ORIGINAL MEANING AND THE FREEDOM OF SPEECH AND PRESS: SOME ILLUSTRATIVE EXAMPLES

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INTRODUCTION

There are many important big-picture questions about original meaning and the Free Speech, Free Press, Assembly, and Petition Clauses.[1] This short Essay will leave those questions for others. Instead, it will offer as illustrations some specific, concrete questions—and, in some instances, answers—about original meaning and the freedom of expression. I hope these narrow illustrations can help us think about the broader questions.

I. BROAD EVIDENCE, AND SILENTLY CONSISTENT PRECEDENTS

In certain areas, First Amendment precedent turns out to be quite consistent with original meaning—even though the Court hasn't squarely discussed historical evidence in any detail. This might be a fortunate accident, or perhaps a random coincidence in the policy judgments of the modern Court and the Framing generation. But I expect that some at least stems from a phenomenon that Justice Scalia discussed in *McIntyre v. Ohio Elections Commission* (1995): "Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality."[2]

In some situations, this observation may not be accurate. But in others, there really does appear to be a longstanding constitutional understanding that has become so much part of the law that a court that simply follows doctrine will incorporate original meaning. Let me offer three examples.

A. "The Liberty of the Press Is Not Confined to Newspapers and Periodicals"

The Supreme Court has generally held that the First Amendment equally protects all who speak to the public, whether they are professional media (e.g., newspaper publishers or reporters) or nonprofessionals (e.g., leafletters). In this respect, it has treated "the freedom . . . of the press" as protecting the press as technology—the use of the printing press and its technological heirs—rather than the press as industry, in the sense of people whose daily job is writing for the public.[3]

1 U.S. CONST. amend. I.

2 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

3 U.S. CONST. amend. I.

Now the original articulation of this position in the Supreme Court came in *Lovell v. City of Griffin* (1938), with little historical analysis:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[4]

And this is so even though the Court had shown an interest in Framing-era history. *Near v. Minnesota ex rel. Olson* (1931) discussed that history in striking down an injunction against the operation of a "scandalous" newspaper.[5] *Grosjean v. American Press Co.* (1936) discussed history in considerably more detail in holding unconstitutional a selective tax on certain newspapers.[6]

More recently, Justice Scalia's concurrence in *Citizens United v. FEC* (2010) offered a bit more historical analysis:

> The dissent . . . interpret[s] the Freedom of the Press Clause to refer to the institutional press (thus demonstrating, according to the dissent, that the Founders "did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets or forms"). It is passing strange to interpret the phrase "the freedom of speech, or of the press" to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish. No one thought that is what it meant. Patriot Noah Webster's 1828 dictionary contains, under the word "press," the following entry:
>
> "*Liberty of the press,* in civil policy, is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state."
>
> As the Court's opinion describes, our jurisprudence agrees with Noah Webster and contradicts the dissent.
>
> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion."[7]

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4 Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

5 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713, 713–22 (1931).

6 *See* Grosjean v. Am. Press Co., 297 U.S. 233, 245–49 (1936).

7 Citizens United v. FEC, 558 U.S. 310, 390 n.6 (2010) (Scalia, J., concurring) (second omission in original) (citations omitted) (first quoting *id.* at 431 n.57 (Stevens, J., concurring in part and dissenting in part); then quoting *Press*, 2 NOAH WEBSTER, AN AMERICAN

But this is still predominantly a precedential analysis, with one textual argument and one early republican source.

At the same time, the foundational case in the Court—*Lovell*—followed 150 years of established practice, to the point that the Court might not have seen the need to do more than just nod to "[t]he press in its historic connotation."[8]

As I've laid out elsewhere, Framing-era legal sources, such as cases, treatises, and constitutional provisions, articulated the freedom of the press as extending to everyone, not just to professional newspaper publishers.[9] Then, starting in the 1820s, courts began to expressly hold that newspaper printers' and editors' rights were equal to everyone else's.[10] In the following decades, that was repeated in case after case throughout the country.[11] By the time *Lovell* was decided, the principle was well-established in the precedents, and, to my knowledge, unanimously so.[12] The original meaning had made its way into well-settled doctrine and was then ratified by the Court in *Lovell*.[13]

The original meaning also fit with practice, which took place in the shadow of the law but which likely also affected the law. In the Framing era, many influential Americans published their views using the printing press, whether in pamphlets or as submissions to newspapers. It would be odd to think that they would have secured special constitutional rights to the just-emerging category of newspapermen, who were in some measure lower status than they were, while denying the same rights to themselves.

And though those newspapers became relatively more influential in the following centuries, a tradition of leafletting and pamphleteering continued. The Court in 1938 could see the media reality as well

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DICTIONARY OF THE ENGLISH LANGUAGE (photo. reprt. 1970) (New York, S. Converse 1828); then citing *Citizens United*, 558 U.S. at 352; and then quoting *Lovell*, 303 U.S. at 452). The cited passage from the majority cites, directly or indirectly, three precedents from the 1970s, 1980s, and 1990s. *See id.* at 352 (majority opinion).

