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Origins and applications of free speech in America

1. Free speech and the First Amendment

The American ideal of free speech has been a source of much contention and celebration in the 200+ years of the nation's existence. Though not outlined in the final Constitution, the statement now known as the First Amendment was among the first debated and was included as a part of the Bill of Rights, ratified by the 10th state (Virginia) on December 15, 1791, thus giving the amendments the 3/4 majority necessary to become part of the Constitution. The first amendment reads as follows: "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 assemble, and to petition the government for a redress of grievances."

The idea contained in the guaranteed freedom of speech is not original to the American experiment, though one might argue that it has found one of its furthest extensions within the American society. But the idea goes back centuries, with notable applications, such as when Socrates spoke to his jury, just before they sentenced him to death via poison hemlock: "'If you offered to let me off this time on condition I am not any longer to speak my mind... I should say to you, "Men of Athens, I shall obey the Gods rather than you" ("Timeline").

It seems reasonable to attribute the contemporary notions of free speech to the grains of wisdom uttered by Socrates. And these, in turn, wove their way into the western tradition, passed through the Greek democracies, through the Roman republic, into the English Bill of Rights of 1689[3]. Yet, *enshrining* the freedom of speech into the *American* constitution was never a guarantee. Tacit acceptance, and understanding of the generalities of free speech, seem to be the historical norm.

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3 Specifically, thefollowingclauses in the English Bill of Rights: "Thatit is theright of thesubjectsto petition theking, and allcommitments and prosecutionsforsuch petitioning areillegal;"…"Thatthefreedom of speech and debatesorproceedings in Parliamentoughtnotto be impeachedorquestioned in anycourtorplace out of Parliament;" …"And thatforredress of allgrievances, and forthe amending, strengthening and preserving of thelaws, Parliamentsoughtto be heldfrequently."

Therefore, rationale for the eventual Constitutional amendment, which, in American politics, ranks as the highest degree of legal occurrence, opens a fascinating foray into the happenings and circumstances of American thought: one that has ramifications even as the parameters of the amendment are debated today.

It is difficult to credit any one occurrence as being the impetus for confirming the liberty the press and free speech into absolute Constitutional right. As mentioned above, there was a long historical precedent from which to draw upon. Yet, this did not make passage of speech protections later found in the American Bill of Rights a certainty. Indeed, for most of American history, the contemporary understanding of right of free speech was one of nebulous application. One may look no further than the Virginia Declaration of Rights, which contains almost uncanny similarities to the eventual wording of the Bill of Rights, yet contains no mention of "speech."

Interestingly, however, though speech is not mentioned in this document, freedom of the press is. Section 12, specifically states "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments"("The Virginia Declaration of Rights").

Interestingly, the decision to add freedom of speech to the amendments was not necessarily obvious even to the original Constitutional framers. In fact, James Madison's original draft of the amendments, first introduced into the House of Representatives on June 8, 1789, lumped freedom of the press and freedom of speech into a single idea, written thusly: "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" (*A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875* 451).

Seen here, it is important to ask why neither the Virginia Declaration, nor Mr. Madison's original amendment did not determine the right of speech as worthy of stand-alone recognition. The answer, we believe, lies in the nature of the political landscape of the period, and this reveals an important aspect to understanding the philosophical rationalization of free speech. The lack of "speech" being mentioned in the Virginia *Declaration* may be explained by noting that the two aspects mentioned above: freedom of the press and freedom of speech, are, practically speaking, two sides of the same coin, and nearly inseparable from one another. One only need place themselves in the mind of an active, 18th century citizen to recognize that speech, without access to the press, was a largely useless guarantee. The inherent value of speech is directly tied to the ability to disseminate that speech to a wider audience. Similarly, the ability to distribute speech on the pages of a newspaper presumed that the speech had a right the be stated in the first place.

As newspapers proliferated thought the colonies, and presses became the preferred method by which individuals expressed their views about all things happening in the world, it was only natural that the right to free press would become conflated with

the right of free speech. For free speech, without access to the press, was futile. The press, after all, remained the sole mass media method for dissemination of public ideas.

It seems that this was an obvious correlation, to many living in that time. However, it was not sufficient for some. It may even be said that the amendments themselves would have never come to fruition but for the demands of a few discontents. It was the so-called "Antifederalists," a small but vocal group of individuals (later identified as Patrick Henry, Thomas Jefferson, Samuel Adams, George Mason, and others) who demanded Constitutional guarantees of certain freedoms before they would accept the Constitution as a whole. It took a rather heated and long-term newspaper debate between the Federalists (Namely James Madison, Alexander Hamilton, and John Jay) and the Antifederalists before the now enshrined amendments came to pass.

