

## First Amendment, Second Fiddle? Free Speech in New Hampshire's Constitution

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*When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people.<sup>1</sup>*

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1. State v. Ball, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983).

## I. INTRODUCTION

A car dealer in Concord, New Hampshire recently challenged the city zoning board's denial of its application to replace its existing readerboard (with manually changeable letters) with an electronic sign.<sup>2</sup> The dealer argued that the city's zoning ordinance, prohibiting "[s]igns which move or create an illusion of movement except those parts which solely indicate date, time, or temperature," constituted an unconstitutional restriction on free speech under the First Amendment.<sup>3</sup> The trial court agreed, but the New Hampshire Supreme Court reversed, applying the *Central Hudson* test<sup>4</sup> and finding that the ordinance reached no "broader than necessary to meet and advance [the city's] substantial interests of traffic safety and aesthetics."<sup>5</sup> Conspicuously absent from the dealer's argument, and thus from the state supreme court's opinion,<sup>6</sup> was any reference to Part I, Article 22 of the New Hampshire Constitution: "Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."

Carlson's Chrysler could have argued its case under the U.S. Constitution, the New Hampshire Constitution, or both.<sup>7</sup> By choosing to assert only federal constitutional rights, however, it passed up two advantages. First, free speech rights may be greater under Article 22 than the First Amendment. Second, had Carlson's Chrysler prevailed in the state supreme court based on Article 22, the city would have been unable to appeal to the U.S. Supreme Court.<sup>8</sup> Moreover, had Carlson's Chrysler asserted its free

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2. See Carlson's Chrysler v. City of Concord, 156 N.H. 399, 938 A.2d 69 (2007).

3. *Id.* at 400–01, 938 A.2d at 70–71. The electronic sign standing outside the Carlson's Chrysler dealership today displays only the time and temperature.

4. The U.S. Supreme Court established a four-factor test for evaluating the constitutionality of commercial speech regulations in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). Carlson's Chrysler failed to challenge the zoning ordinance's effects on noncommercial speech, which might have called for a different test of constitutionality. *Carlson's Chrysler*, 156 N.H. at 406, 938 A.2d at 75 (Duggan, J., concurring).

5. *Carlson's Chrysler*, 156 N.H. at 405, 938 A.2d at 74.

6. *Cf.* Appeal of Sutfin, 141 N.H. 732, 734, 693 A.2d 73, 74 (1997) ("The respondent does not argue that the board's decision violated his commercial speech rights under the State Constitution; consequently, we confine our analysis to the first amendment to the Federal Constitution as applied to the States through the fourteenth amendment." (quotation omitted)).

7. "A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice." *State v. Jewett*, 500 A.2d 233, 234 (Vt. 1985) (quoting Oregon Supreme Court Justice Hans Linde, in *Welsh & Collins, Taking State Constitutions Seriously*, 14 THE CENTER MAG. 6, 12 (Sept./Oct. 1981)).

8. See *Michigan v. Long*, 463 U.S. 1032 (1983) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935))).

speech rights under both constitutional provisions and lost, it still would have been entitled to appeal to the U.S. Supreme Court.<sup>9</sup>

This note explores the meaning of the free speech provision in Article 22 of the New Hampshire Bill of Rights,<sup>10</sup> added in 1968—specifically, whether it should be interpreted to afford greater protection than the First Amendment. Part I briefly discusses the relationship between Article 22 and the First Amendment in light of *Michigan v. Long*<sup>11</sup> (defining the U.S. Supreme Court's approach to state supreme court judgments) and *State v. Ball*<sup>12</sup> (the New Hampshire Supreme Court's response to *Long*). Part II traces the origin of Article 22 as originally adopted as well as its modern free speech provision, and offers an overview of the existing body of relevant case law. Part III explores the meaning of free speech in Article 22 based on the text and history of the original article and the 1968 amendment, analogy to the liberty of the press and other constitutional rights, and relevant interpretations by other state courts. In Part IV, I conclude that the New Hampshire Supreme Court's commitment to the primacy of state constitutional protections, together with the strong language of the provision and persuasive authority from both the New Hampshire Supreme Court and other state courts, supports a robust independent jurisprudence for free speech under Article 22.

## II. STATE VS. FEDERAL FREE SPEECH PROTECTION

Renewed vigor in state constitutional law is commonly traced to 1972, when the California Supreme Court declared the death penalty unconstitutional based on its state constitution's prohibition of cruel or unusual punishment.<sup>13</sup> In a 1975 dissent,<sup>14</sup> and in an article published in 1977, U.S.

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9. The U.S. Supreme Court, of course, would have jurisdiction only over the interpretation of the First Amendment, and not Article 22. See generally *Bush v. Gore*, 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting) (cataloguing the Supreme Court's deference to state court interpretations). But since the First Amendment as incorporated to the states imposes a minimum standard (or "floor") of constitutional protection, the Supreme Court's review could yield the desired relief.

10. N.H. CONST. pt. I, art. 22. Following John Adams's design of the Massachusetts Constitution, the New Hampshire Constitution begins with its Bill of Rights. See generally *State v. Tapply*, 124 N.H. 318, 324, 470 A.2d 900, 904–05 (1983); *Wooster v. Plymouth*, 62 N.H. 193, 195–201 (1882) (discussing at length the function of the New Hampshire Bill of Rights).

11. 463 U.S. 1032 (1983).

12. 124 N.H. 226, 471 A.2d 347 (1983).

13. Robert F. Williams, *The Third Stage of New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 213 (2003) (describing *People v. Anderson*, 493 P.2d 880 (Cal. 1972), as "probably the most important early case" in the rise of New Judicial Federalism). But see Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are a Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529, 1530 n.6 (1998) (suggesting that state constitutional jurisprudence arose directly from "multiple state supreme courts who continued to engage in state constitutional adjudication in spite of the nearly overpowering judicial activism of the Warren Court.").

Supreme Court Justice Brennan advocated that state courts take similar steps to protect individual rights through expansive readings of state constitutional provisions.<sup>15</sup> In 1983, the U.S. Supreme Court issued a landmark decision defining when it will and will not review state constitutional judgments.<sup>16</sup> It had long been established that state high court judgments supported by independent state grounds are not reviewable by the U.S. Supreme Court,<sup>17</sup> regardless of analysis under federal precedent, but *Michigan v. Long* put the burden on state courts to “make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.”<sup>18</sup> At the time, *Long* was criticized as a federal encroachment into state authority (most forcefully by Justice Stevens, in his dissent), but by clarifying the way for state supreme courts to make unreviewable judgments based on their own state constitutions, it may have actually spurred development of independent state constitutional law.

The New Hampshire Supreme Court quickly heeded the U.S. Supreme Court’s guidance, releasing an opinion with a “plain statement” only months later, in *State v. Ball*.<sup>19</sup> *Ball* also marked the state high court’s adoption of the “primacy” approach, which entails analyzing state constitutional provisions before their federal counterparts, in order to give them their due consideration, but also to preclude federal review where possi-

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14. *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

15. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

16. In *Long*, the Supreme Court emphasized its duty to avoid issuing advisory opinions, which would exist where the Court reverses a state supreme court’s interpretation of the U.S. Constitution, only to have the same result reached under the state constitution on remand. 463 U.S. at 1040–42; Charles G. Douglas, Jr., *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1142 (1978) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945)).

17. That state courts’ interpretations of their own constitutions are generally immune from review by the U.S. Supreme Court has long been established, despite the Supreme Court’s general power to take appeals from state supreme courts. See *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (“Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.”); *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874). The U.S. Supreme Court’s respect for state constitutional determinations complements its prudential standing rules and the doctrine of constitutional avoidance. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring):

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. . . . Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

18. 463 U.S. at 1041. The Court added, “If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.” *Id.*

19. Justice Douglas of the New Hampshire Supreme Court was already an advocate and scholar of independent state constitutional jurisprudence and the primacy approach several years before *Ball*. See Douglas, *supra* note 16, at 1142, 1146.

ble.<sup>20</sup> By 1986, New Hampshire had already invoked *Ball's* plain statement in over a dozen cases,<sup>21</sup> and at least three other states had followed the same course of analyzing state constitutional claims first.<sup>22</sup>

Practitioners raising constitutional free speech issues participate in a circular problem. Having little guidance from the state supreme court regarding the meaning of a state free speech provision apart from parallel federal analysis, attorneys themselves can do little more than cite federal precedents.<sup>23</sup> This in turn leaves the state supreme court with little guidance on how it might be able to depart from federal precedent.<sup>24</sup> Further-

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20. The primacy approach was recently described by the New Hampshire Supreme Court in a seizure case under the Fourth Amendment and New Hampshire's parallel provision:

Since *State v. Ball*, we have consistently followed the "primacy" approach to adjudication of constitutional issues. This means that when a defendant specifically invokes the State Constitution, we will consider those constitutional claims before addressing federal claims. Nonetheless, decisions from the United States Supreme Court are important in our State constitutional analysis. We scrutinize these decisions and, if they are logically persuasive and well reasoned, paying due regard to precedent and policies underlying specific constitutional guarantees, such decisions may properly claim persuasive weight as guideposts when interpreting State constitutional guarantees.

*State v. Beauchesne*, 151 N.H. 803, 807, 868 A.2d 972, 975-76 (2005).

21. *Delaware v. Van Arsdall*, 475 U.S. 673, 704 (1986) (Stevens, J., dissenting). *Ball* not only expressed the plain statement prescribed by *Long*, but attempted to prospectively insulate state constitutional interpretations from federal review: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." *Ball*, 124 N.H. at 233, 471 A.2d at 352. Such a blanket disclaimer may be ineffective, given the Supreme Court's "stated reluctance to look beneath or beyond the very state-court opinion at issue in order to answer the jurisdictional question . . ." *Arizona v. Evans*, 514 U.S. 1, 33 (1995) (Ginsburg, J., dissenting).

22. *Van Arsdall*, 475 U.S. at 702 (Stevens, J., dissenting). The primacy approach was championed by Justice Hans Linde of the Oregon Supreme Court. See Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); see also *State v. Kennedy*, 666 P.2d 1316, 1318-23 (Or. 1983) (Linde, J.) (discussing at length the importance of addressing state constitutional claims).

Some other states apply the "interstitial" approach. "Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined." *State v. Lujan*, 175 P.3d 327, 329 (N.M. 2007) (quoting *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997)).

23. Cf. Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 583 (1986) (discussing *State v. Jewett*, 500 A.2d 233, 234 (Vt. 1985), in which the Vermont Supreme Court ordered supplemental briefs to help it address the state constitutional issue).

24. Justice Souter, for one, has highlighted the important role of litigants:

It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. *If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.*

*State v. Bradberry*, 129 N.H. 68, 82-83, 522 A.2d 1380, 1389 (1986) (Souter, J., concurring) (emphasis added).

more, post-*Long*, state supreme courts have a straightforward framework for analyzing state provisions first, in light of federal precedents, while making clear that the latter are cited merely as an analytical aid. When dealing with state provisions interpreted to be at least as strong as their federal counterparts, the state supreme court will never need to conduct separate state and federal analyses.<sup>25</sup> Consequently, when the court's dispositive state analysis relies on federal case law, the practitioner is left with no indication as to how parallel state and federal provisions might be interpreted differently.

For a strong independent free speech jurisprudence to take hold in New Hampshire, the state supreme court will have to break this cycle, perhaps with the aid of a motivated litigant able to ground interpretation of Article 22 firmly outside of federal precedents.<sup>26</sup> This note seeks to provide such a foundation for the independent interpretation of free speech in Article 22 of the New Hampshire Constitution.

### III. THE HISTORY OF ARTICLE 22 AND ITS FREE SPEECH PROVISION

New Hampshire's constitution, as enacted in 1784, included no general guarantee of free speech.<sup>27</sup> In addition to the free press provision in Article 22, it included (and continues to include) a speech and debate clause for legislators<sup>28</sup> and the right to peaceably assemble and petition for redress of

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25. See, e.g., *State v. Allard*, 148 N.H. 702, 706, 813 A.2d 506, 510 (2002) ("Because our State Constitution provides at least as much protection as the Federal Constitution, we decide this case under State law only, considering cases from the federal courts only as an analytical aid."). Moreover, where a state constitutional right is at least as strong as the corresponding federal right, the state constitutional analysis will be dispositive regardless of whether the court finds in favor of the party invoking the constitutional right. For example, in *HippoPress, LLC v. SMG*, 150 N.H. 304, 312, 837 A.2d 347, 356 (2003), the court found no state action as required for a violation of Article 22, and declined to pursue a separate First Amendment analysis "[b]ecause the Federal Constitution affords HippoPress no greater protection than does the State Constitution under these circumstances . . ."). Where the party asserting the state constitutional right prevails in state court, the U.S. Supreme Court will decline review under *Michigan v. Long*. Where the party asserting the state constitutional right loses in state court, and where the federal right is in fact no stronger than its state counterpart, the U.S. Supreme Court will not be able to provide relief.

