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FREEDOM OF SPEECH AND OF THE PRESS

HUGH E. WILLIS*

What is the meaning of "freedom of speech and of the press" under the United States Constitution? Law is a scheme of social control for the delimitation of personal liberty in order to protect social interests.¹ Government is the agency to whom the sovereign people have delegated the power to exercise such social control. The United States Constitution is an instrument adopted by the sovereign people to establish the framework of the federal government and to limit the power of the federal government and the various state governments to exercise social control.² Under the United States Constitution, where does social control over speech and the press end and personal liberty begin? And where does freedom of speech and of the press end and social control begin? Has the Constitution at the same time strengthened both government and liberty and reconciled government with liberty?

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press"; and the Fourteenth Amendment provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law." The United States Supreme Court has held that freedom of speech and of the press are protected against state action by the due process clause of the Fourteenth Amendment.³ Most state constitutions also have guaranties of

* See page 492 for biographical note.

¹ Willis, Introduction to Anglo-American Law, 7-17.

² Willis, The Doctrine of Sovereignty under the United States Constitution, 15 Va. Law Rev. 437.

³ *Gitlow v. New York*, 268 U. S. 652 (1925); *Whitney v. California*, 274 U. S. 357, 371 (1927); *Fiske v. Kansas*, 274 U. S. 380 (1927).

freedom of speech and of the press. But, since the United States Constitution protects this form of personal liberty against both the action of Congress and the action of state legislatures, the guaranties of state constitutions are superfluous. Neither one of the provisions either creates or defines the privilege, but both give the individual possessing it an immunity against governmental action. Hence the words should have the same meaning in both amendments, and our problem is to discover that meaning.

It is true that Cooley was of the opinion that the First Amendment was adopted in order to repudiate the English common law of sedition and to give the people of the United States more freedom of speech than was enjoyed by their English brethren at that time;⁴ Madison, Jefferson and Hamilton were of the opinion that the federal government had no power to legislate upon the subject;⁵ and it has recently been suggested that the Fourteenth Amendment allows the states greater latitude than the First Amendment allows Congress:⁶ but the Supreme Court has finally held that the immunity against "abridging the freedom of speech or of the press" does not prohibit all legislation by Congress, and there is a strong intimation that whatever the states may do under the Fourteenth Amendment Congress may do under the First Amendment.⁷ What, then, may the states and the federal government do in the way of abridging freedom of speech and of the press?

1. In the first place, freedom of speech and of the press means immunity from both state and federal censorship (previous restraints);⁸ except a. as the courts are free to exercise their equity powers in accordance with well settled principles;⁹ b. as new enterprizes—like the movies—which do not give expressions of opinion may be controlled;¹⁰ and c. as the government may exclude printed matter from the mails,¹¹ prohibit in-

⁴ Cooley, *Constitutional Limitations*, (8th Ed.) 901-2.

⁵ *Elliott's Debates*, vol. iv, pp. 571-3; *Writings of Thomas Jefferson*, vol. viii, pp. 56-8; *The Federalist*, No. 84.

⁶ 41 *Harv. Law Rev.* 528.

⁷ *Frohwerk v. United States*, 249 U. S. 204, 206 (1919).

⁸ *Patterson v. Colorado*, 205 U. S. 454, 462 (1907).

⁹ *Gompers v. Buck Stove and Range Co.*, 221 U. S. 418 (1911); *State v. Guilford*, 219 N. W. (Minn.) 770 (1928).

¹⁰ *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U. S. 230 (1915).

¹¹ *Lewis Publishing Co. v. Morgan*, 229 U. S. 288 (1913); *Masses Publishing Co. v. Patten*, 246 Fed. 24 (1917).

timidation by speech and writing¹² and the publication of indecent matter,¹³ forbid government employees to engage in political activity,¹⁴ and restrict publications dangerous to the conduct of military operations in war time.¹⁵

In early English history there was little freedom of speech or of the press. There is no mention of this privilege in the Petition of Right (1628), nor the Bill of Rights (1689), the great forerunners of our bills of rights. Printing presses in the reign of Henry VII could be used only by license of the king, and by the time of Elizabeth the practice of using the license as a means of controlling the character of publications was well established. During the reign of James I, the Star Chamber took over the regulation, or censorship, of the press, and made it an effective engine for its evil genius. The Star Chamber was abolished in 1641, but Parliament continued the censorship of the press. However, after the Revolution of 1688 its regulations gradually fell into disuse, and when the last licensing act expired in 1694 it was never renewed.¹⁶ Hence freedom from censorship became a privilege of Englishmen long before our Revolutionary War, when Blackstone's Fourth Book was published in 1769 he wrote:¹⁷ "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 when the First Amendment to our Constitution was adopted it certainly guaranteed freedom from censorship at least.¹⁸ But this censorship means legal censorship; it does not mean no censorship of any sort. Hence a person is not protected against the social consequences of exercising his legal privilege. It has been suggested that the guarantee of freedom of speech and of the press does not extend to

¹² *Thomas v. Railway Co.*, 62 Fed. 803 (1894).

