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An American Freedom: The Intelligentsia and Freedom of the Press After Blackstone

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ABSTRACT

In 1964, the Supreme Court decided *New York Times Co. v. Sullivan*, constitutionalizing the common law of libel and declaring for the first time the First Amendment's central meaning. Once viewed as a landmark precedent, *Sullivan* is now under attack. According to Justices Clarence Thomas and Neil Gorsuch, *Sullivan* is a policy-based decision divorced from the history of libel and liberty of the press. They contend that early Americans viewed press freedom narrowly, consistent with English commentator William Blackstone. Through an analysis of 12 nineteenth-century U.S. treatises, this Article demonstrates exactly the opposite: early American commentators did not adopt Blackstone's views as their own. Instead, in the fire of a young country, a new understanding of press freedom was forged out of negotiated conflicts between libel's speech-suppressing tendency and the need for democratic debate powered by the press. The result was the creation of an American freedom that displaced antecedent English authorities. This Article thus draws into serious doubt Thomas and Gorsuch's reliance on those English authorities in their attacks on Sullivan.

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I. INTRODUCTION

Animated by the United States' "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the Supreme Court began to constitutionalize much of the common law of libel in *New York Times Co. v. Sullivan*.[1] There, the Court held that public-official libel plaintiffs must plead and prove that a defendant acted with "actual malice" in publishing a defamatory statement, that is, with knowledge it was false or a high degree of awareness of its probable falsity.[2] That standard—which removed the specter of liability for a mistaken falsehood—offered freedom of the press the "'breathing space'" it needed to survive.[3] In the intervening years, the Court extended the standard to public-figure libel plaintiffs.[4] While the Court never extended the actual malice prerequisite to private figures, it placed at least some constitutional limits on their libel lawsuits too.[5]

Sullivan has long been considered one of the Court's landmark First Amendment precedents—an "occasion for dancing in the streets" even.[6] Recently, however, Justices Clarence Thomas and Neil Gorsuch have urged their colleagues to overrule *Sullivan*, claiming that it does not

1. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
2. *Id.* at 280.
3. *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
4. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164–65 (1967) (Warren, C.J., concurring in result); *see also id.* at 170 (Black, J., concurring in part and dissenting and dissenting in part); *id.* at 174 (Brennan, J., concurring in part and dissenting in part).
5. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion), *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (limiting private figure plaintiffs "who do not prove" actual malice "to compensation for actual injury").
6. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn) (internal quotation marks omitted).

reflect an original understanding of the First Amendment (or the Fourteenth, for that matter).[7] According to them, *Sullivan* has "'*no relation* to the text, history, or structure of the Constitution.'"[8] Scholars have cataloged many reasons to doubt these conclusions.[9] But one worrying aspect of Thomas and Gorsuch's reasoning has yet to be interrogated: their assertion that English commentator William Blackstone's narrow conception of liberty of the press and expansive views of libel were shared by the Founders and thus prove that *Sullivan* is ahistorical.[10]

This Article demonstrates that Thomas and Gorsuch's reliance on Blackstone—a monarchist who hated the colonists and their fight for freedom—is misplaced because early U.S. commentators rejected Blackstone's views on liberty and libel.[11] Following the Court's recent guidance for interpreting other provisions of the Bill of Rights, this Article proves its point through an analysis of 12 nineteenth-century American treatises that discussed press freedom.[12] First, in Part I, it introduces Blackstone and some of the early debates in the United States over his views on liberty of the press and libel. In Part II, it examines the Court's historical treatment of these views. And, in Part III, it canvasses each treatise's treatment of press freedom and Blackstone.[13]

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7. *See, e.g.*, Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453 (2022); Berisha v. Lawson, 141 S. Ct. 2424 (2021); McKee v. Cosby, 139 S. Ct. 675 (2019). By way of disclaimer, the author was in-house counsel for Simon & Schuster, a defendant in *Berisha v. Lawson*. The views reflected in this Article are his own and not those of his client.

8. *Coral Ridge Ministries Media, Inc.*, 142 S. Ct. at 2455 (Thomas, J., dissenting from the denial of petition for certiorari) (quoting Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 221, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).

9. *See generally* Matthew L. Schafer, *In Defense: New York Times v. Sullivan*, 82 LA. L. REV. 81 (2021); *see also generally* Lee Levine & Stephen Wermiel, *What Would Justice Brennan Say to Justice Thomas?*, COMMC'NS LAWYER, Spring 2019, at 1 (2019).

10. *See McKee*, 139 S. Ct. at 678; *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from the denial of petition for certiorari).

11. Early lay Americans did too as convincingly demonstrated elsewhere. *See generally* WENDELL BIRD, THE REVOLUTION IN FREEDOMS OF PRESS AND SPEECH: FROM BLACKSTONE TO THE FIRST AMENDMENT AND FOX'S LIBEL ACT (2020).

12. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2127–28 (2022) (noting that views of legal scholars around the Founding and Reconstruction were one of four "different types of sources" courts should consider in "canvass[ing] the historical record").

13. This article canvasses the following treatises: TUNIS WORTMAN, A TREATISE, CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS (1800); ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803); NATHAN DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW (1823); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1825); JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826); THOMAS COOPER, A TREATISE ON THE LAW OF LIBEL AND THE LIBERTY OF THE PRESS (1830); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833); JOSEPH ALDEN, THE SCIENCE OF GOVERNMENT IN CONNECTION WITH AMERICAN INSTITUTIONS (1866); THOMAS M. COOLEY, A TREATISE ON THE

Finally, in Part IV, this Article distills common themes with an eye toward better understanding the legal academy's historical views of press freedom in the United States. It concludes that most of these commentators rejected Blackstone because his narrow understanding of press freedom was inconsistent with republican principles prevailing in the young, representative government established after the Revolution. In other words, these commentators' treatises disprove the notion that early Americans simply adopted as their own Blackstone's—and therefore England's—approach to liberty of the press. Far from undercutting *Sullivan*, the historical record supports *Sullivan*'s continued viability and its democracy-enriching effects. As history plays an increasingly outsized role in the Court's jurisprudence, this analysis is as timely as it is important.[14]

II. WILLIAM BLACKSTONE

Sir William Blackstone was an Englishman born in 1723. He died in 1780, 11 years before the States ratified the First Amendment. He was a jurist, a politician, and a professor.[15] In each, he was largely a failure. As a judge, it was said that he had "only the vaguest possible grasp of the elementary conceptions of law."[16] Nor was he "a particularly successful politician."[17] Likewise, as a professor, he was often passed over for appointments.[18] Nevertheless, Blackstone's *Commentaries on the Laws of England*, a four-volume book summarizing the entire English common law, secured admiration in life and a legacy in death. Published between 1765 and 1769, just before the American Revolution, it was "revolutionary."[19]

Blackstone's relationship with liberty of the press and libel and his treatment of the two in the *Commentaries* is tied to his devotion to the

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CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868); JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS (1868); JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes, Jr., ed., 12th ed. 1873) [hereinafter HOLMES]; SAMUEL MERRILL, NEWSPAPER LIBEL: A HANDBOOK FOR THE PRESS (1888).

14. *See Bruen*, 142 S. Ct. at 2130 ("[R]eliance on history to inform the meaning of constitutional text . . . is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments'" (quoting McDonald v. City of Chi., 561 U.S. 742, 790–91 (2010))).

15. *See* William Blackstone, *Letter from William Blackstone to the Earl of Reading*, 32 HARV. L. REV. 974, 976 (1919).

16. Stephen Skinner, *Blackstone's Support for the Militia*, 44 AM. J. LEGAL HIST. 1, 1 (2000).

17. *Id.*

18. *See* Martin J. Minot, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1370 (2018).

19. *Id.* at 1371.

Crown.[20] While the Stamp Act of 1765 was first a debate over Parliament's power to impose direct taxes on the Colonies, the Act also changed how colonists thought about liberty of the press.[21] After all, the Act taxed the paper on which newspapers were printed. As John Adams said, it was repugnant not just for its direct effects, but also its indirect ones: to "strip us in a great measure of the means of knowledge, by loading the Press, the Colleges, and even an Almanack and a News-Paper, with restraints and duties."[22] Blackstone, then a member of Parliament, "exhibited little sympathy for the grievances of American colonists," and his fellow Members of Parliament underestimated colonial rage caused by the Stamp Act.[23] According to Adams, 1765 turned out to be the "most remarkable" year of his life as it unleashed "the unconquerable Rage of the People."[24] "The People, even to the lowest Ranks," he wrote, "have become more attentive to their Liberties, more inquisitive about them, and more determined to defend them, than they were ever before known or had occasion to be."[25] The presses, he said, "have groaned, our Pulpits have thundered, our Legislatures have resolved, our Towns have voted, The Crown Officers have everywhere trembled."[26] In the face of this rebellion, Parliament was forced to repeal the Act.[27] But Blackstone reissued the *Commentaries*' first volume to make clear that the Colonies remained subordinate to the Crown.[28]

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20. *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 15 (1996); *see also* BIRD, *supra* note 11, at 25–31 (providing evidence that Blackstone had political and personal reasons to "manufacture" a narrow definition of the liberty of the press).

21. *See* Roger P. Mellen, *The Colonial Virginia Press and the Stamp Act: An Expansion of Civic Discourse*, 38 JOURNALISM HIST. 74, 83 (2012) (observing that the Stamp Act crisis cultivated "ideas of press freedom that were a crucial precedent to the new nation's First Amendment guarantee of press freedom"); *see also* ARTHUR M. SCHLESINGER SR., PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN 1796–1776 viii (1957).

22. John Adams, *Dissertation on the Canon and the Feudal Law*, BOS. GAZETTE, Oct. 21, 1765, *reprinted in* 3 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 445, 464 (Charles C. Little & James Brown eds. 1851).

23. Alschuler, *supra* note 20, at 15.

24. Diary of John Adams (Dec. 18, 1765), *in Braintree Decr. 18th. 1765. Wednesday.*, FOUNDERS ONLINE, NAT'L ARCHIVES, http://bit.ly/3GuByCK (last visited Nov. 17, 2022).

25. *Id.*

26. *Id.*

27. *See* John Orth, *"Catch A Falling Star": The Bluebook and Citing Blackstone's Commentaries*, 2020 U. ILL. L. REV. ONLINE 125, 126 (2020).

28. *Id.* Blackstone also emphasized the importance of the Declaratory Act of 1766, the face-saving measure passed along with the repeal of the Stamp Act that declared "that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and the parliament of Great Britain." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *109.

Blackstone's devotion to the sociopolitical order further influenced his views on liberty and libel. In the *Commentaries*, he discussed libel as a "private wrong" where "injuries affecting a man's reputation or good name are, first, by malicious, scandalous, and slanderous *words*, tending to his damage and derogation."[29] According to Blackstone, such injuries were especially heinous where the slanderous allegations were made against those in power as they risked sowing discord between the Crown and its subjects.[30] Thus, even where allegations might not be slanderous at the common law if made against common persons, certain medieval statutes protected "high and respectable characters."[31] Similarly, seditious libel, first introduced in the Star Chamber in 1606, recognized that words "tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man."[32]

Blackstone also discussed libel as a "public wrong." He again focused on individuals in power, defining such libels as "malicious defamations of any person, *and especially a magistrate*, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule."[33] Because the wrong meant to be addressed was sowing discord between the Crown and its subjects, it was immaterial "whether the matter of it be true or false."[34] It was "the provocation, and not the falsity" that was "to be punished criminally."[35] As a result, the only elements of libel were "first, the making or publishing of the book or writing; and, secondly, whether the matter be criminal."[36]

Blackstone saw no conflicts between liberty of the press and civil or criminal consequences resulting from alleged libels. While he believed that a free press was "essential to the nature of a free state," he said that the liberty of the press consisted only in "laying no previous restraints" on publication—that is, freedom from prior censorship.[37] Importantly, however, Blackstone's conception of liberty of the press did not prohibit or even limit subsequent punishments for what one chose to print:

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29. 3 BLACKSTONE, *supra* note 28, at *123.
30. *See id.*
31. *Id.*
32. *Id.* at *124.
33. 4 BLACKSTONE, *supra* note 28, at *150 (emphasis added).
34. *Id.*
35. *Id.*; *see also id.* at *151 ("[I]n a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law.").
36. *Id.* at *151.
37. *Id.* Blackstone did not define liberty of the press in his *Analysis on the Laws of England*, published first in 1756, which would have provided a pre-colonial crisis definition. *See generally* WILLIAM BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND (1756).

"Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . but if he publishes what is improper, mischievous or illegal, *he must take the consequence of his own temerity*."[38]

Blackstone also had personal reasons to define the liberty of the press narrowly while giving an expansive compass to the law of libel. He devised his definition around the time of his dustup with John Wilkes over Wilkes's expulsion from Parliament for his association with the radical newspaper, *The North Britain*. Blackstone, a proponent of expelling Wilkes, had been criticized for taking a position on that issue in Parliament that conflicted with the law set out in the *Commentaries*.[39] Newspapers of the time so pilloried him that he finally was forced to publish a defense, lamenting "anonymous Scurrility" and describing the press as "the dirty Channel" that published the "Lyes of the Day."[40]

Although it is impossible to say if Blackstone let these personal experiences with the press influence his views on its liberty, he was certainly aligned against the press's role in fomenting republican sentiment in England.[41] At the time Blackstone published the *Commentaries*, Wilkes was well known in England and America, where he was widely associated with the cause of liberty of press and speech.[42] It was Wilkes's conception of that liberty—"the right of free enquiry and fair discussion"—that was then "dominant."[43] Wilkes was thus hailed as "a great public benefactor" due to his "obstinate defence of liberty of the press."[44]

Tellingly, Blackstone's definition of liberty of the press was unknown in English law before 1769.[45] In 1755, Lord Mansfield said that "the liberty of the press is that of using your talents in writing, and that it admits of printing everything that don't offend the laws, and the Crown has no prerogative now to demanded that license."[46] Mansfield thus did not believe that freedom from prior censorship was synonymous with liberty of the press.[47] In fact, "only a handful of writers had used a

38. 4 BLACKSTONE, *supra* note 28, at *151–52 (emphasis added).

