

POPULAR CONSTITUTIONALISM IN PHILADELPHIA: How Freedom of the Press Was Won

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In the early days of the American republic, the Constitution was a do-it-yourself project. Though Americans had pioneered the idea of writing down the fundamental rules of their governments and treating these documents as a form of law, almost no one thought courts were or should be the sole means of enforcing those rules, as is the case in the 21st century. Following British constitutional tradition and their own instincts, early Americans believed that keeping government within its constitutional limits was a duty that fell ultimately upon the people themselves. The people elected officials to various branches and levels of government. If the competition among these different representatives and institutions could not check violations of the Constitution, or if the representatives proved unfaithful, it was up to the people to defend their own rights with their votes, their voices, and their bodies if necessary.

Thus the early battles for freedom of speech and especially the press were not achieved by lawyers winning verdicts that affirmed certain legal doctrines in court trials. Instead, these battles were won through the concrete actions of real people, many of the most important of them on the streets of Philadelphia.

The key figures in these fights were two remarkable editors and their newspaper, the *Philadelphia Aurora General Advertiser*, generally known simply as the *Aurora*. Benjamin

Franklin Bache, his namesake's favorite grandson, founded the newspaper in 1790, using the state-of-the-art printing operation his grandfather helped create on Market Street. Bache spent much of his childhood in France while Franklin was American minister there during the Revolution, even forgetting his native language for time. Bache's ardent sympathies with the French Revolution made his newspaper a goldmine of information but also led it to bitterly oppose the Washington administration's increasingly British-tilted foreign policy and to support the Democratic-Republican opposition figureheaded by Thomas Jefferson and James Madison. Feeling secure in his own status as a Founder's grandson, Bache was one of the few editors, even among the Republicans, who dared to criticize President Washington personally.

His assistant and successor William Duane arrived in America a refugee from British persecution twice over. An Irish printer, Duane emigrated to India and started a successful newspaper there, only to be summarily expelled from the country and stripped of his property for mild criticisms of the British East India Company. Finding work in the London printing trade, Duane was swept up in the working-class political reform movement that formed in response to the French Revolution, becoming a leader in the London Corresponding Society and a writer for the London radical press. Like many other radicals, Duane had to flee Britain when war with the French Republic broke out and the British authorities cracked down harshly on political dissent and public assemblies. A significant number of the refugee radicals, including Duane, ended up in America's political and publishing center, Philadelphia. Determined not to be bullied out of a third country, Duane naturally sided with the anti-British Republicans, publishing a pamphlet against President Washington soon after his arrival, and then joining the *Aurora*'s small staff.

This truculent duo produced a newspaper of unusual authority and almost boundless tenacity. The *Aurora* became not only the most nationally important newspaper Pennsylvania

would ever have, it also deserves much of the credit for vindicating and establishing the most basic understanding of press freedom we have in the United States, that the federal government is constitutionally prohibited from using the law to silence its political critics in the press. Instead of losing a court case, the government was beaten in court of public opinion.

Two Constitutionalisms

How such repression was even an option under what the Founders called a “free government” may require some explanation. It lies in the very different understandings of constitutionalism that were abroad in the Early American Republic.

The world’s first written constitutions were created by Pennsylvania and the other 12 original states at the beginning of American Revolution, to replace a British regime they believed had become abusive and tyrannical. These documents all included lengthy lists of the rights that the revolutionaries believed free governments were instituted to protect, as the British had not. Pennsylvania’s 1776 constitution stated, “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.”

If the early constitutions were all about protecting rights, the major purpose of the new federal constitution framed in 1787 was quite different: creating a stronger central government that could finance and defend the country without depending on the states. The new goal of expanding the power of the national state --- pushed by Alexander Hamilton and his coterie of wealthy, well-connected nationalists --- later the core of the Federalist party, led to a different, much less limiting form of constitutionalism. A bill of rights was intentionally left out of the document, and clauses were inserted to ensure that the new government had any powers deemed

“necessary and proper” to executing the duties specifically mentioned in the Constitution.

Hamilton later explained just how loose a limit this provided when he defined “necessary,” in a constitutional debate with Jefferson, as “no more than needful, requisite, incidental, useful, or conducive to.”

Almost immediately, this extremely lax form of constitutional interpretation was challenged by a popular constitutionalism that wanted limits more clearly marked out. Facing an outcry against the lack of a bill of rights, James Madison and other supporters of the federal constitution were forced to promise in the ratification conventions and the first congressional election campaigns that explicit protections for free expression and many other rights would be added as soon as the new federal government took office. Madison fulfilled this promise himself as a congressman, but framed his constitutional amendments very narrowly, to blunt their impact, or so he hoped: “Congress shall make no law . . . 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 grievances.”

