Originalism and the Weight of the First Declarations: A case-study in Free Press Provisions

By Peter Allevato

Introduction

When the newly independent American colonies drafted their first Constitutions and Declarations of Rights, they took varying approaches to drafting, adopting, and structuring their documents. Scholars often overlook these nuances. Contextual information such as who drafted the documents, how they were ratified, and what source material they relied on frequently goes unmentioned.[1] This is a methodological mistake for those seeking the original public meaning of the terms in the United States Constitution.[2] We interpret the Constitution's nature as a document drafted by a documented convention, ratified by the people, and amendable by a specified process.[3] The general absence of these same features in the state constitutions should cause scholars to hesitate before relying on their bare provisions.

Originalists often must dive deepest into the historical record when they examine the "glittering generalities"—or vaguely worded provisions—of the Constitution.[4] This often leads reliance and comparison with early state constitutions and Declarations of Rights as examples. But state counterparts to the "glittering generalities" of the United States Constitution are often

[1] *See, e.g.*, David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 464–66 (1983) (acknowledging that "the first legally effective press clauses appeared in the eleven state constitutions adopted during the War for Independence," but doing little more than listing the existing provisions); David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013–2014 CATO SUP. CT. REV. 15, 29 (citing the 1776 Pennsylvania Constitution without discussion of its drafting, adoption, or comparison with any other state constitutions).

[2] *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989).

[3] Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1923 (2017) ("Originalists maintain that the decisions of prior generations, cast in ratified text, are controlling until lawfully changed.").

[4] *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104, 114–25 (2001) and Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–57 (2003) (canvassing numerous historical sources for every mention of the word "commerce.").

themselves glitteringly general.[5] These constitutions and their provisions require just as much historical excavation as the United States Constitution. By failing to engage with that history, Originalists do themselves no favors. Originalism needs not only evidence from the time of the Constitution's ratification, but also "requires an evaluation of the reliability of that material."[6] Drawing meaning from a state constitution without the accompanying history is every bit as harmful as drawing meaning from the United States Constitution without context.

The article seeks to determine what evidence, if any, the provisions of the state constitutions actually add to the debate over original public meaning, using the freedom of the press as a common example and focusing lens. Individualized evidence shows that the majority of state free press protections lack either authoritative evidence showing their meaning or public acceptance, and are therefore of little weight in the analysis of the first amendment. While such an analysis assuredly could (and should) be made regarding many provisions in the federal Constitution and Bill of Rights with state counterparts, such a widespread undertaking is impossible in this article.

Part I introduces in greater detail the historical role of the original state constitutions, and their place in the Originalist inquiry. The bulk of this Article, in Part II, contains a detailed list of the original state constitutions that protected free press, and documents any evidence of these provisions' meaning. Part III concludes by briefly summarizing the relative weight that the constitutions have, and what methodologies remain appropriate in the context of original state constitutions.

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[5] *Compare* VA. BILL OF RIGHTS of 1776, § 8, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 3814 (Francis Newtown Thorpe ed., 1909) (". . . that no man be deprived of his liberty except by the law of the land or the judgment of his peers.") *with* U.S. CONST., Amend. V, (". . . nor be deprived of life, liberty, or property, without due process of law.").

[6] *See* Scalia, supra note 2.

I. The Birth of the State Constitutions and Declarations

When the American colonies declared independence, it quickly became clear that they would need formal Governments to manage their affairs. Some had hastily drafted temporary governing charters or formed governing democratic bodies.[7] So in early 1776, the Continental Congress adopted a resolution, put forward by John Adams, encouraging these slapdash governments to "adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[8]

Most of the colonies responded by drafting individual, unique constitutions and Declarations of Rights, providing for the formation of their respective governments and protecting the essential freedoms of their citizens.[9] Many of these state constitutions were drafted by prominent Framers of the United States Constitution, including the likes of John Adams (Massachusetts), James Madison (Virginia), George Mason (Virginia), Thomas Jefferson (Virginia), and Benjamin Franklin (Pennsylvania).[10] Eleven of the thirteen colonies adopted their state constitutions before the drafting of United States Constitution at the Philadelphia Convention.[11] These eleven constitutions were varied in their approaches to governmental

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[7] *See* W. F. Dodd, *The First State Constitutional Conventions, 1776-1783*, 2 AM. POL. SCI. REV. 545, 546 (1908). *See also* MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE 3 (1994); COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 10 (2007).

[8] 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, At 341–42 (Worthington Chauncey Ford Ed., 1906).

[9] *See* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION BETWEEN THE SAID STATES; THE TREATIES BETWEEN HIS MOST CHRISTIAN MAJESTY AND THE UNITED STATES 30–344 (1782) [Hereinafter, "CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA"]. While many states adopted their declaration of rights separate from their state constitution, the documents were typically tightly intertwined, and drafted or adopted simultaneously. This Article does not substantively differentiate between the two, unless the authorship or ratification of the two documents differed significantly. Unless otherwise noted, the term "constitution" is used as inclusive of any declaration of rights in that state.

[10] Gregory E. Maggs, *A Guide and Index for Finding Evidence of Original Meaning of the U.S. Constitution in Early States Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 805–06 (2020) [hereinafter "Maggs, *Guide and Index*"].

[11] *Id.* at 786.

structure and protecting rights—the earliest examples of the states as "laboratories of democracy."[12]

Naturally, many of the Framers looked to the state constitutions for inspiration and comparisons when developing the United States Constitution. During the drafting of the constitution, many of the delegates referenced the successes or failures of the state constitutions as they argued for provisions in the United States Constitution.[13] Many of the structural provisions and substantive guarantees in the state constitutions eventually made their way into the United States Constitution, sometimes by explicit reference.[14] For example, the power of eminent domain, as well as the doctrine of just compensation, appeared in the Massachusetts Constitution before it was used by the Framers.[15]

The influence that state constitutions had on the ratification debates for the United States Constitution was also widely observable. Alexander Hamilton, in Federalist No. 1, appealed to the citizens of New York by pointing out that the United States Constitution was "an analogy to your own State constitution."[16] And "[m]any of the clauses [of the United States Constitution] were already in place as state constitutions by the actions of various state (or colonial) legislatures."[17] Throughout the states, many prominent citizens pointed to their own enumerated Declarations of Rights, and objected that the United States Constitution did not have a Bill of

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[12] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
[13] *Id.* at 805–10.
[14] *See* Madison's Notes, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 552 (Max Farrand ed., 1911) ("It was moved to strike out the words 'and shall be subject to alterations and amendments by the Senate' and insert the words used in the Constitution of Massachusetts on the same subject—'but the Senate may propose or concur with amendments as in other bills'—which was agreed to.").
[15] *See* MASS. CONST. OF 1780, Part I, Art. XVI, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 23 ("[W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.").
[16] THE FEDERALIST NO. 1 (Hamilton).
[17] WILLIAM LOWELL PUTNAM, JOHN PETER ZENGER AND THE FUNDAMENTAL FREEDOM 48 (1997).

