

Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition

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I. INTRODUCTION

Does the First Amendment constrain common-law tort liability? The U.S. Supreme Court in *New York Times Co. v. Sullivan* said yes,¹ in a decision that focused on libel law, but applies likewise to other torts.² But some argue that this is a modern innovation and that historically such liability was not seen as constituting the state action required to trigger constitutional

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1. 376 U.S. 254, 269 (1964).

2. For cases applying the First Amendment to other common-law torts, see, for example, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (interference with business relations); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (right of publicity); *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974) (false light invasion of privacy); *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036–37 (9th Cir. 1991) (products liability); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023–24 (5th Cir. 1987) (negligence). The Court is now considering *Snyder v. Phelps*, 130 S. Ct. 1737 (2010) (No. 09-751), *granting cert. to* 580 F.3d 206 (4th Cir. 2009), another case that turns on the limits the First Amendment imposes on the common-law intentional-infliction-of-emotional-distress tort.

constraints.³ The Supreme Court's turn to original meaning, including in free-speech cases,⁴ makes the question significant again, especially since the *Sullivan* Court justified its decision as a matter of policy and logic, not of history.⁵

This Article argues that constitutional constraints on speech-based civil liability have deep roots, stretching back to the Framing era. That aspect of the *Sullivan* holding is thus entirely consistent with original meaning. The

3. See, e.g., Brief for the State of Kansas et al. as Amici Curiae in Support of Petitioner at 3, *Snyder v. Phelps*, No. 09-751 (U.S. June 1, 2010), 2010 WL 2224733, at *3 (“Until the Court’s decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the First Amendment generally placed no limits on state tort law . . .”); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1656 (2009) (“For most of American history, private lawsuits did not implicate the First Amendment, regardless of whether they sought remedies for tort violations or enforced contracts or property rules. These categories of ‘private law’ were not attributable to the government, and thus did not constitute state action.”); Nathan Tucker, *Slander Not Protected by 1st Amendment*, BALT. SUN, Mar. 22, 2010, 2010 WLNR 5966020. I’ve heard the same argument in personal communications from two constitutional scholars.

The statements quoted above may be literally correct as to the First Amendment, which did not apply to state law at all until it was incorporated against the states via the Fourteenth Amendment in the 1920s. But the statements likely suggest to most readers that constitutional principles more broadly—including state constitutional free-speech provisions—did not apply to state tort law either.

4. See *Citizens United v. FEC*, 130 S. Ct. 876, 925–29 (2010) (Scalia, J., concurring) (joined by Justices Alito and Thomas); *id.* at 948–52 (Stevens, J., concurring in part and dissenting in part) (joined by Justices Breyer, Ginsburg, and Sotomayor); *Davis v. FEC*, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., concurring in part and dissenting in part); *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring); *Randall v. Sorrell*, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 424 n.9 (2000) (Thomas, J., dissenting) (joined by Justice Scalia); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358–59 (1995) (Thomas, J., concurring in the judgment); see also *United States v. Stevens*, 130 S. Ct. 1577, 1584–85 (2010) (stressing the importance of “histor[y] and tradition[.]” in determining whether a particular exception to free-speech protection should be recognized); *Citizens United*, 130 S. Ct. at 906 (“There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.” (citing *McIntyre*, 514 U.S. at 360–61 (Thomas, J., concurring in the judgment))); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment) (expressing openness to an originalist analysis in free speech cases).

5. The Court reasoned,

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Sullivan, 376 U.S. at 265 (citation omitted). And though the Court then cited two precedents, *Ex parte Virginia*, 100 U.S. 339 (1880), and *American Federation of Labor v. Swing*, 312 U.S. 321 (1941), those cases dealt with judges’ actions (discriminating in jury selection and issuing a speech-restrictive injunction) rather than with juries imposing common-law damages liability.

Framers likely did view the proper scope of libel liability more broadly than recent First Amendment precedent does. But this was because of a substantive judgment about which speech restrictions (civil or criminal) should be permitted—not because of a judgment that civil liability simply didn’t constitute state action, or that tort law was categorically immune from constitutional scrutiny.

