

“TRUSTEES AND SERVANTS”: GOVERNMENT ACCOUNTABILITY IN EARLY VERMONT

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[A]ll power being originally inherent in, and consequently, derived from, the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

Vermont Constitution of 1777, chapter I, section V

INTRODUCTION

A statewide newspaper requests copies of the governor’s daily meeting schedule in an effort to discover and make public a list of those with whom the governor is meeting.¹ The governor’s office resists the request, arguing that disclosure of the governor’s schedule would violate executive privilege and pose a security threat.² A television station refuses to turn over to law-enforcement officials tapes of a campus riot on the grounds that doing so would interfere with the ability of the press to collect and report stories of public importance.³ After the governor announces plans to run for President, a conservative watchdog organization seeks access to the governor’s official papers, which have been donated to the state archives under an agreement requiring that they remain sealed for ten years.⁴ Is the agreement consistent with the state’s public records law?⁵ A reporter refuses to turn over notes taken at a public meeting that are being sought by a plaintiff in a civil action to support the plaintiff’s claim that a local governmental body’s hiring decision was based impermissibly on age discrimination.⁶ Notwithstanding the state’s open meeting law,⁷

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1. *See Herald Ass’n v. Dean*, 174 Vt. 350, 351, 816 A.2d 469, 471 (Vt. 2002) (noting that publishers were seeking the Governor’s daily schedule to determine the amount of time spent on activities related to his presidential aspirations).

2. *See Herald*, 174 Vt. at 352, 816 A.2d at 472 (outlining the Governor’s arguments against disclosure of his daily schedule, including claims of executive privilege and security concerns).

3. *In re Inquest Subpoena* (WCAX), 179 Vt. 12, 13, 890 A.2d 1240, 1241 (Vt. 2005).

4. *Judicial Watch, Inc. v. State*, 179 Vt. 214, 215–16, 892 A.2d 191, 193–94 (Vt. 2005); *see* *Judicial Watch, About Judicial Watch*, <http://www.judicialwatch.org/about.shtml> (describing *Judicial Watch, Inc.* as a conservative foundation).

5. *Judicial Watch*, 179 Vt. at 215, 892 A.2d at 193.

6. *Spooner v. Town of Topsham*, No. 129-7-04 OeCv (Vt. Tr. Ct. Rep. Mar. 14, 2006).

7. Vermont’s open meeting law requires that meetings of all public bodies in the state be open

administrative meetings of the Vermont Supreme Court, at which important policy decisions are made affecting operation of the state judicial system, are closed to the public and press.⁸ A newspaper seeks access to records of university disciplinary hearings which led to disciplining members of the university's hockey team for having engaged in forbidden hazing.⁹ The university resists the request, claiming that turning over the records would violate student privacy.¹⁰ The Vermont constitutional provision guaranteeing the right of the people to "write and publish" their "sentiments" is limited to writing and publishing sentiments "concerning the transactions of government."¹¹ Why this limitation? Why should not the freedom extend to publication of one's views on any matter whatsoever?

Open meeting laws; public records laws; laws governing access to governmental information by the public and the press; constitutional provisions dealing with freedom of speech and press—disagreement over how these laws and constitutional provisions should be interpreted and applied has been a major source of litigation in Vermont over the past several years, and there is no indication that this pattern will change dramatically in the near future. This is not surprising since the claims that give rise to these disputes often require the courts to balance competing interests of vital importance. For example, in the case where the press was seeking records of university disciplinary proceedings, how should claims by the press of right of access to public records on the one hand be balanced against protecting the privacy interests of the students involved on the other? How should a reporter's interest in protecting the confidentiality of his sources be balanced against the right of criminal defendants to have access to that information in preparing their defense? How should the reporter's interest in confidentiality be balanced against law enforcement's need to have that information to assist in the investigation and prosecution of crime? What makes these cases interesting and difficult is that there are often genuine and important claims to be made on both sides.

to the public, VT. STAT. ANN. tit 1, § 312(a) (2003), but exempts from coverage *all* meetings of the "judicial branch." *Id.* § 312(e). While it may make sense to exclude the public from judicial deliberations in particular cases, it does not make sense to allow administrative meetings of the state supreme court to be conducted in secret. This exemption runs counter to the basic philosophy underlying the open meeting law and the constitutional principle of government accountability. *See* VT. CONST. ch. I, art. 6 (reflecting the same principles found in the law's provisions).

8. *See* VT. STAT. ANN. tit 1, § 312(e) (2003) (excluding the judicial branch from coverage).

9. *Burlington Free Press v. Univ. of Vt.*, 172 Vt. 303, 304–05, 779 A.2d 60, 62 (Vt. 2001).

10. *See Burlington Free Press*, 172 Vt. at 304–05, 779 A.2d at 62 (arguing that the requested disclosure would violate the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232(q) (2000)).

11. VT. CONST. ch. I, art. 13.

Still, it is important not to lose sight of the forest for the trees. At bottom, all of these laws and judicial decisions trace their roots back to a fundamental principle of government embodied in the Vermont Constitution: the principle that in a constitutional democracy, officials of government should be accountable to the people.¹² In terms of the large sweep of history, that idea is a relatively recent one. When the first settlers came to America, the principle was not widely accepted or practiced. It is a fortunate accident of history that, by the time the framers of the first Vermont Constitution set to work, the principle of democratic accountability had arrived, politically speaking, at least in the abstract. How that idea was reflected in the early state constitutions, how it has been carried forward by subsequent generations, and what significance that history has for us is the focus of this Article.

I. “TRUSTEES AND SERVANTS”: CONSTITUTIONAL ACCEPTANCE OF THE PRINCIPLE OF DEMOCRATIC ACCOUNTABILITY

The idea that public officials ought to be accountable to the people goes back to the earliest days of Vermont’s existence as an independent political entity. The underlying philosophy is set forth in section V of chapter I of the Vermont Constitution of 1777:

[A]ll power being originally inherent in, and consequently, derived from, the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.¹³

Expressed here is a simple but important principle of democratic philosophy: in a democracy, public officials are regarded not as rulers but as the “trustees and servants” of the people, and hence should be “accountable” to the people “at all times” for their decisions and actions. Nor is this the only provision in the State’s first constitution to embrace the idea of government accountability. Other provisions—for example, requiring that meetings of the legislature be open to the public;¹⁴ mandating the printing and public dissemination of laws under consideration by the legislature;¹⁵ and protecting the freedom of the press “to examine the

12. *Id.* ch. I, art. 6. The argument in this paragraph anticipates the historical discussion in Part I *infra*, where full citation to sources can be found.

13. VT. CONST. OF 1777 ch. I, § V.

14. *Id.* ch. II, § XII.

15. *See id.* ch. II, § XIII (requiring that records of the General Assembly’s daily activities be published).

proceedings of the legislature, or any part of government”¹⁶—reflect the same basic philosophy. Some of the original provisions have since been amended or deleted, but commitment to the principle of democratic accountability has remained a central strand of Vermont’s constitutional tradition down to the present day.

When the first Vermont Constitution was adopted in 1777, the idea that government officials should be directly accountable to the people was still a relatively new one. Only within the last hundred years had the idea of popular accountability begun to replace an earlier model of government.¹⁷ Under the earlier model, the relationship between government officials and the people was conceived as a paternalistic trustee relationship, reflecting then-existing assumptions about the hierarchical nature of the social and natural orders.¹⁸ Government officials, even when elected, were generally chosen from an elite within the relevant political community—from the “better sort” or “superior rank.”¹⁹ While such officials were expected to rule for the public good, they were not expected to be directly accountable to the people for particular decisions and actions as public officials today are.²⁰

Starting in the mid-eighteenth century, this earlier model began to give way to a new one under which government officials were regarded less as paternalistic trustees of the public good and increasingly as politically accountable to the people.²¹ This transformation did not happen overnight but rather took the form of countless incremental changes in expectation and practice. The process was accelerated somewhat on this side of the Atlantic because of the more democratic conditions existing here, but in the end led to fundamentally and permanently changed notions of governance in both England and America. By the late 1700s, the notion of democratic accountability had come to replace the earlier notion of paternalistic

16. *Id.* ch. II, § 32.

17. See J.R. POLE, *THE GIFT OF GOVERNMENT: POLITICAL RESPONSIBILITY FROM THE ENGLISH RESTORATION TO AMERICAN INDEPENDENCE* xi–xii, 87–90, 141–42 (1983).

18. *Id.* at 7.

19. *Id.*; see also Barbara Aronstein Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 *LAW & HIST. REV.* 101, 130 (1985) (explaining that one of the main areas of power in constitutional formation in colonial Massachusetts belonged to the Magistrate, an element of colonial society which remained quasi-aristocratic despite being elected); see also SUMNER CHILTON POWELL, *PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN* 44–48 (1963) (discussing how a man who achieved a certain “status and reputation for responsibility” could be elected as a “free Burgess” and from that point was eligible to move up through the government ranks at the yearly election by a vote of his fellow government officials).

20. See POLE, *supra* note 17, at 1–41 (describing the public’s expectations of government officials in eighteenth-century America).

21. *Id.*

trusteeship as the dominant understanding.²²

Nor did the process of transformation come to a halt at that point. There still remained much to be done before the idea of democratic accountability was translated into meaningful practice. In the newly formed states, public access to deliberations of the state legislatures was neither guaranteed nor expected.²³ The proceedings of the colonial legislative assemblies had been conducted for the most part in secret—the prevailing principle during the colonial period had been not public accountability, but parliamentary privacy²⁴—and old habits died hard.²⁵ Nor was there clear understanding in the newly formed states of what was meant by “freedom of speech” or “freedom of the press.” Although American colonists in the period leading up to the break with England enjoyed considerable freedom in criticizing the King and Parliament, that freedom did not extend to criticism of popularly elected colonial assemblies.²⁶ As Leonard Levy has observed, “the most suppressive body by far . . . was that acclaimed bastion of people’s liberties: the popularly elected assembly.”²⁷ After the former colonies became states, these earlier habits and practices were not easily abandoned.²⁸ Of the thirteen original states, significantly, only one—Pennsylvania—included a provision in its state constitution protecting freedom of speech.²⁹ In contrast, nine states included constitutional provisions protecting freedom of the press, which by that time had come to be regarded as a “bulwark of liberty,”³⁰ but even here the protection provided was extremely limited. The prevailing view during

22. *Id.* at 140.

23. *Id.* at 117–27.

24. *Id.*

25. *See id.* at 133 (“The habits of generations did not fall lightly from American shoulders. If the Revolution produced changed relations between ruler and ruled, it also produced many new rulers who seem to have been willing to slip into the mantles worn by their predecessors.”). Two familiar examples of the continued practice of “parliamentary privacy” during this period at the national level are (1) the Constitutional Convention in Philadelphia in 1787 and (2) the policy of the U.S. Senate during its first few years of operation to meet behind closed doors and not disclose debate to the public. *Id.*

26. *See* LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 17 (Ivan R. Dee 2004) (1985) (noting the constraint common law criminal libel imposed on the expression of nonconformist opinions in colonial America).

27. *Id.*; *see* John P. Roche, *American Liberty: An Examination of the “Tradition” of Freedom*, in *ASPECTS OF LIBERTY: ESSAYS PRESENTED TO ROBERT E. CUSHMAN* 136–37 (Milton R. Konvitz & Clinton Rossiter eds., 1958) (arguing that while Thomas Jefferson supported free speech in religion, he believed “the state could legitimately act to prevent ideological poison from spreading through the body politic”).

28. *See* LEVY, *supra* note 26, at 183 (describing the period between the Declaration of Independence and the ratification of the First Amendment and the states’ reticence to abandon the common law crime of seditious libel).

29. PA. CONST. OF 1776, Declaration of Rights, cl. XII; *see also* LEVY, *supra* note 26, at 185.

30. LEVY, *supra* note 26, at 184.

this period was that freedom of speech meant only freedom from prior censorship.³¹ Printers who published articles critical of governmental officials acted at their peril. “Liberty” of the press was one thing, “licentiousness,” another. In the late 1700s, prosecutions of newspaper editors and other critics of government for seditious libel, though not frequent, were not unknown.³² In short, although the notion that government officials ought to be accountable to the people had come to be widely accepted, what was meant by “accountable” still remained to be worked out.

In light of this background, it is particularly significant that the first Vermont Constitution describes “officers of government” as the “trustees and servants” of the people.³³ A hundred years earlier government officials might have been considered “trustees” but they would not have been viewed as “trustees and servants.” Reflected in that phrase is an entire revolution in social and political thought.³⁴ A hierarchical social and political order had been replaced with a more democratic and egalitarian one. An earlier model of government based on the idea of paternalistic trusteeship had been replaced with one based upon the idea of democratic accountability.

If the idea of accountability has formed a central strand of the state’s constitutional ideology from the outset, the meaning of the term has undergone profound transformation in the intervening years. Vermonters 230 years ago had a different idea of what was meant by accountability than we do today. When we think of government being accountable to the people, we think in twentieth century terms: we think of legislation mandating that meetings of public officials at every level of government be

31. See discussion *infra* in text accompanying notes 71–87.

32. See generally LEVY, *supra* note 26, at 173–281 (discussing the evolution of the crime of seditious libel in early America).

33. VT. CONST. OF 1777 ch. I, § V. The “trustees and servants” provision in the Vermont Constitution of 1777 was taken verbatim from the Pennsylvania Constitution of 1776. PA. CONST. OF 1776, Declaration of Rights, cl. IV. The framers of the Pennsylvania Constitution, in turn, borrowed this provision, changing the language slightly, from the Virginia Constitution of 1776, which provided “[t]hat all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.” VA. CONST. OF 1776, Bill of Rights § 2; see also WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 79 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973) (discussing the Pennsylvania framers’ debt to the Virginia Constitution of 1776).