Rights.[18] Subsequently, the majority of states submitted a list of proposed amendments to Congress, along with their ratification of the Constitution. These often included language that mirrored the provisions of their Declarations of Rights.[19] Many of these suggestions were eventually built into the Bill of Rights, reinforcing the historical importance of state constitutions.[20]

Because of this historical importance, state constitutions and Declarations seem like natural sources for Originalists to look at when deriving original public meaning.[21] One method is to compare Federal and State constitutional provisions:

> Writers making claims about the original meaning of the United States Constitution also frequently compare its provisions to those of state constitutions. As a hypothetical example, a litigant might claim that the guarantee of the 'freedom of the press' in the First Amendment of the U.S. Constitution originally had the same meaning as the guarantee of the "liberty of the press" in Part the First, article XVI of the Massachusetts Constitution of 1780.[22]

But this must be a two-step approach. "The first step is to prove the meaning of the state constitutional provision. The second step is to explain why the United States Constitutional provision either likely had the same meaning as the state constitutional provision or instead likely had a different meaning."[23] This explanation, however, oversimplifies a complex task.

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[18] See Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 473, 478 (discussing concerns at the ratification debates about the lack of a bill of rights).

[19] *Id.* ("[I]n their ratification conventions, several states offered specific language the gist of which was combined and incorporated by the Congress in its final draft. Of these suggestions North Carolina and Virginia proposed the most, but Massachusetts, New Hampshire, New York, Maryland and South Carolina added significantly.")

[20] CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, at xiv (Helen E. Veit et al., eds., 1991). In fact, the Bill of Rights was made up almost entirely of amendments recommended by the states. *Id.*

[21] Maggs, *Guide and Index* at 786.

[22] *Id.* at 812.

[23] *Id.* Maggs uses the Freedom of the Press as an example: "merely identifying the similarity of the phrases 'freedom of the press' in the First Amendment and 'liberty of the press' in the Massachusetts Constitution of 1780 is not enough to show the meaning of the First Amendment. Also needed is evidence about the meaning of the phrase 'liberty of the press' in the Massachusetts Constitution." *Id.*

Originalists "must never forget that it is a *constitution* we are expounding."[24] And "when it comes to interpreting the Constitution, not all history is created equal."[25] Originalism is grounded in the nature of the United States Constitution itself as a document drafted by convention, ratified by the citizens of the states after much public debate, and amendable only by its own internal processes.[26] If the constitution was not ratified by the public, or if it was merely the act of a legislature, Originalist theory would not be what it is.[27]

But many of the state constitutions do not share the characteristics of the federal Constitution, and so their meanings, even if determined by good evidence, may be inapt comparisons for the original meaning of the United States Constitution. And some lack critical imprints of original public meaning. Who drafted these constitutions? At whose behest? What sources were contemplated and how did they influence the drafting? How were they ratified? Did they play a role in drafting or ratifying the Constitution or Bill of Rights? The records of history are not always complete, and the mere appearance of a provision in a state constitution does not mean that it is fertile ground to discern original meaning. This contextual information sometimes provide answers at both steps in the two-step analysis by analogy, but in most cases, they determine the questions inapplicable in the first place.

II. Free Press Guarantees in State Constitutions

To demonstrate the methodological quirks of determining the meaning of state constitutions, this section takes a close look at state free press protections. As a right found in many states' Declaration of Rights, free press is illustrative of the numerous hurdles to

[24] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819).
[25] New York Rifle & Pistol Assoc. v. Bruen, 597 U.S. 1, 34 (2022)/
[26] *See Barrett*, supra note 3.
[27] Keith Wittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL. 599, 609-10 (2004) ("As the founders themselves noted, the constitutional text is meaningless unless and until it is ratified. It is the adoption of the text by the public that renders the text authoritative.").

interpreting early state provisions. For those seeking evidence of the original public meaning of the First Amendment's freedom of the press in state constitutions, the preliminary inquiries must be what meaning these varied provisions carried, and if that meaning was approved or widely accepted by the public. Then we must seek to unearth any evidence of influence the state provision had on including the federal freedom of the press in the First Amendment.

Of the eleven constitutions passed before the United States Constitution, nine contained a substantive protection for the liberty or freedom of the press: Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, and Virginia.[28] This section contains an analysis of each, accompanied by the contextual information that would inform what weight they should be afforded, such as who drafted them, how they were ratified, any particular controversies that arose from them, how long they governed each state, and if they were explicitly referenced by the Framers or those debating the ratification of the United States Constitution and the Bill of Rights. Canvassing this context shows that some State should be afforded vastly more weight than others when defining original public meaning.

a. Virginia

Virginia was the first of the states to formulate and adopt a constitution. Assembled at Williamsburg, Virginia's delegates drafted and ratified both a constitution and a bill of rights. In June 1777, the Bill of Rights was ratified, with its 12th article stating: "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."[29]

[28] The state constitutions discussed in this section are listed chronologically by their ratification.
[29] VA. BILL OF RIGHTS of 1776, § 12, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 3814 (Francis Newtown Thorpe ed., 1909).

Virginia was able to beat other states to the punch in its drafting and adoption because work began on the Declaration of Rights before independence was even declared.[30] George Mason, prominent Virginian and later an active member of the Philadelphia Convention, was tasked with drafting the Declaration of Rights.[31] While Mason's draft went through multiple changes when it was put to the convention as a whole, his protection for the freedom of the press went without objection, debate, or explanation, and was accepted in his exact wording.[32] Unlike the later ratification of the United States Constitution, the Virginia Declaration of Rights and the Virginia Constitution were not placed before the public eye before their ratification.[33] As a result, no public debates shed light on the meaning of Virginia's press clause. While this was no doubt a triumph for Mason, and demonstrates consensus among Virginia's framers, it provides little help for the inquisitive Originalist.

Some have labeled the language "essential to the security of the freedom in a state" as a mere "flourish" and "an eighteenth-century cliché" used by the likes of Blackstone and the famed *Cato's Letters*.[34] Better understood, that "flourish" provides insight into Mason's writing process. Mason looked not only to the Blackstone and *Cato*, but also "turned to English libertarian writers, such as Milton, Sidney, and Locke, who had grounded their arguments . . . on the universal rights of natural law."[35] Mason's adoption of language from English writers and *Cato's Letters*, showed both an awareness of those sources, and arguably, a conscious adoption of them. What theories of the press did those writers espouse that Mason would have transplanted into Virginia? Mason's language carried with it a recognition that the press must be

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[30] *See* JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 4 (2014).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] LEONARD LEVY, EMERGENCE OF A FREE PRESS 184 (2004) (citing William Blackstone, 4 *Commentaries on the Laws of England* 151 (1769); John Trenchard & Thomas Gordon, 1 *Cato's Letters* 96 (1755)).
[35] ROBERT SUTTON, REVOLUTION TO SECESSION, CONSTITUTION MAKING IN THE OLD DOMINION 22 (1989).

free from "prior restraints" such as restrictive licensing or government editorial oversight, but also subjected to responsibility for printing libelous statements and stories.[36] The legal practices of Virginia going forward would seem to reinforce that theory.[37]

Due to its early adoption, Virginia's Declaration of Rights and Constitution were already in effect and circulating throughout the colonies while other conventions and delegates were drafting their own governing documents. At least three other states trace the "lineage" of their Constitutions directly to Virginia, and many others contain provisions that mirror it.[38] In fact, nearly every state bore some marker from the Virginia Declaration of Rights.[39]

And Virginia's Declaration of Rights played an outsized roll in the call for, adoption, drafting, and ratification of the Federal Bill of Rights. The lack of any freedom of the press was a frequently cited issue when Virginians later debated the ratification of the United States Constitution. In private letters, Virginian Richard Lee was critical of Massachusetts's failure to recommend the adoption of a free press amendment.[40] In defending the need for an amendment, he stated that "the necessity for the freedom of the press," arises to obtain the benefits of a "well informed and enlightened people."[41] George Wythe also proposed that the Constitution, if