8 *Lovell*, 303 U.S. at 452.

9 *See generally* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012) [hereinafter Volokh, *Freedom for the Press*]; Eugene Volokh, *The Press Clause: Important, Remembered, and Equally Shared*, 5 J. FREE SPEECH L. 659 (2025).

10 *See* Dexter v. Spear, 7 F. Cas. 624, 624–25 (C.C.D.R.I. 1825) (No. 3,867) (Story, Circuit Justice) ("The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation. There can be no right in printers, any more than in other persons, to do wrong."); Root v. King, 7 Cow. 613, 628 (N.Y. Sup. Ct. 1827) ("[Press conductors'] right to publish the truth is not questioned; but it is denied that, in the capacity of editors of a newspaper, they have any other rights than such as are common to all.").

11 *See* Volokh, *Freedom for the Press*, *supra* note 9, at 498–504.

12 *See id.* at 510 & n.230.

13 *See id.*

as media law and naturally view the nonprofessional leafletter as having the same free press rights as a professional newspaper editor.

B. Symbolic Expression

The very first case in which the Supreme Court struck down government action as violating constitutional rights of freedom of expression, *Stromberg v. California* (1931),[14] involved neither the press nor speech in the literal sense. Rather, it involved what one might today call symbolic expression (or expressive conduct)—the display of a red flag as a revolutionary symbol.[15]

But the opinion never discussed why displaying a flag counted as "speech" or "press." The opinion below similarly assumed that symbolic expression was as protected as verbal expression, and so did the parties' briefs in the Supreme Court.[16] The Court had neither before nor since analyzed whether this result is consistent with the original meaning of the free expression guarantees.[17]

Likewise, the 1920 California Supreme Court decision in *Ex parte Hartman* (1920) struck down an earlier law banning the possession or display of flags that represented efforts "espous[ing] for the government of . . . the United States of America . . . principles or theories of government antagonistic . . . to the form of the government thereof as now constituted."[18] The court concluded that Americans have "the right to advocate peaceable changes in our Constitution, laws or form of government," and that therefore "an organization peaceably advocating such changes may adopt a flag . . . signifying its purpose, and that the display or possession of such flag . . . cannot be made an unlawful act."[19] The court simply assumed that symbolic expression was constitutionally equivalent to verbal expression, without discussing the matter further.

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14 *See* Stromberg v. California, 283 U.S. 359, 369–70 (1931). *Fiske v. Kansas*, 274 U.S. 380 (1927), the possible rival for this title, held that the Due Process Clause was violated because there was not adequate evidence to convict the speaker under the statute. *See id.* at 386–87. *Stromberg*, on the other hand, expressly relied on "the right of free speech," *Stromberg*, 283 U.S. at 368.

15 *See Stromberg*, 283 U.S. at 361.

16 *See* People v. Mintz, 290 P. 93, 96 (Cal. Dist. Ct. App. 1930), *rev'd sub nom.*, *Stromberg*, 283 U.S. 359; Brief of Appellant at 13, *Stromberg*, 283 U.S. 359 (No. 584); Brief of Appellee at 2–3, *Stromberg*, 283 U.S. 359 (No. 584).

17 *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2009). Much of the discussion in these two paragraphs is borrowed from that article.

18 *Ex parte* Hartman, 188 P. 548, 549 (Cal. 1920) (second omission in original) (citation omitted).

19 *Id.*

But while these assumptions weren't backed by any originalist analysis, they appear to have been fully consistent with the Framing-era understanding that symbolic expression, pictorial expression, and verbal expression were generally treated as functionally equivalent. This equivalence was most often drawn with regard to restrictions on expression, such as defamation law. But it was also the view taken in the early republic with regard to constitutional protections for expression.[20]

Thus, for instance, pre-Revolutionary libel law recognized the category of libel by "pictures, signs, and the like"—meaning through symbols, whether printed or physically displayed—as tantamount to libel by writing.[21] Early American law did the same, extending the same principle to incitement to riot as well.[22] Early treatises drew this equivalence.[23] Early court decisions suggested that pictorial and symbolic expression was potentially protected by free expression guarantees (though subject to the same constitutionally permissible restrictions, such as libel law, as verbal expression).

To offer a particularly vivid illustration, consider the report of *Mezzara's Case* (1817), apparently the earliest American case involving nonverbal libel—there, a painting of the plaintiff with donkey's ears.[24] The reporter, a New York lawyer, followed the case with a note hypothesizing what would happen if the painting were an apt commentary on the subject's folly and lack of patriotism.[25] In such a situation, the reporter wrote, "[I]f the painter could show the truth of the matter in evidence, as before described, and that he published and exhibited the picture, 'with good motives and for justifiable ends,' . . . would he not be justifiable under our statute?"[26]

20 *See* Volokh, *supra* note 17, at 1063–83.

21 *Id.* at 1064 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *125).

22 *See, e.g.*, Commonwealth v. Haines, 6 Pa. L.J. 239, 240 (1824).

23 *See infra* note 34 and accompanying text.