Over time, Madison’s narrow wording would make the First Amendment much more usable in legal battles over civil liberties than it might have been. In the 1790s the wording largely served to shelve the Bill of Rights as a major impediment for the new government, along with many other constitutional details. Instead, President Washington and the man who acted as his prime minister, Alexander Hamilton, proceeded to set a series of precedents about how the government would actually operate, including the use of the “necessary and proper” clause to skate over seeming constitutional limitations to the implementation of their policies.

Meanwhile the American people seemed to embrace the Constitution, though apparently harboring a very different view of its purpose --- the protection of popular rights.

The Rise of Newspaper Politics

No one in the early federal government would have considered action against the press if not for the rise of the political divisions that eventually produced an opposition political party. This was a most unwelcome event for all the Founders, but especially so for conservatives like Washington and John Adams, who feared that their young republic would never survive the stresses of an internal conflict. The press was the first place the divisions spread to outside of Congress and the Cabinet. Believing that newspapers had been the Americans' greatest political weapon during the Revolution, Thomas Jefferson and James Madison had arranged the founding of a Philadelphia newspaper, the *National Gazette*, to take their objections to Hamilton's policies before the reading public. While politically effective, the paper was doomed after only two years by mismanagement and the scandal over its relationship with Secretary of State Jefferson, who had given editor Philip Freneau a no-work job in his office to help subsidize the paper.

Benjamin Franklin Bache stepped in to fill the gap. Adding *Aurora* to the *General Advertiser's* title, Bache took up the journalistic cudgels to defend the French Revolution and reverse the Washington administration's policies, which he saw as tantamount to a new, elective monarchy. One of the most controversial forms of the opposition movement the *Aurora* championed was the emergence of the political clubs historians have dubbed the Democratic-Republican Societies. Bache was a leader of the Philadelphia chapter along with a number of rising immigrant and working-class politicians, including people such as Dr. Michael Leib, Dr. James Reynolds, Thomas Leiper, and Israel Israel. All of their activities and opinions were heavily featured in the *Aurora*, which served as the main form of publicity for their meetings and statements and the main vehicle used in their campaigns for political office.

Washington and the Federalists who supported him regarded the Democratic Societies as completely illegitimate, the probable beginnings of revolutionary conspiracy; in a republic, the people had a right to vote for public officials, but anything more threatened anarchy or worse. Washington erroneously blamed the Democratic Societies for the western disturbances that became known the Whiskey Rebellion, a stance that forced most of the societies to disband but pushed their members into political activities that were far more dangerous to the Federalists in the long run, eventually including the organization of a political party instead of just debating clubs.

The *Aurora* soon attracted a small network of like-minded Republican newspapers in Boston, New York, and other major towns, all of whom republished each other's essays and satires and kept locals abreast of national political events. In a time when parties were completely uninstitutionalized, reading a party newspaper was the essence and only real embodiment of party membership.

At the same time, refugee radical journalists such as William Duane, James Thomson Callender, and James Carey had arrived to work in the Philadelphia press, writing for the *Aurora*, publishing their own books and pamphlets, and/or starting their own complementary newspapers. The opposition press came into its own during the 1795-96 controversy over the Jay Treaty, regarded in radical circles as a gross capitulation to the British that the American people would never accept. Though the Senate met in secret session to ratify the treaty, Bache obtained a leak of its contents, printed thousands of copies, and personally took some north to New York and Boston while a fellow Democratic Society member headed south. Giant political rallies met Bache at his major stops.

As it became apparent that this initial public pressure would fail to stop the treaty, Bache and his circle of Philadelphia radicals decided it was time to rob the Federalists of their favorite tactic. Repeatedly the people's personal veneration for George Washington had been used as a way to make critics of his administration's policies look churlish and treasonous, out to besmirch the great man himself. Beginning in October 1795, the Philadelphians launched an all-out assault on Washington's reputation that made the thin-skinned president's last months in office miserable. There had long been complaints that the Federalists surrounding Washington were trying to make him too much like a king, but now the real muckraking began.

The *Aurora* published a series documenting the fact that Washington's refusal to draw a salary as president was belied by his actual withdrawals from the treasury for expenses: the total yearly amount was considerably more than his salary would have been. According to *Aurora* contributor John Beckley, Washington was now more of a threat to constitutional liberty than its protector, making him a political kinsman to the great dictators of history: "Can the people feel respect for the constituted authorities of their country, when those very constituted authorities are the first to trample upon the laws and constitution of their country? . . . Will not the world be led to conclude that the mark of political hypocrisy has been alike worn by a *CEASAR*, a *CROMWELL* and a *WASHINGTON*?" From there the attacks actually escalated, delving into every aspect of Washington's life and career; among other faults, the president was accused of being a poor general during the Revolutionary War and, in William Duane's first American pamphlet, of being an enemy to "American Freedom" for holding "FIVE HUNDRED of the HUMAN SPECIES IN SLAVERY, enjoying the fruits of their labour without remuneration." The day Washington left office, the *Aurora* declared, should be a national holiday.

