

JONATHAN BARTH

“Liberty of Conscience is Every Man’s Natural Right”: Historical Background of the First Amendment

Abstract: Liberty of conscience, encompassing free speech, a free press, and freedom of religion, has a rich history in Anglo-American political thought, long predating the drafting of the First Amendment to the United States Constitution in 1789. The debate over licensing acts in seventeenth-century England; the advancement of principles of toleration by John Milton, Algernon Sidney, and John Locke in the same period; the renowned, impassioned, and highly influential essays of John Trenchard and Thomas Gordon in *Cato’s Letters*; the flourishing of a relatively free press and free church in eighteenth-century colonial America; and the liberty-championing assertions in the several declarations of rights in the newly independent states of America all played a critical role in shaping and inspiring the popular views in America that made the First Amendment possible.

Keywords: First Amendment of the Constitution of the United States, Liberty of Conscience, Natural Rights, free speech, Bill of Rights, Anti-Federalists, Federalists

“We live in an age that makes truth pass for treason,” Algernon Sidney declared on the scaffold at Tower Hill, the morning of his beheading on December 7, 1683. A staunch republican, Sidney had secretly authored *Discourses Concerning Government*, in which he assailed the doctrines of absolute monarchy and divine right of kings. “The Liberties of Nations are from God and Nature,

JOURNAL OF POLICY HISTORY, Vol. 35, No. 4, 2023.

© Donald Critchlow and Cambridge University Press 2023. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

doi:10.1017/S0898030623000234

not from Kings," he pressed.¹ Following his arrest in June 1683 for the crime of treason, the court admitted as evidence—indeed as a primary witness in the case—the yet-unpublished manuscript for *Discourses Concerning Government*. "To write is to act," the judge proclaimed. Sidney died a martyr for republicanism and liberty of conscience and as such proved a powerful inspiration for the Founding Fathers in America's later revolution against the Crown.

The principles found in the First Amendment to the United States Constitution have a wealthy heritage in the history of Anglo-American political thought: from Milton in the 1640s, to prominent writers in the Whig tradition in the late-seventeenth and early-eighteenth centuries, to the several declarations of the newly independent American states at the outset of the Revolution. Long before Madison's drafting of the First Amendment in 1789, most Americans agreed with Locke's assertion from a century earlier that "Liberty of Conscience is every man's natural Right."²

LICENSING ACTS AND THE FREEDOM OF THE PRESS

Gutenberg's invention of the movable-type printing press in the middle of the fifteenth century revolutionized the spread of information and ideas in Europe and Britain; the Protestant Reformation, for example, hardly seems possible without it. Paralleling today's concerns about the spread of information over the Internet, elites in the sixteenth and seventeenth centuries were deeply distressed about the social and political influence of the wide and unfettered dissemination of heterodox ideas. Censorship followed shortly thereafter; the Pope issued his famous *Index of Prohibited Books*, and princes throughout Europe—Catholic and Protestant—authorized licensing laws that required printers to secure advance approval for every published text.

Since the late-fifteenth century, the English crown had scrupulously regulated the printing of works via licensing requirements enforced by the printers' guild and the Court of Star Chamber. After Parliament abolished the Star Chamber in 1641, printing, for a season, went unregulated, at which time inexpensive pamphlets and broadsides flooded the public square. It cost no more than a penny to print a single page—a published petition, for instance, or a copy of a speech—and longer pamphlets generally sold for no more than sixpence, with circulation commonly exceeding one thousand copies.³ England was one of the most literate societies in the world, and the illiterate portion of the population usually heard works read aloud at public houses.⁴ Two years into the season of unlicensed printing, Parliament responded to the supposed anarchy by enacting, in June 1643, "An Ordinance for the

Regulating of Printing.” Citing “the great late abuses and frequent disorders in Printing,” including “many false, forged, scandalous, seditious, libellous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and Government,” Parliament ordered that all works receive approval and license prior to publication, and that all suspected printers and authors of unlicensed works be diligently searched and apprehended if necessary.⁵

It was against the 1643 Licensing Act that John Milton—poet, Calvinist, humanist, and radical republican—authored one of the most seminal works ever produced on the importance of free speech and a free press: *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicens'd Printing*. “Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties,” he famously wrote.⁶ On the title page, Milton quoted the ancient Greek playwright Euripedes:

*This is true Liberty when free born men,
Having to advise the public may speak free,
Which he who can, and will, deserv's high praise,
Who neither can nor will, may hold his peace;
What can be juster in a State then this?*