24 *See* Mezzara's Case, 2 N.Y. City-Hall Rec. 113, 113 (Ct. Gen. Sess. 1817). This discussion is borrowed from Volokh, *supra* note 17, at 1071.

25 *See* Mezzara's Case, 2 N.Y. City-Hall Rec. at 118.

26 *Id.*

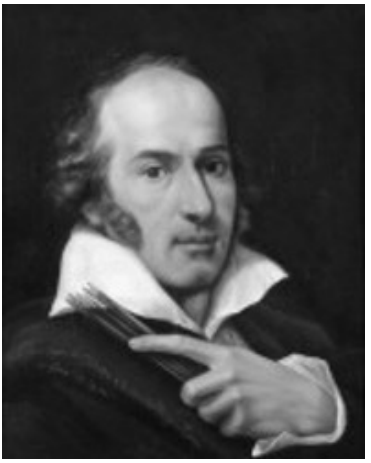


Figure 1. I couldn't find the libelous painting, but here's Francesco Mezzara's self-portrait.[27]

The statute the reporter cites—which did allow truth as a defense in libel actions, if the defendant acted with good motives and for justifiable ends—was passed in the wake of the New York court's evenly dividing in *People v. Croswell* (1804) on whether the freedom of the press mandated that the defense of truth be allowed in libel prosecutions.[28] The statute implemented Chancellor James Kent's view of the constitutional rule, which was also the view championed by Alexander Hamilton (as Croswell's lawyer) in one of the last public acts of his life, and was seen as an important protection for the liberty of the press. And just four years after *Mezzara's Case*, at the next New York constitutional convention, the statute's provisions were adopted as part of the New York Constitution.[29]

The reporter thus saw nothing odd in treating a painting as protected by free expression principles, just as the court saw nothing odd in treating a painting as punishable under libel law principles. Likewise, three-dimensional symbolic expression, such as the raising of a liberty pole, was similarly treated as being potentially constitutionally protected just as pictorial and verbal expression were (though again

27 Francesco Mezzara, *Self Portrait* (painting 1806), *reprinted by* Katlijne Van der Stighelen, *A Self-Portrait by Francesco Mezzara (1774–1845), the Italian Painter Who Changed New York State Constitutional Law with a Pair of Ass's Ears*, 13 NINETEENTH-CENTURY ART WORLDWIDE 375, 375 fig.1 (2014).

28 People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

29 N.Y. CONST. of 1821, art. VII, § 8.

subject to the possible constitutional limitations imposed on verbal expression).[30]

This equivalence of symbolic, pictorial, and verbal expression unsurprisingly endured as part of the law—most often discussed as to libel law—throughout the 1800s and early 1900s. The Supreme Court, for instance, mentioned in 1845 that libel was a "species of defamation which is effected by writing or printing, or by pictures and signs,"[31] and in 1904 quoted a law enacted by the Philippine Commission that offered the same definition.[32] There had been hundreds of similar holdings from state courts, whether explicating the common law or state statutes (and often including "effigies" alongside pictures and signs).[33] Legal treatises had set forth the same principle.[34]

Thus, again, when the cases came before the California Supreme Court in 1920 and the U.S. Supreme Court in 1931, it was natural for the courts and the litigants to casually assume that symbolic expression (there using flags) was likewise treated equivalently to verbal expression for purposes of freedom of expression law. What was accepted in the Framing era continued to be accepted, without any felt need for discussion, in the early 1900s. And here too this conclusion was supported by a long tradition of practice as well as doctrine: Symbolic expression (whether through effigies, processions, visual puns, and the like) was commonplace in the Framing era, and flags and other forms of symbols continued to be used the same way into the 1900s.[35]

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30 *See* Respublica v. Montgomery, 1 Yeates 419 (Pa. 1795), *discussed in* Volokh, *supra* note 17, at 1071–74.

31 White v. Nicholls, 44 U.S. (3 How.) 266, 285 (1845).

32 *See* Dorr v. United States, 195 U.S. 138, 150 (1904).

33 *See* Volokh, *supra* note 17, at 1063–66. Most of the cases just generally stated the law, but some actually involved libels by symbolic expression. *See, e.g.*, State v. Powers, 34 N.C. (12 Ired.) 5, 8–10 (1851) (rejecting, on procedural grounds, a libel prosecution for putting up an "effigy or figure" of a man with "a pair of shears of scissors hung on a nail driven into the ear," *id.* at 8, apparently alluding to the then-archaic punishment of nailing a person's ears to a pillory as a punishment for perjury); Ellis v. Kimball, 33 Mass. (16 Pick.) 132, 134 (1834) ("It is now impossible to contend, that a man may not be as grossly libelled, as effectually exposed to hatred, contempt, and ridicule, by a caricature as by written language. Indeed to say, that a man is *shown up*, a phrase which manifestly has its origin in graphic exhibition, though it may be used figuratively as expressive of other modes of assailing reputation, is used to express significantly and strongly, that his pretensions to character and reputation are put down."); Johnson v. Commonwealth, 14 A. 425, 425–26 (Pa. 1888) (endorsing the trial court's view that "making and suspending [an effigy]," *id.* at 426, "on [a] tree used as a gibbet and gallows," *id.* at 425, "was libelous, without regard to the words upon it, if it was intended to bring the prosecutor into reproach and contempt," *id.* at 426).

