UNIVERZA V LJUBLJANI
FAKULTETA ZA DRUŽBENE VEDE

Jožica Pongrac

Kako sta svoboda govora in tiska postali del prvega amandmaja ameriške ustave

How did freedom of speech and of the press become part of the First Amendment of the American Constitution

Magistrsko delo

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Mentorica: prof. dr. Carolyn Nestor Long
Somentor: red. prof. dr. Bogomil Ferfila

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Kako sta svoboda govora in tiska postali del prvega amandmaja ameriške ustave

To magistrsko delo raziskuje dogodke in okoliščine, ki so pripeljali do inkorporacije pravice do svobode govora in tiska v prvi amandma ustave Združenih držav Amerike.

V današnjem času sta pravici do svobode govora in tiska razumljeni kot osnovni človekovi pravici, ki sta v demokratičnih družbah ustavno varovani, a temu ni bilo vedno tako in Združene države Amerike niso bile nobena izjema. V uvodu predstavimo razloge in pomembnost varovanja svobode govora in tiska, kot so iskanje resnice, udeležba državljanov pri demokraciji, ustvarjanje bolj prilagodljive in stabilne družbe ter zagotavljanje osebne izpolnitve. Ker je prvi amandma ustave Združenih držav Amerike del Listine pravic, smo morali raziskati, kako in zakaj je Listina pravic postala del ustave. Posledično je večji del magistrskega dela posvečen pregledu zgodovinskih in političnih dogodkov, ki so vplivali na tvorce ustave. Najprej smo preučili razvoj pravice do svobode govora in tiska v Angliji in ameriških kolonijah, potem podrobno raziskali zakaj ustava Združenih držav Amerike ne bi bila ratificirana brez Listine pravic in končno razložili postopek oblikovanja prvega amandmaja.

Glede na to, da sta bili pravici do svobode govora in tiska v prvem amandmaju najprej varovani samo v razmerju do zvezne vlade, so ju posamezne zvezne države v začetku lahko omejevale. To pa se je s sprejetjem štirinajstega amandmaja spremenilo, zato magistrsko delo v nadaljevanju razloži njegov vpliv na inkorporacijo pravice do svobode govora in tiska tudi v razmerju do posameznih zveznih držav.

Magistrsko delo se zaključi s pregledom zgodnje sodne prakse Ustavnega sodišča glede pravice do svobode govora in tiska.

Ključne besede: svoboda govora, svoboda tiska, Anglija, Listina svoboščin, prvi amandma, Listina pravic, ustava Združenih držav Amerike, Združene države Amerike.

How did freedom of speech and of the press become part of the First Amendment of the American Constitution

This master's thesis explores the events and circumstances that led to the incorporation of the freedom of speech and freedom of the press into the First Amendment of the United States Constitution.

Today, freedom of speech and freedom of the press are understood as basic human rights and are constitutionally protected in democratic societies, but that was not always the case – and the United States of America was no exception. In the introduction the thesis presents the reasons for and importance of protecting the freedom of speech and press, such as the search for truth, citizens' participation in democracy, creating a more adaptable and stable community and assuring self-fulfillment. Since the First Amendment of the United States Constitution is part of the Bill of Rights, we need to explore how and why the Bill of Rights became part of the Constitution. Therefore, the majority of the master's thesis is dedicated to an overview of the historical and political events that influenced the framers of the Constitution. We must first look at the freedom of speech and of the press in England and in the American colonies, then examine closely why the United States Constitution would not have been ratified without inclusion of the Bill of Rights and, finally, explain the process of shaping the First Amendment.

Because the provision of the First Amendment's free speech and right of press was limited to the federal government, the individual states were initially bound only by their own constitutions, free to limit free speech and press. That, however, changed with the adoption of the Fourteenth Amendment. Therefore, the master's thesis in continuation explains its importance by incorporating the freedom of speech and of the press into and over state governments.

The master's thesis concludes with a review of early Supreme Court jurisprudence regarding free speech and free press.

Key words: freedom of speech, freedom of the press, First Amendment, Bill of Rights, The Constitution of the United States, United States.

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1 INTRODUCTION

The present work attempts to describe the development of freedom of expression – freedom of speech and of the press – in the early United States of America and illustrate how philosophical thinkers, historical events and political conditions of the early American colonies contributed to the establishment of the First Amendment of the United States Constitution's guarantee of freedom of speech and of the press.

When the Declaration of Independence was adopted on July 4, 1776, the event announced the birth of a new nation. Even more significantly, it set forth a philosophy of human freedom that was from that point on a dynamic force in the entire western world. It rested upon a broad base of individual liberty that could command general support throughout America. The political philosophy behind the adoption of the declaration was quite explicit: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these rights are life, liberty, and the pursuit of happiness." The ideas implicit in the declaration powerfully motivated the American cause, as they made ordinary people aware of their own importance and encouraged them to struggle for a dignified place in society, personal freedom and self-government (Olson 1990, 38). But the year 1776 not only marked the birth of the American nation, it also anounced the birth of constitutional government in the Unites States (McClellan 2000, 141-142).

