ARTICLES

THE PENNSYLVANIA CONSTITUTION'S PROTECTION OF FREE EXPRESSION

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INTRODUCTION

Freedom of expression is the paradigmatic right of the information age. As opportunities for communication grow exponentially, and a larger and larger proportion of commercial activity consists of the transfer of knowledge and information, constitutional guarantees of freedom of speech and freedom of the press cast an ever-expanding shadow. During the last decade, hardly a term has passed in the United States Supreme Court which has not seen the vindication of federal constitutional protection of free expression against two or three federal statutes and a half dozen state and local constraints. The United States Supreme Court's activism on behalf of free expression is rivaled only by its exertions on behalf of states' rights.

As Justice Brennan reminded us a quarter century ago, and others have regularly reiterated, however, the work of the United States Supreme Court does not comprise the entire fabric of American constitutional freedom. Each of the fifty states has both historical and legal warrant to provide protections independent of federal norms. The Pennsylvania Supreme Court has for over a decade self-consciously grasped that opportunity to elaborate an independent

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1 Professor of Law, University of Pennsylvania Law School. The research and drafting of this article was assisted tremendously by the outstanding research assistance of Leonardo Castro and Andrew Witten, and the generous review of an earlier version by my colleagues Bruce Mann and South Barringer Gordon. My grateful thanks to them; it is accompanied by full exoneration for any remaining errors or omissions, which are mine alone. The material in this article will be certifies, in a substantially similar form, as a chapter in THE PENNSYLVANIA CONSTITUTION: A TREATY ON INDIVIDUAL RIGHTS AND LIBERTIES (forthcoming 2003) to be published by George W. Briel Co., which holds the copyright therein. Research for this effort was supported in part by the Handler Foundation, whose Stanislaus assistance on this project is gratefully acknowledged.


This article is an effort to provide the materials with which to engage in that elaboration in the area of free expression. It is the first sustained examination of Pennsylvania’s constitutional guarantees of free speech and press since the dawn of the twentieth century, and to my knowledge, the first comprehensive study to synthesize the two and a quarter century history of Pennsylvania’s protection of free expression.

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1 See Commonwealth v. Edmuth, 596 A.2d 887 (Pa. 1991) (analyzing and announcing structure for inquiry to guide development of independent Pennsylvania jurisprudence). Edmuth was preceded by a decade of cases constraining some protections of the Pennsylvania constitution independently of other federal counterparts. See, e.g., Commonwealth v. Mellit, 655 A.2d 1254 (Pa. 1995); Commonwealth v. Blumenthal, 549 A.2d 81 (Pa. 1988); Commonwealth v. Miller, 518 A.2d 1187 (Pa. 1986); Commonwealth v. Soule, 570 A.2d 417, 420 (Pa. 1990) (observing that the Pennsylvania Supreme Court had interpreted the state constitution as affording greater protection to defendants than the federal constitution); Commonwealth v. Defebo, 515 A.2d 1165 (Pa. 1986) (declining to follow the United States Supreme Court’s construing when analyzing the state constitutional protection against unreasonable searches and seizures); and Commonwealth v. Russin, 312 A.2d 29 (Pa. 1973) (noting the difference in wording in the Pennsylvania constitution’s search and seizure protection). One of the first self-conscious efforts along this line was the free expression decision of Wink’s Golden Theatre, Inc. v. Downs, 175 A.2d 59 (Pa. 1961).


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1. PENNSYLVANIA'S HERITAGE

A. The Framing of the Pennsylvania Free Expression Clause

In its current form, Pennsylvania's constitution extends protection to free expression in two sections.

Article I, Section 7 provides:

[a] The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof.  
[b] The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.  
[c] No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Article I, Section 20 adds: "The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes by petition, address or remonstrance."

These provisions are hardly recent innovations. In 1776, a decade and a half before the adoption of the federal Bill of Rights, the Constitution of the Commonwealth of Pennsylvania embodied the protection of free expression in three separate provisions. Pennsylvania's 1776 Declaration of Rights identified rights of speech, press,
assembly, and petition in two of its provisions, while the Frame of Government added 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.

Taken together these provisions made Pennsylvania the flagship of free expression in the early Republic. The protection of freedom of the press in Pennsylvania's constitution was mirrored by the contemporaneous provisions of the constitutions of seven other states. Pennsylvania's, however, was the first constitution to protect "freedom of speech and of writing." Vermont's constitution of 1777 adopted language identical to that of Pennsylvania. But these protections of "speech" stood alone until the adoption of the First Amendment in 1791. Unlike its protection of freedom of the press, the Virginia Declaration of Rights, which preceded Pennsylvania's Declaration, provided no recognition of any right to assembly. Although the right to petition and assembly had been claimed by the Continental Congress in 1774, until the adoption of the First

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1 The first, Article XII, provided: "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." Pa. CONST. of 1776, Declaration of Rights, art. XII (1776). The second Pennsylvania provision, Article XVI of Pennsylvania's 1776 Declaration of Rights, recognized: "[t]hat the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.

2 Id., Frame of Government, § 2. This freedom to examine the proceedings of the legislature was a constituent of the participatory-enhancing innovations of Sections 13, 14 and 15 of the 1776 Frame of Government, which guaranteed public access to legislators' debates, publica-

tions of legislative records, and of proposed legislation. See WILLIAM ADAMS, THE FIRST AMERICAN CONSTITUTIONS 249-50 (Rue & Robes Bache eds., 1989) (describing confidentiality of de-

bate in Pennsylvania assembly debates through 1794, and innovation of public access to the leg-

islative process in the 1776 constitution). The constitutional authorities of open legislative de-

bates and records was retained in modified form in the 1790 Constitution. Pa. CONST. of 1790, Frame of Government §§ 14-15 (1790), and preserved unchanged in the present 1878 Constitution.

3 See Georgia, GA. CONST. of 1777, art. LIX (1777). Massachusetts, MA. CONST. Declara-

tion of Rights, p. 1, art. XVI (1780); Maryland, MD. CONST. of 1776, art. XXXVII (1776); New Hampshire, NH. CONST. pt. I, art. XXII (1784); North Carolina, N.C. CONST. of 1776, art. XIV (1776); South Carolina, S.C. CONST. of 1776, art. XIII (1776); and Virginia, VA. CONST. of 1776, Bill of Rights § 12 (1776). See also LIVINGSTON RICH SCHUYLER, THE LIBERTY OF THE PRESS IN THE AMERICAN COLONIES BEFORE THE REVOLUTIONARY WAR 77 (1905).

4 SCHUYLER, supra note 9, at 77.

5 VT. CONST. of 1777, art. XIV (1779).


7 Continental Cong., N.C. D. 8 Oct 14, 1774, reprinted in JAC. N. RAYMOND, DECLARING RIGHTS (1946) (1980); 3 Journals of Cong., 75-45, reprinted in The Founders' Constitution Volume 3, Amendment I (Petition and Assembly), Document 15, available at http://press.state. nc.us/documents/amendments/assembly15.html (last visited Oct. 16, 2005) ("[T]he people have a right peaceably to assemble, consider of their grievances, and petition the king; and that all proclamations, prohibitory proclamations, and committments of the same, are illegal.")
Amendment, Pennsylvania’s freedom of assembly provision was mirrored only by Vermont and North Carolina. Under its first constitution, the Commonwealth experienced both a profusion of what would today be called “uninhibited robust wide-open debate,” and sporadic, largely unsuccessful efforts by officials to curb criticism. These efforts climaxed in 1788 with Republika v. Oswald. Controversial newspaper editor Eleazer Oswald had found himself subject to civil arrest at the course of a libel suit brought by Andrew Browne, the “master of a female academy in the city of Philadelphia,” and a
friend of Oswald’s political opponents. In response, Oswald published a bitter attack on all of the parties to the libel action, alleging that both the plaintiff and the court had sought to exact political retribution against him, making the claim that “the doctrine of libels” was “incompatible with Pennsylvania’s constitutional protection of free communication and free press, and voicing the hope that his “fellow citizens” would vindicate him in the impending jury trial. Oswald thereupon found himself hailed before the Pennsylvania Supreme Court to defend against charges of contempt of court.

The opinion of Justice McKean, who had previously attempted without success to punish Oswald for his criticism of McKean himself, began by affirming the “doctrine of libels” that Oswald detailed: “libeling is a great crime, whatever sentiments may be entertained by those who live by it,” announced Justice McKean, “the heart of the libeler...is more dark and base than that of the assassin.” Pennsylvania’s protection of freedom of the press according to the opinion, “[precludes] any attempt to fetter the press by the institution of a licensor” and gives every citizen a right of investigating the conduct of those who are entrusted [sic] with the public business.” But while the constitution authorized “candid commentary” and “permits every man to publish his opinion,” once publication occurred an individual was protected against subsequent legal action in only the case of “[publications] meant for use and reformation...with an eye solely to the public good.” Publications meant to “delude and defame” were unprotected, and once in the view of Justice McKean, the evident “objection and tendency” of Oswald’s publications was to “raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them” and to “displease the administration of justice.” Oswald’s publications were subject to punishment as contempt of court.

The Constitutional Convention of 1790 rewrote Pennsylvania’s free expression provisions into the lineal ancestors of their current form. All of the provisions were consolidated in the Declaration of Rights, which was promulgated as the final article (Article IX) of the

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17 [McKean endeavored to have Oswald indicted for criticizing him seven years earlier. See supra note 17.]
18 [Oswald, 1 U.S. (1 Dall.) at 314. McKean was an enthusiast for the law of libel. In addition to his prior efforts regarding Mr. Oswald, he successfully obtained a £700 libel verdict against another printer. Tenter, supra note 16, at 155. See Commonwealth v. Daum, 1 Binn. 87 (Pa. 1808) (libel prosecution for statements regarding McKean as governor of Pennsylvania; neopolitica v. Collier, 1 Years 93 (1800) (McKean as Supreme Court Justice imposed §500 bond conditioned on good behavior of publisher).]
19 [Id.; Oswald was fined £10 and imprisoned for one month. Id. at 328. His effort to obtain relief in Pennsylvania’s unimpeachable legislature failed after several days of discussion by a vote of 34-25. Id.]
1790 constitution. Introduced by the new adumbration "[t]hat the general, great, and essential principles of liberty and [t]hat Government may be recognized and unalterably established, WE DECLARE," Article IX concluded (Section XXVI); "Everything in this article is excepted out of the general powers of government, and shall for ever remain inviolate." Protections of press and speech which had previously appeared in both the Frame of Government and the Declaration of Rights were consolidated in a new section of the Declaration of Rights (Section VII), "Of the liberty of the press," which read (as revised):

[a] That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of Government; and no law shall ever be made to restrain the right thereof.

[b] The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible to the abuse of that liberty.

[c] In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

The right to assemble and petition was retained in Article IX, Section 20 of the 1790 constitution in wording that has remained unchanged to the present constitution (Article I, Section 20). Finally, the 1790 constitution added reiteration to the "inherent and indefeasible" rights recognized in Section 1 of the Declaration of Rights.\[^{5}\]

\[^{5}\] Both the introduction and concluding language were retained unchanged by subsequent constitutions.

\[^{6}\] Sections [a] and [b] were retained unchanged in the constitutions of 1838, 1874 and 1968, and are now contained in Article I, Section 7. Section 7(c) was retained in the constitution of 1838, but amended in 1874 to read:

No concurrence shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public information or information where the fact that such publications were not maliciously or negligently made shall be sufficient to exculpate the authors thereof, and in all matters for both the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Article 5, Section 3(c) (emphasis added). The substitution of a requirement of negligence or malice, both of which required a showing of both falseness and a state of mind, for a simple right to introduce truth for jury consideration was regarded as a more protective standard. See KIBLIN, L. BRANING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 107 (1996).

