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THE DEEP ROOTS OF CONSTITUTIONAL CONSTRAINTS ON SPEECH-BASED CIVIL LIABILITY

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I. INTRODUCTION

Does the First Amendment limit common-law tort liability? *New York Times Co. v. Sullivan* said yes,¹ but some argue this is a modern innovation.² The Court's turn to original meaning, including in free speech cases,³ may make the issue significant again.

This short article argues that constitutional constraints on speech-based civil liability have deep roots, going back to the Framing era. That aspect of the *New York Times v. Sullivan* holding is entirely consistent with original meaning. The Framers likely did view the proper scope of libel liability more broadly than recent First Amendment precedents allow. But this was because of a substantive judgment about which speech restrictions (civil or criminal) should be permitted—not because of a judgment that civil liability simply didn't constitute state action, or that tort law was categorically immune from First Amendment scrutiny.

And it shouldn't be surprising that civil liability was seen as constrained by free speech principles, because it's clear that the imposition of damages liability was seen as government action of the sort that required some constitutional constraints. That much is evident from the Seventh Amendment, and from the many comparable state constitutional provisions assuring a jury trial in civil cases.⁴ Purely private behavior was indeed not covered by state and federal Bills of Rights. But the adjudication of private disputes was done by government-run courts, and was subject to constitutional rules such as the jury trial mandate. And, as the evidence below will show, it was also subject to constitutional rules related to freedom of expression.

¹ 376 U.S. 254, 265 (1964).

² See, e.g., 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.”); 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*, No. 09-751 (“Until the Court’s decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the First Amendment generally placed no limits on state tort law”); Nathan Tucker, *Slander Not Protected by 1st Amendment*, BALTIMORE SUN, Mar. 22, 2010, at 13A. I’ve heard the same argument in personal communications from two constitutional scholars.

Note that the statements quoted above may be literally correct as to the First Amendment, which didn’t apply to state law at all until the Fourteenth Amendment was enacted and then, six decades later, incorporated against the states. But the statements likely suggest to most readers that constitutional principles more broadly—including state constitutional free speech provisions—didn’t apply to state tort law, either.

³ See *Citizens United v. FEC*, 130 S. Ct. 876, 925-29 (2010) (Scalia, J., joined by Alito and Thomas, JJ., concurring); *id.* at 948-52 (Stevens, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting); *Davis v. FEC*, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., dissenting); *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring in the judgment); *Randall v. Sorrell*, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting); *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 424 & n.9 (2000) (Thomas, J., joined by Scalia, J., dissenting); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358 (1995) (Thomas, J., concurring in the judgment); see also *United States v. Stevens*, 130 S. Ct. 1577, 1584-85 (2010) (stressing the importance of “histor[y] and tradition[]” in determining whether a particular exception to free speech protection should be recognized); *Citizens United*, 130 S. Ct. at 906 (briefly noting that “There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations,” and citing Justice Thomas’s *McIntyre* opinion); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in the judgment) (expressing openness to an originalist analysis in free speech cases).

⁴ See, e.g., PA. CONST. of 1776, Bill of Rights, art. XI (“That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.”).

II. LATE 1700S AND EARLY 1800S CASES AND COMMENTATORS

In fact, tort liability was at issue in the very earliest cases that protected speakers based on state constitutional analogs to the First Amendment: In 1802 and 1806, the Vermont Supreme Court and the South Carolina Constitutional Court of Appeals reversed libel verdicts for the plaintiffs, holding that the state equivalents of the Petition Clause barred recovery for alleged libels in petitions to the legislature.⁵ In 1809, the New York Supreme Court reversed a libel verdict based on such a petition, and one of the judges, DeWitt Clinton, likewise rested his opinion on the state constitutional provision.⁶ And in 1818, the South Carolina Constitutional Court of Appeals applied the same reasoning as to the freedom of speech and press more broadly.⁷

In other early cases, courts acknowledged that the freedom of speech and press may apply to civil lawsuits as well as to criminal prosecutions, but reasoned that libelous speech was a constitutionally unprotected abuse of the freedom and could thus lead to civil liability as well as to criminal punishment. We see this in cases from the Pennsylvania Supreme Court in 1799 and 1803,⁸ as well as from a Michigan territorial court in 1829.⁹ And in 1808, the Massachusetts Supreme Judicial Court likewise held that state legislators' freedom of speech and debate¹⁰ could bar civil liability for slanderous statements made "while discharging the duties of [the legislator's] office,"¹¹ though the court held that the particular speech in that case was outside the legislators' duties and thus potentially actionable.

