

## OVERVIEW

### THE FIRST AMENDMENT: INFORMATION, PUBLICATION AND THE MEDIA

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The two hundredth anniversary of the Bill of Rights is a fitting occasion for a volume devoted to issues concerning the first amendment information, publication and the media.

Four years ago, our nation celebrated the bicentennial of the Constitution with great and appropriate fanfare. But of course, the Constitution as originally adopted in 1787 lacked a Bill of Rights. On Wednesday, September 12, 1787, only five days before the Constitution was signed and the Convention dispersed, George Mason of Virginia stated that he wished "the plan had been prefaced with a bill of rights."<sup>1</sup> Mason added: "It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours."<sup>2</sup> Elbridge Gerry of Massachusetts moved for the appointment of a committee to perform that task, and Mason seconded the motion, but Roger Sherman of Connecticut objected, stating that a federal bill of rights was unnecessary since the Constitution did not repeal the state guarantees and that these were "sufficient."<sup>3</sup> Without further debate, the state delegations defeated the motion by a vote of ten to zero.<sup>4</sup>

Two days later, on Friday, September 14, Charles Pinckney of South Carolina moved to insert a declaration that "the liberty of the Press should be inviolably observed."<sup>5</sup> Sherman responded: "It is unnecessary. The power of Congress does not extend to the Press."<sup>6</sup> This proposal, however, was also defeated.<sup>7</sup>

The omission of a Bill of Rights became one of the chief arguments

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<sup>1</sup> 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (1937).

<sup>2</sup> *Id.* at 587-88.

<sup>3</sup> *Id.* at 588.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 617.

<sup>6</sup> *Id.* at 618.

<sup>7</sup> *Id.* The vote was seven to four.

of those who campaigned against ratification of the Constitution. Many state conventions ratified the Constitution while urging prompt amendment,<sup>8</sup> and protection of freedom of speech and of the press was included among the amendments recommended by several states.<sup>9</sup>

In the First Congress, James Madison took up the responsibility of proposing such amendments.<sup>10</sup> Among Madison's twenty eight original proposals<sup>11</sup> was the predecessor of the speech and press clause of the first amendment,<sup>12</sup> as well as another proposal that prohibited infringement of these rights by the states.<sup>13</sup> Although Madison declared that the latter provision was "the most valuable amendment in the whole list,"<sup>14</sup> it was not among the twelve approved by Congress and submitted to the states.<sup>15</sup> In late 1791, Virginia became the eleventh state to ratify ten of the amendments,<sup>16</sup> and the Bill of Rights became part of the Constitution.<sup>17</sup> During the two centuries since then, the meaning of the constitutional right to freedom of speech and of the press has itself been the subject of vigorous and healthy debate.

Professor Ronald K. Chen's article, relating to the United States Supreme Court's decision last year in *Milkovich v. Lorain Journal Co.*,<sup>18</sup> returns to one of the oldest questions concerning freedom of expression,

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<sup>8</sup> 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 712-13 (1923) (Mass.) [hereinafter A DOCUMENTARY HISTORY]; *id.* at 756-57 (S.C.); *id.* at 760-61 (N.H.); *id.* at 840-45 (Va.); *id.* 911-18 (N.Y.); *id.* 966-71 (N.C.).

<sup>9</sup> *Id.* at 842 (Va.); *id.* at 913 (N.Y.); *id.* at 968 (N.C.).

<sup>10</sup> See, e.g., E. DUMBAULD, THE BILL OF RIGHTS—AND WHAT IT MEANS TODAY 33 (1957).

<sup>11</sup> The speech introducing the proposals "is rightly considered one of the great addresses in our history." A DOCUMENTARY HISTORY, *supra* note 8, at 1007. Madison began with his famous declaration:

[A]s I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted or rejected by a Constitutional majority of this House.

1 ANNALS OF CONG. 424 (J. Gales ed. 1789).

<sup>12</sup> 1 ANNALS OF CONG. at 434.

<sup>13</sup> *Id.* at 435.

<sup>14</sup> *Id.* at 755.

<sup>15</sup> *Id.*

<sup>16</sup> A DOCUMENTARY HISTORY, *supra* note 8, at 1202.

<sup>17</sup> *Id.*

<sup>18</sup> 110 S. Ct. 1695 (1990).

the conflict between freedom of expression and the law of defamation. During the eighteenth century, this conflict was highlighted by the famous prosecution and acquittal of New York publisher Peter Zenger for seditious libel<sup>19</sup> and by the controversy spurred by the Sedition Act of 1798.<sup>20</sup> In our own time, the law of defamation was revolutionized by the Supreme Court's decision in *New York Times Co. v. Sullivan*,<sup>21</sup> holding that under the first amendment a public figure may not recover for defamation without proving that the defendant acted with "actual malice."<sup>22</sup> A passage in a related case<sup>23</sup> led some lower courts and commentators to conclude that the first amendment precluded a defamation suit based on an expression of "opinion,"<sup>24</sup> but in *Milkovich*, the Supreme Court rejected "an artificial dichotomy between 'opinion' and fact."<sup>25</sup> Professor Chen analyzes the Court's decision and its implications for future defamation litigation.

Constitutional protection for speech on college campuses, the topic of Thomas A. Cinti's article, is another recurring and important issue. While the first amendment generally protects the individual's right to engage in speech that is "uninhibited," "robust," "vehement, caustic, and . . . unpleasantly sharp,"<sup>26</sup> the traditional concept of the university also embraces competing values such as community and civility. Each generation or so, the issue of freedom of speech on the campus seems to provoke new clashes on new battlegrounds with new faces arrayed on each side.

The student contributions to this volume discuss a fascinating sample of the issues relating to freedom of expression that confront our society. One article, prompted by the Supreme Court's decision in *Florida Star v. B.J.F.*,<sup>27</sup> explores the conflict between the media's right to publish what it regards as news and an individual's interest in her privacy. Other

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<sup>19</sup> 17 Howell's St. Tr. 675 (1735).

<sup>20</sup> 1 Stat. 596 (1798).

<sup>21</sup> 376 U.S. 254 (1964).

<sup>22</sup> *Id.* at 279-83.

<sup>23</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

<sup>24</sup> Judge Friendly noted that the passage from *Gertz* "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion." *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (citing *Gertz*, 418 U.S. at 339-40). See also *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990) (citing same).

<sup>25</sup> *Milkovich*, 110 S. Ct. at 2706.

<sup>26</sup> *New York Times Co. v. Sullivan*, 376 U.S. at 270.

<sup>27</sup> 491 U.S. 524 (1989).

contributions discuss the often difficult problem of speech on publicly owned property, such as parks<sup>28</sup> and airports.<sup>29</sup>

Two hundred years after the first amendment's birth, this volume illustrates the enduring vitality of our national debate regarding freedom of expression.

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<sup>28</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>29</sup> See *Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 64 (3d Cir. 1990).