History of Speech and Press Freedoms

Explicit in the text of the First Amendment is the connection among the freedoms of speech, press, and association, and the concept of a self-governing society. Yet, at the time of the constitutional framing, these notions had received only gradual acceptance in Anglo-American law. Indeed, in the eighteenth century, the freedoms of speech and of the press were still emerging from a protracted struggle with government – a struggle that began in England in the Middle Ages.

English governmental censorship stemmed from the 1275 enactment of *De Scandalis Magnatum*. This act imposed penalties for any false talk about the king. The law punished what a later amendment in 1559 termed "seditious words" -- criticism of the government that was subject to criminal penalties for contributing to public disorder and lawlessness. In the sixteenth and seventeenth centuries, regulatory controls expanded with the enforcement of censorship laws by the King's Council that sat in the "starred chamber" at Westminster – the council that became known as the infamous Star Chamber.

The Star Chamber was merciless in cases like the *Trial of William Prynn*. Prynn had published a book expressing disdain for actors and acting. The Star Chamber viewed the book as an attack on the queen who had recently appeared in a play, and therefore convicted Prynn of seditious libel against the government. Prynn was fined ten thousand pounds, sentenced to life imprisonment, branded on the forehead, and had his nose slit and ears cut off.

Although the Star Chamber was abolished in 1641, its precedents continued to be applied by the common law courts in England and the colonies. The image of colonial America as a society in which freedom of expression was cherished seems largely inaccurate. Diversity of opinion on religion, politics, and social structure dotted the colonies, yet each community tended to be a tight little island clutching to its own respective orthodoxy, and eager to banish or punish unwelcome dissidents.

By 1776 under the common law, freedom of speech and press clearly encompassed freedom from governmental restraints prior to publication. It was the system of crown licensing against which John Milton so eloquently protested in *Areopagitica* (1644) (one of the readings in Assignment 2). As Sir William Blackstone, the most influential English legal commentator of the eighteenth century, explained: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freedman

has an undoubted right to lay what sentiments he pleases before the public; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4 Blackstone, *Commentaries* (1769). Hence, the elimination of licensing in England in 1694 did not mean that publishers operated free of governmental restraint. Once books, pamphlets, or bulletins were released to the public's eye, their authors and publishers were still subject to the amorphous offense of seditious libel.

By the time of the ratification of the Constitution, however, libertarians like James Madison broke with others who continued to embrace the Blackstonian common law understanding of free speech and press. In 1789, when the First Congress entertained amendments to the Constitution, James Madison urged the adoption of a provision rejecting the English common law principles: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Madison's proposal for expressly prohibiting the states from limiting the freedom of speech and press did not survive. Ratified on December 15, 1791, the First Amendment was thought to protect only against censorship by the national government; it did not provide absolute immunity for what speakers or publishers might utter or print.

One of the great paradoxes of First Amendment history is that many of those who participated in its enactment also were parties to the passage of the Alien and Sedition laws. Did late eighteenth century America believe that these laws were consistent with the First Amendment? The Supreme Court of that time did not have an opportunity to pass on this question because the laws were repealed. In 1964, Justice William Brennan, writing for the Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), finally put the matter to rest: "[A]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."

In the absence of restraints on state censorship under the First Amendment, the struggle for free speech and press became a legacy of suppression. Beginning in the 1830s, the dissemination of information on slavery was punished in the North and South by both abolitionists and slave owners. In the North, crusading vigilantes fomented mob action, leading to the tarring and feathering, clubbing, whipping, and shooting of abolitionists. The publicist William Lloyd Garrison, for one, was stripped half-naked and paraded through the streets of Boston. In the South, legislation punished abolitionist sentiments as "incendiary," "inflammatory" and "provoking servile insurrection." That legislation was reinforced by censorship of the mails, which began in 1835 with the refusal of a South Carolina postmaster to deliver abolitionist mail.

By the turn of the twentieth century, public opinion was aroused by the doctrines of socialism, anarchism, syndicalism, and the specter of violent revolution raised by radical political groups. Consequently, there was the resumption of state legislation punishing seditious libel. By the end of World War I, no fewer than thirty-two states had laws against criminal sedition; more than 1,900 individuals were prosecuted for seditious libel; and more than 100 newspapers, pamphlets, and other periodicals were censored. The Espionage Act of 1917 was the primary source of federal restrictions on speech and press in the early twentieth century. That Act imposed criminal liability on any person who would make or convey false statements with the intent to interfere with the operations of the American armed forces.

When challenges to the Espionage Act and other state laws punishing dissident individuals and groups finally reached the Supreme Court, the justices were required for the first time to create standards for determining the scope of constitutionally protected free speech and press. Neither the text nor the history of the First Amendment had as profound an influence on the development of First Amendment law as the normative values and operational functions served by the freedoms of speech and press. That inquiry is the subject of consideration for Assignment 2.

Sources: Excerpted from David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties* (New York, NY: W.W. Norton & Co., 7th ed. 2008), pp. 408-416
and Jerome A. Barron & C. Thomas Dienes, *First Amendment in a Nutshell* (St. Paul, MN: West Publishing Co., 5th ed. 2018), pp. 5-8.