Early commentators, including St. George Tucker, Chancellor Kent, and Justice Joseph Story, likewise treated civil liability the same as criminal punishment when it came to constitutional speech and press protections.¹² The commentators concluded that libel was generally constitutionally unprotected, both against civil liability and criminal punishment. But their conclusion rested on a judgment that defamation didn't merit constitutional protection. Their reasoning did not rest on any view that damages liability didn't involve state action and was thus immune from constitutional constraints.

⁵ *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802); *Reid v. Delorme*, 4 S.C.L. 76 (Const. Ct. App. 1806).

⁶ *Thorn v. Blanchard*, 5 Johns. 508 (N.Y. Sup. 1809). The opinions were given seriatim, as was the custom of that court at the time. The other two judges rested their views on their understanding of the common law, and didn't mention the constitutional provision.

⁷ *Mayrant v. Richardson*, 10 S.C.L. 347 (Const. Ct. App. 1818).

⁸ CONSTITUTIONAL DIARY, Dec. 14, 1799, at 3 (reporting on a jury instruction given by the court in *Rush v. Cobbett*); *Runkle v. Meyer*, 3 Yeates 518, 520 (Pa. 1803); see also *Gray v. Pentland*, 2 Serg. & Rawle 23 (Pa. 1815) (seriatim opinion of Yeates, J.).

⁹ See also *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021, *11-*12 (Mich. Terr. 1829).

¹⁰ MASS. CONST. of 1780, pt. I, art. XXI ("The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.").

¹¹ *Coffin v. Coffin*, 4 Mass. 1, 27-28 (1808).

¹² JAMES SULLIVAN, A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 27-28 (1801); 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA App. 29-30 (1803); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *18 (1827); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1882 (1833). The Tucker, Kent, and Story treatises have often been relied on by the Justices as evidence of the original meaning of the Constitution. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 799 (1995) (relying on these three sources as the only three pre-1850 commentators whose views were relevant); *Pac. Mut. Life Ins. Co v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment) (likewise); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (relying on Kent and Story); *Harmelin v. Michigan*, 501 U.S. 957, 977, 982 (1991) (Scalia, J., joined by Rehnquist, C.J.) (relying on Tucker, Kent, and Story). Sullivan is less known today, but he was a significant figure at the time: When he wrote his work, he was the Attorney General of Massachusetts, and a former state court judge and member of the Continental Congress. BENJAMIN PERLEY POORE, THE POLITICAL REGISTER AND CONGRESSIONAL DIRECTORY 650 (1878).

Some of the cases I cite were brought by government officials; but they were suing as citizens, not as officials, defending their private rights. And other cases were not brought by government officials.¹³ The premise of the court decisions must be that judicial action imposing liability for speech is covered by constitutional free speech provisions, regardless of whether the plaintiff himself was acting for the state.

Some early state constitutional free press clauses did specifically mention “criminal prosecutions,” generally saying something like,

The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.¹⁴

But while the second sentence applies only to “prosecutions” and “indictments,” there is no such limitation in the first sentence. And the reference to criminal cases in the second sentence likely stems from the fact that the protections listed in the second sentence were only needed in criminal cases, and would have been superfluous in civil cases. In criminal cases, English common-law judges had famously not recognized the defense of truth, and didn’t let juries decide whether the defendant’s words were indeed libelous.¹⁵ But in civil cases, the defense of truth was already well established,¹⁶ as was the jury’s role as judges of law as well as fact.¹⁷

III. THE FIRST AMENDMENT, AND THE FEDERALIZATION OF FREE SPEECH PROTECTIONS

So far I’ve discussed state constitutional provisions, but this is because tort liability in the early Republic was almost entirely a matter of state law. Libel lawsuits in federal court generally arose because of diversity of citizenship, and therefore likewise applied state law.¹⁸ Thus, though the First Amendment literally limits itself only to “law” made by “Congress,” and not the common-law-based decisions of federal courts,¹⁹ this limitation was almost entirely irrelevant to civil liability for speech.²⁰

¹³ See, e.g., *Mayrant* (lawsuit brought by a candidate for office); *Runkle* (lawsuit brought by a private party);

¹⁴ PA. CONST. of 1790, art. IX, § 7; see also DEL. CONST. of 1792, art. I, § 5; KY. CONST. of 1792, art. XII, § 8; OHIO CONST. of 1802, art. VIII, § 6; TENN. CONST. of 1796, art. XI, § 19.

¹⁵ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125-26 (1765).

