

# **Introduction to Media**

Kelli Britten and Matt Waite

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# **Preface**

This book is a work of passion from the authors and the result of a deluge of requests from students.

More to come.

# 1 A First Amendment Primer

*“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 the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” – The First Amendment to the U.S. Constitution*

Catch all that? It's only 45 words but they may be among the most important 45 words in American life.

Put simply: The First Amendment of the Constitution guarantees five freedoms:

1. Speech - you are free to speak your mind.\*
2. Press - the government has to stay out of media.\*
3. Religion - the government can't start a religion and can't stop you from practicing yours.\*
4. Assembly - you can peacefully gather for whatever you want.\*
5. Petition - you can tell the government what you don't like.\*

\* Some restrictions apply; more on this over this entire course.

## ! Who are you protected from by the First Amendment?

Arguably the most important word of the First Amendment is the very first: Congress. What does the amendment mean by Congress? Just the 535 Senators and Representatives in Washington? No. **Congress means The Government** from the President down to the local dog catcher. Any layer of government is covered by Congress in that first word of the first amendment.

As you will find, nothing in media and its intersection with culture is simple. There are tons of quirks, exceptions, wrinkles and situations that just don't fit simple narratives. And the history of a free press and free expression in the United States is often impacted by the direction the wind is blowing. As this is a course in media, we're going to focus on freedom of expression – speech and press specifically.

## 1.1 Origins of the freedom of the press

For most of history around the world, expression was not free. The last thing you wanted to do was say something bad about the king, or the khan or the Pope for that matter. People

with a lot of power tend to want to protect it, which is why history is littered with stories of people being hung, burned, banished and worse for speaking out against the government.

The advent of the Gutenberg Press in 1450 is one of the most significant inventions in world history. It made written materials more widely available to the masses. Literacy flourished. And so did censorship.

For centuries, the English crown regulated the printing press through licensing the printers and authors, appointing censors to decide what could and could not be printed (Blasi (1995)). But in 1640, a new Parliament implemented a series of changes that amounted to the suspension of the licensing regime. The result: an explosion of publishing of religious and political ideas that weren't seen before. One historian found that in 1640, 22 pamphlets — think of a kind of a cross between a book and a magazine, not the throwaway folded paper we have now — were published. In 1642, the number jumped to 1,966.

But in 1642, civil war broke out in England between royalist and anti-royalist factions. And in 1643, Parliament re-instituted government licensing of printers, and with it the attending censorship.

Enter John Milton of Paradise Lost fame. As in one of the greatest writers in the English language. The circumstances of Milton coming to write one of the greatest works about the importance of a free press are interesting — see Blasi (1995) — but in 1644 he wrote Areopagitica, a work that appealed to Parliament to do away with government control of the printing press. Milton's argument? How can people understand arguments if they can't get all sides? For example: How can they understand Good if they don't also understand Evil? (Milton (1882))

It was from out the rinde of one apple tasted, that the knowledge of good and evill as two twins cleaving together leapt forth into the World. And perhaps this is that doom which Adam fell into of knowing good and evill, that is to say of knowing good by evill. As therefore the state of man now is; what wisdome can there be to choose, what continence to forbear without the knowledge of evill? He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring Christian.

Also in Areopagitica is one of the most influential passages on what became early American thinking about freedom of the press: That government controls of speech hurt the search for the truth, and that the free exchange of ideas does more to suppress bad ones than the government can.

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing.

The American colonists experience with the crown and the English experience with government shaped the creation of the U.S. Constitution.

One significant milestone was the trial of John Peter Zenger, publisher of the *Weekly Journal*, in 1735. Zenger's publication criticized an unpopular royal governor of New York - see Linder (2001) for just how unkind history is to this governor. Zenger faced trial for "seditious libel", a trial where the unpopular governor attempted to influence things by rigging the jury pool. At trial, Zenger's attorney, Andrew Hamilton, was not allowed to defend Zenger with the truth – a foundational principle in libel law to this day. Instead, with no law to back him up, Hamilton could only appeal to the jury's sense of justice (Linder (2001)). Hamilton told the jury:

It is natural, it is a privilege, I will go farther, it is a right, which all free men claim, that they are entitled to complain when they are hurt. They have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow...

