

The First Amendment

The purpose of this chapter is to outline the context in which the First Amendment to the Constitution came into being, including the seeds for this idea which were planted in the early English experience of the American colonists. Freedom of the press is one of the most cherished freedoms in the United States. But what was the genesis for this idea? That is, how did the framers of the Constitution determine that a free press was necessary in the new government they were designing? In this chapter, you will learn about the ideas that supported the creation of the First Amendment. These ideas formed an ideology that supported press freedom, particularly as it has been defined in jurisprudence (which is a term that refers to the act of deciding court cases or the philosophy of law). While the “framers’ intent” is still a matter of debate, it is worthwhile to consider the primary ideas of the time and the historical context in which the First Amendment was drafted. Emerging from the British roots of the colonists and supported by the Enlightenment philosophy of the day, three ideas emerged to support the notion of freedom of expression: (1) the importance of the informed citizen; (2) the desirability of a free and open exchange of ideas; and (3) the right to criticize government. In this first chapter, the historical context that gave rise to these ideas is presented along with key events that

raised public consciousness and strengthened the ideology of freedom of the press.

After reading this chapter, you should be familiar with the following concepts:

- The libertarian theory of the press
- The various forms and mechanisms of suppression and censorship both in England and in the colonies
- Seditious libel
- Some key turning points in the development of the idea of press freedom
- The impact of the Revolutionary War
- The ideology of the informed citizen and the Enlightenment

The Libertarian Theory of the Press

For the purposes of this chapter, the ideology that supported freedom of the press is identified as the libertarian theory. Libertarianism, as Siebert (1956) defines it, is based on “the superiority of the principle of individual freedom and judgment and the axiom that truth when allowed free rein will emerge victorious from any encounter” (p. 70). Furthermore, the means and channels of knowledge and communication should not be restricted by any individual or government. Later chapters will explore other theories, but as it relates to freedom of the press and the formation of a particular ideology that supports this freedom, the libertarian theory is most relevant.

The libertarian theory builds on the three ideas listed above (the importance of the informed citizen; the desirability of a free and open exchange of ideas; and the right to criticize government) but adds the additional idea that government should not restrict the press. In other words, no law should be passed that prevents the exchange of ideas. This is clear in the wording of the First Amendment: “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 of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

It may be useful as you read this summary of developments to keep in mind some overarching frameworks for press control (derived from

Siebert 1952) to see how they have evolved over time. These frameworks are redefined here as: (1) stability of the state; (2) no prior restraint; and (3) natural rights. Keeping these frameworks in mind will help you focus on the key issues that underlie these events and help you to see the evolution of thought that resulted in the libertarian theory. They also provide, roughly, a kind of schema for the content of this chapter.

Stability of the State

Stability of the state refers to the idea that the “safety, stability, and welfare of the state” (Siebert 1952, p. 6) is the highest priority of any monarchy, government, or society. Anything that might interfere with this safety and stability must be suppressed or controlled. This applies to speech, written materials, demonstrations, and anything that incites or suggests a threat to the state. As you might imagine, this broad definition could be applied in any number of circumstances, and control could be exerted in even instances of *perceived* threat. This framework is associated with the kingdoms of the Tudors and the Stuarts – that is, the royal families who ruled England from 1485 to 1714 (with the exception of the English Republic, 1649–60), including Henry VIII, Elizabeth I, James I, Charles I, Charles II, and James II. You’ll read more about them later in this chapter.

No Prior Restraint

This second framework acknowledges that the state must act in its own defense and for its own continuance and stability; however, it modifies the first framework (stability of the state) by refusing to impose controls on speech or writings before they are uttered or published. In this chapter, you will read about controls that were designed to prohibit the publishing of certain books or ideas. These controls were imposed *before* publication, usually in the form of licensing and royal privileges – that is, these controls were essentially permissions to publish. What this second framework maintains is that a government or state shouldn’t impose controls on writers and publishers before something is published; however, that same state retains the right to impose *penalties* on writers and publishers for what they do publish. In this framework, the state allows freedom but retains the right to punish ideas found to be abuses of that freedom.

Natural Rights

The natural rights theory – which was expressed by British and American philosophers, writers, and statesmen such as John Locke, Tunis Wortman, and Thomas Jefferson – maintains that any government or state is limited in its power over people by the natural rights of individuals. These natural rights, furthermore, are seen as God-given, and are therefore “incapable of infringement” (Siebert 1952, p. 7) by any other human, including human institutions such as the government or the state. This position you will recognize as the underlying philosophy of the libertarian theory discussed above.

In this first section of the book (Chapters 1–3), you may find it helpful to keep these frameworks in mind and to hold various events and opinions against these overarching ideas. For instance, it is important to know that libertarianism – in the form of free speech and press – was not widespread in the eighteenth century (Levy 1985). Some may argue that it doesn’t exist today. But it is a useful theory to assess the *relative* freedom of speech and press and to see how this freedom or philosophy has evolved, departed from, or intersected with the frameworks of stability of the state and no prior restraint. And, as you will see, it is the philosophy that underlies the First Amendment. Some key events led to this evolution of thought – the English Revolution of 1689, the Revolutionary War in the colonies, the changing economic face of the publishing business, and the Enlightenment, that is, the emerging philosophical principle of the freedom of the mind to explore and discuss political, religious, and social matters. But to begin, let’s look at the events and decisions that formed the first instances of press control and see how they are informed by the first framework mentioned above, the stability of the state.

