

# Symbolic Expression and the Original Meaning of the First Amendment

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## INTRODUCTION

The First Amendment protects “speech” and “press,” not “expression”: so some argue, condemning the Court’s symbolic expression cases. Judge Robert Bork writes that “burning a flag is not speech and should not fall under First Amendment protection.”<sup>1</sup> Senators Dianne Feinstein and Orrin Hatch agree,<sup>2</sup> as do many journalists, activists, and commentators.<sup>3</sup> Others similarly reason that

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1. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 100 (1996); *id.* (faulting the Court’s view “that an amendment protecting only the freedom of ‘speech’ somehow protects conduct if it is ‘expressive’”); *see also* *Street v. New York*, 394 U.S. 576, 610 (1969) (Black, J., dissenting) (taking the view that burning a flag was “conduct” that was outside the scope of the First Amendment).

2. *See* Fred Brown, *Flag-Burning Amendment Would Torch Principles*, DENVER POST, July 3, 2005, at E1 (quoting Sen. Feinstein); Orrin G. Hatch, *Burning a Flag Is Not Speech*, ST. LOUIS POST-DISPATCH, Sept. 24, 1989, at 3B; David D. Kirkpatrick, *Congress Again Debates Protecting the Flag*, N.Y. TIMES, June 22, 2005, at A15 (quoting Sen. Hatch).

3. *See, e.g.*, Michael Barone, *Campaign 2000 II*, NAT’L REV., Mar. 20, 2000, at 18; William Gangi, *A Scholar’s Journey to the Dark Side*, 11 CHAP. L. REV. 1, 22 (2007); Margaret Talev, *Waving the Flag: New Push for a Constitutional Amendment Has Senate Seeing Stars—and Stripes*, SACRAMENTO BEE,

the First Amendment doesn't protect the wearing of symbolic armbands or Ku Klux Klan regalia, the symbolic refusal to salute a flag, or the burning of a cross.<sup>4</sup> Judge Richard Posner concludes that "[n]othing in the text of the Constitution, or in the eighteenth-century understanding of freedom of speech, supports the proposition that prohibiting the burning of the flag infringes free speech," partly because "[b]urning a flag is not even 'speech' in a literal sense."<sup>5</sup>

The Supreme Court has disagreed with the Bork/Hatch/Feinstein position. "[I]nherently expressive"<sup>6</sup> or "conventionally expressive"<sup>7</sup> symbolic expression, the Court has concluded, is basically functionally identical to expression through words and should thus be treated the same: the two convey messages through much the same mental mechanism, with much the same effects and for much the same speaker purposes.<sup>8</sup> But are the Court's critics right, at least if one focuses on the text and original meaning of the First Amendment? Is the Court's doctrine here vulnerable to reversal given the Court's growing turn to original meaning analysis?<sup>9</sup>

Even conservatives on the Court and elsewhere have usually shown little

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June 12, 2006, at A1 (quoting Marty Justis, executive director of the Citizens' Flag Alliance); Editorial, *Not for Burning*, NAT'L REV. ONLINE, June 27, 2006, <http://tinyurl.com/hnh6z>.

4. See, e.g., KEVIN R.C. GUTZMAN, *THE POLITICALLY INCORRECT GUIDE TO THE CONSTITUTION 185–86* (2007) (as to armband and flag salute); Lee Anderson, *Protecting 'Freedom of Speech'*, CHATTANOOGA TIMES FREE PRESS, Aug. 23, 2002, at B9 (as to cross-burning); John O'Sullivan, *First Amendment Wrongs*, NAT'L REV., July 9, 1990, at 6 (as to "Klan hood-wearing"); cf. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 517 (1969) (Black, J., dissenting) (expressing doubt about whether "the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment").

5. RICHARD A. POSNER, *HOW JUDGES THINK* 283 (2008). Because Judge Posner is not a textualist or an originalist, he doesn't fault the Court's bottom-line results in symbolic expression cases; rather, he points out (correctly) that the Court didn't support those results on textualist or originalist grounds and argues (mistakenly, as I argue below) that those results can't be supported on such grounds.

6. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

7. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 n.4 (1991) (Scalia, J., concurring in the judgment).

8. Cf. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943) ("[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."). Symbols do tend to be more "primitive" than some verbal arguments, in the sense that they communicate a simpler and often less rational message. But the same is true of many short verbal slogans, which the freedom of speech indubitably protects.

9. For recent opinions applying original meaning analysis to a variety of Bill of Rights provisions, see, for example, *D.C. v. Heller*, 128 S. Ct. 2783 (2008) (Second Amendment); *Morse v. Frederick*, 127 S. Ct. 2618, 2630–33 (2007) (Thomas, J., concurring) (Free Speech Clause); *McCreary County v. ACLU*, 545 U.S. 844, 886–99 (2005) (Scalia, J., writing for three Justices) (Establishment Clause); *Crawford v. Washington*, 541 U.S. 36 (2004) (Confrontation Clause); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment); *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 359–70 (1995) (Thomas, J., concurring in the judgment) (Free Speech Clause). Of course, those who don't think original meaning should be relevant to constitutional interpretation likely won't care much about original meaning as it relates to symbolic expression. But I address this Article to those who do care about original meaning, a group that includes many critics of the Court's flag-burning decision. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143–85 (1990); Barone, *supra* note 3; Hatch, *supra*

interest in revisiting the Court's general free speech/free press precedents, which now consist of hundreds of cases,<sup>10</sup> or in adopting some Framers' attitudes towards seditious libel or even offensive public speech generally. But returning the definition of "speech" and "press" to its original meaning might be feasible, and the call to return to this definition deserves to be considered.

This Article argues that the Court has had it right all along and that the Court's critics are mistaken on originalist grounds.<sup>11</sup> The equivalence of symbolic expression and verbal expression is consistent with the First Amendment's original meaning:<sup>12</sup>

1. Late-1700s and early-1800s courts treated symbolic expression and verbal expression as functionally equivalent when it came to speech restrictions, such as libel law, obscenity law, and blasphemy law. Symbolic expression, for instance, could be just as libelous as verbal expression.<sup>13</sup>

2. This logic and tradition of equivalence extended to speech protections—a term I will use as shorthand for "free speech or free press protections"—as well as to speech restrictions. Paintings, liberty poles, and other symbolic expression

note 2. And of course so long as some judges, legislatures, and citizens care about original meaning, people who are trying to persuade them should care about original meaning arguments as well.

My discussion here focuses on the "original public meaning" of the constitutional text: what it meant in the legal language of the era and therefore how it was likely understood by those who ratified the provision in the state legislatures as well as those who voted for it in Congress and drafted it in Congress. I am not focusing on the original *intent* of particular drafters, which may well not have been captured in the officially adopted text, and not have been known to the ratifiers. Recent originalist works have generally focused on this original public meaning, not the drafters' unexpressed original intent. *See, e.g., Crawford*, 541 U.S. at 60; *Atwater*, 532 U.S. at 339; *see also* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–117 (2004) (discussing the original public meaning approach and its originalist rivals and explaining why original public meaning is the better view); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37–47 (1997) (endorsing the original public meaning approach); Douglas H. Ginsburg, *Original Public Meaning of the Constitution: Out of Exile?*, AEI SHORT PUBLICATIONS, Feb. 18, 2009, [http://aeipress.com/publications/pubID.29416,filter.economic/pub\\_detail.asp](http://aeipress.com/publications/pubID.29416,filter.economic/pub_detail.asp).

10. *Cf.* SCALIA, *supra* note 9, at 138–41 (reasoning that the Court's "long-standing and well-accepted principles" of First Amendment law "are effectively irreversible").

11. The critics have not, to my knowledge, precisely defined their vision of what constitutes "speech," including whether it's limited to spoken words (with "press" to cover printed words) or used more broadly to refer to all verbal expression—including written and printed words and possibly sign language that represents specific words—but not to symbolic expression. *Cf.* 1 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 208, 210 (Boston, Charles C. Little & James Brown 1838) (noting, in discussing the theory of the freedom of speech and of the press, the logical equivalence between speech, writing, and "sign[s] made by the deaf and dumb"); *see also* MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 649 (London, E. & R. Nutt & R. Gosling 1736) (noting that the "dumb or deaf" "may contract by Signs"); *John Ruston's Case*, (1786) 168 Eng. Rep. 408 (Old Bailey) (holding that the deaf and mute could testify by signs). My argument is that the original meaning of "the freedom of speech, or of the press" is broader than either of these definitions because it covers conventionally expressive symbols as much as it covers verbal expression, whether spoken, handwritten, printed, or conveyed through hand signs.

12. Akhil Amar and Justice Scalia have assumed this is so, but without detailed historical evidence. *See* Akhil Reed Amar, *The Case of the Missing Amendments*, 106 HARV. L. REV. 124, 134 (1992); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 344, 377–78 (1995) (Scalia, J., dissenting).

13. *See infra* Part I.

(even outside the “press”) appeared to be no less and no more protected than spoken and printed words. In fact, the first American court decision striking down a government action on free speech or free press grounds (in 1839<sup>14</sup>) treated symbolic expression and verbal expression as interchangeable.<sup>15</sup>

3. And this equivalence of symbolic and verbal expression fits well with the original meaning of the First Amendment. Leading commentators St. George Tucker, Chancellor Kent, and Justice Joseph Story recognized that “the freedom of speech, or of the press” was tantamount to Madison’s original draft of the clause: the “right to speak, to write, or to publish.” And the term “to publish” included not just publishing printed works, but also publicly communicating symbolic expression, such as paintings, effigies, and processions.<sup>16</sup>

The treatment of symbolic expression as equivalent with verbal expression makes historical sense as well as logical sense, because Framing-era English and American political culture was rich with symbolic expression, used interchangeably with words. A leading English holiday, Guy Fawkes’ Day (called Pope Day in the colonies), revolved around processions and burning effigies.<sup>17</sup> In the first major protest against the Stamp Act, colonists placed on a “Liberty Tree” (in that case, a large elm) various effigies, including a “devil . . . peep-[ing] out of a boot—a pun on the name of former British Prime Minister Lord Bute (pronounced Boot), who was widely if erroneously believed to be responsible for the Stamp Act”; “[t]he effigies were then paraded around town, beheaded, and burned.”<sup>18</sup> John Jay, coauthor of *The Federalist*, Supreme Court Chief Justice, and negotiator of a much-opposed treaty with England, reportedly “wryly observed that he could have found his way across the country by the light of his burning effigies in which he was represented selling his country for

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

15. See *infra* Part II.

16. See *infra* Part III.

17. See, e.g., Charlotte S. Burne, *Guy Fawkes’ Day*, 23 *FOLKLORE* 409–10, 411 (1912); see also BRENDAN McCONVILLE, *THE KING’S THREE FACES: THE RISE & FALL OF ROYAL AMERICA, 1688–1776*, at 1–2 (2006); PETER SHAW, *AMERICAN PATRIOTS AND THE RITUALS OF REVOLUTION 197–99* (1981) (discussing Guy Fawkes’ Day ceremonies as a source for some of the American political symbolic expression of the Revolutionary era).

In November 1775, George Washington barred his officers and soldiers from the “ridiculous and childish custom of burning the effigy of the Pope” on Guy Fawkes’ Day, on the grounds that it would interfere with attempts to get “the friendship and alliance of the people of Canada,” which included mostly Catholic Quebec. 3 *THE WRITINGS OF GEORGE WASHINGTON* 144 n.\* (Boston, American Stationers’ Co. 1834–37). But of course a Commander-in-Chief in wartime has broad authority over his soldiers’ behavior, including their expression (whether verbal or symbolic). Exercise of such authority doesn’t suggest anything about the constitutionally protected scope of expression by civilians.

