THE LEVIATHAN'S THIN SKIN—THE DEVELOPMENT OF FREE SPEECH IN AMERICA FROM COLONIAL TIMES TO TODAY

William Han

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INTRODUCTION

Embarrassment, or the fear of it, must surely rank as one of the great motivators of human action. In the American history of the suppression of dissent, and therefore conversely the development of our modern protections for free speech, princes from the colonial era and before to modern presidents have acted out a fear of embarrassment. Indeed, the history of free speech and its suppression in America is a history of a gradual maturation of a portion of humanity that over time grew thicker skin.

Today, Americans everyday subject their government and its officers to all manners of criticism and ridicule, taking it for granted that it is up to the government and officials to learn to endure these barbs. Of course threats against free speech continue to exist in contemporary American society, but contrasted with centuries past, the progress is unmistakable. Earlier in this history, the Chief Justice of England could claim in all seriousness that if the citizenry was suffered to possess "an ill opinion of the government, no government can subsist," because "it is very necessary for all governments that the people should have a good opinion of [them]."[1] A few decades later, no less an authority than William Blackstone could declare that "to punish . . . any dangerous or offensive writing . . . is necessary for the preservation of peace and good order, of government and religion. . . ."[2] Interestingly, these sentiments echo the arguments that authoritarian regimes even today use to justify their suppression of dissent—that the government must not allow itself to be shown in a bad light. It is a sobering reminder that a mind such as Blackstone's might not have been entirely unsympathetic to certain of these arguments emanating from authoritarian corners of the globe today.

This article traces the development of the law of free speech as well as the legal efforts to suppress speech from the English legal tradition through the adoption of the American Constitution to today. Part 1 will examine the legal tools for suppressing speech in traditional English law. Part 2 will examine . . .

I. YE MERRIE OLDE ENGLAND

English subjects in the centuries leading up to the American Revolution considered themselves the freest people on earth.[3] So much so, in fact, that even the conservative Edmund Burke supported the American Revolution when it came, despite his subsequent castigations against the French Revolution, because he considered American Patriots merely men defending their inherited liberties as Englishmen.[4] The Magna Carta of 1215 codified English liberties as matter of the birthright of the English in a way

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[1] *Rex v. Tutchin*, 14 Howell's State Trials 1095, 1128 (1704).
[2] 4 W. Blackstone, Commentaries on the Laws of England 151-52 (1769).
[3] Stephen M. Feldman, Free Expression and Democracy in America 6 (2008).
[4] Edmund Burke _____

unseen in other countries. King George III himself, with no small irony in light of later events, prior to ascending the throne, described "political liberty" as the "pride" and "the glory of Britain."[5]

However exceptional English liberties might have been in the Middle Ages and the Early Modern Era, in the hindsight of today and when it comes to the question of free speech, the Magna Carta's protections look flimsy indeed.[6] Indeed, England had a long history of suppressing speech using the legal tools of licensing requirements, "constructive treason," and seditious libel.

A. The Lesser Legal Options: Scandalum Magnatum, Heresy, and Felony Statutes

A number of medieval and early modern statutes dealt with "*Scandalum Magnatum*," the offense of defamation by inventing of spreading "false news" concerning the king and others.[7] From the perspective of prosecutors looking to stamp out unflattering expressions about the Crown, *Scandalum Magnatum* was not always useful because it was limited to expressions both "false" and "news." Political polemics would not fall under the category of news, and the defendant had a legal right to embarrass the Crown further by establishing the truth of the news in question.[8]

Where the expressions and publications concerned matters of religion, the law of heresy could be used to prosecute individuals for their beliefs. The obvious limitation of this option is that it only dealt with religion.[9]

A number of Tudor-era statutes defined various types of dissent as felonies. These were the first laws to directly prohibit seditious expressions as crimes in themselves instead of evidence of other crimes such as treason or heretical thought.[10] However, the statutes proved too harsh to produce the desired convictions. In 1579, in Stubbe's case, Queen Elizabeth sought the execution of an author for what she considered felonious writings, but the grand jury failed to indict him. In 1585, Parliament declined to adopt an additional felony statute, and after Elizabeth's death 1602, Parliament declined to renew the most important felony statutes against writings for her successor.[11]

B. Licensing

Outside the above, rather inadequate, legal tools, the Crown's primary censorship method was through licensing. Church and state initially worked together in the licensing regime. The pre-Reformation Catholic Church always claimed the authority to license books in order to prevent religious heresy. In 1414, Parliament affirmed the Church's authority to prosecute those who published without the Church's approval.[12] When William Caxton introduced the printing press into England and produced the first printed

[5] Gordon S. Wood, The Radicalism of the American Revolution 14 (1991) (quoting the Prince of Wales, later George III).
[6] In an interesting contrast, the kingdom of Denmark-Norway proclaimed full freedom of the press in 1770, the first country in the world to do so. *See* Elizabeth Powers, ed., Freedom of Speech—the History of an Idea 11 (2011).
[7] 3 Edward I, cap. 34 (1275); 2 Richard II, cap. 5 (1378); 12 Richard II, cap. 11 (1388); 1 & 2 Philip & Mary, Cap. 3 (1554); 1 Elizabeth I, cap. 6 (1559).
[8] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[9] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[10] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[11] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[12] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).

book in England (a copy of Chaucer's *Canterbury Tales*), the Crown claimed the prerogative of licensing printing presses.[13] After the Reformation, in 1538, Henry VIII proclaimed that privy councilors and other appointed officials would replace the clergy in the role of approving licenses for books, with the sole exception of the Bible, which needed only the bishop's approval.[14] Elizabeth I subsequently made various modifications to the licensing system, as did the Star Chamber, including in 1586 when it issued a decree containing a new set of rules for printers.[15]

In 1641, however, Parliament abolished the prerogative courts (the Courts of the Exchequer, the Chancery, and the Star Chamber), which had been primarily charged with promulgating and enforcing licensing laws.[16] Parliament adopted the 1643 Licensing Order to continue the licensing system and to provide it with a legislative basis. The Order provoked a famous response by the poet John Milton in the form of his polemical essay *Areopagitica*.[17] The press freedom that resulted in the brief interval of 1641-42 left its mark on English politics of the time.[18] Further legislations modifying the licensing system occurred in 1647, 1649, and 1653, with the 1649 legislation making the printing of subversive books a treasonable crime. Adopted in the wake of the execution of Charles I, the law is not known to have resulted in any convictions.[19] Indeed the repeated modifications of the licensing system demonstrated the Crown's sense of its ineffectiveness in this period.[20] After the Restoration in 1660, with Charles II on the throne, starting in 1662 and until 1679, the government enacted a series of time-limited but identical licensing statutes.[21]

In 1679, the Licensing Statute again expired without renewal, and the Crown returned to prosecuting unlicensed printing on the basis of royal prerogative. In 1685, however, Parliament adopted statutory licensing once more. The statute would expire, for the last time, in 1694, finally ending the licensing regime.[22] By the second half of the following century, Blackstone would argue that "liberty of the press" consisted in "laying no previous restraints upon publications," by which standard England enjoyed press freedom. Blackstone still held the view, however, that this freedom did not mean "freedom from censure for criminal matters when published," therefore justifying the propriety of criminalizing certain forms of speech.[23]

