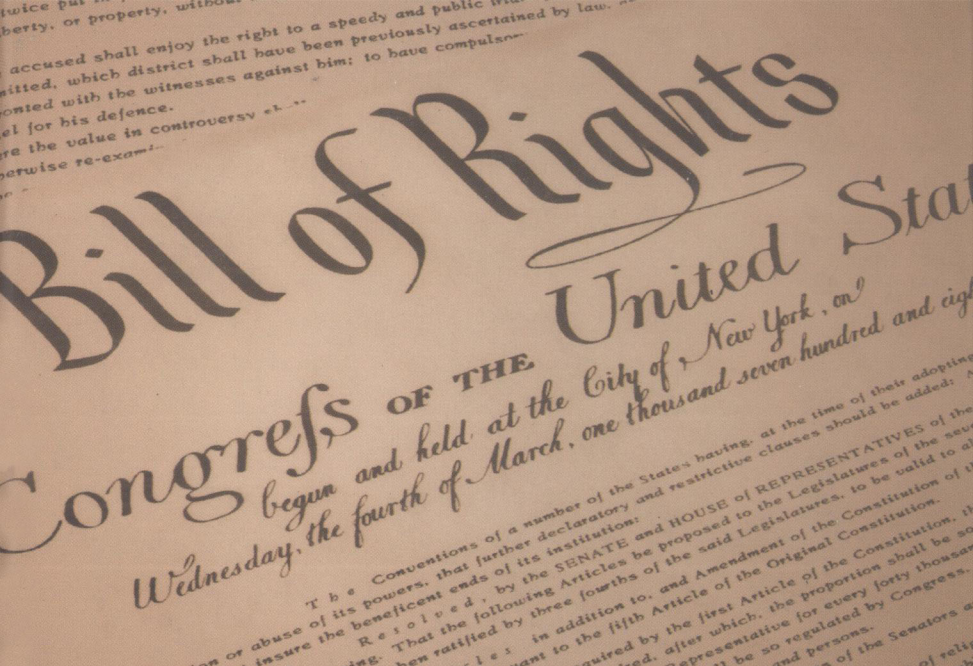

Discourses of Freedom of Speech

From the Enactment of the Bill of Rights to the Sedition Act of 1918

Juhani Rudanko

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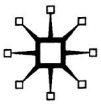

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Discourses of Freedom of Speech

Also by Juhani Rudanko

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1
Introduction

Freedom of speech is generally viewed as a basic right in the United States today. A broad interpretation of this concept has been – and continues to be – a distinctive part of American political culture, or indeed its most distinctive part. Freedom of speech and of the press brings with it many benefits to those living in countries that enjoy it,[1] for these privileges entail openness and accountability in public life, likewise distinctive features of the American political system. These features have also played a role beyond America's borders in other countries. To illustrate this point, consider this extract written by the well-known political columnist Bernard Levin writing in the London *Times* as recently as 1991:

> that splendid organization, the Campaign for Freedom of Information, has just revealed disturbing facts about the tests for pollution from pharmaceutical plants in Britain – a matter, surely, that potentially concerns us all. Not so; the Campaign's revelation is prohibited on pain of two years' imprisonment. But the Campaign's leaders will not go to chokey; they got the information from the United States' Freedom of Information Act, not from Britain. Americans, you see, are trusted by their government; we are not fit to know whether we are going to be poisoned.
>
> The Campaign has revealed a wide range of such British information garnered from America; this month's broadsheet is devoted to the subject, and readers will begin to think that they are hallucinating, so ridiculous and so scandalous are the things Americans can tell us that we cannot be told by our own governors. (Levin 1991, 14)

Levin's comment concerns recent practices in Great Britain, but it is only fair to note that as far as European countries are concerned, there is

undoubtedly more openness and accountability in Britain than in most European countries, and that there are countries in Europe, especially on the continent of Europe, where practices and traditions of secrecy have been far more prevalent than in Britain in recent times.