The verdict: Not guilty. Linder (2001) says no law changed that day, but the signal that colonial feelings about freedom of expression were made clear.

Indeed, 53 years later, in Federalist 84, written in 1788, Alexander Hamilton actually argues *against* a Bill of Rights, arguing that putting popular rights into words isn't necessary. In fact, saying that putting these rights into words would open the door to people who would seek to infringe upon them. In other words: Why say what the government can't do when the Constitution never gave them the power in the first place? (Hamilton, Madison, and Jay (2009)).

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would

be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

Hamilton's argument would not win, and the First Amendment, along with the Bill Of Rights, was ratified in 1791 when Virginia becomes the 11th state to approve of them.

But by 1798, Hamilton is proved right, ironically by his own political party. The Federalist majority in Congress passed the Alien and Sedition Acts aimed at silencing criticism of President John Adams, a Federalist, and the Congress, controlled by Federalists. The Sedition Act made "any false, scandalous and malicious writing" against Congress or the President illegal.

Imagine the Sedition Act in the age of Twitter.

But really, you don't have to. The acts were, to put it mildly, unpopular.

Within weeks of the passage of the Alien and Sedition Acts, thousands of people swarmed into the small town of Lexington, Kentucky, and passed ten angry resolutions that called the acts void and the entire Federalist agenda "unconstitutional, impolitic, unjust and a disgrace to the American name." As the summer wore on, the assault on the recent legislation spread from Kentucky to the crucial states of Virginia, Pennsylvania, New Jersey and New York. (Bradburn (2008))

John Adams, the Federalist president at the time, would go on to lose the next presidential election to Thomas Jefferson and by 1802, most of the Alien and Sedition Acts had been repealed.

They would not be the last attempts by the U.S. Government to restrict the press.

## **1.2 What is not protected by the First Amendment?**

**Censorship is the prohibition or suppression of information considered obscene, politically unacceptable or a threat to the state/government/security.** Typically, when people talk about censorship, they talk about the government or the sovereign – someone with power to arrest people if they publish something. And typically, when we talk about censorship, we talk about direct action – arrests, closing businesses, destroying pamphlets, confiscating works.

A consistent refrain through American history is that Censorship is Bad. But throughout history, not all censorship comes from the government and not all action is direct. And not all cases are clear cut.

And, under the law, not all government restriction of speech is censorship. There are a handful of instances where the courts have said government interventions into free expression are constitutional.

### **1.2.1 Sedition**

Any reading of American history will find a consistent tension between free expression and the government during times of war. Sedition is conduct or speech that incites rebellion against authority. The Crown commonly accused colonists of sedition prior to the American Revolution. The Alien and Sedition Acts in 1798 were a response to a potential war with France. During the American Civil War, Abraham Lincoln and the government he lead would suppress more than 300 newspapers – many sympathetic to the Southern cause. An example, from Bulla (2009), gives a taste: “Marcus ‘Brick’ Pomeroy, editor of the LaCrosse (Wisconsin) Democrat, called Lincoln a widow-maker and wrote that the president deserved to be assassinated.” Some historians have argued that Lincoln had a change of heart during the war about the suppression of newspapers, but this remains an area of significant criticism of Lincoln.

Another Sedition Act passed Congress in 1918 that imposed severe penalties for any criticism of the government’s efforts around World War I. President Woodrow Wilson, congressional leaders and even leading newspapers urged passage of the act (Boyd (2009)). The impacts were profound: Newspaper coverage of the war – as you’ll see below – could hardly be called objective during the period. And around the country, people were persecuted for criticizing the war. According to Boyd (2009), More than 2,000 cases were filed against people, with more than 1,000 convictions.

One of the most significant court rulings to come from the Sedition Act came in *Schenck v United States* where Justice Oliver Wendell Holmes Jr. attempted to draw a line between protected and unprotected speech by using the “clear and present danger” test. Schenk, a socialist, was convicted for discouraging draftees to respond to draft notices. Holmes, in upholding the conviction, wrote that the line between protected and unprotected speech should be “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” (Purdy (2009))

Congress repealed the Sedition Act in 1920, and Holmes’ Clear and Present Danger test in free speech cases continued to be used until the 1950s, when the courts began using other tests for balancing rights vs restrictions.