18. William Pencak, *Play as Prelude to Revolution: Boston, 1765–1776*, in *RIOT AND REVELRY IN EARLY AMERICA* 131–32 (William Pencak et al. eds., 2002); see also SHAW, *supra* note 17, at 9. The Bute/boot pun had also appeared in English symbolic expression a few years earlier: the official burning of John Wilkes’s seditious libel in London in 1763 had been stopped by a mob, which among other things burned “a jackboot and a petticoat, the mob’s hieroglyphic for Lord Bute and the Princess.” 1 HORACE WALPOLE, *MEMOIRS OF THE REIGN OF KING GEORGE III* 217 (Derek Jarrett ed., 2000).

British gold”<sup>19</sup>—a continuation of the pre-Revolutionary pattern of burning the effigies of disliked colonial governors.<sup>20</sup>

English supporters of restoring the Stuarts would pass a wine glass over a water jug while drinking a toast to the health of the king, as a clandestine symbol that one is actually toasting the “King over the Water,” which is to say the Pretender, who lived in exile in France.<sup>21</sup> Englishmen and Americans who sympathized with English radical and colonial hero John Wilkes not only toasted him, but toasted and celebrated him using a number associated with him: forty-five toasts—representing Issue 45 of Wilkes’ *North Briton*, which got him prosecuted for seditious libel and made him a star—were drunk at political dinners where forty-five diners ate forty-five pounds of beef; at other dinners, the meal was “eaten from plates marked ‘No. 45’”; the Liberty Tree in Boston had its branches “thinned out so as to number forty-five.”<sup>22</sup> Literal speech (the words of the toasts) was freely mixed with symbolic expression.

Likewise, 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.<sup>23</sup> Some wore cockades made of cow dung to mock the other side’s cockades.<sup>24</sup> Some conducted mock funerals for the other side’s cockades (see the picture on the next page).<sup>25</sup> Others raised liberty poles<sup>26</sup> or burned “Liberty or Death” flags stripped from

19. JOHN C. MILLER, *THE FEDERALIST ERA 1789–1801*, at 168 (1998); see also PROVIDENCE GAZETTE & COUNTRY J., Feb. 2, 1788, at 3 (reporting on a Pennsylvania incident in which an effigy of the Governor was burned); ALBANY REG., Nov. 24, 1807, at 2 (describing the burning in effigy of leading Maryland politician Luther Martin, prompted by his criticisms of “the federal administration”). In this footnote, as well as most of the other footnotes that cite historical sources, I list each category of sources in chronological order, since the older sources are more relevant.

20. See *New-York, June 16*, BOSTON GAZETTE, June 27, 1774, at 3; see also SHAW, *supra* note 17, at 40. After the Declaration of Independence, Americans burned the King’s effigy, emblems, portrait, and coat of arms. See *Boston, July 25*, PENN. PACKET, Aug. 5, 1776; see also McCONVILLE, *supra* note 17, at 308–09; David Waldstreicher, *Rites of Rebellion, Rites of Assent: Celebrations, Print Culture, and the Origins of American Nationalism*, J. AM. HIST., June 1995, at 47.

21. See, e.g., WALTER SCOTT, REDGAUNTLET 42 (Boston, Samuel H. Parker 1824) (describing such a toast but with the words “[o]ver the water” expressly added); *Toasts, in 2 EVERY SATURDAY: A JOURNAL OF CHOICE READING* 330, 331 (1872) (describing such a toast without the words included).

22. SHAW, *supra* note 17, at 63–64; see also *id.* at 182 (reporting on the pruning of a Liberty tree “to bring the number of branches to match such popularly celebrated totals as the ninety-two who voted against the governor (in support of the legislature’s right to circulate a petition to other colonies)”).

23. See COLUMBIAN CENTINEL (Boston, Mass.), July 4, 1798; see also BENJAMIN AUSTIN, JR., CONSTITUTIONAL REPUBLICANISM 61, 71, 101 (Boston, Adams & Rhoades 1803); CHARLES WARREN, JACOBIN AND JUNTO 81 (1931); SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC 154 (1997).

24. See COLUMBIAN CENTINEL (Boston, Mass.), July 14, 21, 1798; see also WARREN, *supra* note 23, at 84.

25. See NEWMAN, *supra* note 23, at 164.

26. See Arthur M. Schlesinger, *Liberty Tree: A Genealogy*, NEW ENG. Q., Dec. 1952, at 435; see, e.g., BRIDGHAMPTON BEE, Jan. 16, 1799, at 2 (describing a “Liberty Tree,” “seventy-six feet high, bearing on the top a vane, with Liberty inscribed upon one side, and upon the other side a spread eagle with the flag of the United States and a Liberty Cap” and also bearing a motto condemning the Sedition Act); see also PAUL DOUGLAS NEWMAN, FRIES’S REBELLION 1–2 (2004).



**Figure 1:** *Funeral Procession of the Black Cockade*, Lewis Miller (ca. 1800). From the collection of the York County Heritage Trust, York, PA.

their adversaries' liberty poles.<sup>27</sup> Yet others planned an elaborate pantomime criticizing their Congressman, including the burning of a British flag, preceded by displays of the French and American flags crowned with liberty caps, the British flag flying upside down, and a gallows.<sup>28</sup>

Colonists conducted funeral processions for liberty to protest the Stamp Act.<sup>29</sup> After the Revolution, Americans burned copies of the Sedition Act<sup>30</sup> and other federal laws,<sup>31</sup> as well as copies of opponents' publications that they saw as libelous<sup>32</sup> (echoing the English legal practice of having libels be burned by the hangman<sup>33</sup>). It is understandable that a culture that so often used symbolic expression as part of politics would see the freedom of speech and press as covering symbolic expression to the same extent as verbal or printed expression.

And it similarly makes sense that the Supreme Court's protection of symbolic expression dates back to the very first Supreme Court decision striking down any government action on free speech or free press grounds.<sup>34</sup> The Court in that

27. KLINE'S CARLISLE WEEKLY GAZETTE, Sept. 17, 1794, at 2.

28. See MORNING STAR (Newburyport, Mass.), Apr. 15, 1794, at 3; see also Letter from James Madison to Thomas Jefferson (Mar. 26, 1794), in 28 THE PAPERS OF THOMAS JEFFERSON 43, 44 (John Catanzariti ed., 2000). Much of the display was indeed implemented, though some was "obliterated by the heavy rain which fell on the [assigned] morning." MORNING STAR, *supra*. The British Union Jack can't be meaningfully flown upside down, because it is symmetrical; the flag was therefore likely an ensign with the Union Jack in the upper left-hand corner. See H. GRESHAM CARR, FLAGS OF THE WORLD 51–52 & plate VI (rev. ed. 1961).

29. See NEWPORT MERCURY, Nov. 4, 1765, at 3; Waldstreicher, *supra* note 20, at 37, 43; see also SHAW, *supra* note 17, at 179–80 (reporting on several such funerals).

30. See COLUMBIAN CENTINEL (Boston, Mass.), Aug. 19, 1798; COLUMBIAN COURIER (New Bedford, Mass.), Jan. 19, 1799, at 4; ALEXANDRIA ADVERTISER, Dec. 21, 1798; see also James Morton Smith, *The Federalist "Saints" Versus "the Devil of Sedition": The Liberty Pole Cases of Dedham, Massachusetts, 1798–1799*, 28 NEW ENG. Q. 198, 198 (1955).

31. See MASS. MERCURY, Mar. 13, 1798, at 2 (referring to a Congressional statute called the Stamp Act, which was an inheritance tax, see Louis Eisenstein, *The Rise and Decline of the Estate Tax, in Federal Tax Policy for Economic Growth and Stability: Hearings Before the Joint Comm. on the Economic Report, Subcomm. on Tax Policy*, 84th Cong. 819, 820–21 (1955)).

32. See N.Y.J., Mar. 26, 1789, at 2.

33. See, e.g., JOHN PETER ZENGER, A BRIEF NARRATIVE OF THE CASE AND TRYAL OF JOHN PETER ZENGER 3–5 (Boston, Thomas Fleet 1738).

34. See *Stromberg v. California*, 283 U.S. 359, 369–70 (1931). *Fiske v. Kansas*, 274 U.S. 380 (1927), is the other possible candidate for the first such decision, but it rested on the conclusion that the

1931 case casually assumed that symbolic expression was as protected as verbal expression, and treated the display of a red flag as legally tantamount to antigovernment speech.<sup>35</sup> But its assumption was consistent with the First Amendment's original meaning: the equivalence of symbolic expression and verbal expression has been part of American law since the Framing era.

#### I. SYMBOLIC EXPRESSION IN LATE-1700S AND EARLY-1800S SPEECH RESTRICTION LAW

Let us begin by looking for a moment at speech restrictions. Speech restrictions and speech protections were seen around the Framing as closely related: the restrictions were recognized exceptions from the constitutional freedoms, and the freedoms were recognized as being constrained by the traditional restrictions.<sup>36</sup> Framing-era speech-restriction law thus sheds some light on the meaning of the new free speech and free press guarantees (though, as Part II will show, other sources shed still more light).

Speech restriction law of the late 1700s and early 1800s took a functional view of symbolic expression and generally treated it the same as verbal expression.<sup>37</sup> As William Hawkins's *Pleas of the Crown* (1716) explained—in language quoted in the famous American seditious libel trial of John Peter Zenger<sup>38</sup>—“since the plain meaning of . . . [defamatory] scandal as is expressed

Due Process Clause was violated because there was not adequate evidence to convict the speaker under the statute, *see id.* at 382; *Stromberg*, on the other hand, expressly relied on “the right of free speech,” 283 U.S. at 368.

35. The opinion below in *Stromberg* similarly assumed that symbolic expression was as protected as verbal expression, and so did the parties' briefs in the Supreme Court. *See* *People v. Mintz*, 290 P. 93, 96 (Cal. Ct. App. 1930); Brief of Appellant, *Stromberg*, 283 U.S. 359 (1931) (No. 584); Brief of Appellee, *Stromberg*, 283 U.S. 359 (1931) (No. 584). Likewise, *Ex parte Hartman*, 188 P. 548 (Cal. 1920), struck down an earlier California law banning the possession or display of “any flag, insignia, emblem or device . . . representative of any . . . association or . . . effort . . . which . . . espouses for the government of the people of the United States of America . . . principles or theories of government antagonistic to the Constitution and laws of the United States of America, or to the form of the government thereof as now constituted,” *id.* at 549. The court concluded that “the inhabitants of the United States 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 or emblem signifying its purpose, and that the display or possession of such flag or emblem cannot be made an unlawful act.” *Id.* The court simply assumed that symbolic expression was constitutionally equivalent to verbal expression, without discussing the matter further.

36. *See, e.g.*, sources gathered *infra* in Part II.

37. I say “generally” because Blackstone does note one difference: in a civil lawsuit for libel by signs and pictures, “it seems necessary always to shew, by proper *innuendo*'s and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear, that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences.” 3 WILLIAM BLACKSTONE, COMMENTARIES \*126 (emphasis in original). But this rule, which stems from the perceived greater ambiguity of symbolic expression, doesn't alter the basic principle: expression that damages a person's reputation is actionable whether it is symbolic or verbal.