¹³ *People v. Most*, 171 N. Y. 423 (1902); *State v. McKee*, 73 Conn. 18 (1900).

¹⁴ *Duffy v. Cooke*, 239 Pa. St. 427 (1913).

¹⁵ *Ex parte Vallandigham*, 1 Wall (U. S.) 243 (1863).

¹⁶ Paterson, *Liberty of Press and Speech*, 44, 46, 77.

¹⁷ *iv Black. Comm.* 168.

¹⁸ Yet it was proposed to establish a censorship of the press in connection with the Espionage Act, and the proposal was abandoned only for an agreement of the newspapers for a voluntary censorship. The proposed legislation would seem to have been unconstitutional. Carroll, *Freedom of Speech and of the Press in War Time*, 17 Mich. Law Rev. 621, 622-9. The Bill of Rights in the Constitution is not suspended by war. *Ex parte Milligan*, 4 Wall (U. S.) 2 (1866).

aliens,¹⁹ but this suggestion is clearly wrong. Of course this guarantee cannot be invoked to keep aliens from exclusion,²⁰ or deportation by the federal government; but after admission to this country resident aliens are entitled to the guarantee as much as any one else, against both the states and the federal government, because they are entitled to the protection of the due process clause and the equality clause.²¹

Yet to the rule of immunity against censorship there are so many exceptions that a great deal of the rule is no longer left. In particular, there is the exception of equity jurisdiction. So great is this exception that many fear that to allow it opens the way for the complete overthrow of the rule, and the Minnesota case of *State v. Guilford*²² (now on appeal before the United States Supreme Court) is enough to justify such fears. For this reason and because they think censorship by a court of equity is as bad as censorship by any other branch of the government most of the early decisions in this country refused by injunction to put previous restraints upon publications of any kind. Yet the guaranty of freedom of speech and of the press has never given immunity for contempt interfering with the course of justice,²⁴ and modern English cases directly and modern American cases indirectly now grant injunctions to restrain libels, so that it must be taken for granted that some censorship by the courts of equity is legal.²⁵ So far as concerns contempt there is no difficulty,²⁶ for this was established law before the First Amendment was adopted. So far as concerns injunction, how much previous restraint is permissible? Does

¹⁹ Vance, 2 Minn. Law Rev. 239, 242.

²⁰ *United States v. Ju Toy*, 198 U. S. 253 (1905).

²¹ *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886); *Truax v. Raich*, 239 U. S. 33 (1915); *Wong King v. United States*, 163 U. S. 228 (1896).

²² 219 N. W. (Minn.) 770 (1928).

²³ *Brandreth v. Lance*, 8 Paige 24 (1839); *Howell v. Bee Pub. Co.*, 100 Neb. 39 (1916); *Marx Clothing Co. v. Watson*, 168 Mo. 133 (1902); *Empire Theater Co. v. Cloke*, 53 Mont. 183 (1917).

²⁴ *Huggonson's Case*, 2 Atk. 469 (1742); *Respublica v. Oswald*, 1 Dall. 319 (1788). Is it due process of law to punish for indirect contempt of court without making truth a defense and a trial before another judge? 2 Ind. Law J. 310-11.

²⁵ Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harv. Law Rev. 640, 665-8.

²⁶ Willis, *Punishment for Contempt of Court*, 2 Ind. Law Jour. 309; Fox, *History of Contempt of Court*.

