AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 7: The Republican Era – Democratic Rights/Free Speech

*Thomas M. Cooley*, **A Treatise on Constitutional Limitations** (1883)[[1]](#footnote-1)

*Thomas McIntyre Cooley was one of the leading jurists of the latter half of the nineteenth century. Raised on a farm in New York as a Jacksonian Democrat, he broke from the Democratic Party in Michigan, where he joined the antislavery cause. In the postbellum years, he hewed a somewhat independent course, politically. Over the course of his career, he served as chief justice of the Michigan Supreme Court, the first chairman of the Interstate Commerce Commission, a founding professor of the University of Michigan law school, and an author of leading legal treatises. As a judge and writer, he had an enormous influence on the development of state constitutional law throughout the nation. A persistent concern of his jurisprudence was identifying the proper limits on legislative power, and he worked to meld traditional common law concepts with American constitutional provisions. He though the American constitutional and political tradition gave broad scope to freedom of speech and the press, and he called on courts to adopt a liberal standards that would give adequate space to robust debate on matters of public concern.*

The first amendment to the Constitution of the United States provides, among other things, that Congress shall make no law abridging the freedom of speech or of the press. The privilege which is thus protected against unfriendly legislation by Congress, is almost universally regarded not only as highly important, but as being essential to the very existence and perpetuity of free government. The people of the States have therefore guarded it with jealous care. . . .

It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to the pre-existing law, in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they undertake to assure.

At the common law, however, it will be found that liberty of the press was neither well protected nor well defined. . . . Many matters, the publication of which now seems important to the just, discreet, and harmonious administration of free institutions, and to the proper observation of public officers by those interested in the discharge of their duties, were treated by the [English] public authorities as offenses against good order, and contempts of their authority. . . .

The American Colonies followed the practice of the parent country. Even the laws were not at first published for general circulation, and it seemed to be thought desirable by the magistrates to keep the people in ignorance of the precise boundary between that which was lawful and that which was prohibited, as more likely to make them avoid all doubtful action. . . . There were not wanting instances of the public burning of books, as offenders against good order. . . .

It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin; and commentators seem to be agreed in the opinion that he term itself means only that liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship. . . .

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But while we concede that liberty of speech and of the press does not imply complete exemption from the responsibility for everything a citizen may say or publish, and complete immunity to ruin the reputation or business of others so far as falsehood and detraction may be able to accomplish that end, it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, fi while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.

. . . . [The purpose of American constitutional guarantees] has evidently been to protect parties in the free publication of matters of public concern, to secure the right to a free discussion of public events and public measures and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. To guard against repressive measures by the several departments of the government, by means of which person in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose; and there was no design or desire to modify the rules of the common law which protected private character from destruction or abuse, except so far as seemed necessary to secure to accused parties a fair trial. The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand the liberty of speech and of the press to imply not only the liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted.

At common law an action would lie against any person publishing a false and malicious communication tending to disgrace or injure another. Falsehood, malice, and injury were the elements of the action; but as the law presumed innocence of crime or misconduct until the contrary was proved, the falsity of an injurious publication was presumed until its truth was averred and substantiated by the defendant; and if false, malice in the publication was also presumed unless the publication was privileged. . . .

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In those cases in which the injurious charge was propagated by printing, writing, signs, burlesques, etc., there might also be a criminal prosecution, as well as a suit for private damages. The criminal prosecution was based upon the idea that the tendency of such publications was to excite to a breach of the public peace; and it might be supported in cases where the injurious publication related to whole classes or communities of people, without singling out any single individual so as to entitle him to a private remedy. On similar grounds to publish injurious charges against a foreign prince or ruler was also held punishable as a public offense, because tending to embroil the two nations, and to disturb the peace of the world. These common-law rules are wholesome, and are still in force.

. . . . It has always been held, notwithstanding the general rule that malice is to be inferred from a false and injurious publication, that there were some cases to which the presumption would not apply. These are the cases which are said to be privileged. . . . They are generally cases in which a party has a duty to discharge which requires that he should be allowed to speak freely and fully that which he believes. . . .

At the common law it was indictable to publish anything against the constitution of the country, or the established system of government. The basis of such a prosecution was the tendency of publications of this character to excite disaffection with the government, and thus induce a revolutionary spirit. The law always, however, allowed a calm and temperate discussion of public events and measures, and recognized in every man a right to give every public matter a candid, full, and free discussion. It was only when a publication went beyond this, and tended to excite tumult, that it became criminal. It cannot be doubted, however, that the common-law rules on this subject were administered in many cases with great harshness, and that the courts, in the interest of repression and at the instigation of the government, often extended them to cases not within their reasons. . . .

We shall venture to express a doubt if the common-law principles on this subject can be considered as having been practically adopted in the American States .It is certain that no prosecutions could now be maintained in the United States courts for libels on the general government, since those courts have no common-law jurisdiction, and there is now no statute, and never was except during the brief existence of the Sedition Law, which assumed to confer any such power.

The Sedition Law was passed during the administration of the elder Adams, when the fabric of government was still new and untried, and when many men seemed to think that the breath of heated party discussions might tumble it about their heads. Its constitutionality was always disputed by a large party, and its impolicy was beyond question. It had a direct tendency to produce the very state of things it sought to repress; the prosecutions under it were instrumental, among other things, in the final overthrown and destruction of the party by which it was adopted, and it is impossible to conceive, at the present time, of any such state of things as would be likely to bring about its reenactment, or the passage of any similar repressive statute.