This language was retained in the 1968 constitution.

\[^{8}\] PA. CONST. art. I, § 1 (2001). Section 1 of the Declaration of Rights had previously announced "that all men have certain natural, inherent and indefeasible rights, amongst which are the enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and
In this final form, the free expression provisions of Pennsylvania’s constitution manifests three overlapping commitments: political, epistemic, and libertarian.

B. The Political Functions of Free Speech

It is clear from the Pennsylvania constitution’s text and its heritage that free expression serves crucial political functions. Freedom of the press—originally a part of the Frame of Government—is guaranteed to “every person who may undertake to examine the proceedings of the Legislature or any branch of government” (Article I, Section 7(a)); protections against criminal prosecution are vested to publications investigating “the official conduct of officers or men in public capacity” (Article I, Section 7(c)); citizens are protected in their right to assemble and “to apply to those invested with the powers of government” for relief (Article I, Section 20).

1. Remonstrance and Criticism: The Checking Function

Pennsylvania’s constitutional heritage from the beginning has viewed freedom of expression in the words of Philadelphia lawyer Andrew Hamilton, as a

b) work against bad power . . . a right which all freemen claim, and are entitled to complain when they are hurt . . . to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority.16

Shortly before the framing of the Declaration of Rights, the Continental Congress wrote in Philadelphia in 1774, (the importance of freedom of the press contains . . . in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequent promo

of pursuing their own happiness.” (emphasis added). It is not directly relevant to this essay to explore the alterations that omitted the proposition that the rights in question were “natural,” or that there is a right of “pursuing . . . safety” or the elimination of the right of “obtaining . . . happiness and safety.” The wording of this provision has again been retained unchanged in the constitutions of 1838, 1874 and 1968. It currently comprises Article I, Section 1.


Seid ("[T]hat to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power: in these parts of the world, at least, by speaking and writing truth."). Hamilton’s friend in the Zeige trial in New York has long been cited in Pennsylvania’s Supreme Court as a part of Pennsylvania’s constitutional heritage. Seid v. Commonwealth, 89 Pa. 522, 526-27 (1879); see also Bodack v. Law Enforcement Alliance of America, 790 A.2d 277, 279 (Pa. 2001) (Geist, J., dissenting); Mark Appeal, 125 A.2d 479, 485 (Pa. 1956) (Boll, concurring and dissenting); O’Donnell v. Philadelphia Record Co., 58 A.3d 773, 790 n.5 (Pa. 1947) (Muck, J., dissenting); Commonwealth v. McMinn, 21 A. 1018, 1020 (Pa. 1881) (Mitchell J., concurring).
tion of union among them, whereby oppressive officers are shamed or im-
iminated into more honourable and just modes of conducting affairs. So, too, the framers of the 1874 Constitution, though they ultimately limited their work to a relatively minor expansion of the protections against criminal libel prosecutions, articulated a high regard for the political functions of the press when they reenacted the Declaration of Rights.9

The Pennsylvania Supreme Court has repeatedly recognized the constitutional importance of expression which brings to light the po-
tential or actual wrongdoing of government officials, and the constitu-
tional problems raised by official efforts to stifle criticism. Thus, in the 1833 Case of Austin, the court reversed the disbarment of attor-
neys who had criticized a common pleas court judge, commenting that

[the conduct of a judge, like that of every other functionary, is a legiti-
mate subject of scrutiny, and where the public good is the aim, such scruti-
tiny is as open to an attorney of his court as to any other citizen . . . . [An attorney] is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legit animadvers-
ion as a citizen.


E.g., IV DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA: 716-17 (1873) (Mr. Smith) (“Give me but liberty of the press . . . . and I will shake down from its hinges corruption and bury it under the ruins of the abuses it was meant to shelter . . . .”); (Mr. Sharpe):

It is the duty of the press to educate the public mind upon the affairs of State, to drive from its encroachments the wastefulness of public officials, to watch and denounce all arbit-
trary acts of government . . . . the newspaperought to be the wide awake sentinel and guardian which stands upon the watch towers of the State to protect the liberties of the people.

Id. at 721. V DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 596 (1873) (Mr. Dallas) (“Had it been done, the man Treadle and his subordinate . . . . would still revolve in the ‘heaven of political power’.”); (Mr. Landis):

Does any one doubt that it is the duty of the press to keep the people fully posted upon matters of public interest, and to expose fully and freely the character and conduct of public men? If so, he may rest . . . . No people could exercise the elective franchise intelligently unless the newspapers kept them informed on such subjects . . . .

Id. at 598; id. at 599 ("[t]he press may take public instruction, the presence of which requires restraint, the advocacy of that which ought to be introduced;"); VI DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 256 (1873) (Mr. M. Camanni) ("As faithful sentinels upon the watchtower of liberty, they could more effectually warn us of dan-
ger, and being forewarned we could be forearmed.");

9 S Rese 191, 205-06 (Pa. 1851).
So, too, in *In Re Taylor and Selby Appeals* interpreted Pennsylvania's Newspaper Shield Law broadly in light of the observation that "independent newspapers are today the principal watch-dogs and protectors of honest journalism, as well as good Government." Again, in *Commonwealth v. Contento*, the prevailing opinion observed, in sustaining constitutionally mandated access to trials, "the public and the media together counterbalance the possible emergence of a corrupt or biased judiciary."

The election of public officials ceases to be democratic if criticism of their actions or their candidacy is legally sanctionable. Thus, in construing the 1874 revision of Article I, Section 7 to its current form, the court reversed a judgment disbarring attorneys for publishing criticism of a sitting judge in light of the newly-established status of judges as elected officials. The Court observed:

[It is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partiality. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. . . . To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system.]

Shortly thereafter, notwithstanding Pennsylvania's constitutional protection of reputation, the court in *Angry v. Garrett* recognized a
privilege to criticize candidates for public office with probatable cause, even if the criticism was in fact a falsehood:

[j]ave the voters whose suffrages [a candidate] solicits, the right to con-

vex and discuss his qualifications, openly and freely, without subjecting

themselves to fine or imprisonment, or a ruinous suit for damages. If the

voters may not speak, write or print anything but such facts as they can

establish with judicial certainty, the right does not exist, unless in such

form that a prudent man would hesitate to exercise it . . . . If not, we

have indeed fallen upon evil times, and our boasted freedom is but a de-

 fused. The principle contended for here, if sustained by this court,

would put a padlock upon the mouth of every voter, and ungallant free

discussion of the fitness of public men for office would cease.

The sum of the matter, for the Pennsylvania Supreme Court, is that

"[t]here is practically universal agreement that free discussion of

candidates for political office is essential to the functioning of a

democratic society." 64

2. Self Government, Deliberation and Political Truth

The protection of free expression under Pennsylvania's constitu-
in is not limited to a right to remonstrate with and criticize officials

candidates for office. It undergirds a broader right of self gov-

ernment: the right of the citizens of Pennsylvania to inform them-

selves in order to deliberate on the issues of the day. The text of the

constitution protects not only criticism of public officials, but all pub-
lcations "proper for public information" (Article I, Section 7(1)) as

well as the right of citizens to assemble "for the common good" (Arti-

cle I, Section 20) and to seek responses to their concerns from the

holders of political power. 65

The Pennsylvania Supreme Court has recognized that, under

Pennsylvania's structure of government, citizens have both the right

and the "solemn duty" to consult with each other "to work out the

public weal," as well as to address their conclusions to the constituted

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65 For an example commentator reviewed the original protection of free expression in Pennsyl-

vania as a part of the "(l)the determination to establish participatory politics" that characterized

the constitution of 1776. John K. Alexander, Pennsylvania, Power in Appraising Personal Rights,

in THE BILL OF RIGHTS AND THE STATES 517 (Patrick T. Conley & John P. Kaminski eds., 1992);

see also Wells v. Bais, 75 Pa. 39, 47 (1879).

The people, having reserved the right to alter or abolish their form of government, have,
in the latter declaration of their rights, reserved the means of procuring a law as the in-

strumental process of so doing. The twentieth section is as follows (keeping current Ar-

icle I, Section 20) . . . . If the legislature, possessing these powers of government, be

unwilling to pass a law to take the sense of the people, or to derogate to a convention all

the powers the people desire to confide upon their delegates, the remedy is still in their

own hands; they can elect new representatives that will.
authors. Thus, in *Kramer v. Adler*, the court held that the right of labor unions "to present their cause to the public by circulars calculated to induce others to stand with them" found protection under the Pennsylvania constitution. Again, in *Boettger v. Luzerne*, in the course of holding that Pennsylvania's wiretap law could not be applied to punish newspaper publication of lawfully obtained material, the court observed, "[i]t is the freedom of dissemination of information and ideas of public importance that is the bonding agent in a democracy." And in *Commonwealth v. Tate*, in affirming the independent Pennsylvania protection of free speech and assembly, the court announced, 

[The] 'produced national commitment' is the principle that debate on public issues should be uninhibited, robust, and wide-open' has special meaning for this Commonwealth, whose founder, William Penn, was prosecuted in England for the 'crime' of preaching to an unlawful assembly and persecuted by the court for daring to proclaim his right to a trial by an uncorrupted jury.

Penn himself and the colonial Quakers of Pennsylvania were less than unwavering in their commitment to freedom of speech and press, as the experience of William Bradford, the first printer in Pennsylvania, illustrates. In 1687 the Friend's Meeting ordered

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86  See *Spald v. Ringing Rock Lodge*, 113 A. 70, 72 (Pa. 1921). See also *Commonwealth v. Tate*, 452 A.2d 1352, 1358 (Pa. 1982) ("[P]rotection given speech and press was fashioned to assure uncorrected interchange of ideas for it bringing about of political and social change desired by the people."). (quoting *Rob v. United States*, 354 U.S. 476, 484 (1957); *Parker v. Commonwealth*, 5 Pa. 307, 314 (1857) (declaring that the people of Pennsylvania, by vesting power in the General Assembly, "unanimity and emphatically devoted themselves of all right, directly, to make or declare the law, or to interfere with the ordinary legislation of the state, otherwise than in the manner pointed out in art. ix., sect 20.").

87  547 A. 712, 729 (Pa. 1991). Rodger contrasted the First Amendment, the court has been equally emphatic when directly addressing the Pennsylvania constitution: has Pennsylvania's free expression guarantees protect discourse which "disseminates political knowledge, and by adding to the common stock of freedom, gives a just confidence to every individual," *Republica v. Dennis*, 300 Pa. 206, 209 (1905). See Clark v. Allen 209 A.2d 42, 41 (Pa. 1964) (holding acquiescence of "communicative conduct" was not before and if considered as "would realistically and practically put an effective stop in searching and illuminating discussion and debate").

88  452 A.2d 1352, 1358 (Pa. 1982) (citations omitted); see also *Redick v. Low Enforcement Alliance*, 790 A.2d 377, 379 (Pa. 2001) (Castele, J., dissenting) (quoting Tate 452 A.2d at 1358). As the court recognized in *Commonwealth v. Canton*, 452 A.2d 578, 580-81 (Pa. 1982). In 1670 William Penn and William Mead were tried before a jury at the Old Bailey in London on an indictment of unlawful assembly, disturbing the peace, and "causing a great concourse and tumult." Penn had addressed a group of three hundred Quakers in Grace Church Street, London, after the Quakers had found their meeting house locked by order of the crown . . . . He considered the charges against him to be in violation of the Great Charter of 1225 and the earlier vestry, the Magna Carta. (citations omitted).

89  See *SCHWARTZ*, supra note 9, at 25-28.
Bradford to obtain prior approval from them before printing any material that "Concerns Friends or Truth." In 1699, Bradford printed Penn's charter, was summoned before Pennsylvania's Governor and Council, and was bound on 1500 security not to print anything without Governor's permission. The Governor invoked both the interest and orders of William Penn. In 1692, Bradford was arrested for seditious libel; although the jury "could not agree" on his conviction Bradford was held over until new terms and his tools and letters were released only when Penn was deprived of the colony in 1693. In 1721, Andrew Bradford (William's son) was interrogated by Governor Sir William Keith, warned not to publish comments on his conduct without official consent but Bradford continued to publish. During the period 1756-59, the Pennsylvania Assembly sought to silence critics by arresting and trying them for libel; the English Privy Council ordered their discharge on procedural grounds.