II. LATE 1700S AND EARLY 1800S CASES

Tort liability was at issue in the very earliest cases that protected speakers based on state constitutional analogs to the First Amendment, long before the constitutional provisions were first used to set aside injunctions⁶ or to strike down criminal statutes.⁷ In 1802 and 1806, the highest courts of Vermont and South Carolina reversed libel verdicts for the plaintiffs, holding that the state equivalents of the Petition Clause generally barred recovery for alleged libels in petitions to the legislature.⁸

The South Carolina court reasoned,

Though the conduct of [defendant] may have been unreasonable and malicious, yet, in petitioning the legislature against a public officer of the State, he was in the exercise of a constitutional right. . . . Every citizen has a right to petition the legislature for a redress of grievances, and even on account of grievances which do not exist, if they are supposed to exist, although in doing so, the feelings of individuals, or their reputations, should be wounded.⁹

Likewise, the Vermont decision stressed that the Vermont Constitution’s Declaration of Rights protected the right to petition; the court said that “[t]his declaration of the right . . . might seem to decide the question litigated,” but went on (because “the point is new” and “a question of interest to the community at large”) to also rebut the policy arguments against such an interpretation.¹⁰

So the imposition of tort liability was seen as state action and thus limited by the right to petition; and, unsurprisingly, it was treated as equally state action when it came to the right of free speech. In 1818, the South Carolina Constitutional Court of Appeals applied the constitutional guarantee of the freedom of speech in rejecting a lawsuit brought by a failed

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

7. *Louthan v. Commonwealth*, 79 Va. 196 (1884).

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

9. *Reid*, 4 S.C.L. at 78.

10. *Harris*, 2 Tyl. at 143. The court concluded that the immunity for petitions was also part of the common law of libel, but nonetheless repeatedly noted that it was secured by the Vermont Constitution. The constitutionalization of the principle made it a constraint on the common law and not just a repetition of the common law.

congressional candidate who claimed to have been slandered by allegations of mental illness:

The ordeal of public scrutiny, is many times, a disagreeable and painful operation. But it is the result of that *freedom of speech*, which is the necessary attribute of every free government, and is expressly guaranteed to the people of this country by the constitution. The same may be said of the freedom of *speech*, as of the *press*: "That among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with awful reverence, and would approach with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind. That this liberty is often carried to excess, that it sometimes degenerates into licentiousness, is seen and lamented, but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a *shoot* which cannot be stripped from the *stalk* without wounding vitally the plant from which it is torn."¹¹

The quoted passage was not attributed by the court, likely because it was so familiar that it needed no attribution. It had been written by John Marshall, a few years before he was appointed Chief Justice, in a famous rebuke to the French foreign minister (Talleyrand) who had demanded that the United States government silence alleged "calumnies against the [French] Republic, its magistrates and its envoys."¹² And it was then quoted by James Madison in the *Address of the General Assembly to the People of the Commonwealth of Virginia* condemning the Sedition Act.¹³ In both instances, the freedom of the press was relied on as a constraint on criminal liability; but the South Carolina court freely cited the same passage in an argument for constraining civil liability. This further shows that freedom-of-expression provisions were seen

11. *Mayrant v. Richardson*, 10 S.C.L. (1 Nott & McC.) 347, 350 (Constitutional Ct. App. 1818).

12. SEC'Y OF STATE, U.S. DEP'T OF STATE, INSTRUCTIONS TO THE ENVOYS EXTRAORDINARY AND MINISTERS PLENIPOTENTIARY FROM THE UNITED STATES OF AMERICA, TO THE FRENCH REPUBLIC, THEIR LETTERS OF CREDENCE AND FULL POWERS, AND THE DISPATCHES RECEIVED FROM THEM RELATIVE TO THEIR MISSION 111 (Philadelphia, W. Ross 1798); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 229-30 (1996) (crediting the letter to Marshall, who was one of the three envoys who signed the letter). The envoys' mission was talked about throughout the country, especially because it was ended by the infamous XYZ Affair—in which three French officials demanded bribes as a condition for continuing negotiations, a demand that the envoys refused and then publicized—and was followed by the Quasi-War with France. See generally SMITH, *supra*, at 192-233 (discussing the XYZ Affair).

13. James Madison, *Address to the General Assembly to the People of the Commonwealth of Virginia* (Jan. 23, 1799), in 6 THE WRITINGS OF JAMES MADISON 332, 336 (Gaillard Hunt ed., 1906).

as applying to tort liability imposed by juries much as the provisions applied to criminal liability defined by legislatures.

