The Freedom of the Press: An Introduction

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INTRODUCTION

Although the phrase, "the freedom ... of the press," comes after the phrase, "the freedom of speech," in the text of the First Amendment, the people enjoyed the freedom of the press for nearly one hundred years before they secured the freedom of speech. This is well documented by Sir William Blackstone in Volume IV of his *Commentaries on the Laws of England* (1769).

"The art of printing," Blackstone wrote, "was looked upon ... as a matter of state, and subject to the coercion of the crown." Thus, from 1476, the date that the first book was printed in England, the king regulated the press by "proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of star chamber; which limited the number of printers, and of the presses which each should employ, and prohibited new publications unless previously approved by proper licencers." *Id.* at 152, note a.

From 1641 until 1694, the English Parliament assumed control over the press by enacting statutes authorizing the king to continue to license the press. In 1694, however, "the press became properly free" when the English Parliament "resisted" the government's final attempt to hang on to its licensing power. *Id.*

75 years later, when Blackstone published his fourth volume of the Commentaries, he affirmed the freedom of the press as "essential to the nature of a free state":

> *Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press .... To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. Id.* at 151-52.

At the same time that Blackstone affirmed the freedom of the press as a right of the people, he denied to them the freedom of speech. Seditious libels, for example, remained subject to common law punishment as an "abuse" of the freedom of the press. *Id.* Only members of parliament were guaranteed immunity from such prosecutions and only for speeches made in the course of parliamentary debate. See Titus, *The Freedom of Speech: An Introduction*.

This English heritage was transported across the Atlantic to the American colonies and incorporated into the early state constitutions. The 1784 Constitution of New Hampshire was typical. Article XXX guaranteed the freedom of speech in terms comparable to the English Bill of Rights of 1688:

> *The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever. Sources of Our Liberties* 385 (R. Perry, ed. Rev. Ed. 1978).

Article XXII spelled out the press guarantee in language clearly derived from Blackstone:

> *The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved. Id.*

In 1791, when the Bill of Rights of the United States Constitution was ratified, the freedom of speech was extended for the first time in Anglo-American history to the people. See Titus, *The Freedom of Speech: An Introduction.* At the same time, the freedom of the press was preserved as it had been in the state constitutions.

What was that freedom of the press? Blackstone stated that it was composed of two interrelated components. First, the liberty of the press "consists in laying no previous restraints upon publications ...." IV Blackstone's *Commentaries* at 151. Second, it prohibits the government from exercising editorial authority over the "sentiments" of the people. *Id.* at 152.

NO PREVIOUS RESTRAINTS

For over 150 years after the ratification of the Bill of Rights, the Supreme Court observed in *Near* v. *Minnesota,* 283 U.S. 697 (1931), there was almost no effort to "impose previous restraints upon publications relating to the malfeasance of public officers ...." The reason, Chief Justice Charles Evans Hughes wrote, was "the deep-seated conviction that such restraints would violate constitutional right":

> *Public officials whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provision of state constitutions. Id.,* 283 U.S. at 718-19.

In the *Near* case, however, the Minnesota state legislature and courts broke from this tradition. The legislature had enacted a statute authorizing the state to seek an injunction against any "malicious, scandalous and defamatory newspaper, magazine or other periodical." Declaring such publications to be public nuisances, the statute allowed only one defense, namely, that the publication contained "the truth ... published with good motives and justifiable ends." *Id.,* 283 U.S. at 702.

The state courts upheld this statute against a constitutional challenge that it violated the freedom of the press. The United States Supreme Court reversed in a five to four decision.

What divided the majority from the dissent was the question whether the "no previous restraint" principle applied only to statutes authorizing the executive department to exercise unlimited licensing authority. The Minnesota statute did not fit this category. It authorized executive action only upon proof of a public nuisance reviewable by a court under a set of rules promulgated by the legislature.

The four dissenters read the "no previous restraint" principle to prohibit only laws subjecting the press to the "arbitrary will of an administrative officer." *Id.*, 283 U.S. at 733. Justice Pierce Butler contended that the principle should be so limited because that was all that had been prohibited by the English common law. In support, he quoted Blackstone's statement:

> *"To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution [of 1688], is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." Id.,* 283 U.S. at 733-34.

Because the Minnesota statute was not a licensing law, such as had existed in England from 1476 to 1694, but a public nuisance measure to be enforced in a suit of equity, the dissenters claimed that the freedom of the press had not been infringed. *Id.,* 283 U.S. at 734-35.

The majority disagreed, relying first upon Blackstone and then upon James Madison. As for Blackstone, the majority relied upon a different statement than the one quoted by the dissent:

> *"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." Id.,* 283 U.S. at 713-14.