When it is among the fundamental principles of the government that the people frame their own constitutions, and that in doing so they reserve to themselves the power to amend it from time to time, as the public sentiment may change, it is difficult to conceive of any sound principle on which prosecutions for libels on the system of government can be based, except when they are made in furtherance of conspiracy with the evident intent and purpose to excite rebellion and civil war. It is very easy to lay down a rule for the discussion of the constitutional question; that they are privileged, if conducted with calmness and temperance, and that they are not indictable unless they go beyond the bounds of fair discussion. But what is calmness and temperance, and what is fair in the discussion of supposed evils in the government? And if something is to be allowed “for a little feeling in men’s minds,” how great shall be the allowance? The heat of the discussion will generally be in proportion to the magnitude of the evil as it appears to the party discussing it: must the question whether he has exceeded due bounds or not be tried by judge and jury, who may sit under different circumstances from those under which he has spoken, or at least after the heat of the occasion has passed away and who, feeling none of the excitement themselves, may think it unreasonable that anyone else should ever have felt it? . . . Sharp criticism, ridicule, and the exhibition of such feeling as a sense of injustice engenders, are to be expected from any discussion in these cases. . . . Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance or fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all the proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.

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There are certain cases where criticism upon public officers, their actions, character, and motives, is not only recognized as legitimate, but large latitude and great freedom of expression are permitted, so long as good faith inspires the communication. There are cases where it is clearly the duty of everyone to speak freely what he may have to say concerning public officers, or those who may present themselves for public positions. Through the ballot-box the electors approve or condemn those who ask their suffrages; and if they condemn, though upon grounds the most unjust or frivolous, the law affords no redress. . . .

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Among the inventions of modern times, by which the world has been powerfully influenced, and from which civilization has received a new and wonderful impulse, must be classed the newspaper. Beginning with a small sheet, insignificant alike in matter and appearance . . . it has become the daily vehicle, to almost every family in the land of information from all quarters of the globe, and upon every subject. . . . The newspaper is also the medium by means of which all classes of the people communicate with each other concerning their wants and desires, and through which they offer their wares, and seek bargains. . . .

The newspaper is also one of the chief means for the education of the people. The highest and the lowest in the scale of intelligence resort to its columns for information; it is read by those who read nothing else, and the best minds of the age make it the medium of communication with each other on the highest and most abstruse subjects. Upon politics it may be said to be the chief educator of the people; its influence is potent in every legislative body; it gives tone and direction to public sentiment on each important subject as it arises. . . .

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[The common law has] generally held the proprietors of public journals to the same rigid responsibility with all other persons who publish what is injurious. If what they give as news proves untrue as well as damaging to individuals, malice in the publication is presumed. It is no excuse that what was published was copied without comment from another paper, or was given as rumor merely, or that the source of the information was stated as part of the publication, or that the publication was made in the paper without the knowledge of the proprietor, as an advertisement or otherwise, or that it is a correct and impartial account of a public meeting. . . . Criticisms of works of art and literary productions are allowable, but they must be fair and temperate, and the author himself must not be criticized under cover of a criticism of his works, nor must it be assumed that because he seeks the favor of the public for his productions, he thereby makes his private character and conduct public property. For further privilege it would seem that publishers of news must appeal to the protection of public opinion, or they must call upon the legislature for such modification of the law as may appear important to their just protection.

But there is a difference between the mere publication of items of news in which the public may take an interest, as news merely, and the discussion of matters which concern the public because they are their own affairs. It is one thing to reproduce in the newspaper injurious reports regarding individuals, however willing the public may be to hear them, and a very different thing to discuss the public conduct of a high official. . . . The distinction is palpable, and it indicates a line of privilege which is by no means unimportant to the publishers of public journals. . . . If they may not publish news with impunity, they may at least discuss with freedom and boldness all matters of public concern, because this is the privilege of everyone. The privilege extends to all matters of government in all its grades and all its branches; to the performance of official duty by all classes of public officers and agents; to the courts, the prisons, the reformatories, the public charities and the public schools; to all means of transportation and carriage, even when in private hands and management. But the privilege is not limited to these; but extends to all schemes, projects, enterprises and organizations of a semi-public nature, which invite the public favor, and depend for their success on public confidence. The soundness of a bank or an insurance company, the humanity of the managers of a private asylum, the integrity of a board of trade, the just management of public fair, are all maters which directly and immediately concern the interest of the public. That interest can only be adequately protected through the liberty of public discussion, and to deny this would be to offer impunity to fraudulent schemes and enterprises. The law invites such discussion, because of the public interest in it, and it extends its protection to all publications which do not appear on their face, and are not shown otherwise to have been inspired by malice. The publisher of a newspaper may open his columns to them freely, so long as they are restricted within the limits of good faith, not because he makes the furnishing of news his business, but because the discussion is the common right and liberty of every citizen.

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1. Excerpt taken from Thomas M. Cooley, *A Treatise on Constitutional Limitations*, 5th Ed. (Boston: Little, Brown, and Company, 1883). [↑](#footnote-ref-1)