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[36] *See* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, 10–24 (Ed. Leonard Levy) (1966); LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 2–3 (2004); Anderson, supra note 1, at 488–89.
[37] *See* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1881 (1833).
[38] Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declaration of Rights of Virginia, Maryland and Delaware*, 33 RUTGERS L.J. 929, 948–1010 (2002).
[39] ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 48 (1955) ("[I]t is hardly remarkable that in the bills of rights adopted in Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire, there are provisions that carry either the import or the verbatim language of articles in the Virginia declaration.").
[40] *Letter from Richard Henry Lee to George Mason*, Chantilly (May 7) *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* at 784 (John P. Kaminski, et al, eds.) (2009).
[41] *Letter from Richard Henry Lee to Edmund Pendleton*, Chantilly (May 26), *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* at 879 (John P. Kaminski, et al, eds.) (2009) (referring to the freedom of the press as "the happiest Organ of communication ever yet devised, the quickest & surest means of conveying intelligence to the human Mind.").

ratified, should be amended to include freedom of the press.[42] Throughout the convention, free press was often mentioned as a right lacking in the Constitution, but never with any context which might explain the *meaning* of the right as Virginia had protected it.[43] Virginia ultimately ratified the United States Constitution, but with a slate of proposed amendments, including "[t]hat the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated."[44]

Ultimately, the task for drafting a Bill of Rights fell to James Madison, a man intimately familiar with Virginia's Declaration of Rights. Aside from Mason, Madison had been the one most involved in its drafting, although he left the press provision untouched.[45] "Madison apparently drew more heavily on the amendments proposed by the states" than on Virginia's Declaration of Rights, but "the Virginia amendments tracked the Virginia Declaration of Rights" as did the proposed amendments of the numerous constitutions Virginia inspired, most notably Maryland and North Carolina.[46] Madison would ultimately propose multiple protections for the freedom of the press to be included in the Bill of Rights.[47] After many rounds of deliberation,[48]

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[42] *The Documentary History of the Ratification of the Constitution Digital Edition,* at 1512 (John P. Kaminski, et al, eds.) (2009).
[43] *Id*.
[44] *Virginia Convention's Proposed Amendments*, § 16 (June 27, 1788) *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* at 251 (John P. Kaminski, et al, eds.) (2009).
[45] *See* JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 4 (2014).
[46] Jeff Broadwater, *George Mason, James Madison, and the Evolution of the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 547 (2017); *see Virginia Convention's Proposed Amendments*, § 16 (June 27, 1788) *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* at 251 (John P. Kaminski, et al, eds.) (2009); *From the MARYLAND GAZETTE, on April 29, 1788*, THE INDEPENDENT GAZETEER; OR THE CHRONICLE OF FREEDOM 3 (May 6, 1788).
[47] *Creating the Bill of Rights, The Documentary Record from the First Federal Congress*, 13, 181, 252 (Eds. Helen Veit, Kenneth Bowling & Charlene Bickford) (1991).
[48] While multiple drafts were revised, there was little substantive discussion of the *meaning* of the rights protected. *See* LEONARD LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION, 221 (1965) ("If the controversy in the states over the ratification of the Constitution without a bill of rights revealed little about the meaning and scope of freedom of speech-and-press, the debates by the First Congress ... are even less illuminating.").

the First Amendment ensured that congress could make "no law" restricting freedom of the press.[49]

As for interpretation, prominent Jurist Joseph Story would describe the Federal Freedom of the Press by analogy to Virginia Declaration of Rights.[50] The throughline—from Mason's libertarian-inspired free press provision to other state constitutions to the United States Constitution through Madison—cannot be ignored when considering the original meaning of free press. None ever disputed the underlying connotations that Mason's language contained, and it remains the best evidence of the original meaning of the Freedom of the press in Virginia's Declaration of Rights. Due to its clear effect on Maryland, North Carolina and Delaware, the meaning ensconced in Virginia's free press guarantee can also be considered to be the most widely accepted when considering the public understanding of a free press guarantee.[51]

b. Delaware

Delaware's Declaration of Rights of 1776, § 23 read "[t]hat the liberty of the Press ought to be inviolably preserved."[52] The "inviolability" language appears to be lifted from a draft of neighboring Maryland's Declaration of Rights, a copy of which the convention had before them when drafting Delaware's Declaration of Rights.[53] Article 30 of the Delaware Constitution doubled down on the inviolability of the rights protected in the Declaration of Rights, including the liberty of the press, by stating, "[n]o article of the declaration of rights and fundamental rules

[49] U.S. CONST. Amend. I.
[50] Justice Story reasoned that the Federal Freedom of the Press must give way to "private redress for libels and calumny" just as it did in states like Virginia, despite the protections of Free Press in those states. STORY, supra note 37.
[51] *See* Friedman, supra note 38, at 970–72.
[52] DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, § 23, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 90.
[53] *Id.* at 2. *See* MD. DECLARATION OF RIGHTS of 1776, ART. XXXVIII, *reprinted* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 103 ("That the Liberty of the Press ought to be Inviably preserved.").

of this State, agreed to by this convention, . . . ought ever to be violated on any pretence whatever."[54]

In response to the call to form new governments, the Delaware General Assembly called for delegates from the State's three counties to "ordain and declare the future form of government for this State."[55] While the resulting constitution was never put to the wider state citizenry for ratification, each county elected ten delegates to send to the constitutional convention in New Castle, thus ensuring equal representation.[56] Among the thirty delegates, George Read, a signer of the Declaration of Independence and future delegate to the Philadelphia Convention, was appointed as the President of the convention.[57] The drafting committee for the Declaration of Rights was headed by Richard Bassett, another future delegate to the Philadelphia Convention.[58] The Delaware Constitution, which made the Declaration of Rights effectively unchangeable, was drafted by a separate committee, including both George Read and Richard Bassett, as well as Thomas McKean, a member of the Continental Congress.[59] The auspices of these Framers of the Constitution gives credit to imputing knowledge and familiarity with Delaware's liberty of the press provision when the Philadelphia Convention debated the inclusion of a Bill of Rights.

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[54] DEL. CONST. OF 1776, Art. 30, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 568 (Francis Newtown Thorpe ed., 1909).
[55] RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE 1–2 (2002).
[56] THE DELAWARE CONSTITUTION OF 1897, THE FIRST ONE HUNDRED YEARS 27–28 (Rubenstein et al., eds.) (1997).
[57] HOLLAND, supra note 55, at 1–2.
[58] *Id.*
[59] *Id.* at 3. Though tenuous, McKean laid claim to the actual authorship of Delaware's constitution. Allegedly, "McKean drafted the constitution during an all-night session at a tavern with nothing more than ink and a quill pen."

This Constitution lasted only until 1792, when delegates from across the state once again convened to reconsider the structure of their government.[60] The Delaware Constitution of 1792 incorporated the former Declaration of Rights as its first article, but with the protection for liberty of the press substantially reworked.[61]

Historical indications of the meaning of the provision as it existed between 1776 and 1792 (the closest relevant timeframe for discerning any original meaning in the Federal Bill of Rights) are scant. It appears that no cases interpreting the protection arose during that time, nor any time soon after. At the time of its drafting, no debate was heard over the liberty of the press provision, nor was the provision specifically presented as an example or model for the Federal Bill of Rights at any point. Because it was drafted and ratified by the legislature, no debate appeared in the public square over its meaning. The only indication of meaning that can be imputed to the provision is the carry-forward influence of Maryland and Virginia's Declaration of Rights, which was particularly strong in Delaware.[62] With no contemporaneous record of this provision's meaning, we must conclude that the impact of Delaware's liberty of the press provision on the original meaning of the United States Constitution is minimal.

c. Pennsylvania

The Pennsylvania Declaration of Rights of 1776, Article XII provided that "the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the

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[60] *See* DEL. CONST. OF 1792, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 568 (Francis Newtown Thorpe ed., 1909).