These over-the-top attacks took their toll on Washington politically and psychologically, reinforcing his decision not to stand for a third term in 1796. Led by their small network of newspapers, centered on the *Aurora*, the Democratic Republicans mounted a strong challenge to Washington's heir apparent, Vice President John Adams, but fell just short of electing Thomas Jefferson in 1796. At the same time, fear and anger toward the opposition and the increasingly belligerent French galvanized the Federalists, who mobilized the merchant community and not only won the presidency and approval of the Jay Treaty, but also, it turned out, the largest majority in Congress they would ever enjoy. When the French began attacking American ships and insulted American diplomats in 1797, the Federalist majority was ready for war. As has so often been the case throughout world history, the first target on which the war party trained their sights was the enemy within, in the form of the opposition press. The Philadelphia *Aurora* was Enemy #1.

Farewell to Liberty: The Alien and Sedition Acts

If possible, the Federalists had an even higher estimation of the power of the press than Jefferson and the Democratic Republicans did. "Give to any set of men the command of the press, and you give them command of the country," complained Judge Alexander Addison. Thus the press was far too dangerous to leave in the hands of men like Bache and Duane, whom they considered unprincipled foreigners and dangerous incendiaries. There was raw politics in this determination, a desire to shut down their critics, but also raw fear. The bloody "spirit of jacobinism" had acquired "a more, gigantic body" and was "armed with more powerful weapons than it ever before possessed," Alexander Hamilton wrote after the Republican press forced him to publicly admit a sexual indiscretion in 1797. "It threatens more extensive and complicated

mischiefs to the world than . . . the three great scourges of mankind, WAR PESTILENCE and FAMINE” and “the political and moral world with a complete overthrow.”

This was the mood in which the Federalist Congress put together the Alien and Sedition Acts, as part of a broader national security program, in 1798. The Alien Acts were aimed at the immigrant radicals working in the opposition press; the laws made it easier for the president to deport non-citizens he deemed to be threats and lengthened the delay for immigrants seeking citizenship rights. The Sedition Act made criticism of the government a criminal offense, imposing penalties of up to two thousand dollars and two years in prison on anyone who should “write, print, utter, publish, or shall cause or procure to be written, printed, uttered, or published . . . any false, scandalous and malicious writing or writings against the government of the United States . . . with intent to defame the said government . . . or to bring them . . . into contempt or disrepute; or to excite against them the hatred of the good people of the United States.” Naturally it was almost impossible to engage in the normal activities of a democratic opposition, protesting a government policy or campaigning against an incumbent officer, without trying to bring them into some degree of public “contempt or dispute.” Following the most progressive legal standards of the day, the Sedition Act allowed defendants to exonerate themselves if they could prove their assertions were true. Yet, as Republicans pointed out, truth was useless as a defense in matters of political interpretation and opinion. In practice, and on the same grounds, most Federalist judges did not allow evidence of truth to be presented in the Sedition Act cases.

Long before there was such a thing as First Amendment Supreme Court case, the *Aurora* cited the “Congress shall make no law” stipulation as obviously barring something like the Sedition Act. The Federalists had introduced the legislation “from excessive love of the constitution,” the paper noted drily. Bache and Duane and their editorial allies had few illusions

about what it would take to overrule the law. The courts would be no help. Instead, the opposition would have to stand and fight in the arena of public debate, and eventually at the ballot box. Without such active citizenship, “no Constitution however excellent, ever yet secured, or ever will secure the interest of the governed against those who govern,” a widely re-published item asserted. Continued political criticism and organization against men in power was the only thing that could stop repressive, unconstitutional measures like the Sedition Act: “If through the fear of incurring the pain and penalties of this same sedition bill, individuals are deterred from animadverting on the conduct of those employed in public affairs, then farewell to Liberty.” Luckily, Benjamin Franklin Bache and William Duane either did not know the meaning of the word fear, or simply lacked the common sense to heed it. At any rate, they were far from deterred.

Pain and Penalties

This popular constitutionalism only won out in the end because the *Aurora* and the Republican newspaper network it led were still standing in 1801 when Thomas Jefferson and a new congressional majority took office, self-consciously owing much of their victory to what the press had done. In fact, there were many more Democratic Republican newspapers during the election of 1800 than there had been before the Sedition Act, and the *Aurora* had grown even more influential.

