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THE "FREE AND OPEN PRESS":
THE FOUNDATION OF MODERN
AMERICAN DEMOCRATIC PRESS LIBERTY

A THESIS
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL
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BY

Robert William Thomas Martin

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Professor James Farr, Advisor

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GRADUATE SCHOOL

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*For Gretchen,
and in memory of
my father*

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PREFACE

As a student reading scholarly works for the first time, I would occasionally glance upon various authors' acknowledgements and I was struck by two things: the number of people and institutions they felt they had to thank, and the conventional expressions of absolution they would make for colleagues who had commented on the work "but were in no way responsible for its remaining shortcomings." I now understand better both of these matters, and so if I have learned nothing else while writing this dissertation, I have learned a good deal about authorial debts and duties.

A number of institutions have played a critical role in supporting and encouraging this project and I am grateful to them--or rather, to the people who directly or indirectly make them flourish. At the University of Minnesota, both the Department of Political Science and the the Graduate School provided me with financial assistance. The Graduate School's Doctoral Dissertation Fellowship allowed me to focus on my research and its Dissertation Special Grant enabled me to pursue my work at the American Antiquarian Society in Worcester, Massachusetts. The Society's staff is legendary, but they proved their reputation is well-earned: They helped me maximize my use of their vast and valuable resources, pointed out important materials I did not know existed, and jump-started my car when the need arose. The staff of the Wilson Library at the University of Minnesota has been similarly helpful, especially the patient and quiet folk in the Rare Book Room. And the staff of the Catalog Division kindly trusted me to use materials long before they had a chance to record and process them. Finally, the editors of *History of Political*

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If the number of institutions I must thank is limited, the number of individuals is not. As it would be impossible to list them all, I would like to express my deep gratitude to a few people who so richly deserve it. Intellectually, my greatest debt is to James Farr, who has been my trusted advisor, friendly mentor, and keenest critic. By treating me as a colleague for six years, he has made me one. My debt to Terence Ball is also great, for he has been a source of insight, encouragement and inspiration. My other committee members, John Howe, Paul Murphy, and especially Mary Dietz have generously provided perceptive criticism and solid advice. All of these professors read and commented on the dissertation--in Jim's case, repeatedly. Yet they really are not responsible for its weaknesses, for, as I now understand, even the best advice can be poorly heeded. Lastly, I am indebted to the past teachers and advisors who helped me along my academic journey, most notably Jeffrey Isaac, Russell Hanson, and Howard Reiter. None of these, of course, is the type of debt one ever repays. One simply cannot repay them, except perhaps by becoming the very finest scholar one can; I hope to thus repay them all.

I am delighted to acknowledge the immeasurable contribution of my parents, for it is the example of their faith in education that has made me the student I am. I would also like to thank my family and friends whose encouragement and support has made this whole business possible, and who have made the time away from this project both enjoyable and invigorating. Two friends in particular deserve special mention here: Paul Soper, for always making time for our wide-ranging discussions of early American political thought, and Stacey Hunter Hecht, for our continuing conversations about everything else.

And finally, I would like to thank Gretchen Herringer, who often had to put aside professional editorial duties to read my work, charitably. Indeed, the reader too should thank her for making the text both more direct and more elegant, not to mention a good deal shorter. She has taught me much else over the years, and for that I owe her everything. Happily, that is a debt that will take a lifetime to repay.

AUTHOR'S NOTE

In general, I have chosen to leave the text of quotations as well as titles with their original spelling, italicization, capitalization, and punctuation. I have done this in part to retain the flavor of these early tracts and to avoid unduly biasing the reader's interpretation of ambiguous passages. More importantly, many printers actively used italicization, capitalization, and punctuation to augment the message conveyed by the text. However, it has proven necessary on occasion to quote from modern, edited collections in which the text has been modernized.

For the dates before England and her colonies switched to the New Style (Gregorian) calendar in 1752, I have followed the usual convention of maintaining the Old Style (Julian) date, but stating the year as if 1 January were New Year's Day.

INTRODUCTION: THE CONCEPTUAL HISTORY OF PRESS LIBERTY

Contemporary free press controversies--from pornography to "hate speech"--are critical episodes in America's continuing discussion about the competing priorities of individual rights and community concerns. The tensions these conflicts reveal are central and long-standing features of the remarkably ambivalent American tradition of democratic press liberty. The contemporary effects of this equivocal legacy, however, are not the primary focus of this thesis. Rather, I explore that equivocal tradition at its very roots. In this study, I examine the foundational period in the American past that transformed an English and monarchical understanding of press liberty into a distinctively American and recognizably modern concept of democratic press liberty. The study thus aims to provide a much-needed analysis of the tensions at the root of our current First Amendment controversies.

The American Press Liberty Tradition

"I thank God, *there are no free schools nor printing*, and I hope we shall not have these hundred years," Virginia Governor Sir William Berkeley wrote of his colony to the House of Lords in 1671. "For *learning* has brought disobedience, and heresy, and sects into the world, and *printing* has divulged them, and libels against the best government. God keep us from both!"¹ A century and a quarter later a fellow

¹ William Waller Hening. *The Statutes at Large Being a Collection of All the Laws of Virginia, 1619-1792*. 13 vols. (Richmond, Va. 1809-1823). 2:517.

Virginian, James Madison, would write his national legislature in a remarkably different spirit, claiming that "to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression."²

The considerable rhetorical chasm here between Berkeley and Madison is reflective of a theoretical divide that is deeper still. Berkeley, for example, would certainly have agreed with the position taken formally by his successor, Lord Culpeper, prohibiting any printing without prior royal approval and proper license.³ Madison, to the contrary, maintained that freedom of the press was necessary, and he further required "that it should be exempt, not only from previous restraint by the executive...but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws."⁴

The extreme divergence of these statements suggests the reformation in political discourse that culminated in the founding of the American tradition of press liberty. The striking conceptual shift that took place involved not simply matters of definition, but also involved competing understandings and justifications; the transformation cut to the very core of Americans' evolving theories of government, and, ultimately, of democracy. The primary aim of this study is to engage the ongoing

² James Madison, *The Virginia Report of 1799-1800* (Richmond, Va.: JW Randolph, 1850), 223.

³ Hening, *Statutes*, 2:518.

⁴ Madison, *Virginia Report*, 221.

debate over the purpose and extent of this central freedom through a conceptual history of press liberty. This conceptual history begins by examining the legacy of some of the earliest debates over freedom of the press in England and concludes by analyzing the critical political and theoretical struggle over the Sedition Act of 1798.

Because this study seeks to explain how political discourse in America travelled from Berkeley's negative, restrictive view of "free printing" to Madison's positive, more expansive understanding of "freedom of the press," the analysis promises to provide a compelling case study in conceptual change. Seizing this opportunity, the study also undertakes to develop a political theory of conceptual change and then demonstrate its advantages through the extended example of early American press liberty. Nevertheless, the theory will remain tentative for at least two reasons. First, while the literature on conceptual history is considerable and still growing, scant attention has been paid to the practical dynamics of politically significant conceptual change. The existing scholarship specific to this topic is in its nascency. Second, I will be drawing chiefly from my own single, and rather singular, case. These limits notwithstanding, my hope is both to draw attention to a significant feature of political thought and practice, and to lay the foundation for future reflection and critique.

While the main substantive focus of this study is press liberty, interpreting the founding stages of this fundamental debate suggests a great deal concerning the character of American political thought more generally. The recurring rhetorical controversy over press liberty acts as a particularly illuminating window into early

American political discourse precisely because it allows the analyst to view, often all at once, a great many crucial elements of that developing body of thought. The philosophical yet practical debates over press liberty involved questions of individual rights, the public good, liberty, commerce and sovereignty; ultimately, the issue of press freedom forced early Americans to reexamine and reconceive the very nature of democracy.

Tracking the long-standing interdependence between democracy and press liberty as I do here provides for a critical examination of the gaps and bridges between past and present discourse regarding the role of press freedom in a democracy. The "bridges," that is to say, the continuities between foundational debates and contemporary dilemmas, will perhaps be the most engaging as they will reflect inherent tensions and underlying contradictions in the inherited body of thought. The "gaps," the disjunctures between past problems and current predicaments, prove to be just as interesting and illuminating, for they suggest those features of the relationship between democracy and press liberty that have been most susceptible to change. Furthermore, given the study's methodological focus on the dynamics of conceptual change, we will be well placed to speculate profitably on how and why certain theoretical changes took place. The study, then, aims to contribute to contemporary discussions, both those about press liberty and those about democracy, by providing a theoretically and historically grounded examination of the challenges and prospects of democratic press liberty.

The Conceptual History of Press Liberty

Since this thesis is primarily concerned with the foundation of American democratic press liberty, maintaining a practicable focus on the topic requires undervaluing or altogether neglecting a number of broader issues relating to the freedom of expression. For example, I will concentrate my attention on the explicitly political press. The content of children's literature has a political dimension and it might well reveal new evidence of interest to historical political philosophy, but it is not likely to provide thoughtful discourse on the concept of press liberty. On the other hand, discussions of personal libel are more likely to bear on questions of democratic press liberty, especially when either of the parties is a public figure; such cases will be discussed in due course. Furthermore, though I explore the discourse of relatively modest figures such as printers, my focus on the discursive formation of the concept of press liberty will tend to exclude those--such as women and slaves--most often excluded from the early debates. Finally, the issues of religious toleration, religious liberty, and free speech will often prove to be of great interest. As we shall see in Chapter Two, religious toleration and religious liberty played an critical role in the development of press liberty during the seventeenth century. And the theory and practice of "free speech" is often addressed interchangeably with press liberty in the following pages precisely because that is how the historical figures frequently employed the terms. Freedom of speech will be distinguished, however, whenever the distinction is telling about the concept of press liberty.

Just as one must carefully focus one's attention on the matter to be examined, so one must be prudent about the manner of examination. One might take any number

of methodological approaches to the general issue of press liberty. For questions concerning the foundational development of arguments and understandings regarding press liberty, conceptual history furnishes the researcher with his most powerful methodology. Researchers investigating political thought have been greatly advantaged by the considerable scholarly discussion that has centered on this approach. Another result, though, has been a profusion of subtle differences in usage, definition, and vocabulary. The general mode of inquiry that I am calling "conceptual history" has worn a number of labels, including "the history of political discourse," "critical conceptual history," "the history of ideas," and "*Begriffsgeschichte*."⁵ By "conceptual history" I refer broadly to an approach to the history of political thought that appreciates the irreducible centrality of language in human action generally, and in political action specifically.

Language, like the seemingly more "real" world of material experience, partly constitutes, and is partly constituted by, human action. Now, by language I mean not only words but also the concepts, categories, and distinctions that give those words meaning. And this is not to say that what we experience as material reality does not greatly influence human practices and action; it is to say that this reality can only influence intentional human action as it is mediated through the language available to the particular agents. Thus, as Quentin Skinner rightly observes, language change is

⁵ See, e.g., JGA Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985); Terence Ball, *Transforming Political Discourse: Political Theory and Critical Conceptual History* (Oxford: Basil Blackwell, 1988); Quentin Skinner, *Meaning and Context: Quentin Skinner and his Critics*, ed. James Tully (Princeton: Princeton University Press, 1988); and Melvin Richter, *The History of Political and Social Concepts: A Critical Introduction* (New York: Oxford University Press, 1995).

not merely epiphenomenal to material reality; rather, changes in language can play a causal role in channeling developments in material reality. The language of Protestantism, for example, served to channel emergent capitalism toward the "Protestant ethic" of industriousness.⁶ Material reality is in turn made up largely of human actions, which are partly--but only partly--constituted by language. As a result, human language and the experienced material world are always in tension, exhibiting a certain ambivalence.⁷

This interdependence means, among other things, that when people seek to legitimate their actions (as they almost invariably do in the political sphere) they are both constrained and enabled by both language and the material world. Even bold, radical political action (spoken or otherwise) is therefore constrained by what is, or can be made to seem, plausibly legitimate. Conceptual change is the process whereby a use of language that previously seemed implausible becomes plausible, that is, gains the appearance of truth, validity, or worth. This sort of rhetorical transformation is often very gradual, involving many minor, subtle acts of linguistic "sleight of hand."⁸ Thus, for example, over the course of several centuries, what might be called commercial or advertizing propaganda has come to be called, at least plausibly,

⁶ Skinner, "Some Problems in the Analysis of Political Thought and Action," in *Meaning and Context*, 117-8.

⁷ For more on the dynamics of conceptual change, see Chapter One below.

⁸ Skinner, "Some Problems," 115.

"product literature."⁹ Conceptual history seeks to explain these conceptual changes and the ideological shifts that underlie them.

Conceptual history is thus the single best way to address the questions posed by research into the founding of the American tradition of press liberty. The issue of freedom of the press is one given to clashes involving practical politics and abstract philosophy; the locus of such clashes is at the interstices of the material world and the myriad ways to describe and justify that world. Furthermore, the discourse of press liberty requires the researcher to break out of any preconceived distinctions between "high" theory and "low" theory. Many common men engaged this issue and the great minds that entered the fray knew full well their essays might be read aloud in a crowded tavern or coffeehouse. The methodology of conceptual history provides a powerful analytical grasp on the interaction between the philosophical and the practical. In fact, the appreciation of ambivalence and tension between language and material experience that is so central to conceptual history affords the researcher a singular, critical purchase on press liberty discourse.

But if it is true that conceptual history makes it possible to understand the development of press liberty, it is no less true that press liberty makes for especially interesting conceptual history. The history of discourse concerning press liberty is particularly rich due to its wealth of ambivalence, conflict, contradictory language, and political and technological change. Moreover, the use of newspaper slogans that addressed the issue of press liberty often gave rise to conscious, and sometimes

⁹ Skinner. "Language and Social Change." in *Meaning and Context*, 127. citing Raymond Williams. *Keywords: A Vocabulary of Culture and Society* (Oxford: Oxford Univ Press, 1976).

explicitly discussed, rhetorical moves. These features, when combined with the press's critical influence in early America, leave the conceptual historian with a compelling subject to analyze.

The questions I have about the foundation of press liberty in America not only indicated the utility of a particular methodology, they also dictated what sorts of evidence would be most relevant. Pamphlets and books are of course very good sources for public discussion of press liberty. Given the considerable investment of time and money it took to produce these, however, there were relatively few printed that specifically addressed freedom of the press. For these reasons, and due to the considerable depth and breadth expected of a longer tract, the books and pamphlets of the period tend to come from the more elite, more articulate segments of society. Still, bearing these factors in mind, one can use these items to advantage, especially insofar as their expanded depth allows for more reflection on previous assumptions and beliefs.

Among the various and useful types of artifacts for the public discourse concerning press liberty, the most significant sources are the newspapers of the period, along with their textual cousin, the broadside. These documents, in addition to being intimately connected with press freedom issues, were the media of printed communication most accessible to ordinary people.¹⁰ Their broad appeal, at least during most of the eighteenth century, allows the historian to cast a wide net with

¹⁰ Charles E. Clark, *The Public Prints: The Newspaper in Anglo-American Culture, 1665-1740* (New York: Oxford University Press, 1994), 250-7. See also, Lawrence H. Leder, *Liberty and Authority: Early American Political Ideology, 1689-1763* (Chicago: Quadrangle Books, 1968), p. 20.

relative ease. Further, one can get a fairly representative sample from the major newspapers because the systematic exchange of newspapers between editors was led by these papers. And finally, newspapers "in general [were] look'd upon as Authentic" sources of information, second only to legal records.¹¹

Legal records document, sometimes very faithfully, public discourse regarding the meanings and justifications of press liberty. The few cases for seditious libel or similar offenses thus provide a potentially fruitful data source. Unfortunately, legal battles are often settled over minute matters which have little or no bearing on the larger issues involved. As a result, the transcripts or notes from a prosecutor's or defense lawyer's argument will seldom be of much use. The one group in early Anglo-American courts who took the opportunity to expand on the larger issues at stake were the presiding judges. But as these were still parts of a legal proceeding, the judges often supported their charges to the jury with legal precedents, hardly promising sources for conceptual innovation.

In fact, legal records often provide a narrow and skewed window into the public discourse. The mere existence of an old law on the books tells us extremely little about later political thought on the given matter. Juries' verdicts and explanations give us some sense of broader public sentiment, but as these explanations are rare and brief, they too are of limited value.

Legislative records can be important, but the transcripts are few and are often incomplete and inexact. And while the religious sermons that have survived tend to

¹¹ Harbottle Dorr. *The Harbottle Dorr Annotated Collection of Boston Newspapers*. 4 vols., Massachusetts Historical Society, microfilm, 2: titlepage. See also, Clark. *Public Prints*. 245-8.

be exact copies published in newspapers or in pamphlet collections, they are rarely tied directly to issues of press freedom. Ultimately, relevant legal records, legislative transcripts, and sermons must be used, when available, with considerable interpretive caution.

Consulting each available item that falls into one of these genres would be well-nigh impossible. Happily, it is also unnecessary for undertaking the sort of conceptual history I have described. When following general patterns and modes of argument in a vast body of public discourse one need not fear missing every public pronouncement on the subject. Still, getting to the most significant debates and discussions requires considerable research and more than a little bibliographic detective work.

The vast secondary literature on the historical development of press liberty acts as an excellent introduction and guide to the primary materials that provide much of my data. However, one must be careful in using these sources since they will no doubt be influenced by the interpretative approach and substantive views of the analyst. This, of course, is always true, but it is especially problematic with topics, such as First Amendment freedoms, which tend to attract not a few researchers with partisan axes to grind. Still, by taking the time to peruse the work done from a variety of viewpoints one is able to overcome the selectivity of individual historians to emerge with a vast body of relevant primary source material.

Another important way of sifting through the public writings of seventeenth and eighteenth century England and America is to make extensive use of a wide

variety of bibliographic tools. The extensive bibliographical research done for this study has revealed a number of often obscure subject indexes, computer databases, and other finding aids. These valuable resources range from simple eighteenth-century manuscript lists of articles to advanced computer technology employing CD-ROM databases and Boolean search techniques. These avenues into the relevant primary literature, like the secondary studies discussed above, are not without their limits. Still, by combining these two resources one is able to access a wealth of germane original material, thus underwriting the representative, if not exhaustive, sample of primary sources necessary for rich conceptual history.

Reconsidering the Academic Debates

Investigating the conceptual history of American press liberty in its founding stages, one finds oneself amidst two enduring scholarly debates. The first controversy involves the history of press freedom and the second regards early American political thought and culture more generally. In both cases, the way I will relate this history serves to undermine these debates.

Certainly the leading authority on the emergence of American press liberty is legal historian Leonard Levy. In his two books and numerous articles on this topic, Levy has argued that "the theory of freedom of political expression remained quite narrow until 1798, except for a few aberrant statements."¹² The research that informs

¹² Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), xii.

this dissertation not only suggests that Levy misinterprets this history, but also suggests the reasons why he arrived at such a misinterpretation.

Levy's understanding is hampered by an approach which is focused heavily on the law of seditious libel. His emphasis on precedent and changes in the law are understandable from a legal historian. Stressing these sorts of evidence, however, tends to underestimate the amount of theoretical change taking place prior to an official reinterpretation or redrafting of the law. Another aspect of Levy's interpretive approach further contributes to his rather one-sided analysis. Levy simply refuses to explain the reality of a "savage," unfettered press. This evidence "amazes" him and leaves him "puzzled," yet he maintains that "the rarity of prosecutions for seditious libel, and the existence of an unfettered press do not illumine the scope and meaning of freedom of the press or the law on freedom of the press."¹³ While it may be true that the practice of press freedom does not directly elucidate the concept of press liberty, it does help us understand exactly what manner of press freedom the agents took their repeated justifications to be legitimating. Because this conceptual history appreciates the peculiar context of legal change and the critical interdependence between theory and practice, it provides a better grasp of subtle but significant theoretical developments prior to 1798.

Levy's grasp of theoretical developments before the Sedition Act controversy is also impaired by the standard he applies to theories of press freedom. Hoping to demonstrate that our contemporary understanding of press liberty did not emerge

¹³ Levy, *Emergence*. xvi, xvii.

before 1798, Levy adopts our current definition of freedom of the press. This standard, however, is a singularly anachronistic yardstick with which to measure a considerably removed historical period. As a result, Levy is inclined to miss significant shifts in argument that fall short of the mark. Furthermore, since the modern understanding contradicts the concept of seditious libel, Levy largely interprets the history as progressing toward a repudiation of seditious libel. To the historical agents themselves, however, seditious libel per se ceased to be the sole pivotal issue after the trial of New York printer John Peter Zenger in 1735.

The interpretation presented here calls Levy's approach and findings into question for one final reason. While Levy finds no broad theoretical change that would have undermined traditional views of press liberty, my analysis maintains that the increasingly dominant "republican" character of American political thought after 1760 played a crucial role in the development of press freedom. This republicanism--with its emphasis on civic virtue and the public good--constitutes an essential ideological context that Levy ignores.

Recent republican interpreters have provided a part of the story that Levy misses. Unfortunately, these histories, like Levy's, tend to be one-sided. An article by David M. Rabban broadly discusses the influence of republicanism on press liberty, but ignores Levy's good, contrary evidence.¹⁴ Jeffery A. Smith further develops with

¹⁴ David M. Rabban. "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," *Stanford Law Review* 37 (1985): 795-856.

broad strokes the role of republicanism on printers' press ideology.¹⁵ Smith's book, however, misses many of the complexities of a tradition in tension. Smith also leaves the reader at a loss to explain Levy's evidence.¹⁶ Richard Buel, Jr. explains some of Levy's evidence by noting that republicanism would permit some suppression of press freedom if it was necessary to defend the people's liberty more generally.¹⁷ This certainly accords with my analysis, since I document a long-standing emphasis on the "free" press argument that the press is a bulwark of the people's liberty. However, Buel's essay fails to appreciate the interdependent if contradictory role of "open" press logic, the strain of argument that posits the right of all to air their sentiments regardless of the political viewpoint advanced.

One scholar who suggests a distinct "open" press approach is the late Stephen Botein. For Botein, however, developments in press discourse are best explained as part of reactive "business strategies."¹⁸ The printers examined here were businessmen of course

¹⁵ Jeffery A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (New York: Oxford University Press, 1988).

¹⁶ For a critical evaluation, see Norman Rosenberg, "Another World: Freedom of the Press in the Eighteenth Century," *Reviews in American History* 16 (1988): 554-559.

¹⁷ Richard Buel, Jr., "Freedom of the Press in Revolutionary America: The Evolution of Libertarianism, 1760-1820," in *The Press and the American Revolution*, ed. Bernard Bailyn and John B. Hench (Worcester, MA: American Antiquarian Society, 1980), 59-98.

¹⁸ See, for example, "'Meer Mechanics' and an Open Press: The Business and Political Strategies of Colonial American Printers," *Perspectives in American History* 9 (1975):127-225, esp. 177, 180; also, "Printers and the American Revolution," in *The Press and the American Revolution*, ed. Bernard Bailyn and John B. Hench, 11-58.

and economics played an important role in the conceptual history of press liberty. Yet whereas Botein sees economics as the main determinant of press theory and practice, I seek to demonstrate that these forces were subordinate. The main forces of change were ideological and political. Indeed, it is only by examining these contexts that we can begin to explain the critical conceptual transformations of the eighteenth century.

Previous studies, then, for different reasons and from different perspectives, fail to elucidate the central dynamic of the development of American press liberty: two rival doctrines developing within a evolving tradition. By taking account of this central dynamic, the present study explains a great deal more of the evidence, both practical and theoretical, than any of the other interpretations. This analysis thus allows us to better understand the foundation of modern American democratic press liberty.

My interpretation also has ramifications for the current debate over the general character of eighteenth century Anglo-American political thought.¹⁹ While some have maintained that this body of thought is best understood as "republican," others have just as staunchly maintained that it is essentially "liberal." The republican interpretation claims that political debate centered on concerns for public virtue and the people's liberty in the face of inevitable corruption and the threats of power. Those who favor the liberal interpretation, to the contrary, stress the emergence of motivating norms focused more on individual rights and liberties in the maintenance of contract and commerce.

¹⁹ For the most recent history of this debate, see Daniel T. Rodgers, "Republicanism: the Career of a Concept," *Journal of American History* 79 (June 1992): 11-38.

Fitting neatly within neither side of the debate, my analysis demonstrates the need to recast this scholarly discourse. As we will see, a predominantly "republican" stress on the public good and a more nearly "liberal" notion of individual rights co-existed in a single ambivalent tradition throughout much of the eighteenth century. So, rather than take sides in this seemingly interminable debate, this study attempts to demonstrate the limits of these interpretive approaches by providing a compelling interpretation that not only illustrates the vital and longstanding interdependence between liberalism and republicanism, but also reveals a complexity that belies the reductionism of this binary debate.

In fact, where Isaac Kramnick sees a "paradigmatic pluralism," even a "paradigm battle," the historical agents saw only one tradition that some of their contemporaries were misunderstanding or intentionally corrupting.²⁰ Retrospectively, of course, we can elucidate distinct doctrines and this study does precisely that. In so doing, this interpretation analyzes a particular debate that demonstrates how two, now distinguishable, "languages" of political thought existed in a vague unity which alternately exhibited conflict and consonance. More importantly, this conceptual history demonstrates by example that there was considerably more to the founding of the American press liberty tradition than is captured by these interpretive constructs. Findings such as these suggest the need to move beyond the liberal/republican debate to examine actual debates in early America. Only then will we be able to understand fully the complex character of early American political thought.

²⁰ Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* (Ithaca, N.Y.: Cornell Univ Press, 1990), 294.

These implications for the academic debates derive indirectly from the way I interpret the conceptual history of press liberty. The study focuses more directly on the nature and dynamics of conceptual change. In Chapter One an effort is made to formulate a political theory of conceptual change. There I expand on the scant work done specifically on politically significant conceptual change and further attempt to draw on the many suggestions and asides available in the broader literature on conceptual history. The implications for this burgeoning subfield within political theory are, I think, considerable, as this is one of the few sustained efforts to examine the practical dynamics--the conditions, occasions and mechanisms--of politically significant conceptual change. Nevertheless, a political theory of conceptual change is only valuable insofar as it helps us understand the conceptual history that contributed to our past, informs our present, and will influence our future. The substantive analysis that constitutes the bulk of this study, then, constitutes an effort to demonstrate the validity and value of this political theory of conceptual change.

CHAPTER 1. TOWARD A POLITICAL THEORY OF CONCEPTUAL CHANGE

On 13 April 1775, James Rivington was hanged in effigy. The man could hardly have been surprised. Scion of a London publishing family and a successful New York printer and newspaper publisher in his own right, Rivington was highly respected in printing circles for the quality of his newspaper. He had overcome his own history of gambling and bankruptcy to become an established New York figure, with good connections through his marriage into the Van Horne family. Yet despite his standing, a concerted opposition had formed against him during the previous December and, by the end of March, twenty-one communities up and down the coast had denounced him, banning their citizens from having anything to do with him. What sort of heinous behavior caused such an extreme response? Rivington was being condemned not so much for anything he had written, but for what he published in his newspaper, despite the fact that there were other New York papers in which opponents could respond. In the face of this, Rivington stood fast, insisting that he was a "free printer" whose press was "open to...ALL." His opponents, Rivington maintained, were out to "establish a *most cruel tyranny*."¹

Since Rivington's "hanging" took place in the tense days shortly before the opening of hostilities at Lexington and Concord, one might well imagine that imperial authorities and their supporters were trying to send a signal to a troublesome radical; but, no, Rivington was a loyal Tory and a favorite whipping boy of the ardent patriot group, the "Sons of Liberty." How then are we to understand this episode? And

¹ *New-York Gazetteer*, 20 April 1775.

what, for example, can it tell us about the theoretical developments that led to the First Amendment?

Taking Rivington's "hanging" as its dramatic backdrop, this chapter proposes a theory of the practical dynamics of conceptual change. This theory aims to illuminate both the conditions under which and the processes through which political concepts are transformed. Preparing the way for this theory will first involve drawing on a succession of related approaches to the history of political discourse. The discussion of recent approaches to conceptual history will furnish me the opportunity to clarify what I take to be a "concept" and what sources are appropriate to conceptual history. Then, in the second part, I will revert to the example of Rivington in an effort to lay the groundwork for my theory. I will also elaborate on the advantages and limitations of this model of conceptual change. Finally, the conclusion illuminates the demands of this approach and contains some reflections about how it can help us make sense of our present political controversies.

Toward a Political Theory of Conceptual Change

For over a quarter of a century now there has been considerable debate over how one should study the history of political thought. Quentin Skinner's programmatic 1969 essay, "Meaning and Understanding in the History of Ideas," may well be seen as the opening salvo in this sometimes heated theoretical skirmish, the earlier works of Peter Laslett, John Dunn and J.G.A. Pocock notwithstanding.² But regardless of how one

² Quentin Skinner, "Meaning and Understanding in the History of Ideas," in *Meaning and Context: Quentin Skinner and his Critics*, ed. James Tully (Princeton: Princeton University Press, 1988), 29-78.

dates the opening of this debate, the so-called "Cambridge School" has certainly played a major role in this ongoing methodological debate.

A significant question for any approach that aims to provide a genuinely historical analysis of past political texts is how--indeed, whether--that analysis hopes to inform current political and moral controversies. Skinner's early essay, for one, was almost immediately criticized for its apparent "antiquarianism" and similar, if less pointed, appraisals continue to appear.³ Recently, however, a related methodological approach has emerged that attempts to analyze concepts--understood as the always versatile and sometimes adaptable linguistic tools of political debate--that serve both to animate a particular era of political theory and to establish the foundation upon which later political thought was built. As David Miller has recently remarked, such an approach to the history of political thought promises "to illuminate present-day political argument."⁴ Yet as promising as this move to conceptual history may be, what has yet to receive sufficient attention are the very processes through which conceptual transformation takes place. While a comprehensive theory is well beyond my current scope, in this chapter I undertake to outline and defend a tentative model of conceptual change. What is at stake is not only the academic question of how we might best approach these texts, but also the more explicitly political question of how we go about relating the resulting analysis to our current controversies.

³ Charles D. Tarlton, "Historicity, Meaning, and Revisionism in the Study of Political Thought." *History and Theory* 12 (1973): 314; see also, Margaret Leslie, "In Defense of Anachronism." *Political Studies* 18 (1970): 433-47. More recently, see David Miller, "The Resurgence of Political Theory." *Political Studies* 38 (1990): 424-5.

⁴ Miller, "Resurgence of Political Theory." 427.

Though the political theory of conceptual transformation that I delineate here is sympathetic to the work of the Cambridge School, my analysis bears affinities with other important approaches to the history of political thought. Perhaps most significantly, I suggest ways in which we can begin to address the "realist" contention that we must take seriously the role of social structures and other causal forces in understanding and explaining conceptual change.⁵ I also share with the realists the hope that the study of past political theories can be "geared toward a critical understanding of the ideologies of the present."⁶ Yet my approach remains true both to the Cambridge School's central insistence on the primacy of the historical agent's interpretation of his context and to its recognition of the fluidity and linguistic construction of even the most "structural" of causal factors.

Ultimately, this chapter makes modest recommendations for redirecting our focus and retooling our manner of analyzing conceptual change. The result is a method of studying the history of political thought that promises richer explanations of the conceptual transformations that contribute to that history.

The Cambridge Approach

For all the jargon that typically surrounds them, methodologies are only tools: if they do not help us do what we want to do, know what we want to know, their

⁵ E.g., Jeffrey C. Isaac, "After Empiricism: The Realist Alternative," in *Idioms of Inquiry: Critique and Renewal in Political Science*, ed. Terence Ball (Albany: State University of New York Press, 1987), 187-205, esp. 197-200.

⁶ Ian Shapiro, "Realism in the Study of the History of Ideas," *History of Political Thought* 3 (1982): 536.

impressive gadgetry is useless. So a crucial, recurring question concerns identifying and, when it proves necessary, developing a methodological approach that enables us to explain the historical evolution of political theories that interest us. One approach to intellectual history instructs us to read the given text--and only that text--again and again so that we might better understand its argument. While this emphasis on the text is admirable, this approach does not enable us to track the historical metamorphosis of concepts. More than that, how are we to isolate the "text" in Rivington's case? We could, of course, look only at his first written response to his symbolic hanging. This terse polemic, however, tells one little unless one is familiar with a variety of contemporary political events and ideological developments. Expanding the "text" to include all of Rivington's editorial pieces on press liberty mitigates this problem, only to reveal another: Rivington's view of press freedom, as well as his rhetoric, undergoes a marked and influential change during the months prior to April 1775.

Another view of intellectual history, often associated with Sir Lewis Namier, focuses much more closely on political events. Indeed, this view generally reduces political ideas or theories to epiphenomena, mere windowdressing for political actors' more real "material" interests and motives. The role of these events and interests is not to be gainsaid; still, the Namierite approach, or any similarly reductionist approach, is bound to overlook the powerful influence of political concepts in shaping, if not making, history.

A much more promising methodology for our inquiry is associated with the Cambridge School. These political theorists and historians, especially J.G.A. Pocock and Quentin Skinner, have developed an approach to intellectual history that focuses specifically on the language of political discourse, yet does not restrict itself to the text in question. Rather, the "Cambridge approach," as I shall call it, admonishes us to ascertain the "historical identity" of past texts by isolating the linguistic and intellectual context from which these texts, understood as complex "speech-acts," emerged.

Here, then, is a methodology that seems particularly appropriate. The Cambridge approach focuses specifically on language and takes seriously the influence of political discourses on history. Moreover, by examining the linguistic conventions of the day, this method allows the researcher to isolate how a particular "speech-act" differed from the norm. This is crucial data for anyone attempting to explain how and why a particular concept was transformed.

Pocock and Skinner have both used this approach with considerable success.⁷ Their monumental studies have helped us understand the historical identity of texts that draw from the traditions they have illuminated. But as we return to the case of Rivington we find ourselves at a loss. How, exactly, are we to provide a causal explanation of individual, subtle conceptual changes wrought by a relatively minor figure? What are we to make of Rivington's "hanging"? It is a "material" event, not

⁷ J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978).

strictly an episode of conceptual change, but it certainly seems to be an important part of understanding and explaining Rivington's subsequent rhetoric. In fact, as we look more closely at the Cambridge approach, we see that, as helpful as it is, there are several gaps that must be filled before we can begin to fashion a political theory of conceptual change.

Pocock and Skinner stress the recovery of lost or misunderstood traditions of discourse. This rather elevated level of analysis has left many of the more modest conceptual changes that contribute to these discourses largely under-examined. Skinner has never been especially interested in concepts as such⁸, but Pocock has been careful to elucidate the concepts that are central features of the republican language he describes. Nevertheless, even he has been criticized for misunderstanding how particular authors in his histories mobilized certain critical concepts.⁹ Stepping down our level of analysis to Rivington's polemics, we find ourselves a long way from Pocock's and Skinner's imposing exemplars. Moreover, these exemplary studies generally focus on canonical or at least major theorists placed within a rather rarified intellectual context.¹⁰ To be sure, both Skinner and Pocock occasionally draw on previously overlooked figures. Nevertheless, their works provide few examples and

⁸ But c.f., Quentin Skinner, "The State," in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson. (Cambridge: Cambridge University Press, 1989), 90-131.

⁹ E.g., Ronald Hamowy, "Cato's Letters, John Locke, and the Republican Paradigm," *History of Political Thought* 11 (1990): 273-294.

¹⁰ Melvin Richter, *The History of Political and Social Concepts: A Critical Introduction* (Oxford: Oxford University Press, 1996), 135.

little guidance as to how one explains slight but significant conceptual changes wrought by more humble figures such as Rivington.

Another aspect of concentrating on the highest level of analysis is an understandable emphasis on the linguistic and intellectual contexts. The linguistic context is always crucial, and in examining major political thinkers the contemporary intellectual context is clearly relevant. Given the scope and pace of their studies, however, the tendency of the Cambridge School's prolific leaders is to emphasize linguistic and intellectual contexts at the expense of other contexts: The social, economic, and sometimes even the political contexts are slighted or attenuated. Even a sympathetic critic like Melvin Richter is quick to point out the need to "add dimensions now missing to the more restricted linguistic and political contexts emphasized by Pocock and Skinner."¹¹ Indeed, Pocock has cautioned his readers about Skinner's "extreme economy" of context choice, and he has done so while acknowledging the similarity of their methods.¹²

One further feature of the Cambridge approach is its ambiguity regarding the place of explanation in the methodology of the history of political discourse. Skinner has certainly been very successful in advancing our thinking about what we mean by *understanding* complex speech-acts. The role of causality, especially the influence of "material" events on political discourse, has received relatively little attention. None

¹¹ Melvin Richter. "Reconstructing the History of Political Languages: Pocock, Skinner, and the *Geschichtliche Grundbegriffe*." *History and Theory* 29 (1990): 50.

¹² J.G.A. Pocock. "Reconstructing the Traditions: Quentin Skinner's Historians' History of Political Thought." *Canadian Journal of Political and Social Theory* 3 (1979): 105, 104 and passim.

of this is to deny that both Skinner's and Pocock's work has been indispensable and ground-breaking. It is to say that their successful attempts to *recover* and *record* previously ignored or misunderstood traditions of discourse have provided little in the way of *explanation* of conceptual change. Moving down a level of analysis to conceptual history affords the researcher the opportunity to pursue richer, more substantial, even partially causal explanations of an ideological shift. These more robust explanations need not be underwritten by some crude, naturalistic understanding of human causation. Rather, these analyses may be prompted by the belief that the historical understanding we require is often more substantial than is provided by merely tracing theoretical developments. Frequently we will want some interpretation of the many factors, linguistic or otherwise, that contributed to particular conceptual changes. Of course, at a considerable temporal distance, making claims about identifying necessary or sufficient causal determinants of an episode of conceptual change or stasis would be unwise. Equally unwise, I submit, would be to forego any attempt at a compelling account that involved isolating causal factors. Ultimately, if we are to understand any historical political language in a fully robust fashion, we must at least begin to explain the conceptual changes that contribute to the development of these traditions.

Addressing the "hows" and "whys" as well as the "whats" of conceptual change is a complex process. It is, as Iain Hampsher-Monk has put it, "to enter deep waters

concerning the nature and status of explanation in the history of ideas."¹³ It is not, however, a subject that students of political theory can simply overlook, especially given the current paucity of scholarship on the subject. And though developing and defending an entire theory of causality and explanation is well beyond my scope here, a few brief observations concerning Skinner's account of causal explanation should suggest its benefits and limitations.

Happily, and perhaps not surprisingly, it is Skinner who provides a starting point for our understanding of the practical dynamics of conceptual change. He first pointed out that even the most radical ideologist is obliged to appeal to some existing linguistic conventions if he intends to be not only intelligible but also persuasive. This then gives us some grasp of the role a linguistic convention can play in limiting (and enabling) the sorts of speech acts open to an author seeking to legitimate untoward behavior. These limits in turn constrain the type of action that could be thus legitimated.

In his substantive piece on Bolingbroke, Skinner addresses the field's "general incapacity...to give any coherent account of the nature of the relations between political thought and action."¹⁴ To address this shortcoming, he criticizes an academic debate over the role of Bolingbroke's professed principles in explaining his

¹³ Iain Hampsher-Monk, "Political Languages in Time: The Work of J.G.A. Pocock," *British Journal of Political Science* 14 (1984): 104.

¹⁴ Quentin Skinner, "The Principles and Practice of Opposition: The Case of Bolingbroke versus Walpole," in *Historical Perspectives: Studies in English Thought and Society*, ed. Neil McKendrick (London: Europa, 1974), 94.

actions. The scholarly dispute, Skinner maintains, is wrong-headed in so far as both sides appeal to Bolingbroke's principles as *motives* in their efforts to explain his actions. Ideology need not serve as motive to explain political action. Rather, Skinner explains, whenever an agent needs to justify his actions he must "limit and direct his behavior in such a way as to make his actions *compatible* with the claim that they were motivated by an accepted principle and that they can thus be justified." An agent's professed principles can therefore be "causal conditions of his actions."¹⁵

Skinner here affords the historian of political thought with a critical insight: Discourse can causally affect action by subtly but significantly constraining the range of suitable actions. What remains missing, however, is any account of how action, by the agent or others, can and does affect the discourse (or thought, or linguistic action) of the agent. Did Rivington's symbolic "hanging" have any significant effect on his subsequent use of the concept of press liberty? Were the prior bannings--which cost him subscriptions--of lesser or greater impact? This gap in the Cambridge approach points to a broader ambiguity regarding the relationship between linguistic and what I shall call "semi-linguistic" elements in history.¹⁶ For example, Pocock's histories follow the ebb and flow of traditions across centuries, often leaving the relationship between linguistic developments and political, social, and/or economic events vague

¹⁵ Quentin Skinner. "The Principles and Practice of Opposition." 128.

¹⁶ I use the term "semi-linguistic" to refer to what we might loosely call "material" reality in order to emphasize the extent to which even material factors are--at least partially--linguistically constituted.

and abstract.¹⁷ Thus, Hampsher-Monk, in a largely favorable review of Pocock's work, bemoans this common predicament: "We [historians of political thought] are currently much better at talking about the history of conceptual changes within the language of politics, than we are at giving an account of how such changes might be related to any parallel history of events."¹⁸

For all the advantages of the Cambridge approach as evinced by Pocock and Skinner, several lacunae remain for explaining the more modest conceptual changes that contribute to their overarching analyses. These gaps exist not in spite of the strengths of their approach, but rather because of them. Since they have been chiefly concerned with understanding the historical identity of whole traditions of discourse, they have understandably focused their attention on the linguistic and intellectual contexts in which major political theorists thought and wrote. In so doing, they have shown relatively little concern for clarifying the relationship between linguistic and semi-linguistic elements at the level of conceptual change. Thus, if we hope to devise a theory of the practical dynamics of conceptual change that helps us explain the actions, conceptual and otherwise, by figures such as Rivington, we must look elsewhere to move our analysis forward.

Two Sympathetic Alternatives

¹⁷ A similar line of criticism is available in Hampsher-Monk, "Review Article," 103-9; see also, Richter, "Reconstructing the History of Political Languages," 50, 65-8.

¹⁸ Hampsher-Monk, "Review Article," 109.

Recently, two projects that might best be understood as sympathetic alternatives to the Cambridge approach have gained considerable attention. Since both projects address conceptual history, before proceeding any further we should make clear what is meant by a political "concept" and what sources commonly contribute to its history. Defining concepts is no simple business, in part because "concept" is an ambiguous and relatively primitive term of political philosophy. More importantly, Richter is doubtless correct that it is impossible or at least unwise to provide such a definition without reference to a theory of conceptual history.¹⁹ As the groundwork for discussing two such theories, then, let us broach an operative definition.

In everyday language we often think of a concept as a notion or idea that represents or expresses some *thing*, yet exists apart from or "above" that thing. For the purposes of conceptual history, however, we must be careful not to view concepts as somehow above us. Concepts are not Platonic Forms or Kantian *Dinge an sich* (things-in-themselves), unchanging and independent of human cognition and discourse. Rather, concepts are notions made possible by the use of words in language. Conceptual historians, then, standardly distinguish concepts from words or terms while recognizing the essential linguistic character of concepts.²⁰ For instance, though many concepts will be signified by a single word or a multi-word term, this

¹⁹ Richter, *History of Political and Social Concepts*, 21.

²⁰ E.g., Skinner, "Language and Political Change," in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson (Cambridge: Cambridge University Press, 1989), 7-8; and James Farr, "Understanding Conceptual Change Politically," in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson (Cambridge: Cambridge University Press, 1989), 26-8.

relationship varies widely. The words commonly used to signify a concept may remain the same while the meaning and use of the concept change dramatically. Furthermore, often there will be a number of words or terms for one concept, while at other times certain concepts will not yet have any signifying word. Eventually, when a concept has sufficient currency to occasion a new or adapted term to signify it, the concept will become more available as a tool or device for theorizing.

The ever-changing and instrumental nature of concepts points to a couple of distinctions that warrant emphasis. First, though the concepts analyzed in conceptual history are akin to "ideas," they should not be confused with the "unit-ideas" traced by Arthur O. Lovejoy and his adherents.²¹ Such "unit-ideas" are studied as immutable archetypes that can be revealed as existing throughout history.²² Conceptual historians, on the contrary, emphasize the significant changes in a given concept as it is used through specific historical periods. Those conceptual changes will frequently be associated with transformed political theories and altered linguistic conventions, which brings us to the second distinction. If political concepts are tools of political debate, linguistic conventions might be thought of as the customary procedures for using those tools. Thus, to adapt Skinner's familiar example, Machiavelli undermines the concept of "virtuous" and subverts the linguistic conventions of the "mirror-for-princes" genre in his effort to develop a new theory of legitimate princely rule.

²¹ Richter, *History of Political and Social Concepts*, 21-5.

²² Arthur O. Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (Cambridge: Harvard University Press, 1936).

Because political concepts act as the tools of political argument, evidence of their use and "abuse," their change and stasis, is generally limited to political discourse. Historians of political concepts, however, must be careful to define this discourse as widely as possible. Obviously, political debate takes place in and between books, pamphlets, newspapers, and broadsides, as well as religious sermons, legislative proceedings, and legal documents. Illuminating political commentary can also be found in diaries, memoirs, and correspondence. When available, even contemporary dictionaries, encyclopedias, handbooks, and thesauri can be used profitably.²³

Having laid out what I mean by a concept and what types of texts are often examined for its history, we can now turn to the two leading approaches to conceptual history. The first, a predominantly German approach, focuses on *Begriffsgeschichte* (conceptual history) and has a lineage at least as old as that of the Cambridge School.²⁴ Working independently of the Cambridge School, the exponents of *Begriffsgeschichte* have also sought to advance genuinely historical studies of the evolution of political languages, though they have focused more specifically on conceptual history.²⁵

²³ Richter, *History of Political and Social Concepts*, 39.

²⁴ Richter, "Reconstructing the History of Political Languages," 50-56.

²⁵ See *Geschichtliche Grundbegriffe. Historisches Lexikon zur Politisch-Sozialer Sprache in Deutschland*, ed. Otto Brunner, Werner Conze and Reinhart Koselleck. 7 vols. to date (Stuttgart: Klett-Cotta, 1972-).

The most distinguishing feature of *Begriffsgeschichte* is its methodological insistence that the relevant interpretive contexts are political, social, and economic, as well as linguistic and intellectual. While this is not a dramatic difference of *kind* from the Cambridge approach, it is a significant difference of *degree*. Unfortunately, this work has been largely overlooked in Anglo-American political theory because the methodological and substantive studies of *Begriffsgeschichte*'s leading exponent, Reinhard Koselleck, have been translated only recently and sparingly. Fortunately, Melvin Richter has lately taken up the task of introducing this significant body of work to an Anglophone audience.²⁶

The key virtue of the *Begriffsgeschichte* developed by Koselleck and analyzed by Richter is its unwavering insistence that a genuinely historical intellectual history cannot ignore a rather broadly defined and non-reductive social history. For Koselleck, "it goes without saying that historical clarification of past conceptual usage must refer not only to the history of language but also to sociohistorical data, for every semantic has, as such, an involvement with nonlinguistic contents."²⁷

The inclusion of these "nonlinguistic contents"--for example, groups, parties, movements, and their attendant structures or practices--does not imply some naive view of the relationship between the linguistic and the semi-linguistic²⁸;

²⁶ E.g., Richter, *History of Political and Social Concepts*.

²⁷ Reinhard Koselleck, *Futures Past: On the Semantics of Historical Time*, trans. Keith Tribe (Cambridge: MIT Press, 1985), 79.

²⁸ While I prefer the term "semi-linguistic," Koselleck's use of the term "non-linguistic," though perhaps confusing, should not be taken to suggest that he does not appreciate the role language plays in constituting our conceptual understanding of the "material" world.

Begriffsgeschichte's social history is indeed non-reductive. Recent Anglophone intellectual history has largely neglected these factors and at present "seem[s] to lack a method which will connect our histories of events with our histories of ideas."²⁹

Begriffsgeschichte, on the contrary, embraces the unavoidable tension of this relationship. As Koselleck explains,

it would be an irredeemable short circuit if history...establish[ed] a kind of identity between linguistically articulated *Zeitgeist* and the conjunction of events. Rather, there exists between concept and materiality a tension which now is transcended, now breaks out afresh, now appears insoluble.³⁰

Admittedly, embracing this tension is not the same as resolving it. In fact, no single, simple resolution is forthcoming. The best we can do, I believe, is to try to develop a more nuanced theory of the sorts of linguistic and semi-linguistic conditions and processes that contribute to the practical dynamics of conceptual change and stasis. That is the burden of the next two sections of this chapter. In the meantime, we would do well to turn our attention to another recent approach that bears on the practical dynamics of conceptual change.

Terence Ball's approach to "critical conceptual history" is similar to Koselleck's approach to *Begriffsgeschichte*. Both theorists specifically focus on the level of conceptual history. Moreover, they both examine the histories of political concepts as they enter the modern lexicon. Indeed, some of Ball's work serves to

²⁹ Hampsher-Monk. "Review Article," 109.

³⁰ Koselleck, *Futures Past*, 85.

substantiate Koselleck's claim that the eighteenth century was a "*Sattelzeit*," a period of profound conceptual change.³¹ Finally, and most significantly, both Koselleck and Ball appreciate the role of conceptual struggles in political contests. Koselleck and his colleagues stress that "more often than not, [the historical] agents are aware of the high stakes involved in adopting one or another concept in legislation or public argument."³² While a host of Anglo-American theorists have noted the "essentially contestable" nature of most political concepts³³, Ball emphasizes the "contingent contestability" of those concepts. "Conceptual contestation remains a permanent possibility even though it is, in practice, actualized only intermittently."³⁴ It is those periods when political contests become conceptual struggles that most interest the conceptual historian.

Despite these important similarities, there are several features that distinguish Ball's work from Koselleck's.³⁵ For example, whereas Koselleck alludes to the "potential critique of ideology that *Begriffsgeschichte* can initiate,"³⁶ Ball's approach

³¹ See, e.g., Terence Ball, "The Prehistory of Party," and "Reconstituting Republican Discourse," in *Transforming Political Discourse: Political Theory and Critical Conceptual History* (Oxford: Basil Blackwell, 1988), 22-46, 47-79.

³² Richter, *History of Political and Social Concepts*, 10.

³³ W.B. Gallie "Essentially Contested Concepts," *Proceedings of the Aristotelean Society* 56 (1956): 167-98; Alisdair MacIntyre. "The Essential Contestability of Some Social Concepts." *Ethics* 84 (1973): 1-9; John Gray, "On the Essential Contestability of Some Social and Political Concepts." *Political Theory* 5 (1977): 331-48; William E. Connolly. *The Terms of Political Discourse*, 2nd ed. (Princeton: Princeton University Press, 1983).

³⁴ Ball, *Transforming Political Discourse*, 14.

³⁵ Ball, *Transforming Political Discourse*, 9-11.

³⁶ Koselleck, *Futures Past*, 85.

is more explicitly critical and contemporary, at times viewing the present as history. Ball further theorizes that we are currently living in a new *Sattelzeit* and has turned his gaze to some of our present conceptual disputes.³⁷ Ultimately Ball's theoretical and substantive work demonstrates that conceptual histories of the past as well as of the present can provide valuable critical purchase on modern moral and political disputes. It is in this capacity to view contemporary concerns with a historical eye that "critical conceptual history" most distinguishes itself.

Despite their differences, these two approaches undoubtedly share one critical characteristic: the recommendation that we focus specifically on the historical development of concepts. By redirecting our sights, conceptual history promises to clarify and substantiate the overarching analyses of Pocock and Skinner. At the level of conceptual history one often encounters rich historical episodes that highlight the interaction between a variety of contextual factors and a *mélange* of actors speaking an array of political languages. This, then, would be the perfect level at which to explore and examine the dynamics of conceptual change while filling in the gaps of the Cambridge approach.

The Mechanics of Conceptual Change

For all the attention paid to the history of political discourse and, more recently, the role of conceptual history, questions remain concerning the practical dynamics of conceptual change and the place of semi-linguistic factors within those

³⁷ See Ball, *Transforming Political Discourse*, 80-105, 143-160.

dynamics. More specifically, what types of conditions constitute the *occasions* of politically significant conceptual change and what sorts of *mechanisms* contribute to such change? Under what circumstances and through what processes, conceptual or otherwise, do theorists of various historical statures contribute to conceptual metamorphosis?

One who has sought to address these questions is James Farr. Farr's approach to conceptual history is similar to Ball's, though Farr has gone further to investigate the sources of conceptual change.³⁸ As a result, Farr has recently offered an "idealized sketch of a basic explanatory mechanism of conceptual change."³⁹ Farr's model posits a historical agent faced with a problematic political situation; one particularly creative response to this "problem" might involve conceptual change. Human rationality being what it is, though, the conceptual "solution" might not address the problem in all its depth. Moreover, the conceptual change might have unforeseen consequences that, despite the best efforts, only serve to make matters more problematic in other ways. Thus, Farr's model captures the unavoidably human character of the conceptual histories with which we are concerned here.

These notions of political problems and problem solving being rather rudimentary, Farr focuses on the most significant type of political problem to which conceptual change usually responds: contradiction. Farr sees contradiction as

³⁸ Farr, "Conceptual Change and Constitutional Innovation," in *Conceptual Change and the Constitution*, ed. Terence Ball and J.G.A. Pocock (Lawrence, KS: University Press of Kansas, 1988); and Farr, "Understanding Conceptual Change Politically."