26. See generally Donna M. Nakagiri, *Developing State Constitutional Jurisprudence after Michigan v. Long: Suggestions for Opinion Writing and Systemic Change*, 1998 DET. C.L. MICH. ST. U. L. REV. 807 (1998).

27. Prior to the 1968 amendment, Part I, Article 22 read: "Liberty of the Press is essential to the security of freedom in a State: It ought therefore to be inviolably preserved." The earliest copies employed a semicolon rather than a colon.

28. N.H. CONST. pt. I, art. 30 ("The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.")

grievances.<sup>29</sup> The New Hampshire Constitution's open government provision, amended in 1976 to provide that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted," has also been read in tandem with Article 22 to protect publication of government records.<sup>30</sup> Although understanding these provisions may be critical to resolving certain types of free speech cases, they are beyond the scope of this note.

The 1964 New Hampshire Constitutional Convention yielded several proposed amendments, including the free speech amendment to Article 22, which was presented to the voters in 1968. Garnering nearly 87% support, the amendment was, at the time, one of the most popular ever considered by New Hampshire voters.<sup>31</sup> Among the eleven states which adopted charters during the Revolutionary War, nine included liberty of the press, two also included free speech, and only two mentioned neither.<sup>32</sup> New Hampshire was not unique in adding free speech to its press clause, and today all fifty state charters recognize free speech and press.<sup>33</sup>

#### A. *Origin of the Language*

There is little doubt that New Hampshire's constitution, as proposed in 1783 and ratified in 1784,<sup>34</sup> was based on the 1780 Massachusetts Constitution.<sup>35</sup> Massachusetts's Article 16 originally read: "The liberty of the

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29. N.H. CONST. pt. I, art. 32 ("The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.")

30. N.H. CONST. pt. I, art. 8; see *Associated Press v. State*, 152 N.H. 120, 127–29, 888 A.2d 1236, 1244–45 (2005).

31. See *Bennett v. Thomson*, 116 N.H. 453, 461–63, 363 A.2d 187, 193 (1976) (Kenison, C.J., dissenting). For comparison, the 2006 amendment (now Part I, Article 12-a) to prohibit eminent domain for private use received 85.66% support. In New Hampshire, an amendment needs to garner two-thirds of the vote in order to be adopted. N.H. CONST. pt. II, art. 100.

32. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 464, 465 n.64 (1983).

33. Massachusetts added free speech to Article 16 of its declaration of rights in 1948. Virginia's constitution first forbade the legislature from abridging "the freedom of speech" in its 1830 constitution, but the protection was not added to free press in the bill of rights until the entire constitution was revised in 1971. JOHN J. DINAN, *THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 60 (2005). Maryland's constitution of 1776 originally declared "[t]hat the liberty of the press ought to be inviolably preserved." Its declaration of rights, as adopted in 1867, added this language: "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 45 (2005).

34. 9 N.H. STATE PAPERS 896, 901 (Nathaniel Bouton ed., 1875).

35. See *In re Opinion of the Justices*, 78 N.H. 617, 618, 100 A. 49, 50 (1917) ("The New Hampshire Bill of Rights is mainly a copy of the Massachusetts Bill of 1780 . . ."); SUSAN E. MARSHALL, *THE NEW HAMPSHIRE STATE CONSTITUTION: A REFERENCE GUIDE* 85 (2004); LYNN WARREN TURNER, *THE NINTH STATE: NEW HAMPSHIRE'S FORMATIVE YEARS* 28 (1983).

press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth.”<sup>36</sup> Although the structure of Article 22 follows Massachusetts’s original Article 16, New Hampshire’s convention opted for stronger language: “to be inviolably preserved” rather than “not . . . to be restrained . . . .” This divergent language was not new, however, having been employed in Maryland’s 1776 Declaration of Rights,<sup>37</sup> and subsequently with minor variations in the Delaware Declaration of Rights (1776)<sup>38</sup> and South Carolina Constitution (1778).<sup>39</sup>

John Adams drafted the Massachusetts Constitution, probably including Article 16,<sup>40</sup> but almost none of the wording from Adams’s draft of the Massachusetts free press provision made it into Part I, Article 22 of the New Hampshire Constitution.<sup>41</sup> The wording of the free press article generated by his drafting subcommittee matched that from the 1776 Pennsylvania and 1777 Vermont Declarations of Rights: “The people have a right to the freedom of speaking, writing, and publishing their sentiments. The liberty of the press, therefore, ought not to be restrained.”<sup>42</sup> The Massa-

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36. MASS. CONST. pt. I, art. 16 (1780). In 1948, a second sentence was added: “The right of free speech shall not be abridged.” *Id.* amend. art. 77.

37. MD. DECL. OF RTS. art. 40 (1776) (“That the liberty of the press ought to be inviolably preserved.”). The article now includes a second sentence. MD. DECL. OF RTS. art. 40 (“That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.”).

38. DEL. DECL. OF RTS. § 23 (1776) (“That the liberty of the press ought to be inviolably preserved.”). The Delaware Constitution was subsequently revised by convention in 1792, resulting in a very different free press clause. RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE* 25–26 (2002); *see* DEL. CONST. art. I, § 5.

39. S.C. CONST. art. 43 (1778) (“That the liberty of the press be inviolably preserved.”); *cf.* GA. CONST. art. 61 (1777) (“Freedom of the press and trial by jury to remain inviolate forever.”). Neither the South Carolina or Georgia constitutions still employ this same language. *See* S.C. CONST. art. I, § 2; GA. CONST. art. I, § I, para. 5.

40. John Adams, with Samuel Adams and James Bowdoin, served on a subcommittee in the 1779 Massachusetts Constitutional Convention assigned to draft the document. “[T]he other two picked [John] Adams to draw up the state’s constitution.” DAVID MCCULLOUGH, *JOHN ADAMS* 220 (2002); *see* RONALD M. PETERS, *THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT* 21 (1978).

41. Regarding the shorter article adopted by the Massachusetts convention, “Much objection was made to it, among the people, as insufficient.” 4 *THE WORKS OF JOHN ADAMS* 227 n.2 (Charles Francis Adams ed., 1865); *see also* CLYDE AUGUSTIS DUNIWAY, *THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS* 133, 134–36 (1906) (discussing the various objections and alternate proposals during ratification of the Massachusetts Constitution).

42. DUNIWAY, *supra* note 41, at 133 (citing 4 *THE WORKS OF JOHN ADAMS*, *supra* note 41, at 227); MCCULLOUGH, *supra* note 40, at 221; PETERS, *supra* note 40, at 21. Pennsylvania and Vermont were unique among the early states in their embrace of freedom of expression beyond the press. Both states’ constitutions also contained an additional press clause, apart from the one in their Declarations of Rights: “The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.” Anderson, *supra* note 32, at 465 (citing BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 273 (1971)). The absence of free speech from other states’ constitutions did not pass without notice, however. For example, in Massachusetts, Boston proposed the following language in place of Article 16: “The Liberty of Speech and of the Press with respect to publick men and their Publick Conduct and Publick Measures, is essential to

achusetts convention substantially abridged Adams's language, stripping out any reference to free speech.<sup>43</sup> New Hampshire's Article 22 should be viewed as a combination of the final Massachusetts preamble ("essential to the security of freedom in a state") and Maryland's command ("ought to be inviolably preserved"). Unfortunately, no records from New Hampshire's original constitutional conventions or ratification procedures remain.<sup>44</sup>

## B. *Free Speech Case Law in New Hampshire*

### 1. *Pre-1968*

Free speech litigation in New Hampshire prior to 1968 is relatively sparse, but New Hampshire spawned a pair of landmark precedents regarding free speech under the First Amendment. In *Cox v. New Hampshire*,<sup>45</sup> the U.S. Supreme Court affirmed the state supreme court's ruling, establishing that a state's broad police powers allow time, place, and manner restrictions on speech consistent with the First Amendment.<sup>46</sup> The U.S. Supreme Court again affirmed the state supreme court a year later in *Chaplinsky v. New Hampshire*,<sup>47</sup> which established the "fighting words" exception to the First Amendment based on a Jehovah's Witness who was ar-

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the Security of Freedom in a State and shall not therefore be restrained in their Common Wealth." A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON CONTAINING THE BOSTON TOWN RECORDS, 1778 TO 1783, at 128 (1895). Foreshadowing New Hampshire's approach nearly 200 years later, the town of Westford, Massachusetts proposed replacing the first clause with "the Liberty of the press and of speech are essential to the Security of Freedom in a State." EDWIN R. HODGMAN, HISTORY OF THE TOWN OF WESTFORD 141 (1883).

43. The result was closer in form to a 1768 resolution passed by the Massachusetts House of Representatives: "The Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it." LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 69 (1960). The resolution was adopted (by a vote of 56 to 18) following an attempt by Governor Bernard to crack down on the *Boston Gazette*, a pro-independence paper which he described as "an infamous weekly paper which has swarmed with Libells of the most atrocious kind." 5 FREDERIC HUDSON ET AL., AMERICAN JOURNALISM, 1690-1940, at 75 (2000); accord JOSEPH WARREN, THE HUNDRED BOSTON ORATORS APPOINTED BY THE MUNICIPAL AUTHORITIES AND OTHER PUBLIC BODIES 53 (1853).

44. See TURNER, *supra* note 35, at 21.

45. 312 U.S. 569 (1941) (affirming *State v. Cox*, 91 N.H. 137, 16 A.2d 508 (1940)).

46. For a compelling argument that viewing states as endowed with plenary police powers undermines respect for state constitutions and individual rights, see Richard B. Sanders & Barbara Mahoney, *Restoration of Limited State Constitutional Government: A Dissenter's View*, 59 N.Y.U. ANN. SURV. AM. L. 269, 269 (2003). Under New Hampshire's constitution, which vests the legislature with "full power and authority . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions," the advocated approach is likely a distinction without a difference. N.H. CONST. pt. II, art. 5.

47. 315 U.S. 568 (1942) (affirming *State v. Chaplinsky*, 91 N.H. 310, 18 A.2d 754 (1941)). Walter Chaplinsky was also a defendant in *Cox*, which considered a permit requirement for parades. See *Cox*, 91 N.H. at 137, 16 A.2d at 508.

rested after calling a police officer “a goddamned racketeer” and “a damned fascist.”<sup>48</sup> The New Hampshire Supreme Court has reaffirmed *Cox* several times.<sup>49</sup>

## 2. *Post-1968*

After the adoption of the 1968 free speech amendment, recognition of the new provision by the courts came very slowly.<sup>50</sup> The first free speech case, *State v. Hoskin*, reached the state supreme court in 1972 following two convictions for obscuring the “Live Free or Die” motto on the New Hampshire license plate.<sup>51</sup> The Superior Court transferred “the questions of law presented by the contentions of the defendants that imposition of criminal liability for their conduct exceeds the police power of the State, and that if construed to impose liability the statute violates rights guaranteed to the defendants by the State and Federal Constitutions.”<sup>52</sup> Yet neither the parties’ briefs nor the court’s opinion invoked the state constitution, relying only on the First and Fourteenth Amendments.<sup>53</sup> The court swiftly rejected the defendants’ federal free speech argument, concluding that the required display of the state motto was not unconstitutionally compelled speech.

After another New Hampshire defendant faced three convictions under the law upheld in *Hoskin*, he and his wife brought an action for declaratory and injunctive relief in federal district court to protect against future convictions.<sup>54</sup> The district court accepted their argument (which substantially matched the one rejected in *Hoskin*) and issued “an order enjoining the

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48. *Chaplinsky*, 315 U.S. at 574. Notably, in 1987 the Oregon Supreme Court rejected *Chaplinsky*’s support for the obscenity exception to free speech rights, finding that the state provision did not contemplate such an exception. See *State v. Henry*, 732 P.2d 9, 14–15 (Or. 1987). For a critique of the Oregon high court’s historical analysis, see Daniel R. Barnhart, *The Oregon Bill of Rights and Obscenity: How Jurisprudence Confounded Constitutional History*, 70 OR. L. REV. 907 (1991).