To be sure, in these cases the same state courts were both defining the underlying tort and deciding what a constitutional provision requires. The courts therefore developed the tort rules in light of the constitutional provisions, rather than having to decide whether the constitutional provisions trumped the tort rules.

It was only when the Supreme Court incorporated the First Amendment against the states in the 1920s that courts had an opportunity to take a tort rule as given (since federal courts had no power to substantively redefine state tort rules) and then decide whether that rule violated a constitutional provision. Still, the early state-court decisions I mention do show that early American courts saw tort law as implicating the freedom of speech, press, and petition, and saw those freedoms as limiting the permissible scope of tort law.

In other early cases, courts acknowledged that the freedom of speech and press may apply to civil lawsuits as well as to criminal prosecutions, but reasoned that libelous speech was a constitutionally unprotected abuse of the freedom and could thus lead to civil liability as well as to criminal punishment. We see this in cases from the Pennsylvania Supreme Court in 1799 and 1803,¹⁴ the Michigan Supreme Court in 1829,¹⁵ and a Massachusetts court in 1836.¹⁶

For instance, in the 1799 case, the court's jury instruction in a libel lawsuit quotes the Pennsylvania Constitution's free expression guarantee, but goes on to stress that libel liability is permissible because the guarantee provides that the speaker ought to be "responsible for the abuse of that liberty."¹⁷ This is precisely the way Pennsylvania judges understood the

14. CONSTITUTIONAL DIARY (Philadelphia), Dec. 14, 1799, at 3 (reporting on a jury instruction given by the court in *Rush v. Cobbett*); *Runkle v. Meyer*, 3 Yeates 518, 520 (Pa. 1803); see also *Gray v. Pentland*, 2 Serg. & Rawle 23, 33 (Pa. 1815) (Yeates, J.) (same view expressed by one judge in his seriatim opinion).

15. *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346–47 (Mich. 1829).

16. *Commonwealth v. Whitmarsh*, Thacher 441, 466–67 (Bos. Mun. Ct. 1836). For later examples, see *Rice v. Simmons*, 2 Del. (2 Harr.) 417, 428 (1838) (Harrington, J.), and *Giddens v. Mirk*, 4 Ga. 364, 367 (1848).

To be sure, many reports of early cases involving libel lawsuits do not mention a constitutional defense. See, e.g., *Van Vechten v. Hopkins*, 5 Johns. 211 (N.Y. Sup. Ct. 1809). But the same is true of many cases involving criminal libel prosecutions. See, e.g., *State v. Neese*, 4 N.C. (Taylor) 691 (1818). In both sorts of cases, the reason for the absence of a constitutional defense—or perhaps for the reporter's failure to mention a constitutional defense—is likely the one mentioned in the text: The law of libel, both civil and criminal, was seen as substantively consistent with the constitutional free-expression provisions because libelous statements were seen as constitutionally unprotected abuses.

17. *Republica v. Dennie*, 4 Yeates 267, 269 (Pa. 1805) (emphasis omitted) (internal quotation marks omitted).

freedom of expression when it came to criminal cases¹⁸ and to judicially imposed good-behavior bonds aimed at preventing future libels.¹⁹ And an 1807 opinion by Pennsylvania's Chief Justice likewise described the guarantee as providing "that a man may freely speak, write and print, at his own peril, being responsible either to the public, or any individual whom he may injure"²⁰—evidence that the constitutional provision was seen as applying equally to criminal liability (responsibility "to the public") and civil liability (responsibility to "any individual whom he may injure").

In 1808, the Massachusetts Supreme Judicial Court likewise held that state legislators' freedom of speech and debate²¹ could bar civil liability for slanderous statements made "while discharging the duties of [the legislator's] office," though the court held that the particular speech in that case was outside the legislators' duties and thus potentially actionable.²² And in 1811, a Pennsylvania court relied on "the freedom of the press" in instructing the jury that a defendant in a libel case should not be found liable if his statement, even if false, was republished from a credible source and made without malice.²³

Government officials brought some of these cases—but they sued as citizens defending their private rights, not as government officials. And other cases were brought by private citizens.²⁴ The premise of these court decisions must be that judicial action imposing liability for speech is covered by constitutional free-expression provisions, regardless of whether the plaintiff himself was acting for the state.