Parliament underestimated “the ingenuity of Truth” to defeat error, Milton claimed. “Though all the windes of doctrine 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,” he wrote, “Let her and Falshood grapple; who ever knew Truth put to the worse, in a free and open encounter.” Licensing requirements, he said, evince nothing “but weakness and cowardice in the wars of Truth.” Moreover, he argued, it is deeply insulting. By not counting the author “fit to print his mind without a tutor and examiner,” the licensing system is “the greatest discouragement and affront, that can be offer'd to learning and to learned men ... a dishonour and derogation to the author, to the book, to the priviledge and dignity of Learning.” Knowledge and understanding suffer grievously as a result; the mind and creative faculties become stagnant. “Truth is compar'd in Scripture to a streaming fountain,” he said, “if her waters flow not in a perpetuall progression, they sick'n into a muddy pool of conformity and tradition.” Liberty is “the nurse of all great wits,” Milton wrote, but censorship compels intellectuals to bear the “iron yoke of outward conformity.”⁷

Milton's work, though well received, did not persuade members of Parliament, who were all too pleased to wield the sword against the speech of royalists and against Protestant sects that dissented from Presbyterian

orthodoxy, to revoke the Licensing Act. At the Restoration of the Crown in 1660, the censorship continued. A new licensing act, in 1662, called it a "matter of Publique care" that all "heretical schismatical blasphemous seditious and treasonable Bookes Pamphlets and Papers" be suppressed. To this end, according to the 1662 Licensing Act, "no surer meanes can be advised then by reducing and limiting the number of Printing Presses," with heavy fines and imprisonment for all offending printers.⁸ A Whig-dominated Parliament allowed the Licensing Act to lapse in 1679—albeit with expansive libel prosecutions still in effect—but a new Tory Parliament, loyal to King James II, reinstated the Licensing Act in 1685.⁹

When the Glorious Revolution ousted King James II in 1688, liberal, Whiggish principles appeared cemented as never before into the English constitution. Within a year, Parliament enumerated several "undoubted rights and liberties" belonging to Englishmen, in what became known as the 1689 Bill of Rights. "It is the right of the subjects to petition the king," the law stated, "prosecutions for such petitioning are illegal." Additionally, "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court."¹⁰ Although this latter protection extended only to Members of Parliament on the floor of Parliament, Whig theorists such as John Locke viewed a free press, free speech, and liberty of conscience as a natural right. As Locke elaborated in his 1689 *Letter Concerning Toleration*, censorship laws force people "to quit the Light of their own Reason; to oppose the Dictates of their own Consciences; and blindly to resign up themselves to the Will of their Governors."¹¹

Parliament renewed the Licensing Act in 1692, but in 1695 the House of Commons, under the direct influence of Locke, and notwithstanding strong push back from the House of Lords, declined to renew the Licensing Act so that from 1695 onward there were no further prepublication restrictions on the press. A torrent of printed works followed, from approximately 1,100 titles per annum between 1660 and 1688 to approximately 2,000 titles per annum between 1689 and 1727.¹² Many of the works were highly political and partisan, designed expressly to appeal to a popular audience and to sway mass opinion. At this time, approximately half the adult male population and perhaps a quarter of the adult female population in England were literate.¹³ A vibrant print culture took hold in eighteenth-century Britain, with pamphlets, broadsides, sermons, journals, and newspapers widely circulated and read aloud on the streets and in taverns, inns, and coffeehouses.¹⁴ Printing outside of London—the provincial press—expanded rapidly in this period; by 1735 the number of newspapers outside London reached twenty-five, each

boasting a wide readership per issue, ranging from several hundred to several thousand.¹⁵ Libel laws enforced some restriction on the manner and content of these publications—ardent and forceful criticism of the government would often result in prosecution—but undoubtedly in the early eighteenth century, Britain enjoyed the freest and most independent press in the world.

Cato's Letters AND THE COLONIAL AMERICAN PRESS

More than any other published work in Britain in the eighteenth century, *Cato's Letters*—though authored and published in London—shaped and aroused the burgeoning republican sentiment in colonial North America, particularly the colonists' love for a free press and free speech. Between 1720 and 1723, John Trenchard and Thomas Gordon published a weekly series of essays for the *London Journal*. They assumed the pen name *Cato*, after the Roman senator and republican champion who had courageously challenged the power of Julius Caesar. Though starting as a blast against the corrupt dealings of the collapsed South Sea Company, the essays went on to tackle a wide range of subjects, political and religious, combining classical republicanism with Lockean liberalism to expose and combat corruption and to thwart the establishment of a future tyranny in Britain. The genius of Trenchard and Gordon's work was their ability to communicate political ideas for a mass audience so that one could accurately describe *Cato's Letters* as one of the earliest and most successful examples of the populist style in politics.