38. *See* ZENGER, *supra* note 33, at 28. The trial was recognized at the time as a major event in colonial legal and political history, and the account of the trial was “widely read and frequently reprinted” in the Colonies. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 37 (1985).

by signs or pictures[] is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking, as that which is expressed by writing or printing, why should it not be equally criminal?"<sup>39</sup>

We see this equivalence between symbolic expression and verbal expression as early as Sir Edward Coke's report of *De Libelli Famosis* (1606):

Every infamous libel, [is either] *in scriptis*, [or] *sine scriptis* [that is, without writing]; a scandalous libel *in scriptis* when an epigram, rhyme, or other writing is composed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced. And such libel may be published, 1. *Verbis aut cantilenis*: As where it is maliciously repeated or sung in the presence of others. 2. *Traditione*, when the libel or copy of it is delivered over to scandalize the party. *Famosus libellus sine scriptis* may be, 1. *Picturis*, as to paint the party in any shameful and ignominious manner. 2. *Signis*, as to fix a gallows, or other reproachful and ignominious signs at the parties door or elsewhere.<sup>40</sup>

Later sources repeated Coke's two categories of symbolic expression and treated them as equivalent to verbal expression. Blackstone's *Commentaries* (1765) defined libel to include "pictures, signs, and the like" alongside verbal expression;<sup>41</sup> "signs" was a literal translation of Coke's "signis," apparently in the sense of "symbols," such as Coke's gallows.<sup>42</sup> Hawkins's *Pleas of the Crown* took the same view as Blackstone.<sup>43</sup> American sources, which often

39. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 193 (London, Eliz. Nutt 1716) (capitalization modernized); see also 2 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 742 (London, Eliz. Nutt & R. Gosling 1720) (making a similar argument); THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS 163–64 (London, J. & W.T. Clarke 1813) ("A picture is the image or likeness of the scene itself: words written or printed are merely symbols, which, by virtue of a previous compact and understanding on the subject, are the representatives of the ideas which they communicate . . . . If, in fact, [these modes of communication] are . . . equally mischievous in every respect, they cannot be considered as distinguishable, for any legal purpose, upon any principle of reason and good sense . . . ."); ANTHONY HAMMOND, A TREATISE ON THE LAW OF NISI PRIUS 305 (Exeter, N.H., George Lamson 1823) ("As writing is only a mode of expression by means of the symbols termed letters, any other sign or symbol that shall convey to the beholder the same idea with the writing above supposed, will be equally a libel; therefore, to depict a man hanging on a gallows, or the like, is defamatory.").

40. (1606) 77 Eng. Rep. 250, 250 (K.B.); see also FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 214 (London, J. Butterworth & Son 1816). The gallows wasn't a threat (as a noose might be today), but a pejorative implying the target was a criminal and thus deserved execution.

41. 3 BLACKSTONE, *supra* note 37, at \*125; see also *id.* at \*126; 4 *id.* at \*150.

42. For some of the many examples of commentators and courts using "symbols" in this context instead of "signs," see HOLT, *supra* note 40, at 175, 244–45; HAMMOND, *supra* note 39, at 305; 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES & MISDEMEANORS \*303 n.h (Boston, Wells & Lilly 1824); BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 255 (Boston, Marsh, Capen & Lyon 1832); *Williams v. Karnes*, 23 Tenn. (4 Hum.) 9, 11 (1843).

43. See 1 HAWKINS, *supra* note 39, at 193; see also, e.g., JOHN RAYNER, A DIGEST OF THE LAW CONCERNING LIBELS 7 (London, H. Woodfall & W. Strahan 1765); TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, G.G.J. & J. Robinson et al. 1771) (entry for "libel").



cited Blackstone and sometimes Hawkins, naturally followed suit.<sup>44</sup> This meant libel law covered a wide range of symbolic actions, processions, and pictures, for instance:

- burning an effigy of a person,<sup>45</sup>
- hanging an effigy of a person,<sup>46</sup>
- engaging in a “procession carrying a representation of the plaintiff in effigy,”<sup>47</sup>
- painting a man “with a fool’s cap, or coat, or with horns, or . . . asses ears,”<sup>48</sup> or “playing at cudgels with his wife,”<sup>49</sup>

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44. For examples in judicial and legislative proceedings, and in Attorney General opinions, see ZENGER, *supra* note 33, at 28 (citing Hawkins); 4 PROCEEDINGS AND DEBATES OF THE GENERAL ASSEMBLY OF PENNSYLVANIA 217, 247 (Philadelphia, Daniel Humphreys 1788) (citing Blackstone) (speech of Rep. William Lewis, who was later to be a delegate to the 1789 Pennsylvania Constitutional Convention and a federal district court judge); *Trial for a Libel*, MIDDLESEX GAZETTE (Middletown, Conn.), Mar. 12, 1791, at 1 (charge to the jury in a Connecticut case, identified as *Freeman v. Gardiner* in the Mar. 5, 1791 issue of the same newspaper); Alexander Addison, *Remarks on the Late Insurrection*, Grand Jury Charge, Add. 126 (Pa. Super. Ct. 1794) (second page numbering); *Libellous Publications*, 1 U.S. Op. Atty. Gen. 71, 72 (1797) (citing Blackstone); AM. MERCURY (Hartford, Conn.), Dec. 26, 1799, at 2 (charge to the jury in the Pennsylvania case *Rush v. Cobbett*); *Harris v. Huntington*, 2 Tyl. 129, 135–36 (Vt. 1802); *Commonwealth v. Clap*, 4 Mass. 163, 166 (1808); *Sharff v. Commonwealth*, 2 Binn. 514, 517 (Pa. 1810) (Brackenridge, J.) (citing Blackstone); Acts of the General Assembly of the State of Georgia, Nov. 1811, § 64 (codifying the Blackstone definition); *Mezzara’s Case*, 2 N.Y. City-Hall Rec. 113, 117 (1817) (citing and applying the definition in a case involving display of a painting); *White v. Nicholls*, 44 U.S. 266, 285 (1845). For examples from commentators, see *On Libels*, PENN. MERCURY, Nov. 19, 1789, at 2; 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 51 (Windham, John Byrne 1796); JAMES PARKER, THE CONDUCTOR GENERALIS; OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, &C. 255–57 (Philadelphia, Mathew Carey 1801); 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 73 (Philadelphia, Lorenzo Press 1804) (printing one of Justice Wilson’s lectures on law) (citing Blackstone). For examples from leading lawyers, see *Respublica v. Cobbet*, 3 Yeates 93, 98 (Pa. 1800) (argument on behalf of the prosecution, by the Attorney General, citing Blackstone and Hawkins); *People v. Croswell*, 3 Johns. Cas. 337, 354 (N.Y. 1804) (argument on behalf of the defense, by Alexander Hamilton).

45. See, e.g., STARKIE, *supra* note 39, at 165; 3 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 866 (London, A.J. Valpy 1816); *Eyre v. Garlick*, (1878) 42 Eng. Rep. 68 (Q.B.). I cite English sources from the 1800s as well as from the 1600s and 1700s because they apply longstanding English legal principles and elaborate on what was understood as “signs and pictures” from Coke’s time on. This is certainly the purpose of the treatises, which try to describe well-settled law, not to propose novel views; and all the cases I cite likewise purport to apply longstanding legal principles.

46. See, e.g., OLIVER, *supra* note 42, at 255; see also *Johnson v. Commonwealth*, 14 A. 425, 425 (Pa. 1888).

47. *Regina v. Lovett*, (1839) 173 Eng. Rep. 912, 913 (Nisi Prius); see also *Rex v. Carlile*, (1834) 172 Eng. Rep. 1397, 1403 (Nisi Prius) (acknowledging, in a public nuisance case, that displayed effigies may be libelous).

48. RAYNER, *supra* note 43, at 7 (capitalization modernized); *Mezzara’s Case*, 2 N.Y. City-Hall Rec. at 114 (painting with donkey’s ears); see also 2 WOOD, *supra* note 39, at 742; GILES JACOB, THE NEW LAW-DICTIONARY (London, Henry Lintot 1743) (entry for “libel”). The horns were probably accusations of cuckoldry. See Martin Ingram, *Ridings, Rough Music and the “Reform of Popular Culture” in Early Modern England*, 105 PAST & PRESENT 79, 101 (1984).

49. Anonymous, (1707) 88 Eng. Rep. 921, 922 (K.B.). Such libels could of course be committed by printing, *Carr v. Hood*, (1808) 170 Eng. Rep. 983 n.\* (Nisi Prius) (engraving of plaintiff as “a man of ludicrous and ridiculous appearance,” holding a pocket handkerchief to his face and appearing to be

- displaying an etching of plaintiff's head, with an iron nail driven into his ear and scissors attached to the nail, implying the plaintiff is a perjurer,<sup>50</sup>
- "placing a wooden gun at an officer's door, thereby implying cowardice,"<sup>51</sup>
- hanging "wool upon a tree near the high-way, before the plaintiff's dwelling-house," which was understood to suggest that the plaintiff was a wool thief,<sup>52</sup>
- lighting a lantern outside a person's house, implying the house was a brothel,<sup>53</sup>
- "carrying a fellow about with horns, and bowing at [the plaintiff's] door,"<sup>54</sup> implying the plaintiff's wife was unfaithful,
- and "riding Skimmington"<sup>55</sup> (see the picture on the next page), a "ludicrous cavalcade, in ridicule of a man beaten by his wife," consisting "of a man riding behind a woman, with his face to the horse's tail, holding a distaff in his hand, at which he seems to work, the woman all the while beating him with a ladle; a smock, displayed on a staff, is carried before them as an emblematical standard, denoting female superiority: they are accompanied by what is called the *rough music*, that is, frying-pans, bulls' horns, marrow-bones and cleavers, &c."<sup>56</sup>

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weeping); *Ellis v. Kimball*, 33 Mass. (16 Pick.) 132, 133–36 (1834) (caricature), but also just by painting and displaying a picture, as in *Mezzara's Case* and in *Anonymous*.

50. *State v. Powers*, 34 N.C. (12 Ired.) 5, 8 (1851). Being nailed to a pillory by the ear was once a common punishment for various crimes. *See, e.g.*, 4 BLACKSTONE, *supra* note 37, at \*137.

51. JOHN JONES, *DE LIBELLIS FAMOSIS; OR, THE LAW OF LIBELS* 16 (London, S. Rousseau 1812), *apparently referring to* *Rex v. Thicknesse* (unreported), *discussed in* *THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1763*, at 91 (5th ed., London, J. Dodsley 1782) (rendering defendant's name as "Thickness"); JOHN HORNE TOOKE, *FURTHER PROCEEDINGS ON THE TRIAL OF JOHN HORNE, ESQ.* 5 (London, G. Kearsly 1777); *and* JOHN TRUSLER, *A CONCISE VIEW OF THE COMMON AND STATUTE LAW OF ENGLAND* 214 (London, W. Nicoll 1781). Thicknesse's symbolic expression apparently referred to a ritual in which a man would be "Arm'd with a wooden gun and Sword and Drum'd out of the Army for cowardice." *Journal of Capt. William Beatty, 1776–1781*, 3 MD. HIST. MAG. 104, 104 (1908).