the Constitution confine the use of injunction to the class of cases where it was used at the time of the adoption of the Constitution, when it had not begun to be used to restrain libels, or does it permit its use without limitation in any new classes of cases? If the latter any use of words or any writing could be made a nuisance, following the Minnesota precedent, and then enjoined and thereby freedom of speech and of the press could be destroyed. The answer to this question is that neither of these positions is correct, but a middle position, that anything may be restrained which due process of law permits. Before any conduct can be made a nuisance or otherwise illegal, the United States Supreme Court must be convinced that under the due process clause there is sufficient social interest to make it reasonable to do so. Probably the Supreme Court will permit some extension both of the law of antecedent rights and the law of remedial rights, but before it will do so it must be convinced that this will be within the due process clause. This will permit the courts to exercise some previous restraints, but it will still leave intact the rule against censorship.^{26a} The reasons for the other exceptions are apparent. With these exceptions, the people of the United States are guaranteed freedom of speech and of the press immune from both state and federal censorship. The notion once prevailed that this was all the protection that they had, but that after publication they could be punished for anything which the government desired to make illegal. Blackstone²⁷ and Holmes²⁸ have helped to perpetuate this notion. But now it is settled that freedom of speech and of the press means something more than freedom from previous restraints.²⁹ What this further protection is may be stated as follows:

2. In the second place, freedom of speech and of the press also includes immunity from liability after publication for any publications which are not harmful as tested by the legal standards of the day, but not immunity from liability, a. if such liability was recognized at the time of the adoption of the constitutional provision, or b. if such liability is imposed in a proper exercise of the police power today. That is, freedom of speech and the press means the privilege to speak and write what one pleases, not only free from censorship (previous restraint) ex-

^{26a} See notes 39-48.

²⁷ iv Black. Comm. 168.

²⁸ *Patterson v. Colorado*, 205 U. S. 454, 462 (1907).

²⁹ *Coleman v. MacLennan*, 78 Kan. 711, 715; *Schenck v. United States*, 249 U. S. 47, 51 (1919).

cept for equity, etc., but also free from liability therefor, unless such speech or writing violates the social interests protected either in 1791 or today.

At the time of the adoption of the First Amendment liability was recognized at the common law for blasphemy,³⁰ obscenity,³¹ contempt,³² or urging crimes³³ and defamation.³⁴ However, it must be remembered that the law of defamation gave an absolute privilege to those conducting legislative, judicial and military proceedings, and a qualified privilege to those under duty to make the communication, with a common interest, speaking in self-defense and making fair and accurate report of legislative and judicial proceedings (after the judge was brought into the case), and permission to make a fair and honest comment and criticism of matters of public concern.³⁵ The colonists not only recognized as great liability as did England but no more freedom of speech and of the press. It is said that the first mention of free speech and free press occurred in Mason's famous Bill of Rights in 1776.³⁶ Hence it must be assumed that when the immunity of freedom of speech and of the press was written into the Constitution it was in the sense in which it was understood at the time, which was freedom from liability for publications unless they amounted to blasphemy, obscenity, contempt, defamation, or urging a crime. Was sedition (or revolt against legitimate authority) also excepted? Probably it was not. Fox's Libel Act was not passed until 1792; but Erskine and others had carried on a long fight for freedom of speech and the press, the people of England were clamoring for it,³⁷ and undoubtedly one reason for introducing into the First Amendment the clause in regard to freedom of speech and of the press was to get rid of the old English law of seditious libels.³⁸

³⁰ *Reg. v. Taylor*, 1 Ventris 293 (1687); *Reg. v. Ramsay*, 15 Cox. C. C. 231 (1883).

³¹ *Rex v. Wilkes*, 4 Burr. 2527 (1770).

³² *Bagg's Case*, 11 Rep. 93b (1615); *Wilson's Case*, 7 Q. B. 984 (1845).

³³ Opinions in *Abrams v. United States*, 250 U. S. 616 (1919); *People v. Most*, 171 N. Y. 423 (1902).

³⁴ *Moore v. Meager*, 1 Taunt. 39 (1807).

³⁵ Hale, *Law of the Press*, 90, 130; *City of Chicago v. Chicago Tribune*, 307 Ill. 595 (1923).

³⁶ 4 Harv. Law Rev. 379; Cooley, *Constitutional Limitations*, (8th ed.) 881.

³⁷ Burdick, *Constitutional Law*, 351.

³⁸ Cooley, *Constitutional Limitations*, (8th ed.) 898-908.