34 *See, e.g.*, MARTIN L. NEWELL, THE LAW OF LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA 35 (Chicago, Callaghan & Co., 2d ed. 1898).

35 *See* Volokh, *supra* note 17, at 1060–63.



Figure 2. Funeral Procession of the Black Cockade, Lewis Miller (ca. 1800).[36]

C. Civil Liability

New York Times Co. v. Sullivan's "actual malice" requirement[37] has of course been criticized as contrary to the original meaning of the First Amendment.[38] But some have also criticized the case on the grounds that it improperly imports freedom of expression principles into civil tort liability.[39] Here too the Court has never tried to explain this particular conclusion on originalist grounds.[40] Likewise, none of

36 Lewis Miller, Illustration of Funeral Procession of the Black Cockade (on file with author) (From the collection of the York County History Center, York, PA). In the 1790s, "Americans wore colored cockades in their hats to represent their Republican (red, white, and blue, referring to Republican sympathy for the French Revolution) or Federalist (black) allegiances. . . . Some conducted mock funerals for the other side's cockades," as shown in this illustration. *See* Volokh, *supra* note 17, at 1061.

37 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

38 *See, e.g.*, McKee v. Cosby, 139 S. Ct. 675, 677–78 (2019) (Thomas, J., concurring in denial of certiorari); Berisha v. Lawson, 141 S. Ct. 2424, 2426–27 (2021) (Gorsuch, J., dissenting from denial of certiorari).

39 *See, e.g.*, Brief for the State of Kansas, 47 Other States, and the District of Columbia as Amici Curiae in Support of Petitioner at 3, Snyder v. Phelps, 562 U.S. 443 (2011) (No. 09-751) ("Until the Court's decision in *New York Times v. Sullivan*, the First Amendment generally placed no limits on state tort law . . . ." (citation omitted)); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1656 (2009) ("For most of American history, private lawsuits did not implicate the First Amendment, regardless of whether they sought remedies for tort violations or enforced contracts or property rules. These categories of 'private law' were not attributable to the government, and thus did not constitute state action."); Nathan Tucker, *Slander Not Protected by First Amendment*, BALT. SUN (June 4, 2019, at 12:25 ET), https://www.baltimoresun.com/2010/03/22/slander-not-protected-by-first-amendment/ [https://perma.cc/B3LL-42NW]. *See generally* Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249 (2010) (discussing this).

40 *See Sullivan*, 376 U.S. at 277–78 (defending the holding on functional grounds and citing as support *City of Chicago v. Trib. Co.*, 139 N.E. 86, 90 (Ill. 1923), which in turn offers a functional analysis).

the briefs in *Sullivan* made an originalist argument in favor of applying constitutional limitations to common law civil lawsuits.[41]

Nonetheless, here too this may have stemmed from the longstanding understanding, dating back to the Framing era, that freedom of expression guarantees did indeed potentially apply to civil liability. We see that starting with 1802 and 1806 decisions from the Vermont and South Carolina high courts, rejecting liability in part by citing the state equivalents of the Petition Clause.[42] And we see that in other cases from 1799 onwards that reasoned that constitutional protections may apply to civil lawsuits as well as to criminal prosecutions, but that libelous speech was constitutionally unprotected against civil liability as well as against criminal punishment.[43] Early commentators took the same view.[44]

And here too the early original meaning turned into well-established constitutional tradition. Throughout the 1800s and 1900s, court decisions routinely assumed that constitutional protections could limit civil liability, though subject to the recognition that there was essentially a First Amendment libel exception for civil as well as criminal liability. By the time of *New York Times Co. v. Sullivan* (1964), this position just wasn't particularly controversial, even if the other features of that decision were.

II. SCANT EVIDENCE: PROVOKING A RIOT

Let me turn now to a different question, as to which the evidence is intriguing but scant: Was freedom of expression understood as including expression that created resentment that risked provoking riots? (This question has of course arisen often more recently, in cases such as *Terminiello v. Chicago* (1949)[45] and *Forsyth County v. Nationalist Movement* (1992).[46]) In fact, I hadn't seen any evidence until I came across one early case, which has been apparently virtually undiscussed during the last fifty years, perhaps because it's not on Westlaw or Lexis.[47]

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41 *See* Brief for the Petitioner, *Sullivan*, 376 U.S. 254 (No. 39); Brief for Respondent, *Sullivan*, 376 U.S. 254 (No. 39); Brief for the Petitioners, *Sullivan*, 376 U.S. 254 (No. 40); Brief for Respondent, *Sullivan*, 376 U.S. 254 (No. 40).

42 *See* Volokh, *supra* note 39, at 251–53.

43 *See id.* at 253–54.

44 *See id.* at 255–57.