34. “The Revolution became, among other things, a revolution in America in the relations between rulers and ruled” POLE, *supra* note 17, at 131. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 600–602 (1969) (discussing how American constitutions were grounded in the concept of securing individual liberty).

open to the public,³⁵ of legislation providing for public access to government records,³⁶ and of constitutional decisions by the courts protecting the freedom of the press to report on and criticize the actions of government officials.³⁷ But these are twentieth-century developments and reflect twentieth-century assumptions about government accountability. Vermonters in the late 1700s lived in a different world. In short, while the commitment to government accountability has been present from the outset, the meaning of the term “accountable” has changed over time. It has continued to evolve. What the Vermont framers gave us when they declared that government officials were to be accountable to the people was not an idea with fixed political content but rather commitment to a vision. They gave us not the end, but the beginning, of a constitutional tradition.

II. GOVERNMENT ACCOUNTABILITY IN EARLY VERMONT

If Vermonters in the early days meant something different by “government accountability” than we do today, what was their understanding of the phrase? What expectations did they have about public access to meetings by government officials? About access to governmental records? About the freedom of citizens and of the press to criticize the actions of government officials? About freedom of speech and press generally? To what extent did those who framed the early Vermont constitutions share our vision? To what extent was their vision different? Only by answering these questions can we appreciate the dynamic and constantly evolving nature of the idea of government accountability in our constitutional tradition.

In seeking to discover what early Vermonters thought about issues of government accountability, we encounter at the outset three major difficulties. First, there is the problem of multiple state constitutions.³⁸ During Vermont’s formative period, from 1777 to 1800, the people of the State adopted not one, but three successive constitutions: the Vermont Constitution of 1777, the Vermont Constitution of 1786, and the Vermont

35. See, e.g., VT. STAT. ANN. tit. 1, §§ 310–14 (2003) (containing Vermont’s open meeting law).

36. See, e.g., VT. STAT. ANN. tit. 1, §§ 315–20 (2003) (detailing Vermont’s public records law).

37. E.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 283–84 (1964) (carving out broad protection for the press from libel suits brought by public officials by requiring a showing of “actual malice”).

38. See Peter Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 31 (1988) (discussing the problem of determining which constitution is the most useful in analyzing the meaning of current Vermont constitutional provisions).

Constitution of 1793. The latter documents were not created from scratch, of course, but rather took the form of reworked versions of the first constitution. Nonetheless, in particular provisions they reflected important changes. This means we cannot look back to a single constitutional document to determine what early Vermonters thought about important constitutional issues but must look instead to all three constitutions and the total experience they represent.

If we take such an approach, what we find is not a single point in time in which the constitutional views of Vermonters were fixed but an on-going process of correction and counter-correction extending over a period of sixteen years. The years between 1777 and 1793 in Vermont were ones in which the people of the state, through a process of trial and error, gradually settled on a constitution they could live with. In fact, if there is any one constitution that can be said to reflect the considered will of the people, it is not the Constitution of 1777, which was adopted in haste and without popular ratification,³⁹ but the Constitution of 1793, which is the product of accumulated experience and extensive deliberation.⁴⁰ Yet even that document can be understood only in the context of the extended process of deliberation and choice which culminated in its adoption.

A second problem is that the historical evidence from this period is often spotty and incomplete. While we do have complete records of the constitutional texts that were adopted, records of the legislation enacted during this period, and records of some of the deliberations and proceedings of important public bodies, there is a great deal we do not have. For example, no record exists—at least none has ever been found—of the deliberations of the State's first constitutional convention.⁴¹ Whether such a record was ever made we simply do not know. As a consequence, we

39. See John W. Rowell, *Constitutional History of Vermont*, in 3 THE NEW ENGLAND STATES: THEIR CONSTITUTIONAL, JUDICIAL, EDUCATIONAL, COMMERCIAL, PROFESSIONAL AND INDUSTRIAL HISTORY 1377, 1388–89 (William T. Davis ed., 1897) (discussing the hurried adoption of the Constitution of 1777 and the decision to forego popular ratification); see also RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 1 (Paul S. Gillies & D. Gregory Sanford eds., 1991) [hereinafter RECORDS OF THE COUNCIL OF CENSORS] (explaining that the constitutional convention was held “against the backdrop of British military operations” and that “[t]he fall of Ticonderoga hastened deliberations and . . . only the intervention of a thunderstorm kept the delegates in Windsor long enough to adopt a constitution.”); Nathaniel Hendricks, *A New Look at the Ratification of the Vermont Constitution of 1777*, 34 VT. HIST. 136, 136–40 (1966) (arguing that the record showed that the constitution was submitted to the people for ratification but acknowledging the majority view that it was not); Teachout, *supra* note 38, at 31 (discussing Vermont historians who held a similar view regarding the haste with which the Vermont Constitution of 1777 was adopted).

40. Teachout, *supra* note 38, at 31–32.

41. 2 WALTER HILL CROCKETT, HISTORY OF VERMONT: THE GREEN MOUNTAIN STATE 203 (Vt. Farm Bureau 1938) (1921); RECORDS OF THE COUNCIL OF CENSORS, *supra* note 39, at 80; Teachout, *supra* note 38, at 30 n.44.

have no way of knowing what attention, if any, was given to individual provisions in that document. By way of contrast, we do have evidence about the various revisions that were subsequently incorporated in the constitutions of 1786 and 1793. What was intended by these revisions is sometimes illuminated by records that were kept of the proceedings and recommendations of the early Council of Censors.⁴² But even here we are often left to work at least partly in the dark.

We have to operate under the same handicap when we deal with the legislative history of this period. While we know what laws were passed, we often do not know why the legislature was prompted to act as it did or whether in particular cases the legislative mandate was ever acted upon. Without answers to these questions, we are left to speculate about what was intended. Historians have always done this of course—it is one of the conditions of their existence—but it is important to recognize that what is involved is not historical certainty or historical fact but informed speculation based upon incomplete evidence.

A third complication encountered in seeking to discover what early Vermonters thought about government accountability is that the people of the state back then, like the people of the State today, were not of one mind. It is important to remember that the period we are talking about was a time when ideas about government accountability were still undergoing significant transformation. It is unlikely, therefore, that there was any uniform agreement about what was acceptable and what was not. Furthermore, aspiration and practice did not always coincide. Longer-term commitments, however genuinely held, were sometimes lost in the passions of the moment. For all these reasons, it is difficult to know or say with certainty exactly what Vermonters 230 years ago believed or intended.

Yet informed speculation is possible. Regarding questions of government accountability, with which we are here concerned, there is substantial evidence about what early Vermonters believed. It is that evidence that will next be addressed. As a way of organizing the discussion that follows, there are two basic groups of issues relating to government accountability. First are issues relating to the right to criticize government—issues of freedom of speech and press. Second are issues dealing with public access to meetings of government officials and to government records.

42. See RECORDS OF THE COUNCIL OF CENSORS, *supra* note 39, at 113–14 (reprinting the Address of the Second Council of Censors from 1792, where the president of the Council explained some of the reasons behind proposed constitutional amendments).

III. FREEDOM OF SPEECH AND PRESS IN EARLY VERMONT: THE NATURE
AND EXTENT OF THE RIGHT TO EXAMINE AND CRITICIZE THE ACTIONS OF
GOVERNMENT OFFICIALS

[T]he people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.

Vermont Constitution, chapter I, article 13

The Vermont Constitution of 1777 is widely regarded as one of the most democratic and libertarian of the early state constitutions.⁴³ It was the first state constitution to abolish slavery⁴⁴ and the first to provide for universal suffrage by eliminating the property qualification for the right to vote.⁴⁵ Vermont was the only other state, besides Pennsylvania, to expressly provide in its constitution for protection of freedom of speech.⁴⁶ Thus there is a basis for the claim that the spirit of liberty and democracy is uniquely reflected in Vermont's first constitution. Generally speaking, that spirit has been carried forward in the amended versions of the state constitution and in the practices and policies of elected officials over the intervening years.⁴⁷

Yet when we closely examine specific provisions in the early Vermont constitutions, a more complex pattern begins to emerge. That is particularly true with respect to the provisions dealing with freedom of speech and press. To appreciate this, we need to pay close attention to the choices made by the Vermont framers in expressing the protections to be afforded to freedom of speech and freedom of the press. If some of these choices support the view that the Vermont Constitution is especially protective of rights and liberties, others seem—at least at first glance—to

43. *Baker v. State*, 170 Vt. 194, 211, 744 A.2d 864, 876 (Vt. 1999) (noting the liberal leanings of Vermont's Constitution); FRANK M. BRYAN, *YANKEE POLITICS IN RURAL VERMONT* 11 (1974) ("Vermont accepted and has preserved one of the most liberal constitutional documents of the country."); James L. Oakes, *State Courts in a Time of Federal Constitutional Change*, 13 VT. L. REV. 323, 329–30 (1988); *see also* *State v. Jewett*, 146 Vt. 221, 226–27, 500 A.2d 233, 237 (Vt. 1985) (discussing some unique elements of the Vermont Constitution in comparison to the U.S. Constitution).

44. VT. CONST. OF 1777 ch. I, § I; WILLIAM DOYLE, *THE VERMONT POLITICAL TRADITION: AND THOSE WHO HELPED MAKE IT* 21 (1st ed. 1984); Oakes, *supra* note 43, at 330.

45. 2 CROCKETT, *supra* note 41, at 216; DOYLE, *supra* note 44, at 24; *see also* VT. CONST. OF 1777 ch. I, § VIII (requiring connection to the community, but not ownership of land, for suffrage).

46. LEVY, *supra* note 26, at 188.

47. *See* Oakes, *supra* note 43, at 329 (discussing the high degree of protection that the Vermont Constitution provides).

cut in the other direction.

The provision dealing with freedom of speech and press in the current version of the Vermont Constitution offers an example. Article 13 of chapter I reads as follows: “[T]he people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.”⁴⁸ This provision descends from a similar provision in the state’s first constitution, the Constitution of 1777,⁴⁹ but the language in its current form comes from the Constitution of 1786.⁵⁰ The first thing that strikes one in reading this provision is the curiously limited scope of the protection afforded by the Vermont Constitution to the freedom to “write and publish” one’s “sentiments” (and perhaps also, depending on how one reads the provision, to “freedom of speech”).⁵¹ Read literally, the protection extends only to the publication of sentiments “concerning the

48. VT. CONST. ch. I, § 13.

49. See VT. CONST. OF 1777 ch. I, § XIV (“That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not to be restrained.”).

50. VT. CONST. OF 1786 ch. I, § 15 (“That the people have a right of freedom of speech and of writing and publishing their sentiments, concerning the transactions of government—and therefore the freedom of the press ought not be restrained.”).

51. In seeking to understand what was intended by this provision, we encounter at the outset a threshold problem of grammatical construction. Was the limiting phrase “concerning the transactions of government” intended to apply only to the “writing and publishing [of] . . . sentiments” and not to “freedom of speech”? The provision certainly can be read that way, and a good libertarian, of course, would want to do so. But why would the framers have wanted to provide broader protection for “freedom of speech” than for “writing and publishing” one’s sentiments? And why the use of the comma after “writing and publishing their sentiments” if the limiting phrase was intended to apply only to the latter? Was this just a reflection of the fact that our ancestors took a more relaxed attitude toward, or followed different rules in, the use of punctuation than we do? If we are inclined to conclude that the limiting phrase was intended to apply only to the “writing and publishing” of sentiments and not to “freedom of speech,” we then have to ask why the framers would have wanted to give narrower protection to “writing and publishing” one’s sentiments than to expression of those sentiments through the vehicle of ordinary speech? Is it conceivable that the framers wanted to say: “In this wonderful state where individual liberty is greatly valued, you can talk about anything you want to. You have complete freedom of speech. But when it comes to writing and publishing your sentiments, your freedom is limited to the expression of sentiments concerning the transactions of government”? That does not seem to make sense. On the other hand, if both “freedom of speech” and the freedom “of writing and publishing sentiments” are governed by the modifying phrase that reflects a curiously limited conception of these freedoms. Another possibility is that the framers simply did not think very much about it. They inserted the phrase “concerning the transactions of government” where they did without thinking whether it applied just to “writing and publishing” or also “freedom of speech.” As it turns out, this last explanation is the most likely. See *infra* notes 58–69. For purposes of discussion here, I am going to assume the modifying phrase “concerning the transactions of government” applies to both “freedom of speech” and the freedom of “writing and publishing . . . sentiments,” but I want to recognize that the provision can just as easily be read as if the modifying phrase only applied to the latter.

transactions of government.” That qualifying phrase moreover casts a shadow over what is meant by “freedom of the press” in the phrase immediately following since the latter phrase is preceded by “therefore” (“[T]he people have a right . . . of writing and publishing their sentiments, concerning the transactions of government—therefore, the freedom of the press ought not to be restrained meaning.”). If the constitutional principle is the principle that people in the state have a right to write and publish only those sentiments “concerning the transactions of government,” the use of “therefore” as a connecting preposition suggests that the freedom of the press may be correspondingly limited.

The free speech and press provision in the current state constitution is not a model of legislative clarity. Why the limitation to only those sentiments “concerning the transactions of government”? Does the limitation apply only to writing and publishing one’s sentiments or does it apply as well to freedom of speech? Why the comma after “sentiments”? What significance should attach to the use of “therefore” as a connecting preposition before the reference to “freedom of the press”? What did the framers intend? As we shall see, the answers to these questions, to the extent answers are discoverable, lie in history.⁵² We will return to that later. For the moment, it is enough to observe that, under the Vermont Constitution, the freedom to write and publish one’s sentiments (and, perhaps also, freedom of speech) is limited to the expression of sentiments “concerning the transactions of government.”