39. Charles McCamic, *The First Edition of Blackstone's Commentaries*, 33 W. VA. L. REV. 287, 291 (1927).

40. WILLIAM BLACKSTONE, A LETTER TO THE AUTHOR OF THE QUESTION STATED 5–6 (1769).

41. *See* BIRD, *supra* note 11, at 31 (arguing that Blackstone was "horrified" by Wilkes).

42. *Id.* at 179.

43. *Id.*

44. COOLEY, *supra* note 13, at 418.

45. BIRD, *supra* note 11, at 23.

46. *Id.*

47. *Id.* Mansfield would, however, later adopt Blackstone's definition, likely for the same political reasons that caused Blackstone to manufacture the narrow definition to begin with.

definition remotely like freedom from licensing and other prior restraint," while the majority of others defined liberty of the press "in a broad sense."[48]

Blackstone's definition faced even stronger headwinds in the Colonies. The first reference in the Founders' correspondence to Blackstone's views on liberty of the press is a February 18, 1789, letter to John Adams from soon-to-be-Justice William Cushing.[49] Even if Blackstone's definition was accurate in England, Cushing questioned "whether it is law now, *here*" in light of the "very general & unlimited" guarantee of press freedom in the Massachusetts Declaration of Rights.[50] Considering that expansive language, he maintained that liberty of the press in Massachusetts "must exclude *subsequent* restraints—as much as, *previous restraints.*"[51] This must be so, he wrote, because "if all men are restrained, by the fear of jails, Scourges & loss of ears, from examining the conduct of persons in administration . . . from declaring it to the public; *that* will be as effectual a restraint, as any *previous* restraint whatever."[52]

Blackstone's definition of liberty of the press was also doubted after the Revolution, especially by Democratic-Republicans battling the Sedition Act. In July 1798, Harrison Gray Otis stood on the floor of the U.S. House of Representatives in Philadelphia. Otis, a Boston millionaire and a leading Federalist, defended the Act from attacks by Democratic-Republicans, who argued that the Act was unconstitutional under the First Amendment.[53] Invoking Blackstone's view of liberty of the press as consistent with the First Amendment, Otis argued that the Act was constitutional because it only imposed subsequent punishments—not prior restraints.[54] Encapsulating the criticism widely shared by his fellow Democratic-Republicans, Albert Gallatin argued to the contrary that it was an "insulting evasion of the Constitution" to say that the freedom of the press was not violated "[s]o long as we do not prevent, but only punish your writings."[55]

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48. BIRD, *supra* note 11, at 181.

49. Letter from William Cushing to John Adams (Feb. 18, 1789), *in To John Adams from William Cushing*, 18 February 1789, FOUNDERS ONLINE, NAT'L ARCHIVES, https://bit.ly/3r6wFXA (last visited Nov. 17, 2022).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* 8 ANNALS OF CONG. 2148 (1798).

54. *See id.* Even Otis questioned the applicability of Blackstone, saying that he would not "dwell upon the law of England, the authority of which it might suit the convenience of gentlemen to question." *Id.*

55. *Id.* at 2160; *see also, e.g.*, GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS (1799) ("If freedom of the press consists in an exemption from previous restraint,

Nor were Blackstone's views on the common law of libel widely accepted in the early United States. In December 1790, Philadelphia papers advertised lectures by U.S. Supreme Court Justice James Wilson.[56] The first lecture was held a year before the States would ratify the First Amendment.[57] Wilson spoke to a "most brilliant and respectable audience" that included George and Martha Washington, Adams, the U.S. Congress, and both houses of the Pennsylvania Legislature.[58] He would give dozens more lectures hoping to "secure his reputation as America's Blackstone."[59] While service on the Supreme Court and increasing financial struggles derailed Wilson's quest, his speeches remain some of the earliest reviews of the law in the United States.[60]

One of Wilson's later lectures focused on libel.[61] Speaking shortly after the adoption of the First Amendment, Wilson observed that there was an "unwarrantable attempt . . . in the star chamber . . . to wrest the law of libels to the purposes of ministers."[62] This effort "lost to the community the benefits of that law."[63] Reviewing the 1606 case *de libellis famosis*, Wilson said that it had come to form "the foundation of the law" on seditious libel and would require examination to "some degree of minuteness."[64] The case's first principle was that libels of public persons were "a greater offence than one against a private man."[65] But Wilson disagreed.[66] In the United States, he argued, the circumstance "of office ought to incline the beam . . . because an officer is a citizen and more."[67] Next, he attacked the idea that truth was immaterial because the thing to be avoided was a breach of peace—not harm to one's reputation.[68] "[I]n the first place," Wilson said, "a libel is a violation of the right of character, and not of the right of personal safety."[69] At any rate, there was a "gross inconsistency" in this rule.[70] The law assumed

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Congress may, without injury to the freedom of the press, punish with death any thing actually published, which a political inquisition may chuse to condemn.").

56. *See Law Lectures*, THE PENNSYLVANIA PACKET, Dec. 1, 1790 at 3.

57. *See Law Lecture*, THE PENNSYLVANIA PACKET, Dec. 15, 1790 at 3.

58. *See Appointments*, THE PENNSYLVANIA PACKET, Dec. 25, 1790 at 3.

59. Mark David Hall, *Notes and Documents: James Wilson's Law Lectures*, 128 PENN. MAG. HIST. & BIOGRAPHY 63, 65 (2004).

60. *See id.*

61. James Wilson, *Of Crimes Against the Right of Individuals to Liberty, and to Reputation*, *in* 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 67, 67 (1804)

62. *Id.* at 73.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.*

67. *Id.* at 73–74.

68. *See id.* at 74. Blackstone admitted that truth was a defense in a civil libel case. *See id.*

69. *Id.*

70. *Id.* at 75.

that the effect of a libel was for the injured party to respond with violence, but it required the libeler "to complain for every injury in the ordinary course of the law."[71] Why, Wilson asked, was this advice not given "consistently"?[72]

In sum, Blackstone's views on liberty and libel were the subject of substantial criticism before and after the ratification of the First Amendment. The American Revolution was a revolution against British rule but, as importantly, a revolution "in rights against British law's restrictions."[73] Among the restrictions revolted against was "an assertion or exercise of the narrow freedoms of press and speech described by Blackstone."[74] In its place, new citizens—no longer subjects—argued for "expansive freedoms that allowed denunciation of the British government and monarchy and advocacy of a republican replacement."[75] Put differently, "[w]hile the revolutionary colonists marched to radical Whig and other dissenting thought, Blackstone . . . [was] nearly the opposite."[76]

III. THE SUPREME COURT AND BLACKSTONE

Prior to 1907, the Supreme Court had never considered the effect, if any, of the First Amendment on state libel law. Then, in *Patterson v. Colorado*, that question presented itself.[77] Thomas Patterson, a U.S. Senator and newspaperman, published a political cartoon alleging that the justices of the Colorado Supreme Court were "under the control of, the Republican party, and were and are governed by political pr[e]judice."[78] Thereafter, the Colorado Supreme Court found him guilty of contempt for his criticisms of the court.[79] Patterson then sought review from the U.S. Supreme Court, where he claimed "the right" under the Constitution to prove the truth of his allegations.[80]

Justice Oliver Wendell Holmes, Jr. wrote the majority opinion, which affirmed the contempt finding. While the Court declined to decide "whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st," it noted the even if there were, the Court would

71. Wilson, *supra* note 61, at 75.
72. *Id.*
73. BIRD, *supra* note 11, at 8.
74. *Id.* at 9.
75. *Id.*
76. *Id.*
77. *See generally* Patterson v. Colorado *ex rel.* Att'y Gen., 205 U.S. 454 (1907).
78. People *ex rel*. Att'y Gen. v. News-Times Publ'g Co., 84 P. 912, 914 (Colo. 1906).
79. *See News-Times Publ'g Co.*, 84 P. at 956.
80. *Patterson*, 205 U.S. at 461.

still "be far from the conclusion that [Patterson] would have us reach."[81] Citing a Massachusetts opinion by the highly regarded Chief Justice Isaac Parker, the Court adopted Blackstone's narrow view that freedom of the press meant only freedom from prior censorship, not subsequent punishment: "[T]he main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[82] The Court thus enshrined Blackstone in the First Amendment.[83]

Justice John Marshall Harlan dissented. He believed that the Fourteenth Amendment's Privileges or Immunities Clause "necessarily prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press."[84] He also believed that Blackstone's conception of liberty of the press was inconsistent with the First Amendment, "if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done."[85] He added: "It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press."[86]

For ten years, the Court did not revisit *Patterson* or its adoption of Blackstone's narrow view. Then, in 1917, Congress passed the Espionage Act and, a year later, the Sedition Act. The Espionage Act prohibited certain criticisms of the government that interfered with its ability to wage war. The Sedition Act went much further. It provided that no individual may "utter, print, write or publish any disloyal, profane, scurrilous or abusive language about the form of government in the United States, or the Constitution of the United States" on pain of a fine of up to $10,000 or imprisonment for not more than 20 years.[87]

Upholding a conviction based on the Espionage Act in *Schenck v. United States*, Holmes, again writing for the Court, admitted for the first time that it "may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints."[88] Instead, he wrote, "to

81. *Id.* at 462.

82. *Id.* (citing Commonwealth v. Blanding, 20 Mass. 304, 313–14 (1825); Respublica v. Oswald, 1 U.S. 319, 325 (Pa. 1788)).

83. *See* THOMAS HEALY, THE GREAT DISSENT 56 (2013).

84. *Patterson*, 205 U.S. at 464 (Harlan, J., dissenting).

85. *Id.* at 465.

86. *Id.*

87. Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553–54.

88. Schenck v. United States, 249 U.S. 47, 51 (1919) (citing *Patterson*, 205 U.S. at 462).

prevent" prior restraints was likely "the main purpose, as intimated in *Patterson*."[89] But contrary to *Patterson*'s suggestion, the Court recognized that the First Amendment might also prohibit subsequent punishments like those under the Espionage Act: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."[90] While this may have been "far from a *candid* admission of error" in adopting Blackstone in *Patterson*, "it was enough to put Blackstone to rest" for the time being.[91]

Still, in *Schenck*, the Court upheld a criminal punishment for political speech. Unsettled, the political theorist Harold Laski introduced Holmes to Zechariah Chafee, Jr.[92] A year earlier, Chafee published a critique of the Sedition Act on the basis that it interfered with freedom of the press.[93] According to Chafee, some judges had limited freedom of the press "to freedom from interference *before* publication, and would therefore hold the [Sedition] Act constitutional because it only imposes punishment *after* publication."[94] This idea, he said, "originated with Blackstone, and ought to be knocked on the head once for all."[95] In his estimation, there was little difference between prior restraints and subsequent punishments: "Severe punishment for sedition will check political discussion as effectively as a censorship."[96] According to Chafee, "[t]he men who drafted the First Amendment knew this well."[97]

Blackstone's definition, Chafee said, "was really just a statement of the objectionable English law of seditious publications" and threw "no light on the meaning of the free speech clauses in our Federal and State Constitutions."[98] Colonists were not preoccupied with prior restraints, which had been "abolished in England a century before" the Founding.[99] But they had seen "seventy English prosecutions for libel since 1760."[100] Moreover, after the controversy over the Sedition Act of 1798, Congress allowed that speech-suppressing law to lapse, Jefferson declared it unconstitutional, and the United States repaid the fines collected under

89. *Id.* at 51–52 (citing *Patterson*, 205 U.S. at 462).
90. *Id.* at 52.
91. HEALY, *supra* note 83, at 97 (emphasis added).
92. *See* Robert Post, *Writing the Dissent in Abrams*, 51 SETON HALL L. REV. 21, 22 (2020).
93. *See generally* Zechariah Chafee, Jr., *Freedom of Speech*, NEW REPUBLIC, Nov. 2, 1918–Jan. 25, 1919, at 66 (Nov. 16, 1918).
94. *Id.* at 66.
95. *Id.* at 67.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

it.[101] Around the same time, Alexander Hamilton mounted a spirited defense of freedom of the press as defense counsel in *People v. Croswell* that went beyond Blackstone.[102] Thus, there was evidence "from leaders of both parties" that freedom of the press prohibited subsequent punishments in addition to prior censorship.[103]

Chafee's intervention was successful. In 1919, Holmes broke from the Court and dissented in *Abrams v. United States*, an Espionage Act case, concluding that the indictments deprived the defendants of their rights under the First Amendment.[104] Curious about Holmes's switch from majority author to dissenter, Chafee wrote to him in 1922, asking where he came up with the "clear and present danger" standard first enunciated by Holmes in *Schenck* and invoked in his dissent in *Abrams*. Holmes responded:

> I think it came without doubt after the later cases (and probably you—I do not remember exactly) had taught me that in the earlier *Paterson* [sic] case, if that was the name of it, I had taken Blackstone and Parker of Mass[105] as well founded, wrongly. I surely was ignorant. . . .[106]

While the wartime cases essentially repudiated the Blackstonian view insofar as they recognized that the First Amendment imposed at least some limits on subsequent punishments, the Court would not confront Blackstone head-on until the 1931 case *Near v. Minnesota*.[107] *Near* was an unlikely candidate for the repudiation of Blackstone, not least because the statute at issue was unconstitutional even under the Blackstonian view as it permitted prior restraints. Indeed, in *Near*, Chief Justice Charles Evans Hughes began the Court's opinion with Blackstone: "[I]t 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."[108]

After admitting that the Court in *Patterson* appeared to accept this idea, Hughes explained that the criticism of it "has not been because

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101. *See id.*

102. *See id.*

103. Chafee, *supra* note 93, at 67.

104. *See* Abrams v. United States, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting).