49. *State v. Harvey*, 108 N.H. 139, 140–41, 229 A.2d 176, 177–78 (1967); *State v. Poulos*, 97 N.H. 53, 53, 88 A.2d 860, 861 (1952); *State v. Derrickson*, 97 N.H. 91, 93–94, 81 A.2d 312, 313–14 (1951).

50. Massachusetts’s recognition of its 1948 free speech amendment came even more slowly, however, with the first citation by the Supreme Judicial Court not occurring until 1972. *First Nat’l Bank of Boston v. Att’y Gen.*, 290 N.E.2d 526, 536 (Mass. 1972).

51. *State v. Hoskin*, 112 N.H. 332, 332, 295 A.2d 454, 455 (1972).

52. *Id.* at 332, 295 A.2d at 455.

53. See *id.* at 334–36, 295 A.2d at 456–57 (distinguishing the instant case from *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). The defendants argued that the statute only pertained to the “identifying letters and figures” on the plates, that construing the statute more broadly brought it beyond the state’s police power, that they had been denied equal protection under the Fourteenth Amendment, and that “prosecution of the defendants . . . infringes upon the right . . . to freedom of speech as guaranteed in the First and Fourteenth Amendments of the United States Constitution.” Brief for Defendants at i, *State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972) (No. 6354).

54. *Wooley v. Maynard*, 430 U.S. 705, 707–09 (1977). Given the recent state supreme court precedent, it’s not surprising that the Maynards’ ACLU attorney elected to pursue the case in federal court.

State ‘from arresting and prosecuting [The Maynards] at any time in the future for covering over that portion of their license plates that contains the motto ‘Live Free or Die.’”<sup>55</sup> Following the State’s appeal, the U.S. Supreme Court affirmed, finding that the state’s interest in vehicle identification could be “more narrowly achieved,” and that “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”<sup>56</sup>

A year after *Hoskin*, in 1973, the New Hampshire Supreme Court finally had occasion to recognize the existence of Article 22’s new free speech provision. In upholding the state’s “mob action” statute against vagueness and overbreadth challenges, the Court acknowledged that Article 22, along with Article 32<sup>57</sup> and the First and Fourteenth Amendments, “guarantee[s] the freedom of assembly and expression.”<sup>58</sup> In a 1974 case, the defendant raised, and thus the court addressed, the definition of obscenity under only the federal Constitution.<sup>59</sup> The following year, the state House of Representatives sought an opinion of the justices<sup>60</sup> regarding the constitutionality—under both the state and federal constitutions—of a proposed ban on schoolbooks containing obscenities.<sup>61</sup> Again, the state supreme court discussed the definition of obscenity under federal case law only.<sup>62</sup>

The prospects for free speech rights under Article 22 started to change in 1976, thanks to Chief Justice Kenison.<sup>63</sup> The state director of resources

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55. *Id.* at 709.

56. *Id.* at 716–17. The state interests rejected by the U.S. Supreme Court had been accepted by the state supreme court in *Hoskin*, 112 N.H. at 335, 295 A.2d at 456 (“We cannot say that the legislature could not reasonably find that display of the State motto in the manner required would promote the general welfare by encouraging State pride and individualism through this reminder of its heritage.”).

57. N.H. CONST. pt I, art. 32, quoted *supra* note 29, includes the right to petition.

58. *State v. Albers*, 113 N.H. 132, 137, 303 A.2d 197, 201 (1973).

59. *State v. Harding*, 114 N.H. 335, 342–43, 320 A.2d 646, 652 (1974) (upholding New Hampshire’s ban on the sale of obscene material, but ordering dismissal of prosecutions based on lack of fair warning to the defendants that the materials in question were obscene).

60. Unlike the U.S. Supreme Court, the New Hampshire Supreme Court is authorized to issue advisory opinions regarding “important legal questions pending in, and awaiting consideration and action by, the body entitled to the advice in the course of its duty.” Opinion of the Justices, 115 N.H. 329, 330, 340 A.2d 112, 114 (1975). “Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.” N.H. CONST. pt. II, art. 74.

61. Opinion of the Justices, 115 N.H. 226, 226, 337 A.2d 777, 777 (1975).

62. *Id.* at 227, 337 A.2d at 778 (finding the proposed law “of doubtful constitutionality”).

63. Chief Justice Kenison was undoubtedly familiar with free speech rights, having represented the state before the U.S. Supreme Court in *Cox and Chaplinsky*. The attorney for the Governor and Executive Council in *Bennett v. Thomson*, David Brock, later became Chief Justice of the New Hampshire Supreme Court. 116 N.H. 453, 363 A.2d 187 (1976). Justice Souter represented the state as Attorney General in *Wooley v. Maynard*, before being appointed to the state and then the federal Supreme Court.

and economic development was asked to resign after publicly criticizing Governor Thomson's support for a pulp mill in the Upper Connecticut River Valley.<sup>64</sup> He petitioned directly to the state supreme court, arguing, inter alia, that his discharge violated his free speech rights under both the state and federal constitutions.<sup>65</sup> As might have been expected, the New Hampshire Supreme Court's majority opinion completely ignored the state constitution in analyzing the free speech rights of public employees.<sup>66</sup> In dissent, however, Chief Justice Kenison included the court's longest-ever discussion of free speech under Article 22, a single paragraph dedicated to the adoption of the 1968 amendment.<sup>67</sup> Kenison failed to elaborate on the significance of Article 22, simply declaring that "[t]he constitutional command of the New Hampshire constitution and the first amendment to the United States Constitution does not permit the discharge of the plaintiff from State service on the grounds of insubordination in the circumstances of this case."<sup>68</sup> Justice Grimes also dissented on constitutional grounds and mentioned Article 22, but he analyzed public employee free speech under federal case law only.<sup>69</sup> Even though neither Justice Kenison nor Justice Grimes articulated an independent approach to free speech under Article 22, it would be twenty years before any free speech litigant before the New Hampshire Supreme Court would again fail to raise Article 22.<sup>70</sup>

Today, there are still no New Hampshire Supreme Court opinions indicating that free speech rights under Article 22 are stronger than under the First Amendment, but the door remains open.<sup>71</sup> Twice the Court has used the phrase "at least as much protection" to describe the extent of Article 22's protection relative to the First Amendment's.<sup>72</sup> In each case, the Court fit the characterization into its *Ball* plain statement, obviating the

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430 U.S. 705 (1977). Current New Hampshire Supreme Court Justice Duggan represented the defendant in *State v. Nickerson*. 120 N.H. 821, 424 A.2d 190 (1980).

64. *Bennett*, 116 N.H. at 454–56, 363 A.2d at 188–89.

65. *Id.* at 456, 363 A.2d at 189; see also Jurisdictional Statement of Appellant at \*12, *Bennett*, 429 U.S. 1082 (1977) (No. 76-744).

66. *Bennett*, 116 N.H. at 456–60, 363 A.2d at 189–92 ("Bennett contends that his discharge on the basis of remarks made by him on matters of public concern violates his constitutional right to freedom of speech guaranteed by the first amendment to the Constitution of the United States.").

67. *Id.* at 462, 363 A.2d at 193 (Kenison, C.J., dissenting).

68. *Id.*

69. *Id.* at 462–65, 363 A.2d at 193–95 (Kenison, C.J., and Grimes, J., dissenting) (applying *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

70. Several notable free speech opinions came down in the interim, including *State v. Nickerson*, striking down the state's disturbing the peace statute for overbreadth. 120 N.H. 821, 825, 424 A.2d 190, 193 (1980).

71. *But see* Opinion of the Justices, 121 N.H. 434, 436, 430 A.2d 191, 193 (1981) (indicating that "the New Hampshire Constitution guarantees the same right to free speech and association" as the First Amendment in the context of campaign contribution restrictions).

72. *State v. Allard*, 148 N.H. 702, 706, 813 A.2d 506, 510 (2002) (Duggan, J.); *Appeal of Booker*, 139 N.H. 337, 340, 653 A.2d 1084, 1086 (1995) (Brock, C.J.).

need for any interpretation of the First Amendment.<sup>73</sup> In each case, however, the court proceeded to analyze the contested free speech rights—employee speech and the right to make false statements to police officers—almost exclusively in light of federal case law.

#### IV. THE MEANING OF FREE SPEECH IN ARTICLE 22

Judges and scholars have advocated a variety of approaches to state constitutional interpretation, including textual analysis, reliance on binding precedents and dicta, federal precedents, sister state opinions, historical analysis, and policy concerns.<sup>74</sup> The New Hampshire Supreme Court has employed each of these approaches, but puts a particularly strong emphasis on original textual meaning: “When interpreting a constitutional provision, ‘we will look to its purpose and intent, bearing in mind that we will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.’”<sup>75</sup> The meaning of constitutional text must be discerned in light of the circumstances surrounding its adoption.<sup>76</sup> In the case of constitutional liberties, the historical understanding of a right prior to, during, and shortly following its enshrinement in the bill of rights has also received extensive treatment in some opinions.<sup>77</sup> In cases where the history of adoption is unavailable, the court may look to the U.S.

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73. “Because our State Constitution provides at least as much protection as the Federal Constitution, we decide this case under State law only, considering cases from the federal courts only as an analytical aid.” *Allard*, 148 N.H. at 706, 813 A.2d at 510. Recently, the Court found the federal precedent dispositive with regard to simulated child pornography, so it abandoned the primacy approach in favor of addressing the First Amendment first:

[T]he defendant raises his claims under both the State and Federal Constitutions. Our settled rule is to first address the defendant’s claims under the State Constitution, and cite federal opinions for guidance only. Here, however, because United States Supreme Court precedents compel us to hold that criminalizing the defendant’s mere possession of the images in question violates his First Amendment rights, and because we are required to follow federal constitutional law, an analysis under the State Constitution is unnecessary. We therefore decide this case under the First and Fourteenth Amendments to the Federal Constitution.

*State v. Zidel*, 156 N.H. 684, 686, 940 A.2d 255, 257 (2008). As noted above, under *Long*, this opens up the possibility of federal review.

74. See Robert I. Berdon, *An Analytical Framework for Raising State Constitutional Claims in Connecticut*, 14 QUINNIPIAC L. REV. 191, 204 (1994) (state supreme court justice listing six approaches for arguing state constitutional claims identified in *State v. Geisler*, 610 A.2d 1225 (Conn. 1992)).

75. *In re Below*, 151 N.H. 135, 139, 855 A.2d 459, 464 (2004) (quoting Opinion of Justices, 126 N.H. 490, 495, 494 A.2d 261, 267 (1985)); accord *Grinnell v. State*, 121 N.H. 823, 826, 435 A.2d 523, 525 (1981) (citing *Keniston v. State*, 63 N.H. 37, 37–38 (1884)).

76. *Warburton v. Thomas*, 136 N.H. 383, 386–87, 616 A.2d 495, 497–98 (1992) (citing Att’y Gen. v. Morin, 93 N.H. 40, 43, 35 A.2d 513, 514 (1943)) (recounting the history of Part II, Article 44).

77. See, e.g., *In re Estate of Dionne*, 128 N.H. 682, 684–85, 518 A.2d 178, 179 (1986) (turning to Magna Carta for the meaning of the right to free justice).

Supreme Court or other state courts to illuminate the meaning of a particular term or provision, particularly where the language is identical.<sup>78</sup>

### A. *Textual Meaning*

The text of Article 22 provides a useful starting point<sup>79</sup> and framework for its analysis.

#### 1. “essential to the security of freedom in a state”

As the New Hampshire Supreme Court has observed, “Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting.”<sup>80</sup> Yet this description probably understates the meaning of Article 22’s justification clause. The liberty of the press does not merely foster effective self-government—more importantly, it protects other freedoms by helping to prevent the rise of despotism.<sup>81</sup>

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78. See, e.g., *In re Juvenile* 2003-195, 150 N.H. 644, 650, 843 A.2d 318, 324 (2004) (citing to the Massachusetts Supreme Judicial Court to aid in interpreting New Hampshire’s identical confrontation clause); *Warburton*, 136 N.H. at 390, 616 A.2d at 499 (“Early constitutional interpretation is entitled great weight in determining the framers’ intent, especially when the framers later serve in one of the branches of government.”); *State v. Pinder*, 128 N.H. 66, 71–73, 514 A.2d 1241, 1244–1246 (1986) (citing opinions of the U.S. Supreme Court and the supreme courts of Mississippi and Kentucky to aid in defining “possessions” in part I, article 19’s prohibition of unreasonable searches and seizures); *State v. Settle*, 123 N.H. 34, 38, 455 A.2d 1031, 1034 (1983) (interpreting Part I, Article 15, regarding the right to represent oneself in court):

We have been unable to find any legislative history to indicate the Framers’ intent when this article was adopted. There are no cases discussing the meaning of the article. Other courts, interpreting similar constitutional provisions, have concluded that the language was intended to guarantee the right to represent oneself, or to be represented by counsel but that it was not intended to guarantee the right to represent oneself and be represented by counsel simultaneously.

