Original Meaning: Freedom of Speech or of the Press

by P.A. MADISON *on* October 18th, 2008

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Summary: Freedom of Speech or the Press is the freedom from government officials making speech or writings they find too critical of their affairs a seditious crime. Under common law, people had to be careful of any criticism they wrote or said about government policy, laws or official conduct out of fear of being charged with a seditious crime where truth would be of no defense.

Before discussing the meaning of the words "freedom of speech, or of the press" as established under early American law, we should first understand why these words are found under the United States Constitution. Mr. Madison explained in 1799, "Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt, that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood; and that the [first] amendment was intended as a positive and absolute reservation of it." Alexander Hamilton argues in Federalist No. 84 why such an amendment does not belong under the federal constitution:

Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government. (This argument lead to adopting the Ninth Amendment.)

Framer James Wilson before the Pennsylvania Convention to ratify the Constitution of the United States in 1787 said he would have no further remarks over the freedom of the press "until it is shown that Congress have any power whatsoever to interfere with it, by licensing it to declaring what shall be a libel."

After Madison finished introducing his proposed bill of rights to the House of Representatives in 1789, Rep. James Jackson of GA stood up and remarked:

The gentleman (Madison) endeavors to secure the liberty of the press; pray how is this in danger? There is no power given to Congress to regulate this subject as they can commerce, or peace, or war. … An honorable gentleman, a member of this House, has been attacked in the public newspapers on account of sentiments delivered on this floor. Have Congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, although the constitution provides that a member shall not be questioned in any place for any speech or debate in the House?

One big modern error in interpreting freedom of speech and press comes from not treating it as freedom from government shielding itself against public examination of its affairs through use of criminal libel or license but as a right to be heard or seen. Newspapers were never under any obligation to publish whatever someone had to say no more than a university or town was viewed obligated to provide persons with a public soapbox. It is all about government and its agents subjectively determining what speech or publication it considers defamation against government and punishing such without truth being a defense.

Laws that regulate what shall be considered abusive speech or displays, what people wear, public conduct, etc., are not the same thing as government officials or judges of the court exercising authority to criminally punish anything they subjectively consider in speech or publication to be sedition against government or government established religion while ignoring truth as a valid defense.

Freedom of speech and of the press served one purpose in America: To remove the fear of the common law doctrine of *seditious libel* so citizens could freely speak or publish without license their grievances against public policy or conduct of public officials. One of the distasteful things found under the common law was the government practice of criminalizing or shielding itself through requiring license to publish of any criticism it felt made people dissatisfied with their government or government established religion.

Seditious libel (or criminal libel as it was sometimes called) was generally defined as *"the intentional publication, without lawful excuse or justification, of written blame of any public man, or of the law, or of any institution established by law."* (Stephen, History of the Criminal Law)

In England, it could be dangerous to criticize government, or peaceably assemble or petition government for redress of grievances because anything one might speak or write could end up being used against them under the charge of seditious libel where truth would be of no defense.

In 1808 for example, the British newspaper publisher, John Drakard, was indicted over an article questioning military flogging, and the jury had been instructed that the military establishment had been injured and "**it was not to be permitted to any man to make the people dissatisfied with the Government under which he lives.**" Henry VIII once made it a high treason crime to suggest his marriage to Anne of Cleves was valid even though it was the truth.

Parliament's famous licensing order of 1643 made clear it was the "defamation of religion and government" that was not to be tolerated. While one could still find themselves in a world of trouble for defamation of religion in the colonies and States, there was no license required for publication or laws of seditious libel against undesirable political speech.

How can we know for sure the freedom of speech means freedom from seditious libel? All early American laws over speech and the press dealt solely with breaches of the peace or public morality (blasphemy, obscenity, profanity, etc.), but never proceedings of seditious libel (NY might have been a brief exception) over any criticism of government or its agents. In other words, the common law doctrine of seditious libel was absent from American laws, while public abuses of the freedom outside of political speech was punishable.

The Sedition Act of 1798 would appear to be an exception, but Federalists argued correctly there was no freedom to utter or publish licentiousness, falsehoods or slander (however, they were incorrect with their assertion of being able to enforce the Act within States).

Benjamin Franklin, writing in The Pennsylvania Gazette, April 8, 1736, wrote of the American doctrine behind freedom of speech and of the press:

Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the action of the magistrates.

James Madison in 1799 wrote, "In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law."

The Democratic-Republican caucus included the following in their 1800 platform: "An inviolable preservation of the Federal constitution, according to the true sense in which it was adopted by the states. … Freedom of speech and the press; and opposition, therefore, to all violations of the Constitution, to silence, by force, and not by reason, the complaints or criticisms, just or unjust, of our citizens against the conduct of their public agents."

Some incorrectly argue the freedom of the press extends beyond political matters, generally pointing to a 1774 Continental Congress letter to the Inhabitants of Quebec describing the freedom in broad terms:

The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.