Nevertheless, in construing Pennsylvania's "great heritage of freedom," one must take account, as Justice Harlan put it with regard to federal constitutional traditions, of "what history teaches are the traditions from which it developed as well as the traditions from which it arose." By the end of the revolution, the press in Pennsylvania was typified by robust and indeed viuperative public debate. The Pennsylvania Supreme Court has viewed the earlier colonial excursions into the suppression of free expression as vices against which Pennsylvania's constitution sought to guard.

C. Free Expression and The Search for Knowledge

When the Continental Congress praised the virtues of a free press in Philadelphia in 1774, it highlighted the importance of a free press to the "advancement of truth, science, morality." So, too, in 1824, Updike v. Commonwealth acknowledged the protected status of communications which sought to "prove any supposed truths" or "de-
The constitutional heritage of Pennsylvania acknowledges that governmental censorship is a bar to the advancement of knowledge. As Justice Holmes maintained on the federal level, the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. 60

D. Free Expression and Freedom of Thought

The political and epistemic roles of free expression are essentially consequentialist; they rest on the utility of free expression as a means of attaining other goals. Yet Pennsylvania’s constitutional values encompass as well, an intrinsic regard for liberty of expression as an element of human dignity. In 1790 Pennsylvania amended its constitution specifically to announce that “the free communication of thoughts and opinions is one of the inalienable rights of man.” It has retained this declaration unchanged through three constitutional revisions over the last two hundred years. This commitment points to a third and complementary grounding for freedom of expression in Pennsylvania’s constitutional heritage: free expression is an element of personal autonomy of thought that underpins the freedoms guaranteed by the rest of the constitution.

60 11 Serg. & Rude 394, 409 (1826). See id. at 405 (“Upon the whole it may not be going too far to infer, from the decisions that no author or printer, who shall conscientiously promulgate the opinions with whose results he is impressed, for the benefit of others, is answerable as a criminal.”). Underlying stands that an indictment for blasphemous against statements it regarded as directed toward ridiculing religion rather than “prevailing truth” or “defeating error” was indictable, notwithstanding constitutional protections, but dismissed the indictment because it was improperly drawn.

61 Harris v. United States, 250 U.S. 464, 480 (1920) (Holmes, J. dissenting). In In re Chalk, 272 A.2d 457 (Pa. 1971), the court sustained a challenge under Article I, Section 7 to the dismissal of a welfare recipient because:

Whether his statements were true, or false, need not concern us, for this is a question which cannot meaningfully be answered by either the York County Board, or the Civil Service Commission. Appellant was addressing himself to matters of public policy, wherein, the best test of truth is the power of the thought to get itself accepted in the competition of the market.

272 A.2d at 461 (quoting Harris, 997 U.S. at 630). See also In re Schenck, 174 A.2d 851, 855 (Pa. 1961) (invoking Jefferson’s classic admission in his first inaugural address that, “If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated while men feel certain that errors will disappear by debate.”); Kyes v. Harlow Co. v. Am. Fed’n of Full-Fashioned Hosiery Workers, 157 A. 566, 606 (Pa. 1931) (Mann, J. dissenting). (Id.) Ideas are not subject to injunction. Ideas have far-reaching effects. Some of these effects may be good and some may be evil, but it is opposed to progress and contrary to the spirit of our institutions to insist (sic) any official with the arbitrary power to say what ideas shall be libelous and what ideas shall be suppressed.
Pennsylvania's heritage of liberty of conscience found its most prominent recognition in the sphere of religious freedom. But in this respect the regard for religious conscience is congruent with a regard for freedom of thought, belief, and inquiry more generally. The root of Blackstone's special disapprobation of prior restraints, invoked by the Pennsylvania Supreme Court in William Goldman Theaters, Inc. v. Dana, is that if prior restraints are prohibited, "the will of individuals is still left free .... Neither is any restraint hereby laid upon freedom of thought or inquiry liberty of private sentiment is still left." So, too, the court has observed that, "direct restraints upon expression impose restrictions on human thought and strike at the core of liberty in a way which limitations on access to information do not." More recently, in Commonwealth v. Beiser, the Pennsylvania Supreme Court held that, even absent an effort to participate in politi-
cal dialogue, the use of a flag for interior decoration was constitutionally protected expression. It declared:

There are few forms of self-expression as personal and important as the manner in which we decorate our homes. We have long recognized the sanctity of the home in this Commonwealth as we have repeatedly stated that "upon closing the door to one's home to the outside world, a person may legitimately expect the highest degree of privacy known to our society." Clearly, there is no precise constitutional calculus as to what constitutes constitutionally protected expression. However, we believe that the government must satisfy constitutional scrutiny before it can tell the citizen of this Commonwealth what pictures they may hang on their walls or what symbols they may display in the sanctity of their homes. 

The grounding of Pennsylvania's right to free communication of thoughts and opinions in intellectual autonomy is manifest as well in the protection of the right to decline to communicate. As long as the citizen remains free to disavow statements she is forced to adopt, the argument from a "marketplace of ideas" or a "right to remonstrate" against compelled communications are difficult to maintain, since any compelled expression can be remedied by the citizen's right to communicate affirmatively. By contrast, if intellectual autonomy is at the root of the rights of communication, being required to speak what one does not believe is constitutionally offensive even if one is not barred from speaking one's true beliefs. 

In 1967, the Pennsylvania Supreme Court held in _Dudak v. Pittsburgh City Fire Fighters, Local No. 1_ (1) that the guarantees of the Pennsylvania constitution barred an effort to compel the plaintiff to engage in speech to which he objected. The Court observed,

[(1) It is just as illegal to compel one to speak when he prefers to remain silent as it is to gag one when he wishes to talk. The liberty to write or speak includes the corresponding right to be silent and also the liberty to decline to write. . . .]

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56 Id. at 391 (quoting Commonwealth v. Brian 666 A.2d 287, 289 (Pa. 1995)).
57 228 A.2d 702 (Pa. 1967).
58 Id. at 705 (citation omitted). See id. at 738 (Roberts, J., concurring) ("The principle of free speech is deeply rooted in our law and in our vision of a free society. That principle is as much violated by requiring a man to speak what he does not believe, as it is by prohibiting him from expressing what he does believe."). The parallel case in First Amendment jurisprudence makes even clearer the link to Pennsylvania's heritage. In _West Virginia State Bd. of Educ. v. Barnette_, 319 U.S. 624, 683 (1943), the court observed that a mandatory flag salute "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objectives to this form of communication when coupled is an old one, well known to the fearers of the Bill of Rights." The court recalls that "(O)ur Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority." Id. at 683 n.13. See also _HOMELAND SECURITY TRAGEDIES_, 355, 1061-1078 (account by William Penn and William Mead of their trial at the Old Bailey in 1670 in which Penn was fined for refusing to remove his hat).
It is this intellectual and spiritual autonomy which the Pennsylvania constitution recognizes as the pre-condition for a free society. As the court commented in Commonwealth v. Tate, the observation of the Supreme Court of the United States with regard to the First Amendment to the United States Constitution applies equally to the Pennsylvania Constitution: "freedom of speech ... is protected against censorship or punishment ...". For the alternative would lead to submission of ideas either by legislatures, courts, or dominant political or community groups.\(^\text{45}\)

II. THE STRUCTURE OF PROTECTION

A. Prior Restraint

Unlike the federal constitution, where the strictures against prior restraint are a matter of inference from a relatively opaque provision,\(^\text{46}\) the clearest principle to emerge from Pennsylvania's constitutional text is that, as the court put it in Republica v. Denniss in 1805, a citizen is free to "publish as you please in the first instance without control.\(^\text{47}\)"

Pennsylvania's original protections of free expression adjudged, "freedom of the press ought not to be restrained.\(^\text{48}\)" As noted above, in Republica v. Oswald, Justice McKeen equated the "restraint" prohibited by the 1776 constitution with the licensing schemes of prior restraint which had been overturned in the British struggle for freedom of the press during the seventeenth century. According to Justice McKeen, the protections 1776 gave to every citizen a right of investigating the conduct of those who are instructed [sic] with the public business; and they effectively preclude any attempt to fetter the press by the institution of a licensor.\(^\text{49}\) The true

\(^{45}\) 472 A.2d 1303, 1308 (Pa. 1983) (citation omitted). See also Daggan v. 807 Library Ave., Inc., 288 A.2d 706, 714 (Pa. 1972) ("[f]reedom of speech and press ... is the matrix, the indispensable condition, of nearly every other form of freedom. With new alternatives a permissible recognition of that truth can be traced in our history, political and legal."). (quoting Pekos v. Connecticut, 302 U.S. 359, 361 (1937)).


\(^{47}\) 4 Harr. 267, 269 (1802). See also William Goldman Theaters, Inc. v. Dana, 175 A.2d 59, 62 (Pa. 1961) ("[I]t is clear enough that what [the provisions of Article I, § 5] was designed to do was to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege. History supports this view.").

\(^{48}\) Pa. CONST. art. 1776, Declaration of Rights, art. XII (1776).
liberty of the press is amply secured by permitting every man to publish his opinion; but [once published] it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distin-
guish between those which are meant for use and reformation, and with
an eye solely to the public good, and those which are intended merely
to degrade and delude."

In amending the provisions to their current form in 1790, the Pennsyl-
vania Convention retained the proviso that, "no law shall ever be
made to restrain the right of examining any branch of government
in the press, and added that "every citizen may freely speak, write and
print on any subject, being responsible for the abuse of that liberty."26
The text of the constitution thus establishes a right to "write, speak
and print" without prior restraint, leaving harms caused by free ex-
pression to subsequent "responsibility for abuse."27

This clear commitment provided the basis for the Pennsylvania
Supreme Court's 1961 decision in William Goldman Theatres, Inc. v.
Dana,28 invalidating Pennsylvania's regime of motion picture regu-
lation, which required that an exhibitor register with the Board of Mo-
tion Picture Control forty-eight hours in advance of any initial show-
ing, and empowered the board to disapprove a film as "obscene" or
"unsuitable for children" by majority vote. The Court held that pro-
cedure to be an invalid "pre-censorship" inconsistent with Article I,
Section 7, notwithstanding the fact that obscenity was punishable at
common law, and that the United States Supreme Court had upheld
a film censorship regime under First Amendment analysis earlier the
same year.29

26 Oswald, 1 U.S. at 555. See id. at 529 (addressing the General Assembly, one of its members,
Mr. Lewis, supported McKean's opinion through the following statement: "[i]f, by those, it is to be
discovered the genuine meaning of this section in the bill of rights. . . . Every man may publish
what he pleases, but, it is at his peril, if he publish any thing which violates the rights of
another, or subverts the peace and order of society. . . .").
27 Pa. CONST. of 1790, art. IX, § 7 (1790). This wording was retained unaltered to the pres-
28 Dana, 4 Years at 207; Commonwealth v. Dana, 1 Binn. 98, 100 (Pa. 1800) (Troup, J.); ("[T]his provision was intended to prevent men's writings from being subject
in the previous examination and control of an officer appointed by the government, it is the
practice in many parts of Europe, and was once the practice in England. . . .")
There is some debate as to exactly which legal regimes or interferences transgress Pennsylvania's constitutional hostility to prior restraints. On one side of the spectrum, administrative regimes which give officials discretion to block entirely the publication of materials without their prior authorization are impermissible. They fall clearly afield of Blackstone's admonition that "[t]o subject the press to the restrictive power of a licensor...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."