**Stability of the State: The Catalyst of
the Printing Press and the English Roots
of Press Freedom**

To understand the fervor with which the early colonists embraced the press and freedom of the press, you should understand their roots in England and the restrictions the early colonists experienced. The idea

that freedom of expression and opinion is the essence of practical wisdom as well as the foundation of common justice stems from the same beliefs that influenced the Revolutionary War, the drafting of the Constitution, and the philosophy of the Enlightenment.

The invention of the printing press was the beginning of an information revolution that would enable the common man (and, in fact, most literate members of society at this time were men) to acquire and read information that previously had been transmitted orally or through manuscripts printed by Catholic monks (Eisenstein 1978). The Catholic Church controlled the flow of information, and it was mostly the elites in a society who had access to manuscripts, books, or the Bible. The invention of movable type in Germany by Johannes Gutenberg in the fifteenth century would change this controlled flow and access and provide information to all readers. With the first printing in 1455 of the 42-line Bible, a printing revolution spread throughout England that shattered social structures and encouraged the spread of information among varied social classes. Knowledge was available to all who could read. But this increase in information flow produced a social and political force that the monarchy in England sought to control. It took at least fifty years for these controls to take shape, but when they did, they lasted for at least the next hundred years, and some form of control persisted for the next three centuries (Siebert 1952).

The monarchy of England – as with many power structures – viewed the development of the printing press and the growing literacy of its subjects with trepidation and fear. If people had knowledge, then they could rebel against the Crown, the monarchy reasoned. An informed subject may be harder to control than subjects who depended on the Church and the monarchy for information and direction. As a result, The Tudors immediately sought to control this new printing technology with decrees, proclamations, monopolies, and licensing. What resulted, however, was a centuries-long struggle over the right to publish.

King Henry VIII, who came to the throne in 1509, introduced the first official forms of press control. From the late 1520s he went head to head against the Pope and moved to wrest control over the Church in England from him. This dispute wasn't over the press, however. It was over whom the King wanted to marry. In order to achieve dynastic control over the realm, King Henry needed to produce an heir to the throne. But his current wife, Catherine of Aragon, had not given birth to a surviving son. As a result, King Henry wanted to divorce Catherine and marry Anne Boleyn. Eventually, with the Act of Supremacy in 1534,

Parliament established Henry VIII as the supreme head of the new Church of England. With his powers expanded, the King sought to establish control and authority in areas where formerly the Church had been in charge; one of these areas was the publishing enterprise.

Forms of Press Control in England

Henry VIII instituted the first forms of press control. The controls the King instituted fell into two categories (which remain the foundation of current First Amendment jurisprudence in the United States): prior restraint and punishment for publication.

Prior restraint refers to attempts to control publication before it happens. The most common form of prior restraint is licensing, but it also includes formal mechanisms to receive permission to publish and lists of things which may not be published. As we shall see in the next chapter, forms of prior restraint have existed in the United States in the present day, but Henry VIII was the first to enact these controls in England. In 1529, the King issued a list of prohibited books. The next year he instituted the first-ever licensing act, which required every printer to obtain a license to publish (Siebert 1952). In 1534, printers had to receive permission from the Crown to publish. The goal of these measures was to discourage the subjects of King Henry's realm from engaging in church and civic matters so as to discourage dissent and *sedition*, which is criticism of the government. One way to achieve this, of course, was to prevent the people from having knowledge about the government – thus the restrictions on publishing.

If attempts to restrict publishers before publication of prohibited matter failed, the King instituted forms of punishment for these publishers. In sixteenth-century England, the Privy Council and the Star Chamber supervised the administration of laws, oversaw the courts, and controlled the press. The goal was to arrest individuals for sedition – criticism of the government – thus ensuring the control of the Crown. The monarchy believed this suppression was necessary for public safety and social control; in other words, the Crown believed that peace demanded the suppression of dissent. It was not considered the people's place to discuss government or to have an opinion about the affairs of state. Obedience, not political expression, was the first responsibility.

It is important to remember that while King Henry VIII was the first to institute forms of press control, he certainly wasn't the last. Monarchs after him, and even Presidents of the United States, have instituted similar forms of control. Following the rule of King Henry and King Edward VI, Queen Mary – who was known as “Bloody Mary” for her relentless persecution of Protestants – granted a royal charter to the Stationers' Company in 1557, which was a form of publisher self-regulation. The Stationers' Company was a group of publishers who voluntarily complied with royal orders and turned in their colleagues who violated those restrictions, ordering searches and seizures of printing presses and unauthorized works. Clegg (1997) maintains that the purpose of the Stationers' Company was primarily to protect the economic interests of the trade of printing and that it operated like other guilds to ensure the rights of property ownership and protect its members from poor workmanship and from nonmembers who might abuse the trade. Still, it provided the structure and potential mechanism for monitoring the activities of printers and for controlling content that could be deemed heretical or too critical of the monarchy.