And if sedition sounds familiar to you, it should: More than a dozen members of far right groups have been charged with seditious conspiracy in relation to the January 6 attack on the US Capitol. A significant issue at trial: Where does free speech end and sedition begin?

## Sedition vs Free Expression at UNL



In April of 1918, the Nebraska Council of Defense - which dedicated itself to snuffing out criticism of the war effort and identifying people who weren't sufficiently patriotic - sent a letter to the Nebraska Board of Regents that there were professors on campus who were not supporting the war to their satisfaction.

The council accused the university's American history department and the graduate school "lacks virile American leadership: but in place of this a spirit of philosophic pacifism has obtained; and in the department first named, sympathy has been expressed for those who have lately outraged the patriotic sentiment of the loyal people of Nebraska." The Board of Regents - the elected body that oversees the university system - convened a loyalty inquiry to determine who wasn't patriotic enough. By the time they were done, 14 professors would be publicly accused of not being sufficiently patriotic toward the war. What did these professors do to draw the attention of the Council of Defense and the Regents?

Witnesses accused Professor G.W.A. Luckey, who founded the Teachers College (now the College of Education and Human Sciences), of saying German Kaiser Wilhelm II was "a nice looking man" and that the German school system was good. Previously, he had been accused of saying the U.S. should only send old men to die in the war, saving the young, which was construed as trying to sabotage the war effort.

These accusations were front page news on May 31, 1918.

Later, the defense council accused Professor Harry Wolfe, who brought the study of psychology to UNL when he came to the school and was considered one of the top psychology scholars in the world at the time, of insufficient patriotism. Why? Because he kept his donations to the Red Cross private, instead of posting a card displaying his donation. He also warned of the dangers of patriotism.

"He said that patriotism was inclined to carry people off their feet and lead them to extremes. It was this tendency, he said, that made patriotism dangerous. Patriotism, he said, got Germany into the war," the Omaha World-Herald quoted a witness telling the Regents. Wolfe did not deny saying it.

In the end, 11 professors publicly accused would be exonerated, including Wolfe. The regents would demand Luckey's resignation, along with two others. Luckey would be the only one to resign – the other two professors retired.

Wolfe would die suddenly of a heart attack one week after he was exonerated. That December, the Daily Nebraskan student newspaper would memorialize him in an editorial, writing "He gave to the limit of his physical, mental and moral strength to his students."

### 1.2.2 Prior restraint

It isn't until 1931 that prior restraint – the government stopping the publication of something it doesn't like – is found to be unconstitutional by the Supreme Court. In *Near vs Minnesota* in 1931, the court ruled that prior restraint was unconstitutional, but left the door open to cases where the speech was obscene, incites violence or reveals military secrets.

But in 1971, the New York Times and the Washington Post were leaked a massive trove of documents called the Pentagon Papers. It was a secret history of the Vietnam War, filled with never-before-seen memos and frank assessments of the war that contradicted the government's public statements about the war.

On June 13, 1971, the Times began publishing stories based on the Pentagon Papers. Within 48 hours, the attorney general of the US asked the Times to stop, saying it would do "irreparable injury to the defense interests of the United States." The Times refused, and the Nixon Administration went to court, and won an injunction stopping the Times from publishing more stories on June 15. The Post then began publishing stories from the trove, and were similarly sued, but were not stopped from publishing. (Pember (1971))

In 15 days, the case made its way to the Supreme Court, a record. The government, echoing Near, argued the publication of secret documents would cause harm to national security. The court, however, ruled on June 30 that the Nixon Administration had not proved its case, and that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."

### 1.2.3 Copyright infringement

Copyright is an exclusive legal right given to creators – or someone they dedicate – for their creative work. The copyright protects the copyright holder from people taking it and using it for their own purposes. As such, using someone's copyrighted materials without their permission is not protected by the First Amendment.

This happens every day on social platforms. In the first half of 2021, there were 772 million copyright claims on YouTube alone (Trendacosta (2021)). That's 4 million *per day*.

Congress passed the first Copyright Act in 1790, which granted copyright holders their rights for 14 years. At the end of that time period, a work would enter the public domain, meaning anyone *could* use it for any purpose. In 1976, Congress extended creator rights to 50 years after the author's death – corporate copyright holders got 75 years to hold on to their works. Then, in 1998, Congress extended the copyright grant another 20 years. Why? Because Mickey Mouse was set to become public domain in 2003. (Christiansen (2004))

In 2022, Winnie the Pooh entered the public domain. Shortly after, a Hollywood studio announced they were making a horror movie starring the beloved bear from the children's stories.