On the other hand, not every reduction in the flow of information is a "prior restraint." If the prior restraint doctrine were rooted solely in the proposition that government should not be able to exercise discretion over the information available to the public, then any action which prevents the news media from obtaining information would constitute a prior restraint. Although the position has been advanced by news media seeking access to information, this is not the law under Pennsylvania's free expression guarantees. The right to "freely speak, write and print" prevents the government from imposing prior censorship on the "communication" of "thoughts and opinions," but provides no untrammeled right to obtain information in order to form those opinions. Thus, the court's 1978 decision in Philadelphia Newspapers, Inc. v. J. Ferreira rejected the proposition that orders limiting public access to pre-trial suppression hearings criminal proceedings were prior restraints:

A prior restraint prevents publication of information or material in the possession of the press and is presumed unconstitutional. These orders, however, issued in compliance with the Rules of Criminal Procedure, did not prevent petitioners from publishing any information in their possession or from writing whatever they pleased and therefore did not constitute a prior restraint upon publication.

Currier, Mutual Film was "in accordance with the long Common Law of these cases." Mutual Film, 35 A. 620 at 640.


8 386 A. 2d 419 (Pa. 1978).

9 Id. at 419-20 (citations omitted). See McLaughlin v. Philadelphia Newspapers, Inc., 388 A. 2d 576, 584 (Pa. 1978) (Roberts, J., dissenting) ("Speech as a free exercise of a constitutional right is not diminished by the fact that speech is engaged in by the press."); Costello v. Philadelphia Newspapers, Inc., 388 A. 2d 808, 811 (Pa. 1978) (rejecting newspaper's claim of right of access to attorney's disciplinary records, but deferring reliance on prior restraint grounds through the assertion that "this is not a case which calls into question the right of the press to print, publish and distribute information which it has already acquired"); McLaughlin v. Wolfsgren, 388 A. 2d 868 (Pa. 1978) (rejecting newspaper's claim of right of access to records of identity of welfare recipients under Article I, Section 7), see also id. at 895 ("[T]his is not a case involving the right of the press to print, publish and distribute informa-
And although every legal sanction has some deterrent effect, not every statute announcing an ex post facto prohibition on speech is a prior restraint. The "responsibility for abuse" contemplated by Article I, Section 7 clearly encompasses criminal as well as civil liability.\footnote{65} The two intermediate cases addressed by Pennsylvania's high court have involved the issuance of injunctions against communication activities which are said to violate applicable law and situations in which administrative officials exercise discretion over some but not all opportunities to engage in free communications.

1. Injunctions

Injunctions, unlike prior licensing schemes, generally restrain speech only after notice and hearing, and are usually subject to immediate appeal. On the other hand, injunctions share with licensing schemes an orientation towards preventing rather than punishing allegedly illegal communications. Like a press license, injunctions turn on the determination of a single official; they can be granted with the stroke of a pen. Injunctions interfere with the dissemination of information on the basis of potentially exaggerated threats of possible future harm, rather than on the basis of the results of abuse proven before a jury. Historically, the record on judicially imposed ex post restraints on free expression has been mixed in Pennsylvania. In the first years after the adoption of the 1790 constitution, it was not uncommon for courts to require authors and editors to post bonds or recognizances which were subject to forfeiture in the case of a published libel.\footnote{65}
This practice was said to be consistent with the constitutional prohibi-
tion on prior restraints on the ground that before forfeiture, a jury was
required to find that a libel had occurred, and "a man though bound
into his good behavior, may still publish what he pleases, and if
he publishes nothing unlawful, his recognition will not be for-
feited." The rule after 1806 was that savoir could not be demanded
for good behavior before conviction.

In the context of labor struggles during the end of the nineteenth
and the first half of the twentieth century, the Pennsylvania Supreme
Court regularly upheld injunctions issued against parades, pickets,
boycotts, and efforts to persuade employees to withdraw their labor.
Many of these labor injunctions were phrased as prohibitions against
particular modes of expression that were regarded as coercive.

These instances accord with the constitutional text. A prohibition
against the assembly of a violent mob might well be seen as no in-
fringement of the proposition that "every citizen may freely speak,
write or print on any subject." Mob violence is not "speaking writing
or printing;" indeed, the protection of the right to assembly in Article
1, Section 20 was specifically limited in 1790 to "the right in a peaceable
manner to assemble together." So long as the injunction leaves open ample
opportunity to exercise the constitutional right of "free com-
munication of thoughts and opinions" identified by Article I, Section
7, it might well be viewed as no prior restraint.

Other labor injunctions issued in the late nineteenth century and
early twentieth, however, were directed not at the manner of speech
but at its substance; the constitutionally protected "communication of
thoughts and opinions" was enjoined because of its unlawful tenden-

by Justice McKean on publisher William Cobbett, 1 McGee v. Aiken, 1 Years 186 (1792)
(requiring a fine and security for good behavior for one year imposed in libel case).

Commonwealth v. Deane, 1 Ron. 98 (Pa. 1806) (Figgmore, J. J. (granting writ of habeas
corpus).

6. See Logans Valley Plaza v. Amalgamated Food Employees Union Local 590, 227 A.2d 874
(Pa. 1967) (upholding an injunction against labor picketing in shopping mall); Westinghouse
picketing that prevented access to plant); Wayne Mills Inc. v. Textile Workers, 85 A.2d 851 (Pa.
1952) (enjoining an injunction issued against mass picketing through a prohibition on "speak-
ing or being unreasonably in the vicinity"); Westinghouse Electric Corp. v. United Elec. Radio
Mach. Workers, 41 J.2d 15 (Pa. 1965) (enjoining an injunction against Verde interference with
access to strike plant); Carnegie-Illinois Steel Corp. v. United Steelworkers, 63 A.2d 837, 861
(Pa. 1946) (issuing an injunction against members freely interfered with maintenance
employees entering work area stating that " development of a picketing line becomes a picketing
where it is time for government to intercede."); cf. Jefferson & Indiana Coal Co. v. Marks, 194 A. 50, 5155 (Pa.
1936) (issuing an injunction against picketing and convinving that "the fact of parading in the
space was not restrained and was properly enjoined . . . . For
reason, no longer and permanently continued; becomes a nuisance and an unlawful form of ex-
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cies, an approach in substantial tension with the constitutional hostility to prior restraints. 7

By the middle of the twentieth century, however, the Pennsylvania Supreme Court had announced the proposition that no equitable jurisdiction existed to enjoinder the communications of organized labor in the absence of disorder, insurrection or threats. 8 In the last fifty years, the issuance of injunctions against speech has withered.

The Pennsylvania Supreme Court regularly invalidated the issuance of injunctions proscribing exercises of free expression where the issuing courts failed to comply with the procedural mandates of notice, hearing, and prompt final judicial determination imposed as a matter of First Amendment doctrine by the United States Supreme Court. 9 As amended in 1973, in light of those cases, Pennsylvania Rule of Civil Procedure 1581(D)(1) now provides:

When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed in the office of the prothonotary within twenty-four (24) hours after the close of the hearing. If the final hearing is not held within the three (3) day period, or if the final decree

7 The early cases were the most aggressive. See Kramer v. Union Co., 464 F.2d 203 (2d Cir.), aff'd, 410 U.S. 835 (1973), reviving a prior restraint against a union and setting a precedent for the Court of Appeals to follow in later cases. See also Klein v. Surratt, 356 F.2d 154 (3d Cir. 1966), reviving an injunction issued against a union on the ground that the union failed to meet the conditions of the Pennsylvania Rule of Civil Procedure 1581(D)(1). See also People v. Taylor, 194 Misc. 117, 214 N.Y.S. 120 (1927), reviving an injunction against a union on the ground that the union failed to meet the conditions of the Pennsylvania Rule of Civil Procedure 1581(D)(1).

8 See, e.g., Berger v. Glassell, 330 F.2d 164 (2d Cir. 1963), aff'd, 379 U.S. 78 (1964), reviving a prior restraint against a union on the ground that the union failed to meet the conditions of the Pennsylvania Rule of Civil Procedure 1581(D)(1). See also United States v. Vannerson, 337 F.2d 357 (3d Cir. 1964), reviving an injunction against a union on the ground that the union failed to meet the conditions of the Pennsylvania Rule of Civil Procedure 1581(D)(1). See also United States v. Waterman v. Van Ert, 341 U.S. 64 (1951), reviving an injunction against a union on the ground that the union failed to meet the conditions of the Pennsylvania Rule of Civil Procedure 1581(D)(1).
is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved."

These rules themselves suggest that viewed as a procedural matter, not all injunctions "involving freedom of expression" are impermissi-
ble. On the other hand, neither the cases enunciating the pro-
cedural requirements nor the comments to Rule 1581(f) make refer-
ence to the words and history of Article I, Section 7 of the holding of
Dana that Pennsylvania's hostility to prior restraints is more severe
than that of the Federal constitution.

Willing v. Masszone provides the most recent discussion of the
constituents of Article I, Section 7 on the issuance of injunctions, treat-

PA. R. CIV. P. 1581(f)(1). In Sch. Dist. of Pittsburgh v. Pittsburgh Fed's of Teachers, 440 A.2d 394 (Pa. 1980), the court held that since part of a preliminary injunction prohibiting a teachers' strike "prohibits certain communications by and between appellants and prohibits certain pick-
eting," the entire injunction was disolved as refitful to grant a final hearing, although parts of the injunction "arguably did not involve the forum of expression."


Prior restraints do often take the form of injunctions. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140 (1971) (refusing to retain
statute which authorized state judges, on the basis of a showing that a theater had exhibited obscene films in the past, to enjoin in future exhibition of films not yet found to be obscene was unconstitutional asauthorizing an initial prior restraint. Not all in-
juctions that may incidentally affect expression, however, are "prior restraints" in the sense that some have been used in New York Times Co. or Vance. Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the state's traffic zone. Moreover, the in-
junction is issued not because of the content of petitioners' expression, as was the case in New York Times Co. and Vance, but because of short prior unlawful conduct (juyor sentences omitted). Cf Justice O'Brien's dictum in Cohen v. California, 403 U.S. 15, 91 S. Ct. 1489 (1971) (discussing First Amendment, precedent, Justice O'Brien states that: "Although we cannot agree with appellants' contention that no prior restraint on the exhibition of a motion picture is permissible, it is clear that any such restraint must be very carefully circumscribed").

393 A.2d 1155 (Pa. 1978). Judge Mandel's reliance on the structures against prior re-
straints was joined by Janacek and Roberts, both concurring in the result. Id. at 1160 (holding that Pennsylvania's constitutional protection of free expression is "based upon an ab-
horrence of prior restraint"); id. (Pomerleau, J., concurring) (incorporating Justice Holmes' dis-
senting opinion in the Superior Court, Masszone v. Willing, 369 A.2d 825, which was premised on the proposition that "Article I Section 7... was designed to... prohibit the imposition of prior restraint"). See Kramer v. Thompson, 947 F.2d 666 (3d Cir. 1991) (certifying Pennsylvania
cases and holding that injunction against defamation is imposed, even after a jury ver-
dict awarding damages); Terminiello v. Co. of Ray, 150 F.R.D. 552 (E.D. Pa. 1993) (granting Rule 66(b) motion against plaintiff's counsel who sought an injunction against critical speech); Commonwealth v. Pittsburgh Press Co., 596 A.2d 1102, 1109 (Pa. 1991) (Roberts, J., concur-
ing) (arguing that statutory authorization of the Human Relations Commission to direct newspaper to cease and desist publication of "situations wanted" advertisements identifying the adver-
sor by sex, race, religion or age is an unconstitutional prior restraint under Article I, Section 7); Vogel v. W.T. Grant Co., 327 A.2d 152, 158 (Pa. 1976) (Mandel, J. , concurring) (arguing that an injunction against contacting employers and family of credit card purchasers in effort to collect debt was an impermissible prior restraint).
ing injunctions as prior restraints. The prevailing opinion of Justice Mandartino relied on the prohibition of prior restraints in Article I, Section 7 to reverse an injunction entered against the picketing of a law firm by a disgruntled former client, despite a showing that the client's allegations were false and that her indigent status made her judgment proof in a defamation action. Since Widing, the Pennsylvania Supreme Court has not upheld an injunction prohibiting an exercise of free expression in the face of a prior restraint challenge under Article I, Section 7.47

2. Permit Requirements

It is not uncommon for municipal governments to require permits for parades, demonstrations, or public meetings. While denial of such permits may not entirely foreclose the possibility of conveying the communications at issue, neither does it deny the classic press license to disseminate the information at issue by word of mouth. Article I, Section 20 declares that citizens have the right to peaceably assemble, and permit requirements, like the prior restraints against which Blackstone inveighed, place the opportunity to exercise unilateral discretion over the exercise of a constitutional right in the hands of the administrative officer who issues the permit. On the other hand, public meetings, and sometimes other forms of communication, carry with them the possibility of physical disruption

47 In Giant Eagle Min., Co. v. United Food & Commerc. Workers Union, Local Union No. 22, 552 A.2d 1296 (Pa. 1988), the court sustained an injunction "ordering the pickets to be peaceful and lawful in nature, restricting the number of pickets at the entrance of all appellants' stores, maintaining the proper spacing and location of those pickets, and requiring apprehension of persons having business with appellants from entering or leaving the premises" after a showing of mass picketing, violence, and incitement. Id. at 1301. The order in question did not prevent the communication of any thoughts or opinions, and the issue of prior restraint under Article I, Section 7 was not raised.

