of Secrets*, N.Y. Times, May 26, 1986, at A1, col. 3.

190. See, e.g., *Questions of National Security: The CIA Tangles with the Washington Post and NBC*, TIME, June 2, 1986, at 67; *Papers Won't Face Charges on Past Articles*, Casey Says, N.Y. Times, May 16, 1986, at A15, col. 1.

itself met behind closed doors, and the Constitution allows both houses of Congress to omit secret information from their published journals.¹⁹¹ Still, the early federal government did not treat the unauthorized disclosure of secrets as a crime.¹⁹² In contrast to present-day efforts to censor or punish government employees' speech,¹⁹³ the country's first four presidents in effect overlooked the fact that a top-ranking general supplied the Spanish with information in exchange for gold and played a key role in the Burr conspiracy.¹⁹⁴

In the nineteenth century, federal authorities made sporadic efforts to suppress news coverage during wars,¹⁹⁵ and postal officials occasionally seized abolitionist literature¹⁹⁶ and obscene materials.¹⁹⁷ Government attempts to control information and opinion have been more systematic in the twentieth century, however. As many as 2,000 individuals were prosecuted for radical or disloyal speech under laws passed at the time of World War I and World

191. U.S. CONST. art. I, § 5, cl. 3.

192. See Hoffman, *Contempt of the United States: The Political Crime That Wasn't*, 25 AM. J. LEGAL HIST. 343 (1981); see also Dennis, *Stolen Peace Treaties and the Press: Two Case Studies*, 2 JOURNALISM HIST. 6 (1975); Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83*, 45 JOURNALISM Q. 445, 449 (1968).

193. See Chimes, *National Security and the First Amendment: The Proposed Use of Government Secrecy Agreements Under National Security Directive 84*, 19 COLUM. J.L. & SOC. PROBS. 209 (1985); Miovski, *Freedom of Speech, National Security, and Democracy: The Constitutionality of National Security Decision Directive 84*, 12 W. ST. U.L. REV. 173 (1984); Comment, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 CALIF. L. REV. 962 (1984); *Morison Receives 2-Year Jail Term: Ex-Navy Analyst Plans Appeal of Espionage Conviction—Released on Bail*, N.Y. Times, Dec. 5, 1985, at A21, col. 1.

According to the General Accounting Office, more than 290,000 former and present federal employees have signed Form 4193 prepublication review agreements which require them to receive prior authorization for writings and speeches which may refer to intelligence data. In 1985, the GAO has reported, 14,144 reviews occurred. Engelberg, *Security Rule Died But Lived On*, N.Y. Times, Oct. 23, 1986, at 12, col. 4.

194. See T. HAY & M. WERNER, *THE ADMIRABLE TRUMPETER: A BIOGRAPHY OF GENERAL JAMES WILKINSON* (1941); J. JACOBS, *TARNISHED WARRIOR: MAJOR-GENERAL JAMES WILKINSON* (1938); R. SHREVE, *THE FINISHED SCOUNDREL: GENERAL JAMES WILKINSON* (1933).

195. See H. NELSON, *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* 221-47 (1967); Price, *Governmental Censorship in War-Time*, 36 AM. POL. SCI. REV. 837, 838-39 (1942).

196. See H. NELSON, *supra* note 195, at 210-20, 269-79.

197. *Id.* at 269-79.

War II.¹⁹⁸ During the world wars, the press generally cooperated with voluntary and involuntary censorship schemes.¹⁹⁹ World War II journalists, for instance, knew about but did not reveal the extent of damage at Pearl Harbor, the stories of radar and the atomic bomb, and the preparations for the Normandy invasion.²⁰⁰ Mistakes did occur, however. In 1942 a *Chicago Tribune* story, reprinted by half a dozen other newspapers, stated that the United States had advance information that the Japanese were planning to attack Midway Island. The story did not appear until after the battle and did not reveal the fact that American intelligence forces had broken the Japanese communication code, but a federal grand jury began an inquiry. The government dropped the case, however, when Navy officers, not wishing to confirm that the code was known to the American military, declined to say why the story was useful to the enemy.²⁰¹

The postwar era has seen a turning point in the government's relations with the press. News management, such as that practiced during the uncensored Vietnam War,²⁰² and relentless classification of documents has replaced crude censorship for the most part. The government now "manages" the media by such means as plain lies,²⁰³ pressure on public employees and contractors not to talk about a particular issue,²⁰⁴ script approval rights in exchange for assistance with movies about the military,²⁰⁵ and intimidation of magazine distributors.²⁰⁶ Simply withholding information is, of

198. See H. NELSON & D. TEETER, *supra* note 98, at 42-45; Washburn, *FDR Versus His Own Attorney General: The Struggle over Sedition, 1941-42*, 62 JOURNALISM Q. 717 (1985).