In 1724 Thomas Gordon compiled the 144 essays into a four-volume book, *Cato's Letters: Or, Essays on Liberty, Civil and Religious*. The essays became enormously popular in colonial America; their influence on American political thought in the mid-eighteenth century could hardly be overstated; Bernard Bailyn, historian, identifies *Cato's Letters* as the most influential text over the political thought of the American revolutionaries.¹⁶ Trenchard and Gordon identified as Independent Whigs: the Country faction of Whigs that, together with Country Tories, opposed the corruption and patronage of the establishment (Court) Whigs under Robert Walpole, the first prime minister of Britain, who for decades towered over the proceedings of Parliament. Virtually all of the Founding Fathers possessed a copy of *Cato's Letters*, and they often quoted from it, far more than they quoted Locke. By the eve of the Revolutionary War, the book had undergone six editions; colonial newspapers frequently reprinted its content. "Liberty is the unalienable Right of all Mankind," read the pages of *Cato's Letters*: "the divine Source of all human Happiness."¹⁷

Paramount to *Cato's Letters* was the idea that a free press and free speech was a natural right—indeed mandatory for any free system of government. "Freedom of Speech is the great Bulwark of Liberty; they prosper and die together," Gordon wrote. "Without Freedom of Thought," he said, "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." "This sacred Privilege," Gordon continued, "is so essential to free Governments, that the Security of Property and the Freedom of Speech always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own. Whoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech."¹⁸

Well-run states and honest public officials have nothing to fear from having "their Deeds openly examined, and publickly scanned," Gordon said; "the best Princes have ever encouraged and promoted Freedom of Speech; they know that upright Measures would defend themselves." On the other hand, free speech "is the Terror of Traytors and Oppressors... . Guilt only dreads Liberty of Speech, which drags it out of its lurking Holes, and exposes its Deformity and Horror to Day-light." Ministerial opponents of this liberty have only "shewed how much Truth alarmed them, and how much they were at Enmity with Truth."¹⁹ "Every private Subject has a Right to watch the Steps of those who would betray their Country," Trenchard argued, "nor is he to take their Word about the Motives of their Designs... . This is the Principle of a *Whig*, this the Doctrine of Liberty."²⁰ Thus, it is an "undoubted Right," Gordon remarked, for the people "humbly to represent their publick Grievances, and to petition for Redress"; the right to petition "is indeed the best and only just Way that they can take to breathe their Grievances."²¹

With respect to knowledge and culture, the freedom of speech "produces excellent Writers, and encourages Men of fine Genius," Gordon added. Absent this liberty, and the people, especially "brow-beaten Writers," succumb to "Abject Sycophancy and blind Submission ... Men durst not open their Mouths, but to flatter."²² "Where Liberty is lost," Gordon wrote, "Life grows precarious, always miserable, often intolerable."²³ Suppress this liberty, Trenchard warned, and "the World must soon be over-run with Barbarism, Superstition, Injustice, Tyranny, and the most stupid Ignorance ... a servile Submission to Power ... and a furious and implacable Animosity to all whose Mouths are not formed to the same Sounds." "It is senseless," he said, "to think that any Truth can suffer by being thoroughly searched, or examined into"; the real issue was that tyrants desperately fear the truth.²⁴ "Where-ever Truth is Dangerous, Liberty is precarious," Gordon remarked.²⁵

Trenchard and Gordon were especially critical of expansive libel prosecutions, which, in the era after the lapsing of the Licensing Act, was the primary means by which the British government censored political speech. While acknowledging that “private and personal Failings” should be off-limits in the press—justly falling within libel prohibitions—Gordon argued that “it is quite otherwise when the Crimes of Men come to affect the Publick.” Exposing such “publick wickedness,” he said, “can never be a Libel in the Nature of Things.” “We know that in all Times there have been Men lying upon the Watch to stifle Liberty, under a Pretence of suppressing Libels,” he wrote, “I must own, that I would rather many Libels should escape, than the Liberty of the Press should be infringed.”²⁶ Expansive libel prosecutions would “inevitably destroy all Liberty,” Trenchard warned, constituting “such a Stretch of discretionary Power, as must subvert all the Principles of free Government, and overturn every Species of Liberty.”²⁷ History proved that aspiring tyrants “have called every Opposition to their wild and ravenous Schemes, and every Attempt to preserve the People’s Right, by the odious Names of Sedition and Faction, and charged them with Principles and Practices inconsistent with the Safety of all Government.” A free people should see through this ploy, Trenchard wrote, and assert “the Advantages of Liberty of Speech, and Liberty of Writing (which secures all other Liberties).”²⁸

Opponents of free speech, Trenchard wrote, object that “this is setting up the Mob for Statesmen,” and indeed, he conceded, “if Men be suffered to preach or reason publicly and freely ... they may reason wrongly, irreligiously, or seditiously, and sometimes will do so; and by such Means may possibly now and then pervert and mislead an ignorant and unwary Person.” But the alternative was far worse, he argued, and besides, why should we trust some “ignorant Licensor” to judge rightly on such matters?²⁹ “The whole People, who are the Publick, are the best Judges, whether Things go ill or well with the Publick”; indeed, he said, “the People often judge better than their Superiors, and have not so many Biases to judge wrong.”³⁰ “Every Ploughman knows a good Government from a bad one,” Gordon wrote.³¹