105. Here, Holmes was referring to Parker's opinion in *Blanding* that adopted Blackstone and that he had cited in *Patterson*. *See* Patterson v. Colorado *ex rel.* Att'y Gen., 205 U.S. 454, 462 (1907).

106. David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 100 (1982) (quoting Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922)).

107. *See generally* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

108. *Id.* at 713.

immunity from previous restraint upon publication has not been regarded as deserving of special emphasis."[109] Instead, it was "chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal Constitutions."[110] Were it otherwise, "'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.'"[111]

In the United States, Hughes wrote, freedom from prior restraints was merely a "preliminary freedom."[112] Unlike in England, press freedom in the United States "broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration."[113] Today, Hughes said, freedom of the press in the United States was one of the five great rights and consisted in the "'diffusion of liberal sentiments on the administration of Government . . . , whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.'"[114]

Before the decade was out, the Court revisited *Near* in *Grosjean v. American Press Co.*, a case challenging a tax on newspapers.[115] There, the Court explained that the limited liberty of the press as understood in England at the time of the Founding was "never accepted by the American colonists."[116] While *Near* made clear that "the object of the constitutional provisions was to prevent previous restraints on publication," the Court added that it was "careful not to limit the protection of the right to any particular way of abridging it."[117] Judge Cooley, the Court said, "laid down the test to be applied": "The evils to be prevented were not the censorship of the press merely, but any action of the government . . . [that] might prevent . . . free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[118]

With *Near* and *Grosjean*, Blackstone's influence in the Court's First Amendment canon waned. It was not until the 1970s when Justice Byron White, disenchanted with *Sullivan*'s erosion of the common law of libel,

109. *Id.* at 714.
110. *Id.* at 714–15.
111. *Id.* at 715 (quoting COOLEY, *supra* note 13, at 421).
112. *Id.* at 721.
113. *Id.* at 716–17.
114. *Id.* at 717 (quoting Letter from the Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774), *reprinted in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 104, 108 (1904)).
115. *See generally* Grosjean v. Am. Press Co., 297 U.S. 233 (1936).
116. *Id.* at 249.
117. *Id.*
118. *Id.* at 249–50.

attempted to revive the long-dead Englishman. Dissenting in *Gertz v. Robert Welch, Inc.*, White said Blackstone was proof that the Court had gone too far in extending the protections of *Sullivan*.[119] The Founders, he wrote, "were steeped in the common-law tradition of England."[120] And "[t]hey read Blackstone, 'a classic tradition of the bar in the United States' and 'the oracle of the common law in the minds of the American Framers.'"[121] From this, White said, they learned that freedom of the press meant freedom from prior restraints, leaving "the publisher later being subject to legal action if his publication was injurious."[122]

White went further still in his endorsement of Blackstone: "Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel."[123] Consistent with "the Blackstone formula," libel actions were understood not to "abridge freedom of the press."[124] Even Alexander Meiklejohn, "who accorded generous reach to the First Amendment," had admitted that libels "may be, and must be, forbidden and punished."[125] While debates over the Bill of Rights were "inconclusive" on the scope of press freedom, White said that several of the Founders "favored limiting freedom of the press to truthful statements" and argued (incorrectly[126]) that James Wilson adopted Blackstone.[127]

Decades later, Justice Thomas would make the same arguments. In 2019, in *McKee v. Cosby*, Katherine McKee, one of Bill Cosby's victims, appealed the dismissal of her defamation lawsuit against Cosby for

119. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (White, J., dissenting).

120. *Id.* at 381 n.14.

121. *Id.* (citing JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 257 (1950); LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 13 (1960)).

122. *Id.*

123. *Id.* at 381.

124. *Id.* (citing LEVY, *supra* note 121, at 247–48); Jerome Lawrence Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 376 (1969); John E. Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 56 (1929)).

125. *Id.* at 382 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 21 (1965)).

126. *Id.* at 383 (White, J., dissenting). This argument is based on Wilson's assertion at the Pennsylvania Ratifying Convention that he "presumed it was not in the view of the honorable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country." JAMES WILSON, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 55 (1792). At the time, Wilson was advocating for the adoption of a constitution and demands for a bill of rights risked upending it, so his resort to Blackstone is understandable. At any rate, his statement *predates* the First Amendment and did not, therefore, purport to be an interpretation of it. After the Amendment was ratified, Wilson rejected Blackstone's views. *See supra* notes 61–72 and accompanying text.

127. *Gertz*, 418 U.S. at 382.

branding her a liar.[128] While the Court denied the petition, Thomas wrote to explain "why, in an appropriate case, [the Court] should reconsider" *Sullivan*.[129] His thesis was simple: "The constitutional libel rules adopted by this Court in [*Sullivan*] and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law."[130]

Citing Blackstone, Thomas argued that "the common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard."[131] Citing him again, Thomas explained that at common law, truth was "a defense to a civil libel claim," as opposed to the rule under *Sullivan*, where it was a public official's burden to plead and ultimately prove falsity.[132] In fact, he wrote, "[f]ar from increasing a public figure's burden in a defamation action, the common law deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels."[133] Once again citing Blackstone, he explained that libel was a common-law crime in the Colonies.[134]

Two years later in *Berisha v. Lawson*, while Thomas again wrote an opinion in support of overturning *Sullivan*, it was Justice Gorsuch who repeatedly invoked Blackstone.[135] "At the founding," Gorsuch wrote, "freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished."[136] As a result, "none of that meant publishers could defame people, ruining careers or lives, without consequence."[137] Instead, "those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused."[138] This, Gorsuch wrote, "extended far back in the common law" when Blackstone declared that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," but if he publishes falsehoods "'he must take the consequence of his own temerity.'"[139]

128. *See generally* McKee v. Cosby, 139 S. Ct. 675 (2019).
129. *Id.* at 676 (Thomas, J., concurring in the denial of petition for certiorari).
130. *Id.* at 678.
131. *Id.*; *see also id.* at 680 (arguing that, before *Sullivan*, the Court "consistently recognized that the First Amendment did not displace the common law of libel").
132. *Id.* at 678.
133. *Id.* at 679.
134. *See id.* at 678 (quoting Beauharnais v. Illinois, 343 U.S. 250, 254 (1952)).
135. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting from the denial of certiorari).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

Finally, in 2022, Thomas again renewed calls to overturn *Sullivan*, arguing that it had "'*no relation* to the text, history, or structure of the Constitution.'"[140]

In summary, beginning with the wartime cases like *Schenck*, the Court implicitly rejected the Blackstonian idea that the First Amendment protected only against prior restraints when it adopted a "clear and present danger" test that placed limits even on subsequent punishments. Later, in *Near* and *Grosjean*, the Court confronted and explicitly rejected the idea that the Founders incorporated Blackstone's treatment of liberty of the press into the First Amendment. This rejection of Blackstone decades ago should foreclose reliance on him today. But, as discussed below, the current Court's willingness to revisit precedent requires going beyond doctrine to examine the historical record itself.

IV. THE ACADEMY REJECTS BLACKSTONE

If we accept that the historical record matters, that record has far reaching implications for the Court's First Amendment case law. For example, if early Americans really did understand the First Amendment as merely codifying Blackstone's narrow view of liberty of the press, much of today's First Amendment jurisprudence would be vulnerable to overruling. For present purposes, accepting Blackstone's view would upend *Sullivan* and the cases extending it. Civil damages and criminal punishments for defamation would be unencumbered by constitutional restraints. States would be free to punish disfavored speakers and adopt onerous laws targeting speech and press in an attempt to control public dialogue.

While not eventualities, these fears are far from unreasonable. The Court has shown a willingness to overturn decades-old cases, throwing into disarray areas of law previously governed by national, constitutional standards.[141] And it has done so under the auspices of history. This Article proceeds with an examination of the historical record as required by those cases, including, specifically, *New York State Rifle & Pistol Association, Inc. v. Bruen*. There, the Court said that it interprets the Second Amendment by reference to the text as informed by history.[142] The Court added, as important here, that this approach "accords with how we protect other constitutional rights," including the First

140. Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2455 (2022) (Thomas, J., dissenting from the denial or certiorari) (quoting Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).

141. *See generally, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

142. *See Bruen*, 142 S. Ct. at 2129–30.

Amendment.[143] Thus, there is little reason to believe that the presently constituted Court would not undertake a similar inquiry in the First Amendment context.

To determine what history tells us about any particular question, the Court in *Bruen* instructed that there are certain categories of historical evidence that are most relevant, including the views of legal scholars at the Founding and the Reconstruction.[144] Consistent with this direction, what follows is an analysis of Founding- and Reconstruction-era legal treatises and how they viewed Blackstone's influence on the public's understanding of the First Amendment. This analysis is especially necessary because prior scholarship has offered only conclusory assessments of these early texts' treatment of press freedom, which has led to conflicting conclusions. Some scholars have concluded that these early commentators embraced Blackstone's definition of liberty of the press.[145] Others have been less confident.[146] And still, others, like Roscoe Pound, have said that the early academy rejected Blackstone.[147] As we will see, Pound turned out to be right.

143. *Id.* at 2130.

144. *Id.* at 2127–28 (noting that views of legal scholars around the Founding and the Reconstruction were one of four "different types of sources" courts should consider in "canvass[ing] the historical record"); *see also* District of Columbia v. Heller, 554 U.S. 570, 606 (2008) (reviewing treatises by St. George Tucker, William Rawle, Joseph Story, Thomas Cooley, James Kent, and Oliver Wendell Holmes to discern the meaning of the Second Amendment).

145. Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 23 (2011) ("[T]he leading commentators in the first half of the nineteenth century hewed to Blackstone . . . ."); *see also* BIRD, *supra* note 11, at 50 (arguing that Story "explained freedoms of press and speech by paraphrasing and embracing Blackstone[]"); Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1572 (2008) ("James Kent . . . followed Blackstone by equating freedom of the press with a freedom from prior restraint.").

146. *See* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 199 (2001) ("Story's views on the First Amendment were consistent with Blackstone . . . ."); Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, the Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1174 n.353 (1993) ("Story seems both to embrace Blackstone's analysis of prior restraint and to justify suppression of items adjudged at trial to have a 'pernicious tendency.'").

147. *See* Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 651 (1916) (arguing that neither Story nor Cooley accepted Blackstone); *see also generally* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2009) (discussing some commentators and their relationship to Blackstone).

A. The Early Commentators

Early U.S. commentators rejected Blackstone with near unanimity. Tunis Wortman and St. George Tucker stressed that freedom of the press in the United States could not be confused with liberty of the press at English common law. That risked too great an interference with public dialogue about public individuals and public matters. Instead, they argued, freedom of the press in the United States should be interpreted broadly, consistent with the need for robust public discussion in a republican government. Thomas Cooper would have thrown out the law of libel altogether—at least insofar as libel lawsuits interfered with democratic debate. Others, like James Kent, similarly emphasized the conflict between libel and republicanism—as did Nathan Dane and Joseph Story, who adopted views broader than Blackstone's. Just one of these early commentators, William Rawle, who prosecuted many defendants for violating the Sedition Act of 1798, adopted Blackstone's definition uncritically.

1. Tunis Wortman

In 1800, while the Sedition Act remained in effect, Tunis Wortman, a New York lawyer, published *A Treatise Concerning Political Enquiry, and the Liberty of the Press*.[148] Prior to the introduction of printing in Europe, he began, there was nothing but "a dark and dismal gloom."[149] The instrument of the press, however, "afforded a new and powerful spring to human genius and activity."[150] Through the diffusion of knowledge, the press was "possessed of extensive influence upon Government, Manners, and Morals."[151] As a result, government became "more cautious and deliberate" and ambition "dread[ed] that vigilant guardian of Public Liberty, whose eye can penetrate, and whose voice be heard, in every quarter of the State."[152] One of the chief benefits of the press was that it "harmonize[d] with the establishment of the Representative System."[153]

The press was susceptible to abuse too though. It could either display "an interested partiality towards the Government," or it could display "a wanton or designing misrepresentation of its measures."[154] The government should guard against both forms of abuse because each

148. WORTMAN, *supra* note 13, at 256.
149. *Id.* at 243.
150. *Id.* at 244.
151. *Id.* at 245.
152. *Id.* at 245–46.
153. *Id.* at 246.
154. *Id.* at 248.