The Antifederalists took their writings and opinions to the pages of the American newspapers, arguing that the Constitution did not affirm the rights of the people to an adequate degree, and needed further, explicit, enshrined protections. Though there is no defined "canon" of writings which constitute the "Anti-Federalist papers," several books and collections have attempted to organize writings in some semblance of association. Antifederalist 9, dubbed thus by the Gilder Lehrman Institute of American History (*Gilder Lehrman*) contains an example of one method used by the anti-federalist writers to argue against the Constitution as it stood. In this clearly satirical piece, the author (writing under the pseudonym "Montezuma" takes on the persona of an aggrieved aristocrat, bemoaning the acceptance of the statement "that all men are born equal" and offering the rest of the piece as "defense of our monarchical, aristocratical democracy." The author goes on to argue that the Constitution as it stands is better without the Bill of Rights, because "this constitution is calculated to restrain the influence and power of the LOWER CLASS -- to draw that discrimination we have so long sought after" and making amendments would embolden and give power to the non-aristocrat, making it much more difficult "to check the licentiousness of the people by making it dangerous to speak or publish daring or tumultuary sentiments;"

Other, less satirical pieces take a more measured approach. Writing to citizens of Pennsylvania as "Centinel," one author correctly notes that although the Pennsylvania Constitution guarantees freedom of speech, among other rights, such rights have not yet been enshrined in the federal Constitution. Centinel writes

"From this investigation into the organization of this [proposed federal] government, it appears that it is devoid of all responsibility to the great body of the people, and that so far from being a regular balanced government, it would be in practice a *permanent* ARISTOCRACY. The framers of it, actuated by the true spirit of such a government, which ever abominates and suppresses all free enquiry and discussion, have made no provision for the *liberty of the press,* that grand *palladium of freedom*, and *scourge of tyrants*; but observed a total silence on that head" (Ketcham 236).

Here is found both the importance of enshrined rights, as well as the implied association of freedom of speech and freedom of the press: again, they are presented as two sides of the same coin.

After Pennsylvania adopted the new federal Constitution, twenty-one members of the minority signed a dissenting address, and argued the following:

"We entered on the examination of the proposed system of government, and found it to be such as we could not adopt, without, as we conceived, surrendering up your dearest rights." The minority then offered a series of amendments which, they determined, would address the flaws in the constitution. Among these amendments was number 6: "That the people have a right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States" (Ketcham 239–40).

Of note, here we see that freedom of speech is directly tied to freedom of the press. As explained by the author, freedom of speech serves as the foundation of freedom of the press. Notice the placement of "therefore" in the proposed amendment. In essence, free speech is the cause, and freedom of the press is the effect. One cannot exist without the other.

This sentiment was expressed, in other forms, by individuals up and down the eastern seaboard. George Mason of Virginia succinctly expressed his opposition to the Constitution as written. "There is no declaration of any kind, for preserving the liberty of the press…" (Ketcham 175).

On Nov 5, 1787, "John DeWitt's Essay III was published in the *Boston American Herald*, and noted that "Civil liberty, in all countries, hath been promoted by free discussion of publick measures, and the conduct of publick men. The FREEDOM OF THE PRESS hath, in consequence thereof, been esteemed on of its safe guards. That freedom gives the right, at all times, to every citizen to lay his sentiments, in a decent manner, before the people" (Ketcham 311).

Here again, there seems to be a stated fear that the Constitution as proposed by the framers and, in some cases already adopted by several of the states, was insufficient to guard the liberties thought most important to the existence in sustaining of free peoples; most notably, freedom of speech and freedom of the press. Once again, they are seen as inseparable.

Elsewhere in the debate over the Bill of Rights, James Wilson made the argument that an amendment guaranteeing freedom of the press was unnecessary, since the press is "a copious source of declamation and opposition, what control could possibly proceed from the federal government to shackle and destroy that sacred palladium of national freedom" (Wilson 63)? Arthur Lee replied that since Congress is empowered to define and publish offenses against the government, it is a near certainty that without amendment guaranteeing freedom of the press, Congress would declare all publications from the press against the conduct of government an offense against the government and thus punish them justly. (Lee)