During the last quarter century, the Pennsylvania Supreme Court has three times explicitly declined to address Article I, Section 7 prior restraint issues: in Adler v. Bittis, 691 A.2d 1175, 1179 (Pa. 1996); the court upheld an injunction against solicitation by a former employee of a law firm of the firm's clients, but engaged in no prior restraint analysis, observing that the employees "have not disposed the constitutionality of an injunction as a form of sanction." Id. at 1194 n.9. This seems a sensible approach.

In Mersky v. Penn Auto. of Allegheny County, 613 A.2d 1186, 1187 (Pa. 1992), the court declined to address the propriety of a lower court order directing the participants in a court-sanctioned labor negotiations not to make public statements without prior court authorization because "neither of the parties has asserted that the [court] has denied it authorization to make any public statements." Id. at 1187 n.1. This seems to be in some tension with the usual rule that the mere requirement of obtaining authorization is an impermissible prior restraint.

Finally, in Budek v. Law Enforcement Alliance of N.C., 750 A.2d 277 (Pa. 2000), a majority of the Supreme Court without opinion declined to grant extraordinary jurisdiction to review an injunction entered against the airing of advertisements by political advocacy groups who had not complied with campaign disclosure laws. Justice Castille's dissent from the denial of jurisdiction argued, with some plausibility that the orders constituted impermissible prior restraints.
of traffic flow or other content-neutral interests which are not ade-
quately addressed by the possible assessment of damages.

In an initial encounter with the issue in 1920, Duquense City v. Fin-
del reviewed a conviction of labor organizers for holding a parade in
violation of a local ordinance which forbade the holding of public
meetings on city streets without a permit issued by the mayor. Nor-
withstanding the fact that the organizers had filed three successive
requests for permits upon which the mayor had taken no action, "the
court held that the conviction was consistent with the constraints of
Pennsylvania's guarantees of free expression. The streets, according
to the opinion, "are intended for passage and not assembly" and
"unless regulation is vested somewhere we may renege in our large cit-
esthe disorders which have recently appeared in those of the old
world." If a city, being the owner of the streets, was said to be entitled
to regulate their use "under such restrictions and limitations, as in
her opinion would best conserve 'the peace, good government,
safety, and welfare of the city.'" If the mayor's refusal to act on the
permit was unconstitutionally arbitrary or discriminatory, according
to the court, a mandamus petition would provide the appropriate
remedy. No mention was made of the constitutional strictures
against prior restraints.

Modern cases have been more skeptical of administrative licens-
ing. They have, in general, applied the federal free speech doctrine
that a permit regime "which establishes a 'previous restraint' on free
speech with no standards prescribed for the exercise of the discretion
of the officer issuing the permits is invalid." Under Pennsylvania's
independent free expression guarantees, the court in Commonwealth v. Tate held impermissible the exclusion of leaflets from a public forum on the basis of "a vague requirement of permits, governed by no articulated standards."

B. "Every Citizen May Freely Speak, Write and Print"

1. The Scope of the Protected Conduct:
   "Free Communication of Thoughts and Opinions"

Pennsylvania's free expression protections are broadly phrased. Although particular modes of communication are mentioned—"the printing presses" in Article I, Section 7(a), "speech, printing and writing" in Article I, Section 7(b), the "publication of papers" in Article I, Section [c], and "assembly" and "petition address or remonstrance" in Article I, Section 20—the underlying protection is accorded to the right of citizens to "free communication of thoughts and opinions."

A citizen need not any particular means of communication to invoke her right to free expression. Pennsylvania's courts have recognized that constitutional protection extends to displays of the flag as a decoration within the privacy of a citizen's home, as well as to erect-
tion of a liberty pole in the public square. The effort to peacefully persuade employees to withdraw from employment or join a union, to picket the premises of employers involved in a labor dispute, to picket landlords accused of disreputable practices, to seek to persuade others to join a boycott for legitimate purposes, to distribute or sell printed materials on a public street (though not to establish a stationary newsstand) have all been regarded as protected exercises of the rights of free expression under the Pennsylvania constitution. Likewise, the right to free communication of thoughts and opinions is infringed by a compulsion to engage in undesired communication.

Although the Pennsylvania Court formerly excluded commercial speech from the protected “communication of thoughts and opin-

58 Republic v. Montgomery, 1 Vease 419, 422 (1795) (rejecting the claim that erection of a liberty pole was an exercise of the right to “free communication of thought and opinion” because it amounted to an “abuse of that liberty” when the area was known to have been on the march in support of the constitution and law could only be attributed to an unwarranted design of gaining not to the improvement”); cf Pennsylvania v. Morrison, 1 Aed 274 (1875) (preserving for a liberty pole in defiance of the laws of the state of Pennsylvania): Liberty poles originated as large wooden columns often labeled not just main erected in public squares as part of the rise of resistance to British authority during the American revolution. SIMON P. NOVICK, PARADES AND THE POLICIES OF THE STREET 25-50 (1997). After the revolution, they were used as symbols of resistance during the Whiskey Rebellion, id. at 173-75, and adopted by Jeffersonian republicans as prominent and easily recognizable symbols of liberty, equality and republicanism, and as symbols of opposition to the Federalist government, as well as to the Sedition Act. 43 U. S. C. at 8061, 97, 17379.


62 1611 Inc v. Wilson, 166 A. 2d 273 (Pa. 1960) (neighborhood organization picketing local upstairs viewed as nuisance); Wag v. Fewer Bldg & Trade Scy’s, 166 A. 2d 147 (Pa. 1969) (Catholic threat to boycott department store whose radio station broadcast anti-communist programming).
ions. The current rule considers commercial speech to be within the sphere of constitutional safeguards when it is neither false nor misleading.  

2. The Scope of Prohibited Interference

Article I, Section 7(a) announces that the freedom of the press is protected against "laws . . . made to restrain the right thereof." Article I, Section 7(c), places constraints on "prosecutions" and "indictments" for publications of papers. It is clear, therefore, that official actions which impose criminal punishment for the exercise of rights of free expression are subject to the limits imposed by the Pennsylvania constitution.

But the potential for interference with free expression extends beyond the threat of criminal prosecution and Article I, Section 7(b) and Article I, Section 20 are phrased in broader terms. They announce that "every citizen may freely speak, write and print on any subject" and that "citizens have the right" to freedom of assembly, petition or remonstrance. Under these provisions, actions other than criminal prosecution may constitute derogations of the right to "freely speak, write, or print" and the right to freedom of assembly, petition, and remonstrance that call forth scrutiny under the Pennsylvania constitution.

a. Civil Sanctions

Although the protections of Article I, Section 7(c) are limited by their terms to "indictments" or "prosecutions," it has long been clear

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84 Ultron v. Boehm, 142 A.2d 10 (Pa. 1958) (holding that a prohibition of price advertising by sellers of explosives does not violate Article I, Section 7, but rather, is a valid exercise of the state's police power).

85 See Bureau of Prof'l Affairs v. State Bd. of Physical Therapy, 788 A.2d 586, 543 (Pa. 1999) ("[I]nstead, if true or misleading commercial speech is concerned, we have followed the federal view that such speech is not constitutionally protected."); In's Adjunct Bureau v. In's Comms., Inc., 854 A.2d 1317 (Pa. 2004) (invalidating a statute prohibiting solicitation of business by claims adjusters during the first forty-eight hours of a catastrophe).

86 Id. at 1324 ("Our perspective is that, in the commercial speech area, we should treat carefully where restrictions are imposed on speech if there are less intrusive, practicable means available to effectuate legitimate, important governmental interests."); Commonwealth v. Pittsburgh Press Co., 489 Pa. 314, 398 (1979) (holding that an order forbidding newspapers from printing requests for employment abridging their right to free speech, if not a deprivation of the employer's constitutional right to free speech because the speech was not of a constitutional nature and the state was not "showing the limitations were necessary to protect legitimate interest[s]").

87 PA. CONST. art. 1, § 7(a) (2001).

88 Id. art. 1, § 7(b), art. 1, § 20.
that civil sanctions levied by state courts are also constrained by the general guarantees of Article I, Sections 7(a) and 7(b).69

b. Deprivation of Licenses and Government Employment

Under the constitution of 1790, the Supreme Court of Pennsylvania determined that despite the fact that attorneys are admitted to the bar on good behavior, the disbarment of an attorney for publication of measured criticism of a sitting judge would be an impermissible limitation of free expression.70 Similarly, in construing the constitution of 1874, Pennsylvania's Supreme Court treated disbarment as a punishment that would deprive an attorney of "his profession and livelihood," holding that

"[l]t would be a clear refraction of the spirit if not the letter of [the free speech protections] to hold that an attorney can be summarily disbarred for the publication of a 'libel on a man in a public capacity or where the master was proper for public investigation or information . . . he certainly does not forfeit his constitutional rights as a freeman by becoming an attorney."71

In the case of public employment, the Pennsylvania Supreme Court was initially less willing to recognize denial of employment as a "deprivation of livelihood" that infringed on constitutional rights to free expression. During the first half of the twentieth century the court regularly held that discharge from public employment because of particular expressions of political sentiment did not interfere unconstitutionally with the right to "free communication of thoughts


70 In re Austin S Rainey, 191 A. 194 (Pa. 1936) (stating an attorney is "not professionally answerable for a decision into the official conduct of the judge, which would not expose him to legal punishment as a citizen").

71 Ex parte Stewart, 90 Pa. 220, 239-90 (1880) (overturning a decision of a court of a judge); Compare Maquil's Case, 112 A. 678, 680 (Pa. 1921) (upholding disbarment where in addition to anarchistic affiliations, attorney "conducted other of his address, to violate the laws of the land"); id. ("Such conduct . . . is the case of an attorney, whose duty it is to uphold the law, and not encourage a breach thereof it constitutes a positive disregard of the official obligation which he solemnly entered into when he took oath of office."); (admission cited) with Schreiner Appeal, 178 A. 855, 864 (Pa. 1916) (referring to federal precedent, reversing disbarment of a member of the communist party, because "[t]he ability does not attach merely from membership in the Communist Party, under our traditions beliefs are personal and not a matter of mere association") (citation omitted). See also Schneiders v. Mezzonato, 41 S.W. 316 (Pa. 1914) (reviving on just process grounds summary disbarment by a trial judge who concluded the attorney was a communist).