"evil equally consist[ed] in a deviation from the Truth."[155] Still, of the two evils Wortman believed that "Servility and Flattery" posed a greater risk than libels on the government.[156] But, he complained, the law focused on misrepresentations of the government and not on flattery. This left him to ask: "Why this extreme solicitude to shield a Government from Licentiousness, and yet this lethargic inattention to the poison which lurks in Flattery?"[157]

Wortman then questioned Blackstone's view of criminal libel. As to Blackstone's premise that truth was irrelevant because criminal libel protected against breaches of peace, he wrote, "[t]ruth can never be a libel" and any other conclusion was "the most palpable injustice."[158] A system that outlawed truth rendered the "political magistrate inviolable" and protected him "from punishment or animadversion."[159] "To maintain such a doctrine," he said, "is to declare open war against Political Enquiry, entirely destroy the responsibility of the Magistrate, and establish the throne of Absolute Despotism upon the ruins of Civil Liberty."[160]

Wortman finally examined Blackstone's views on liberty of the press. He called Blackstone's narrow definition of that liberty "extremely imperfect" and "fallacious in the extreme."[161] "Of what use," he questioned, "is the liberty of doing that for which I am punishable afterwards?"[162] If Blackstone's definition were applied elsewhere, it could be said that one had "liberty to perpetrate . . . murder" so long as he thought it "proper to expose" himself to "penalties annexed" to that crime.[163] Instead, Wortman wrote, "[i]t cannot be said that any Liberty of the Press is established by law, unless the publication of Truth is expressly sanctioned, and it is particularly ascertained what species of writings shall be comprehended under the title of Libels."[164]

155. *Id.*
156. *Id.*
157. *Id.* at 249.
158. WORTMAN, *supra* note 13, at 252.
159. *Id.*
160. *Id.*
161. *Id.* at 256.
162. *Id.*
163. *Id.*
164. *Id.* at 256–57. Wortman also challenged Blackstone's views on civil libels, although he was more open to civil consequences for abuses. *Id.* at 259. Still, he disagreed with the Blackstonian view that the common law of libel should be more protective of public officials than private individuals. Instead, he said, "[l]et the Officer be placed upon the same footing with a private individual." *Id.* at 259. And, he added, civil punishments should be limited to "malignant Slanderer[s]" and "adequate satisfaction" should be owed only to those who were "unjustly stigmatized." *Id.*

2. St. George Tucker

In October 1802, newspapers solicited subscribers interested in an American edition of Blackstone's *Commentaries* that would include references to the Constitution and laws of the United States.[165] St. George Tucker, a law professor at William and Mary, would be its author, interspersing notes throughout the *Commentaries* and adding an appendix containing "notes of a more considerable length."[166] One promised appendix was on "the freedom of the press, in the United States."[167] Two years after the Sedition Act expired in 1801, Tucker's edition of Blackstone's *Commentaries* was published.[168]

These "800 pages of annotations and 1,000 footnotes w[ere] not a memorial to Blackstone but 'an engagement of it in combat.'"[169] His version of the *Commentaries* was quickly recognized as a valuable contribution and later commentators argued that it, rather than Blackstone's English edition, was the "instant success" that secured the influence of Blackstone's *Commentaries* in early America.[170] As one later commentator explained, "Tucker was the most significant legal scholar of the early nineteenth century, particularly after publication" of his edition of the *Commentaries*.[171] Tucker's *Commentaries* thus constitutes the earliest and most detailed analysis of Blackstone's views on liberty of the press.

Tucker strongly disagreed with Blackstone. Initially, Tucker noted that *scandalum magnatum*, medieval statutes summarized by Blackstone that made criticism of public officials a crime, were never "in force in Virginia."[172] Tucker also questioned several of Blackstone's other summaries, including that libels of public officials were especially dangerous as they could cause a "breach of the public peace," that it mattered not whether the libel was published publicly or to its target, and

165. *See, e.g.*, *Judge Tucker's Blackstone: Proposals for Publishing an American Edition of Blackstone's Commentaries*, THE VIRGINIA ARGUS, Oct. 9, 1802, at 4.

166. *Id.*

167. *Id.*

168. *See On Monday Next Will be Published at Duane's Store Pennsylvania Avenue: Blackstone's Commentaries*, NAT'L INTELLIGENCER & WASH. ADVERTISER, Nov. 28, 1803, at 4.

169. Schafer, *supra* note 9, at 139 (quoting Robert M. Cover, *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 70 COLUM. L. REV. 1475, 1476 (1970)).

170. Alschuler, *supra* note 20, at 11; *see also Impeachment of Judge Chase*, NAT'L INTELLIGENCER & WASH. ADVERTISER, Aug. 26, 1805, at 2; *see also* Minot, *supra* note 18, at 1361.

171. Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1112 (2006).

172. 1 TUCKER, *supra* note 13, at 88 n.15.

that truth was irrelevant.[173] According to Tucker: "When we consider the source from whence these doctrines have been brought to us, *the reasonableness of them ought to be examined before we yield our full assent to all of them*."[174]

Tucker then arrived at Blackstone's definition: "[T]he liberty of the press, properly understood, is by no means infringed or violated" by punishments for "seditious[] or scandalous libels."[175] That liberty meant only "laying no previous restraints."[176] In response, Tucker added a cross-reference and a note, both refuting Blackstone's views. The cross-reference referred to an earlier note challenging the constitutionality of the Sedition Act. There, Tucker wrote that the Act "probably excited more apprehension, and greater indignation in many parts of the U. States, and particularly in Virginia, than any other measure of the federal government had done before."[177] Many believed the law to be the "most flagrant violation of the constitution of the United States."[178] Kentucky's and Virginia's legislatures declared the Act unconstitutional, and it expired in 1801.[179]

In the note, Tucker reproduced the Virginia Bill of Rights' press freedom clause, Virginia's preamble to the ratification of the U.S. Constitution, which declared that "the liberty . . . of the press cannot be cancelled, abridged, restrained or modified, by any authority of the United States," and the First Amendment.[180] He also quoted from a 1798 letter by Charles Cotesworth Pinckney, John Marshall, and Elbridge Gerry in response to the French foreign minister's complaints about "calumnies against the Republic, its Magistrates, and its Envoys" in American newspapers:

> The genius of the constitution cannot be over-ruled by those who administer the government. Among the principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the government should contemplate with awful reverence, and approach only with the most cautious circumspection, there is none of which the importance is more deeply impressed on the public mind than the liberty of the press.[181]

173. 4 TUCKER, *supra* note 13, at 150.
174. *Id.* at 150 n.19 (emphasis added).
175. *Id.* at 151.
176. *Id.*
177. *Id.* at 123 n.9.
178. *Id.*
179. *See id.*
180. *Id.* at 153 n.20.
181. *Id.*

Republicanism drove Tucker's rejection of Blackstone. By the First Amendment, the Constitution secured to the People the "unlimited right" to "enquire into, censure, approve, punish or reward their agents."[182] In a representative government, a constituent could not "be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."[183] In the United States, freedom of the press sat upon a "visible solid foundation" in the form of positive prohibitions of interference in state and federal constitutions.[184] Thus, the Blackstonian doctrine "that the liberty of the press consists only in this, that there shall be no previous restraint . . . , is not applicable to the nature of our government, and still less to the express tenor of the constitution."[185]

Tucker saved his greatest challenge to Blackstone for his appendix. He declared that the "right of personal opinion is one of those absolute rights which man hath received from the immediate gift of his Creator, but which the policy of all governments . . . hath endeavoured to restrain."[186] One aspect of that right was freedom of conscience.[187] The other was "liberty of speech and of discussion in all speculative matters, whether religious, philosophical, or political."[188] That latter liberty "consist[ed] in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject."[189]

Especially important was the right to inquire of and examine "the expediency or inexpediency of all public measures."[190] This included inquiry into the "conduct of public men."[191] The right was, as Wortman previously said, "without restraint, except as to the injury of any other individual, in his person, property, or good name."[192] And, in fact, in the United States, "the press had always exerted a freedom in canvassing the merits, and measures of public men of every description."[193] By ensuring such freedom in their governments, individuals could prevent "tyranny over the human mind," which could never come to pass so long as "the organ by which our sentiments are conveyed . . . was free."[194]

182. 1 TUCKER, *supra* note 13, at app. at 297.
183. *Id.*
184. *Id.*
185. *Id.* at app. at 298.
186. 1, pt. 2 TUCKER, *supra* note 13, at app. at 3.
187. *Id.* at app. at 4.
188. *Id.*
189. *Id.* at app. at 11.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at app. at 21.
194. *Id.* at app. at 11.

In England, Tucker wrote, the press was long subjected to prior restraints until Parliament refused to renew them in 1694.[195] By refusing to perpetuate the use of prior restraints, Parliament "established the freedom of the press in England."[196] That freedom, however, was not the same as in the United States: "[A]lthough this negative establishment may satisfy the subjects of England, the people of America have not thought proper to suffer the freedom . . . of the press to rest upon such an uncertain foundation."[197] Pointing to the controversy over a lack of a bill of rights to the Constitution, Tucker explained that the First Congress proposed what became the First Amendment; for their part, Tucker's fellow Virginians adopted a similar provision in their bill of rights and declared at the ratifying convention that "freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated."[198] These early men, he said, were "tenacious of this right" and "so reasonably jealous" of any potential violations of it.[199]

But how could such a broad freedom be fair to the public servants who were subjected to the press's criticisms?[200] As an initial matter, no one forced public servants into service against their own will.[201] If public servants could not withstand criticism, they could resign.[202] As Tucker put it, "if censure be too galling to his feelings, he might avoid it in the shades of domestic privacy."[203] If "flattery be the only music to his ear, or the only balm to his heart" then "the indignation of the people ought immediately to mark him, and hurl him from their councils, and their confidence forever."[204]

A republic could only work if citizens could "inquire into the conduct of their agents."[205] This meant that they must be allowed to "scrutinize their motives, sift their intentions, and penetrate their designs."[206] Thus, those republicans believing that America owed its existence to freedom of the press denied the Sedition Act's constitutionality.[207] True, supporters of the Act invoked Blackstone, contending that the Act's punishments did not offend press freedom because that phrase meant only "permission to publish without previous

195. *See id.* at app. at 12.
196. 1, pt. 2 TUCKER, *supra* note 13, at app. at 12.
197. *Id.* at app. at 13.
198. *Id.*
199. *Id.*
200. *See id.*
201. *See id.* at app. at 15.
202. *See id.* at app. at 15–16.
203. *Id.* at app. at 16.
204. *Id.*
205. *Id.* at app. at 15.
206. 1, pt. 2 TUCKER, *supra* note 13, at app. at 15.
207. *Id.*

restraint."[208] But Tucker rejected this argument, explaining that such an understanding was "only to be found in the theoretical writings of the commentators on the *English* government" who interpreted it consistent with *their* tradition.[209]

Were it otherwise, Americans risked having their republic turned into an "oligarchy, aristocracy, or monarchy, according to the prevailing caprice of the constituted authorities."[210] Accountability of public officials vanished when "absolute freedom of discussion" was prohibited.[211] For that reason, freedom of the press was a "fundamental principle" that was "engrafted in the constitution."[212] It was a sentiment that, unlike liberty of the press in England, "was generated in the American mind, by an abhorrence of the maxims and principles of that government which they had shaken off" and by "extrajudicial dogmas, of the still odious court of star-chamber."[213]

3. Nathan Dane

In 1823, Nathan Dane, a Massachusetts representative at the Continental Congress, wrote the book that created Harvard Law: *A General Abridgment and Digest of American Law*. It was one of the first books covering the entirety of American law,[214] and it separately dealt with defamation as a tort and a crime (much as Blackstone had).[215] According to Dane, "[i]t is often difficult in a free country to draw the

208. *Id.* at app. at 18.
209. *Id.* (emphasis added).
210. *Id.* at app. at 16.
211. *Id.*
212. *Id.*
213. *Id.* Still, as with Wortman, Tucker believed that civil remedies should be available to those libeled. *Id.* at app. at 28. "Heaven forbid," he wrote, "that in a country which boasts of rational freedom . . . the most valuable of all should be exposed without remedy, or redress, to the vile arts of detraction and slander!" *Id.* The First Amendment left it to state governments to regulate such speech. *See id.* Critics of public men were then "bound to adhere strictly to the truth; for any deviation from the truth is both an imposition upon the public, and an injury to the individual whom it may respect." *Id.* at app. at 29. Thus, while "the letter and spirit" of the Constitution "wisely prohibit[ed] the congress of the United States from making any law, by which the freedom of speech, or of the press, may be exposed to restraint or persecution under the authority of the federal government" for "injuries done the reputation of any person, as *an individual*, the state-courts are always open." *Id.* at app. at 29–30. This echoed his earlier sentiment as to state law: "there, no distinction is made between one individual and another; the farmer, and the man in authority, stand upon the same ground: both are equally entitled to redress for any false aspersion on their characters, nor is there anything thing in our laws or constitution which abridges this right." 1 TUCKER, *supra* note 13, at app. at 299.
214. *See* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 40 (1998).
215. *Compare* 2 DANE, *supra* note 13, at 565 (describing defamation as a tort), *with* 7 DANE, *supra* note 13, at 51 (describing defamation as a public wrong).

true line between a libel indictable and a publication to be allowed as a fair investigation of public measures, and of the characters of public men."[216] The problem being that freedom of the press could not be preserved if freedom of inquiry was not allowed, but, so too, government could not be preserved if it was "maliciously misrepresented."[217]

Dane then moved on to some finer points. Falsity was material because of its "pernicious tendency."[218] But even a true libel could "produce a vast deal of public mischief."[219] As such, what was material was the manner and intent in which the libel was made: "The same act, in one state of things, may be innocent, as when done . . . without malice or evil intent . . . and in another state of things it may be criminal, as where it is done intending to injure."[220] From this, Dane offered a definition of freedom of the press, writing that it was "preserved whenever the party is allowed to publish the truth, with candor and fairness, and in a manner shewing his object is the public good, and not to vilify character, or to make a measure odious, merely because not adopted by his party, or by particular men."[221]

But Dane recognized there were still definitional problems. "All agree . . . that the licentiousness of it is to be punished," but when was the press "used in a licentious manner"?[222] Dane referred to the common law to answer that question, but he recognized that the common law conflicted with statutes and state constitutions in the United States.[223] While truth was, historically, no defense to a criminal libel, it was a defense in the Sedition Act and by the constitutions of several states.[224] Still, Dane attempted to harmonize the common law with these developments. He argued that the definition of freedom of the press Hamilton advocated for in *Crosswell*—that it consisted in "publishing the truth, from good motives and for justifiable ends, though it reflect on government, on magistrates, or individuals"—was consistent with the common law because a "piece written with good motives, and on a proper occasion, rarely provokes a breach of the peace, or tends to it."[225]

216. 7 DANE, *supra* note 13, at 51.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 52.
221. *Id.* at 51.
222. *Id.* at 51–52.
223. *See id.* at 52.
224. *See id.*
225. *Id.* at 53.