One scholar has argued persuasively that many prosecutions before the end of the seventeenth century nominally for "seditious libel" (discussed below) were in fact prosecutions against violations of licensing laws.[24] This

[13] G. Stone et al., Constitutional Law, 993-94 (2001); Stephen M. Feldman, Free Expression and Democracy in America 6 (2008).
[14] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[15] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[16] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[17] G. Stone et al., Constitutional Law, 993-94 (2001); Stephen M. Feldman, Free Expression and Democracy in America 6 (2008).
[18] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[19] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[20] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[21] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[22] G. Stone et al., Constitutional Law, 993-94 (2001).
[23] 4 W. Blackstone, Commentaries on the Laws of England 150-53 (1769).
[24] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).

was particularly true in the period between 1679 and 1685. A key reason for this was that the word "libel" could mean both its common modern sense of slander in a written form and simply mean a "little book" or "a short treatise or writing."[25] Indictments and other legal records relating to licensing violations therefore might be indistinguishable on paper from documents relating to cases where the charges were actually of "seditious libel."[26]

C. Treason

In some situations, the Crown was able to make out treason charges against its critics. Parliament had codified the common law crime of treason in Treason Act of 1351, 25 Edward III (1352). The statute defined high treason as (1) compassing or imagining the king's death, (2) levying war against the king, or (3) adhering to his enemies.[27] In 1534, Parliament redefined treason so that it was possible to commit the crime "by words or writings."[28] In a small number of cases, as a further doctrinal extension of the law, the Crown charged defendants with "constructive treason." In the notorious case of John Twyn, the defendant was a printer. In 1663, shortly after the Restoration of monarchy in 1660, the Crown prosecuted Twyn for printing (not writing) a book that claimed that the people had a right to rebel against their king. Twyn was convicted of constructive treason and given the following gruesome sentence: "You shall be hanged by the neck, and being alive, shall be cut down and your privy members shall be cut off, your entrails shall be taken from you body and you living, the same to be burnt before your eyes."[29] English courts abandoned the doctrine of constructive treason after 1720.[30]

D. Seditious Libel

The law of seditious libel, properly understood, developed in England as Crown and Parliament struggled with other legal tools of censorship as described above and found them inadequate. Some scholars have traced the concept of "seditious libel" to the earliest, 1275 *Scandalum Magnatum* statute.[31] As noted earlier, however, *Scandalum Magnatum* was limited to "false" information that could be considered "news."

The first proper description of the doctrine of seditious libel occurred in Sir Edward Coke's report of his 1605 prosecution against a certain Lewis Pickeringe.[32] It was also in this report that Coke tried to impute the modern legal meaning of "libel" to ancient usages where the word simply meant a short piece of writing.[33] Coke set up a framework with three key propositions: (1) Libel (in the sense of defamatory writing) against a private person could be a crime because it could cause a breach of the peace. (2) Libel against a public official or "magistrate" was a greater offense, "for it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked

[25] Oxford English Dictionary ____
[26] Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[27] G. Stone et al., Constitutional Law, 994 (2001).
[28] 26 Henry VIII, cap. 13 (1534).
[29] Stephen M. Feldman, Free Expression and Democracy in America 6 (2008).
[30] G. Stone et al., Constitutional Law, 994 (2001).
[31] G. Stone et al., Constitutional Law, 994 (2001); F. Siebert, Freedom of the Press in England, 1476-1776, at 117-19 (1952).
[32] Case de Libellis Famosis, 77 Eng. Rep. 250, 5 Coke 125 (1605).
[33] I. Brant, The Bill of Rights 113-14 (1965).

magistrates. . . ." (3) As such, although *Scandalum Magnatum* was limited to falsehoods, libel could be criminalized for the sake of public order if the libel is true. Indeed, a libel that was true was more likely to disturb public peace than a false one; therefore after the Pickeringe case, the legal maxim came to be, "the greater the truth the greater the libel."[34] One limitation remained, however: Under a theory of libel, specific magistrates or public persons must be defamed in some way, and writings containing generally antigovernment contents would not support a charge of seditious libel. Coke appeared to maintain this distinction, even though in common usage at the time, "seditious libel" meant an antigovernment writing, whether or not any particular individual was defamed. Others were less particular than Coke about maintaining this doctrinal fine point. A century after Coke's report on the Pickeringe case, Lord Chief Justice John Holt elaborated on the theory of seditious libel thusly: "If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."[35] Seventeenth century judges in fact punished as seditious libel any "written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever."[36]

In hindsight, it may seem that it was Chief Justice Holt himself who had a rather low opinion of the English government, so fragile he considered it as to be at risk of collapse if confronted with some measure of criticism. For the time being, however, even as the other statutes and doctrines fell by the wayside, the English government appeared to have found the legal cudgel it wanted to suppress speech freedom. As one historian summarized the situation, "no single method of restricting the press was as effective as the law of seditious libel as it was developed and applied by the common-law courts in the latter part of the seventeenth century."[37]

II. SEDITIOUS LIBEL IN THE AMERICAN COLONIES

The American colonists brought with them the English traditions of dissent but also its suppression. For example, the 1669 Fundamental Constitutions of Carolina, originally drafted by the philosopher John Locke, provided: "Since multiplicity of comments, as well as of laws, have great inconveniencies, and serve only to obscure and perplex, all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the common or statute laws of Carolina, are absolutely prohibited."[38] In one Virginia case, the court convicted of a defendant for making "detracting speeches" about a prominent person; the defendant had "his tongue bored through with an awl" before being banished from Jamestown.[39] Roger Williams famously founded Rhode Island because the Massachusetts Bay Colony had expelled him for spreading "newe & dangerous opinions."[40]

[34] G. Stone et al., Constitutional Law, 994 (2001); Philip Hamburger, The Development of the Law of Seditious Libel, 37 Stanford L. Rev. 661-765 (1985).
[35] *Rex v. Tutchin*, 14 Howell's State Trials 1095, 1128 (1704); quoted in G. Stone et al., Constitutional Law, 994 (2001).
[36] J. Stephen, A History of the Criminal Law of England 350 (1883).
[37] F. Siebert, Freedom of the Press in England, 1476-1776, at 269 (1952)
[38] Fundamental Constitutions of Carolina (1669), *available at* http://avalon.law.yale.edu/17th_century/nc05.asp.
[39] Stephen M. Feldman, Free Expression and Democracy in America 10 (2008).
[40] Stephen M. Feldman, Free Expression and Democracy in America 11 (2008).

Against this type of suppression, Massachusetts Bay, alone among the colonies, adopted a Body of Liberties in 1641 that included a limited provision protecting free speech:

> Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.[41]

Although no other colony adopted an analogous provision, and although in contrast plenty of laws allowed for suppression of speech, colonial officials in the seventeenth century were much more willing to tolerate what their counterparts in the mother country might have prosecuted as seditious speech.

A. The Case of John Peter Zenger

In the Province of New York, one colonial governor would make an exception to the rule of generally tolerating critical speech. He lived to regret it, and the trial of John Peter Zenger turned out to be a turning point in the history of free speech in America and later a rallying cry in the Revolutionary War.