[61] *Id.* Art. I, § 5. ("The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty. In prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury may determine the facts and the law, as in other cases.").

[62] *See* Friedman, supra note 38, at 970.

freedom the press ought not to be restrained."[63] The combination of speech and press in this article was unique among the state constitutions, but that was not the only unique aspect of Pennsylvania's press protection. §35 of the Pennsylvania Constitution also provided that: "The printing presses shall be free to any person who undertakes to examine the proceedings of the legislature, or any part of the government."[64] Despite the unique combinations, little is known about the intended meaning in these provisions, as they were never enforced, and swiftly replaced.

These provisions were written by convention in Philadelphia, by delegates who were chosen by election in each of Pennsylvania's counties, and the city of Philadelphia.[65] Prominent delegates included Gouverneur Morris, Thomas Paine, Benjamin Franklin, and Timothy Matlack.[66] The minutes of that convention are brief and non-specific, but they do demonstrate that multiple drafts of both the Declaration of Rights and the Frame of Government were considered and revised.[67] Like the Virginia and Maryland constitutions before it, this constitution was ratified by the convention without any input from the public to illuminate its meaning.[68]

The entire Pennsylvania Constitution of 1776 was to be short lived. Due in part to its unique governmental structure, a new Constitution replaced it in 1790.[69] Because of that

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[63] PA. CONST. of 1776, Art. XII, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 78.
[64] *Id.* Art. XXV.
[65] PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790: THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, at 45–47 (1825).
[66] *Id.*
[67] *See generally id.*
[68] *Id.* at 66.
[69] Article IX, § VII of the 1790 constitution contained a robust protection for freedom of the press:

> "Of the liberty of the press.
> Sect. VII. That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government: And no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official

replacement, even early cases on the press, such as *Respublica v. Cobbet*, in 1800, were argued under the substantially different provisions of the 1790 constitution, and no record of a judicial interpretation of the 1776 press provisions were made.[70]

But one precise articulation of Freedom of the press arose during the Pennsylvania ratification debate. Anti-Federalists such as John Smilie insisted that the United States Constitution was insufficient without a protection for free press similar to Pennsylvania's.[71] James Wilson responded by saying that the federal government was vested with no power which could violate the free press, and that the amendment was therefore irrelevant.[72] James Wilson's defense contains one of the only direct statements defining the freedom of the press by any founder. "What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government of the safety, character and property of the individual."[73] It is likely that Wilson's articulation embodied the common understanding of the freedom of the press among the Pennsylvania ratifiers—particularly given that no other member objected. This is the most succinct and simply stated summary of the meaning of the liberty of the press in the founding era.

Despite Wilson's protestations that it was unnecessary, when Pennsylvania did ratify the constitution, it also provided a recommendation for an amendment which read: "That the people have a right to the freedom of speech, of writing and publishing their sentiments, therefore, the

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> conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence: And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."

[70] 3 Yeates 93 (Penn. 1800) (refusing an argument that the 1790 constitution prohibited charging a newspaper with criminal libel on information and required an indictment by a grand jury).
[71] FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, 130–31 (Ed. Leonard Levy) (1966).
[72] *Id.*
[73] *Id.*

freedom of the press shall not be restrained by any law of the United States."[74] When James Madison was drafting the First Amendment, he may have taken inspiration from this proposed amendment, along with others, to combine the freedoms of speech and press. As a result, Wilson's clear articulation of the Free Press provides strong evidence for an Originalist who might seek to discern original public meaning of the free press in Pennsylvania. While that clarity has an attractive quality, its limitations must be acknowledged. James Wilson, while an influential figure, did not have a hand in the drafting of the Pennsylvania Constitution of 1776, nor is it clear how his articulation of the liberty of the press interacted with Pennsylvania's substantive protection for the freedom of printing presses. Because of the many unique facets of the Pennsylvania's free press protections, we cannot assume that Wilson's understanding was either shared throughout the many states or particularized to Pennsylvania's unique provisions.

d. Maryland

The Maryland Declaration of Rights, Article XXXVIII provided "[t]hat the Liberty of the Press ought to be inviably preserved."[75] In pre-revolutionary Maryland, the colony was governed by a series of regular conventions. The eighth of these conventions, recognizing the need for a formal government post-independence in accordance with the Continental Congress's instruction, called for the election of a special ninth Convention.[76] It was this ninth convention that drafted and adopted Maryland's Declaration of Rights, containing the Liberty of the Press.[77] The drafting of the Declaration of Rights is alternatively credited to Charles Carroll (there were

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[74] *Amendments Submitted to the Pennsylvania Convention*, § 6 (Dec. 12, 1787) *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 242.
[75] MD. DECLARATION OF RIGHTS of 1776, ART. XXXVIII, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 103.
[76] DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION, A REFERENCE GUIDE 2 (2006).
[77] Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 639 (1998).

two Charles Carroll's in attendance), Samuel Chase, or both.[78] Like most of the early constitutions, Maryland adopted its new governing documents by a vote of the convention, without any public input.[79]

As is too often the case with early state constitutions, "the materials that one desires most do not exist. . . . [N]o records of the Maryland Constitutional Convention's deliberative process are known to exist."[80] Secondary sources, including the personal notes of the attendees, shed some light, however, on the inspiration behind Maryland's documents.[81] These sources show that when drafting Maryland's constitution and Declaration of Rights, the convention was greatly influenced by the preceding publication of the Virginia Declaration of Rights.[82]

In addition, Maryland's 1776 Declaration and Constitution continued in force for much longer than most early constitutions, and the free press guarantee remained unchanged in those documents until 1864, when a more complex provision, protecting both freedom of the press and responsibility for its abuse, was drafted.[83] Despite that long stretch, no controversy of free press arose during that time to make clear the provision's meaning.[84]

When the United States Constitution's ratification was debated in Maryland, the protection for the Press was often considered by the ratifiers. For example, one widely published series of essays, written by "A Farmer," stressed that the liberty of the press required an

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[78] ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776–1791, at 51 (1955).
[79] *Id*.
[80] Friedman, supra note 77 at 640. Secondary sources suggest that due in part to the necessary secrecy of the convention, no records of the debates themselves were even created, aside from the recorded votes on specific questions. *Id.*
[81] *Id.* at 937–38.
[82] *Id*.
[83] DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION, A REFERENCE GUIDE 45 (2006) ("That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write, and publish his sentiments on all subject, being responsible for the abuse of that privilege.").
[84] While one lawyer argued that barring subscribers of certain publications from holding certain publication violated the liberty of the press, the Maryland Court of Appeals did not reach this argument in its dispensation of the case.

allowance for anonymity.[85] The same "Farmer" also pressed the need for a bill or rights protecting the liberty of the press.[86] Others argued that the press was securely out of reach of the Federal Government, and thus needed no federal protection.[87] At the same time, the ratifiers in Maryland also read a published letter from Virginian Richard Henry Lee, arguing for a bill of rights containing a provision that "the freedom of the press shall be secured."[88] To resolve the debate, the state convention voted to ratify, but with proposed amendments to the Constitution. The "Farmer" had his way. Among the suggested amendments was a protection for the freedom of the press that went into considerably more detail than Maryland's eleven word provision: "That the people have a right to freedom of speech, of writing and publishing their sentiments, and therefore that the freedom of the press ought not to be restrained, and the printing presses ought to be free to examine the proceedings of the Government, and the conduct of its officers."[89]

As a result, the Maryland Declaration of Rights can impute a some meaning to the First Amendment protection ultimately ratified. The critics who debated the freedom of the press all agreed that the liberty of the press in Maryland's declaration was important, and consistent with anonymous publication on critical public action. When Maryland's citizens later ratified the First Amendment, they likely believed those same protections were secured at the federal level.