³⁹ James Farr, "Understanding Conceptual Change Politically," 25.

involving "manifestly *inconsistent* beliefs,"⁴⁰ thus distancing himself from any crude view of "structural" contradictions that ignores the extent to which even the most deeply embedded practices are experienced through the mediation of our concepts in particular and our language more generally. This is not to say that semi-linguistic factors play no role; in fact, contradictions emerge from the "complex web of...beliefs, actions, and practices."⁴¹ As such, these contradictions will rarely, if ever, be a simple matter of logical or straightforward incongruity. Indeed, probing criticism will often be a necessary factor in bringing these contradictions to light.

The chief merit of Farr's preliminary analysis is this recognition that contradiction and criticism form the principal mechanisms of conceptual change. If Skinner is right--and surely he is--that legitimation of one's beliefs, actions, and practices is a recurring need of political life, then Farr is certainly correct to point to the dominant place of contradiction and criticism in presenting problematic situations to which actors can and sometimes do respond with conceptual innovation. Farr is also right to recognize the variety of situations that beget contradictions. Contradictions arise when an agent sees--or is forced by a critic to see--inconsistency among several beliefs within an adopted belief system. Contradictions may also emerge from the juxtaposition of beliefs and actions or practices. Further, they may arise at the "fault lines" between two belief systems that an agent is attempting to maintain simultaneously. Significantly, contradictions often grow from subtle

⁴⁰ Farr. "Understanding Conceptual Change Politically," 34.

⁴¹ Farr. "Understanding Conceptual Change Politically," 25.

implications and unexpected consequences of beliefs, belief systems, actions, or practices, rather than in some simple or straightforward contrast.⁴²

Given the many and subtle sources of contradiction, it is perhaps not surprising to find Farr observing that "all of us some of the time, and some of us all of the time, live with contradictions."⁴³ When contradictions are not resolved or at least addressed, Farr notes, the researcher's concern turns to explaining why concepts did not change to address the contradiction. But for Farr, this recognition of unresolved contradictions remains something of a methodological last resort and a limitation on the role of contradiction as the central mechanism of politically significant conceptual change.⁴⁴ In what follows, I present a different appreciation of the central role of contradiction in human life and elaborate my own theory of the dynamics of conceptual change based on this alternative understanding.

The Practical Dynamics of Conceptual Change

Human life is rife with contradiction; contradictions exist inevitably, though often they exist "below the surface" of our consciousness.⁴⁵ Walt Whitman admits as much in the penultimate stanza of "Song of Myself": "Do I contradict myself?/ Very

⁴² Farr, "Conceptual Change and Constitutional Innovation," 24-5.

⁴³ Farr, "Conceptual Change and Constitutional Innovation," 26.

⁴⁴ Farr, "Understanding Conceptual Change Politically," 37.

⁴⁵ The metaphor is Farr's; see Farr, "Conceptual Change and Constitutional Innovation," 25.

well then I contradict myself,/ (I am large, I contain multitudes)."⁴⁶ And while most of us are not nearly as complex as Whitman, it is nevertheless true that we are all heirs to a variety of traditions of thought, ideologies, and worldviews. We unavoidably inhabit a number of interrelated roles and communities. The resulting belief systems are massive and complex, containing an infinite number of far-reaching implications and unintended consequences; we cannot possibly address them all. Furthermore, were any individual ever able to come to terms with all of this and establish for him/herself a perfectly consistent system of beliefs, this would last but an instant, for the world does not rest, and seemingly "external" changes would surely unsettle this thoroughgoing coherence, creating contradictions once again.

All of this may well be perfectly obvious. But if I am right that *all of us all* of the time live with many contradictions, our research question no longer asks why a particular contradiction was not addressed, but asks instead why certain contradictions *were* addressed (perhaps through conceptual change) at a particular time. This novel perspective on the dynamics of conceptual change reveals why myriad contradictions remain for us plausibly legitimate as long as insufficient attention and critical insight are focused on them.

This thesis of a constant body of unresolved contradictions that are both seemingly unproblematic and "contingently contestable" redirects our attention to the role played by contexts and, more specifically, contextual shifts. A shift in the relevant contexts, be they political, social, intellectual, or whatever, often triggers

⁴⁶ Walt Whitman, "Song of Myself," in *A Choice of Whitman's Verse*, ed. Donald Hall (London: Faber and Faber, 1968), 82; see also, Farr, "Conceptual Change and Constitutional Innovation," 26.

conceptual change by enabling or constraining certain lines of criticism or by highlighting certain new or extant contradictions. These contextual shifts, then, can best be seen as the *occasions* of conceptual change. The conceptual transformation is most likely to be politically significant when the context shifts during political conflict, for these conflicts generally bring criticism and the need for political agents to legitimate their beliefs, actions, or practices.

The political theory of conceptual change outlined here has certain advantages. For one, this approach accounts for a wider spectrum of transformations in the history of political discourse than do previous approaches. Whereas the Cambridge approach generally focuses on histories of a vast scope and theorists of at least major status, my view of the dynamics of conceptual change examines mechanisms prior to or independent of Skinner's epoch-making "innovating ideologist." A comparison of John Locke, one of Skinner's favorite examples, and James Rivington, our loyalist printer, should make clear what I mean.

Writing his *Two Treatises* in the early 1680s, Locke was one of the radical Whigs who saw the need to justify resistance against the restored monarchy. Addressing this problem, many of his allies and friends wrote tracts on the right of resistance. Some of these theorists, Sidney, Tyrrell, and Neville for example, were writing within contexts substantially similar to Locke's. Yet it was Locke, and only Locke, who crafted a theory that defended resistance to the King without reference to the much-lauded "Ancient Constitution." This conceptual act of omission undermined one of the most powerful linguistic conventions of the time in one fell swoop. Locke

thus innovates through what may well be "the most radical and original feature of his whole argument."⁴⁷ As Skinner correctly points out, to understand this major contribution to political discourse we must appreciate at least the linguistic context.

Monumental innovations by theorists of Locke's genius may be comprehensible with little contextualization beyond an awareness of the prevailing linguistic conventions. But many politically significant conceptual changes are less grand, yet require a more thorough understanding of many interrelated contexts. While Rivington's conceptual innovation was hardly epoch-making, we must dig more deeply to reveal his rhetorical moves and to explain their genesis.

A significant part of Rivington's context was, of course, linguistic. Powerful rhetorical norms dictated that press practices be defended in terms of the value of the "free and open press." This term referred to a long-standing but ambivalent theoretical tradition. The ambivalence of this tradition lay in the fact that two distinguishable doctrines of press liberty were being drawn on simultaneously. The notion of impartiality and the value of letting the public hear all sides of an issue were exalted by "open" press doctrine. "Free" press doctrine vaulted the press as the people's chief defense against a presumably power-hungry government. As we shall see more fully in Chapters Three and Four, the (potential) contradictions between these two doctrines had been largely masked for several decades by contexts that served to smooth over any tensions. For example, as long as the relations between colonial adherents of the British Ministry and more radical colonists were sufficiently amicable, an impartial

⁴⁷ Skinner, "Meaning and Understanding," 62. Cf. Ashcraft, *Revolutionary Politics*, 210-12.

press was open to opposition voices. But as political relations soured in the 1760s, the more established newspapers--those "printed by [ministerial] authority"--were more reluctant to print critical pieces. Conversely, as radical Whigs began to espouse what they took to be a ministerial "plot" against the people's liberties, presses open to government forces seemed threatening, ominous, anything but "free."

The long-term political context, then, began to enable the decline of a previously unassailable concept. The more radical papers began to emphasize, both in theory and in practice, the increasingly distinct "free" press necessity of defending the peoples' threatened liberties. The Tories in turn began to stress the value of an "open," impartial press. Not long after Rivington set up his printing press in 1773, a more specific, shorter-term political shift exacerbated the conflict. The "Tea Party" in Boston and the ensuing "Coercive" Acts brought the political debates to a head. The different political ends furthered by the two doctrines of press liberty became more unmistakable as critical barbs were exchanged. While all this led to greater attention being focused on press discourse and practice, the sometimes violent actions against ministerial printers poignantly revealed the conceptual bifurcation underway.

In addition to the various political contexts, the social milieu merely served to intensify the divisions. The Tories, being drawn more heavily from the gentry, were more likely to be socially connected with ministerial agents. Of course, this had long been true, but it took on new importance as the political crisis grew deeper and the conceptual chasm grew wider. Economic factors also did nothing to relieve the ever-increasing tension. Long gone were the days when the market strongly favored

printers who avoided controversy and kept their papers open to only the most decorous political discourse. Indeed, Rivington soon made his name by making his *Gazetteer* open especially to trenchant Tory vituperation. Significantly, the moral and economic norms of the day led Rivington to defend his newspaper on ethical, not financial, grounds.

All of these various contexts occasioned an increasingly polarized conceptual terrain. By 1775 Tory printers, including Rivington, were defending their presses on "open" press grounds, even if they were in fact more likely to print Tory pieces. The Whigs naturally made their case in "free" press terms, baldly excluding the work of "ministerial placemen." It is against this tide that Rivington makes his shrewdest conceptual moves. Rivington at once appropriates the Whigs "free" press rhetoric, thus neutralizing it, while justifying his press on the grounds that he is a mere printer who simply prints what he gets; it is his correspondents' fault if their letters are partial.⁴⁸ In response to his "hanging," Rivington's next move was to turn the Whigs' logic on its head: They, not the Tories, were threatening liberty. "While [the printer's] enemies make *liberty* the prostituted pretense of their illiberal persecution of him," Rivington maintained, "their aim is to establish a *most cruel tyranny*."⁴⁹

By turning the nascent patriots' rhetoric back on them, Rivington was able to expose poignantly the extent of intimidation and even coercion they were willing to impose in the name of liberty. Labeling the "Sons of Liberty" and their supporters

⁴⁸ *New-York Gazetteer*. 16 February 1775.

⁴⁹ *New-York Gazetteer*. 20 April 1775.

"tyrants," Rivington made clear that the patriots' militant press practices no longer accommodated, or even tolerated, a press "open" to sentiments that differed from their own. Thus, Rivington's conceptual innovation not only shifted the burden of defense onto the patriots, it unmistakably revealed heretofore opaque dimensions to, and contradictions in, the patriots' developing concept of press liberty.

The previously unassailable "free and open press" tradition had received a mortal blow. After 1775, the concept of a "free and open" press appeared now and again in public discourse, but its days were numbered. The unquestioned coherence of a "free and open press" would never return. As early as 1776, zealous advocates of independence in patriot-held America found the "free" press a newly-enfeebled concept. Their impulse to suppress "reunionist" essays and articles as dangerous to public liberty were rarely persuasive, even as war raged around them. Rather, as the traditional distinction between the terms "free" and "open" began to wane, patriot printers and authors drew on "open" press doctrine to insist that the presses be available to all, regardless of how reactionary or revolutionary their views.⁵⁰ As we shall see in Chapter Five, by the 1780s, "open" press doctrine was transformed and new concepts of press liberty emerged that attempted to address the very sorts of tensions Rivington had revealed.

⁵⁰ Robert Bell, "The Printer to the Public: On the Freedom of the Press," in [anonymous], *A Dialogue between the Ghost of General Montgomery just arrived from the Elysian Fields: and an American Delegate, in a Wood near Philadelphia* ([Philadelphia]: Robert Bell, 1776); Bell, "A Few More Words, on the Freedom of the Press," in Josiah Tucker, *True Interest of Britain* (Philadelphia: Robert Bell, 1776); and William Goddard, *The Prowess of the Whig Club* (Baltimore: [Mary K. Goddard], 1777).

The conceptual change fostered by Rivington was significant and provocative. It was not, however, earth-shattering. Nor was Rivington alone in contributing to the metamorphosis of the early American concept of press liberty. Others had and would continue to make subtle alterations in the concept, either practically or theoretically. And as I have tried to suggest, shifting contextual factors played a significant role in causing Rivington's conceptual re-casting of the "free and open" press. Nevertheless, while other Loyalists found themselves in similar situations, it was Rivington who proved the shrewdest, most insightful, and most outspoken of the Tory printers; it was his argument that best articulated the tyrannical potential of his contemporaries' concept of a "free" press.

I have anticipated some of the substantive analysis of this thesis in order to demonstrate the breadth and explanatory strength of a methodological approach to conceptual history that emphasizes context and contradiction. My point in drawing the comparison with Locke is not to suggest that Skinner's appeal to linguistic conventions is an unnecessary first step toward understanding the "historical identity" of a text. Nor do I claim that in trying to explain epoch-making conceptual change by a grand theorist we need not analyze the myriad of contexts that surely placed constraints on the author's theorizing. Indeed, I am inclined to think that we need to look much further than linguistic conventions if we are to provide a rich understanding of the conceptual innovations of even grand theorists such as Locke. On this score it is worth noting that the late Richard Ashcraft recently offered a compelling account of the genesis of Locke's *Two Treatises* that is convincing in large part because he

perceptively analyzed many other contexts and was thus better able to explain why lesser radical Whig theorists were also moving in the direction of emphasizing arguments based on natural rights when Locke so boldly and brilliantly reshaped the conceptual landscape.⁵¹

My point is a rather modest one: If we are not only to *understand* politically significant conceptual change, but also begin to explain it, and explain it in the truly broad variety of cases in which it takes place, we must analyze more thoroughly the many potentially influential contexts that may have exacerbated (or alleviated) nascent or extant contradictions. By isolating certain contextual shifts, linguistic or otherwise, that intensified the relevant contradiction(s), we can point to the causal conditions that triggered a conceptual change. As I have tried to suggest above, this type of analysis is surely necessary if we are to broach an explanation of the conceptual shift ushered in by figures like Rivington.

This comparison between Locke and Rivington, despite the rather broad strokes with which I have depicted it, serves to illustrate a further advantage of the methodological approach proposed here. Skinner's stress on linguistic conventions and intellectual context has occasioned criticisms that he has brought about the "death" of the autonomous author. Skinner himself concedes that his approach has left the author "in extremely poor health."⁵² That his methodology should mortally wound the autonomous author does not overly concern Skinner and indeed it should not. Insofar

⁵¹ Ashcraft, *Revolutionary Politics*, 210-12, 314-5, and passim.

⁵² Skinner, "A Reply to My Critics," in Tully, ed., *Meaning and Context*, 276; similarly, on Pocock's contextual "overdetermination," see Hampsher-Monk, "Review Article," 104-5.

as Skinner is primarily concerned to present the evolution of entire discourses, it is of little moment that individual authors should seem to get lost amid the evolving linguistic conventions. But those of us interested in supplementing these over-arching analyses with richer explanations of particular conceptual metamorphoses are in no position to lose sight of the substantial contributions of individual authors.

At this point one might well ask whether the more contextualized approach advocated here does not go so far as to drown the autonomous author in his/her circumstances. The answer, paradoxically, is no. In fact, by more fully recovering the author's situation, we are better placed to appreciate the extent to which the author capitalized on, or even managed to expand, the available room for manoeuvre. Rivington, for example, was not the only Tory printer in New York at the time, but he proved to be both the shrewdest and the boldest. His position and the rapidly shifting contexts meant that he was a prime target for criticism and even violence. Of course, he could have moderated his newspaper, but he did not. More to the point, Rivington, like other Tory printers, could have quietly ignored "free" press rhetoric and simply stressed "open" press doctrine. Indeed, he did just that for a time. But as the crisis deepened and the need for a more powerful response became apparent to him, Rivington was able to see the advantage of turning the patriots' language on its head, thus both neutralizing it and revealing its central tension.

By sketching the relevant contexts, even this cursory account suggests how the interrelated forces of context and authorial action can bring about subtle yet significant conceptual change. In general, it is only by focusing more closely on the situation of

a particular theorist or group of theorists that we can make sense of an author's choice while appreciating it *as* a choice. A more robust contextualization reveals the forces both for and against a given conceptual change, thus demonstrating the extent to which the innovation is the product of a (partially) autonomous author.

If this approach addresses some issues, others remain necessarily open. For example, the question of why a certain contradiction was not addressed does not altogether disappear. Many contradictions will naturally go unaddressed due simply to a lack of focus or insight, but there will be times when historical evidence will make it clear that a given contradiction was revealed, recognized, and analyzed--but not resolved. In these cases the researcher will have to look to the relevant contexts and agents for clues as to why this issue went unresolved. Fortunately, the mere existence of this sort of situation may also be powerful evidence of the strength and significance of the beliefs, actions, and practices constitutive of this seemingly insoluble contradiction. The issue of slavery during and after the American Revolution provides a particularly apt example.⁵³

As Bernard Bailyn explained over a quarter of a century ago, the contradiction between the colonists' broad and unqualified praise of liberty and their relatively common practice of slave-ownership "became inescapable" by the 1770s.⁵⁴ Nevertheless, the practice would remain intact for decades to come for many reasons. The slave trade was profitable, of course, and many would try to evade the issue

⁵³ Farr, "Conceptual Change and Constitutional Innovation," 26.

⁵⁴ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), 232-246.

altogether. But there was more to it: The contradiction was difficult to resolve in part because the practice was so central to the Southern way of life, and in part because some of the colonists' ideological sources justified slavery.⁵⁵ Methodologically, then, there will be times when an unmistakable, but unresolved, contradiction will force us to re-open the question of how a certain contradiction could withstand such intense scrutiny.

A second critical issue that must remain open concerns the relevancy and causal force of any given context. Were there important cultural factors at play in a certain conceptual move or was it chiefly a matter of economic expediency? Was it social group pressure or political strategy that most influenced this or that reconfiguration of an accepted intellectual/linguistic convention? Ultimately, these matters of historical interpretation resist any crude attempt at methodological regulation. Our paradoxical rule of thumb here is to try to make sense of a historical moment as the agents genuinely experienced it while recognizing that they did not always see things clearly or consider them rationally. All of this is further complicated by the fact that while many potential contradictions remain "off-stage" as it were, other contradictions are addressed through means quite apart from conceptual innovation, such as denial, counter-accusation, or myriad other diversionary tactics. It is for all these reasons that we can at best speak of shifting contexts as "occasions" or "conditions" for conceptual change and can only isolate "emerging" contradictions or "revealing" criticisms as "mechanisms" of such change. Ultimately, determining the

⁵⁵ Bailyn. *Ideological Origins*. 232-46.

relevance and causal force of a given contextual shift, like many practical matters in conceptual history, requires methodological prudence on the part of the theorist in light of the complexities of a concrete episode of conceptual history.

Conclusion

I have been arguing that my model of politically significant conceptual change derives a number of advantages from its stress on context and contradiction. The first strength of this approach is its broad range of applicability. While it may be possible to appreciate some conceptual changes based chiefly on the linguistic context and the thinker's penetrating intellect, many other significant conceptual changes will require a great deal more contextualization if we are to understand, much less begin to explain, the rhetorical shift and the contradiction it served to address.

A second advantage of the interpretive strategy advocated here is that the relative autonomy of the author, though restricted by context, is by no means lost or ignored. This is true not in spite of the emphasis on context, but rather because of it. Contextual factors are always shifting, thus enabling or constraining (but never wholly determining) an author's ability to see emerging or extant contradictions. It is still true, therefore, that a certain author's own insight--whether monumental or modest--will be necessary to make *that* particular conceptual move to address *that* contradiction at *that* moment. A fuller contextualization of critical moments in a conceptual history provides the groundwork for a more genuine history that recognizes the concrete

complexity of the relationship between causally effectual but not determinant contexts and an innovating but only partially autonomous author.

The simultaneous appeal to context *and* agent suggests the third and most important strength of this approach: the promise and burden of richer understandings than have been the norm in recent intellectual history. The burden lies in the fact that while simple explanations may be "elegant," they are rarely historically accurate. The attempt to *explain* historical political behavior--especially *innovative* political behavior--is a particularly tricky business. I concede as much but maintain that the best way to proceed is by recognizing that the historical moments we seek to understand are at once complex and concrete.

The complexity lies in the fact that there are always any number of contradictions below the surface that might emerge as mechanisms of conceptual change; there are also many contextual shifts that might act to reveal these contradictions, thereby acting as occasions or even triggers of the conceptual changes we seek to explain. Furthermore, there are always criticisms being made that focus attention on some contradictions while diverting attention from others. Finally, behind all this is stasis: the contexts that are not changing significantly, the criticisms not made, the contradictions as yet masked by one thing or another, and the contradictions exposed but as yet unresolved (through conceptual change or otherwise) due to insufficient focus or insight.

The complexity of any actual case of conceptual change suggests the need for the simultaneous attention to concreteness. Abstract discussions of methodology can

at most serve as guidelines to direct our interpretive scrutiny. It is for this reason that I am loath to do more than to characterize contextual shifts as "occasions" of conceptual change and to direct the reader's attention to the role of contradiction and criticism as mechanisms of such change. Anything more rigorous is likely to be useless at best and detrimental at worst simply because of the infinite variety of situations and thinkers that beget conceptual change. For example, sometimes a long-term shift in the economic context will prove crucial, as it did in the first half of the eighteenth century when "open" press arguments were enabled in the colonies by weak markets that barely supported one newspaper. As we shall see in Chapter Three, financially strapped printers in that context were much better off publishing papers that were open to all potential customers, rather than papers that were the favorite vehicles of particular groups.

In other instances, alternative contexts prove pivotal. For example, the social context may be a critical factor, as the position of the "midling class of citizens" was for the Founding. When the "midling" Anti-Federalists charged that the middle and lower orders of society would be excluded from the proposed federal constitution, the Federalists responded by expanding one concept ("democrat") while altogether redefining another ("republic").⁵⁶ And, as I tried to suggest in the case of Rivington, sometimes a variety of long- and short-term shifts exacerbates emergent contradictions

⁵⁶ Ball, "'A Republic--If You Can Keep It'," in *Conceptual Change and the Constitution*, ed. Ball and Pocock, 137-64, esp. 145-50; see also, Russell L. Hanson, *The Democratic Imagination in America: Conversations with Our Past* (Princeton: Princeton Univ Press, 1985), 54-91, and Hanson, "'Commons' and 'Commonwealth' of the American Founding: Democratic Republicanism as the New American Hybrid," in *Conceptual Change and the Constitution*, ed. Ball and Pocock, 165-193.

at the "fault lines" that run between two interpretations of an ambivalent tradition, leading to brief, intense conceptual change. All of these concrete cases are irreducibly complex; neither draconian methodological rules nor a reluctance to broach the tension "between concept and materiality"⁵⁷ will alleviate that complexity. Nevertheless, it has been my contention that without an interpretive strategy that identifies context and contradiction as the principal forces of the practical dynamics of conceptual change, the relevant conceptual history will remain opaque or incomplete.

The success of any methodological approach such as this lies in the historical understanding it makes possible.⁵⁸ But a further value of conceptual history lies in the critical purchase it provides on current political disputes. At a minimum, conceptual histories furnish us with a timely reminder that the terms we make unquestioned use of in our current political discourse *can* be questioned, and in fact were at some earlier juncture in the development of our political tradition. Thus, Terence Ball's "prehistory" of the concept of a political "party" reminds us that the belief that parties play a positive role in democratic politics is not some universal truth, but rather the result of certain theoretical disputes and particular ideological commitments.⁵⁹

Insofar as my approach provides us with an appreciation of the contextual forces that constrained or enabled a given conceptual evolution, it will equip us with

⁵⁷ Koselleck, *Futures Past*, 85.

⁵⁸ Farr, "Understanding Conceptual Change Politically," 37.

⁵⁹ Ball, *Transforming Political Discourse*, 22-46.

more than a reminder. If the model I have been outlining yields richer understandings of conceptual history than would otherwise be possible, then we will be better placed to appreciate the emerging, continuing, or receding similarities between our modern political/conceptual disputes and the past controversies we have recovered. For example, not only would such a conceptual history demonstrate that a "free press" was conceptualized differently in an earlier era, but it would also provide us with the comparative data necessary to analyze how various political, economic, social, and ideological forces enable and undergird our current concept(s) of press liberty.

Ultimately, if we can explain how and why particular conceptual changes took place in an ideological tradition to which we are heir, we can begin to appreciate which features of that tradition are enduring or essential. And it is only by appreciating what is enduring in our tradition that we can begin to reveal its inherent contradictions and explain how and why they might be addressed, resolved, or transcended.

CHAPTER 2. THE ENGLISH INHERITANCE: FROM MILTON TO CATO

The eighteenth-century Americans who concern us here were not really Americans at all; they were, for the most part, Englishmen. Accordingly, the purpose of this chapter is to analyze the theoretical background from which the colonists of British America could draw. This analysis will thus provide a benchmark against which later developments can be compared. More specifically, this examination will establish the vast array of arguments that emerged during the seventeenth century, the first era of significant press liberty discourse in Anglo-American political thought. From there we will follow the falling away of many of those arguments due to the end of licensing, increased secularization, and broad philosophical shifts. I will then contend that the remaining arguments coalesced into two strains of argument that I have been calling "free" press doctrine and "open" press doctrine, borrowing the terms from the historical agents themselves. Throughout the course of this study we will follow eighteenth-century Americans as they isolate, re-examine, and recast these concepts, ultimately arriving at a recognizably modern, if still ambivalent, understanding of press liberty.

The role of this chapter, then, is to examine the English inheritance concerning press liberty and to define and analyze the distinguishable, but as yet indistinct, doctrines of the "free" press and the "open" press. In order to do this as succinctly as possible, we will stress influential theorists writing during the three major periods of debate: the radical 1640s, the licensing disputes of the turn of the century, and "Cato's" response to the unscrupulous politics of the 1720s.

First Flush of Freedom

The three years leading up to the Printing Ordinance of 1643 witnessed the first great explosion of press freedom in the history of the Anglo-Saxon world. The Ordinance, and succeeding acts, presented real threats to this new-found liberty. Reacting to the dire need to protect press liberty, several religious and political radicals went into print, providing the first concerted defense of the liberty of the press in the Anglo-American tradition.

The press was not new to England in 1640, having been introduced at least by 1476, possibly by 1468. The crown immediately assumed the prerogative over the press, with Henry VIII instituting the first comprehensive royal licensing system in 1538. By 1640 control was considerable, if imperfect, and was founded upon the old Tudor alliance of the crown and the Stationers' Company, whereby the crown let the Stationers monopolize the press in exchange for a commitment to help combat seditious and blasphemous printing.

But if the printing press and its regulation were not new to the 1640s, neither were claims for some measure of press liberty. To be sure, for most sixteenth century Englishmen, the idea that subjects should have the privilege of publishing their sentiments "seemed a dangerous and undesirable claim to make."¹ Nevertheless, by 1600 Members in Parliament, at least, had freedom of speech, though debates would sometimes erupt over whether this allowed Members to discuss certain topics such as the royal succession. Amidst these debates, Peter Wentworth defended freedom of

¹ William M. Clyde. *The Struggle for the Freedom of the Press From Caxton to Cromwell* (Oxford: Oxford University Press. 1934), 9.

speech in 1570, asking "how can Truth appear and conquer until falsehood and all subtleties that should shadow and darken it be found out?"² Thanks to Wentworth and others, the revolutionaries of the 1640s had several "long-standing radical Protestant traditions" on which they could draw.³

In addition to some philosophical precedents, the 1640s were also heir to a history not altogether void of practical experience with press liberty, or rather press license. Black-market printing was by no means unheard of, and importation for politics and profit was also a problem the Stationers' Company had to monitor. The Martin Marprelate tracts (1588-9) are perhaps the most famous example of illicit printing, though these Puritan authors bristled at the application, not the principle, of press regulation.⁴

These experiences notwithstanding, the practical freedom of the early 1640s was unique and unrivaled. With the weakening of the crown in the late 1630s, the Stationers' moved to ally with Parliament. "For three years, 1640-3, while the adjustment was taking place, the printing organization was without a rudder." The result: "Insurgent printers, long suppressed by Star Chamber and [the royal court of] High Commission, openly published partisan attacks on both king and Parliament. Political and religious controversialists suddenly found the press open to them."⁵

² Wentworth, quoted in Frederick S. Siebert, *Freedom of the Press in England, 1476-1776* (Urbana: University of Illinois Press, 1952), 101.

³ Christopher Hill, *Milton and the English Revolution* (London: Faber & Faber, 1977), 152.

⁴ Siebert, *Freedom of the Press*, 89, 98-100.

⁵ Siebert, *Freedom of the Press*, 166, 173.

This new burst of freedom was genuine. It was not, however, intentional. Political pressures and confusion led to a failure of control. Both Houses of Parliament turned to press regulation as soon as it was deemed possible. Nevertheless, during the early 1640s, "the English press operated virtually free of restriction." This liberty is dramatically demonstrated by the almost one hundred-fold increase in the number of pamphlets printed during this period, from 22 in 1640 to the peak of 1,966 in 1642.⁶ This practical freedom would continue throughout the decade, despite repeated attempts by Parliament and the Stationers' to reestablish control. Significantly, these conditions provided the occasion for the first explosion of press liberty discourse.

Gifted rhetoricians that they were, the radical defenders of the free press used many different arguments in their tracts, oftentimes presenting two or three separate arguments in the same paragraph. Fortunately, these myriad defenses can be aggregated into a handful of general types of claims without too much violence to the texts or their spirit. In what follows, then, I briefly survey and analyze these different types of arguments. I begin with the more practical and rhetorical arguments. While these may be of less interest to us today, they are quite common in the tracts and were central to the propaganda war being fought. As such, examining these gives us a more accurate picture of the pamphlets as well as a feeling for the debate.⁷ From

⁶ Elizabeth Skerpan, *The Rhetoric of Politics in the English Revolution, 1642-1660* (Columbia, MO: Univ of Missouri Press, 1992), p. 9; see also, Siebert, p. 203n1.

⁷ For the general background to these debates, see Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (Middlesex, UK: Penguin, 1972).

there, we move to examine the arguments that proved most influential to the conceptual history examined in this study.

The Practical/Rhetorical Arguments

Arguments by their very nature tend to be rhetorical and aim, almost invariably, at some practical end. But the contentions I refer to here are rhetorical in the worst sense: bombastic and hyperbolic, yet lacking in substance. Typically these barbs involved a sort of guilt by association, usually labelling press regulation as "Papist." There was simply no more efficient way to stigmatize your adversaries than to associate their principles with those of the "Roman Antichrist." John Milton, the master wordsmith, was quite adept with this tactic, but it was perhaps Leveller leader John Lilburne who epitomizes the strategy, writing in his open letter to the more moderate John Prynne, "truly, had I not seen your name to your Bookes, I should rather have judged them a Papists or a Jesuites."⁸

But if these rhetorical arrows should miss their mark, one could simply claim that regulation could not possibly work, or was bound to be counterproductive. Indeed, as the 1640s wore on, press regulation did seem more and more ineffective. Further, Milton and others argued that attempts at legal suppression would be

⁸ John Lilburne, *A Copie of a Letter to Mr. William Prinne, Esq.* (London: 1645), 6. See John Milton, *Areopagitica* (1644; reprint, London: Noel Douglas, 1927), 23, 26, 29, 39; see also, the finale of Milton's sonnet, *On the Forcers of Conscience* (1647?): "New Presbyter is but old Priest writt large." John T. Shawcross, ed., *The Complete Poetry of John Milton* (New York: Doubleday, 1971), p. 251. See also, William Walwyn, *A Helpe to the right understanding of a Discourse concerning Independency* (London: 1645), 1; and John Goodwin, *A Fresh Discovery of the High-Presbyterian Spirit*, 1641; appended to *The Struggle for the Freedom of the Press From Caxton to Cromwell* by William M. Clyde (Oxford: Oxford University Press, 1934), 336.

counterproductive by making heterodox views more famous, and thus would "prove a nursing mother to sects."⁹

A more reflective if still practical tack was to argue that since licensers (like all men) are fallible, to license the press is to risk suppressing truth. This argument was a favorite of John Goodwin, whose *Theomachia*--"one of the most important publications of the entire period"--bore the subtitle, *The Grand Imprudence of men, running the hazard of Fighting against God, in suppressing any Way, Doctrine, or Practice, concerning which they know not certainly whether it be from God, or no*. The centrality of religion demonstrated here, and in the ubiquitous scriptural references used by Goodwin and others to make this argument, suggests the fundamental role religious issues played throughout the revolutionary era.¹⁰ Of course, religion and politics were profoundly interdependent at this time; nevertheless, it is significant that while the Levellers' petitions to Parliament in 1647 and 1648 make this argument without scriptural support, the censorship and subsequent punishment of religious publications are their most pressing concerns.¹¹

The One Truth Shall Prevail

⁹ Milton, *Areopagitica*, 26, 4. See also Walwyn, *A Helpe*, 7, and John Goodwin, *Theomachia* (London: Henry Overton, 1644), 37; and Goodwin, *A Fresh Discovery*, 332-3. Cf. also Roger Williams, *The Bloudy Tenent of Persecution, for cause of Conscience*, 1644, reprint, vol. 3 of *Publications of the Narragansett Club*, 6 vols., ed. S. L. Caldwell (Providence: Providence Press, 1866-74), 80.

¹⁰ William Haller, *Liberty and Reformation in the Puritan Revolution* (New York: Columbia University Press, 1955), 147. Goodwin, *Theomachia*, 1, 6-7, 11, 12; and Goodwin, *Fresh Discovery*, 331. See also, Henry Robinson, *Liberty of Conscience* (London: 1644), 42.

¹¹ Leveller *Petition of March 1647 and Petition of 11 September 1648*, Don M. Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution* (New York: Thomas Nelson & Sons, 1944), 139, 289.

Pragmatism and hyperbolic rhetoric can be efficient argumentative tools and there is no reason to believe they were not effective in the raging debate of the 1640s. Nevertheless, the prevailing assumption--reinforced by recent experience--that free debate would lead to division and disorder had to be seriously addressed if the radical case was to be persuasive. The radicals generally argued in response that the Presbyterian Divines and, before them, the Episcopalian Bishops had obscured religious and political issues for their own interests. These obscuring tactics, licensing included, made it all but impossible for the truth to emerge and thereby unite the nation.¹²

In a fair fight, however, the truth--God's Truth--would most certainly prevail. This claim was perhaps the most prevalent argument for press liberty in the middle of the sixteenth century. The argument was Biblical in its origins, and chapter and verse would sometimes be cited for anyone who might miss the allusions (especially 2 Corinthians 13:8).¹³ The "bible" for the latter-day Revolutionaries of America, however, would be Milton's prose works.¹⁴ And while *Areopagitica* seems to have gone almost entirely unnoticed by its contemporary audience, this fact may be explained by its decorous presentation and classical language.¹⁵ This language, of

¹² See, e.g., Walwyn, *The Power of Love*, A8; or Lilburne, *Copie of a Letter*, 3, 6.

¹³ See, e.g., Robinson, *Liberty of Conscience*, 59, 56.

¹⁴ Caroline Robbins, *The Eighteenth-Century Commonwealthman* (Cambridge MA: Harvard University Press, 1959), 46.

¹⁵ Haller, *Liberty and Reformation*, 187. See also, Haller, *Tracts on Liberty in the Puritan Revolution, 1638-1647* (New York: Columbia University Press, 1934), 1:7.

course, is what makes Milton so quotable today. "We do injuriously by licencing and prohibiting to misdoubt [Truth's] strength," he argued. "Let her and Falshood grapple: who ever knew Truth put to the wors, in a free and open encounter[?]." On this head, Walwyn is almost as eloquent: "All mens mouthes should be open, that so error may discover its foulnes and trueth become more glorious by a victorious conquest after a fight in open field; they shunne the battell that doubt their strength."¹⁶

The Leveller party, in its *Petition of 18 January 1649*, provide perhaps the most innovative rendering of this critical argument. Reacting to Parliamentary moves to enforce strictly the comparatively draconian Printing Ordinance of 1647, they take this argument onto secular, political ground and explain its logic.

...if Government be just in its Constitution, and equal in its distributions, it will be good, if not absolutely necessary for them, to hear all voices and judgements, which they can never do, but by giving freedom to the Press; and in case any abuse their authority by scandalous Pamphlets, they will never want Advocates to vindicate their innocency.

The "good of the Commonwealth," like religious truth, would also prevail in open debate. And why do they prevail? Because falsity is easily combatted in a fair encounter. Indeed, the Levellers insisted, "scandalous Pamphlets" do "greater mischief" when licensing restricts "proper and effectual answers."¹⁷

¹⁶ Milton, *Areopagitica*, 35, 36; Walwyn, *The Compassionate Samaritane* (London: 1644), 60. See also, Walwyn, *The Compassionate Samaritane*, 14, 61; Goodwin, *Theomachia*, 33, and *Fresh Discovery*, 333, 335.

¹⁷ Levellers' *Petition of 18 January 1649*, in Wolfe, *Manifestoes*, 328; see also, their *Remonstrance of Many Thousand Citizens* (1646), and their *Petition of 11 Sept 1648*, in Wolfe, *Manifestoes*, 128, 289.

The Necessity of Conscience

The radicals wanted to persuade their readers that the free press, and free expression generally, was the best and quickest way to end division and bring out the one unifying Truth. Failing that, if the readers were not persuaded, or just did not want to let radicals have their opinions, many theorists argued--as Thomas Hobbes soon would--that they simply had no choice but to believe what they believed.¹⁸

Walwyn maintains that "man is by his own reason necessitated to be of that mind he is, now where there is a necessity there ought to be no punishment." Lilburne echoes Walwyn's sentiment, insisting that "it is the incommunicable Prerogative of Jesus Christ alone...to raigne in the soules and consciences of his chosen ones."¹⁹

In *A Helpe to the Right Understanding of a Discourse concerning Episcopacy* (1645), Walwyn truly breaks new ground. After extending the argument to "the free and undisturbed exercise" of one's conscience, Walwyn suggests Parliament is subordinate (at least theoretically) to the very people they are attempting to control.²⁰ He abruptly shifts from his religious exegesis to assert baldly that the Parliament cannot have any power the people did not grant them; thus, since the people cannot possibly have the right to force others against their consciences, Parliament cannot properly do so either.

¹⁸ See Hobbes, *Leviathan*, ed. CB Macpherson (Middlesex: Penguin, 1968), 527, 550.

¹⁹ Walwyn, *Compassionate Samaritane*, 7; Lilburne, *A Copie of a Letter*, 5.

²⁰ Walwyn, *A Helpe*, 7.

...the people of a Nation in chusing of a Parliament cannot confer more then that power which was justly in themselves; the plain rule being this: That which a man may not voluntarily binde himselfe to doe, or to forbear to doe, without sinne: That he cannot entrust or refer unto the ordering of any other: Whatsoever (be it Parliament, Generall Councils, or Nationall Assemblies:) ²¹

Or, more simply, "what the people cannot entrust...[Parliament] cannot have."²²

This argument is potentially very radical. The Levellers would repeat it, maintaining that Parliament is inferior to those "who chuse them," and Williams would argue that if the people did not have a "*power originally and fundamentally*" it is impossible to "derive it *Ministerially*."²³ Nevertheless, to the best of my knowledge, neither Walwyn nor any of his contemporaries drew out the implication of reversing this logic--that since the Parliament has a right to free speech, the people must have it as well. The arguments from the necessity of conscience had begun to chip away at some of the foundation of the arguments against press liberty. Exploring this innovative logic would have provided the radicals with a convincing thrust to their arguments for the right of press freedom. An easier tactic, however, was just to claim it.

Claiming the Commoners' Right

²¹ Walwyn, *A Helpe*, 4 (italics in original).

²² Walwyn, *A Helpe*, 7.

²³ Levellers' *Agreement of the People*, 227; Williams, *Bloody Tenent of Persecution yet more bloody*, 1645, reprint, vol. 4 of *Publications of the Narragansett Club*, 6 vols., ed. S. L. Caldwell (Providence: Providence Press, 1866-74), 189, 198-9.

Walwyn's "grant of power" argument, even if someone had traced the logic backwards, would have struck many as extremely radical and would have lacked any accepted precedent. It seemed simpler and less novel merely to expand the established Member's right to free expression during Parliament to include subjects out of Parliament. Walwyn, Milton and Lilburne all were willing to borrow from (and perhaps bend) recent history in support of this claim. Earlier, when the Bishops complained that the Divines were attacking them in the press, argues Walwyn, "*some of You [in Parliament] made answer, that there was no remedy, forasmuch as the Presse was to be open and free for all in time of Parliament: I shall make bold as a Common of England to lay claim to that privilege.*" But later in the same paragraph Walwyn drops the historical logic and simply writes in defense of "just Liberty *in time of Parliament*".²⁴

Lilburne is the most straightforward, using a largely unintentional failure of control in the recent past to establish a moral right to a free press. He appeals to the Presbyterian Divines, "that the Presse might be as open for us as for you, and as it was at the beginning of this *Parliament*, which I conceive the *Parliament* did of purpose, thatso the freeborne *English* Subjects might enjoy their Liberty and Priviledge, which the Bishops had learned...to rob them of...."²⁵

Lilburne's position here is the most extreme. He claims freedom of the press on the grounds of a subject's liberty, even asserting that this liberty existed at some

²⁴ Walwyn, *Compassionate Samaritane*. A4; see also, Milton. *Areopagitica*, 26.

²⁵ Lilburne. *A Copie of a Letter*, 2-3.

time before the Bishop's "robbed" it from the people. Lilburne further suggests that the established reasoning for a free press, the need to debate during Parliament, applies to subjects as well as Members. He goes on to note, however, that the sitting Parliament provides a punishing body should someone "abuse his penne." This argument is a little disingenuous as Lilburne well knows that the Long Parliament and its regulations were proving less than effective.²⁶ Nevertheless, Lilburne here makes the strongest case for the subject's liberty of the press while at the same time raising the pivotal issue of just how far this freedom went.

The Extent and Purpose of the Commoners' Right

Even if the right that Lilburne was claiming for English subjects was meant only to allow debate, the moderate majority might well have insisted that certain ideas were simply beyond the pale, even dangerous. Our radicals surely knew that most people feared the dissolution of society. But even though the masses of people tended (at least in the early sixteen-forties) to be fearful of societal breakdown, we might well expect our radicals to be more revolutionary. We are thus surprised to find them excluding seditious printing from the right of press freedom. Walwyn, for one, concludes his *Compassionate Samaritane* by calling on Parliament "that the Presse may be free for any man, that writes nothing scandalous or dangerous to the State."²⁷

²⁶ Lilburne, *A Copie of a Letter*, 2. The number of newspapers published peaked in 1645 with 722. Siebert, *Freedom of the Press*, 203n1.

²⁷ Walwyn, *Compassionate Samaritane*, 78-9. See also A4, 5; Walwyn, *Power of Love*, 43; Milton, *Areopagitica*, 37; and Lilburne, *A Copie of a Letter*, 2.

These would not be considered libertarian sentiments today. Yet the issue of the extent and purpose of this right claimed on behalf of the common people of England is crucial to an accurate interpretation of these early arguments concerning press liberty. If we read our own current First Amendment freedoms into the radicals' claims we are sure to overestimate them. Conversely, however, if we are not sensitive to the context, we are likely to overemphasize the limits and misread their positions.

In part, the deference to the idea of *some* limits was most likely a "sort of tactical moderation in the interests of strategic extremism."²⁸ But part of the reason these radical theorists sometimes bowed to restrictions on seditious printing was because they took them be efforts to stop the Royalist press. Lilburne, for one, makes it clear that it is the Royalist writings that the radicals take to be dangerous. The licensers abuse their powers, he complains, yet they allow (or rather do not adequately discourage) the printing of Royalist "Malignant Books and Pamphlets, tending to the ruine both of the *Kingdome* and *Parliaments Priviledges*, by likewise [allowing] the sending of Printing materials to the King, whereby to Print down both Power of Parliament, and freedome of the People."²⁹ The Levellers knew that the only hope of any long-lasting freedom (including press freedom) was through pressuring Parliament, not through allowing the King to propagandize freely his way back to power.

When the context shifted, and Royalist success seemed unlikely, the Levellers began to think more creatively about press liberty. While the notion of the press as a

²⁸ Hill makes this claim regarding Milton's argument: see *Milton and the English Revolution*, 151.

²⁹ Lilburne, *Englands Birth-Right Justified* (London: 1645), 11. See also, Walwyn, *Compassionate Samaritane*, A4, 39-40.

check on tyranny had been hinted at before,³⁰ it was only when the King was at bay and Parliament had threatened strict regulation that the Levellers were led to apply these notions to a Parliamentary despotism. As with the "truth shall prevail" argument, it was in the *Petition of 18 January 1649* that the Levellers were at their most innovative and explicit.

...all things being duly weighed, to refer all Books and Pamphlets to the judgement, discretion, or affection of Licensers, or to put the least restraint upon the Press, seems altogether inconsistent with the good of the Commonwealth, and expressly opposite and dangerous to the liberties of the people, and to be carefully avoided, as any other exorbitancy or prejudice in Government.³¹

The notion of the press as a barrier to parliamentary as well as royal tyranny and a defender--indeed, the most essential defender--of the people's liberties would thereafter appear again and again.³² Significantly, however, the Levellers would never elaborate on whether all post facto punishment of criticism of public men and measures was prohibited by their argument against "the least restraint" being placed on the press. This issue would have to wait for the next century.

³⁰ See Milton, *Areopagitica*, l. 40; and the Levellers' *Petition of 11 September 1648*, in Wolfe, *Manifestoes*, 289.

³¹ *Petition of 18 January 1649*, in Wolfe, *Manifestoes*, 328-9.

³² See, for example, the Levellers' *Englands New Chains Discovered. The Second Part of Englands New-Chaines Discovered*, and *Walwyns Just Defence Against The Aspersion Cast Upon Him*, all in William Haller and Godfrey Davies, eds., *The Leveller Tracts, 1647-1653* (New York: Columbia, 1944), 162, 167, 184, 384.

The Overt Acts Argument

The "grant-of-power" claim, the Commoner's increasingly unrestricted right, and the "press-as-check-on-government" argument are all innovative and revolutionary; the claim that only "overt acts" can harm government was at least as radical for two reasons. First, the notion that words can endanger government was widespread. The "bad tendency" of words to breach the peace and bring government into disrepute had been a central precept of the Star Chamber until its abolishment in 1641. Second, overt acts theory strikes at the heart of the definition of seditious libel, which maintains that government can be harmed by mere words.

Perhaps the earliest hint of this argument is to be found in Roger Williams' *The Bloody Tenent*. Williams suggests the overt acts argument in several places, but is most direct when he posits "a false Religion and *Worship* will not hurt the *Civill State*, in case the *worshippers* breake no *civill Law*:...the *Civill Lawes* not being broken, *civill Peace* is not broken: and this only is the Point in Question."³³ Williams is here concerned chiefly with religious toleration, and at no place does he specifically extend this overt acts argument to free expression regarding civil authority.

Walwyn, however, does take this argument explicitly into the civil realm. In *A Helpe*, after defending freedom of the press against claims that it would increase divisions, he counters, "and as for disturbance to the State: admit any mans judgement be so misinformed, as to beleeve there is no sinne; if this man now upon this

³³ Williams, *Bloody Tenent*, 198: see also 78-9, 96, 147, 163, 171, 384-5; and *Bloody Tenent Yet More Bloody*, 91, 111.

government should take away another mans goods, or commit murder or adultery: the Law is open, and he is punished a malefactor, and so for all crimes that any mans judgement may mislead him unto."³⁴

Walwyn does not develop this line of thinking any further. And his Leveller party, in their *Petition of 18 January 1649*, would only suggest that an "abused" government can readily "vindicate their innocency." Indeed, this argument, and these early arguments more generally, are perhaps not inspiring as developed theory. Nevertheless, this first concerted attempt at press liberty discourse provided the varied and multi-faceted grounding on which later defenses would burgeon.

The Licensing Controversy

January 1649 was at once the high point and the beginning of the end for the Levellers, both as a political movement and as innovating theorists of press liberty. The arrival of the Commonwealth and the Council of State brought with them some of the most repressive press regulations of the Interregnum. When power was centralized in Cromwell's Protectorate in 1653, press control became even more efficient. The Restoration, in turn, brought a new, exhaustive licensing act which lasted in place, with one six-year hiatus, until 1694.

The longevity of these regulations suggests how the restored monarchy and a conservative balance of power served to remove press liberty as a topic of public debate. This is not to say, however, that control was complete. Indeed, during Sir

³⁴ Walwyn. *A Helpe*. 8.

Roger L'Estrange's long tenure as licenser (1662-1679) it seems only about half of the pamphlet literature carried his imprimatur.³⁵ Still, the Printing Act's expiration in 1679 was not due to any reasoned stand regarding press liberty. Rather, once the exclusion crisis, which had already eclipsed all other issues in the press, threatened to become violent, Charles II prorogued Parliament before the Act had been renewed.

This lapse in the licensing provisions was of no help to Algernon Sidney, both because the manuscript found in his study was unpublished and because he was tried and executed for treason, not unlicensed printing. And while this martyrdom would make him a cherished source for the American Revolutionaries, neither he nor his confederate John Locke did much to develop the philosophy of press liberty. To be sure, both provided occasional interpretations of the truth-shall-prevail argument, and--in keeping with their broader concerns--they stressed the people's right to debate as well as their revocable grant of power to their rulers.³⁶ Still, when Locke took up the specific issue of the Licensing Act in 1694 he provided many (ultimately convincing) practical arguments against renewing the Act, pausing only twice to make "sarcastic reference" to the broader principles of licensing.³⁷

³⁵ Siebert, *Freedom of the Press*, 243.

³⁶ See, for example, Sidney, *Discourses Concerning Government* (1698; reprint, London: Arno Press, 1979), 9, 409, 424, 427, 451, 453. For Locke, see, for example, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 409; and *A Letter Concerning Toleration*, ed. James Tully (Indianapolis, IN: Hackett, 1983), 46.

³⁷ H. R. Fox Bourne, *The Life of John Locke* (New York: Harper & Brothers, 1876), 315; see Locke's memo, reprinted in Peter King, *The Life and Letters of John Locke, with Extracts from his Journals and Commonplace Books* (London: George Bell & Sons, 1884), 376, 384. Locke also played a quiet role in the end of licensing in Virginia. The Royal Instructions of 1698, "which Locke did so much to draft" (Laslett, ed., *Two Treatises*, 284n), silently drop the conventional licensing passage that
(continued...)

With Locke's memo circulating, the Printing Act of 1662 expired, never to return. And while Locke did little directly to develop press liberty philosophy, the end of licensing brought recurring exchanges during the next two decades over the merits of licensing and press regulation more generally. An examination of this discourse demonstrates the refining of the vast array of arguments that emerged in the 1640s. This can best be seen in the writings of radical Deist Matthew Tindal. Before analyzing Tindal, however, we would do well to pause briefly to assess the philosophical context to which he was responding.

In the interests of brevity, focusing chiefly on one frequent contributor to these debates seems prudent, and Daniel Defoe provides an excellent subject. Laurence Hanson is quite right to note that Defoe would have been justified in defending his essays as representing "the best work on both sides."³⁸ Defoe's general moderation and mercenary attitude can make him difficult to characterize. Happily, this is not a biography but a conceptual history, and Defoe is a perfect source for the most articulate expression of the moderate middle ground concerning early eighteenth century press liberty discourse.

"THAT there should be a Restraint upon the Press, seems a Matter of Necessity: But the Manner of it, a Matter of Debate," John Asgill declared as late as

³⁷(...continued)

would continue to appear in other colonies' Instructions. See Leonard Woods Labaree, *Royal Instructions to the British Colonial Governors*, 2 vols. (New York: D. Appleton-Century Co., 1935), 2:495-6; also, Laslett, "John Locke, the Great Recoinage, and the Origins of the Board of Trade: 1695-1698," *William and Mary Quarterly*, 3rd. Series, 14 (1957): 369-402, esp. 398-401.

³⁸ Laurence Hanson, *Government and the Press: 1695-1763* (Oxford: Oxford University Press, 1936), 94.

1712 and many, Defoe included, would certainly have agreed.³⁹ The reason licensing was needed, Defoe wrote in support of the Whig government in 1699, was because truth will *not* prevail. The mere printing of some assertion made it seem orthodox: this is especially problematic since the "generality of mankind" are unable to detect falsity. The more corrupt amongst them will use the unclarity of truth as an excuse for evil while even the indifferent will think there is no difference between truth and falsity. Ultimately it is the Magistrate's duty to stop people who are in error.⁴⁰

Some would go so far as to argue that the unrestrained press brought a "Tyranny" over men's reputation since insulting attacks are "irremediable." This is true, Defoe explained, because, with the "poison" already out, the proper response arrives too late to change men's minds.⁴¹ Writing now for the Tories in 1705, Defoe would conclude that debate is dangerous, since some authors are "like *Guy Faux* with his...Candle, walking among the Barrels of Gun-Powder...."⁴²

Press liberty has a direct tendency to disorder. Indeed, for many, printing was an overt act. Seditious authors "are [the] very Assassins of all Government," one anonymous author explained; defending libelling was tantamount to "not only the

³⁹ John Asgill, *An Essay for the Press* (London: A. Baldwin, 1712), 2. See also Daniel Defoe, *An Essay on the Regulation of the Press* (1704; reprint, Oxford: Basil Blackwell, 1948), 4.