79. See *State v. Roache*, 148 N.H. 45, 49, 803 A.2d 572, 576 (2002) (“[W]e look to the text, our prior interpretations . . . , and the reasoning of those courts that have interpreted similar constitutional language.”).

80. Opinion of the Justices, 117 N.H. 386, 389, 373 A.2d 644, 647 (1977).

81. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 124 (2d ed. 2001) (describing the free press as “an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented, manageable, and accountable”); Anderson, *supra* note 32, at 496–97 (“[I]f the press clause was not intended even to protect press criticisms of government, we can assume a fortiori that it was not intended to protect such exotics as confidentiality of sources or editorial autonomy. On the other hand, if the press clause was viewed as providing an essential check on government, then the claim to these additional rights may be far more plausible.”); Martin J. Rooney, *Freedom of the Press: An Emerging Privilege*, 67 MARQ. L. REV. 33, 56–58 (1984) (discussing the role of the press as an “independent check on the government”). *But see The Press*, in 3 THE NEW-YORK REVIEW 296, 302–03 (Francis Lister Hawks et al. eds., 1838):

When it is said that “the liberty of the press is essential to the security of freedom in a state,” is it meant that freedom cannot exist in a state, unless every one may, with legal impunity, calumniate and blacken whomsoever he pleases—destroy man, and blaspheme God? No state can exist, where there is such freedom.

The prefatory clause in Article 22 comes directly from the Massachusetts Declaration of Rights, ratified in 1780. Although the precise wording employed by Massachusetts was original, the concept was not.<sup>82</sup> Blackstone's oft-cited Commentaries of 1769, although expressing a narrow interpretation of the right, stated, "The liberty of the press is indeed essential to the nature of a free state . . . ."<sup>83</sup> The prior year, 1768, the Massachusetts House described the liberty of the press as "a great Bulwark of the Liberty of the People."<sup>84</sup> The "bulwark" concept, also employed by George Mason in the 1776 Virginia Declaration of Rights,<sup>85</sup> dates back at least to 1720 and underscores the importance of the liberty of the press as a safeguard of other liberties.<sup>86</sup>

Unlike the Second Amendment to the U.S. Constitution, which refers to the security of a *free state*, Article 22 refers directly to the security of *freedom in a state*. "In eighteenth-century political discourse, 'free state' was a commonly used political term of art, meaning 'free country,' which is to say the opposite of a despotism."<sup>87</sup> Free speech and liberty of the press are not merely conducive to functioning democracy, but are indispensable preservatives of other liberties—i.e., they are safeguards against the rise of oppressive government.<sup>88</sup>

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John Adams himself (who went on as President to infamously support the Alien and Sedition Acts) expressed concerns during the Revolution that liberty of the press might be used to destroy rather than protect liberty. DUNIWAY, *supra* note 41, at 143 (citing 4 THE WORKS OF JOHN ADAMS, *supra* note 41, at 31–32).

82. "The press, when open to all parties and influenced by none, is a salutary engine in a free state, perhaps a necessary one to preserve the freedom of that state . . . ." *Massachusetts*, Letter to the Inhabitants of the Province of Massachusetts-Bay (Dec. 12, 1774), reprinted in JOHN ADAMS & JONATHAN SEWALL, NOVANGLUS, AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS, PUBLISHED IN THE YEARS 1774 AND 1775, ON THE PRINCIPAL POINTS OF CONTROVERSY, BETWEEN GREAT BRITAIN AND HER COLONIES 141 (1819); see also 2 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 102 & n.1 (1863) (attributing the origin of the concept of free speech to Socrates, Demosthenes, and Euripides).

83. WILLIAM BLACKSTONE, 4 COMMENTARIES 152 (1769), available at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_speechs4.html](http://press-pubs.uchicago.edu/founders/documents/amendI_speechs4.html).

84. Anderson, *supra* note 32, at 463.

85. VA. DECL. OF RTS. § 12 (1776) ("That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.").

86. The wording of the 1768 resolution appears to have been derived from a 1720 letter by Cato, the pseudonym for two English journalists, which proclaimed that "Freedom of speech is the great bulwark of liberty; they prosper and die together . . . . Freedom of speech, therefore, being of such infinite importance to the preservation of liberty, every one who loves liberty ought to encourage freedom of speech." See Anderson, *supra* note 32, at 463, 490–91 (citing 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 96–103 (1755)).

87. Eugene Volokh, "Necessary to the Security of a Free State," 83 NOTRE DAME L. REV. 1, 5 (2007).

88. See *id.* at 9 (equating "free state" as used by Blackstone with "freedom in a state" in the Massachusetts Constitution); WEBSTER'S DICTIONARY (1828) (defining "security" as "[p]rotection; effectual defense or safety from danger of any kind; as a chain of forts erected for the security of the frontiers").

The recent landmark Second Amendment case, *District of Columbia v. Heller*,<sup>89</sup> offers some guidance on the proper treatment of Article 22's prefatory clause.

Logic demands that there be a link between the stated purpose and the command. . . . That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause . . . . But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.<sup>90</sup>

The New Hampshire Supreme Court has already implied that Article 22's prefatory clause bolsters the force of the operative clause.<sup>91</sup> Clearly, the importance of the rights as expressed in the prefatory clause accords with the strong command that they be "inviolably preserved." In adjudicating free speech cases, the balancing of the right against other rights and governmental interests necessarily injects a degree of ambiguity; that the New Hampshire Bill of Rights recognizes free speech as "essential to the security of freedom in a state" supports resolving this ambiguity in favor of free speech rights.<sup>92</sup>

## 2. "ought"

Free speech in Article 22, as with many other state constitutional rights,<sup>93</sup> including liberty of the press in the Massachusetts constitution,<sup>94</sup> relies on the aspirational term "ought" rather than the imperative "shall."<sup>95</sup>

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A free press, like an armed citizenry, stands as a check on despotic government. See *supra* note 81; cf. Michael I. Garcia, *The "Assault Weapons" Ban, The Second Amendment, and The Security of a Free State*, 6 REGENT U. L. REV. 261, 270 (1995) ("[A] Militia, composed of armed and free citizens, would actually threaten the security of a tyrannical slave state or a police state.").

89. 128 S. Ct. 2783 (2008).

90. *Id.* at 2789 (citations omitted); see also *id.* at 2789 n.3 ("[I]n America 'the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.'" (quoting JABEZ SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 47.04 (Norman J. Singer ed., 5th ed.1992))).

91. See *infra* note 130 and accompanying text (quoting Opinion of the Justices, 117 N.H. 386, 389, 373 A.2d 644, 647 (1977)).

92. See WEBSTER'S DICTIONARY (1828) (defining "essential" as "[n]ecessary to the constitution or existence of a thing").

93. See, e.g., VA. CONST. art. I, § 9 ("excessive bail ought not to be required"); DEL. CONST. art. I, § 1 ("no person shall or ought to be compelled to attend any religious worship").

94. MASS. CONST. pt. I, art. 16 ("The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.").

95. Cf. PETERS, *supra* note 40, at 46 (describing the Massachusetts Declaration of Rights):

The Declaration of Rights . . . consists of thirty articles which are so various as to almost defy any attempt to render an orderly account of them. Some [articles] are simple assertions . . . . Others are commands . . . . Still others appear to be recommendations. Article XVI

In early American history, this linguistic choice may have reflected the view that “[b]ills of rights . . . provid[ed] a statement of broad principles rather than a set of legally enforceable rights.”<sup>96</sup> Even though the concept of judicial review was explicitly recognized in several state constitutions, the judiciary’s future role in constitutional rights could not have been fully appreciated. Alexander Hamilton, for instance, embraced judicial review in *The Federalist* No. 78,<sup>97</sup> but in *The Federalist* No. 84 ridiculed the utility of a federal bill of rights, citing the liberty of the press as a useless provision in state constitutions.<sup>98</sup> (New Hampshire’s 57–47 vote, in 1788, to

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reads: “The liberty of the press is essential to the security of freedom in a state: it ought not therefore, to be restrained in this Commonwealth.”

96. Donald S. Lutz, *Political Participation in Eighteenth-Century America*, 53 ALB. L. REV. 327, 331 & nn. 18–19 (1988–1989) (“It is for this reason that they were more often than not couched in admonitory language using words like ‘should’ and ‘ought’ rather than the legally binding ‘shall’ and ‘will.’”). The first nine amendments to the U.S. Constitution use the word “shall,” a total of sixteen times. Even though some states’ proposed amendments used the word “ought,” Charles Pinckney’s proposed amendments in 1787 and Madison’s proposed amendments from 1791 relied on “shall.” THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445 (Jonathan Elliot ed., 1876). Pinckney’s proposed amendments included: “The liberty of the press shall be inviolably preserved.” *Id.* Roger Sherman spoke against the proposed amendment on the ground that “[t]he power of Congress does not extend to the Press,” and the amendment was rejected. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 617–18 (Max Farrand ed., 1911).

97. THE FEDERALIST NO. 78 (Alexander Hamilton):

By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

98. THE FEDERALIST NO. 84 (Alexander Hamilton) (emphasis added):

In the first place, I observe that there is not a syllable concerning it in the constitution of this state, and in the next, I contend that whatever has been said about it in that of any other state, amounts to nothing. *What signifies a declaration that “the liberty of the press shall be inviolably preserved?” What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?* I hold it to be impracticable; and from this, I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as intimated upon another occasion, must we seek for the only solid basis of all our rights.

.....

I know not by what logic it could be maintained that the declarations in the state constitutions, in favour of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the state legislatures. . . . And if duties of any kind may be laid without a violation of that liberty, *it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that after all, general declarations respecting the liberty of the press will give it no greater security than it will have without them.* The same invasions of it may be effected under the state constitutions which contain those declarations through the means of taxation, as under the proposed constitution which has nothing of the kind. *It would be quite as significant to declare that government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained.*

Hamilton added:

ratify the federal Constitution was secured with a recommendation of twelve amendments, which addressed “rights of Conscience” but not free speech or press directly.<sup>99</sup>)

Nevertheless, in considering ratification of the Massachusetts Constitution, some towns “urged the alteration of ‘ought not’ to ‘shall not,’ because the ‘strongest and most definite expressions should be adopted.’”<sup>100</sup> When “the right of free speech” was added to Massachusetts’s Article 16 in 1948, it was accompanied by the imperative “shall,” while “the liberty of the press” retained the less adamant “ought.”<sup>101</sup> The Massachusetts Supreme Judicial Court has not so much as noted this distinction.

New Hampshire has never treated the word “ought” in its Bill of Rights as inferior to the word “shall.”<sup>102</sup> Nothing from the 1964 Convention indicates that the matter was even considered, and today in New Hampshire, adjudication of the two categories of constitutional rights is indistinguishable.<sup>103</sup>

### 3. “*inviolably preserved*”

The text of Article 22 differs significantly from that of the First Amendment: “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>104</sup> It also diverges from that of its sister, the 1780 Massachu-

“We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.” This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights.

*Id.* (quoted by *Wooster v. Plymouth*, 62 N.H. 193, 200 (1882)).

99. See PATRICK T. CONLEY & JOHN P. KAMINSKI, *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* 162–63 (1992) (discussing New Hampshire’s ratification convention of 1788); TURNER, *supra* note 35, at 78 (citing 10 N.H. STATE PAPERS, *supra* note 34, at 17–18).

100. DUNIWAY, *supra* note 41, at 135 (quoting from the Town of Lexington). Lexington’s resolution continued, “and we cannot but think that the Words—*It shall not*, are more full, expressive and definite than the Words, ‘*It ought not*.’” *Id.*

101. MASS. CONST. amend. art. 77.

102. Compare *State v. Spiritous Liquors*, 68 N.H. 47, 48, 40 A. 398, 399 (1894) (describing N.H. CONST. pt. I, art. 19, “no warrant ought to be issued but in cases and with the formalities prescribed by law,” as “a simple affirmation of the common law”), with *State v. Foster*, 80 N.H. 1, 7, 114 A. 277, 277 (1921) (“It is probable that [N.H. CONST. pt. I, art. 18] is merely directory; but, assuming that it is mandatory, and that all punishments must be ‘proportioned’ to the nature of the offence, it does not help the defendant . . .”).