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[85] A Farmer I, BALTIMORE MARYLAND GAZETTE (15 Feb., 1788), *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* 306 (John P. Kaminski, et al, eds.) (2009) ("That men who profess an attachment to the liberty of the press, should also require names, is one of those instances of human weakness and inconsistency, that deserves rather pity than resentment.").
[86] *Id*.
[87] Aristides, MARYLAND JOURNAL (4 Mar. 1788) *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* 351 (John P. Kaminski, et al, eds.) (2009) ("[S]uch an act would have the validity of law, no more, than if a federal bill of rights had declared inviolable the freedom of the press"). "Aristides" directly alluded to his appreciation for the Maryland Declaration of Rights, despite his distaste for a federal bill of rights containing a protection for the press. *Id.* at 356.
[88] *Id*.
[89] *From the MARYLAND GAZETTE, on April 29, 1788*, THE INDEPENDENT GAZETEER; OR THE CHRONICLE OF FREEDOM 3 (May 6, 1788).

e. North Carolina

North Carolina's Declaration of Rights of 1776, Article XV provided "[t]hat the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained."[90] A special Fifth Provincial Congress of North Carolina was called to draft the Declaration of Rights and the "Independence Constitution."[91] When the call went out to elect delegates for this congress, it was made known that "it will be the business of the delegates then chosen, not only to make laws for the good government of, but also for form a constitution for, this state."[92] Like its contemporaries, it was adopted by a vote of the convention, merely a month after the convention had convened.[93]

That early constitution rarely saw the pens of judicial interpretation. "Prior to 1868, it has been observed, the Constitution was so simple in its provisions . . . that few questions involving either the validity of acts of the Legislature or of the constitutional construction were presented to the courts."[94] The press provision was no exception. No controversies pertaining to the press arose under the Constitution of 1776. As a result, one must look beyond North Carolina itself for evidence of its constitution's meaning.

North Carolina's governing documents were strongly influenced by other state constitutions; when the delegates convened to draft the document, they had in hand copies of the recently adopted constitutions in Pennsylvania, Virginia, and Maryland.[95] As a result, North Carolina's free press provision mimicked its neighbor, Virginia, almost verbatim—another

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[90] N. C. DECLARATION OF RIGHTS of 1776, Art. XV, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 23.
[91] *Id.*
[92] JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 5 (2013).
[93] *Id.* at 4–5. The speed of the convention's work is credited to its reliance on already enacted constitutions. *Id.*
[94] *Id.* at 11 (internal quotation marks omitted).
[95] *See Letter from William Hooper to Fifth Provincial Congress* (Oct. 26, 1776), *reprinted in* 10 THE COLONIAL RECORDS OF NORTH CAROLINA 862–70 (William L. Saunders, ed.) (1890).

example of the that Declaration's influence.[96] Throughout the ratification process, North Carolina remained in lockstep with Virginia, even going so far as to propose amendments drawn from Virginia's ratification convention, including a protection for the liberty of the press.[97] This close relationship indicates that, if any meaning can be found in the interpretation of North Carolina's press protection, it is identical to that of Virgina.[98]

f. Georgia

In the Georgia Constitution of 1777, article LXI demanded "[f]reedom of the press and trial by jury to remain inviolate forever."[99] Georgia was unique among the early constitutions in combining its freedom of the press with a protection of the trial by jury, though the historical reason for this combination is unknown. In Georgia, the preexisting government took the form a Provincial Congress, made up of 96 delegates, elected by taxpayers of the 18 districts.[100] Archibald Bulloch, the President of Georgia under this pre-existing government, called a special session of the Provincial Congress to discuss "business of the highest consequence to the government and welfare of the State."[101] This convention chose seven drafters by ballot to form a committee, and debated several versions of the constitution in the following months.[102] Once an

[96] JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 61 (2013).
[97] "That the people have a right to freedom of speech, and of writing and publishing their sentiments; that freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated." *North Carolina's proposed amendments to the Constitution and Declaration of Rights*, Aug. 1, 1788, § 16, GENERAL RECORDS OF THE U.S. GOVERNMENT, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (https://www.visitthecapitol.gov/artifact/north-carolinas-proposed-amendments-constitution-and-declaration-rights-august-1-1788) (last accessed Dec. 1, 2022).
[98] *See* Supra notes 32–50 and accompanying text for the meaning imparted in Virginia's press provision. For other similarities throughout the North Carolina Constitution, see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759 (1992).
[99] GA. CONST. of 1777, Art. LXI, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 143.
[100] ETHEL K. WARE, A CONSTITUTIONAL HISTORY OF GEORGIA, 29 (1947).
[101] *Id.*
[102] *Id.* at 32.

acceptable draft was read on February 4, of 1777, it was unanimously affirmed, and thereby ratified by the state constitutional convention, not by the voters of Georgia.[103]

Georgia called a new state convention in 1788 to reevaluate and revise its constitution.[104] The result was a short (and short-lived) document, but the freedom of the press survived in identical language.[105] No cases or commentaries provided insight to the meaning of the freedom of the press under either of these constitutions. The most authoritative treatises on Georgia's constitutional history make no mention of debate or discussion regarding the first convention's views on freedom of the press.[106] Lamentably, the minutes of this convention exist only in fragmentary form, and do not provide a complete record of the proceedings.[107] As the constitution was adopted and ratified via the Provincial Congress, there was no public debate to illuminate its meaning.

Yet once the constitution was ratified, the drafting committee was tasked with the supervising the printing and distribution of 500 copies, which were then circulated and widely read.[108] Arguably, this creates a presumption that the citizens of Georgia, who later ratified the United States Constitution and Bill of Rights, were aware of the provisions in the state constitution, and voted to ratify their federal counterparts with them in mind. The historical

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[103] *See id.*; MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION, A REFERENCE GUIDE 3 (1994).
[104] MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION, A REFERENCE GUIDE 4 (1994).
[105] GA. CONST. of 1789, Art. IV, § 3, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 789 (Francis Newtown Thorpe ed., 1909) ("Freedom of the press and trial by jury shall remain inviolate."). When this short-lived constitution was also replaced in 1798, the new Art. IV, § 5 read "Freedom of the press, and trial by jury, as heretofore used in this State, shall remain inviolate; and no ex post facto law shall be passed." *Id.* at 800.
[105] WARE, supra note 100 at 29.
[106] WALTER MCELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA, 69 (1877); ETHEL K. WARE, A CONSTITUTIONAL HISTORY OF GEORGIA, 29 (1947); ALBERT SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA, 1732–1945 (1984).
[107] WARE, supra note 100 at 29.
[108] *Id*. at 32; *see also*, A Citizen, *Cursory Remarks on Men and Measures in Georgia* (1784) (circular letter referencing the 1777 distribution of the constitution, with the appended *Habeas Corpus* act).