“The Independent Whigs think all Liberty to depend upon Freedom of Speech, and Freedom of Writing,” Trenchard remarked, “conceiving that there is often no other Way left to be heard by their Superiors, nor to apprise their Countrymen of Designs and Conspiracies against their Safety.”³² Free speech, therefore, is of “infinite Importance to the Preservation of Liberty,” Gordon said, “every one who loves Liberty, ought to encourage Freedom of Speech”; in fact, “a free People will be shewing that they are so, by their Freedom of Speech.”³³

Notwithstanding, Prime Minister Walpole and other Whig members of the Court vigorously prosecuted printers in England for libel, and in colonial America too, critiquing or satirizing a public official could land one a heavy fine or jail time.³⁴ The colonial press was small but growing. The first colonial newspaper, the *Boston News-Letter*, began its run in 1704, and by the 1720s New York and Philadelphia each had a newspaper. The *Pennsylvania Gazette*, published by Benjamin Franklin, had approximately two thousand subscribers; other colonial newspapers, often weeklies, ran in the hundreds. In 1740 there were fourteen colonial newspapers; by 1765, twenty-five newspapers; by 1775, thirty-nine newspapers. At the time of the Revolution, an astounding three-quarters of free adult men and more than one-third of women in the colonies could read. The vast majority of books in the colonies was imported from Britain—works like *Cato's Letters* or Sidney's *Discourses Concerning Government*—nevertheless, colonial printers published low-cost pamphlets, leaflets, and single-page broadsides, many of which commented frankly and often insolently on the most pressing political issues and controversies of the day.³⁵

The seminal case on the free press in colonial America was the Zenger decision in 1735. John Peter Zenger was editor of the *New-York Weekly Journal* and a staunch opponent of the royal governor, William Cosby. Zenger, who often printed portions of *Cato's Letters* in his weekly, accused the governor of corruption and tyrannical tendencies, leading to Zenger's arrest and prosecution for seditious libel. Libel laws in England at the time made it clear that the truth or accuracy of the written word was irrelevant in the case: even a truthful word about a public official, if stated vituperatively or in a manner the government deemed offensive, could make one guilty of libel. The judge strictly instructed the jury in this method, but Zenger's lawyer, Andrew Hamilton, urged the opposite, famously telling the jury that their decision "may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty ... the liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth." At these remarks, the audience erupted in applause—even the prosecutor admitted that Hamilton had "made himself and the people very merry"—and the jury, shortly after, returned the verdict, "Not guilty."³⁶

Though expansive libel laws continued in force in Britain and in some of the colonies even after the Zenger case, the notion of a free press and free speech was thoroughly ingrained in the Anglo-American psyche by the mid-eighteenth century. As one anonymous pamphleteer in London wrote in 1740,

“The People of Britain in general have an undubitable Right to Canvass publick affairs, to express their sentiments freely. . . . [This right] is so far from being dangerous that it is really conducive to the Publick Peace. By this means, all Degrees of People, who have leisure and abilities, and a turn to this sort of reading, acquire rational ideas of liberty and submission, of the rights of the church, and of the power of the State, and of their duties as subjects, and of what they may justly claim as *Free men*.”³⁷

THE REVOLUTIONARY ERA

Freedom of speech and of the press was not among the core complaints of the colonists leading up to the Revolution. But certainly, on the eve of the Revolutionary War, the right to peaceably assemble and petition the government for a redress of grievances was foremost on the minds of the delegates to the First Continental Congress, which convened in September and October 1774. The 1689 Bill of Rights said that it was “the right of the subjects to petition the king,” but according to the delegates, that right had been denied in the colonies, for “assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, and reasonable petitions to the crown for redress, have been repeatedly treated with contempt by his Majesty’s ministers of state.” The Congress thereby resolved, on October 14, 1774, “That they have a right peaceably to assemble, consider of their grievances, and petition the king”; this they considered among “their indubitable rights and liberties,” as discovered “by the immutable laws of nature [and] the principles of the English constitution.”³⁸

Two weeks later in October 1774, the First Continental Congress sent a letter appealing to the inhabitants of Quebec, urging that they join them in the struggle. In it they described some of “the right, without which a people cannot be free and happy,” and among these included “the freedom of the press.” A free press, they argued, contributes to “the advancement of truth, science, morality, and arts in general”; the importance of a free press also consists “in its diffusion of liberal sentiments on the administration of Government, [and] its ready communication of thoughts between subjects . . . whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.”³⁹

More significantly, in May 1776, George Mason drafted the Virginia Declaration of Rights, ratified by the Virginia convention on June 12. The document was enormously influential; it directly inspired the Declaration of

Independence that followed shortly after and later inspired the Bill of Rights. "All men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity," Mason wrote, "namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Section XII of the Virginia Declaration of Rights resolved, "[t]hat the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."⁴⁰