103. See, e.g., *State v. Johanson*, 156 N.H. 148, 152, 932 A.2d 848, 854 (2007) (interpreting N.H. CONST. pt. I, art. 17, which reads in relevant part: “In criminal prosecutions, the trial of facts, in the vicinity where they happened, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed . . .”).

104. U.S. CONST. amend. I; see JAMES MADISON, *THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS* 139 (1850):

Now the people of Virginia, in their state constitution, appear to have been as jealous of this freedom of the press, as were the people of the United States in the formation of the Federal

setts Constitution, by “plac[ing] a higher emphasis on liberty of the press, demanding that it be ‘inviolably preserved’ as opposed to ‘not . . . restrained.’”<sup>105</sup> As noted above, while New Hampshire embraced the structure of the Massachusetts article, it elected Maryland’s stronger wording, which should be read as expressing greater concern for the right.<sup>106</sup>

There are cases where state constitutional rights compete against one another, and the strong language in Article 22 could be used to justify giving priority to free speech.<sup>107</sup> In one instance, the New Hampshire Supreme Court hinted that it would not be so predisposed with regard to finding a general constitutional right to disseminate information from a juvenile court proceeding.<sup>108</sup> Interestingly, it cited the U.S. Supreme Court’s holding that the press’s right to publish the information enjoys First Amendment protection, but indicated that the press may enjoy greater protection than others who “give such information to the media.”<sup>109</sup>

Given the prevalence of balancing tests in free speech case law<sup>110</sup> and adjudication of other constitutional rights,<sup>111</sup> “inviolably” carries strong

Constitution. For if the Constitution of the United States declares, that Congress shall “make no law abridging the freedom of speech or the press,” the Constitution of Virginia, in the twelfth article of the bill of rights, declares, “that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.”

105. MARSHALL, *supra* note 35, at 85. Other state constitutions, including Pennsylvania’s, use the same approach of “inviolability.” See Seth F. Kreimer, *The Pennsylvania Constitution’s Protection of Free Expression*, 5 U. PA. J. CONST. L. 12, 18 (citing the Declaration of Rights from Pennsylvania’s 1790 Constitution: “Everything in this article is excepted out of the general powers of government, and shall for ever remain inviolate.”).

106. *But see* State v. Read, 680 A.2d 944, 952 (Vt. 1996) (“Defendant provides no comparison to similar state constitutions, and thus invites us to resolve his constitutional claim based only upon an inference drawn from dissimilar state constitutions. We decline defendant’s invitation.”). With Article 22, the comparison to Massachusetts’s language carries weight not simply for “sibling state” analysis, but for illuminating the meaning of the article to its drafters and adopters.

107. *Cf. Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1415 (1982) (citation omitted):

Some have argued that constitutional rights run not against private parties, but against the state; if the state cannot pursue a course of action without infringing upon either of two rights, it must abandon the action rather than violate either right. For example, a state constitution might warrant extending a testimonial privilege to a reporter in a case in which the extension of such a privilege would violate the federal right of a defendant to compulsory process. According to this view, the correct result would be not to narrow the state speech right to conform with the federal right, but to dismiss the prosecution unless a procedural accommodation could be found that would preserve both rights.

108. *In re Werme’s Case*, 150 N.H. 351, 354, 839 A.2d 1, 3 (2003). In this instance, the right to free speech failed against a statutory right to privacy. See *In re Brianna B.*, 785 A.2d 1189, 1195 (Conn. App. 2001) (cited by *In re Werme’s Case*).

109. *In re Werme’s Case*, 150 N.H. at 354, 839 A.2d at 3.

110. See KEITH WERHAN, *FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 78–79* (2004) (outlining free speech analysis under the First Amendment and describing different levels of scrutiny).

111. See, e.g., *Alonzi v. Northeast Generation Servs. Co.*, 156 N.H. 656, 662, 940 A.2d 1153, 1159 (2008) (describing levels of scrutiny applicable to equal protection challenges).

implications. Unless “inviolably” in Article 22 is surplusage, the term elevates speech and press above other interests. Where the right to free speech is weighed against other rights or interests, the presumption ought to thus be strongly in favor of free speech. This is not to say that the rights in Article 22 should be read as absolutes—rather, once the general extent of protected activity<sup>112</sup> is understood, it should not be readily circumscribed.

The New Hampshire approach (“inviolably preserved”) may mean more than emphatic insistence on the importance of the liberty of the press. First, as was commonly (though not universally) understood in the eighteenth century, liberty of the press referred only to a lack of prior restraints.<sup>113</sup> Whereas Massachusetts’s Article 16 referred arguably only to such restraints, the New Hampshire wording allows for a more expansive reading. Support for this distinction can be found in the federal amendment proposed by New York, which had no bill of rights of its own: “Freedom of the Press ought not to be violated or restrained.”<sup>114</sup> That is, freedom of the press could conceivably be “violated” by something other than a prior restraint; the Massachusetts Constitution might tolerate such a violation, but New Hampshire’s would not.<sup>115</sup> The scope of free speech and the liberty of the press in relation to prior restraints is discussed further below.

Article 22 does not technically grant the rights of free speech and free press, but declares that they must be “preserved.”<sup>116</sup> Should the rights thus

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112. “[Th]e First [A]mendment, then, we may take it for granted, *does not forbid the abridging of speech*. But, at the same time, *it does forbid the abridging of the freedom of speech*.” ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 19 (1948) (cited by Gertz v. Robert Welch, Inc., 418 U.S. 323, 382 (1974) (White, J., dissenting)), available at <http://digioll.library.wisc.edu/cgi-bin/UW/UW-idx?type=goto&id=UW.MeikFreeSp&isize=M&page=19>. To say that Article 22 protects “free speech” rather than “speech” only begs the question—what is the extent of the protected right? *See id.* (characterizing the distinction as a “paradox”); *infra* note 176 (questioning the distinction).

113. *See infra* note 124 & accompanying text.

114. *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 440 & n.52 (1983); *see also* CONN. CONST. art. I, § 5 (“No law shall ever be passed to curtail or restrain the liberty of speech or of the press.”); ME. CONST. art. I, § 4 (“no laws shall be passed regulating or restraining the freedom of the press”).

115. Bogen, *supra* note 114, at 440 n.52 (“The disjunctive indicates that something other than restraint would be a violation of freedom of the press.”).

116. Massachusetts’s parallel provision was viewed as “merely declaratory of the law as it had existed for nearly sixty years, with an added prohibition of any possible reestablishment of censorship.” DUNIWAY, *supra* note 41, at 143. Constitutional rights, at least today, carry more weight than common law rights, and presumably the American people who called for state and federal bills of rights did not believe they were advocating superfluity. *See id.* at 141 n.1 (noting Massachusetts newspapers’ recognition of their “fortunate legal position” relative to England’s mere common law “freedom of discussion” rights). A similar sentiment was expressed in *Aldrich v. Wright*, 53 N.H. 398, 400 (1873), which described “the right of defence” recognized in Article 2: “Long upheld by the common law, it has,

be construed as they were perceived when the article and its amendment were enacted? This conclusion would be consistent with New Hampshire's approach to constitutional interpretation<sup>117</sup> and would fit neatly with the New Hampshire Supreme Court's 1888 pronouncement concerning the relationship between constitutional rights and the preexisting common law: "That a bill of rights . . . is a reservation and not a grant, was a point on which there could be no difference of opinion."<sup>118</sup> Comparable constitutional provisions, most notably the Seventh Amendment ("the right of trial by jury shall be preserved"), have been treated this way.<sup>119</sup>

Any distinction between preserving, protecting, maintaining, or upholding a right, or the like, must be made in light of the circumstances surrounding the 1968 amendment, when New Hampshire's people already enjoyed free speech protection through incorporation of the First Amendment. If Article 22 was meant to enshrine a preexisting common law right, the interpretive challenge is to understand that right at the time of adoption, but when the free speech amendment was ratified in 1968, free speech should not have been understood as merely an ancient common law right. At the same time, in order for free speech to be "inviolably preserved" as Article 22 requires, no restrictions beyond the common law (e.g., defamation) and statutory limitations on speech existing in 1968 should escape constitutional scrutiny.

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under the administration of that law, theoretically been what it was before; and now, reinforced by a constitutional guaranty, it is what it has always been."

117. See *supra* notes 75–76 and accompanying text; see also *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 186, 635 A.2d 1375, 1377–78 (1993) (quotations omitted, alterations in original):

In interpreting an article in our constitution, we will give the words the same meaning that they must have had to the electorate on the date the vote was cast. In doing so, we must place [ourselves] as nearly as possible in the situation of the parties at the time the instrument was made, that [we] may gather their intention from the language used, viewed in the light of the surrounding circumstances.

118. *Wooster v. Plymouth*, 62 N.H. 193, 200 (1882). The court continued:

It was universally understood by the founders of our institutions that jury trial, and the other usual provisions of bills of rights, were not grants of rights to the public body politic, but reservations of private rights of the subject, paramount to all governmental authority; and this constitutional principle has never been abandoned.

*Id.*

119. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639–40 (1973) ("For at least the past century and a half, judicial and academic writings on the right to jury trial afforded by the seventh amendment have uniformly agreed on one central proposition: in determining whether the seventh amendment requires that a jury be called to decide the case the court must be guided by the practice of English courts in 1791."); accord *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990) (discussing *preservation* of the right to a jury trial in the Seventh Amendment); *id.* at 579 (Brennan, J., dissenting); *Smith v. State*, 118 N.H. 764, 768–69, 394 A.2d 834, 838 (1978); see also *State ex. rel. Rhodes v. Saunders*, 66 N.H. 39, 90, 25 A. 588, 590 (1889) (finding that New Hampshire's original jury trial provision in part I, article 20, which read in part "except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury," merely secured the common law right existing in 1784).

Because New Hampshire's people already enjoyed a federal free speech right in 1968 (and in 1964, when the amendment was authored), the choice to amend Article 22—with the “preserved” language—could clearly be read as an attempt to freeze the right at that point in time. This is a variation on the doctrine of legislative acquiescence, by which a lawmaking body is deemed to have assented to a prior interpretation through either inaction or reenactment of statutory language.<sup>120</sup> Although legislative acquiescence is a strongly and justifiably disfavored interpretive tool in cases of legislative inaction,<sup>121</sup> here New Hampshire voters actively embraced the recognition of free speech in their own state's constitution. Even if not intended to afford greater protection than the First Amendment, Article 22 as amended would continue to protect free speech rights in the event that First Amendment rights were to recede through new U.S. Supreme Court jurisprudence, or in the less likely event that the First Amendment was unincorporated.<sup>122</sup>

#### 4. “free speech and liberty of the press”

Although “free speech” and “liberty of the press” enjoy the same linguistic treatment in Article 22 and mostly parallel judicial treatment by the New Hampshire Supreme Court, their historical meanings cannot easily be reconciled. As understood by Blackstone and most other jurists up through the nineteenth century, liberty of the press encompasses the absence of

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120. See *Tomson v. Ward*, 1 N.H. 9, 12 (N.H. Super. 1816) (“It is an established legal maxim, that when the legislature adopt or re-enact a statute, the previous construction of the statute as settled by the courts of law is adopted . . .”); see also Note, *Legislative Adoption of Prior Judicial Construction: The Girouard Case and the Reenactment Rule*, 59 HARV. L. REV. 1277, 1277, n.7 (1946).

In 1984, New Hampshire voters approved part I, article 2-a, protecting the right to keep and bear arms. Unlike free speech, the amendment occupies its own article in part I. Citing Article 22, the New Hampshire Supreme Court has indicated that under article 2-a “the right to bear arms is no more absolute than the right of free speech.” *State v. Smith*, 132 N.H. 756, 758, 571 A.2d 279, 281 (1990). Article 2-a, while straightforward, lacks the forceful language of Article 22: “All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.” N.H. CONST. pt. I, art. 2-a.

121. See *United States v. Craft*, 535 U.S. 274, 287 (2002).

122. As expressed in the amendment's voters' guide, *infra* note 136, “as a matter of our state's self-respect and good constitutional law, we should not be dependent on the federal government for the protection of this basic personal liberty.”