record of the ratification supports this theory. In a circulated letter during the ratification debates, "A Georgian" argued that the Constitution should be amended to included protections that mirrored Georgia's joint assurance of the trial by jury and liberty of the press.[109] While the "Georgian" gave no insight into what that protection meant, his suggested language was a clear indication that Article XXXVIII of the Georgia Declaration of Rights was on his mind. Presumably, he was satisfied when the First Amendment was eventually concretized in the Bill of Rights. Aside from this presumption, it is a great stretch to impute any meaning from Georgia's Free Press provision to the First Amendment of the United States Constitution.

g. South Carolina

South Carolina's Constitution of 1778, Art. XLIII stated "[t]hat the liberty of the press be inviolably preserved."[110] Before declaring independence, South Carolina's de facto governing body, the Provincial Congress, had already created a temporary Constitution and instituted a formal government.[111] Perhaps because of that temporary stability, South Carolina ratified the 1778 Constitution nearly two years later than many others throughout the colonies. But that delay allowed South Carolina to survey a panoply of the other states' constitutions and bills of rights. Among the Framers who contributed to the state constitution were John Rutledge, Charles Cotesworth Pinckney and Pierce Butler.[112] They were apparently influenced a great deal by

[109] "Let the trial by jury in civil and criminal causes, and the liberty of the press, be forever sacred and inviolable." A Georgian, GAZETTE OF THE STATE OF GEORGIA, (Nov. 15, 1787) *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* (John P. Kaminski, et al, eds.) (2009).
[110] S. C. CONST. of 1778, Art. XII, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 142.
[111] See COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 10 (2007). The temporary constitution contained no protection for freedom of the press.
[112] *See The Founding Fathers: South Carolina*, NAT'L ARCHIVES (last updated Dec. 19, 2018), (https://www.archives.gov/founding-docs/founding-fathers-south-carolina). There were three Charles Pinckney's of mention in South Carolina. Charles Cotesworth Pinckney was the second-cousin of Charles Pinckney, one of the youngest delegates to the Continental Congress and a zealous presence throughout the debates, and the son of Col. Charles Pinckney, who served in the state government and led many battles throughout the revolution.

Maryland and Delaware, as they adopted identical language for their protections of free press, despite South Carolina's lack of a complete Declaration of Rights.

The free press provision of South Carolina's constitution received some treatment by the drafters and ratifiers of the United States Constitution. Charles Pinkney proposed free press provisions that were identical to South Carolina's multiple times before the constitutional convention, but these proposals were each defeated without explanation of the provisions meaning, primarily based on the rebuttal that "[i]t was unnecessary—The power of Congress does not extend to the Press."[113]

Regardless of any meaning that can be loosely inferred from this debate, or the language of Maryland and Delaware's provisions, other evidence counsels against affording great weight to any of this Constitution's terms. The congress established by the temporary 1776 constitution had the power to amend the temporary constitution by bill. "Just such an alteration did take place with the enactment of March 19, 1778, which was the Act of the General Assembly establishing the Constitution of 1778."[114] South Carolina's Supreme Court would later point to this amendment process and remark that, "[i]n this respect, the document is statutory in nature, for its alteration could take place by subsequent statutory enactments."[115] This method of amendment was carried forward into the 1778 Constitution, which the Court also considered "statutory."[116] Originalists should therefore question whether or not South Carolina's 1778 Constitution should be given any more weight in determining original meaning than any law or bill passed throughout the colonies. Furthermore, due to the large losses of land to British forces during this

[113] Anderson, supra note 1, at 467 (citing B. SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 437–39 (1971)).
[114] Kalber v. Redfearn, 215 S.C. 224 (1949).
[115] *Id.*
[116] *Id.*

period, many of the elections of state representatives to the congress that drafted the 1778 Constitution were either compromised, or did not occur, further impinging the democratic merit of its provisions.[117]

h. Massachusetts

The 1780 Massachusetts Constitution, Art I, Section XVI provided that: "The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth."[118]

Massachusetts's early constitutional history presents a somewhat more complex narrative than the other colonies. Unlike its preceding sister colonies, whose legislatures spontaneously drafted Constitutions for presentment to the people at the behest of the continental congress, Massachusetts's Great and General Court (the governing legislative body) was petitioned by the people to draft a constitution.[119] On May 29th, 1776, the legislature received a petition from the people of Pittsfield, requesting a "fundamental constitution as the basis and frame-work of legislation" which would be referred to the people for approval.[120] In response, the towns of Massachusetts were polled to determine whether the legislature should draft a constitution, and if so, whether it should be ratified by the public, or by its drafting body.[121] As most towns voted to affirm on both questions, the legislature began drafting a constitution in June 1777.[122] Neither the Journal of the convention nor any other preserved source contains records of that body's deliberations, but the resulting document was swiftly rejected by the voters.[123] It lacked a bill of

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[117] *See* EDWARD MCCRADY, 4 THE HISTORY OF SOUTH CAROLINA IN THE REVOLUTION 484 (1902).
[118] MASS. CONST. of 1780, Part I, Art. XVI, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA, at 23.
[119] LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 9 (2011).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] CLYDE DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS 132, n.3 (1906).

rights—or any protection for the freedom of press—which specifically motivated its rejection by the towns of Lennox, Brookline, Plymouth, Beverly, Westminster, Lexington, Dartmouth, and Stoughton.[124] Lennox in particular wrote the convention, "We further suppose that by a Constitution the printing presses ought to be declared free for any Person who might undertake to examine the proceedings of the Legislature or any part of Government."[125]

Taking its cue from these towns, the legislature set to work on a second proposed constitution. This time, over 300 delegates elected by the people were sent to a designated convention.[126] When it quickly became apparent that the size of the convention would be unmanageable, a smaller drafting committee was chosen. From this body, a smaller subcommittee was formed of John Adams, Samuel Adams, and James Bowdoin.[127] Within this subcommittee, John Adams was tasked with actually writing the first draft. His draft received only minor revisions from the subcommittee of three, or the full committee.[128] As a result, it was later said that the committee's draft was largely Adam's own draft.[129] Adam's draft contained a full bill of rights, including a provision declaring that "The people have a right to freedom of speaking, writing, and publishing their sentiments. The liberty of the press, therefore, ought not to be restrained."[130] This draft, upon being presented to the full convention, was pared down to what would be its final iteration, having lost any reference to a freedom of speech. This draft, when presented to the people, was finally ratified in 1780.[131]

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[124] *Id.* at 132–33, n.4.
[125] *Id.* at 133.
[126] Editorial Note, 8 PAPERS OF JOHN ADAMS 228–236 (Gregg Lint, et al, eds) (1989).
[127] *Id.*
[128] *Id.*
[129] *Id.* at 231.
[130] DUNIWAY, supra note 123 at 133. This provision was identical to a provision in the Vermont constitution, which at that point was its own republic, and not unified with the other colonies.
[131] *Id.* at 136. While a minority of towns reported concerns that the freedom of the press protected by this provision would allow for the printing of "herasy" "abuse" or "injury to Private Charecters" [sic], the total votes for and against the ratification of this provision totalled approximately 4000 to 1400. *Id.* at 135–36.

Because of its novel ratification process, the 1780 constitution would later be called "the most important [constitution] to be written between 1776 and 1789."[132] And because of that same process, it should also be one of the most important for Originalists. The Massachusetts constitution was addressed and ratified by the people in a way that mirrored the United States Constitution, and thereby incorporated public opinion the same way. Thus, Massachusetts's constitution lays the strongest claim to bearing the original *public* meaning of the United States Constitution.