The grant of copyright isn't absolute: There is something called **fair use** which *is* allowed under the First Amendment. Fair use grants some limited uses of copyrighted materials for things like criticism, comment, news reporting, teaching, scholarship and research (Office (n.d.)). What constitutes fair use is complicated – more complicated than we will go into here. The most important factors to determining if something is fair use vs a copyright violation are the purpose of the use, the amount of the work used and the effect on the copyrighted work. Drawing the line is hard, but quoting from a copyrighted work, such as been done here many times is fine. Reprinting that document is too much. Uploading copyrighted works to YouTube to try and get the ad money? Violation. Using bits and pieces in your video critique on YouTube? Allowed. A clip of a movie that doesn't give away the ending? Fair use. A half hour that gives it all away, keeping people from having to go to the movies to find out what happens? Violation.

#### 1.2.4 Libel and slander

Can your professor get up in front of class and call you a dim-witted, bed-wetting Iowa fan? Ignore the redundancy for a moment. Can your professor get up and defame you like that?

The answer is ... it depends.

First, we have to figure out what kind of suit you're going to file. **Libel** is defamation in written or broadcast form. **Slander** is defamation in spoken form. So our professor accusing you of ... shudder ... liking Iowa is spoken, so it's in the slander neighborhood. This determines what kind of suit you're going to file.

Now, there's a three part test to figure out if you're going win your defamation case:

1. Is falsely accusing you an Iowa fan defamatory – meaning, does it hurt your reputation?  
In this class, it absolutely does hurt your reputation.

2. Does your professor falsely accusing you of being an Iowa fan do actual harm to you?  
You are going to have to prove that the defamatory statements did actual harm to you – a lost job, emotional anguish, something like that.
3. Did your professor do anything to determine the truth? Were they negligent in saying what they said? Should they have known better?

So falsely saying defamatory things is not protected by the First Amendment. Sort of.

Because libel suits have the power to limit a free press, there's complications to this that the courts have put into place.

Truth is the first defense in a defamation suit – libel or slander. If it's true, it's not defamation, no matter how much harm was done to your reputation. If you showed up to class, even just once, wearing an atrocious mix of yellow and black with a diseased bird logo on your shirt, then you're likely to lose your suit. You just get to suffer because of your poor choices.

It gets harder still if you're a public person. Famous people and elected officials are two types of public persons. One of the most important free press cases to come to the Supreme Court was New York Times vs Sullivan. In 1960, a group of civil rights activists took out a full page ad in the New York Times criticizing police tactics in southern cities. The ad didn't name anyone, but the police commissioner of Montgomery, Alabama sued the times for libel. In an Alabama court, the commissioner won, and the New York Times was fined \$500,000 (that's about \$5 million in today's dollars). ("New York Times Company v. Sullivan" (n.d.))

The Times appealed to the Supreme Court, where the court ruled that Alabama libel law violated the First Amendment. What the court determined – unanimously – in 1964 was that it wasn't enough for a public person to prove something was false. Instead, the public person has to prove that the statement was made with "actual malice", a reckless disregard for the truth. In other words, the newspaper would have to know the statement was false and published it anyway, knowing it would hurt the person ("New York Times Company v. Sullivan" (n.d.)).

Times vs Sullivan is seen as one of the cornerstones of a free press in the US, but it's come under new criticism recently. On June 22, 2022, Supreme Court Justice Clarence Thomas filed a dissent in a case the court refused to hear that challenged Times vs Sullivan. A religious group called the Coral Ridge Ministries Media, Inc. sued the Southern Poverty Law Center in Alabama Court (again) for defamation after the SPLC labeled them a "Anti-LGBT hate group." The Alabama Court ruled that the religious group could not prove their case that being called a hate group was false because it was a debatable and ambiguous label. Thomas, in his dissent, said the court should review the actual malice standard because it has "no relation to the text, history, or structure of the Constitution." Thomas – no stranger to media criticism – wrote that Times vs Sullivan media organizations can "cast false aspersions on public figures with near impunity."