Admittedly, in the 1960s, incorporation was less a fixture of American jurisprudence than it is today. *Gitlow v. New York*, 268 U.S. 652 (1925), indicated the Supreme Court's willingness to apply the First Amendment to state government actions, and the Court first upheld a personal liberty claim under the First and Fourteenth amendments two years later, in *Fiske v. Kansas*, 274 U.S. 380 (1927). HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT* 50–52 (7th ed. 1998). Reversing a decision of the Ohio Supreme Court, *Mapp v. Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the states by way of the Fourth and Fourteenth Amendments, but there were three dissenters. *Id.* at 59. In 1965, two Justices disputed the incorporation of the Sixth Amendment in *Pointer v. Texas*, 380 U.S. 400 (1965).

prior restraints,<sup>123</sup> as opposed to immunity from punishment after words have been printed.<sup>124</sup> Prior restraints were certainly loathed in eighteenth-century America. In 1785 Massachusetts imposed a stamp tax on newspapers and almanacs, startlingly similar to the British stamp tax, but public outcry led to its repeal the following year.<sup>125</sup> Modern scholarship has debated the proper scope of liberty of the press,<sup>126</sup> although some historical

123. See generally Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439 (1987). The Massachusetts Supreme Judicial Court has explained:

It was with a wise regard to these evils, that the common law has put a check upon the *licentiousness* of the press, and the expression of opinion by writing, painting, &c. when the effect and object is to blacken the character of any one, or to disturb his comfort . . . .

Nor does our constitution or declaration of rights abrogate the common law in this respect, as some have insisted. The 16th article declares, that "the liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth." The *liberty* of the press, not its *licentiousness*; this is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who formed it, requires. In the 11th article it is declared, that every "subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or *character*." And thus the general declaration in the 16th article is qualified. Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.

Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 314 (1825).

124. JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 4131 (1904) (citing *Blanding*, 20 Mass. 304); Smith, *supra* note 123, at 460; see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 705–07 (1987 reprint of 1833 abridgement) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769)):

Mr. Justice Blackstone has remarked, that the liberty of the press, properly understood, is essential to the nature of a free state ; but that this consists in laying no *previous restraints* upon publications, and not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. . . .

The doctrine laid down by Mr. Justice Blackstone, respecting the liberty of the press, has not been repudiated (as far as is known) by any solemn decision of any of the state courts, in respect to their own municipal jurisprudence. On the contrary, it has been repeatedly affirmed in several of the states, notwithstanding their constitutions, or laws recognize, that "the liberty of the press ought not to be restrained," or more emphatically, that "the liberty of the press shall be inviolably maintained."

*Accord* Smart v. Blanchard, 42 N.H. 137, 151 (1860) ("The liberty of the press is not endangered by the punishment of libelous publications."); see also Krebiozen Research Found. v. Beacon Press, Inc., 134 N.E.2d 1, 7–8 (Mass. 1956) (discussing the original meaning of liberty of the press); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 106 (2d ed. 2001).

125. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 248 (1936) (citing DUNIWAY, *supra* note 41, at 136 n.2).

126. See *Near v. Minnesota*, 283 U.S. 697, 714–15 (1931) ("The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal Constitutions."). Compare LEONARD W.

documents suggest that the right was understood as something broader than a lack of prior restraints or licensure of the press.<sup>127</sup> To limit free speech rights to the absence of prior restraints would drastically restrict them, and the historical regulation of printers does not easily analogize to speech regulation—as a practical matter, how could the government require prior approval of *speech* as it could with printed material.<sup>128</sup> Of course, time, place, and manner jurisprudence expressly allows prior restraints on speech (and assembly), albeit rationalized by content-neutral exercise of the police power.<sup>129</sup>

One way to evaluate the meaning of the free speech provision in Article 22 is to study its antecedent free press provision. Here, at least in the area of a press shield against revealing sources, the state supreme court has forcefully articulated an interpretation of Article 22 stronger than the First Amendment:

In *Branzburg v. Hayes*, the [U.S.] supreme court rejected by a five to four margin the proposition that a reporter's privilege existed when faced with inquiries before a grand jury. . . .

However, . . . the court made clear that it was “powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.” The New Hampshire Constitution, part I, article 22 provides that “liberty of the press” is “essential to the security of freedom in a state” and ought, therefore, “to be inviolably preserved.”

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LEVY, FREEDOM OF THE PRESS: FROM ZENGER TO JEFFERSON (1967) (arguing that freedom of the press merely prohibits prior restraints), with Anderson, *supra* note 33 (advocating a broader interpretation).

127. See, e.g., DAVID HUME, *Of the Liberty of the Press*, in 1 ESSAYS AND TREATISES ON SEVERAL SUBJECTS 6, 8 (2d ed. 1758) (first emphasis added):

Nothing can impose a farther restraint, but either the clapping an IMPRIMATUR upon the press, or the giving to the court very large discretionary powers to punish what displeases them. But these concessions would be such a bare-faced violation of liberty, that they will probably be the last efforts of a despotic government. We may conclude, that the liberty of *Britain* is gone for ever when these attempts shall succeed.

Nevertheless, around this time in the colonies it was risky business to publish any criticism of the government. See, e.g., 1 ISAIAH THOMAS, THE HISTORY OF PRINTING IN AMERICA 129–32 (2d ed. 1874) (describing one printer's plight, in 1754, for libel of the Massachusetts General Court).

128. See Bogen, *supra* note 114, at 440 n.52 (suggesting that protection from prior restraints does not make sense in the context of speech). *But cf.* State v. Chong, 121 N.H. 860, 861, 435 A.2d 538, 539 (1981) (“Prior restraints are inherently suspect because they threaten the fundamental right to free speech.”).

129. “The state has authority to make regulations as to the time, mode, and circumstances under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property.” State v. Cox, 91 N.H. 137, 141, 16 A.2d 508, 512 (1940) (citing State v. White, 64 N.H. 48, 50, 5 A. 828, 830 (1886)).

Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process. . . .

We hold only that in this civil proceeding involving the press as a nonparty, the balance is struck in favor of the press.<sup>130</sup>

Although the New Hampshire Supreme Court retreated closer to the U.S. Supreme Court's approach to the press shield in subsequent cases,<sup>131</sup> this judicially created shield<sup>132</sup> remains good law and offers a lodestar for strengthening free speech under Article 22.

#### *B. History and Contemporary Understanding of the 1968 Amendment*

Recognizing the limited utility of ratification history,<sup>133</sup> it is unfortunate that the record of the 1964 New Hampshire Constitutional Convention sheds so little light on whether the amendment was aimed to bring New Hampshire's constitutional protection of free speech above that of the First Amendment. Of course, since this was well past incorporation, a provision no stronger than the First Amendment would have had no immediate effect on the rights of New Hampshire's people.<sup>134</sup> The sole explanation from the 1964 convention journal regarding the purpose of the amendment could be interpreted in different ways:

What we have proposed to you, as amended, provides simply that the right of free speech which is, of course, an essential part of our heritage, is spelled out very clearly in the Constitution. The Con-

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130. Opinion of the Justices, 117 N.H. 386, 389, 373 A.2d 647 (1977) (citations omitted).

131. See Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305, 317 (1985).

132. Thirty-two states have enacted press shield laws, and California has added a press shield to its constitution. Courts in most of the remaining states have followed New Hampshire's lead by finding a shield in either the common law or the state constitution. Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 225–26 & nn.119–24 (2005).

133. N.H. Mun. Trust Workers' Comp. Fund v. Flynn, 133 N.H. 17, 21, 573 A.2d 439, 441 (1990) ("The statements made by the delegates to the constitutional convention are not always significant in determining the meaning of a particular amendment. To be entitled to consideration, the delegates' statements must interpret the amendment's language in accordance with its plain and common meaning while being reflective of its known purpose or object.") (discussing the interpretation of N.H. Const. pt. I, art. 28-a, adopted in 1984); see also Wheeler ex rel. Boulanger v. Morin, 93 N.H. 40, 50, 35 A.2d 513, 519 (1943) (Marble, C.J., dissenting) ("While language is usually to be interpreted in the light of the circumstances surrounding its utterance, such circumstances cannot be shown for the purpose of contradicting the plain meaning of the language used . . . ." (citing Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 985 (S.D.N.Y. 1917) (Hand, J.)); accord Cohen v. Att'y Gen., 259 N.E.2d 539, 571–72 (Mass. 1970).

134. See *supra* note 122 and accompanying text.

stitution presently has several references to it so that inferentially you can presume that the right to free speech is guaranteed in our New Hampshire Constitution. The right is, of course, guaranteed under our Federal Constitution. What we wanted to do was to be absolutely certain the Constitution was clear, that there could be no possible misunderstanding or misinterpretation of it. And we felt that the right to free speech should, consequently, be enunciated in the Constitution and we had included it with that part which relates to the liberty of the press—the freedom of the press. We consequently ask your support in the adoption of Resolution No. 55 as amended.<sup>135</sup>

The 1968 voters' guide indicated that free speech had been omitted from the 1784 constitution "due to an historic error of omission made in 1783."<sup>136</sup> The ballot read, "Do you favor an addition to the Bill of Rights in the New Hampshire Constitution guaranteeing free speech together with the liberty of the press?"<sup>137</sup> The "presumption" that the New Hampshire Constitution guaranteed free speech prior to the 1968 amendment follows from the breadth of the "liberty of the press,"<sup>138</sup> but is hard to reconcile with the opposition to the addition of free speech to the Massachusetts Constitution. When Massachusetts considered adding free speech to its constitution in 1948, the move was criticized not only as unnecessary based on the existing protection from the Fourteenth Amendment as well

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135. N.H. JOURNAL OF CONSTITUTIONAL CONVENTION 218 (1964) (William P. Bittenberger of Deering, a member of the convention's Bill of Rights Committee, explaining the amendment).

136. MARSHALL, *supra* note 35, at 81. It's not clear where the idea of a "historic error of omission" came from. Among early state constitutions, only Pennsylvania's and Vermont's expressed support for free speech. The full text of the voters' guide included the ballot question, text accompanying *infra* note 137, as well as the following:

NOW — AT THE PRESENT TIME, the state constitution's Bill of Rights guarantees freedom of the press; but due to a historic error of omission made in 1793, the right of the individual citizen to freedom of speech was left out. The Fourteenth Amendment to the U.S. Constitution now protects the right of New Hampshire citizens to exercise freedom of speech. However, as a matter of our state's self-respect and good constitutional law, we should not be dependent on the federal government for the protection of this basic personal liberty.

IF THIS AMENDMENT IS ADOPTED, by enough Yes votes on Question No. 6, freedom of speech will be added to the basic rights of every citizen, which are guaranteed by the New Hampshire Bill of Rights, and our state constitution, thus amended to rectify the historic omission referred [sic] to above, will be made more consonant with the 20th Century.

137. Ballot from the Town of Woodstock, New Hampshire (1968) (on file with author).

138. *See* *Bowe v. Sec'y of the Commonwealth*, 69 N.E.2d 115, 129 (Mass. 1946) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."). Although Massachusetts acknowledged the absence of a free speech provision its pre-amendment constitution, *Commonwealth v. McGann*, 100 N.E. 355, 356 (Mass. 1913) (comparison to California Constitution), New Hampshire did not. *E.g.*, *State v. Derrickson*, 97 N.H. 91, 93, 81 A.2d 312, 313 (1951) ("The rights of freedom of assembly, speech and worship are accorded a high place in and are specifically guaranteed by the New Hampshire Constitution and statutes implementing it.").

as other existing state provisions, but dangerous, too. The state bar even adopted a resolution in opposition.<sup>139</sup>

If the exclusion of free speech from the Massachusetts Constitution was due to fears regarding the abuse of the right, then the later addition of the right can be seen as either an acceptance that the costs of giving constitutional protection to the right do not outweigh the benefits, or an understanding (perhaps based in part on federal precedent) that the right to free speech is far from absolute. Indeed, by 1968 (and 1948 in Massachusetts), the federal right to free speech, as incorporated to the states, had been well established. In Massachusetts, fears about a state right to free speech nevertheless persisted, to the extent that the Massachusetts Bar recommended against adopting the amendment.<sup>140</sup>

Taken together, the 1964 convention statements and 1968 voters' guide imply that the free speech right added to the New Hampshire Constitution was no different from the First Amendment right. That is, the "right" added to Article 22 was not distinguished from the freedom of speech already protected by the federal government via the First and Fourteenth Amendments. Still, the *context* of "free speech" in Article 22, which declares that it is "essential to the security of freedom in a state" and "ought, therefore, to be inviolably preserved," might nevertheless vary the meaning. Moreover, even an understanding that the Article 22 right was on par with the corresponding First Amendment right would not dictate how to handle changes in First Amendment interpretation or even new state laws affecting speech. In spite of the New Hampshire Supreme Court's commitment to original understanding, these interpretive ambiguities only exacerbate the difficulty of ascertaining the intent of a diverse populace.<sup>141</sup>

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139. Frank W. Grinnell, *The Unnecessary Proposal About Free Speech*, 32 MASS. L. Q. 51, 51–52 (1947).