The Federalists failed to suppress the Republican press, but not for lack of trying, mounting a strenuous pogrom against the Republican press and its supporters. Both *Aurora* editors and most of the other major Republican journalists were prosecuted under the new laws, but the harassments went far beyond the Sedition Act. In May 1798, mobs twice attacked the

Aurora office, which was also the Bache family home. On two other occasions that year, Bache was physically assaulted, in addition to myriad verbal insults and social snubs aimed at the editor and his family.

The legal harassment of the *Aurora* actually began before the Sedition Act was even law. When Bache obtained and published a copy of a conciliatory diplomatic letter from the French foreign minister, the Adams administration made but failed to prove charges of “treasonable correspondence” against Bache. Dropping that effort, the federal government then had Bache arrested and charged with seditious libel, without benefit of a statute, for some of the remarks he had made in the *Aurora* defending himself against the treason accusation. Far from quieting Bache, these tactics resulted in a long summer of invective and detailed accounts of the questionable proceedings against the editor, all summed up in a pamphlet about the attempted suppression of the *Aurora*, *Truth Will Out!* Bache was out on bail and awaiting trial when he died of yellow fever in the September 1798 epidemic.

His successor William Duane, who re-launched the *Aurora* in November 1798, endured an even more epic struggle with the authorities than Bache. Duane’s American legal troubles began in February 1799 when he and three other Irishmen were charged with “seditious riot” for trying to collect signatures on a memorial against the Alien Acts after services at St. Mary’s Catholic Church. Acquitted in a circus-like trial, Duane was immediately targeted again, for insinuations that British secret service money had influenced American politics. Unfortunately for the prosecutors, the *Aurora* had obtained a letter making the very same charge from the hand of John Adams himself, during his vice presidency. With Adams’ encouragement, Secretary of State Timothy Pickering combed through the *Aurora* for more actionable items and had Duane indicted again for criticizing the newly expanded federal military forces, which Republicans

believed were being used to frighten dissenters rather than preparing to fight the French. At the same time, machinery was set in motion to have Duane declared an undesirable alien and deported, despite the fact that he was born in New York.

The *Aurora*'s complaints about the troops brought on the most horrific attack on freedom of expression during this whole period, inflicted by Philadelphia soldiers returning from the expedition against the so-called Fries Rebellion in Northampton County. Irritated by Duane's comments on their misbehavior during the march, which had included the whipping of an editor in Reading, some thirty members of the city's silk-stocking volunteer cavalry forced their way into the *Aurora* office on May 15, 1799. Part of the group kept the newspaper's staff at bay with pistols, while the rest surrounded the editor at his desk. Duane offered to fight any one of the men "singly," was refused, and then further inflamed the angry soldiers by ostentatiously ignoring them, calmly putting away the papers on his desk and beginning to write a letter. At that point the leader of the group punched the insolent editor in the mouth, and the rest dragged him struggling into the street outside the office. There the soldiers formed a circle and took turns striking Duane, their largest man more often than the others. Their victim got back to his feet after each blow, until stunned by one to the back of his head. Duane's teenage son escaped from the guard in the office and forced his way into the ring to protect his father, only to be beaten back. Then the elder Duane was whipped for good measure. Injured but not intimidated, the editor rewarded his attackers with a long article recounting the incident in the next day's *Aurora* under the heading, "MORE OF GOOD ORDER AND REGULAR GOVERNMENT!"

Increasingly detailed bad publicity was the typical result of Federalist persecutions against the *Aurora*, effectively turning the suppression efforts back against those they meant to protect. When a Senate bill that would have changed Electoral College procedures to lessen

Republican chances was leaked and published in the *Aurora* in 1800, Duane was charged with contempt of Congress and forced into hiding for time; yet the paper continued to appear and kept up its steady barrage on the Federalists all the while, always adding to its long list of scandals and outrages. To the Republican editors who copied from the *Aurora*, these exploits made Duane a kind of folk hero and symbol of their cause. They dutifully reported on his troubles and reprinted his ripostes against the Federalist authorities, while the *Aurora* did likewise for the other Sedition Act targets.

Provided with such excellent material, the Republican press was seen as the crucial element in the defeat of John Adams that vindicated the constitutional protection of press freedom. This verdict was rendered by the electoral system and the court of public opinion, rather than courts of law. Thanks to a couple of tenacious Philadelphia newspaper editors, Federalist repression of the press had completely backfired, and the federal government would never try anything on a similar scale again.

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