As the first 13 colonies transformed into states, they started to adopt their own constitutions, where most of them included bills or declarations of rights that protected freedom of speech and freedom of the press. Pennsylvania and Virginia were the first two states to adopt declarations of rights in 1776. The Pennsylvania Constitution included a Declaration of Rights that protected all five freedoms later outlined in the federation's First Amendment: Article 2 protected "the right of conscience in the free exercise of religious worship", Articles 12 and 16 provided for freedom of speech, press, assembly and petition, and section 35 of the Frame guaranteed that "the printing press shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government" (Lilian Goldman Law Library 2008). Virginia's Declaration of Rights

became the basis for the Bill of Rights, and it was widely copied by the other colonies. Later, it also directed Thomas Jefferson's opening paragraphs in the Declaration of Independence (The Charters of Freedom 2016).

American constitutionalism, written or unwritten, has its roots in British customs and practices. All of the individual liberties that are guaranteed in the federal and state constitutions can, almost without exception, be found in English precedents (McClellan 2000, 25-26). In reference to this, the master thesis provides a broad and extensive overview of the first great political documents in English constitutional history: the Magna Carta (1215), the Petition of Rights (1628) and the Bill of Rights (1689), and their influence on the development of the freedom of speech and of the press in the United States. But first we discuss the importance of freedom of speech and of the press, since the history of these two rights is, in fact, a history of attempts to prevent people from communicating their views by different means, including restrictive laws, censorship, actual and implicit threats of violence, search engine blocks, book burning, imprisonment and in the most extreme cases, execution (Warburton 2009, 8).

We believe that freedom of expression is one of the most fundamental rights that individuals enjoy. On one hand it is fundamental for the assurance of human dignity and the existence of democracy, and on the other it is one of the most dangerous rights, since it includes the freedom to express one's discontent with the status quo and the desire to change it. As such, it is also one of the most threatened rights, since governments of all forms all over the world are constantly trying to curtail it (Derechos Human Rights 2016). Freedom of speech and of the press depends on more than declarations of rights, proclamations, and constitutional provisions forbidding their infringement. It depends on courage, personal convictions and the ever-present realization that a right which is so essential to a democratic society cannot be taken for granted – it should always be a matter of concern (Hudon 1963, V). Freedom of thought and expression is at the heart of individual liberty and is, at some level, a necessary condition for democratic government (Barker et al. 1999, 164).

The essential distinction between life in a free country and in a dictatorship is the ability of the people to speak their minds, to criticize the policies and actions of the government without fear of recrimination by the state and to challenge the political orthodoxies of the time. Supreme Court

Justice Benjamin Cardozo, who served on the Court from 1932 to 1938, said that on the pantheon of the rights of a people free speech is “the matrix, the indispensable condition of nearly every other freedom” (Urofsky 2003, 20). As Stevens elaborates, other values mean little without free expression, therefore it is not just one among many fundamental values in a free society, it deserves a special place in the hierarchy of them (1982, 13). As we can see the commitment to free speech includes protection of speech that we want to hear, yet more importantly also the speech that we do not want to hear; that principle is a basic human right, the heart of the democracy, and its protection is a mark of civilized and tolerant society. The famous French philosopher Voltaire (1694-1778) has encapsulated the idea that freedom of speech is worth defending vigorously even when you hate what is being spoken, as in, “I despise what you say, but will defend to the death your right to say it” (Warburton 2009, 1).

The aim and purpose of the master thesis is to describe the development, establishment and importance of freedom of expression in America. To do so we will examine how English legal history, different philosophical views and the early United States colonial experience contributed to and influenced the incorporation of freedom of speech and of the press in the First Amendment of the United States Constitution.

2 METHODOLOGICAL STARTING POINTS

2.1 Research questions

Thesis description:

- How the English Heritage of Rights and Early American colonial traditions contributed to the development of freedom of expression in America.

The First Amendment of the United States of America reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (National Constitution Center).

The adoption of the Bill of Rights, the first ten amendments to the U.S. Constitution, was difficult, but it ensured Anti-Federalist support for the Constitution. The delegates from 13 new American states, recently British colonies, met in Philadelphia in the summer of 1787 in order to write a constitution for a unified nation. Until September, the draft document that provided a blueprint for how the national government would function was prepared and then sent to the state legislatures for review and ratification. Since the new constitution did not specifically outline the rights of individual citizens, a public debate quickly arose. Two groups were immediately established: Federalists who were advocates of the draft constitution and others known as Anti-Federalists who believed that some specific provisions stating the rights of individuals were necessary. Federalists argued that guarantees of individual rights were not needed because the Constitution itself – which gave the federal government broad powers – also preserved liberty by constraining the government through a system of separated powers and checks and balances. On the other side Anti-Federalists were aware of the explicit rights that were already guaranteed in earlier documents such as the British Bill of Rights and the Virginia Declaration of Rights in 1776 and were therefore opposed to the Constitution's ratification (Urofsky 2003).

In December 1787, at the heat of the ratification debate, Thomas Jefferson wrote a letter to one of the chief authors of the new constitution, his friend James Madison who at first saw no need for a bill of rights, stating that a bill of rights was almost superfluous to good government. In the letter Jefferson stressed the importance of the bill of rights like this: “Let me add that a bill of rights is what every people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference” (Baritz 1966, 193). Another founding father and governor of Virginia, Patrick Henry also saw the need for protection against a strong federal government and expressed his concern in the following manner: “By this Constitution, some of the best barriers of human rights are thrown away” (Hudon 1963, 1).