52. *Stace v. Walker* (Star Chamber 1634) (capitalization modernized), *reported in* 3 JOHN RUSHWORTH, *HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, WEIGHTY MATTERS IN LAW, REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS* 59–60 (London, Robert Boulter 1680), *also available at* <http://www.british-history.ac.uk/report.aspx?compid=74933>.

53. *See* *Jefferies v. Duncombe*, (1809) 103 Eng. Rep. 991, 991 (K.B.).

54. *Bolton v. Deane* (unreported), *discussed in* *Austin v. Culpepper*, (1682) 89 Eng. Rep. 960, 960 (K.B.).

55. *Rex v. Roberts*, (1672) 84 Eng. Rep. 889, 889 (K.B.); *Mingey v. Moodie* (unreported), *discussed in* *Austin v. Culpepper*, (1682) 89 Eng. Rep. 960, 960 (K.B.); *Cropp v. Tilney*, (1693) 91 Eng. Rep. 791, 791 (K.B.); *see also* *Mason v. Jennings*, (1680) 83 Eng. Rep. 209, 209–10 (K.B.) (reporting a not guilty verdict in such a case).

56. FRANCIS GROSE, *THE DICTIONARY OF THE VULGAR TONGUE* (3d ed., London, Hooper & Co. 1796) (entry for "Riding Skimmington"); *see also* E.P. THOMPSON, *CUSTOMS IN COMMON* 467–531 (1991) (describing Skimmingtons and related symbolic customs); *id.* at 516–21 (noting that similar processions were used to express public grievances against the government, not just condemnation of more private misconduct by neighbors); Steven J. Stewart, *Skimmington in the Middle and New England Colonies, in* *RIOT AND REVELRY IN EARLY AMERICA*, *supra* note 18, at 48–49 (describing such an incident in 1751 New York). For a comparatively late example of libel by rough music, *see* *Varner v. Morton*, 53 Nova Scotia Rep. 180 (1919) (rough music used by mob as an accusation of adultery). I speak in these examples of



**Figure 2:** *Hudibras Encounters the Skimmington*, William Hogarth & Thomas Cook (1802)

Symbolic expression and verbal expression were likewise equivalent under the law of sedition.<sup>57</sup> They were equivalent under the law of obscenity, sometimes called “obscene libel”: “[i]n [obscenity law], as in private libels and slanders, the communication may be, not only by writings and words, but also by exhibitions, symbols, and pictures.”<sup>58</sup> They were equivalent under the law of slander, to the extent that some impromptu symbols were treated as tantamount to spoken slander (the examples listed earlier were of more deliberately chosen symbols that were treated as tantamount to written libels).<sup>59</sup>

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Skimmingtons in which someone impersonated the target; Skimmingtons in which the target was forced to participate would obviously be actionable (and criminally punishable) as battery or kidnapping.

57. See, e.g., CONST. GAZETTE (New York), Jan. 3, 1776, at 2 (quoting newly passed act of the Connecticut legislature that disarmed and barred from office anyone who “by writing or speaking, or by an overt act, . . . libel[ed] or defame[d] any of the resolves of the Honourable Congress of the United Colonies, or the acts or proceedings of the General Assembly of this colony”); Alexander Addison, *Remarks on the Late Insurrection*, Grand Jury Charge, Add. 126 (Pa. Super. Ct. 1794) (second page numbering) (“Offences may be committed by writing, by words or by other signs of an evil purpose. The mere act of raising a [liberty] pole is, in itself, a harmless thing; the question is, what is the meaning of it. Those poles were evidently standards of rebellion and signs of war against the government . . . Will any man doubt, therefore, that raising those poles was criminal . . .?”); Pennsylvania v. Morrison, Add. 274, 274–75 (Pa. Super. Ct. 1795) (Addison, J.); DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 467–68 (Boston, Cummings, Hilliard 1824); FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS 648 n.x (Philadelphia, J. Kay Jun. & Brother 1849); EMORY WASHBURN, A MANUAL OF CRIMINAL LAW 67 (Chicago, Callaghan 1878).

58. WINGROVE COOKE, A TREATISE ON THE LAW OF DEFAMATION 70 (Philadelphia, T. & J.W. Johnson 1846); see also HOLT, *supra* note 40, at 73; HENRY J. STEPHEN, SUMMARY OF THE CRIMINAL LAW 115 (Philadelphia, John S. Littell 1840).

59. See, e.g., Cook v. Cox, (1814) 105 Eng. Rep. 552, 554 (K.B.) (dictum) (giving as example of a slander “holding up an empty purse” to insinuate that someone else was insolvent); Lakin v. Gun, Wright 14, 17 (Ohio 1831) (stating, in a discussion of slander, that “one may be defamed by signs” as

And symbolic expression and verbal expression were equivalent under the law of blasphemy, or “blasphemous . . . libel.”<sup>60</sup> Though blasphemy was generally seen as consisting of “oral or written” “words,”<sup>61</sup> a leading blasphemy case suggested the crime could equally be committed by burning an effigy of Jesus Christ; depicting the Virgin Mary as “naked . . . in the act of prostitution”; or, in a hypothetical majority Muslim or Jewish community, “gibbetting the image of the prophet,” “burning the koran by the hands of the common hangman,” “burning the prophets in effigy,” or “maliciously stamping the pentateuch under foot.”<sup>62</sup>

## II. SYMBOLIC EXPRESSION IN LATE-1700S AND EARLY-1800S DISCUSSIONS OF CONSTITUTIONAL LAW

As I suggested at the start of Part I, the view that symbolic expression is functionally equivalent to verbal expression,<sup>63</sup> and therefore should be treated the same, would logically apply to constitutional speech protections as well as to speech restrictions. And history here tracks logic: several sources from the 1790s to the 1830s,<sup>64</sup> and from several states,<sup>65</sup> suggest that judges and lawyers of that era indeed understood constitutional free speech and free press principles as applying to symbolic expression as well as to verbal expression. (I have seen

well as by words); *Gutsole v. Mathers*, (1836) 150 Eng. Rep. 495, 501 (Exch.) (stating that slander could be “by sign” as well as “by words”).

60. *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 206 (1838); *see also* *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 400–01 (Pa. 1824) (citing English authorities); 3 BLACKSTONE, *supra* note 37, at \*153.

61. *State v. Chandler*, 2 Del. (2 Harr.) 553, 553 (1837); *see also* HOLT, *supra* note 40, at 64–65.

62. *Chandler*, 2 Del. (2 Harr.) at 569.

63. *See supra* note 39 and accompanying text.

64. Sources from the first half of the nineteenth century are often considered to be probative of the original meaning of the Constitution. *See, e.g.*, *D.C. v. Heller*, 128 S. Ct. 2783, 2804–09 (2008) (discussing such sources at length and arguing that they show “the public understanding of a legal text in the period after its enactment or ratification,” and that this “inquiry is a critical tool of constitutional interpretation”) (emphasis removed); *Wilson v. Arkansas*, 514 U.S. 927, 933–34 (1995) (unanimous) (relying on such sources). This especially makes sense when the sources buttress the evidence offered by late-1700s sources. Such sources, moreover, are also relevant to understanding the original meaning of the First Amendment in 1868, when the Fourteenth Amendment was enacted, because it is the Fourteenth Amendment that has been read as applying the First Amendment to the states.

65. I rely on cases and commentaries related to state constitutional provisions because they were generally viewed as similar in scope to the federal ones, and the law of freedom of the press was seen as a national body of law, albeit with occasional differences among jurisdictions. *See, e.g.*, 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. 13 (Philadelphia, W.Y. Birch & A. Small 1803); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 739–42 (Boston, Hilliard, Gray, & Co. 1833); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 414 (Boston, Little, Brown 1868); *see also* *Territory v. Nugent*, 1 Mart. (o.s.) 108 (Orleans 1810) (a pre-statehood case from what is now Louisiana); *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337 (Mich. 1829); *cf.* *Wilson v. Arkansas*, 514 U.S. 927, 933–34 (1995) (Thomas, J., for a unanimous Court) (relying on early-1800s views on state constitutional search and seizure provisions as evidence of the original meaning of the Fourth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in the judgment) (likewise as to state religious freedom provisions and the Free Exercise Clause).

no sources from that era that suggest the contrary.)

1. The very first American court opinion that held a speech restriction unconstitutional on free speech/free press grounds<sup>66</sup> treated a painting as tantamount to a printed book. The opinion came in the 1839 New York *Brandreth v. Lance* decision; the *Brandreth* litigation itself involved a printed book, but the opinion also considered an earlier precedent that involved a painting.

*Brandreth* set aside a lower court injunction against an allegedly libelous unauthorized biography, reasoning that:

[T]his court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government. (2 R. S. 737, § 1, and Revisers' note.)<sup>67</sup>

This analysis was based on constitutional principles: “[I]iberty . . . of the press” was the phrase used in the New York Constitution,<sup>68</sup> and the cited Revisers’ Note made clear that the cited statute was seen as implementing the constitutional free speech/press provision.<sup>69</sup>

Immediately after the just-quoted sentence, the *Brandreth* court had to deal with the contrary precedents that did authorize injunctions of alleged libels. Most were easily dismissed: some were from the despised Star Chamber of the early 1600s; another was a pre-Glorious-Revolution opinion from the notoriously oppressive Chief Justice Scroggs, and the *Brandreth* court pointed out that “[t]he house of commons . . . considered this extraordinary exercise of power on the part of Scroggs as a proper subject of impeachment.”<sup>70</sup>

But the court then had to consider a much more recent case: an 1810 English decision stating that an injunction could indeed be issued against “exhibition of . . . [a] libelous painting.”<sup>71</sup> If the constitutional protections were understood as covering only verbal expression, or even verbal expression plus pictures printed using a printing press, the painting case could have been easily distinguished.

66. During the late 1700s and early 1800s, very few speech-restrictive actions were set aside by courts on constitutional grounds. Most speech restrictions of the era were judge-made, so the judicially developed constitutional rules understandably fit with the judicially developed restrictions.

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

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

69. 3 N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 33 (1836). The statute provided that the court’s power to require convicted criminal defendants “to give security to keep the peace, or to be of good behavior, or both” would not extend “to convictions for writing or publishing any libel.” 2 N.Y. REV. STAT. pt. 4, ch. 2, tit. 6, art. 1, § 1 (1836). This power to require a good-behavior bond from libelers or accused libelers had been a potent but controversial restriction on speech because it allowed subsequent libels to be punished by bond forfeiture, which required no indictment by the grand jury. *See, e.g.*, *Respublica v. Cobbet*, 3 Yeates 93 (Pa. 1800) (discussing the procedure and laying out the constitutional arguments).

70. *Brandreth*, 8 Paige Ch. at 24.

71. *Id.* at 27 (discussing *Du Bost v. Beresford*, (1810) 170 Eng. Rep. 1235 (Nisi Prius)).

Instead, the *Brandreth* opinion expressly rejected the reasoning of the painting case, on the grounds that the decision “excited great astonishment in the minds of all the practitioners in the courts of equity” and “must unquestionably be considered as a hasty declaration, made without reflection during the progress of a trial . . . and as such it is not entitled to any weight whatever.”<sup>72</sup> The court treated the painting case as being a “case of the like nature” to the case about the published book—and as being equally subject to the “liberty of the press.”<sup>73</sup> Symbolic expression (paintings) was viewed as legally equivalent to verbal expression (books) for purposes of free press protections.

