

The First Amendment and Progress

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THE FIRST AMENDMENT has been explored at great length by legal, constitutional, and jurisprudential scholars. Despite the voluminous nature of the research, critical clarification of this constitutional clause has been hampered by a failure on the part of many commentators to penetrate to principle. Underlying the various legal positions on freedom of speech and the role of religion in public life are various ideas and sentiments with traceable lines of meaning which extend back over the centuries. This paper will attempt to transcend the practical, prudential and legal questions surrounding the First Amendment by extrapolating the general philosophies which motivate the various legal positions.

The two greatest theoretical influences upon interpretations of the First Amendment are found in the older tradition of British common law and constitutionalism and the newer currents of thought brought on by the Enlightenment. Both intellectual traditions could support the existence of a Bill of Rights. Both traditions could agree on some kind of separation of church and state as well as a "right" to freedom of speech and the press. This agreement over wording, however, was not an agreement in principle. The two traditions embodied fundamentally incompatible views on the nature of man and the purpose of government. Owing to the pressing necessities of political events, however, there was no conscious clash between these theories at the Founding. The struggles over a general theory for interpreting the First Amendment would be decided later.

The history of constitutional theory regarding the First

Amendment is marked by the intellectual competition between the Enlightenment view of man and that of an older tradition. In recent decades, the victory of Enlightenment theory has approached completeness. Without an understanding of this intellectual revolution, the theory behind current First Amendment decisions will continue to remain opaque both for those who favor and those who oppose the current state of American jurisprudence in this area.

The intellectual tradition with the greatest influence upon the Founders was that of English common law and constitutionalism. Most Americans understood their Revolution in

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the wider context of British history since the Magna Carta, which affirmed a popular right to check the sometimes arbitrary authority of the Crown. "The history of the present king," wrote Jefferson in the Declaration of Independence, "is a history of repeated injuries and usurpations." These injuries, such as taxing without consent or quartering troops, were some of the very same charges made against the Crown in England itself. In fact, the grandiose opening sentences of the Declaration sometimes overshadow its long list of practical grievances which any educated Englishman would have understood as part and parcel of the debates over British constitutionalism.

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