The openness and accountability of American political culture is anchored in the memorable language of the First Amendment, adopted in 1791:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance. (Article 1 of the Federal Bill of Rights, as proclaimed on December 15, 1791, see Rutland 1983, 243)

The language of this Amendment is clear enough, but the question of freedom of expression in the United States is still complex and a fascinating subject for study. The present book offers fresh perspectives on some important tests of, and challenges to, freedom of speech in the United States. These begin with the very enactment of the Bill of Rights. Today the Bill of Rights and the First Amendment tend to be among those parts of the United States Constitution that are revered by most people in America, regardless of their party affiliation, and it may come as a surprise that the enactment of these parts of the Constitution was by no means a foregone conclusion. The delegates who drafted the United States Constitution at the Constitutional Convention in Philadelphia in the summer of 1787 had considered a proposal for a Bill of Rights, but they had turned it down, and when the first Congress met in the spring of 1789 the issue hung finely in the balance. Federalists had a large majority over their Antifederalist opponents in the first House of Representatives and, while some Federalists were amenable to considering a Bill of Rights, there was also an undercurrent of opposition to the project. Federalists, as the name implies, were in general in favor of a strong Federal government, and a Bill of Rights might have posed a threat from that point of view. When James Madison, who was a Federalist at the time, made a motion, in accordance with a campaign pledge, that the House of Representatives should consider the question of a Bill of Rights on June 8, 1789, he ran into considerable opposition, especially from his fellow Federalists. Chapters 2 and 3 investigate the debates that followed and the nature of the opposition that ensued.

At one point in the first debate on the Bill of Rights on June 8, 1789 James Madison made detailed proposals for a Bill of Rights. However, that debate did not focus on the substance of Madison's proposals. Instead, it focused on the procedural question of whether or not the subject of a Bill of Rights should be considered in a timely fashion. The same procedural question was again discussed on July 21, 1789. Finally, on August 13, 1789, after another procedural debate, the House of Representatives finally decided to consider amendments to the Constitution. Once that procedural decision had been made, the discussion of the actual substance of the amendments proceeded relatively smoothly. (Whether or not there were serious procedural or other problems in the Senate cannot be determined with certainty because the Senate met in secret at that time.) With the benefit of hindsight it is possible to say that the procedural debates in the House of Representatives in the summer of 1789 were a time when the project of a Bill of Rights hung in the balance and could easily have been defeated.

The procedural debates are investigated with the help of a specific theoretical framework, that of fallacy theory. This approach, developed mainly in the disciplines of informal logic or philosophy, has a rich history going back all the way to Aristotle (see for instance Hansen and Pinto 1995; for a recent overall overview of the field of fallacy theory, see Johnson and Blair 2006). The key notion is that of a fallacy. Here is a textbook definition:

> It is customary in the study of logic to reserve the term "fallacy" for arguments that are *psychologically* persuasive but *logically* incorrect; that *do* as a matter of fact persuade but, given certain argumentative standards, *shouldn't*. We therefore define "fallacy" as a type of argument that *seems* to be correct but that proves, on examination, not to be so. (Copi and Burgess-Jackson 1996, 97; emphasis in the original)

The definition thus makes use of the modal auxiliary verb *should* and of the criterion of "certain argumentative standards," and these mean that identifying an informal fallacy involves making normative judgments about the nature and content of arguments. It may be noted here that fallacies are of two types, formal and informal. The former can be identified by their form, the latter cannot. (Further on the distinction, see Copi and Burgess-Jackson 1996, 97). It is fallacies of the latter type that turn out to be useful in the analysis of the procedural debates on the Bill of Rights in the summer of 1789. Such fallacies are discussed further in Chapter 2.

Following Chapters 2 and 3, which are devoted to the procedural debates in the summer of 1789, Chapter 4 turns to a discussion of a series of debates in the House of Representatives in November 1794. These debates are of interest because they shed light on the question of how the notion of freedom of speech was understood in the first years of the American Republic. The procedural debates of 1789 are important to the history of freedom of speech because in these debates the very fate of the Bill of Rights hung in the balance. But neither the procedural debates nor the subsequent debates on the Bill of Rights in the House of Representatives in the summer of 1789 shed much light on the question of how the concept of freedom of speech and of the press was understood in the earliest years of the American Republic. It is in this respect that the debates of 1794 are helpful, for they do shed light on the substance of the concept of freedom of speech and of the press. This is of added interest because James Madison, the Father of the Bill of Rights and of the First Amendment, was still a member of the House of Representatives and also took part in the debates of 1794.

Some features of the debates of 1794 are also of interest because they point forward to the Sedition Act of 1798. The debates that preceded the enactment of this Act are examined in Chapter 5. In the course of the 1790s the Federalists and the Republicans had solidified as the two parties in the early Republic. As regards foreign policy, it is possible to say that Federalists, whose power base was in New England and especially in Massachusetts and Connecticut, tended to place an emphasis on close relations with Great Britain, and that Republicans, whose power base was in Virginia, tended to have sympathies with France. John Adams was a Federalist, and during his tenure the United States went through what has been called the Quasi-War with France. The Federalists had a majority in Congress in 1798 and, over strong Republican opposition, they enacted the Sedition Act of 1798. One key provision of the Act was to prohibit anyone from writing, printing, uttering or publishing "any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent ... to bring them, or either of them, into disrepute," and this provision was used against Republican opponents of the Federalist Adams Administration. Here is an encyclopedic description of the Act:

> The Sedition Act of 1798 reestablished the English common law on seditious libel, with some important changes. The new law accepted the idea of jury determination of sedition and also allowed truth to

> be considered in defense. But the Sedition Act did not clearly differentiate between malicious libel and political opinionation. The conviction of several newspaper editors and a Republican congressman confirmed fears that the law was being used to settle political scores. (Kutler 2003, 301)

The Sedition Act clearly threatened the very survival of freedom of speech and of the press in the United States. Chapter 5 examines the debates in the House of Representatives that led to the enactment of the Sedition Act. The focus is on the arguments used by proponents of the Sedition Act in its favor, and on the arguments of those opposed to the Act. It is argued that the framework of informal fallacies can again be employed to help analyze some of the speeches in the Congressional debates on the Act. Chapter 6 offers comments on the operation of the Sedition Act, and it illustrates some critical responses to it after its enactment. The chapter also offers a brief account of the Federalist attempt in 1801 to make the Sedition Act permanent. When it was enacted, the Act was set to expire in March 1801, but in January 1801 – when the fate of the Presidential election was still in limbo in the House of Representatives – the Federalist majority engaged in an attempt to enact it as a permanent law. That attempt proved futile and, after Jefferson had been elected President, the majority of the House of Representatives turned against making the Sedition Act permanent, and the Act expired on March 3, 1801. After Thomas Jefferson had been inaugurated, he pardoned all those convicted under the Sedition Act of 1798. The new Republican Administration repudiated the Federalist Sedition Act of 1798, and did not seek a Federal sedition law of their own.

In 1809 Thomas Jefferson was succeeded as President by his fellow Republican James Madison. During his tenure relations deteriorated with Great Britain for a number of reasons, including the impressment of American sailors into the Royal Navy during the Napoleonic Wars, and in 1812 the United States declared war on Great Britain. The declaration of war was approved by reasonable majorities in both Houses of Congress, but there was also a sizable minority in both Houses. In particular, Federalists, in opposition during Madison's Republican Administration, opposed the War of 1812. Many Federalist newspapers were also vociferous in their opposition to the War of 1812, especially in New England.

President Madison, of course, had been the Father of the Bill of Rights, including the First Amendment, and he had been very active in opposing the Sedition Act of 1798. However, it should be noted that

at the time of the Sedition Act controversy he was in opposition. By contrast, during the War of 1812 he was in office as President and his party was dominant in Congress, and the harsh attacks on him and his administration in Federalist newspapers put his commitment to the cause of freedom of speech to the test. In the autumn of 1814 Federalists in Massachusetts and Connecticut went so far as to call the Hartford Convention to consider their position in opposition to the war and in opposition to the Madison Administration. Chapter 7 investigates the nature and the content of attacks on the Madison Administration in two major Federalist newspapers, the *Boston Gazette* and the *Connecticut Mirror*, during the War of 1812. These newspapers have been chosen in order to pay attention to Federalist writings in the two major Federalist strongholds of Massachusetts and Connecticut during the War of 1812. In a final section, Chapter 7 also illustrates and examines Federalist writings relating to the Hartford Convention. In this section the sources are mainly two other major Federalist newspapers, the *Boston Daily Advertiser* and the *Columbian Centinel*.

The theoretical perspective employed in Chapter 7 is that of politeness theory, or, more appropriately, that of impoliteness theory. Politeness theory derives mainly from Brown and Levinson ([1978] 1987), and its key concept is the notion of face, "the public self-image that every member wants to claim for himself" (Brown and Levinson 1987, 61), which comes with a distinction between negative face, the "basic claim to territories, personal preserves, rights to non-distraction," and positive face, the "positive consistent self-image or 'personality'... claimed by the interactants" (Brown and Levinson 1987, 61). Politeness may be viewed as involving strategies designed to enhance face and to minimize face threats. Much less work has been done on impoliteness theory than on politeness theory, but the key concept of impoliteness may be defined as "communicative strategies designed to attack face, and thereby cause social conflict and disharmony" (Culpeper, Bousfield and Wichman 2003, 1546; see also Culpeper 2011, 23).[2] In recent years linguistic pragmatics has turned towards impoliteness as a legitimate object of study, and Chapter 7 seeks to contribute to this new research. In brief, the chapter identifies different types of verbal attacks launched by Federalists against the Madison Administration during the War of 1812, and documents the astonishing lengths to which Federalists were ready to go in their opposition to the Madison Administration.