⁴⁰ Defoe, *A Letter to a Member of Parliament Shewing the Necessity of Regulating the Press* (Oxford: George West & Henry Clements, 1699), 41-3, 52; see also [Anonymous], *ARGUMENTS Relating to a Restraint upon the PRESS, Fully and Fairly handled in a LETTER to a Bencher, FROM a Young Gentleman of the TEMPLE* (London: R. & J. Bonwicke, 1712), 22.

⁴¹ [Anon.], *ARGUMENTS Relating to a Restraint Upon the PRESS*, 19, 18; Defoe, *A Letter to a Member*, 41, 49.

⁴² Defoe, *A Review of the Affairs of France*, 8 November, 1705.

wearing of private Daggers, but the using them too, even against the Person of the Magistrate himself."⁴³ A regulated press was plainly necessary to check a licentious world. As for the people's rights and privileges, press liberty was not among them. Press freedom was not one of the ancient or essential liberties, nor was it necessary: "the Lords and Commons," not the people, were "a sufficient Bulwark against any Designs of Arbitrary Power."⁴⁴

Matthew Tindal's works would be "much in Vogue" in mid-eighteenth-century America but it was against these turn-of-the-century mainstream currents that he was fighting. And it is in response to these moderate views that Tindal fashions a radical approach to press liberty. Tindal's work is crucial for us here not only because he represents some of the most innovative thinking of his day, but also because his arguments demonstrate a narrowing of the range of arguments. Furthermore, Tindal's division of his arguments into civil and religious reasons against press regulation paves the way for the "free and open" press tradition that emerges in the works of Trenchard and Gordon.

The argument that the truth shall prevail is perhaps the most central claim that Tindal makes and it is the essence of his "religious" reasons for press liberty. With the Glorious Revolution of 1688 the issues of religious toleration and freedom of conscience had, in large part, been resolved, leaving the arguments from the necessity of conscience to fall away. Conversely, with the need to defend against the return of

⁴³ [Anon.], *ARGUMENTS*, 27.

⁴⁴ Defoe, *A Letter to a Member*, 34, 61; [Anon.], *ARGUMENTS*, 14-5.

licensing provisions, arguments that defended the right of every one to publish their sentiments would prove right on target.

Religious concerns remained a crucial shared basis of agreement even in this increasingly secular era and Tindal, a leading Deist of the day, would tie many of his arguments for opening the press to the goal of advancing Protestantism, though he was much less likely to cite scripture than the Puritan revolutionaries of the 1640s. The rhetoric of "popery" was still effective and Tindal used it, but he did so sparingly, tending to be more positive.⁴⁵ Thus he stressed the role of searching for truth in advancing Protestantism.

Press licensing, Tindal complained, hinders our examining all sides of any debate, which is "the only way to discover truth."⁴⁶ Indeed, rather than being lost in comparison with falsity, truth becomes clearer and gains the "greater Power" of belief. This is not to say that men are infallible, only that this is a reason to open, not censor, the press, since licensers may be wrong and ultimately men must discuss and argue for the truth to prevail.⁴⁷

But if Tindal gives priority to religious reasons centering on the truth's power to emerge from debate, this was not because he thought there were no convincing "civil reasons" for wider press liberty. For starters, Tindal concurred with the radicals

⁴⁵ See, for example, Tindal, *Four Discourses on the Following Subjects: viz...IV. Of the Liberty of the Press* (London: 1709) [a reprint of his *Letter to a Member of Parliament* (London: J. Darby, 1698)], 309.

⁴⁶ Tindal, *Reasons Against Restraining the Press* (London: 1704), 7; see also, Tindal, *Four Discourses*, 294, 295.

⁴⁷ Tindal, *Four Discourses*, 296, 294. See also, Tindal, *Reasons*, 7, 4.

of an earlier day in maintaining "That once [Liberty of the Press] falls, nothing we hold dear or precious is safe." Royal prerogatives would surely know no bounds. But more than that, even "*Westminster-Hall*" would prove arbitrary if there were no press to "warn the people of their Danger."⁴⁸

This notion that Parliament, the people's traditional defenders against royal power, could be a danger to the people flew in the face of the assumptions of the age. But Tindal would prove more radical still. After blandly maintaining that "the People retain a right to offer their Advice to their Representatives," Tindal asks if the Commons "thought fit to publish their proceedings to prevent being misrepresented [as they recently had in the Occasional Conformity Act], why should they deny those they represent the Liberty?"⁴⁹

Here then we find Tindal "claiming the Commoners right" and suggesting--if only obliquely--the "grant of power" logic first seen in Walwyn. He would again echo Leveller arguments in reasoning that the people should be allowed to criticize those in power since they could not be injured by criticism "since they have a number of dependents, ready upon all occasions to write in justification of their measures."⁵⁰ As we saw above, this sort of argument goes a long way toward undermining the concept of seditious libel and it certainly contradicts the contemporary claim that press attacks are "irremediable."

⁴⁸ Tindal, *Four Discourses*, 323, 321.

⁴⁹ Tindal, *Reasons*, 10; see also, Tindal, *Four Discourses*, 324.

⁵⁰ Tindal, *Reasons*, 13.

Tindal responds to some of the most widely accepted claims of his day by renewing and refining arguments that first flourished in the 1640s. Significantly, Tindal does more than this in that he further develops his "civil" and "religious" arguments and demonstrates how they are ultimately intertwined. This unity results in part from the fact that "Priestcraft and Slavery go hand in hand." But in fact it goes much deeper than that. Everyone, Tindal explains, "has a natural Right in all matters of Learning and Knowledge" to say and hear what can be said on all sides of all issues, even extending to the criticism of government. With this argument Tindal goes well beyond responding to any argument supporting a return to licensing. He provides a broader, more secular, and more reason-centered body of argument than had been hitherto available.

Cato and the Emergence of the "Free" and "Open" Press

With the writings of John Trenchard and Thomas Gordon we witness the emergence of the ambivalent body of thought I have called the "free and open press." The narrowing of the myriad arguments that exploded onto the scene in the 1640s concludes with the two general strains of thought developed by Trenchard and Gordon under the pseudonym "Cato." This narrowing was not entirely of their own doing of course. Broad cultural, political and philosophical changes contributed to the falling away of other concerns and arguments. For example, by 1720 a secular approach to political argument was far more the norm than it had been even at the turn of the century. Trenchard and Gordon's work contributes to this secularism, not merely in

the anti-clerical attitude of their *Independent Whig* essays, but--more significantly--in their reliance on reason and ancient history for their sources and arguments.

Cato's arguments not only had different sources, but different subjects. With licensing gone for over a quarter of a century, Cato's press liberty concerns are primarily libel law and post facto punishment. Stamp taxes had been introduced several years earlier by Queen Elizabeth on Bolingbroke's advice, but had proven ineffective due to readily exploited loopholes, making them gratuitous targets.⁵¹

The issues, too, had changed somewhat. Freedom of conscience was primarily a starting-point for Cato.⁵² And while the common man's inability to reason was a claim disputed by Trenchard and Gordon's colleague Anthony Collins back in 1713. Cato saw fit to ignore it.⁵³ Finally, since Cato would forthrightly maintain that press liberty was a natural right he did not need to claim it as a Commoner or derive it retroactively from the grant of power argument.

One strain of argument that Cato did employ was what I have been calling "open" press doctrine.⁵⁴ An "open" press supported the right of every man to voice his own views on any subject, whereupon others would decide for themselves if these views had any merit. But as modern as this formulation may sound, the reader searches in vain in Cato's works for a claim of some absolute, inherent human right to

⁵¹ See Siebert, *Freedom of the Press*, 315-9, 321.

⁵² Trenchard and Gordon, *Cato's Letters*, 4 vols. (London: Wilkins, Woodward, Walthoe & Peele, 1724), 2:54-5 (#60), 74 (#62), 128 (#66).

⁵³ Anthony Collins, *A Discourse of Free-Thinking* (London: 1713), 101 and passim.

⁵⁴ I employ the terms "open" and "free" to distinguish these doctrines in anticipation of the colonists' common use of these terms. See below, Chapters 3 and 4.

free expression. Rather, this doctrine was an elaboration and reworking of the "truth shall prevail" argument first stressed in the radical tracts of the 1640s.

In Cato's able hands, however, the "truth shall prevail" argument was based less on radical Protestant notions of a continuous reformation and more on logic and historical lessons. We find, for example, remarkably few recourses to the traditional phrasing and no reliance on scripture. In a much more secular, rational approach, Trenchard and Gordon cite recent history and ancient examples.⁵⁵ Further, these examples are more likely to show a "virtuous Administration" exalted than God's truth revealed.

Cato's secular and historical rationalization of the "truth shall prevail" logic served to place the argument on a new footing; moreover, it brought the argument explicitly into the realm of government, defying Tindal's rigid categorization of this notion as a "religious" reason for press liberty. Perhaps more important for "open" press doctrine was Cato's emphasis on and development of the other side of the well-worn "truth shall prevail" coin: "it is Error and Imposture alone, which dread a fair Enquiry, as being conscious of their own Weakness." Thus it is "Knavery and Deformity alone" that need "Disguise."⁵⁶

Why is it that knavery seeks disguise and shuns a fair enquiry? Because, Cato reasons, "misrepresentation of publick Measures is easily overthrown, by representing publick Measures truly." The same is true of an honest man's "clear Reputation,"

⁵⁵ See, for example, Trenchard and Gordon, *Considerations offered upon the Approaching Peace* (London: J. Roberts, 1720), 6; or *Cato's Letters*, 1:99 (# 15).

⁵⁶ Trenchard and Gordon, *The Independent Whig* (London: J. Peele, 1721), 24 (# 5), 75-6 (#11).

which even "foul Mouths cannot hurt." The rationale is that "Truth has so many Advantages above Error, that she wants only to be shown, to gain Admiration and Esteem."⁵⁷

Cato, then, has no fear that the people will be unable or unwilling to examine and perceive the truth once the press is open. In fact, "certain Experience shews us" that when great men simply "despise" the libels against them, "then [the libels] always lose their force." Recent history confirmed this, Trenchard and Gordon point out, when good ministers "knew very well that [a wild] Calumny could make no Impression upon any judicious Man, and they laugh'd at the simplicity and malice" of their attackers.⁵⁸

Others, of course, were less sanguine than Cato concerning the ability of an open press to permit the common people to separate knavery from virtue. Recognizing this, Cato concedes that an open press will occasion abuses, yet "it is an Evil arising out of a much greater Good." Press liberty was a life-sustaining force, like the Sun or the Nile; they may produce "Monsters" on occasion, but they remain "general Blessings."⁵⁹ The "bad tendency" of the press is at once conceded and minimized by comparison with its virtues.

Thus, Trenchard and Gordon stress and make explicit the notion of an open press's net advantage; this view had been implicit all along, for even the religious

⁵⁷ Trenchard and Gordon. *Cato's Letters*. 1:101 (#15), 1:261 (#32), 3:248 (#100).

⁵⁸ Trenchard and Gordon. *Cato's Letters*, 3: 248 (#100); *Considerations*, 16.

⁵⁹ Trenchard and Gordon. *Cato's Letters*. 1:259 (#32).

radicals of the 1640s knew that reformation was an uneven struggle rather than a sweeping and immediate conquest. For Cato, however, this was a secular axiom proven by Tacitus's histories of Rome, wherein we learn that during three centuries of open debate "not Five publick Ministers suffered unjustly." And here again we also see that Cato's "open" press logic is aimed not so much at truth's revelation but rather at the virtuous administration of government. "Slander is certainly a very base and mean Thing: But surely it cannot be more pernicious to calumniate even good Men, than not to be able to accuse ill ones."⁶⁰

With these claims, the role of the open press in acting as a check on government and possible defender of the people's liberties becomes evident. And in fact, the peculiar coherence in Cato's thought between open press doctrine and these other long-standing defenses of press freedom will prove a pivotal facet of the American colonists' ideological inheritance. But to understand fully the unity of this tradition, we must first understand how these other traditional defenses of press liberty coalesced into "free" press doctrine.

"Free" press doctrine sees the paramount role of the press as a bulwark against governmental power, and thus the essential defender of all of the people's other liberties. With an entrenched and expanding Whig oligarchy in power and the government tied into the venality of the ill-fated speculation scheme known as the South Sea Bubble, Cato saw a dire need for a "free" press. Trenchard and Gordon, along with other radical, "independent" Whigs, saw in the politics of the time a critical

⁶⁰ Trenchard and Gordon. *Cato's Letters*. 1: 99 (#15); 1:254 (#32); see also, 3:243 (#100).

junction in the relentless struggle between the people's liberty and the government's power.

The fundamental opposition between the relentless, aggressive power of government and the ever-vulnerable liberties of the people was, for Cato, a matter of historical fact: his letter on "The encroaching Nature of Power, ever to be watched and checked" draws heavily on Roman history.⁶¹ But it was also an aspect of simple natural reality: "Power is naturally active, vigilant, and distrustful.... Now, because Liberty chastises and shortens Power, therefore Power would extinguish Liberty; and consequently Liberty has too much Cause to be exceeding jealous, and always upon her Defence. Power has many Advantages over her...."⁶²

Given this stark view of the vulnerability of the people's liberties, it is not surprising that "free" press doctrine provides the second thrust to Cato's philosophy of press liberty. While various formulations of this doctrine are ubiquitous in *Cato's Letters*, it receives its classic expression in his first letter on the subject, "Of Freedom of Speech: That the same is inseparable from Publick Liberty." Here Trenchard and Gordon declare succinctly, "Freedom of Speech is the great Bulwark of Liberty: they prosper and die together: And it is the Terror of Traytors and Oppressors, and a Barrier against them."⁶³

⁶¹ Trenchard and Gordon, *Cato's Letters*, 3: 326-31 (#115).

⁶² Trenchard and Gordon, *Cato's Letters*, 1: 268 (#33).

⁶³ Trenchard and Gordon, *Cato's Letters*, 1:102 (#15); see also, 3:243-4 (#100). In these *Letters*, freedom of speech and of the press are often referred to interchangeably.

Statements like these advancing "free" press doctrine are made again and again in the *Letters*, but this emphasis alone does not explain their importance. Rather, Cato's significance here lies in his having taken the boundaries of "free" press doctrine to radical extremes and having explicitly defended them. Whereas other authors are cautiously abstract about precisely what can or cannot be said about public men and measures, Cato expressly defends a broad view of press liberty and an exceedingly slender concept of seditious libel.

None of this is to say that Cato does not make some moderate statements. In one of his later essays on libel, he defines libel in a mainstream way and concludes by approving of the current laws "when prudently and honestly executed."⁶⁴ Some scholars claim that these comments are best understood as mere "face-saving gestures," while others maintain that passages like these betray Cato's acceptance of the legal status quo.⁶⁵ Perhaps Cato's claim that an unrecognized type of libels, those against the people, are at least as bad as all other types betrays his essential radicalism.⁶⁶ In any event, this question is not crucial for us here: Trenchard and Gordon's own intentions aside, they were read by many in England, and especially later in America, as ardent defenders of the people's liberties who placed few if any bounds on criticism of public men and measures. There would be much to recommend this reading.

⁶⁴ Trenchard and Gordon. *Cato's Letters*. 3:242, 249 (#100).

⁶⁵ David L. Jacobson, ed., *The English Libertarian Heritage* (Indianapolis, IN: Bobbs-Merrill, 1965), xli; Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), 118.

⁶⁶ Trenchard and Gordon. *Cato's Letters*. 1:254-5 (#32); more generally, see 1:77-84 (#12).

Trenchard and Gordon's earliest and most popular essay on libel appeared in June 1721, only two months before its vehicle, the *London Journal*, would peak its circulation at over 10,000 copies.⁶⁷ This *Letter*, in turn, was probably the one most reprinted in America. Cato immediately defines a libel as "a Sort of Writing that hurts particular Persons, without doing Good to the Publick." And while he accedes in the traditional notion that the truth may still be libellous, he restricts this doctrine to "private and personal Failings," for "it is quite otherwise when the Crimes of Men come to affect the Publick."⁶⁸

The "exposing of Publick Wickedness" Cato further maintains, is a "Duty," and this is true even of exposing a public man's "private Ignorance," as this could well cause "publick Confusion." For support of this radical narrowing of seditious libel, Cato cites Machiavelli to the effect that it is beneficial to a state that the people can accuse magistrates who are criminals, or merely "thought to be so." Calumny, Cato concedes, is an evil, but it is better that even good men are maligned falsely and maliciously than that bad magistrates should not be accused.⁶⁹

Cato insists on this radical latitude in tolerating even false and malicious attacks on public men and measures in part because, as we saw above, even "foul Mouthes" cannot hurt an honest man's reputation, and in part out of jealousy for the people's ever-threatened liberty. Ultimately for Cato, "it is certainly of much less

⁶⁷ Siebert, *Freedom of the Press*, 339.

⁶⁸ Trenchard and Gordon, *Cato's Letters*, 1:252 (#32).

⁶⁹ Trenchard and Gordon, *Cato's Letters*, 1:253-4 (#32); see also John Trenchard and Thomas Gordon, *The Character of an Independent Whig*, 4th ed. (London: J. Roberts, 1720), 19.

Consequence to Mankind, that an innocent Man should be now and then aspersed. than that all Men should be enslaved."⁷⁰

Once again, then, we find Cato appealing to the advantages of press liberty and combining "free" press doctrine and "open" press doctrine. For Trenchard and Gordon, both truth *and* the people's good may sometimes be slightly set back by press liberty, but they will ultimately prevail--and usually in short order and with little effort. Conversely, without a broad freedom of the press--even permitting sedition--"the World must soon be over-run with...Tyranny, and the most stupid ignorance."⁷¹

How is it then that these doctrines, though distinguishable for us, remained indistinct for Cato? Trenchard and Gordon can see these two halves of the "free and open" press as complimentary simply because history shows them that they are. On this point Cato can turn to ancient history or even the history of Christianity, since both demonstrate that a press open to the people, frees the people. The early Christians, Cato notes, could not regulate discourse to hamper their opponents--indeed their enemies had all the advantages--"yet Christianity spread." And more significantly--at least for Cato, who would belabor the point--ancient history clearly proved that when the press was open for all to declare their sentiments, it was the

⁷⁰ Trenchard and Gordon, *Cato's Letters*, 1:261 (#32); 3:244 (#100). See also, 1:254 (#32); 3:248 (#100); 3:254 (#101).

⁷¹ Trenchard and Gordon, *Cato's Letters*, 3:247 (#100).

champions of the public good and the people's liberties, not the corrupt advocates of superstition and tyranny, who would prevail.⁷²

Cato, then, can and does see a coherent, harmonious theoretical basis for his radical understanding of press liberty. In fact, the consistency of the "free and open" press is apparent from the very first line of the first *Letter* devoted to the subject. "Without Freedom of Thought," Cato declares, "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, as far as by it he does not hurt and controul the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know."⁷³ The first half of the eighteenth century would see the British colonists in the New World repeat these ideas and reprint these very words again and again, all the while maintaining a similar coherence, though in a different context and for different reasons.

⁷² Trenchard and Gordon, *Independent Whig*, 79 (#11); on ancient history, see, for examples, *Cato's Letters*, 1:97-105 (#15).

⁷³ Trenchard and Gordon, *Cato's Letters*, 1:97 (#15).

CHAPTER 3. THE COMING OF THE CRISIS

The first half of the eighteenth century witnessed a period of considerable change for the British colonists in America in matters political, social, demographic, economic, and religious. Against this backdrop of change, the discourse of press liberty seemed rather more stable and continuous. As one measure, *Cato's Letters* remained nearly as popular in the 1750s as in the 1720s. Accordingly, one of the primary themes of this chapter is the remarkable continuity of the "free and open" press tradition throughout this period. Reflecting on this marked rhetorical continuity, some scholars have been lead to see little development at all in colonial press liberty. However, it is the burden of this chapter to show that within the enduring bounds of the "free and open" press tradition, important if subtle transformations were taking place. As political life became more secular and more popular, the meaning of press liberty was broadened and refined. Though the terms of debate scarcely changed, new tensions emerged.

To make sense of the subtle shifts in the discourse of press liberty, we will need to examine a number of controversies over press liberty that challenged the colonists to explore the tradition of press liberty that they brought with them from England. Though many of these changes grew out of the increasing popularization and secularization of government, these forces created their own tensions, as the conflicts between legislative privilege and press liberty will demonstrate. To begin, however, we would do well to establish the context of the colonial world to which *Cato's Letters* and other English tracts were imported. Accordingly, this chapter

opens with an overview of changing views of press liberty in seventeenth-century colonial America and then examines some early challenges that strained even the growing leniency of that earlier period. Then, we will briefly return to Cato to establish his central place in early- to mid-eighteenth-century America. Next, we turn to the celebrated seditious libel trial of John Peter Zenger. This case receives extensive analysis not only because it brought about the end of seditious libel as a serious restraint on press liberty in the colonies, but also because the controversy produced some of the richest discourse over press liberty in this period. The next section examines the subtle but significant developments within the "free and open press tradition" occasioned by the increasingly popular nature of government in the 1740s and '50s. Finally, the chapter closes by considering nascent tensions between press liberty and legislative privileges that grew out of these same alterations in nature of colonial government.

Press Liberty in Seventeenth-Century America

The British colonies in America, like far-off Great Britain itself, were ruled by a monarch. This monarchical background is crucial to understanding the suppression of free expression in early colonial America. The role of the monarch was perhaps most immediate in royal charter colonies such as Massachusetts and Connecticut, which held their charters directly from the King. But even outside New England, colonial governors would traditionally receive the same "Instructions" from the King:

Forasmuch as great inconvenience may arise by the liberty of printing within our said province[s], you are to provide by all necessary orders.

that no person keep any press for printing; nor that any book, pamphlet, or other matters whatsoever, be printed without your especial leave and license first obtained.¹

Colonial governors were also suspicious of press liberty; Virginia Governor Sir William Berkeley makes this clear in his letter to the Lords Commissioners of Foreign Plantations in which he thanks God that there is yet no printing in his colony.²

After the arrival of a printing press in 1638, governors of Massachusetts Bay would make no such expressions of gratitude, though they would see to it that the press was adequately supervised. Indeed, the way Massachusetts Bay approached press liberty is of considerable importance not only because they had the first press, the first newspapers, and the first newspaper controversy, but also because the Puritan theocracy's notoriously restricted view of free expression reveals the crucial role of religion in early understandings of press liberty.

The Puritans' belief in their uniqueness in history as the founders of a "new Israel" required that they keep their covenant with God by maintaining an especially pious community. One aspect of this was tracking God's unfolding providence, and the very first newspaper in the colonies opened by declaring its primary aim was to assure "That *Memorable Occurrences of Divine Providence* may not be neglected or

¹ *Royal Instructions to British Colonial Governors, 1670-1776*, ed. by Leonard Woods Labaree (New York: D. Appleton-Century Co., 1935), 2:495-6. See also, Livingston Rowe Schuyler, *The Liberty of the Press in the American Colonies before the Revolutionary War* (New York: Thomas Whitaker, 1905), 34.

² William Waller Hening, *The Statutes at Large Being a Collection of All the Laws of Virginia, 1619-1792*, 13 vols. (Richmond, Va: Samuel Pleasants, 1809-1823), 2:517.

forgotten."³ Another aspect of this covenant was that all means be taken to avoid God's wrath. The theocracy's leaders felt it their duty to God to punish pernicious authors.⁴ Thus both Anne Hutchinson and Roger Williams were banished from the Bay colony, and the very same newspaper that aimed to relate God's providence was suppressed after its first issue appeared in 1690. Indeed, one might well wonder why Benjamin Harris thought his paper had any chance of surviving beyond its first issue. A licensing system had been in place since the 1660s that continued uninterrupted through the early 1690s, despite the temporary expiration of licensing acts in the mother country.⁵ Nevertheless, Harris was right to sense an increasingly permissive approach to the press at the turn of the seventeenth century.

In a recent comprehensive study of early seditious expression prosecutions in colonial America, Larry D. Eldridge has "discovered that colonists experienced a dramatic expansion of their freedom to criticize government and its officials across the seventeenth century."⁶ This transformation must be understood in comparison to an approach to liberty of expression that was so repressive in some cases as to mete out "bodily correction" (like whipping, tongue-boring, or ear-cropping). Furthermore, the paramount reason for this sort of control of expression was understood throughout the century: The state had to be preserved, and this in turn required keeping the peace as

³ *Publick Occurrences* (Boston), 25 September 1690.

⁴ Clyde Augustus Duniway, *The Development of Freedom of the Press in Massachusetts* (New York: Longmans, Green and Co., 1906), 33.

⁵ Duniway, *Development*, 58.

⁶ Larry D. Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (New York: New York University Press, 1994), 3.

well as maintaining social, political, and moral institutions.⁷ Also, in the small, cohesive communities of early America, the good reputation of any individual, public or private, was critical to his practical ability to interact with anyone in that community, and thus "false aspersions" were vehemently contradicted well into the subsequent century.⁸ Nevertheless, "the gulf between theory and practice, between statute and enforcement, was substantial."⁹ Though legal historian Leonard Levy sees the practice of freedom of expression as irrelevant to understanding the emergence of press liberty, in fact the nascent defenses and distinctions that contributed to a new leniency in regard to seditious libel foreshadow some of the early challenges of the next century.¹⁰

Some of this leniency was merely the result of a new stress on technicalities in seditious libel cases. But these technicalities could now seize on emerging if unofficial notions about legitimate expression. For one thing, toward the end of the century, people were less likely to attack the authority of government in general, and more likely to criticize a particular official or measure, an act less threatening to state preservation. Further, these criticisms would increasingly be punished only if the claims were found groundless. This period also saw an augmented reverence for, and

⁷ Eldridge, *Distant Heritage*, 9.

⁸ Extract from a letter from Conrade Adams to [Grove Hirst], 18 June 1713, Curwen Family Manuscript Collection, American Antiquarian Society, Box 2, Folder 1. More generally, see Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill: University of North Carolina Press, 1986), 25.

⁹ Eldridge, *Distant Heritage*, 42.

¹⁰ See, e.g., Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), xvi.

success with, jury trials, though some judges would occasionally still over-awe or even overrule these acquitting juries. Finally, Eldridge notes that by 1700 harsh punishments were "reserved for words that posed a genuine...danger to the government"; the bad tendency of words alone brought little if any punishment.¹¹

With these unofficial shifts in the approach to seditious expression and the expiration of the British licensing law in 1695, it is perhaps not surprising that the early eighteenth century saw censorship end in the colonies. By 1700, men debated in sworn depositions whether or not licensing was a "new thing," and controversial but unlicensed pamphlets would soon be "numerous."¹² In 1721, Massachusetts Governor Samuel Shute appealed to the General Court for a licensing law, thus conceding that though his royal Instructions had not changed, they had become irrelevant. The House refused to enact any such law, noting "the innumerable inconveniences and dangerous Circumstances the People might Labour under" if the Governor were to control the press.¹³

Early Challenges

With the practical end of licensing as a restraint on liberty of expression and an increasing leniency toward seditious libel, one might well imagine that the early eighteenth century would bring a relative lull to the theoretical development of press

¹¹ Eldridge, *Distant Heritage*, 65, 77, 79, 84, 137.

¹² Isaiah Thomas, *The History of Printing in America*, 2d. ed., 2 vols. (New York: Burt Franklin, 1874), 1:417, 423; Duniway, *Development*, 79.

¹³ Duniway, *Development*, 89, 89n1, 96; see also, the *Boston News-Letter*, 3 April 1721, and the *Boston Gazette*, 6 April 1721.

liberty. To the contrary, however, the early 1720s saw one of the most important controversies over freedom of the press. The dispute over James Franklin's *New-England Courant* not only popularized the colonial newspaper culture and heralded the arrival of Cato to America, but also established the coherence between the "free" press and the "open" press that characterized the first half of the eighteenth century in America.

The *Courant* entered the Boston printing scene just as a dispute over the merits of smallpox inoculation was animating the town's public discussions. Dr. William Douglass opposed the policy on the grounds that the cure was worse than the disease, but his original medium for publication, the *Boston News-Letter*, was effectively closed for him when its printer learned that Increase and Cotton Mather--the politically powerful theologians and inoculation supporters--disapproved of allowing Douglass to make his case. Franklin, having recently returned from training in London, applied the vigorous printing practices of the imperial capital to Boston's new controversy. Having first given Douglass a new outlet, the "Hell-Fire Club" of Franklin and his colleagues took to printing controversial pieces and mocking local authorities such as the Mathers. But when the *Courant* insinuated that the provincial government was only lamely attempting to capture a nearby pirate vessel, they went too far.¹⁴

Reacting to this "high Affront," the Massachusetts General Court imprisoned Franklin under their powers of legislative privilege, a provincial version of the parliamentary privilege recognized in the Bill of Rights, which mandated that

¹⁴ *New-England Courant* (Boston), 11 June 1722.

legislators not be questioned in any other place for their actions in the legislature. Accordingly, Franklin was imprisoned for the remaining month of the General Court's session. The *Courant* continued to ridicule the local elite and by the following January the General Court once again censured Franklin though this time they voted to forbid Franklin from printing a paper without a license. Franklin continued to publish--though now under his younger brother Benjamin's name--and the General Court had him arrested again.¹⁵ But the ruse worked, for when the case came to the grand jury, they returned the bill "ignoramus," rejecting it as ungrounded due to lack of evidence.¹⁶

The case of the *Courant* is significant for the development of colonial press liberty for a number of reasons. First, it conclusively buried licensing in the colonies. Even at the height of displeasure with Franklin, the House would not reinstate censorship, despite the Council's attempt to attach this provision to a bill placing Franklin under a "good behavior" bond. More significantly, the case advanced the role of the jury in the development of colonial press liberty. While this aspect of controversies over freedom of expression has generally been overlooked, it is crucial to understanding the conceptual evolution that is our central concern here.

As noted above, juries had played a role in the growing leniency of the previous century. Two trials for seditious libel in the 1690s are particularly relevant. Both in the case of William Bradford in Philadelphia and that of Thomas Maule in

¹⁵ Duniway, *Development*, 97-103, 163-6.

¹⁶ *New-England Courant*, 13 May 1723.

Salem, the trial juries were allowed to find a "general" verdict, that is, they ruled not only on the *fact* of publication, but also on the *law* as to whether or not the published words amounted to seditious libel.¹⁷ These expanded jural powers were a marked deviation from standard English practice.¹⁸ They also complemented and advanced existing facets of colonial political discourse.

Juries had long been part of the Whig ideology that was so well received in colonial America. In *English Liberties, or the Free-born Subject's Inheritance*, Henry Care popularized the freedoms inherent in the "Great Charter" and other authoritative sources. In this familiar book, reprinted entire by Franklin as well as excerpted in the *Courant*, Care maintained that juries, along with Parliament, were "the two Grand Pillars of *English Liberties*," with the jury trial being the "great jewel of liberty." The reasoning was that the people, through the jury, thus played a role in the executive power of government.¹⁹ Colonial charters echoed these sentiments in favor of the protection provided by "twelve men of the neighborhood."²⁰ By mid-century, Samuel

¹⁷ On the Bradford case, see George Keith and Thomas Budd, *New-England's Spirit of Persecution Transmitted to Pennsylvania* (Philadelphia: William Bradford, 1693), and Thomas, *History*, 1:211-23; on the Maule case, see Theo. Philanthes [Thomas Maule], *New-England Persecutors Mauld with their Own Weapons* (New York, 1697), and Duniway, *Development*, 70-3.

¹⁸ Harold L. Nelson, "Seditious Libel in Colonial America," *American Journal of Legal History* 3 (1959): 165n24; Frederick S. Siebert, *Freedom of the Press in England, 1476-1776* (Urbana: University of Illinois Press, 1952), 273-4. On the general magnification of colonial jural powers, see Shannon C. Stimson, *The American Revolution in the Law* (Princeton: Princeton University Press, 1990); for seventeenth-century changes, see Eldridge, *Distant Heritage*, 79-85.

¹⁹ Henry Care, *English Liberties*, 5th ed. (Boston: James Franklin for Buttolph, Eliot and Henchman, 1721), 4, 203; see also, *New-England Courant*, 30 July 1722.

²⁰ Eldridge, *Distant Heritage*, 80.

Adams would equate juries with the judgement of the people as a whole.²¹ Indeed, the notion that the jury embodied the public voice would reappear throughout the century.²²

Juries, then, had an important place in colonial political thought. Yet the significance of jural power went deeper still. The well-worn distinction between liberty and licentiousness centered on the notion that genuine liberty existed in accordance with the law. The rule of law was the countervailing force that moderated the popular components of government.²³ Expanded jural powers therefore weakened the conservative element that otherwise defended unpopular (usually elite) individuals and minority groups. The resulting vulnerability of unpopular authors, while inconsequential in the 1720s, proved more important as popular power grew. For the moment, though, it was the liberating potential of increased jural powers that was most conspicuous.

The shift from restricted "special verdicts" on the matter of publication only to "general verdicts" regarding culpability for seditious libel thus entailed a shift in the origins of the authoritative definition of the society's most threatening restraint on press liberty. Juries, of course, do not set legally binding precedents nor does the popular voice always defend the freedom of expression for the unpopular. Nevertheless, when the grand jury returned Franklin's indictment "ignoramus" (thus

²¹ *Independent Advertiser* (Boston), 10 April 1749; see also 5 February 1749.

²² See, e.g., Stimson, *American Revolution*, 48, 71, and passim.

²³ Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina, 1980), 160.

precluding a jury trial), they participated--no doubt consciously if not intentionally--in expanding the effective understanding of permissible press liberty in the colonies.

Juries, however, rarely explain their findings. We are thus at a loss to find a detailed explanation of any conceptual change afoot. We may speculate however that the "free and open" press notions available in *Cato's Letters* played a role in the jurymen's thinking. They certainly had access to them; Franklin shrewdly saw to that. In only its sixth issue, the *Courant* rushed into print Cato's most popular letter on press liberty, "Reflections upon Libelling" (#32), a mere three months after its appearance in London. The "Hell-Fire Club" also reprinted other *Letters* espousing "free and open" press liberty as well as offering their own similar statements.²⁴

The appearance of "free and open" press notions in the colonies, when taken together with the marked jural expansion of practical press freedom, made for unmistakable signs of a transformation of the colonial newspaper culture, and even of the political culture more generally. These signs of growing leniency were certainly not lost on Increase Mather. Calling the *Courant* a "*Wicked Libel*," he complained in the *Boston Gazette* that, having been in New England since its early days, he could "well remember when the Civil Government could have taken an effectual Course to suppress such a *Cursed Libel!*" Were this not done, Increase continued, he feared "the *Wrath of GOD will arise and there will be no Remedy.*"²⁵

²⁴ *New-England Courant*, 11, 18 September 1721. For Cato's earlier letter on press liberty (#15), see 9 July 1722; for similar statements by the "Hell-Fire Club," see, e.g., 20 November, 4 December 1721 and 22 January 1722.

²⁵ *Boston Gazette*, 19 January 1722.

That a religious minister would invoke the wrath of God amidst a civil controversy was entirely in keeping with long-standing New England tradition. Indeed, prior to the arrival of the *Courant*, most Bostonians would hear such subjects discussed only in the form of Puritan sermons. However, "the issue of clerical authority was in large measure what the inoculation controversy was all about."²⁶

The *Courant* not only undermined elite authority, it also elevated the role of ordinary people. As the *News-Letter* and the *Gazette* were almost equally conservative, the *Courant* was the first opposition newspaper on American soil.²⁷ The mere fact that political debate now appeared in newspapers as well as pamphlets and books had a popularizing effect since papers were both less expensive and more accessible. Relatively speaking, newspapers were not "high culture," and the *Courant* certainly was not limiting its appeal to elite audiences.²⁸ Finally, the emergence of opposition newspapers had a subtle but profound effect in that they both sanctified local political discourse and invigorated the existing forum for debate provided by the oral culture. "The public sphere was becoming profoundly transformed."²⁹

These transformations in the political culture of early America laid important groundwork for the expansion of popular government; indeed, they were a part of that expansion. More immediately relevant here is the role played by the first colonial

²⁶ Charles E. Clark, *The Public Prints: The Newspaper in Anglo-American Culture, 1665-1740* (New York: Oxford University Press, 1994), 131.

²⁷ Clark, *Public Prints*, 123.

²⁸ Clark, *Public Prints*, 250-6.

²⁹ Clark, *Public Prints*, 169-70.

opposition press in supporting the coherence of "free and open" press discourse. Franklin did this by advocating, and in fact pursuing, an "open" press policy that was also clearly aimed at checking government's power and defending the people's liberties.

Not that Franklin had much choice in the matter. On a practical level, the Mathers and other Boston elites were far too powerful to be in any way restricted from press access by the likes of the Hell-Fire Club. Theoretically, Franklin would have had to break with the most recent and radical thinking on the subject, since even the *Letters of Cato* he was reprinting in no way questioned the government's right to make its case in the press. This would have required critical political insight beyond even the monumental capabilities of his brother Benjamin.

But if it was true that James Franklin would have been exceedingly hard-pressed to legitimize press constraints on the Mathers and their ilk, it is also true he did not have to. In fact, while he was reprinting the "free and open" press thinking of Cato, Franklin himself stressed the "open" press ideal of impartiality. Only days after the first issue of the *Courant* appeared, he not only printed but published the Matherian retort, *The Anti-Courant*.³⁰ Three months later Franklin printed a *pro*-inoculation letter with the hope that "our Readers (Anti-Inoculators) will bear with [us], since they have been promis'd, and are welcome to the same Liberty of speaking their Minds in this Paper."³¹

³⁰ [Thomas Walter]. *The Little-Compton Scourge: Or, The Anti-Courant* (Boston: J. Franklin, 1721).

³¹ *New-England Courant*, 20 November 1721.

Franklin, then, was appealing to the seemingly more reasonable and less radical half of the increasingly mainstream "free and open" press tradition to justify an opposition press culture that undermined elite authority and provided a new public voice for ordinary people. Of course, this novel understanding of press liberty was not well received by the *ancien regime* of Puritan theocrats and Crown officers. Nevertheless, thanks to a sympathetic grand jury, Franklin lost only one month's freedom and effectively demonstrated the colonial coherence of the inherited tradition of press liberty.

Cato in America

Franklin's immediate recourse to the persuasive philosophy of free expression available in *Cato's Letters* would prove an omen of things to come. Early Americans again and again appealed to the ideals espoused in the *Letters*. Indeed, before we proceed any further in analyzing the evolution of press liberty discourse in America, it is crucial that we appreciate the extent to which Cato provided the very terms of debate, thus in large measure furnishing both the limits and potentials of colonial discussions of freedom of the press.

The limitations of Cato's rhetoric were real and they proved influential in the conceptual shifts that we will examine later in this chapter. But for the colonists of the 1720s, '30s, and '40s, it was the liberating potential of Cato's press discourse that was most remarkable. To be sure, there were other sources to which the colonists could refer for explanation and legitimation of their expanding view of permissible political expression. The Bible, of course, was a familiar touchstone. But despite its

frequent use by Civil War radicals, it was rarely cited explicitly concerning eighteenth-century colonial press liberty.³² Extreme Whig interpreters of traditional legal sources, such as Coke, Hawkins, and even the Magna Carta itself, were often appealed to; witness Franklin's reprinting and excerpting of Henry Care. And the "immortal Milton" would prove more and more relevant as a political thinker, especially after *Areopagitica* was reprinted in the aftermath of the seditious libel case against John Peter Zenger in 1735. The *Discourses* of Sidney, the "republican martyr," were also important, though they rarely spoke directly on freedom of the press. Further, Sidney's famous passage on the "Character of a Good and of an Evil Magistrate" was available in one of Cato's oft-reprinted *Letters*, as were other important excerpts.³³ Finally, Locke's *Treatises* were also influential, but as Clinton Rossiter long ago aptly remarked, "no one can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that *Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period."³⁴ If this was true for political ideas in general, it was true in spades for ideas of free political expression.

It was not only the more controversial opposition papers such as the *Courant* and Zenger's *New-York Weekly Journal* that took to reprinting Cato on free

³² But cf. the *American Weekly Mercury* (Philadelphia), 6 November 1740.

³³ John Trenchard and Thomas Gordon, *Cato's Letters*, 4 vols. (London: Wilkins, Woodward, Walthoe & Peele, 1724), 1:295-302 (#37) and, e.g., *South-Carolina Gazette* (Charleston), 29 July 1748; see also, Trenchard and Gordon, *Cato's Letters*, 1:200-7 (#26).

³⁴ Clinton Rossiter, *Seedtime of the Republic* (New York: Harcourt, Brace, 1953), 141.

expression, either with or without attribution.³⁵ More importantly, the colonists were shaping Cato's "free and open" press ideas and language into original statements, thereby quite literally making his discourse their own. Thus, Thomas Fleet of the *Boston Evening Post* defended his press first by noting that those who want to shut the press "are of tyrannical Principles, and Enemies to *Liberty*..., and would be glad to keep the People in the most abject Slavery." He continued by observing that "all Men [should] have an Opportunity to judge for themselves," for "no good [Cause]...ever yet suffered by being examined."³⁶ And when colonial Americans were not championing both halves of the "free and open" press in the same breath, one author would advance one logic while another would posit the other, with no apparent incongruity; sometimes the very same author would stress the different strains of thought on different occasions.³⁷

The early Americans saw no inconsistency in all this, of course, since for them the "free" press's defense of public liberty and the "open" press's appeal to the power of truth were merely two sides of the same coin that they inherited from their radical Whig forebears back home in England. In turn, this tradition of press liberty

³⁵ See, e.g., the *South Carolina Gazette*, 12 June 1736, 16 July 1748, or the *Boston Gazette*, 21 April 1755, 26 April 1756.

³⁶ *Boston Evening Post*, 30 March 1741. See also, e.g., the *South Carolina Gazette*, 2 February 1734; *Boston Gazette*, 26 May 1755, 2 January 1758; and *Connecticut Gazette* (New London), 7 February 1756.

³⁷ Cf., e.g., Jonathon Mayhew, "Objections Considered," in his *Seven Sermons* (Boston: Rogers and Fowle, 1749), 71-4, and Mayhew, *A Discourse Concerning Unlimited Submission and Non-Resistance to the Higher Powers* (Boston: Fowle and Gookin, 1750), 38-40. For "free" press notions on their own, see, e.g., Obadiah Honesty, *A Remonstrance of Obadiah Honesty* (Philadelphia: 1757), 4. For "open" press, see, e.g., *Pennsylvania Gazette* (Philadelphia), 30 March 1738, 4 May 1740.

dovetailed perfectly with the broader Whig view of politics that saw the struggle between liberty and power as never-ending, or ending, if at all, in liberty's inevitable demise. To reinforce this point and its critical relation to press liberty, Benjamin Franklin's *Pennsylvania Gazette* hurried into print a letter from Bolingbroke's *Craftsman* that declared that should "the Artifices of *Men in Power*" meet with "the Silence of the *Advocates for Liberty*," the results would be disastrous for "the LIBERTY OF THE PRESS." Speaking in its own voice, the *Gazette* went further to specify the unity required of a people hoping to defend their liberties: The balance of powers in government is "*Nonsense*, when applied to a *Democratical Government*. If the people are *Equally* divided, you may easily enslave both parties."³⁸

Finally, not only did the colonists increasingly assume Cato's conception of press liberty and of politics more generally, they even began to perceive the grander coherence between the "free" press and "open" press, between truth and liberty. For Cato, a classic example of this coherence was the Protestant Reformation, in which the separation of God's Truth from papist superstition advanced the people's liberties. For mid-century colonials, this coherence was more civic. Part of this consistency rested on the belief that only evil magistrates could suffer from even the most malicious libels, for a good character was "above the reach of ignorance, envy, or malice." Or,

³⁸ *Pennsylvania Gazette*, 6 June 1738, 30 March 1738. See also, e.g., A Lover of Truth and Liberty [Elisha Williams], *The Essential Rights and Liberties of Protestants* (Boston: Kneeland & Green, 1744), 65; *South Carolina Gazette*, 1 August 1748; *Boston Gazette*, 10 May 1756; and *Pennsylvania Gazette*, 26 January 1758.

as Poor Richard epigrammatically put it, "Dirt may stick to a Mud Wall, but not to polish'd Marble."³⁹

One also had to presume that the Truth would always lead directly to realizing the people's liberty. An "open" press could never be perverted to the detriment of "free" press objectives, since "altho' *Publick Virtue* cannot be affected by the Indulgence of the most *unlimited* Freedom of speaking or writing, yet *Oppression* and *Tyranny* as it derives all its Influence from its secrecy may be extremely benefited by the *reverse*."⁴⁰

Thus, in the decades after James Franklin had demonstrated in the colonies the practical consonance of the "free and open press"--provided that the press was "open" to opposition voices--some began to reveal this logic on a more abstract, philosophical level. This conceptual development, however, advanced no further. The arrival of the crisis in imperial relations in the 1760s brought these vague ideals down to the sullied and imperfect level of specificity and pragmatism. The struggle for control of the colonies was the long-expected battle between power and liberty. And, as we shall see in the next chapter, the ambiguous unity of "free and open press" tradition would not survive unscathed.

In the first half of the eighteenth century, however, the vague language of the "free and open press" tradition was one of its greatest strengths. As we shall see

³⁹ *Pennsylvania Gazette*, 18 May 1738; Richard Saunders [Benjamin Franklin], *Poor Richard Improved: Being an Almanack for...1757* (Philadelphia: Franklin and Hall, 1756).

⁴⁰ *Independent Advertiser*, reprinted in the *Boston Gazette*, 8 March 1756. See also, the *Connecticut Gazette*, 7 February 1756.

presently, in press controversies it was not uncommon for all sides to concede the authority of Cato. But this very ambiguity means that to find many of the real advances in press liberty discourse, we must take recourse to actual debates that forced to the fore the specific issues of the extent and purpose of freedom of the press. In this regard, no dispute over press liberty is as fertile as the celebrated case of John Peter Zenger.

Zenger and the End of Seditious Libel

As a locus of historical significance, the trial of John Peter Zenger for seditious libel published in his *New-York Weekly Journal* has hit on hard times. Once lionized as a turning point for American liberty, the last few decades have seen the trial minimized and Zenger marginalized. The editor of the most recent edition of the *Brief Narrative* of the trial maintains that Zenger's associates were "a somewhat narrow-minded political faction seeking immediate political gain rather than long-term governmental or legal reform."⁴¹

This recent reinterpretation is correct as far as it goes. Zenger himself was little more than a pawn in the struggle between the faction supporting former Chief Justice Lewis Morris against recently appointed New York Governor William Crosby. And the primary objective of the Morrisite faction was surely to have Crosby removed and elevate Morris to his former political prominence. Furthermore, as many have

⁴¹ James Alexander. *A Brief Narrative of the Case and Trial of John Peter Zenger*, ed. by Stanley Nider Katz (Cambridge: Harvard University Press, 1972), 1.

hastened to point out, Zenger's trial failed to produce a valid legal precedent formally overruling the common law of seditious libel.⁴²

Political motives, however, no matter how low or particular, sometimes yield consequences much loftier and more general. Whether shallow or not, the motives at work surrounding Zenger forced the competing camps to debate issues of press liberty in more explicit terms than would be the case at any other time in the first half of the century. The results demand our attention for the richness of the political discourse and the significant elaborations of the received tradition of the "free and open press." Finally, the results did not make law, but they would prove "better than law."⁴³

With the mounting opposition to Governor Crosby yielding few substantive gains, the Morrisite faction sought to redirect their pamphlet attacks to the more timely and more widely available, not to mention anonymous, vehicle of newspaper articles. The only paper in New York at the time was William Bradford's *New-York Gazette*. Bradford had moved from Philadelphia after the seditious libel trial discussed earlier. Since that time he had been "the King's Printer" for New York and by 1733 was "known to be under the direction of the government" due to an annual salary of £50.⁴⁴ James Alexander, the leading mind of the Morrisite faction, therefore enlisted Zenger, heretofore an obscure printer and former apprentice and partner of Bradford's,

⁴² See, e.g., Katz, *Brief Narrative*, 30; Leonard Levy, *Emergence of a Free Press* (New York: Oxford Univ Press, 1985), 130; and Levy, "Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York," *William and Mary Quarterly*, 3rd. series, 17 (1960):35-50.

⁴³ *Pennsylvania Gazette*, 18 May 1738.

⁴⁴ *New-York Weekly Journal*, 17 December 1733; see also, *New-York Gazette*, 28 October 1734.

to print the *Journal*. It soon became apparent that the paper "had been deliberately created as an instrument of propaganda" against Crosby and his circle of supporters: in a word, "the *Journal* was looking for trouble."⁴⁵

And trouble it quickly found. After only two months Crosby had Chief Justice James DeLancey, whom he had recently promoted after unseating Morris, lecture the January 1734 grand jury on the traditional interpretation of libel law. Under the usual common law understanding, any "reflections" on the government or its officers were illegal and the truth of the matter was at best immaterial and at worse an aggravation of the offense. The jurymen surely knew what DeLancey wanted, but did nothing. When DeLancey tried again in October the grand jury presented two "*Scandalous Songs*," but insisted they could find no one responsible, though everyone would have known they were the work of Zenger's press.

Crosby and his Council then had Zenger arrested on their own authority, though without the Provincial Assembly, which refused to concur. They then optimistically attempted to have charges brought against Zenger by yet another grand jury, though this time they appointed a new sheriff, confident he would seat sympathetic jurors. But even these jurors refused to act.

Not to be disappointed, Crosby had Zenger charged by way of an "information," which avoided grand juries altogether and was thus seen as a dictatorial legal instrument. Next, the Crosbyites tried to pack the trial jury, but the Morrisites exposed this plan. In response, DeLancey publicly threatened any jury acquitting

⁴⁵ Katz. *Brief Narrative*. 9.

Zenger with perjury charges and had the defense counsel, Alexander and William Smith, disbarred. These actions may have stacked the deck, but the Crosbyites also clearly had the law on their side. Yet on the day of the trial the jury recessed for only ten minutes before acquitting Zenger.⁴⁶ How could this be? By what manner of argument could "twelve men out of the neighborhood" find him innocent?

One searches in vain through DeLancey's grand jury charges, the *Gazette*, or the prosecution's case to find some draconian new discourse severely restricting free expression and thus understandably engendering the jury's ire. The Crosbyites, their heavy-handed political moves notwithstanding, actually made their case on very solid ground.

Zenger's enemies made their case on established, traditional lines, and the divergence from the *Journal's* approach was immediately apparent. The first *Gazette* article defending DeLancey's view of libel even reprinted a former Chief Justice's grand jury charge claiming that reflections on government were highly punishable because "Government is that sacred Institution appointed by GOD to restrain the irregular Appetites and Passions of Men." Though this might have been unassailable logic in 1716, it was a far cry from the natural right rhetoric and social contract ideas New Yorkers were now reading in *Cato's Letters* and the *Journal*.⁴⁷

For the most part, though, the Crosbyites appealed to the conventional distinctions between liberty and licentiousness, and between the use and the abuse of

⁴⁶ For much of this history, see Katz's "Introduction" to the *Brief Narrative*, 8-9, 17-23; Alexander's *Brief Narrative* itself, 41-56, 101-5; and the *New-York Weekly Journal*, 18 August 1735.

⁴⁷ *New-York Gazette*, 21 January 1734.

the press. These well-worn distinctions rested on the "direct Tendency" of abusive expressions to break the peace and cause sedition. One could freely use one's press just as one could one's sword, but when one breaks the peace, the law must punish.⁴⁸

In fact, libels were traditionally understood to be more dangerous than swords. Certainly a society that holds duels on the "field of honor"--as eighteenth-century America occasionally did--clearly prefers bodily wounds to reputational ones. But there was more to it than that. Libels were "the Arrows that fly by Night," the "small Sparks" easily blown into a flame, but "*not easily to be extinguished*."⁴⁹ Or, to use the most common metaphor, libels were poison, the more dangerous because their secrecy meant "none can defend himself against it."⁵⁰ To be sure, the rhetoric of "poison" had been employed metaphorically in regard to libel and sedition since at least the 1650s⁵¹, though its counter-concept, "antidote," was notably absent in the traditional, conservative argument. Instead, seditious libel was likened to a "*Scorpeon's Bite*," the only remedy for which were Chinese "snake stones" or other such useless quackery.⁵²

⁴⁸ James DeLancey, *The Charge of the Honourable James DeLancey...to the...Grand Jury [15 October 1734]* (New York: William Bradford, 1734), 7; *New-York Gazette*, 4 February 1734.

⁴⁹ *New-York Gazette*, 28 October, 21 January 1734.

⁵⁰ James Delancey, *The Charge of the Honourable James DeLancey...to the...Grand Jury [15 January 1734]* (New York: William Bradford, 173[4]), 2. See also, e.g., *New-York Gazette*, 28 October 1734.

⁵¹ See, e.g., Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (Middlesex: Penguin, 1968), 365.

⁵² *New-York Gazette*, 28 October 1734: concerning "snake stones." see Anthony Duche, *Advertisement. We do hereby Certify...* (Philadelphia, 1743).