But the immunity contained in the guarantee of freedom of speech and of the press is not now so broad as this.³⁹ The guarantee gives immunity from liability from no form of social control which is a proper exercise of the police power as understood by the Supreme Court of the United States. In other words, just as the Supreme Court controls what the courts may enjoin before publication so it controls what the legislatures may make punishable after publication. This is the doctrine of the Supreme Court so far as concerns the Fourteenth Amendment.⁴⁰ That makes freedom of speech and of the press vary as due process of law varies. In its interpretation of the due process clause the Supreme Court has not adopted the meaning which the words "due process of law" had at the time of the adoption of the constitutional provisions but whatever meaning it thinks is reasonable at the time of the decision of each particular case.⁴¹ Under this liberal method of interpretation it becomes constitutional to create a new right of privacy,⁴² to re-create the crime of sedition,⁴³ to forbid advertisements of lottery tickets and false advertisements,⁴⁴ and to make any conduct illegal provided the Supreme Court can find a sufficient social interest to be protected thereby.⁴⁵ It is true that the Supreme Court has generally adopted a strict (conservative) interpretation of the various clauses in the Bill of Rights of the Constitution, making them continue to mean just what they did at the time of their adoption. But, since it has applied the liberal interpretation to the due process clause of the Fourteenth Amendment, and has adopted the same method of interpretation as applied to the due process clause of the Fifth Amendment;⁴⁶ and since it has made the due process clause of the Fourteenth Amendment include freedom of speech and of the press,⁴⁷ it must make the due

³⁹ *Schenck v. United States*, 249 U. S. 41 (1919).

⁴⁰ *Gitlow v. New York*, 268 U. S. 652 (1925); *Fiske v. Kansas*, 274 U. S. 380 (1927).

⁴¹ Willis, *Due Process of Law under the United States Constitution*, 74 U. of Pa. Law Rev. 331.

⁴² *Pavesich v. New Eng. L. Ins. Co.*, 122 Ga. 190 (1905).

⁴³ *Debs v. United States*, 249 U. S. 211 (1919); *Gilbert v. Minnesota*, 254 U. S. 325 (1920).

⁴⁴ *State v. McKee*, 73 Conn. 18 (1900); *Lewis Pub. Co. v. Morgan*, 229 U. S. 288 (1912).

⁴⁵ Willis, *Some Conflicting Decisions of the United States Supreme Court*, 13 Va. Law Rev. 280-287; 12 C. J. 952.

⁴⁶ X A. B. A. 509.

⁴⁷ Cases in note, 3, *supra*.

process clause of the Fifth Amendment include it; and, if it does this, it must give to freedom of speech and of the press in the First Amendment the same meaning that it gives it under the due process clause; and the cases under the Espionage Act,⁴⁸ to be considered later, can be rationalized only on the theory that the Supreme Court has already done this.

3. The question remaining, then, is, When is social control of speech and the press today due process of law and not a violation of the privilege of freedom of speech and of the press? The answer is, When it is a proper exercise of the police power. When is there a proper exercise of the police power? When the Supreme Court can find a paramount social interest for any specific legislation? When should it find such a social interest? When the legislature forbids one person, or a few persons, to do what would make the social order intolerable if all were to do it. When does this situation arise? In the historical cases of blasphemy, obscenity, contempt, urging crimes and defamation in the modern and analogous cases, and in the case of seditious libel where words give rise to unlawful acts. Discussion and criticism of the form of government and of the conduct of those in authority by all would tend to make the social order better instead of worse. Without them there would be no possibility of progress in the form of government or means of getting rid of corruption and inefficiency on the part of officials. When do words give rise to unlawful acts? a. Either when they directly urge or cause such acts, or b. where there is a clear and present danger that they will cause such acts, or c. where they might have an indirect or remote tendency to cause such acts. Which one of these tests is the correct test? In *Masses Pub. Co. v. Patten*⁴⁹ Hand J. held that the first was the correct test, but on appeal of the same case to the Circuit Court of Appeals⁵⁰ (2nd) Rogers J. held that the third was the correct test, and a great many state courts in war time adopted this test. But in the case of *Schenck v. United States*⁵¹ the United States Supreme

⁴⁸ See notes 51 to 55. In passing on cases involving freedom of speech or of the press the Supreme Court does not distinguish between the First Amendment and the Fourteenth Amendment, but in both cases seems to talk in terms of the police power.

⁴⁹ 244 Fed. 535, 542 (1917).

⁵⁰ 246 Fed. 24, 38 (1917). Chafee, *Freedom of Speech*, discusses state cases.

⁵¹ 249 U. S. 41 (1919).