18. *See, e.g., id.*

19. *Commonwealth v. Duane*, 2 *Wheeler* 533, 536 (Pa. 1807) (Tilghman, C.J.).

20. *Id.*

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

22. *Coffin v. Coffin*, 4 *Mass.* (3 *Tyng*) 1, 28 (1808).

23. *Binns v. M'Corkle*, 2 *Browne* 79, 90 (Pa. Dist. Ct. 1811).

24. *See, e.g., Runkle v. Meyer*, 3 *Yeates* 518 (Pa. 1803) (lawsuit brought by a private party); *Binns*, 2 *Browne* 79 (lawsuit brought by a newspaper editor); *Mayrant v. Richardson*, 10 *S.C.L.* (1 *Nott & McC.*) 347 (Constitutional Ct. App. 1818) (lawsuit brought by a candidate for office).

III. LATE 1700S AND EARLY 1800S COMMENTATORS AND RELATED CONSTITUTIONAL PROVISIONS

Early commentators—Luther Martin,²⁵ Chancellor Kent,²⁶ Justice Joseph Story,²⁷ and others²⁸—likewise treated civil liability in the same manner as criminal punishment when it came to constitutional speech and press protections. The commentators concluded that libel was generally constitutionally unprotected, both against civil liability and criminal

25. Luther Martin, *No. VI*, FED. GAZETTE & BALT. DAILY ADVERTISER, Mar. 26, 1799, at 2 (discussing the freedom of the press equally as a limitation on the civil and on the criminal branches of libel law). Martin was a Maryland Attorney General, leading early American lawyer, and Constitutional Convention member (though he opposed various features of the new Constitution and walked out before the end of the Convention). He 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*, 17 U.S. (4 Wheat.) 316 (1819); he was also one of the signers of the Declaration of Independence. See David Gordon, *Martin, Luther*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1687, 1687–88 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

26. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13–14 (New York, O. Halsted 1827) (discussing the freedom of the press equally as a limitation on the civil and on the criminal branches of libel law).

27. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1882, at 740–41 (Boston, Hilliard, Gray, & Co. 1833) (arguing that the freedom of the press applies no differently to criminal prosecutions than to civil lawsuits). The Justices have often relied on the Kent and Story treatises as evidence of the original meaning of the Constitution. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799–2800, 2812 (2008); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 799 (1995); *E. Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *Harmelin v. Michigan*, 501 U.S. 957, 977, 982 (1991) (Scalia, J.); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment).

28. JAMES SULLIVAN, A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 26–28 (Boston, David Carlisle 1801) (discussing the freedom of the press as a constraint on “action[s]” for libel, which is to say civil lawsuits, as well as on criminal “prosecution[s]”); 2 JOHN REED, PENNSYLVANIA BLACKSTONE; BEING A MODIFICATION OF THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, WITH NUMEROUS ALTERATIONS AND ADDITIONS 522 (Carlisle, Pennsylvania, George Fleming 1831) (mentioning the Pennsylvania Constitution’s freedom-of-the-press guarantee within the libel subsection of the section on torts); BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 224 (Boston, Marsh, Capen & Lyon 1832) (discussing the freedom of the press equally as a limitation on the civil and on the criminal branches of libel law); TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 189 (Philadelphia, P.H. Nicklin & T. Johnson 1837) (same). Sullivan was the Attorney General of Massachusetts at the time he wrote the *Dissertation*, and a former state-court judge and member of the Continental Congress. BEN PERLEY POORE, THE POLITICAL REGISTER AND CONGRESSIONAL DIRECTORY 650 (Boston, Houghton, Osgood & Co. 1878). Reed was the President Judge of the Court of Common Pleas of the Ninth Judicial District of Pennsylvania, and the founder of the oldest law school in Pennsylvania, the Dickinson School of Law. See William E. Butler, *Reed, John*, AM. NAT’L BIOGRAPHY ONLINE, <http://www.anb.org/articles/11/11-01219-print.html> (last updated May 2008). Walker was the cofounder of the Cincinnati law school, and later became president judge of the Hamilton County, Ohio Court of Common Pleas. See Bernard J. Hibbitts, *Walker, Timothy*, AM. NAT’L BIOGRAPHY ONLINE (Feb. 2000), <http://www.anb.org/articles/11/11-00887-print.html>.

punishment. But their conclusion rested on a judgment that defamation didn't merit constitutional protection, whether against civil liability or criminal punishment. Their reasoning did not rest on any view that damages liability involved no state action and was thus immune from constitutional constraints.