45 Terminiello v. Chicago, 337 U.S. 1 (1949).

46 Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

47 A Westlaw search for citations to it reveals no citations in law review articles, one citation in Wharton's Criminal Law, *see* 3 JENS DAVID OHLIN, WHARTON'S CRIMINAL LAW § 37:1 n.1 (16th ed. 2025), four in mostly rather old Pennsylvania cases, *see* Commonwealth v. Egan, 173 A. 764, 766 (Pa. Super. Ct. 1934); Commonwealth v. Spartaco, 158 A. 623, 625

The case is *Commonwealth v. Haines* (1824), a decision by Pennsylvania Supreme Court Justice John Gibson (later the Chief Justice), apparently sitting alone as a trial judge.[48] Haines had been accused of intentionally causing a riot by "erecting and fixing, a certain figure, resembling a man, commonly called a Paddy, as and for the effigy of St. Patrick . . . with the accompaniment of a rum bottle and a string of potatoes," in "a neighborhood inhabited principally by emigrants from Ireland."[49] "[T]he exhibition of a Paddy was resented as an insult upon the Catholic portion of the Irish . . . ."[50]

The main legal complication was that defendants' involvement in displaying the Paddy was disputed, but there was no dispute that the defendant had displayed a "Shelah"—"a female figure . . . with several features, besides that of sex, distinguishing it from a Paddy."[51] Such a Shelah was apparently "often displayed as a retaliatory emblem" to the Paddy.[52]

After deliberating for some time, the jury asked whether it could convict based on a finding that defendant was involved in exhibiting the Shelah rather than the Paddy.[53] Justice Gibson "answered in effect, that, if the characteristics and object of the Shelah were different from those of the Paddy, the variance [from the indictment] was fatal; but that the question of the identity or dissimilarity of the two was for the jury."[54]

(Pa. Super. Ct. 1932); Commonwealth v. Pope, 317 A.2d 887, 890 (Pa. 1974); City of Wilkes-Barr v. Garabed, 11 Pa. Super. 355, 374 (1899), and one in an old Georgia case, *see* Garvin v. City of Waynesboro, 84 S.E. 90, 91 (Ga. Ct. App. 1915). A HeinOnline search finds some older authorities, all from 1960 or before. A Lexis search adds a brief mention in Ballentine's Law Dictionary, under the entry "paddy." *Paddy*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

48 Commonwealth v. Haines, 6 Pa. L.J. 239 (1824); *see John Bannister Gibson (1780–1853)*, DICK. COLL. ARCHIVES & SPECIAL COLLECTIONS (2005), https://archives.dickinson.edu/encyclopedia/john-bannister-gibson-1780-1853 [https://perma.cc/9CYY-DJF6].

49 *Haines*, 6 Pa. L.J. at 239–40 (emphasis omitted).

50 *Id.* at 240.

51 *Id.* (emphasis omitted).

52 *Id.*

53 *See id.* at 241.

54 *Id.* A reporter's note elaborates:

> This case is a strong illustration of the distinction which exists between a variance in matter of substance, and a variance in matter of form. In an indictment for murder, it has always been held that an averment that the deadly wound was inflicted by a sword, is supported by evidence that it was inflicted by a knife; though it is otherwise if the instrument be of a different nature, e. g. a pistol . . . . Where the defendant is charged with the commission of a given result, and the means by which that result was committed are specified one way in the indictment, and proved another way on trial, it is no variance, if the means as proved are of the same kind as those laid, but differ only in degree. Where, however, they are of an opposite nature, as where evidence that a gun was

(The jury ultimately acquitted.[55]) Indeed, of the sources that cite *Haines*, a considerable fraction does so on this question of how far the proof may diverge from the indictment.[56]

But Justice Gibson also charged the jury thus:

> The offence specified in the first count, is clearly indictable at common law. No man has a right to trifle with the feelings of any large class of men, so as to provoke them to a breach of the peace. If it is done by libel, no one doubts it is a misdemeanor; if it is done by effigy is it less so? Suppose the defendant had published a picture of the same character, and with the same tendency as the figure which is the subject of the present offence, would it not be held a libel? The gist of the offence, is its tendency to provoke a breach of the peace. It may be indiscreet in the Irish residents of the district to take notice of acts of the kind; but it is worse than indiscreet in others to provoke them to do so.[57]

So here's a case from the early republic on when speech can be punished. And it is possibly a case that bears on the original meaning of "the freedom of speech," if Justice Gibson was correct not just about Pennsylvania 1824 law but about the "common law" more broadly.[58]

In principle, the case might therefore bear on important First Amendment debates. One might ask whether it would, for instance, justify restrictions on flag burning, on the theory that flag burning likewise "trifle[s] with the feelings of [a] large class of men, so as to provoke them to a breach of the peace."[59]

Or one might ask how the case bears more broadly on Justice Scalia's observation in *McIntyre* that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not

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> discharged, is offered to support the allegation that a blow was given with a stone, the variance is fatal.

Id. at 241 n. (reporter's note) (citation omitted).