One year after the delegates to the Constitutional Convention had convened in Philadelphia, on May 28, 1788, Alexander Hamilton published his response to the Anti-Federalists on the question of the need for a federal Bill of Rights (McClellan 2000, 401). While the Constitution was ratified, there was less than a general consensus of support for the new government. Those who were elected to the First Congress, meeting in New York in 1789, understood this. Two states had withheld their support for the Constitution. Proposals for amendments had come from every state. There was still relatively strong and vocal opposition to the new government. In June, James Madison offered a series of revisions to the Constitution, hoping that they would satisfy those who seemed most opposed to the Constitution without offending its supporters. He wrote to Thomas Jefferson again: “A bill of rights, incorporated in the constitution will be proposed, with a few other alterations most called for by the opponents of the Government and least objectionable to its friends” (Hickok Jr. 1996, 3).

Anti-Federalists would not support ratification of the Constitution without the Bill of Rights because of their fears that a powerful federal government would be dangerous to individual rights and liberties. Their fear, and justification for inclusion of the American Bill of Rights has roots in English legal history, English philosophers and the early American colonial experience, as well as the fact that early American States already included Bills of Rights to their constitutions. With reference to that, my theses are the following:

- **Thesis 1:** If the Anti-Federalists would not oppose the ratification of the United States Constitution without a bill of rights, the Bill of Rights would not be included in the Constitution, and freedom of speech and of the press would not be constitutional guaranteed.

- **Thesis 2:** Without English legal influence the protection of speech and press would not be part of the Bill of Rights.

- **Thesis 3:** The early American State Declarations and Bills of Rights provided the basis for the United States Bill of Rights, including the protection of freedom of speech and of the press.

The United States Bill of Rights is the historical product of a particular time and place. It arose from a long British tradition of enumerated rights within the British legal system that governed the American colonies (Urofsky 2003).

2.2 Methodology

In order to describe what influenced the introduction and passage of the rights to freedom of expression I use historical development analysis. This approach permits researching tendencies in the historical development of a certain occurrence or tendency in a historical setting, here with a certain occurrence for describing the development of the freedom of speech in the early American colonies. Given this context, it is also applied to describe the shaping of the bills of rights in the first State Constitutions. It is a qualitative approach which analyses and interprets primary and secondary sources.

For the purpose of research I use primary sources (historical texts, such as the English Bill of Rights and the Magna Carta) and secondary sources (publications and academic articles on the selected topic). The analysis of primarily sources will be my most important research method, since with this method I will be able to examine historical texts that will enable me to accurately capture the influences on those who constructed, fought for, and helped ratify constitutional protection for freedom of expression.

This Master thesis relies primarily on foreign literature. Because the thesis is based mostly on historical developments that contributed to the adoption of the First Amendment of the Constitution of the United States, I use analysis of primary historical texts and secondary analysis of the American experience to describe how the English Heritage of Rights and Early American colonial traditions contributed to the development of freedom of expression in America.

3 REASONS FOR PROTECTING THE FREEDOM OF SPEECH AND OF THE PRESS

3.1 Values served by the protection of free speech

Freedom of speech has a particular value in a democratic society. All human beings have an interest in having the opportunity to hear, to read and to see other people's free expression and being allowed their own expression. Voters have an interest in contesting views that are personally, morally and politically offensive and in hearing a wide range of opinions, as well as in having access to important facts and interpretations. Members of a democracy have interest in the broad citizenry being active participants in political debate rather than passive recipients of government policy. Some have further elaborated the importance of the freedom of speech, arguing that government without extensive freedom of speech would not be legitimate at all and could not be regarded as "democratic". In such a view democracy does not only contain commitment to election; extensive protection of freedom of speech is a precondition of any democracy that merits the name, since without it government could not otherwise be genuinely participatory (Warburton 2009, 2-3).

Ronald Dworkin has drawn attention to the importance of free speech in the legitimate process of adoption of laws. He considered that: "Free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be" (Warburton 2009, 4). As Justice Felix Frankfurter wrote (Pennekamp v Florida, 328 U.S. 331, 1946): "The liberty of the press is no greater and no less than the liberty of every citizen of the United States." This puts the rationale for freedom of expression in the proper perspective. In a democratic society, the people need to be able to know and decide crucial issues for themselves. That in essence is the pragmatic reason for granting a maximum of free expression (Stevens 1982, 19).

Freedom of speech is intimately linked to freedom of thought, being a central capacity to wonder and reason, to believe and hope, which largely defines our humanity. Consciousness and conscience are the sacred areas of mind and soul. In a unique and special way freedom of speech

is boned to the human capacity to think, imagine and create. And as one of the basic human rights it gives the ability to robustly, defiantly and irreverently speak one's mind simply because it is one's mind (Lincoln University 2016).

As already mentioned, the aspect that is especially important for a democracy is that freedom of speech is worthy of a strong defense even if one does not like what is being spoken. But free speech has many functions; its role as centrepiece of democracy is only one. Without some broad protection of the right to dissent, democracy and intellectual inquiry cannot function. Free speech protects the right to dissent, and dissent is crucial if a sovereign people are to have a chance to be part of the decision making process and to be presented full information and alternatives. Information and the opportunity to participate are, of course, required for intelligent, responsible and widely accepted decision making (Curtis 2000, 19).

The next section further elaborates specific aspects of values to be protected by freedom of speech.