With respect to issues of government accountability with which we are here concerned, that limitation, of course, poses no problem. Indeed, it highlights the constitutional importance attached by the framers to protecting the freedom of citizens and of the press to examine and criticize the actions of government officials. But compared to the protection afforded under the First Amendment to the United States Constitution to a wide range of different types of speech—to artistic, religious, commercial, sexually explicit, and other types of speech which have nothing to do with the transactions of government—and the broad scope given to freedom of the press under that Amendment, the protection afforded by the Vermont Constitution seems strangely curtailed.

The question of why the Vermont Constitution protects only speech and writing “concerning the transactions of government” is not unrelated to other questions about the meaning of the free speech and press provision. We also have to ask what the framers of the Vermont Constitution meant by “freedom of the press” and by “restrained” when they declared that

52. See *infra* notes 58–69.

“therefore, the *freedom of the press* ought not to be *restrained*.” We may think the meaning of these terms is clear, but we need to be careful not to read into them the meaning that has been given to similar terms in the United States Constitution by the Supreme Court in a series of judicial decisions handed down over the past century. Such a reading would be anachronistic and misleading. To Vermonters in the late 1700s these terms and phrases meant something different from what they have come to mean today.⁵³ We also might ask why, in providing for freedom of the press, the framers of the Vermont Constitution used the hortatory declamation, “ought not to be restrained,” rather than something more clear and unambiguous like “shall never be restrained.” On the surface, and taken indifferently, the Vermont constitutional provision governing freedom of speech and press seems fairly conventional, but once we begin to take a closer and more critical look, it opens upon a veritable hornet’s nest of problems in constitutional interpretation.

A. “*Ought Not to Be Restrained*”: *Why Did the Vermont Framers Use Hortatory Language?*

[T]herefore the freedom of the press ought not to be restrained.

Vermont Constitution of 1777, chapter I, section XIV

An example of the sort of complication we encounter when we take a closer look at the free speech and press provision in the Vermont Constitution is the framers’ choice of the phrase “ought not to be restrained” to describe the protection to be afforded freedom of the press. Why choose the phrase “ought not to be restrained” rather than a formulation which would have set clear constitutional limits on the ability of government to interfere with freedom of the press—like, for example, “shall never be restrained”? Since the “ought not” language has been carried down to the state’s current constitution, it is important to ask why the framers chose the language they did and what they intended by it.

As it turns out, the “ought not” language in Vermont’s free press provision was taken directly from the Pennsylvania Constitution.⁵⁴ This is not surprising since, as is well known, the Vermont Constitution of 1777 was modeled on the Pennsylvania Constitution of 1776.⁵⁵ Although the

53. See *infra* discussion in text accompanying notes 63–95.

54. PA. CONST. OF 1776, Declaration of Rights, cl. XII (“[T]he freedom of the press ought not to be restrained.”).

55. Although the Vermont framers borrowed heavily from the Pennsylvania Constitution of

Vermont framers made several changes in the Pennsylvania document, custom carving particular provisions to meet Vermont's special needs, for the most part they took the language of the Pennsylvania Constitution as they found it, right off the shelf. In the case of the "ought not" language under consideration here, the Vermont framers simply adopted the Pennsylvania provision as it was written.

The framers of the Pennsylvania Constitution, in turn, drew upon the Virginia Constitution in drafting their own document. At that point, interestingly, substantive changes were made in the provision. For one thing, the Virginia Constitution protected only freedom of the press.⁵⁶ The Pennsylvania Constitution, in contrast, protected both freedom of speech and freedom of press.⁵⁷ In this respect, the Pennsylvania Constitution was more protective of basic liberties than was Virginia's. Vermont adopted this added measure of protection by including the Pennsylvania "freedom of speech" language in its own constitutional document.

On the other hand, the Virginia Constitution provided that freedom of the press "can never be restrained" while the Pennsylvania and Vermont Constitutions provided only that the press "ought not to be restrained." "[C]an never" expresses an absolute prohibition, while "ought not" is hortatory. It is an ethical appeal, an appeal to principle, rather than a directive to be followed. What significance should attach to this change in language, this shift from the mandatory and absolute "can never" in the Virginia Constitution to the hortatory "ought not" in the Pennsylvania and Vermont Constitutions? Why was this change made? What does it reflect about the intent of the Vermont framers?

In drafting the first Pennsylvania Constitution, the authors of that document must have concluded that the "can never" language of the Virginia Constitution was too absolute and restrictive, and therefore they substituted the "ought not" language in its place. The Pennsylvania

1776, they did not hesitate to make changes where they thought such changes were in order. Gary J. Aichele, *Making the Vermont Constitution: 1777-1824*, in 56 VT. HIST.: THE PROCEEDINGS OF THE VERMONT HISTORICAL SOCIETY 166, 176 (1988); 2 CROCKETT, *supra* note 41, at 215-16; DOYLE, *supra* note 44, at 26-29; Peter Teachout, "No Simple Disposition": *The Brigham Case and the Future of Local Control over School Spending in Vermont*, 22 VT. L. REV. 21, 38 (1997); see also RECORDS OF THE COUNCIL OF CENSORS, *supra* note 39, at xi n.2 (noting that in the 1777 constitution "Vermont copied Pennsylvania's ideas on a Council of Censors with only minor changes" but deleted these provisions at the 1789 constitutional convention).

56. The Virginia Constitution of 1776 provided: "[t]hat the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments." VA. CONST. OF 1776, Bill of Rights, § 12.

57. PA. CONST. of 1776, Declaration of Rights, cl. XII. Pennsylvania was the only one of the original thirteen states to include a provision in its constitution specifically protecting freedom of speech. See *supra* note 29 and accompanying text.

Constitution of 1776 can be read, accordingly, as reflecting an intention to back off somewhat from the absolute protection provided to freedom of press by the Virginia Constitution.⁵⁸ If the experience with similar provisions in other states is any guide, there are reasons why the Pennsylvania framers might have wanted to do so.⁵⁹ Whatever the motivation, the intention itself is clearly reflected in the decision by the Pennsylvania framers to make the change.

Such an interpretation is less persuasive in Vermont's case, however, even though the Vermont free press provision replicates exactly the language of the first Pennsylvania Constitution. The reason it is less persuasive in Vermont's case is that in Vermont, unlike in Pennsylvania, there is no evidence that a conscious choice was ever made to adopt one phrasing over the other. We know that the Vermont framers had before them the Pennsylvania Constitution as a model, and we know that they felt free to make changes in it when they thought it important to do so.⁶⁰ But there is no evidence that they had before them the Virginia, or for that matter any other state, constitution for purposes of comparison. It is possible they may have discussed the difference between "can never" and "ought not" in adopting the Pennsylvania free speech and press clause,⁶¹ but it is equally, if not more, likely that they did not. There is certainly no evidence that such a discussion ever took place. Under such circumstances, all that can be fairly said is that there is no evidence that the Vermont framers consciously chose the "ought not" language over the stronger formulation.⁶²

58. See LEVY, *supra* note 26, at 183–84 (interpreting the use of the word "ought" instead of "shall" as evidence of a prescriptive, rather than mandatory, intent).

59. See LEVY, *supra* note 26, 187–88 (discussing the Massachusetts process of adopting a freedom of speech clause and the disparate opinions held on the proper amount of protection afforded the press).

60. See *supra* note 51 and accompanying text.

61. The question of whether to use hortatory or mandatory language was an issue later in Massachusetts when the towns in the state were asked to vote upon the proposed state constitution in 1780. The framers in Massachusetts proposed the "ought not" language of the Pennsylvania Constitution in their draft of the free press clause in the state constitution. Although this proposal did not meet objection in a majority of the towns, the voters in five towns, including Boston, objected, arguing that "shall not" should be substituted. LEVY, *supra* note 26, at 186–87. Arguing in favor of this substitution, the voters in Lexington stated: "we cannot but think that the words 'it shall not' are more full, expressive, and definite." *Id.* at 187 (citing Return of the Towns on the Constitution of 1780 Middlesex County, in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONVENTION OF 1780, at 475, 660 (Oscar Handlin & Mary Handlin eds., 1966)).

62. Teachout, *supra* note 38, at 44–46. In seeking to understand the significance of the use of hortatory language by the Vermont framers in this and other provisions of the early state constitutions, there is one other factor that needs to be taken into account: from 1777 until the mid-1820s there was no established practice of judicial review in the state. During the first four decades of the state's history, the Council of Censors was exclusively responsible for exercising this function, although only in

The most likely scenario is that the Vermont framers simply adopted the free speech and press provision in the Pennsylvania Constitution without considering possible alternative formulations. They wanted to protect freedom of speech and press in the state and they used the only constitutional language they had before them—the language of the Pennsylvania Constitution—to express that commitment. We do not know for certain that is what happened, of course, but if in fact it did, then no great significance should attach to the Vermont framers' use of the hortatory “ought not” instead of the mandatory absolute “can never” since it is likely no conscious choice was involved. The Vermont provision should be read simply as reflecting a general commitment to the idea that the press in the state should not be “restrained.”

B. Why Does the Vermont Constitution Protect Only Speech and Writing “Concerning the Transactions of Government”?

Let us return now to the question raised above: Why does the Vermont Constitution protect only speech and writing “concerning the transactions of government”? The answer lies in an important change made in the state constitution when it was amended in 1786.

As it turns out, the first Vermont Constitution, the constitution of 1777, contained not one but two provisions protecting freedom of the press.⁶³ The first of these, discussed above, was located in chapter I, the chapter

recommendatory capacity. VT. CONST. OF 1777 ch. II, § XLIV. Cf. *Dupy v. Wickwire*, 1 D. Chip. 235, 238–39 (Vt. 1814) (stating in dictum that an act of the legislature contrary to the state or federal constitution would be void). It was not until 1825 in the case of *Ward v. Barnard* that the court first actually exercised the power of judicial review. *Ward v. Barnard*, 1 Aik. 120, 122, 127 (Vt. 1825). Thus between 1777 and 1825 the primary constitutional watchdog in the State was the Council of Censors. The framers' use of hortatory language must be viewed in this light. Since the Vermont framers did not contemplate judicial enforcement of constitutional directives, it served no purpose to use mandatory as opposed to hortatory language. To ensure that the legislature stayed within constitutional bounds, they had to rely primarily on appeals to the legislature and pressure from the larger body politic. As Daniel Chipman observes in *A Memoir of Thomas Chittenden*: “No idea was entertained that an act of the legislature, however repugnant to the Constitution, could be adjudged void and set aside by the judiciary, which was considered by all a subordinate department of government.” DANIEL CHIPMAN, *A MEMOIR OF THOMAS CHITTENDEN: THE FIRST GOVERNOR OF VERMONT* 102 (1849). During this period, according to Chipman, the state legislature considered all constitutional restrictions upon their power “merely directory.” *Id.* Thus the framers of the State's early constitutions had to rely on pressure from the electorate as the primary way of encouraging or compelling legislative adherence to constitutional directives. In such a context, there was no need to be greatly sensitive to the difference between mandatory and hortatory language. We are preoccupied with the difference today because we expect the courts to exercise judicial review, but that was not an expectation held by the early framers.

63. The Vermont framers based this approach on the Pennsylvania model. Both of these free press provisions are also found in the Pennsylvania Constitution of 1776. PA. CONST. OF 1776, Declaration of Rights, cl. XII, § 35.

dealing with “Declaration of Rights,” and protected both freedom of speech and freedom of press. Section XIV of chapter I of the 1777 constitution provided that: “the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not to be restrained.”⁶⁴ The second provision dealt solely with press freedom and was located, significantly, in chapter II which established the basic “Frame of Government” for the state. Section XXXII of chapter II of the Vermont Constitution of 1777 provided that: “[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.”⁶⁵

There are two important things to note about these provisions as they appeared in the first state constitution. First, the protections provided to speech and press under section XIV of chapter I are broader than those provided under article XIII of chapter I of the current state constitution. The 1777 constitution protected the expression of any and all “sentiments” without regard to subject matter while the current state constitution protects only the expression of sentiments “concerning the transactions of government.”⁶⁶ The limiting phrase in the current chapter I provision (if it can fairly be viewed that way) was added later.

Second, it is deeply significant that the framers of Vermont’s first constitution placed a second provision dealing with freedom of the press in chapter II, the chapter establishing a basic Frame of Government.⁶⁷ In the state’s first constitution, in other words, *the press was given an express constitutional role*: to “examine” critically “the proceedings of the legislature, or any part of government.”⁶⁸ This reflects a belief on the part of the original framers that an independent press was essential to maintaining the integrity of government. By including this second press provision, the framers of Vermont’s first constitution sought to recognize and underscore the crucial role played by the press in maintaining the accountability of government to the people.⁶⁹

64. VT. CONST. OF 1777 ch. I, § XIV.

65. *Id.* ch. II, § 32.

66. VT. CONST. ch. I, § 14; *cf.* VT. CONST. OF 1777 ch. I, § XIII.

67. In so doing, they followed Pennsylvania’s example. *See* VT. CONST. OF 1777 ch. II, § XXXII; PA. CONST. of 1776, art. I, § 35 (providing a second provision for freedom of the press under the “Plan or Frame of Government for the Commonwealth of the State of Pennsylvania” section).

68. VT. CONST. OF 1777 ch. II, § XXXII.

69. The importance of this cannot be overstated. Commenting on the watchdog role assigned to the press generally during this period, Levy observes: “the press had achieved a special status as an unofficial fourth branch of government . . . whose function was to check the three official branches by exposing misdeeds and policies contrary to the public interest.” LEVY, *supra* note 26, at xii. Yet, if the press enjoyed a “preferred position” in the new constitutional order, it was because of its special role in performing this watchdog function as a check against abuse of governmental power. *See* Vincent Blasi,

For reasons that are not entirely clear, the second free press provision was eliminated as part of the revisions adopted in 1786. At the same time, the phrase “concerning the transactions of government” was added to the first of the two provisions identified above, the one in the Declaration of Rights section, by inserting that phrase after the word “sentiments.” These changes have particular significance for us because the amended language of the 1786 provision has been carried down to the state’s current constitution. Why were these changes made? What did the framers of the 1786 amendments intend? How should the modified language of the retained free speech and press provision be interpreted and understood?