Colonel William Cosby was the scion of an aristocratic but not entirely wealthy Anglo-Irish family. From 1718 to 1728, he served as the governor of the Spanish island of Minorca, but he found himself in difficulties when he illegal seized a Portuguese ship and its cargo and was forced to pay £10,000 in damages. His financial problems motivated him to find a new and lucrative position. Through family connections and lucky timing, he found such a position in the form of the governorship of New York and New Jersey. Appointed in 1731, Cosby finally arrived in August 1732 and quickly began demanding various forms of payments from the legislature. He also sued Rip Van Dam, who had acted as interim governor prior to Cosby's arrival, for half his salary. The moneygrubbing and other obnoxious behaviors made Cosby unpopular among the people he was meant to govern. He also made enemies among local politicians.[42]

In 1733, German immigrant and printer John Peter Zenger began publishing the *New York Weekly Journal*. The paper was overtly political and gleefully attacked and ridiculed Cosby, particularly from his greedy demands for money. Zenger's role in the *Journal* was in fact limited to its printing and publishing. Politicians and lawyers opposed to Cosby were responsible for the editorial work. When Cosby decided to pursue seditious libel charges to shut down the paper (licensing having expired in 1725), however, he chose to target Zenger. In court, the same lawyers who had been truly responsible for the *Journal*'s editorial content represented Zenger, but the Cosby-appointed Chief Justice James De Lancey disbarred them. These friends and allies of Zenger then brought in Andrew Hamilton of Philadelphia, the most famous lawyer in the American Colonies at the time.[43]

Hamilton proceeded to make an argument for which neither the De Lancey nor the prosecutor (also a Cosby ally) was prepared. Essentially, he argued that his client was guilty. Attorney General Richard Bradley had

[41] Stephen M. Feldman, Free Expression and Democracy in America 10 (2008).
[42] A Brief Narrative of the Case and Tryal of John Peter Zenger, Peter Finkelman (ed.) (2010) at 6-13.
[43] A Brief Narrative of the Case and Tryal of John Peter Zenger, Peter Finkelman (ed.) (2010) at 14-17.

planned to call multiple witnesses to establish that Zenger had indeed published the *Journal*. Hamilton surprised him by conceding the fact of publication. On the basis of that admission, Bradley demanded that the case go directly to the jury. Hamilton pointed out, however, that Bradley had not proven that the publication was libelous. Hamilton then proceeded to argue that (1) the allegedly libelous articles were truthful, (2) the truth could not be libelous, and (3) the jury had the authority to reach a general verdict and thus determine both the law and the facts of the case. All of these notions were contrary to settled English law—indeed, truth was not a defense but an aggravating factor in the crime—so that Hamilton effectively argued that English law ought to be reformulated for the distinct situation in America. When Hamilton was finished, Chief Justice De Lancey instructed the jury to return a special verdict of guilty on the factual issue of publication and to leave the question of law to the court. Instead, the jury returned a general verdict of not guilty, in an instance of what today we would call "jury nullification."[44]

Jury nullification of course does not alter the law. After Zenger's acquittal, the jurisprudence of seditious libel remained what it was. Politically, however, Zenger's case was a major victory in the history of the development of free speech protection in America. After Zenger, no colonial administration ever succeeded in convicting anyone for seditious libel. It should be noted that speech suppression still happened through executive or legislative powers, typically when the dissenting opinion being expressed was less than popular.[45] Benjamin Franklin's older brother James, for example, published an item in the *New England Courant* critical of the Massachusetts assembly, which voted to arrest Franklin and imprisoned him for the remainder of the legislative session.[46] Nonetheless, the Zenger case came to stand in the American imagination as a symbol of free speech. The *Brief Narrative* published under Zenger's name describing his case became a bestseller. The case influenced American thinking in the years leading up to the Revolution and in its aftermath. The conduct of Cosby's cronies serving as judge and prosecutor in the Zenger case underscored for Americans the importance of judicial independence and the separation of powers. The case was also an important precedent for Americans demanding a bill of rights that would guarantee free speech among other freedoms.[47]

III. Free Speech in the Early Republic

A. The First Amendment

Shortly after the original United States Constitution came into effect, the First Congress convened and proposed a series of twelve amendments to the Constitution. The requisite three quarters of state legislatures ratified the third through the twelfth of these amendments in 1791. Therefore the third amendment in the originally proposed Bill of Rights became the Constitution's First Amendment.[48] The final text of this Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

[44] A Brief Narrative of the Case and Tryal of John Peter Zenger, Peter Finkelman (ed.) (2010) at 18-31.
[45] Stephen M. Feldman, Free Expression and Democracy in America 12 (2008).
[46] G. Stone et al., Constitutional Law, 995 (2001).
[47] A Brief Narrative of the Case and Tryal of John Peter Zenger, Peter Finkelman (ed.) (2010) at 33.
[48] A. Amar, The Bill of Rights: Creation and Reconstruction 8 (2000).

assemble, and to petition the government for a redress of grievances.[49]

Focusing on the free speech provision, scholars have debated vigorously over the Framers' original intent. Ironically, scholars have had to puzzle over the question of original intent precisely because the proposed protection was in fact extremely popular, so that Congress approved the free speech and free press clauses without debate.[50] In the face of this absence of clarifying records of discussions, some have adopted the view that the Framers principally meant to erect a barrier to the old licensing system, which is to say, a rule against "prior restraint." This view would impute to the Framers Blackstone's belief that "liberty of the press [consists] in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published."[51] No less a legal scholar than Justice Holmes once held this view,[52] although he would later change his mind. Other scholars have pointed out that by 1791, licensing had been abolished in England for almost a century and in the Colonies since 1725, so that it would have made little sense for the Framers "to go to all the trouble of pushing through a constitutional amendment just to settle an issue that had been dead for decades."[53] In this view, the Framers would more likely have meant to abolish the practice of seditious libel prosecutions, which remained available at least in theory.[54]

Another scholar has noted that certain Framers appear to have believed that the federal courts would not have jurisdiction to hear seditious libel cases anyway. James Wilson, future Supreme Court justice, stated at the Pennsylvania ratifying convention that there was no need for the federal Constitution to contain a guarantee of press freedom because the federal government would have "no power whatsoever concerning it." In the North Carolina convention, James Iredell, another future Supreme Court justice, stated in response to a question about Congress potentially criminalizing certain writings: "[Congress] ha[s] power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations . . . [but] no power to define any other crimes whatever." Actually Congress had the authority to define crimes pursuant to its enumerated powers in Article I, Section 8 of the Constitution, but Iredell's point stands that restricting or punishing speech was not among the enumerated.[55] Both men appeared to imply that seditious libel cases would not be heard in federal courts, but state courts might well remain available to such prosecutions. As the First Amendment only restricted Congress, it could not abolish seditious libel on the state level.[56]

An interesting correspondence between John Adams and William Cushing, Chief Justice of Massachusetts, sheds light on the debate without resolving it. In a 1789 letter to Adams, Cushing discussed the free press clause in the Massachusetts constitution and argued that the clause covered both prior and subsequent restraints, and that truth ought to be a defense against charges of seditious libel. Adams, who had drafted that clause of the

[49] U.S. Constitution amend. I.
[50] I. Brant, The Bill of Rights 224 (1965).
[51] 4 W. Blackstone, Commentaries on the Laws of England 151-52 (1769); *see* L. Levy, Legacy of Suppression (1960).
[52] *See Patterson v. Colorado*, 205 U.S. 454 (1907).
[53] Z. Chafee, Free Speech in the United States 18-20 (1941).
[54] Z. Chafee, Free Speech in the United States 18-20 (1941).
[55] I. Brant, The Bill of Rights 229-30 (1965).
[56] As discussed below, the Bill of Rights would not applied against the states until after the Civil War, via incorporation through the Fourteenth Amendment.