As for Madison, the majority cited him to demonstrate that the scope of the freedom of the press in America went beyond the application of that freedom in England:

> *"The great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also." Id.,* 283 U.S. at 714.

By relying on Madison, the majority brought the freedom of press into harmony with the constitutional text. The First Amendment states that "Congress shall pass no law ... abridging the freedom ... of the press .... " By its text, the First Amendment, including the freedom of the press, limits legislative discretion, not executive.

And rightfully so. Should Congress pass a statute authorizing the exercise of arbitrary executive power, such as unlimited discretion in the licensing of the press, it would not even be enacting a law. Such a legislative act would be unconstitutional because it would be a delegation of legislative power to the executive contrary to Article I, Section 1 and Article II, Section 2 of the Constitution. *J. W. Hampton, Jr. & Co.* v. *United States,* 276 U.S. 394, 409 (1928). Thus, the First Amendment would not even be implicated by an act of the kind that had been forbidden by the common law

protecting the freedom of the press.

Only if Congress enacted a statute containing a rule or principle governing the exercise of executive discretion would the limitation provided by the First Amendment come into operation. What the First Amendment did was to deny to the legislature the kind of discretion that the common law had denied to the executive in relationship to the press. As the majority in the *Near* case put it, the freedom of the press forbade "censorship" whether exercised by the executive or the legislative branch. *Near,* 283 U.S. at 713.

NO EXCEPTIONS

As strong as the *Near* majority's denunciation of censorship was, it allowed that a "previous restraint" may be permitted in "exceptional cases," such as in times of war:

> *No one would question that a government might prevent the actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. Id.,* 283 U.S. at 716.

This exception to the general rule that the freedom of the press prohibits all prior restraints lay uncontested for forty years. During that time, the High Court stated the principle as imposing a "heavy presumption" against constitutionality of any prior restraint. *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963).

In 1971, however, two justices, Hugo Black and William Douglas, argued that the freedom of the press allowed for no exceptions to the rule against previous restraints. What triggered their remarks was the effort of the Government to stop The New York Times and The Washington Post from publishing excerpts from a top secret Defense Department study of the Vietnam War. Known as the Pentagon Papers case, the Court refused to approve the injunction, but only Justices Black and Douglas concluded that the freedom of the press absolutely required denial of the government's request. *New York Times Co.* v. *United States,* 403 U.S. 713 (1971).

Writing for himself and Justice Douglas, Justice Black did not mince words:

> *I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Id.,* 403 U.S. at 714-15.

Relying on both history and constitutional text, Justice Black contended that "the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraint." *Id.,* 403 U.S. at 717.

As for history, he maintained that Madison and the other Founding Fathers insisted that the freedom of the press be "inviolable." *Id.,* 403 U.S. at 716. In order to remain inviolable, Justice Black insisted that the founders abolished "[t]he Government's power to censor the press ... so that the press would remain forever free to censure the Government." Only if the freedom of the press was absolutely guaranteed would the "press serve the governed, not the governors." *Id.,* 403 U.S. at 717.

As for the constitutional text, Justice Black chided Erwin Griswold, the Solicitor General, for deliberately refusing to be bound by the language of the Constitution. Quoting verbatim from the Solicitor General's oral argument, he let the record speak for itself:

> *"Now, Mr. Justice [Black], your construction of ... [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true .... [T]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and ... the First Amendment was not intended to make it impossible for the Executive ... to protect the security of the United States." Id.,* 403 U.S. at 717-18.

While Justice Black did not cite Blackstone to support his textual analysis, he could have. In describing the liberty of the press in his *Commentaries,* Blackstone stated that the liberty "consists in laying no previous restraints upon publications." He stated no exception to that rule. Nor did he imply any. To the contrary, he wrote that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public." IV Blackstone's *Commentaries* at 151. (Emphasis added.)

No other justice joined Justices Black and Douglas. Only Justice Brennan attempted to justify the *Near* dictum that there could be an exception to the rule against prior restraints. He made no effort, however, to reconcile this view with either text or history. *Id.,* 403 U.S. at 725-27.

Nor could he have done so, for the *Near* majority had not relied on the constitutional text or on history to support its view. Rather, it had rested upon an opinion of Justice Oliver Wendell Holmes in *Schenck v. United States,* 249 U.S. 47 (1919) and a book written by Harvard law professor, Zechariah Chafee. *Near,* 283 U.S. at 716, n. 6.