The Informed Citizen and Freedom of Religion

In the restrictive climate of early England, one could expect individual initiative to wither. Recall, however, that freedom of information was not just a matter of social and political control. Religious freedom was inextricably tied to freedom of expression. King Henry had established the Church of England, but Martin Luther and Puritan reformists wanted to institute changes in this structure. This Puritan movement wanted Bible-based sermons, not rituals only. They believed that individuals should practice self-examination and be educated in the principles of the Bible. The same motivation that drove an informed, Bible-reading, sermon-attending, Puritan activist fueled the idea of an informed citizen (even though the notion of a “citizen” was unfamiliar to British subjects). In other words, religious literacy and education spurred the interest in literacy and education in other areas of life – namely civic and political life. The Puritans and other critics of the monarchy developed a clandestine printing trade to nurture their interests.

In addition, British subjects who were educated in the ideas of Plato and Aristotle had begun to believe that the people should be involved

in political, civic, and religious matters. These ideas were encouraged by Queen Elizabeth I, who named citizens to her revamped Privy Council and tolerated a certain degree of discussion. The Elizabethan era (1558–1603) was one of increased reforms that encouraged greater citizen involvement. The privileges granted by Queen Elizabeth “reflect[ed] her regime’s interest in fostering education and classical learning and . . . in fostering knowledge of England’s past” (Clegg 1997, p. 13). Education and the spread of information allowed even the common person to become more accustomed to political participation. Queen Elizabeth, however, still maintained control over publications that might present opposition to her religious reforms and mandates – which effectively meant securing the Queen’s supremacy. Indeed, the intent of licensing in the Elizabethan era was to suppress religious heresy (Clegg 1997, p. 26).

The monarchs who succeeded Elizabeth I not only sought to restrict religious writings, they also associated political sedition with religious dissent and introduced even more stringent controls. This return to a more restrictive climate eventually led to revolt. Elizabeth I was the last of the Tudor family to sit on the throne. The Stuarts, beginning with James I (who was also James VI of Scotland) and later his son, Charles I, sought to achieve greater conformity and less dissent among their subjects. But this was too difficult to achieve among a people who had known less restriction. “By the time that the first Stuart, James I, peacefully ascended the throne after Elizabeth’s death in 1603,” Brown (1996) writes, “the idea that the educated, informed, and sometimes conflicting voices of gentlemen, merchants, lawyers, and clergymen should be expressed had been sanctioned by decades of experience” (p. 5). Still, the new Stuart monarchy sought to achieve authority and control, in matters of both Church and state. The Puritan reformists would once again fight to reform such royal control over the Church of England by encouraging Bible reading and other forms of religious education. James I and Charles I reinstated licensing laws and the Star Chamber became a brutal weapon for seeking compliance. The crackdown on what had been previously a more open and democratic climate was intolerable. The people had known a certain measure of freedom; they had experienced the power of education and self-determination, and they would not tolerate monarchical control on the dissemination of ideas. From 1642 to 1649, a civil war in England would bring these issues to the forefront.

The Civil War of the 1640s was known as the Puritan Revolt. What is most significant about this climactic event is that it represented a watershed moment for individuals in England to demand freedom and to be involved in the events of their time. What began as a desire for religious reform soon became tied to openness in all areas of life. The press was both the channel for these ideas and its own metaphor. In other words, freedom of religion and freedom of the press were seen as tied together in an individual's search for truth, for liberty, and for individual expression and enlightenment.

During the war, the press actually enjoyed fewer restrictions. Siebert (1952) notes that press controls were "abandoned or unenforced in the early years of the civil war" (p. 3). In addition, what we would now call "news" took on greater importance (Emery, Emery, & Roberts 2000, p. 10). The religious disputes, the rise of England as a maritime power, the struggles between the King and Parliament, and changing social conditions made the public more interested in news of these events. Two important ideas emerged from this period that influenced the future colonists and their notion of self-government and the centrality of the press to that endeavor: the free flow of information and the fallibility of what was known as the "divine right of Kings."

Milton's Areopagitica and the Seeds of Libertarianism

In 1644, *Areopagitica; a speech of Mr. John Milton for the liberty of unlicenc'd printing to the Parliament [sic] of England* was printed. In this polemic, Milton was mostly concerned for freedom of religion, but words he wrote here have been used as the cornerstone of the First Amendment – the notion that ideas and arguments should mingle without restriction so that the truth will emerge: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . . Let [truth] and falsehood grapple; who ever knew truth put to the wors [sic] in a free and open encounter" (Milton 1644, p. 35).

Some scholars have identified this as the "marketplace of ideas" concept (Smith 1988, pp. 31–34), but that term was not put in use until the 1930s in the United States (Peters 2005), and its economic overtones can be a bit confusing in this context. Rather, Milton's *Areopagitica* argues for freedom of expression – an open roundtable – for all ideas to be expressed in the belief that truth will emerge. But

what is “truth?” Is it the same for all people? Do all forms of communication have value at this open roundtable? These are questions we return to in the next chapters. For now it is sufficient to introduce this idea since it lays the foundation for “the libertarian theory of the press.” The libertarian theory of the press argues that all ideas should be allowed expression and that forms of suppression can never be imposed equally without inflicting damage on the free flow of ideas and the development of an informed citizen.