Because libels were so dangerous, the truth of the libel was held to be no defense. This claim had its origins in the Star Chamber of Stuart England but DeLancey aptly cited Coke to the effect that in a stable government there were other, proper channels of redress. Press liberty was not the safeguard of the people's liberty, the *Gazette* declared; "Magna Carta, and such other wholesome Laws...were rather the Bulwark."⁵³

Recognizing that even these tried and true principles might prove too moderate and traditional for the times, the Crosbyites could take heart in the fact that some of their number spoke the increasingly popular language of the "free and open" press. Understandably stressing "open" press logic, an anonymous contributor to Bradford's *Gazette* even praised Gordon as a "great Author" and hoped that the press "may be always open, to defend the Innocent, and shame the Guilty." Another unnamed correspondent went so far as to borrow his definition of press liberty from Zenger's *Journal*. Prior to Zenger's arrest, at least one Crosbyite consoled himself with the "open" press confidence that "the more Outragious and bitter the Invectives are, the more they will redound to the advantage of [Crosby's] character."⁵⁴

Given these solid if moderate arguments, it must have seemed to many of Crosby's supporters as though they had played their rhetorical hand well. Actually, they had, only the rules of press liberty discourse were changing without them noticing. To begin with, *Cato's Letters* and the "free and open press" thinking were

⁵³ DeLancey, *The Charge* [15 January 1734], 2; *New-York Gazette*, 4 February 1734.

⁵⁴ *New-York Gazette*, 4 February, 28 October 1734. Cf. *New-York Weekly Journal*, 14 January 1734; *New-York Gazette*, 14 October 1734.

now too widespread for a few weak gestures to suffice. In response to DeLancey's first grand jury charge, Alexander and the rest of the Morrisite faction began exposing New Yorkers to the *Letters*, especially those on free expression.⁵⁵ More importantly, Alexander himself took to theorizing about press liberty, elaborating on Cato's arguments, and adapting them to the very sorts of legal attacks Zenger would soon encounter.

In only the second issue of the *Journal*, Alexander defended his approach to press liberty in terms clearly borrowed from Trenchard and Gordon, even maintaining the vague yet provocative rhetoric. Calling himself "Cato," Alexander claimed to "communicate...the Sentiments of a late excellent Writer," and his phrasing and arguments betrayed his debt to the English "Cato." Should anyone still wonder about the origins of Alexander's thinking, he closed with a quotation from Gordon's popular translation of Tacitus's *Discourses*. With the first legal challenge still a couple months off, Alexander ignored the issue of libel, only stressing the dangers of "any restraint" of free expression.⁵⁶

Alexander's indefinite arguments were no longer tenable after DeLancey's first grand jury charge and the ensuing *Gazette* letters supporting him. Alexander had Zenger reprint Cato in response, but in his own writings took on a new radical specificity.⁵⁷ Observing that libel's definition changed with the times and this

⁵⁵ See, e.g., *New-York Weekly Journal*, 18 February (#15), 25 February, 4 March (#32), 9 December 1734 (#100).

⁵⁶ *New-York Weekly Journal*, 12, 19 November 1733.

⁵⁷ *New-York Weekly Journal*, 18, 25 February, 4 March 1734.

flexibility was often exploited to suppress government critics, Alexander went so far as to suggest that the only way to define libels fairly was to "have the Readers [be] Judges." In practice this meant that the "twelve good Men" of the jury would define the boundaries of permissible political expression.⁵⁸

Another extreme interpretation of the "free and open" press tradition attacked the very notion of "libelling the Government" as unintelligible and insisted that libels could only be individual and even then the libel "must descend to particulars," naming individuals in no uncertain terms. This understanding had something in common with Cato's insistence that public men's private doings were legitimate subjects of public discussion, though Alexander seemed to be attacking the whole notion of seditious libel. The *Journal* soon made its interpretation unmistakably clear when it reprinted a "free" press declaration that condemned all restraints on the press, "*but what is just sufficient to prevent Men from writing either Blasphemy or Treason.*"⁵⁹

With the transfer of the dispute to a criminal trial, the Crosbyites had succeeded in shifting the context to a legal one seemingly less open to radical interpretation than the relatively vague public discourse of the "free and open" press tradition. But the disbarment of Alexander and Smith brought celebrated Philadelphia lawyer Andrew Hamilton to Zenger's defense. Hamilton recognized that the conservatism of the law's dependence on precedent and authoritative commentary left Zenger with hardly a legal leg to stand on, despite public opinion's strong support.

⁵⁸ *New-York Weekly Journal*, 18 February 1734.

⁵⁹ *New-York Weekly Journal*, 11, 18 February, 4 March 1734.

But of course the Anglo-American tradition brought the public into the case in one powerful institution, the jury. Hamilton accordingly admitted Zenger's guilt as far as printing the alleged libels and spent the rest of the trial arguing two points: 1) the jury's right, even duty, to issue a general rather than a special verdict, and 2) that "*Truth* ought to govern the whole affair of libels."⁶⁰

Both of these claims had precedents in the evolving tradition of the "free and open press" if not in the law, and Hamilton succeeded largely by appealing directly to the jury in these terms. Of course, the appeal to truth resonated with "open" press logic. Furthermore, the claim that truth should be a valid defense was a successful legal move in part because Crosby's dictatorial behavior made the prospect of witnesses being called to testify about the Governor's conduct an unwelcome one for the prosecution. Why DeLancey let Hamilton make his case at such length remains a mystery, though his inexperience (and Hamilton's commanding presence) may well explain it. In any event, the jury's acquittal clearly demonstrated their general verdict powers and put the effective determination of permissible political expression in the public's hands.

In fact, when the controversy was revisited in print in 1737, the most trenchant legal critic of Hamilton's defense arguments readily conceded the jury's power to find a general verdict.⁶¹ The issue of using truth as a defense was much more complicated, and "Anglo-Americanus" makes clear that the law made truth immaterial

⁶⁰ Katz, *Brief Narrative*, 90, 91, 84, and *passim*.

⁶¹ Anglo-Americanus [Jonathon Blenman], "Remarks on Zenger's Trial," in Katz, *Brief Narrative*, 158 [originally published in the *Barbados Gazette*, 20 July 1737].

and opinions still libelous. James Alexander responded in a long essay spread over four issues of Benjamin Franklin's *Pennsylvania Gazette*. Despite this generous allotment of print, Alexander rehearsed "free and open" press arguments and largely ignored the many legal issues presented. When he did attempt to address the legality of truth as a defense, Alexander was forced to retreat to civil law, a system of jurisprudence largely alien to the British system of statute and common law. Alexander was trying to find legal support for the view that only direct assertions of demonstrably false facts could be libellous. Ultimately, Alexander found it easier and more persuasive to argue that liberty of the press as it was now understood would be "wholly abolished" if one could punish truth.⁶²

This late exchange proved to be the Zenger case's denouement. The partisan dispute itself was short-lived and the *Journal* would soon become an ordinary opposition newspaper. Moreover, Zenger's case would not become a legitimate legal precedent. Zenger's proved to be the last seditious libel trial in the colonies, however. In an America where "Custom and Usage are the best Expositors of every Law," the Zenger case served as an effective deterrent to seditious libel charges. Few cases would even appear before a grand jury.⁶³

The role of juries, and through them the people, was one of the primary facets of the controversy and herein lies its predominant influence. In colonial political discourse, juries had long been lionized as the "great bulwark" or "principal pillar" of

⁶² X [James Alexander], *Pennsylvania Gazette*, 1, 8 December 1737; see also 17, 24 November 1737.

⁶³ *Pennsylvania Gazette*, 26 January 1758; Nelson. "Seditious Libel." 170-1.

liberty.⁶⁴ In practice, colonial juries had some experience exonerating those guilty of breaking laws they found unfair, a practice that increased during the imperial crisis of the 1760s.⁶⁵ With the Zenger case, this jural power in seditious libel cases was permanently established in the colonies. This is a marked divergence from practice in the mother country. Only a few years before the Zenger case, Richard Francklin, printer of Bolingbroke's *Craftsman*, was found guilty of seditious libel in a case in which the jury was restricted to a special verdict and the defense counsel did not even object.⁶⁶ It would be almost two decades before an English jury would similarly presume the power to determine the extent of press liberty.⁶⁷

In the colonies, press liberty was effectively broadened by the jural power established in the Zenger case. For example, in 1747 a South Carolina grand jury refused to indict printer Peter Timothy for printing two attacks on the governor in the *South-Carolina Gazette*. The Charleston grand jury could have simply ignored the request to indict Timothy or pretended they could not find anyone responsible, thus following the lead of first two Zenger grand juries. Instead, they publicly declared

⁶⁴ See, e.g., *New-York Weekly Journal*, 3 December 1733, 8 April 1734; *Independent Advertiser*, 6 February 1749; and *Pennsylvania Gazette*, 26 January 1758.

⁶⁵ For seventeenth-century jural circumvention of maritime laws, see Eldridge, *Distant Heritage*, 141; for the role of lenient juries in the crisis of the 1760s, see below, Chapter 4.

⁶⁶ Laurence Hanson, *Government and the Press* (Oxford: Oxford University Press, 1936), 20; Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton: Princeton University Press, 1990), 54.

⁶⁷ Katz, *Brief Narrative*, 31.

that indicting Timothy for these caustic criticisms would be "*destructive* of THE LIBERTY OF THE PRESS."⁶⁸

The Zengerian appeal to jural power had its roots in a developing colonial practice. The move to truth as a defense, to the contrary, had antecedents in *Cato's Letters*. Yet it was taken further in the colonies than in the mother country. Twice in the 1740s printers were charged for factual assertions made in their newspapers. In both cases, the available records suggest that the charges were dropped when the printers proved the veracity of their claims.⁶⁹ More than that, one suspects that the prospects of zealous critics having the right to debate the truth of their claims in the public eye had what we would now call a chilling effect on government prosecutions. In practice, then, as well as in theory, the appeal to truth as a defense against seditious libel charges was instituted in the wake of the Zenger controversy. Indeed, when the Federalists fashioned the Sedition Act (1798) to muzzle their vociferous Jeffersonian critics, they made sure to respect the two Zengerian principles of the jury's general verdict power and truth as a defense.

The Zenger controversy brought about changes in press discourse and practice that elaborated on and expanded the existing concept of press liberty. Ultimately, one could now say whatever public opinion, through the jury, would allow, and one could appeal to the truth of the matter to make one's case. As we shall see shortly, this did

⁶⁸ *South-Carolina Gazette*, 30 March 1747; see also, Jeffrey A. Smith, "Impartiality and Revolutionary Ideology: Editorial Policies of the *South-Carolina Gazette*, 1732-1775." *Journal of Southern History* 49 (1983): 519-20.

⁶⁹ Thomas, *History*, 1:333-4, 2:48, 253; see also, Nelson, "Seditious Libel," 168-9.

not exhaust all threats to press liberty in the colonies. Nevertheless, the removal of seditious libel as a real threat in the colonies advanced and made explicit the inherited "free and open" press tradition.

Post-Zenger Developments

The consequences of the Zenger trial were such that the position of the press was a far cry from the theocratic control of Puritanism in the seventeenth century or even the monarchical worldview that was predominant in England and was still commonplace in the colonies. With the rise of the discourse of the "free and open press" and the end of seditious libel as a real threat, free expression theory might have seemed on the brink of real philosophical shifts. Certainly the decades of the 1740s and '50s did not lack for profound transformations in colonial America. Demographic and economic growth in the ever-expanding colonies brought a surge in the number of (often competing) newspapers. Even more significantly, the religious and political upheaval of the Great Awakening brought public affairs to many who had previously been excluded. But despite these important changes in colonial life, few serious challenges emerged to the increasingly mainstream press liberty tradition.

"Open" press logic had thrived in the colonies through the 1720s and '30s in part because of its roots in the inherited radical Whig philosophy; the prevailing economic context also contributes to explaining its salience. Simply put, the economic realities of running a printing shop in the colonies tended to promote "open" press

doctrine.⁷⁰ At least early on, "each urban area, until the population expanded adequately, could support but one newspaper, usually an official one that depended on government contracts for economic survival."⁷¹ Even with the arrival of opposition papers, maintaining a press open to all sides was partially a matter of economic necessity in the first half of the century.⁷² Perhaps Benjamin Franklin's classic "An Apology for Printers" best captures the complementary logics that informed the colonists' "open" press doctrine:

Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick; and that when Truth and Error have fair Play, the former is always an overmatch for the latter: Hence they chearfully serve all contending Writers that pay them well, without regarding on which side they are of the Question in Dispute.⁷³

⁷⁰ For more on this point, see Stephen Botein, "'Meer Mechanics' and an Open Press: The Business and Political Strategies of Colonial American Printers," *Perspectives in American History*, 9 (1975):127-225; and "Printers and the American Revolution," in *The Press and the American Revolution*, ed. Bernard Bailyn and John Hench (Worcester, MA: American Antiquarian Society, 1980), 11-57.

⁷¹ Lawrence W. Leder, *Liberty and Authority: Early American Political Ideology, 1689-1763* (Chicago, 1968), 22; cf. the *American Weekly Mercury*, 6 Nov 1740.

⁷² Botein, "'Meer Mechanics,'" 142-3, 166, 171; "Printers and the American Revolution," 20n27.

⁷³ Franklin's own *Pennsylvania Gazette*, 10 June 1731; see also, *South-Carolina Gazette*, 14 October 1732.

Now, while "there is no evidence to suggest that in practice printers of colonial newspapers routinely received payments from contributors," maintaining a press open to all sides generally brought the largest possible subscribership.⁷⁴

But how "open" should one's press be? Printing *every* piece of malicious scurrility sent to a printer would serve neither truth nor the printer's pocketbook, as someone would surely be offended. Franklin saw this clearly; the "Apology" itself was responding to some disgruntled readers. Franklin made much of "open" press logic and insisted that "Printers naturally acquire a vast Unconcernedness as to the right or wrong Opinions contain'd in what they print." Nevertheless, printers must "continually discourage the Printing of...bad things."⁷⁵ Later, Franklin would be more forthright about a printer's duty to judge, even when "open" press doctrine dictated a criticized person be allowed to respond.

I think there is a good deal of Difference between a *Vindication* and an *Invective*: and that, whatever Obligations a Printer may be under to publish Things of the former kind, he can be under none with Regard to the latter.⁷⁶

Other printers would also insist on the propriety of exercising their judgement, "the Censure of the most snarling Critick" notwithstanding.⁷⁷

⁷⁴ Botein, "Printers and the American Revolution," 20n27; c.f. Clark, *Public Prints*, 210.

⁷⁵ *Pennsylvania Gazette*, 10 June 1731.

⁷⁶ *Pennsylvania Gazette*, 8 May 1740. Concerning Franklin's judgement, see also. Thomas, *History of Printing*, 1:237.

⁷⁷ *Virginia Gazette*, 10 August 1739.

This insistence on a printer's judgement tempering an "open" press would fade as the turbulent 1740s and '50s wore on. Indeed, in 1740, shortly after dictating the above distinction between a vindication and an invective, Franklin himself would print a vindicating letter that contained, by his own admission, "Invectives" and "personal Reflections."⁷⁸ When presented with criticism of his press, Thomas Fleet appealed to "open" press notions and further maintained that he was simply a printer trying to make a living. While his language was clearly reminiscent of Franklin's "Apology," Fleet's apology contained no discussion of the duty of judgement that had moderated Franklin's reasoning only a decade earlier.⁷⁹

By the mid-50s, many would qualify this duty of judgement, insisting that the printer have "some very substantial Reason for his Refusal." The reason that the printer had to "justify him[self] to the world," James Holt explained, was that the press belonged to "the *Publick*" as much as to the printer. Holt further maintained that the liberty of the press did not require even the "least restraint" because an "open" press inherently "carries the Means of restraining or reducing itself to its proper Boundaries" by way of a critical response.⁸⁰ When Hugh Gainé set himself up as "sole Judge" of what to print and closed his *Mercury* to William Livingston and his associates in New York, they went so far as to wonder whether "a Press...inaccessible to every Antagonist, be not more dangerous to the civil and religious Rights of the People, than

⁷⁸ *Pennsylvania Gazette*, 24 July 1740.

⁷⁹ *Boston Evening Post*, 30 March 1741.

⁸⁰ *Connecticut Gazette*, 7 February 1756; see also, e.g., *Independent Reflector* (New York), 30 August 1753, and *New-England Magazine* I (August 1758): 38-40.

the total Suppression of Printing." Upon reflection, they decided total suppression would be better than a partisan press.⁸¹

The popular upheaval of the Great Awakening not only increased the confidence of many that the reading public could sift through the excessive scurrility of a wide "open" press, it also occasioned an expanding appreciation of an "open" press as a *right*. Cato, of course, had spoken broadly of rights that included the liberty of free expression. Some colonists, however, now took to explaining press liberty as necessary to popular government. Samuel Adams' *Independent Advertiser* implied something remarkably reminiscent of our modern notion of "the right to know" when it discussed legitimate restrictions on free expression for reasons of military security. "There are indeed some Things which require Secrecy, NOT BECAUSE THE PEOPLE HAVE NOT A RIGHT TO KNOW THEM, but because the Promulgation of them will necessarily defeat them: But such instances are extremely rare," perhaps only found "in a Time of War."⁸²

Why exactly do people have a "right to know"? With the *Mercury* again open to him, Livingston explained that "if no Law can be binding upon the Subject without his Consent, he has surely a Right to divulge his Sentiments" on men's conduct and measures.⁸³ This principle, it will be noted, is a far cry from the claim that the press must be "open" because the truth will prevail in a fair fight, though it is not

⁸¹ "Philo-Reflector's" preface to *The Craftsmen: A Sermon from the Independent Whig* (New York: J. Parker, 1753), ii, xii.

⁸² *Independent Advertiser* (Boston), 9 January 1749.

⁸³ *New-York Mercury*, 27 January 1755.

necessarily contradictory to it. But might not truth be hurt by mistaken persons exercising their "open" press rights? In a sermon that otherwise repeatedly echoed Milton's *Areopagitica*, Jonathan Mayhew conceded this threat but insisted this was no ground on which to deny them the right which comes from "*God and nature, and the gospel of Christ.*" "We may as well pick our neighbors pocket," Mayhew explained, "for fear he should spend his money in debauchery."⁸⁴

As a minister, it is perhaps not surprising that Mayhew so thoroughly intertwined natural law and religious principle. Nevertheless, his expansive understanding of free expression would more and more fall on sympathetic ears. And whereas Mayhew was careful to remind his congregation and his readers that the gospel instructs all to follow their civil leaders, others would see in an augmented conception of press liberty an opportunity to reinterpret many of the traditional restrictions on "free" press activities.

As always, it was the radical challengers of the established powers and not the traditional elites that were likely to be excluded by a printer's judgement.⁸⁵ So as the duty of judgement began to fade from view, it was naturally opposition press forces that explained how "free" press logic required a wide "open" press. "New Light" minister and former Yale rector Elisha Williams defined press liberty not only as "*the*

⁸⁴ Jonathan Mayhew, "Objections Considered," in *Seven Sermons* (Boston: Rogers and Fowle, 1749), 74, 73. For a discussion of Mayhew's debt to Milton, see George F. Sensabaugh, *Milton in Early America* (Princeton: Princeton University Press, 1964), 52-66.

⁸⁵ Though New Light forces were periodically rankled when a press proved "open" to anti-Whitefield forces. For one such press, see Clark, *Public Prints*, 263-5, Thomas, *History of Printing*, 2:48, and the *Boston Evening Post*, 30 March 1741.

Right that everyone has to speak his Sentiments openly" on all public matters, but also the duty of all to "give notice of the danger" he sees. Leaders, in turn, must not suppress his warning or punish him, even if they think him in error.⁸⁶ This obligation to alert the public of dangers to the community, though they may well prove false, was a considerable extension of the Zengerian principle of the right to publish truth.

Zenger's *Journal* had declared that press liberty allowed everything but blasphemy and treason. The letter to the *Independent Advertiser* maintaining that "*the Liberty of the Press, perhaps, is exempted from nothing, but Blasphemy and Treason*" might therefore appear redundant or uninteresting; it seems to do no more than to provide ethical approbation for the practical fact of seditious libel's demise. But contemporary readers would have understood the claim in light of Samuel Adams' redefinition of "loyalty" a few months prior. "Loyalty," Adams asserted, was no more than "a firm...attachment to a legal Constitution." "Sedition," accordingly, was best understood as "all Tendencies, Machinations, and Attempts to upset a *Legal* Constitution."⁸⁷ Since the *Advertiser* had often insisted that a "free" press was sacred to the British Constitution, the implication would have been clear to all: those who attempted to restrict the opposition press were the seditious ones.

⁸⁶ "A Lover of TRUTH & LIBERTY" [Elisha Williams], *The Essential Rights and Liberties of Protestants* (Boston: Kneeland & Green, 1744), 6-7.

⁸⁷ *Independent Advertiser* (Boston), 20 February 1749, 1 August 1748; c.f. Trenchard and Gordon, *Cato's Letters*, 1:286-95 (#36).

With his essay of 1748, Adams was only beginning his career as a leading propagandist for the Whig cause; indeed, his bold attempt at conceptual redefinition of "loyalty" was part of emerging changes in the meaning of "patriotism."⁸⁸ But it is the attempt to transform the concept of "sedition" that is most significant for this study. Adams' statement not only undermines the authority of the prevailing legal definition of sedition (and thus seditious libel), but it shifts the burden of justification from radical Whigs to ministerial elites.

William Livingston and his colleagues in New York would soon elaborate these claims and make them explicit. The authors of the *Independent Reflector* were excellent students of Cato's works and their essay, "*Of the Use, Abuse, and LIBERTY OF THE PRESS*" elaborates on Cato's notion of "treason against the people." Turning the well-worn distinction between liberty and license on its head, the *Reflector* argues that press liberty "is always to be restricted from becoming a Prejudice to the public Weal." Printing "any Thing injurious to his Country...is criminal, --It is high Treason against the State." Conversely, refusing to print "any Thing, not repugnant to the Prosperity of the State, is an unjustifiable and tyrannical Usurpation."⁸⁹

If treason was no longer an attack on the king or his ministers, but anything "injurious" to the country, then it was corrupt "government" papers, not the opposition press, that were radically endangering the public peace. With the "free and open"

⁸⁸ Mary G. Dietz, "Patriotism," in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson (Cambridge: Cambridge University Press, 1989), 177-93, esp. 187.

⁸⁹ *Independent Reflector* (New York), 30 August 1753. See also, the *New-England Magazine* (Boston), August 1758, 38-40 (partial reprint).

press tradition firmly established as the predominant colonial understanding of press liberty, the more radical forces of the 1750s thus began to hint that a press "open" to ministerial forces could be "Enemies to the *Press* and the *Public*."⁹⁰

These conceptual shifts occasioned by the Great Awakening, like those that contributed to the Zenger controversy, did not go unnoticed by a contemporary audience that would have recognized the significance of even the subtlest reinterpretation of the established discourse of free expression. And indeed, mid-century radicals were not altogether rebuilding the received tradition, but they were shifting its center of gravity. With the printing world now wide "open," opposition forces seized on the ambivalent character of the now-dominant press tradition to stress both the primary importance of the "free" press defense of public liberty and the dangers of a press "open" to a power-hungry ministry "disloyal" to the people.

In retrospect, however, what is perhaps most remarkable is the extent to which the upheaval of the '40s and '50s left the inherited tradition of press liberty fundamentally unaltered. From the meager beginnings of three newspapers in 1720, the burgeoning colonies could claim twenty-two active papers by 1760.⁹¹ This economic and demographic expansion, however, did not translate into an expanded exploration of the theoretical foundations of press liberty. The growth of multi-newspaper towns could conceivably have led to a bold new discourse concerning press

⁹⁰ *Independent Reflector* (New York), 30 August 1753.

⁹¹ Botein, "'Meer Mechanics,'" 150.

liberty that permitted or even encouraged a system of avowedly partisan presses, each representing a leading faction; significantly, no such discourse emerged.

The religious and political upheavals of the 1740s and '50s were even more thoroughgoing than the demographic and economic ones. With traditional religious institutions undermined, the political establishment was seriously challenged.⁹² The newspaper culture itself was also reshaped in accord with the Great Awakening; the newspapers' local focus and controversial character were solidified.⁹³ Moreover, the newspaper audience grew hand-in-hand with the expansion of the ranks of the politically involved. William Livingston made this connection clear when, in a "Watchtower" essay exalting the press, he affirms that it is "highly commendable" for "every member of the Community" to study subjects which concern his well-being, such as government and religion. That this "community" of citizens and readers was expanding is evident from the *Independent Advertiser's* first issue. The colophon hinted at this new audience in its simple note that "all Gentlemen and others may be supplied with this Paper" at the printing shop. Who these "others" were is clear from the introductory preface. The editors promised that "for the Benefit of those who are unacquainted with the Geography of foreign Parts, we may insert such Descriptions as may enlighten them therein."⁹⁴

⁹² See, e.g., Bushman, *From Puritan to Yankee*, 220, 143, and passim.

⁹³ Clark, *Public Prints*, 259.

⁹⁴ *New-York Mercury* 27 January 1755; *Independent Advertiser*, 4 January 1748. For the earlier elitist view of the newspaper audience, c.f., *American Weekly Mercury*, 6 November 1740.

Despite the popularization of the political and print cultures, the "free and open" press tradition that the colonists avidly imported from England remained fundamentally unchanged. There were novel and more extreme interpretations of the inherited discourse, but the foundation of the concept of press liberty endured. Indeed, the very coherence of the "free and open press" persisted, though now in more practical terms and in a new context. As one journalism historian explains, even "in adopting a policy of impartiality, the editors of [a colonial newspaper], in effect, expanded the opportunity for public debate and thereby aided those who would challenge authority in any of its forms--religious, economic, social, or political."⁹⁵ A press increasingly open to constant, vigorous, even scandalous attacks on public men and measures tended to undermine elite power and exalt public liberty. The "open" press was a "free" press.

Or was it?

Legislative Privilege and Press Liberty

During the first half of the eighteenth century, colonial political thought had become increasingly popular, or, as the colonists would have put it, republican. This is evident in the expanding popular participation in government and in the growing expectation that it was not the people's duty to serve the government, but the government's duty to serve the people.⁹⁶ Press liberty discourse was also republican.

⁹⁵ Jeffery A. Smith, "Impartiality and Revolutionary Ideology," 526.

⁹⁶ For a particularly dramatic example of this shift, see Nathaniel Eells, *The Wise Ruler a Loyal Subject* (New London: Timothy Green, 1748). See also, Bushman, *From Puritan to Yankee*, 282.

The "free and open press" tradition embodied in *Cato's Letters* was "classically republican" not only in its reliance on the likes of Tacitus and Machiavelli, but also in its faith that only public virtue and vigilance could delay the inevitable decline into governmental tyranny. Most significantly, the consistency of the "free and open press" in the colonies rested on the fact that an increasingly "open" press permitted "free" press forces to defend the people's liberty and the public good from the menacing "designs" of the government and its "ministerial tools."

But what if one who made use of a wide "open" press to assail public liberty were not merely another ministerial "placeman"? What if, in the process of defending public liberty, a defender of the people should criticize the institutional protectors of that liberty, the popular legislature? For the seventeenth century generally, this was not a problem. Since the political elite was relatively homogeneous, one part of the government or another would punish improper expression as either sedition or contempt; sometimes, the assembly and the governor would combine to bring offenders to justice.⁹⁷ However, this sort of cooperation would be rare in the eighteenth century as the assembly began to represent the people's interests more directly. The popularly elected assemblies developed into defenders of the people's liberty against the governor and his council.

This shift was not without its complications. James Franklin, let us recall, was imprisoned for a month under the assembly's power of legislative privilege. Under the radical Whig understanding of politics, the assembly was the people's key weapon in

⁹⁷ Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven: Yale University Press, 1943), 123; see also, Nelson, "Seditious Libel," 165-6.

the struggle to combat royal or ministerial power. Accordingly, any criticism that undermined the people's faith in it was a threat to this crucial bulwark of the people's liberty. Of course, in Franklin's case, the Assembly was in general agreement with Governor Shute and his Council whereas Franklin echoed the sentiments of many previously marginalized ordinary people. Yet Franklin, consistent with the opposition thinking he had picked up in London and was still reading in *Cato's Letters*, only once--and then fleetingly and obliquely--addressed legislative privilege despite all the ink he spilled in his defense.⁹⁸ In fact, this potential contradiction in the received tradition of press liberty would remain in the background until the 1750s.

With the spread of radical Whig ideas and the popularization of government in the 1740s and '50s, the struggle of liberty versus power, the "people versus the ministry" was increasingly evident in theory and in practice. Cato himself had explained the representatives' critical role in the defense of public liberty when he wrote that "the Representatives...will always act for their Country's Interest; their own being so interwoven with the People's Happiness, that they must stand and fall together."⁹⁹ Yet like so much radical Whig thinking, these burgeoning notions found much more fertile land in the colonies than in the mother country. As one recent historian of colonial America concludes, "the close acquaintanceships that inevitably developed between legislators and their constituents in sparsely populated, contiguous, local communities encouraged the expectation that popular rights should mirror, rather

⁹⁸ *New-England Courant*, 6 May 1723.

⁹⁹ Trenchard and Gordon, *Cato's Letters*, 1:126 (#24); see also, 3:234 (#99) and *South-Carolina Gazette*, 20 March 1749.

than be subordinate to, assembly privilege." The equating of assembly rights with popular rights often reappears in the political literature of mid-century America, but the Pennsylvania Assembly may have put it most succinctly when they matter-of-factly agreed that criticizing the Assembly was a "high breach of privilege, and an invasion of the liberties of the freemen of the province."¹⁰⁰ This privilege gave the Assembly an upper hand vis-à-vis the governor that was not lost on Governor William Denny. He complained that though the Assembly could scream "Breach of Privileges" should they be criticized, he would have to bear the brunt of their "unbounded Freedom in calumniating" him.¹⁰¹

The ability to punish individual critics of an assembly for breach of legislative privilege left colonial legislatures in a stronger, more unified position from which to defend public liberty from the governor and his minions. Dozens of times in the first half of the century a particularly outspoken opponent was dragged before the bar of the house to answer for written or spoken affronts.¹⁰² Usually the accused would ask to be pardoned and would receive a reprimand, a small fine, and at most a brief

¹⁰⁰ Alan Tully, *Forming American Politics: Ideals, Interests, and Institutions in Colonial New York and Pennsylvania* (Baltimore: Johns Hopkins University Press, 1994), 118; Clarke, *Parliamentary Privilege*, 128. See also, e.g., Tully, *Forming American Politics*, 467n147; Clarke, *Parliamentary Privilege*, 131, 222, 244; Elnathan Whitman, *Character and Qualifications of a Good Ruler* (New London: Timothy Green, 1745), 21; and *Pennsylvania Archives*, 8th ser. (Harrisburg: 1874-1935), 6:4701, 4839-40.

¹⁰¹ *Pennsylvania Archives*, 6:4708, 4712; see also, *Pennsylvania Gazette*, 26 January 1758.

¹⁰² Jeffery A. Smith estimates that there were more than 20 such cases in eighteenth-century America, while Mary Patterson Clarke figures that "literally scores, probably hundreds" were charged with breach of privilege during the entire colonial period. See Smith, "A Reappraisal of Legislative Privilege and American Colonial Journalism," *Journalism Quarterly* 61 (1984): 98; and Clarke, *Parliamentary Privilege*, 117.

imprisonment.¹⁰³ But generally in these cases, as James Franklin's virtual silence on the issue suggests, no conflict between legislative privilege and "free" press logic was alleged. Two controversies in the 1750s, however, put colonists in a position to begin exploring the limits and tensions inherent in the received tradition.

When preliminary skirmishes of the Seven Years War threatened Pennsylvania's western frontier, opponents of the Quaker-run Assembly criticized the weak half-measures that were the most the Friends' pacifist consciences would permit. William Smith, Provost of the nascent University of Pennsylvania, was perhaps the Quakers' most acerbic critic. As Quakers, however, the assemblymen were not only pacifists, but also firmly wedded to the ideal of freedom of conscience. The assembly therefore refused to dignify Smith's scurrilous pamphlets with a response. But when Smith's vitriolic letter to London's *Evening Advertiser* was forwarded by Friends there, the Assembly could abide no more. They called Smith before the bar of the House and found him guilty of "libelous, false, and seditious Assertions."¹⁰⁴

The Pennsylvania Assembly, however, postponed further proceedings against Smith and never got back to the case. Smith, for his part, insisted that his case was a matter of freedom of "Writing and Preaching."¹⁰⁵ That Smith appealed to religious freedom was no accident since his criticisms were primarily aimed at Quaker influence in government. More importantly, the existence of Quaker ministers--and their

¹⁰³ Clarke, *Parliamentary Privilege*. 120 and passim.

¹⁰⁴ Tully, *Forming American Politics*. 114.

¹⁰⁵ Tully, *Forming American Politics*. 114. For much of this history, see Clarke, *Parliamentary Privilege*. 220-2, 240-6; Tully, *Forming American Politics*. 106-22.

scruples about freedom of conscience--in the Assembly proved his saving grace. But Quaker ministers/assemblymen had withdrawn from politics by early 1758, when county magistrate William Moore, with Smith's editorship, condemned the defunct 1756-7 Assembly. With the religious ministers absent, the issue was now clearly one of press liberty versus Assembly privilege. The Assembly imprisoned the men for three months but upon release during a legislative recess, Moore sailed to England to appeal to the Privy Council. The Privy Council found in Smith and Moore's favor, *not* because their press liberty had been violated, but on the grounds that an assembly could not punish criticisms of an earlier and now defunct assembly.

The right of the assembly to imprison for breach of privilege survived the test of the Privy Council. And though Smith and Moore technically won on the issue of criticizing former assemblies, the assembly had succeeded in imprisoning them for three months, thus demonstrating their practical power. Most importantly for this study, little was said in this case revealing any contradiction between press liberty and legislative privilege.¹⁰⁶ For the first significant discussion undermining the equation of assembly rights with popular rights we must look to the case of Daniel Fowle in Massachusetts.

When Fowle was dragged from his dinner one night in 1754 to appear before the Massachusetts House of Representatives on suspicion of printing *The Monster of Monsters*, a satirical assault on the House, Fowle declared that it was not

¹⁰⁶ See, e.g., *Pennsylvania Journal*, 23 February, 30 March 1758. See also, Obadiah Honesty [author unknown], *A Remonstrance of Obadiah Honesty* (Philadelphia: 1757); *A Fragment of the Chronicles of Nathan Ben Saddi* (Constantinople [Philadelphia]: 5707 [1759]); and *The American Magazine and Monthly Chronicle* (Philadelphia) 1 (1757-8): 184-5, 196, 199-200, 210-227, 308.

his printing. After some beating about the bush, Fowle admitted that he had sold it, having bought some copies from Royall Tyler's apprentice. Fowle was then imprisoned, whereas Tyler was committed only briefly for contempt, having refused to answer any questions. Tyler's partner, Daniel's brother Zechariah Fowle, was not imprisoned due to illness. After six days of harsh imprisonment, public sympathy was with Daniel Fowle, and the House wisely freed him on his own recognizance. It then let the prosecution drop.¹⁰⁷

Fowle did not let the matter drop, however. After writing *A Total Eclipse of Liberty* to tell his side of the story, he sued the Speaker of the House and the arresting messenger for illegal imprisonment. By the time the suits and appeals were settled in 1757, Fowle had been printing in New Hampshire for a year. From Portsmouth, Fowle simply ignored that the Court had found against him, and he neglected to pay the assessed court costs. After five years he was finally sued for the money. Fowle petitioned the Massachusetts General Court several times in the mid-1760s, eventually having his own legal costs paid and a damage award paid for his suffering.

The fact that the only person ever seriously punished for *The Monster of Monsters* was later paid damages for his trouble is of some significance for the development of press liberty in America. The House had called it a "false scandalous libel" that was a "Breach of the Privileges" of its members, yet Fowle was £50 richer

¹⁰⁷ For various accounts this history, see Daniel Fowle, *A Total Eclipse of Liberty* (Boston: Daniel Fowle, 1755); Thomas, *History of Printing*, 1:129-34; Duniway, *Development*, 115-9; and Levy, *Emergence*, 34-5.

by 1767.¹⁰⁸ Much more important for this study, however, is the manner in which Fowle censured the House for its behavior. The House, confident that Fowle was culpable, defended itself in traditional terms, maintaining that they alone were the "indisputable Judges" of a breach of privileges and declaring that Fowle's suit was "an Attempt against the Rights of the People." Furthermore, much of Fowle's response was traditional, for he complained that his personal freedom had been violated and his right to trial ignored. He cited such conventional Whig sources as Magna Carta and Care's *English Liberties*.

Fowle's use of standard arguments and failure to discuss press liberty specifically has led some to slight his case.¹⁰⁹ But Fowle's peculiar situation led him to reconsider the traditional equation of assembly rights with the people's rights. In *A Total Eclipse of Liberty*, Fowle appeals to the people *and* their Representatives. Anticipating that some will call this redundant on the grounds that "the Representatives are the People," Fowle admits this is true, but only "in a qualified Sense, i.e., when they act according to the Laws of the Land...and their Conduct is agreeable to the Constitution of a free People; and...consequently will be approved by the *Voice of the People*."¹¹⁰

¹⁰⁸ *Extract from the Journal of House of Representatives of Massachusetts Bay* (Boston: Z. Fowle & Tyler, 1756), 2, 4-5. Fowle received £ 31/7/0 in 1765 and another £20 in 1766; see Duniway, *Development*, 118-9.

¹⁰⁹ See, e.g., Levy, *Emergence*, 34-5.

¹¹⁰ Daniel Fowle, *A Total Eclipse of Liberty* (Boston: Daniel Fowle, 1755), 10.

Applying this rupture between the people and their representatives more boldly to his own case, Fowle explains that representatives have "no more than a *delegated* Power," so that when the "common Rights of this Community [are] trampled upon, or only the Liberty of *one* is attempted against," the trust is broken and representatives at "that Moment forfeit all the Power committed to them." "For if but one Member suffers unjustly," Fowle continued, "the *whole* Community is wounded *through his* Sides."¹¹¹ Here, then, one harassed person is defending the people's liberty against its erstwhile defender, the popular assembly. Fowle would reiterate this theme in his final petition to the General Assembly, hoping that "the Loss of Liberty may be thought equally distressing to an innocent Individual, as to the whole Community."¹¹²

As we have seen, there had been occasional references to press liberty as an individual, natural right that existed apart from the unwritten Constitution, Parliament, or colonial assemblies. But Fowle's case, despite its silence on press liberty as such, explicitly calls into question not only the equation of the assembly's liberty with the people's liberty, but also the central notion that animated much of colonial political thought: the simple yet unavoidable opposition between the people's liberty and the ministry's power. Could not a popularly elected legislature use its powers to silence a single, liberty-minded elector? If so, who was defending liberty? More to the point, was liberty the community's, or the community's through single persons?

¹¹¹ Daniel Fowle, *An Appendix to the late Total Eclipse of Liberty* (Boston: Daniel Fowle, 1756), 5.

¹¹² *The Third Petition of Daniel Fowle* (1766) is reprinted in Duniway, *Development*, 171-3.

This sort of sophisticated thinking presents a contradiction in the colonists "free and open press" tradition. If the press was "open" to a number of individuals--none of them "ministerial tools"--who differed over fundamental questions of how the public good was best served, it was no longer clear who was defending public liberty. Juries, popularly chosen representatives, and the "free" press were all intended to protect the people's liberty. But now that the community's liberty could be "wounded" through one person, it was no longer entirely clear whose liberty was at stake. These strains on the received tradition were being felt more strongly as the popularization of government proceeded in the 1740s and '50s. But with the arrival of the pre-Revolutionary crisis in the 1760s, these complicated issues were marginalized by a political context that unambiguously appealed to mid-century America's polarized logic of the "ministry versus the people."

Conclusion

Fowle's tempered reconsiderations about assembly rights are a far cry from the traditional appeal to parliaments as one of the main pillars of the people's liberty. In many respects, the first half of the eighteenth century had taken Americans a long way. The practice of press liberty had change significantly. The end of licensing (legally) and seditious libel (effectively), the elevation of jural power, and the expansion of the ordinary person's role in the print and political cultures brought the colonists a great distance from even the most lenient proceedings of the previous century.

The discourse of press liberty had also changed considerably, often evolving hand-in-hand with the practical innovations. First, the radical Whig discourse of the 1720s in England became mid-century America's dominant alternative to conservative notions of seditious libel. Second, the range of permissible expression had been expanded. Most now accepted the arguments that the press should be free to criticize public men and measures, that the truth--or even honest error--was allowable, and that only private and particular libels were illegal. Furthermore, the role of the jury as the finder of law as well as fact, and thus the final arbiter of lawful expression, had been theoretically established. Finally, a more meaningful function for the public and public opinion had been philosophically advanced. Others--not just Gentleman--now had a right, even a duty, to participate in the public discourse.

Yet despite all these changes, both theoretical and practical, the "free and open press" tradition received from Cato and other radical Whigs remained fundamentally intact. The structure of argumentation and the conceptual arsenal endured. The inherited tradition endured because the biggest, most significant change took place *within* that tradition. This profound transformation was not merely the mainstream acceptance of a previously radical discourse; that acceptance was part and parcel of the popularization of the print and political cultures. More than that, the popularization of the public sphere complemented a pivotal shift in the very center of gravity within the "free and open" press tradition: If in 1720 radicals stressed the need for an "open" press in an effort to force open the narrow window of permissible expression to justify their subtlest and soundest insinuations, by 1760 radicals stressed

"free" press arguments to legitimate even dubious and vitriolic accusations while beginning to cast a suspicious eye at presses "open" to seemingly corrupt ministerial forces. This, then, was a shift of emphasis that made the most of the radical potential inherent in an ambiguous and ambivalent tradition.

Though mid-century Whigs made a great deal of the promise of the vague yet unified "free and open" press tradition, its limitations were no less real. A discourse fashioned in a time and place where Parliament was the sole institutional defender of the people's liberty was bound to experience philosophical and conceptual strain in a period when legislative privilege had replaced seditious libel as the only real threat to press liberty. By 1760, the emerging notion of an individual's natural right to free expression and the tension immanent in Daniel Fowle's qualifications of assembly rights presented complications for the inherited press liberty tradition. These potential contradictions might have been explored given enough time and attention. But the uncompromising political context of the 1760s and '70s would leave little time for such nuances.

CHAPTER 4. THE PRE-REVOLUTIONARY CRISIS

If the 1740s and '50s brought about a shift in the center of gravity within the "free and open press" tradition, the fifteen years prior to the Revolution proved to be the crucible in which that conceptual tradition was broken down and analyzed. As a result, many of the elements remained, but the theoretical structure and ideological weights would be permanently transformed.

It is not at first surprising that the period immediately before a war should be given to increasing tensions and great changes; we have come to expect such rumblings in antebellum periods. But the American colonists of the 1760s had little reason to expect grand innovations, least of all in the concept of press liberty. The publication, beginning in 1765, of *Commentaries on the Laws of England* by the distinguished Tory jurist and Oxford law professor William Blackstone might well have been expected to solidify at least the legal conceptualization of press liberty.¹ Certainly, Blackstone's *Commentaries* served as the standard legal resource for decades to come on both sides of the Atlantic. More to the point, this enormously influential work codified the traditional legal understanding of press liberty with a great deal of authority.

Blackstone in America

¹ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765-9).

Formally, the law of seditious libel, and press liberty more generally, had changed little since the expiration of the Licensing Act in 1694. For example, neither the Zenger case nor its later English analogue, the *Francklin* case, were legitimate precedents. Reflecting this legal conservatism, Blackstone maintained that

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 for criminal matter when published.... To punish (as the law does at present) any dangerous or offensive writings...is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.²

Blackstone's endorsement of subsequent punishment and his concern for preserving government is further evident in his definition of "libels" as

malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule.

The direct tendency of these libels is the breach of the public peace....

The direct-tendency contention is a familiar conservative argument, as is Blackstone's insistence that "it is immaterial with respect to the essence of a libel, whether the

² Blackstone, *Commentaries*, 4:151-2. For a similarly Zengerian, though far less influential, American view of press liberty, see [William Bolla], *The Freedom of Speech and Writing upon Public Affairs, Considered, with an Historical View* (London: S. Baker, 1765).

matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally."³

Though there is nothing novel here, and certainly nothing colonial Whigs could applaud, Blackstone's monumental work was widely admired for codifying and simplifying the otherwise byzantine common law. Indeed, even the radical Whig *Boston Gazette* reprinted a piece which praised Blackstone as "a sensible, judicious author." What Whigs appreciated most about Blackstone, however, was his praise for juries, "the most transcendent privilege."⁴ Blackstone went so far as to maintain that it was up to each jury to decide if it would find a general verdict (on the law and the facts) or special verdict (on the facts only). This is important for press liberty, as we have seen, because government supporters often attempted to extract special verdicts on the fact of publishing only, thus taking the effective definition of seditious libel out of the jury's hands. But even this allowance on Blackstone's part was not enough for Whiggish colonists, for he considered it a hazardous right to exercise since misapplying the law would put the jury in breach of their oaths.⁵ Opposition forces in colonial America instead argued that returning anything but a general verdict was a violation of the jurors' oaths.⁶

³ Blackstone, *Commentaries*, 4:150.

⁴ *Boston Gazette*, 9 January 1769, quoting Blackstone, *Commentaries*, 3:379; see also, 3:350.

⁵ Blackstone, *Commentaries*, 4: 354; see also, 3: 378.

⁶ E.g., *New-York Journal*, 15 March 1770.

Differences over jury power aside, the colonial Whigs broke from Blackstone most notably over his view of press liberty. Especially egregious in their view was his claim that truth could still be seditious libel. This classic Tory argument was perhaps the most memorable part of the Zenger case for colonists and in fact the pamphlet account of the trial was reprinted in 1770.⁷ When only a small part of Andrew Hamilton's lengthy defense would fit in the moderate *Boston Evening-Post*, the newspaper naturally excerpted Hamilton's closing argument that only falsity could be libellous.⁸ The continuing disagreement between lawyers over whether truth could be libellous was a license for printers to do as they wish, the *Boston Gazette* suggested. More importantly, if truth could actually be libellous, the vaunted English Constitution was simply tyrannical.⁹

Despite Blackstone's influence, then, Whiggish Americans of the 1760s and '70s maintained their contrary stance on a number of issues concerning press liberty. The most radical response to the *Commentaries* printed in America, however, was that of an Englishman, Dissenting minister and theologian Philip Furneaux. Rebutting Blackstone's reading of religious freedom laws, Furneaux wrote letters to the jurist that were included in two pamphlet collections of responses to the *Commentaries*. The colonists had access to this debate, for just as Philadelphia printer Robert Bell busied himself with an American edition of Blackstone, he also took to reprinting *An*

⁷ James Alexander. *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New-York Weekly Journal, for a Libel* (New York: John Holt, 1770).

⁸ *Boston Evening-Post*, 20 August 1770.

⁹ *Boston Gazette*, 10 December 1770; see also, *New-York Journal*, 15 March 1770.

*Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England and The Palladium of Conscience.*¹⁰

Furneaux's chief concern was to preserve a generous interpretation of Dissenters' rights, especially freedom from punishment for religious sentiments. This concern leads Furneaux to argue that the laws should punish overt acts only, leaving professed religious principles and their "tendency" beyond the reach of the magistrate. Yet in one revealing passage, Furneaux not only applies this logic to the civil realm, but actually draws his doctrine from it.

The distinction between the tendency of principles, and the overt acts arising from them is, and cannot but be, observed in many cases of a *civil* nature; in order to determine the bounds of the magistrate's power, or at least to limit the exercise of it, in such cases. It would not be difficult to mention customs and manners, as well as principles, which have a tendency unfavourable to society; and which, nevertheless, cannot be restrained by penal laws, except with the total destruction of civil liberty. And here, the magistrate must be contented with pointing his penal laws against the evil overt acts resulting from them. In the same manner he should act in regard to men's professing or rejecting, religious principles or systems.¹¹

¹⁰ *An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England* (Philadelphia: Robert Bell, 1772) and *The Palladium of Conscience* (Philadelphia: Robert Bell, 1773). Dated Pamphlets Collection. American Antiquarian Society.

¹¹ *Palladium*, 34. See also, Jeremy Bentham, *Fragment on Government* (1776), chap. 4, sec. xxiv.

Furneaux's overt-acts doctrine, here fleetingly drawn from his view of civil liberty, was not entirely without precedent: Walwyn and Williams had made similar assertions over a century before. Still, these were startling claims which confuted not only Blackstone but the vast majority of previous Anglophone discourse over press liberty. And they might well have expressed many radical colonists' unspoken practical ideal of press freedom. But we will never know. Furneaux's overt acts doctrine grew out of an obscure controversy over English laws concerning religious freedom. As promising as the argument was, the American colonists of the early 1770s had no time and little need to pursue such speculative disputes.

Legislative Privilege

Another press liberty issue that would not receive its due in the turbulent pre-war years was legislative privilege. As we saw in the case of Daniel Fowle, it was not until the mid-1760s that the Massachusetts Assembly awarded him damages for his punishment for breach of legislative privilege. This belated reversal points to a theoretical change afoot. Most likely, other factors weighed into the Assembly's decisions. As we shall see more fully below, the Stamp Act certainly had the affect of making the colonists more alive to the smallest infringement on press liberty. In that charged ideological context, remunerating Fowle for his damages might well have been seen as a symbolic vote in favor of free expression. Also, the popular uproar in favor of beleaguered English politician John Wilkes probably contributed to this

change of heart.¹² Wilkes was author of the notorious *North Briton*, No. 45, which defamed the King and began a series of legal attacks that made Wilkes a martyr to liberty, especially press liberty.¹³

Even if these factors contributed to the Assembly's reversal in Fowle's case, popular understanding of legislative privilege was, in fact, undergoing a limited change. The theoretical shift was limited in that not once did a popularly-elected lower house unreservedly renounce its contempt¹⁴ powers in a case where they were the targets of vituperation. Still, the notion of legislative privilege as a curb on press liberty was weakened considerably.

About a year after awarding Fowle the last of this damages, the Massachusetts lower house refused to exercise their legislative privilege and instead praised liberty of the press. When the opposition *Boston Gazette* printed a vicious attack on Governor Bernard, the Governor duly sent it to the legislature for action. The Council, acting as the upper house, was quite willing to go along, but the House of Representatives preferred to take recourse in legal niceties. They skirted the issue by noting that no particular person had been named, despite the fact that Joseph Warren, writing as "A True Patriot," made it unmistakable that Bernard was his quarry. Equally

¹² Fowle implicitly referred to Wilkes in his last petition to the legislature. See Clyde Augustus Duniway, *Development of Freedom of the Press in Massachusetts* (New York: Longmans, Green, and Co., 1906), 118-9; see also, 172.

¹³ See *An Authentick Account of the Proceedings against John Wilkes, Esq.* (Philadelphia: John Dunlap, 1763), Dated Pamphlets, American Antiquarian Society.

¹⁴ "Contempt" and "breach of legislative privilege" were terms used interchangeably in colonial America, especially insofar as the breach was an expression that reflected on the dignity of the legislature: see Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven: Yale University Press, 1943), 206-7.

unmistakable was the rebuke evident in the "free" press language of one passage in the popular branch's response.

The Liberty of the Press is a great Bulwark of the Liberty of the people: It is therefore the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it. This House however...are ready to discountenance an Abuse of this Privilege, whenever there shall be Occasion for it: Should the proper Bounds of it be at any Time transgressed, to the Prejudice of Individuals or the Publick.¹⁵

The House insisted it was ready to use its contempt powers if ever "any extraordinary Aid shall become needful." But since there was no emergency at the moment, they told the Governor to pursue the issue in the courts. Bernard did take the *Gazette's* printers to court; despite a lecture from Chief Justice Thomas Hutchinson, the grand jury refused to find against them.¹⁶

Less than two years later, after Hutchinson had been elevated to Governor, the Massachusetts upper house again had its claims to legislative privilege foiled. Writing as "Mucius Scaevola," Joseph Greenleaf brazenly attacked Hutchinson as "a usurper" in the pages of Isaiah Thomas's *Massachusetts Spy*.¹⁷ The Council debated for more than a day before deciding to order Thomas to appear before them. They should have

¹⁵ *Boston Gazette*, 7 March 1768.

¹⁶ *Boston Gazette*, 14 March 1768. See also, Arthur M. Schlesinger, *Prelude to Independence: The Newspaper War on Britain, 1764-1776* (New York, 1958), 96-7.

¹⁷ *Massachusetts Spy* (Boston), 14 November 1771.

debated longer. Three times they sent for Thomas and three times he defied their authority on the advice of a "distinguished law character" who informed him only a sheriff could "serve such a process upon him."¹⁸ The subsequent motion to imprison him for contempt "did not obtain." And though the reason for this remains unclear, there is no question that at least one Councilman argued that they had "no legal authority" to commit him.¹⁹ When a grand jury was presented with the alleged seditious libel, they returned the bill *ignoramus*. The government soon thereafter dropped the matter entirely.²⁰

The upper chamber's right to legislative privilege was denied outright in a South Carolina case in 1773. When Thomas Powell printed in his *South-Carolina Gazette* Councilman William Henry Drayton's dissent to the Council's decision not to send £1,500 to help support John Wilkes, the Council had Powell arrested for breach of legislative privilege. In their roles as justices of the peace, the Speaker and another member of the lower house freed Powell by issuing a writ of habeas corpus. The Council then found the two Assemblymen guilty of a "Breach of Privilege and Contempt" against the upper house, though the Council dared not have them arrested. The Speaker presented his reasons for the writ to his colleagues, concluding "hat it would be dangerous to countenance such a Usurpation of Power in the Council, [and]

¹⁸ Isaiah Thomas, *The History of Printing in America*, 2nd ed., 2 vols. (Albany, NY: J. Munsell, 1874), 1:166.