Other such declarations, from other states, followed; the authors of which risked prosecution, of course, for seditious libel and treason. The Constitution of Massachusetts, drafted in October 1779 and ratified a year later, also included a Declaration of Rights, which, besides acknowledging the right of the people to peaceably assemble and to petition the government, stipulated, "The liberty of the press is essential to the security of freedom in a state," and additionally, that "the freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint."⁴¹

RELIGIOUS LIBERTY

The opening clause of the First Amendment precludes Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof." Like the freedom of speech, of the press, and of the right to peaceably assemble and petition the government, religious liberty had a long history in the English and especially the American colonial experience. In most colonies, public tax money supported established churches, but the remarkable diversity in religious sentiments in colonial America, together with a general and growing acceptance of a right to a free conscience, contributed to a widespread belief by the time of the Revolution that individuals have a natural right to follow their own private religious convictions, without harassment or compulsion from the state.

The first great document of religious liberty in the colonies was the Maryland Act of Toleration in 1649. Adopted more out of necessity than principle—Maryland was the only colony to possess a mixed Roman Catholic and Protestant population—the statute, while making it a capital crime to blaspheme the Holy Trinity or to deny the divinity of Christ, also declared that "the inforceing of the conscience in matters of Religion hath frequently fallen out to be of dangerous Consequence in those commonwealthes where

it hath been practised.” Therefore, in order to secure a “more quiett and peaceable government of this Province, and the better to preserve mutuall Love and amity amongst the Inhabitants,” the act stipulated that no person “professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof ... nor any way compelled to the beliefe or exercise of any other Religion against his or her consent.”⁴²

Roger Williams, the Reformed Baptist minister and theologian, founded Rhode Island in 1636 as a refuge for those seeking “to hould forth liberty of Conscience.”⁴³ When Rhode Island received a royal charter in 1663, King Charles II recognized, in the text of the charter, that the people in Rhode Island wish “to hold forth a lively experiment, that a most flourishing civil state may stand and best be maintained ... with a full liberty in religious concernments.” Therefore, according to the Rhode Island charter, no person “shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion”; on the contrary, each person shall “free and fully have and enjoy his and their own judgments and consciences, in matters of religious concernments.”⁴⁴

William Penn, Quaker, founded Pennsylvania on similar principles. In 1670 in England, following his arrest for unauthorized preaching, Penn authored *The Great Case of Liberty of Conscience*. In 1681 King Charles granted him proprietary rights over the lands of Pennsylvania in order to settle a debt owed to his father. Penn determined to make the colony a beacon for religious liberty—“Almighty God being the only Lord of Conscience.” Penn outlined these principles in the 1701 Charter of Privileges. “No People can be truly happy,” it stated, “though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship.” Therefore, so long as a person confessed and acknowledged “One almighty God, the Creator, Upholder and Ruler of the World,” they would not be “in any Case molested or prejudiced ... nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind.” To serve in public office required a slightly higher bar of religious belief: so long as one professed “to believe in Jesus Christ, the Savior of the World, [they] shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively.”⁴⁵

Sentiments in England also trended toward liberalization, though certainly more slowly than in colonial America. The Toleration Act in 1689 allowed Protestant dissenters—those who did not belong to the Church of

England—the right to publicly meet and freely worship (though not to Roman Catholics or Unitarians). Still, Protestant dissenters could not hold public office or attend most universities. Radical and independent Whigs in England supported further liberalization. "Every one should do what he in his Conscience is perswaded to be acceptable to the Almighty," Locke wrote in *A Letter Concerning Toleration*, "no body ought to be compelled in matters of Religion, either by Law or Force."⁴⁶ John Trenchard agreed, remarking in *Cato's Letters* (1722):

Every Man's Religion is his own; nor can the Religion of any Man, of what Nature or Figure soever, be the Religion of another Man, unless he also chooses it; which Action utterly excludes all Force, Power, or Government. Religion can never come without Conviction, nor can Conviction come from Civil Authority; Religion, which is the Fear of God, cannot be subject to Power, which is the Fear of Man. It is a Relation between God and our own Souls only.