2. Likewise, consider Justice Morton’s dissent in *Commonwealth v. Kneeland*, an 1838 Massachusetts blasphemy case. Justice Morton wrote that the liberty of the press did not “restrain[] . . . the legislative power in relation to the punishment of the violations of the rights of others, or of the disturbance of the peace, by malicious falsehoods or obscene or profane publications or exhibitions.”<sup>74</sup> “[O]bscene or profane . . . exhibitions” likely referred to paintings<sup>75</sup> or displays;<sup>76</sup> Justice Morton was treating such nonverbal expressions as tantamount to verbal expressions, which lose their protections because they are “obscene or profane” and not because they are “exhibitions” rather than spoken or printed words. And the majority did not disagree on this score: The official Reporter of Decisions echoed Justice Morton’s statement in the summary of the majority opinion.

Justice Morton similarly derided plaintiff’s freedom of the press argument by saying that:

Under [the state constitution’s Liberty of the Press Clause] the defendant claims for every citizen a right to publish, in any form, by printing or pictures, whatever he pleases, without liability to punishment[,] [n]o matter how obscene, how profane, how blasphemous, how revolting to the sentiments of the community, [or] how shocking to their notions of decency and decorum.<sup>77</sup>

The claim of a “right to publish, in any form, by printing *or pictures*” wasn’t rejected on the grounds that “press” didn’t cover “publish[ing] . . . by . . . pictures,” a phrase that would have included exhibition of hand-drawn material.<sup>78</sup>

72. *Id.*

73. *Id.* at 26.

74. *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 233 (1838) (Morton, J., dissenting).

75. *See, e.g.*, *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815) (the leading obscenity decision in early-1800s America, which affirmed a conviction for “exhibiting an obscene picture”); *Du Bost v. Beresford*, (1810) 170 Eng. Rep. 1235 (Nisi Prius) (the case discussed in *Brandreth v. Lance*, which involved “exhibition of [a] libelous picture”).

76. *See, e.g.*, *Knowles v. State*, 3 Day 103 (Conn. 1808) (describing a prosecution for a “public exhibition” of “a horrid and unnatural monster, highly indecent, unseemly, and improper to be seen”).

77. *Kneeland*, 37 Mass. (20 Pick.) at 228 (Morton, J., dissenting).

78. *See, e.g.*, *Sharpless*, 2 Serg. & Rawle at 102 (Tilghman, C.J.); *id.* at 105 (Yeates, J.); *Mezzara’s Case*, 2 N.Y. City-Hall Rec. 113, 117 (1817); *State v. Chandler*, 2 Del. (2 Harr.) 553, 570 (1837); sources cited *infra* notes 122–26.

Rather, symbolic expression was treated the same as “printing” verbal profanity and blasphemy, such as the printed blasphemous words involved in *Kneeland* itself.

3. The report of *Mezzara’s Case* (1817),<sup>79</sup> apparently the earliest American case involving symbolic libel—there, a painting of the plaintiff with donkey’s ears—likewise indicates that free speech and press principles were seen as applying to such symbolic expression. The reporter (Daniel Rogers, a New York lawyer<sup>80</sup>) 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. In such a situation, the reporter wrote, “if 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?”<sup>81</sup>

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 even division in *People v. Croswell* on whether the freedom of the press mandated that the defense of truth be allowed in libel prosecutions.<sup>82</sup> The statute implemented Chancellor Kent’s view of the constitutional rule, which was also the view championed by Alexander Hamilton in one of the last public acts of his life, and was seen as an important protection for the liberty of the press.<sup>83</sup> 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.<sup>84</sup> The reporter thus saw nothing odd in treating a painting as protected by free speech and press principles, just as the court saw nothing odd in treating a painting as punishable under libel law principles.

4. We see the same equivalence of symbolic and verbal expression in both sides’ arguments in *Respublica v. Montgomery*, a 1795 case arising out of the Whiskey Rebellion. Montgomery was a justice of the peace who was prosecuted for failing to help suppress a supposed riot; the only part of the riot discussed in the report consisted of installing a liberty pole during the Rebellion.<sup>85</sup>

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79. 2 N.Y. City-Hall Rec. 113 (1817).

80. See *id.* at front cover.

81. *Id.* at 118.

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

83. See, e.g., 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 844–48 (Julius Goebel, Jr. ed., 1964); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 20 (New York, O. Halsted 1827). Hamilton argued on Croswell’s behalf a few months before Hamilton’s duel with Aaron Burr.

84. N.Y. CONST. of 1821, art. VII, § 8 (“Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence, to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.”).

85. *Respublica v. Montgomery*, 1 Yeates 419 (Pa. 1795) (“[T]he deponents hearing that some ill disposed persons were about to erect a liberty pole (falsely so called) in the town of *Northumberland*,



**Figure 3:** *Raising the Liberty Pole*, Frederic A. Chapman (1875)

Liberty poles (see the picture above) were tall poles that were crowned with flags or “liberty caps.” They originated before the Revolution as symbols of hostility to the assertedly oppressive English government, but by the 1790s, they had become symbols of hostility to asserted oppression by the federal government.<sup>86</sup> (Supporters of the federal government labeled liberty poles “sedition poles.”<sup>87</sup>)

The defense lawyer raised the freedom of speech as part of his argument for dismissing the prosecution;<sup>88</sup> as the reporter of decisions summarized the argument,

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determined to prevent it if possible. They called on Mr. *Montgomery*, and desired him to go with them for that purpose . . .”).

86. See Schlesinger, *supra* note 26 (describing in more detail liberty poles, which were essentially tall wooden poles generally crowned with flags or caps, and sometimes containing political inscriptions posted at the bottom). For more on liberty poles in the Whiskey Rebellion, including some pole-raising that led to grand jury refusals to indict and thus produced no opinions that would be helpful to testing my thesis, see generally Wythe Holt, *The Federal Whiskey Rebellion Cases of 1795 and the Rise of the National Security State* (unpublished manuscript, on file with author) and *infra* note 92 (citing the indictments in those cases).

87. See, e.g., COLUMBIAN CENTINEL (Boston, Mass.), Dec. 5, 1798, at 1; DAILY ADVERTISER (New York, N.Y.), Dec. 21, 1798, at 2.

88. For other sources discussing or adopting the view that people had a right to raise liberty poles, see INDEP. CHRON. (Boston, Mass.), Feb. 28, 1799, at 4 (“It is true, in ’75, the British government destroyed these poles as the rallying posts of sedition and rebellion; but they were tyrants for so doing. And it is true that in ’98 the American federal government did the same; but they were *not* tyrants for doing it, for the Sedition Law forbids our calling them so.”); MIDDLESEX GAZETTE (Middletown, Conn.),



Every citizen had a right “to the free communication of his thoughts and opinions” while his views were upright; and it was difficult to draw the line, when “the abuse of that liberty” should be said to begin, and the first tinge of criminality appear. It was essential to the freedom of a republic, that people should speak their minds on laws and all public transactions, and their conduct in this particular should not be scanned too nicely. The mere erection of a liberty pole was innocent in itself; and while the minds of the multitude were bent in that direction, the defendant might perceive the inutility as well as danger of opposing their avowed purpose.<sup>89</sup>

The prosecutor likewise treated the raising of a liberty pole as something potentially covered by the “freedom of speech,” though in this instance unprotected because it was seditious:

The proofs are here sufficiently clear to warrant an information. Though freedom of speech is secured to us by the constitution, yet we are responsible for an abuse of that liberty. The people may meet and discourse on public measures, and the public mind may thus be illustrated and informed; but if they meet for *seditious* purposes, or when met, go into seditious resolutions, they are amenable to the law. Credulity itself could not be brought to believe, that the defendant, a justice of the peace, was ignorant of the transactions in the western counties, or of the traitorous insurrections existing there . . . . Could the defendant be so unconscious of his duty, as not to feel that his oath of office required of him his honest endeavours to preserve the peace, suppress riots, and prevent the erection of liberty poles, “the avowed standards of rebellion?”<sup>90</sup>

The prosecutor’s argument was that symbols (“standards,” which is to say something like flags) such as liberty poles could be “an abuse of that liberty [freedom of speech]” when they signify and promote rebellion. This presupposes that the use of other symbols might be within the “freedom of speech . . . secured to us by the constitution,” so long as the users of the symbols don’t “abuse . . . that liberty” by using the symbols for seditious purposes. That both sides in the case assumed the protection of at least some symbolic expression—even though it would have been in one side’s interest to deny such protection, if the denial were plausible—suggests that such protection was seen as uncontroversial by lawyers of that era.

The reporter’s paragraph-long summary of the court’s opinion does not mention the freedom of speech. But the court’s conclusion that “setting up a pole” was “design[ed to give] . . . aid to the insurgents” and was therefore

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Feb. 22, 1799, at 3 (“[I]f the Federalists cut down the pole, it would be considered by those who erected it, as a violation of civil rights.”).

89. *Montgomery*, 1 Yeates at 420.

90. *Id.* at 421.

punishable<sup>91</sup> is consistent with the parties' view that symbolic expression is tantamount to verbal expression;<sup>92</sup> speech designed to give aid to rebels would have been seen as punishable as well.<sup>93</sup>

5. Judge Alexander Addison's 1798 charge to the grand jury on "Liberty of Speech and of the Press" likewise endorses the equivalence of symbolic expression and verbal expression, which is especially noteworthy because Judge Addison had earlier specifically dealt with one form of symbolic expression (again, liberty poles).<sup>94</sup>

The Pennsylvania Constitution's free speech/press provisions expressly mentioned, among other things, "[t]he free communication of thoughts and opinions," and Judge Addison defined "communicat[ion]" of sentiments as including "pictures or other signs":

*We communicate our sentiments by words, spoken, written or printed, or by pictures or other signs. [Discussion of slander by "words spoken" omitted.]*

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91. *Id.* at 423.

92. The prosecutions of David Brown and Benjamin Fairbanks in Massachusetts under the Sedition Act of 1798 stemmed partly from the raising of a liberty pole in Dedham, Massachusetts. But the indictments referred to the text posted on the pole, not to the raising of the pole itself, and the parties pled guilty, thus avoiding any need for the court to discuss the free speech questions. Indictment, *United States v. David Brown*, June Term, 1799; General Case Files; United States Circuit Court for the District of Massachusetts; Records of District Courts of the United States, Record Group 21; National Archives and Records Administration—Northeast Region (Boston); MASS. MERCURY, June 21, 1799, at 2 (describing the Fairbanks indictment as similarly being for a "Libel affixed to the [liberty] Pole," not for the raising of the pole itself). Likewise, the prosecutions of Andrew Billmeyer, William Bonham, Thomas Caldwell, George Langs, George Lucas, John Mackey, Daniel Montgomery, William Montgomery, Frederic Reamer, Nathan Stockman, and George Weiscarvers during the Whiskey Rebellion involved the erection of a liberty pole, but they were prosecuted for conspiracy to raise an insurrection, rather than for erecting a liberty pole as such. Moreover, these prosecutions were apparently dropped shortly after the indictments were secured, so there was no chance for any free speech questions to be aired in court. *See* Criminal Case Files of the U.S. Circuit Court for the Eastern District of Pennsylvania 1791–1840, National Archives M-986, reel 1, RG 21; WHARTON, *supra* note 57, at 647–48 & n.w.

93. *See infra* note 94.