55 *See id.* at 241.

56 *See, e.g.*, ELLIS LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 71–72 (Philadelphia, Thomas, Cowperthwait & Co. 1848) (written by a Pennsylvania judge who was later elevated to the Pennsylvania Supreme Court, *see* BURTON ALVA KONKLE, THE LIFE OF CHIEF JUSTICE ELLIS LEWIS 1798–1871, at 139, 168 (1907)); FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS 43 (Philadelphia, James Kay, Jun. & Bro. 1849); FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES § 91, at 82 (Philadelphia, Kay & Bro., 8th ed. 1880); Commonwealth v. Pope, 317 A.2d 887, 890 (Pa. 1974).

57 *Haines*, 6 Pa. L.J. at 240–41; *cf. Riots, Routs, and Unlawful Assemblies*, AM. L. MAG., Apr.–July 1844, at 350, 357. "Where banners are displayed, holding up any class or portion of the community to ridicule or contempt, and which are calculated to arouse their passions, and thus provoke an attack upon them." *Id.* at 357 (discussing the common law and English precedents).

58 *Haines*, 6 Pa. L.J. at 240.

59 *Id.*

prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[60] (Justice Scalia was explaining there why he thought flag burning was constitutionally protected, despite the presence of a contrary tradition, dating back to 1890 and the following decades, of flag burning bans.[61]) Perhaps such protection for offensive messages, at least when publicly displayed in order to offend, is not indeed a bedrock principle underlying the First Amendment.

One might also inquire into the scope of the principle that Justice Gibson was invoking. Does it apply only to situations where the action *does* provoke a riot, as it apparently did in *Haines*? Is it enough if it has a tendency to provoke a riot? Is it enough if it provokes or has a tendency to provoke a "breach of the peace,"[62] which might be as little as just a fight between one viewer and the provoker?

Is the principle limited to purposeful provocation (which the phrase "trifle with the feelings"[63] might suggest), so that engaging in well-motivated but offensive speech wouldn't be punishable? Compare *Respublica v. Dennie* (1805), an 1805 Pennsylvania seditious libel case: The court there held that criticizing the government with the purpose to subvert the Constitution of the United States could be punished as seditious libel—but criticism "honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously" was constitutionally protected.[64]

The trouble is that *Haines* appears to be the only case from that era that considered the matter. I've done a good deal of research on early American cases dealing with speech restrictions, but I haven't found any others. *Haines* doesn't cite any relevant precedents. I couldn't find any cases that in turn cite *Haines* until 1899,[65] and that case and the few later cases citing *Haines* didn't squarely deal with the issue.[66]

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60 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting) (alteration in original) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

61 *See id.* at 375–78.

62 *Haines*, 6 Pa. L.J. at 240.

63 *Id.*

64 Respublica v. Dennie, 4 Yeates 267, 271 (Pa. 1805).

65 *See* City of Wilkes-Barre v. Garabed, 11 Pa. Super. 355, 374 (1899).

66 *Garabed*, for instance, cited *Haines* as one of several cases recognizing that drawing crowds onto public streets may be a punishable nuisance. *Id.* It didn't deal with the question of inciting a riot. Another case, *Commonwealth v. Redshaw*, 12 Pa. C.C. 91 (Ct. Quarter Sess. 1892), upheld a disorderly conduct conviction for calling nonunion workmen "scabs" in the context of labor strife that had produced "riot and bloodshed": "[F]or a man of one party to intentionally apply an offensive epithet to a number of men of the other party as they are passing along the public highway, must of necessity tend to create tumult and

What can courts make of an isolated case such as this one? Perhaps one can view it as being connected to the early cases upholding blasphemy laws, but their rationales are actually quite different: The blasphemy cases, for instance, do not generally rest on any concern about rioting.[67] As it stands, we have an intriguing understanding of what the law perhaps was at the time—or perhaps not.

III. AMBIGUOUS EVIDENCE: ENJOINING REPETITION OF LIBELS

Throughout much of American history, the dominant view has been that courts can't enjoin libels. The first precedent on this was *Brandreth v. Lance* (1839), an 1839 New York trial court decision.[68] This was followed by *State ex rel. Liversey v. Judge* (1882), an 1882 Louisiana Supreme Court decision.[69] Subsequent decisions helped establish this as a firm rule, seemingly culminating in *Near v. Minnesota ex rel. Olson*.[70]

Yet since then, many state courts have allowed permanent injunctions against libels. By my count the court systems of thirty-four states have either so held or have in practice been so acting, with only six states plus D.C. continuing to categorically bar such injunctions.[71]

This trend seems to have accelerated with the rise of the internet. Historically, a libel has been a short, sharp shock—typically, a one-time article in a newspaper that is printed and can't be removed—with the only possible remedy being damages or criminal prosecution.[72] But the internet can turn libel into a steady drip, drip, drip of damage, with

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provoke a conflict." *Id.* at 92–93. That might be seen as applying a similar principle to that in *Haines* (though without citing *Haines*), but again not until 1892.