199. Price, *supra* note 195, at 839-40; Price, *Nation's Press Has Complied With Censorship Code*, 20 JOURNALISM Q. 318 (1943).

200. R. DESMOND, *TIDES OF WAR: WORLD NEWS REPORTING 1940-1945*, at 225 (1984).

201. *Id.* at 226.

202. See D. HALLIN, *THE "UNCENSORED WAR": THE MEDIA AND VIETNAM* (1986); K. TURNER, *LYNDON JOHNSON'S DUAL WAR: VIETNAM AND THE PRESS* (1985); see also Steele, *News of the 'Good War': World War II News Management*, 62 JOURNALISM Q. 707 (1985).

203. See, e.g., *Handling of Press During Libya Fighting Faulted*, N.Y. Times, April 7, 1986, at A6, col. 3.

204. See, e.g., *Administration Faulted for Curbing Comment on Chernobyl*, N.Y. Times, May 22, 1986, at B12, col. 3.

205. See, e.g., *'Top Gun': Ingenious Dogfights*, N.Y. Times, May 27, 1986, at C15, col. 1.

206. See, e.g., *Playboy and Booksellers Suing Pornography Panel*, N.Y. Times, May 20, 1986, at A24, col. 1.

course, a cleaner method of censorship—even if the information need not be withheld.²⁰⁷

The national security considerations of the postwar era have made concealment an ungainly obsession. Seven thousand officials in thirty government agencies now are authorized to make decisions on secrecy.²⁰⁸ Their orders are carried out by 200,000 government employees who classify 22 million documents a year.²⁰⁹ Today the executive branch even can deny congressional oversight committees the details of a military preparedness report that the committees themselves have ordered²¹⁰ or can simply decide not to inform Congress of a covert campaign to mine the harbors of another country.²¹¹ Indeed, some of the facts that are made public and read by members of Congress may be “disinformation” designed to mislead foreign adversaries.²¹² These disinformation campaigns, combined with official restrictions on the flow of information, allow the government to spread falsehoods while preventing the press from publishing the truth.

The American people and their elected representatives have learned much of what they do know about perilous or provocative acts by their government—such as safety lapses in the space program²¹³ or intelligence-gathering by U.S. submarines in Soviet wa-

207. See, e.g., Turner, *The U.S. Responded Poorly to Chernobyl*, N.Y. Times, May 23, 1986, at A31, col. 1; Schmidt, *Reporters Use Technology to Thwart NASA's Secrecy*, N.Y. Times, Mar. 20, 1986, at A24, col. 1; *Work Ship Aiding Salvagers: Focus on Chunks that may be Part of Right Solid Fuel Rocket*, N.Y. Times, Mar. 18, 1986, at C4, col. 3.

208. *The Keeper of Secrets in Chief*, N.Y. Times, Apr. 15, 1986, at B6, col. 4.

209. *Id.*

210. Gordon, *Tug of War, With a Twist, On Secrets*, N.Y. Times, May 15, 1986, at B14, col. 3.

211. Roberts, *More Lessons in the Secrecy Trade*, N.Y. Times, Apr. 10, 1986, B10, col. 3. For a more recent example of covert activity not revealed to Congress, see *Senators Charge a Web of Deceit in Iranian Affair*, N.Y. Times, Jan. 30, 1987, at A1, col. 6.

212. See *Sorry, Wrong Numbers*, TIME, Mar. 31, 1986, at 31; Weinraub, *White House and Its News: Disclosures on Libya Raise Credibility Issue*, N.Y. Times, Oct. 3, 1986, at 1, col. 1; *Iran and Iraq Got 'Doctored' Data, U.S. Officials Say*, N.Y. Times, Jan. 12, 1987, at 1, col. 6. CIA rules prohibit agency employees from paying U.S. journalists, but strong evidence suggests CIA bribes buy false and misleading news stories in Central America. Honey, *Contra Coverage—Paid for by the CIA*, COLUM. JOURNALISM REV., March/April 1987, at 31.

213. See *NASA Had Solution to Key Flaw in Rocket When Shuttle Exploded*, N.Y. Times, Sept. 22, 1986, at A1, col. 2. For an example of space shuttle safety issues being raised before the explosion of the Challenger in January 1986, see Easterbrook, *The Spruce Goose of Outer Space*, WASHINGTON MONTHLY, Apr. 1980, at 32.

ters²¹⁴—from the uncensored reporting of classified or otherwise concealed material. Even in the face of blatant attempts at prior restraint, newsworthy information has a natural tendency to emerge. If the United States were preparing a surprise attack on another country, for example, the government might seek an injunction to stop a news organization from revealing the plans. A court might be reluctant to take such an extreme measure, however, where its order may not work in any event because newsworthy information is so difficult to contain.²¹⁵

In some situations the government can threaten to use secrecy laws against journalists. The Justice Department, however, has avoided using such laws against the press, perhaps because courts might strike them down as prior restraints.²¹⁶ Prosecutions of the press also can be politically costly, and government agencies recognize that trials involving classified information may reveal additional secrets.²¹⁷ Still, prior restraint remains a danger for journalists, and may be extended in the future to such new areas as satellite news gathering and distribution.²¹⁸ The press's ability to

214. *C.I.A. Director Requests Inquiry on NBC Report*, N.Y. Times, May 20, 1986, at A17, col. 1.