94. Judge Addison's 1794 charge to the grand jury, "Remarks on the Late Insurrection" (which referred to the Whiskey Rebellion), specifically condemned "the raising of liberty-poles": Judge Addison reasoned that "[o]ffences may be committed by writing, by words or by other signs of an evil purpose" and argued that raising poles that "were evidently standards of rebellion and signs of war against the government" was therefore "criminal." Add. 126 (1794) (second page numbering). Judge Addison had also decided a 1795 case, *Pennsylvania v. Morrison*, upholding the convictions of several people who had raised a liberty pole during the Rebellion. Add. 274, 274–75 (Pa. Super. Ct. 1795). The pole had been raised in front of the home of federal commissioners who were trying to defuse the rebellion and was thus in context likely seen as a threat aimed at preventing the enforcement of federal law; the pole-raisers also originally planned to run up a secessionist flag, though they were ultimately persuaded to fly the American flag instead. *See* HENRY M. BRACKENRIDGE, HISTORY OF THE WESTERN INSURRECTION IN WESTERN PENNSYLVANIA: COMMONLY CALLED THE WHISKEY INSURRECTION, 1794, at 195 (Pittsburgh, W.S. Haven 1859). It is thus no surprise that Judge Addison concluded the behavior involved was legally punishable, whether done "by writing, by words or by other signs of an evil purpose." Even William Findley, in a book largely critical of the suppression of the Rebellion, took the view that "the erecting of liberty poles . . . encourage[ed] the insurgents" and was criminal to the extent it was "design[ed]" to do so. WILLIAM FINDLEY, HISTORY OF THE INSURRECTION, IN THE FOUR WESTERN COUNTIES OF PENNSYLVANIA 213 (Philadelphia, Samuel H. Smith 1796).

With respect to libels, or slander expressed by words written or printed, or by pictures or other signs, and infringing the right of reputation; “they have . . . at all times, and with good reason, been punished in a more exemplary manner than slanderous [that is, spoken] words . . .” [Discussion of libel omitted.]

Justice Blackstone defines libels, “taken in their largest sense, to be writings, *pictures or the like*, of an immoral or illegal tendency, and in a more particular sense, any malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath or expose him to public hatred, contempt or ridicule . . . .”

The constitution of our state provides “. . . 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 . . . .”<sup>95</sup>

Addison viewed the freedom of speech as distinctly limited; among other things, “[t]his right of free communication of thoughts and opinions is, like all other rights, limited by responsibility for its abuse; and laws to punish its abuse[] are not, in a constitutional or just sense, restraints on the liberty of the press.”<sup>96</sup> But just as the limits applied equally to “words” and “pictures or other signs,” so the constitutionally protected “communication” equally covered both.<sup>97</sup>

6. St. George Tucker’s appendix to his influential 1803 American edition of

95. ALEXANDER ADDISON, LIBERTY OF SPEECH AND OF THE PRESS: A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA 5–8 (Albany, C.R. & G. Webster, 1798) (emphasis added).

96. *Id.* at 6.

97. The free speech/press provision of the 1790 Pennsylvania Constitution did expressly state that “[i]n 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,” PA. CONST. of 1790, art. IX, § 17, and Judge Addison quoted this language. But as the material quoted in the text makes clear, he did not view this language as generally limiting constitutional protection to “papers” as opposed to “pictures or other signs.” Rather, he saw the separate clause that spoke of the “right of free communications of thoughts and opinions” as providing independent protection to more than just papers. Likewise, neither the defense nor the prosecution in *Respublica v. Montgomery* took the view that the “publication of papers” clause meant that the state constitutional protection could not extend to liberty poles. *See supra* notes 89–90 and accompanying text.

The possibility that protection was limited only to “papers” did not come up at all for the other sources I cite because the language from the Pennsylvania Constitution was duplicated only in the Kentucky and Tennessee provisions and, later, in the Indiana, Arkansas, and Texas Constitutions. *See* KY. CONST. of 1792, art. XII, § 8; TENN. CONST. of 1796, art. XI, § 19; IND. CONST. of 1816, art. I, § 10; ARK. CONST. of 1836, art. II, § 8; TEX. CONST. of 1845, art. I, § 6. Other antebellum constitutions that provided that the truth was a defense spoke more broadly of “all criminal prosecutions or indictments for libels,” or “prosecutions for any publication respecting the official conduct of men in a public capacity, or where the matter published is proper for public information.” *See, e.g.*, DEL. CONST. of 1792, art. I, § 5; OHIO CONST. of 1802, art. VIII, § 6; An Act Relative to Libels, 1805 N.Y. Laws ch. XC, at 450, later enacted as N.Y. CONST. of 1821, art. VII, § 8; MISS. CONST. of 1817, art. I, § 8; CONN. CONST. of 1818, art. I, § 7; ME. CONST. of 1819, art. I, § 4; MO. CONST. of 1820, art. XIII, § 16; MICH. CONST. of 1835, art. I, § 7; R.I. CONST. of 1842, art. I, § 20; N.J. CONST. of 1844, art. I, § 5; IOWA CONST.

Blackstone<sup>98</sup> likewise treated “pictures and hieroglyphics” (which, judging by the citation Tucker gives, referred to Blackstone’s “signs, or pictures”<sup>99</sup>) as protected equally with “speech,” “writing[,] and printing”:

Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political . . . . [L]iberty of speech in political matters, has been equally proscribed in almost all the governments of the world, as liberty of conscience in those of religion . . . . [W]hen the introduction of letters among men afforded a new mode of disclosing, and that of the press, a more expeditious method of diffusing their sentiments, writing and printing also became subjects of legal coercion [sic]; even the expression of sentiments by pictures and hieroglyphics [footnoting the Blackstone passage defining libels as “malicious defamations . . . made public by either printing, writing, signs, or pictures”] attracted the attention of the Argus-government, so far as to render such expressions punishable by law. The common place arguments in support of these restraints are, that they tend to preserve peace and good order in government . . . . [further details omitted].

In England . . . [until] 1694, the liberty of the press, and the right of vending books, was restrained to very narrow limits [by a system of prior restraint] . . . . In 1694, the parliament refused to continue these prohibitions any longer, and thereby . . . established the freedom of the press in England. But although [the lack of currently effective prior restraint regimes] may satisfy the subjects of England, the people of America have not thought proper to suffer the freedom of speech, and of the press to rest upon such an uncertain foundation . . . [citing the First Amendment and the Virginia Constitution as examples of the more certain foundation for the freedoms in America].<sup>100</sup>

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of 1846, art. I, § 7; WISC. CONST. of 1848, art. I, § 3; CAL. CONST. of 1849, art. I, § 9; KAN. CONST. of 1858, art. I, § 11.

98. See, e.g., *D.C. v. Heller*, 128 S. Ct. 2783, 2799, 2805 (2008) (relying on Tucker’s notes and the description of the Bill of Rights in his Appendix); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 799 (1995) (relying on Tucker).

99. “Hieroglyphics” was often used to mean symbols beyond just ancient Egyptian writings and even beyond cryptic writings more broadly. See, e.g., 1 WALPOLE, *supra* note 18, at 217 (referring, in his remembrances of 1763, to the display and burning of “a jackboot and a petticoat, the mob’s hieroglyphic for Lord Bute and the Princess”); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755–56) (entries for “hieroglyphick,” noun and adjective) (defining the noun as “an emblem; a figure by which a word is implied[;] the art of writing in picture” and the adjective as “emblematical, expressive of some meaning beyond what immediately appears,” which suggests the broader figurative meaning—beyond pictures—that Walpole and Tucker were apparently using); *Calvin’s Case*, (1608) 77 Eng. Rep. 377, 390 (K.B.) (“[A] King’s Crown is an hieroglyphic of the laws, where justice, &c. is administered,” which is to say that “to do justice and judgment” is “that which is signified by the Crown”).

100. 2 TUCKER, *supra* note 65, app. 11–13. In classical mythology, Argus was a hundred-eyed, nearly all-seeing monster.

Tucker thus viewed “the freedom of speech, and of the press” as covering “pictures and hieroglyphics”—that is, “signs, or pictures”—alongside oral “speech,” “writing[,] and printing.”

7. We see something similar in a 1799 essay on the liberty of the press by Luther Martin, the Maryland Attorney General, leading early American lawyer, and Constitutional Convention member.<sup>101</sup> Martin discussed libel law as a permissible limitation on the freedom of the press and then casually mentioned the applicability of libel law to “signs” and “pictures”:

That “the freedom of the press[”] was never considered to extend so far as to exempt the printers and publishers from legal animadversion, according to the forms and principles of the common law, in case of publications false, scandalous and malicious, injuriously affecting private citizens or the public, [Sir William Blackstone] will prove to us: “Libels (says he) are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt and ridicule” . . . .<sup>102</sup>

Martin’s analysis would have been odd if communication by “signs or pictures” (as opposed to by “printing” or “writing”) were unrelated to the constitutional right Martin was discussing. But it makes perfect sense if the underlying constitutional right embodied the equivalence of symbolic and verbal expression—protecting both, but not when “publications false, scandalous and malicious[] injuriously affect[] private citizens or the public”—just as the libel law restriction on the right embodied this equivalence.

8. Finally, many early cases and commentaries on libel law likewise define libels to equally include symbolic and verbal expression, and at the same time discuss constitutional objections to libel law with no hint that the constitutional protection is limited to words and excludes the symbols.<sup>103</sup> Just to give one

101. Martin went on to represent Aaron Burr at his treason trial, Supreme Court Justice Samuel Chase at his impeachment trial, and the state of Maryland in *McCulloch v. Maryland*; he was also one of the signers of the Declaration of Independence. Though a member of the Constitutional Convention, he opposed various features of the new Constitution and walked out before the end of the Convention. See David Gordon, *Martin, Luther*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1687–88* (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

102. Luther Martin, *No. VI.*, *FED. GAZETTE* (Philadelphia, Pa.), Mar. 26, 1799, at 2.

103. See, e.g., *Charge of Pennsylvania Supreme Court Chief Justice McKean to the Grand Jury*, *COLUMBIAN HERALD* (Charleston, S.C.), May 9, 1785, at 2; 4 *PROCEEDINGS AND DEBATES OF THE GENERAL ASSEMBLY OF PENNSYLVANIA*, *supra* note 44, at 247–55 (speech of Rep. William Lewis, who was later to be a delegate to the 1789 Pennsylvania Constitutional Convention and a federal district court judge); *Trial for a Libel*, *MIDDLESEX GAZETTE* (Middletown, Conn.), Mar. 12, 1791, at 1 (charge to the jury in *Freeman v. Gardiner*); *AM. MERCURY* (Hartford, Conn.), Dec. 26, 1799, at 2 (charge to the jury in *Rush v. Cobbett*); FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 322–24* (Philadelphia, Carey & Hart 1849) (grand jury charge by Pennsylvania Supreme Court Justice McKean as to the proposed criminal indictment of William Cobbett in 1797); *Trial of J.T. Buckingham, Extract from Judge Thacher’s Charge to the Jury*, *ESSEX REG.*, Jan. 22, 1824; *Root v. King*, 7 Cow. 613, 613 (N.Y. Sup. Ct. 1827); *Rice v. Simmons*, 2 Del. (2 Harr.) 417, 417–18

example, consider this passage from Chancellor Kent, one of the leading commentators on early-1800s American law:

A libel, as applicable to individuals, has been well defined [citing two Massachusetts cases] to be a malicious publication, expressed either in printing or writing, or by *signs or pictures*, tending either to blacken the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule. [Two more sentences on libel law omitted.]