2. The Zenger case

To be fair, this fear expressed by Lee and others was not totally unfounded. There had been instances earlier in American history that would have certainly weighed heavily on the minds of the anti-federalists as they argued for protective amendments. They would have remembered the blatant efforts, made in 1733, to prosecute John Peter Zenger when, under the pseudonym, "Cato" he published excoriating remarks against the standing New York colonial governor in his *New-York Weekly Journal*. Zenger was charged with libel. And, in what would become important legal precedent, Zenger's attorney made the case that truth stands as the ultimate defense against libel. Zenger's attorney argued:

"Every crime against the publick is a great crime, though there be some greater than others. Ignorance and folly may be pleaded in alleviation of private offences; but when they come to be publick offences, they lose all benefit of such a plea: We are then no longer to consider only to what causes they are owing, but what evils they may produce; and here we shall readily find, that folly has overturned states, and private ignorance been the parent of publick confusion.

The exposing therefore of publick wickedness, as it is a duty which every man owes to truth and his country, can never be a libel in the nature of things; and they who call it so, make themselves no compliment"("Trial of John Peter Zenger").

Though Zenger was eventually exonerated, his arrest and eight-month imprisonment stood as a red flag, warning of the tendency or potential of governmental despotism. And, though this case did not rewrite law, the verdict did lay the groundwork for future protections of press and speech freedom.

On the basis of these and other arguments, and through much deliberation in state houses, the Bill of Rights was eventfully approved by Congress on September 25, 1789, and ratified by the states on December 15, 1791. And there, in what has become known as the first amendment, is found the statement demanded by the anti-federalists: "Congress shall make no law… abridging the freedom of speech, or of the press…"

As contrasted with the above understandings of the right, it is notable that one of the most significant elements of the adopted version of the Bill of Rights was to take the idea of free speech, and apply it directly to the individual, connected to, but also separate from the freedom of the press.

This simple change has had long-term effects on the United States culture and law. Over time, the amendment has been interpreted to include not only speech, but freedom of expression. Consequently, the amendment has been used as the legal basis for allowance of pornography ("Jenkins"), opposition to censorship (Purdy), support of commercial speech (Brudney), and expressive conduct (e.g. flag-burning ("Eichman"), offensive gestures (Kutner), etc.).

3. "Classic" press vs. social media

Jumping ahead a few hundred years from the passage of the Bill of Rights, the United Sates finds itself at the crossroads of yet another struggle to define the parameters of free speech and governmental regulation. In this latest instance, it is Social Media that lives at the center of the disagreement.

Traditionally, the press (and other forms of media) have served an important role as a means of disseminating information from government, and to the government. In many ways, it was a symbiotic relationship. Government provided newsworthy events, and the press, through the nature of its business model, served governmental purposes. Media scholars acknowledge intentional manipulations of media through understanding such concepts as the Friday night news dump, the news hole, and the Sunday news reveal (Karpf).

Much changed, however, with the emergence of Donald Trump in the seat of American presidential power. Almost immediately, it was clear that Trumps relationship with the media would be strained. Only 100 days in office, Trump declined to attend the annual White House Correspondents Dinner (Palmeri), which came as no surprise for those political observers who had noticed growing animosity between Trump and the press. Accusations back and forth about the presence and spreading of "fake news" and a general unwillingness to work through the press to reach the people caused increasing tension. The press was accustomed to White House access. The Trump administration cut them off, largely ending press briefings, suspended some reporters from such briefings, and revoked the credentials of others. ("Press Briefing").

For the Trump camp, such a move seemed largely appropriate. From this perspective, the press was not a neutral entity, but existing in active opposition to the Trump administration (Borchers). And, to be fair, such a pattern of partisan journalism had been growing for years. In 2014, the *Washington Post* reported that fewer than 7% of journalists were Republicans (Cillizza). Consequently, trust of the media overall and for Republican voters especially, trust in traditional media, is at near historic lows (NW et al.)("Inverse"). Even some reporters are acknowledging the nefarious goals of the media and begging for admission of bias. ("Media Hate")

Given the perceived bias of media, perhaps it is unsurprising that rather than work through traditional media, Trump chose to speak to the American people through social media, specifically Twitter. This allowed him unfettered access to millions of smartphones, 24 hours per day. It connected Trump with his supporters (and opponents) in a direct manner.

As Trump's fanbase grew, so did his political opposition. Eventually, Trump grew fed up with receiving push back on his tweets. Mockery was not something Trump tolerated. Therefore, he simply blocked certain users from receiving his tweets or responding to his messages.

