



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 31
Number 2 *The Conservative Edition*

Article 6

May 2015

Tyranny of the Arrogant, Ignorant and Intolerant: The Liberal Movement to Undermine Free Speech

Hon. Loretta A. Preska

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [First Amendment Commons](#)

Recommended Citation

Preska, Hon. Loretta A. (2015) "Tyranny of the Arrogant, Ignorant and Intolerant: The Liberal Movement to Undermine Free Speech," *Touro Law Review*. Vol. 31: No. 2, Article 6.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol31/iss2/6>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

**TYRANNY OF THE ARROGANT, IGNORANT, AND
INTOLERANT:
THE LIBERAL MOVEMENT TO UNDERMINE FREE SPEECH**

Honorable Loretta A. Preska *

Publius Valerius Publicola,¹ born in the 6th century B.C., was one of four Roman aristocrats who led the overthrow of the Roman monarchy after the expulsion of its last king, Lucius Tarquinius Superbus.² In 509 B.C., commonly considered the first year of the Roman Republic, Publius became a Roman consul, the highest elected office of the new republic.³ It was this allegiance to his public, not to his power, that earned Publius the agnomen, or Roman nickname, Publicola, meaning “friend of the people.”⁴

But all of you undoubtedly recall the name Publius from a formative time in *our* [United States] history, rather than that of ancient Rome. For it was the penname under which James Madison, Alexander Hamilton, and John Jay wrote the Federalist Papers, a compilation of eighty-five articles and essays dedicated to helping shape democracy out of a monarchy.⁵

* Judge Preska was appointed United States District Judge for the Southern District of New York on August 12, 1992. From June 1, 2009, to the present, she serves as Chief Judge of that Court. Judge Preska received a B.A. from the College of St. Rose in Albany, New York,, a J.D. from Fordham University School of Law, and an LL.M. in Trade Regulation from New York University Law School. With gratitude, Judge Preska acknowledges the invaluable assistance of Celia Belmonte, a student at Georgetown Law School, in the preparation of this piece. This article is derived from a speech given by Judge Preska at the James Madison Award Dinner for the New York City Lawyers Chapter of the Federalist Society, on October 8, 2014.

¹ DAN T. COENAN, THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA 19-20 (2007).

² 1: A-M JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 271 (2005).

³ See *id.*; 19 GEORGE LONG, THE PENNY CYCLOPAEDIA OF THE DIFFUSION OF USEFUL KNOWLEDGE 109 (1841).

⁴ LHOMOND’S VIRI ROMAE 25-26 (Duval’s (Hachette, Paris) ed., Edward Roth trans., David McKay 1898).

⁵ THE FEDERALIST at viii (Clinton Rossiter ed., 1961).

In a letter to former United States Secretary of the Navy James Kirke Paulding on July 23, 1818, James Madison wrote that the “immediate object of . . . [the Federalist Papers] was to vindicate & recommend the new Constitution to the State of New York whose ratification of the instrument, was doubtful, as well as important.”⁶ He continued:

The papers were originally addressed to the people of N.Y. under the signature of a ‘Citizen of N.Y.’ This was changed for that of ‘Publius’ the first name of Valerius Publicola. A reason for the change was that one of the writers was not a Citizen of that State; another that the publication had diffused itself among most of the other States.⁷

Writing under a pseudonym was common at that time. In fact, Hamilton first published his independent work under the penname “Caesar.”⁸ But after the poor reception of one of his newspaper editorials under that nom de plume, Hamilton teamed up with Madison and Jay, ditched Caesar, and replaced him with a friendlier ancient Roman figure—Publius.⁹

Under the name Publius, the three Founding Fathers could better demonstrate their commitment to democratic principles. The very act of writing the Federalist Papers was not only an embodiment of those values but was also an example of informed debate commonly practiced at that time.

But the Federalist Papers were more than a common political practice or academic exercise. The anonymity afforded by pen-names amplified debate, forcing major issues—and, most importantly, differing views of those issues—into the public consciousness. Hamilton and Madison could have engaged in these discussions exclusively behind closed doors. That they chose to do so both publicly and anonymously sharpened the focus on issues and opinions, rather than on presentation and messengers. Hamilton, Madison, and Jay thus created a unique forum, a space where “Publius” could debate the merits of an issue as an unrestricted public persona instead of a

⁶ 8 THE WRITINGS OF JAMES MADISON 410 (Gaillard Hunt ed., 1908) [hereinafter WRITINGS OF MADISON].