The Great Awakening, a popular revival that emphasized conversion as a matter of the individual conscience and heart, together with the ultra-rationalistic Enlightenment, helped swing public opinion more and more toward religious toleration so that by the time of the American Revolution, it was widely and broadly accepted in the American population. In section 16 of the Virginia Declaration of Rights (May 1776), George Mason asserted

that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity toward each other.⁴⁷

The Pennsylvania Constitution of 1776, in like manner, stipulated, "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding."⁴⁸ "It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe," the Constitution of Massachusetts stated, but "no subject shall be

hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience,” and therefore, “no subordination of any one sect or denomination to another shall ever be established by law.”⁴⁹

Tax-supported churches, notwithstanding, still existed in revolutionary Virginia and Massachusetts. The Massachusetts Constitution of 1780, after guaranteeing religious freedom, asserted that because “the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality,” it was rational and just to provide public funds for churches in the state, “for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality.” All taxpayers, however, had the right to designate their contribution for the support of their “own religious sect or denomination.”⁵⁰

In Virginia, the Anglican Church had received public funds since the founding of Jamestown. Jefferson drafted a Statute for Religious Freedom in 1777 and introduced it to the legislature in 1779. The bill proposed to fully disestablish the church in Virginia (now the Episcopal Church), but it stalled in the legislature. In 1784 Patrick Henry sponsored a bill requiring inhabitants to “pay a moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination, or communion of Christians, or for some form of Christian worship.” Thus Quaker and Mennonite churches could receive public funds; the Episcopal Church would no longer be the sole established church. Jefferson, at the time, was abroad, but Madison, aged 33, helped defeat the measure, authoring, in 1785, the widely read “Memorial and Remonstrance against Religious Assessments.” “Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion,” he said. Instead,

[t]he Religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men.⁵¹

A year after the “Memorial,” Madison ushered through the legislature Jefferson’s Statute for Religious Freedom. “Almighty God hath created the

mind free," the statute began; "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical ... it tends only to corrupt the principles of that very Religion it is meant to encourage." "Our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry." Finally, and speaking broadly also to the freedom of speech, the statute resolved,

that Truth is great, and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.⁵²

After the Statute for Religious Freedom passed through the legislature, Madison wrote Jefferson, "I flatter myself we have in this country extinguished forever the ambitious hope of making laws for the human mind."⁵³ A year later, the Northwest Ordinance proclaimed that no person "shall ever be molested on account of his mode of worship or religious sentiments, in the said territory." And finally, the Federal Constitution in 1787 provided that "no religious Test shall ever be required as a Qualification to any office or public Trust under the United States."⁵⁴

DRAFTING AND RATIFYING THE FIRST AMENDMENT

The most commendable legacy of the Anti-Federalists during the Ratification debates over the United States Constitution was their demand that it be amended to include explicit provisions barring the national government from ever transgressing certain rights. Madison, famously, believed at first that such a bill of rights was redundant and unnecessary, for the limited powers granted to the federal government in the Constitution would not allow the Congress to ever transgress upon those rights. "I have never seen in the Constitution, as it now stands, those serious dangers which have alarmed many respectable Citizens," he said.⁵⁵ Some Federalists argued that it was dangerous to enumerate specific rights, as it might imply that other, unenumerated rights did not in fact exist. Yet Madison soon came around to the idea, agreeing even to draft the amendments. He corresponded with Jefferson on this matter in October 1788, writing that "among the advocates for the Constitution there are some who wish for further guards to public liberty and individual rights,"

and that it was now “probable they will be added.” “My opinion has always been in favor of a bill of rights,” he told Jefferson, but “at the same time, I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others.” Nevertheless, he told Jefferson, “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State”—a reference to the feebleness of the various declarations of rights in the states in the 1780s. “Wherever there is an interest and power to do wrong, wrong will generally be done,” he said, “Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Habeas Corpus be dictated by the alarm, no written prohibitions on earth would prevent the measure.”⁵⁶ In the end, for Madison, it was “from a spirit of conciliation” that he agreed to draft the amendments that became the Bill of Rights; he was especially anxious to avoid the need for a second convention, which would threaten to throw “all things into confusion.”⁵⁷ “Circumstances are now changed,” he wrote another correspondent in January 1789, “it is my sincere opinion that the Constitution ought to be revised,” and “if pursued with a proper moderation and in a proper mode, [the Bills of Rights] will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty.” Of those liberties, Madison considered “the rights of conscience in the fullest latitude” to be the most significant.⁵⁸

In June 1789, no more than three months into the first session of the First United States Congress under the new Constitution, Madison rose to bring forward amendments to the Constitution. “The great object in view,” he told his colleagues in Congress, “is to limit and qualify the powers of Government.”⁵⁹ Madison’s initial draft of what became the First Amendment was as follows:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable. The people shall not be restrained from peaceably

assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.⁶⁰

James Jackson of Georgia, a representative who soon aligned himself with the Democratic Republicans in opposition to Hamilton and the Federalist Party, objected on the floor of the House to Madison's proposal. It is one of the few recorded speeches in Congress against the Bill of Rights:

The gentleman [Madison] endeavors to secure the liberty of the press; pray how is this in danger? There is no power given to Congress to regulate this subject as they can commerce, or peace, or war. Has any transaction taken place to make us suppose such an amendment necessary? An honorable gentleman, a member of this House, has been attacked in the public newspapers on account of sentiments delivered on this floor. Have Congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, although the Constitution provides that a member shall not be questioned in any place for any speech or debate in the House? No, these things are offered to the public view, and held up to the inspection of the world. These are principles which will always prevail. I am not afraid, nor are other members I believe, our conduct should meet the severest scrutiny. Where, then, is the necessity of taking measures to secure what neither is nor can be in danger?⁶¹