This blocking, though built into the Twitter system, caused a unique situation which raised questions about the nature of political speech and when, exactly, a public political figure's speech (or, in this case, the speech *to* a political figure) falls within the realm of first amendment protection. In this instance, Trump was "speaking" outside of official government channels. And, people reacting to Trump's speech were also outside those channels. No one doubts the legitimacy of Twitter to make policy decisions of its own choosing. The dilemma comes when a political figure uses non-governmental or, arguably, non-public modes of communication to communicate. In those instances, does a person have the right to restrict an individual's speech? In other words, is a person's right to free speech limited by being blocked from talking to the President on Twitter?

A lawsuit, filed in the Southern District of New York by the Knight First Amendment Institute at Columbia University, contended that the President's blocking of Twitter followers did indeed constitute a violation of first amendment rights. As the executive director of the Knight institute argued,

"President Trump's Twitter account has become an important source of news and information about the government and an important forum for speech by, to or about the president…" "The First Amendment applies to this digital forum in the same way it applies to town halls and open school board meetings. The White House acts unlawfully when it excludes people from this forum simply because they've disagreed with the president" (Wolf).

The court agreed and, in May 2018, Judge Naomi Reice Buchwald ruled that Donald Trump use of Twitter "fell under the "public forum" doctrine as defined by the U.S. Supreme Court. Blocking users from expressing their political views at a designated public forum violated their right to free speech, as set out in the First Amendment of the US Constitution"("Trump Ruling").

The ruling was appealed, but upheld by the a three-judge panel on the United States Court of Appeals for the Second Circuit. In even starker terms, the judges ruled that "The First Amendment prohibits an official who uses a social media account for government purposes from excluding people from an 'otherwise open online dialogue' because they say things that the official finds objectionable" (Savage).

Importantly, this ruling extends beyond the scope of Presidential speech and also applies to any other American political figure who seeks to "silence" the voices of their political opposition. (Csáki-Hatalovics)

Soon, this new standard had been put to the test. Not long after Trumps ruling, New York Democratic Congresswoman Alexandria Ocasio-Cortez was also sued for blocking a Twitter follower. After the suit was filed, Ocasio-Cortez backed down and offered an apology to the previously blocked user. She wrote, "Mr. Hikind has a First Amendment right to express his views and should not be blocked for them…" "In retrospect, it was wrong and improper and does not reflect the values I cherish.

I sincerely apologize for blocking Mr. Hikind" (*Alexandria Ocasio-Cortez Apologizes to Man She Blocked on Twitter*).

The same process has unfoldedelsewhere, in Colorado, for instance, where Republican Congresswoman Lauren Boebert blocked several political opponents (Goodland). If the past rulings are any indication, these, and the near certain future attempts to stem the ability of constituents to speak to their elected officials, will be halted. In short, Twitter and other social media platforms seems to have a recognized position in American politics a sort of "new public square" where the speech of the individual cannot be suppressed.

4. New parameters of the "public square"

The extended definition of public speech raises interesting questions. For instance, where are the parameters of the new "public square?" If, for instance, the reciprocal nature, including opposition comments, mockery, and other forms of speech are allowed, where does this open forum potential stray into territory of harassment? Especially in the modern era of discrimination of all kinds being on the forefront of public conversation, it's not terribly difficult to foresee a time where someone attacking a female politician, or transgender politician, over their policies could easily be accused of gender-based discrimination or hate speech. Of course, motives are never easy to prove. But the opportunity for accusations of "hate-based" opposition are high.

Also, though it must be acknowledged that none of this is necessarily new, and political opponents have long made a point of protesting in front of the homes or offices of elected leaders, what makes this situation different is the potential for anonymous and widespread opposition. In other words, through in this new definition of the "public square" and expanded definition of "speech", it's much easier for a person to verbally attack political figures by means of a few taps on a smartphone, than going to a place to protest in person. Furthermore, that difference raises questions of legitimacy. For instance, should a politician be subject to opposition, potentially harassing comments from a foreign source, governmental or otherwise? If not, how could it be known? What of bots, or fake accounts, or even U.S. citizens outside of his or her constituency?

Again, the idea of dealing with opposition is not new, but the nature of the opposition existing on such an ungoverned platform, where misinformation, false reporting, or outright lies, can be spread worldwide, and shared among millions, far faster than the platform can determine veracity, raises an interesting specter for the future of free speech in America.

Finally, as demonstrated above, the very nature of free speech has long been considered as corollary to freedom of the press (i.e., the free press is the way through which free speech is conveyed.) Viewed from on high, then, questions may be asked of what these rulings in the name of American free speech will do for the nature

of the American free press. For instance, what is a journalist? What responsibility does that journalist have to verify information before sharing it with an audience?