Despite the Federalist attacks on him, James Madison did not take any steps to enact a Sedition Act during the War of 1812. His forbearance established a precedent for the toleration of dissent in the United States,

even during war time, and there was no Federal sedition law for over a century after the Sedition Act of 1798. However, the situation changed during the Democratic Wilson Administration in the first decades of the twentieth century. As early as December 1915 – over a year before the United States joined the Allies against Germany in the First World War – Wilson used noteworthy language in a message to Congress that was unmistakable in its emphasis on suppressing dissent and political discussion. For instance, he spoke of citizens of the United States "...who have sought to bring the authority and good name of our Government into contempt," proposing that "[s]uch creatures of passion, disloyalty, and anarchy must be crushed out" (*Cong. Rec.*, December 7, 1915, 99).[3] This language was reminiscent of the Sedition Act of 1798, and in 1917 the Wilson Administration pushed hard for a censorship provision to be included in the Espionage Act of 1917. In spite of President Wilson's actions, that effort failed. However, the Wilson Administration played a large part in generating and encouraging an atmosphere of hysteria over claims of disloyalty in the country, and only about a year later Congress enacted the Sedition Act of 1918. The Act was supported by some Republicans, but it was largely pushed through by the Democratic Party under Wilson's leadership. Here is an encyclopedic summary of some aspects of the Sedition Act of 1918:

> The Sedition Act of 1918 made it a felony to interfere in the war effort; to insult the government, the Constitution, or the armed forces; or "by word or act [to] oppose the cause of the United States." This act departed from the 1798 measure in its emphasis on criticism of the government and its symbols. ... The Sedition Act hastened the spread of wartime xenophobic hysteria, climaxing in the red scare and the PALMER RAIDS. (Kutler 2003, 301)

The Congressional debates on the Espionage Act of 1917 and the Sedition Act of 1918 are long and complex, and cannot be fully analyzed in the present book. However, Chapter 8 examines two sets of debates on the Espionage Act in the House of Representatives in the spring of 1917, and it also examines a Senate debate on the Sedition Act in 1918. The focus is on proposed provisions in the two acts relevant to freedom of speech and of the press. Where appropriate, the methodological perspective of fallacy theory is again used to shed light on the debates.

The present book is offered as a contribution to elucidating the procedural debates that form an important stage in the enactment of the Bill of Rights, and to tracing and analyzing some of the major challenges to

freedom of speech in the United States in the subsequent period of the Early American Republic and during the First World War. The investigation is carried out on the basis of primary data from Congressional debates and views published in newspapers.

The analytic frameworks used are fallacy theory and politeness theory. These frameworks come from different research traditions, but they are linked in involving a focus on the speaker-hearer nexus in communication, on how certain messages are presented by speakers for certain purposes, and on how the messages in question are interpreted and perceived by hearers. Further, in both frameworks attention is paid to the notion of a norm and on what is appropriate verbal behavior in a certain linguistic and cultural context. These frameworks have generally not been used in the study of the historical documents in question[4] and, because of this fresh perspective, it is hoped that the investigation will yield new insights into our understanding of freedom of speech, one of the most important formative ideas in American political culture. It is also hoped that the theoretical perspectives of fallacy theory and politeness theory will benefit from being applied to the study of important historical texts in their contexts.

2

Informal Fallacies in Two Procedural Debates on the Bill of Rights in the Summer of 1789

1 Background and context of the procedural debates on amendments

As noted in Chapter 1, the First Amendment is at the heart of the openness and accountability that are characteristic features of American political culture. It is therefore of interest to inquire into the question of how it came to be enacted and whether there was opposition to it at the time it was proposed.

There was indeed a considerable amount of opposition, and this opposition should be understood in its historical context. When the first Congress met in the spring of 1789 the two political "parties" were the Federalists and the Antifederalists. The former tended to be cool towards amending the Constitution and including a Bill of Rights. After all, the Constitution had been in effect for only a very short time. There was also a deeper reason for Federalist doubts about, or opposition to, amending the Constitution. Federalists had been unhappy about the weakness of the Confederacy and one of their basic tenets was a belief in a strong Federal or central government. A Bill of Rights might undermine some of the powers of the Federal Government. Most of the delegates to the Constitutional Convention in Philadelphia in the summer of 1787 were Federalists, and when there was an attempt to include a Bill of Rights in the new Constitution it failed decisively.

For their part, Antifederalists were wary of a strong Federal government and more sympathetic to States' rights, and they had doubts about ratifying the new Constitution in the form it had been drafted. Antifederalists tended in general to be in favor of amendments.