4. William Rawle

Shortly after Dane published his *Abridgement*, William Rawle, a Pennsylvania lawyer from a loyalist family, published *A View of the Constitution of the United States of America*. Even among conservative contemporaries, Rawle's work was an outlier. In a discussion about the First Amendment, Rawle appeared ready to offer a broad definition of press freedom. He said that life was of "little value" where such rights were denied.[226] Nor were these freedoms only about personal autonomy: "The foundation of a free government begins to be undermined when freedom of speech on political subjects is restrained."[227] After all, "printing illuminat[ed] the world."[228]

Yet, Rawle went on to write that the liberty of press could not be "abused with impunity."[229] On the contrary, "[r]emedies will always be found while the protection of individual rights and the reasonable safeguards of society itself form parts of the principles of our government."[230] The liberty of the press meant only what Blackstone had said: "A previous superintendency of the press, an arbitrary power to direct or prohibit its publications are withheld, but the punishment of dangerous or offensive publications . . . is necessary for the peace and order of government."[231]

Rawle's adoption of Blackstone is out of step with other commentators but ultimately unsurprising. Rawle was the first United States Attorney for Pennsylvania, and in that role he repeatedly prosecuted printers under the Sedition Act.[232] In one instance, President Adams needled Rawle, writing that if he did "not think this paper libellous, he is not fit for his office."[233] Rawle initiated the prosecution—keen "not to appear unfit for office."[234] In light of this, had Rawle rejected Blackstone in favor of a broader view of press freedom, he would have been admitting that the prosecutions he led under the Act were constitutionally suspect.

5. James Kent

In 1826, James Kent, the former Chief Justice of the then-New York Supreme Court, published *Commentaries on American Law*.[235] While he

226. RAWLE, *supra* note 13, at 119.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 119–20.
231. *Id.* at 120.
232. *See* WENDELL BIRD, CRIMINAL DISSENT 63 (2020).
233. *Id.* at 231.
234. *Id.* at 232.
235. *See generally* 1 KENT, *supra* note 13.

recognized that libels on public officials might harm both public and private interests, he said that it was just as important that liberty of speech and press be preserved.[236] "The liberal communication of sentiment . . . in respect to the character and conduct of public men, and of candidates for public favor," he said, was "essential to the judicious exercise of the right of suffrage."[237] Liberty of the press enabled "control over the[] rulers, which resides in the free people of these United States."[238] In the United States, this liberty had become "a constitutional principle" that "every citizen may freely speak, write, and publish his sentiments . . . being responsible for the abuse of that right" and further that "no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press."[239]

After a lengthy discussion of the history of libel in England and the United States, Kent concluded that the "weight of judicial authority undoubtedly is, that the English common law doctrine of libel is the common law doctrine in this country, in all cases in which it has not been expressly controlled by constitutional or legislative provisions."[240] Yet, after reviewing many of those constitutional and legislative provisions, he argued that "the current of opinion seems to have been setting strongly, not only in favour of erecting barriers against any previous restraints," but also "in favour of the policy that would diminish or destroy altogether every obstacle or responsibility in the way of the publication of truth."[241]

While Kent believed that the "tendency of measures in this country has been to relax too far the vigilance with which the common law surrounded and guarded character," he still supported abandoning the common law insofar as it barred truth as a defense.[242] Even the Sedition Act provided for a truth defense, and, in civil cases, truth could be pleaded as a defense.[243] The availability of a truth defense could be traced to Kent himself who, as a judge in *Croswell*, adopted as "perfectly correct" Hamilton's definition of press freedom as the right to state the truth from good motives and for a justifiable purpose.[244]

Kent then considered whether it should matter if a statement were about a public official and related to their public conduct. A defendant, he argued, should have greater protections in such cases as compared to

236. *See* 2 KENT, *supra* note 13, at 14.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 17.
241. *Id.* at 19.
242. *Id.* at 19–20.
243. *See id.* at 20–21.
244. People v. Croswell, 3 Johns. Cas. 337, 393–94 (N.Y. 1804).

cases brought by private plaintiffs. In cases concerning private plaintiffs, "the public have no interest in the detail of private vices and defects."[245] Moreover, such libels were more likely to have been made with malice.[246] Publishing even the truth "maliciously, and with an evil intent, and for no good purpose," suggested that it was published only to cause "private misery."[247] But the same principles did not attach to cases implicating a "candidate for any public trust."[248]

6. Thomas Cooper

Thomas Cooper was part scientist, inventor, and philosopher-polemist.[249] He also advocated for defendants prosecuted under the Sedition Act and himself faced charges and a trial under the Act. After Cooper published a broadsheet critical of Adams, Rawle prosecuted Cooper in 1800.[250] The prosecution landed Cooper in jail for six months and cost him $400 in fines.[251] But he was soon appointed to a judgeship and, after his removal from that post, he became a professor in Pennsylvania and South Carolina.[252] His prosecution forever shaped how he understood liberty and libel.

In 1830, Cooper, who Jefferson called "one of the ablest men in America,"[253] published *A Treatise on the Law of Libel and the Liberty of the Press*.[254] His treatise addressed "freedom of discussion and the liberty of the press, as relating to questions of a general or public nature only."[255] That question, he wrote, was the most important one in the "whole range of human inquiry."[256] It was a question of "whether the people should doom themselves to voluntary ignorance, to imperfect

245. 2 KENT, *supra* note 13, at 21.
246. *See id.*
247. *Id.* at 22.
248. *Id.* at 21.
249. *See* Eugene Volokh, *Thomas Cooper, Early American Public Intellectual*, 4 N.Y.U. J.L. & LIBERTY 372, 374 (2009).
250. *See* Wendell Bird, *New Light on the Sedition Act of 1798: The Missing Half of the Prosecutions*, 34 L. & HIST. REV. 541, 573 n.193 (2016). In his treatise, Cooper said that "Rawle was a prominent character among the ultra federal party, during the period emphatically called in Pennsylvania, the reign of terror." COOPER, *supra* note 13, at 64.
251. *See* Volokh, *supra* note 249, at 378.
252. *See id.* at 379–80.
253. Seymour S. Cohen, *The Correspondence of Thomas Jefferson and Thomas Cooper: A Previously Unpublished Manuscript of Dumas Malone*, 147 PROC. OF THE AM. PHIL. SOC'Y 39, 49 (2003) (quoting Letter from Thomas Jefferson to Joseph C. Cabbell (June 7, 1810)).
254. *See generally* COOPER, *supra* note 13.
255. *Id.* at 40.
256. *Id.* at 39.

knowledge, and place themselves, bound and blindfold, under the guidance of the men who assume to govern them."[257]

Libel was the chief instrument governors used to control criticism by the governed.[258] But recently, Cooper wrote, people had begun to conclude that knowledge could be found only through public discussion.[259] Therefore, he argued that "*no limit* can be put to the right of discussion, *by previous prohibition or by subsequent punishment*":

> If I show that the whole system of the law of libel, in political questions, is based upon the necessity of shutting out all argument and inquiry as to the character and conduct of men in high office—all investigation of errors and abuses in the laws or government of a country; that the whole tendency of the law of libel is to deprive the people of the means of information as to the extent of their own rights and privileges, and the infringement made upon them by the bad intentions, mistakes, or misconduct of their public servants; that the manifest effect, as well as design of the law of libel, is to blind the eyes of the people, and not to dispense, but withhold useful information,—*I say, if I show this, satisfactorily, to the mind of a reasonable man, I assign sufficient cause to abolish the whole of this iniquitous system*.[260]

Critical of the English law of libel at every turn, Cooper believed that the ruling class in England had corrupted libel law in the Star Chamber. As he put it, libel in England had been "in a continued state of doubt and uncertainty" since the establishment of that court, and such cases had "almost always" been decided in favor of those in power.[261] The Star Chamber began down this path in 1606 in the case of *de libellis famosis*, which established seditious libel. From then on, there had been a "constant struggle of the court, faithfully supported by the bench . . . to blind the eyes of the public, as to the measures of government and the conduct of its officers."[262]

Nearly the whole of libel law as then known could be traced to the Star Chamber, which Cooper argued was not properly viewed as a common law court. Resort to the Star Chamber's precedent was nothing more than a resort to corrupted doctrine derived from a polluted source.[263] Indeed, the law of libel that developed in the seventeenth century had before been unknown in the common law and, instead, was

257. *Id.*
258. *See id.* at 88 ("The doctrine of libel is . . . a doctrine of power.").
259. *See id.* at 39.
260. *Id.* at 39 (emphases added).
261. *Id.* at 76–77.
262. *Id.* at 66.
263. *See id.* at 99.

merely comprised of enactments of "laws" by judges to suit "the views and purposes of those who govern."[264] The "whole system" had been "calculated to screen the government of the nation, the ministers, the public officers of every description . . . from public investigation."[265]

Moreover, the law of the Star Chamber, as summarized by Blackstone, did not account for the liberty of the press under the state or federal constitutions.[266] Those constitutional provisions, Cooper explained, took precedence over prior English law.[267] Nor did the "illiberal, time-serving character of the British law of libel" harmonize "with all our republican institutions; and which, therefore, neither ought to be, nor can be, the law here."[268] Thus, he urged his fellow U.S. judges to "universally feel and act upon their own superiority" over those in England, "and occupy the vantage ground, which the spirit of our free government affords them."[269]

7. Joseph Story

In 1833, Joseph Story published *Commentaries on the Constitution of the United States*. By that time, Story had been a Supreme Court justice for more than 20 years. With his *Commentaries*, he aimed to write the definitive treatise on federal law and to dispel Tucker's limited view of the scope of the federal Constitution.[270] It was lauded by Chief Justice John Marshall and others as "an 'incomparable monument of sound and healthy and incontestable constitutional principles.'"[271] The *Commentaries* also had detractors. It was "damned" by future Secretary of State Abel Upshur "as a 'regrettable' collection of 'mere dogmas.'"[272]

In his *Commentaries*, Story discussed freedom of the press in the context of the Bill of Rights. According to Story, the First Amendment was never meant to "secure to every citizen an absolute right to speak, or

264. COOPER, *supra* note 13, at 76.

265. *Id.*

266. *See id.* at 78 (federal Constitution)*; see also id.* at 88 (state constitutions); *id.* at 102 (noting that Blackstone was "nothing to the purpose" even of the meaning of the "law of England").

267. *See id.* at 87; *see also id.* at 93 (noting that the common law must yield where it is "repugnant to that liberty [of the press], and as such is abrogated by the terms of our constitution").

268. *Id.* at 109.

269. *Id.*

270. *See generally* Kurt T. Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343 (2006).

271. H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1285 (1985) (quoting Letter from James Kent to Joseph Story (June 19, 1833), *in* 2 JOSEPH STORY, LIFE AND LETTERS OF JOSEPH STORY 134, 135 (William W. Story, ed. 1851)).

272. *Id.* (quoting ABLE UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT 53 (1840)).

write, or print, whatever he might please, without any responsibility."[273] Instead, it meant what Hamilton argued for in *Croswell*: "[E]very man shall be at liberty to publish what is true, with good motives and for justifiable ends."[274] Otherwise, it would "allow every citizen a right to destroy . . . the reputation, the peace, the property, and even the personal safety of every other citizen."[275] No civil society, Story wrote, could exist under such freedom.