But a bill of rights was the condition on which many prior Anti-Federalists agreed to go along with the Constitution. Madison desired to retain their trust in the new government's goodwill and integrity by introducing the amendments in the first session. And the House wisely elected to streamline his chief 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 the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁶²

On December 15, 1791, ten of the twelve articles of amendment that Congress approved and submitted to the states were ratified and added to the Constitution. Seventy-seven years later, owing to the Due Process Clause of the Fourteenth Amendment, the rights outlined in the first ten amendments

henceforth limited the actions not only of Congress and the federal government but also of the state and local governments.

Arizona State University

NOTES

1. Algernon Sidney (1681–83), *Discourses Concerning Government* (London, 1698), 242.
2. [John Locke], *A Letter Concerning Toleration* (London, 1689), 48.
3. Michael Mendle, “Preserving the Ephemeral: Reading, Collecting, and the Pamphlet Culture of Seventeenth-Century England,” in *Books and Readers in Early Modern England: Material Studies*, eds. Jennifer Anderson and Elizabeth Sauer (Philadelphia: University of Pennsylvania Press), 201.
4. Tim Harris, *Politics under the Later Stuarts: Party Conflict in a Divided Society, 1660-1715* (London: Longman, 1993), 20–21.
5. “An Ordinance for the Regulating of Printing,” June 14, 1643, in *Acts and Ordinances of the Interregnum, 1642-1660*, eds. C. H. Firth and R. S. Rait (London: His Majesty’s Stationery Office, 1911), 184–86, *British History Online*, <http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp184-186>.
6. John Milton, *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicens’d Printing, to the Parliament of England* (London, 1644), 35.
7. *Areopagitica*, 15, 20–21, 26, 35–36.
8. “An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses,” 1662, in *Statutes of the Realm: Volume 5, 1628-80*, ed. John Raithby (London: Great Britain Record Commission, 1819), 428–35, *British History Online*, <http://www.british-history.ac.uk/statutes-realm/vol5/pp428-435>.
9. Harris, *Politics under the Later Stuarts*, 20; Julian Hoppit, *A Land of Liberty? England, 1689-1727* (Oxford: Clarendon Press, 2000), 177.
10. “An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown,” Feb. 13, 1689, in *The Statutes at Large, from the First Year of King James the First to the Tenth Year of the Reign of King William the Third*, vol. 3 (London, 1770), 440.
11. Locke, *Letter Concerning Toleration*, 8.
12. Hoppit, *Land of Liberty*, 178; Harris, *Politics under the Later Stuarts*, 186.
13. Harris, *Politics under the Later Stuarts*, 20–21; J. A. Downie, “The Development of the Political Press,” in *Britain in the First Age of Party, 1680-1750*, ed. Clyve Jones (London: The Hambledon Press, 1987), 114–15.
14. Kathleen Wilson, *The Sense of the People: Politics, Culture and Imperialism in England, 1715-1785* (Cambridge: Cambridge University Press, 1995), 29–37; Steven G. Marks, *The Information Nexus: Global Capitalism from the Renaissance to the Present* (Cambridge: Cambridge University Press, 2016), 115–17.

15. Wilson, *Sense of the People*, 37–43; Terry Belanger, "Publishers and Writers in Eighteenth-Century England," in *Books and their Readers in Eighteenth-Century England*, ed. Isabel Rivers (New York: Leicester University Press, 1982), 8.

16. Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967; rev. ed., Cambridge, MA: The Belknap Press of Harvard University Press, 1992), 35, 42, 45–47, 51–52; Bernard Bailyn, "Political Experience and Enlightenment Ideas in Eighteenth-Century America," *The American Historical Review* 67, no. 2 (January 1962): 343–44; W. A. Speck, *Stability and Strife: England, 1714–1760* (Cambridge, MA: Harvard University Press, 1977), 223–24; H. T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain* (New York: Holmes and Meier Publishers, 1977), 175–81.

17. Cato's Letters, No. 59, Dec. 30, 1721, in *Cato's Letters; or, Essays on Liberty, Civil and Religious, and other important Subjects*, 4 vols. (4th ed., London, 1737), 2:214; Cato's Letters, No. 62, in *Cato's Letters*, 2:252.

