Putting Beliefs on Trial: Laws of Cultural Orthodoxy and Dissent

James H. Landman

Images of heretics burning at the stake or of traitors being drawn, hanged, and quartered for disloyalty to the king seem well removed from twenty-first century America. Yet the laws that defined these offenses—which included heresy and blasphemy, sedition and treason—were at the heart of some of the most significant debates defining the shape of the United States Constitution. To this day, they influence our freedom to follow the religion of our choice or to question public policies or the decisions of our lawmakers.

Although the United States now comprises a vast array of cultural influences, in its early years it was defined primarily in relation to England and its experience as an English colony. English legal traditions provided the material from which our constitutional structure was fashioned. The English legal heritage included a substantial body of law that attempted to regulate and enforce cultural standards of a religious or political character. The framers of our Constitution discarded or altered some of this material, but they also retained some of it completely. The result has been a recurring tension between the right of the individual to freedom of religious and political belief and attempts by the government to restrict the influence of unorthodox religious and political beliefs.

This article explores the history of English laws defining religious and political “orthodoxy”—adherence to cultural standards or norms—and the influence these laws had on the United States Constitution. Finally, it discusses the continuing force of this legal legacy in today’s United States.

Religious Orthodoxy and Dissent

With the 1531 ratification of the First Amendment’s provision that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” the United States attempted to establish the legal grounds for defusing what was then, and continues to be, one of the most volatile sources of cultural strife—clashes between conflicting cultures of religious belief. It also attempted to separate what in English law had long been a powerful alliance between church and state, in which an offense against one was often treated as an offense against the other and political and religious orthodoxy went hand in hand.

Establishing Religious Orthodoxy: The English Experience

Even before the establishment of the Church of England as the official church during the Protestant reformation, English monarchs had been the enforcers of religious orthodoxy. In 1401, the English government passed a far-reaching statute against heresy, De Haereticis Comburenti (“On the Burning of Heretics”). This statute followed the Peasants’ Revolt of 1381, which had rocked the established order and been nourished by Lollard religious teachings deemed heretical by the church.

From 1401 on, convicted heretics in England faced the mutual interest of the state and church in enforcing both political and religious orthodoxy. Under the law of heresy, the ecclesiastical court determined guilt, but the threat of being burnt at the stake’s hands hung over those convicted heretics who refused to publicly recant their beliefs or who returned to their heretical practices after they had once been convicted. Although relatively few heretics were burned in England, the threat of burning gave the church a powerful tool in enforcing religious orthodoxy.

Heresy trials continued into the seventeenth century, although the religion whose orthodoxy was maintained shifted abruptly during the sixteenth century’s struggles between Roman Catholicism and the newly established Church of England. Edward Wightman was, in 1612, the last person in England to be burnt at the stake for his religious beliefs. Official enforcement of religious orthodoxy did not, however, wane with heresy trials. It instead sought to control cultures of religious belief through nonconformity legislation and the crime of blasphemy.

If anything, the links between religious dissent and political sedition that underpinned the participation of secular authorities in the punishment of condemned heretics only intensified when the English monarchy broke with the Roman Catholic Church and established itself as the Church of England’s head. Civil and ecclesiastical jurisdictions were brought together under the monarch, and an attack on the doctrine of the established church could even more easily be interpreted as an attack on the king or queen. A series of laws defined and enforced an official English religious culture that was backed by and identified with the state. Acts excluding members of nonconforming faiths (including Roman Catholicism, certain Protestant sects, and Judaism) from public office were not fully repealed until well into the nineteenth century.

The accusation of blasphemy also emerged in the sixteenth century as a
On January 26, 1972, the FBI advised that John Winston Lennon, who was formerly associated with the Beatles music group, had donated seventy-five thousand dollars to the Alliance for the Tribal Nation, to further their cause of New Left activities.

On January 26, 1972, the FBI advised that the Alliance for the Tribal Nation had changed its name to the Alliance Information Center (AIC), to be more effectively known to the general public.

On February 5, 1972, the FBI advised that several members of the Peoples Coalition for Peace and Justice from Washington, DC, had transferred to the PCPJ office in New York City to work on EBIC-

The PCPJ is self-described as an organization consisting of over 100 organizations using massive civil disobedience to combat war.