3.1.1 Marketplace of ideas and the search for truth

The marketplace of ideas theory argues that with a laissez faire approach – minimal government intervention to the regulation of speech and expression – theories, ideas and different propositions will succeed or fail by their own credit. Free individuals if left to their own rationality have the transparent capacity to sift through competing proposals in an open environment of exchange and deliberation, allowing the truth, or the best possible results, to be realized in the end (Civil Liberties in the United States 2015). Proponents of this theory saw this market as essential to our society's efforts to discover truth and enhance effective popular participation in government (Ingber 1984, 1).

This argument for the importance of free speech that is based on the open discussion to the discovery of truth, was from a historical point of view the most durable. Cases where restrictions on speech are allowed and accepted prevent society the verification and publication of accurate

facts and valuable opinions. This opinion is particularly associated with John Stuart Mill, and it also served in the theorizing by American judges (Barendt 2005, 7).

John Stuart Mill, who first developed the marketplace of ideas metaphor, said that free expression was valuable on individual and social grounds because it served to develop and sustain the rational capacity of man and, in an instrumental sense, facilitated the search for truth (Civil Liberties in the United States 2015). When he was defending the theory in his 1859 tract "On Liberty", he argued that three situations are possible: "1) if heretical opinion contains the truth, and if we silence it, we lose the chance of exchanging truth for error; 2) if received and contesting opinions each hold part of the truth, their collision in open discussion enables the best means to discover the truth in each; 3) even if the heretical view is entirely false and the orthodoxy contains the whole truth, the received truth, unless debated and challenged, will be held in the manner of prejudice or dead dogma, and therefore its meaning may be forgotten or enfeebled and it will be inefficacious forever." In this model, the value of free speech does not lie in the liberty interest of individual speakers, it lies in the societal benefits derived from unimpeded discussion. This social gain is so great, and any loss from allowing speech is so small, that society should tolerate no restraint on the verbal search for truth (Baker 1997-1978, 964-965).

Mill believes that the extensive freedom of speech is a precondition for individual happiness as well as for a flourishing society. If there were no free expression people would be deprived of ideas that could otherwise contribute to their development. Preservation of freedom of speech therefore maximizes the possibility of the truth emerging from its collision with error and half-truth (Warburton 2009, 22). He is further of the opinion that freedom of speech is a especially important topic because of its relation to truth and human development and points out the assumptions that a) truth is valuable and b) no matter how certain someone is that they know the truth, their judgment is still fallible: they might still be wrong. For Mill, a free marketplace of ideas will increase the likelihood of achieving the best result, namely the emergence of truth and the elimination of error. Truth is good for us. Furthermore, the process of lively debate with opinions from different sides will reinvigorate views that might otherwise be held in an unthinking way (Warburton 2009, 25).

John Locke also retained some of this faith that truth would prevail. In "A Letter Concerning Toleration" (1689), he wrote:

> *Truth certainly would do well enough if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succors. But if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.*

Locke's regard for freedom of expression arose out of scepticism about the state or any individual as a source of guidance in seeking truth, and he shared Milton's view that governmental restrictions on freedom of inquiry would increase the likelihood of error. He condemned those "places where care is taken to propagate the truth without knowledge" (Carter et al. 1988, 35).

In the jurisprudence area, the case that has formally established the marketplace of ideas as a legal concept was *Abrams v. United States* (1919), where the influence of Mill was evident on Justice Oliver Wendell Holmes, Jr.'s dissent (Civil liberties in United States 2015). Holmes argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market". The marketplace of ideas metaphor does not say that truth will derive from the free trade in ideas, at least not right away. It merely says that free trade in ideas is the best test of truth (Lincoln University, 2016).

According to Urofsky (2003, 22), the "marketplace of ideas" theory also relates to one of the foundations of democracy, the right of the people to decide. Thomas Jefferson based his belief in democracy upon the good judgment of the people who would choose by themselves what would be the right thing to do. Therefore the people and not their rulers, should have the right to decide the free elections. If one group is prevented from expressing their ideas and opinions because these considerations are offensive, then the public as a whole will be deprived of the large amount of facts and theories that it needs to consider in order to achieve the best result.

Critics of the classic marketplace of ideas theory have argued that there are factors that prevent successful facilitation of the discovery of truth or generating proper social decisions and perspectives. They believe that the marketplace of ideas fails to achieve the wonted and desired result because of lack of access of disfavored or impoverished groups, techniques or behavior of manipulation, monopoly control of the media, irrational response to propaganda, and nevertheless the nonexistence of objective, value-free truth (Baker 1997-1978, 965-966). Sunstein (1993, xviii-xx) has drawn attention to the large differences between a "marketplace of ideas", a deregulated economic market and a system of democratic deliberation. He said that deregulated economic markets are neither a sufficient nor a necessary condition for a system of free expression.

Scholarly critics of the marketplace model point out that the model itself suggests a vital need for government regulation on the market and that the imagery of the marketplace of ideas is rooted in laissez-faire economics that asserts that desirable economic conditions are best promoted by free market systems. But economists today broadly admit that for the correction of failures in the economic market that are caused by real world conditions, government regulation is indeed needed and essential. And not only that, real world conditions also interfere with effective operation of the marketplace of ideas: monopoly control of the media, irrational responses to propaganda, expensive and sophisticated communication technology, techniques of behavior manipulation, access limitations suffered by disfavored or impoverished groups, and the arguable nonexistence of objective truth all affect the marketplace of ideas. In this context critics of the marketplace model and laissez-faire economics have come to the conclusion that in order to correct communicative market failures, state intervention is necessary (Ingber 1984, 5).