But though the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech, and of the press, should be duly preserved. The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favour, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of these United States. It has, accordingly, become a constitutional principle in this country, that “every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press” [apparently closely paraphrasing the constitution of Kent’s own New York].<sup>104</sup>

Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court spoke similarly in an 1832 grand jury charge.<sup>105</sup> And Alexander Hamilton likewise argued in the 1804 *People v. Croswell* case that the liberty of the press limited the scope of libel law, and felt no qualms about defining libel to include

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(1838); *Pugh v. Starbuck*, 1 Ohio Dec. Reprint 143 (1845); *Commonwealth v. Chapman*, 54 Mass. (13 Met.) 68, 68, 75–77 (1847); *Keemle v. Sass*, 12 Mo. 499, 504 (1849); *State v. Jeandell & Vincent*, 5 Del. (5 Hart.) 475, 480–81 (1854); *see also, e.g.*, 3 WILSON, *supra* note 44, at 73, 76; 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 594 (Philadelphia, John Bioren 1810); JOHN HAYWOOD, THE DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, IN THE STATE OF TENNESSEE 47 (Nashville, Thomas G. Bradford 1810).

104. 2 KENT, *supra* note 83, at 13–14 (emphasis added).

105. LEMUEL SHAW, A CHARGE DELIVERED TO THE GRAND JURY FOR THE COUNTY OF ESSEX 13 (Boston, Steam Power Press Office 1832); *see also A Review of the Institutions of Connecticut*, MIDDLESEX GAZETTE (Middletown, Conn.), Nov. 28, 1826, at 2 (discussing the liberty of the press, defining libel as “malicious defamation expressed in printing or writing, or by signs, pictures, emblems, or any other devices or characters” and noting that “if the author of every printed or written paper, or of any thing else, that may be technically regarded as a libel, might be subject to damages . . . or to punishment . . . without having the power of defending himself by exhibiting the real character of the [plaintiff] . . . the very object of the liberty of the press would be defeated” (emphasis added)); *The Law of Libel*, AM. Q. REV., Mar. & June 1829, at 77 (treating “the liberty of the press” as limited to writings, but viewing “the freedom of communication of thought and opinion”—a term specifically mentioned in the Pennsylvania Constitution and several other state constitutions—as covering “signs,” such as “burning in effigy,” as well as “writing[s]”). These sources are of limited value, because they were unsigned, and not in publications aimed at lawyers; I mention them for the sake of completeness. *See* Ralph M. Aderman, *Contributors to the American Quarterly Review, 1827–1833*, in *STUDIES IN BIBLIOGRAPHY* 163, 169 (Fredson Bowers ed., 1961) (uncovering the likely identities of many *American Quarterly Review* authors, but giving no author for *The Law of Libel*).

“picture[s] or sign[s]” as well as words.<sup>106</sup> If symbols were seen as outside the liberty of the press, it would have made much more sense for Kent, Shaw, and Hamilton to omit the constitutionally unprotected part of the definition, and to focus solely on verbal libel.

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Standing alone, each of these sources would not be dispositive. Some were some decades removed from the Framing. Others spoke generally without having to deal with a concrete fact pattern involving symbolic expression. Yet others were extrajudicial commentaries or lawyers’ arguments rather than judicial opinions. Each could be suspected of being the idiosyncratic view of one author or of one state’s legal system. But together, the sources are highly probative, precisely because they show a consistent pattern from the 1790s to the 1830s and in many states, and because they show that the equivalence of symbolic and verbal expression was taken for granted by judges, commentators, and lawyers alike.

### III. “FREEDOM OF SPEECH, OR OF THE PRESS” AS THE “RIGHT TO SPEAK, TO WRITE, OR TO PUBLISH,” INCLUDING SYMBOLIC EXPRESSION

So late-1700s and early-1800s judges and commentators accepted the equivalence of symbolic and verbal expression where the freedom of speech or of the press was concerned. But can this be legitimately done, at least as to symbolic expression that wasn’t printed on printing presses, given that the First Amendment expressly speaks only of “speech” and “press”?

If we pay attention to the constitutional text, presumably because the text received legal approval as the supreme law of the land, we should focus on what the phrase actually meant as a legal concept when it was enacted, and not just on what the individual words mean in non-legal contexts. This is why those Justices who most focus on the constitutional text continually stress the original meaning of the legal phrases.<sup>107</sup> Likewise, Judge Bork and Senator Hatch, whom I quoted at the start of this Article, are prominent originalists, not pure textualists.<sup>108</sup>

Looking to the phrase’s legal meaning rather than the word-by-word non-legal meaning is especially sensible when we look at “the freedom of speech, or of the press”:<sup>109</sup> read in its most restrictive sense, the provision would leave the

106. *People v. Croswell*, 3 Johns. Cas. 337, 354 (N.Y. Sup. Ct. 1804). Hamilton’s definition of libel was later cited as authoritative by other courts. *See, e.g., Steele v. Southwick*, 9 Johns. 214, 215 (N.Y. Sup. Ct. 1812); *Ryckman v. Delavan*, 25 Wend. 186, 198 (N.Y. 1840).

107. *See, e.g., SCALIA, supra* note 9, at 38.

108. *See supra* note 9.

109. The definite article at the start of “*the* freedom of speech, or of the press” suggests that the Framers indeed used the phrase to refer to a preexisting legal and political concept. *See, e.g., Justice Antonin Scalia, Students & Leaders: Supreme Court Justice Antonin Scalia*, C-SPAN.ORG, Apr. 9, 2008, at 1:00:51, [rtsp://video1.c-span.org/archive/sc/sc040908\\_scalia.rm](https://video1.c-span.org/archive/sc/sc040908_scalia.rm) (expressing this view); Justice John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296 (1993) (likewise); *see also* Robert H.

government free to punish its critics based on their personal letters or hand-lettered signs,<sup>110</sup> though exactly the same statement would be protected if it were spoken or broadly disseminated through print. It's hard to see why the Framers would have wanted to enact a provision with this sort of limitation. And the oddness of such a result points to the likelihood that the original meaning of "the freedom of speech, or of the press" was broader than the most restrictive reading of the individual words.<sup>111</sup>

So what did the phrase "the freedom of speech, or of the press" mean? Apparently it meant what James Madison originally proposed as the text of the clause: "[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments . . . ."<sup>112</sup>

This was roughly the language suggested by the three state ratifying conventions that proposed a combined free speech and press guarantee—Virginia, North Carolina, and Rhode Island.<sup>113</sup> "[R]ight to speak, to write, or to publish" was also the language of the influential Pennsylvania Constitution of 1776 and of the Vermont Constitution of 1777. And the three most prominent early writers on American law, St. George Tucker, Chancellor James Kent, and Justice Joseph Story, all expressly characterized the First Amendment as protecting a right to speak, to write, and to publish.<sup>114</sup>

I've seen no evidence that the omission of the right "to write" and the change

Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 21 (1971) (rejecting "[l]aymen['s]" possible focus on "the literal words of the amendment," and suggesting instead that "[f]reedom of speech' may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be 'abridged'").

110. See, for instance, the dinner plates marked "No. 45" in honor of John Wilkes, *supra* note 22 and accompanying text.

111. See SCALIA, *supra* note 9, at 38 ("Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole."). For a further example of such a synecdoche, see 1 THOMAS STARKIE, *A TREATISE ON THE LAW OF SLANDER AND LIBEL* i n.a, 1 n.a (London, J. & W.T. Clarke 1830) (noting that "writing" in this noted treatise would be used to cover all "printing and painting, or any other signs or symbols, as well as writing").

112. James Madison, Speech to House of Representatives, June 8, 1789, in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 81 (Helen E. Veit et al. eds., 1991).

113. See *Documents Illustrative of the Formation of the Union of American States*, H.R. Doc. No. 398, 69th Cong., 1st Sess., at 1030 (1927) (Virginia proposal, "[t]hat the people have a right to freedom of speech, and of writing and publishing their Sentiments; but the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated."); *id.* at 1047 (North Carolina, same as Virginia but with "that" instead of "but" and with minor punctuation differences); *id.* at 1054 (Rhode Island, same as Virginia, but with "that" instead of "but the" and with minor punctuation differences). The New York convention suggested only a free press guarantee, framed simply as "That the Freedom of the Press ought not to be violated or restrained." *Id.* at 1037.

114. See, e.g., 2 TUCKER, *supra* note 65, app. 11–14 (characterizing the First Amendment as securing a "right of speaking, writing, and publishing"); 2 KENT, *supra* note 83, at 12 (speaking of "liberty of speech, and of the press" interchangeably with the "constitutional principle . . . that 'every citizen may freely speak, write, and publish his sentiments'"); 3 STORY, *supra* note 65, at 732–33 (characterizing the First Amendment as securing, subject to various limitations, "a right to speak, write and print . . . [one's] opinions," and, later in the same passage, "to publish").



from “to publish” to “freedom of the press” were deliberate decisions to narrow the scope of Madison’s language.<sup>115</sup> Tucker’s, Kent’s, and Story’s views suggest that there were no such deliberate decisions,<sup>116</sup> and the Court has correctly seen these early and learned sources as highly probative of the original meaning of the Constitution.<sup>117</sup> The First Congress, when editing Madison’s proposal, thus apparently viewed “Congress shall make no law . . . abridging the freedom of speech, or of the press” as a synonym for “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments.”<sup>118</sup>

And “publish” at the time meant, to quote Samuel Johnson’s Dictionary, “to make generally and openly known; to proclaim; to divulge,” and not only to print a book.<sup>119</sup> “Publishing” and “publication” thus included publicly display-

115. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 478 (1983) (noting that “we know almost nothing about the committee’s thoughts,” the committee being the select committee charged with revising Madison’s draft Bill of Rights).

116. See also John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 91 n.174 (1996) (treating Madison’s draft as illuminating the meaning of the First Amendment). Professor McGinnis is a leading originalist scholar. See, e.g., John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

117. 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); see also *E. Enters. 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, 982 (1991) (Scalia, J., joined by Rehnquist, C.J.).

118. The Pennsylvania Constitution of 1790 replaced the language “That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained” with “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.” PA. CONST. of 1790, art. IX, § 7. (Some other constitutions of the era likewise used “print,” see DEL. CONST. of 1792, art. I, § 5; KY. CONST. of 1792, art. XII, § 7; TENN. CONST. of 1796, art. XI, § 19; OHIO CONST. of 1802, art. VIII, § 6; LA. CONST. of 1812, art. VI, § 21; IND. CONST. of 1816, art. I, § 9; ILL. CONST. of 1818, art. VIII, § 22; MO. CONST. of 1820, art. XIII, § 16; ARK. CONST. of 1836, art. II, § 7, though most used “publish,” see PA. CONST. of 1776, decl. of rts., § XII; VT. CONST. of 1777, ch. I, § XIV; MISS. CONST. of 1818, art. I, § 6; CONN. CONST. of 1817, art. I, § 5; ALA. CONST. art. I, § 4; MAINE CONST. of 1819, art. I, § 4; N.Y. CONST. of 1821, art. VII, §8; MISS. CONST. of 1832, art. I, § 6; MICH. CONST. art. I, §7; TEX. CONST. of 1836, bill of rts., § 4; FLA. CONST. of 1838, art. I, § 5; R.I. CONST. of 1842, art. I, § 20; N.J. CONST. of 1844, art. I, § 5; IOWA CONST. of 1846, art. I, § 7; WISC. CONST. of 1848, art. I, § 3; CAL. CONST. of 1849, art. I, § 9.) This replacement in the Pennsylvania Constitution may lead one to ask whether “publish,” the term used in the forbears of the First Amendment, was seen all along as a synonym simply for printing.