215. A panel of distinguished jurists and journalists discussed the hypothetical invasion situation on *National Security and Freedom of the Press* (public television broadcast, Jan. 5, 1983). For the current method on handling reporters during an invasion, see Comment, *The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press Right of Access to Wartime News?* 58 TEMP. L.Q. 873 (1985).

216. See, e.g., *U.S. Aides Said to Have Discussed Prosecuting News Organizations*, N.Y. Times, May 21, 1986, at A18, col. 1; *White House Backing C.I.A. On Prosecuting Publications*, N.Y. Times, May 9, 1986, at A14, col. 3; *Justice Agency said to Resist C.I.A. Call to Prosecute News Groups*, N.Y. Times, May 8, 1986, at B18, col. 1. These stories involve efforts undertaken by William J. Casey, then director of the Central Intelligence Agency, to stop the publication of information emerging from an espionage case by citing 18 U.S.C. § 798 (1982), which forbids the disclosure of facts concerning communications intelligence. See *The Casey Offensive*, 25 COLUM. JOURNALISM REV. 18 (July/Aug. 1986).

217. See Press, *Trying Spies in a House of Mirrors: Hard to Catch, Harder to Prosecute*, NEWSWEEK, June 2, 1986, at 64; *Spy Trial Brings Warnings on News: Intelligence Officials Caution Reporters on 'Speculation'*, N.Y. Times, May 29, 1986, at A20, col. 1. The Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16 (1982), delineates pretrial, trial, and appellate procedures for criminal cases involving classified material.

218. See *News Photo Satellite Use Hinges on Law Changes*, NEWS MEDIA & L., Spring 1986, at 8. Under federal law, the Secretary of Commerce has the authority to limit use of satellite photographs where the use conflicts with "international obligations or national security concerns." Land Remote-Sensing Act of 1984, 15 U.S.C. § 4243(a)(1) (Supp. III 1985).

publish freely need only depend on the rejection of the level of logic once displayed at a Washington hearing by a CIA official who intoned, "Remember—the First Amendment is *only an amendment*."²¹⁹

V. CONCLUSION

The American system of government rests on the paradox that although the people are sovereign, public institutions are by nature stronger than individuals. The Bill of Rights accordingly was adopted to protect citizens from certain forms of interference with their lives and liberties. In the case of the first amendment, historical evidence supports the absolutists' position that the Framers intended that the press clause prohibit not only prior restraint, but also all content-based controls available to government. As Madison put it, "[I]t would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of it."²²⁰ Court opinions to the contrary have created confusion over the most basic rights of journalists. Modern prior restraint doctrine defies definition, does not reflect adequately the original intent underlying the first amendment, and has allowed dangerous interference with the press.

Of particular concern for the future will be the resolution of conflicts between asserted national security interests and first amendment freedoms. As long as national leaders support the free flow of information in principle²²¹ but not in practice,²²² they will find it

The FCC has granted CNN a temporary license to use news feeds from a Soviet satellite, but the State Department has reserved the right to revoke the permission if the license is not "in the national interest." See Lancaster, *Red Alert at CNN*, 25 COLUM. JOURNALISM REV. 14 (May/June 1986).

219. L. ELLERBEE, "AND SO IT GOES" 252 (1986).

220. J. MADISON, REPORT ON THE RESOLUTIONS, in 6 WRITINGS OF MADISON, *supra* note 63, at 341, 391.

221. At their summit meeting in 1985, President Reagan told Soviet leader Mikhail Gorbachev that Thomas Jefferson had said that when the people know the facts, they will not make mistakes. Gorbachev said the remark was "very profound." *Gorbachev and Jefferson*, N.Y. Times, Dec. 12, 1985, at B24, col. 2.