Massachusetts constitution, appeared to agree. This exchange would suggest that the free speech and press clauses of the First Amendment were not limited to prior restraints as per Blackstone. However, both Cushing and Adams also agreed that certain malicious and false statements could amount to criminal attacks upon the government.[57] Adams of course would go on to be the president during whose tenure Congress passed the Alien and Sedition Act.

Yet another scholar has demonstrated that the original intent of the free speech and press clauses was to protect the popular majority's right to criticize a government that might not entirely represent the people's interest:

> The body that is restrained [by the First Amendment] is not a hostile majority of the people, but rather Congress; and the earlier two amendments [which were not adopted] remind us that congressional majorities may in fact have "aristocractical" and self-interested views in opposition to views held by a majority of the people.[58]

The modern conception that the First Amendment was meant to protect minority voices is, in this view, ahistorical. It is important to recall that, at least in the original constitutional scheme, with no direct election of the Senate, there was a greater danger at the national level than the state level that the legislature would not accurately reflect the sentiment of the people.[59] This view is consonant with a cautionary note that Alexander Hamilton sounded in the Federalist Papers: "The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter. . . ."[60] This view of the free speech and press clauses also tracks what happened in the Zenger case: The defendant expressed a popular critique of an unpopular governor imposed by the Crown, and a jury—the representatives of the people—acquitted him through an exercise of popular sovereignty.[61]

The picture of the First Amendment's free speech and press clauses that the above scholarship paints in the aggregate is something of a cypher. An absolutely clear understanding of the Framers' original intent, assuming a single coherent original intent even existed, appears impossible. Nevertheless, we can draw certain conclusions. For one thing, it is undisputed that prior restraint, the old licensing regime being the most salient example, cannot stand under the First Amendment. Secondly, although the First Amendment might not have explicitly abolished the crime of seditious libel, it seems to have at least contemplated the Zenger situation in which a voice for the popular majority criticized an unrepresentative government; in this type of situation, the First Amendment held that the people had the right to voice their criticism, even if they have to count on themselves (as embodied in the jury) for legal protection when prosecuted. Finally, although the Framers might have had a majoritarian view in mind when they drafted the First Amendment, the plain language of the free speech and press clauses is broad enough to protect the rights of unpopular minorities as well.[62] As American jurisprudence progressed, the breadth of this wording would allow the United

[57] D. Rabban, The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History, 37 Stan. L. Rev. 795, 812 (1985).
[58] A. Amar, The Bill of Rights: Creation and Reconstruction 21 (2000).
[59] A. Amar, The Bill of Rights: Creation and Reconstruction 21-22 (2000).
[60] The Federalist No. 71, at 433 (A. Hamilton). Note, however, that Hamilton was discussing the checks and balances among the three branches of government rather than freedom of speech.
[61] A. Amar, The Bill of Rights: Creation and Reconstruction 24 (2000).
[62] A. Amar, The Bill of Rights: Creation and Reconstruction 21 (2000).

States to develop one of the strongest protections for free expression in the world.

B. Politics of the 1790s and the Sedition Act of 1798

The political consensus of the revolutionary era fell apart in the face of peace. The Framers divided into two embryonic political parties, the Federalists led by John Adams and Alexander Hamilton, and the Republicans led by Thomas Jefferson and James Madison, with George Washington presiding above the fray. Disagreements between the two sides were often over the nature and limits of federal power—for example, whether any implied power existed to allow the federal government to charter a bank of the United States, an issue eventually decided in *McCulloch v. Maryland*. The fractious political climate of the time, however, also served as backdrop to events such as the Whiskey Rebellion from 1791 to 1794, when insurgent whiskey distillers took up arms to fight a tax newly imposed by Congress. The Whiskey Rebellion crystallized the question of what types of conduct and expression should citizens and citizen groups be able to engage in to show disagreement with the policies of the government; what types of conduct and expression should be permitted as legitimate where those citizens lived in a republic and thus participated in the election of the government themselves. Washington himself was not sympathetic to rebels, tending "to group all opponents of his programs grossly together; any dissent appeared, to him, close to insurrection."[63] Hamilton in turn had argued for criminal prosecution of those who criticized the new excise tax, although Attorney General Edmund Randolph felt that the published criticisms of the tax did not constitute sedition.[64]

An issue of foreign policy—the aftermath of the French Revolution—came to rend the fabrics of the young Republic even further. The absolutist monarchy of France had, with no small irony, served as the American Patriots' staunchest ally in the Revolutionary War against England. Shortly after the Americans succeeded in their cause, the French, with American inspiration, decided to sever their bonds with their king as well. In contemporary eyes, the French Revolution would have seemed a much most significant political event than the American one, taking place as it did at the center of European power and culture, as opposed to some far-flung colonies of the British Empire. The political storms of Paris blew all the way out to the newborn United States as well. One scholar described the historical context this way:

> No single foreign event affected the United States more profoundly in the 1790s than the French Revolution. Most Americans initially hailed the new Republic's commitment to "*liberté, égalité, fraternité*." Over the next several years, however, France exploded in religious conflict, economic chaos, and civil war. With the executions in 1793 of the French king Louis XVI and his queen Marie Antoinette, the French Republic spiraled into the "Reign of Terror." . . . The division between Federalists and Republicans grew increasingly acrimonious over the crisis in Europe. The Republicans saw the French Revolution as an extension of the American promise of liberty, republicanism, and democracy. The Federalists saw it as a menacing harbinger of licentiousness and a clear and present danger to the established order. The political tension and mutual suspicion soon reached fever pitch. In 1796, in the first contested presidential

[63] Stephen M. Feldman, Free Expression and Democracy in America 73 (2008).
[64] Stephen M. Feldman, Free Expression and Democracy in America 71-74 (2008).