In *Schenck,* Justice Holmes had not even addressed the meaning of the freedom of the press because the case did not pose any issue of prior restraint. Chafee, on the other hand, touched on the freedom of the press, but gave it no meaning independent from the other provisions of the First Amendment. Throughout his introductory chapter, he discussed the freedom of speech, of the press, and the freedom of religion without regard to their distinct textual and historical differences. Chafee, *Freedom of Speech* 3-4, 8-9, 17-18, 19- 24 (1920).

Then, in a *tour de force*, he announced that "the meaning of the First Amendment did not crystallize in 1791":

> *Into the making of the constitutional conception of free speech have gone, not only men's*

> *bitter experience of the censorship and sedition prosecutions before 1791, but the subsequent development of the law of fair comment in civil defamation, and the philosophical speculations of John Stuart Mill. Id.* at 32.

Having discarded the original text, including its historical context, Chafee set himself free to define his own First Amendment, choosing a unitary definition under the rubric of "free speech":

> *The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion .... Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which then must be balanced against freedom of speech, but freedom of speech ought to weigh heavily in the scale. The First Amendment gives binding force to this principle of political wisdom. Id.* at 34.

Justice Holmes championed the same approach to the First Amendment on the Court. As Chafee reminded his reader, Justice Holmes did not believe that the constitutional text contained words with fixed meanings:

> *The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Id.* at 32 quoting from Justice Holmes' opinion in *Gompers v. United States,* 233 U.S. 604, 610 (1914).

So, in the *Schenck* case, Justice Holmes invented the "clear and present danger" test to determine the meaning of the freedom of speech, a test calculated to allow for exceptions if the time and circumstances demanded them:

> *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. Id.* at 178-79 quoting from Justice Holmes' opinion in *Schenck,* 249 U.S. at 52.

Justice Brennan, in the Pentagon Papers case, picked up where Justice Holmes left off. He conceded that the Government could impose a prior restraint on the press so long as it could prove "that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea ...." *New York Times Co.,* 403 U.S. at 726-27.

Such an exception would not be possible if the Court would adhere to the constitutional text which allows for no exceptions to the freedom of the press, the heart of which protects the people from the Government exercising any editorial authority whatsoever.

AN ABSOLUTE RULE

From the time of Blackstone's *Commentaries* to date, the freedom of the press has been identified primarily with the doctrine of "no previous restraints." That is, the people have the exclusive right to decide what they want to speak or write and need not obtain civil government approval before they do so.

The major issue through the years has been whether this right is absolute, or whether it is subject to some very limited exceptions. The text of the First Amendment appears to endorse the principle that the right is an absolute one: "Congress shall pass no law abridging the freedom ... of press."

Most lawyers, judges, and legal commentators, however, have been reluctant to take this constitutional language literally. They continually seek to reserve the right to make an exception, just in case one is necessary to serve a compelling government interest.

For example, former Justice William J. Brennan, Jr., even though reputed to be a champion of First Amendment liberties, could not quite bring himself to proclaim that the freedom of press was absolute. In the Pentagon Papers case, he sided with the New York Times and the Washington Post, but reserved power to himself as a judge to decide whether those newspapers could publish something that he determined would "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea ...." *New York Times Co.* v. *United States,* 403 U.S. 713, 726-27 (1971).

By stating the exception so narrowly, Justice Brennan left the impression that it would take a very, very strong claim before he would be persuaded to use his judicial power to censor a person, preventing him from choosing to speak or to write what he wished.

Just six years before the Pentagon Papers case, however, Justice Brennan gave approval to judicially supervised government censorship of pornography without any requirement that such a system of prior restraints was absolutely necessary to guard against serious adverse consequences. *Freedman* v. *Maryland,* 380 U.S. 51 (1965).

Both Justices Hugo Black and William O. Douglas, consistent with their position in the Pentagon Papers case, insisted that the rule of prior restraint applied to pornography, just as it applied to all other forms of oral and written expression. Justice Douglas wrote:

> *... I do not believe any form of censorship - no matter how speedy or prolonged it may be - is permissible .... If censors are banned from the publishing business, from the pulpit, from the public platform - as they are - they should be banned from the theatre .... Any authority to obtain a temporary injunction gives the State "the paralyzing power of the censor" ... [and] substitutes punishment for contempt for punishment by jury trial... I would put to an end all forms and types of censorship and give full literal meaning to the command of the First Amendment. Id.,* 380 U.S. at 61-62.

Justice Brennan attempted to distinguish the pornography cases, claiming that they were not examples of legitimate exceptions to the doctrine of no prior restraints. He asserted that pornography was not free speech, and therefore, not subject to the no prior restraint doctrine of the Press clause. *New York Times Co. v. United States,* 403 U.S. at 726, n. *.