Finally Schauer (2010) comes to the conclusion that almost none of the variants in the search for truth and marketplace of ideas rationales for a free speech principle arose in contexts even remotely connected with verifiable factual truth and falsity, and indeed even the number of arguments and justifications premised on democratic deliberation, individual autonomy, self-expression, and political decision making appear to have little to say about common false factual propositions. If factual falsity is protected, it must be more because of a distrust of government that pervades the American variety of free speech thought and less because of the history of free speech thought.

3.1.2 The argument from citizen participation in a democracy

This argument is most probably the one that is most clearly understandable, and in modern Western democracies certainly the most fashionable. In the case *Whitney v. California* (1927) a representative view on this argument is the extract from Judge Brandies J.'s judgment: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that the greatest menace to freedom is an inert people; that public discussion is a political duty and that this should be a fundamental principle of American government" (Barendt 2005, 18).

When we study the relationship between democracy and freedom of speech, we come across two questions: whether it is democracy that justifies freedom of speech or it is freedom of speech that serves democracy? There is no doubt that freedom of speech plays a crucial role in the process of democratization. It guarantees to citizens the right to effectively participate in the working of democracy. In the same manner, a democracy cannot be stable and viable if individuals and leading rivals of the administration in power do not have the access to the right of free speech (Sun 2014, 1). In cases where candidates and proponents of certain policies are restricted in their ability to communicate positions, the citizens will be unable to make wise and informed choices in elections (Exploring First Amendment Law Homepage 2016). A democratic society is therefore based on self-governance and on an informed citizenry that will intelligently elect representatives. James Madison believed that the people, not the government, were sovereign, and that the purpose of freedom of speech was to allow citizens to govern themselves in a free society (Carter et al. 1988, 40-41). When people in a democracy maintain views on how their political representatives are performing, they should be allowed to express those views – going far beyond putting a cross beside a candidate's name on a ballot every few years (Warburton 2009, 4). Freedom of expression can be seen as partly constituent of democracy itself, and democracy is accepted as a universally shared value within the relevant constituencies (Cambell and Sadurski 1938, 37).

Democracy depends upon a knowledgeable, literate citizenry whose access to information enables them to participate as widely as possible in the public life of society and to criticize oppressive and unwise government policies or officials. Citizens and their elected representatives are aware that democracy depends upon the broadest possible access to uncensored opinions, ideas and data. If free people should govern themselves, they must be free to express themselves publicly, openly and frequently in both speech and in writing. The protection of free speech is a so-called "negative right", since it only requires the government to refrain from limiting speech (Library of Congress). Freedom of speech further enables citizens to influence the public discourse, to exchange views and information, to criticize the actions of the government and to protest against injustice. Restricting free speech harms democratic continuity and is in contradiction to the fundamental principles of democracy: that government should impose only the necessary minimum of restrictions on individuals, especially regarding their basic rights (DemocracyProject.org. 2016).

One of the most notable proponents of the link between freedom of speech and democracy is English philosopher and free-speech advocate Alexander Meiklejohn (1872–1964). He argues that the concept of democracy is that of self-government by the people. An informed electorate is necessary for such a system to work. In order to be appropriately knowledgeable, there must be no constraints on the free flow of information and ideas. According to Meiklejohn, democracy will not be true to its essential ideal if those in power are able to manipulate the electorate by withholding information and stifling criticism. Meiklejohn acknowledges that the desire to manipulate opinion can stem from the motive of seeking to benefit society. However, he argues, choosing manipulation fundamentally negates, in its means, the democratic ideal (Press Score 2016).

3.1.3 Creating a more adaptable and stable community (The "Safety Valve" function)

The second rationale in favor of protection of free speech is the one that argues that a society which allows alienated, discontent and angry citizens to speak their mind will be more stable, since people will not have the need to resort to violence. This also enables government to better monitor potentially dangerous groups who would, if suppressed, act more secretly (Exploring First Amendment Homepage 2016). An open discussion provides means that can contribute to a more adaptable and more stable community and maintain the variable balance between necessary

consensus and healthy opposition. This, however, may not have always been true, and it may not be true of many existing societies, but where people have learned how to function within the law, an open society will be a stronger and more cohesive one (Emerson 1963, 9).

Thus, limiting freedom of expression leads to an inflexible and stultified society, one that cannot adapt to new circumstances because new ideas and solutions have not been allowed to flourish. Any tendency of a society to lose its vitality and become rigid is exacerbated when its members cannot exchange ideas freely. Innovative approaches to old problems and to methods of coping with new concerns will not develop unless dissent and opposition are allowed to exist. If opposition is driven underground, open, higher-stakes confrontation may result between the government and the opposition, including the use of physical force. According to Emerson, freedom of expression will not lead to the fragmentation of the society and will not cause the division into opposing camps, but suppression of communication will do that. Freedom of speech and of the press will allow dissidents to express their ideas "in a release of energy, a lessening of frustration and channelling of resistance into courses consistent with law and order." When people have had an opportunity to convince others of their ideas and have been rejected, the dissidents are more likely to accept the majority view. So long as they have not had a chance to persuade others, the minority will continue to believe their cause would be accepted if only heard. When certain they have been treated fairly, however, and have not won over others, a minority is less likely to use force and, consequently, others in society are less likely to view force as a legitimate alternative (Carter et al. 1988, 40).