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and ideas" because no constitutional provision guaranteed public employment. Objections were dismissed on the ground that "[i]f such restriction is distasteful to [an employee], he has the alternative of seeking other employment." So, too, the Pennsylvania Court concluded that conditions on the grant of licenses could not infringe on guarantees of free expression because there was no right to obtain such licenses. In the aftermath of the McCarthy era, however, the Pennsylvania Court began to recognize the scope of the potential impact of denials of "privileges" on opportunities for free expression. In 1973 the court sustained a challenge under both federal and state free speech protections to the denial of a public employee for statements critical of government welfare policy. It announced that in light of the tremendous increase in government activity and employment... it is a day well established that this constitutional right are no longer confined simply because one is a policeman, or a lawyer, or a teacher, or even a lifeguard. These public occupations "are not relegated to a watered-down version of constitutional rights... It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."
c. Private Interference with Free Expression

Unlike the First and Fourteenth Amendments of the federal constitution, which are by their terms directed respectively against actions by "Congress" and "states," the word of Pennsylvania's free expression guaranties do not confine their protection to particular modes of "state action." Article I, Section 7(b) announces, as its predecessors have since 1796, that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for abuse of that liberty." Article I, Section 20 declares, in similar fashion, that "[t]he citizens have a right to assembly, petition and remonstrance." The constitutional text gives no reason to believe that private and public assaults may not equally violate these rights.

To be sure, the concluding paragraph of the Declaration of Rights has provided since 1790 that "everything in this article is excepted out of the general powers of government and shall forever remain inviolate." But the limitation of the "powers of government" does not exhaust the effect of the Declaration of Rights. In Speiser v. Randall, the court gave weight to the separate constitutional admonition that the rights of the Declaration should "forever remain inviolate" to preclude retaliation by a labor union against one of its members. Moreover, the Declaration's wording since 1790 has been introduced by an intent that the "essential principles of liberty and free government may be recognized and unalterably established."

By the terms of the constitution, the "invaluable right" of "free communication of thoughts and opinions" is one such "principle of liberty and free government." To take the extreme case, a policy in which one political group is at liberty to suppress its competitors by

who had publicized criticism, violating on federal First Amendment precedent. Commonwealth v. Specter, 501 A.2d 894 (Pa. 1985) (finding "it is now beyond cavil that public employees may not be denied constitutional rights on the theory that public employment is a privilege, not a right," but holding under First Amendment precedent that prohibitions on political candidacy is a constitutionally permissible restriction on the political activity of municipal employees).

In Pennsylvania State Police v. Hospitality Inn of Philadelphia, Inc., 600 A.2d 814 (Pa. 1992), a majority of the court refused to follow the district court's holding that liquor licenses were their free speech objections to prohibition on price advertising. The case was reversed and remanded for reconsideration by the U.S. Supreme Court, 517 U.S. 1206 (1996) and on remand, the status was struck down on First Amendment grounds without addressing Article I, Section 7 Pennsylvania State Police v. Hospitality Inn of Philadelphia, Inc. 689 A.2d 213 (Pa. 1997).

PA. CONSTIT. art. I, § 7(b) (2001).

Id. art. I, § 25.

Id. art. I, § 25.

113 A. 2d, 72 (Pa. 1961).

private force would be characterized by neither "liberty" nor "free government," even if the form of elections remained. Given the importance of free speech in underpinning Pennsylvania's democratic self-governance, its constitution cannot be indifferent to private attempts to stifle political expression.

A line of twentieth century cases confirms this perception. In Spald v. Ringing Rock Lodge, the Pennsylvania Supreme Court reviewed a petition from a member of the Brotherhood of Railroad Trainmen who had been expelled for signing a petition asking the Pennsylvania legislature to reconsider a "full crew law" supported by the union. The court issued a injunction grounded on the free expression provisions of the Pennsylvania constitution, compelling the plaintiff's reinstatement. It declared:

When plaintiff signed the petition to the legislature to repeal the Full Crew Law, he was communicating his "thoughts and opinions" to that body, and seeking its judgment on what he considered a public "grievance"—relief which the law enforcement alone could grant. Since plaintiff viewed the statute petitioned against as such a grievance, the course of conduct pursued by him was not merely within his legal rights, but accorded with his solemn duty as a citizen, for the exercise of which he can under no circumstances be penalized.

The court adduced as well a narrower ground for decision:

We have often said that the by-laws, rules and regulations of those artificial bodies will be enforced only when they are reasonable . . . . and they never can be adjudged reasonable when, as here, they would compel the citizen to lose his property rights in accumulation, or forego the exercise of other rights which are constitutionally insubable.

Similarly, in Dudek v. Pittsburgh City Fire Fighters, Local No. 1,\(^5\) the court, relying on Spald, enjoined the imposition of fines by a public employees union on eighteen members who refused to picket Democratic ward meetings as the union directed. The court reasoned:

it is just as illegal to compel one to speak when he prefers to remain silent as it is to gag one when he wishes to talk. . . . [T]he regulations and by-laws of organizations such as the one under consideration, will be enforced only when they are reasonable . . . . [P]laintiffs would be compelled to oppose by signs, and by picketing, candidates for whom they might well have a decided preference. Such a regulation imposes a blanket opposition which is so contrary to the fundamental rules of fairness

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\(^5\) Spald, 111 A. at 72. See also id. ("The right of a man cannot lawfully be infringed, even momentarily, by additional any more than by the State itself."); id.

The Constitution does not confer the right, but guarantees its free exercise—without let or hindrance from those in authority—at all times, under any and all circumstances, and, when this is kept in view, it is apparent that such a prerequisite can neither be desired by others nor survived by the person himself.

\(^6\) Id.

\(^7\) 218 A.2d 752 (Pa. 1967).
that "I cannot possibly pass muster under the criterion of reasonableness."  

Communityash v. Tate\(^{16}\) reversed the defendant trespass conviction of demonstrators who sought to peacefully distribute leaflets on a private college campus opposing the policies of the FBI director who had been invited to a public meeting on campus. The court began by reviewing the wording and heritage of Pennsylvania's constitutional guarantees of free speech, concluding that "the rights of freedom of speech, assembly, and petition have been guaranteed since the first Pennsylvania Constitution, not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and 'invaluable' rights of man." Constraining the Pennsylvania statute's affirmative defense to prosecution for defendant trespass when property is "open to members of the public" and an alleged trespasser has complied with all "lawful conditions" for access, the court concluded that the prohibition of defendants' leafleting was not a "lawful" condition:  

"[T]he college could not, consistent with the invaluable rights to freedom of speech, assembly, and petition constitutionally guaranteed by this Commonwealth to all citizens, exercise in right of property to invoke a standardless permit requirement and the state's defendant trespass law to prevent appellees from peacefully presenting their point of view to this indisputably relevant audience in an area of the college normally open to the public."  

Some federal courts have reviewed the Supreme Court's subsequent decision in Williams-Pennsylvania Socialist Workers v. Commonwealth General Liquor Insurance Co.\(^{17}\) as a repudiation of the Speck-Dudek-Tate line of

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\(^{16}\) Id. at 175-56. See also id. at 757 (Roberts, J., concurring in the result) ("The legality of the objective sought by the union did not overcome its unlawful attempt to control expression by inducing union members contrary to their constitutional rights of free speech and political belief.") and id. at 1758 (Roberts, J., concurring) ("It should be noted that the language of our Constitution prohibits not only state interference with free expression but also coercion of speech from sources other than the state."). See also Collins v. Main Line Bd. of Realtors, 504 A.2d 493 (Pa. 1985) (enjoining exclusion of real estate broker from trade organization on common law reasoning of reason).  

One of the reasons, for example, given to the appellee corporation for denying membership to the appellee concerned an order by the state's attorney general of the Commonwealth. The court of appeals sustained the order of the Commonwealth, citing a Pennsylvania statute.  

\(^{17}\) Id. at 497-98.  


\(^{18}\) Id. at 1380.  


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cases, and therefore as a rejection of the possibility that private actions can constitute an unconstitutional interference with Pennsylvania free expression rights. Pennsylvania State Employees Association v. Commonwealth, 529 A.2d 583 (Pa. 1988) (citing the desire to protect free speech as a constitutional right). The dissenting justices noted that the majority's ruling could lead to the chilling of free speech and could have a chilling effect on future speech. The Pennsylvania Constitution provides that the right to free speech is guaranteed to all individuals, and that the state must not interfere with the free expression of opinions. The dissenting justices argued that the majority's ruling was in conflict with the Pennsylvania Constitution and the First Amendment of the United States Constitution.
tions, "[w]e are not suggesting that the rights enumerated in the Declaration of Rights exist only against the state." 

"[T]hey are not created by the constitution, but preserved by it," citing State. It concludes that shopping malls are not "require[d] . . . to provide a political forum for persons or groups with views on public issues, so long as the owner does not grant unfair advantage to particular interests or groups by making his premises arbitrarily available to those he favors while excluding all others," citing Commonwealth v. Tate. Thus, the opinion apparently reaffirms both Tate and State without mentioning Duked.

The current state of doctrine is hardly picnicky. None of the Pennsylvania cases go so far as to declare that every action by a private party which deters the exercise of free expression is a violation of the Pennsylvania Constitution. But the constitutional commitment to free expression clearly exercises a "gravitational pull" in interpreting both statutory and common law requirements. Where either statutory or common law doctrines constrain the exercise of a legal right or privilege to "reasonable" dimensions, this line of cases at a minimum mandates that a "reasonable" application of those rights or privileges cannot be one that derogates Pennsylvania's constitutional commitment to free expression.  

The essential principles of liberty and free government may be expected to be, and us to be, forever established.

90 Id. at 1535.  
91 Id. at 1536.  
92 See also id. at 1538 (affirming that "impliedly-repugnant" Pennsylvania's constitution provides greater protection than the federal constitution).  
93 These cases also suggest that Judge Adams was on solid ground in National v. National Life Ins. Co., 721 F.2d 894 (3d Cir. 1983), in holding that the Pennsylvania free expression guarantee provides a basis for concluding that public policy pursuant-to-a discharge of a prison employee for refusing to sign an oath to legislate in support of his employer's political agenda. The possibility of a wrongful discharge action based on the Declaration of Rights has occurred a long-running debate at Pennsylvania's law has evolved over the last twenty years. See James C. Fut-

von, The Public Policy Exception in the Employment at Will Doctrine. Searching for Clear Mandates in the Pennsylvania Constitution, 27 RUTGER'S L.J. 997 (1996). The most recent opinions from the Pennsylvania Supreme Court suggest that an employer's efforts to interfere with an employee's activities as a citizen, exercising two constitutional rights to participate in political discourse or petition or demonstrate, would be actionable. See Mck v. Shirley, 716 A.2d 1221 (Pa., 1998) (discharge in retaliation for firing worker's compensation claim was actionable); see also Mck v. Shirley, 715 A.2d 511, 518 (Pa. Super. Ct. 1997), rev'd, 714 A.2d 1313 (Pa. 1998) (contra); see supra, note 92, supra note 92. (rejected wrongful discharge claim based on a possible violation of a federal statute distinguishing one where "if we allowed an employer to discharge an employee for filing a complaint with a Commonwealth agency such as the Workers' Compensation Appeal Board, we impact the rights of that employee and the public by undermining the very purpose of a statute of the Commonwealth").
d. Other Regulations

In the usual case, the free communication of thoughts and opinions is not infringed by generally applicable regulations simply because they impose some collateral burden on communication. Thus, the elimination of a sales tax exemption for magazines, while the tax was retained for newspapers, was held to be consistent with Article I, Section 7 because the tax was identical to that imposed on other items of commerce and incidence of the tax was based on format and frequency of the publication rather than its contents.\(^{11}\)

In Philadelphia Fraternal Order of Correctional Officers v. Reniöli, the court held that a statute which limited collective bargaining rights of public employees to a single designated union even when a rival union had been chosen by employees did not impinge on rights guaranteed by Pennsylvania's free expression protections. The Court reasoned: "Appellants have not been prohibited from forming PFOCO; nor have they suffered any restriction from the City or the Commonwealth for forming a rival union and expressing dissatisfaction with AFSCME . . . freedom of speech does not include the right to force another to listen . . . .\(^{12}\)

On the other hand, while an order denying access to government information is not a prior restraint, interferences with the opportunity to gather news are subject to review under the Pennsylvania Court's free expression jurisprudence, to guard against gratuitous government interference with the flow of information to the public.\(^{13}\)

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\(^{11}\) See Magazine Publishers of Am. v. Commonwealth, 554 A.2d 510 (Pa. 1989). So, too, the Pennsylvania constitution does not prevent the press from the general obligation to comply with grand jury subpoenas. In re Taylor, 195 A.2d 161, 184 (Pa. 1963) ("[I]n no stretch of language can it be said or even implied under 'freedom of the press' the mandate of sources of information . . . ."). See also Commonwealth v. Abou Jaleel, 550 A.2d 161, 839 (Pa. 1988) ("Publicizing a person for expressing his views or for associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character when that character is a relevant inquiry.").