The second idea formed in the crucible of the Protestant Revolution and Civil War of the 1640s was the fallibility of the divine right of kings. In a monarchy, the King (or Queen) assumes power over the state. But in England, with the founding of the Church of England by Henry VIII, this power extended as well to matters of religion. This is what the Puritans were revolting against. Monarchs could be bad, they argued, and the repressive policies of James I and Charles I were clear evidence of this. James I sought to reassert the divine right of kings in his speech to Parliament in 1609:

Kings are justly called gods, for that they exercise a manner or resemblance of divine power upon earth; for if you consider the attributes to God, you shall see how they agree in the person of a king. . . . They make and unmake their subjects, they have power of raising or casting down, of life and of death, judges over all their subjects and in all causes and yet accountable to none but God only. (cited in Stevens 1982, pp. 13–14)

The people rebelled against this assertion of divine authority, for once they had seen the light of education and involvement that Elizabeth I had turned on, English citizens could not return to the dark. They argued against the divine right of kings and demanded greater citizen participation and control. Parliament gained power during this time, and as evidence of the people’s revolt, Charles I, the monarch who succeeded James I, was beheaded in 1649. Most important, citizens began to see that those in power could be corrupt, they could be questioned, and they could be overthrown. Such ideas could not be quenched, even in the renewed period of restriction that followed the Protestant Revolution.

Once again, in 1662, licensing was renewed as a form of royal restriction. The Restoration movement of Charles II required that order be

renewed; the Licensing Act of 1662 would remain on the books until 1679 and then be renewed again in 1685. Under the Act, books and pamphlets were sold only by publishers who were members of the Stationers' Company, and licenses were given by the bishops of the Church. Bishops oversaw printing activities, and the monarchy regained its control over the press. All news was published by the King. James II, who took the throne in 1685, appointed Catholics as official printers and staged public book burnings (Brown 1996). Royal control, then, was not only over publishing activities but also invoked the power of a particular Church – that is, a particular religion. Knowing this, you can understand why the First Amendment combines those two freedoms (although some earlier drafts separated the two clauses; see Levy 1985, p. 301). The people realized that it was impossible to achieve uniformity of opinion in religion and politics. Following the Glorious Revolution of 1688–89, Parliament passed the Act of Toleration, which recognized the political and religious differences among people.

This Revolution also culminated in the removal of prior restraints, such as licensing, in 1695. The growth in publishing that occurred during this time made licensing and punishment efforts unwieldy and ineffective. In addition, members of Parliament had a financial interest in the expanding printing and book trades. In essence, the social revolution that had begun with the advent of Gutenberg's printing press centuries earlier had developed into an information trade with enough economic force to stem the British monarchy's inclination to wield censorship power. The ideals of freedom of expression had captured the hearts and minds of English citizens, resulting in a "de facto free press policy" (Brown 1996, p. 24).

From this brief review of the English roots of press freedom two key ideas emerge: first, the idea that an unfettered flow of information is essential to an informed citizenry; and, second, the idea that those in power can be questioned and that revolution is possible. In other words, people have the right to get rid of a bad government, but if they are to do this they must have information about that government. Linked inextricably is the role of religion in the administration of government. The people of England conflated the monarchy and religion because of the control that Henry VIII had wrested from Rome in the sixteenth century and from experiencing the repressive reigns that followed. But it was also in the interests of religious freedom and how this was linked

to the free flow of ideas that the two became linked. This heritage lasted even into the next two centuries and was firmly in the consciousness of the colonists as they crafted a new form of government.

No Prior Restraint: The Colonial Experience and the Notion of Seditious Libel

Among the many ideas that American colonists brought to the New World, the ones central to press freedom are these: the right to express diverse opinions; the right to report on government; and the right to criticize government. But Colonial America did not necessarily encourage freedom of expression, with continued early censorship and licensing laws and even mobs who attacked printers with whom they disagreed. The business of building a nation with its new form of government took precedence and led to the conflict over press freedom and the nascent democracy. It would be the turn of another century before the ideas listed above actually coalesced into a theory of press freedom that could endure.

The Crime of Seditious Libel

In his landmark book *Legacy of Suppression*, Levy (1960) argued that the framers of the Constitution never intended to do away with the notion of seditious libel – that freedom of the press was only extended so far as it did not assault the state or criticize the government to such an extent that it was held in disfavor or disrepute. The crime of seditious libel began in the early Stuart era of England (1603–40) for reasons described above. But even into the eighteenth century, seditious libel prosecutions remained the chief form of press control (Siebert 1952). Many of us are familiar with the notion of criminal libel, which is damaging a person's reputation through the publication of words. Seditious libel is based on the same principle except that it applies to the government or to government leaders. For those of us who live in countries that enjoy the peaceful transfer of executive and legislative power, it may be difficult to imagine the importance of this concept. But in an era of uncertain dynasties and violent revolutions and coups,

preserving the stability of a government was essential, not just for the preservation of the Crown or of leaders, but also for the preservation of order and economic stability. For this reason, even John Milton and John Locke – names that we associate with a more libertarian approach to press freedom – believed in upholding a notion of seditious libel. As Levy (1985) writes:

Locke . . . [and] Milton . . . were indubitably the most eminent defenders of civil liberty in their time. But they were *of* their time, and one of its *a priori* premises, unthinkable for anyone to attack, was the state's incontestable right to proscribe seditious utterance, a commodious concept encompassing anything from criticism of public policy to advocacy of overthrow of the government. Neither Locke, Milton, nor their contemporaries ever indicated disagreement with the common law's spacious definition of unlawful discourse nor sought to limit its application. Subsequent generations of libertarians, with only a few persons excepted, inherited from them and passed on to the American Framers in unaltered form an unbridled passion for a bridled liberty of speech. (p. 100)

This belief that the government could be criminally assaulted and needed to be protected from overly critical speech laid the foundation for speech theory into the eighteenth century. Two prominent jurists who upheld this idea were Chief Justices Blackstone and Mansfield. Although free speech was considered a value, the definition of free speech, as defined by Blackstone and Mansfield, was that it would not be restrained prior to publication. In other words, many free speech theorists saw that the graver harm lay in licensing and pre-publication censorship. But they were not ready to extend a free speech clause that would protect the *possible harmful effects* of speech. Again, seditious libel was considered a crime, leading William Blackstone to write in 1769: "The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published" (*Commentaries on the Laws of England, 1765–1769*, cited in Copeland 2006, p. 216).