222. See Neuborne & Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719 (1985); Karp, *Liberty Under Siege*, *The*

easier to manipulate and mislead public opinion.²²³ Current prior restraint doctrine may prove to be an effective guarantee of press rights in some cases, but its lack of coherence limits its usefulness. A government that fails to keep its secrets²²⁴ should not force the press to do so, either by prior restraint or subsequent punishment. Journalists have agreed to self-censorship even in doubtful instances such as the Bay of Pigs invasion,²²⁵ but their role under the Constitution is to publish what they see fit. Officials have the authority to keep some necessary secrets, but they have no legitimate power to prevent the press from telling what it already knows. Such freedom to publish obviously involves some risks, but no democratic system can ever be entirely safe. The stark choice is between living with occasionally irresponsible journalism²²⁶ and continually onerous state control of the news media.

Early Americans seem to have thought that suppression of facts and opinion offered only a false security. In deciding that the distribution of patriot publications was the best answer to expressions of pro-British sentiment during the Revolution, the Continental

Reagan Administration's Taste for Autocracy, HARPER'S MAGAZINE, Nov. 1985, at 53; *Reporters Committee Reports on Reagan*, EDITOR & PUBLISHER, March 28, 1987, at 16. The lack of accurate information may lead to rumors. See, e.g., Wilford, *Challenger, Disclosure and an 8th Casualty for NASA*, N.Y. Times, Feb. 14, 1986, at B5, col. 3.

223. See Marro, *When the Government Tells Lies*, 23 COLUM. JOURNALISM REV. 29 (Mar.-Apr. 1985); Rosenberg, *The Authorized Version: The Reagan Administration Has Been Misrepresenting Its Own Internal Reports on the Feasibility of the Strategic Defense Initiative*, ATLANTIC MONTHLY, Feb. 1986, at 26. Leaders such as President Reagan ironically have relied on the news media for much of their own information. See, e.g., King & Weaver, *Television I*, N.Y. Times, Mar. 12, 1986, at A24, col. 1; *Getting Into the Story*, TIME, July 1, 1985, at 48.

224. The Lockheed Corporation's reported failure to find more than a thousand secret documents for "an Air Force fighter so secret that the Pentagon will not concede it exists" is one example. *1,000 Documents for Secret Aircraft Cannot Be Found, House Panel Told*, N.Y. Times, July 25, 1986, at A8, col. 1; see also Engelberg, *Loss of Enthusiasm: U.S. Officials Concede That Moscow Has Advantage in Espionage Rivalry*, N.Y. Times, Apr. 8, 1987, at A16, col. 1; *U.S. Called Lax by House Panel in Fighting Spies*, N.Y. Times, Feb. 5, 1987, at A1, col. 5.

225. G. TALESE, *THE KINGDOM AND THE POWER* 4-5 (1966); see also Stein, *Voluntary Embargo*, EDITOR & PUBLISHER, July 26, 1986, at 13; *Press Warily Welcomes C.I.A. Offer to Cooperate*, N.Y. Times, June 1, 1986, at A18, col. 5.

226. In contemplating what might be done with journalists who offended the community without infringing on the "sacred liberty of the Press," Benjamin Franklin suggested that citizens be content with "tarring and feathering." *Federal Gazette* (Philadelphia), Sept. 12, 1789, at 2, col. 2.

Congress advised the colonies to treat loyalists "with kindness and attention; to consider them as the inhabitants of a country determined to be free, and to view their errors as proceeding rather from want of information than want of virtue or public spirit."²²⁷ During his diplomatic mission to France, Benjamin Franklin was warned that he was surrounded by spies. He replied that discovering all instances of espionage was impossible and that he did not care if his own valet was a spy because he observed a rule which precluded difficulties.²²⁸ "It is simply this," he said, "to be concerned in no affairs that I would blush to have made public, and to do nothing but what spies may see and welcome."²²⁹

The first citizens of the United States believed that the greatest threat to a country's freedom and well-being was the public ignorance which would foster corruption and illegal activity in their own government. Recent revelations about officially sanctioned secret wrongdoing—particularly by the CIA and FBI—can only tend to confirm such suspicions.²³⁰ Madison wrote in *The Federalist*,

The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of society, and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.²³¹

One of the most effective precautions is a press protected by the first amendment from government censorship.

227. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 109, at 19.

228. Letter from Benjamin Franklin to Juliana Ritchie (Jan. 19, 1777), *reprinted in* BENJAMIN FRANKLIN'S AUTOBIOGRAPHICAL WRITINGS 426 (C. Van Doren ed. 1945).

229. *Id.*

230. For a convenient compilation, see R. SMITH, D. CAULFIELD, D. CROOK, & M. GERSHMAN, *THE BIG BROTHER BOOK OF LISTS* (1984). Recurrent misconduct in the executive branch has not been exclusive to past administrations. *See, e.g.,* Tolchin, *Eyes on Ethics at White House*, N.Y. Times, May 27, 1986, at A18, col. 4.

231. *THE FEDERALIST* No. 57, at 384 (J. Madison) (J. Cooke ed. 1961).