Justice Story, in particular, argued against an absolutist view of the freedom of the press by arguing that any such view would forbid tort liability for libel as well as criminal liability: "If to publish without control, or responsibility be [the] genuine meaning [of the liberty of the press]; is not that equally violated by allowing a private compensation for damages, as by a public fine?"²⁹ Such an argument would make no sense if "private compensation for damages" were seen as not involving state action, and thus not implicating the "freedom of the press." Story is assuming that tort liability and criminal punishment are both covered by the constitutional provision, and is using that to argue that the coverage should leave room for considerable restrictions.

And the early conclusion that free-expression principles constrained civil liability should not be seen as surprising, because the imposition of damages liability was clearly seen as government action of the sort that required some constitutional constraints. That much is evident from the Seventh Amendment and the many comparable state constitutional provisions assuring a jury trial in civil cases.³⁰ Purely private behavior was indeed not covered by state and federal bills of rights. But the adjudication of private disputes was done by government-run courts, and was therefore subject to constitutional rules such as the jury-trial mandate. And, as the evidence above shows, adjudication of private disputes was also subject to constitutional rules related to freedom of expression.

Some early state constitutional free-press clauses did specifically mention criminal prosecutions, generally saying something like this Pennsylvania provision:

The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for

29. 3 STORY, *supra* note 27, § 1882, at 740.

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

libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.³¹

But while the second sentence applies only to “prosecutions” and “indictments,” there is no such limitation in the first sentence. And the reference to criminal cases in the second sentence likely stems from the fact that the protections listed in the second sentence were only needed in criminal cases, and would have been superfluous in civil cases. In criminal cases, English common-law judges had famously not recognized the defense of truth, and didn’t let juries decide whether the defendant’s words were indeed libelous.³² But in civil cases, the defense of truth was already well established,³³ as was the jury’s role as a judge of both law and fact.³⁴

IV. THE FIRST AMENDMENT AND THE FEDERALIZATION OF FREE-SPEECH PROTECTIONS

So far I have discussed state constitutional provisions, but this is because tort liability in the early Republic was almost entirely a matter of state law. Libel lawsuits in federal court generally arose because of diversity of citizenship, and were therefore governed by state constitutions.³⁵ Thus, though the First Amendment literally limits itself only to “law” made by “Congress,” and doesn’t mention the common-law-based decisions of federal courts,³⁶ this limitation was almost entirely irrelevant to civil liability for speech.

As it happens, federal courts applying the common law did seem to see themselves as bound by the First Amendment, notwithstanding the

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

32. 3 WILLIAM BLACKSTONE, COMMENTARIES *125.

33. *Id.* at *125–26; *Harris v. Huntington*, 2 Tyl. 129, 136 (Vt. 1802); 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 74 (Philadelphia, Lorenzo Press 1804) (printing a lecture delivered in 1790–91). *See generally* Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964). James Wilson was a Justice of the United States Supreme Court and one of the leading drafters of the Constitution. *See* Ralph A. Rossum, *Wilson, James*, in 6 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 25, at 2909.

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

35. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92; *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (confirming that the Act mandated the application of “rules and enactments promulgated by the legislative authority thereof,” which would include state constitutions, though concluding that the Act didn’t mandate the application of state common-law rules that rest merely on “the decisions of Courts”), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that the Act mandated the application of state common-law rules as well); *see, e.g., Vidal v. Mayor of Phila.*, 43 U.S. (2 How.) 127, 197–98 (1844) (referring to the state constitution when deciding a diversity-of-citizenship case).