Again, the primary emphasis here was on maintaining and preserving the government. As we shall see, however, this idea begins to shift in the eighteenth century among Enlightenment thinkers who argued that people – not government – should be the supreme authority in a democratic republic. And, as we learned in looking at the experiences

of colonists in England, the right to criticize government is a key idea that led to the drafting of the First Amendment. A key turning point in reconsidering the notion of seditious libel in the colonies was the trial of John Peter Zenger.

John Peter Zenger and the Truth Defense

John Peter Zenger was the publisher of the *New York Weekly Journal*, and from the beginning, his paper criticized the colonial governor of New York, William Cosby (Emery, Emery, & Roberts 2000, p. 36). Cosby eventually had Zenger arrested and charged with “Scandalous, Virulent and Seditious Reflections upon the Government.” The trial began on August 4, 1735, with “the most respected attorney in the colonies,” Andrew Hamilton, defending Zenger (Peters 2005, p. 30). Under English law, one could be convicted of seditious libel – that is, communication that is critical of the government – by proving only that the communication was published. But the Zenger trial began with an admission of this fact. The difference was that Hamilton argued that the statement should also be proven to be false, malicious, and seditious. Hamilton claimed that English precedent established the freedom to express the truth and that “the *Falsehood* makes the *Scandal*, and both the *Libel*.” He then directed his argument to the jury and asked them to decide. His argument relied on the idea we just explored – that people should have the right to information and their own education – but it also introduced the notion that this information is of most use when it can be used to oppose the restrictions of a tyrannical government. In his closing argument, Hamilton said:

But to conclude; the Question before the Court and you Gentlemen of the Jury, is not of small nor private Concern. It is not the Cause of the poor Printer, nor of *New York* alone, which you are now trying; No! It may in its Consequence affect every Freeman that lives under a British Government on the main of *America*. It is the best Cause. It is the Cause of Liberty; and I make no Doubt but your upright Conduct, this Day, will not only entitle you to the Love and Esteem of your Fellow-Citizens; but every Man who prefers Freedom to a Life of slavery will bless and honour You, as Men who have baffled the Attempt of Tyranny; and by an impartial and uncorrupt Verdict, have laid a Noble Foundation for securing to ourselves, our Posterity and our Neighbors, That, to which

Nature and the Laws of our Country have given us a Right – the Liberty – both of exposing and opposing arbitrary Power (in these Parts of the World, at least) by speaking and writing-Truth.

At issue, then, was the right to criticize government, and the case established two procedural safeguards: first, the truth of a statement could be used as a defense against libel; and, second, the jury decided the case. It is important to note that these were only safeguards; they were not actually written into law until the time of the Alien and Sedition Acts of 1798, which are explained in more detail later. What is significant about the Zenger case is that it raised public consciousness about this issue and reworked the definition of seditious libel.

The notion of seditious libel in England was designed to prevent criticism of the monarchy. Any communication that was critical of the monarchy could be considered seditious libel, regardless of whether it was true. In fact, if a statement were true it would be considered even more damaging as criticism. Therefore, the truth of a statement could not be used as a defense. The only thing to be decided is whether it was critical of the reigning government. The Zenger trial first introduced the notion that criticism – if it were true – was defensible under the terms of libel. Still, as Levy (1985) and other historians have noted, seditious libel was still considered a crime, and the Zenger trial would not change this. While the Zenger case raised public consciousness, it took the presidency of John Adams and the drafting of the Alien and Sedition Acts of 1798 to make the procedural safeguards introduced in the Zenger case into law.

The Alien and Sedition Acts of 1798

The Alien and Sedition Acts of 1798 were instituted during the presidency of John Adams in an effort to quell dissent and criticism of his government. During Adams' administration, the French Revolution and the growing number of immigrants in the United States created fear that another revolution could occur in the country. So Adams sought to restrict the power of the immigrant population and the voice of the Anti-Federalist papers that were critical of his administration. The Acts prohibited "writing, uttering or publishing any false, scandalous and malicious writing" with the intent to "defame" or excite "contempt"

or “hatred” toward the government of the United States, the president, or Congress, or to stir up opposition to laws. They specified that forbidden statements must be false, thus writing into law the notion of truth as a defense. But Adams tended to abuse his power, and public opposition to the Acts was severe. Although, in the three years the Acts were in effect, no more than 20 persons were prosecuted (Stevens 1982, p. 37), the power of the Acts extended beyond prosecutions; they created a chilling effect due to the fear of speaking out, and this became intolerable to the people. The Acts expired in 1801 despite Federalist support.