¹⁹ *Boston Gazette*, 18 November 1771. See also, Thomas, *History*, 1:167-8.

²⁰ *Boston Gazette*, 24 February 1772; see also Thomas, *History*, 1:168, and Schlesinger, *Prelude*, 142.

would render the Liberty of the Subject precarious." The lower house unanimously found this reasoning "extremely satisfactory."²¹ In an effort to avoid utter defeat, the Council sent the case to England but the War soon preempted the issue.²²

Upper houses, then, had an increasingly precarious hold on their power to punish what they took to be licentious expression as a breach of legislative privilege. But what of the lower houses? These were the popularly-elected branches of the legislatures, and so it is precisely here that the people's liberty and an individual's freedom would mostly readily come into conflict. And conflict they did when Alexander McDougall assailed the New York Assembly for approving provisions for the King's troops in late 1769. The affronted Assembly stopped at nothing to get the author's name, and soon printer James Parker had been pressured into identifying McDougall. McDougall refused to admit his guilt and accepted martyrdom in jail rather than post bail. America had its own Wilkes.

With the government united against him, and a packed grand jury in place²³, McDougall became the first man indicted for seditious libel in over a quarter century. This only endeared him further to his growing throng of Whiggish supporters. Then, only days before the trial, James Parker, who had long regretted giving up McDougall, saved him at last: Parker died. The loss of the only eyewitness brought the indefinite postponement of the criminal case.

²¹ *Pennsylvania Gazette* (Philadelphia), 20 October 1773.

²² Jeffery A. Smith, "Impartiality and Revolutionary Ideology: Editorial Policies of the *South-Carolina Gazette*, 1732-1775," *Journal of Southern History* 49 (1983): 525.

²³ *New-York Gazette*, 7 May 1770.

Not to be outdone, the Assembly had McDougall arrested and brought before them. Charged with writing the offending essay, McDougall refused to plead, arguing on the grounds of freedom from self-incrimination and double jeopardy. When the latter reasoning was held to be "a Breach of Privilege," Assemblyman George Clinton argued that the house was scorning "Justice" and "straining its Authority." The question was put to a vote and only Clinton and four others refused to find McDougall in breach of legislative privilege; he spent the remaining three months of the legislative session in jail.

Ultimately, the issue of legislative privilege as a threat to press liberty had been broached, but not substantially addressed. Indeed, the change suggested by these episodes might best be understood as a shift in the political, rather than the ideological, context. The antagonism between the people and the ministry reached its zenith in the pre-revolutionary crisis, empowering the popularly-elected branches of the legislature to challenge the contempt power of the upper houses in cases where the Governor or the Council itself had been maligned. Such cases thus undermined the upper houses' privileges without confronting the conflict between an individual's liberty and the people's liberty as embodied in their chosen representatives. This tension, revealed in Daniel Fowle's case, was only revisited in the pre-war period by the controversy over America's Wilkes, Alexander McDougall. Then, only five Assemblymen would agree with McDougall and his supporters that such use of a legislature's contempt powers undermined the freedom of expression, "the peculiar

Right and Privilege of Freemen."²⁴ This, however, should not surprise us. For, as we will see, the escalating struggle between the people and the ministry put a premium on unity and made every attack on the people's representatives, the traditional guardians of public liberty, an attack on the people themselves.

Increasing Division

It was not Blackstone's *Commentaries* or debates over legislative privilege but a remarkable transformation in the general political context that brought the issue of press liberty to a head in the 1760s and '70s. As we observed in the previous chapter, the expanding public sphere in mid-century America occasioned a significant shift but no great restructuring of the "free and open" press legacy. To be sure, mounting partisanship and the increased number of newspapers in the 1740s and '50s led to many disputes over the extent of press liberty. But these economic strains and political quarrels did not force a wholesale re-examination of the existing press liberty tradition.

The larger political changes after the Seven Years War, in contrast, altered drastically the relationship between Britain and her colonies, ultimately revealing the ambivalence and inconsistencies in the inherited "free and open" press discourse. No individual political change was compelling in itself. Rather, it was the cumulative effect of these events that forced things onto an entirely different footing. The acts of

²⁴ *Pennsylvania Gazette*, 3 January 1771.

the British Ministry again and again fit into what Bernard Bailyn has called the colonists' "logic of rebellion." That is, the colonists believed

they saw about them, with increasing clarity, not merely mistaken, or even evil, policies violating the principles upon which freedom rested. but what appeared to be evidence of nothing less than a deliberate assault launched surreptitiously by plotters against liberty both in England and America.²⁵

The colonists had long known about the dangers ministerial power presented for the people's liberty. True to their English heritage, they turned a suspicious eye to government.

In 1763, at the end of the War, some regiments of British army regulars were left in the colonies. These regiments bore alarming similarities to the sort of "standing armies" that John Trenchard, Robert Molesworth, and others had taught the colonists were a presage of arbitrary power and therefore a threat to the people's liberty. But as these troops were left out in the newly-won territories, far from any population centers, they were seen as a minimal threat. Following this came the introduction of the Revenue or "Sugar" Act in the spring of 1764 which presented an undue burden during hard economic times.

George Grenville, first minister to young King George III, was simply trying to raise some funds to help defray the costs of the recently concluded Seven-Years War. And in fact the Sugar Act cut the duty on foreign molasses in half. Grenville's idea

²⁵ Bernard Bailyn. *Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), 95.

was to put an end to the rampant smuggling that characterized the giant sugar market. To that end, he expanded the jurisdiction of the jury-less vice-admiralty courts and increased the number of customs personnel. All this had the effect of raising the duty, as smuggling merchants were now less likely to go undetected or to be acquitted by a local jury. More importantly, these changes presented the vigilant colonists with convincing evidence of a ministerial conspiracy: The vice-admiralty courts were despised for circumventing juries, one of the traditional "pillars" of the people's liberty, and the customs officials seemed to be ministerial lackeys or "placemen." Later that spring the Stamp Act was tentatively announced for passage the following year.

When the Stamp Act was passed on 22 March 1765, to become effective in November, it cut right at the heart of the press. Admittedly, wartime stamp duties were established in Massachusetts in 1755 and in New York in 1757; yet they were temporary, relatively inexpensive and were enacted by local authorities.²⁶ These new taxes were different. First, the duties were considerably higher than either of the earlier provincial duties, especially given the post-War recession and the myriad paper products to which they applied. Second and more importantly, these duties, combined with the difficulty of getting stamped paper, seemed a type of censorship particularly aimed at those newspapers not governmentally supported. The Stamp Act also brought up even larger issues, such as the very real fear of more "taxation without representation." And as with the Sugar Act, Stamp Act violations were supposed to be

²⁶ Schlesinger, *Prelude*, 66.

handled by vice-admiralty courts. Taken together, these new elements seemed to reveal an unfolding conspiracy for arbitrary power.

Even with the news of the repeal of the Stamp Act in May 1766, relations failed to return to normal. Parliament had simultaneously maintained their complete authority over the colonies in the Declaratory Act. Making good on this declaration, the Townshend Duties arrived a year later and imposed taxes on a wide variety of commodities. To this the colonists responded by raising the stakes. They undertook to establish and maintain a non-importation agreement. These and myriad other smaller political controversies led to a heightened sense of tension. Then, on 1 October 1768, two regiments of British regulars, complete with artillery, arrived in Boston. These troops, soon to number four full regiments, were the very sort of "standing army" the colonists had long feared. The ministerial design for arbitrary power was never more evident.

These developments, and especially how they were viewed by the colonists, are significant for this analysis because the political dispute and escalating polarization undermined the practical consonance between "open" press doctrine and "free" press doctrine. While there had long been successful opposition newspapers, the power of the Ministry and the government side more generally would never have allowed such papers if there were no government press "open" to ministerial voices. Shifting political power meant that the opposition presses could exist while placing increasing pressure and public scorn on the government printers. More importantly, developing public attitude held that a press "open" to ministerial arguments was now a

considerable threat to the people's liberties. The "open" press was no longer consonant in practice with the "free" press.

The developments of the 1760s brought increasing political division to the colonies. Admittedly, the Stamp Act crisis itself brought a great deal of heat but little new light to the issue of press liberty. For example, when the famous "Tombstone Edition" of the *Pennsylvania Journal* protested the imminent enforcement of the Stamp Act, it failed to augment the discourse of press liberty. Within thick black borders and amid ominous crossbones and coffins, the editors merely reprinted a 1756 essay from the *Boston Gazette*, itself a reprint from an earlier piece in the *Independent Advertiser*.²⁷ In fact, the Stamp Act was such a blunt weapon, affecting all newspapers and numerous other goods, that opposition printers were successful simply by rehearsing the traditional rhetoric of "free and open" press discourse. Nevertheless, events after the Act's repeal induced the more Whiggish printers and their Tory adversaries to reconsider and even recast the "free and open" press. The polarized politics of the day did not force them to abandon their press liberty tradition; it did, however, lead them to begin to identify distinct logics and examine differing consequences.

In 1766, after the Stamp Act had been repealed, William and Thomas Bradford of the *Pennsylvania Gazette* printed some letters of former stamp distributor John Hughes, indicating that he supported the Stamp Act and had hoped to be able to help enforce it. Hughes denied the letters' authenticity and began a suit against the

²⁷ *Pennsylvania Journal* (Philadelphia), 31 Oct 1765.

Bradfords. In retrospect, the Bradfords' response demonstrates the tensions of Whig printers wanting to have it both ways, wanting to espouse both a "free" and an "open" press:

We are only the printers of a free and impartial paper.... We can appeal to North-America not only for our impartiality as printers, but also for the real advantages derived to us very lately from the unrestrained liberty, which every Britain claims of communicating his sentiments to the public thro' the channel of the press. What would have become of the liberties of the British Colonies in North-America, if Mr. Hughes's calls on Great-Britain had been heard, to restrain printers here from publishing, what he is pleased to stile *inflammatory pieces*, and if every prostitute scribler, and enemy to his country had been suffered, without controul from the pens of true patriots, to rack their distempered brains, to find out arguments to gull a free-born people into a tame submission to perpetual slavery, and to impose their flimsey cobwebs upon us, instead of solid and substantial reasoning....²⁸

The Bradfords here appeal to "open" as well as "free" press doctrine, in that they valorize the right of each man to print his sentiments while also pointing out the danger to the people's general liberty when this right is exercise by those of tyrannical

²⁸ *Pennsylvania Gazette*, 11 Sept 1766. For a very different interpretation of the Bradfords' statement, see Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), 154.

principles. Ultimately, the weight of the piece stresses the "free" press fear of curtailed liberties. The passage evinces little confidence that the "truth will prevail." The fear was that the ministerial party would muster its strength to restrain the opposition presses, thus jeopardizing public liberty. Most importantly, the Bradfords' response provides an early suggestion of the practical tension between "free" press and "open" press logic.

Part of the Bradfords' concern stemmed from a fear that the "open" press backed by the ministerial party was open especially to those who intended "to impose their flimsey cobwebs" upon the public. Since, as Cato had long taught, "power has so many advantages," a press "open" to ministerial "tools" might very well defraud the people of their liberties. Despite this logic, even the more Whiggish printers could not abruptly break with the long-established concept of the "free and open" press. Rather, it was gradual process.

The Whigs' first step was to implicate the Tory printers in the unfolding ministerial conspiracy while maintaining their faith in the "open" press notions inherent in their press liberty tradition. The very first edition of William Rind's *Virginia Gazette* bore the following motto on its masthead: "Open to ALL PARTIES, but Influenced by NONE." The immediate intention was to suggest, as all would have understood, that Alexander Purdie's rival *Virginia Gazette* was "influenced," perhaps even bribed, by the ministerial side, particularly the Governor. This claim was credible in part due to the English Government's earlier practice of bribing opposition editors into supporting the government. This even happened in the case of the *London*

Journal, where the earliest of *Cato's Letters* originally appeared.²⁹ Rind's insinuation therefore fit both relatively recent English history and the colonists' conspiratorial "logic of rebellion." Indeed, the slogan captured the new sentiment of the opposition presses throughout the colonies; many would soon pick up the phrase either as their own motto or simply as an argumentative refrain.³⁰

Having implicated the Tories' "open" press, the next Whig rhetorical move was to qualify the demands of "openness" on their own "free and open" presses. William Goddard of the *Pennsylvania Chronicle* was perhaps the first to put a Whig cast on the impartiality of "open" press doctrine. He maintained that press freedom did *not* require the printer to forfeit all judgment. Goddard thus resurrected an argument we saw fade in the 1740s: "Open" press doctrine allowed, even required, the printer to use his own judgement in deciding what to print. Press liberty, Goddard thus insisted, does not "consist in publishing all the Trash which every rancorous, illiberal, anonymous Scribbler may take it into his Head to send him."³¹ But if the printer had to judge what to print, the principles underlying that judgement would provide new specificity to the previously nebulous "open" press tenet. A month later Goddard would defend his judgement, maintaining that it had "never been bias'd, in the least

²⁹ Francis Seaton Siebert, *Freedom of the Press in England: 1476-1776* (Urbana: University of Illinois Press, 1952), 323-45.

³⁰ Rind's *Virginia Gazette* (Williamsburg), 16 May 1766; cf. Schlesinger, *Prelude*, 79. For use of this "common dodge of Whig editors" (Schlesinger, *Prelude*, 137), cf., e.g., the *Massachusetts Spy*, 10 Dec 1770 and thereafter. For an early suggestion of influence, cf. the *American Weekly Mercury* (Philadelphia), 6 Nov 1740.

³¹ *Pennsylvania Chronicle* (Philadelphia), 16 March.

degree, to the injury of the Public, or the poorest individual."³² By specifying the "Public, or the poorest individual," Goddard shifted his concerns away from the Tories, who were generally more affluent and who were not, in any case, what the Whigs thought of as defenders of the "Public" in the struggle between ministerial power and the people's liberty. Although these shifts may not at first appear radical, they were a far cry from Franklin's simple claim that printers would "cheerfully serve all contending Writers."³³

These subtle changes regarding the "openness" of the "free and open" press were unmistakable to the Tories. "A Constant Customer" of Purdie's *Gazette* saw all too clearly that Rind's "weekly declaration" provided him with "an easy screen" to close his press to pieces of which he disapproved. "He can, at any time, want [i.e., lack] room to do what he has not a mind to do." With such ambiguous principles, this contributor wondered whether Rind "may be quite so open to all parties" as he claimed to be.³⁴

But while the Whigs were implicating the "open" Tory press and were tinkering with the "openness" of their own, the Tory *Boston Chronicle* glaringly demonstrated that a truly "open" press can cut both ways. After the introduction of the Townshend Duties, John Hancock and other members of the Committee of Merchants in Boston took to imposing the non-importation agreement by exposing

³² *Pennsylvania Chronicle*, 13 April, 1767; cf. 20 April 1767.

³³ Benjamin Franklin, "An Apology for Printers," *Pennsylvania Gazette*, 10 June 1731.

³⁴ Purdie's *Virginia Gazette* (Williamsburg), 7 April 1769.

alleged violators to public derision by printing their names in the opposition press. John Mein and John Fleeming responded by alleging in their *Chronicle* and in widely available pamphlets that certain of the "well disposed" members of the Committee of Merchants were violating the spirit, if not the letter, of the non-importation agreement as well as publishing false accounts of imports and importers. After making these claims, from November 1769 on, the *Chronicle* began each edition with the question. "Is not the detection of the "WELL DISPOSED" owing to the Glorious LIBERTY of the PRESS?"³⁵

The Tories were partially correct. This was precisely the sort of exchange that "open" press notions supported. However, it was not, as was becoming increasingly clear, the Whigs' practical ideal of press liberty. Harbottle Dorr, an ordinary shopkeeper and a Whig, noted contemptuously in the margins of his bound collection of Boston newspapers that Mein had "attempted to ridicule the Characters of the most respectable men."³⁶ Others clearly concurred, for during the riots over the non-importation controversy Mein and Fleeming's printing shop was vandalized. Mein was then personally threatened and, after the first revelations concerning the Committee of Merchants, he and Fleeming were attacked by a mob. Amidst the pandemonium, a wounded Mein escaped to the safety of a royal guardhouse. Soon thereafter he fled to London. Fleeming, however, continued printing until Hancock

³⁵ *Boston Chronicle*, 26 Oct. 2 Nov 1769 and thereafter.

³⁶ Manuscript note to *Boston Evening-Post*, 30 October 1769. The Harbottle Dorr Annotated Collection of Boston Newspapers. Massachusetts Historical Society, microfilm.

managed to act on behalf of Mein's creditors and shut down their press.³⁷ In this way the patriots closed down the most active Tory vehicle to date and gave practical evidence of their increasing disdain and suspicion of the Tories' use of the "open" press. The Whigs clearly knew what they were doing, for when Mein had assaulted opposition printer John Gill the year before, Whigs called it an attack on press liberty.³⁸ Nevertheless, assaulting Mein and closing down the *Chronicle* was as yet scarcely justified by "free" press doctrine.

Isaiah Thomas, of the avidly Whig *Massachusetts Spy*, took "free" press notions further than anyone had hitherto taken them. In December 1770 Thomas enlarged the *Spy* and used this opportunity to reaffirm his principles. He made the briefest nod to "open" press doctrine and then spelled out in some detail his extreme "free" press logic. Beginning with the now-common masthead motto, "OPEN to ALL Parties, but *Influenced* by NONE," Thomas made but one other reference to his "*Impartiality of Conduct*" and spent the rest of the statement extolling the "free" press. Considering himself a faithful "FRIEND to TRUE LIBERTY," Thomas declared that

the *Free* Use of the PRESS has ever been acknowledged one of the greatest Blessings of Mankind, especially when its PRODUCTIONS tend to defend the GLORIOUS CAUSE OF LIBERTY; and to point out to the world those base and wicked arts of designing men, who fain

³⁷ Schlesinger. *Prelude*, 104-8; *Boston Evening-Post*, 30 October 1769. See also, Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of Opposition to Britain, 1765-1776* (New York, 1972), 127.

³⁸ *Boston Gazette*, 1 February 1768.

would set nations together by the ears, and involve whole kingdoms in slavery.

Hoping to expose such "miscreants," the printer promised that "a great regard will always be paid to such political pieces as tend to secure to us our invaluable rights and privileges."³⁹

The significance of Thomas's ardent declaration of press liberty was not in implicating the Tories' "open" press or in qualifying the demands of "openness" on the patriot press. Rather, Thomas's pronouncements served to shift the balance between the increasingly conflictual demands of a "free and open" press, ultimately relegating "open" press doctrine to a very subordinate position. In so doing, he placed himself at the very forefront of Whig "free" press doctrine.⁴⁰ Indeed, Thomas's assertions, when taken together with the attack on Mein, foreshadow the violently exclusionary "press of freedom" that would achieve dominance only after a more substantial bifurcation of the inherited tradition of press liberty.

Bifurcation

The increasing division between Tory and Whig, both ideological and political, reached a peak in 1770. Violent exchanges in January and February led to the "Boston Massacre" of early March. These events exacerbated the colonists' fears about the standing army occupying Boston. Further, these events provided more

³⁹ *Massachusetts Spy*, 10 December 1770.

⁴⁰ Cf., for example, the more mainstream Whig view (which was less dismissive of 'open' press theory than was Thomas) exemplified in the *South-Carolina Gazette* (Charleston), 14 Dec 1769.

evidence, if any were needed, that the people must redouble their efforts to defend themselves from the "arbitrary designs" of ministerial forces.

In contrast to these heightened tensions, the period after 1770 constituted something of a *détente*. The repeal of the Townshend Duties in March 1770, the removal of troops from Boston, and the absence of any new provocative events afforded a period of eased tensions.⁴¹ The *détente* was sometimes strained, as it was with the arson of the *Gaspee*, a customs ship, in Providence Harbor in June 1772. Still, something of a calm did exist. The storm, however, arrived with the Tea Act in the autumn of 1773. The so-called "Tea Party" of that December and the introduction of the "Intolerable" or "Coercive" Acts in the following May spurred on the renewed, intensified political tumult.

With the intensifying polarization of the political crisis, the ideological debate over press freedom evinced a similar cleavage. A virtually complete philosophical bifurcation set in as the Tories, more and more defensive politically, began an ideological offensive. Capitalizing on the introduction of a new, ardently Tory newspaper, they continued to defend, even advance, their "open" press doctrine while attacking the Whigs' "free" press logic. In response, the nascent patriots further entrenched themselves in this "free" press doctrine, distancing themselves from "open" press doctrine and all but abandoning its practice. Although the political dispute was ultimately resolved through force of arms, the free press debate would not find permanent resolution even then. Nevertheless, as the ideological crisis reached its

⁴¹ Bailyn, *Ideological Origins*, 117-8.

most intense stage, the inherent tensions of an ambivalent tradition were at last unmistakably revealed.

The Tories Make their Case

With the forced closing of the *Boston Chronicle*, the Tories lost their premier vehicle for propaganda. Indeed, they lacked such a leading voice until the founding of the *New-York Gazetteer* in 1773. Its printer, James Rivington, proved a shrewd editor and a trenchant defender of "open" press doctrine. As a result, the *Gazetteer* soon maintained the largest circulation of any paper in the colonies; it had subscribers from Portsmouth to Charleston and beyond. Further, its articles were often printed in other papers throughout the colonies, making it the Tories' "political bible."⁴²

Given the indictments of "influence" or bribery that had become common in the patriot press, the Tories took up defending themselves and their "open" press. First, though the patriot's "trick" of labelling all adversaries "ministerial minions" was "now worn threadbare," Tories frequently denied the charges.⁴³ Second, seeking to fight motto with motto, Rivington emblazoned his masthead with the simple retort, "PRINTED at his EVER OPEN & UNINFLUENCED PRESS." Making only a passing gesture to "free" press logic, he insisted "the Printer has, without reserve, inserted every piece sent to him relative to the liberties and interests of America: his press has been equally open to the sons of freedom, and to those who have differed in

⁴² Schlesinger, *Prelude*, 222; cf. 240.

⁴³ [John Drinker], *Observations on the Late Popular Measures, Offered to the Serious Consideration of the Sober Inhabitants of Pennsylvania* (Philadelphia: 1774), 24; see also, *New-York Gazetteer*, 2 February, 14 July 1774.

sentiment from them".⁴⁴ While his claim to complete "openness" was not strictly true, this press philosophy did lead Rivington to open his press to more opposing views than could be found in the patriot press.⁴⁵ More importantly, Rivington was pushing "open" press notions to their extreme, discarding the patriot claim that the printer must exercise some judgment. Later, when defending himself from criticisms about his press, Rivington would spell out this extreme "open" press doctrine at length (cleverly using the term, "free press"⁴⁶):

It is worthy to remark, that in this, and many other charges of the like nature, no attempt has been made to convict [the Printer] of *partiality*. His crime then is neither more or less, than the keeping a *free press*, in a land of Liberty: For if this news-paper is not *impartial*, it is the fault of his correspondents. He does not arrogantly set himself up as a judge, of every piece that is offered for publication, by selecting *this*, and rejecting *that*, he is content to lay them before a more respectable

⁴⁴ *New-York Gazetteer*, 12 May 1774; cf. 2 Dec 1773; also, the *Boston Post-Boy Advertiser*, 12 Dec 1774, 6-20 Feb 1775, and the *Boston Weekly News-Letter*, 16 Feb 1775.

⁴⁵ The *Gazetteer* had a well-known 'violently partisan cast' and had been accused of failing to include Patriot contributions (Schlesinger, *Prelude*, 190; see also, 226).

⁴⁶ Rivington thus reminds us of the inexact and ever-changing relationship between word and concept: see Skinner, "Language and Political Change," in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson (Cambridge: Cambridge University Press, 1989), 7-8; and James Farr, "Understanding Conceptual Change Politically," in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson (Cambridge: Cambridge University Press, 1989), 26-8; and above, Chapter One.

tribunal, to have their merits tried, as they ought to be, by the public voice.⁴⁷

Shrewdly, Rivington deflected any criticisms of the partisan bent of his paper by simply claiming his contributors were partial. More importantly, gifted rhetorician that he was, Rivington expropriated the term "free press" and emphasized it. This, however, was not likely to fool anyone. Indeed, as "free" press doctrine became increasingly rare in the Tories' pronouncements on press liberty, the rhetoric of the "free" press also disappeared.

Rather than expropriate the language of their enemies, the Tories more often took to ridiculing the freedom of the patriots' "free" press, thus further expanding the theoretical divide. The vicious, partisan slant of the patriot press made criticizing their "free" press an easy business. Rivington sometimes made spirit of it, publishing poems and satirical dialogues. These were often lengthy pieces, but excerpts from one poem suggest the character of these barbs. Lambasting the patriots, one amateur poet wrote,

THEY tremble at an equal press,
 for reasons any dunce can guess,
 ...Dares the poor man impartial be,
 He's doomed to want and infamy
 ...[he] Sees all he loves a sacrifice,
 If he dares publish aught--but lies

⁴⁷ *New-York Gazetteer*, 16 Feb 1775.

...Alas vain men, how blind, how weak;

Is this the liberty we seek[?]⁴⁸

The Continental Congress's "Address to Quebec" provided material for more serious reflections on the patriots' evolving view of press liberty. In this appeal to their French-Canadian brethren, the Congress enumerated the rights they were defending, including

freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs.⁴⁹

This traditional "free and open" press rhetoric was meant for uncontroversial consumption beyond the colonies, but the ministerial side made the most of the ambivalent language. "A Sailor" actually quoted the entirety of the Address, and then asked "whether the Congress meant to encourage liberal and free sentiments concerning every other *administration of government*, but not to tolerate them when they relate to their *own*?" But if such a question did not make the increasing conceptual tensions clear enough, a fellow loyalist, "T.W.," sought to distinguish sharply between their own "open" and the patriots' "free" press. While these "men of

⁴⁸ *New-York Gazetteer*. 8 Dec 1774; cf. 14 July, 29 Dec 1774, 5 Jan 1775.

⁴⁹ *Journals of the Continental Congress, 1774-1789*, ed. Wrothington C. Ford et al. (Washington, D.C., 1904-37), 1:108 (24 October 1774), reprinted in *Boston Gazette*, 14 November 1774.

dangerous designs, dark purposes, and foul deeds" sought to "destroy the productions of the press," the "ears of a genuine son of liberty are ever open to all doctrines, it is his glory to hear them, to examine them, to adopt them if they are true, to confute them if they are false."⁵⁰

With a sharp distinction drawn, an extreme "open" press defended, and the "free" press mocked, it only remained for the Tories to contend outright that the patriot press was *not*, in fact, free. As the "republican press" became more and more extreme, it was naturally Rivington himself who most sharply took the Tory attack to its outermost bounds, turning the "free" press's underlying logic on its head. Rivington simply insisted that "while his enemies make *liberty* the prostituted pretense of their illiberal persecution of him, their aim is to establish a *most cruel tyranny*."⁵¹ And with this contention, the bifurcation of the received tradition, at least from the Tory side, was complete; the only truly free press, as far as they were concerned, was the "open" press. But even as Rivington's words were being printed, the news of Lexington and Concord was racing to New York. Increasingly, the patriots' "free" press would become the extreme and exclusive "press of freedom," and Rivington's words would become treason.

The Patriots Respond

⁵⁰ *New-York Gazetteer*, 15 December 1774; cf. 2 December 1773; also, the *Boston Weekly News-Letter*, 14 January 1773.

⁵¹ *New-York Gazetteer*, 20 April 1775; cf. 2 September 1774; also, the *Norwich Packet* (Connecticut), 25 November-2 December 1773.

In response to the end of *détente* in 1773 and multiplying Tory assaults on their press, the patriots further explored their increasingly extreme "free" press doctrine. This shift and the deepening bifurcation are evident even in the emergence of a new motto. At Williamsburg, the home of Rind's "open and uninfluenced press." Alexander Purdie, now an unequivocal patriot, eschewed this motto and introduced his new paper with the masthead exclamation: "ALWAYS FOR LIBERTY AND THE PUBLICK GOOD."⁵²

Just what did liberty and the public good require from the press? "A Customer" of the *Maryland Gazette* spoke for many patriots when he spelled out "free" press logic, insisting that press liberty was subordinate to the general cause of the people's liberty: "the liberty of the press is the most powerful adversary to slavery, ambition, and faction; but it is repugnant to the principles of honour and general liberty, that it should not be totally at the devotion of the *professed* friends of the people [i.e., the patriots]."⁵³

The more cautious Bradfords felt it best not to dispense completely with "open" press rhetoric. Still, their response to an attack on their press evinces an adherence to "free" press doctrine where there had been strained ambivalence only eight years before. Under their new "Unite or Die" masthead, the Bradfords now insisted they supported liberty of the press,

⁵² Purdie's *Virginia Gazette*, 3 February 1775.

⁵³ *Maryland Gazette* (Baltimore), 21 October 1773. The use of the term "professed" by this anti-British writer may be a bold appropriation of a derogatory Tory term; see Phillip Davidson, *Propaganda and the American Revolution, 1763-1783* (Chapel Hill: University of North Carolina Press, 1941), 294.

but will any say that this requires the publishing [of] ... every piece that may be sent to a printer? It has ever been ... our fixed resolution to keep *our Journal* free and open ... yet we do not mean that it should be a vehicle of ... inflammatory declaration. ---In the present unhappy controversy between G.B. and these colonies, which so nearly concerns the freedom not only of our country, but of all the British Empire, we defy any one of those pretended advocates for ministerial measures, to say they were denied a place for their pieces in our paper; yet, at the same time, we look on it as a right to judge and have always followed our own judgement....⁵⁴

This judgement, the Bradfords continued, would ensure the omission of anything "calculated to inflame and divide."

This passage suggests much about the polarization of "free" press doctrine. Despite the claim that their paper is "open," the Bradfords qualify that "openness" beyond recognition. Whereas Rivington claims he would not "arrogantly" judge but would print all pieces, the Bradfords explicitly disagree, specifying that they *will* judge in an effort to maintain the people's unity in the "present unhappy controversy." In so doing, the Bradfords subordinate the demands of the "open" press to the "free" press imperatives of the general freedom of the country.

With the political crisis deepening, it was becoming more and more obvious, to most patriots at least, that the underlying concerns of the "free" press greatly

⁵⁴ *Pennsylvania Journal*, 17 August 1774.

outweighed those of the "open" press.⁵⁵ But with the Tories continually appealing to "open" press doctrine to justify their practices, the patriots still needed to undermine these claims entirely. John Holt of the *New-York Journal* was that city's primary patriot printer and a frequent victim of Rivington's barbs. Going far beyond mere claims of influence or bribery, Holt maintained that a "fair" contest would be impossible with the "devious" ministerial supporters.

My paper is sacred to the cause of truth and justice, and I have preferred the pieces, that in my opinion, are the most necessary to the support of that cause; and yet, if I could see anything on the opposite side that had the least degree of plausibility, truth and commonsense to recommend it.--I would endeavor to find a place and give a fair hearing to such a performance,--but when I see every thing on that side to be no better than barefaced attempts to deceive and impose upon the ignorant, and imprudently overbear and brazen them out of their reason, their liberty and their property--I disdain such publications, but yet will meet any of them upon fair ground.⁵⁶

Given the political crisis and the designs of the Tories, Holt was implying, a fair hearing for truth was not to be had. Thus, with an "open" press the truth might *not*

⁵⁵ Even at this late date some patriots tried to maintain features of the older, received theory of the "free and open" press. Significantly, these texts also demonstrate an awareness of the increasingly distinct "free" and "open" press logics; see, e.g., *Pennsylvania Packet* (Philadelphia), 28 November 1774.

⁵⁶ *New-York Journal*, 5 January 1775; cf. Rind's *Virginia Gazette*, 18 August 1774. For a Tory, "open" press response to Holt, see the *New-York Gazette and Weekly Mercury*, 9 January 1775.

prevail, and general liberty was at risk of being stolen forever. This was a risk that Holt and other patriots were increasingly unwilling to accept.⁵⁷

Their concept of press liberty no longer told them they had to accept this risk. The loyalist press was perceived to be influenced, unfair, deceitful, and divisive; meanwhile, the very cause of liberty hung precariously in the balance. Once the patriots established, at least in their own minds, the right, even the necessity, of judging what was deceitful and divisive, a thoroughly distinct "free" press emerged.

The "Free" Press Becomes the "Press of Freedom"

The patriots had scarcely distinguished and developed their "free" press doctrine when the political crisis deepened irrevocably and gave rise to the most extreme manifestation of "free" press logic. With the commencement of hostilities on Lexington Green on 19 April 1775, the dire threat to the people's liberties from ministerial forces became dramatically apparent. The "free" press doctrine of the patriot party was further polarized and an extreme, active formulation of the "free" press emerged. Rather than maintaining that the press ought to be "sacred to liberty," this new militant view consisted of an active program of threats, public exposure, financial sanctions, and ultimately, physical violence. The aim was to ensure that all presses were free *only* for the speech of freedom.⁵⁸ The patriots' "free" press was becoming the exclusive "press of freedom."

⁵⁷ See Timothy Green's exclamation that his *Connecticut Gazette* (New London) was "sacred to LIBERTY." 19 August 1774.

⁵⁸ Schlesinger, *Prelude*, 189.

It is true that there was intimidation prior to Lexington. The emergence of what I identify as the "press of freedom" was gradual, foreshadowed by extreme moments in the development of "free" press doctrine. The accusations of ministerial bribes, when tied to specific Tory printers, were certainly early efforts at intimidation. And the riotous attack on Mein and Fleming, as well as the *Chronicle's* coerced downfall, were omens of what was to come. Shortly before Lexington itself, Rivington was condemned by town meetings up and down the coast; and on 13 April a mob in New Brunswick, New Jersey hung him in effigy.

It was only after Lexington and Concord had drastically altered the political context that the exclusive, repressive "press of freedom" truly flourished. The pro-British side almost immediately lost two of their papers due to shifting public sentiment. A third loss poignantly symbolized the end of the "free and open" press discourse as the colonists had known it. Thomas and John Fleet were patriots who, true to the inherited legacy of press liberty, maintained an "open" press, the only press acknowledged by all sides to be truly neutral. Even a unique patriot-owned paper like the Fleet's *Boston Evening-Post* could no longer maintain a "free and open" press in the face of the emerging "press of freedom." The paper closed immediately after Lexington.

These losses were replaced by avidly Whig papers which contributed to the atmosphere of verbal and increasingly physical attacks on Tories. For example, Rivington's printing shop was vandalized by a mob of seventy-five horsemen less than three weeks after news of Lexington reached New York. In late autumn the repressive

extremity of the "free" press burgeoned. By then most patriots could agree with an earlier *South-Carolina Gazette* contributor who baldly maintained that it was "no *Loss of Liberty*, that court-minions can complain of, when they are silenced. No man has a right to say a word, which may lame the liberties of his country."⁵⁹ On 23 November, the "press of freedom" incarnate visited Rivington's printing shop a second time. A mob had marched three days, all the way from New Haven, in order to destroy his press and steal the type. This time, Rivington understandably fled to a British ship and the *New-York Gazetteer*, the Tories' most powerful vehicle, went silent. Without that leadership the remaining pro-British presses in patriot-held America became more and more tame. In March 1776, when the British abandoned Boston, the "only outspoken Tory organ then left," the *Massachusetts Gazette and Boston Newsletter*, expired.⁶⁰

With the establishment of hostilities and the solidification of opposing sides, propaganda became one of many weapons of war. As "A Tory" observed in Philadelphia, "amongst the other implements of war, the *pen* and the *printing-press* are not the least important." "By influencing the minds of the multitude, [they] can perhaps do more towards gaining a point than the best rifle gun or the sharpest bayonet."⁶¹ As a result, forthright suppression of the enemy became the practice on

⁵⁹ *South-Carolina Gazette*, 19 December 1774.

⁶⁰ Schlesinger, *Prelude*, 240-1; 257-8. Hugh Gaine's now-docile *New-York Mercury* remained, though under the patriots' watchful eyes. New Tory papers emerged and past printers returned, but these papers were "narrowly circumscribed," effectively limited to areas held by the British Army (Davidson, *Propaganda*, 312).

⁶¹ *Pennsylvania Evening Post* (Philadelphia), 16 November 1776.

both sides of the dispute. The patriots, as we have seen, had been intimidating Tory printers for some time in their struggle for freedom. Virginia's governor, however, made it clear that both sides could play that game. Lord Dunmore simply had his soldiers confiscate patriot printer John Hunter Holt's press. Shortly thereafter, in early 1776, Dunmore was publishing his own *Virginia Gazette* from a ship off the coast.

Patriots, for their part, took to instituting oaths of allegiance and other wartime restrictions on freedom of expression.⁶² Pennsylvania, for example, initiated penalties for those who refused to swear a Patriot oath; they consisted of exclusion from jury duty, public office, and voting. The so-called "non-jurors" also had their taxes doubled. Since Quakers rejected oaths on religious grounds, they too were penalized by these laws. Printing presses were also closed to Quakers as well as Tories since the former's pacific beliefs were suspect in wartime. Though these practices hardly bespeak an "open" press, we should bear in mind the context. Sedition was a very real threat. One Revolutionary committee went beyond sedition ordinances to set up rewards for catching deserters because some Tories had been "exceedingly industrious in sowing the seeds of sedition in the minds of the militia."⁶³

It was due to the genuine danger presented to the people's liberty that the "press of freedom" had such support on the patriot side. Even a young James Madison could snarl, "I wish most heartily we had Rivington & his ministerial Gazetteers for 24. hours in this place. Execrable as their designs are, they would meet

⁶² For an extensive--but by no means exhaustive--catalogue of such laws, see Claude Halstead Van Tyne, *The Loyalists in the American Revolution* (New York: MacMillan, 1902), 327-41.

⁶³ Philadelphia *Pennsylvania Packet*, 15 October 1776.

with adequate punishment."⁶⁴ The Philadelphia Committee of Inspection and Observation preferred official, authorized punishment of such "ministerial enemies" and they justified their repressive resolves by explaining the "press of freedom."

The rights which all men are entitled to, of speaking their sentiments candidly, so far as is consistent with the peace and welfare of society, they hold to be sacred, and that it ought to be inviolate. But when this privilege is used for the purpose of raising jealousies among the people, distracting their councils, and counteracting their virtuous exertions against injury and oppression, all laws, human and divine, justify the punishment of such licentiousness.⁶⁵

Notwithstanding these pronouncements at the locus of power, the "press of freedom" was in fact retreating.

Beyond the "Press of Freedom"

The spreading hostilities brought about the suppression of Tory voices. In one sense, the threat of the ministry attacking the people and their liberties was more dangerous than ever. But in another sense, the danger was now external and overt. Thus, the logic of the "free" press, while held in the extreme for Tories, no longer

⁶⁴ James Madison to William Bradford, [Early March 1775], *Papers of James Madison*, ed. William T. Hutchinson et al., 17 vols. (Chicago: University of Chicago Press, 1962-), 1:141.

⁶⁵ *Pennsylvania Gazette*, 27 September 1775; see also *Pennsylvania Evening Post*, 16 November 1776.

made sense within the patriot circle. Gradually, a refined "open" press replaced the "press of freedom."

As early as 1776 the "open" press was beginning to return to patriot America. Not surprisingly, there were overzealous moments. Daniel Fowle once again got in trouble with his legislature when his *New-Hampshire Gazette* ran an anti-independence piece in January 1776; this position concurred with the Continental Congress's view at the time, but the Provincial Congress reprimanded him. Samuel Loudon, of the *New-York Packet*, agreed to print some anti-independence pamphlets in March. Despite his pledge to hold up publication, a mob stole the whole run of 1500 copies and burned them on New York Common. Still, the "open" press was in fact returning, and patriot authorities from the New York Committee of Safety put Loudon on the payroll.⁶⁶

The Continental Congress certainly endorsed an "open" press approach. They recommended that the various Revolutionary committees presume that all "erroneous opinions" proceeded "rather from want of information than want of virtue or public spirit." The delegates were convinced that "the more our right to the enjoyment of our ancient liberties and privileges be examined, the more just and necessary our present opposition to ministerial tyranny will appear." Congress therefore advocated a policy of publication and persuasion, not repression and intimidation, for all but the ostensibly dangerous.⁶⁷ Soon, even the Philadelphia Committee of Inspection was

⁶⁶ Schlesinger, *Prelude*, 257-8.

⁶⁷ *Journals of the Continental Congress*, 4 (1779):18-20, reprinted in *The New-England Chronicle, or the Essex Gazette* (Cambridge, MA), 8 January 1776.

toning down its rhetoric.⁶⁸ Though many were penalized for refusing the oath or were imprisoned as dangerous Tories, there was only one conviction for seditious speech under Pennsylvania's misprision of treason laws: a man had advised someone to supply the enemy with a stolen horse.⁶⁹

Treason aside, the "press of freedom" was soon both practically restricted and theoretically criticized. In practice, with a war on, it was generally quite clear who could talk and what could be said; *within* a given side, then, an "open" press prevailed, even flourished.⁷⁰ College of Philadelphia Provost William Smith thus had no trouble getting his attacks on *Common Sense* into the *Pennsylvania Packet*.⁷¹ Theoretically, *Common Sense* publisher Robert Bell defended his printing of *Plain Truth* and other anti-independence pieces on the "AUTHORITY [OF] THE LIBERTY OF THE PRESS."⁷² Bell criticized those who contended for limiting the press "under the specious pretence of there being a necessity at some trying exigence for a temporary restriction of the FREEDOM OF THE PRESS" and argued that if "their foolish advice

⁶⁸ Philadelphia Committee of Inspection and Observation, "In Committee chamber, May 16, 1776" (broadside), (Philadelphia: William and Thomas Bradford, 1776).

⁶⁹ Thomas R. Meehan, "The Pennsylvania Supreme Court in the Law and Politics of the Commonwealth, 1776-1790" (Ph.D. diss., University of Wisconsin, 1960), 139. "Misprision of treason" is "an offense or misdemeanour akin to treason or felony, but involving a lesser degree of guilt, and not liable to the capital penalty" (*Oxford English Dictionary*).

⁷⁰ Schlesinger, *Prelude*, 261, 267, 298.

⁷¹ *Pennsylvania Packet*, 18, 25 March 1776.

⁷² Robert Bell, "The Printer to the Public: On the Freedom of the Press," appendix to *A Dialogue between the Ghost of General Montgomery Just Arrived from the Elysian Fields; and an American Delegate, in a Wood near Philadelphia* ([Philadelphia]: Robert Bell, 1776), American Antiquarian Society, Dated Pamphlets.

should at any one time be adopted, we may then bid final adieu to everything pertaining to Liberty." To substantiate his point, Bell reminded his readers of Parliament's switch in 1716 from triennial to septennial parliaments on the dubious grounds that "there were too many Jacobites in the Nation." The point of the analogy was to demonstrate that in times of crisis, seemingly temporary, repressive moves made ostensibly to protect general liberty, can set tyrannical precedents.⁷³

This history lesson notwithstanding, not everyone would conform with Bell's "open" press standard, especially when it came to heated personal matters. The mercurial Thomas Paine threatened Tory-leaning printer Benjamin Towne with a "halter" [i.e., noose] in order to get the name of an anonymous critic. When a mob went after Paine's antagonist, Whitehead Humphreys, it was Humphreys who got the better of the incident, "several gentlemen having explained the liberty of the press, and clearly demonstrated that it ought not to be restrained."⁷⁴ Even after the War was over and the Treaty of Paris signed, James Rivington's old enemy, Isaac Sears, raided the printer's shop as he had in 1775, this time ending Rivington's printing career forever.⁷⁵

Two, more notorious episodes provide a clearer window into understandings of freedom of political expression. William Goddard's active insistence on the liberty of

⁷³ Robert Bell, "A Few More Words, on the Freedom of the Press," appendix to Josiah Tucker, *True Interest of Britain* (Philadelphia: Robert Bell, 1776). See also, e.g., *Pennsylvania Evening Post*, 3 January 1778.

⁷⁴ *Pennsylvania Packet*, 31 July 1779; *Pennsylvania Evening Post*, 2 August 1779. See also, *Pennsylvania Packet*, 29 December 1778.

⁷⁵ Davidson, *Propaganda*, 334.

his press occasioned two revealing clashes between an individual's "open" press and a community's "free" press. A satirical piece in Goddard's *Maryland Journal* praised some terms of peace allegedly offered by England; the same issue also carried a spirited caution against any terms offered by the corrupt British government. The satire, however, was lost on the zealous Whig Club of Baltimore, and the caveat was ignored. Taking the first piece to be genuinely dangerous, the Whig Club dragged Goddard before them and demanded the author's name. When Goddard refused, he was banished from Baltimore. The printer left, but only to appeal to the authorities at Annapolis. A committee of the Assembly found the Whig Club's proceedings in "manifest violation of the Constitution, [and] directly contrary to the Declaration of Rights."⁷⁶ The *Maryland Declaration* held simply "that the liberty of the press ought to be inviolably preserved."⁷⁷

The Whig Club incident demonstrates that, at least in Maryland, press liberty was officially understood to permit an individual's sentiments ostensibly favoring submission to the enemy, even if those sentiments seemed to undermine the fight for public liberty. But if Goddard "was thought severe, and...little friendly to the American Cause" for the views published in 1777, we can be sure the "Queries" he

⁷⁶ William Goddard, *The Prowess of the Whig Club* (Baltimore: [Mary K. Goddard], 1777), 12. *The Prowess* contains appendices reprinting a number of relevant documents; see also, *Maryland Journal*, 25 February 1777; and Ward L. Miner, *William Goddard: Newspaperman* (Durham, NC: Duke University Press, 1962), 150-62.

⁷⁷ Bernard Schwartz, *The Bill of Rights: A Documentary History*, 2 vols. (New York: Chelsea House, 1971), 1:284.

published in 1779 made him extremely unpopular.⁷⁸ General Charles Lee had already published a lengthy response to his court-martial when he sought to publish "Some Queries, Political and Military." The "Queries" were as much an attack on Washington as they were a defense of Lee; Philadelphia printers wanted nothing to do with them, despite that city's factious and unrestrained press. Indeed, the exalted Washington was just about the only public figure safe from vilification in the Pennsylvania papers; the printers there feared the "Queries" would raise mobs.⁷⁹ As Goddard soon found out, these fears were well-founded.

Again a mob came after Goddard and this time they forced him to sign a statement begging the people's pardon and made him promise to publish it in the *Journal*. Goddard did publish it, but he again went to Annapolis to plead his case.⁸⁰ The subsequent hearing has left no record, but Goddard was apparently satisfied. For in the next day's *Journal* he recanted his apology. A week later he printed both a response to Lee's "Queries" and an anonymous letter insisting no country is free where "restraints on the Press in any Cases, except Libels and Treason" are tolerated.⁸¹ These episodes involving Goddard, the people of Baltimore, and the Maryland authorities demonstrate that "open" press notions were returning--in fits and

⁷⁸ John Holt to William Goddard, 26 February 1778, Book Trades Collection, Box 1, Folder 6, American Antiquarian Society.

⁷⁹ Dwight L. Teeter, "Press Freedom and the Public Printing: Pennsylvania, 1775-83," *Journalism Quarterly* 45 (1968): 446; Teeter, "A Legacy of Expression: Philadelphia Newspapers and Congress During the War for Independence" (Ph.D. diss., University of Wisconsin, 1966), 221.

⁸⁰ *Maryland Journal* (Baltimore), 14 July 1779 (supplement to the *Journal* of 13 July 1779).

⁸¹ *Maryland Journal*, 27 July, 3 August 1779. For more on the "Queries" incident, see Miner, *Goddard*, 168-73.

starts--to patriot America. More importantly, they suggest that new, deeper understandings of the relationship between public liberty and individual liberty were emerging in the Revolutionary era.

A more sophisticated "open" press dominated the colonies. The Tories had no access to the press and increasingly few sympathizers, but within Whig circles, all were allowed fair play. When the debate raged over independence this toleration led not only to serious debate, but to exaggeration, invective, and misrepresentation. Notably, reunionists used many old Tory arguments; yet they were allowed to take their case to the people since, as Whigs, they all agreed that the current British rule was unjust, arbitrary, and deserving of opposition. Moreover, this toleration held even though disunionists such as Samuel Adams took to calling the reunionists "disguised Tories."⁸²

In 1775, the "free press" arguments of the patriots, newly distinguished and developed, took their most extreme form, the "press of freedom." Still, "the great and honorable exception to this reign of intolerance," was the "free and open debate within the Whig party" over independence.⁸³ With the threat to the people's liberty predominantly external, the "press of freedom" began to give way to a renewed, yet better defined and better understood, "open" press.

⁸² Candidus [Samuel Adams], *Philadelphia Evening Post*, 3 February 1776; see Schlesinger, *Prelude*, 261.

⁸³ Schlesinger, *Prelude*, 298.

CHAPTER 5. PRESS LIBERTY AND THE MAKING OF THE FIRST AMENDMENT

The pre-Revolutionary crisis had broken down the "free and open press" tradition and exposed its contradictions. Patriots had taken "free" press doctrine to its extreme and then saw it become largely immaterial as the threat to the people's liberty was limited to the guns and pens of Tory-held towns. In the debates over independence, and later over how to conduct the War, fellow Whigs could be trusted to make their sentiments known through an "open" press. But it is one thing to practice, even justify an "open" press, quite another to institutionalize it. That, however, was only one of the challenges facing a war-torn America.

Revolutionary Shifts in American Society

The American Revolution, as Gordon Wood has recently demonstrated, was a radical turning point.¹ Like so many of the revolutions that followed it, the American Revolution was an intentionally transformative event. Yet, like all human action, the Revolution was also fraught with a number of unintentional consequences and many repercussions that were at best dimly perceived. For some of the most radical colonists, of course, the Revolutionary War was indeed a matter of fundamental political, economic, and social transformation. But for the great mass of the people, even independence from Britain was not clearly a goal until the War was over a year old; any further purpose was at best uncertain. Nevertheless, the ramifications of the

¹ Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Knopf, 1992).

War were such that major forces of change were unleashed that would reverberate throughout colonial society.

The War, as we have seen, brought the marginalization, even persecution, of outright loyalists and suspected Tories. This was obvious and clearly perceived at the time. The implications of this reality, however, were less distinctly comprehended. The Tories had made up a large portion of the colonial elite, and even conservative Patriots were slow to take command of the remarkably fluid mid-1770s. The net result was a void at the top layer of the emerging Revolutionary society.

The political vacuum created by these changes was both exploited and exacerbated by the continuing development of revolutionary committees, conventions, and militias. From the early 1770s on, as Tories maintained a tight grip on the conventional reigns of power and other traditional colonial elites vacillated, political outsiders bypassed these authority structures to create their own. Once independence was declared and these new institutions were formally adopted, many more people, from a wider swath of American society, were involved in political power. And drawing more deeply into the well of Revolutionary America was only part of the political reformation. More important still was the nature of the authority these political parvenus held. The role of the middling and lower classes "out of doors"--in crowds, protests, and mobs--had long been a quasi-institutional aspect of British politics. Yet as Edward Countryman has aptly put it, "the difference was very real: a

crowd could act, but a committee could set and execute a policy; a crowd would dissolve, but a committee could adjourn."²

No less significant for our understanding of American political thinking in the 1770s and 1780s is the economic void that was created by the marginalization of the conservative and moderate portions of the traditional elite. Add to that the War itself, which accelerated capitalist development in America, and the consequence, intentional or not, was a profound shift in the emerging nation's economy.³ The rise of new merchants and consumers was certainly significant. The wartime stress on local manufactures was perhaps even more critical, since the resulting boon for the artisan class hastened the spread of nascent liberal ideas in the middle classes.

Another momentous transformation of colonial society expedited by the War was the development of distinct public and private spheres. This evolution had been underway since the middle of the century, when the "sharp modern distinction between private and public was as yet scarcely visible."⁴ This shift meant that whereas a person's station in life encompassed public and private attributes prior to the War, in the 1770s and 1780s a person's office, not his reputation, was increasingly the source of his authority. While mid-century officials knew "that their ability to govern rested on their personal reputations," public men of the 1780s drew a distinction between

² Edward Countryman. *The American Revolution* (New York: Hill and Wang, 1985), 144.

³ Wood. *Radicalism*, 248.

⁴ Wood. *Radicalism*, 59.

their public character and private reputation.⁵ To be sure, one's reputation was still sacred and to be defended at all costs, but it was now increasingly a separate, unofficial asset.

Finally, the watershed of the Revolution marks the establishment of a practical distinction between private, individual liberty and the communal, public liberty that had long been the focus of Whig political theory. The Tories had been occasionally appealing to individual rights even in the early 1770s. They had little choice since an appeal to public liberty would have been considered thoroughly unpersuasive by those who were convinced the Tories were part of the "ministerial design" to destroy American (public) liberty.

As we shall see more fully below, with the arrival of the War, even patriot America would see signs of the rise of notions of individual liberty. Merchants, for example, often claimed the right to withhold goods in order to reap higher profits when the commodities were scarce. These merchants, however, would often be reminded of the traditional dominance of communal priorities over individual liberty: Crowds--sometimes with committee orders--would raid a warehouse, leaving behind the "just" price. These conflicts between sections of "the people" were not easily explained by the radical Whig philosophy that dominated patriot America. A "democratic despotism," John Adams insisted in 1776, "is a contradiction in terms."⁶ Yet it was becoming less clear that public liberty would guarantee private liberty.