⁷ *Id.* at 410-11.

⁸ EDWIN ERLE SPARKS, THE UNITED STATES OF AMERICA: 1783-1830, pt. 1, at 107 (1904).

⁹ See COENAN, *supra* note 1, at 5; see VILE, *supra* note 2, at 269-71; see WRITINGS OF MADISON, *supra* note 6.

known political quantity. The biases associated with “Hamilton” and “Madison” were replaced by the clear-headedness of “Publius,” re-framing debate for the public in clear and collective terms. “Publius” spearheaded the Founding Fathers’ concerted effort to foster debate by an enlightened citizenry.

This ethos guided decision-making at the outset of the republic. The Neutrality Controversy saw Hamilton, writing as Pacificus,¹⁰ debating against Madison, writing as Helvidius,¹¹ on the heels of President George Washington’s 1793 Proclamation of Neutrality.¹² Hamilton also entered into a fiery discussion with Robert Yates, who wrote as Brutus,¹³ over the legitimacy of judicial review¹⁴ and similarly against Richard Henry Lee over the inclusion of a Bill of Rights in the Constitution.¹⁵

These debates displayed the reasons behind, and animating principles of, the First Amendment: protecting a system of democratic self-government, discovering truth, advancing autonomy, and promoting tolerance.

However, this fundamental American right of free speech has not gone unchallenged. Throughout our history we have seen individuals in positions of power attempting to erode what truly makes America the land of the *free*.

Today, for example, there is the specter of fifty-four Senators trying to amend the First Amendment’s glorious protection of freedom of speech in the name of political correctness.¹⁶

Perhaps as the 1798 analog to these Senators’ efforts, President John Adams and his Federalist party spearheaded the passage of

¹⁰ See WRITINGS OF MADISON, *supra* note 6; ALEXANDER HAMILTON AND JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1797, at 8 (Morton J. Frisch ed., 2007) [hereinafter PACIFICUS-HELVIDIUS DEBATES].

¹¹ PACIFICUS-HELVIDIUS DEBATES, *supra* note 10, at xi.

¹² President George Washington, The Proclamation of Neutrality 1793 (Apr. 22, 1793), available at http://avalon.law.yale.edu/18th_century/neutra93.asp.

¹³ THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 269 (Ralph Ketcham ed., 1986) [hereinafter ANTI-FEDERALIST PAPERS AND CONSTITUTIONAL CONVENTION DEBATES].

¹⁴ THE FEDERALIST NO. 78, at 464 (Alexander Hamilton); Robert Yates (Brutus), Essay XI (Jan. 31, 1788), in THE U.S. CONSTITUTION: A READER 373 (Hillsdale College Press ed. 2012).

¹⁵ ANTI-FEDERALIST PAPERS AND CONSTITUTIONAL CONVENTION DEBATES, *supra* note 13, at 256-57.

¹⁶ Stephen Dinan, *GOP Blocks Democrats’ Push to Rewrite First Amendment Campaign Spending*, WASH. TIMES (Sept. 11, 2014), <http://www.washingtontimes.com/news/2014/sep/11/gop-blocks-democrats-push-rewrite-first-amendment-/>.

four laws, known collectively as the Alien and Sedition Acts.¹⁷ The Sedition Act declared that any treasonable activity, including the publication of “any false, scandalous and malicious writing,” was a high misdemeanor, punishable by fine and imprisonment.¹⁸

Two infamous Circuit Court cases followed: *United States v. Lyon*¹⁹ and *United States v. Callender*.²⁰ Matthew Lyon, a Democratic-Republican congressman from Vermont, was fined \$1,000 and sentenced to four months in jail for penning an essay accusing the Adams administration of “ridiculous pomp, foolish adulation, and selfish avarice.”²¹ Pretty tame stuff.

James Thomson Callender, a Democratic-Republican journalist and book author, was fined \$200 and sentenced to nine months in prison for calling the President a “repulsive pedant, a gross hypocrite and an unprincipled oppressor.”²² *Lyon* and *Callender* were two of fourteen criminal prosecutions, most of which were against newspapers run by Democratic-Republicans, today an oxymoronic title but back then the main opposition to the Federalist party. Despite challenges to these convictions, the Circuit Courts, erroneously, I suggest, upheld the Sedition Act’s constitutionality.