The first case I could find that cited in *Haines* in dealing with speech that allegedly incited a riot was *Commonwealth v. Spartaco*, 158 A. 623, 625 (Pa. Super. Ct. 1932), which involved a defendant loudly expostulating against a visit of Benito Mussolini's foreign minister, Dino Grandi (who would later be known for introducing the resolution that effectively removed Mussolini from office in 1943). *See id.* at 624; *Benito Mussolini Falls from Power*, HIST. (May 27, 2025), https://www.history.com/this-day-in-history/july-25/mussolini-falls-from-power [https://perma.cc/FZ2C-F4X6]. The judge in *Spartaco* interpreted *Haines* as covering words said "with intent to provoke a riot or with a reckless and willful disregard of their probable outcome in that respect." *Spartaco*, 158 A. at 625.

67 *See, e.g.*, Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838); State v. Chandler, 2 Del. (2 Harr.) 553 (1837); Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824); People v. Porter, 2 Parker 14 (N.Y. Ct. Oyer & Terminer 1823); Bell's Case, 6 N.Y. City-Hall Rec. 38 (Ct. Gen. Sess. 1821); People v. Ruggles, 8 Johns. 290 (N.Y. Sup. Ct. 1811); *cf. Law Intelligence*, FRANKLIN GAZETTE (Philadelphia), Nov. 17, 1818, at 2 (reporting a decision of the Philadelphia Mayor's Court in a blasphemy case, *Commonwealth v. Murray*).

68 Brandreth v. Lance, 8 Paige Ch. 24, 24 (N.Y. Ch. 1839).

69 State *ex rel.* Liversey v. Judge of Civ. Dist. Ct., 34 La. Ann. 741, 745 (1882).

70 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931).

71 *See* Eugene Volokh, *Anti-Libel Injunctions*, 168 U. PA. L. REV. 73 app. A, at 137–42, 144–45 (2019).

72 *See id.* at 75.

more readers seeing a libelous web page every day.[73] Injunctions thus seem a more useful remedy.

The internet also makes it easier for judgment-proof defendants to cause real damage; an injunction can thus be useful in a way that a damages remedy might not be.[74] Criminal libel is theoretically available in about ten states, and there are indeed likely a couple of dozen criminal libel prosecutions in the United States each year.[75] But in most states the only way to deploy criminal remedies in service of protecting reputation is through getting an injunction that can be enforced through the threat of criminal contempt.[76]

Are these injunctions contrary to the original meaning of the First Amendment? The answer turns out to be complicated, especially if we focus on permanent injunctions, entered to forbid the repetition of material found to be libelous in a final judgment (with the defendant having had an opportunity to call for a jury trial).[77]

It's true that early sources often view the freedom of the press as precluding prior restraints: To quote William Blackstone, "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."[78] Yet this doesn't quite speak to the modern question whether the law may restrain *repetition* of material for matter found to be criminal (or tortious).

Nor does it speak to whether the law may require removal of such matter after a trial: Removal just wasn't practically an option in the print era. In such situations of injunctions against repetition of an already published libel or ordering its removal, "[e]very freeman" would retain the "undoubted right to lay what sentiments he pleases before the public" (again quoting Blackstone) at least in the first instance.[79]

Nor is there a "restrictive power of a licenser"[80] or "control of an inspector"[81] in the sense that the Framers likely understood licensers, which is to say officials administering a licensing system. (To quote St. George Tucker, under that system "all books printed were previously licensed by some of the great offices of state, or the two universities,

73 *See id.* at 76.

74 *See id.*

75 *See id.* at 81 & n.26.

76 *See id.* at 83–87.

77 *See id.* at 88–89.

78 4 BLACKSTONE, *supra* note 21, at *151.

79 *Id.*

80 *Id.* at *152.

81 *Id.* at *153; *see also* Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788) (concluding that the Pennsylvania Constitution's free press provisions "effectually preclude any attempt to fetter the press by the institution of a licenser" (emphasis omitted)).

and all foreign books were exposed to a similar scrutiny before they were vended."[82]) The injunction is imposed by a judge, often following a jury verdict, administering justice between two parties, not running a traditional licensing system that "subject[s] all freedom of sentiment to the prejudices of one man, and make[s] him the arbitrary and infallible judge of all controverted points in learning, religion, and government."[83]

Likewise, early sources stressed the importance of allowing a jury to resolve what is true and false in libel cases.[84] But, as I noted, the modern permanent injunction in libel cases is entered after a final judgment on the merits, which at least in principle allows a defendant to demand a jury trial.[85] If the defendant has so demanded, then any injunction would be based on the jury verdict.[86]

This stems in part from the twentieth-century merger of law and equity, since equitable remedies, such as injunctions, can now be issued following the use of the legal procedure of a jury trial. (Historically, one argument against injunctions in libel cases has been that "equity will not enjoin a libel," a statement about the limits of the equity courts more than about constitutional protections for free expression.[87]) Indeed, the Delaware Court of Chancery, which operates in a state system where law and equity remain largely separate, has continued to hold that it generally can't enjoin libel.[88] But it expressly left open the possibility that, once the Delaware Superior Court (the law court) concludes—after a jury trial, if the parties don't choose a bench trial—that a statement is libelous, an injunction can then be issued.[89]

In practice, anti-libel injunctions are often parts of default judgments, or follow bench trials, and thus don't involve factual findings

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82 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE app. note G, at 12 (Philadelphia, William Young Birch & Abraham Small 1803).