In support of this claim, Brennan cited *Freedman* v. *Maryland,* the 1965 case where Brennan wrote the majority opinion approving a judicially limited system of censorship. But Brennan's opinion approving such a system explicitly rested upon the claim that it fit within the limited exception to the freedom of the press allowing for some prior restraints. *Freedman,* 380 U.S. at 53-54.

Brennan's attempt to narrow the exceptions to the prior restraint doctrine not only did not fit the case precedents, but any attempt to justify an exception to that doctrine is to deny the central principle of the freedom of the press. That principle is that the people have the sole and exclusive right to edit their own speech, written or oral, without the government exercising any editorial authority whatsoever.

NO EDITORIAL AUTHORITY

In his *Commentaries,* Blackstone wrote that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press." To do otherwise would make the government "the judge of all controverted points in learning, religion, and government." IV Blackstone, *Commentaries on the Laws of England,* 151-52 (1769).

On the other hand, a person who published any sentiment in breach of law, civil or criminal, that person was not protected by the liberty of the press from liability. The press liberty was designed solely to preclude the government from playing the role of editor in the lives of the people. *Id.*

The United States Supreme Court has consistently followed this Blackstonian principle in its application of the freedom of the press to the print media. In *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), the Court unanimously struck down a Florida statute "granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper ...."

Chief Justice Warren E. Burger rejected the argument that the law could be upheld because it enhanced the marketplace of ideas by insuring that all points of view would be represented in the newspaper and the community that it served. He did so because such a law would "compel ... editors or publishers to publish that which 'reason' tells them should not be published ...." *Id.*,418 U.S. at 256. Therefore, he found that the law in question "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.,* 418 U.S. at 258.

The Chief Justice then elaborated:

> *The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials*

> *- whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Id.,* 418 U.S. at 258.

In a concurring opinion, Justice Byron White chimed in, reminding the Court that the Press principle affirming editorial autonomy did not mean total unaccountability:

> *To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But prior compulsion by government in matters going to the very nerve center of a newspaper - the decision as to what copy will or will not be included in any given edition - collides with the First Amendment....*
>
> *But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print.... Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation .... Id.,* 418 U.S. at 260-61.

RIGHT OF THE PEOPLE: TO PUBLISH

In the *Miami Herald* case, the Court emphasized the protection afforded newspapers by the Press Clause. Portions of Justice White's opinion could lead the casual reader to conclude that the First Amendment guarantee of editorial autonomy applied only to the institutional press. *Id.,* 418 U.S. at 259-60. Others have explicitly argued that the primary purpose of the Free Press guarantee was to protect "the institutional autonomy of the press." Stewart, "Of the Press," 26 *Hastings L. J.* 631, 633-34 (1975).

Four years after *Miami Herald,* Chief Justice Burger sought to put such notions to rest. He claimed that there were "two fundamental difficulties with [such a] reading of the Press Clause":

> *First ... the history of the Clause does not suggest that the authors contemplated a "special" or "institutional" privilege ....*
>
> *[The] second fundamental difficulty ... is one of definition. [The] very task of including some entities within the "institutional press" while excluding others [is] reminiscent of the abhorred licensing system [that] the First Amendment was intended to ban ... [T]he First Amendment does not "belong" to any definable category of persons or entities: It belongs to all who exercise its freedoms. First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 797- 801 (1978) (Burger, C.J. concurring).

Burger's views are supported both by text and history. The freedom of press preexisted the First Amendment and, therefore, carried with it its historic meaning crystallized by Blackstone in his *Commentaries*. He stated the liberty of the press in the most comprehensive of terms:

> *Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press....* (Emphasis added.)

While some of the early state constitutions guaranteed the freedom of the press, including language linking it to the right of "the people" to "publish their sentiments," most state constitutions just simply stated the guarantee in Blackstonian terms. Compare Article XII of the 1776 Constitution of Pennsylvania with Section 12 of the 1776 Constitution of Virginia, *Sources of Our Liberties* 330, 312 (Perry, ed. 1978). There is absolutely no evidence to indicate that these differences in text were anything but stylistic.

Nor is there anything in the court precedents prior to the modern era even hinting that the Press Clause applies only to persons who qualify as the "institutional press." Quite the contrary. Chief Justice Charles Hughes, the author of the majority opinion *Near v. Minnesota,* 283 U.S. 697 (1931), the seminal case condemning prior restraints, applied the Press Clause to protect the distribution of religious tracts.

As to whether the Press guarantee was "confined to newspapers and magazines," the Chief Justice wrote:

> *The liberty of the press ... necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. Lovell v. Griffin,* 303 U.S. 444, 452 (1938).