Historically, some countries punished criticisms of public persons made "in terms of the strictest truth," and the history of liberty of the press in England would "justify this statement."[276] After recounting the end of licensing in England, Story explained that the liberty of the press in that country stood only "upon this negative foundation," that is, the absence of a prior restraint.[277] It had never become "an article of [England's] numerous bills of rights."[278] Even after the Glorious Revolution, while other rights were singled out for protection in the Bill of Rights of 1689, England failed to single out liberty of the press for protection.[279] In short, the liberty in England was "frail and uncertain."[280]

Turning to Blackstone, Story observed that he was unaware of any state court having expressly "repudiated" Blackstone's doctrine.[281] Several states, including Massachusetts, Louisiana, and South Carolina, had affirmed Blackstone's understanding of the liberty of the press.[282] Others had gone beyond Blackstone and adopted Hamilton's broader definition.[283] And it was these cases and state constitutions, especially those implicating "libels for official conduct," that were "exceedingly strong to show, how the general law is understood" despite Blackstone.[284]

Story then turned to the Sedition Act, asking whether the federal government had the power, not to enforce a prior restraint, but to "punish[] the licentiousness of the press."[285] Story abstained from answering that question though. Instead, he merely recognized that the Sedition Act was "immediately assailed, as unconstitutional," even

273. 3 STORY, *supra* note 13, at 731.
274. *Id.* at 733.
275. *Id.* at 732.
276. *Id.* at 733–34.
277. *Id.* at 735.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 741.
282. *See id.* at 742.
283. *See* 3 STORY, *supra* note 13, at 742.
284. *Id.*
285. *Id.* at 743.

though "many professional men, and judges, and legislatures" argued in favor of its constitutionality.[286]

Story also launched an attack on Tucker, calling him a "learned American commentator" but saying that his view on freedom of the press was not "very easy to ascertain."[287] Tucker, he wrote, appeared to argue that freedom of the press meant freedom from prior restraints "as in Great Britain," but also from "subsequent penalty of laws."[288] Elsewhere, Tucker argued that "liberty of the press does not include the right to do injury to the reputation of another," including of private and public men.[289] And still elsewhere, Tucker added that "every individual certainly has a right to speak, or publish his sentiments on the measures of government."[290] This meant to speak "without restraint, control, or *fear of punishment for so doing*."[291] It was unclear, Story argued, why Tucker appeared to embrace these allegedly contradictory definitions.[292]

B. The Later Commentators

While the early commentators offer a sense of what the Founders' legal academy believed about freedom of the press, the later commentators provide insight into how those beliefs developed before and after the Fourteenth Amendment's ratification.[293] As with the earlier treatises, these later commentators also questioned Blackstone's narrow

286. *Id.* at 744 & n.2.
287. *Id.* at 738.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 738–39.
292. In 1840, Story followed up his *Commentaries* with an abridgement for popular consumption. That abridgment contained none of the discussion about the Hamiltonian definition. *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 261–64 (1840). Instead, the only sections included were those contending that freedom of the press did not mean the freedom to write what anyone wished. On the contrary, that notion was "too wild to be indulged by any reasonable man." *Id.* at 261. Story then continued into a truncated discussion of the history of liberty of the press, invoking the Blackstonian definition. He concluded with a line that was also in the unabridged work, "liberty of private sentiment is still left; the disseminating, or making public of bad sentiments, destructive of the ends of the society, is the crime. . . . A man may be allowed to keep poisons in his closet; but not publicly to vend them as cordials." *Id.* at 264. It is unclear whether his facially narrower account in the abridgment represented a narrowing of his understanding of press freedom or was merely reflective of limited space to discuss the issue.
293. The Court has questioned reliance on Reconstruction-era history, but its reasoning for excluding this history is unclear, unpersuasive, and inconsistent with prior case law. *Compare* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022) ("[W]e must also guard against giving postenactment history more weight than it can rightly bear."), *with* District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (describing history of the Second Amendment "in the century after its enactment" as a "critical tool of constitutional interpretation").

views of liberty of the press. Thomas Cooley published his celebrated treatise on constitutional limitations in 1868, which helped shape a still youthful nation's understanding of constitutional law. In it, he explicitly rejected Blackstone and instead relied on the nature of constitutional protections in the United States. Others like Samuel Merrill sought to summarize libel cases heard in American courts rather than English ones—itself a demonstration of the waning influence of English libel law in the nineteenth century.

1. Joseph Alden

In 1866, Joseph Alden, a minister, academic, and then-editor of the *New York Observer*, published his work *The Science of Government in Connection with American Institutions*. Alden's work does not occupy the same rarified air as many of his contemporaries' works. Nevertheless, it remains important because Holmes thought it good enough to use as a guide for his lectures to students at Harvard.[294] Alden's book was not "very sophisticated" and instead laid out elementary principles of the law.[295]

Alden adopted a narrow view of freedom of the press. In advancing this view, however, he demonstrated just how expansive freedom of the press had come to be understood in the last half of the nineteenth century. According to Alden, "[f]reedom of speech and of the press is essential to liberty."[296] But he warned that such unbridled freedoms might result in a press susceptible to abuse.[297] While he recognized that such abuse was a great evil to be guarded against, he said that "greater evils would follow the power of the government to interfere" with freedom of the press.[298]

Alden then questioned contemporary views about press freedom that he classified as "extravagant and unsound"—borrowing language from Story. A licentious press did not equate to a free press and was "incompatible with the existence of a free government."[299] He then invoked Blackstone: "An eminent jurist has remarked that freedom of the press consists in laying no *previous* restraints upon publications, and not in freedom for criminal matter when published."[300] And he invoked Kent's proposition that it "has become a constitutional principle in this country that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right"

294. *See* Bogen, *supra* note 106, at 116.
295. *Id.*
296. ALDEN, *supra* note 13, at 200.
297. *See id.*
298. *Id.*
299. *Id.*
300. *Id.* at 200–01.

and further that "no law can rightfully be passed to restrain or abridge the freedom of the press."[301] He did not venture a guess as to whether Blackstone's or Kent's definition was the proper one.

2. Thomas Cooley

In 1868, Thomas Cooley, the Chief Justice of the Michigan Supreme Court, published *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. The treatise was "massively popular."[302] It was also the "'first systematic treatment of state constitutional law as a distinct subject.'"[303] As Tucker had with the Founding, Cooley's *Treatise* provided some of the most detailed evidence of the meaning of press freedom during the Reconstruction.

Cooley began by recognizing that in the United States freedom of the press had been "almost universally regarded [as] a sacred right, essential to the existence and perpetuity of free government."[304] This right, which was protected both in the Constitution and in the various state constitutions, formed "a shield of protection to the free expression of opinion in every part of our land."[305] These provisions did not "create new rights" but protected "the citizen in the enjoyment of those already possessed."[306]

At common law, "liberty of the press was neither well protected nor well defined."[307] Traditionally, printing was viewed "as an engine of mischief, which required the restraining hand of government."[308] In England, "censors were appointed" and "[t]he government assumed to itself the right to determine what books might be published."[309] Thus, "[m]any matters, the publication of which now seems important to the . . . proper observation of public officers by those interested in the discharge of their duties, were treated by the public authorities as offences against good order."[310]

301. *Id.* at 201.
302. D.C. v. Heller, 554 U.S. 570, 616 (2008).
303. Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 193 (2002) (quoting 1 JAMES A. GARDNER, STATE EXPANSION OF FEDERAL CONSTITUTIONAL LIBERTIES: INDIVIDUAL RIGHTS IN A DUAL CONSTITUTIONAL SYSTEM xvi (1999)).
304. COOLEY, *supra* note 13, at 414.
305. *Id.*
306. *Id.* at 416–17.
307. *Id.* at 417.
308. *Id.*
309. *Id.*
310. *Id.* at 418.

Nor did the press fare well in the Colonies. Colonial authorities prohibited the publication of laws and punished anyone who did so.[311] Thomas Dongan, the royal governor of New York from 1683 to 1688, had been told to "suffer no printing," while other governors aimed to keep the presses out of their jurisdictions altogether.[312] As limits on the press relaxed, governments embraced secrecy as an alternative to the censor's control. Even the Constitutional Convention, Cooley observed, "sat with closed doors," as did the Senate until 1793.[313] Cooley thus stated what had become obvious by 1868: "[L]iberty of the press, as now exercised, is of modern origin."[314]

English commentators, he wrote, appeared to agree that liberty of the press meant only "liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship."[315] Cooley, however, disagreed. Even if one were to accept that liberty of the press was not a blank check to publish everything one wished, "the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions."[316] After all, it "might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications."[317]

Cooley believed that these guarantees protected individuals "in the free publication of matters of public concern, to secure their right to free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion."[318] They not only protected against prior restraints "but any action of the government by means of which it might prevent such free and general discussion of public matters."[319] In other words, freedom of the press meant "not only liberty to publish, but

311. *See id.* at 418–19.

312. *Id.* at 419.

313. *Id.* at 419–20. *But see* N.J. Media Grp., Inc. v. Ashcroft, 308 F. 3d 198, 210 (3rd Cir. 2002) (stating incorrectly that the House met in secret "until after the War of 1812").

314. COOLEY, *supra* note 13, at 420.

315. *Id.*

316. *Id.* at 421.

317. *Id.* Cooley maintained this view several years later when, in 1873, he edited Story's *Commentaries*. In a footnote to Story's discussion of the liberty of the press at common law, he minced no words: "If the 'freedom of the press' which the Constitution undertakes to preserve means no more than an exemption from a censorship of articles intended for publication, then it is obvious that the guaranty is as near worthless as possible." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 613 n.2 (Thomas M. Cooley, ed., 4th ed. 1873).

318. COOLEY, *supra* note 13, at 421–22.

319. *Id.* at 422.

complete immunity for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords."[320]

After summarizing the general rules of libel at common law, Cooley said that he was more concerned with the privileges that had since developed "for some reason of general public policy."[321] It was these privileges that "may be supposed to be within the constitutional protection."[322] They recognized that at times an individual has a duty to "speak freely and fully that which he believes."[323] One such duty arose in the context of government misfeasance. At common law, the government outlawed libels out of fear they would "induce a revolutionary spirit."[324] Cooley doubted that this approach had ever really been adopted in the United States.[325] The reason was simple: in a representative government, it would be "difficult to conceive any sound basis on which prosecutions for libel on the system of government can be based."[326] People "must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand."[327] The only restraint being that they were responsible for "exceed[ing] all proper bounds."[328]

In fact, according to Cooley, there were "certain cases where criticism upon public officers . . . is not only recognized as legitimate, but large latitude and great freedom of expression [is] permitted."[329] At times, it was a citizen's *duty* to criticize public officials.[330] Contrasting rulings in New York that privileged criticism when directed to a public body but not to the public at large, Cooley said that public sentiment was in favor of allowing "greater freedom of discussion."[331] Thus, in one case where the defendant had libeled the government, the jury found him not guilty after being instructed that if the publication "'was honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously, . . . they should acquit the defendant.'"[332]

320. *Id.*
321. *Id.* at 425.
322. *Id.*
323. *Id.*
324. *Id.* at 226.
325. *Id.*; *see also id.* at 229 ("The English common-law rule which made libels on the constitution or the government indictable . . . seems to us unsuited to the condition and circumstances of the people of American, and therefore to have never been adopted in the several States.").
326. *Id.* at 428.
327. *Id.* at 429.
328. COOLEY, supra note 13, at 429.
329. *Id.* at 431–32.
330. *Id.* at 435.
331. *Id.* at 439.
332. *Id.* at 432 (quoting Respublica v. Dennie, 4 Yeates 267 (Pa. 1805)).

Cooley then proposed a rule that liability should not attach to comments about a public official's public conduct so long as they were "*bona fide* remarks, whether founded in truth in point of fact, or justice in point of commentary, provided only they were an honest and *bona fide* comment."[333] As the case from which Cooley borrowed the rule explained, "all matters that are entirely of a public nature—conduct of ministers, conduct of judges, the proceedings of all persons who are responsible to the public at large—are deemed to be public property," and, as such, "all *bona fide* and honest remarks upon such persons may be made with perfect freedom, and without being questioned too nicely for either truth or justice."[334]

3. John Townshend

The same year Cooley published *Constitutional Limitations*, John Townshend, an unremarkable New York lawyer, published *A Treatise on the Wrongs Called Slander and Libel*.[335] As others had before him, Townshend, while repeating the definition of liberty of the press meaning only liberty from prior restraints, also adopted the Hamiltonian definition: "The liberty of the Press consists in the right to publish with impunity, truth with good motives and for justifiable ends, whether it respects governments, magistracy, or individuals."[336] Townshend was against expanding this right any further. Others, he observed, "argued that the exigencies of the business of a newspaper editor demand a larger amount of freedom."[337] But he disagreed: "A newspaper proprietor is not privileged as such in the dissemination of news, but is liable for what he publishes in the same manner as any other individual."[338]

333. *Id.* at 439.

334. *Id.* (quoting Gathercole v. Miall, 15 M. & W. 319, 331–33 (1846)). Ten years later, Cooley addressed the same issues in another treatise. *See generally* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT (1879). There, he admitted that the federal and state constitutions had been "careful to preserve the freedom of the press" but had not used the same care in providing a definition of that freedom. *Id.* at 217. Everyone agreed that "the freedom of the press implies exemption from censorship, and a right in all persons to publish what they may see fit, being responsible for the abuse of the right." *Id.* Yet, it was unclear what constituted an abuse. Nevertheless, it was clear to Cooley that freedom of the press had been "secured on public grounds, and the general purpose [was to] preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned." *Id.* This meant that freedom of the press meant freedom from prior restraints and "exemption afterward from liability for any publication made in good faith, and in the belief in its truth." *Id.* at 218.