James Madison and Thomas Jefferson responded to what they believed was an abuse of power and a blasphemous distortion of the First Amendment’s meaning. In his Virginia Resolution, Madison echoed the sentiments he fought so hard to cement in the First Amendment. Madison wrote: “[the Sedition Act] . . . ought to produce universal alarm, because it is levelled against . . . [the] right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.”²³

¹⁷ Naturalization Act, ch. 54, 1 Stat. 566(1798); Alien Friends Act, ch. 58, 1 Stat. 570 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798); *Primary Documents in American History, Alien and Sedition Acts*, LIBRARY OF CONG., available at <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html> (last visited Jan. 5, 2014).

¹⁸ Sedition Act, 1 Stat. 596.

¹⁹ *United States v. Lyon (Lyon’s Case)*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646).

²⁰ *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

²¹ Bruce A. Ragsdale, *The Sedition Act Trials*, in *FEDERAL TRIALS AND GREAT DEBATES IN UNITED STATES HISTORY* 3-4 (2005), available at <http://www.fjc.gov/history/docs/seditionacts.pdf>.

²² JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 217-19 (1951).

²³ James Madison, *Virginia Resolution of 1798* (Dec. 21, 1798), available at http://www.constitution.org/cons/vir_g1798.htm.

Adams's harsh laws ultimately cost him re-election in 1800. His support of the Sedition Act led to a public uproar, with many accusing Adams of favoring Great Britain in order to promote aristocratic values.²⁴ Immediately upon taking office, the victor, Thomas Jefferson, pardoned all those convicted under the act.²⁵

The Sedition Act was not the first time the freedom of speech clause survived possible dismantling—indeed, Congress spent nearly four months debating and proposing to alter Madison's draft before ultimately adopting it with only superficial changes.²⁶ Nonetheless, in his address to Congress on June 8, 1789, Madison made clear that a power hungry President and a scrutinizing Senate Committee were *not* the most dangerous threats to the First Amendment's durability.²⁷ Rather, Madison warned:

The prescriptions in favor of liberty, ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this is not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.²⁸

It was the majority, Madison believed, that could best chill the speech of factions it deemed unworthy or incorrect. Therefore, on the day of his death in 1836, Madison left his nation with a final ominous warning: “[t]he advice nearest to my heart and deepest in my convictions is that the Union of the States be cherished and perpetuated. Let the open enemy to it be regarded as a Pandora with her box opened.”²⁹

So who is that open enemy today, threatening fundamental American rights that should be cherished and perpetuated? Sadly, it is America herself and the arrogance, ignorance, and intolerance of her universities and politics, which have burst open Pandora's Box.

²⁴ See generally Richard J. Behn, *The Election of 1800-1801*, The Lehrman Institute, <http://www.lehrmaninstitute.org/history/1800.html#adams> (last visited Jan. 20, 2015).

²⁵ *American President: A Reference Resource*, MILLER CTR. AT THE UNIV. OF VA., <http://millercenter.org/president/jefferson/essays/biography/4> (last visited Jan. 20, 2015).

²⁶ See generally The Virginia Report of 1799-1800 (Da Capo Press ed., 1850), available at <http://www.constitution.org/rf/vr.htm>.

²⁷ See James Madison, Speech in Congress on the Removal Power (June 8, 1789), available at http://www.constitution.org/jm/17890608_removal.htm.

²⁸ *Id.*

²⁹ 4 THE VIRGINIA HISTORICAL REGISTER, AND LITERARY NOTE BOOK 118 (William Maxwell ed., 1854).

Madison must be turning over in his grave.

What has become of the great nation his Publius took to the quill to fight for? There is no better indication of the current sad state of the First Amendment than the ill treatment of conservative commencement speakers during this past spring's college graduation season.³⁰ Somehow academia has become the "friend of the *liberal*" instead of the "friend of *the people*;" a place, as Mayor Michael Bloomberg noted in his commencement address at Harvard, where a liberal arts education has turned into "an education in the art of liberalism."³¹

As bastions of intolerance, universities are promoting a single ideology instead of acting as welcoming, neutral forums for debate. In censoring unpopular viewpoints, they rob the marketplace of ideas of its substance and consequently silence the critical debating practice that our Founding Fathers routinely turned to in ironing out the nation's most complex issues. Mayor Bloomberg added: "There is an idea floating around college campuses—including here at Harvard—that scholars should be funded only if their work conforms to a particular view of justice. There's a word for that idea: censorship. And it is just a modern-day form of McCarthyism."³² This modern-day McCarthyism has run rampant across college campuses.