As to whether the Press guarantee was limited to "publication," the Chief Justice wrote:

> *The ordinance cannot be saved because it relates to distribution not to publication. "Liberty of circulating is as essential to that freedom (of the press) as liberty of publishing; indeed, without the circulation, the publication would be of little value.*" *Id.*

Thus, the Court unanimously applied the no editorial authority principle to a city ordinance granting to a city official the power to prohibit the distribution of literature without a license. Again, Chief Justice Hughes wrote:

> *We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. Id.* at 451.

RIGHT OF THE PEOPLE: TO CENSOR

If the freedom of press includes the right of the people to distribute or to circulate literature or ideas without government censorship, it necessarily extends to the right of the people to receive or reject that literature or those ideas free from government censorship. This issue arose in the 1940's when

a Jehovah's Witness was arrested and convicted for knocking on the doors of the homes of strangers in violation of a city ordinance prohibiting such activities.

Justice Hugo Black, stated the issue in the case, as follows:

> *For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power. Martin v. City of Struthers,* 319 U.S. 141 (1943).

Justice Black did not hesitate to extend the freedom of press from the "right to distribute literature," previously recognized in the *Lovell* case, to "the right to receive it." *Id.,* 319 U.S. at 143. He, then, proceeded to condemn the ordinance for substituting "the judgment of the community for the judgment of the individual householder," claiming that the right to decide to receive a communication is a right guaranteed by the freedom of speech and of the press. *Id.,* 319 U.S. at 144, 148-49.

As for protecting one's privacy in the home, Justice Black suggested that the city could redraft its ordinance to protect any householder from unwanted solicitations by prohibiting the knocking on doors and the ringing of doorbells of those homes where the householder has, by appropriate signage, indicated that such intrusions are not welcome. In this manner, Justice Black concluded that the city ordinance "leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs - with the homeowner himself." *Id.*, 319 U.S. at 148.

While Justice Black did not invoke the language of censorship and no prior restraints found in previous Press cases, he clearly applied the Press principle denying to government officials editorial authority over the home. At the same time, he allowed for government enforcement of rules consistent with the householder's exercise of that editorial power, including the right of the householder to censor.

This point was brought home 27 years later in *Rowan* v. *Post Office Department,* 397 U.S. 728 (1970). In an opinion written by Chief Justice Burger, the Court unanimously affirmed the power of Congress to place in a householder the "unfettered discretion" not to receive mail from any particular source as designated by the householder.

In support of the statute, the Chief Justice relied upon Black's *Struthers* opinion affirming that the Press Clause guaranteed the right of a householder to determine what communications he would receive and what he would reject. *Id.,* 397 U.S. at 736. The law provided that the householder's discretion was absolute and final, reflecting Congress's purpose "to place judgment of what constitutes an offensive" intrusion into the home and reflecting Congress's desire "to avoid possible

constitutional questions that might arise from vesting the power to make any discretionary evaluation in a governmental official." *Id.,* 397 U.S. at 732, 737.

In so ruling, the Court rejected a claim by a mailer of pornographic material that he had a constitutional right to communicate his ideas free from such private censorship.

CONCLUSION

The freedom of the press, then, outlaws government censorship no matter what its purpose and no matter how persuasive its goal. On the other hand, it affirms the people's right to communicate and to censor free from government intrusion no matter what the purpose or the limitation. No wonder the writers of the 1776 Virginia Constitution, called the freedom of the press "one of the great bulwarks of liberty" and warned that this great freedom could only be restrained by "despotic governments." Sec. 12 of the 1776 Virginia Constitution, reprinted in *Sources of Our Liberties* 312 (Perry, ed. 1978).

Those same Virginians also forecast that "no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." *Id.*

The truth of this prophecy was borne out just this last term of the United States Supreme Court. In a unanimous opinion, the Court ruled that the Commonwealth of Massachusetts could not require an unincorporated association of private individuals to include a bunch of gay, lesbian and bisexual marchers in their St. Patrick's Day parade.

Writing for the Court, Justice David Souter found that "under the First Amendment. .. a speaker has the autonomy to choose the content of his own message," including the right "not to propound a particular point of view." Relying on a host of precedents, including the *Miami Herald* case, Justice Souter concluded that the benefit of the First Amendment's rule of"speaker autonomy" could not be "restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Hurley* v. *Irish-American Gay Group,* 515 U.S. --, 132 L.Ed 2d 487, 503, 504-05 (1995).

Justice Souter's holding signaled a great victory for the freedom of the press. But it took a persevering people to overcome some Massachusetts authorities determined to homogenize the opinions of the people.

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