What meaning can be taken from the free press clause in particular? Some early discussion by its author John Adams sheds light. William Cushing, the Chief Justice of Massachusetts's Supreme Court, wrote a letter to John Adams soliciting his view on the state's free press protections.[133] In particular, he sought Adams's advice on what limitations could be placed on the press. To Cushing, "the words of our article" when "understood according to plain English," disclaimed both prior and subsequent restraints on the press, so long as the newspapers printed the truth.[134] John Adams agreed, and suggested that, if the question were put to a court, evidence of a statement's truth ought to substantiate a defendant's defense against an accusation of libel.[135] Cushing's appeal to "plain English," coupled with Adams's authorship of the provision, provides substantial proof that this was the accepted meaning of the freedom of the press in Massachusetts. The votes of the Massachusetts towns, over dissenting voices that perceived the freedom of the press to include freedom of libel and "abuse," demonstrates public acceptance of this interpretation.[136]

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[132] DONALD LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 129 (1980).
[133] LEONARD LEVY, EMERGENCE OF A FREE PRESS 198–202 (2004).
[134] *Id.* at 199.
[135] *Id.* at 200.
[136] DUNIWAY, supra note 133, at 135–36 (1906).

Massachusetts was one of the few states with a significant free press controversy under its first Constitution, when the state tried to tax the press. The Massachusetts legislature in 1785, in an attempt to raise revenue, issued a "stamp tax" on the distribution of all newspapers.[137] The newspapers immediately objected to this tax as an inhibition on the freedom of the press, and were ultimately successful in getting the tax repealed.[138] Public opinion, it seemed, was that imposing a tax on newspapers violated the freedom of the press as it was protected in Massachusetts.

This was not the first such controversy. During the prior Stamp Act, when newspapers had vigorously objected to the tax placed on their distribution by Great Britain, they had also appealed to the freedom of the press (then unprotected by any constitution). Chief Justice Hutchinson of the Superior Court of Judicature, took special care to denote that while no prior licensing system could restrain "the Emission of Things from the Press," freedom of the press did not give printers "a Liberty of reviling and calumniating all Ranks and Degress of Men with Impugnity[sic]."[139] In particular, he emphasized that authors published in newspapers could be cited for contempt of Court if they criticized the justices of the Court.[140] This articulation was confirmed to have survived the ratification in 1791, when "a judicial construction of liberty of the press in the state had been announced, differing no wise from the opinions of Chief Justice Hutchinson in 1768."[141]

All this evidence, backed by Massachusetts's strong claim to public opinion, makes for a convincing Originalist argument. John Adams, the author of Massachusetts's constitution, as

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[137] *Id.* at 136.
[138] *Id.*
[139] *Id.* at 127–28.
[140] *Id.*
[141] *Id.* at 142–43. The case involved a newspaper printer, Edward Freeman, who was indicted "for publishing a slanderous communication reflecting upon the private character of one John Gardiner." *Id.*

well as one of his contemporaries, Cushing, believed that freedom of the press prevented any licensing restrictions, but believed in repercussions for misinformation. The Stamp Act controversy demonstrated that a tax on newspapers was considered to be injurious to the freedom of the press. The courts of Massachusetts, in mirroring holdings before and after the ratification of the constitution, preserved the common law of libel, affirming that it survived the constitutionalized freedom of the press.[142] If an Originalist seeks to show, by way of a state constitution, that the ordinary public meaning of freedom of the press meant freedom from prior restraints, and susceptibility to libel laws, Massachusetts presents the prime comparison. To wit, Justice Story would later reason that the federal freedom of the press must give way to libel law, just as the Massachusetts freedom of the press did.[143]

i. New Hampshire

The last state constitution to be ratified containing a free press clause before the adoption of the federal Bill of Rights, New Hampshire's 1784 Constitution, Article XXII read: "The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved."[144]

The specific author and drafter of the 1784 Constitution is unknown as, like most of the early drafting conventions, no minutes survived.[145] But the convention was greatly influenced by its neighbor, Massachusetts, and adopted many provisions with similar language.[146] Bearing the

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[142] *See also* Commonwealth v. Blanding, 3 Pick. 304 (Mass. 1825) ("Nor does our constitution or declaration of rights abrogate the common law in this respect, as some have insisted. The 16th article declares, that "the liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth.").
[143] JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1881 (1833). *See* supra text accompanying note 52.
[144] N. H. CONST. of 1784, Art. XXII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 2456 (Francis Newtown Thorpe ed., 1909).
[145] JAMES FAIRBANKS COLBY, MANUAL OF THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE 87 (1912).
[146] *Id.* at 89.

characteristic "flourish" from *Cato* and Blackstone, the Free Press protection was one of those borrowed provisions.[147]

Like South Carolina, New Hampshire had adopted a temporary constitution to streamline governance during the tumultuous revolution, and like Massachusetts, the state's constitution was submitted to the voters for ratification, after being drafted in a specialized convention.[148] Also like Massachusetts, New Hampshire's delay in adopting a constitution was due in part to its multiple failed attempts.[149] The first draft was swiftly rejected, and in 1781, a new draft was put to the people. While closer to the mark, this draft was also rejected.[150] Upon reconsidering the draft, the convention was able to incorporate the comments and suggestions of the towns that had rejected it.[151] So the convention drafted yet another constitution. This one was ultimately ratified.

In the objections to these various drafts, the towns of New Hampshire were chiefly concerned with the structure of government and the balance of powers, rather than their Bill of Rights. When the final draft of the constitution was circulated, it was preluded by a statement from the convention, explaining the reasoning that guided its drafting.[152] While that statement included lengthy examinations of the separation of powers between legislature, executive, and judiciary, only two brief paragraphs were dedicated to explaining the rights guaranteed by the constitution. While the freedom of the press is not mentioned specifically, the statement reads that "[the drafters] have distinguished betwixt the alienable and unalienable rights; for the former of which men may receive an equivalent; for the latter, or the rights of conscience, they can

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[147] *See* supra text accompanying notes 33–38.
[148] SUSAN MARSHALL, THE NEW HAMPSHIRE CONSTITUTION: A REFERENCE GUIDE, 9–10 (2004).
[149] *Id.*
[150] *Id.* at 11–12. The first draft was alike to the temporary constitution already in existence, and failed to persuade critics that it would make any substantial changes.
[151] *Id.* at 12.
[152] *See* JAMES FAIRBANKS COLBY, MANUAL OF THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE 93–101 (1912).

receive none, the world itself being wholly inadequate to the purchase."[153] It is not immediately clear whether this Bill of Rights distinguished freedom of the press as "alienable" or "unalienable." Part I, Article IV, states that "[a]mong the natural rights some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience."[154] Is the freedom of the press a "right of conscience"? By its placement, it would appear not. While rights which are clearly "rights of conscience" fall towards the beginning of the bill of rights, the freedom of the press sits near the end, among such rights as a prohibition on retroactive laws, or trial by jury.[155]

So without specific recorded objection or debate, the freedom of the press was included among the "alienable" rights of New Hampshire. What was meant by this protection? With no statements from the Towns as to their perspective of the freedom, nor from its unknown authors, only the residual meaning drawn from the influence of Massachusetts could remain. Geographically, it would make sense that Massachusetts and New Hampshire, as northern states, whose newspapers were more often circulated and shared across state lines, would have similar conceptions of freedom of the press.[156] But the general impression of the Massachusetts constitution is not a great indication of specific meaning of free press without a more substantial documentary record. For the Originalist, then, New Hampshire provides little to the meaning of the freedom of the press.