140. *See id.*

141. *Cf.* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United State Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 16–21 (Amy Gutmann ed., 1997). There is a noteworthy distinction between original intent and original textual meaning, *id.*, often lost in New Hampshire constitutional analysis. *See, e.g.*, *Baines v. N.H. Senate President*, 152 N.H. 124, 133, 876 A.2d 768, 778 (2005) (quotations omitted):

When interpreting a constitutional provision, we examine its purpose and intent. By reviewing the history of the constitution and its amendments, the court endeavors to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances. The language used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted.

*C. Other Constitutional Liberties in New Hampshire*

A number of state constitutional rights in New Hampshire afford greater protection than their federal counterparts, but the variety of opinions makes it hard to discern a pattern. Certainly the New Hampshire Supreme Court has not hesitated to reject the U.S. Supreme Court's approach to particular rights. *State v. Ball*, for instance, was not the first case to yield a stronger independent state interpretation, and now it fits within a line of search and seizure cases that deviate from federal interpretation.<sup>142</sup> The rationale expressed in *Ball* for requiring a higher level of probable cause for warrantless seizures under the plain view doctrine is largely conclusory, relying on the same reasonableness standard but interpreting it to forbid "[s]eizure on mere suspicion."<sup>143</sup>

Overall, the strongest state constitutional protections relative to federal rights exist with regard to search and seizure under Article 19. Even though the U.S. Supreme Court adopted the exclusionary rule for federal cases in 1914, New Hampshire avoided enforcing an exclusionary rule until *Mapp v. Ohio*<sup>144</sup> mandated it by incorporation in 1961. Instead, New Hampshire had maintained "the strict common law rule that a court must admit all competent and probative evidence regardless of its source."<sup>145</sup> As federal decisions narrowed "the scope and content of fourth amendment rights" through the 1980s, the New Hampshire Supreme Court "repeatedly emphasized the importance of undertaking independent interpretation of [its] State constitutional guarantees."<sup>146</sup> This culminated with the rejection, over a strongly worded dissent by Justice Thayer, of the federal good faith exception to the exclusionary rule.<sup>147</sup> Justice Thayer, referring to *State v. Ball*, argued that "[h]aving the power to interpret some provisions as providing greater protection, however, does not mandate that we must interpret our constitution more broadly, nor does it give us permission to invent new constitutional protections . . . ."<sup>148</sup> Yet the majority concluded that the exclusionary rule had been implicitly recognized as existing under Article 19, and that the good faith exception is incompatible with the privacy rights and prohibition of the issuance of warrants without probable cause in

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142. *State v. Ball*, 124 N.H. 226, 232, 471 A.2d 347, 351 (1983).

143. *Id.* at 353 (construing N.H. CONST. pt. I, art. 19).

144. *Mapp v. Ohio*, 367 U.S. 643, 643 (1961).

145. *State v. Canelo*, 139 N.H. 376, 384, 653 A.2d 1097, 1103 (1995); *see id.* at 394, 654 A.2d at 1110 (Thayer, J., dissenting) ("This court steadfastly refused to adopt an exclusionary rule and only applied it when forced to do so by the federal judiciary." (citing *State v. Mara*, 916 N.H. 463, 467, 78 A.2d 922, 925 (1951))).

146. *Id.* at 384, 654 A.2d at 1104 (majority opinion).

147. *Id.* at 385, 654 A.2d at 1105.

148. *Id.* at 397, 654 A.2d at 1112 (Thayer, J., dissenting).

Article 19. Citing the purpose of Article 19 when it was adopted in 1784, the court asserted that deterrence of police misconduct is not the sole aim of the rule, and to bolster its holding, it cited several other state courts that had “held that the good faith exception is inconsistent with state constitutional requirements of probable cause.”<sup>149</sup>

However, the departure from federal search and seizure jurisprudence has been far from complete. In 2003, for example, only Chief Justice Brock argued in favor of applying the exclusionary rule to driver’s license suspension proceedings.<sup>150</sup> With regard to the standard for evaluating authority under a search warrant to search a container on the premises,<sup>151</sup> community care-taking functions, and the inventory exception allowing warrantless searches,<sup>152</sup> New Hampshire has followed the federal approach.

Despite different language, the right against self-incrimination under the state constitution has generally been found identical to the federal right,<sup>153</sup> except for the standard required for admissibility of a defendant’s confession.<sup>154</sup> The state high court expressly rejected the federal preponderance standard in 1977, based on its determination that danger of involuntary confessions deserves a greater safeguard.<sup>155</sup> The state has also followed the federal approach to the confrontation clause, relying in part on Massachusetts’s interpretation of its identical provision.<sup>156</sup>

#### D. *Other States’ Treatment of Free Speech*

Keeping in mind that the text of Massachusetts’s corresponding article is weaker, Massachusetts is a useful place to begin looking at sister state approaches to free speech.<sup>157</sup> The Massachusetts Supreme Judicial Court generally follows federal analysis of free speech issues,<sup>158</sup> but has on one

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149. *Id.* at 387, 654 A.2d at 1105 (majority opinion).

150. *Jacobs v. Dir.*, N.H. Div. of Motor Vehicles, 149 N.H. 502, 506–07, 823 A.2d 752, 756 (2003) (Brock, C.J., dissenting).

151. *State v. Leiper*, 145 N.H. 233, 761 A.2d 458 (2000).

152. *State v. Denoncourt*, 149 N.H. 308, 821 A.2d 997 (2003).

153. *See State v. Hearn*, 151 N.H. 226, 855 A.2d 549 (2004).

154. *State v. Laurie*, 135 N.H. 438, 444–45, 606 A.2d 1077, 1080 (1992) (discussing how the State carries the burden of proving that a confession was voluntary beyond a reasonable doubt, rather than under a mere preponderance standard).

155. *State v. Phinney*, 117 N.H. 145, 147, 370 A.2d 1153, 1154 (1977).

156. *See In re Juvenile 2003-195*, 150 N.H. 644, 652, 843 A.2d 318, 324 (2004); *State v. Peters*, 133 N.H. 791, 794, 587 A.2d 587, 588–89 (1991).

157. *Cf. Opinion of the Justices*, 143 N.H. 429, 437, 725 A.2d 1082, 1088 (1999) (“Because much of the New Hampshire Constitution was taken from the Massachusetts Constitution, this court gives weight to interpretations of relevant portions of the Massachusetts Constitution when interpreting similar New Hampshire provisions.” (citations omitted)).

158. *Hosford v. Sch. Cmte. of Sandwich*, 659 N.E.2d 1178, 1180 n.5 (Mass. 1996) (“Our State freedom of speech analysis is guided by the Federal analysis.”); *cf. In re Matter of Amendment to S.J.C. Rule 3:07*, 495 N.E.2d 282, 284 n.4 (Mass. 1986) (“Although in some circumstances art. 16 of the

occasion extended its state constitutional rights further. In *Commonwealth v. Sees*, it frowned on attempting to distinguish “free speech in a bar and free speech on a stage,” and struck down an ordinance restricting exotic dancing.<sup>159</sup>

In Maryland, whose Article 40<sup>160</sup> also shares language with New Hampshire’s Article 22, free speech under the state declaration of rights has been interpreted to be coextensive with free speech under the First Amendment.<sup>161</sup> Although Maryland’s high court has interpreted other state constitutional rights differently than their federal counterparts,<sup>162</sup> it has long read state and federal free speech rights in *pari materia*, despite the starkly differing language.<sup>163</sup>

Oregon certainly claims the strongest protection for speech under its constitution, based in part on the breadth implied by its wording: “No law shall be passed restraining the free expression of opinion or restricting the right to speak, write, or print freely *on any subject whatever*; but every person shall be responsible for the abuse of this right.”<sup>164</sup> The Oregon Supreme Court’s historical analysis has led to the conclusion that disfavored categories of speech like pornography and commercial advertising deserve just as much protection as other speech.<sup>165</sup> Applying a “natural rights” approach to free speech in lieu of the more common balancing tests, the court first evaluates whether a challenged regulation is directed at restraining speech or expression; if so, the regulation will be upheld only if “wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted

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Massachusetts Declaration of Rights . . . may protect expression not entitled to protection as a matter of Federal constitutional law, there is no reason to conclude that our State Constitution affords greater protection to lawyer solicitation than does the Federal Constitution.”)

159. 373 N.E.2d 1151, 1155 (Mass. 1978).

160. MD. DECL. OF RTS. art. 40 (“That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.”).

161. See *Newell v. Runnels*, 967 A.2d 729, 746 (Md. 2009) (“The protections accorded by Article 40 are generally ‘coextensive’ with the protections accorded by the First Amendment.” (quoting *Jakanna Woodworks, Inc. v. Montgomery County*, 689 A.2d 65, 70 (Md. 1997))); accord *State v. Brookins*, 844 A.2d 1162, 1165 n.2 (Md. 2004) (“This Court has often treated Art. 40 [of the Maryland Declaration of Rights] as being in *pari materia* with the First Amendment and has stated that the legal effect of both provisions is substantially the same.” (quotations and citation omitted, alteration in original)).

162. *DiPino v. Davis*, 729 A.2d 354, 367 (Md. 1999).

163. *Freedman v. State*, 197 A.2d 232, 236 (Md. 1964), *rev’d*, 380 U.S. 51 (1965); see *Howard Sports Daily v. Weller*, 18 A.2d 210, 214–15 (Md. 1941). I have been unable to locate in Maryland case law an explanation for the conclusion that the rights should be interpreted coextensively.

164. OR. CONST. art. I, § 8 (emphasis added); *State v. Ciancanelli*, 121 P.3d 613, 629 (Or. 2005) (“[T]he words are so clear and sweeping that we think that we would not be keeping faith with the framers who wrote them if we were to qualify or water them down, unless the historical record demonstrated clearly that the framers meant something other than what they said.”).

165. See generally *Barnhart*, *supra* note 48.

and that the guarantees then or in 1859 [upon adoption of the Oregon Constitution] demonstrably were not intended to reach.”<sup>166</sup>

## V. APPLYING ARTICLE 22

Although an exhaustive list or analysis of unresolved free speech questions in New Hampshire is beyond the scope of this note, this note addresses the state action requirement and sketches a framework for stronger independent free speech jurisprudence under Article 22.

### A. *State Action*

The First Amendment differs from many state constitutions in its approach to rights, articulating limitations on the federal government’s powers rather than affirmative acknowledgements of rights.<sup>167</sup> Emboldened by *Pruneyard Shopping Center v. Robins*,<sup>168</sup> several state courts have relied on this distinction to justify diminishing the state action requirement for a constitutional free speech violation.<sup>169</sup> New Hampshire’s Supreme Court, meanwhile, has expressly held that the state constitution can only be violated through state action.<sup>170</sup> Indeed, the structure of the New Hampshire Constitution reflects the relationship between reserved rights and *governmental* powers.<sup>171</sup>

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166. *Ciancanelli*, 121 P.3d at 633–34 (quoting *State v. Robertson*, 569 P.2d 569, 576 (Or. 1982)).

167. See *Simon*, *supra* note 131, at 311.

168. 447 U.S. 74 (1980) (rejecting appellant’s argument that California’s finding that free speech rights extend to private property held open to the public amounted to an unlawful taking under the Fifth Amendment).

169. See *Simon*, *supra* note 131, at 313 (identifying six states that followed California’s lead). *But see* Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J. L. & PUB. POL’Y 533, 557–58 (2004) (identifying thirteen states that have not taken the California approach).

170. *State v. Carroll*, 138 N.H. 687, 691, 645 A.2d 82, 85 (1994) (cited by *HippoPress, LLC v. SMG*, 150 N.H. 304, 308, 837 A.2d 347, 353 (2003) (applying the state action requirement to Article 22)). *But cf.* Matthew S. Fuchs, *Free Exercise of Speech in Shopping Malls: Bases that Support and Independent Interpretation of Article 40 of the Maryland Declaration of Rights*, 69 ALB. L. REV. 449 (2006) (arguing that Maryland’s constitutional free speech provision should be read like California’s).