⁵ Wood, *Radicalism*, 86.

⁶ Novanglus [John Adams], quoted in Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 63.

Rather, as one prickly army colonel-turned-printer maintained as early as 1778, "he that will not contend for his own rights, as an Individual, will never defend the Rights of the Community."⁷

Press Liberty and the First American Constitutions

The various, interrelated, and momentous Revolutionary transformations in American political, economic, and social thought can perhaps be most readily appreciated in the early state constitutions and declarations of rights. More specifically, the press clauses provide a promising starting point for a conceptual history of press liberty in the decade and a half leading up to the First Amendment. The rhetoric of these passages clearly draws from the "free and open press" tradition. The first press clause written in Revolutionary America is found in George Mason's *Declaration of Rights* for Virginia (1776) and employs the traditional "free" press vernacular: "That the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotick Governments."⁸ Not only does this declaration exhibit the "free" press fear of despotic government, but it borrows Trenchard and Gordon's classic rhetoric of the "bulwark of liberty."

The language of "open" press doctrine is no less evident in the early constitutions. Vermont (1777) quoted almost verbatim from Pennsylvania's

⁷ Eleazor Oswald to George Washington, 28 October 1778, quoted in Dwight L. Teeter, "The Printer and the Chief Justice: Seditious Libel in 1782-83," *Journalism Quarterly* 45 (1968):260.

⁸ Bernard Schwartz, *The Bill of Rights: A Documentary History*, 2 vols. (New York: Chelsea House, 1971), 1:235; see also, North Carolina *Declaration of Rights* (1776), 1:287.

Declaration (1776) in proclaiming "that the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not be restrained."⁹ Here one finds the conventional "open" press notion that people have a right to air sentiments, presumably on any side of an issue. But it is Pennsylvania's radical convention that best exemplifies the "free and open press" tradition of eighteenth-century America. In keeping with the ambivalent nature of that tradition, the Convention enacted the above "open" press language borrowed by Vermont while also incorporating unequivocal "free" press thinking in the accompanying *Plan or Frame of Government*: "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."¹⁰

Many of America's first constitutions, then, employ the language of the "free and open press" tradition. Nevertheless, it remains to be seen just what they meant by these pronouncements. Could one speak one's mind with complete immunity? Leonard Levy has long maintained that eighteenth-century Americans followed William Blackstone in claiming that the "liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint [such as licensing] upon publication, and not in freedom from censure for criminal matter [such

⁹ Schwartz, *Bill of Rights*, 1:324.

¹⁰ Schwartz, *Bill of Rights*, 1:273.

as seditious libel] when published."¹¹ Gordon Wood concedes--and we have seen-- that Americans admired Blackstone's *Commentaries*, but counters that its appeal "stemmed not so much from its particular exposition of English law...but from its great effort to extract general principles from the English common law."¹²

The later state constitutions lend support to Wood's view. Thomas Jefferson, who would later dismiss the *Commentaries* as "honeyed Mansfieldism,"¹³ makes clear in his own drafts for a Virginia constitution (1776) that the only permissible subsequent punishment is for *private* defamation: "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."¹⁴ The later constitutions of Massachusetts (1780) and New Hampshire (1783) are at once less explicit and more anti-Blackstonian. Both states' clauses began by virtually quoting Blackstone: "The liberty of the press is essential to the security of freedom in a state...." But where the eminent jurist goes on to allow subsequent punishment, these later American constitutions simply declare that press liberty "ought

¹¹ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Philadelphia: Robert Bell, 1771), 4:151-2 (emphasis in original); Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), 12-3.

¹² Wood, *Creation*, 10.

¹³ Jefferson to James Madison, 17 February 1826, *Writings of Thomas Jefferson*, ed. Andrew A. Lipscombe and Albert Ellery Bergh, 20 vols. (Washington: Thomas Jefferson Memorial Association, 1905), 16: 156; see also, Jefferson to Horatio Spafford, 17 March 1814, *Writings*, 14:120.

¹⁴ *Papers of Thomas Jefferson*, ed. Julian P. Boyd, 26 vols., (Princeton: Princeton University Press, 1950-), 1:363 [third and final draft]; see also, 1: 344-5, 53 [first and second draft].

not be restrained" and "ought, therefore, to be inviolably preserved."¹⁵ The French, to the contrary, in writing their *Declaration of the Rights of Man and Citizen* (1789), do not quote Blackstone, though they do explicitly include the Blackstonian notion of post facto responsibility for "abuse" of press liberty.¹⁶

Though suggestive, this analysis of parallel texts can at best provide the foundation for speculation. What would help us draw accurate conclusions about these declarations is some record of discourse concerning the value, meaning, and limits of the "liberty of the press." In fact, such a record exists in the proceedings of the various town meetings called throughout Massachusetts to debate the proposed Constitution of 1780. This evidence demonstrates that the townspeople across Massachusetts read the press clause to warrant no subsequent legal responsibility whatsoever. It was this understanding that led a number of towns to resolve that the clause should be explicitly amended to provide legal damages for defamation of private individuals.¹⁷ The distinction found in these debates between private reputations and public characters along with the occasional references to the people's right to comment regularly on public men and measures suggest that there are more thoroughgoing changes afoot than merely the decreasing influence of Blackstonian

¹⁵ Schwartz, *Bill of Rights*, 1:342 (MA), 1:378 (NH). For more on these and the other state constitutions, see James R. Parramore, "State Constitutions and the Press: Historical Context and Resurgence of a Libertarian Tradition," *Journalism Quarterly* 69 (1992): 105-23, esp. 110-2.

¹⁶ Robert R. Palmer, *The Age of the Democratic Revolution: A Political History of Europe and America, 1760-1800*, 2 vols. (Princeton: Princeton University Press, 1959), 1: 520.

¹⁷ Oscar Handlin and Mary Handlin, eds., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge: Harvard University Press, 1966), 641, 724, 728, 749-50, 771, 789, and esp. 762.

notions. But even these animated debates over press liberty are bound, like most constitutional discussions, by the constraints of time and the burden of countless, fundamental issues. By expanding our sights to include the vast newspaper, broadside, and pamphlet literature of the Revolution and Confederation periods, we can more fully analyze a metamorphosis of the "free and open press" tradition. In the wake of these changes, the concepts "free" and "open" lost their distinctive meanings and critical power; the terms were used much more interchangeably. More significantly, both strains of argument were theoretically transformed.

A Sovereign People, A Sovereign Press

An extensive analysis of the press liberty discourse of the decade following independence reveals a comprehensive reworking of "free" press doctrine. This doctrine had been elucidated when the pre-Revolutionary crisis occasioned the bifurcation of the vague and ambivalent "free and open press" tradition. A "free" press was seen as an essential bulwark in the seemingly continual struggle between the people's liberty and ministerial power. Another key safeguard, as Whig theory had it, was Parliament. As we have seen, for Cato and for mid-century Americans, the legislature's rights were equivalent to the people's rights.¹⁸ And while there were some few hints of doubting this equation prior to the 1760s, it was in large part due to Parliament's patent failure to defend the colonists' popular rights (at least as they saw them) that some patriots were led to question the conventional wisdom.

¹⁸ See, e.g., John Trenchard and Thomas Gordon, *Cato's Letters*, 4 vols. (London: Wilkins, Woodward, Walthoe & Peele, 1724), 1:126 (#24); see also, 3:234 (#99).

Masters, Servants, and Legislative Tyranny

Perhaps the most significant democratic development of the Revolutionary era--more important even than the expansion of electoral offices or the widening of suffrage--was the devolution of the bulk of political power into the hands of popular legislatures.¹⁹ But given Parliament's recent behavior, several patriots and their philosophical friends back in England reminded all who cared to listen about the threat of legislative betrayal. According to John Adams, James Burgh had "exhausted the subject" in his *Political Disquisitions* (1775).²⁰ Not all Americans would be so wary or critical, however, and as late as 1785 we find "Lucius" admonishing those who "think that nothing, that is done by our own legislature, the representatives of ourselves, can be wrong." "As freemen....," Lucius continued, "let us...[not] pay so great a deference to our legislature, as to suppose, that they cannot err."²¹ Others took a different tack by criticizing the notion that the legislature, not the people, was the supreme power; on this matter, as on others, Blackstone was simply wrong.²² For "the only definition of a free government is, *security of person and property*: and when these essentials depend on the *will* of even a *republican legislature*, it is *absolute tyranny*."²³

¹⁹ Wood, *Creation*, 163.

²⁰ Novanglus [John Adams] quoted in Wood, *Creation*, 165.

²¹ *Massachusetts Centinel* (Boston), 28 May 1785.

²² *Freeman's Journal* (Philadelphia), 13 June 1781.

²³ *Independent Chronicle* (Boston), 11 January 1787; see also, *Massachusetts Centinel*, 28 May 1785.

The notion that "the people" were the ultimate source of political power and authority had roots in the English Civil War and was a staple of radical Whig theory. But this idea of popular sovereignty not only became more widespread in the Revolutionary era, it took on a new cast. Public officials were now "servants" and the people their "masters." More important, one begins to find suggestions of the manner of oversight implied by such a relationship. Virginia's *Declaration of Rights*, for example, proclaims in only its second clause "that all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable [i.e., answerable] to them." Benjamin Church (writing as "Leonidas") certainly thought he had the right to supervise and guide the actions of the Continental Congress; his article severely criticizing Congress's monetary policy demonstrates this. More importantly, Church wrote that he would be overwhelmed with the thought of addressing Congress, "did I not consider myself at the same time as one of the people from whom you derive your authority. Let the subjects of monarchs tremble at the feet of their sovereigns...the citizens of America...invert the systems of government which are now established in Europe, and instead of addressing you as *masters*, I presume in the name of all the honest Whigs in America to address you as the *SERVANTS* of the public." The Massachusetts Constitution (1780) simply declared that "all power residing originally in the people," all government officials "are their substitutes and agents, and are at all times accountable to them."²⁴

²⁴ Schwartz, *Bill of Rights*. 1:234; *Pennsylvania Packet*, 3 July 1779; Handlin and Handlin, *Popular Sources*, 443.

Electoral accountability, at the very least, was stipulated by the constitutional rhetoric and newspaper discourse of the Revolutionary era. But this power, as Rousseau's famous observation would have it, left Englishmen slaves on every day save election day.²⁵ What further safeguards could be instituted against the threat of legislative tyranny? The representative assembly, John Adams explained in 1776, "should be in miniature an exact portrait of the people at large."²⁶ The movement to larger legislatures that characterizes America's first constitutions can thus be recognized as an attempt to cast a wider, more representative net.

Another effort to contain legislative power can be seen in the augmentation, both qualitative and quantitative, of the instructing power. The practice of instructing representatives was by no means new to Revolutionary America. Yet their more frequent use and application beyond parochial issues to more general concerns signals a greater effort to check the popular assemblies. Indeed, instructions were not at all controversial in the late 1770s.²⁷ The declarations of rights for Pennsylvania, North Carolina, and Massachusetts all expressly protect the people's right to instruct.²⁸ With the emergence of the later constitutions of Massachusetts (1780) and New Hampshire (1783) one detects a sharpened distrust of representative legislatures.

²⁵ Jean-Jacques Rousseau, *Social Contract*, Book 3, Chapter 15.

²⁶ John Adams, *Thoughts on Government* (1776), reprinted in Charles S. Hyneman and Donald S. Lutz, eds., *American Political Writing during the Founding Era, 1760-1805*, 2 vols. (Indianapolis: Liberty Fund, 1983), 1:403.

²⁷ Wood, *Creation*, 191; Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina, 1976), 246.

²⁸ Schwartz, *Bill of Rights*, 1: 266, 287, 343.

"There is scarcely a newspaper, pamphlet, or sermon of the 1780s that does not dwell on this breakdown of confidence between the people-at-large and their representative governments."²⁹

The Press of Sovereignty

The threat of legislative tyranny and the attendant need to check even the most representative government is but one part, the negative part, of the Revolutionary change affecting the press. Conventional Whig thought considered the press, like the popular assembly, primarily as a bulwark against ministerial or royal tyranny. Or more precisely, the press was seen as a last resort should the more moderate, more continuous safeguard provided by the representative legislature fail. Pamphlets, broadsides, and especially newspapers were the place for dire warnings rallying the troops against an imminent assault on the people's liberties. This role for the press would certainly continue, but with the advent of broad-based, annual elections for larger, more representative, and more powerful legislatures, the people's duty and the press's role now centered on *maintaining* rather than simply *defending* the republics they had established. This transformation had roots in the more radical strains of Whig theory but its realization required the practical experience of committee rule and the complete saturation of society with the public concerns of the War.

These forces were perhaps most pressing in Pennsylvania and so it is no surprise that the Pennsylvania Constitution of 1776 is both the most radical state

²⁹ Wood, *Creation*. 368.

constitution and the one most clearly demonstrative of these new understandings. In this constitution, for example, we find frequent elections and rotation in office established not only as precautions, but because "by this mode...more men will be trained to public office." And it is this very "frame of government" that most clearly stipulated the incipient role of the press. As we have seen, in addition to declaring that "the people have a right to freedom of speech, and of writing, and publishing their sentiments," the Pennsylvania Convention further established that "the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."³⁰ What we might call the "press of sovereignty," the press of a sovereign people, must foster the examination of every aspect and branch of government.

As is frequently the case with constitutional pronouncements, one is left wondering what exactly they meant, or were taken to mean. The printer allied with Pennsylvania's conservative "Republican" faction--those who opposed the 1776 Constitution--maintained "that the public, whose right it is, may know every thing for and against their servants."

Indeed, Francis Bailey went further to maintain that a printer had a public duty to print everything that was sent to him, excepting only private libel.³¹

Further hints that the people were taking on a more active role in politics and in the press can be seen in the conservative responses. Some conservatives began to

³⁰ Schwartz, *Bill of Rights*, 1:266, 273.

³¹ *Freeman's Journal*, 25 April 1781; 13 June 1781. Cf. a "constitutionalist" printer's (Eleazor Oswald's) view, *Independent Gazetteer* (Philadelphia), 13 April 1782.

view the prospect of instructions, constant oversight and the "master-servant" relationship as subversive. It was in radical Pennsylvania where this reaction first appears. "It has been said often...that 'all power is *derived* from the people,' but it has never yet been said, that all power is *seated* in the people. Government supposes and requires a delegation of power."³² And this view was by no means restricted to Pennsylvania. Maryland Judge Alexander Contee Hanson, writing as "Aristides," allowed that "all power indeed flows from the people, but the doctrine that the power, actually, at all times, resides in the people, is subversive of all government and law."³³

Perhaps the best way to appreciate the new understanding of the role of a sovereign people and their relationship with the press is to examine the debates over the Massachusetts stamp act (1785) and its replacement, the advertisement tax. Admittedly, printers had a stake in both of these taxes, but we are less concerned with the purity of their motives than with the nature of their arguments. And the arguments surrounding this issue are particularly revealing for the "press of sovereignty" because the taxes were a *modest* restriction on the press. To be sure, many--and printers especially--cast the situation in the most dire terms, predicting (wrongly) that numerous newspapers would fold. But the resulting price increases did not undermine the traditional role of the press, for elites could still afford the papers and the press would remain sufficiently "free" for raising the alarm in a crisis; rather, it was the

³² *Pennsylvania Journal* (Philadelphia), 4 June 1777.

³³ *Maryland Journal* (Baltimore), 22 June 1787; see also 23 February 1787.

press of sovereignty that was at stake, for the common people would be less able to purchase "those necessary vehicles of public Information" and discourse. If "it is the right and duty of every sober, considerate citizen, to speak his mind, and to communicate what has but a probability of being serviceable," then newspaper taxes of any sort were likely to come between the common people and their duties as political masters.³⁴

One of the printers' most common refrains was that the taxes would make it more difficult for their papers to circulate "among all ranks of the people, even among those of the lowest fortune," and would "prevent the circulation of that political Intelligence, which is manifestly necessary to the virtue, freedom and happiness of the people."³⁵ It was not only printers who feared that the duties would undermine the sovereignty of the common people, however. Recognizing that the tax would "fall on the midling and poorer classes" most heavily, one correspondent maintained that "the consequences that will ensue from clogging this channel of information, must be obvious to every person of common sense, and painful for every lover of his country

³⁴ Isaiah Thomas, *To the Customers for Thomas's Massachusetts Spy...* [broadside, 3 April 1786] (Worcester, MA: I. Thomas, 1786); *Independent Chronicle*, 22 September 1785.

³⁵ Petition of John Mycall, Book Trades Collection, Box 1, Folder 7, American Antiquarian Society (photocopy of Senate File 718-5, Massachusetts State Archives); see also, Petition of Several Printers, Book Trades Collection, Oversize Manuscript Box, American Antiquarian Society (photocopy of Senate File 718, Massachusetts State Archives).

to reflect on."³⁶ Indeed, some would even blame Shay's Rebellion on the lack of political information resulting from the taxes.³⁷

If the press of sovereignty involved a significantly more active, informed, and broad-based citizenry than ever before, it remains to be seen just how far the common people could--or should--go in reviewing and criticizing the characters and policies of their public officers. The seditious libel charge brought against Philadelphia printer Eleazor Oswald by Pennsylvania Chief Justice Thomas McKean presents perhaps the most unadulterated dispute over the limits of a sovereign people's press. There were other episodes, of course. The seditious libel charges surrounding Shay's Rebellion seem promising, but only one case ever made it to trial. Moreover, the breach of peace aspect--understandably a significant factor--pollutes the case for our analysis of free political expression insofar as the case focuses on incitement to violence. In another case, Chief Justice McKean won a libel ruling against General Charles Thompson, but it was private matter. The only public angle was Thompson's memorial to Congress in which he criticized the Chief Justice (also a Congressman for Delaware); Congress found him in breach of privilege but did nothing more. By 1784 even the threat of reprimanding someone for insulting a representative would be renounced as an abuse of legislative privilege.³⁸

³⁶ *Massachusetts Centinel*, 28 May 1785; see also *Independent Chronicle*, 11 August 1785.

³⁷ *Massachusetts Centinel*, 28 July 1787, reprinting from the *Independent Gazetteer*, 14 July 1787; see also *Essex Journal* (Newburyport, MA), 20 December 1786.

³⁸ Wood, *Creation*, 367.

In comparison to these episodes, the Oswald/McKean controversy of 1782-83 presents a rich and unambiguous case.³⁹ Oswald's *Independent Gazetteer* carried two denunciations of two separate fines handed down by a court over which McKean presided. McKean arranged to have charges of seditious libel presented to the next grand jury. The grand jury, who considered themselves a "bulwark of our civil liberties," and whom others considered "a kind of representation of the people at large," examined a number of witnesses, both for and against; they returned the first bill of indictment "ignoramus," voting 16 to 3.⁴⁰ Then McKean, who was still presiding over the court, told the jurymen to reconsider and sent a second bill (for the second article). This time the jurors voted 17-2 against indicting and returned both bills.

The jurymen, in the memorial they published to complain of McKean's handling of the case, maintained their abhorrence of wanton defamations, public or private.⁴¹ "Adrian" (George Bryan, one of the presiding judges), in turn, criticized them for examining extra witnesses and suggested they refused to indict Oswald on the presumption that he was merely misinformed about the facts of the two cases criticized in the original articles.⁴² "Aristides" defended the jurors, and asked Adrian, "cannot you suppose, that some amongst them may have been averse to the

³⁹ For a general discussion of the case, see Dwight L. Teeter, "The Printer and the Chief Justice: Seditious Libel in 1782-3," *Journalism Quarterly* 45 (1968): 235-42, 260.

⁴⁰ *Pennsylvania Gazette*, 8 January 1783; *Pennsylvania Packet* 25 January 1783. Eighteenth-century juries used the term "ignoramus" to reject indictments as ungrounded due to lack of evidence.

⁴¹ *Pennsylvania Gazette*, 8 January 1783.

⁴² *Freeman's Journal*, 15 January 1783.

introduction of that accursed engine of tyranny, the doctrine of criminal libels to our courts, where it has been hitherto unknown?"⁴³ What was beyond question was that one grand jury in the early '80s, despite its "abhorrence of defamatory publications," refused to indict a printer for pointed criticism of public men and measures. Though the jury's memorial concentrates on the role of juries rather than press liberty, the broader debate occasioned by the controversy provides us with a uniquely rich and extensive discourse over press freedom--and evidence of an emerging conceptual refinement.

The Public/Private Distinction

As we had an opportunity to observe earlier, the Revolutionary and Confederation periods were significant eras for the developing bifurcation of the public and private spheres. And though personal reputation lost much of its import as a source for political authority, it retained its sacred value for the private individual. One result of these contending social forces was to place the nascent press of sovereignty in a precarious situation. It soon became clear that if the people are to use the press not merely as a bulwark against tyrannical government, but also as a medium for active, continual, and spirited contribution to public discourse, then some acceptable and relatively distinct dividing line must be fashioned between a people exercising its sovereignty and an individual scandalizing his enemies.

⁴³ *Pennsylvania Gazette*, 22 January 1783.

Thomas Jefferson, as we noted above, made clear as early as 1776 that he understood press liberty to permit only private actions for private injuries; but it was not only visionary thinkers that expressed this distinction. In 1778, the printers of the *Independent Chronicle* apologized for unintentionally defaming someone in their press: "And we beg leave to assure the Public, that while we shall preserve our Press free for Animadversions on public Characters, we shall, in future, guard against Attacks on private Reputations."⁴⁴ By the time the towns of Massachusetts met to debate the proposed Constitution of 1780, their primary concern regarding the press clause was that the immunity to censure public men and measures not be construed as an opportunity for private defamation.⁴⁵ This public/private distinction would appear again and again during the Confederation period.⁴⁶

The public/private distinction provided some means of allowing criticism of public men and measures while protecting solely private reputations, but it begged the question of what was permissible discussion of public men's private characters. Some would insist that attacks on the private affairs of public officials went beyond the constitutional provisions of Massachusetts while others went so far as maintain that even purely private characters were assailable insofar as they had a tendency to injure

⁴⁴ *Independent Chronicle*, 4 June 1778.

⁴⁵ Handlin and Handlin, *Popular Sources*, 641, 724, 728, 749-50, 789, and esp. 762.

⁴⁶ See, e.g., *Independent Gazetteer*, 13 April 1782 and 7 December 1782; *Massachusetts Centinel*, 19 January 1785 and 27 July 1787.

the community.⁴⁷ But it was in Philadelphia, in the midst of the Oswald trial, that the outer limits of a sovereign people's press liberty were most thoroughly debated.

"Junius Wilkes," writing in defense of Oswald and combining the names of England's two most notorious public critics, maintained a distinction between "circumstances...entirely of a *private* and malicious dye, with which the *public* have no business, *quasi public*," and public affairs. Comments regarding "public servants...when they even appear false and groundless, [are] rather an inconvenience upon the occasion, a kind of *damnum absque injuria* [a harm without legal injury]." Government officers understood that the public might "stain a fair character."⁴⁸ Others went further to insist that the "private vices of our governors" or even candidates for office were to be scrutinized. One final correspondent in the Oswald controversy admitted private attacks on all who were merely eligible for public office, though he, like many others, left false and malicious attacks to the jury in civil suits for private defamation.⁴⁹ Perhaps in response to discussions such as these, by 1786 Thomas Jefferson contended that personal attacks of public men are "an evil for which there is no remedy." A public servant simply had to prepare to sacrifice, among other

⁴⁷ *Boston Evening Post*, 8 December 1781; *Massachusetts Centinel*, 24 September 1785.

⁴⁸ *Independent Gazetteer*, 9 November 1782.

⁴⁹ *Independent Gazetteer*, 7 December 1782; 14 December 1782.

valuable things, his reputation.⁵⁰ And this from a man who thought slander "worse than assassination, theft, suicide or robbery."⁵¹

Despite all this, some conservatives held fast to Blackstone's contention that press liberty meant no more than a freedom from prior restraint. Once one published, one was criminally liable. In the Confederation period, however, even conservatives ignored Blackstone's claim that truth merely exacerbated seditious libel; true discussions of public men and measures were deemed permissible. By early 1791, both sides of a private libel case brought by a Massachusetts representative conceded that the public characters and measures of public figures were, in the words of the maligned legislator, "proper subjects of discussion for a free press."⁵² If the people were to be sovereign masters of their public servants, they required a more active, positive, and continuously scrutinizing press liberty: a press of sovereignty.

The Advantage of an Open Press

The "free" press doctrine that had made up half of the "free and open press" tradition of mid-century America was not the only part of that tradition to undergo major conceptual and theoretical change in the run-up to the First Amendment. The primary claim of "open" press doctrine had always been that the truth would prevail

⁵⁰ Thomas Jefferson to John Jay, 25 January 1786, *Papers of Thomas Jefferson*, 9:239; see also, Jefferson to James Currie, 28 January 1786, 9:215; and for John Jay's concurring view, see Jay to Jefferson, 5 May 1786, 9: 450.

⁵¹ Thomas Jefferson to Abigail Adams, 25 September 1785, *Papers of Thomas Jefferson*, 8:548.

⁵² John Gardiner, quoted in Maryann Yodelis Smith and Gerald J. Baldasty, "Criticism of Public Officials and Government in the New Nation," *Journal of Communication Inquiry* 4 (1979):66.

over falsehood in an open encounter. Yet the related, fail-safe argument was never far behind: Even if the press permitted some objectionable or even untrue things to be printed, the benefits of an open press far outweighed the costs. This auxiliary postulate, however, became a much more prominent fixture of press liberty discourse in the decade preceding the debates over the federal constitution. We find, in fact, a more sophisticated version of the "open" argument. The implication was largely the same--let people print what they please--but the shift in argument to a more pessimistic and provisional view of the "open" press was at once subtle and portentous.

From our retrospective position, what is perhaps most remarkable about the Confederation period is that continuing "open" press notions did not give way to a system of avowedly partisan presses, each representing a particular faction, providing truth through confrontation. There were some signs of partisan presses, especially in Pennsylvania where the competing political factions were most thoroughly established. The demographic and economic contexts were conducive for such a development, since by 1784 there were 2 or more papers in each of the 10 major cities.⁵³ Nevertheless, factionalism was still seen as a threat to republican government, and press norms continued to require that each individual printing press remain open to sentiments on every side of an issue.

What we do find emerging even in the Revolutionary period is a new skepticism regarding the positive potential of an open press. This increased skepticism

⁵³ John B. Hench, "The Newspaper in a Republic: Boston's Chronicle and Centinel, 1782-1800" (Ph.D. diss., Clark University, 1979), 11.

combined with the developing reality of non-communal, interest-based politics. The result, at its most extreme, was the first signs that the identity of authors should be made known, not necessarily to punish the authors, but so that the public knowledge of their character and interests--and not a truer, more compelling argument--would provide the single best way to overthrow their ideas. "Many good people have been lately misled....," the Albemarle Instructions (1776) noted. "Had [the authors'] names been published, their Characters would have been the antidote to their own poison."⁵⁴

The more general diffusion of this individualized, interest-based logic lay a few years in the future; the skepticism on which it was founded, however, was already broadly dispersed. There was, in fact, good reason to be dubious about the notion that truth would best falsehood given the functioning of the widespread newspaper exchange system of the 1780s. As newspapers were exchanged, free of charge, between printers, so too were errors, half-truths, and misprints; these inaccuracies were often further distorted in the transmission. But as many in the new nation observed, nothing--certainly not retractions--travelled faster than erroneous rumors.⁵⁵

As the War wound down, faith that the truth would prevail was waning. Many, to be sure, still praised a press open to all sides, despite the occasional abuses. "Where," they asked, "is that blessing of life that may not be abused!"⁵⁶ Those abuses, went the familiar phrase, were only a "partial evil for universal good." The

⁵⁴ Instructions of the Inhabitants and Freemen of Albemarle County to their Representatives in the General Assembly. *Papers of Thomas Jefferson*. 6:288.

⁵⁵ See, e.g., *Independent Chronicle*. 21 October 1790; and *Pennsylvania Packet*. 9 August 1783.

⁵⁶ *Freeman's Journal*. 10 April 1782.

ambivalence over the power of truth to prevail is most clearly evident in Eleazer Oswald's discussion of press liberty that introduces the premier issue of his *Independent Gazetteer*. Against those who maintained that an open press would allow truth and justice to prevail, Oswald replied:

Tho' this should be true, on a full Discussion, yet so much might be said to misrepresent and disguise the Truth; and such a long Train of Argumentation be necessary to make it apparent, that few People would have Leisure or Opportunity, Inclination or Ability, to go thro it, and form a right Judgment of its Merits. And thus the Liberty of the Press might be controverted to the worst Purposes, and occasion much more Evil than Good.

But in concluding the same article, Oswald's vacillation is apparent.

Let the Press be but free, and that Freedom will sufficiently check its Extravagacies---He that has Truth, Reason and Justice on his Side, will always be an Overmatch for his Adversaries of equal Abilities, and it will be in the power of one sensible Man, armed with those divine Weapons, to put a thousand of his most formidable Adversaries to right.⁵⁷

As the 1780s progressed, many would be less and less ambiguous about the dangers of abused press liberty. That is not to say that there was a movement to restrict the press; quite the opposite, as we have seen. But citizens of the new states

⁵⁷ *Independent Gazetteer*. 13 April 1782.

had a heightened appreciation of the disadvantages as well as the advantages of press liberty. "Honestus" was hyperbolic, but at least he was succinct: "Popular licentiousness will ever destroy the efforts of the most wise Governours."⁵⁸

A contributor to the *Massachusetts Centinel* echoed "Honestus's" view but posited the advantage of press liberty. "It must be owned that the *press* is sometimes applied to an ill use, and is made the channel through which falsehoods and scurilities flow in too violent a torrent; yet, however injurious the unlimited licence of printing may prove to particular persons, the liberty itself is of too great a benefit to the publick in general, to be abolished, or restrained."⁵⁹ These "private inconveniences" were the "disadvantages" of public office.⁶⁰ Englishman Richard Price was reprinted arguing that more mischief came from restraint of the press, even when its freedom led to violence; only the overt acts ought to be punished.⁶¹

Nor was it only anonymous newspaper correspondents and distant English philosophers that held these views. John Jay, reflecting on some newspaper defamations against his own private character, agreed with Jefferson that there was no remedy. "The Liberty of the Press," Jay explained,

is certainly too important to the public, to be restrained for the sake of personal Considerations; especially as it is in every man's power to

⁵⁸ *Independent Chronicle*, 11 January 1787.

⁵⁹ *Massachusetts Centinel*, 15 June 1785.

⁶⁰ *Independent Gazetteer*, 9 November 1782.

⁶¹ *Independent Chronicle*, 17 March 1785, reprinting from Price's *Observations on the Importance of the American Revolution* (1784).

frustrate Calumny, by not deserving censure; for altho Slander may prevail for a while, yet Truth and consistent Rectitude will ultimately enjoy their rights.⁶²

Jay and Jefferson, like other men of the Confederation period, were much less sanguine about the power of truth than their predecessors had been only two decades before. Press liberty could impose a heavy price on certain individuals. Yet with a bloody war for liberty behind them, they were not likely to dicker about the cost. Later, others would see things differently.

Antifederalists and Federalists

The debate between proponents of the new federal Constitution and their adversaries provides an opportunity to deepen our analysis of press liberty. It has the preponderance of abstract rhetoric typical of constitutional debates, but there is considerable relevant discourse, I have found, when one sifts through the mountain of primary literature. The secondary literature is of little help, however. Although there is plenty written about the victors, the Federalists themselves had every political incentive to ignore the issue of press liberty as much as possible, and the secondary works reflect this paucity. Concerning the Antifederalists, who discussed press liberty frequently if not exhaustively, most of what has been written is dismissive or distorted.

⁶² Jay to Jefferson, 5 May 1786. *Papers of Thomas Jefferson*, 9:450.

Long before Cecilia Kenyon labelled them "men of little faith," the Antifederalists were being belittled from a perspective sympathetic to the Federalists.⁶³

Fortunately, the Antifederalists have seen something of a resurgence recently. Herbert Storing's *What the Antifederalists were For* takes the Antifederalists seriously, examining and explaining their views sympathetically. Michael Lienesch's "In Defense of the Antifederalists" makes sense of Antifederalist views by placing those views within the conventional wisdom of the 1780s. Most recently, Christopher M. Duncan has placed the Antifederalists within a "communitarian" tradition dating back to the Puritans.⁶⁴ While these efforts to express the "different faith" of the Antifederalists are welcome, they are only a beginning.

The literature concerning the history of press liberty has been perhaps even less kind to the Antifederalists. Leonard Levy minimizes their arguments as mere political manipulation in his most recent book on the subject; his thirty-year-old collection of primary sources on press liberty all but ignores the Antifederalists.⁶⁵ David Rabban, in a much-needed rejoinder to Levy, marginalizes the Antifederalists in favor of their

⁶³ For a brief discussion of this historiography, see Michael Lienesch, "In Defence of the Antifederalists," *History of Political Thought* 4 (1983): 65-87, esp. 65-8, 74-5, 81-2. For Kenyon's argument, see Cecilia Kenyon, "Men of Little Faith: The Anti-federalists on the Nature of Representative Government," *William and Mary Quarterly*, 3rd Series, 12 (1955): 3-43.

⁶⁴ Herbert J. Storing, *What the Anti-Federalists Were For*, vol. 1 of *The Complete Anti-Federalists*, 7 vols., ed. Storing (Chicago: University of Chicago Press, 1981); Lienesch, "Defence"; Christopher M. Duncan, *The Anti-Federalists and Early American Political Thought* (DeKalb: Northern Illinois University Press, 1995).

⁶⁵ Levy, *Emergence*, esp. 227-233; Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* (Indianapolis: Bobbs-Merrill, 1966).

ideological descendants, the Democratic-Republicans of the 1790s.⁶⁶ The resurgence of Antifederalist studies has done little to bridge this lacuna in the literature; Lienesch and Duncan do not descend to the appropriate level of specificity,⁶⁷ and Storing simply presumes that the "general view" was the Blackstonian belief "that freedom of the press meant a prohibition against prior restraint."⁶⁸

The People and a Declaration of Rights

Levy is right to point out that the lack of a declaration of rights in the proposed federal constitution was a powerful political argument for the Antifederalists. This, however, is no reason to dismiss their arguments; rather, it demonstrates that declaring and defending certain rights, press liberty chief among them, was a deep and widespread concern. The difference between Antifederalists and Federalists can be most readily seen in the Antifederalist suspicion of the Federalists' novel claim that the new national government would only have those powers expressly given to it: all other powers and rights would implicitly be reserved to the people and the states.⁶⁹ The Antifederalists maintained the conventional Whig view that governmental power

⁶⁶ David M. Rabban, "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," *Stanford Law Review* 37 (1984/5): 795-856, esp 841-8. But cf. David A. Anderson, "The Origins of the Press Clause," *U.C.L.A. Law Review* 30 (1983): 455-541, esp. 466-86.

⁶⁷ But cf. Michael Lienesch, "Thomas Jefferson and the American Democratic Experience: The Origins of the Partisan Press, Popular Political Parties, and Public Opinion," in *Jeffersonian Legacies*, ed. Peter S. Onuf (Charlottesville: University Press of Virginia, 1993), 316-339.

⁶⁸ Storing, *Complete Anti-Federalists*, 4:215n3. Storing's presumptive reading apparently relies on a single ambiguous Antifederalist statement and James Wilson's Blackstonian interpretation presented in the Pennsylvania Ratifying Convention. See, 4:206-7, 215n3.

⁶⁹ See especially Hamilton's *Federalist* 84.

continuously and inexorably struggles to expand. This logic led them to see potential threats to press liberty in several clauses of the Constitution, even in the federal government's role in observing the law of nations.⁷⁰ But underlying these differences over the Constitution and the lack of a declaration of rights, Federalists and Antifederalists had profoundly contrasting views of the role of the people.

"The quarrel," Wood rightly observes, "was fundamentally one between aristocracy and democracy."⁷¹ Disdainful of those they saw as inferiors, Federalists sought to systematize or institutionalize virtue, believing that their Constitution "put to an end the need for [civic] activism."⁷² The neutralized factions of Madison's tenth *Federalist* would allow public-spirited gentlemen to prevail.⁷³ At the risk of oversimplifying, we can say that what the Federalists wanted were voters. The virtue of these voters would not lay in traditional republican vigilance, but rather in an obligatory respect for their public officers once chosen.

The Federalists, and James Wilson especially, were the ones who had first and most doggedly argued that the people, and not the states, were the ultimate sovereigns in America. As nationalists, they were concerned to combat the state's rights claims of the Antifederalists. And thought there is something "decidedly disingenuous" in the

⁷⁰ See, e.g., "Cincinnatus" I. *New York Journal*, 1 November 1787.

⁷¹ Wood, *Creation*, 485.

⁷² Michael Lienesch. *New Order of the Ages: Time, the Constitution, and the Making of Modern American Political Thought* (Princeton: Princeton University Press, 1988), 162.

⁷³ Russell Hanson, *The Democratic Imagination in America: Conversations with our Past* (Princeton: Princeton University Press, 1985), 69.

Federalists appeal to the people, we should once again be careful to look beyond the political motives to assess the theoretical significance of this conceptual shift.⁷⁴ In fact, Wilson does see the people as the *ultimate* sovereigns, but they are sovereign only at that extreme. His Blackstonian view of the press, with its support of punishment for printed criticism of public men and measures, suggests as much.⁷⁵ Nevertheless, the increasing power and stature of the language of the people's sovereignty is evident in the fact that it is this language that ardent Federalists were forced to expropriate.

Though they had little faith in the Federalists' national representative government, the Antifederalists saw the need for a citizenry that was not only ultimately sovereign but was also actively involved, informed, and vigilant. Virginia Antifederalists, for example, included in a list of proposed amendments a clause that would protect the people's right to instruct their representatives.⁷⁶ When a similar amendment was proposed in the First Congress, many Federalists feared that legislators would be bound by such instructions.⁷⁷ The Antifederalists, on the

⁷⁴ Wood, *Creation*, 562.

⁷⁵ Thomas Lloyd, ed., *Debates of the Convention, of the State of Pennsylvania, on the Constitution proposed for the government of the United States* (Philadelphia: Lloyd, 1788), 56 (1 December 1787).

⁷⁶ George Mason to John Lamb, 9 June 1788, reprinted in Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution* (hereafter *DHRC*), 17 vols. (Madison: State Historical Society of Wisconsin, 1976-), 9:821.

⁷⁷ Helen E. Veit et al., eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore: Johns Hopkins University Press, 1991), 150-3 (reprinting from the *Congressional Register* for 15 August 1789). For an earlier exchange over instructions, see *Maryland Journal* (Baltimore), 22 June, 13 July, 3 August 1787.

contrary, were fearful of the end of meaningful political citizenship, especially for members of the "midling" class such as themselves.

These contrasting views of the people's proper role in the new republic led in turn to differing views of a declaration of rights. Federalists wanted to avoid the issue altogether, viewing it as mere obstructionism, and they frequently dismissed such "parchment barriers" as useless.⁷⁸ Yet in those rare moments when one of them discussed what impediments there were, the reasoning is revealing. "The only barrier against tyranny, that is necessary in any State," Noah Webster explained, "is *the election of Legislators* by the yeomanry of that State. Preserve *that*, and every privilege is safe."⁷⁹

For the Antifederalists, a charter of rights was not useless, for it would serve both a practical, legal function and a symbolic, educational function. It would at once be a "test" of all national laws and a "plain, and pithy" reminder of the country's fundamental principles.⁸⁰ It was the "legal check" on majority tyranny that Thomas Jefferson had to explain to James Madison in March, 1789; by June, Madison would be lecturing the House on it.⁸¹ The Minority of the Maryland Convention explained the use of a press clause thus: "In prosecutions in the federal courts for libels, the

⁷⁸ See, e.g., "Uncus," *Maryland Journal*, 9 November 1787; James Madison to Thomas Jefferson, 17 October 1788, *Papers of Thomas Jefferson*, 14:19; and *The Federalist* 84.

⁷⁹ "America" [Noah Webster], *New York Daily Advertiser*, 31 December 1787; see also, "J.B.F.," *Maryland Journal*, 23 February 1787.

⁸⁰ *Independent Gazetteer*, 2 October 1788, reprinting from the *Virginia Independent Chronicle* (Richmond), 18 June 1788.

⁸¹ Jefferson to Madison, 15 March 1789, *Papers of Thomas Jefferson*, 14:659; Veit et al., eds., *Creating the Bill of Rights*, 84 (reprinting from the *Congressional Record* for 8 June 1789).

constitutional preservation of this great and fundamental right, may prove invaluable."⁸²

In its symbolic and educative role, a declaration of rights could sanctify and confirm pre-existing natural rights. "We do not by declarations change the nature of things, or create new truths, but we do give existence, or at least establish in the minds of people truths and principles which they might never otherwise have thought of, or soon forgot."⁸³ With the Constitution ratified, even Madison had begun to see things differently. More than merely reminding the people, he argued, "the political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."⁸⁴ While most Federalists were concerned with giving and reserving powers, the Antifederalists were keen to protect and substantiate pre-existing rights.

The Role of the Press

Chief among the fundamental rights the Antifederalists wanted to safeguard and confirm was press liberty. And while it is largely true that "so far as we can tell,

⁸² Address of the Minority of the Maryland Convention, *Maryland Gazette* (Annapolis), 1 May 1788.

⁸³ "The Federal Farmer," Letter XVI, reprinted in DHRC, 17:343. For earlier examples of declarations "defining and ascertaining" rights, see *The Essex Result* (1980), reprinted in Handlin and Handlin, eds., *Popular Sources*, 324, 332; and, *Independent Gazetteer*, 19 October 1782.

⁸⁴ Madison to Thomas Jefferson, 17 October 1788, *Papers of Thomas Jefferson*, 14:20. See also, Veit et al., eds., *Creating the Bill of Rights*, 82 (reprinting Madison from the *Congressional Record* for 8 June 1789); and [Madison], "Public Opinion," *National Gazette* (Philadelphia), 19 December 1791.

Congress never debated the merits or meaning of freedom of the press," we do have some evidence of a conservative reaction to Antifederalist views of the press.⁸⁵ The Senate, meeting behind closed doors, saw the introduction of a motion to amend the press clause to protect press liberty "in as ample a manner as hath at any time been secured by the common law." As the common law originated in England, this language would have invited Blackstonian interpretations. The Senate rejected this motion the same day it accepted one to include common law rules in the Seventh Amendment.⁸⁶ Still, some clearly wanted to narrow the definition of press liberty. James Wilson, for one, maintained that "what is meant by the liberty of the press is, that there should be no antecedent restraint upon it." Others clearly held similar views.⁸⁷ Finally, the conservative Pennsylvania Constitution of 1790 allowed for subsequent punishment of public libel, though it made truth a defence and established the jury as the finders of law as well as fact. John Adams interpreted the Massachusetts Constitution to warrant similar provisions.⁸⁸

The resurgence, or at least resurfacing, of qualified Blackstonian views of press liberty corroborated escalating Antifederalist fears of a Federalist attack on the press. That freedom of the press was a central concern for the opponents of the constitution

⁸⁵ Anderson, "Origins," 485.

⁸⁶ Anderson, "Origins," 499.

⁸⁷ James Wilson in Lloyd, *Debates*, 56; also *DHRC* 9:1136, 16:202; and Alexander J. Dallas, *Reports of Cases Ruled and Adjudged in the courts of Pennsylvania, before and since the Revolution* (Philadelphia: T. Bradford, 1790), 325.

⁸⁸ Anderson, "Origins," 490n211; John Adams to Thomas Cushing, 7 March 1789, reprinted in Frank W. Grinnell, ed., "Hitherto Unpublished Correspondence between Chief Justice Cushing and John Adams in 1789," *Massachusetts Law Quarterly* 27 (1942): 16.

is clear from one sarcastic Federalist's "Receipt [i.e., recipe]" for an Antifederalist essay, which included, among other terms, "WELL-BORN, nine times--*Aristocracy*, eighteen times--*Liberty of the Press*, thirteen times repeated."⁸⁹ The Antifederalists had reason to be concerned. In addition to the fact that Federalists dominated most of the presses and were pressuring printers to require anonymous Antifederalists to surrender their names, the new Postmaster General effectively cut off newspaper circulation between the North and the South of the Confederation. Against this background it is perhaps not surprising that the Antifederalists took to enlarging upon the advantages of a sovereign press.

The Antifederalist Press of Sovereignty

The framing of a new government is the most important step a sovereign people can take; thus, it was only natural for those critical of the Constitution to stress the role of the press as a critical medium for public discourse. In explaining his editorial policy, Matthias Bartgis of the *Virginia Gazette and Winchester Advertiser* observed "that it must be evident to the least thoughtful, that the *body of the people* should be well-informed of the nature of any [proposed] Government." Adhering to the public/private distinction, Bartgis assured his readers that "*private characters* shall be secure from the poisoned shafts of envy and malice, cast through the medium of his Press."⁹⁰ Jefferson, an advocate of the Constitution provided it contained a

⁸⁹ *Pennsylvania Gazette*, 14 November 1787.

⁹⁰ *Virginia Gazette and Winchester Advertiser*, 7 March 1788; see also, "Centinel" II [Samuel Bryan], *Freeman's Journal*, 24 October 1787.

declaration of rights, would have altered Madison's proposed federal press clause to protect against "false facts affecting injuriously the life, liberty, property, or reputation of others."⁹¹

Antifederalist voices took to emphasizing and extending the conception of press liberty that I have been calling the "press of sovereignty." Some of the most radical would assert the common people's role as masters in unequivocal terms. Quoting his own state constitution to make his point, one anonymous newspaper correspondent wrote, "the magistrates can, & must be accountable to the people---they are our 'substitutes and agents,' that is, acting under & for us.... We chose them to deliberate for us, not that they were wiser or knew more than we; but because we cannot spare time."⁹² Others defended Antifederalist newspaper correspondents from often offensive and threatening responses by stressing the duty of citizens to contribute to the public discourse. "For my part," wrote "A Citizen" of Georgia, "I always thought it not only the indubitable right, but the bounden duty, of every citizen freely to declare his sentiments when anything of consequence to this country was in agitation."⁹³

The Antifederalists also wanted to establish that the press was not solely a medium for the elite. "[The press in a free state] gives all the people an opportunity

⁹¹ Jefferson to James Madison, 28 August 1789. *Papers of Thomas Jefferson*, 15:367; Jefferson also excluded false facts "affecting the peace of the confederacy with foreign nations."

⁹² Undated letter to Isaiah Thomas for the *Worcester Magazine* [1786-8], Isaiah Thomas Papers, Box 15, Folder 3, American Antiquarian Society.

⁹³ *Gazette of the State of Georgia* (Savannah), 6 December 1787. See also, e.g., *Independent Gazetteer*, 27 October 1787, and A Friend to Harmony, *Candid Considerations on Libels* (Boston: Freeman and Andrews, 1789), 3.

to learn and be wise, to choose or refuse, in all important matters." The channel of the press, another Antifederalist asserted, enabled "fellow-citizens...to inform the minds and enlarge the understandings of the bulk of the people, as to those leading and essential points which contain every thing dear to them as men and members of society."⁹⁴ Finally, Thomas Jefferson maintained--even before the Constitutional Convention--that "the people are the only censors of their governors." To keep the people from even momentary errors, though, it was critical to "give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people."⁹⁵

In addition to placing increased emphasis on certain aspects of a press of sovereignty, the Antifederalists expanded the argument by explaining the heightened significance of a vigorous press in an extensive territory such as the United States. "By means of [a free press]," the "Federal Farmer" insisted, "the people in large countries ascertain each others sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures." "Centinel" concurred. "In a confederated government of such extent as the United States, the freest communication of sentiment and information should be maintained, as the liberties, happiness, and welfare of the union depend upon a concert of counsels." Commending the newly ratified Bill of Rights, James Madison concluded, "whatever

⁹⁴ *Independent Gazetteer*, 2 October 1788, reprinting from the *Virginia Independent Chronicle* (Richmond), 18 June 1788; Mentor, *Virginia Gazette and Petersburg Intelligencer*, 3 April 1788. See also Richard Henry Lee to Edmund Pendleton, 26 May 1788, reprinted in *DHRC*, 9:879.

⁹⁵ Jefferson to Edward Carrington, 16 January 1787, *Papers*, 12:48.

facilitates a general intercourse of sentiments, as...a free press, and particularly a *circulation of newspapers through the entire body of the people*...is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too extensive."⁹⁶

Most Federalists were understandably loath to give more ink to the issue of press liberty, one of their opponents' most popular issues. What hints we do have suggest they had little faith in the common people's ability to be anything more than obedient voters. Conservatives had in fact long been skeptical about non-elites taking part in political activity. The conservative *Essex Result* (1778) posited that "the bulk of the people...are so situated in life...that they cannot have time for, nor the means of furnishing themselves with proper information, but must be indebted to some of their fellow subjects for the communication," with the result that they were prey to the "artful demagogue."⁹⁷ Noah Webster, the reader will recall, thought the election of their legislators a sufficient role for the people. Chief Justice McKean argued in Pennsylvania's ratifying convention that the dissent of a majority need not be included in the published proceedings of a legislature since "the members of which are from time to time responsible to their constituents."⁹⁸ "Cæsar," however, was the most explicit, belittling the doctrine that

⁹⁶ "Federal Farmer," *Additional Letters*. Letter XVI, reprinted in *DHRC*, 17: 350; "Centinel" XVII. *Independent Gazetteer*, 9 April 1788; *National Gazette*, 19 December 1791.

⁹⁷ Handlin and Handlin, *Popular Sources*, 333.

⁹⁸ *Independent Gazetteer*, 3 December 1787.

all power is seated in the People. For my part, I am not much attached to the *Majesty of the multitude*.... I consider them in general as very ill qualified to *judge* for themselves what government will best suit their peculiar situations.... [Antifederalists] will admit, I presume, that men of good education and deep reflection, only, are judges of the *form* of a Government.

The people would do best to maintain "a tractable and docile disposition."⁹⁹ The Federalists then saw little need for conceiving of press liberty as a vigorous medium for a sovereign people.

The Antifederalists and the Advantages of the Press

Critics of the Constitution were more likely than its supporters to stress the advantages of an active press. Thomas Jefferson, both an advocate of the Constitution and a critic of its lack of a bill of rights, wrote to James Madison championing amendments securing, among other things, freedom of the press. "The few cases wherein these things may do evil, cannot be weighed against the multitude wherein the want of them will do evil."¹⁰⁰ The Antifederalists, more importantly, were not merely being naive about the benefits of a unrestricted press. "Newspapers may sometimes be the vehicles of abuse, and of many things not true," the "Federal

⁹⁹ "Cæsar" II. *Daily Advertiser* (New York), 17 October 1787.

¹⁰⁰ Jefferson to Madison, 31 July 1788, *Papers of Thomas Jefferson*, 13:442; see also, Jefferson to Noah Webster, Jr., 4 December 1790, *Papers of Thomas Jefferson*, 18:132.

Farmer" conceded, "but these are but small inconveniences, in my mind, among many advantages."¹⁰¹

"A Friend to Harmony" was even more forthright about the failings of an "open" press, acknowledging that a vindication rarely travels as quickly or as far (or with as much entertainment value) as calumny. To make matters worse, many readers merely "conform to the publick opinion" without sufficient reflection. But rather than deriding the people and doubting the value of the press, "A Friend" recommended an open press and exhorted the public to be more skeptical.¹⁰²

Federalists were more likely than their critics to stress the disadvantages of an unrestricted press. When Eleazor Oswald published a defense of his alleged libel of a Federalist writer, thus arguably attempting to sway potential jurors, Chief Justice McKean seized the opportunity to both jail Oswald for contempt of court and lecture him on press liberty. While the case itself is too convoluted to serve our purposes here (though we may be sure that it served McKean's purposes satisfactorily), the Chief Justice's language is revealing. An ardent Federalist, McKean claimed that an arsonist's damages to one's house "are easily repaired" but "the injuries which are done to character and reputation seldom can be cured" because "the wide circulation of public prints must render it impracticable to apply the antidote as far as the poison

¹⁰¹ "Federal Farmer." *Additional Letters*, Letter XVI, reprinted in *DHRC*, 17: 350.

¹⁰² A Friend to Harmony. *Candid Considerations*, 8, 9, 17; see also, Thomas Jefferson to Edward Carrington, 16 January 1787, *Papers of Thomas Jefferson*, 11:49.

has been extended." Ultimately, McKean sanctioned a Blackstonian interpretation of press liberty, both public and private.¹⁰³

The Federalist suspicion of an open press was in part a function of their suspicion of an actively sovereign common people. Federalist printer Benjamin Russell excluded from his *Massachusetts Centinel* any Antifederalists who refused to provide their names. Defending this policy, Russell insisted it furnished

a timely caution against those, who secure, in not being known, even to the printer, would foist into our papers their assertions and falsehoods, to excite jealousy and mistrust--Which though the *wise* would consider as too glaring to be hurtful, and too weak to merit an answer, yet the less informed would believe, and adopt as truth.¹⁰⁴

In the seventeen-eighties, Americans all across the political spectrum had grown less likely to celebrate the unmitigated blessing of an open press. Still, whereas the Antifederalists took the disadvantages of an open press to be call for a more informed, more active citizenry, the Federalists saw the need to restrict and narrow press liberty.