> election, John Adams defeated Thomas Jefferson by a scant three electoral votes. After Adams's election, both Federalists and Republicans feared the breakup of the Union.[65]

From the Federalists' point of view, if the Republicans gained power they would surely bring out the guillotines from France. From the Republicans' point of view, the Federalists had betrayed their true nature as pro-British monarchists. In the wake of the Jay Treaty with Britain, France threatened war against the United States. President Adams sent a three-man delegation to Paris consisting of Charles Cotesworth Pinckney, Elbridge Gerry, and the future Chief Justice John Marshall. The French, however, treated the American delegates with such disdain that public opinion turned against France and its sympathizers, the Republicans. The Federalists saw an opportunity to defeat their opponents once and for all. In the summer of 1798, Congress adopted the Sedition Act along with three other statutes restricting immigration and naturalization. [66]

With the benefit of hindsight, the Sedition Act seems like a blemish on the proud American tradition of free speech. In the legal and historical context of the time, however, the Act must have seemed quite moderate from the Federalists' perspective. It is true that the statute provided criminal penalties for any criticism of the government, Congress, the President, where the criticism was voiced "with intent to defame . . . or to bring them . . . into contempt or disrepute."[67] Section three of the Act, however, incorporated the truth defense used in Zenger's trial as well as the right of the jury to determine both the law and facts of the case.[68] One scholar described the 1798 Act as "the most liberal seditious libel statute then imaginable."[69] Federalists at the time emphasized that the law eliminated the aspects of English seditious libel prosecutions that had most irked Americans.[70] Blatant partisanship, however, clouded the Act, from the voting along entirely party lines to the expiration date upon the end of the Adams presidency to the pointed failure to prohibit criticism of the Vice President, the Republican Thomas Jefferson.[71] The Federalists proceeded to prosecute a number of Republican opponents and critics under the Sedition Act, mostly successfully. The Zengerian protections proved largely ineffective in the face of these charges, as illustrated by the case of Matthew Lyon, Republican congressman from Vermont. Lyon could not prove the "truth" of his claims against the Adams administration, as they were essentially opinions and not statements of fact. He was sentenced to a $1,000 fine and four months in jail.[72]

In a first test for the First Amendment's free speech and press clauses, Republicans quickly began invoking that portion of the Bill of Rights to argue that the Federalist-controlled Congress had no authority to adopt a measure such as the Sedition Act. The Republican critique, however, still seems limited in hindsight. The argument was not that Americans ought to enjoy the freedom to criticize their government and its officers, but rather the argument was that the federal government had no jurisdiction over seditious libel. Article I, Section 8 of the Constitution did not enumerate the power to punish seditious speech among Congress's powers, and the First Amendment

[65] G. Stone, "The Story of the Sedition Act of 1798: 'The Reign of Witches'," in First Amendment Stories 13-15 (Garnett & Koppelman eds., 2012).
[66] Stephen M. Feldman, Free Expression and Democracy in America 75-78 (2008).
[67] Stephen M. Feldman, Free Expression and Democracy in America 79 (2008).
[68] Stephen M. Feldman, Free Expression and Democracy in America 79 (2008).
[69] Stephen M. Feldman, Free Expression and Democracy in America 79-80 (2008).
[70] G. Stone et al., Constitutional Law, 997 (2001).
[71] Stephen M. Feldman, Free Expression and Democracy in America 79-80 (2008).
[72] G. Stone et al., Constitutional Law, 997 (2001).

specifically stated that "Congress shall make no law" respecting this subject. The debate was not over individual liberty but federal power, resembling the contemporaneous debate over the Bank of the United States. Where Congress lacked the power to act, it did not mean that the States did as well—just the opposite, in fact, as the States still held the power at common law to punish libel of all kinds including the seditious.[73] "No less so than the Federalists, the Republicans believed that the punishment of seditious libel remained consistent with the tenets of republican democracy."[74]

As the controversy progressed, however, other more substantive arguments about the importance of a free press and its role as the fourth estate and a watchdog of the established branches of government began to emerge.[75] Albert Gallatin, Republican Congressman from Pennsylvania and future Treasury Secretary, argued that tyrants sought to control the press in order "to throw a veil on their folly or their crimes." In contrast, wise leaders ought to know "that the proper weapon to combat error was truth, and that to resort to coercion and punishments in order to suppress writings attaching their measures, was to confess that these could not be defended by any other means." Gallatin's assertion here that in the marketplace of ideas the truth would triumph over falsehood was a throwback to Milton's *Areopagitica*.[76] James Madison in turn wrote a report on the Alien and Sedition Acts for the Virginia legislature, which adopted the report in 1800, in which he made the modern point that Blackstone and so many others had missed: The doctrine of seditious libel "would have a similar effect with a law authorizing a previous restraint" on the press. "It would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made."[77] Madison's report was an early exposition of what is now well recognized: post-publication punishment can operate as and effectively become prior restraint. Controversy over the Sedition Act in the end had an unexpected consequence of causing Americans to think more critically about the precise nature of free expression and what ought to be protected in the democratic system.

Ultimately, the citizenry that a few decades earlier had refused to indict John Peter Zenger once again exercised its popular sovereignty and in a way that the Federalists failed to anticipate. The highhanded Sedition Act and prosecutions under it turned the voters against the Federalists, and in 1800 they voted Jefferson into the White House. Jefferson promptly pardoned every defendant convicted under the law, and Congress repaid most of the fines exacted.[78] The pre-Marshall Supreme Court never ruled on the constitutionality of the Sedition Act, although lower courts staffed by Supreme Court justices riding circuits unanimously upheld the law.[79] The Sedition Act expired as prescribed at the same moment Adams left office, bringing to an end this contentious period in the history of free expression in America.

[73] Stephen M. Feldman, Free Expression and Democracy in America 82-83 (2008).
[74] Stephen M. Feldman, Free Expression and Democracy in America 83 (2008).
[75] Stephen M. Feldman, Free Expression and Democracy in America 83-84 (2008).
[76] Stephen M. Feldman, Free Expression and Democracy in America 73-74 (2008).
[77] Stephen M. Feldman, Free Expression and Democracy in America 90-91 (2008).
[78] K. Sullivan & Noah Feldman, First Amendment Law 3 (5th ed.) (2013); G. Stone et al., Constitutional Law, 997 (2001).
[79] G. Stone et al., Constitutional Law, 997 (2001).

IV. THE LONG NINETEENTH CENTURY FROM THE SEDITION ACT TO THE ESPIONAGE ACT

A. Suppression of Abolitionist Speech Before the Civil War

After the controversy of the Alien and Sedition Acts settled with the election of 1800, free speech issues did not reach the Supreme Court until the World War I era, with the passage of the 1917 Espionage Act.[80] Scholars have traditionally treated the period between 1800 and 1917 as a period of negligible free speech issues. More recent scholarship has shown, however, that this view of the history of free expression in America is flawed at least after 1870.[81] Further research into the largely forgotten years after 1800 and before the Civil War may be particularly fruitful.

At least noteworthy during these forgotten years was the suppression of abolitionist and antislavery speech. America's original sin, slavery became a focus of controversy in 1820 with the Missouri Compromise and again in the 1830s as the Southern States increasingly felt the institution under threat. Most notably, Nat Turner led a slave rebellion in 1831, which killed about sixty whites before it was put down. Antislavery literature including William Lloyd Garrison's newspaper *The Liberator* called for abolition or even revolts like Turner's, and the governor of Virginia attributed Turner's revolt to abolitionist newspapers.[82] Panicked by events, Southern legislatures began adopting laws prohibiting the publication or dissemination of antislavery expressions. In 1833 the Supreme Court under Chief Justice John Marshall ruled that the Bill of Rights restricted Congress and not the States,[83] constitutionally permitting these State-adopted speech suppressions.