18. Cato's Letters, No. 15, Feb. 4, 1721, in *Cato's Letters*, 1:96, 100.

19. Cato's Letters, No. 15, 1:97–102.

20. Cato's Letters, No. 13, Jan. 21, 1721, in *Cato's Letters*, 1:86.

21. Cato's Letters, No. 24, Apr. 8, 1721, in *Cato's Letters*, 1:182.

22. Cato's Letters, No. 15, 1:100–1.

23. Cato's Letters, No. 62, 2:249.

24. Cato's Letters, No. 100, 3:297–98.

25. Cato's Letters, No. 38, July 22, 1721, in *Cato's Letters*, 2: 35.

26. Cato's Letters, No. 32, June 10, 1721, in *Cato's Letters*, 1:246–47, 253.

27. Cato's Letters, No. 100, October 27, 1722, in *Cato's Letters*, 3:299; Cato's Letters, No. 101, November 3, 1722, in *Cato's Letters*, 3:303.

28. Cato's Letters, No. 100, 3:293–94.

29. Cato's Letters, No. 100, 3:296–97; Cato's Letters, No. 101, 3:305.

30. Cato's Letters, No. 13, 1:86–87.

31. Cato's Letters, No. 32, 2:35.

32. Cato's Letters, No. 101, 3:304.

33. Cato's Letters, No. 15, 1:97, 102.

34. Speck, *Stability and Strife*, 223–24.

35. Belanger, "Publishers and Writers," 11–12; Richard Beale Davis, *A Colonial Southern Bookshelf: Reading in the Eighteenth Century* (Athens: University of Georgia Press, 1979), 12–14; Edwin Wolf II, *The Book Culture of a Colonial American City: Philadelphia Books, Bookmen, and Booksellers* (Oxford: Clarendon Press, 1988), 3.

36. *The Trial of Peter Zenger*, ed. Vincent Buranelli (New York: New York University Press, 1957), 131–32.

37. *The Liveryman, or Plain Thoughts on Public Affairs* (London, 1740), 2, 9, cited in Wilson, *Sense of the People*, 43.

38. "Declaration and Resolves of the First Continental Congress," Oct. 14, 1774, in *A Decent Respect to the Opinions of Mankind: Congressional State Papers, 1774–1776*, ed. James H. Hutson (Washington, DC: Library of Congress, 1975), 53–54.

39. "A Letter to the Inhabitants of the Province of Quebec," Oct. 26, 1774, in *A Decent Respect to the Opinions of Mankind: Congressional State Papers*, 63–64.

40. "Virginia Declaration of Rights," June 12, 1776, in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* [hereafter cited as FSC], 7 vols., ed. Francis Newton Thorpe (Washington: Government Printing Office, 1909), 7:3814.
41. Constitution of Massachusetts, Oct. 25, 1780, in FSC, 3:1892.
42. *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland*, 72 vols., eds. William Hand Browne, Clayton Colman Hall, and Bernard Christian Steiner (Baltimore: Maryland Historical Society, 1883-1972), 1:244-47.
43. "Plantation Agreement at Providence," 1640, in FSC, 6:3206.
44. "Charter of Rhode Island and Providence Plantations," 1663, in FSC, 6:3223.
45. "Charter of Privileges Granted by William Penn to the Inhabitants of Pennsylvania," Oct. 28, 1701, in FSC, 5:3077.
46. Locke, *Letter Concerning Toleration*, 43, 48.
47. "Virginia Declaration of Rights," FSC, 7:3813.
48. Constitution of Pennsylvania, Sept. 28, 1776, in FSC, 5:3077.
49. Constitution of Massachusetts, FSC, 3:1889-90.
50. *Constitution of Massachusetts*, FSC, 3:1889-90.
51. James Madison, "Memorial and Remonstrance against Religious Assessments," 1785, repr. in Franklyn S. Haiman, *Religious Expression and the American Constitution* (Lansing: Michigan State University Press, 2003), 161, 165.
52. James Madison, "Memorial and Remonstrance against Religious Assessments," 1785, repr. in Franklyn S. Haiman, *Religious Expression and the American Constitution* (Lansing: Michigan State University Press, 2003), 161, 165.
53. James Madison to Thomas Jefferson, Jan. 22, 1786, in *The James Madison Letters*, 4 vols. (New York, 1884), 1:214.
54. Constitution of the United States, Article VI, Clause 3, in FSC, 1:27.
55. James Madison to George Fox, Jan. 2, 1789, in *James Madison Letters*, 1:447.
56. James Madison to Thomas Jefferson, Oct. 17, 1788, in *James Madison Letters*, 1:423-27.
57. James Madison to Thomas Jefferson, Dec. 8, 1788 in *James Madison Letters*, 1:442.
58. James Madison to George Fox, Jan. 2, 1789, in *James Madison Letters*, 1:447.
59. *Annals of Congress: The Debates and Proceedings in the Congress of the United States*, 42 vols. (Washington, DC: Gales & Seaton, 1834-56), 1:453-54.
60. *Annals of Congress: The Debates and Proceedings in the Congress of the United States*, 42 vols. (Washington, DC: Gales & Seaton, 1834-56), 1:451.
61. *Annals of Congress*, 1:460.
62. U.S. Constitution, Amendment I. in FSC, 1:30.