\(^{13}\) See, e.g., McMullen v. Wohlgenannt, 138 A.2d 888, 896-97 (Pa. 1957). [2] is perhaps better to assume that a right to gather news 'of some dimension must exist' if the First Amendment is to have real world vitality . . . . We agree that such a right, apart from the First Amendment, may exist, this right, as an other First Amendment right, is not absolute . . . . Here appellants have no right to compel the disclosure of names explicitly mentioned by source . . . . The Commonwealth's interest in protecting the privacy of those it odds through public scrutiny is paramount and compelling . . . . The statutory limitation imposed on appellants' asserted First Amendment right to compel the disclosure . . . . is no greater than necessary to protect the substantial governmental and individual interests involved.

See also In re McLaughlin, 584 A.2d 376, 382 (Pa. 1990) ("We need not here intimate any view as to whether such a right of access exists in this case, or even assume [is does] . . . we would conclude that the right is呃erlene to the parent/interest of the state in protecting the status of confidentiality."). In re Mack, 126 A.2d 675, 688 (Pa. 1956) (upholding in order pro-
The protections offered by Pennsylvania’s free speech provisions are qualified. The core constitutional text contemplates the possibility of sanctions for “abuse” of constitutional liberties, and the prime interpretative challenge is to identify the substance of these “abuses.”

The clearest constitutional provision, the substantive and procedural protection against criminal prosecution for publications involving public officials or issues provided by Article I, Section 7(c), has been largely superseded by more protective federal constitutional standards in the area of libel. The Pennsylvania Supreme Court has taken the position that in light of the constitutional protection for personal reputation provided by Article I, Section 1 of the Declaration of Rights, federal rules establish the outer limits of constitutional protection against defamation actions. The Court wrote: “[t]o gratuitously emblazon upon the stringent requirements of current federal constitutional law [regarding libel] ... would be in conflict with the

... standing taking pictures of criminal defendants within the courthouse upheld because it was "subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice").

On the other hand, courtroom activities must be subject to a balancing process which gives substantial weight to the right to public access under Pennsylvania’s constitutional mandate of “speedy and public trials” and “open courts.” See Pa. Const. art. I, §§ 1, 9 (2001). See also Seay, 559 A.2d 799, 805 (Pa. 1988) (“Before closing a judicial proceeding, a trial court must determine that closure will effectively prevent the compelling interest endangered by openness and that the information sought to be withheld from public exposure will not be made public anyway.”); Commonwealth v. Breinholt, 504 A.2d 215, 217 (Pa. 1986) (“Court does not stand for the impossibly strict... that is improper to exclude the public from a segment of a criminal trial.”); Commonwealth v. Contrada, 453 A.2d 579, 580 (Pa. 1982) (arguing that “the public shall not be excluded from trials... that the atmosphere at a criminal trial is subject to reasonable time, place, and manner restrictions”); Commonwealth v. Hayes, 414 A.2d 518, 523 (Pa. 1980) (Lamb and Flaherty, JJ., concurring) (arguing that court proceedings should always be open to the public and the media, without exception). In Philadelphia Inquirer, Inc. v. News, 503 A.2d 695 (Pa. 1985), the court found that under Pennsylvania free speech provisions, any limitation on access should be carefully drawn... [and should not be limited for any reason than the compelling state interest to protect constitutional rights of criminal defendants... and the threat posed to the proscribed interest is serious... and access would be limited no more than is necessary to accomplish the end sought.”)

According, records of public trials have been held to be subject to a mandate of public accessibility under Article I, Section 7 and Article I, Section 11. See, e.g., Commonwealth v. French, 63 A.3d 175, 180 n.12 (Pa. 2003) (“because condemning sealing of records and limiting “public trials involve public records”). A separate common law rule, established under the “same considerations,” mandates access to material filed in courts. See PG Publishing Co. v. Commonwealth, 616 A.2d 1109 (Pa. 1992) (recognizing common law right of access to records written in the absence of good cause for sealing); Commonwealth v. Fennemeyer, 530 A.2d 414 (Pa. 1987) (holding that there is a contempt law right of access to arrest warrants, where substantial threats to legislative state interests).
recognition given by our state's constitution to a citizen's right to protect his or her reputation.

Outside the context of reputation, however, a separate analysis under the Pennsylvania constitution is necessary. The fulsome analysis is the proposition under Article I, Section 7(b) that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." 37

Beginning with the constitution of 1790, eighteenth and nineteenth century courts held that the definition of "abuse" of free expression for which punishment could be imposed was tied to the common law-a common law criminal offense or tort was by definition an abuse of free expression. Thus, notwithstanding the constitutional protection of free communication, the easy Pennsylvania courts had no difficulty in sanctioning criminal prosecutions for communicative acts which today would be recognized as obvious "abuses" such as riots, conspiracies and solicitations to engage in criminal acts, 38 and

37 Sprague v. Walker, 549 A.2d 1078 (Pa. 1988); see also Hachek v. Westinghouse Broad. Co., 552 A.2d 346 (Pa. 1988) (interpreting Pennsylvania Shield Law to allow discovery of "moneys" in last actions to the extent that the documentary information does not reveal the identity of a personal source of information or may be reduced in-esteem the revelation of a personal source of information); Moore v. Phillips, 361 A.2d 441 (Pa. 1976) (holding that exception in survival action for cause of action for libel and slander in action antedating the violation of equal protection rights afforded under the state constitution for protection of a fundamental right of reputation); Bank v. Moore, 87 Pa. 385, 393 (1878).

The high esteem in which reputation is held, and the protected status which the organic law has thrown around it, are clearly expressed in the first section of the Declaration of Rights: ... The general liberty of the press must be counterpoised to the liberty of the person, to be equal and as such, held responsible for an abuse of that liberty. 38

As a textual matter, one might argue that the different phrasing in Article I, Section 28, providing for protection of the right to assemble, petition and redress "in a peaceable manner," provides unqualified protection to petition, assembly, and redress as long as it is peaceful. The Pennsylvania courts have, however, interpreted Article I, Section 28 and Article I, Section 7 in pari materia, see Commonwealth v. Troxell, 796 A.2d 573, 576 (Pa. 2002); Commonwealth v. Fromm, 768 A.2d 1023, 1028 (Pa. 2001); Commonwealth v. Fromm, 71 A.2d 856 (Pa. 1950).

In the aftermath of the Whiskey Rebellion of 1794, the Pennsylvania Supreme Court upheld prosecutions for erecting "liberty poles" as standards of rebellion, Commonwealth v. Morris, 1 A. 376 (Pa. 1795) (providing protection for erecting a liberty pole "in defiance of the laws of the state of Pennsylvania"). See, e.g., Montgomery, 1 A. 513 (1795) (denying due process was to prevent erection of liberty pole; "setting up of [a] pole at any time, in any manner, with arms is a riot" violating right of "free communication"). Likewise, courts regularly upheld indictments for conspiracy and solicitation to illegal actions. See, e.g., Commonwealth v. Gillispie, 7 Serg. & Rae, 487 (1821) (regarding conspiracy to sell "illegal lottery tickets"); see also, e.g., Commonwealth v. Price, 4 A. 255 (1802) (holding solicitation under statute that defined as "willfully false combination or conspiracy, for the purpose of conveying, procuring, and settling, on certain kinds within the limits of the county, the possession, under a certain pretended title, so derived from the authority of the commonwealth, so as to entitle such conspiracies to violations of common law; Commu-
obstructions of the public highway. But the courts equally approved common law prosecutions for seditious libel, personal libel, obscenity, blasphemy, public profane swearing, and the

wealth v. Randolph, 25 A. 388 (Pa. 1882) (Colding submission to commit murder is a common law crime although libel to common hernia and adultery is not); in Northern Liberty lace Co., 13 Pa. 185, 190 (1859) (upholding statutory procedure to require fire company to close its doors because of rioting by the [fire] company, or [by them] otherwise).

Pennsylvania's early conspiracy law exempted in communication we would today regard as proceeds. E.g., Mifflin v. Commonwealth, 5 Wisn. & Serg. 2d (Pa. 1845) (upholding inaction for conspiring "to effect the escape of Jane M. Norris, an infant... with a view to her marriage"); Commonwealth v. Beiler, 3 Serg. & Raoul 9 (Pa. 1877) (upholding conspiracy indictment for color libelous language communicating means of German Evangelical Congregation to suppress the use of English in services); id. at 16 ("The defendants complain of the hardship of charging them with all the [440b] and seditious speeches of a few individuals. Such however is the law."); Commonwealth v. Wood, 3 Bom. 414 (Pa. 1818) (discussing conspiracy prosecution against journeyman printers).

The Supreme Court of Pennsylvania rejected free speech claims and upheld a nuisance prosecution against a defendant who "by means of violent, loud, and indecent language" "would not assemble and remain in the public highway" for a long space of time "to circulate among the men and boys, so that the streets were obstructed." Barker v. Commonwealth, 19 Pa. 412 (1852).

The Court subsequently emphasized in Fairbank v. Koe & Smith, 70 Pa. 56, 92 (1872), that it does not follow that "every one who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is thereby guilty of the indicium offence of nuisance." The act may be a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance as such. Such a stringent interpretation of the case of Barker is entirely suited to the genius of our people or to the character of their institutions. So the County of Allegheny v. Zappa-Lima, 59 Pa. 287 (1880) (holding plaintiff cannot claim that erection of a 40 foot theory pole in public street prior to election was a nuisance per se), id. at 294.

It is a custom sanctioned by a hundred years and inveterate with the traditions, manners and creed of a free people. . . . it does not occupy the street in such an extent or in such a manner that any person complained of it interfering with the public street.

Republica v. Dennis, 3 Vesey 267 (1807) (delineating prosecution for statement that "(a) democracy is scarcely tolerable at any period of rational history."). The Court charged the jury that a conviction required a finding that the statement was "sedulously, maliciously and sedulously at the construction" and that a privilege was available on a showing of "good motives and be available only." The jury acquitted.

Commonwealth v. Place, 20 A. 600, 601 (Pa. 1881) (criminal libel prosecution for newspaper story that "was such as to be scandalous to the morals of the public."); Commonwealth v. Duane, 1 Bibb 601 (1880) (prosecution for libeling Governor held unconstitutional, but suspended by 1889 statute barring indictment for that of public officials); see also Wood v. Boyle, 35 A. 823 (Pa. 1896) (upholding civil libel verdict in case brought after defendant had been acquitted on criminal libel charge).

See Byars v. Commonwealth, 19 Pa. 412, 413 (1855) (determining that prosecution for "openly and public speaking with a loud voice ... representing men and women is obscene and indecent offenses and indecent and should not be allowed to be done in public and have a "tenency ... to defame and corrupt the public morals"); see also Commonwealth v. Shapiro, 2 Serg. & Raoul 91, 1855/1856 (1815) (determining that painting, representing a man in obscene, impudent, and indecent posture with a woman, despite the absence of public display was indictable at common law, like an "indecent book"); id. ("What step is to corrupt society, held to be a breach of the peace and punishable."); The Pennsylvania Court continued to take the position that Shappol was good law through the middle of the twentieth century. See William Goldman
offense of being a "common scold." So, too, the common law's bar against interference with contractual and business relations were held to sanction the issuance of injunctions against strikes, labor organizing and picketing as "abuses" of Pennsylvania's guarantees of free communication and assembly.