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[153] *Id.*
[154] *See* N. H. CONST. of 1784, Art. IV, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 2454 (Francis Newtown Thorpe ed., 1909).
[155] *Id.* at 2546.
[156] *See generally* The Controversy over the Post Office and the Circulation of Newspapers *printed in The Documentary History of the Ratification of the Constitution Digital Edition,* 540–96 (John P. Kaminski, et al, eds.) (2009).

III. Evaluating Impact and Originalist Methods

So what are Originalists left with? The many state constitutions should carry varying weight when determining the original meaning of freedom of the press. In Virginia and Massachusetts, the original public meaning of freedom of the press is fairly well determined. One need only look to Justice Cushing's interpretation of the "plain English" meaning of Massachusetts's provision. New Hampshire's constitution provides little beyond a suggestion that Massachusetts's reflection of original public meaning was accepted by the public beyond the borders of the Bay State. Virginia's importation of the common law and libertarian theory presents a strong claim that it also reflects the ordinary public meaning, despite its lack of public ratification, thanks to its imitation by Maryland, North Carolina, and Delaware. Pennsylvania presents a unique case in many ways, so while James Wilson's concise articulation of Freedom of the Press may have reflected the ordinary public meaning, there is little evidence that meaning was carried in its Constitution's protections. The general lack of contemporary evidence in Georgia and South Carolina, as well as the infirmities in the adoption of South Carolina's constitution, provides little to the debate.

These conclusions cast serious doubts on the reliance of many modern scholars on state constitutions when it comes to the freedom of the press. For example, Professor Eugene Volokh attributes a monolithic meaning to the state constitutions: "Some early state constitutions mentioned both the 'every citizen' phrase and, separately, the 'liberty of speech, or of the press,' but as the Pennsylvania Constitution of 1776 shows, these formulations did not describe separate rights."[157] Volokh goes on to point out that early 19th century cases treated Pennsylvania's provision that "every citizen may freely speak, write and print on any subject" as synonymous

[157] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology - From the Framing to Today*, 160 U. PA. L. REV. 459, 467 (2012).

with liberty of the press.[158] But whether or not that is true, it says little about the understanding of the freedom of the press in states other than Pennsylvania. It is true that many of the state constitutions were influenced by preceding constitutions in their neighboring states. But none of the original constitutions adopted the language found in Pennsylvania's free press provision, which included the "every citizen" clause, the "liberty of the press" clause, and an entirely separate protection for printing *presses*.[159] Professor Sonja West also looks to Pennsylvania as an "example" that is illustrative of early state constitutions, despite its obvious unique qualities.[160] West does not engage with any of the differences between Pennsylvania and other state constitutions, nor does she draw any significant line from that specific conception of free press to the freedom of the press enshrined in the First Amendment.[161] Treating the state constitutions as uniform in their contribution, without a word of their individual histories, drafting, or ratification, can lead to significant mischaracterization of original meaning.

That is not to say that evidence of the original meaning of Free Press cannot be found in state constitutions. Rather, any meaning that is drawn from them must be drawn while conscious of the context in which they were drafted. If one is seeking evidence of the original public meaning of a term Virginia (due to its widespread influence) and Massachusetts (due to its public ratification and influence in New Hampshire) hold more meaning than Pennsylvania or South Carolina. The language used in Virginia, drawn from libertarian theory and understood by other states to contain that theory, and the "plain English" understanding of Massachusetts's provision both provide weight to a framework that frees newspapers from prior licensing restrictions, but

[158] *Id.* (citing Runkle v. Meyer, 3 Yeates 518, 519 (Pa. 1803)).
[159] Pennsylvania's constitution was post-dated by the constitutions of Maryland, Georgia, South Carolina, North Carolina, Massachusetts, and New Hampshire.
[160] Sonja R. West, *The Press, Then & Now*, 77 OHIO ST. L.J. 49, 66 (2016).
[161] *See id.* at 66–67.

still subjects them to potential charges of libel for untrue statements. Other states may provide evidence of more specific meaning, such as Maryland and the right to anonymous publication. When the bill of rights was ratified, the voters aware of these provisions would have understood the freedom of the press, as protected by the First Amendment, to carry the same meaning. This approach shows adequate respect for the varied historical records in the states and puts proper emphasis on their role as laboratories of democracy of constitutions.

Liquidation presents an even harder analysis. Some look to discern original meaning from state constitutions by superimposing the practices of a state over its freedom of the press to illustrate what the protection was understood to protect or allow.[162] The practices of a state laboring under a recently adopted free press protection can provide meaning that looking at the protection's adoption alone would not. An early model for this type of analysis is found in Federalist No. 84. Alexander Hamilton argued that a protection for the freedom of the press was unnecessary, and in doing so, made arguments that illuminated the limitations of freedom of the press in the states.[163] In a footnote, Hamilton sought to dispel the argument that congress might tax publications of newspapers, thereby created a de facto restriction on the press.[164] His refutation was that the protections for free press in the states did not prevent such taxation: "I know not by what logic it could be maintained, that the declarations in the state constitutions, in favor of the freedom of the press, would be a constitutional impediment to the imposition of

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[162] *See generally William* Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

[163] THE FEDERALIST No. 84 (Hamilton). Hamilton also argued that a protection for the press would be vague, and undefined.

> What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.

Id. The language which Hamilton found to be so intractable was that used in the constitutions of Maryland and Delaware: "What signifies a declaration, that 'the liberty of the press shall be inviolably preserved'?" *Id.*

[164] *Id.* at n.3.

duties upon publications by the State legislatures."[165] Hamilton drew meaning of the free press the from the fact that some states had allowed taxation on their newspapers, even though those newspapers were protected by state constitutions.[166]

But this feedback loop of meaning first requires a protected right, and a practice that arguably conflicts with it—in this case, free press and taxation. The logic goes that if the public does not object to the practice as a violation of the protection, the protection likely does not preclude that practice. The meaning of free press, derived from the practice, was generally understood by the public. This same public later ratified the United States Constitution. Therefore, the meaning of free press in the Bill of Rights would have been understood by the public to allow the same practice of taxation. This same analysis can be applied to any state with an early practice that arguably infringed on free press, regardless of other evidence that the state constitutional provision lacked affirmative public ratification.

So for this analysis to take, each link in this feedback loop must be sound and historically supported. That's a tall order for the many states with thin records, no significant free press controversies, and short-lived Constitutions. Instances where liquidation can inform the Federal Bill of Rights by way of a State Declaration are few. For the Freedom of the Press, it may be limited to a class of one, in Massachusetts' stamp tax controversy.

Conclusion

To be sure, nuanced evaluation of textual weight and state constitutional liquidation can inform the United States Constitution. And any departure from these methods carries a grave risk of misinterpretation and legal error. But the many unique characteristics embodied by the state

[165] *Id.*
[166] Hamilton, apparently, was not talking about Massachusetts. *See* supra notes 133–37 and accompanying text.

constitutions require nuanced analysis, not buffet-style help-yourself analysis. In many cases, the context of a state constitutional provision renders it useless to an inquiry about original meaning. Sometimes, it is useful only for showing the how a single drafter or group understood a term.

While this Article has ostensibly focused on free press, that is merely an example that proves the larger point on Originalism and state constitutions. Different cross-sections of the state constitutions contained protections for many rights, but what is good analysis for one may not be good for the other.[167] Much more work is needed.

[167] *See* Maggs, *Guide and Index* at 819–36 (exhaustively indexing which provisions appear in original constitutions).