In 1785, the Vermont Council of Censors⁷⁰ called a constitutional convention to consider proposed amendments to the state constitution.⁷¹ While several of the changes that appear to have been eventually adopted were substantive, others were of a housekeeping nature. Since there is no record of debate over these particular amendments, it is difficult to know what was intended by their adoption.

However, there is one provocative piece of evidence suggesting that Governor Thomas Chittenden, who served as the state’s governor during this time, may have had a hand in it. In the archives at the University of Vermont library, there is a copy of the 1777 Vermont Constitution, marked up in what appears to be Governor Chittenden’s hand, in which certain sections have been scratched out and others inserted. On the page of this copy on which the second free press (press-as-governmental-watchdog) provision appears, that provision has been crossed out in pen with “X’s.” Significantly, no changes were made to the first of the free press provisions, the one that appears in the Declaration of Rights chapter. Although it is not certain, it is likely that these hand-written editorial changes were made in anticipation of the constitutional convention called by the Council of Censors in 1785. The intriguing question is what motivated Governor Chittenden, if in fact these editorial changes were made by him, to cross out

The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 538 (1977) (noting that a primary purpose and benefit of a free press is “that of checking the inherent tendency of government officials to abuse the power entrusted to them.”). Their position did not mean, however, that printers could escape responsibility for “damaging publications,” for which they were still potentially subject to prosecution for seditious libel. LEVY, *supra* note 26, at 273.

70. The Council of Censors was charged, among other things, with monitoring whether the state constitution had been preserved and given responsibility for proposing amendments to the constitution if needed. VT. CONST. OF 1777 ch. II, § XLIV. The Council was authorized to call a convention to consider proposed amendments. *Id.* Once the convention was convened, however, there apparently was nothing to prevent proposal and adoption of amendments introduced from the floor. *Cf. id.* (requiring that proposed amendments be put out to the general public “at least six months” before the date of the convention so “they may have an opportunity of instructing their delegates on the subject”).

71. RECORDS OF THE COUNCIL OF CENSORS, *supra* note 39, at 19.

the second of the free press provisions in his copy of the constitution. Did he feel threatened by the prospect of an independent and critical press digging into the conduct of his administration? Did he seek to take a preemptive step of eliminating any reference in the Vermont Constitution to the special watchdog role to be played by the press? Or, given the existence of the provision in chapter I which already protected freedom of speech and freedom of press, did the Governor think the second free press provision was redundant and therefore unnecessary? In other words, was the proposed elimination of the second reference to freedom of press intended simply as a housekeeping measure? We simply do not know. Whatever Chittenden's motivation, the marked out provision suggests that he may have been at least partly responsible for deleting the second free press provision in chapter II of the first state constitution.

During this period, the process for amending the Vermont Constitution was set forth in section XLIV of chapter II. That provision assigned responsibility for considering and proposing amendments to the Vermont Council of Censors, which was composed of thirteen members elected on a statewide basis every seven years for a term of no more than one year.⁷² Unfortunately, the records of the deliberations of the Council of Censors are very spotty and incomplete, so while we know the amendments proposed by this body, we often do not know the motivation behind them. This is true with respect to the particular changes in the free press provisions with which we are concerned here. We know that responsibility for considering and preparing a draft of constitutional amendments to be considered at the 1786 convention was assigned to a committee of three members of the Council;⁷³ we know the identity of those three members;⁷⁴ and we know

72. VT. CONST. OF 1777 ch. II, § XLIV. If it appeared "an absolute necessity of amending any article of this constitution which may be defective—explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people," the Council could, upon two-thirds vote, call for a constitutional convention to decide upon proposed amendments. *Id.* Only those amendments proposed by the Council could be considered at the convention to be voted up or down. The proposals had to be promulgated at least six months before the election of delegates to the convention to allow for "the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject." *Id.* This is yet another manifestation of commitment to the principle of "accountability." The process established by this provision for promulgating and adopting amendments ensured a much greater level of public involvement and consideration than had been the case with the original 1777 constitution.

73. On June 7, 1785, the Council resolved "that Mr. Carpenter, Mr. Hunt, and Mr. Townsend be a Committee to examine the Constitution of this State, and that they report such Alterations as they shall conceive necessary to be made therein, to the Council, at their next Session." RECORDS OF THE COUNCIL OF CENSORS *supra* note 39, at 23.

74. The three members of the committee were Benjamin Carpenter from Guilford, Jonathan Hunt from Vernon, and Micah Townsend from Brattleboro. Carpenter, who had been a delegate to the Windsor Convention of 1777, served as Lieutenant Governor from 1779–81, during which time

when they reported their recommendations to the larger Council.⁷⁵ But we do not have any record of deliberations within the committee or within the Council itself over these particular recommended changes. We do know, however, that all three members of the committee charged with drafting proposed constitutional amendments had close ties to Governor Chittenden.⁷⁶ So if the Governor was intent upon ensuring that particular changes were proposed and considered at the convention, he had ample opportunity to make his wishes known.

In any event, what emerged from the 1786 convention was an amended version of the state constitution in which (1) the provision in chapter II assigning the press a special watchdog role over the transactions of government was deleted and (2) the provision in chapter I which guaranteed freedom and speech for the expression of “sentiments” was amended by inserting after the word “sentiments” the phrase “concerning the transactions of government.” The amendments adopted in 1786, in effect, combined the free speech and press provision in chapter I with the free press provision in chapter II into a single provision by collapsing the two provisions into one. As amended, the free speech and press provision in chapter I read as follows (new language in italics): “[T]he people have a right to freedom of speech, and of writing and publishing their sentiments, *concerning the transactions of government*, and therefore, the freedom of the press ought not to be restrained.”⁷⁷ This version of the provision, which first appeared in the 1786 constitution, has been carried down unchanged to

Chittenden was serving as Governor. Hunt, a Federalist, served as representative from Vernon in 1783 (and later in 1802), as a member of the Executive Council from 1786–93, and as Lieutenant Governor under Chittenden from 1794–96. Townsend, who was a judge in Windham County, served as Secretary of State from 1781–88, also during Chittenden’s tenure as Governor. BIOGRAPHICAL SKETCHES OF THE CENSORS: 1785 COUNCIL (Gregory Sanford & Paul Gillies eds.) (on file with author).

75. “The Committee appointed to examine the Constitution and report such Alterations as they conceive necessary to be made therein, reported a Draft, which was read.” RECORDS OF THE COUNCIL OF CENSORS, *supra* note 39, at 21, 33–34. The full Council debated the draft proposal and made changes in a series of meetings held October 1–19, 1785. *Id.* at 25–33. On October 20th, the Council adopted a motion calling for a constitutional convention to consider proposed amendments, and setting up a mechanism for electing delegates to the convention and for publishing and distributing 300 copies of the proposed changes. *Id.* at 33–34. As part of the same resolution, the Council interestingly recommended that, to avoid the appearance of possible conflict of interest, certain state and local officials be ineligible to serve as delegates to the convention: “the Governor, Lieutenant Governor, Treasurer of the State, Members of the [Executive Council], Council of Censors, or General Assembly, Officers who hold their Commissions during good behaviour, and other Officers who may be interested by the Alterations proposed to be made in the Constitution.” *Id.* at 33.

76. All three members of the subcommittee not only were of the same political persuasion as Governor Chittenden but also had ample opportunity for contact with the Governor prior to and during the period when the subcommittee was considering proposed amendments to the Vermont Constitution. See *supra* note 74 and accompanying text.

77. VT. CONST. OF 1777 ch. I, § XIV.

present day.

This poses an interesting and difficult problem in constitutional interpretation. How should the current provision be read? If the effort should be to try to give effect to the original intent of the framers of this amended provision, what did the framers intend? Why at the time of the 1786 convention was the second free press provision dropped? Why was the phrase “concerning the transactions of government” inserted in the retained provision in chapter I? Was the intention to narrow the scope of the protections afforded to free speech and press in the state? How else might these changes be explained and understood?

This is one of those areas where we cannot know for certain what happened or why, but there is no evidence that the 1786 changes were intended to narrow the protections afforded to freedom of speech and press in Vermont. It is equally plausible that the changes were made to eliminate what was perceived to be a redundancy in the 1777 constitution. Whatever Governor Chittenden’s role or motivation in the matter, the delegates at the convention were the ones ultimately responsible for adopting proposed changes, and apparently they were convinced there was no need to have two separate provisions in the state constitution protecting freedom of the press so they combined the two original provisions into one.

But if eliminating redundancy was the motive behind the 1786 changes, why not simply drop the second provision and leave the first unchanged? Why insert in the retained chapter I provision the phrase “concerning the transactions of government” after the word “sentiments”? The most plausible explanation is that those responsible for the 1786 amendments wanted to underscore the importance of protecting freedom of speech and press *when the exercise of that freedom took the form of examining and criticizing the transactions of government*. They did not want to let that idea go. But since that idea was expressed in the second free press provision, the one to be eliminated, it would have been lost if they had simply dropped it. Therefore, in an effort to retain the accountability idea and emphasize its importance, they salvaged it from the eliminated provision and inserted it in the free speech and press provision in chapter I.

Ironically, and in a way that could not have been foreseen at the time, this had the unintended effect of narrowing the protections afforded to speech and press under the Vermont Constitution, since now, under the amended provision in chapter I, only the expression of sentiments “concerning the transactions of government” was protected. But present effect and original intent are not necessarily interchangeable. It is important to remember that these changes were made at a time when

constitutional law dealing with freedom of speech and press in this country was for all intents and purposes non-existent. At the time these changes were made, there was no First Amendment, no Bill of Rights, indeed, and no Constitution of the United States. These things were all part of an unseen and unknown future. Today, our understanding of freedom of speech and press is informed by twentieth- and twenty-first-century Supreme Court pronouncements interpreting and applying the First Amendment of the federal constitution. Free speech protections that we take for granted—protections of artistic, commercial, sexually explicit, and other types of speech unrelated to the transactions of government—had not yet been recognized in 1786. So those who proposed and adopted the combined language of the 1786 constitution had no reason to think that by doing so they were in any way narrowing or limiting the protections afforded to speech and press. Indeed, they probably thought that by making clear that the right to express sentiments included the right to express sentiments “concerning the transactions of government,” they were emphasizing rights that otherwise might be neglected. They were reasserting the view that the primary reason for protecting these important freedoms was to ensure that government officials were held accountable to the people.

To sum up, there is no evidence that the insertion of the language “concerning the transactions of government” in the chapter I provision of the 1786 constitution was intended to narrow or limit the protections afforded to speech and press in Vermont. The purpose, rather, seems to have been to preserve the thrust of the second of the original free press provisions while eliminating the provision itself as redundant. It is in that spirit, it can be argued, that the combined provision in chapter I of the current state constitution should be interpreted and applied.

C. The Meaning of “Freedom of the Press” and “Restrained”

[T]herefore the freedom of the press ought not to be restrained.

Vermont Constitution of 1777, chapter I, section XIV

In our discussion up to this point, we have assumed that the phrase “freedom of the press” and the word “restrained” in the free press provisions of the early Vermont constitutions meant the same thing in the late 1700s as they mean today. But such an assumption is unwarranted. There is no question that the framers of the state’s early constitutions meant

to protect the right of the people to freedom of speech and press, nor is there any doubt that they meant it when they declared that the freedom of the press “ought not to be restrained,” but what they meant by these terms—by “freedom” and “restrained”—was not the same as we mean today. To appreciate how their understanding differed from ours, we need to examine the historical and political context in which the framers acted. These were years when notions of freedom of speech and press were undergoing fundamental transformation in America.⁷⁸ During the early colonial period, the press in America, like the press in England, was subject to prior restraint and censorship by government authorities.⁷⁹ Licensing of the press existed in Massachusetts, New York, and Pennsylvania up through the 1720s and in Virginia until the late seventeenth century.⁸⁰ The colonies followed the English practice under which a printer was required to submit manuscripts to a government licensor or censor prior to publication.⁸¹

Nor was prior restraint the only inhibition on freedom of the press during the colonial period. Those who published articles critical of government risked punishment after the fact for “seditious libel.”⁸² The same applied to subversive speech as well. The Massachusetts legislature in 1635 banished Roger Williams for disseminating “dangerous opinions” against the government.⁸³ Nor had things changed much fifty years later when, in 1685, the Pennsylvania Council prosecuted one of its citizens for uttering seditious words.⁸⁴ Other colonial governments took similar actions. Perhaps the most famous example is the prosecution of John Peter Zenger in New York in 1735 for having printed *Cato’s Letters*,⁸⁵

78. See generally LEVY, *supra* note 26; David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 515 (1983) (explaining how the revolutionary experience may have shaped the Framers’ desire to use the freedom of the press as a vehicle for governmental critique).

79. See LEVY, *supra* note 26, at 16–28 (describing restraints on speech in colonial America).

80. *Id.* at 22, 30, 48.

81. *Id.* at 6; see generally FREDERICK S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476–1776* (1952) (describing the licensing system in England from its inception shortly after the printing press to its demise at the end of the seventeenth century).

82. See LEVY, *supra* note 26, at 17 (explaining that seditious libel was in force in the eighteenth century and was enforced by the provincial legislatures in America).

83. LEVY, *supra* note 26, at 26.

84. *Id.* at 22.