335. *See generally* TOWNSHEND, *supra* note 13.

336. *Id.* at 342.

337. *Id.* at 343.

338. *Id.* (citing Scheckell v. Jackson, 64 Mass. (10 Cush.) 25 (1852)).

Nor did he think greater latitude should necessarily be given to critics of public officials, although he admitted that "isolated *dicta*" appeared to "favor the idea that person occupying a public situation is thereby rendered, personally, a subject of criticism."[339] Rather, Townshend said the law focused not on one's stature as a public official but instead on his public conduct: "'[I]f any part of [a public official's] public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position.'"[340]

To Townshend, then, a central facet of freedom of the press was that a newspaper "may comment freely on the acts of government, officers or individuals and indulge in occasional mirth and wit, and it is only when the character of the publication is malicious, and its tendency to degrade and excite to revenge, that is condemned."[341] As he wrote: "[B]eing a candidate for an office or for employment, in many instances affords a license or legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse did he not occupy the position of such a candidate."[342] Indeed, "'[n]o one can doubt the importance in a free government of the right to canvass the acts of public men, and the tendency of public measures; to censure boldly the conduct of rulers and to scrutinize the policy and plans of government.'"[343]

4. Oliver Wendell Holmes, Jr.

In 1873, Oliver Wendell Holmes., Jr., then a 32-year-old lawyer and editor of the *American Law Review*, published a new edition of Kent's *Commentaries*.[344] As Tucker had done with Blackstone, Holmes interspersed notes throughout Kent's *Commentaries* updating the law.[345] But, unlike Tucker, he treaded lightly, careful not to "encumber[] the text with frequent interruptions and an unmanageable body of notes": "Even on those occasions where the drift of current doctrine ran counter to propositions Kent had advanced in earlier editions, Holmes interpreted his role as that of one who was merely presenting the new cases."[346] This

339. *Id.* at 354; *see also id.* at 355 ("Apart from the obsolete statutes of *scandalum magnatum* there is no distinction of persons, nor any division of persons into public and private.").

340. *Id.* at 354 (citation omitted); *see also id.* (noting that "'whoever fills a public position, renders himself open to public discission'" (citation omitted)).

341. *Id.* at 345.

342. *Id.* at 202; *see also id.* at 336–38 (discussing same).

343. *Id.* at 345 (quoting JOSEPH STORY, STORY ON THE CONSTITUTION § 1888).

344. *See generally* 2 HOLMES, *supra* note 13.

345. 1 HOLMES, supra note 13, at vii*.

346. *Id.*; G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 125 (1995).

was so even though Holmes's assessment of Kent was that he had "no general ideas, except wrong ones."[347]

Consistent to form, when it came to Kent's discussion of libel, Holmes did not challenge him. Instead, he only provided brief updates. One related to "privileged communications."[348] Holmes explained that there were two kinds of privileged communications: "[T]hose absolutely privileged, although made with malice and without probable cause, and those privileged *sub modo* [i.e., qualified], or until actual malice or gross extravagance be shown."[349] As to the latter, "a communication fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs where his interest is concerned, is privileged, unless express malice be shown."[350] Among those various qualified privileges were "[f]air reports of judicial proceedings," but also "fair and reasonable comments on matters of public concern."[351] While then-existing American cases had excused even false statements made with probable cause, Holmes, citing English cases, wrote that "if a newspaper . . . falsely imputes dishonest motives . . . it is no defence that the imputations were believed to be true."[352]

5. Samuel Merrill

In 1888, Samuel Merrill, a lawyer and editor at *The Boston Globe*, published *Newspaper Libel, a Handbook for the Press*.[353] There, he lamented the lack of a legal reference guide for lay persons working in news.[354] Unlike some other treatise authors, Merrill wanted to focus best as he could on American cases relating to newspapers as opposed to English cases.[355]

"Despotic governments," he began, "are always intolerant of criticism."[356] The Star Chamber once ordered a man who had scandalized the Lord Chancellor to be "perpetually imprisoned," fined, and set "to be twice pilloried, and to lose both his ears."[357] Others had suffered similar fates, and it was only after the "gradual growth of popular liberty in

347. G. Edward White, *The Chancellor's Ghost*, 74 CHI.-KENT L. REV. 229, 230 (1998) (internal quotation marks and citation omitted).

348. HOLMES, *supra* note 13, at 22 n.1.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *See generally* MERRILL, *supra* note 13.

354. *See id.* at 3.

355. *See id.* at 4. Oddly, in his introduction, Merrill did invoke Blackstone and his views on press freedom, but also invoked Cooley and his views. He made no effort to rationalize the two. *See id.* at 9–38.

356. *Id.* at 209.

357. *Id.*

England" that "the right of free discussion of political affairs became better established."[358]

Aware of this history, the Colonies "united under a republican form of government," "considered all restraints removed, and for a time the acts and motives of political opponents were attacked with a degree of bitterness which has never since been equalled."[359] These abuses resulted in the Sedition Act, the constitutionality of which was assailed by Democratic-Republicans and even some Federalist printers.[360] While that Act expired, and the fines were repaid, ever since a "large proportion of the suits and prosecutions for libel in this country" had "been a result of political controversy."[361]

Merrill then canvased nineteenth-century cases recognizing privileges applicable to cases implicating the public interest. In one case where a newspaper falsely accused a city treasurer of not accounting for funds, the Minnesota Supreme Court held that although the statement was false, "it was nevertheless privileged if made in good faith, for the reason that free discussion in the press of the fitness of candidates for elective offices is essential to good government."[362] Other courts had devised similar privileges, but their scope varied greatly. And still other courts had been slow to address these privileges or, as in the case of New York, been "especially illiberal in the construction of the law of privilege."[363]

The best approach, Merrill thought, was that of the Minnesota court and others like it, because "the cause of good government requires freedom in the discussion of affairs of interest to the general public."[364] The privilege to speak *bona fide* should thus be understood to extend to elected public officials, appointed ones, and candidates for public office.[365] As Cooley had written in one case, "I know of nothing more likely to encourage the license of a dissolute press than to establish the principle that the discussion of matters of general concern, involving public wrongs, and the publication of personal scandal, come under the same condemnation in the law."[366]

358. *Id.*
359. *Id.* at 210.
360. *See id.* at 211.
361. *Id.* at 213.
362. *Id.* (citing Marks v. Baker, 28 Minn. 162 (1881)).
363. MERRILL, *supra* note 13, at 215.
364. *Id.* at 221.
365. *See id.*
366. *Id.* at 222.

V. COMMON THEMES

These early commentators—with the exception of Rawle—did *not* understand Blackstone's views on liberty and libel to be consistent with the law of the United States. Instead, these commentators, while often referencing their English forebearers, fashioned throughout the nineteenth century an American freedom of the press reflective of the values and considerate of the needs of a republican government. They expanded notions of press freedom as compared to liberty of the press in England and recognized that courts had adopted privileges that made it more difficult for public libel plaintiffs to recover damages. For this reason, it cannot be said that ideas about freedom of the press remained unchanged from Blackstone through the nineteenth century.[367] Nor can it be said in the context of the First Amendment that "Blackstone's assessment was shared by the American colonists."[368]

True enough, these commentators recognized the value of reputation, but that had long been understood. Most of their pages were devoted to striking a balance between protecting reputations and cultivating a climate conducive to republican debate. That this intellectual exercise took place is evidence alone that the common law's treatment of speech and press in England was not simply transplanted in the United States. Even Justice Thomas, in *McKee*, was forced to acknowledge as much: "It is certainly true that defamation law did not remain static after the founding."[369] Cooley was right when he recognized that, as of 1868, "liberty of the press, as now exercised, is of modern origin"—in other words, freedom of speech and the press in the United States is, itself, post-revolutionary and dynamic.[370]

It is not surprising, then, that Justices Thomas and Gorsuch do not rely on these American commentators in their attacks on *Sullivan*. Instead, they rely primarily on English commentators.[371] But these

367. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (suggesting that a similar timeframe was relevant to understanding the Second Amendment).

368. McDonald v. City of Chicago, 561 U.S. 742, 768 (2010).

369. McKee v. Cosby, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial of petition for certiorari).

370. COOLEY, *supra* note 13, at 420.

371. *See McKee*, 139 S. Ct. at 678 (citing THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL (1813)). Thomas also cited the Martin Newell's 1890 American treatise, *The Law of Defamation, Libel and Slander*, which cataloged both English and American law. *Id.* (citing MARTIN L. NEWELL, THE LAW OF DEFAMATION, LIBEL AND SLANDER (1890) [hereinafter NEWELL]). Thomas's citations to Newell were at times to his discussion of English law or law in the Colonies. *See, e.g.*, *id.* (citing NEWELL, *supra*, at 842–43 (discussing exemplary damages with reference to English cases)); *id.* (citing NEWELL, *supra*, at 839 (same as to nominal damages)); *id.* (citing NEWELL, *supra*, at 28–29 (noting seventeenth-century and eighteenth-century criminal

commentators—including Blackstone—were not interpreting an American freedom. Their commentaries were merely descriptive of the law then existing in England. American commentators had long since moved on from that cramped approach to liberty and libel because the government had changed, a revolution had intervened. As a result, Thomas and Gorsuch's reliance on English ideas to inform the meaning of the First Amendment is ahistorical, anti-revolutionary, and therefore unpersuasive.

Of the 12 commentators reviewed, only Rawle adopted the Blackstonian definition of press freedom without qualification.[372] Tucker, Kent, Cooper, Story, and Cooley all rejected Blackstone.[373] Dane, Alden, Townshend, and Merrill each seemed to embrace the traditional Blackstonian view but also gave credit to the broader Hamiltonian view.[374] Holmes's limited additions to Kent's *Commentaries* do not allow a conclusion one way or the other as to his view, if any, of Blackstone, but his later jurisprudence makes clear that he too rejected Blackstone.[375]

Even those commentators who espoused more limited conceptions of press freedom (although still broader than Blackstone's) recognized that public opinion was trending in favor of a broader understanding. Kent, unnerved by the development, admitted that the "tendency of measures in this country has been to relax *too far* the vigilance with which the common law surrounded and guarded character, while we are

libel statutes in the Colonies)). Twice, Thomas cited Newell's discussion of the law in the United States but did so selectively. *See id.* at 679 (citing NEWELL, *supra*, at 533).

372. *See* RAWLE, *supra* note 13, at 120.

373. *See* WORTMAN, *supra* note 13, at 256 (Blackstone's definition was "extremely imperfect" and "fallacious to the extreme."); TUCKER, *supra* note 13, at 18 (Liberty of the press as liberty from prior restraint is "only to be found in the theoretical writings of the commentators on the *English* government."); KENT, *supra* note 13, at 19 (Public opinion was against "erecting barriers against any previous restraints," but also "in favour of the policy that would diminish or destroy altogether every obstacle or responsibility in the way of the publication of truth."); COOPER, *supra* note 13, at 102 ("Sir William Blackstone [is] nothing to the purpose."); STORY, *supra* note 13, at 731–32 ("[T]he very circumstance, that, in the constitutions of several states, provision is made for giving the truth in evidence, in prosecutions for libels for official conduct, when the matter published is proper for public information, is exceedingly strong to show, how the general law is understood."); COOLEY, *supra* note 13, at 421 ("[L]iberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him.").

374. *See* DANE, *supra* note 13, at 51–52 (grappling with the right to publish the truth as compared to the Blackstonian definition); ALDEN, *supra* note 13, at 200–01 (same); TOWNSHEND, *supra* note 13, at 342–43 (same); MERRILL, *supra* note 13, at 1, 27 (Blackstonian definition); *id.* at 209–21 (embracing common law privilege but not recognizing a constitutional dimension).