Individual Liberty, Majority Tyranny

The Privatization of Liberty

The Antifederalists' vision of a sovereign people censuring their public servants through an unrestricted press amounted to an assault on the Federalists' professed hope

¹⁰³ Dallas, *Reports*, 324, 5. See also, *Federal Gazette* (Philadelphia), 12 February 1789; and *Gazette of the United States* (New York), 13 March 1790.

¹⁰⁴ *Independent Gazetteer*, 4 December 1787; see also, *Massachusetts Centinel*, 10 November 1787.

that the new Constitution would provide an opportunity for a natural elite to legislate, unmolested, for the nation. Reflecting on the Antifederalists' rebuke of these aristocratic pretensions, Gordon Wood reveals a startling dimension to their arguments. By attacking the ability of any aristocracy, natural or otherwise, to speak for the public good, and insisting that the common people speak for themselves--or better yet, represent themselves--the Antifederalists were undermining the "basic similarity of interest for which an empathic elite could speak."¹⁰⁵ "Consequently," Wood has recently concluded, "there was no one in the society equipped to promote an exclusive public interest that was distinguishable from the private interests of people."¹⁰⁶

Wood is on solid ground here. It is true that "without fully comprehending the consequences of their arguments the Antifederalists were...undermining the social basis of republicanism."¹⁰⁷ Yet what we should not lose sight of here is that the Federalists, their recourse to traditional notions of social homogeneity notwithstanding, were also positing an increasingly liberal, interest-based politics. This is perhaps evident, theoretically at least, in Madison's *Federalist* 10 and 51. It is also unmistakable in the much more practical and widespread Federalist efforts to unmask Antifederalist essayists. To be sure, these efforts were part of a broader and largely transparent tactic of intimidation and pressure. This, for example, explains the

¹⁰⁵ Wood, *Creation*, 491.

¹⁰⁶ Wood, *Radicalism*, 256; see also, Wood, "Interests and Disinterestedness in the Making of the Constitution," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 69-109.

¹⁰⁷ Wood, *Creation*, 492.

frequent suggestions that those critical of the Constitution must be foreign or domestic enemies.¹⁰⁸ But a more compelling argument was required since the Federalists were breaking with the long-standing tradition of anonymous authorship. Rather than simply providing a more convincing case and allowing truth to best falsehood in an open encounter, Federalists were rebutting critical essays by describing the individual interests of the author.

Pre-Revolutionary Tories had been accused of being the "tools" of ministerial power's assault on public liberty, but the Federalists were taking these sorts of claims to another, more individualized level. The authors and popularizers of Antifederalist sentiments, went the claim, were averse to the proposed constitution due to their particular economic and political interests in the continued prestige and power of state governments. Their pensions and salaries were at risk.¹⁰⁹ At its most explicit, this view insisted on discovering the "REAL designs" of each "hidden enemy," for fear that--"notwithstanding the absurdity and falshood" of his remarks--"some, who supposing them to be the result of honest enquiry of some friend to our country, may give them attention."¹¹⁰ An author's individual interests, not his public argument, were for the first time emerging as the central concern.¹¹¹

¹⁰⁸ See, e.g., *Independent Chronicle*, 4 October 1787; *Boston Massachusetts Gazette*, 16 October 1787; and *Independent Gazetteer*, 2 November 1787.

¹⁰⁹ See, e.g., *New Haven Gazette* 22 November 1787; and "The Landholder" VIII, *Connecticut Courant* (Hartford), 24 December 1787.

¹¹⁰ *Massachusetts Centinel*, 10 October 1787; for an editor defending a contributor as not "concerned" in any present or future administration, see *Massachusetts Gazette*, 16 October 1787.

¹¹¹ For a telling exchange over the relative importance of an author's "reasonings," see *Independent Gazetteer*, 7 November, 4, 5 December 1787.

The decline of a republican common good in the face of the developing contest between individuals and their interests can also be seen in the first hints of people subscribing to two newspapers for the avowed purposes of hearing both sides. In the heated controversy between critics and supporters of the Constitution, a single newspaper, some suggested, could no longer be expected to be open and impartial enough to present opposing arguments fairly. "TWENTY-SEVEN SUBSCRIBERS" wrote to Antifederalist editor Thomas Greenleaf, observing that "a number of gentlemen" subscribed to his *New York Journal* in addition to their customary, Federalist newspapers "merely for the variety and to have an opportunity of seeing the arguments as fully as possible on both sides."¹¹² And in a portentous item reprinted from an English paper the day before the Bill of Rights became part of the Constitution, the *Gazette of the United States* published a novel, even modern, understanding of the open press. "The great variety of the papers having separate interests and separate employers, often, by contradicting each other, set mutual errors to rights."¹¹³

Pace Wood, Federalists *as well as* Antifederalists were appealing to certain "liberal" ideas of interested individuals at the expense of more traditional, republican notions of a single, objectively identifiable public good. This observation serves to underscore the fact that though the coexistence of liberal and republican concepts in the same political discourse remains "a puzzle yet to be solved," the solution lies in

¹¹² *New York Journal*, 1 January 1788.

¹¹³ *Gazette of the United States* (Philadelphia), 14 December 1791.

appreciating the fluidity, and not the distance, between them.¹¹⁴ Given this fluidity, it is perhaps not surprising that the most prescient thinker, the one who most clearly saw the nascent threats to individual liberty, was a Federalist-turned-Republican, James Madison.

The Concept of Majority Tyranny

In pre-Revolutionary American thought, public liberty had been the common concern of the people in their struggle with governmental power. In post-Revolutionary America, public liberty *per se* was no longer the issue: The people were the government. Whereas the communal liberty had been the concern of every individual, individual liberty was now the concern of every member of the community. "THE Liberty of every man is not only dear to *himself*, but dear to *his fellow citizens*." Eleazer Oswald proclaimed in his second controversy with Chief Justice McKean. "Oppressions and injuries to *one* individual in the great line of equal and fundamental privileges, are affecting to the *whole* community."¹¹⁵ In the traditional politics of England, the people would unite to defend printers and authors opposing the government; in the new politics of America, controversial printers and authors run the risk of being "severely handled, not by the government, but by the populace."¹¹⁶

¹¹⁴ Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York: New York University Press, 1984), 21. For significant efforts to appreciate this fluidity, see Michael Lienesch, *New Order*, and Michael Lienesch, "Thomas Jefferson and the American Democratic Experience."

¹¹⁵ *Pennsylvania Packet*, 26 July 1788.

¹¹⁶ "The State Soldier" III, *Virginia Independent Chronicle*, 12 March 1788.

No one saw the threats to liberty more clearly than James Madison. His shift from Federalist to Republican reflected not a change of political theory so much as a change in the circumstances about which he theorized.¹¹⁷ Madison recognized that the threats to liberty are many and do not emanate from a single source. To be sure, even in the new federal republic there still "may be occasions on which the evil [of oppression] may spring from [the Government]." But the majority was the real threat. As he explained to Jefferson,

wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.¹¹⁸

Madison reiterated this same theme the next summer when he was presenting his draft amendments to the House.¹¹⁹ Those amendments included a clause to be added to the limitations on the states found in Art. I, Sec. 10: "No State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases." When Antifederalist Thomas Tudor Tucker

¹¹⁷ For a similar interpretation, see James H. Read, "'Our Complicated System': James Madison on Power and Liberty." *Political Theory* 23 (1995): 452-75.

¹¹⁸ Madison to Jefferson, 17 October 1788. *Papers of Thomas Jefferson*, 14:19.

¹¹⁹ Veit et al., eds., *Creating the Bill of Rights*, 77, reprinting from the *Congressional Register* for 8 June 1789.

sought to strike this clause on the grounds that the Constitution "interfered too much already" with the states, Madison called the clause "the most valuable amendment on the whole list."¹²⁰ "These abuses," he said, "are most likely to take place under the State governments." Some state constitutions permitted the "rights of the community" to override press liberty and other "particular rights." Indeed, Madison had observed the actions of "overbearing majorities" in his own and other states.¹²¹ The House passed both of Madison's press clauses with nothing more than a slight change in wording. The Senate changed the first press clause to the now-familiar "Congress shall make no law..." language and "passed in the negative" Madison's prized state-limiting clause.¹²²

Though the First Amendment that the country ratified in 1791 was a far cry from the clause, or rather clauses, Madison would have wanted, it lives on in American press liberty rhetoric. It was his fear of majority tyranny, however, that most clearly expresses the evolving conceptions of press liberty espoused by the Antifederalists while at the same time illustrating the nascent privatization of liberty. Majority tyranny presented a dangerous unification and adaptation of both the "press of sovereignty" and "advantage" arguments I have sought to elucidate. An "overbearing majority" was nothing more than the bulk of the sovereign people

¹²⁰ *Gazette of the United States* (New York), 22 August 1789; Veit et al., eds., *Creating the Bill of Rights*, 188, reprinting from the *Congressional Record* for 17 August 1789.

¹²¹ *New York Gazette of the United States*, 22 August 1789; Veit et al., eds., *Creating the Bill of Rights*, 85, reprinting from the *Congressional Record* for 8 June 1789; Madison to Jefferson, 17 October 1788, *Papers of Thomas Jefferson*, 14:19.

¹²² *Journal of the First Session of the Senate* (New York: Gales and Seaton, 1789), 72.

actively participating, though in an imperious manner. Rather than suffer the disadvantages of an open press, such a majority seeks to restrict untrue, or at least unpopular, ideas. The net result, Madison foresaw, put individual liberty at risk.

Conclusion

The momentous political, economic, and social transformations of the Revolutionary era occasioned pivotal reformulations of the inherited press liberty tradition. As the "press of freedom" was theoretically challenged, "open" press arguments returned to patriot America with an increased recognition that press liberty must permit even the most unpopular sentiments. The radical remaking of American society brought increased popular participation in government and in the economy. The accelerated separation of public and private spheres prompted a bifurcation between public and private liberties.

The "free and open press" tradition was transformed. The distinct, rhetorical power of the terms "free" and "open" was lost as they became blurred and largely synonymous, but more consequential reformations were under way in the doctrines they had signified. Radical Americans of the Confederation period took up the task of making sense of profound changes in the very nature of government and the implications they had for the role of the press. A sovereign people required a steady flow of political information, constructive as well as critical, in order to be competent masters of their public servants. To make this practicable, an effective if rough distinction had to be drawn between a government official's public character and his

private life. Finally, as factionalism turned to calumny of the people's chosen servants, a more considered appreciation of the advantages of the press was fashioned.

In response to the Federalists' proposed constitution and their narrower understanding of press liberty, Antifederalists stressed and extended these evolving conceptions of press liberty. In an extensive country, a vigorous, pervasive press was all the more essential. For conservative Federalists, an abused political press was an argument for legal sanctions; Antifederalists instead sought a better informed populace in an effort to improve an already advantageous press. In response to Federalists' attempts to systemize virtue, their critics emphasized the continued need for citizen vigilance, participation and dialogue. These competing views, when combined with the emergence--on *all sides*--of a more individualized, interest-based politics, laid the groundwork for the more divisive politics of the 1790s.

Within this highly fluid context, some Antifederalists had sufficient prescience to anticipate the threat of majority tyranny, especially in light of the Federalists' aristocratic politics. A sarcastic "Philadelphiensis" envisioned the Federalist future--and the Sedition Act (1798)--all too clearly.

I wonder that our *well born* should allow such mean fellows to write against this their government; such base wretches ought not to live in the same country with *gentlemen*; and as soon as our new government is confirmed, these vile enemies to its *splendor and dignity*, shall quit their carping, I'll warrant them; a federal soldier with a fixed bayonet will soon give such daring dogs their quietis [sic]. Ah! what glorious days

are coming; how I anticipate the brilliancy of the American court!

...here is the president going in state to the senate house to confirm the law for the abolition of the liberty of the press. Men and brethren will not these things be so?¹²³

They would be so, as Madison, former Antifederalists, and other Jeffersonian Republicans soon discovered.

¹²³ "Philadelphiensis." *Independent Gazetteer*. 7 November 1787.

CHAPTER 6. THE EMERGENCE OF MODERN DEMOCRATIC PRESS LIBERTY

Conceptual innovation, as we have seen, is the frequent result of contradictions being exposed or created due to criticism and debate. On these grounds alone, the decade or so after the ratification of the Bill of Rights would be worthy of study. More importantly for our central concerns, increased newspaper partisanship and especially the controversy over the Sedition Act precipitated a sustained and probing debate over the meaning of press liberty in a republic.

Since the analysis in Chapter 1, we have had an opportunity to observe the role various types of contextual shifts can play in conceptual change. Perhaps most explicitly in Chapter 4, we observed that contextual shifts often occasion the emergence of contradictions in existing and manifestly coherent political discourses and traditions. The emerging practical political context of the 1790s was certainly one that was apt to lead to bitter divisions and to foster trenchant criticism. Though establishing the Constitution brought different definitions of republicanism to light in the 1780s, the debate was still largely abstract and institutional. As we noted in Chapter 5, Federalists often left the issue of press liberty alone, praising it broadly and insisting the Constitution did not touch it. Even the contest over the Bill of Rights failed to furnish congressional debate over the meaning of the "freedom of the press." The controversy over the Sedition Act, to the contrary, cut right through such vague agreement. Yet this dispute was part of a broader context that forced even those who had once agreed on many general principles--Madison and Hamilton provide the

classic example--to differ profoundly when those same principles had to be made real during the course of governing the new republic.

The practical political context, however, is not the only one critical to understanding the divisive politics and conceptual innovation of the 1790s. For the early years of the new republic the general ideological context was also critical. Here, though, it is actually the shared beliefs and not the divergent policies that are most illuminating. As John Howe demonstrated some thirty years ago, the common republican presuppositions of the period underwrote a political life that "was gross and distorted, characterized by heated exaggeration and haunted by conspiratorial fantasy. Events were viewed in apocalyptic terms with the very survival of republican liberty riding in the balance."¹ Americans of the 1790s were very much aware of the historical juncture in which they lived and saw all around them reason for despair. Every good republican knew that history had proven republics to be the most vulnerable of all political systems. And now the virtue and broad equality that sustained republicanism seemed to be waning while factionalism, the death knell of a republic, was unmistakably waxing. It seemed the American republic was on the road to a premature demise.

But if the first decade after the Bill of Rights was given to a divisive and distrustful politics, it is the controversy over the Sedition Act (1798) in particular that provides the researcher with unprecedented quality and quantity of press liberty discourse. In fact, the Sedition Act crisis motivated more debate and greater

¹ John R. Howe Jr., "Republican Thought and the Political Violence of the 1790s," *American Quarterly* XIV(1967): 150.

philosophical advances than even the pre-Revolutionary crisis. It is in response to defenses of the sedition law that the recognizably modern concept of democratic press liberty emerges. The founding of this concept involved more than a repudiation of the idea that government could be criminally assaulted by words. It further required an understanding of the need for both an ongoing discourse that represented the diversity of sentiments and a public opinion that acted as the ultimate political standard.

Yet the period did even more than provide the foundation of modern American democratic press liberty. "The debate over the Sedition Act," Gordon S. Wood has rightly observed, "marked the crucial turning point in the democratization of the American mind."² The effort to realize the constitutional principles of 1787 and 1791 revealed divergent ideas about the equality of all men and the role of "the people" in republican politics. These differences contributed to differing concepts of political representation. In turn, all of these divisions contributed to competing views of republican press liberty. In recognition of these interconnected ideological disputes, this chapter will examine Federalist and Republican ideas about the people, representation, and the nature of republican press liberty. An additional section will further analyze rival understandings of the advantages and dangers of absolute political press liberty in a republic. Ultimately, we will arrive at an examination of the novel, indeed radical, ideas of public truth and public opinion that underwrote a recognizably modern discourse of democratic press liberty. But before addressing these issues, we

² Gordon S. Wood, "The Democratization of Mind in the American Revolution," in *Leadership in the American Revolution* (Washington: Library of Congress, 1974), 81.

turn first to important theoretical and practical events leading up to the Sedition Act, and then to some significant issues surrounding the Act itself.

Early Issues and Episodes

The earliest and perhaps most suggestive issue of the pre-Sedition Act period is actually a non-event. The Post Office Act (1792) and a proposed stamp tax seemed to threaten newspaper circulation by increasing the cost of a paper. This was especially important to opposition leaders who could turn to only a handful of sympathetic newspapers in the early 1790s. Thus, the Republican *National Gazette* bemoaned the attack on necessary information, especially troubling in such an extensive territory.³ Yet what is most remarkable about such comments is their paucity. Compared to the reactions to the Massachusetts stamp and advertisement taxes of 1785-7, or to the changes in postal policies in 1787-8, these tandem proposals elicited little response. Perhaps the explanation lies in the rapidly expanding newspaper market and the burgeoning postal system. The increase of a penny or two due to the new postal regulations and the proposed tax would not (and in fact did not) prove enough to undermine newspaper circulation. Furthermore, the increase in partisanship and the broadening class of politically active citizens meant that even ordinary people were quite unlikely to go without political information. The restrained response, then, points to important changes in these several, interrelated factors; accordingly, they will each receive further discussion below. In the meantime, suffice it to say that

³ *National Gazette* (Philadelphia), 28 May, 7, 14 July 1792; see also, Donald H. Stewart, *The Opposition Press of the Federalist Period* (Albany: State University of New York Press, 1969), 460-3.

important shifts in the economic and political contexts meant that these were the first newspaper duties that threatened not popular sovereignty, but merely profit margins.

The case of William Keteltas was anything but a non-event; yet it too was prophetic.⁴ Keteltas, a young Republican lawyer in New York, had taken up the case of two Irish ferrymen summarily convicted of insulting a Federalist Alderman. Keteltas, among others, argued that there was no law banning insulting language and further claimed that the magistrates had been partial. When he petitioned the Assembly and criticized the resulting special committee report, Keteltas was unanimously censured. Press liberty became a central issue when his next newspaper article was held a breach of privilege. With Keteltas in jail for the remainder of the session, the pseudonymous "Camillus Junius" argued that the legislature had no right to punish for offensive publications, even if they included "*falshoods* which have an evident tendency to destroy" public confidence.⁵ Such summary proceedings were well out of the Assembly's proper powers. "I am no friend to the doctrine of libels." Camillus Junius declared, "but it is a perfect *guardian of the press*, compared to your late decision."⁶ This off-hand sarcasm regarding libel law would soon prove all too portentous for those who were not friends to the doctrine, but it is Camillus's extension of such legislative privileges to the U.S. Senate that is most prophetic.

⁴ For much of this history, see Alfred F. Young, *The Democratic-Republicans of New York: The Origins, 1763-1797* (Chapel Hill: University of North Carolina, 1967), 476-95.

⁵ *Argus* (New York), 15 March 1796. See also, *Timepiece* (New York), 22 December 1797; and *Aurora* (Philadelphia), 8 May 1798.

⁶ *Argus*, 6 April 1796.

Camillus's intent was no doubt to expose "so monstrous" a policy by appealing to the extreme case of the infrequently, indirectly elected Senate.⁷ Nevertheless, in retrospect, the comments aptly foreshadow the Senate proceedings against William Duane, discussed below. Moreover, the Keteltas case presents the first explicit and sustained arguments that reject altogether the use of legislative privilege as a restraint on press liberty.

Notwithstanding this early assault on legislative privilege, by far the most significant press liberty issue prior to the Sedition Act was the controversy over the so-called Democratic Societies. The Democratic Societies popped up in 1793-4, in part the result of Republican enthusiasm over the new French Republic and the Jacobin Society of Paris. But as much as anything, the Democratic Societies provided an avenue to public prominence and influence for political and economic parvenus who had been heretofore unable to get into power. But if the political establishment of the early 1790s--Republican as well as Federalist--had as yet no place for these new men, the late eighteenth century also had no obvious place for unofficial associations. Such Societies might very well be factions, and thus "might actually inhibit the free expression of public opinion." The "self-created" nature of the Societies put their legitimacy very much in doubt, for their relationship to popular sovereignty was an open question.⁸

⁷ *Argus*, 15 March 1796.

⁸ Stanley Elkins and Eric McKittrick, *The Age of Federalism* (New York: Oxford University Press, 1993), 847n12.

The discourse concerning the Societies foreshadows the coming dispute over the Sedition Act in that we see a clearly defined Republican understanding of the role of the people and the press in a republic. In many respects the arguments of the Democratic Societies start to extend Antifederalist contentions about a "press of sovereignty" to include the people's elective responsibilities. The Federalists once again largely avoided the issue of press liberty, preferring instead to emphasize the questionable legitimacy of any "self-created" body.

The Democratic Societies, for their part, naturally wanted to avoid the issues of party and faction. Accordingly, "a principal theme in their statements of purpose was simply the importance of discussion, the exchange of views, the spread of information."⁹ Given the dubious legitimacy of such "self-created societies," the Democratic Societies were generally eager to stress that their membership was open to all. The Political Society of Mount Prospect (New Jersey) went so far as to "invite all, within the limits of this parish" to join their deliberations, provided they not be felons or others of "immoral character."

Are several of you disposed to advocate an aristocratical or monarchical government? Where there is real opposition of sentiment, in a well regulated discussion, the righteous cause will probably shine with an additional lustre: Come forward then, with your arguments; we are more

⁹ Elkins and McKittrick. *Age of Federalism*. 456.

general than cowardly; liberty is yours, as well as ours; come on, and vindicate your cause, in the open field of reason....¹⁰

But if the Societies maintained that the truth would probably prevail in their open discussions, their emphasis was on the "the duty of every good Citizen...to *detect* and *publish* to the world, every violation of our Constitution, or instance of Mal-Administration."¹¹ Moreover, in keeping with the "press of sovereignty" argument, the Societies insisted on continuous scrutiny of public men and measures, for "after having set up a government, citizens ought not to resign it into the hands of agents." Employers do not cease being watchful once an employee is hired and "the different members of the government, are nothing more than the agents of the people, and as such, have no right to prevent their employers from inspecting into their conduct...."¹²

Where we begin to see signs of Society members expanding on previous understandings of republican press liberty is in their emphasis on the need for citizen vigilance. Vigilance, of course, had long been a republican--and more specifically, a "free" press--mantra, but with the establishment of popularly-elected governments in the 1770s and '80s, the concept receded from view as the need for such watchfulness

¹⁰ *Newark Gazette*, 26 March 1794, quoted in Philip S. Foner, ed., *The Democratic-Republican Societies, 1790-1800: A Documentary Sourcebook of Constitutions, Declarations, Addresses, Resolutions, and Toasts* (Westport, CT: Greenwood Press, 1976), 142.

¹¹ *Declaration of the Political Principles of the Patriotic Society of Newcastle County, in the State of Delaware*, quoted in Foner, *Democratic-Republican Societies*, 320.

¹² *Independent Chronicle* (Boston), 16 January 1794; *Newark Gazette*, 31 December 1794, quoted in Foner, *Democratic-Republican Societies*, 148.

seemed relatively less pressing. In the discourse of the Societies, however, one espies an emerging belief that governmental officials, even in a republic, "ought to be watched with a *scrupulously* jealous eye." For "it is the right and duty of every Freeman, to watch with the vigilance of a faithful centinel the conduct of those to whom is intrusted the administration of Government...."¹³

A second critical issue that is suggested by the dispute over the Democratic Societies is that of the competence of the people for active participation in politics. A New Jersey "Cato" made the necessary argument with Republican gusto:

To declare that the affairs of government are too enveloped in mysterious intricacy as to be placed beyond the reach of common capacities, is as slavish a doctrine as ever disgraced the creed of the vilest minion of the most despotic tyrant, and is the source from which much oppression springs.¹⁴

Perhaps the most important arguments, however, were those that began to explore the meaning of press liberty in an elective republic. The suffrage of the people (or at least the white, adult, males among them) required an informed public. The Democratic Society of the City of New York put the matter most emphatically. "*The RESPONSIBILITY of PUBLIC FUNCTIONARIES presupposes a RIGHT OF INVESTIGATING INTO THEIR PROCEEDINGS.*" The Democratic Society also thought it especially important that political discourse be encouraged in a republic so

¹³ *Farmers' Library* (Rutland, VT), 23 April 1794, quoted in Foner, *Democratic-Republican Societies*, 285; *Independent Chronicle*, 16 January 1794.

¹⁴ *Newark Gazette*, 12 March 1794, quoted in Foner, *Democratic-Republican Societies*, 144.

that all citizens would be prepared for public service. "It is in Republic governments...that it becomes a duty more particularly incumbent upon individuals, to require a perfect knowledge of the government and political institutions of their country, the administration of which they may one day be called upon to take an active share."¹⁵

The Democratic Societies would not last long enough to do more for the discourse of press liberty than to posit briefly a few promising extensions of earlier arguments. For example, the overall advantages of unrestrained political press liberty receive little attention in the Societies' discourse.¹⁶ This, however, is understandable, since the Federalists were not criticizing them for libel but for being dangerous factions. Indeed, the Societies died out in large part due to Washington's accusation that they were partly responsible for the Whiskey Rebellion. Still, even in their passing, the Societies provided the opportunity for some prophetic words, this time from James Madison. Madison, no member of the Societies, rose to speak against a motion to censure the Societies as part of concurring with Washington's Address. "If we advert to the nature of Republican government," he lectured the House, "we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Moreover, "in a Republic, light will prevail over darkness, truth over error." Having reminded his audience of traditional republican principles, Madison went further to broach a view of public opinion and press liberty

¹⁵ *General Advertiser* (later the *Aurora*) (Philadelphia), 26 January 1795; *New York Journal*, 31 May 1794.

¹⁶ But cf. *General Advertiser*, 26 January 1795.

that would find strong echoes in the coming controversy. As he had "confidence in the good sense and patriotism of the people," Madison "did not anticipate any lasting evil to result" from the Societies' publications. "They would stand or fall by the public opinion."¹⁷ These are broad claims, to be sure, mere philosophical promissory notes. But in the Sedition Act debates, it would be Madison, perhaps more than any other man, that would prove their full value.

The Sedition Act

"An Act in addition to the act, entitled 'An act for the punishment of certain crimes against the United States'" (14 July 1798) criminalized--along with actual sedition and insurrection--"any false, scandalous and malicious writing or writings against the government of the United States...or Congress...or the President, with the intent to defame...or to bring them...into contempt or disrepute." More commonly referred to as the Sedition Act, it has long been taken to be the epitome of Federalist high-handedness. Though by no means unfounded, this view is still overstated. The Federalists, of course, were drawing on a wealth of British, and in some cases American, arguments and precedents. These sources and arguments are evident if we reflect on the various conservative claims analyzed in the preceding chapters. Indeed, in some respects the "Sedition Act controversy" began with the institution of common law proceedings against two Republican printers shortly before the law was enacted.

¹⁷ *Annals of Congress*. 3d Congress. 934-5.

For various reasons, however, neither of these common law cases went to trial.¹⁸

Nevertheless, these two cases remind us of the Federalists' faith in the common law of seditious libel. More importantly, this turn of events proved critical because in the absence of actual trials, the Federalists had little idea of the popular opprobrium that seditious libel convictions might bring.

Had these two cases brought lengthy, heated trials it is at least possible that the sedition law would have been seriously reconsidered. The Alien and Sedition Acts had only half-hearted support, as the most recent authorities on the 1790s make clear.¹⁹ If any law was the epitome of Federalist high-handedness, it was the Alien Act, which gave the President authority to expel any "dangerous," non-naturalized person without trial or even explanation. The Sedition Act that was finally approved on 14 July was "sweet reason" compared to the Alien law and to earlier versions of the sedition law.²⁰ The House had watered-down earlier bills and ended up approving the modified common law of the Zenger trial: evidence of the truth of the libel could be presented by the defence and the jury could rule on the law as well as the facts.

Notwithstanding these meliorations, the sedition law seemed despotic to many. The Federalists, in fact, were not only "blindly striking back" at the vilification of the "right sort" of men, they were trying to stem the growth of the emerging Republican

¹⁸ For a discussion of these trials, see James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, NY: Cornell University Press, 1956), 188-220.

¹⁹ Elkins and McKittrick, *Age of Federalism*, 590.

²⁰ Elkins and McKittrick, *Age of Federalism*, 592.

party.²¹ The Federalists did not see themselves as partisan, of course, but rather loyal. Still, the political nature of the sedition law was evident from its specified expiration date. The Act was to expire not at the end of the international crisis with France, but at the end of Adams's current term. Moreover, as Federalist Representative John Allen declared, "it is our business to wrest" the press from Republican hands.²² But if the intent of the Sedition Act was political, its execution was all the more so. Republican editors--and only Republicans--were indicted, and most of the major opposition papers and several minor ones were targets. The timing was such that the trials would take place, and hopefully silence the editors, before the election of 1800.²³

Yet if the political cast and draconian nature of the prosecutions are obvious, so is the "almost comic clumsiness, the sheer political ineptitude" of the Federalists' efforts.²⁴ The ineptitude is perhaps best seen in the attempts to muzzle William Duane, Bache's successor at the *Aurora*.²⁵ Duane won first an acquittal on trumped-up seditious riot charges and then an embarrassing dismissal from Federalist authorities in a seditious libel proceeding. Taking a seemingly safer path, the Senate found Duane in breach of their privileges for printing and commenting on a

²¹ Elkins and McKittrick, *Age of Federalism*, 703.

²² *Annals of Congress*, 5th Congress, 2098.

²³ Smith, *Freedom's Fetters*, 186.

²⁴ Elkins and McKittrick, *Age of Federalism*, 704.

²⁵ See Smith, *Freedom's Fetters*, 277-306.

compromising bill. But Duane alluded arrest for the remainder of the session and then mocked them in his paper. When Federalists went after him again for seditious libel, Duane argued successfully for a postponement and by the time the trial came Jefferson was President and all seditious libel charges had been dropped.

The draconian character of the sedition law is even more apparent in the Federalists' desperation than in their incompetence. Federal authorities even fined a man who drunkenly remarked, as Adams paraded through Newark, that he did not care if the celebratory cannon fire struck the presidential posterior.²⁶ As pitiful as this episode is, it suggests the importance--for Federalists--of defending the honor and dignity of governmental officials. Seeking to defend themselves, the only device they could think of was "the rusty principle of seditious libel--one which, even as a theoretical premise, had come to have little or no pertinence to the emerging state of political practice in America."²⁷ As we have seen, the preceding decades had brought increasingly wide practical leeway to the press, despite the fact that libel laws were anything but settled.

The unsettled nature of the law and theory of the Sedition Act left fertile ground for a wide variety of arguments both for or against. Many of these can be dispensed with quickly here, as they add little to the evolving concept of press liberty. For example, one of the most common critiques of the sedition law was a simple appeal to the First Amendment. Several papers reprinted the Amendment as "Text"

²⁶ Smith, *Freedom's Fetters*, 270-4.

²⁷ Elkins and McKittrick, *Age of Federalism*, 713.

and then sarcastically printed the Sedition Act's libel clause as "Commentary."²⁸ Federalists merely responded that they had not abridged press freedom because that term required nothing more than a press free from prior restraint. Sometimes such dialogues led to illuminating discussions of the role of such a press in a republic, and these will be discussed below. More often than not, however, these exchanges remained superficial. Similarly tedious arguments centered on the Constitution's "necessary and proper" clause and on the Tenth Amendment. States-rights arguments drawn from the Tenth Amendment were tricky, of course, because they suggested that Republicans were accepting the concept of seditious libel. Surely some Republicans were.²⁹ At other times, such arguments were clearly tactical moves, as when an *Aurora* correspondent wanted state jurisdiction despite the fact that the Pennsylvania law was effectively identical to the new federal statute. On other occasions, Republicans would insist that press liberty was an individual, not a state, right.³⁰

At least one seemingly inconsequential dispute gave rise to a deeper issue that would come to have a pivotal role in the emergence of the modern concept of democratic press liberty. Exchanges over the regulations governing the use of truth as a defence often began as legal disputes but resulted in broader debates about the nature of truth and opinion. In the legal case, the Federalists were decidedly the

²⁸ See, e.g., *Aurora*, 6 June, 13 July 1798; *Independent Chronicle*, 14 June, 5 July 1798.

²⁹ See, e.g., *Annals of Congress*, 5th Congress, 2153.

³⁰ *Aurora*, 11 February 1799; John Thomson, *An Enquiry Concerning the Liberty and Licentiousness of the Press, and the Uncontrollable Nature of the Human Mind* (New-York: Johnson & Stryker, 1801), 20, 21.

victors. Federalist courts held that the accused must prove the truth of the opinions as well as the facts in their alleged libels. Moreover, the defendant's intent was inferred from the "bad tendency" of his words. All of this left the truth defence virtually useless and the jury trial little more than a rubber stamp (especially once the Federalist-appointed marshall impanelled the jurymen of his choice).³¹ Republicans responded that certain types of truth did not admit of legal proof because they were matters of argument and opinion. This forced them "to do what had never been done perhaps before, to draw a line of discrimination between fact and opinion."³² Given the unprecedented nature of the theoretical and conceptual innovations that were required, it is not surprising that conservative Federalist judges refused to admit the distinction. Nor is it surprising that it is here that Republicans were forced to theorize their most original and advanced arguments. For now, these arguments too will have to wait until we address the genuinely philosophical differences that contributed to the Sedition Act controversy.

Impartiality

Before we hasten to confront the critical theoretical arguments that emerged from the debates over the sedition law, we must take one last pause to address an issue that is, in a sense, remarkably tangential: impartiality. Impartiality, as we have seen, had long been the watchword for printers. The "open" press doctrine that was a

³¹ See Smith, *Freedom's Fetters*, 421-3.

³² *State Trials of the United States During the Administrations of Washington and Adams*, ed. Francis Wharton (Philadelphia: Carey and Hart, 1849), 692.

central feature of the American press tradition for three-quarters of the eighteenth century required that printers maintain their impartiality. Even into the 1790s "open" press phrases (as well as "free" press notions) would periodically reappear, with *Cato's Letters* still quoted on rare occasions. For the most part, the terms "free" and "open" had evolved into vaguely synonymous terms. Impartiality, however, was still a commonplace affirmation of newspaper editors both Federalist and Republican.

These frequent claims were belied by the decline of newspaper impartiality, both in theory and in practice, that developed alongside the marked increase in partisanship that characterizes the 1790s.³³ By the end of the decade, some papers were clearly partisan in tone despite their declarations of impartiality. The editors of *The Ploughman*, for example, appealed to potential subscribers by assuring them that they would "impartially embrace the primary Objects of NATIONAL CONCERN" and remain "free from Party Rancour;" yet they also admitted they printed "under the Auspices of FEDERAL PATRONAGE."³⁴ Others were less equivocal and more brazen. "The *times* admit of no *duplicity*," Charles Pierce proclaimed in proposing "The Oracle of the Day as A FEDERAL PAPER." "Every native *American* has but *two choices* to

³³ For the illustrative example of one newspaper's varying attempts at impartiality, see *Independent Chronicle*, 9, 16 May 1799; 15 May 1800; and John B. Hench, "The Newspaper in a Republic: Boston's Centinel and Chronicle, 1784-1801" (Worcester, MA: Clark University Ph.D. Thesis, 1979), 273, 168, and passim.

³⁴ William Collier and Thomas Stockwell. "PRINTING-OFFICE, south of the MEETING-HOUSE...." October 1800, Broadside Collection, American Antiquarian Society, Worcester, MA.

make. He must *rank* with the *friends* or the *foes* of *America*. *Neutrality* is *criminal*."³⁵

Though the impartiality of early American newspapers had only very rarely maintained pristine purity, bald statements like these suggest a profoundly changed approach to the press. This remarkable decline in impartiality was in part a reflection of the nascent party system and the broader partisanship it engendered. But there were also significant shifts at a more practical level that were revolutionizing American press discourse. The new citizens of the American republic were conversing far more broadly than ever before, and they were transforming their institutions and practices to enable that expanding conversation. The number of post offices, for example, grew from only 75 in 1790 to over nine hundred in 1800. The number of newspapers more than doubled in the same decade, from 92 to 235. Meanwhile the time-lag in news dropped from 4 days between Philadelphia and New York, to about one and a half days by only the middle of the decade.³⁶ The increased speed and ease of news exchange from Philadelphia is especially important to the decline in impartiality because some of the most avidly partisan papers were printed there, and the capital city's papers "acted as a kind of news service for papers throughout the country."³⁷ The decline of impartiality, even as a standard, can thus be followed in Philadelphia.

³⁵ Charles Pierce, "PROPOSALS FOR EDITING, PRINTING AND PUBLISHING The Oracle of the Day...." 4 August 1798, Broadside Collection, American Antiquarian Society.

³⁶ Elkins and McKittrick. *Age of Federalism*, 848n13. See also, Stewart, *Opposition Press*, 15-6.

³⁷ Elkins and McKittrick. *Age of Federalism*, 365.

When John Fenno's *Gazette of the United States* became anti-republican, at least in Thomas Jefferson's view, he and Madison cajoled Philip Freneau to start the *National Gazette*, to be written "on whig principles," and "in a contrary spirit" to Fenno's paper. The result was that citizens increasingly required two newspapers to see "both sides of our politics."³⁸ Not only were there now unabashedly two sides to the supposedly unified politics of a republic, they were growing further apart. The opposition between Freneau and Fenno gave way to that between Benjamin Franklin Bache's *Aurora* and Englishman William Cobbett's aptly named *Porcupine's Gazette*. Bache had at least claimed impartiality back in 1790 and printed both sides as late as 1792, but after 1795 Federalists were almost never defended, Republicans almost never criticized.³⁹ By mid-decade, even his claims to truth and impartiality were gone.⁴⁰ Cobbett is perhaps the only newspaper editor who surpassed Bache in newspaper poison; as we shall see below, he had only contempt for the notion of impartiality.

The decline in the norm of impartiality was not restricted to Philadelphia. Boston's Federalist *Columbian Centinel*--rival to the Republican *Independent Chronicle*--had by 1795 dropped its motto ("Uninfluenced by party, we aim only to be

³⁸ Thomas Jefferson to David Humphreys, 23 August 1791, *Writings of Thomas Jefferson*, 10 vols., ed. Paul Leicester Ford (New York: Putnam, 1892-7), 5:372-3.

³⁹ *General Advertiser* (later the *Aurora*), 1 October 1790; James Tagg, *Benjamin Franklin Bache and the Philadelphia Aurora* (Philadelphia: University of Pennsylvania Press, 1991), 160, 297.

⁴⁰ Jeffery A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (New York: Oxford University Press, 1988), 38-9.

just") as a travesty.⁴¹ Indeed, during the 1790s, the use of reason and the standard of impartiality gave way to the use of invective and the norm of brazen partiality. The dialogue that was once seen within newspapers was now expected to proceed, if anywhere, *between* two or more newspapers.⁴² Thus, Charles Holt, editor of the New London, Connecticut *Bee*, defended his exclusively Republican printing in late 1798 by insisting that since "nine tenths of the newspapers in Connecticut are decidedly partial to *one side*, and keep the *other* totally out of sight," he would print the missing Republican side.⁴³ The marked increase in unadorned partisanship prior to the Sedition Act was such that one could matter-of-factly state on the floor of the House. "It is well known that there are papers on both sides [of] the question and if you say you have read one; you are generally asked if you have seen the other."⁴⁴

With the remarkable decline in impartiality in practice came unprecedented attacks on impartiality as a theoretical standard, much less as an ideal. Papers on both sides of the political divide ridiculed impartiality as impossible or even undesirable.⁴⁵ Why should the theoretical assault have emerged in the 1790s? Part of the explanation probably lies in the unmistakably partisan nature of the new political context; the ongoing contradiction between certain newspapers' policies and practices

⁴¹ Stewart, *Opposition Press*, 29.

⁴² Hench, "Newspaper in a Republic," 168. See also *Annals of Congress*, 5th Congress, 2106; *General Remarks, on the Proceedings Lately Had in the Adjacent Country, Relative to Infidelity...* (Newburgh, NY: David Denniston, 1798), 36.

⁴³ *Bee* (New London, CT), 14 November 1797; cf. 14 June 1797.

⁴⁴ *Annals of Congress*, 5th Congress, 2106. See also, Stewart, *Opposition Press*, 28-9.

⁴⁵ For examples, see Stewart, *Opposition Press*, 29-30.

was simply too glaring--and too widely criticized--to be sustained. Thus, once William Cobbett had advertised that his *Gazette* would return the Republicans "two blows for one," he could scarcely make any claims to impartiality. Instead, his first issue addressed the public with a candor impossible only a few years earlier:

Professions of *impartiality* I shall make none. They are always useless, and are besides perfect nonsense.... For my part, I feel the strongest partiality for the cause of order and good government, such as we live under, and against every thing that is opposed to it. To profess impartiality here, would be as absurd as to profess it in a war between Virtue and Vice, Good and Evil, Happiness and Misery.⁴⁶

Given the power of republican norms, even the partiality of an arch-Federalist had a public-spirited, not merely a partisan, cast. Nevertheless, the attack on the notion of press impartiality was well underway.

The prospectus of Joseph Dennie's *Port Folio* was at least as candid as Cobbett's *Gazette*, and even more hostile to the ideal of impartiality. Dennie's first promise to subscribers was a negative one: "He *will not* publish an *impartial* paper in that style of cold, callous, supine, and criminal indifference, which views, with [an] equal eye...a stable government, and the uproar of anarchy." "For the silly scheme of impartiality," Dennie "cherishe[d] the most ineffable contempt."⁴⁷

⁴⁶ *Aurora*, 1 March 1797; *Porcupine's Gazette* (Philadelphia), 3 April 1797. See also, Charles Pierce, "PROPOSALS FOR EDITING."

⁴⁷ [Joseph Dennie], *Prospectus of a New Weekly Paper* ([Philadelphia: Joseph Dennie and Asbury Dickins, 1800]), 1-2. Dated Pamphlets Collection, American Antiquarian Society.

But the theory and practice of impartiality was not only thoroughly implausible almost everywhere in the late '90s, it was also unnecessary. The growth of multi-newspaper towns, and more importantly the circulation of papers and news between towns, made an impartial, "open" newspaper much less crucial: One could just publish in an opposing paper. Indeed, in some cases editors were telling critical correspondents to take their responses to another paper.⁴⁸ The issue of an "open" press as such thus became less central to the modern, democratic free press discourse that would emerge from the Sedition Act crisis.

A Republican Press for a Republican People

In his classic work, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*, James Morton Smith wrote that the controversy over liberty of the press "pivoted on the concept of the relation of the people to the government."⁴⁹ As we shall now see, there was a good deal more to it than this, involving differing conceptions of representation, of the power of public opinion, and of the nature of truth. Yet the practical role of the people in the new republic was precisely the crux of the matter. The question was what concept of press liberty was most appropriate for a genuine republic. This was a question radical Englishmen and even French Jacobins simply did not face, and one that Americans of the early Republic simply could not avoid.

⁴⁸ See, e.g., *General Remarks*, 36.

⁴⁹ Smith, *Freedom's Fetters*, 146.

All men are created equal. But how so, exactly? This is the very question that ultimately divided Federalists and Republicans and serves as the basis of their competing views of press liberty. As Stanley Elkins and Eric McKittrick conclude, the Republicans devised a "politics of inclusion" while "Federalism ended up as little more than a kind of strident exclusivism."⁵⁰ The differing visions of the people and of popular sovereignty are most clearly summarized in Madison's essay, "WHO ARE THE BEST KEEPERS OF THE PEOPLE'S LIBERTIES?," the last in an increasingly partisan series written for Freneau's *National Gazette*. Predictably, Madison's "Republican" answers, "The people themselves. The sacred trust can be no where so safe as in the hands most interested in preserving it."

Anti-Republican.--The people are stupid, suspicious, licentious. They cannot safely trust themselves. When they have established a government they should think of nothing but obedience, leaving the care of their liberties to their wiser rulers.

Republican.--...because the people *may* betray themselves, they ought to give themselves up, blindfold [sic], to those who have an interest in betraying them? Rather conclude that the people ought to be enlightened, to be awakened, to be united, that after establishing a government they should watch over it, as well as obey it.⁵¹

⁵⁰ Elkins and McKittrick. *Age of Federalism*, 28, 27.

⁵¹ *National Gazette*, 20 December 1792.

This is highly polemical, of course. Alexander Hamilton, probably the "Anti-Republican" caricatured here, was never this extreme. Still, John Rutledge would write Hamilton privately acknowledging the Federalist fear that a Jeffersonian presidency "would begin by democratizing the people & end with throwing everything into their hands." And indeed, Federalists would soon publicly lament that "in this country, almost every man considers himself a politician, and a judge of the affairs of state."⁵²

Private fears and public railings aside, the conceptual distinction that best captures the contrasting views of the people and popular sovereignty is that arising over whether vigilance or confidence is the proper attribute of a republican people. For Republicans, it "remained axiomatic" that government, even republican government, "had a tendency to trespass on popular liberties."⁵³ "Implicit confidence is the parent of tyranny," insisted John Thomson. "Vigilance" is "the first duty of every republican." Defending himself against seditious libel charges, Thomas Cooper cautioned that any confidence placed in government "ought not to be unlimited, and

⁵² John Rutledge, Jr. to Alexander Hamilton, 10 January 1801, *Papers of Alexander Hamilton*, 27 vols., ed. Harold C. Syrett and Jacob E. Cooke (New York: Columbia University Press, 1961-87), 25:309; Zephaniah Swift Moore, *An Oration on the Anniversary of the Independence of the United States of America* [1802], reprinted in *American Political Writing during the Founding Era, 1760-1805*, 2 vols., ed. Charles S. Hyneman and Donald S. Lutz (Indianapolis, IN: Liberty Press, 1983), 2:1215.

⁵³ Richard Buel, Jr., *Securing the Revolution: Ideology in American Politics, 1789-1815* (Ithaca, New York: Cornell University Press, 1972), 258.

need not be paid up in advance; let it be earned before it be reposed." Madison instead placed "confidence in the good sense and patriotism of the people."⁵⁴

Federalists, however, insisted that confidence was properly placed in the government. The problem with the publication of falsehoods, Hamilton explained, was that they "destroy the confidence of the people" in government officials and supporters. To the Republican insistence on vigilance and jealousy of governmental power, one Federalist replied that "...nothing can be more mischievous...than the raising and harboring of idle fears and jealousies. The government stands on higher ground than we do, and of course sees to a greater distance, and are enabled to form a better judgement of what is necessary for the public welfare; and they are entitled to a generous and manly, not a blind confidence." Other Federalists agreed and were much less equivocal. Verbal abuse of government officials elected by the people "was in direct opposition to the duties of a good citizen."⁵⁵

Federalist Representation, Federalist Press Liberty

The Federalists' views of the people and of popular sovereignty naturally played a role in their understanding of representation and, in turn, their conception of

⁵⁴ Thomson, *An Enquiry*, 49; Cooper in *State Trials*, 665; *Annals of Congress*, 3d Congress, 934. See also, St. George Tucker, *Letter to a Member of Congress* ([1799]), 36.7; *Argus*, 6 April 1798; *Independent Chronicle*, 8 January 1798; and Madison's "Virginia Report," in *The Virginia Report of 1799-1800* (Richmond: J.W. Randolph, 1850), 166.

⁵⁵ Hamilton to Josiah Ogden Hoffman, 6 November 1799, in *Papers of Alexander Hamilton*, 24:5-6; *Observations on the Alien and Sedition Laws* (Washington, PA: John Colerick, 1799), 42-3; *State Trials*, 663. See also, *State Trials*, 670; and Alexander Addison, *Liberty of Speech and of the Press: A Charge to the Grand Juries...* (Washington, PA: John Colerick, 1798), 23-4. Dated Pamphlets Collection, American Antiquarian Society.

press liberty. Madison's *National Gazette* parody of the Anti-Republican held a grain of truth in that it captured the Federalist stress on the obedience of the people. The Federalists of the 1790s were still clinging to the version of republicanism that held sway for much of the eighteenth century, which included the elitist assumption that "men of the right sort" would govern and the people would obey. But by the 1790s, traditional notions of status and authority had lost most of their significance. Nevertheless, "this principle--men of the right sort--comes close to holding the key to the entire Federalist idea."⁵⁶

If men of the right sort were to govern a representative republic, what of the sovereign people? As we saw in Chapter 5, Federalists held that the people's primary virtue was to choose wisely. Elections, not a free press, were thus seen as "a security paramount to all others." Opposition would be confined to election-time, after which confidence in, and obedience to, the chosen rulers would be the norm. For Hamilton, the act of election "committed the administration of our public affairs" to government officials. To the Federalist mind, opposition to public men and measures between elections was anti-republican precisely because voting was the act of relegating the public business to the elected officials. "Those, who choose their civil magistrates, do voluntarily pledge their obedience," Rev. Nathanael Emmons preached in a fast day sermon. "By putting power into the hands of their rulers, they put it out of their own:

⁵⁶ Elkins and McKittrick, *Age of Federalism*, 703.

by choosing and authorizing them to govern, they practically declare...their intention and willingness to obey."⁵⁷

Some Federalists would go further yet, wondering whether popular discussion even at election-time was in the best interests of the people. Many feared that some publications had "been too unrestrained for the benefit of our citizens. Can it be beneficial to the community to have our gazettes crowded, as they sometimes have been, on the subject of elections, of public men?" Ultimately, regulating the press was especially necessary in a republic because, as James Bayard explained on the House floor, "that falsehood which deprives men of the means of forming a true judgement of public affairs, in this country, where the Government is elective, is a crime of the first magnitude."⁵⁸

The Federalists' notion of representation and view of the people, then, helps us understand their conception of press liberty. Punishing untrue criticism of public men and measures was further required by their view of the "government." Most Federalists used the words "administration" and "government" interchangeably.⁵⁹ Thus, for them, opposition to the current Federalist administration was tantamount to treason. Republicans again and again argued that the Federalists were--perhaps

⁵⁷ *Columbian Centinel*, 21 September 1791; "T.L." [Hamilton], *Gazette of the United States*, 25 July 1792; Nathanael Emmons, *A Discourse Delivered on the National Fast* [1799], reprinted in *American Political Writing*, ed. Hyneman and Lutz, 2:1027.

⁵⁸ *Massachusetts Magazine* 3 (1791):156; *Annals of Congress*, 5th Congress, 2961.

⁵⁹ Smith, *Freedom's Fetters*, 352. Cf. Jefferson's indiscriminate use of "country," "government," "nation," and "people" in his diplomatic correspondence; see Michael Lienesch, "Thomas Jefferson and the American Democratic Experience: The Origins of the Partisan Press, Popular Political Parties, and Public Opinion," in *Jeffersonian Legacies*, ed. Peter Onuf (Charlottesville: University Press of Virginia, 1993), 330.

intentionally--failing to distinguish between the administration, the government, and the Constitution, and thereby confusing dissent with sedition.⁶⁰ While the Federalist position may seem a bit overdrawn to us in retrospect, we must recall that the relationship between a sovereign people, a republican government, and a written constitution was only now being fleshed out for the first time in history. Republicans hoping to elect one of their own to the presidency in 1800 had every political reason to conceptualize this new distinction between a temporary administration and a permanent constitution. Federalists like Washington and Hamilton, who spent little time addressing this relationship, remained "quite unable to imagine that opposition could be loyal opposition."⁶¹

By elevating their administration to the level of the Constitution itself, and by relegating the people to mere choosers of wise rulers, the Federalists had "corrupted that very principle--the sovereignty of the people--that had enabled them a dozen years before to ride down the opposition to their new Constitution."⁶² This, however, did not mean that the Federalists were abandoning popular sovereignty as such. Rather, they were realizing it as they genuinely understood it. The people, in fact, were being molested by Republican critics, only they were being molested *through* their elected officials. Vilifying President Adams as a "mock Monarch" was therefore an "indignity offered to their majesty of the American people, thro [sic] the Chief

⁶⁰ *Annals of Congress*, 5th Congress, 2110, 3010. See also, Stewart, *Opposition Press*, 437.

⁶¹ Forrest McDonald, *The Presidency of George Washington* (Lawrence: University Press of Kansas, 1974), 93-4.

⁶² Elkins and McKittrick, *Age of Federalism*, 752.

Magistrate," according to Noah Webster's *Commercial Advertiser*. "How long ye slumbering Americans, will you be thus insulted?" In defaming Congress and the President, Republican papers were "of course openly vilifying that very PEOPLE for whom they profess so deep a respect."⁶³ Officials had a right to the people's good opinion for the people's own interests. Even finding William Duane in breach of Senate privilege was a matter of defending the public: "It is for the interest of the people, and not for our own peculiar advantage, that we enjoy these privileges."⁶⁴ This, the reader will recall, had been sound logic through mid-century. Now, however, the Federalists' notion of exalting the people by exalting themselves was the object of Republican sarcasm.⁶⁵ Republicans, for their part, were busy shaping a concept of press liberty that exalted the people as active members of the republic's politics.

Republican Representation, Republican Press Liberty

Just as the Federalists' conception of press liberty is best understood in relation to their views of representation, so too the Republican's efforts to formulate a conception that legitimated unrestrained political expression can only be comprehended in correlation with their understanding of representation. As the philosophical

⁶³ *Commercial Advertiser* (New York), 3 July 1798; *Gazette and General Advertiser* (New York), 13 November 1798. See also, *State Trials*, 672; *Philadelphia Gazette*, 27 March 1800, quoted in Smith, *Freedom's Fetters*, 316.