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

reference to “Congress.” Thus, Justice Story’s 1825 circuit court opinion in *Dexter v. Spear*³⁷ discussed the “liberty of speech and the liberty of the press” in a diversity case decided under Rhode Island law, even though Rhode Island lacked a state constitution and a corresponding bill of rights at the time. Likewise, three territorial cases, two from Orleans Territory in 1810 and 1811³⁸ and one from Michigan Territory in 1829,³⁹ similarly discussed the freedom of the press in applying the common law. These three cases involved criminal law and injunctions, but nothing suggests that the First Amendment’s reference to “Congress” would have barred consideration of the First Amendment as to common-law damages liability if it did not bar consideration of the First Amendment as to other common-law principles. All four cases thus support Judge Michael McConnell’s view that the term “Congress” was chosen simply to make clear that the First Amendment applied only to the federal government and not to states, and that “there was no intention to confine the reach of the First Amendment to the legislative branch” of the federal government.⁴⁰

But in any event, to the extent that the First Amendment now applies to state common-law torts—as well as to other state action—it applies through the Fourteenth Amendment. The Fourteenth Amendment generally covers all action by a “State,” and isn’t limited to state legislatures.⁴¹ Moreover, by

37. 7 F. Cas. 624 (Story, Circuit Justice, C.C.D.R.I. 1825) (No. 3867). In keeping with the views that he would later express in his *Commentaries*, see STORY, *supra* note 27, Justice Story concluded that the liberty of the press does not protect defamation; but he did discuss the liberty as at least potentially constraining common-law judicial decisions.

38. *Denis v. Leclerc*, 1 Mart. (o.s.) 297, 315 (Orleans 1811) (concluding that the First Amendment does not bar injunctions against the printing of private letters, but resting the judgment on the limited scope of the freedom of the press, and citing as authority cases upholding the Sedition Act, which was indeed enacted by Congress); *Territory v. Nugent*, 1 Mart. (o.s.) 108, 112 (Orleans 1810) (concluding that “Constitutional . . . rights” such as the “liberty of the press” “are to be exercised, so as they work no injury to others,” and thus that the liberty of the press does not extend to criminal libel, even though the criminal libel was prosecuted under the common law and not under a congressional act). These cases were decided by Judge François-Xavier Martin, who was a noted legal scholar, and eventually the presiding judge of the Louisiana Supreme Court. Michael Chiorazzi, *Francois-Xavier Martin: Printer, Lawyer, Jurist*, 80 LAW LIBR. J. 63, 63 (1988). In the view of some, Martin is the “Father of Louisiana Jurisprudence.” 17 ENCYCLOPEDIA BRITANNICA 794 (11th ed. 1911).

39. *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346–47 (Mich. 1829) (describing libel as equally unprotected by the First Amendment against civil liability and against criminal punishment).

40. *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1142 (10th Cir. 2006) (McConnell, J.). An alternative explanation for the cases might be that the Bill of Rights was understood as embodying basic legal principles; while Congress was bound by the freedom of speech and of the press because of the text of the First Amendment, courts were likewise bound by the freedom of speech and of the press because those were seen as being part of American common law.

41. This is true whether one views incorporation as properly taking place through the Due Process Clause, U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”), or through the Privileges or Immunities

the time the Fourteenth Amendment was enacted, the freedom of speech and press had been understood for decades as applying to civil liability as well as criminal punishment.⁴²

V. CONCLUSION

“It matters not,” the *New York Times Co. v. Sullivan* Court said, “that [a speech restriction] has been applied in a civil action and that it is common law only, though supplemented by statute.”⁴³ *Sullivan* didn’t offer any late 1700s or early 1800s support for this proposition, though elsewhere the opinion was willing to make claims about the history of that era.⁴⁴ Nonetheless, such support is available: Many cases and commentators from that time took for granted that civil liability was subject to constitutional constraints, and I know of no source that took the contrary view.

Clause, *id.* (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

42. See the cases discussed *supra* Part II, as well as THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 422 (Boston, Little, Brown & Co. 1868). The Court has often cited Cooley as an especially influential and reliable authority. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2811 (2008) (describing Cooley as the “most famous” of the “late-19th-century legal scholar[s],” and his treatise as “massively popular”); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995) (referring to “the great constitutional scholar Thomas Cooley”); see also *Corliss v. E.W. Walker Co.*, 57 F. 434, 435 (C.C.D. Mass. 1893) (refusing, on constitutional free speech and press grounds, to issue an injunction against the publication of an unauthorized biography, but also stating—citing Cooley—that such speech was protected even against a damages remedy unless it “by its falsehood and malice may injuriously affect the standing, reputation, or pecuniary interests of individuals”).

43. 376 U.S. 254, 265 (1964).

44. See, e.g., *id.* at 273–77.