Office is located at 126 5th Avenue, New York City, Room 327.
powerful tool to control religious culture in England. As trials of heresy began to wane over the sixteenth century, trials for blasphemy began to intensify. Blasphemy is a statement or act that is found to provoke or offend religious sensibilities. It had been part of ecclesiastical courts’ jurisdiction in the Middle Ages, but with the bringing together of church and state in England, the ecclesiastical offense was absorbed by the secular courts. Like its secular counterpart, sedition libel (discussed below), blasphemy was originally tried in Star Chamber, an extension of the king’s council, which flourished as a judicial tribunal under the Tudor and Stuart monarchs. With the abolition of Star Chamber in 1641, the crime of blasphemy was reestablished as a common law offense.

Because the English church and crown were one in the same, blasphemy was often a political as well as a religious accusation. This melding of the political and religious was expressly confirmed in Lord Chief Justice Hale’s famous seventeenth-century statement that “to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved . . . and therefore to reproach the Christian religion is to speak in subversion of the law.” Indeed, charges of blasphemous and seditious libel became practically interchangeable—both were perceived as attacks on the state.

The offense of blasphemy is determined according to its offense to community standards, and it thus inevitably involves the judgment of the majority religious culture against a dissident expression of belief or of disbelief. It also means that the blasphemous nature of an utterance or publication cannot be determined until the community responds—if the community does not take offense, the utterance is not blasphemous. William Blackstone held that “where blasphemous, immoral, treasonable, scismatical, seditious, or scandalous libels are punished by the English law, . . . the liberty of the press is by no means infringed or violated. . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.” What such laws can produce, however, is a self-censoring culture. Even though the law imposes no “prior restraints,” religious orthodoxy is upheld through the fear of being tried if a statement or publication is found to give offense after the fact.

Blasphemy, which many thought to be “dead letter law” as of the mid-twentieth century, has made an unexpected return to English legal thought in recent years, and looks increasingly anachronistic as the protector of established church doctrine in a now multicultural and multi-religious England. Since the 1970s, at least two publications in England have been successfully tried for blasphemously offending Christian beliefs. In one of these cases, Regina v. Gay News Ltd., the House of Lords held that it was not necessary for the prosecution to prove a specific intent to blaspheme if a publication is in fact blasphemous, thus attesting to the continued vitality of Blackstone’s eighteenth-century commentary on blasphemous libel.

At the same time, the English courts have affirmed that blasphemy still applies only to Christianity, particularly as defined by the Anglican Church. England now has a significant minority Muslim population, and following the publication of Salman Rushdie’s Satanic Verses, an attempt was made to have a summons of blasphemy issued against Rushdie and his publishers. The attempt failed because, as Lord Justice Watkins declared, “[w]e have no doubt that as the law stands it does not extend to religions other than Christianity.” And indeed, it is far from certain that a law of blasphemy that was not faith-specific could prove workable in a multicultural religious society. From the standpoint of many religions, the observance of another faith carries with it an implicit denial of the first religion’s sacred truths, which might in itself be considered blasphemous.

The Constitutional Response: The Free Exercise and Establishment Clauses

It is highly unlikely that a blasphemy law limited to protecting Christian sensibilities would withstand judicial scrutiny in the United States today. The First Amendment’s free exercise and establishment clauses were a direct response to the English experience of an established church, and they laid the groundwork for dismantling of a legal structure that had promoted religious conformity and prosecuted religious dissent. But what has been the practical effect of this legal dismantling on religious cultures—both majority and minority—in the United States?

Historically, the record has been mixed. For most of our history, the majority of Americans have practiced some form of Christian Protestantism. While legal attempts to overly ban or suppress the practice of other faiths have been rare, legislators at both the national and state levels have demonstrated considerable imagination in passing laws that ostensibly promote a state purpose while adversely affecting the ability of minority religious cultures to practice their beliefs.

In 1925, for example, the U.S. Supreme Court in Pierce v. Society of Sisters declared unconstitutional an Oregon state law that required all children between eight and sixteen to attend public school. Public schools at that time still played a significant role in inculcating Anglo-Protestant moral values. On the surface, the Oregon law promoted the state’s interest in ensuring an adequate education for its citizens. But it had the practical effect—implicitly acknowledged by the Supreme Court—of undermining a minority Roman Catholic culture that provided parents a religious school alternative to the moral education offered by the public school system. A similar clash between majority and minority religious cultures at the national level underlay constitutional amendments first authorizing and then repealing liquor prohibition. The prohibition amendment has been read as an attempt to maintain an Anglo-Protestant morality against the cultural norms of Roman Catholic Irish and German immigrants.”