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Justices Castle and Zeppala have recently taken the position that an even more protective state rule should be reflected in improved erotic dancing on the grounds that "[w]hispers may not categorically preclude any form of protected expression simply because they are not in the context of a Nolan's." Pa.'s A.M. v. City of Erie, 715 A.2d 175, 284 (Pa. 1996) (Castle, J., concurring in the result), rev'd on other grounds, 529 U.S. 277 (2000).

Upgrah v. Commonwealth, 94 S.C. & K. 194 (1894) (holding that blasphemy may be punishable, like cursing, swearing is public). Commonwealth v. Litt, 27 A. 463 (Pa. 1899) (prosecution dismissed because no sufficient allegation of swearing was heard by the public); see also at 844 ("It cannot be denied that the presence and bearing of citizens of the Commonwealth meeting and replying on the public streets . . . is an indicable offense.").

In Jones v. Commonwealth, 17 Serg. & Ride's 1, 2 (1825), the court declared constitutional, as a cruel and unusual punishment "revolting to human nature," the punishment of affixing written consent of being crowned scolds to being "plunged three times in the water" on a "corking stool." The court, however, despite some "hesitations" declared that "the offense of asinine insinuation" remained "punishable as a common nuisance, to first be by fine and imprisonment." Id. at 273. See also Commonwealth v. Muh, 52 Pa. 245 (1866) (upholding prosecution of "common scold" as a nuisance); id. at 274 ("to the unreasonableness of holding women liable to punishment for a too free use of their wit, it is enough to say that the common law, which is the express sanction of ages, adjures that it is not unreasonable.").

In re Turner, etc., of John F. B. et al., 10, 15 (1810) (the court declared unconstitutional, as cruel and unusual punishment "revolting to human nature," the punishment of affixing written consent of being crowned scolds to being "plunged three times in the water" on a "corking stool." The court, however, despite some "hesitations" declared that "the offense of asinine insinuation" remained "punishable as a common nuisance, to first be by fine and imprisonment." Id. at 273. See also Commonwealth v. Muh, 52 Pa. 245 (1866) (upholding prosecution of "common scold" as a nuisance); id. at 274 ("to the unreasonableness of holding women liable to punishment for a too free use of their wit, it is enough to say that the common law, which is the express sanction of ages, adjures that it is not unreasonable.").

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O'Neill v. Behrman, 37 A. 443 (Pa. 1897) (injunction against strikers who used "intimidation, intimidation, and duress").
Privileges were accorded in civil libel actions on the basis of "good motives" and "probable cause." This privilege and the broader constitutional mandate extended their protection primarily to sober addresses to the public on public topics, though more extreme statements could prevail before juries. In the early twentieth century, Pennsylvania courts began to evaluate limitations on free expression that diverged from the common law. In general, in the early years of the twentieth century, the Pennsylvania Supreme Court was as deferential to legislative constraints as to common law limitations. Legislative exercises of the police power were held consistent with the guarantees of free expression so long as the legislative determinations were "reasonable."
Pennsylvania's courts began to develop a more assertive approach to the protection of the rights of free expression during the 1950s, in the shadow of the United States Supreme Court's application of federal free speech principles to the states. In *Korne v. Adler*, the Pennsylvania Supreme Court unanimously affirmed that the right of labor unions to peacefully urge employees to withdraw from employment or to induce customers of hostile employers to withdraw their patronage was "secured to the citizen[s]" by Pennsylvania's free expression protections. Characterizing the guarantees of free speech as "absolute rights," the court held that "[h]aving this unquestioned right to present their case to the public in newspapers or circulars in a peaceful way, if the employer suffers loss from this peaceable assertion of rights, it is a damage without a remedy."

The constitutional guarantees were largely superseded in the labor area by statutory protection, and much subsequent litigation in the labor field turned on the construction of Pennsylvania's statutory protection in light of federal free speech jurisprudence. Pennsylvania's courts, however, continued to recognize that "[p]leasant picketing has been recognized as a form of assembly and of speech, and has been afforded the protection of . . . Article I, Section 7 of the Constitution of Pennsylvania," and that "[a] state cannot because of its own notions of the
wise limits of judicial discretion, either by legislative enactment or judicial determination, unduly limit the right of free speech.238 Outside the labor context the Pennsylvania Supreme Court continued to hold that "flora to persuade customers to withdraw their patronage were protected.239

The free speech analysis of Pennsylvania's high court in the mid-twentieth century in large measure tracked federal doctrine. Thus, in the area of film censorship, the invocation of 'ague and overbroad censorship schemes followed exclusively from federal precedents.'240 So, too, in responding to the anticommunist fervor of the 1950s, the Pennsylvania Supreme Court did not interpret Pennsylvania's free expression provisions to provide greater protection than their federal counterparts.241 While Pennsylvania's high court periodically declared the excesses of red-baiting repression,242 where it provided relief, the


239 In a democracy, so long as the communication in a labor controversy—or in any other type of speech due to differences in view—adopts action and does not resort to force, there exists the grandest of all checks against the invasions of the right of freedom of communication.

240 Wonthower v. Tram-Serv., 11 A.2d 147, 149 (Pa. 1955) ("[Ideas] cannot be made to suffer in damages for possessing against the censure of one who believes his message to be untruthful.").

241 See, e.g., Commonwealth v. Blumenfeld, 115 A.2d 257 (Pa. 1955) (holding that a statute was not applicable to the dissemination of material that was not obscene and did not constitute a misrepresentation).

242 The trend began with Allen v. American Legion Post No. 4, 121 A.2d 584 (Pa. 1956) (stating that a statute was violates the Constitution if it is not unconstitutionally limited).

243 See, e.g., Schenck v. United States, 249 U.S. 47 (1918) (defining speech to include the dissemination of ideas).
court relied on requirements of due process and fair procedure rather than the rights of free expression.

As the McCarthy era receded, the Pennsylvania's courts began to approach free expression cases with a somewhat greater degree of independence. In recent decades, the Pennsylvania cases have

See also Holt v. Unemployment Comp. Bd. of Rev., 157 A.2d 755, 758 (Pa. 1960) (asserting denial of due process to employee who was discharged over alleged insubordination); Matson v. Margiott, 18 A.2d 892, 899 (Pa. 1941) (asserting denial of due process to employee who was discharged over alleged insubordination).

The recent precedents of some high public officials to slander and mislead people who have laid out the chance to defend themselves or their reputation has shocked our nation out tiersily every respectable citizen would like to see the modifying and unpalatable character assassination by public officials and candidates for public office stopped or prevented.

See also Schlesinger, 172 A.2d 895 (Pa. 1961) (asserting denial of due process of Pennsylvania's nonunion public employees to worker discharged for refusal to work on Memorial Day); Commonwealth v. Trim, 45 A.2d 435 (Pa. 1945) (asserting denial of due process of Pennsylvania's nonunion public employees to worker discharged for refusal to work on Memorial Day); Commonwealth v. Murr interesting precedent set in Pennsylvania's nonunion public employees to worker discharged for refusal to work on Memorial Day); Commonwealth v. Murr interesting precedent set in Pennsylvania's nonunion public employees to worker discharged for refusal to work on Memorial Day).


See, e.g., William Goldman Theaters v. Zazz, 179 A.2d 59 (Pa. 1962) (holding that film censorship statute was unwise prior to 1965 under Article 4, Section 6 of the Pennsylvania Constitution).

Under the Pennsylvania constitution, the courts must be restrained from the actual probability of disruption (which is in justifiable limitations on expression. See e.g. Commonwealth v. Pittsburgh Press Co., 106 S. W. 657, 658 (Pa. 1940). Both are strong in advertising because if the absence of any showing that the limitation was "necessary in order to maintain harmony in the community" or the like.

Philadelphia Freedom v. District District 9 Inc. in Law's Machinists, 9 A.2d 86 (Pa. 1939) (holding that peaceful "showing of 4" has the right to make peace in the public interest of the constitutional guarantees").
regularly articulated a doctrine that allows the state to burden free expression only to the extent necessary to remedy demonstrated evils. In Insurance Adjustment Bureau v. Insurance Commissioner, the court announced that "Article I, Section 7, will not allow the ... restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished prudently in another, less intrusive manner." Reviewing a prohibition on solicitation by claim adjusters within twenty-four hours of a loss, the court concluded that the legitimate governmental goal of preventing overreaching by insurance adjusters "could be accomplished by enforcement, of civil, criminal and administrative remedies already in place." In regard to commercial speech, this "least restrictive alternative" requirement has been subsequently held to be limited to speech which is neither false nor misleading.

This approach is consonant with the constitutional language that makes a criminal subject to "responsibility for abuse of liberty," a requirement that the burden on free communication be no greater than necessary to avoid a demonstrated harm follows the linkage of "responsibility" to a particular "abuse." There is no reason to believe this "least restrictive alternative" analysis, which is sometimes more protective than First Amendment standards, is limited to commercial speech cases, since it seems clear that in terms of the concern for political and expressive liberty that underpin Pennsylvania's free expression jurisprudence, commercial speech is far from the core of protected expression.  

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50 See, e.g., Philadelphia Newspapers, Inc. v. Jerome, 897 A.2d 425, 458 (Pa. 2005) (stating that closure of trial is permissible where "the threat posed to the protected interest is serious" and the closure is "too much than is necessary to accomplish the end sought"); Pettini v. Tallie, 561 A.2d 956, 959 (Pa. 1989) (upholding order prohibiting civil contempt of 15 subpoenaed witnesses by warrants employed by policy quien because litigant is "too great than necessary to circumvent the substantive evil"); McNally v. Vordenbagh, 385 A.2d 885 (Pa. 1977) (upholding refusal to allow access to names of other recipients because of interest in privacy); see also id. at 897 ("The statutory limitation imposed on appellants' asserted First amendment rights to compel the disclosure . . . is no greater than necessary to prevent the substantial governmental and individual interests involved").

51 547 A.2d 1517, 1524 (Pa. 1988).

52 Commonwealth v. State Bd. of Physical Therapy, 728 A.2d 449 (Pa. 1999) (holding that allowing chiropractors to advertise as "physical therapists" is misleading), see id. at 545 ("[P]hysical therapy is not quackery or insufficiently regulated for public protection, where quackery is not misinterpretation of what we engaged to do analysis of whether, for purposes of the Pennsylvania Constitution, there were available less restrictive means by which the government could have accomplished its objective.")

The analysis of the court in Bridge v. Louisiana, 327 A.2d 715, 718 (Pa. 1974), concerning Pennsylvania's writings against not to impose liability for publication of intercepted communications obtained from court records after a motion to suppress had been denied, proceeded largely in terms of First Amendment values. However, for court's conclusion that "it cannot be said that the information . . . was presented by a state interest of the highest order" because
CONCLUSION

Two and a quarter centuries ago, Pennsylvania led the nation in establishing explicit constitutional guarantees of liberty of expression. In the intervening years, federal constitutional protections have also come to shelter the “free communication of thoughts and opinions.” Yet during this same time Pennsylvania’s courts have elaborated their own written guarantees into a fabric which both provides independent protection, and illuminates the underpinnings of free expression in a democratic society. It is well for both citizens and governors to acknowledge and respect that fabric; by setting it forth in some detail, it is my hope that this article renders that respect more likely and more practicable. By highlighting the independent resources with which the courts of Pennsylvania may work, perhaps the guarantees of 1776 will provide raw materials with which to continue to weave the protections for liberty in the twenty-first century.

note: citizens’ right to privacy does not extend to protecting a “right to privacy in illegal evidence” in violation of the tradition that infringement on freedom of the press is acceptable no further than is truly necessary to protect important state interests