171. *State v. Tapply*, 124 N.H. 318, 325, 470 A.2d 900, 904–05 (1983) (“The reservation precedes the grant. Before they create the power of proportional taxation . . . and the supreme legislative power . . . and before they form themselves into a state . . . they lay the foundation, and therein reserve those personal liberties, which, upon the evidence of history and their own experience, they think cannot safely be surrendered to government.” (quoting *State v. U.S. & Canada Express Co.*, 60 N.H. 219, 250 (1880))).

### B. *Balancing Framework*

The chief purpose of this note is to provide the fodder for jurists and other practitioners to articulate their own independent interpretations of free speech in Article 22, but I will outline one possible framework based on the above research, albeit without deeply exploring the consequences that would flow from its application.

Constitutional rights are enumerated in order to be protected, not merely to be weighed against competing interests.<sup>172</sup> Nevertheless, free speech and other constitutional rights cannot exist as true absolutes,<sup>173</sup> and constitutional law accordingly relies on various balancing tests to define the extent of protected activity. A stronger independent free speech jurisprudence under Article 22 fits harmoniously within this existing balancing test framework.

As under the First Amendment, the analysis should begin by determining whether affected communication is protected speech or qualifies as one of several established exceptions, e.g., fighting words, threats, incitement to illegal activity, and obscenity,<sup>174</sup> and the proper inquiry is whether the communication was understood to be outside the scope of constitutional protection when the pertinent constitutional provision was adopted.<sup>175</sup> In Oregon, the analysis also involves a determination as to whether the constitutional provision was intended to supersede existing limitations on speech, but there is no evidence that the amendment to Article 22 was contemplated as a means to repeal existing laws. Thus, statutory limitations on speech existing in New Hampshire in 1968 remain immune to invalidation on free speech grounds under Article 22, and the question is how to treat regulations of speech implemented after 1968.

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172. See *id.*; *Wooster v. Plymouth*, 62 N.H. 193, 200 (1882) (quoted *supra* note 118); see also MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 42–57 (2001) (critiquing a cost-benefit approach to free speech jurisprudence and offering support for the proposition that free speech rights are an end unto themselves).

173. See WOJCIECH SADURSKI, *FREEDOM OF SPEECH AND ITS LIMITS* 37 (2001) (“To insist that all speech, regardless of its nature, should presumptively be equally protected, would be both patently absurd and inimical to the freedom of *really* valuable speech.”); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121, 126 (1970) (suggesting that there are no actual “free speech ‘absolutists’”); see also *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (warning that weighing civil liberty too heavily against “attempts to maintain order” would “convert the constitutional Bill of Rights into a suicide pact”).

174. See *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 51–52 (1st Cir. 2008) (identifying speech exempt from First Amendment protection), *cert. denied*, 77 U.S.L.W. 3562 (U.S. June 29, 2009) (No. 08-1202); *United States v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008) (listing exceptions), *cert. granted*, 129 S. Ct. 1984 (Apr. 20, 2009) (No. 08-769).

175. See *Roth v. United States*, 354 U.S. 476, 482–85 (1957) (holding “that obscenity is not within the area of constitutionally protected speech or press” based on evidence that it was outside the protection intended for speech and press at the time the First Amendment was adopted).

The operative clause of Article 22 supports a presumption against the constitutionality of any restrictions enacted after 1968 affecting protected speech. To the lay voter considering the amendment, to “inviolably preserve” free speech would likely have meant this: “The Constitution will protect my right to say in the future whatever I am free to say now.”<sup>176</sup> The typical voter would have recognized that free speech rights are not absolute—that the amendment would *preserve* rather than expand the scope of his freedom to communicate. But because it was to be preserved *inviolably*, this freedom would, generally speaking, no longer be subject to encroachment by new regulations.<sup>177</sup>

As a threshold matter, Article 22’s protection extends to expressive conduct, but not to all conduct incidentally affected by a regulation.<sup>178</sup> After resolving these threshold questions, the most critical determination in free speech cases is whether a regulation is a content-neutral time, place, and manner restriction. If so, under the First Amendment the regulation receives intermediate scrutiny, and will be upheld if it is “narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information.”<sup>179</sup> Otherwise, protected speech is entitled to strict scrutiny under the First Amendment, which requires that a regulation “must be narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”<sup>180</sup>

In *Carlson’s Chrysler*, the New Hampshire Supreme Court applied the *Central Hudson* test for commercial speech regulations rather than content-neutral intermediate scrutiny.<sup>181</sup> Because Article 22 does not distinguish among classes of speech, it is not appropriate to disfavor types of speech other than based on the restrictions existing in 1968, and I advocate aban-

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176. In applying an original understanding approach to Article 22, I am deeply skeptical of the distinction between protecting speech and protecting “free speech.” See MEIKLEJOHN, *supra* note 112, at 13. Typical voters in 1968 probably would not have believed that the amendment would *preserve* an abstract right to “free speech” instead of their actual extant liberty.

177. See *Tapply*, 124 N.H. at 325, 470 A.2d at 904–05 (1983) (quoted *supra* note 171).

178. Compare *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning protected by the First Amendment), with *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (rejecting “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”); see also *IMS Health, Inc.*, 550 F.3d at 51–52 (attempting to distinguish speech from unprotected conduct).

179. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).

180. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 804 (2000); accord *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

181. Compare *Carlson’s Chrysler v. City of Concord*, 156 N.H. 399, 402, 938 A.2d 69, 72 (2007), with *Naser Jewelers, Inc. v. City of Concord*, No. 06-CV-400 SM, 2007 WL 1847307, at \*2 (D.N.H. June 25, 2007) (applying intermediate scrutiny in a challenge to a revision of the same zoning ordinance).

doning *Central Hudson* in favor of strict scrutiny for commercial speech cases that do not otherwise qualify for intermediate scrutiny.<sup>182</sup> But New Hampshire has long embraced allowing the state's police power to limit the exercise of rights based on time, place, and manner restrictions,<sup>183</sup> and such regulations accordingly deserve less than strict scrutiny. In applying a version of intermediate scrutiny under Article 22, upholding speech regulations based on "significant" government interests is difficult to reconcile with the meaning imparted by the 1968 amendment, that free speech would be shielded from prospective encroachments by government—that is, the evaluation of government interests should be informed by the status quo in 1968. In a case like *Carlson's Chrysler*, the challenged regulation might not survive intermediate scrutiny, in part because the state interests in "aesthetics" were not established as of the 1968 amendment.<sup>184</sup> Moreover, the forceful language of Article 22, in combination with other rights such as the property rights recognized in Part I, Article 2 of the New Hampshire Constitution, demands that the government interests at stake exceed mere reasonableness.<sup>185</sup>

By its plain terms, strict scrutiny, in requiring the government to demonstrate a compelling interest, accords with Article 22's prefatory clause, which declares that "free speech . . . is essential to the security of a free state." Only a truly paramount government interest could justify the limitation of such a right. Because Article 22 elevates free speech above other rights and interests not only by its prefatory clause but through its command that the right remain inviolable, compelling interests should be defined more narrowly under Article 22 than under the First Amendment. As with intermediate scrutiny, defining the government interests to be used in the test is an inexact science,<sup>186</sup> and should be informed by the context of the 1968 amendment. In application, strict scrutiny under Article 22 might

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182. See HENRY COHEN, CONGRESSIONAL RESEARCH SERVICE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 9 (2008) (noting that in nine of the last ten most recent cases in which it has applied the *Central Hudson* test, the U.S. Supreme Court has struck down the challenged speech restriction, and stating that "the Court has found it unnecessary to consider whether to abandon the test, because it has been striking down the statutes in question anyway").

183. See *State v. Cox*, 91 N.H. 137, 141, 16 A.2d 508, 512 (1940) (citing *State v. White*, 64 N.H. 48, 50, 5 A. 828, 830 (1886)) (quoted *supra* note 129).

184. Neither the challenged town ordinance nor the enabling statute were enacted until well after 1968.

185. See N.H. CONST. pt. I, art. 2 ("All men have certain natural, essential, and inherent rights—among which are . . . acquiring, possessing, and protecting, property . . ."); *Cnty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 758, 917 A.2d 707, 717 (2007) ("As the right to use and enjoy property is an important substantive right, we use our intermediate scrutiny test to review equal protection challenges to zoning ordinances that infringe upon this right.").

186. See generally Stephen E. Gottlieb, *Compelling Government Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988) (endeavoring to define "compelling government interests").

come to resemble a jurisprudence based primarily on “selective exclusions rather than tiers,”<sup>187</sup> under which most speech is presumptively constitutional.

In *Burson v. Freeman*,<sup>188</sup> the U.S. Supreme Court upheld restrictions on campaigning at polling places, even though it was a facially content-based regulation of political speech in a public forum—the archetype of a law that burdens constitutional free speech.<sup>189</sup> The Court reasoned that the law was necessary to advance compelling state interests regarding the right to vote freely “in an election conducted with integrity and reliability.”<sup>190</sup> Justice Scalia, concurring in the judgment, explored the long history of similar state laws, which existed in at least thirty-four states by 1900.<sup>191</sup> New Hampshire was not one of those states.

Today, New Hampshire’s restriction on polling place picketing is relatively benign, restricting only the insides of polling places and a 10-foot pathway outside.<sup>192</sup> Although protecting the right to vote may be a compelling governmental interest in the context of Article 22, it is not at all clear that the existing polling place regulation is necessary to protect this right. Moreover, the regulation, enacted over a decade after the amendment to Article 22, is inconsistent with the free speech rights enjoyed in New Hampshire in 1968. An expansion of the law proposed and voted down last year that would have been more akin to the regulation upheld in *Burson* more clearly would not be constitutional under Article 22.<sup>193</sup>

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187. SUNSTEIN, *supra* note 173, at 151–52; see also Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1997) (advocating that “the Court to shift away from means-ends scrutiny, and toward an approach that operates through categorical rules—such as a per se ban on content-based speech restrictions imposed by the government as sovereign—coupled with categorical exceptions”).

188. 504 U.S. 191 (1992) (plurality opinion).

189. *Id.* at 196–211.

190. *Id.* at 198–99.

191. *Id.* at 214–16 (Scalia, J., concurring in the judgment).

192. N.H. REV. STAT. ANN. § 659:43 (2008).

193. H.R. 1218, 2008 Leg., 160th Sess. (N.H. 2008), available at <http://www.gencourt.state.nh.us/legislation/2008/HB1218.html>. The House Election Law Committee unanimously recommended that the bill be voted down:

This bill would limit polling place visibility workers to holding only one sign no larger than 3 feet by 2 feet. The bill’s sponsor testified that he brought the bill to minimize the risk of physical injury to voters and the chance that large signs may intimidate voters. The solution to these problems—if they exist at all—is not to restrict the right to freely express political opinion, but to restrict the proximity of the signs to the voters. Because this bill opts to suppress free speech instead of proposing a real solution that does not infringe a fundamental constitutional right, the committee voted unanimously against it.

*Hearing on H.R. 1218*, 2008 Leg., 160th Sess. (N.H. 2008) (statement of Rep. David M. Pierce, for the House Election Law Cmte.), available at [http://www.gencourt.state.nh.us/house/caljournals/calendars/2008/houcal2008\\_18.html](http://www.gencourt.state.nh.us/house/caljournals/calendars/2008/houcal2008_18.html).

*C. Conclusion*

Although this note finds support for an expansive interpretation of free speech in Article 22 of the New Hampshire Constitution, this potential should not be overstated. The state supreme court has not embraced a living constitution approach, and instead repeatedly emphasizes its aim of discerning the original purpose and understanding of constitutional text.<sup>194</sup> Nevertheless, the text of Article 22, bolstered by its historical context and various persuasive authorities, strongly supports independent adjudication of free speech more protective than the First Amendment.

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194. See *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 186, 635 A.2d 1375, 1377–78 (1993) (quoted *supra* note 117); see also *N.H. Mun. Trust Workers' Comp. Fund v. Flynn*, 133 N.H. 17, 21, 573 A.2d 439, 441 (1990) (“[W]e will not redraft the constitution in an attempt ‘to make it conform to an intention not fairly expressed in it.’” (quoting *Concrete, Inc. v. Rheaume Builders, Inc.*, 101 N.H. 59, 61, 132 A.2d 133, 135 (1957))).