In that same year abolitionists began organizing themselves into societies and conducting a campaign to end slavery. By 1837, there were 1,006 such societies. They flooded the North with abolitionist literature directly not only at men but also women and children, and in 1835 they engaged in mass direct mailing of abolitionist literature into the South. They also petitioned Congress to end slavery in the District of Columbia. In reaction, mobs attacked abolitionists in both North and South, and anti-abolitionists began holding mass meetings to promote the opposite view. By this time, it was a matter of national consensus that abolitionist publications, left unchecked, would lead to slave revolts. Worse, they could lead to disunion and civil war.[84]

Even before the mass mailing, however, many Southern States had already adopted laws banning abolitionist speech. In 1830, North Carolina enacted a statute punishing publications with a "tendency" to excite insurrection among slaves or free blacks. Alabama would punish by death anyone who distributed or published "any seditious paper . . . tending to produce conspiracy or insurrection . . . among the slaves or colored population." In 1836, Virginia adopted a law that would imprison any member of any antislavery society who entered Virginia and advocated abolition or maintained that slaveholders held no property interests in their slaves. The

[80] K. Sullivan & Noah Feldman, First Amendment Law 4 (5th ed.) (2013).
[81] D. Rabban, Free Speech in Its Forgotten Years 4 (1997).
[82] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 797 (1995).
[83] *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).
[84] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 797-803 (1995).

law also banned books that persuaded "persons of colour . . . to rebel. . . ."[85] Moreover, the general opinion in the North and nationally was to support the right of Southern States to suppress abolitionist speech within their jurisdictions.[86]

The South then began demanding suppression by law of abolition in the North as well. Northerners, however, even when they considered abolitionists to be "fanatics," felt that it was inherent to freedom of speech to be able to criticize the institution of slavery. At one anti-abolitionist mass meeting in Albany, New York, General Dix recalled Milton's notion of truth triumphing in the marketplace of ideas: "nothing is to be feared from discussions," he said, "when reason is free to combat error." He then suggested, however, that an exception might be made where it is "unsafe in practice" to allow abolitionist speech when "it is carried on by the circulation of abolition publications in the South."[87] Even if the federal Bill of Rights did not apply to the States, however, many state constitutions contained analogous guarantees of freedom of speech or press. As a result, it was often unclear what steps the anti-abolitionists were suggesting.[88]

The administration of Andrew Jackson sought to limit the 1835 mass mailing campaign. The U.S. Postal Service, under Postmaster General Amos Kendall, declined to deliver the abolitionist literature.[89] Jackson, a slaveholder himself, complained about abolitionists in his Seventh Annual Message to Congress and recommended a law to prohibit "the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection"—an incitement law, of a sort.[90]

In response, the Twenty-Fourth Congress referred the issue to a select committee of five senators, four of them from slave states. Many senators doubted, however, that the federal government had the authority to adopt such a statute. In February 1836, Senator John C. Calhoun of South Carolina reported a bill from the Select Committee on Incendiary Publications. The bill would prohibit deputy postmasters from knowingly delivering and receiving "any pamphlet, newspaper, handbill or other printed, written, or pictorial representation touching the subject of slavery," but in so doing the postmasters would be enforcing the laws of those states the prohibited the circulation of such materials.[91] Calhoun wrote a report explaining why the draft bill would not do what Jackson asked for and establish a federal prohibition against circulating abolitionist materials: The First Amendment, Calhoun wrote, made federal restrictions on the press impossible. Interestingly, Calhoun claimed that by this time there was no doubt that the Sedition Act had been unconstitutional.[92] In April 1836 the Senate debated the Calhoun bill, and senators including Daniel Webster and Henry Clay rose

[85] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 805 (1995).
[86] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 806 (1995).
[87] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 814 (1995).
[88] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 817 (1995).
[89] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 817-21 (1995).
[90] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 821 (1995).
[91] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 824 (1995).
[92] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 825 (1995).

in opposition on the grounds that it violated the First Amendment.[93] Senator Davis of Massachusetts, among other objections, pointed out that the language of the bill would cover private letters, and that records of congressional debates and even the Declaration of Independence could be deemed to touch on the subject to slavery and thus banned—in fact, in the ensuing years speeches made in Congress did fall within the censorship of the slave states.[94] In the end the bill was defeated.[95]

The House of Representatives in turn was unable to agree on a course of action with respect to any incendiary publications bill and took none. Representative Hiland Hall of Vermont drafted a report, however, representing the view of three minority members of the House Post Office Committee that Congress had no power to prohibit incendiary publications. The report was never printed.[96]

Parallel to these debates in Congress, numerous Northern state legislatures also considered potential legal measures to muzzle abolitionist speech. Some Southern legislatures had called on their brethren to pass this kind of law. Ultimately, however, no free state adopted any such law, and some ended up defending the principle of free expression.[97]

Congress still faced the issue of abolitionist petitions addressed to Congress. Southern congressmen pointed out that petitions calling for abolition were precisely the type of materials that the South was trying to ban. Thus they demanded that Congress forbid these petitions, a demand that obviously ran up against basic principles of representative government. John Quincy Adams, in his post-presidency career as a congressman, led the opposition to this effort to ban abolitionist petitions. In the end, the House adopted a resolution stating that all petitions relating to slavery "shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon." This gag rule was finally abandoned in 1844.[98]

Finally, a mob attacked the printing press run by Rev. Elijah Parish Lovejoy and killed him in November 1837. Lovejoy, a Presbyterian minister, had run the abolitionist paper Alton Observer, and Alton, Illinois proved to be the scene of his death. Mobs had already destroyed three of his presses, and he died defending the fourth one.[99] Lovejoy's death served as a violent capstone to the crisis over abolitionist speech of 1835-37.

The issue of freedom of speech for abolitionists again came to the fore in the years immediately leading up to the Civil War. The Kansas-Nebraska Act of 1854 first set the stage for war by overturning the 1820 Missouri Compromise and allowing the expansion of slavery into western territories. The Act led to the founding of the Republican Party that same year. Soon afterward, the Supreme Court held in the Dred Scott case of 1857 that Americans had a right to slavery in the territories and that blacks could never

[93] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 832-33 (1995).
[94] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 830-31 (1995).
[95] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 835 (1995).
[96] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 825-26 (1995).
[97] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 836-45 (1995).
[98] M. Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37, 89 Nw. U.L. Rev. 785, 846-49 (1995).
[99] M. Curtis, The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens, 44 UCLA L. Rev. 1109 (1997).

be citizens. In 1859, John Brown led his infamous raid at Harpers Ferry.[100]