85. *Id.* at 40. *Cato’s letters*, written by two Whig pamphleteers in England, circulated widely throughout the colonies prior to the Revolution and became one of the most influential sources of political ideas. *Id.*; CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 141 (Harcort, Brace and Co. 1953) (“*Cato’s Letters* was the most popular, quotable, [and] esteemed source of political ideas in the colonial period.”). The most popular letters focused on the relationship between speech and the political process. Since government was a “trustee” of the people, Cato argued, the actions of government should be openly examined. Government “is the part and business of the people, for whose sake alone all public matters are, or ought to be, transacted,” and therefore government transactions should be freely discussed. LEVY, *supra* note 26, at 110 (quoting JOHN TRENCHARD & THOMAS GORDON, NO. 15

advocating the duty of all citizens to expose public wickedness.⁸⁶

By the mid-1700s, a free press had generally come to be regarded as a “bulwark of liberty” in the colonies, but that did not mean that those who published articles critical of government officials could not be punished after the fact for seditious libel. What “freedom of the press” meant was simply freedom from prior censorship.⁸⁷ That was the prevailing view when the first state constitutions were adopted in the late 1770s, and it was still the prevailing view more than a decade later when the First Amendment was added to the United States Constitution in 1791.⁸⁸

The idea that freedom of the press meant only freedom from prior restraint continued to find acceptance up through the early 1800s,⁸⁹ although by then the notion that freedom of speech and press ought also to include protection from subsequent punishment was beginning to gain traction.⁹⁰ This point needs to be stressed. Well after the adoption by the newly formed states of constitutional provisions guaranteeing freedoms of speech and press, even after the adoption of the First Amendment, there were prosecutions of newspaper editors and political dissidents in this country for seditious libel for having made statements deemed to be subversive of established government.⁹¹ During this period, the doctrinal law regarding what elements had to be proven to make out a case of seditious libel was undergoing liberalization, and the clear tendency was toward increasing the defenses available to those charged with the offense.⁹² However, editors and pamphleteers who published articles critical of government risked prosecution for seditious libel well into the

OF FREEDOM OF SPEECH: THAT THE SAME IS INSEPARABLE FROM PUBLIC LIBERTY (1775), reprinted in CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS, 110, 111 (Ronald Hamowy ed., Liberty Fund 1995)).

86. See LEVY, *supra* note 26, at 39–41 (explaining that the goal of publishing *Cato's Letters* was not only to critique the administration, but to educate the public about the evils of their government).

87. *Id.* at 272 (“Freedom of the press meant, in part, an exemption from prior restraints.”).

88. See *generally id.* at 210–81 (discussing various perspectives on the freedom of the press in early America, as well as key differences among views of the interaction between the First Amendment and the common law).

89. To give an example, Thomas Jefferson, after becoming President, urged prosecution of administration critics by state officials under *state* seditious libel laws. *Id.* at 340–41.

90. See *infra* notes 119–47 and accompanying text.

91. See LEVY, *supra* note 26, at 183, 269, 273, 276–79 (noting the resilience of the common law crime of seditious libel and several prosecutions for seditious libel during the early period of United States history).

92. The Sedition Act of 1798, for example, for the first time made truth a defense in a seditious libel prosecution. An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), ch. 74, § 2, 1 Stat. 596, 596 (1798) (expired); LEVY, *supra* note 26, at 297.

early nineteenth century.⁹³ In reply to the argument that such prosecutions violated state and federal constitutional protections of freedom of speech and press, there was a ready answer based in the traditional common law understanding that freedom of the press meant only freedom from prior restraint.

Thus early Vermonters in all likelihood would have read the language of the free speech and press provision in the state's early constitutions differently from the way we read that language today. To us, "freedom of speech" and "freedom of the press" mean freedom not only from prior restraint but also from subsequent punishment, and that freedom extends to criticisms of government—even irresponsible criticisms—with narrow exceptions for those situations where it can be shown that the challenged publications threaten "imminent lawless action."⁹⁴ Similarly, when we read in our state constitution that the freedom of the press should not be "restrained," we interpret that to mean that the press ought to be free from any and all restraint, whether imposed beforehand in the form of censorship or after the fact in the form of criminal prosecution. But these terms did not mean the same thing to our ancestors as they do to us. To early Vermonters, "freedom" and "ought not to be restrained" meant simply freedom from prior restraint.

But was that in fact the case in Vermont in the late 1700s? How much freedom of speech and press was there in the state during its formative period? Here the evidence is sketchy, so we are forced to proceed in part upon speculation; what evidence there is seems to support the view that early Vermonters understood "freedom" and "ought not to be restrained" to mean what it meant at common law: freedom from prior restraint.⁹⁵

1. Freedom of Speech and Press in the New Hampshire Grants

If we want to understand what freedom of speech and press meant to early Vermonters, the place to begin is with the experience of the state's inhabitants in the period immediately prior to adoption of the first constitution. What sort of freedom existed to speak one's mind in the New Hampshire Grants, the territory now occupied by the State of Vermont before it became a separate political entity? This was a time, as is well known, when local politics in the New Hampshire Grants were dominated

93. See LEVY, *supra* note 26, at 338–43 (listing prosecutions for common law criminal libel occurring during the beginning of the nineteenth century).

94. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

95. See *supra* notes 87–94 and accompanying text. See also *infra* notes 96–147 and accompanying text.

by the Allens and the Green Mountain Boys.⁹⁶ Since the name Ethan Allen is regularly associated with the view that Vermonters cherish liberty, it would be illuminating to know what “freedom of speech” meant in Ethan Allen’s world.

The best indication of what freedom of speech meant is revealed by a famous incident involving a clash between Ethan Allen and Doctor Samuel Adams in 1774 over how to deal with disputed land claims in the New Hampshire Grants.⁹⁷ Adams, who held his land by New Hampshire title, disagreed with Allen’s policy respecting disputed land claims. Adams advised those holding New Hampshire titles to purchase New York titles as a way of resolving the disputed claims. This did not please Allen, who conveyed to Adams “that this tone of conversation was not acceptable.”⁹⁸ Adams was requested to change his views “or at least to show his prudence by remaining silent.”⁹⁹ Adams refused, declaring that he would speak his mind and defend his right to do so. For this, he was arrested, tried, and convicted by Ethan Allen and his Green Mountain Boys in a kangaroo court proceeding. For having stood up to Ethan Allen, for having asserted his right to freely express his views, Adams was tied to an armchair and hoisted up the twenty-five-foot pole of the Green Mountain Tavern sign in Bennington, where he was left suspended for two hours beneath a stuffed wildcat.¹⁰⁰ Alienated by this experience, Adams became a Tory, and his land was subsequently confiscated.¹⁰¹

What can we say from this incident about the meaning of “freedom of speech” in the New Hampshire Grants prior to adoption of the first Vermont Constitution? If it meant freedom to criticize the policies of New York authorities, and to condemn Yorker sympathizers, by the same token, it clearly did not mean freedom to criticize the policies and actions of the Allens and their allies. This was a world in which one adhered to the

96. Ethan Allen, his brothers Ira and Heman Allen, and his cousin Remember Baker formed an unauthorized militia known as the Green Mountain Boys that had considerable military and political influence within the State. *See generally* JOHN PELL, ETHAN ALLEN (1929) (discussing in great detail the life of Ethan Allen); JARED SPARKS, THE LIFE OF COL. ETHAN ALLEN (1858) (discussing the Green Mountain Boys); DOYLE, *supra* note 44, at 6–15 (discussing the life of Ethan Allen and his role in early Vermont political life).

97. IRA ALLEN, THE NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT 36–37 (Charles E. Tuttle Co. 1969) (1798); *see also* PELL, *supra* note 96, at 36–37 (giving a short account of this incident).

98. SPARKS, *supra* note 96, at 123; *see* ALLEN, *supra* note 97, at 37 (“Under these circumstances Doctor Adams was requested to change his conversation on the subject, or, at least, to be silent.”).

99. SPARKS, *supra* note 96, at 123.

100. ALLEN, *supra* note 97, at 37.

101. I RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL OF THE STATE OF VERMONT (1775–1777) 167 n.2 (E.P. Walton ed., 1873).

“politically correct” line as it was enunciated by the Allens, or risked serious reprisal.

2. Freedom of Speech and Press in Vermont after Adoption of the 1777 Constitution

The interesting question is how this situation changed, if at all, after adoption of the 1777 constitution. The state’s first constitution, it will be recalled, contained not one but two separate provisions protecting freedom of speech and press. Now the people of the state had—on paper at least—a constitutional “right to freedom of speech.”¹⁰² They had a constitutional right to write and publish their “sentiments” on whatever matter they wanted. They had a specific constitutional provision declaring that “the freedom of the press ought not to be restrained.” In addition, the press was given a special provision of its own in chapter II assigning it constitutional responsibility for “examining the proceedings of government.”

But did the adoption of these constitutional provisions change things in fact? How much freedom of speech and press was there in Vermont under the 1777 constitution? Here again we have only scattered evidence to go on, but the available evidence suggests that adoption of these provisions did not protect against being prosecuted in Vermont for expressing one’s political views. Even after adoption of the Vermont Constitution of 1777, one still acted at one’s peril in criticizing the actions of government officials.

In February of 1779, the Vermont General Assembly passed an act adopting the common law “as it is generally practiced and understood in the New England states” as the law of Vermont.¹⁰³ This was not unusual; other states did the same. Almost all the newly formed states adopted the common law because they needed a body of operative law to govern legal relationships pending adoption of supplementary or corrective legislation.

The significance of this development for our inquiry is that, at this point in time, no state—including the “New England states” to which the Vermont statute referred—had abolished or altered the common law of

102. It is important to keep in mind that only Vermont and Pennsylvania expressly protected freedom of speech in their original constitutions. *See supra* notes 55–57 and accompanying text.

103. “Be it further enacted by the authority aforesaid, that common law, as it is generally practiced and understood in the New England states, be, and is hereby established as the common law of this state.” Act for Securing the General Privileges of the People, and Establishing Common Law and the Constitution, As Part of the Laws of this State, Gen. Assem. (Vt. 1779), *reprinted in* 12 STATE PAPERS OF VERMONT: LAWS OF VERMONT 1777–1780, at 36–37 (Allen Soule ed., 1964) [hereinafter 12 STATE PAPERS].

sedition libel. The common law of seditious libel was as it was described in Blackstone's Commentaries (1765): "The liberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."¹⁰⁴ In other words, freedom of speech and press meant freedom from prior restraint. The Vermont Assembly reaffirmed the adoption of the common law in 1782.¹⁰⁵

But did Vermonters actually subscribe to the Blackstonian view? We do not know for certain because there were no criminal prosecutions of the press in Vermont for common law seditious libel during this period. There is, however, some evidence to suggest that the Blackstonian view informed Vermonters' understanding of what was meant by freedom of speech and press during this period.

In 1779, the Vermont legislature passed two acts limiting freedom of speech and press in the state. It passed so-called "false news" act which prohibited making or publishing any false statement "which may be pernicious to the public weal, or tend to the damage or injury of any particular person, or to deceive and abuse the people with false news."¹⁰⁶ Although this "false news" statute would almost certainly be declared unconstitutional today, at the time of its adoption, no one regarded it as infringing upon state constitutional protections.

In the same session, the Vermont Assembly passed a second act, this one punishing the defamation of civil authorities:

And whereas defaming the civil authority of the state, greatly tends to bring the same into contempt, and thereby to weaken the hands of those by whom justice is to be administered . . . whosoever shall defame any court of justice . . . or any of the magistrates, judges, or justices of any such court . . . shall be punished for the same by fine, imprisonment, disfranchisement or banishment.¹⁰⁷

On its face, this second act appears to apply only to the defamation of

104. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (9th ed., Garland Publ'g, Inc. 1978) (1765).

105. 13 STATE PAPERS OF VERMONT: LAWS OF VERMONT 1781–1784, at 101 (John A. Williams ed., 1966). "Be it enacted, and it is hereby enacted, by the Representatives of the freemen of the State of Vermont, in General Assembly met, and by the Authority of the same, that so much of the Common law of England is not repugnant to the Constitution, or to any Act of the Legislature of this State, be, and is hereby adopted, and shall be, and continue to be, Law within this State." *Id.*

106. Act for the Punishment of Lying (1779), *reprinted in* 12 STATE PAPERS, *supra* note 103, at 147.

107. An Act for the Punishment of Defamation (1779), *reprinted in* 12 STATE PAPERS, *supra* note 103, at 168–69.

courts and judicial officers (“any court of justice . . . or any of the magistrates, judges, or justices”), although whether the act was so construed is debatable since “civil authority” was also exercised by other local and state officials. One would think that defaming those authorities would have the same undesired tendency. Moreover, during this period, the Vermont legislature regularly exercised a judicial function by hearing and deciding appeals from court decisions in cases involving property disputes and other matters.¹⁰⁸ In other words, the legislature was also responsible for the administration of justice within the meaning of the statute. Even if limited in application only to courts and judicial officers, the defamation act was notable for the severity of its penalties: those found guilty of “defaming” civil authorities were subject, among other things, to “disfranchisement” and “banishment.” Like the “false news” act discussed above, this act would also be found unconstitutional if challenged today, but during this period, significantly, it was apparently not considered inconsistent with the protections of free speech and press contained in the 1777 constitution.

It should be pointed out that neither of the two acts discussed above expressly required a showing of falsehood to sustain a conviction. The first act made it a crime to make any statement “pernicious to the public weal,” whether or not the statement was true, and the second only required, in the sense then prevailing, that the civil authorities be “defamed.” At this time, prosecutors did not have to prove that the statements made were false to sustain a conviction for defamation. In fact, under the earlier English view, defendants in public defamation cases were precluded from introducing evidence of the truth of the statements they made.¹⁰⁹ The rationale behind this exclusion was that truth in such cases was, if anything, an aggravation.¹¹⁰ It was destructive enough of established government to falsely charge officials with misconduct, but even more destructive if the charges were true. Whether that understanding was the prevailing one in Vermont during this period, we do not know. The issue was never presented in a focused way, but it is significant that it was not until 1804 that the Vermont legislature enacted a statute allowing the truth of the words of a supposed libel to be admitted into evidence as a defense in a defamation action.¹¹¹

108. During the early years in the state’s history, “[t]he legislature vacated judgments, and deeds fraudulently procured; stayed executions and granted pardons.” Rowell, *supra* note 39, at 1400. Objections by the Council of the Censors to the legislature’s exercise of judicial appellate powers led to amendments in the 1786 constitution which provided for clear separation of powers. *Id.* at 1400–01.