Court adopted the second test. Is this case still the law? It has not directly been overruled. The Frohwerk⁵² case is in accord with it. The Debs⁵³ case and the Abrams⁵⁴ case can perhaps be distinguished from it. But the cases of *Pierce v. United States*⁵⁵ and *Gitlow v. New York*⁵⁶ seem almost to have adopted the indirect remote tendency test. In the Gitlow case the Supreme Court distinguished between a statute which prohibited acts and one which prohibited words, and intimated that where the statute prohibited words the legislature had determined that such utterances involved a substantive danger so that the question whether any specific utterance of the sort prohibited actually involves such a danger was not open to consideration. Yet in *Fiske v. Kansas*⁵⁷ the Supreme Court decided that a valid statute was not enough, but that if the utterances could not be constitutionally punished a conviction would be reversed even though the words had been held to be within the statute by the state court; and in *Whitney v. California*⁵⁸ it indicated that a legislative declaration that language involves sufficient danger is not conclusive but will be held invalid if arbitrary and unreasonable. If remote indirect tendency were to be the test of the constitutionality of social control of speech and the press, it might as well be admitted first as last that there would be no such thing as "freedom of speech or of the press." But it now looks as though the Supreme Court were going to protect this form of personal liberty against social control either by previous restraint or by subsequent liability unless the Supreme Court itself—passing both on the utterance and the statute—thinks such control reasonable (and perhaps in the case of sedition as judged by the test of clear and present danger).⁵⁹

⁵² *Frohwerk v. United States*, 249 U. S. 204 (1919).

⁵³ *Debs v. United States*, 249 U. S. 211 (1919).

⁵⁴ *Abrams v. United States*, 250 U. S. 616 (1919).

⁵⁵ 252 U. S. 239 (1920).

⁵⁶ 268 U. S. 652 (1925).

⁵⁷ 274 U. S. 380 (1927).

⁵⁸ 274 U. S. 357, 371 (1927).

⁵⁹ Chafee, *Freedom of Speech*; Schofield, *Freedom of the Press in the United States*, 9 Pub. Am. Soc. Soc. 67; Carroll, *Freedom of Speech and of Press in Wartime*, 17 Mich. Law Rev. 621; Chafee, *Freedom of Speech in War Time*, 32 Harv. Law Rev. 932; Wallace, *Constitutionality of Sedition Laws*, 6 Va. Law Rev. 385; Taft, *Freedom of Speech and the Espionage Act*, 7; Hall, *Free Speech in War Time*, 21 Col. Law Rev. 526; Wigmore, *Freedom of Speech and Freedom of Thuggery in Wartime and Peacetime*, 14 Ill. Law Rev. 539.

Do the decisions of the United States Supreme Court give too much freedom of speech and of the press, or too much social control? In war time the dominant hysterical majority thought they gave too much freedom of speech and of the press. In peace time the dominant majority, regaining its sanity, is beginning to think that they give too much social control. The press, in particular, is becoming restive and apprehensive over a rule under which Arkansas and Tennessee legislate against the teaching of evolution, the city of Boston censors plays and Minnesota enjoins newspapers as nuisances. The writer is inclined to sympathize with the attitude of the press when he looks at the situation as a whole, but when he looks at any particular part of it he is inclined to approve of it and not to desire to have the law changed. Is the test for reasonableness under the police power wrong? No. Assuming that the Supreme Court has adopted the "clear and present danger" test the writer would suggest no change. Did the Supreme Court make a mistake in extending due process to include freedom of speech? No, not if due process of law is to be extended to include any substantive law. Of course, if the Supreme Court had not extended due process to any substantive law the First Amendment would have applied only to the federal government, and the Supreme Court might have limited its meaning to the meaning it had at the time of its adoption when either social control over sedition (where the worst abuses have arisen) would have been excluded or nothing but censorship would have been excluded (which would have made the situation worse than it is now); but the state legislatures and courts would have been uncontrolled except by their own constitutions, and the writer would rather trust the Supreme Court than state legislators and judges. Has the Supreme Court made a mistake in permitting previous restraints by courts with equity powers? No. So far as this is accomplished through the power to punish for contempt, while some reform of the law of indirect contempt is doubtless desirable, it is unthinkable to take away from the courts the power to punish either for direct or for indirect contempt of court. So far as concerns the use of injunctions, it is also useless to rail. If due process of law is going to be extended to include freedom of speech and the courts are going to have the power to determine what is due process of law after publication and to impose liability, it is no worse for the same courts to determine what is due process of law before publication and to prevent

wrong-doing, unless all injunctive relief is to be abolished, which again is something unthinkable. There are as cogent reasons for protecting by injunction rights of personality as there are for protecting rights of property. Are the other exceptions to the rule of no previous restraints justifiable? The writer is not prepared to say that they are not. Hence, if we are getting too little freedom of speech and of the press and too much social control of them, the writer feels that the remedy lies, not in changing the law, but in obtaining a Supreme Court whose personnel will guarantee a good application of the rule of reasonableness.