In May, Condoleezza Rice, former Secretary of State and Provost of Stanford University, backed out of Rutgers University's commencement after a chemistry professor successfully urged faculty and students to oppose her selection as speaker.³³ In response, Dr. Rice wrote: "I am honored to have served my country. I have defended America's belief in free speech and the exchange of ideas.

³⁰ See, e.g., Harry Enten, *The Disappearance of Conservative Commencement Speakers*, FIVETHIRTYEIGHT (May 28, 2014, 11:23 AM), <http://fivethirtyeight.com/datalab/the-disappearance-of-conservative-commencement-speakers/>; see also *Conservatism Constrained on College Campuses this Commencement Season*, COLL. REPUBLICAN NAT'L COMM. (June 7, 2014), <http://www.crtc.org/conservatism-constrained-college-campuses-commencement-season/>.

³¹ See, e.g., *Mike Bloomberg Delivers Remarks at Harvard University's 363rd Commencement Ceremony*, MIKE BLOOMBERG (May 29, 2014), <http://www.mikebloomberg.com/index.cfm?objectid=4D9E60A5-5056-9A3E-D07D6B773CAD46E4> [hereinafter *Harvard Commencement*]; see also Scott Malone and Daniel Lovering, *Bloomberg bashes liberal McCarthyism at Harvard Commencement*, REUTERS (May 29, 2014), <http://www.reuters.com/article/2014/05/29/us-usa-harvard-bloombergidUSKBN0E92BI20140529>.

³² See *Harvard Commencement*, *supra* note 31.

³³ Susan Snyder, *Commence the Firestorms*, PHILLY.COM (Apr. 7, 2014), http://articles.philly.com/2014-04-07/news/48912078_1_commencement-speaker-baccalaureate-ceremony-morehouse-college.

These values are essential to the health of our democracy.”³⁴ Apparently the Rutgers community disagreed.

In 2012, College Republicans at Fordham University invited Ann Coulter to speak on campus. Even at Fordham, a university located here in New York at the center of the known universe where I served on the Board for six years, the uproar caused the group unceremoniously to rescind the invitation.³⁵

In October, former New York City Police Commissioner Ray Kelly was booed off stage by student protesters at Brown University before he even had the opportunity to speak.³⁶ In response, University President Christina Paxson condemned Commissioner Kelly’s treatment, writing: “our University is—above all else—about the free exchange of ideas. Nothing is more antithetical to that value than preventing someone from speaking and other members of the community from hearing that speech and challenging it vigorously in a robust yet civil manner.”³⁷

This is because, as Madison put it nearly 200 years ago, “the advancement and diffusion of knowledge is the only guardian of true liberty.”³⁸ Nothing is advanced or diffused when we destroy the channels of and opportunities for open and free communication. And university students and faculty are not the only Americans who need to be reminded of Publius’ charge.

The struggle over the modern interpretation of the First Amendment has also made a battlefield of our courts. Most recently, conservatives were on the winning side, securing vital victories in *Citizens United v. Federal Election Commission*³⁹ in 2010 and *McCutcheon v. Federal Election Commission*⁴⁰ in 2014. The Su-

³⁴ Emma G. Fitzsimmons, *Condoleezza Rice Backs Out of Rutgers Speech After Student Protests*, N.Y. TIMES, May 4, 2014, at A27.

³⁵ Laura Sanicola, *Larry Kudlow, James Vacca Headline for College Republicans and Democrats*, THE FORDHAM RAM (Mar. 27, 2014), <http://fordhamram.com/2014/03/27/larry-kudlow-james-vacca-headline-for-college-republicans-and-democrats/>.

³⁶ Peter Jacobs, *Ray Kelly Was Booed Offstage by Student Protestors at Brown Before He Could Even Speak*, BUS. INSIDER (Oct. 29, 2013, 5:04 PM), <http://www.businessinsider.com/ray-kelly-was-booed-offstage-by-student-protestors-at-brown-before-he-could-even-speak-2013-10>.