109. LEVY, *supra* note 26, at 12.

110. *Id.*

111. 1804 Vt. Acts & Resolves 8.

It appears that there were only two prosecutions in Vermont during this period under the 1779 acts described above. Although they are not as illuminating as one might hope, the reports we have of these cases seem to support the view that Vermonters during this time accepted the Blackstonian, or traditional common law, view of what was meant by freedom of speech and press.

In May 1779, Nathan Stone was convicted for uttering and publishing reproachful and scandalous words against the authorities.¹¹² The authorities in this case were the high sheriff of Cumberland County, his Excellency the Governor, and the Honorable Council. Under which act this prosecution was brought is not clear from the reports we have of the case. All we know are the words for which Stone was prosecuted: “God damn you and your Governor, and your Council.”¹¹³ Stone did not challenge this prosecution but instead pled guilty and was fined.

In August 1780, there was a second prosecution; this one brought under both the “false news” and “defamation” acts.¹¹⁴ We do not know the name of the accused since the name was deleted from the court records. The accused was charged with “endeavoring to subvert the government” by spreading false news and by defamation. According to the report of the case, the prosecution charged that the accused “did defame the authority, magistrates and judges, endeavoring to bring the same into contempt, and was guilty of spreading false news.”¹¹⁵ In this case, unlike in Nathan Stone’s case, the accused pled not guilty and demanded a trial. At the end of the trial, the jury brought back a verdict of guilty. The accused was fined and disenfranchised.

3. The Experience in Vermont After Adoption of the 1786 Constitution

There is no evidence of any other state criminal prosecutions under these acts, but in the period following the adoption of the 1786 constitution, a couple of other incidents shed light on what Vermonters understood by freedom of speech and press. As noted above, in 1785, the Vermont Council of Censors recommended that a constitutional convention be called to consider proposed amendments to the 1777 constitution.¹¹⁶ This was the

112. WILLIAM SLADE, VERMONT STATE PAPERS 552 (1823); *see also* Paul S. Gillies, *The Reporters: January 1998*, 24 VT. B.J. & L. DIG., 12, 14 n.2 (1998) (discussing a small collection of decisions in an early, unofficial reporter, including a case where the court fined Nathan Stone for comments directed toward officials).

113. SLADE, *supra* note 112, at 552; Gillies, *supra* note 112, at 14 n.2.

114. SLADE, *supra* note 112, at 555.

115. *Id.*

116. RECORD OF THE COUNCIL OF CENSORS, *supra* note 39, at 43.

convention that eliminated the second of the free press provisions in the 1777 constitution, and amended the first by, in effect, combining the two original provisions into one. In calling a convention, the Council proposed adding a new provision to the state constitution guaranteeing freedom of debate in the legislature:

The freedom of deliberation, speech and debate in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.¹¹⁷

This provision was adopted and subsequently incorporated as article XIV of chapter I of the 1786 Constitution. What difference did these changes make? How were the new constitutional provisions understood and applied?

In Vermont, as in other New England states, during this period there was growing discontent over taxes. Vermont farmers strapped for cash and unable to meet their obligations were especially irritated by the use of their tax dollars to pay the courts for sitting, since the courts were regarded as the collection instruments of creditors.¹¹⁸ The discontent escalated until riots broke out in Windsor and Rutland counties aimed at preventing the courts from sitting.¹¹⁹

One of the leaders in the Rutland riots was Jonathan Fassett, a member of the General Assembly.¹²⁰ For certain comments he made in the course of the riots, the General Assembly ordered a complaint against Fassett designed to expel him from that body.¹²¹ Fassett was charged with having made “seditious speeches misrepresenting the proceedings of this Assembly . . . [by which he] endeavored to influence the minds of the citizens of this State against the proceedings of this Assembly” and with having incited a riot.¹²² The “trial” was to be held in the Assembly itself.¹²³ Fassett pled

117. *Id.* at 45.

118. See ALEINE AUSTIN, MATHEW LYON: “NEW MAN” OF THE DEMOCRATIC REVOLUTION, 1749–1822, at 51–52 (1981) (describing early settlers’ problems with debt); 2 CROCKETT, *supra* note 41, at 412–16 (describing the protests).

119. See AUSTIN, *supra* note 118, at 51–52 (noting that riots occurred in Rutland and Windsor Counties shortly before the November 1786 referendum).

120. 3 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 369–70 (E. P. Walton ed., 1873) [hereinafter 3 RECORDS]; 2 CROCKETT, *supra* note 41, at 415–16.

121. 3 RECORDS, *supra* note 120, at 370.

122. *Id.*

123. See *id.* (noting that the General Assembly would take the complaint under consideration the following week).

not guilty.¹²⁴ Whether he would have been allowed to introduce evidence of the truth of the charges he made against the Assembly we will never know because he failed to appear when summoned before the Assembly.¹²⁵ As a consequence, Fassett was summarily expelled from his seat in the Assembly and fined.¹²⁶

The only other incident involving freedom of speech and press in Vermont during the post-1786 period is the Joshua Tracy case.¹²⁷ In 1787, the General Assembly reenacted the statute prohibiting defamation of the civil authority on the grounds that such defamation “tends to bring the same into contempt and enervate the Government.”¹²⁸ Although on its face the statute applied only to defamations of judicial officers, the act apparently was construed to apply as well to defamation of the General Assembly.¹²⁹ Joshua Tracy, Esquire, was taken into custody and brought before the bar of the House for allegedly having defamed the civil authorities.¹³⁰ We do not know what Tracy was charged with having said about the Assembly, but whatever it was, the Assembly apparently did not find it flattering. We do know that on the day following his arrest, Tracy was dismissed from custody, “having made satisfaction to the House for his insult against them,”¹³¹ and that, apparently, was the end of the matter.

In summary, although the evidence is fairly slender, at least up through the 1780s, freedom of speech and press in Vermont seemed to mean what it meant at common law. It meant freedom from prior restraint or censorship, but it did not mean freedom from subsequent punishment.

D. The Trial of Mathew Lyon Under the Federal Sedition Act of 1798

The crucial turning point in this development occurred later, but not until the end of the 1790s, with the trial of Mathew Lyon under the Federal Alien and Sedition Acts of 1798.¹³² Lyon’s trial served to crystallize public opinion against prosecutions for seditious libel and eventually led to a shift in the public understanding of what was meant by freedom of speech and

124. *Id.*

125. *Id.* at 371.

126. *Id.* at 371–72.

127. *See id.* at 140 (reporting the Joshua Tracey case).

128. *Id.* at 139.

129. *See id.* at 139–40 (failing to list the General Assembly as a target of defamation and acknowledging that this law was interpreted to include the General Assembly).

130. *Id.* at 140.

131. A JOURNAL OF THE PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE STATE OF VERMONT (Oct. 17, 1788) reprinted in 3 STATE PAPERS OF VERMONT: JOURNALS AND PROCEEDINGS OF THE STATE OF VERMONT (PT. IV) 1787–1791, at 84–85 (Walter H. Crockett ed.).

132. AUSTIN, *supra* note 118, at 108.

press in a democratic polity, not only in Vermont but more generally throughout America.

On December 15, 1791, the First Amendment to the United States Constitution was ratified, making it the law of the land.¹³³ That Amendment provided that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”¹³⁴ At the time of the adoption of this Amendment, the prevailing view of what was meant by freedom of speech and press was that described above: it meant only freedom from prior restraint.

We can see this reflected in the majority report to Congress on the Alien and Sedition Acts of 1798.¹³⁵ The Sedition Act, which is the relevant act for our purposes, imposed criminal sanctions for “any false, scandalous and malicious writing or writings against the government of the United States.”¹³⁶ This did not violate the First Amendment, according to the majority report, because freedom of speech and freedom of the press did not include “a license for every man to publish what he pleases without being liable to punishment.”¹³⁷ The freedoms referred to in that Amendment were never intended to cover “the publication of false, scandalous, and malicious writings against the Government.”¹³⁸ The Sedition Act, according to the majority report, was “merely declaratory of the common law.”¹³⁹ The Sedition Act, therefore, did not “abridge” the freedoms of speech or press as those freedoms were understood at common law.

The Jeffersonians opposed the Alien and Sedition Acts primarily on the grounds that the federal government did not have the constitutional power to enact general criminal legislation.¹⁴⁰ Although the rhetoric of opposition sometimes included the argument that speech critical of government should be protected from subsequent punishment as well as from prior restraint, even among the Jeffersonians, the old Blackstonian view held sway.¹⁴¹

133. U.S. CONST. amend I.

134. *Id.*

135. Annals of Congress 5th Cong., 3rd Sess. 3003–14, reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 172–86 (Levy ed., 1966) [hereinafter *Annals of Congress*]. See also LEVY, *supra* note 26, at 269–73 (“Thus freedom of the press meant more than just freedom from prior restraint. It meant the right to criticize the government, its officers, and its policies.”).

136. Act of July 14, 1789, ch. 74, § 2, 1 Stat. 596, 596–97 (expired).

137. Annals of Congress, *supra* note 135, at 172–86.

138. *Id.*

139. *Id.*

140. LEVY, *supra* note 26, at 306–07.

141. See *id.* at 307–08 (arguing that the Jeffersonians, despite repudiating the Blackstonian and Federalist theory of freedom of the press, explicitly endorsed the power of states to prosecute seditious

After the Alien and Sedition Acts expired in the early 1800s, Jefferson, who was now President, urged the prosecution of Federalist editors by state officials under *state* sedition laws in an effort to discourage what he considered irresponsible criticisms of his administration.¹⁴² Thus up through the end of the 1700s and into the early 1800s, the prevailing view of the freedom of speech and press in America meant only the freedom from prior restraint.¹⁴³

The prosecution and trial of Matthew Lyon under the federal Sedition Act of 1798 served as a focal point for changing this traditional view. Matthew Lyon was a Republican congressman from Vermont.¹⁴⁴ In the course of his campaign for reelection in 1798, he wrote a letter to the editor of *Spoooner's Vermont Journal* in which he included the following remark critical of President John Adams:

As to the Executive, when I shall see the efforts of that power bent on the promotion of the comfort, the happiness, and accommodation of the people, that Executive shall have my zealous and uniform support. But when I see every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, or selfish avarice . . . I shall not be [a] humble advocate.¹⁴⁵

On the campaign trail in Vermont, Lyon also repeatedly read a passage from a letter written by Joel Barlow that was harshly critical of Federalist policies regarding the relationship between France and the United States.¹⁴⁶

With Federalist urging, grand jury proceedings were instituted against Lyon in the fall of 1798, which resulted in his indictment under the Sedition Act.¹⁴⁷ The indictment “[d]escrib[ed] Lyon as ‘a malicious and seditious person, and of a depraved mind and a wicked and diabolical disposition.’”¹⁴⁸ He was charged with three violations of the Sedition Act: (1) writing and publishing the original letter criticizing Adams in *Spoooner's Vermont Journal*; (2) publishing the Barlow letter criticizing administration policies toward France; and (3) “assisting, aiding, and abetting of

libel).

142. *Id.* at 341.

143. Annals of Congress, *supra* note 135, at 172–86.

144. AUSTIN, *supra* note 118, at 74. Lyon was elected in the February 1797 runoff. *Id.* at 74–75.

145. *Id.* at 108–09.

146. *Id.* at 109–10.

147. *Id.* at 108, 110. Lyon was the first person to be prosecuted under the Act. *Id.* at 108.

148. *Id.* at 110 (internal citation omitted).

publication of the Barlow's letter."¹⁴⁹ According to the indictment, Lyon published these statements with the "intent and design to excite against the said Government and President the hatred of the good people of the United States, and to stir up sedition in the United States [by] deceitfully, wickedly and maliciously contriving . . . with intent and design to defame the said Government of the United States."¹⁵⁰

The presiding judge at Lyon's trial, Judge Patterson, was known to be sympathetic to the Federalist cause, a sympathy that was clearly reflected in his rulings from the bench.¹⁵¹ Moreover, in an effort to stack the outcome of the trial, the jurors had been deliberately selected from towns that had voted against Lyon in the recent election.¹⁵² Patterson's charge to the jury made clear that, whatever was meant by freedom of speech and press, it did not include the right to be disrespectful of those in power. "[Y]ou will have to consider," Patterson instructed the jury,

whether language such as that here complained of could have been uttered with any other intent than that of making odious or contemptible the President and government, and bringing them both into disrepute. If you find such is the case, the offence is made out, and you must render a verdict of guilty.¹⁵³

Notice that the gravity of the offense is not the falsity of the statements uttered by Lyon but their tendency to bring government officials "into disrepute."¹⁵⁴ This reflected the traditional common law view.¹⁵⁵ Interestingly, the Sedition Act of 1798 made truth a defense to a prosecution under the act.¹⁵⁶ But where, as in Lyon's case, the offending statements involved the expression of opinions, permitting the introduction of the truth provided no protection since opinion statements cannot be shown to be either true or false.¹⁵⁷ At the close of trial, it took one hour for

149. *Id.*

150. *Id.* at 110–11 (internal citation and quotation marks omitted).

151. *See, e.g.*, JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 234 (1956) (providing examples of various forms of Judge Patterson's bias through rulings and comments to jury members).

152. *See id.* at 235–36 (stating that the jury who would judge Lyon was composed of men who had previously spoken ill of him).