Still, the Acts raised awareness of the tension between the notion of seditious libel and the belief in the natural rights of human beings. The dispute over the Acts, according to Levy (1985), “provoked American libertarians to formulate a broad definition of the meaning and scope of liberty of expression for the first time in our history” (p. 282). Specifically, the Acts drove the Jeffersonians to broaden speech freedom to include political opinion. In other words, political opinion should not be subject to legal restraints.

Natural Rights, Independence, and the Enlightenment Philosophy

The growing awareness that speech and political opinion should not be restricted by law or the government was just part of an overall groundswell that would eventually lead to the battle for independence from Britain. It became part of the fabric of revolution to believe that liberty, freedom of speech, and the natural rights of the people to govern themselves were all intertwined. And it was the work of philosophers, publishers, and politicians to raise public consciousness about these ideas. Certainly, Thomas Paine, in his enormously popular pamphlet *Common Sense* (1776), awakened other colonists and fueled the fires of independence. His writings, written in deeply religious rhetoric, affirmed that humans were ruled by God alone, that no king should be sovereign over any man, and that “a government of our own is our natural right.” (Indeed, historians such as Nord have linked Enlightenment ideals with those of the Great Awakening, the early eighteenth-century

religious revivalist movement; see Nord 2001.) Many rebels and leaders such as Paine emerged during these years, but according to Levy (1985), “In the history of political liberty as well of freedom of speech and press, no eighteenth century work exerted more influence than Cato’s letters” (p. 114). John Trenchard and Thomas Gordon, writing under the pseudonym “Cato,” published 138 essays in London newspapers between 1720 and 1723 and subsequently published the essays collectively in four volumes that received widespread distribution in the American colonies. Although the “most important of the English political theorists to the formation of America’s type of government and its ideas concerning inalienable rights . . . was John Locke,” most Americans in the middle of the eighteenth century were not aware of his writings. But they were aware of the writings of “Cato” (Copeland 2006, pp. 90–95). One of the more popular and widely quoted essays written by Cato was “Of Freedom of Speech: That the same is inseparable from Publick Liberty” (1720). In this essay, Cato wrote that “Freedom of Speech is the great Bulwark of Liberty” and that “Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech: Which is the Right of every Man . . .” Referring to government control, Cato argued for a complete absence of restrictions (except for speech which hurt or controlled the rights of another individual), saying that “Only the wicked Governors of Men dread what is said of them. . . . Freedom of Speech, therefore, being of such infinite Importance to the Preservation of Liberty, everyone who loves Liberty ought to encourage Freedom of Speech” (cited in Copeland 2006, pp. 110–111).

Cato’s letters were reprinted and widely quoted in colonial newspapers. In 1722, Benjamin Franklin first published the “Freedom of Speech” essay in the *New-England Courant* after his brother, James, was imprisoned. Prior to the Zenger trial, it was Cato who first argued that truth should be admitted as a defense against libel (Copeland 2006). And, echoing the words of John Milton a century earlier, Cato wrote that “whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out” (cited in Buel 1981, p. 66). Cato’s letters, then, were the first and most popular communication that raised consciousness about the need for complete freedom of the press and the rights of individuals to self-govern.



Figure 1.1 Thomas Paine's writings led other colonists to embrace the doctrine of natural rights (National Archives and Records Administration)

*The Stamp Act, the Revolutionary War,
and the Revolutionary Press*

The impetus for revolution among the colonists illustrated another important principle underlying the First Amendment: freedom to publish without any government restriction. Based on historical research of pamphlets published during the Revolutionary period, scholars suggest that the democratic ideals of religious freedom, political self-determination, and individual liberty fueled the war with Britain (Bailyn & Hench 1981). One of the ways the colonists expressed these freedoms was through newspapers. The revolt against the Stamp Act of 1765 indicated the strength with which the early colonists assumed a



Figure 1.2 Editor William Bradford printed the front page of his newspaper to look like a tombstone in protest of the Stamp Act and of British rule

right to a free exchange of ideas. (These ideas later became the underpinning of the First Amendment: information should be freely exchanged and government should not interfere with its distribution.)

The Stamp Act was imposed by the British to raise revenues following their Seven Years War with France. It was essentially a tax on paper because all printed materials required revenue stamps. Opposition to the Acts was great and widespread from printers, clergy, colonial legislators, lawyers, and merchants. They argued that Parliament was imposing taxes on the colonies, but since the colonists didn't vote for members of Parliament they didn't think they should be subject to taxes. The Stamp Act represented a form of royal control and interference in the publication of newspapers in the colonies. It was seen both as governmental interference and as taxation without representation. Publishers resisted the Act and were a key instrument in raising questions about the

relationship with Britain. Eventually, these questions would provide the impetus for the Revolutionary War and independence (Copeland 2006).

The Revolutionary War caused newspapers of the day to adapt to circumstances. The war created a thirst for “news,” specifically news about the war itself, and circulation numbers and the frequency of issues increased. An individual newspaper’s circulation averaged about 3,500 readers, although the *Connecticut Courant’s* circulation reached 8,000 (Schlesinger 1958, p. 281). Most newspapers were published weekly; however, at times a newspaper would be distributed two or three times a week. Some newspapers experimented with daily distribution, but this was difficult to sustain due to the demand for paper, ink, writers, and distribution staff.