The reality is that, in the American system, any attempt to stifle or limit bad speech (or bad press) also opens the door to stifling good speech (or good press); for the definition of good speech or bad speech remains a wholly arbitrary determination depending on the view of the speaker and hearer. This conundrum has been noted by many, not least of which include James Madison. He recognizes, in Federalist Paper number 10, the messy nature of politics. Speaking specifically of factions, which one could easily argue may be created and maintained by undesired speech, Madison writes: "Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

Madison recognizes that liberty is inefficient. Yet, there is great trust placed in the belief that, given enough active citizens, a faction has potential to "clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution."

Perhaps one of the most apt explanations of America's relationship to its freedoms can be found in Alexis de Tocqueville's *Democracy in America* where he notes that the press (and therefore speech), is not wholly an institution for good, but is in fact, prone to creating dissention. In his words, "it is at the same time indispensable to the existence of freedom, and nearly incompatible with the maintenance of public order" (221). His query is, essentially, why, given the obstinate nature of freedom, representative democracy works in the United States, when it has failed so often elsewhere. Regarding freedom of the press, de Tocqueville concludes:

"The reason of this is perfectly simple: the Americans, having once admitted the doctrine of the sovereignty of the people, apply it with perfect consistency. It was never their intention to found a permanent state of things with elements which undergo daily modifications; and there is consequently nothing criminal in an attack upon the existing laws, provided it be not attended with a violent infraction of them" (221).

In other words, Americans are under no delusion that their system is perfect, but conversely, are very willing to modify laws as they are needed. And those modifications depend on a disorderly process in the press and in the public squares. The alternative would be to limit what could be said and by whom. This, however, is problematic, for he explains that courts are wholly incapable of policing the press, for the courts would undoubtedly decide in favor of limiting burdensome opposition.

Therefore, he concludes, that the American system recognizes that "there is no medium between servitude and extreme license; in order to enjoy the inestimable benefits which the liberty of the press ensures, it is necessary to submit to the inevitable evils which it engenders" (222).

The Federalists did not see the need for an explicit protection of free speech or a free press. Yet their objection to the amendment was one of practicality, not principle. Federalist paper 84, written by Alexander Hamilton, states "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."

Here we find a general truth, enshrined into the American form of government: that the American people, alone, are responsible for the maintaining their rights. Free speech, and free press are noble ideals, but are only guaranteed as long as they are not abused. For with abuse comes rationale for limitation: a limitation that would undoubtedly benefit the law makers.

This idea has been upheld, consistently, and perhaps no more powerfully and eloquently than by Supreme Court Justice Oliver Wendell Holmes, who in 1919, articulated the following in his dissent to Abrams vs. The United States:

"If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death… (*Abrams v. United States*)"

Though Holmes was on the dissenting side of this case, this idea resonated, and has since been used as sort of general understanding about the importance of debate and speech in the American system. We see Holmes' belief that, since certainty of truth cannot be absolutely known, the only legitimate alternative is competition of ideas, and that American ought to guard against any attempt to stifle outspoken opposition.

Holmes words seem to have struck a chord, for as courts have since understood and interpreted the First Amendment and applied "free speech," the general pattern

has erred toward expansion of the term. His conceptual "marketplace of ideas" has "been invoked hundreds if not thousands of times by the Supreme Court and federal judges to oppose censorship and to encourage freedom of thought and expression" over the past 100+ years. (Hudson)

5. Quo vadis "Free Speech"?

Arguably, speech in the United States is freer, and more widely defined now than it has ever been. Expansion of alternative media have created new outlets for users from all ideologies. Yet, what has been need not always be. Though the nation has generally enjoyed expansive freedom of speech, the nation is undoubtedly headed for a reckoning. Actions by citizens, and the resulting arguments against "hate speech" or "incendiary speech" ("Incitement to Violence Isn't Free Speech")(Hall) give fodder for laws limiting what can be said, and who can speak. Furthermore, as the range of "public square" expands, and becomes increasingly less defined, and the opportunity for abusive speech grows, there will undoubtedly be questions of who can speak freely, who can write boldly, and what can and should be said.

The United States of America stands as a unique peculiarity in the eyes of much of the rest of the world. It remains to be seen if the enshrined dedication to personal, speech-based freedoms can withstand the pressures, and potential abuses, of an interconnected, communicative planet.