153. AUSTIN, *supra* note 118, at 117.

154. *Id.*

155. Annals of Congress, *supra* note 135, at 172–86.

156. AUSTIN, *supra* note 118, at 116.

157. *See id.* at 127 (discussing arguments by Gallatin and Nicholas, clarifying the bounds of libel).

the jury to return a guilty verdict.¹⁵⁸ Lyon was sentenced to four months in prison and required to “pay the costs of prosecution, and a fine of one thousand dollars.”¹⁵⁹

Undeterred, Lyon conducted his reelection campaign from jail, making his prosecution under the Sedition Act a campaign issue.¹⁶⁰ Although he did not focus on the need to expand the constitutional protections afforded to freedom of speech and press, that message was implicit in his attack on the Sedition Act itself. The argument, in any event, was picked up and expounded on by Lyon’s Republican sympathizers.¹⁶¹ Although it did not result in an immediate change in prevailing seditious libel doctrine, it contributed to a change in popular attitude. To be prosecuted for having expressed views critical of government, it increasingly came to be felt, was inconsistent with what ought to be meant by freedom of speech and press in a democratic polity.

That sentiment was reflected in the Vermont congressional elections that fall. Though still in jail, Lyon was elected, his vote total exceeding the votes of all his opponents combined.¹⁶² Although there were other issues in the campaign, growing public hostility to the use of seditious libel prosecutions to still political dissent was clearly reflected in Lyon’s victory.

Emerging from prison, Lyon returned to Congress. The Federalists, however, immediately mounted an effort to expel him from the House based on his “imprisonment as ‘a notorious and Seditious person.’”¹⁶³ The debates in Congress over whether to expel Lyon focused once again on the law of seditious libel and the need for reform. In the course of those debates, Lyon’s supporters argued that the existing federal law was flawed because, although it permitted the defense of truth, such a defense did not provide adequate protection for freedom of speech since expressions of opinion could not be shown to be either true or false.¹⁶⁴ Therefore, they argued, opinion statements should be considered outside the scope of the doctrine of seditious libel and immune from prosecution. Though a majority of the House voted to expel by a narrow margin, Lyon maintained his seat, since a two-thirds vote was necessary for expulsion.¹⁶⁵

Lyon’s biographer, Aline Austin, sums up the impact of Lyon’s trial on public attitudes toward freedom of speech and press in America:

158. *Id.* at 117.

159. *Id.*

160. *Id.* at 119.

161. *Id.* at 124.

162. *Id.* at 124. Lyon won by close to 600 votes. See DOYLE, *supra* note 44, at 75.

163. AUSTIN, *supra* note 118, at 127.

164. *Id.*

165. *Id.* at 128.

The situation whereby a Congressman could be imprisoned for criticizing the policies of the government focused sharply the question of opposing political parties. The impact of the Sedition Act was to deny the legitimacy of party politics. According to the Federalists' view of the political process sanctioned by the Constitution, once the elected government decided upon a policy, the populace was obliged to support it. There was no room in Federalist thought for opposition to the government. At the least, such opposition was factious. At the most, an organized opposition party that appealed to the populace to change government policy was seditious.

Matthew Lyon and the other victims of the Sedition Act, who were mainly editors of Republican newspapers, forced the country to face the issues of free speech and legitimate party opposition, and eventually to forge a broader concept of the democratic process.¹⁶⁶

This change did not take place immediately. But in the wake of Lyon's prosecution, there began to emerge in America a new appreciation of the importance of providing broad freedom to political speech, a new appreciation of the critical role played by such speech in making and keeping government accountable to the people.

To summarize, to Vermonters in the late 1700s, freedom of speech and freedom of press meant something different than these terms mean to us today. To early Vermonters freedom meant what it meant at common law: it meant freedom from prior restraint. It did not mean freedom from subsequent prosecution for having said or published things that tended to bring the government into disrepute. During this period, criminal prosecutions for defaming the civil authorities were not considered inconsistent with the protections of freedom of speech and press contained in the Vermont Constitution. No constitutional objections were raised when a member of the state legislature was arrested on the orders of the General Assembly and punished for having made remarks considered "insulting" to that body. Today these would be considered violations of the constitutional right to free speech and press under both state and federal constitutions, but Vermonters in the late eighteenth century lived by different assumptions. By including provisions protecting freedom of speech and freedom of the press in the early state constitutions, our

166. *Id.* at 118.

ancestors took an important first step: they established the beginning of a constitutional tradition which has been carried forward and expanded upon by subsequent generations. They provided the foundations for a development of which we are all the beneficiaries.

IV. ACCESS TO THE PROCEEDINGS AND RECORDS OF GOVERNMENT DURING THE FORMATIVE PERIOD IN VERMONT CONSTITUTIONAL HISTORY

Protecting freedom of speech and press was not the only way in which the notion of government accountability was expressed in the State's first constitution. Provisions aimed at making government more accountable to the people took other forms as well. These provisions—which represent early expressions of the policies that underlie current open-meeting and public-records laws—provided, among other things, for public access to legislative proceedings;¹⁶⁷ maintaining records of the votes and proceedings of the General Assembly;¹⁶⁸ printing and dissemination to the public of acts under consideration prior to final passage;¹⁶⁹ and keeping “fair books” of the proceedings and actions of the Governor and Council.¹⁷⁰

The history of public access to meetings of government officials and to government records follows a course, in many respects, parallel to the history of freedom of speech and press that we have just traced. In both England and the American colonies prior to the Revolutionary War, the prevailing tradition was that of closed meetings and of government secrecy: a tradition of “parliamentary privacy.”¹⁷¹ That tradition has a long history, with different justifications advanced for it at different periods. What it represents, essentially, is a very different idea of the relationship that should exist between the people and their representatives than that which exists today. The tradition of parliamentary privacy came into existence in a hierarchically structured world governed by rulers who saw themselves as paternalistic trustees of the people they were charged with representing.¹⁷² As discussed above, the idea that government representatives should be directly accountable to the people only gradually began to take hold in the

167. VT. CONST. OF 1777 ch. II, § XII.

168. *Id.* ch. II, § 3.

169. *Id.* ch. II, § 13.

170. *Id.* ch. II, § 18.

171. POLE, *supra* note 17, at 86–116. See LEVY, *supra* note 26, at 17–18 (describing the consequences of breaching parliamentary privilege).

172. See POLE, *supra* note 17, at xi (“What courts and parliaments owed to the people was the gift of good government; but government itself, one might say, was too important a matter to be entrusted to the people.”).

mid-1700s.¹⁷³

In England during the 1600s, the claim of a privilege of parliamentary privacy was advanced in the context of a power struggle between Parliament and the Crown.¹⁷⁴ Secrecy was thought to be necessary to protect members of Parliament from being charged with treason for having expressed support for Parliament's side in the struggle.¹⁷⁵ In the American colonies during this period, most colonies were required to keep records of the decisions and actions of the colonial parliamentary assemblies and to forward those records or reports to appropriate English authorities.¹⁷⁶ This was England's way of trying to keep tabs on what was going on in the remote colonies.¹⁷⁷ But as tensions increased between the colonies and England during the period leading up to the Revolutionary War, the colonial assemblies invoked the doctrine of parliamentary privacy to keep English authorities from knowing exactly what was going on.¹⁷⁸ In the American context, parliamentary privacy had the double advantage of keeping from English authorities information about what was being considered as well as shielding internal divisions that might be interpreted as reflecting weakness or lack of resolve.¹⁷⁹ As the colonies moved closer to independence, however, some colonial leaders saw advantage in opening up assembly debates and votes to public scrutiny, hoping that such public exposure might pressure those who were wavering into coming over to the side of independence, or, if they persisted as loyalists, lead to their defeat in the next elections.¹⁸⁰ But the prevailing practice throughout the colonies during the pre-War period was that of parliamentary privacy.¹⁸¹

Only with rare exception were the doors to the colonial assemblies open to the public, and there was little or no public access to information about the votes of representatives or about the debates within the assemblies.¹⁸² Indeed, in Pennsylvania, it was considered an offense

173. See *supra* notes 17–25 and accompanying text.

174. POLE, *supra* note 17, at 95–96.

175. *Id.*

176. *Id.* at 117–18.

177. See *id.* at 118 (“Governors were also expected to transmit a great deal of information in their correspondence, which remained a major source for British governments throughout the period.”).

178. *Id.* at 117–20.

179. *Id.* at 119–20.

180. *Id.* at 128, 130. This was, in part, the motivation behind John Adams's efforts to make the debates of the House of Representatives in Massachusetts open to the public. *Id.* at 130. In response to pressure to do so from the Boston delegates, the House approved construction of a gallery for the public in 1776. *Id.* As Pole observes about this development, “[s]ince the outsiders who attended debates would normally be [pro-independence] Bostonians, and since most of the representatives came from country towns, the public presence could quickly assume the persuasive force of a mob.” *Id.*

181. *Id.* at 117–19.

182. *Id.*

simply to publish the colonial charter and laws.¹⁸³ It was not until 1726 that a newspaper anywhere in the colonies published a roll call of the votes of assembly representatives.¹⁸⁴ In that year, for the first time ever, a Massachusetts newspaper printed beside the names of the members of the Massachusetts Assembly the yeas or nays of those members on particular votes.¹⁸⁵ It would be a while yet, however, before this became a widely adopted practice.

Even more revealing about public attitudes during this time was the practice regarding publication of the debates (as distinct from the votes) in the colonial assemblies. Here, as one historian has noted, the shocking fact is that “[n]owhere and at no time in the history of the colonies [before the Revolutionary War] did any newspaper or magazine report one single assembly debate.”¹⁸⁶ So when, in the period following the Declaration of Independence, the newly independent states set about drafting their first constitutions, the tradition against which those constitutions were written was not one of government openness but one of parliamentary privacy. The tradition of parliamentary privacy continued to find wide acceptance in this country up through the 1790s.¹⁸⁷ We need only be reminded that the Philadelphia Convention of 1787, which led to the adoption of the United States Constitution, was conducted entirely behind closed doors, a decision that was probably crucial to the Convention’s success.¹⁸⁸ Less well known is the fact that the first Senate of the United States under the new Constitution voted to exclude the public from attending its sessions, a practice that was continued for the next four years.¹⁸⁹ Although we may condemn the practice as inconsistent with basic requirements of democratic government, our ancestors had a different view. In their world, there existed a countervailing sense—now no longer fashionable—that the freedom of deliberation and debate made possible by meeting out of the glare of public scrutiny enhanced the likelihood of coming up with wise and responsible legislation.¹⁹⁰

The situation, of course, was neither simple nor one-sided. Against the older tradition of parliamentary privacy, the new idea of governmental accountability was making substantial inroads. Running against the old

183. LEVY, *supra* note 26, at 22.

184. POLE, *supra* note 17, at 120–21.

185. *Id.* at 121.

186. *Id.* at 134.

187. *See id.* at 138 (noting that the first Senate’s decision to hold its deliberations in secret “provide[d] powerful evidence of the inertial force of the habit of privacy”).

188. *Id.* at 133–34.

189. *Id.* at 138.

190. *Id.* at 134.

current was a new counter-current. Thus when one examines the law and practice of this period, one finds both impulses at work: on the one hand, the desire to open up the proceedings of government to public scrutiny, and, on the other, the need to maintain some control over the nature and extent of public exposure. That complex double impulse is reflected, as we shall see, in the provisions dealing with public access to government in the first Vermont Constitution.

A. Doors of Assembly to be Kept “Open”

In addition to the general provision setting forth the philosophy that government officials should be accountable to the people, the “trustees and servants” provision discussed above,¹⁹¹ the Vermont Constitution of 1777 contained a number of other provisions aimed at ensuring that the decisions of such officials would be subject to public scrutiny. Section XII of chapter II of the Constitution of 1777 provided that the sessions of the legislature should be generally open to the public:

The doors of the house in which the representatives of the freemen of this State, shall sit, in General Assembly, shall be and remain open for the admission of all persons, who behave decently, except only, when the welfare of this State may require the doors to be shut.¹⁹²

Notice that this provision rejects the old idea of parliamentary privacy and embraces in its stead the newly emerging view that the proceedings of the legislature in a democratic government ought to be open to the public. This view, however, extended only to the proceedings of the state legislature and did not cover meetings by those in the executive branch or by other state and local officials.¹⁹³ Even more interesting is the fact that the framers left broad discretion in the legislature to determine when to exclude the public.¹⁹⁴ The constitutional standard was—and still is today—“when the welfare of this State may require the doors to be shut.”¹⁹⁵ Such a standard, it can be seen, is not very exacting. It could be met without much difficulty in almost any circumstance when the legislature wanted to exclude the public.

191. *See supra* notes 13–37 and accompanying text.

192. VT. CONST. OF 1777 ch. II, § XII.

193. *See id.* (specifying an open door policy for the General Assembly while remaining silent on policy for the executive branch and other state and local officials).

194. *Id.*

195. *Id.*

Today we would insist, as we have done in modern open-meeting legislation, that the circumstances in which the public can be excluded from meetings of public officials be narrowly defined and carefully spelled out.¹⁹⁶ Our ancestors, however, struck this balance differently. They wanted to establish the general principle of open meetings of the legislature, while reserving the legislature's broad discretion to depart from the open-meeting requirement where circumstances warranted. If this discretion were abused, the people retained the power to remove those who abused it by voting for someone else at the next election.

Although this provision, as it appeared in the first state constitution, applied only to sessions of the legislature, it established a foundation for the general principle that meetings of government officials, as the "trustees and servants" of the people, should be open to public scrutiny.¹⁹⁷ This principle has since been extended by legislation to apply to all meetings of public officials, with a few narrow exceptions.¹⁹⁸ It is by such means that the accountability principle has remained at once a constant feature of our constitutional tradition while at the same time taking on new meaning over the intervening years.