All of these events led to fierce debates in the prelude to war. Abolitionists began adopting a violent rhetoric. In 1854, abolitionist Angelina Grimké Weld admitted that she preferred war to slavery. Hinton Rowan Helper, a North Carolina abolitionist, published a book entitled *The Impending Crisis* in 1857 in which he wrote, "the negroes . . . in nine cases out of ten, would be delighted with an opportunity to cut their masters' throats." Many Republican politicians endorsed the book and sought to publish an abridgement of it.[101] In 1858, Boston abolitionist attorney Lysander Spooner advocated arming blacks for guerrilla warfare. William Seward spoke of an "irrepressible conflict" between freedom and slavery. After Harpers Ferry, Frederick Douglas justified violence as a means toward abolition. Also after Harpers Ferry, a North Carolina grand jury called *The Impending Crisis* treasonous against North Carolina and indicted Republican endorsers of the book, although the defendants were out of the reach of North Carolina courts.[102] The abolitionists resented having been muzzled for all these years, which contributed to the turn to violent rhetoric. Southern slaveholders in turn saw the abolitionists as inciting violence in their midst.[103] During the 1859 congressional debate, Democrats would suggest that Helper and Seward incited the Harpers Ferry raid and were as guilty as Brown was of the acts of violence.[104] Southern judiciaries acted on this belief: Rev. Daniel Worth, a Wesleyan minister who circulated Helper's book in North Carolina, was arrested and charged with circulating "any written or printed pamphlet or paper . . . the evident tendency whereof is to cause slaves to become discontented with the bondage in which they are held . . . and free negroes to be dissatisfied with their social condition." Worth was convicted, and the North Carolina supreme court upheld the conviction on appeal. The message to Republican politicians was clear: prison awaited them if they entered the jurisdiction of the South.[105]

Freedom of speech and of the press in the years leading up to the American Civil War remains an under-explored topic of research, but in truth it was intimately tied up with the debates at the time over slavery. William Seward declared that if only the South allowed free speech, the Republican Party would have as many supporters there as there were northern Democrats. Southern Democrats in turn believed that a Republican president was unacceptable precisely because he would not muzzle abolitionist publications.[106] Slave state laws banning abolitionist speech were, broadly speaking sedition laws as well, in that they criminalized a subset of political speech that was critical of governing institutions.[107] In this way, freedom of speech was at the heart of the greatest and most cataclysmic political dispute

[100] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 265-72 (2000).
[101] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 272 (2000).
[102] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 272-73 (2000).
[103] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 273 (2000).
[104] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 277 (2000).
[105] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 289-96 (2000).
[106] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 297 (2000).
[107] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 299 (2000).

in American history, a cataclysm that, despite Lincoln's protestation, would break the American bonds of fellowship.

B. Speech Suppression During the Civil War

Tables would turn during the Civil War, with Abraham Lincoln and the Republicans now put in the position of suppressing expressions that they deemed seditious in Union territories.

On September 24, 1862, President Lincoln issued a proclamation that read in part:

> Now, therefore, be it ordered, first, that during the existing insurrection and as a necessary measure for suppressing the same, . . . all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to the Rebels . . . shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.

"Discouraging" enlistment was now punishable as a crime. Moreover, Lincoln had authorized the suspension of the writ of habeas corpus back in April 1861 when fighting began and Washington, D.C. came under direct threat. Chief Justice Roger Taney, acting as a circuit judge, famously ruled that the President had no authority for doing so in *Ex parte Merryman*,[108] and Lincoln famously ignored Taney's decision. In the September 1862 proclamation Lincoln reiterated that the writ was suspended with respect to any person arrested or imprisoned by military authorities. Both before and after this proclamation, the Union military arrested a number of civilians. In March 1863, Congress passed an act at once authorizing and limiting presidential suspension of the writ.[109]

On March 16, 1863, President Lincoln appointed General Ambrose Burnside to take up command of the Department of Ohio. A month later, Burnside issued General Order number 38, which specifically prohibited pro-Confederacy speech among other offenses: "The habit of declaring sympathies for the enemy will not be allowed in this Department. Persons committing such offenses will be at once arrested." Similarly, in Indiana, General Milo Hascall issued General Order number 9 to prohibit newspapers and public speakers from "bring[ing] the war policy of the Administration into disrepute." On May 5, Union soldiers burst into the Dayton home of Ohio Democratic congressman Clement L. Vallandigham and arrested him for an anti-war speech that he delivered a few days earlier at a Democratic Party rally. Vallandigham attempted but failed to procure a writ of habeas corpus. He was tried the next day by a military commission appointed by General Burnside. According to a witness for the prosecution, Vallandigham had specifically criticized General Order number 38. The military tribunal convicted Vallandigham, and the Supreme Court declined to review the case. President Lincoln then commuted Vallandigham's sentence from imprisonment to banishment to the Confederacy.[110]

Vallandigham's arrest was by no means the only one under General Order number 38 for expressing disloyal sentiments, but it was a leading case. Massive protests followed, the Democratic press heavily criticized the arrest, as were even many Republicans. Lincoln offered Burnside support after the

[108] 17 F. Cas. 144 (C.C.D. Md. 1861).
[109] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 305-06 (2000).
[110] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 305-14 (2000).

arrest took place, even while noting that real doubt existed in the cabinet that the arrest was necessary. In June 1863, General Burnside, who also had command of Illinois, went on to suppress publication of the *Chicago Times*, a paper that had denounced Lincoln's Emancipation Proclamation. Even though this time a federal judge issued a temporary injunction against Burnside, Union soldiers ignored the court's order and seized the newspaper. Massive protests again followed. President Lincoln quickly revoked Burnside's order of seizure, allowing the *Chicago Times* to resume publication.[111]

Lincoln was wrestling with, and never could fully resolve, the tension between free speech and the wartime emergency, which went to the heart of democracy itself. To justify Vallandigham's arrest, Lincoln argued that wartime necessity justified it, because the type of expressions voiced by Vallandigham led to desertions. "[A]rmies cannot be maintained unless desertions shall be punished," the President noted. "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" Lincoln also argued that wartime precedents would not be applied to justify suppression in peacetime: "I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one."[112]

Vallandigham's arrest, however, touched off a wave of criticism against the Administration, which criticism also tended lead to desertions and to undermine the Union cause. Taken to its logical conclusion, Lincoln's argument would mean that the authorities ought to arrest these critics as well, and presumably any critics of these arrests, and so on ad infinitum. The only logical stopping point would be where no more critics remained, which to say, where none dared to criticize the government. At that point there would be no democracy either. It is the nature of democratic government that citizens, in particular citizens who could be sent out to kill or to die in a war, had a right to debate and consider the wisdom of that war even as the war continues. If they could not debate the question of war and peace, then neither could they properly vote on the issue.

As events transpired, the critics of Vallandigham's were generally not arrested. [113] Lincoln had enunciated an argument that could potentially undermine American democracy, but he was equally committed to that democracy. In the election year of 1864, as the war still raged, some suggested that Lincoln ought not to relinquish power if a Democratic opponent were to defeat him, but Lincoln rejected the suggestion. "I am struggling," he said, "to maintain the government, not to overthrow it." The American people remained sovereign of their country, and if they "should deliberately resolve to have immediate peace even at the loss of their country, and their liberty," Lincoln said, then "I know not the power or the right to resist them." A presidential election in the midst of civil war was dangerous, Lincoln acknowledged in November 1864, but it was nonetheless necessary: "We

[111] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 314-16 (2000).
[112] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 341 (2000).
[113] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 339 (2000).

cannot have free government without elections."[114] In the end Lincoln won the 1864 election substantially on the strength of support from soldiers voting by absentee ballots.