But the answer to that question is apparently “no.” First, the new 1790 introductory clause, which speaks broadly of “free communication of thoughts and opinions,” was on its face broad enough to go beyond oral and written verbal expression. Second, the sources cited in Part II—including the views of post-1790 Pennsylvanian judges and lawyers—show that the constitutional principle was seen as covering symbolic expression as well as the literally spoken, written, and printed expression. This constitutional protection for symbolic expression may have been seen as stemming from “free communication of thoughts and opinions,” or “speak, write, and print” may have been seen as extending to analogous “publish[ing]” that didn’t literally use the spoken, written, or printed word. But in any case, such protection seemed to be assumed.

119. 2 JOHNSON, *supra* note 99 (entry for “publish”); see also JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE, IN MINIATURE 175 (11th ed., London, Longman & Rees 1799) (defining “publish” as simply “to make known, to set forth”).

ing symbolic expression, and for that matter publicly speaking something.<sup>120</sup> To quote Supreme Court Justice James Wilson, one of the leading drafters of the Constitution,<sup>121</sup> a libel is “a malicious defamation of any person, *published* by writing, or printing, or *signs, or pictures*, and tending to expose him to publick hatred, contempt, or ridicule.”<sup>122</sup> Blackstone,<sup>123</sup> Chancellor Kent,<sup>124</sup> other commentators,<sup>125</sup> and leading cases<sup>126</sup> likewise used “published” to refer to conveying symbolic expression and not just verbal expression. The same was true of blasphemy law<sup>127</sup> and of obscenity law: “the showing of a picture [in that case, a painting] is as much a publication, as the selling of a book.”<sup>128</sup>

120. See, e.g., *Smith v. Minor*, 1 N.J.L. 16 (1790); *Leister v. Smith*, 2 Root 24 (Conn. Super. Ct. 1793); *Brown v. Lamberton*, 2 Binn. 34 (Pa. 1809); *Mezzara’s Case*, 2 N.Y. City-Hall Rec. 113, 117 (1817) (citing and applying the definition in a case involving display of a painting); see also 1 J. CHITTY, *THE PRACTICE OF THE LAW IN ALL ITS DEPARTMENTS* \*45 (London, Henry Butterworth 1833) (speaking of “the publication of written as of verbal slander”). Likewise, banns of marriage were said to be “published” when they were publicly read in church. See, e.g., MARK HILL, *ECCLESIASTICAL LAW* 136 (2d ed. 2001) (“Banns are to be published in an audible manner,” speaking of Anglican practice); *Ellis v. Hull*, 2 Aik. 41 (Vt. 1826) (noting that “banns” were to be “published” “in the parish church of the parish in which the parties dwelt”).

121. See, e.g., Ralph A. Rossum, *Wilson, James*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 101, at 2909.

122. 3 WILSON, *supra* note 44, at 73 (emphasis added).

123. 4 BLACKSTONE, *supra* note 37, at \*150 (describing libels as statements “made public by either printing, writing, signs, or pictures . . . . The communication of a libel to any one person is a publication in the eye of the law . . .”).

124. 2 KENT, *supra* note 83, at 13 (defining libel as “a malicious publication, expressed either in printing or writing, or by signs or pictures, tending . . . to blacken . . . the reputation”).

125. See, e.g., 2 WILLIAM SELWYN, *AN ABRIDGMENT OF THE LAW OF NISI PRIUS* \*1042 (Albany, E.F. Backus 1811); 3 CHITTY, *supra* note 45, at 875; JOHN HENRY ADLINGTON, *THE CYCLOPAEDIA OF LAW; OR, THE CORRECT BRITISH LAWYER* 135 (London, W. Emans 1820); 2 NATHAN DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* 587 (Boston, Cummings, Hilliard & Co. 1823).

126. E.g., *Lake v. King*, (1680) 85 Eng. Rep. 137, 139 n.2 (K.B.) (“A libel may also be published by pictures or signs, as by painting another in an ignominious manner, or making the sign of a gallows, or other reproachful and ignominious sign upon his door . . . .”); *Commonwealth v. Clap*, 4 Mass. (4 Tyng) 163, 167 (1808) (“A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending . . . to blacken [a person’s] reputation.”); *State v. Farley*, 15 S.C.L. (4 McCord) 317, 317 (S.C. Ct. App. 1827) (“A libel is a censorious or ridiculing writing, picture or sign, published with a mischievous and malicious intent, towards government, magistrates, or individuals.”); *Regina v. Lovett*, (1839) 173 Eng. Rep. 912, 913 (Nisi Prius) (describing “paint[ing] an ignominious sign over the door of another, or [taking] part in a procession carrying a representation of the plaintiff in effigy” as “publish[ing] the alleged libel”); *State v. Powers*, 34 N.C. (12 Ired.) 5, 5–6 (1851) (characterizing an effigy of a man with a nail through his ear as having been “published” by being displayed); see also *An Act for the Punishment of Diverse Treasons, 1551-1552*, 5 & 6 Edw. 6, c. 11 (Eng.) (“[I]f any person . . . by writing[,] printing[,] painting[,] carving[,] or graving does directly[,] expressly[,] and advisedly publish[,] set forth[,] and affirm that the King . . . or any his heirs or successors . . . is an Heretic[,] Schismatic[,] Tyrant[,] Infidel[,] or Usurper . . . , [it] shall be High Treason . . . .”) (spelling modernized); 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 294–96 (London, E. & R. Nutt et al. 1736) (describing this statute).

127. See *State v. Chandler*, 2 Del. (2 Harr.) 553, 570 (1837) (characterizing a hypothetical burning of Jesus on the cross, and “exhibit[ion of] a naked figure which [the exhibitor calls] the mother of Christ, in the act of prostitution” as “publish[ing]”).

128. *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 102 (Pa. 1815) (Tilghman, C.J.) (emphasis omitted); *id.* at 105 (Yeates, J.) (likewise treating “exhibition of a . . . painting” to the public as tantamount to “publication”).

The “right to speak, to write, or to publish”—which is what Tucker, Kent, and Story understood the First Amendment to be securing—thus literally covered the right to “publish” symbolic expression by publicly displaying it. The early courts’ and commentators’ treatment of symbolic expression as equivalent to verbal expression therefore fits well with the provision’s original meaning.

#### CONCLUSION

I hope I’ve shown that the original meaning of the First Amendment protects symbolic expression to the same extent that it protects spoken, written, and printed verbal expression.

I doubt the Framers of the First Amendment focused much on this issue: then as now, symbolic expression was much less important than verbal expression. But if you asked lawyers of the era whether symbolic expression was covered by the new provision, they would likely have answered “yes,” as the sources I cite above suggest.

This doesn’t tell us whether the Framers would have understood any particular form of symbolic expression, whether flag burning, liberty pole raising, armband wearing, or dancing, as constitutionally protected. Perhaps they would have recognized a special exception for flag desecration,<sup>129</sup> though I doubt it.<sup>130</sup> Perhaps they would have concluded that some forms of expression, whether symbolic, printed, or verbal, were so likely to lead to breaches of the peace that they merited restriction; it’s hard to tell. Perhaps some would have concluded that any subsequent punishments were permissible, so long as they were imposed by juries.

Perhaps they would also have concluded that symbolic expression is protected only against laws that target it precisely because of what it expresses, and not against generally applicable laws (such as public nudity laws) that incidentally cover expressive conduct.<sup>131</sup> The original meaning of the First Amendment

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129. See, e.g., Brief for the Speaker and Leadership Group of the U.S. House of Representatives as Amici Curiae, *United States v. Eichman*, 496 U.S. 310 (1990) (Nos. 89-1433, 89-1434).

130. The Amicus Brief cited in note 129 *supra* demonstrates that the Framers saw the importance of creating a flag, using the flag, and mandating that it be used in certain situations (for instance, by a ship at sea, when displaying a flag helped determine whether the ship was friendly or hostile). But no source cited by the brief demonstrates that the Framers saw symbolic conduct involving a privately owned flag as inherently unprotected, and in fact the first flag desecration laws weren’t enacted until 1897. See ROBERT JUSTIN GOLDSTEIN, *SAVING “OLD GLORY”* 40–41 (1995); PELEG D. HARRISON, *THE STARS AND STRIPES AND OTHER AMERICAN FLAGS* 283 (1906) (offering a list that purported to cover all then-existing flag desecration bans); Note, *Flag Burning, Flag Waving and the Law*, 4 VAL. U. L. REV. 345, 362–67 (1970); Joseph Quarles, *Desecration of the American Flag*, S. Rep. No. 58-506, at 4–12 (1904) (offering a list that purported to cover nearly all then-existing flag desecration bans).

131. Compare *United States v. O’Brien*, 391 U.S. 367 (1968) (taking the view that in some cases symbolic expression must be exempted from generally applicable laws), with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment) (concluding that symbolic expression is protected only when “the government prohibits conduct precisely because of its communicative attributes”) (emphasis omitted). See generally Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 38–44 (1973).

is in many ways hard to determine.<sup>132</sup>

But most critics of the Court's symbolic expression cases don't seem to seek a wholesale rejection of eighty years of broadly libertarian Supreme Court precedent on the freedom of speech.<sup>133</sup> Rather, they criticize only the symbolic expression doctrine, which to them seems the most clearly inconsistent with text and original meaning, and which can be reversed without vast shifts in the law.

And on this narrow question—was symbolic expression understood as legally tantamount to verbal expression, and thus protectable by “the freedom of speech, or of the press” even when the expression wasn't communicated through spoken words or through printing?—the original meaning is comparatively clear. Seventy-five-year-old Supreme Court precedent and original meaning point in the same direction: symbolic expression and verbal expression ought to be equally covered by the First Amendment.

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132. The scope of the liberty of speech and press in the Framing era was notoriously disputed. Some took the view that the liberty of the press consisted only of freedom from prior restraints and didn't apply to subsequent punishments. *See, e.g.*, *Libellous Publications*, 1 Op. Att'y Gen. 71, 72 (1797). Some took the view that it required that all subsequent punishments be imposed only after a jury verdict, in which the jury was entitled to decide whether the speech was unprotected. *See, e.g.*, PENN. CONST. of 1790, art. IX, § 7. Some took the view that “[t]he genuine liberty of speech and the press is the liberty to utter and publish the truth” and not “falsehood and slander” about the government or private persons. Massachusetts Resolutions in Reply to Virginia (1799), reprinted in JEFFERSON POWELL, *LANGUAGES OF POWER* 136 (1991); *cf.* PENN. CONST. of 1790, art. IX, § 7 (providing that “truth[] may be given in evidence” in libel cases involving allegations related to “the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof”). Some took the view that even statutes such as the Sedition Act of 1798, which ostensibly applied only to false statements, violated the freedom of speech and of the press. James Madison, Report on the Virginia Resolutions, reprinted in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 546, 571–72 (J. Elliot ed., 1836). I won't opine on which substantive view should be understood as the original meaning of the First Amendment, or whether any view can even be so understood, because—as I mention in the text—few people call for undoing modern Free Speech/Free Press Clause doctrine generally and returning to the original meaning. I will speak only of the original meaning of the First Amendment as it relates to symbolic expression.

133. *See supra* note 10.