### **1.2.5 Obscenity**

In 1968, Marvin Miller – called by some the “King of Smut” – mailed advertisements for four books. They were called, and no we are not making this up:

- *Intercourse*
- *Man-Woman*
- *Sex Orgies Illustrated*
- *An Illustrated History of Pornography.*

Also included in the ads? A film called “Marital Intercourse.” Miller was charged under California law prohibiting the distribution of obscenity, and Miller appealed his case all the way to the Supreme Court, claiming the materials were not obscene and his First Amendment rights had been violated.

Unlike many of these tales of people fighting for their rights before the court, this time the court upheld the convictions 5-4. However, in the process, they established a three-part test for obscenity cases.

1. “Whether the average person, applying contemporary community standards, would find that the work taken as a whole, appeals to the prurient interest”
2. “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”
3. “and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”

Prior court rulings had ruled that any material designated as obscene was “utterly without any redeeming social value.” The Miller ruling, however, granted some leeway, requiring the material to have “serious value” and that “local community standards” would guide if something was obscene or not (Jr. (2009)).

“It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City,” Chief Justice Warren Burger wrote for the majority. He also added that materials that ”depict or describe patently offensive ‘hard core’ sexual conduct” constituted obscenity. (Jr. (2009))

In other words: A nude painting was not obscene. A porn video depicting intercourse might be.

The Miller test remains today, but it has taken on new criticism in the internet era. How do you apply “community standards” for porn over the internet? What community, the sender or the receiver? What does community even mean in the internet era?

### **1.2.6 Violation of privacy**

All of these other areas that the First Amendment doesn't protect have big court rulings that define them and offer a legal guide going forward. One area that doesn't is the **right to privacy**. Courts, generally, have established that there is a right to be left alone, a right to not have your daily business become public. The courts have also granted leeway to news media covering public figures, who because of interest in their lives have reduced privacy rights.

Lines are always being drawn and tested. California has paparazzi laws which are designed to reduce some of the worst behaviors of paparazzi and give celebrities some breathing room, but come perilously close to infringing on free press rights.

In a recent significant case, a Florida court in 2016 ordered Gawker, an entertainment site, to pay \$140 million to Terry "Hulk Hogan" Bollea after the website published a two-minute video involving the former professional wrestler, nine seconds of which show him having sex with a friend's wife. There's a lot to the case – including Bollea's legal fees being funded by a billionaire with a grudge against Gawker for outing him – but ultimately, Gawker settled for \$31 million and was sold off and shut down months later. Gawker had argued that Bollea was a public figure - the legendary wrestler also had a reality TV show about his life around the time - and that publication of the tape was protected by the First Amendment. The jury disagreed, saying the tape had no news value and that Bollea's privacy had been violated. There's substantial disagreement over if the case has any real impact on First Amendment law, but it illustrates how privacy cases are decided in the United States: Does a jury view the actions as a gross violation? If so, it is. If not, it isn't.

## **1.3 Current controversies and misunderstandings**

Public misunderstanding of just what the First Amendment does and does not do have been around as long as the Republic. A 2019 Freedom Forum survey of Americans found that 4 percent could name the right to petition the government as a right in the First Amendment. Meanwhile, 16 percent thought the First Amendment granted the right to bear arms and 14 percent thought it granted them the right to vote. ("State of the First Amendment Survey" (2019)).

Public understanding of the First Amendment would come to head during the Trump presidency, where supporters of the former president were removed from social media platforms, culminating in Trump himself being removed from Twitter and Facebook.

Prior to Trump being removed from the major social media platforms, the Freedom Forum found that 65 percent of Americans believed social media companies violate users' First Amendment rights when they ban accounts. Not surprisingly, more Republicans (71 percent) thought this than Democrats (62 percent).

Reminder: The First Amendment applies to the government. Remember *Congress shall make no law?*

## 1.4 More Reading

- Read 15.2, 15.3 and 15.4 in Understanding Media and Culture
- Read pages 1-33 of The Knight Foundation's [FREE EXPRESSION ON CAMPUS: WHAT COLLEGE STUDENTS THINK ABOUT FIRST AMENDMENT ISSUES](#) and note that the survey was taken in 2018 – before the pandemic and in the middle of the Trump Presidency. Think about what might have changed and what hasn't since this report.

## 2 Summary

In summary, this book has no content whatsoever.

**1 + 1**

[1] 2

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