Distribution, of course, was difficult during the war years. Prior to this time, newspapers were delivered through the postal system, but the war interfered with roads and financing. As a result, publishers developed new methods for delivery, including post riders on a pony express, trained pigeons, and delivery personnel, originally adults rather than the delivery boys or girls with whom we are familiar today. In the years leading up to the Revolutionary War, the number of newspapers – initially quite small – grew by more than 260 percent (Copeland 2006, p. 210). But perhaps the most significant feature of the Revolutionary War era press was its emphasis on the formation and maintenance of public opinion.

Public Opinion, the Informed Citizen, and the Party Press

It is important to remember that not all colonists in the New World supported the idea of independence from Britain. Various political factions such as the Tories, Whigs, and Patriots had different opinions about their relationship with Britain and about the idea of independence. The newspapers of the time, then, were primarily vehicles for promoting the ideas of a particular political group. Pro-independence Patriots, in particular, believed that to publish both sides of an argument damaged their ultimate goals of truth and liberty, as they defined them. During the years leading up to and during the Revolutionary War, the press became more politically assertive. Printers who were interested in or involved with various political factions began publishing political tracts

that supported their particular viewpoint. The purpose of the press at this time was to mobilize and even manipulate public opinion, which became nearly inseparable from the idea of an informed citizen (Brown 1996). In other words, the level of information a citizen had was the extent to which he or she had an opinion on the issues of the day. The informed citizen was a citizen with an opinion, a viewpoint. And the press of the day helped fuel the viewpoints that citizens held, respective to their political allegiance. Citizens had access to a variety of opinions and political information, but it was specific to a particular newspaper's political leanings. The emphasis of the press at this time was not daily events or news and certainly not a balanced presentation of events and opinions. It was a vehicle for promoting a particular political viewpoint.

Ironically, it was also a time of suppression of ideas as political papers promoted their perspective and ignored or trivialized other viewpoints. Such efforts occasionally turned violent. Patriots, especially, engaged in mob violence, tar and feathering, and beatings. Two publishers loyal to Britain, John Mein, the publisher of the *Boston Chronicle*, and James Rivington, publisher of the *New York Gazetteer*, were harassed so badly that they eventually fled the colonies (Nerone 1994). So despite the libertarian rhetoric espoused by the colonists, the primary emphasis of the time was on the circulation of ideas. These ideas, moreover, were supportive of the Patriots' cause, and publishers saw their role as the cultivation of public opinion, not necessarily the free and open exchange of ideas that the town hall metaphor might suggest.

The legacy of the Revolutionary War for the press was an emphasis on political opinion. The era that followed, the Party Press, is thus named because newspapers were published by political parties for the purposes of promoting their ideas. The practice of newspapers taking on specific opinions and viewpoints in the form of editorials emerged during the Revolution and was carried over into the Party Press era. These newspapers received funding from a political party which allowed them to be published on a daily basis. They focused on legislative coverage, entailing the first use of correspondents, who were sent to cover the capital. The emphasis of these papers was on domestic and political matters as well as on cultivating public opinion on issues of the day. As mentioned earlier, this capacity to hold an opinion became central to the notion of what constituted an informed citizen in the late eighteenth and early nineteenth centuries.

As we have seen, the climate that gave rise to the drafting of the First Amendment of the Constitution was steeped in a libertarian philosophy that demanded freedom from government interference. In addition, the ideology that supported freedom of expression held that individuals needed a free flow of information in order to become educated, to be an informed citizen, and to participate in the newly formed democratic government. As Smith (1988) writes, the very definition of libertarianism is that “the press should scrutinize government and express opinions freely . . .” (p. 10). The writings of eighteenth-century philosophers and politicians support this claim: for instance, James Madison wrote that public opinion is “the real sovereign” in a free country and a free press helps “keep the public informed” (cited in Smith 1988, p. 164). The press, then, acted as the meeting place for ideas and opinions. This town hall metaphor for the free flow of ideas among citizens who, with information, will make the best decisions for their own governance was itself the manifestation of another overarching philosophy of the time: the Enlightenment.

Enlightenment Philosophy

Are people basically good, or do they have evil tendencies which, left unchecked, will result in chaos? It’s a philosophical question, of course, that has no easy answers. But the Enlightenment philosophy of the seventeenth and eighteenth centuries holds that progress is inevitable and leads to the greatest benefit for humankind (Lavine 1984). This optimistic outlook on life, human beings, and the workings of progress characterized the Age of Enlightenment from 1650 to 1770. This was a European movement, but it caught hold in the United States among such thinkers as Benjamin Franklin, Thomas Jefferson, and Samuel Adams.

From the mid-seventeenth century on, people began to experience the wonders of science and the boon of mining and agricultural technologies. Sir Isaac Newton published his *Mathematical Principles of Natural Philosophy* in 1687, showing that laws governed nature, and Descartes published his philosophies on the supremacy of human reason. The British philosopher John Locke wrote that all human beings were rational, equal, and entitled to the rights of life and liberty. Locke’s ideas about an orderly, rational universe, and humanity’s place in it, were used to justify freedom from the British monarchy and were echoed in

the language of the Declaration of Independence asserting that people “are endowed by the Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. . . .”