3.1.4 Assuring individual self-fulfillment

The third major theory sees free speech as a crucial aspect of each individual's right to self-fulfillment and self-development. Restrictions on what we are allowed to hear and read, to say and write, hinder our growth and personality. A right to express political attitudes and one's beliefs instantiates or reflects what it is to be human. The argument asserts that there is an individual right to freedom of speech, even though its exercise may be inimical to the welfare of society (Barendt 2005, 13). Under the self-fulfillment theory, free speech may be justified as an end itself, an end intimately intertwined with human dignity and autonomy. The self-fulfillment rationale justifies

the protection of freedom of speech for reasons that are not connected directly to the collective search for truth or the processes of self-government, or for any other conceptualization of the common good (Smola 1992).

The liberty model of free speech also stands for the notion that it protects an arena of individual liberty from certain types of governmental restriction and not a marketplace. In this instance, speech is protected because the value of speech relates to the individual and not as a means to collective good. The liberty theory justifies protection because of the manner the protected conduct enhances individual self-determination and self-determination without improperly interfering with the legitimate claims of others (Baker 1977-1978, 966). Others further regard free expression as enabling individuals to express themselves fully and create and identity; consequently, freedom of speech becomes an aspect of human dignity (Exploring First Amendment Law Homepage 2016).

The emphasis on the individual, contained in what are variously called the self-fulfillment or self-realization models, is on the importance of expression as a route to individual development and fulfillment. The notion of self-fulfillment involves an individual's attempt to fully achieve his or her potential. Restrictions on beliefs or forms of expression inhibit this process and are "an affront to the dignity" of an individual, said Emerson. Without the individual's freedom to search for truth and discuss questions of right or wrong, society becomes a "despotic" commander and places a person in "the arbitrary control of others". Also, a person has a right to be involved in decisions affecting him or herself. Emerson asserted that individuals' right to freedom of expression is independent of society's needs. That is, free communication may or may not enhance society's goals. Regardless, it is "a good in itself" – almost a natural right. Society's objectives must be achieved through other methods, such as counter-expression and "regulation of conduct which is not expression" (Carter et al. 1988, 33).

According to Sadurski there is a little doubt that human communicative activities are crucial to our capacity for self-expression and self-fulfillment. They are crucial for self-expression because speech is the most direct way of communicating to the rest of society who we really are. The messages we convey to other people about our identity form part of the process that includes feedback from other people, which in turn modifies our own self-perception. Communication is

the center of this complex process. And it is crucial for self-fulfillment because the exercise of our capacities is only made possible through self-definition, and the determination of who we really are is impossible without open communication with other human beings. It also allows our self-fulfillment in a trivial sense: there are many of us who rightly or wrongly perceive our best skills and capacities in areas connected with communicating our ideas with other people (Sadurski 1999, 18). Theorists who rely on self-fulfillment as the basis of the First Amendment believe the line between speech and conduct is crucially important, for without such a line the rationale spreads so far as to become unworkable. After all, effectively everything we do arguably contributes to our self- fulfillment (Carter et al. 1988).

On the other hand Schauer is of the opinion that the most striking feature of all self-development theories (self-fulfillment, self-realization and self-development) is that they identify as the value underlying the principle of freedom of speech a value that is not peculiar to speech. In every variant at issue the value that self-development theorists urge is a value that can undoubtedly be promoted by speech. Nevertheless, that same value can also be promoted by other activities that do not involve communication, and self-development theorists offer no particular reason why communicative activities can serve the goal more completely or more frequently than other activities that are not in any significant sense communicative (Schauer 1983).

4 THE ENGLISH HERITAGE

In order to come close to the events which led to the adoption of the freedom of speech and of the press as protected rights, we must first closely examine the English influence.

4.1 Freedom of speech and of the press in England

American colonist brought English law, or rather some of it, with them to the new world. English law provided Americans with ready-made rationales for the suppression of freedom of speech: freedom of the press was no more than protection against prior restraint, truth did not justify criticisms of government or its officials, and the law punished circulation of ideas with tendency to cause harm (major harm was considered to include bringing government or its officials into disrepute; the harm did not have to be imminent or even likely). These ideas were initially developed for a monarchy in which the king was sovereign. They continued to serve a mixed government of king and parliament, in which a very oligarchic parliament was supreme. These English justifications for suppression appear again and again in the struggle for representative government and free speech in early American history. Still, this legal orthodoxy was hotly contested. A radical seventeenth century critique insisted that the people (not Parliament) were sovereign and that government was the agent or trustee of the people. In this view, free speech was an essential mechanism to ensure representative government and to see that the government officials did not abuse the people's trust (Curtis 2000, 23).

In England, repression of ideas antithetical to the government was in operation by the 13th century. In 1275 and again in 1379, Parliament made it criminal to speak against the state. Later known as "seditious libel", words that questioned the crown in any way were punished by the King's Council sitting in the "starred chamber". Ecclesiastical laws forbidding heresy already existed, thus making it dangerous to say anything in opposition to the Church or the state (Carter et al. 1988, 24).

