Before discussing the meaning of the words “freedom of speech, or of the press” as established under early American law, we should first understand why these words are found under the United States Constitution. Mr. Madison explained in 1799, “Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt, that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood; and that the [first] amendment was intended as a positive and absolute reservation of it.” Alexander Hamilton argues in Federalist No. 84 why such an amendment does not belong under the federal constitution:

*Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government.*

As one might suppose from the above, Congress would be just as powerless in abridging the freedom of speech or the press without the First Amendment; and the First Amendment served only as a declaration that no such power had been vested with Congress over speech or the press.

Now, under State jurisdiction it is an entirely different matter because unlike national government, States reserved for themselves broad general powers over all domestic concerns within their limits with very few exceptions. It would be alien to our form of government to say it is unconstitutional for a State to prohibit the burning of a flag or for school districts to prohibit what it deems offensive or contrary to norms of decency student clothing or behavior. Absolute regulatory powers over the press and speech was never surrendered by the States, and the U.S. Supreme Court has never found documented anywhere under the U.S. Constitution the surrender of this right.

The court instead has took upon themselves to “assume” that “the ‘liberty’ protected by the Fourteenth Amendment includes the liberty of speech and of the press.” The fatal problem with this assumption is John Bingham, the Fourteenth Amendments primary author, declared at least five times this “liberty” was an import of Chapter 39 of the Magna Carta. If the word “liberty” was to encompass broad personal rights of all descriptions under the Fourteenth Amendment, then the last thing in the world anyone would do is link the word to the 39th Chapter.

Thomas Jefferson remarked that “[t]here are certain principles in which all agree, and which all cherish as vitally essential to the protection of the life, liberty, property, and safety of the citizen … Freedom of person (liberty), securing everyone from imprisonment or other bodily restraint but by the laws of the land. This is effected by the well-know law of habeas corpus.” In other words, this “liberty” protects against arbitrary imprisonment or detention, and not the freedom to speak or write whatever.
Freedom of Speech and of the Press Defined

Freedom of speech and of the press served one purpose in America: To remove the fear of the common law doctrine of seditious libel so citizens could freely speak or publish their grievances or concerns regarding public affairs or conduct of public officials. In England, it could be dangerous to criticize government, or peaceably assemble or petition government for redress of grievances because anything one might speak or write (or draw) could end up being used against them under the charge of seditious libel where truth would be of no defense.

In 1808 for example, the British newspaper publisher, John Drakard, was indicted over an article questioning military flogging, and the jury had been instructed that the military establishment had been injured and “it was not to be permitted to any man to make the people dissatisfied with the Government under which he lives.” Henry VIII once made it a high treason crime to suggest his marriage to Anne of Cleves was valid even though it was the truth.

How can we know for sure the freedom of speech or of the press means freedom from seditious libel? All early American laws over speech and the press dealt solely with breaches of the peace or public morality (blasphemy, obscenity, profanity, etc.), but never restraints against public discussion of public measures, grievances or criticism of public officials where truth was of no defense. In other words, the common law doctrine of seditious libel was absent from American laws.

Benjamin Franklin, writing in The Pennsylvania Gazette, April 8, 1736, wrote of the American doctrine behind freedom of speech and of the press:

*Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the action of the magistrates.*

James Madison in 1799 wrote, “In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law.”

The Democratic-Republican caucus included the following in their 1800 platform: “An inviolable preservation of the Federal constitution, according to the true sense in which it was adopted by the states. … Freedom of speech and the press; and opposition, therefore, to all violations of the Constitution, to silence, by force, and not by reason, the complaints or criticisms, just or unjust, of our citizens against the conduct of their public agents.”

Generally speaking, all State constitutions or laws stipulated along the lines that the “press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity,” and “in prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence.” Allowing juries to determine the facts and the law in such trials acted as a powerful deterrent against frivolous charges by government officials towards speech or publication over their public conduct.
Other common expressions of the freedom found were, “No law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right.”

If freedom of speech or of the press alone was understood to mean the liberty to freely write or speak whatever one wishes then there can be no purpose for the additional declaration that says persons may also “freely speak, write, and publish his sentiments on all subjects.” It is too clear freedom of speech and of the press had specific meaning and that meaning could only have been freedom from seditious libel. Thomas Cooley hit the ball out of park when he wrote of the freedom found under American constitutions:

*The mere exemption from previous restraints (Blackstonian theory) cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, ... Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. ... The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.*

It should be apparent now how States could prohibit “books or other publications of a sectarian infidel or immoral character” from being “distributed in any common school,” or prohibit public discussion of acts of sexual gratification, or even solicitation for donations on public property without permit. The great advantage of adhering to original meaning is that it does not act to force courts to read inventive “exceptions” into constitutional words to either sanction a law or rule the law unconstitutional.

It should be pointed out that activism, or points of view, is not protected against restrictions. No one has a right to be heard where they wish that can result in disturbing the peace, traffic disruption, or simply, become in anyway a public nuisance.

The liberty of speech and of the press in this country can be said to have been born in the year 1735 in the colony of New York. The story begins on November 5, 1733 when John Peter Zenger published his first issue of the Weekly Journal that included this criticism:

*The sheriff was deaf to all that could be alleged on that [the Quaker] side; and notwithstanding that he was told by both the late Chief Justice and James Alexander, one of His Majesty’s Council and counselor-at-law, and by one William Smith, counselor-at-law, that such a procedure [disqualifying the Quakers for affirming rather than swearing] was contrary to law and a violent attempt upon the liberties of the people, he still persisted in refusing the said Quakers to vote....*
Governor Crosby wanted Zenger charged with seditious libel but found it difficult to obtain a grand jury indictment against him. To get around this obstacle Crosby instructed his attorney general to file a formal accusation of a criminal offense before two justices. This in return led to a bench warrant and arrest of Zenger.

The trial opened on August 4, 1735 on the main floor of New York’s City Hall with Attorney General Bradley’s reading of the information filed against Zenger. Bradley told jurors that Zenger, “being a seditious person and a frequent printer and publisher of false news and seditious libels” had “wickedly and maliciously” devised to “traduce, scandalize, and vilify” Governor Cosby and his ministers. Bradley said that “Libeling has always been discouraged as a thing that tends to create differences among men, ill blood among the people, and oftentimes great bloodshed between the party libeling and the party libeled.” (Linder, The Trial of John Peter Zenger (2001)

Additionally, Bradley explained truth was of no defense for seditious libel under state law while Zenger’s attorney argued the law should not be interpreted to prohibit “the just complaints of a number of men who suffer under a bad administration.” The judge instructed the jury the “law is clear that you cannot justify a libel,” and the “jury may find that Zenger printed and published those papers, and leave to the Court to judge whether they are libelous.”

With law and precedent squarely against him, the jury nonetheless found Zenger not guilty and the beginning of public opposition to trials of seditious libel had been established. Gouverneur Morris (served on the committee of five responsible for the final drafting of the Constitution) would write a half-century later: “The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America.” It is this liberty we find under the First Amendment and State constitutions today.