Enlightenment philosophy believes that humans are rational creatures. The Puritan ideal of social order and personal discipline is also embodied in this philosophy. It carries a certain faith in humanity’s capacity for reason. The philosophy implies a commitment, then, to freedom of the mind, specifically a release from governmental or religious tyranny and the dictates of superstition. Truth comes from the development of one’s own intellect, not from an outside authority, according to this philosophy. Left on their own, people will display their most humanitarian impulses and work toward progress, which was seen as inevitable and good. This faith in human nature extended to the belief that humans are born with certain natural rights and that it is the government’s purpose to ensure that people are given those rights in order to realize their full potential. With maximum freedom comes the evolution of the best society. In this there is also a belief in the self-righting process of individuals and society. Truth will emerge. With information, people will make the best choices and decisions because they are essentially rational beings.

The Enlightenment philosophy supported the belief that people were good, that information should be freely exchanged, and that with this forum for information and the development of intellect, the best society would emerge. As Smith (1988) writes, “The faith of the Enlightenment . . . was that the public could use and should have both freedom and knowledge” (p. 42). Indeed, according to Levy (1985), the Constitution of the United States was written to guarantee the rights of the individual, specifically that “free political expression” was a “natural right” and thus these rights should be maintained even so far as to limit government control (p. 117). Thomas Paine, in his “Liberty of the Press” article (1806), and Tunis Wortman, a New York lawyer, who wrote *A Treatise Concerning Political Enquiry, and the Liberty of the Press* in 1800, also believed that the ideas which supported the drafting of the U.S. Constitution could not simultaneously support justification for seditious libel prosecutions (Levy 1985).

Thus, a new framework emerged – a libertarian, Enlightenment framework – that argued for complete freedom, because without it rational beings could not come to know the truth and could not self-govern effectively. With this viewpoint it is easy to see why the First

Amendment was so vital to the creation of a new government. Citizens must be free, information must be free-flowing, government must be criticized if necessary, and the rational, humanitarian, orderly, informed citizen must be supported through the insurance of particular rights.

As we will see in the next chapter, however, this is not the end of the story. Are people rational? Is all information good? Is complete freedom a desirable goal? These are questions that have emerged since the drafting of the First Amendment and continue through contemporary times.

Conclusion: What You Have Learned

After reading this chapter you should now be familiar with the following concepts:

The libertarian theory of the press. This theory was defined by Siebert (1956). It supports complete individual freedom and sees the free flow of information as central to that freedom. It is thus the cornerstone of our First Amendment (despite various interpretations of First Amendment law that suggest the necessity for some restraints). The libertarian theory of the press maintains that complete freedom is necessary in order to come to know “the truth” and to self-govern effectively.

Forms and mechanisms of suppression and censorship both in England and in the colonies. The forms of suppression and censorship are best categorized as “prior restraint” and “punishment for publication.” Under the heading of prior restraint come the controls instituted by Henry VIII, such as licensing and prohibitions to publish certain materials. It also includes such things as the Stamp Act in the colonies. In addition to prior restraint, punishment for publishing certain materials or ideas was another form of press control. English monarchs used the Star Chamber and the Stationers’ Company to punish errant printers. The most stringent punishment, however, was conviction of the crime of seditious libel.

Seditious libel. Seditious libel is the crime of criticizing the government. It is one of the libel laws, but it assumes that the government can be criminally assaulted by words. In England and in the colonies, conviction

for libel rested on the fact of publication, instead of whether the published statement was true or false. Because sedition is the act of stirring people up against the government, truth could be more dangerous than a lie, thus provoking a stronger official reaction. Sedition remains on the books as a crime in the United States and throughout the world.

Some turning points in the development of the idea of press freedom. Some turning points in the development of the idea of press freedom were: the invention of the printing press, the Civil War of the 1640s and the Glorious Revolution of 1688–89 in England, which brought “the divine right of kings” into question and resulted in the abolishment of certain prior restraints; the John Peter Zenger trial and the Alien and Sedition Acts of 1798, which rewrote the legal standards for seditious libel; and, of course, the Revolutionary War and the period immediately following it, when citizens grappled with the realities of their new freedom.

The impact of the Revolutionary War. Certainly, independence from Britain was a key turning point in press freedom because the founders of the new country envisioned a democratic republic of informed citizens. An amendment guaranteeing the free flow of information was central to that vision. In addition, colonists were exposed to a robust, idea-filled press during the years leading up to the war. The words of Thomas Paine, Cato’s Letters, Thomas Jefferson, James Madison, and other political thinkers of the time supported freedom from government restriction.

The ideology of the informed citizen and the Enlightenment. It is important to remember that the prevailing philosophical climate of the seventeenth and eighteenth centuries was the optimistic outlook of Enlightenment philosophy. This philosophy believed in continuing progress, in the essential goodness of human beings, and the supremacy of an orderly, rational universe that is supported through freedom and educated citizens. The philosophy implies a commitment to freedom of the mind, specifically from governmental or religious tyranny, and it believes in the self-righting process of the free flow of information – that the truth will emerge when all ideas are given expression.

Again, to recall the framework presented at the beginning of this chapter, the evolution of the First Amendment – and the continuing

conditions for its debate – can be identified by three stages: (1) the stability of the state (which holds that the highest priority of any government should be its own stability and continuance); (2) no prior restraint (which acknowledges the importance of allowing communication but also believes that harmful communication should be punished); and (3) natural rights (which holds that individuals possess God-given natural rights that no government or state should infringe upon, thus providing absolute freedom of expression).

This framework will be useful in considering the next two chapters in this section on the relationship of media to government.

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