375. *See supra* notes 104–106 and accompanying text.

animated with a generous anxiety to maintain freedom of discussion."[376] Townshend criticized those who maintained that greater freedom of the press should be given to newspaper editors and dismissed as *dicta* language in cases contrary to his views on press freedom.[377] Alden criticized "extravagant" contemporary views.[378] This is consistent with research concluding that early public opinion disfavored the idea that freedom of the press meant only freedom from prior restraint.[379] As one scholar explained, "[t]he common law meaning, at least of a free press, had been inherited from Blackstone's England, but that concept never really took root in America."[380]

Almost all commentators also rejected Blackstone's summary of the common law of libel as either a corruption of the real common law predating the Star Chamber or as inapplicable to the United States.[381] True, most commentators recognized, as Blackstone had, that the right of freedom of the press did not insulate one from consequences for abuses of that freedom. Kent, for example, wrote that it had become "a constitutional principle" that "'every citizen may freely speak, write, and publish his sentiments . . . being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press.'"[382] But Kent spoke more than 50 years removed from Blackstone. "Abuse" to Kent, and as developed in the United States, meant something different than what was "improper, mischievous, or illegal" to Blackstone.[383]

Indeed, the development of additional privileges and defenses in the common law of libel in the nineteenth century—especially in the context of political speech—excused certain "abuses" that Blackstone would not have. Chief among these was a defense that Blackstone never recognized as a universal principle: truth. Wortman said: "It cannot be said that any Liberty of the Press is established by law, unless the publication of Truth is expressly sanctioned."[384] A system that outlawed truth rendered the "political magistrate inviolable."[385] Cooper agreed, writing that truth was a "necessary consequence" of the constitutional protections for press freedom.[386] Tucker said critics of public men were bound only "to adhere

376. 1 KENT, *supra* note 13, at 636 (emphasis added).
377. *See* TOWNSHEND, *supra* note 13, at 343.
378. ALDEN, *supra* note 13, at 200.
379. BIRD, *supra* note 11, at 368.
380. Rosenthal, *supra* note 145, at 29.
381. *See, e.g.*, COOPER, *supra* note 13, at 102 (rejecting Blackstone); MERRILL, *supra* note 13, at 209; 1 KENT, *supra* note 13, 19–20.
382. 2 KENT, *supra* note 13, at 14.
383. 4 BLACKSTONE, *supra* note 33, at *152.
384. WORTMAN, *supra* note 13, at 256.
385. *Id.* at 252.
386. COOPER, *supra* note 13, at 91.

strictly to the truth; for any deviation from the truth is both an imposition upon the public, and an injury to the individual whom it may respect."[387] Kent adopted as "perfectly correct" "that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends."[388] Others, like Story, Dane, Alden, and Townshend, took a similar approach. Merrill, the last to speak, observed: "Since the beginning of this century, the common law has been changed in this respect in every State in the Union."[389]

Others questioned why tyrannical rules of the common law of libel should be considered to have been imported from England. After reviewing some of these rules, Tucker wrote: "When we consider the source from whence these doctrines have been brought to us, *the reasonableness of them ought to be examined before we yield our full assent to all of them*."[390] Cooley too doubted that the common-law prohibitions against libels on government had been "adopted in the American states." [391] Instead, Cooley was concerned with privileges that had since developed "for some reason of general public policy" that he believed to be "constitutional" in nature.[392]

Cooper was most hostile to the thought that early Americans were beholden to the common law of libel as bastardized in the English Star Chamber. Not only did he view the Star Chamber as an illegitimate source of the common law, but Americans had since interposed constitutional protections that preempted that law. As he explained in a discussion of the common law of libel in Massachusetts, "[w]hat the nature of the liberty of the press is under our constitution, must be sought, therefore, in its own nature, *and not in the principles of the antecedent law*."[393] Said another way, wherever Cooper saw a conflict between constitutional protections for press freedom and the law of libel, "the exception is to be made out of the principles of the doctrine of" the common law "and not out of the nature of the constitutional liberty."[394]

Relatedly, Cooley recognized that constitutional privileges developed in the United States throughout the nineteenth century, displacing the common law of libel.[395] Where the speaker was under

387. 2 TUCKER, *supra* note 13, at 29.

388. People v. Croswell, 3 Johns. Cas. 337, 393–94 (N.Y. 1804).

389. MERRILL, *supra* note 13, at 230.

390. 5 TUCKER, *supra* note 13, at 150 n.19 (emphasis added).

391. COOLEY, *supra* note 13, at 427; *see also id.* at 429 ("The English common-law rule which made libels on the constitution or the government indictable . . . seems to us unsuited to the condition and circumstances of the people of American, and therefore to have never been adopted in the several States.").

392. *Id.* at 425.

393. COOPER, *supra* note 13, at 88 (emphasis added).

394. *Id.* at 87.

395. *See* COOLEY, *supra* note 13, at 425.

some recognized duty to speak, like, for example, when it came to informing her fellow citizens about the qualifications of a candidate for public office, the privilege then-recognized would "throw upon the plaintiff the burden of offering some evidence of [fault's] existence beyond the mere falsity of the charge."[396] Holmes would later acknowledge a line of cases holding similarly that where a defendant was discharging some public duty in making the allegation, the plaintiff must show malice.[397] This included cases of "fair and reasonable comments on matters of public concern."[398] Merrill made similar observations, emphasizing that courts had even begun to find falsity privileged if spoken in good faith and for a proper purpose.[399]

Similarly, several commentators stressed that in a republican form of government public servants assumed the risk of public criticism. This view departed from the common law's contrary rules that protected those in power. Wortman said that public officials should be made to stand on "the same footing with a private individual."[400] Tucker wrote that statutes like *scandalum magnatum*, which gave special treatment to public officials, had no effect in the United States.[401] Kent recognized that libels on public officials might harm both public and private interests, but he argued that "the liberty of speech, and of the press, should be duly preserved."[402] Cooley criticized the common law where the "proper observation of public officers by those interested in the discharge of their duties[] were treated by the public authorities as offences against good order."[403] Townshend admitted that "being a candidate for an office or for employment, in many instances affords a license or legal excuse for publishing language concerning him as such candidate."[404] Cooper castigated the "doctrine of libel" as nothing more than a "doctrine of power" and rejected special treatment for those in power.[405]

It was the more liberal of these commentators who most often stressed that the republican form of government established in the United States after the Revolution required revisiting traditional rules relating to liberty of the press. As Wortman explained, intrusion on the right to speak the truth "is to declare open war against Political Enquiry, entirely

396. *Id.*
397. *See* 2 HOLMES, *supra* note 13, at 22 n.1.
398. *Id.*
399. *See* MERRILL, *supra* note 13, at 213; *see also* COOLEY, *supra* note 13, at 432 (discussing acquittal based on mistaken falsity).
400. WORTMAN, *supra* note 13, at 259.
401. *See* 5 TUCKER, *supra* note 13, at 149 n.15.
402. KENT, *supra* note 13, at 17.
403. COOLEY, *supra* note 13, at 418.
404. TOWNSHEND, *supra* note 13, at 202; *see also id.* at 336–38 (discussing same).
405. COOPER, *supra* note 13, at 88.

destroy the responsibility of the Magistrate, and establish the throne of Absolute Despotism upon the ruins of Civil Liberty."[406] Tucker agreed; in a representative government, a constituent could not "be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."[407] Or, as Kent put it, "[t]he liberal communication of sentiment . . . in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage."[408] According to Cooley, freedom of the press prohibited "any action of the government by means of which it might prevent such free and general discussion of public matters."[409] Cooper put it plainly: "[N]o limit can be put to the right of discussion."[410]

Even those less liberal in their sentiments recognized the important role freedom of the press played in a republican government. Dane said that it was "often difficult in a free country to draw the true line between a libel indictable and a publication to be allowed as a fair investigation of public measures, and of the characters of public men."[411] And Rawle, while adopting Blackstone, admitted that "a free government begins to be undermined when freedom of speech on political subjects is restrained."[412] Townshend, for his part, argued that a newspaper "may comment freely on the acts of government, officers or individuals and indulge in occasional mirth and wit, and it is only when the character of the publication is malicious, and its tendency to degrade and excite to revenge, that is condemned."[413] These commentators believed that republican values could survive alongside harsher rules of the common law.

VI. CONCLUSION

Nineteenth-century American commentators rejected Blackstone's views on liberty of the press with near unanimity. Thomas and Gorsuch's reliance on Blackstone to understand the First Amendment is therefore misplaced. It looks to the wrong country, the wrong time, and the wrong commentator. In Blackstone's place, the commentators discussed in this Article had begun fashioning an *American* freedom that addressed their time and their country. In this way, the evolution of press freedom in the

406. WORTMAN, *supra* note 13, at 253.
407. 1 TUCKER, *supra* note 13, at app. at 297.
408. 1 KENT, *supra* note 13, at 19.
409. COOLEY, *supra* note 13, at 422.
410. COOPER, *supra* note 13, at 39.
411. 7 DANE, *supra* note 13, at 51.
412. RAWLE, *supra* note 13, at 123.
413. TOWNSHEND, *supra* note 13, at 345.

United States ultimately arriving at *Sullivan* was preordained. It was Cooley, after all, who argued nearly 100 years before *Sullivan* that common-law privileges developing in the United States "for some reason of general public policy," including the protection of political debate, "may be supposed to be within the constitutional protection" provided by the First Amendment.[414] Insofar as the story of the common law of libel in nineteenth-century America is a story about republican thought, it is as much a story about evolving notions of press freedom.[415]

In the face of this, Thomas and Gorsuch's insistence on resurrecting Blackstone has little to commend it. Surely Founding- and Reconstruction-era American commentators are better proxies for the meaning of an American constitutional freedom of the press than an Englishman. Indeed, Thomas and Gorsuch's approach ignores that Blackstone's summary of the law was born out of, and designed for, a different form of government than that prevailing in the United States. It ignores that Blackstone's pre-Revolutionary rules were an interpretation of the English common law, not the First Amendment—an amendment that would not be ratified until a decade after Blackstone's death. And it ignores that Blackstone's rules were meant to suffocate republican thought among the masses rather than give it the breathing space it needed to survive. It was that latter idea that found a foothold in these early commentaries.

Whatever the case, one could argue that this is all beside the point because the Court's First Amendment jurisprudence today, including the actual malice rule adopted in *Sullivan* that Thomas and Gorsuch attack, is inconsistent with Blackstone's views *and* many of these commentators' views. True enough, Merrill foreshadows the adoption of the actual malice rule and Holmes acknowledged early case law supporting its adoption, including case law on which the *Sullivan* Court eventually relied.[416] But most of these commentators believed that freedom of speech only protected truth—not the kind of mistaken falsity that the actual malice rule protects. Thus, while this Article demonstrates that these commentators did not agree with Blackstone's narrow view, it also demonstrates that they had not yet endorsed a rule that, like actual malice, would protect even false speech.[417]

And despite all the progress in favor of freedom of the press in the context of criminal libels, these commentators largely agreed that victims

414. COOLEY, *supra* note 13, at 425.

415. *See* COOPER, *supra* note 13, at 87, 93.

416. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964).

417. State courts, however, had recognized such a rule in the nineteenth century. *See* Schafer, *supra* note 9, at 126–32.

of a libel should be free to seek civil redress.[418] While "the letter and spirit" of the Constitution "wisely prohibit[ed] the congress of the United States from making any law, by which the freedom of speech, or of the press, may be exposed to restraint or persecution under the authority of the federal government," as Tucker explained, "for injuries done the reputation of any person, as *an individual*, the state-courts are always open."[419] Still, to guard against abuses in state courts that would stifle speech, these commentators argued in favor of greater protections than those at the common law. These included the right to prove the truth of the allegation, removing special treatment for public officials, and championing the power of juries to return a defense verdict.

But it is important to remember that when these commentators were writing, "subsequent punishments were replacing the earlier censorship schemes as the mechanism for government control over disfavored speech in England."[420] In rejecting Blackstone, they recognized that a freedom of the press that only meant freedom from prior restraints was ineffectual in confronting these evolving threats. Wortman questioned: "Of what use is the liberty of doing that for which I am punishable afterwards?"[421] Or as Cushing wrote to Adams, "if all men are restrained, by the fear of jails, Scourges & loss of ears, from examining the conduct of persons in administration . . . from declaring it to the public; *that* will be as effectual a restraint, as any previous restraint whatever."[422] In short, this history shows these commentators endorsed evolving protections to address new threats to press freedom during their time.

What these commentators had not yet come to realize, however, was that civil libel lawsuits could be as pressing a threat to press freedom as prior restraints and criminal punishments. True, Cooper, himself a libel defendant, lamented the "expense," "labor," and "vexation" of defending against a libel claim.[423] But he could not have anticipated just *how* expensive, *how* laborious, and *how* vexatious such claims could and eventually would become. While in 1888 defending a civil libel lawsuit cost around $500 (today, around $15,000), in 2023 the cost to do the same can easily exceed $1 million.[424] Today, simply forcing a critic to

418. *See, e.g.*, *supra* notes 164, 213.

419. TUCKER, *supra* note 13, at app. at 30.

420. Alexander v. United States, 509 U.S. 544, 568 (1993) (Kennedy, J., dissenting) (speaking of criminal punishments).

421. WORTMAN, *supra* note 13, at 256.

422. Letter from William Cushing to John Adams (Feb. 18, 1789), *in To John Adams from William Cushing*, 18 February 1789, FOUNDERS ONLINE, NAT'L ARCHIVES, https://bit.ly/3rkzog4 (last visited Nov. 18, 2022).

423. COOPER, *supra* note 13, at 79.

424. David J. Acheson & Dr. Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, 47 SW. L. REV. 335, 364 (2018).

defend their criticism is one of the most potent weapons libel plaintiffs have; "[t]he ability of well-financed and motivated plaintiffs to use defamation litigation not to *correct* serious mistakes but to *deter* criticism can be a substantial problem for First Amendment law."[425]

Today, publishers do not fear prior restraints (although some errant ones are ordered), and they do not fear subsequent criminal punishments (although some errant ones are attempted). Instead, what they fear are civil lawsuits brought not to redress reputational harm but to exact punishment through drawn-out litigation. In short, unlike the nineteenth century, merely engaging a critic in bad faith civil libel litigation has become the preferred and, indeed, the most effective method of punishing "disfavored speech."[426] The lesson of these commentators is not, as Thomas and Gorsuch would have it, that the legal community is powerless to address this new threat to press freedom. Or that we must roll back the clock on press freedom to Blackstone's time. Their teaching is just the opposite: that conceptions of press freedom in this country are malleable enough to develop alongside and be responsive to new attacks on that very freedom.

425. David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1299 (1995) (emphasis added).

426. Alexander v. United States, 509 U.S. 544, 564 (1993) (Kennedy, J., dissenting).