With the advent of printing, around 1500, the government became even more concerned about statements that questioned the secular powers. To prevent the wider dissemination that the printing press made possible, the Crown established a system of censorship, similar to one already used by

the Church, for all publications. This repression lasted until almost 1700. The core of the censorship system was licensing. In the Elizabethan era[1] the system was overseen by agencies of the Queen. The Stationers Company, established in 1556, gave to a selected group of London printers a monopoly over all printing in the country. Its members had the exclusive right to print certain categories of books, such as Bibles and spellers, and could search other printers' offices to look for "illegal" materials. Since all printed matter was to be registered with the Stationers Company, complete prepublication review was possible. Violators of the licensing system were tried by the infamous Court of the Star Chamber, which became notorious for its secret proceedings and severe punishments (Carter et al. 1988, 24). As a royal court that enjoyed the royal prerogative, it was unhampered by rules of evidence and it had no regard for form; it heard only its own counsel and it sat whenever it desired (Hudon 1963, 9). Bonding was also part of the licensing system, forcing printers not part of the Stationers Company to post a large sum of money, a bond, before being granted a license to print. Publishing anything in opposition to the Church or the crown meant forfeiture of the bond (Carter et al. 1988, 24).

The English had established legal restrictions on three types of speech: blasphemy (criticism of religion), sedition (criticism of the government) and defamation (criticism of individuals). Each of these types of speech were called "libel". In terms of political liberty seditious libel was most important, since ruling elites in Blackstone's era (1723–1780) believed that any criticism of government or its officials, even if true can subvert public order by undermining confidence in the government. According to Blackstone[2], while the government could not stop someone from criticizing the government, it could punish him once he had done so (Urofsky 2003, 20).

In trials for seditious libel, the jury decided whether the defendant had published the material and whether it carried the meaning charged by the government. But judges decided whether the words were published with malice and had a "bad tendency" to damage the government, usually the two crucial points. The defendant could not plead the truth of the words as a defense; indeed, truth

[1] The Elizabethan era is the epoch in English history marked by the reign of Queen Elizabeth I (1558–1603) (Wikipedia 2016).
[2] Sir William Blackstone (10 July 1723 – 14 February 1780) was an English jurist, judge and Tory politician of the eighteenth century. He is most noted for writing the *Commentaries on the Laws of England* (Wikipedia 2016).

made the offense more severe, since truthful charges would increase the public's disrespect for the crown. This approach to criminal libel persisted even after the licensing system disappeared in 1695, making it still unsafe to criticize the government or the Church. Until 1688, even members of Parliament were occasionally imprisoned for discussing forbidden subjects. Parliament had long struggled with the King to assure freedom of speech for its Speaker, and this was gradually extended to all members. The privilege to initiate discussion on any subject was recognized in 1649, and later the House of Lords declared that seditious words uttered in Parliament could not be punished in court. Full freedom of speech and debate, including the right to criticize the crown, had been assured in Parliament well before the American Revolution (Carter et al. 1998, 25).

In addition to criminal prosecutions for libel, the English government found taxation to be an effective way to control the press. The purpose of the Stamp Act of 1711 and later laws was to reduce the circulation of newspapers. This was done by forcing publishers to raise their sale price to cover the cost of the tax, which applied not only to newspapers, but to advertisements, pamphlets and paper as well. It was possible for Great Britain to maintain the Stamp Act, press licensing, the Star Chamber court and bonding and still contend that freedom of the press existed. Sir Wiliam Blackstone, the most famous compiler of the common law, wrote in the late 1760s:

> *Where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, other with a less, degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. 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. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good*

> *order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force, when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true it will be found, that to censure the licentiousness, is to maintain the liberty, of the press* (The University of Chicago 2000).

Blackstone's definition of freedom of the press as the absence of "previous restraints upon publications", and the distinction between liberty and licentiousness (for which punishment was considered legitimate) made clear that freedom of expression meant, as a minimum, rejection of prior restraint. Uncertainty remained as to the legitimacy of subsequent punishment for seditious libel, and as to what types of expression constituted punishable "licentiousness" (Carter et al. 1988, 25, 26).

Furthermore in English constitutional history three great political documents which in the words of the great parliamentary leader Lord Chatman (1708–1778) constitute "the Bible of the English Constitution" and are essentially compacts or agreements between the Crown and the Nation (the people and the representative) stand out as prominent landmarks. These are the Magna Carta (1215), the Petition of Rights (1628), and the Bill of Rights (1689). A great deal of the individual rights guaranteed in these documents reappear in the first state constitutions, in the federal constitution and in the U.S. Constitution's Bill of Rights (McClellan 2000).

The next section takes a closer look at these three important documents, starting with the Magna Carta.

4.2 Magna Carta (1215)

The most significant early influence on the extensive historical process that led to the rule of constitutional law in the English-speaking world today was without a doubt the Magna Carta, or "Great Charter". After King John of England in 1215 violated a number of ancient customs and laws by which England had been governed, his subjects forced him to sign the Magna Carta. The document enumerates what later came to be thought of as human rights. Between the protected right were the rights of all free citizens to own and inherit property, to be protected from excessive taxes and the right of the church to be free from governmental interference. The Magna Carta was a crucial turning point in the struggle to establish freedom and was broadly viewed as one of the most important legal documents in the development of modern democracy (United for Human Rights 2008-2016).

The "Great Charter" did not mention the freedom of speech specifically, but it set constitutional limits on government in the name of individual liberty (Longman 2003, 129-130). This document established a framework for future documents such as the Declaration of Independence and the Bill of Rights and established the principle that no one, including a king or a lawmaker, is above the law. King John of England, in 1215, agreed to accept what has become a keystone of democracy: Even a king must obey the law (Pleasants 1966, 5).