¹⁶ *Id.* at *125; 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 74 (Philadelphia, Lorenzo Press 1804) (printing a lecture delivered in 1790-91); *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802); see generally Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964). James Wilson was a Justice of the United States Supreme Court and one of the leading drafters of the constitution. See Ralph A. Rossum, *Wilson, James*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2909 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

¹⁷ *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794); William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 916 (1978)

¹⁸ Judiciary Act of 1789, sec. 34, 1 Stat. 73.

¹⁹ See Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156 (1986).

²⁰ Even in the territories, where federal law applied, courts apparently treated the First Amendment as governing the common law. The cases I have seen on this have involved criminal law and injunctions; but nothing suggests that the First Amendment’s reference to “Congress” would have barred consideration of the First Amendment as to common-law damages liability, given that it didn’t bar consideration of the First Amendment as to other common-law principles. See *Territory v. Nugent*, 1 Mart. (o.s.) 108, 1810 WL 838 (Orleans Terr. 1810) (concluding that “Constitutional . . . rights” such as the “liberty of the press” “are to be exercised, so as they work no injury to others,” and thus that the liberty of the press does not extend to criminal libel, even though the criminal libel was prosecuted under the common law and not under a Congressional act); *Denis v. Leclerc*, 1 Mart. (o.s.) 297, 1811 WL 986 (Orleans Terr. 1811) (concluding that the First Amendment does not bar injunctions against the printing of private letters, but resting the judgment on the limited scope of the freedom of the press, and citing as authority cases upholding the Sedition Act, which was indeed enacted by Congress); *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021, *11-*12 (Mich. Terr. 1829)

And to the extent that the First Amendment now applies to state common law torts, as well as to other state action, it applies through the Fourteenth Amendment. The Fourteenth Amendment generally covers all action by a “State,” and isn’t limited to state legislatures.²¹ Moreover, by the time the Fourteenth Amendment was enacted, the freedom of speech and press had been understood for decades as applying to civil liability as well as criminal punishment.²²

IV. CONCLUSION

“It matters not,” *New York Times v. Sullivan* said, “that [a speech restriction] has been applied in a civil action and that it is common law only, though supplemented by statute.”²³ *New York Times v. Sullivan* didn’t offer any late 1700s or early 1800s support for this proposition, though elsewhere the opinion was willing to make claims about the history of that era.²⁴ Nonetheless, such support is available: Many cases and commentators from that time took for granted that civil liability was subject to constitutional constraints, and I know of no sources that took the contrary view.

(describing libel as equally unprotected by the First Amendment against civil liability and against criminal punishment). (*Nugent* and *Denis* were decided by Judge François-Xavier Martin, who was a noted legal scholar and eventually the presiding judge of the Louisiana Supreme Court, Michael Chiorazzi, *Francois-Xavier Martin: Printer, Lawyer, Jurist*, 80 LAW LIBR. J. 63 (1988); Martin was apparently called by some the “Father of Louisiana Jurisprudence,” 17 ENCYCLOPEDIA BRITANNICA 794 (1911).)

The likeliest explanation for reading the freedom of speech and of the press as applying to judges as well as to Congress, I think, is that the Bill of Rights was understood as embodying basic legal principles. Congress was bound by the freedom of speech and of the press because of the text of the First Amendment. But courts were likewise bound by the freedom of speech and of the press, because those were seen as being part of American common law.

²¹ This is true whether one views incorporation as properly taking place through the Due Process Clause (“nor shall any State deprive any person of life, liberty, or property, without due process of law”) or through the Privileges or Immunities Clause (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”).

²² See the cases discussed above, as well as THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 422 (1868). Cooley has often been cited by the Court as being an especially influential and reliable authority. See, e.g., *D.C. v. Heller*, 128 S. Ct. 2783, 2811 (2008) (describing Cooley as the “most famous” of the “late-19th-century legal scholar[s],” and his treatise as “massively popular”); *Haddle v. Garrison*, 525 U.S. 211, 225 (1998) (labeling Cooley “the great constitutional scholar”); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (describing Cooley as a “great constitutional scholar”). See also *Corliss v. E.W. Walker Co.*, 30 Abb. N. Cas. 372 (N.Y. Sup. 1893) (refusing, on constitutional free speech and press grounds, to issue an injunction against the publication of an unauthorized biography, but also stating—citing Cooley—that such speech was protected even against a damages remedy unless it “by its falsehood and malice may injuriously affect the standing, reputation, or pecuniary interests of individuals”).

²³ 376 U.S. 254, 265 (1964).

²⁴ See, e.g., *id.* at 273-77.