On the other hand, the First Amendment’s religious clauses have frustrated many faith-minded Americans who see establishment clause interpretations that, for example, ban prayer in school or at other public events as a restriction of their rights to freely exercise their religion, and even as a government assault on their religious beliefs. Law professor Stephen Carter is among those who have argued that the old
use of public schools to inculcate Protestant values has been replaced by a new project in which the public schools inculcate distinctly secular values that may in fact breed disrespect for religious beliefs.\(^3\)

At least one commentator has even questioned whether the First Amendment is preferable to blasphemy laws, noting that “nobody who has had inflicted upon them in the USA free publications of stunningly crude and violent racism or anti-Semitism can have absolute confidence that the First Amendment is the right antidote to blasphemy laws.” The same commentator argues, “ironically . . . legal religious freedom in the United States has served to protect and stimulate the growth of particularly aggressive and intolerant types of cult. The renunciation by government and law of ‘violence or compulsion’ in religious matters has produced an exponential increase in violent fundamentalism.”\(^3\)

The American experience may simply attest to the unavoidable tensions that result when strong cultures of belief are allowed to coexist in a society. The more flagrant government attempts to suppress religious minorities made earlier in America’s history have largely subsided, although the debate about the role of organized religion in America’s civic and cultural life maintains its vigor. Constitutional litigation continues to define the extent to which state actions impinge upon religious practice or unduly support particular faith traditions. But these issues now seem relatively removed from the English experience of an established orthodoxy, and more concerned with reconciling conflicts within a diverse American religious landscape.

**Political Orthodoxy and Dissent**

When Thomas Jefferson began his presidency in 1801, the young United States had just experienced its first encounter with federal laws designed to suppress and punish political dissent. One of his first acts as president was to pardon those convicted under these laws, the Alien and Sedition Acts of 1798. Yet the problem of political dissent has never been fully resolved in the United States, and in this area the English legal structure for trying unorthodox beliefs has had a particularly enduring influence on American law. The law of treason defined in our Constitution reflects the language of a medieval English statute, while some have argued that our First Amendment was meant to absorb the English common law of seditious libel.

**Treason**

The United States Constitution deliberately echoes portions of the English Treason Act of 1352 in its named offenses of “levying war against [the United States], or in adhering to their enemies, giving them aid and comfort.” These were the more concrete offenses of the English treason act. The framers of the Constitution required that treason be an overt act, and omitted a provision in the English Treason Act that made certain kinds of thoughts treasonous (under that act, having thoughts “compassing or imagining the death of the king” was considered treason).

**Sedition**

There have been few treason trials in United States history, and few controversies surrounding the interpretation of the Constitution’s relatively restrictive treason clauses. The continuing force in American law of the English common law of seditious libel, which complemented treason law, is far more controversial. A more flexible law aimed at controlling political dissidents, seditious libel developed as the secular counterpart of blasphemous libel, providing the basis for trials of dissent against the crown or its government that did not have a religious component. Seditious libel was a creation of the Star Chamber, the administrative tribunal established by the sixteenth-century Tudor monarchs whose members served at the monarch’s pleasure. Star Chamber was not bound by common law procedures—trial by jury, for example, was not required—and although it could not impose capital punishment (it had no jurisdiction over felonies), it could impose corporal punishments such as branding, mainining, and whipping.

In 1606, in a case titled *De Libellis Famosis*, Star Chamber defined seditious libel—criticism of public persons or the government—as a crime because it tended to undermine respect for public authority. Moreover, since the crime was based upon the need to maintain public respect for the government and its agents, truth could not be a defense against a seditious libel charge. Indeed, truth did not become admissible as evidence in English libel trials until 1842. Star Chamber was dissolved as a tribunal in 1641, but Charles II proclaimed seditious libel a common law offense in 1679. The problem of having to submit the issue of libel to a jury, which might be sympathetic to the accused’s statements, was circumvented by having the judge determine whether the speech was seditious, leaving to the jury only a decision as to whether publication of the speech had occurred.\(^4\) Note that William Blackstone’s eighteenth-century comments regarding libel and the freedom of speech apply to seditious libel as well as to blasphemous libel. One is free to speak as one wishes; one is not immune from trial, however, if that speech is found—in this case, by the judge instead of the jury—to be seditious. And like blasphemous libel, seditious libel could work to create a self-censoring political culture in which dissident speech was restricted by fear of trial “after the fact.”