⁶⁴ Addison, *Liberty of Speech*, 6; *Annals of Congress*, 6th Congress, 87.

⁶⁵ See, e.g., *National Gazette*, 3 May 1792.

descendants of the Antifederalists, the Republicans of the 1790s held that the people were the continual masters of their political servants. Such servants, of course, were still men whose reputations deserved protection and so the public/private distinction that had emerged during the previous decade was maintained and advanced.

Recounting his own use of this argument in a seditious libel trial, lawyer George Blake simply asserted that "the distinction we presume is neither novel nor unfounded." That the public expected the distinction to be drawn (and public conduct to be scrutinized) is equally apparent from private correspondence and public declaration.⁶⁶ Indeed, Hamilton, Washington, and other Federalists understood that the people anticipated news of public men and measures.⁶⁷ And Republicans were sure to stress the government official's continuing recourse to civil suits for private damages. Nevertheless, most Federalists, Hamilton among them, persisted in maintaining that criticism of public men could be criminal.⁶⁸

For Republicans, of course, these public men were public servants and thus were just as fit for criticism as any servant. In the 1790s, radicals took to extending this notion. The people were the masters, and "the *President*--even the great Washington--the first *servant*." "The independent citizens of the United States," the

⁶⁶ *Independent Chronicle*, 18 April 1799. See also, e.g., Thomas Cushing to Jedediah Morse, 1 December 1798, Book Trades Collection, Box 1, Folder 10, American Antiquarian Society; *Timepiece*, 23 August 1798.

⁶⁷ Elkins and McKittrick, *Age of Federalism*, 420.

⁶⁸ For Hamilton, see Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (New York: Columbia University Press, 1964), 1:809; and below, Conclusion. For others, see, e.g., *Annals of Congress*, 5th Congress, 2148, 2967-8; Addison, *Liberty of Speech*, 8,14; and *State Trials*, 332, 669.

Independent Chronicle asserted, "will never be deterred, from a manly censure on their servants." But an official is not only a servant, he is an employee, and "in case of mal-performance on his part, the people who *employ and pay him*, have a right not only to complain, but to punish; whereas, when he has done his best, he has done but that which is his duty."⁶⁹ Alternatively, the government official was characterized as a mere "substitute," a "tenant," and a "creature of the people."⁷⁰ Republicans, however, did more than merely expand their list of appropriate metaphors. They began to argue that scrutinizing the conduct of annually elected Assemblymen, no less than executive officers and indirectly elected Senators, was central to the nature of a *republican* press liberty.⁷¹

What, then, did a genuinely republican government require of the press? Most clearly it demanded a concept of press liberty that was sufficiently broad as to make room for unrestrained exchange of political information and opinion, otherwise the power of elections would be chimerical. In one of the relatively few critiques of the proposed stamp tax in 1792, a contributor to the *National Gazette* fleetingly makes this connection, arguing that if the stamp tax left the people uninformed about their public servants' conduct, it would "make the ensuing general election not so satisfactory a touchstone of the public mind as it ought to have been." For one thing, elections

⁶⁹ *Independent Chronicle*, 9 December 1793, 5 July 1798; *National Gazette* 3 May 1792.

⁷⁰ See, e.g., *Independent Chronicle*, 9 May 1799; *Argus*, 15 March 1796; Thomson, *Enquiry*, 21.

⁷¹ *Argus*, 15 March 1796. See also *Virginia Report*, 220 and St. George Tucker, ed., *Blackstone's Commentaries With Notes of Reference*.... 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), 2:Appendix G, 3-30.

would not be fair if, as in the Sedition Act, incumbents were protected from public criticism while candidates had no such protection. With a sedition law, "you in fact render [the people's] right of electing nugatory," Albert Gallatin admonished Congress. Thomas Cooper defended himself from seditious libel charges by asking, "how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed." For Virginia jurist St. George Tucker it was really quite simple: "Where *discussion is prohibited or restrained, responsibility vanishes.*"⁷²

For Republicans, then, the "perfect freedom" of political discussion was a matter of actualizing a truly republican form of government. Yet their vision of republican press liberty went further still. Having established the need for continual citizen vigilance, even in a republic, nascent Jeffersonians built on the Antifederalist notion of ongoing, active participation. Not surprisingly it is Madison who most eloquently combines the negative and positive features of a republican press freedom. In his "Virginia Report" of 1799, he defends the Virginia Assembly against criticism of its Resolutions opposing the Alien and Sedition Acts. Concerning any faulty governmental proceedings,

it is the duty as well as right of intelligent and faithful citizens, to discuss and promulge them freely, as well to control them by the

⁷² *National Gazette*, 14 July 1792; *Virginia Report*, 227; *Annals of Congress*, 5th Congress, 2110; *State Trials*, 665; Tucker, *Letter*, 45. See also, e.g., *General Advertiser*, 25 July 1793; *Virginia Report*, 221; Thomas Cooper, *An Account of the Trial of Thomas Cooper...* (Philadelphia: John Bioren, 1800). Dated Books Collection, American Antiquarian Society, 46.

ensorship of the public opinion, as to promote a remedy according to the rules of the Constitution.⁷³

Other Republicans saw a need to be very explicit that the people's positive contribution was more than a matter of electing public men. "In *Popular governments*," wrote John Park, "*the People* have a direct influence on the measures of the administration, possessing the right to approve or condemn." "A TRUE AMERICAN" conceptualized the interconnection of absolute political press liberty, active citizenship, and republican government.

The most unlimited disquisition, as to the conduct of public men in their official character is the only channel, thro which *real* knowledge can be diffused among the People. The theory of every Government really free, presupposes a continued appeal to the public understanding; and, in what manner, can this be made, except thro the *medium* of the Press?⁷⁴

St. George Tucker and other partisans to the Jeffersonian cause took the further, final step of making absolute freedom of public, political expression--not mere elections--the *sine quo non* of popular government.

True it is, that where that freedom [of political expression] be *abridged* or in any wise impaired the nature of government will instantly be

⁷³ *Virginia Report*, 225.

⁷⁴ John Park, "Boston. January 23, 1804. Repertory. : To the Publick..." ([Boston: John Park, 1804]), Broadside Collection, American Antiquarian Society; *Independent Chronicle*, 4 March 1799.

changed from a representative democracy, in which the *people* are the *sovereign*, and those who administer the government their agents, to complete oligarchy, aristocracy, or monarchy.⁷⁵

With this recognition of the essential character of continuous and unlimited popular scrutiny and sanction, one can see a recognizably modern discourse of democratic press liberty emerging.

The *Other* Half of Democratic Press Liberty

The notion of a continuous and active popular sovereignty gave the people the practical right, even duty, of vigilant, democratic press liberty. This argument, however, only begged the question whether such a practice was pragmatically warranted. What if a good, popularly-elected government could be undermined by a few vicious men and their libels, despite the otherwise continuing approbation of the people? Would not the public interest require investing government with some power to control these abuses of the press?

Conservatives of varying stripes, of course, had long made similar arguments, insisting that a licentious press was not only a disadvantage to government, but a threat to liberty of the press, properly understood. But as active popular sovereignty was realized on a relatively widespread scale, and as newspaper discourse proliferated, the argument seemed especially persuasive. An unrestrained press was particularly

⁷⁵ Tucker, *Letter*, 45. See also, e.g., Tucker, *Blackstone's Commentaries*, 2:Appendix G, 16; Thomas Cooper to William Duane, 25 March 1800, reprinted in *Aurora*, 27 March 1800, quoted in Smith, *Freedom's Fetters*, 316.

dangerous in an elective government, because artful demagogues could gain power by "falsely and deceitfully stealing the public opinion."⁷⁶

The Truth Shall Probably Prevail

The traditional response to this argument, as we have seen, was the "open" press contention that the "truth will prevail." And despite the changed context of an increasingly practical popular sovereignty, this well-worn notion was the Republicans' single most common retort, more prevalent even than the claim that an elective government required an unlimited political press. Republicans also appealed to the familiar corollary, insisting that good governments have nothing to fear from open debate; only tyranny needs protection.⁷⁷ The nascent Jeffersonians even extended these arguments, claiming that political virtue would prevail, even shine, from unrestricted examination. Writing as "Hortenius," Virginia lawyer George Hay was confident that "truth, liberty, and virtue, must prevail in America." "Truth and merit are so far from tarnishing by examination, that they receive additional strength and lustre from the trial," "FRANKLIN" declared. "A sound character, therefore, will not be hurt by the strictest investigation."⁷⁸

⁷⁶ *Annals of Congress*, 5th Congress, 2960. See also Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (Philadelphia: Zachariah Poulson, 1800), 40, 42, 50.

⁷⁷ See, e.g., *Independent Chronicle*, 5 July 1798, 18 April 1799; *Aurora*, 20 August 1798, 7 November 1798, 4 February 1799; *Annals of Congress*, 5th Congress, 2105.

⁷⁸ Hortenius [George Hay], *An Essay on the Liberty of the Press, Respectfully Inscribed...* (1799; reprint, Richmond: Samuel Pleasants, Jr., 1803), 5; *Bee*, 3 January 1798. See also, *Independent Chronicle*, 5 July 1798, 11, 18 April 1799; *Aurora* 1 January, 4 February 1799; Thomson, *Enquiry*, 23.

This elaboration of conventional notions had a significant amount of traditional appeal. But to men of both parties who had experienced the hurly-burly of political discourse in the 1770s, '80s, and '90s, these assertions began to sound hopeful at best and deliberately naive at worst. Just as the Antifederalists conceded that the conquest of truth was too often late and even uncertain, the Republicans of the 1790s were circumspect about the progress of truth. "The sentiments of reason and truth will always ultimately prevail," John Thomson maintained, but he admitted adverse proceedings "may for a time be carried on."⁷⁹

The Federalists were even less sanguine. Richard Buel, Jr., in his study of late eighteenth-century free press discourse concludes that "in effect, [the Republicans] assumed what the Federalists denied, that when ideas could compete freely true opinions would always triumph." This oversimplifies the Federalist position no less than the Republican.⁸⁰ Still, many Federalists looked at the "Jacobin" newspapers and despaired that truth would ever prevail. Senator Uriah Tracy certainly did, convinced that "the defamation and calumny of yesterday, circulated in the newspapers, out-travel the slow and tardy steps of truth." James Bayard, Tracy's Senate colleague, put the Federalist argument candidly. The belief that truth would prevail "was a fine moral sentiment, but our limited knowledge of events did not verify it." "Truth had power to prevail in the end," Bayard conceded. Yet, "before

⁷⁹ Thomson, *Enquiry*, 69.

⁸⁰ Richard Buel, Jr., "Freedom of the Press in Revolutionary America: The Evolution of Libertarianism, 1760-1820," in *The Press & the American Revolution*, ed. Bernard Bailyn and John B. Hench (Worcester, MA: American Antiquarian Society, 1980), 90. Cf., e.g., *Columbian Centinel*, 8 August 1798.

the victory was obtained by truth it often happened that much mischief was done by falsehood."⁸¹

Faced with bald assertions that truth would *not* prevail, claims they themselves half-believed anyway, Republicans looked elsewhere to combat the claim that an unrestricted political press liberty would be dangerous even to a genuinely republican government. So they simply turned the argument on its head: Even if truth did not prevail, falsehood and error were not dangerous, at least not to government. "Where discussion is free, error ceases to be dangerous." Or, as Republican Congressman John Nicholas argued, it was the issuing press, not government, that suffered, "because falsehoods issued from a press, are not calculated to do any lasting mischief. Falsehoods will always depreciate the press from whence they proceed." With the expiration of the Sedition Act, John Thomson went so far as to say that errors let the truth "appear with increased lustre." Of course, it is Jefferson's phrasing that has proven most enduring:

If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.⁸²

⁸¹ *Annals of Congress*, 6th Congress, 87, 409.

⁸² Hay, *Essay*, 28-9; *Annals of Congress*, 5th Congress, 2143; Thomson, *Enquiry*, 83; "Inaugural Address," 4 March 1801. *Writings of Thomas Jefferson*, 8:3.

The Advantage of an Unrestrained Press

The Jeffersonians' arguments were not only a new twist on the "truth shall prevail" logic of traditional "open" press doctrine, they were further a modification of the Antifederalists' "advantage" argument. For if falsehood and error truly were harmless, then even an ardent Federalist would have to concede the advantages of an unlimited, republican political press liberty. Federalists, not surprisingly, had no intention of conceding the argument regarding the advantages of press liberty. Or, more precisely, they praised the advantages of press *liberty*, but were more concerned to explicate the egregious disadvantages of press *licentiousness*. Seizing on this long-standing distinction, Federalists time and again insisted that they were only trying to restrain a perilously licentious press. Rejecting the Virginia Resolutions, the Massachusetts Legislature maintained that "the constitutional right of the citizen to utter and publish the truth, is not to be confounded with the licentiousness in speaking and writing, that is only employed in propagating falsehood and slander."⁸³

The response to this traditional argument was just as long-standing: The distinction was practically untenable. Even Federalist officials employed this argument shortly before the Sedition Act crisis. When the French Foreign Minister, Charles-Maurice de Talleyrand-Périgord, complained of the treatment the French were getting in the Federalist press, the American Envoys said that though press "licentiousness is seen and lamented," "the remedy has not yet been discovered[;]

⁸³ *Independent Chronicle*. 18 February 1799. See also, e.g., *Massachusetts Magazine* 3 (1791): 156; Addison, *Liberty of Speech*. 16; Virginiensis [Charles Lee], *Defence of the Alien and Sedition Laws* (Philadelphia: John Ward Fenno, 1798), 25; *State Trials*. 478.

perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn."⁸⁴ Republicans doggedly maintained that the distinction was "impossible," or at they very least, "difficult." Liberty and licentiousness "cannot be separated." "Some degree of abuse is inseparable from the proper use of everything." Madison explained. Then, deftly echoing the Envoy's response, he claimed it "has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits."⁸⁵

Having established--at least to their own satisfaction--that a genuinely republican political press liberty had to be assessed in its totality, warts and all, the Republicans took recourse to the Antifederalists contention that an unrestricted political press was ultimately an advantage, if not an unmitigated blessing. Though this argument had only been elaborated a decade earlier, it had roots deep in the radical Whig tradition. Indeed, the *Bee* made this claim by paraphrasing *Cato's Letters* (with adaptations but without attribution). The *Bee* need not have looked so far afield for eloquent adherents of this view; there were contemporary champions. Madison again chief among them: "To the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and

⁸⁴ Marcellus [pseud.], *Essays on the Liberty of the Press* (Richmond: S. Pleasants, 1804); see also *Columbian Centinel*, 8 August 1798.

⁸⁵ *Independent Chronicle*, 15 April 1799; *Aurora*, 22 August 1798; Thomas Jefferson, "Kentucky Resolutions" [1798], in *Virginia Report*, 163; Madison, *Virginia Report*, 222. See also, e.g., *Aurora*, 1 August 1798; George Hay, *Essay*, 26-7; *Independent Chronicle*, 22 April 1799.

humanity, over error and oppression."⁸⁶ Eloquence aside, it was by arguing that error did little or no harm that one could assert the aggregate benefits of unrestricted press liberty. As one Republican polemicist put it in the *New York Timepiece*, "suppose even that the supercilious pride of men in place, should sometimes be slightly wounded; is that a reason for depriving the human race of the mine of knowledge[?]"⁸⁷

Overt Acts Only

Nascent Jeffersonians had laid the conceptual groundwork for the claim that only overt acts of violence or sedition should be criminal in a republic. They did this by arguing, first, for the essential nature of unrestricted political press liberty to a genuinely republican popular sovereignty, and second, for the relatively trivial and easily mitigated harm of an intemperate press. To be sure, actual breaches of the peace would still be punished in America, but anything less can and must be tolerated.

To Federalists, this was outright heresy. The false, scandalous, and malicious sentiments of a seditious libel had a "direct tendency" to breach the peace. And in any event, they undermined the "confidence" the people should have in elected officials. Even the rare conservative Republican, like Thomas McKean, held to this view. McKean, of course, had been a stalwart advocate of seditious libel law since at least

⁸⁶ *Bee*, 27 August 1800; Madison, *Virginia Report*, 222. See also, e.g., An Impartial Citizen [James Sullivan], *A Dissertation upon the Constitutional Freedom of the Press...* (Boston: Joseph Nancrede, 1801), 35.

⁸⁷ *Timepiece*, 23 August 1798.

the first Oswald trial in the early '80s. Prior to the Sedition Act crisis, McKean candidly explained traditional common law doctrine to a Pennsylvania grand jury in a vain attempt to indict avid Federalist William Cobbett. "The direct tendency of these libels is the breach of public peace...which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind." For Congressional Federalists, this logic was self-evident. "If gentlemen would agree" that acts such as sedition were criminal, Harrison Otis asserted, "it follows that all means calculated to produce these effects, whether by speaking, writing, or printing, were also criminal." This was true, as Judge Alexander Addison explained in his oft-reprinted grand jury charge, because seditious libels "have a direct tendency, differing only in degree from force." Once the Federalists had candidly maintained that the difference between physical and verbal violence was a difference not of kind but only of degree, it was but a small step to equating the two. The Federalists took this philosophical step in the most public and authoritative manner possible. The Select Committee charged with reviewing the myriad public petitions for repeal of the Alien and Sedition Acts reported back to the House: "As the liberty of speech does not authorize a man to speak malicious slanders against his neighbor, nor [does] the liberty of action justify him...in assaulting any person whom he may meet in the streets."⁸⁸ As soon as the Federalists had equated liberty of expression with liberty of action, character assassination was tantamount to corporeal assassination. Radical

⁸⁸ *State Trials*, 322; *Annals of Congress*, Fifth Congress, 2146; Addison, *Liberty of Speech*, 14; *Annals of Congress*, Fifth Congress, 2989.

Republicans like Matthew Lyon, however, could scarcely begin to comprehend the equation.⁸⁹

Drawing from their "advantage" argument, their contention that error was virtually harmless given free discussion, and their conviction that the press's abuses could not be safely trimmed away, the Republicans advanced press liberty discourse by arguing that only overt acts could be punishable in a republic. To the argument that the press would then be abused, they replied, "Wretched subterfuge. Is not every thing abused?.... As long as Government performs its functions entire, and undisturbed by actual opposition, this is all that in the nature of things it has a right to expect. Opinion is nothing, if it be not accompanied by an overt act." As early as 1796, Republicans were professing that "it is sufficient for the laws of a Republic, to restrain from violence the conduct and actions of its citizens." To the Republican mind, of course, "there can be no doubt" that the government would always have plenty of defenders, and, as they often repeated, actual insurrections remained punishable.⁹⁰

To the Federalists' "direct tendency" argument, the very backbone of traditional seditious libel law, the Republicans responded with derision. Sarcastically extending Otis's argument, George Hay asserted that "under this system of reasoning," since the government criminalizes murder, "it would have of course a right to punish an insult. because insults lead to quarrels, and quarrels to murder." Criticism of public men and

⁸⁹ Smith, *Freedom's Fetters*, 228.

⁹⁰ *Independent Chronicle*, 4 March 1799, 21 January 1796; *Bee* 14 November 1798; Tucker, *Blackstone's Commentaries*, 2:Appendix G, 24. See also, e.g., *Virginia Report*, 219.

measures exists "without the most remote design" to actual sedition. In fact, it was not an alleged seditious libel that had a dangerous tendency, one Republican lawyer argued, it was rather "the tendency of measures, which are adopted to correct it" that is menacing.⁹¹

Perhaps John Thomson best summarizes the Republicans' innovative view of absolute political press liberty.

Political opinions never can be destructive of social order, or public tranquility, if allowed a free operation. The law is at all times sufficiently energetic to punish disturbers of the public peace. When men are found guilty of this, let them be punished; it is well. It is not then punishing *opinion*, it is punishing actions injurious to the peace of the community.⁹²

The nascent Jeffersonians had already conceptualized and defended the genuinely republican *right* to an active, critical, and unrestricted political press liberty. But if this right could be exercised, should it be? Republicans resoundingly answered in the affirmative. With their newly developed "overt acts" argument, the Republicans were not only refuting the perennial claim that such a press had a "direct tendency" to breach the peace or undermine the government, they were vindicating their democratic conception of press liberty.

⁹¹ Hay, *Essay*, 15; Tucker, *Blackstone's Commentaries*, 2:Appendix G. 18; *Independent Chronicle*, 2 May 1799. See also, Pennsylvania House of Representatives, *Report of a Committee: The Committee Appointed on that Part of the Governor's Address Which Relates to...Libels...*([Lancaster, PA]:W. Hamilton, [1806]), 12-4, Dated Pamphlets Collection, American Antiquarian Society.

⁹² Thomson, *Enquiry*, 79.

A Modern Concept of Press Liberty

If the partisans of Jefferson and Madison were formulating a decidedly democratic notion of press liberty during the 1790s, why exactly does it seem so "modern"? This characteristic of the Republicans' novel conception was part of a philosophical revolution at the very core of the dispute between Federalists and their opponents; this transformation involved competing understandings of the power of popular opinion and the nature of truth. Gordon Wood has recently explained this shift by arguing that while the Federalists adhered to the established notion that there is a constant, universal, and discoverable truth, nascent Jeffersonians, to the contrary, were beginning to develop the notion that the "truth was actually the creation of many voices and many minds, no one of which was more important than another."⁹³

Though this characterization aptly captures the practical, modernizing effect of the conceptual innovation underway, it obscures the actual philosophical claims that gave rise to this change. Republicans of the 1790s were not so much repudiating universal truth as marginalizing it. In reaction to the Federalists' Sedition Law, and specifically its allowance of truth as a defence, the Republicans elaborated their novel distinction between facts and opinion. While American adherents of the Scottish Enlightenment were trying to make a science of politics, many Republicans argued that the domain of universal political truths was small, including "mere" facts that were rarely decisive to the discourse of a genuinely sovereign, republican people. It was instead political opinions that mattered, and it was ultimately the "public opinion"

⁹³ Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1992), 363.

that was the great arbiter. Regarding those types of political discourse that Federalists would call seditious libel, Republicans argued "very few of them will probably ever relate to mere matters of fact." "Matters of opinion admit of no other proof than the argument by which they are supported," concluded a memorial from Suffolk County, New York.⁹⁴

For Judge Samuel Chase and other Federalists, this distinction between fact and opinion was a "departure from common sense." To the Federalist insistence that "opinions may be false," Republicans answered that such a view was "absurd;" "an opinion may be incorrect." By 1800, the *Bee* claimed that it printed matters "*all neither wholly false, nor wholly true.*"⁹⁵

Republican arguments notwithstanding, Federalists insisted that opinions could be false, and as the 1790s proceeded, it seemed to many of them that the opinion most likely to be furthest from the truth was "public opinion." More importantly, by the mid-'90s popular opinion was becoming the dominant force in the politics of the new Republic. Capitalizing on the abrupt shift in popular opinion in favor of the Jay Treaty during 1796, Federalists used this public approbation to win necessary funding for the Treaty in Congress. John Fenno immediately rebuked his Federalist allies for such behavior. "The recent appeal to the people by the friends of the

⁹⁴ *Aurora*, 30 January 1799. See also, e.g., *Independent Chronicle*, 9 May 1799; *Annals of Congress*, 5th Congress, 2162.

⁹⁵ *State Trials*, 695; *Annals of Congress*, Fifth Congress, 2967; Thomson, *Enquiry*, 68; *Annals of Congress*, Fifth Congress, 2969; *Bee*, 26 March 1800. See also, Addison, *Freedom of Speech*, 23; *State Trials*, 693.

Constitution...has been irregular; it is all improper; it is an extraneous influence, unknown to the regular governmental proceedings."⁹⁶

Fenno need not have worried; this was a unique aberration. As Elkins and McKittrick point out, Federalists did not "have much taste for pandering to the multitude, and they frequently said so." The proper role for Federalists was rather Burkean: "not to mirror public opinion but to lead and correct it." Indeed, ardent Federalists mocked a moderate colleague because he tended to "quote the [people's] opinions as an evidence of truth."⁹⁷

Republicans, as we have seen, were dubious that there were any simple political "truths." But if there were any, public opinion was not merely evidence for it, it was the *principal* evidence for it. Public opinion could not be corrected so much as informed. The aim of republican press liberty was precisely that, to inform the whole people so that they might collectively choose the proper approach to any given political issue. Human nature, of course, was imperfect, and so even popular opinion would not be "infallibly correct." But for John Park, this only elevated "the absolute necessity of giving to popular sentiment the highest possible degree of intelligence." Charles Holt concurred; newspapers in a republic must "contain the most useful and important information for all ranks and conditions of men." In turn, "the people *read, scan and spell out* all the truth," despite attempts to deceive them.⁹⁸

⁹⁶ *Gazette of the United States*, 5 May 1796.

⁹⁷ Elkins and McKittrick, *Age of Federalism*, 518, 727, 729 (quoting Theodore Sedgwick).

⁹⁸ Park, *Repertory; Bee*, 14 June 1797, 27 December 1797.

Ultimately, the Republicans were arguing, they "knew of no such thing," as "slanders against the Government." The only response to political criticism was "to disprove it," "by the force of reason," and "let the public judge."⁹⁹ "Let the presses stand on the footing of equality, and the good sense and virtue of the people will decide between them." With sufficient discussion, one Republican explained, "it is never difficult for common sense to recognize Truth." By 1801, even pamphlets remarkable for their "unusual...temperateness" concluded that where political issues were concerned, "there can be no standard, besides that of the public opinion."¹⁰⁰

The Discourse of Modern Democratic Press Liberty

With the marginalization of political "truths" that were "mere facts," and with the conceptualization of public opinion as the final authority on political legitimacy, a recognizably modern concept of democratic press liberty had emerged. A crucial step in that process was a robustly developed, theoretical repudiation of the legal concept of seditious libel. Time and again during the eighteenth century, printers, lawyers, gentlemen and commoners advocated increasingly broad understandings of political press liberty. Yet they rarely assaulted the very idea of seditious libel. To be sure, most were reluctant to take such a radical stance, believing that some controls on seemingly dangerous words were necessary. Others, no doubt, might have taken this

⁹⁹ *Annals of Congress*, 5th Congress, 2154.

¹⁰⁰ Pennsylvania House, *Report*, 8; Park, *Repertory*; Hyneman and Lutz, eds., *American Political Writing*, 2:1126 (characterizing Sullivan's *Dissertation*); Sullivan, *Dissertation*, 35. See also, Thomson, *Enquiry*, 39.

stand had they been forced to do so; yet, they were often able to achieve the widening of press liberty they immediately required by taking a less extreme, and therefore less threatening, position.

Substantiating political press liberty in the new republic allowed no such room for equivocation. And once lines were drawn, as they were with the Sedition Act, the rhetorical pressure to elaborate a concept of press liberty that undermined seditious libel was intense. Some of the more radical adherents of the emerging Jeffersonian party took up the task of arguing that the government simply cannot be criminally assaulted by words. Actual insurrections and instigations to immediate violence were punishable in the Republic, but seditious libel could not be. To begin with, they conceded that government might be harmed by words, but argued that such injury would be minimal, even if the words were false, scandalous, and malicious. Drawing on recent Antifederalist advances, the Republicans of the 1790s insisted that such harm was also far outweighed by the good to the community. Second, false, scandalous, or malicious criticisms could be easily contradicted by truthful vindications since a republican people would be able to examine and judge properly. Americans of all ranks could be trusted with the incisive weapon of unlimited political press liberty. Finally, there really was no choice in the matter, for the universally exalted features of press liberty--the exchange of ideas, the advance of knowledge, even the respectful appraisal of government--were inseparable from the vituperation of press "licentiousness." In the final analysis, only overt *acts* should be punishable in order to allow public discourse to follow its virtuous, if not pristine, path.

Yet there was more to formulating a modern concept of democratic press liberty than merely the absolute denial of seditious libel. Repudiation is a decidedly negative process. The radical thinkers in the first decade of the First Amendment were more broadly concerned with elaborating a more constructive notion of press liberty, one that made room for popular government. This concept of democratic press liberty required, first, the contention that it is the right of a sovereign people not merely to elect but to scrutinize and criticize vigorously their public servants. The nascent Jeffersonians further developed the understanding that it is essential to democratic government that public opinion continually and ultimately act as the standard of political right. Finally, they argued that public opinion and political "truths" of any significance are the creation of many diverse and oft-colliding sentiments; it is thus necessary that citizens of all ranks contribute to that discourse. While they did not deny the existence of universal truth, Republicans were far more skeptical of such a notion than their Federalist countrymen; they accordingly argued that practical, political truths were accessible to, indeed created by, the aggregated citizenry. In contrast to the British monarchical tradition they had inherited, early Americans had now--for better or for worse--crowned public opinion King.¹⁰¹

Federalists no less than Republicans were stepping into the future while inevitably looking to the past. Federalists sought to preserve from the recent past the notion of a hierarchical order, ruled for the people by the "right sort" of men. For

¹⁰¹ For the failure of British and French thought to draw these connections between popular sovereignty, press freedom, and public opinion until decades later, see J.A.W. Gunn, "Public Opinion," in Terence Ball, James Farr, and Russell L. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), 259.

them, the future had arrived with the institution of a representative polity in which almost all significant governmental officials were answerable to the people directly or indirectly. For the Republicans, the future was only now in the making. Their future too would be built on a notion from the past, that of the constantly vigilant people, ever watchful of governmental power. The future lay in realizing popular government, meaning not only an expanded political class, but also an adaptation of traditional vigilance to include all of the people's servants, all of the time.

Given their view of the future, the Republicans argued that seditious libel law made elections meaningless. Yet, ironically, it was the first election after the widespread use of the Sedition Act that proved most significant for their view of republican--or as it was now increasingly called, "democratic"--government. In the "Revolution of 1800," "the political nation had spoken resoundingly for Jefferson," and his version of popular government.¹⁰² It was this Revolution that provided the founding for a broader, more participatory, democratic politics, as well as the modern concept of press liberty that went with it.

¹⁰² Elkins and McKittrick. *Age of Federalism*, 741.

CONCLUSION: THE FOUNDATION OF AMERICAN PRESS LIBERTY

The emergence of a recognizably modern concept of democratic press liberty was the culmination of more than a century and a half of conceptual and political struggle, development, and redefinition. Capitalizing on the first experience of de facto freedom of the press in the Anglophone world, the English radicals of the 1640s employed a variety of arguments to challenge and revise the customary limits on free expression. They held that the Truth would prevail, claimed the Parliamentarian's right to free speech, suggested that a free press would check government, and exhorted that only overt acts should be punishable. Though some of these contentions would prove their staying power decades later, the Radicals' ideas would all but disappear for half a century.

With the end of censorship, Diests and radicals such a Matthew Tindal defended against the return of licensing by forcing these more expansive understandings of press liberty back into political discourse, recasting and honing the arguments in the process. Trenchard and Gordon further refined the discourse of press liberty in reaction to libel laws and post facto punishment, resulting in the emergence of the "free and open press" tradition. Cato's discourse simultaneously defended a press "open" to sentiments on all sides of an issue and maintained that the people's liberty was the one concern to which all others must be sacrificed.

This ambivalent tradition of thought was exploited by colonial Americans who sought a widening of the range of acceptable comment in public discourse. At once contributing to and benefitting from the popularization of government, "free and open"

press discourse was used to argue for an end to criminal punishment for expression. The growth of general verdicts in libel cases and the developing distinction between the public life and private character of government officials proved to be steps in the transformation of press liberty in the pre-Revolutionary, Revolutionary, and Founding eras.

All of these changes were necessary for the development of modern democratic press liberty; they were not, however, sufficient for such a development. The modern concept of democratic press liberty rests on three fundamental claims that reveal their roots in the "free and open press." Inherent in the concept of modern democratic press liberty is the claim that an absolute liberty of political expression--not mere elections--is essential to genuinely democratic government. Drawing on the "free" press ideal of an ever-vigilant people checking their public servants through the press, many figures in the decade after the First Amendment argued that a representative government instantly and unavoidably became an oligarchy with the abridgement of free expression.

The second element crucial to the modern concept of press liberty is the claim that only overt acts--not expression--should be punishable. Central to this claim is a sophisticated view of the "open" press declaration that the truth shall prevail. Americans of all political stripes had, by the 1790s, come to realize that truth does not always prevail, at least not for significantly long periods. Nevertheless, Jeffersonians maintained that the disservice done by faulty information was minimal when compared to the damage done to valid dialogue by legal efforts to excise falsity. Modern

democratic theory rests on the belief that democracy is, in many respects, the worst kind of political system *except for all the others*; similarly, modern democratic free press discourse concedes that criminalizing only overt acts permits falsity to do its harm but contends that any attempt to outlaw falsity risks doing even more serious injury to the accuracy and robustness of public discourse.

The third and final tenet of the modern concept of democratic press liberty is the belief that public opinion is the definitive measure of political legitimacy. Conceding that they printed things "*neither wholly false, nor wholly true*,"¹ many Jeffersonian printers and theorists argued that political "truths"--if any existed--were few and fundamental, and therefore rarely pivotal in deciding public debate. In keeping with their unprecedented faith in the *demos*, these radical theorists maintained that there could be no other ultimate standard in public life but public opinion. It is this faith that made the new concept of press liberty at once modern, democratic, and distinctively American.

A Theorist of Modern Democratic Press Liberty

The modern concept of democratic press liberty was the work of no one person. By fits and starts, as circumstances shifted and as theoretical assertions were attacked or ignored, conceptual changes both great and small were developed, often only semi-consciously, by a vast array of patrician and plebeian thinkers. Nevertheless, one man personifies the emergence of modern democratic press liberty

¹ *The Bee* (New London, CT), 26 March 1800.

and thus serves as the spokesman for a free press as Jeffersonian Republicans faced the new century.

Tunis Wortman was a New York lawyer and a devoted partisan of Jeffersonian politics. His contribution to the press controversy of the Sedition Act era, however, was remarkably lacking in legal forensics and partisan vitriol, two commodities amply supplied in most opposition literature. What it does provide is the epitome of a comprehensive, explicit, and coherent discourse of modern, democratic press liberty.

"There is no natural right more perfect or more absolute," Wortman maintained, "than that of investigating every subject which concerns us." To government he would have us declare, "'You have no legitimate empire over opinion.'" Thus, if there is no actual public injury, there should be no law. "If our conduct is not injurious, it is immoral to interpose the shackles of restriction. Every unnecessary law is...an infringement of the rights of personal liberty and judgment." Wortman further asserts that the advantages of an unlimited political press are clear: Misrepresentations are less dangerous than public prosecutions for libel, and knowledge is "a more powerful corrective than coercion." Ultimately, only overt acts should be punished. Government's authority should be constantly interposed to prevent violence and crimes, and never exerted to restrain that circulation of knowledge and sentiment which is essential to general improvement.²

² Tunis Wortman, *A Treatise Concerning Political Enquiry and the Liberty of the Press* (New York: George Forman, 1800), 33, 46, 76, 170, 26, 132; see also 157, 253-5, 266. See also, e.g., *Independent Chronicle* (Boston), 4 March 1799, 21 January 1796; and St. George Tucker, ed., *Blackstone's Commentaries With Notes of Reference*, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), 2:Appendix G, 24.

But the abstract right to unlimited press liberty was not enough. Wortman knew that exercising such a right would be deemed imprudent if the people were not up to exercising it wisely. "Little would be gained by a most decisive victory in the argument, unless it should be equally evident, that *abilities* may reside in society, adequate to the formation of a correct and pertinent opinion." Like most Republicans, Wortman had considerable confidence in the people, as is implicit in the view that even willful misrepresentations would do little harm because the people could sift out the "correct" opinion.³ The New York lawyer, however, went further to elucidate the connection between the people's capacities and the Republicans' changing view of truth. "Whatever may be the abstract nature of truth, its evidences are capable of equal presentation to the percipient powers of all men." "Whether it relates to principles or facts, it is to be discovered and ascertained by judgment; and judgement is a faculty possessed in common by mankind." Wortman felt the whole merit of his treatise was comprised in this proposition.⁴

Wortman also conceptualized the relationship between public opinion and representative government. In a chapter whose running title is "Freedom of Enquiry Essential to Representative Governments," Wortman argues that "if my suffrage is requested in favor of any individual, it is my duty to enquire" into his qualifications.

³ See, e.g., *The Bee*, 27 December 1797; Pennsylvania House of Representatives, *Report of a Committee: The Committee Appointed on that Part of the Governor's Address Which Relates to...Libels...* ([Lancaster, PA]:W. Hamilton, [1806]), 8. Dated Pamphlets Collection, American Antiquarian Society; John Park, *Boston, January 23, 1804. Repertory: : To the Publick...* ([Boston: John Park, 1804]), Broad­sides Collection, American Antiquarian Society.

⁴ Wortman, *Treatise*, 48, 49, 55. See also 60, 62, 63-4, 66, 68-9, 91, 98, 110-1.

But he again went further than most Republicans to elaborate on the process through which individual investigation and reflection relates to public opinion. "By Public Opinion," Wortman explained, "we are to understand that general determination of private understandings which is most extensively predominant," "an aggregation of individual sentiment." Ultimately, "the opinion of the majority is to be deemed the general opinion."⁵

Individual reflection and community deliberation combine, for Wortman, to create an aggregate majority sentiment that *is* the "public opinion." "In proportion as investigation continues free and unrestricted, the mass of error will be subject to continual diminution, and the determinations of distinct understandings will gradually harmonize." The result is "public opinion," and "with relation to government, public opinion is omnipotent."⁶ Public opinion not only directs and controls government, Wortman maintains, it also controls its own extremes. "Public Opinion will always possess sufficient discernment and authority to curb its tendency towards licentiousness."⁷ In the end, unlimited, democratic political expression takes the contributions of diverse, sometimes extreme views and creates public opinion.

The collision produced will be favorable to the eventual reception of Truth. The heresy of Sectarists will be sure of becoming vanquished in such a state of intellectual fervor and activity; and Society, at length,

⁵ Wortman, *Treatise*, 203, 119, 120.

⁶ Wortman, *Treatise*, 122, 24.

⁷ Wortman, *Treatise*, 267; see also Pennsylvania House, *Report*, 8.

having heard the arguments, and examined the pretensions of both parties, will finally decide the controversy.⁸

During the late 1790s, Americans heard the arguments and examined the pretensions of both parties. And with the Jeffersonian's electoral "Revolution of 1800," society decided the Sedition Act controversy.

The Forgotten Years

The Sedition Act controversy would not be the last press liberty struggle, of course. The Republican development of a recognizably modern concept of democratic press liberty did not instantly establish it as the indisputable standard. Indeed, more traditional and less libertarian understandings of press liberty would remain dominant throughout the nineteenth century, the "forgotten years" of First Amendment scholarship.⁹ What's more, Republicans would play a conspicuous role in the maintenance of conventional elements of the law of seditious libel.

The most notorious example of Republicans not adhering to the nascent modern conception of press liberty is undoubtedly that of Thomas Jefferson's own letter to Governor Thomas McKean (19 February 1803). Jefferson argued that the Federalists--having lost their Sedition Act--had been seeking to undermine the press by making it so full of lies that it no longer had any credit with the public. To restore its credibility, the President suggested "a few [state] prosecutions of the most prominent

⁸ Wortman. *Treatise*, 266.

⁹ The term is borrowed from David M. Rabban. "The First Amendment in its Forgotten Years." *Yale Law Journal* 90 (1981): 514-95.

offenders."¹⁰ Jefferson's request that his words be kept "entirely confidential" give the letter a sinister tone. But, in fact, Jefferson expresses the same spirit in his Second Inaugural, in which he says that state officials who can afford the time might well use the "salutary coercions of the law" to correct the falsehood and defamation of the press.¹¹

Contrary to Wortman's writings but in keeping with Jefferson's provisos, state officials pursued a few Federalist printers in the courts. The cases against partners Barzillai Hudson and Thomas Goodwin in Connecticut, and Joseph Dennie in Pennsylvania ultimately came to nothing. The seditious libel conviction of Harry Crosswell, printer of the Hudson, New York *Wasp*, however, laid the groundwork for the nineteenth-century dominance of a modified form of the Zengerian principles of truth as a defense and a general verdict. The case is also replete with ironic twists. Staunch Jeffersonian and Chief Justice Morgan Lewis, in his role as trial judge, refused the defence opportunity to prove the truth of *The Wasp's* attack on Jefferson: furthermore, he instructed the jury that truth was no defence and that they could only find a special verdict, leaving to the bench the determination of whether the words were libelous.

¹⁰ Thomas Jefferson to Governor Thomas McKean, 19 February 1803. *Papers of Thomas Jefferson*, 10 vols., ed. Paul Leicester Ford (New York: Putnam, 1897), 8: 218.

¹¹ Second Inaugural, 5 March 1805, Ford, *Writings*, 8: 346. See also, Jefferson to Thomas Seymour, 11 February 1807, Ford, *Writings*, 9: 28-31; and Jefferson to Judge John Tyler, 28 June 1804, *Writings of Thomas Jefferson*, 20 vols., ed. Andrew Lipscomb and Albert Bergh (Washington: Thomas Jefferson Memorial Association of the United States, 1904-5), 11: 32-5.

On appeal, it was none other than Alexander Hamilton who defended Crosswell against this pre-Zengerian interpretation of the common law of seditious libel. Hamilton's apt defence speech espoused modified Zengerian principles and ultimately divided the Court. Crosswell was awarded a new trial, but his Republican prosecutors shrewdly dropped the case. In contrast, Hamilton's victory outside of court was unconditional. The New York legislature soon passed a libel law giving the jury uncontested authority to find a general verdict and making truth a justification *if* "published with good motives and for justifiable ends."¹² This Hamiltonian standard was thus a *weakening* of the Zengerian principles that even the Sedition Act had not watered down. Nevertheless, this interpretation of libel became the model for laws in many states throughout the nineteenth century.

Such legal precepts, as we are by now well aware, are seldom a sure guide to actual practice. Certainly the practice of the Madison administration suggests that a modern, democratic conception of press liberty could be actualized in nineteenth-century America. Whereas the patriots in the Revolutionary War and Federalists in the "Quasi-War" with France thought nothing of using press restrictions to silence their adversaries. Republicans in the War of 1812 tried nothing of the sort. As Drew McCoy explains,

although few Presidents have been subjected to so much personal invective and abuse, [Madison] never hinted at measures abridging freedom of speech or

¹² Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (New York: Columbia University Press, 1964), 1: 846n124.

press, even in the face of rampant obstruction of his government's policies and countless cases of outright treason in the "eastern states" of New England.¹³

Yet if Madison provides a heroic example of the modern, democratic press liberty that Wortman's *Treatise* epitomized, the fact remains that the nineteenth century was a long period in which this newly fashioned understanding of press liberty was the minority view. Elements of the new, modern concept would reappear now and again throughout the century, at times in conspicuous places. St. George Tucker would become the "American Blackstone," and his edition of the *Commentaries*--complete with its thirty page appendix defending the new American concept of press liberty--would become the standard legal text for a generation of lawyers.¹⁴ Mid-century libertarians like Frederick Grimke would give rise to the conservative libertarianism of late-century thinkers such as the famed jurist Thomas Cooley.¹⁵ Nevertheless, these ideas would remain subordinate. Just as the Levellers' arguments laid fallow for decades after their emergence in the 1640s, so too did the modern concept of democratic press liberty have to await broader renewal. This fact, however, only provides evidence, if any were needed, that conceptual change does not guarantee the dominance of the new conceptualization.

¹³ Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge: Cambridge University Press, 1989), 12.

¹⁴ Leonard Levy, *Freedom of the Press from Zenger to Jefferson* (Indianapolis: Bobbs-Merrill, 1966), 318.

¹⁵ See, generally, Norman Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill: University of North Carolina Press, 1986), 130-178; and Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991), 17-49.

The Persistence of Tradition

In retrospect, Wortman's *Treatise* surely seems to be the most articulate exposition of the modern concept of press liberty to emerge in the aftermath of the Sedition Act. Not only does it embody the founding of the American tradition of democratic press liberty, the *Treatise* also points forward to an America of partisan politics and individual rights. For there surely were two parties now, despite the Federalists' insistence to the contrary. This new partisanship, however, did not seem ominous to Wortman. "Associations may be rendered subservient to the particular views of sectaries or factions. Admitted. Their opponents will have the same right and the same spirit of association." Instead of fearing parties, Wortman valued "diversity of sentiment," because "it produces Collision, engenders Argument, and...it corrects our errors."¹⁶

Wortman's text also serves to highlight the developing hegemony of a stress on individual rights and individual sentiments, an emphasis we would characterize as "liberal." As we observed in earlier chapters, these ideas surfaced during the debate over the Constitution and the Bill of Rights. These issues take center stage in Wortman's book when he writes of "personal liberty and judgment." The right of unlimited press freedom left the individual at liberty to reflect alone and to deliberate in society. In turn, "private understandings" and "individual sentiment" would be "aggregated" into public opinion.

¹⁶ Wortman, *Treatise*, 266, 123.

Jefferson apparently would concur with Wortman's view, for Jefferson reportedly said "that the public good is best promoted by the exertion of each individual seeking his own good in his own way." Gordon Wood takes such a claim to mark the end of classical republicanism and the beginning of liberal democracy.¹⁷ Yet Wortman, as modern as he is, provides us with reason to be skeptical about *any* end to the central role of community concerns and civic duties. As a modern, he believes--no less than Jefferson--that "the moral system of the universe has in reality wisely united general good with individual interest." "True virtue," Wortman explains, does not require that "men should become totally detached from themselves." For, "the same conduct which ensures our own substantial good, shall also contribute to the general benefit of mankind." But for Wortman, "our natural and social existence presents a system of continual duties." My individual rights and interests notwithstanding,

it is not indifferent to Morality whether I conceal the perceptions of Truth within the dungeon of Solicitude, or whether I apply its evidences to remove the errors of my companion. We are not entitled to waste our hours in lethargic in exertion.

Rather, "it is incumbent upon me...to exercise my faculties for the production of the greatest sum of good."¹⁸ Even as he was conceptualizing a novel, "liberal" view of

¹⁷ Wood, *Radicalism*, 296 (quoting Benjamin Latrobe to Philip Mazzei, 19 December 1806).

¹⁸ Wortman, *Treatise*, 103, 104, 144.

democratic politics and press liberty, Wortman could not altogether abandon "republican" norms and notions. Perhaps neither can we.

Whether the "republican" norms of early America continue to influence the concepts that inhabit late twentieth-century America is a question this book has not directly addressed. Certainly our study of early American conceptions of press liberty suggests that the power of republican notions did not end with the turn of the century. Rather we have seen that "liberal" and "republican" ideas and ideals functioned in a vague unity during much of the eighteenth century. In fact, the evidence presented here demonstrates a long-standing interdependence between the individual rights-holder and the duty-bound community member. The "open" press conception that emerged, became pivotal, and was transformed in the period analyzed here embodies this complex interrelationship. Most critically, it defended every citizen's right to air his sentiments and let others weigh their merits. But the press was only "open" to each individual's sentiments because another individual's private property--a printer's newspaper--was thought of as a communal good, something the printer was beholden to make available to the community.

The complex nature of eighteenth-century American discourse over freedom of expression demonstrates the reductionism inherent in the binary debate between "liberal" and "republican" interpretations of early American political discourse. Due to the illuminating window into this body of discourse provided by the concept of press liberty, we have seen not only that the long-standing interdependence between "liberal" and "republican" notions must be explained, but also that other strains of thought, for

example, monarchical theory or protestant theology, have occasionally played notable roles in the development of early American political thought. Ultimately, these findings show how important it is that we move beyond the academic "liberal/republican" debate to analyze actual debates in early America.

Examining the actual eighteenth-century debates over press liberty has provided a means for making sense of the contrary bodies of evidence provided by free press historian Leonard Levy and his "republican" critics. This was made possible by a conceptual history that revealed and elucidated the central dynamic of early American press liberty discourse: two rival doctrines evolving within one shared tradition. The recourse to actual disputes taken here also provides us with a more nuanced sense of the political thought of the Founding and Early Republic. For instance, *pace* Wood, Jeffersonians at the turn of the century were not so much arguing that absolute truth was created by the people as they were contending that, because genuinely knowable truths were few and rarely decisive, the ultimate standard for significant community affairs in a democratic republic must be public opinion.

Epilogue

This conceptual history, then, provides needed correctives to previous interpretations of early American political thought in general, and specifically early American notions of press liberty and popular government. These valuable lessons in turn suggest the need to study discourse not only through meta-level analysis, but also by examining those general findings "on the ground." By shrinking the time frame

and expanding the variety of agents to include less-than-monumental figures, one can analyze more deeply a critical element in a broader tradition of discourse, thereby yielding more robust conceptual history. And since even the most radical thinker must use *some* concepts from the inherited tradition, even while transforming others, conceptual history of this sort is crucial to understanding the theoretical baggage of our current concepts. Only if we know the limits and potentials of the concepts that shape our political language can we fulfill the promise of our politics.

Capitalizing on that promise also requires that we avoid idolizing the similarities between our current predicaments and their eighteenth-century foundation. To be sure, some of the Jeffersonian's arguments are still with us in virtually unmodified form. The Supreme Court's adherence to the "overt-acts" doctrine is evident in the continuing dominance of variations of the "clear and present danger test": Government can only punish speech if it constitutes "incitement to imminent lawless action."¹⁹ The Court has thus calibrated the overt-acts doctrine to recognize that on rare occasions speech can be so "brigaded with action" that a strict policy of punishing only overt acts may be imprudent.²⁰

Concerning other free expression claims, the connection with the foundation of the tradition is much more extenuated. The Freedom of Information Act may not be a far cry from the people's "RIGHT TO KNOW" that Sam Adams' *Independent Advertiser*

¹⁹ *Brandenburg v Ohio*, 395 U.S. 449 (1969).

²⁰ Douglas, con. op., *Brandenburg v. Ohio*, 395 U.S. 456 (1969).

claimed²¹, but he would find incomprehensible the impunity with which the lurid details of public figures' private lives are circulated.

Conspicuous similarities and disjunctures notwithstanding, it has been my contention that the robust form of conceptual history pursued here does more than reveal the historical roots and continuing influence of our modern concepts. I have further argued that my approach to conceptual change leaves us well-placed to reflect critically on the ways in which other contextual factors occasion our current First Amendment controversies. Just as we saw how the economic and demographic contexts contributed to "open" press doctrine in the 1720s and '30s, we can analyze how professional standards, as well as economic and technological forces, weigh into contemporary media politics.

The norm in our cities of a single major daily newspaper that espouses "objectivity" and an opinion page open to all is reminiscent of its colonial precursor, but new journalistic standards have altered our conception of press liberty--to the detriment of democracy. As we have seen, the notion of impartiality, a traditional mainstay of "open" press doctrine, was coming under direct and indirect attack as early as the late 1790s. Two centuries later the analogous standard is that of "objectivity." The difference is subtle but momentous. Journalists, reacting to accusations that they are "soft" or biased, have responded by asking the "tough" questions (i.e., those concerning hidden political tactics), and stressing the (seemingly)

²¹ *Independent Advertiser* (Boston), 9 January 1749.

most objective news (e.g., polling data). And, as has been widely bemoaned, democratic politics has thus been depicted as a "horse-race."

The message here is unmistakable, but this should not surprise us. Permitting early eighteenth-century contributors to use Latin phrases, Roman pseudonyms, and classical references sent a subtle but effective message of the exclusivity of public discourse; just as effectively, the *Independent Advertiser's* promise to describe "foreign parts" to "Gentlemen and others" sent the opposite message. Similarly, by depicting politics as a horse race, "objective" journalists construct a public life in which there can only be a few "players." The rest of us must be mere spectators, and spectators, whether animated or lethargic, are impotent. Indeed, even the critical reflection on this "game" is left to "commentators" who analyze the political tactics rather than the public good.

Of course, the established press has never been the only medium of public discourse, even if it has traditionally been the most central. Happily, the emergence of communication technologies of unprecedented public accessibility--from electronic mail to desktop publishing--promises remarkably numerous and unobstructed avenues for discourse. Yet, awash as we are in this sea of expression, the problem is no longer one of having a voice, it is a matter of being drowned-out by others. Citizens searching for an opportunity to air their sentiments no longer work to combat suppression, but to merit our attention. This dynamic clearly advantages the sensational over the thoughtful, and thus all those with the economic wherewithal--or

the campaign contributions--to dress their political messages in "entertainment value" and saturate the "market."

These genuine shortcomings notwithstanding, the potential of universal access of public media immanent in the current technological revolution must not be neglected or derided. The economic and demographic growth of the 1740s and '50s failed to bring about significant change in the existing press liberty tradition until the political and ideological transformations of the 1760s. Similarly, the technological changes of the late twentieth century will require considerable democratic rethinking and political restructuring if we are to realize the potential of public discourse that is genuinely open to all. This will require a revolution in our concept of democratic press liberty not unlike that wrought by the Revolutions of 1776 and 1800. Those Revolutions occasioned the foundation of the modern American tradition of democratic press liberty. In many respects, we have yet to fulfill its promise.

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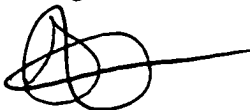
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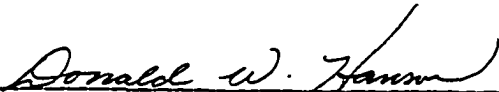
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