Abraham Lincoln is rightly remembered as America's greatest president. He saved the Union, and he freed the slaves. His contemporary Democratic opponents were perhaps hypocritical in their cries of free speech, having not long ago supported the suppression of abolitionist speech throughout the South. Nevertheless, the Lincoln Administration's suppression of legitimate political expressions such as those made by Vallandigham stains Lincoln's reputation. History would prove Lincoln wrong that later generations would not use his precedent to justify suppression, as the American government sought to suppress free speech during World War I, when the Republic was under much less threat than during the Civil War. Lincoln left a legacy of a more just and more equal America, not a mention the continued existence of the United States as a country. Suppression of free expression on the basis of executive war powers, however, is also a part of Lincoln's legacy. In the fight for greater freedom of expression around the world, Lincoln serves as a reminder that even the best of leaders can depart from the better angels of their nature and wrongly abridge freedom of expression.

C. From the Civil War to the Great War

The traditional account of the history of the freedom of speech in America skips from after the Civil War to the Espionage Act during World War I. Recent scholarship has shown, however, that the struggle over free speech continued during the period between the two wars, albeit in a different form. Instead of war and peace, the topic of expression or suppression would now be the result of puritanical morals.

Anthony Comstock was a veteran of the Union army and a man of strict Victorian morals—which is to say, he was a proverbial stick in the mud. After moving to New York after the war, Comstock began working to increasing police enforcement against publications that he considered obscene as well as other items deemed indecent. Morris K. Jesup, president of the YMCA, began working with Comstock and created a "Committee for the Suppression of Vice" to further Comstock's goals. In 1872, Comstock became embroiled in the case of *Woodhull and Claflin's Weekly*, a publication that advocated free love. The *Weekly* had attacked minister and moralist Rev. Henry Ward Beecher for his hypocrisy in engaging in an adulterous relationship. Comstock had Woodhull and Claflin arrested, but the judge eventually dismissed the case on the grounds that the federal obscenity statute at the time, which addressed obscene materials sent by mail, did not apply to newspapers. Dissatisfied with the outcome of the case, Comstock began and succeeded in lobbying Congress to enact a broader federal obscenity statute. What came to be known as the Comstock Act also created a special agent of the Post Office to enforce its provisions against obscene materials. After the Act's passage, the Postmaster General appointed Comstock to this position, and held it until his death in 1915.[115]

In the most significant case of enforcement of that law that bore his name, Comstock found his chief antagonist to be individualist anarchist Ezra

[114] M. Curtis, Free Speech, "The People's Darling Privilege"—Struggles for Freedom of Expression in American History 351 (2000).
[115] D. Rabban, Free Speech in Its Forgotten Years 28-30 (1997).

Heywood. Born in 1829, Heywood had trained for the ministry at Brown University before abandoning the church to work as an abolitionist activist. During the Civil War, however, his pacifism led him to oppose war as a means to end slavery, and he supported free speech rights for pro-South Democrats—including Ohio's Vallandigham. After the war, Heywood turned his energy to labor and sexual reform. In 1872, he founded a journal called *The Word*, which advocated "the abolition of speculative income, of women's slavery, and war government." In 1876 he published a pamphlet called *Cupid's Yokes* which argued for what Heywood called "sexual self-government" and attacked marriage as an institution. The pamphlet contained some references to sex but nothing that could be deemed prurient, but it also directly attacked Comstock and the YMCA. Comstock began prosecuting Heywood within a month of the pamphlet's publication, arresting him in November 1877. At trial, the judge limited the issue to whether Heywood mailed copies of his pamphlet and prevented him from discussing the philosophy behind it. The jury convicted Heywood, who then unsuccessfully appealed on First Amendment grounds. Heywood was sentenced to two years imprisonment and fined. President Rutherford Hayes subsequently pardoned Heywood. Heywood would be convicted under the Comstock Act again in 1890, however, for printing a letter that contained an obscene word, and this time President Benjamin Harrison declined to pardon him, and Heywood served two years in prison.[116]

The National Liberal League and later the National Defense Association, organizations of American freethinkers, began campaigning against the Comstock Act. In 1878 the National Liberal League submitted a petition to Congress calling for the repeal or revision of the Act so that it could not be used for moral or religious persecution. A House committee rejected the petition and affirmed the constitutionality of the Comstock Act.[117]

The organization that emerged as the advocate for free expression, however, was the Free Speech League. Unlike the National Defense Association, which defended libertarian radicals prosecuted for obscenity under the Comstock Act, the Free Speech League was established in 1902 in response to legislation against anarchists to protect the constitutional freedom of speech of all American citizens, regardless of their views.[118] At the League's helm was a man named Theodore Schroeder, a son of German immigrants who began his career as a lawyer in Utah defending Mormons only to turn against adherents of that new religion. A man of eccentric manners, as secretary of the League Schroeder stuck to administration and scholarly works on freedom of speech and stayed away from actual litigation. His scholarship proved influential, however, and under his leadership the Free Speech League came to be involved in virtually every major free speech controversy in the first two decades of the twentieth century.[119]

Perhaps the reason that the Free Speech League attained the importance it had was that Schroeder and his colleagues made a unique commitment to defending the right to free expression regardless of the particular viewpoint expressed. Even today, it remains all too easy to cry "free speech" only when defending speech with which we happen to agree. In his book, "Obscene Literature and Constitutional Law," Schroeder complained

[116] D. Rabban, Free Speech in Its Forgotten Years 32-40 (1997).
[117] D. Rabban, Free Speech in Its Forgotten Years 38 (1997).
[118] D. Rabban, Free Speech in Its Forgotten Years 44-45, 64 (1997).
[119] D. Rabban, Free Speech in Its Forgotten Years 44-57 (1997).

that those who voiced support for free speech usually only spoke up when their own point of view was under attack. Worse still, these supposed supporters of freedom of speech often supported restrictions on speech opposed to their own opinions. Schroeder pointed out a commitment to freedom of expression meant committing to the freedom of all and not only those with whom one happened to agree. To illustrate the point, Schroeder needled his own allies, the self-professed radicals of the time, arguing that many political conservatives were actually better on the subject of free speech because they accepted "unabridged freedom of utterance as a matter of acknowledged natural right" irrespective of the content of the utterance, something that radicals often failed to do.[120]

In practice, the controversies of the day typically involved either sex radicals or anarchists. In an early case that reached the Supreme Court, the British anarchist John Turner was arrested for delivering lectures on anarchism in the United States. The Free Speech League funded his defense, and Turner hired Clarence Darrow and the poet-lawyer Edgar Lee Masters to defend him. Despite the caliber of his lawyers, Turner lost and was deported. Emma Goldman, the Russian immigrant anarchist and co-founder of the League, was herself deported in 1917 for making antiwar speeches.[121] The League's assistance of birth control activist Margaret Sanger proved more successful. Prosecuted under the Comstock Act for various writings on birth control, venereal diseases, and other topics, Sanger received substantial legal assistance from the League, and the government eventually dropped its charges against her. When Comstock proceeded to arrest Sanger's estranged husband William, the League provided assistance as well. Finally, the League used its own funds to print copies of Sanger's pamphlet, "Family Limitations."[122]

[120] D. Rabban, Free Speech in Its Forgotten Years 57-62 (1997).
[121] D. Rabban, Free Speech in Its Forgotten Years 64-65 (1997).
[122] D. Rabban, Free Speech in Its Forgotten Years 67-69 (1997).