83 4 BLACKSTONE, *supra* note 21, at *152.

84 *See, e.g.*, OHIO CONST. of 1802, art. VIII, § 6 ("In prosecutions for any publication respecting the official conduct of men in a public capacity, or where the matter published is proper for public information, the truth thereof may always be given in evidence; and in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."). Indeed, even the Sedition Act of 1798 provided that "the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases." Sedition Act of 1798, ch. 74, § 3, 1 Stat. 596, 597.

85 *See* Volokh, *supra* note 71, at 102.

86 *See id.*

87 Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001); *see also, e.g.*, Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 308–12, 324–30 (2001).

88 *See* Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 115–19 (Del. Ch. 2017).

89 *See id.* at 122–26, 124 n.105.

by juries.[90] In both those situations, though, the defendant can be said to have waived his right to a jury trial. To be sure, temporary restraining orders and preliminary injunctions are entered before any opportunity for a jury trial—but for that reason many courts continue to reject them on First Amendment grounds.[91]

And, as the California Supreme Court held in allowing such post-final-judgment permanent injunctions, the reasoning of *Near v. Minnesota ex rel. Olson* expressly sets aside injunctions in traditional civil libel disputes:

> The high court was careful to point out . . . that the statute being considered was "not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected." . . . But most significant is that the court . . . clarified that it was not addressing "questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity." In a footnote, the court cited [an] . . . article by Roscoe Pound that observed that English courts permit "an injunction in case the libel was repeated or publication was continued after a jury had found the matter libelous." Therefore, *Near* expressly did not address the issue posed in the present case.[92]

The Supreme Court hasn't confronted such permanent injunctions against repetition of proven libel since *Near*, but it has authorized injunctions against obscenity (which *Near* had anticipated[93]) and against commercial speech that proposes illegal transactions.[94] The one case in which it granted certiorari as to anti-libel injunctions, *Tory v. Cochran* (2005), largely disappeared when the plaintiff, famed lawyer Johnnie Cochran, died while the case was pending.[95] None of these cases discussed the original meaning of the First Amendment,[96] and

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90 *See generally* Volokh, *supra* note 71.

91 *See id.* at 94–96.

92 Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 345–46 (Cal. 2007) (citations omitted) (first quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 709 (1931); then quoting *id.* at 716; and then quoting Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 665 (1916)).

93 *See Near*, 283 U.S. at 716; *see, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957).

94 *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 389–90 (1973).

95 *See* Tory v. Cochran, 544 U.S. 734, 737–38 (2005).

96 Some of the briefs in *Tory* discussed 1600s, 1700s, and 1800s evidence at some length, but this analysis didn't make its way into the Justices' opinions. *See, e.g.*, Brief of Amici Curiae Los Angeles Times Communications LLC et al. in Support of Petitioners at 4–10, *Tory*, 544 U.S. 734 (No. 03-1488); Brief Amici Curiae of Historians Alfred L. Brophy et al. in Support of Petitioners, *Tory*, 544 U.S. 734 (No. 03-1488); Petitioners' Brief on the Merits at 20–22, *Tory*, 544 U.S. 734 (No. 03-1488).

the lower court cases dealing with the matter have largely not discussed it, either.[97]

So here we have a fairly rich body of originalist evidence related to libel law generally. We have a considerable body of evidence from before and shortly after the Framing that talks about "previous restraints." And we have some nineteenth-century sources that seem to take the view that all injunctions in libel cases are unconstitutional. But how exactly do the Framing-era sources apply to a permanent anti-libel injunction issued by a court following the resolution of a libel case? Hard to know for sure.

CONCLUSION

Whether courts *should* shift the constitutional law of free expression to a more originalist footing is an important and difficult question. Perhaps it's a question that should be resolved entirely as a matter of constitutional theory—maybe such an approach is required by proper interpretive principles, or maybe it's forbidden by other principles (for instance, having to do with precedent).

But it's also possible that the answer may rest in part on how practically usable an originalist framework is likely to be. And to consider that, it's helpful to have in mind some practical questions. Some are already familiar, for instance questions related to damages liability in libel cases, obscenity law, and the like. This short Essay has aimed to help supplement those familiar examples with some others that haven't been much discussed; I hope others who think about the topic can find them useful.

97 For two exceptions, see *Willing v. Mazzocone*, 393 A.2d 1155, 1157–58 (Pa. 1978) and *Oberholzer v. Galapo*, 322 A.3d 153, 172–81 (Pa. 2024). Pennsylvania is one of the few states that continues to categorically prohibit anti-libel injunctions. *See* Volokh, *supra* note 71, app. A, at 144–45.