³⁷ Christina H. Paxson, *Letter to the Brown Community*, BROWN UNIV. (Oct. 29, 2013), <http://www.brown.edu/about/administration/president/10-29-2013-Raymond-Kelly-talk-closed>.

³⁸ Letter from James Madison to George Thompson (June 30, 1825), *available at* <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-0472>.

³⁹ 558 U.S. 310 (2010).

⁴⁰ 134 S. Ct. 1434 (2014).

preme Court has thankfully recognized that financing political speech is still speech and is therefore protected by the Constitution—even if the speaker is a corporation or a labor union.⁴¹

But why do the restrictive speech laws which prompted these cases even exist? Justice Anthony Kennedy, writing for the majority in *Citizens United*, identified the same McCarthy-like suppression Madison feared 200 years ago when he wrote: “[t]he censorship we now confront is vast in its reach,” for “the electorate [has been] deprived of information, knowledge and opinion vital to its function.”⁴²

The Left’s recent movement actually to *amend* the Constitution to allow Congress to limit fundraising and spending on all-important political speech is perhaps the most troubling attack on our First Amendment freedom.⁴³ Such an amendment would rip Pandora’s Box wide open, for it could have the domino effect of allowing further restrictive amendments so vast, unknown, and alarming, that they would surely awaken Madison from his grave. Such an amendment would prove the truth of Madison’s observation in a letter to Thomas Jefferson:

In our Government, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from the acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.⁴⁴

Despite a liberal majority’s support of such an amendment, it simply does not fit within the America Madison envisioned.

In the 1919 Espionage Act case, *Abrams v. United States*,⁴⁵ Supreme Court Justice Oliver Wendell Holmes recognized Madison’s America, marking a turning point in the nation’s ill treatment of the First Amendment, and wrote what became known as his “Great Dis-

⁴¹ See *Citizens United*, 558 U.S. at 315 (noting “the Government may not suppress political speech based on the speaker’s corporate identity”); *McCutcheon*, 134 S. Ct. at 1462.

⁴² *Citizens United*, 558 U.S. at 354 (internal citations omitted).

⁴³ Hans A. von Spakovsky and Elizabeth Slattery, *Amending the First Amendment: How the Campaign Finance Amendment Will Silence Free Speech*, THE HERITAGE FOUNDATION, (June 2, 2014), <http://www.heritage.org/research/reports/2014/06/amending-the-first-amendment-how-the-campaign-finance-amendment-will-silence-free-speech>.

⁴⁴ 5 THE WRITINGS OF JAMES MADISON 272 (Gaillard Hunt ed., 1904).

⁴⁵ 250 U.S. 616 (1919).

sent.”⁴⁶ In it, Holmes advised that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe.”⁴⁷ In our time, we cannot let academia and political pressure relegate Justice Holmes’s sentiments, which led the majority in *Citizens United* and *McCutcheon*, back to the status of dissents once again. We cannot do that to the America Madison carved out of monarchy; to the republic Publius molded out of tyranny. That tyranny’s last Roman king, Lucius Tarquinius Superbus, was the antithesis of all that Publius stood for. While Publius was regarded by the Romans as their “friend,” Tarquin’s tyrannical reign earned him his agnomen “Superbus,” meaning “arrogant.”⁴⁸

The fate of these two ancient figures should serve as a warning to us against the backdrop of the battered state of American free speech: while narrow-mindedness led to Tarquin’s downfall, acceptance led to Publius’ immortality.

Madison, Hamilton and Jay needed a name that would conjure a sense of public-spiritedness in their plea to ratify the Constitution. Today, chilling speech, in whatever form it takes, tramples on the very spirit of Publius’ appeal. Infringing free speech not only makes us arrogant, ignorant, and intolerant, but it also makes today’s America the antithesis of all that our Founding Fathers hoped their nation would be.

The Federalist Society continues the Founding Fathers’ tradition of open and robust debate on questions of public importance. In this time of such danger to the First Amendment, we must redouble our efforts.

⁴⁶ *Id.* at 625-31 (Holmes, J., dissenting).

⁴⁷ *Id.* at 630.

⁴⁸ 1 PLUTARCH, PARALLEL LIVES OF NOBLE GRECIANS AND ROMANS 176 (2001).