At the time England had an Established Church whose teachings was protected by Parliament in the same rigor it protected government from what it subjectively considered seditious speech or publication. Under the Continental Congress and later Federal Congress there was no Government Established Church for which Congress might feel obligated to defend against advancements of science, i.e., discoveries of new truths. Remove the influence of Established Church of England, which was not applicable under the new American Federal Republic, and the freedom of the press was viewed strictly as protecting political examination of government affairs.

George F. Will once correctly described the First Amendment as "an instrument of government," where it "concerns the democratic disposition of public power," and hence, "its protections extend only to political speech."

Generally speaking, all State constitutions stipulated along the lines that the *"press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity,"* and *"in prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence."*

Other common expression of the freedom found were, *"No law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right."*

If freedom of speech or of the press alone was understood to mean the liberty to freely write or speak whatever one wishes then there can be no purpose for the additional declaration that says persons may also *"freely speak, write, and publish his sentiments on all subjects."* It is too clear freedom of speech and of the press had specific meaning and that meaning could only have been freedom from seditious libel. Thomas Cooley hit the ball out of park when he wrote of the freedom found under American constitutions:

The mere exemption from previous restraints (Blackstonian theory) cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, … Their purpose (of the free-speech clauses) has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. … The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

Additionally, all State constitutional provisions guaranteeing the freedom of speech or press provided for the exception of abusing the freedom. What this means is people never had a constitutional right to ignore laws that defined those abuses such as introducing public indecency, vice, etc. While there was never any justification for prior restraint via licensing the discussion of public concerns, everything outside of this was open to public restrictions for purposes of preventing crime, breach of peace, enforcing public morality, etc.

Under the federal constitution there is no provision for making anyone responsible for the abuse for the simple reason no sovereignty was surrendered to the central government over domestic matters of the states. If one carefully reads the First Amendment, they will find it says nothing about what people can, or cannot do, but only what Congress cannot do.

It should be apparent now how States could prohibit "books or other publications of a sectarian infidel or immoral character" from being distributed in any common school, or prohibit public discussion of acts of sexual gratification, or even solicitation for donations on public property without permit. These restrictions are directed at public order or vice and not public discussion of government affairs or policies made libel.

A little know court ruling in 1891 did what many courts have struggled to do; correctly recite the historical meaning of the freedom in two simple sentences:

And so the history of the struggle for the establishment of the principle of freedom of speech and press shows that it was not ordinary talk and publication, which was to be disenthralled from censorship, suppression and punishment. It was in a large degree a species of talk and publication which had been found distasteful to governmental powers and agencies.

Trial of John Peter Zenger

The liberty of speech or of the press in this country can be said to have been born in the year 1735 in the colony of New York. The story begins on November 5, 1733 when John Peter Zenger published his first issue of the Weekly Journal that included this criticism:

[T]he sheriff was deaf to all that could be alleged on that (Quaker) side; and notwithstanding that he was told by both the late Chief Justice and James Alexander, one of His Majesty's Council and counsellor-at-law, and by one William Smith, counsellor-at-law, that such a procedure [disqualifying the Quakers for affirming rather than swearing] was contrary to law and a violent attempt upon the liberties of the people, he still persisted in refusing the said Quakers to vote….

Governor Crosby wanted Zenger charged with seditious libel but found it difficult to obtain a grand jury indictment against him. To get around this obstacle Crosby instructed his attorney general to file a formal accusation of a criminal offense before two justices. This in return led to a bench warrant and arrest of Zenger.

The trial opened on August 4, 1735 on the main floor of New York's City Hall with Attorney General Bradley's reading of the information filed against Zenger. Bradley told jurors that Zenger, "being a seditious person and a frequent printer and publisher of false news and seditious libels" had "wickedly and maliciously" devised to "traduce, scandalize, and vilify" Governor Cosby and his ministers. Bradley said that "Libeling has always been discouraged as a thing that tends to create differences among men, ill blood among the people, and oftentimes great bloodshed between the party libeling and the party libeled." (Linder, The Trial of John Peter Zenger (2001))

Additionally, Bradley explained truth was of no defense for seditious libel under state law while Zenger's attorney argued the law should not be interpreted to prohibit "*the just complaints of a number of men who suffer under a bad administration*." The judge instructed the jury the "law is clear that you cannot justify a libel," and the "jury may find that Zenger printed and published those papers, and leave to the Court to judge whether they are libelous."

With law and precedent squarely against him, the jury nonetheless found Zenger not guilty and the beginning of public opposition to trials of seditious libel had been established. Gouverneur Morris (served on the committee of five responsible for the final drafting of the Constitution) would write a half-century later: "The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."

With this historical understanding of free speech, our first analysis of what might constitute a violation of the clause will always be whether government has assumed through law the common law power of subjectively defining what shall be a sedition against government or its members (shielding itself from public examination/criticism). If the answer is no then there is no infringement under the clause.

Additionally, it is rather absurd to argue a school can violate someone's freedom of speech when no school has any municipal police authority to subjectively declare speech or publication seditious and criminally punish such.

Finally, opposition to speech or press restrictions for purpose of public decency or order is a political question and not a judicial one. By making it a judicial question serves only to uproot the great liberty of the people to govern themselves under their own chosen laws and sense of norms.