B. Printing of Votes in the Legislative Journals

A second open-government provision in the State's first constitution was section XIII of chapter II, which provided for the printing of the votes of the members of the General Assembly in the Legislative Journals and, in certain circumstances, of the reasons supporting the decisions of individual members to vote as they did:

The votes and proceedings of the General Assembly shall be printed weekly during their sitting, with the yeas and nays on any question, vote or resolution, where one third of the members require it, (except when the votes are taken by ballot) and when the yeas and nays are so taken, every member shall have a right to insert the reasons of his votes upon the minutes, if he desire it.¹⁹⁹

Note that this provision also reflects less than a complete embrace of the

196. See VT. STAT. ANN. tit. 1, §§ 310–13 (2003) (outlining Vermont's open meeting law).

197. Compare *id.* (specifying an open door policy for "[a]ll meetings of a public body"), and VT. CONST. OF 1777 ch. II, § XII (specifying an open door policy for only the General Assembly).

198. See VT. STAT. ANN. tit. 1, §§ 312 (2003) (exempting the judicial branch and certain routine administrative matters from coverage).

199. VT. CONST. OF 1777 ch. II, § XIII.

notion of government accountability. Only where at least a third of the Assembly has requested it must a roll call of the votes be printed in the Journals.²⁰⁰ Moreover, this provision does not require that positions taken by individual members in debates on particular issues be printed and made available to the public.²⁰¹ Rather, it establishes a procedure whereby those who want their views for or against a particular measure included in the Journals may arrange to do so.²⁰² But this is a far cry from requiring the printing of the views expressed by members in the course of debates over particular issues. So while this constitutional section provided an added measure of accountability, it fell short of requiring that information centrally important to understanding the votes of one's representatives be made readily available to the public.²⁰³

The interesting question is whether, and to what extent, the information printed in the Journals was available to the newspapers in the state or to the general public. This apparently was a bone of contention between the legislature and the newspapers. On October 27, 1787, the General Assembly addressed the question of access by the press to the Journals by passing the following resolution:

Resolved that the Clerk of this Assembly be directed to copy for both the presses in this state all the proceedings of the General Assembly on which the yeas & nays have been taken or may be taken & that no other part of the Journals be printed without the special order of the Legislature.²⁰⁴

Notice what the Assembly has done here. It has permitted the roll call of votes on particular measures to be published in the newspapers while at the same time restricting press access to any other information that might be printed in the Journals—including reports of legislative debates and post

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. A JOURNAL OF THE PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE STATE OF VERMONT (Oct. 11, 1787), reprinted in 3 STATE PAPERS OF VERMONT; JOURNALS AND PROCEEDINGS OF THE STATE OF VERMONT (PT. 4) 1787–1791, at 61–62 (Walter H. Crockett ed.) [hereinafter PROCEEDINGS OF THE GENERAL ASSEMBLY] (second emphasis added). There were two newspapers in the state at this time: the Vermont Gazette or Green Mountain Post Boy at Windsor and the Vermont Gazette or Freeman's Depository at Bennington. *Id.* at 61 n.2 (internal citation omitted). Walter Crockett, who published annotations to this legislation in 1929, commented: "This is one of the earliest recognitions on the part of the Vermont legislature of the right of State newspapers to a record of legislative proceedings, and the importance of furnishing the readers of newspapers accurate information of these proceedings." *Id.*

hoc explanations inserted in the Journals by legislative permission.²⁰⁵

“[N]o other part of the Journals [may] be printed without the special order of the Legislature.”²⁰⁶ Why did the legislature vote for this restriction on press access to the Journals? We do not know. Perhaps it was because politically sensitive issues were being addressed, and the legislature did not want the public to know what was being considered or why they had voted as they did. But this explanation does not seem very convincing in light of the first part of the resolution which mandates press access to the roll call portions of the Journals.²⁰⁷ A more probable explanation is that in restricting press access to the Journals, the legislature was motivated by the same fear that likely motivates politicians today: the fear of being misquoted or of being quoted out of context. Under this view, the legislature did not object to the press printing accurately what had transpired in the legislative sessions but was nervous about providing unfettered press access to the Journals because of a concern that what was recorded there might not accurately reflect what had, in fact, transpired.

In any event, what we see reflected here is yet another example of the mixed pattern of response to pressures for increased accountability. On the one hand, in establishing procedures for printing and disclosing information about how individual representatives had voted on particular issues, one can see reflected a clear embrace of the accountability principle. On the other, in the restrictions placed on printing votes and on press access to the Journals, one can see an attempt by the legislature to maintain control over exactly what information was made available to the public.

C. Establishment of a “Cooling Off” Period in the Passage of Legislation

Yet another provision aimed at increasing legislative accountability was section XIV of chapter II of the 1777 Constitution, which required that bills under consideration by the legislature be printed for the consideration of the people before being finally enacted into law:

To the end that laws, before they are enacted, may be more maturely considered, and the inconveniency of hasty determination as much as possible prevented, all bills of public nature, shall be first laid before the Governor and Council, for their perusal and proposals of amendment, and shall be printed

205. See 2 CROCKETT, *supra* note 41, at 408 (stating that several resolutions were adopted in 1784 to redress grievances but were never printed in the Vermont newspapers).

206. PROCEEDINGS OF THE GENERAL ASSEMBLY, *supra* note 204, at 61–62.

207. *Id.*

for the consideration of the people, before they are read in General Assembly for the last time of debate and amendment; except temporary acts, which, after being laid before the Governor and Council, may (in case of sudden necessity) be passed into laws; and no other shall be passed into laws, until the next session of assembly. And for the more perfect satisfaction of the public, the reasons and motives for making such laws, shall be fully and clearly expressed and set forth in their preambles.²⁰⁸

The central idea of this provision—the idea of requiring a “cooling off” period for proposed legislation by suspending final action until the next session of the legislature and providing the public with copies of acts under consideration in the interim—was an interesting experiment in democratic accountability.²⁰⁹ Apparently, however, this requirement proved too cumbersome and unwieldy in practice, for in calling a constitutional convention in 1785, the Council of Censors recommended that this requirement be eliminated.²¹⁰ That proposal was adopted as part of the changes incorporated in the 1786 constitution.²¹¹

Unfortunately, in throwing out the cooling off period requirement, the last sentence in section XIV of chapter II, requiring the legislature to set forth in the preamble to proposed acts a full and clear statement of the “reasons and motives” for “making such laws,” was also deleted.²¹² Since there is no record of objection to this requirement, nor any record of debate

208. VT. CONST. OF 1777 ch. II, § XIV.

209. *Id.*

210. RECORD OF THE COUNCIL OF CENSORS, *supra* note 39, at 51. The text of the proposed amendment to section XIV of chapter II of the 1777 Vermont Constitution read:

To the end that laws, before they are enacted, may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills which originate in the Assembly, shall be laid before the Governor and Council, for their revision, and concurrence or proposals of amendment; who shall return the same to the Assembly, with their proposals of amendment (if any) in writing; and if the same are not agreed to by the Assembly, it shall be in the power of the Governor and Council to suspend the passing of such bills until the next session of the Legislature. Provided, that if the Governor and Council shall neglect or refuse to return any such bill to the Assembly, with written proposals of amendment, within five days, or before the rising of the Legislature, the same shall become a law.

Id.

211. *See id.* at 70 n.78 (“Section XVI of the Constitution of 1786 deleted the requirement for printing.”).

212. *Compare* VT. CONST. OF 1777 ch. II, § XIV (“The reasons and motives for making such laws, shall be fully and clearly set forth in their preambles.”), *with* VT. CONST. OF 1786 ch. II, § 16 (lacking such a requirement).

over whether it should be eliminated, its deletion is probably best explained as simply a case of throwing out the baby with the bath water.

D. Public Scrutiny of the Proceedings of the Executive Branch: The Requirement to Keep “Fair Books”

To what extent, under the Constitution of 1777, were the decisions and actions of the executive branch, the Governor and Council, also subject to public scrutiny? Interestingly, the first Vermont Constitution did not provide for public access to the proceedings of the Governor and Council or for the printing and public dissemination of those proceedings.²¹³ The only provision in the first constitution bearing on this question was the requirement in section XVIII of chapter II that: “[t]he Governor and Council shall have a Secretary, and keep fair books of their proceedings, wherein any Councillor may enter his dissent, with his reasons to support it.”²¹⁴ Whether the public and the press had a right of access to these “fair books” of the proceedings of the Governor and Council is not clear. It is at best doubtful given the practice respecting access by the public and the press to the legislative Journals described above.

If we step back and look at these provisions together, it seems fairly clear that the framers of the State’s first constitution were genuinely committed to the principle of democratic accountability. They sought to implement that principle by making the proceedings of government more accessible to the people.²¹⁵ They did so by requiring that the doors of the Assembly be kept open, by setting up a procedure for printing a roll call vote on particular measures, by establishing a cooling off period for legislation during which acts under consideration would be disseminated to the people, and by requiring that the Governor and Council keep fair books of their proceedings and deliberations.²¹⁶

Yet, in examining these early provisions, one can also see reflected there residuals of attachment to the competing, if now waning, notion of parliamentary privacy. The first Vermont Constitution reserved to the legislature the power to close its doors to the public whenever in the legislative judgment the public welfare required it; it carved out exemptions to the requirement that the yeas and nays of individual members be printed in the Journals; it did not provide for public or press access to the Journals, with the consequence that the legislature limited that access to only the

213. See VT. CONST. OF 1777 (lacking such a provision).

214. *Id.* ch. II, § 18.

215. See discussion *supra* pp. 840–45.

216. *Id.*

listing of yeas and nays recorded there, except where special permission had been obtained; it required that fair books be kept of the proceedings of the Governor and Council but failed to provide for public or press access to those books; and its provision that laws under consideration be held over until the next session before final enactment was eliminated by the first round of amendments to the constitution.²¹⁷ The picture, in short, is a mixed one. The prevailing impulse or tendency was to open up government proceedings and records to the public, but in virtually every instance that impulse was coupled with the imposition of some limitations.

That, perhaps, should neither surprise nor dismay us since the same double impulse is reflected in current state legislation mandating open meetings and public access to government records. We strike the balance differently today—generally on the side of increased public access—but even today the requirements of public access are not absolute.²¹⁸ We need only be reminded that the deliberations of the state supreme court are conducted in secret, even though those deliberations often involve discussions of policy and have a profound impact on our lives.²¹⁹ Even less justifiably, administrative meetings of the court, at which important policy decisions affecting the administration of the court system in the state are discussed and made, are exempt from the requirements of the state's open meeting law.²²⁰ To the general requirement that meetings of elected officials be open to the public as reflected in our state open meeting laws, moreover, a number of exceptions have been carved out.²²¹ The same is true with respect to public access to government records; while generally government records have to be made available for public inspection and copying, there are exemptions here too where important countervailing interests are implicated.²²²

217. *Id.*

218. *See* VT. STAT. ANN. tit.1, § 312(e) (2003) (excluding the judicial branch from the open meeting law).

219. *Id.*

220. *Id.*; *see also supra* note 5 and accompanying text.

221. *See* VT. STAT. ANN. tit.1, § 312 (2003) (exempting certain meetings of public officials including routine administrative matters, site inspections, and activities of the judicial branch, as discussed above).

222. *See generally* VT. STAT. ANN. tit.1, §§ 315–20 (2003) (detailing the various public disclosure laws in Vermont); *see also* MICHAEL J. O'GRADY, VERMONT LEGISLATIVE COUNCIL, LEGISLATIVE COUNCIL STAFF REPORT ON PUBLIC RECORDS REQUIREMENTS IN VERMONT 35 (2007), available at <http://www.leg.state.vt.us/REPORTS/07PublicRecords/Public%20Records%20Requirements%20in%20Vermont.pdf> (identifying 206 current exemptions to Vermont's public records law).

CONCLUSION

Whenever we seek to find in our constitutional tradition bases for asserting contemporary rights and liberties, there is a tendency to ascribe to the framers of the original constitution, and, more generally, to Vermonters in the early period, a kind of simple and uncomplicated adherence to fundamental rights and liberties that we now, according to a popular form of constitutional rhetoric, are simply trying to preserve. But in taking such an approach, we tend to oversimplify the experience—and the intentions—of those involved in framing our first constitution and in proposing and adopting constitutional amendments during this formative period. We turn our backs on the difficulties they had to deal with and the compromises they worked out. We deny them the kind of complexity that forms a central aspect of our own political and constitutional experience. Such an approach is not only false to historical experience, it is unnecessary. More so perhaps than ourselves, our ancestors were aware that constitutional rights and liberties are not forged at a particular moment in time but are, rather, creations of tradition. They were aware that the tradition of constitutional rights and liberties they sought to embody in the Vermont Constitution had its beginnings in the charters of the early English kings. From those tiny beginnings that tradition had been carried forward and expanded, first, by generations of Englishmen and, then, transformed and expanded again by the American colonists on this side of the Atlantic. They were aware, in short, that the whole process of creating and establishing a constitutional tradition had been one of gradual growth and expansion. By including within the state's first constitution the rights and liberties they did, they knew they were not fixing for all time contemporary practices and understandings in constitutional concrete. They were trying to preserve, as best they could, the best of their constitutional traditions as they understood them, while at the same time establishing a mechanism which would allow future generations to carry those traditions forward.

When they declared that freedom of speech and freedom of the press should be protected they meant, at one level, only freedom from prior restraint; at another level, they knew that those freedoms might be carried forward and expanded by future generations. That is what they had done with the freedoms they had inherited, and they did not seek to preclude future generations from doing the same. This is also true of the provisions they made in the first constitution for public access to government meetings and records. Within the preceding one hundred years, they had witnessed the tradition of parliamentary privacy giving way to the new idea of government accountability. They endorsed that change—writing it into the

state constitution. But exactly how that new idea would evolve, they could not say. They carried things as far as they could and then turned the responsibility over to future generations.

The fact that our ancestors' notions of freedom and governmental accountability were not as ambitious or protective as ours are today need not be a source of embarrassment or dismay. Indeed, that recognition makes us aware of how far we have come. It makes us aware of the extent to which Vermonters over the intervening years have not rested with rights and liberties they inherited but have carried them creatively forward. It is that appreciation, more than any other, that should inform our sense of our own constitutional responsibilities.