Arguably, the limited grants of power to the branches of government in the original U.S. Constitution—grants that did not include authority to regulate speech—denied the federal government authority to restrict political dissidence that did not reach the level of treason, but was limited to the expression of thoughts or ideas against the government. The implied prohibition against laws prosecuting dissident speech was arguably strengthened by the First Amendment’s provisions that “Congress shall make no law . . . abridging the freedom of speech.”

Some have argued, however, that the very language of the First Amendment’s guarantee of “freedom of speech” is meant simply to echo and absorb the notion of freedom of speech put forth by the English jurist William Blackstone. One is free, that is, to speak under the First Amendment, but one is not immune from punishment if that speech is seditious or otherwise injurious to the common good. Indeed, in one of the Supreme Court’s landmark sediton cases, *Abrams v. United States*, 250 U.S.
upholding the conviction of five alien radicals for the publication of two leaflets criticizing the United States war effort during World War I, the government’s winning case included the argument that the First Amendment left the English common law of seditious libel in force.

The Abrams case involved the trial of individuals under the 1918 Sedition Act (an amendment to the 1917 Espionage Act), one of several sedition acts that the federal government has enacted over the course of American history. Other such acts include the 1918 Alien and Sedition Acts and the Alien Registration Act (also known as the Smith Act) of 1940—and the Supreme Court has upheld the convictions of individuals tried under both the 1918 and 1940 acts. All these acts were promulgated during times of great uncertainty when the nation was actively engaged in or on the brink of war, when tolerance of dissent tends to be low and distrust of cultural “outsiders” tends to run high. It is not coincidental that two of these acts—the 1918 legislation and the 1940 Smith Act—explicitly linked sedition to concern over alien populations in the United States. And the World War I espionage and sedition acts culminated in the infamous Palmer Raids of 1919 and 1920, in which thousands of alien residents were arrested and detained and over 240 were deported to Russia aboard the “Soviet Ark.”

The Supreme Court struggled over the course of the twentieth century to define a workable balance between free speech rights and the need of the federal government to protect national security, including the test that spoken or published words present “a clear and present danger” of substantive evils that Congress has the right to prevent. But the variety of balancing tests the Court has formulated have failed to define a bright line around protected speech, and absolutist interpretations of the First Amendment, which would deny the government any power to restrict speech, have not prevailed.

The government has also used “extralegal” means to restrict speech and political associations. The House Committee on Un-American Activities, for example, used the power of stigma to investigate suspected affiliations with the Communist Party during the Cold War years of the 1950s, as well as agreements with major Hollywood studios to form the notorious “blacklists” that were used to deny employment to individuals in the entertainment industry who refused to testify. FBI surveillance has also been used to harass individuals “whose politics or lifestyle is disfavored by federal officials”—John Lennon, for example, was placed under FBI surveillance as one of a suspected group of “radical New Left leaders” . . . hoping to ‘dump Nixon’ by means of rock concerts in primary election states.”

The United States has entered a new time of international crisis, and there are again indications that sedition may stage a new appearance in our political culture. In the December 6, 2001 testimony of Attorney General John Ashcroft to the Senate Committee on the Judiciary, the attorney general criticized those “who pit Americans against immigrants, and citizens against non-citizens” and “those who scare peace-loving people with phantoms of lost liberty,” stating that their “tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends.” These comments cast a wide net, conflating those who arouse anti-immigrant sentiment with those raising civil liberties concerns, and come close to an accusation of providing “aid and comfort” to our enemies in their accusations that dissenting speech may “aid terrorists,” giving “ammunition to our enemies.”

Despite such statements, we have not yet seen government efforts to enact new sedition laws or to prosecute speech critical of government actions or policies. Yet our history has shown that neither our courts nor our government has fully accepted Thomas Jefferson’s advice to “let those who would wish to dissolve this Union or to change its republican form . . . stand undisturbed.” Defeated by reason alone. Real or imagined, fears of sedition during times of political or military crisis have kept alive the English legacy of sedition laws in American political culture. Times of crisis understandably arouse a sense of heightened vigilance. It is important, however, that we be as vigi-

Notes
4. Ibid., 166-77.
5. Ibid., fn 223.