We should not forget the importance of this document, but we must also mention that the interest of the common man was hardly apparent in the minds of those who negotiated the agreement. Still there are two principles expressed in Magna Carta that resonate to this day: first is that "No freeman shall be taken, imprisoned, diseased, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land," and the second guarantees right and justice such that "To no one will We sell, to no one will We deny or delay, right or justice" (National Archives & Records Administration 2016). Chapter 39 of the Magna Carta contains the source of modern procedural and substantive due process. Its law-of-the land phrasing appears in many of the early American state constitutions and, together with cognate concept of due process, is at the core of modern concepts of limited government (Hall et al. 1991, 5). In the colonization of American colonies the charter played an

important role, since the English legal system was used as a model in many colonies when they were establishing and developing their own legal systems (Wikipedia 2016).

Many political thinkers have celebrated the Magna Carta as the first example of a bill of rights and an ancient constitution (Coursera 2016). As we have already stated, this document was the first of its kind in England, as well as the rest of the world, to acknowledge the freedoms and rights of citizens (Kemp 2010, 2).

4.2.1 Magna Carta and Its American Legacy

Before the Founding Fathers started the adaptation of the first of the American Charters of Freedom, the Declaration of Independence in 1776, they searched for a historical precedent for asserting their rightful liberties from King George III and the English Parliament. A gathering that took place over half a millennium earlier, on June 15, 1215 in the plains of Runnymede offered that precedent. There an assembly of barons confronted a cash-strapped and despotic King John and requested that traditional rights be recognized, written down, confirmed with the royal seal, and sent to each of the countries in order for all the freemen to become acquainted with them. The result of this struggle was the Magna Carta – momentous achievement for the English barons and, much later, at the time of the fight for independence from England, an inspiration for angry American colonists (National Archives & Records Administration 2016).

But the document that King John conceded to and set with his seal in 1215 was not the Magna Carta as we know it today; it was rather a set of baronial stipulations that are now lost and were known as “Articles of the Barons”. After barons reached the agreement with their King, they adopted the final provisions and additional wording changes. The formal version of the document that came to be known as Magna Carta was issued on June 19. What happened to be of a great significance to future generations was a minor wording change in stipulating to whom the provisions applied: the term “any baron” was replaced with the term “any freeman”. This change would over time help justify the application of the document’s provision to a wider part of the

population. Since freemen were a minority in 13th century England, the term would eventually include all English, just as "We the People" would come to apply to all Americans in this century (Rights Of The People 2016).

As we know it today the Magna Carta stands as a basic document of the British Constitution, but as we have already mentioned, democracy and universal protection of ancient liberties were not among the barons' goals. The Charter was originally a feudal document with the purpose to protect the property and rights of the few powerful families that represented the rigidly structured feudal system. The documents actually mentioned the majority of the population, the masses of unfree laborers only once, in a clause concerning the use of court-determined fines to punish minor offenses. The primary purpose of the Magna Carta was restorative, namely to force the King to limit his ability to raise funds, to recognize the supremacy of ancient liberties, and to reassert the principle of "due process". With the final clause the principle of "majority rule" was adopted. It introduced something new to English law and severely limited the king's power (Kemp 2010, 12).

Another important influence for the American experience was the view on the law of the English jurist Sir Edward Coke[3], who wrote Institutes of the Laws of England, a series of legal treaties that were published between 1628 and 1644 and widely recognized as a foundational document of common law, since that was the period when the charters for the colonies were written (Wikipedia 2016). Every charter included the guarantee that those who would come to the New World, as well as their heirs, would have "all the rights and immunities of free and natural subjects". When the founding father of America were developing legal codes for the colonies, many included liberties that were guaranteed by documents such as the Magna Carta and the 1689 English Bill of Rights directly into their own laws. The colonists were, despite the fact that only few of them could afford legal training in England, remarkably familiar with English common law. Young colonists like Thomas Jefferson, John Adams and James Madison through Coke's work learned of the spirit of the charter and the common law, or at least Coke's interpretation of them. Jefferson expressed his opinion of Coke in the following manner: "A sounder wig never wrote, nor of profounder learning

[3] Sir Edward Coke; 1 February 1552 – 3 September 1634) was an English barrister, judge and, later, opposition politician, who is considered to be the greatest jurist of the Elizabethan and Jacobean eras (Wikipedia 2016).

in the orthodox doctrines of the British constitution, or in what were called English liberties." Therefore it is not a surprise that colonists look to Coke and the Magna Carta for justification as they prepared for the war of independence (Kemp 2010, 13).

Around the year 1760, American colonists had come to believe that they were creating a place that combined the best of the English legal system adopted to new circumstances, where a person could prosper by merit and not birth and where people could actively participate in self-government and voice their opinion. But these beliefs were soon under the test. After the Seven Years War[4], Great Britain was burdened with great debts and the continuing expense of keeping troops on the American continent. Parliament was of the opinion that colonies should finance their own defense and in 1765 adopted the Stamp Act, the first direct tax. Consequently, every document, including legal writs, newspapers, insurance policies, licenses, even playing cards, would need to hold a stamp as a proof that required taxes had been paid. As the elected legislative bodies of the colonist had not been asked to consent to the Stamp Act, the colonists rebelled against such control over their daily affairs and argued that without either their local consent or direct representation in Parliament, the act was "taxation without representation". They also raised their objection against the provision of the law that established the rule that those who disobeyed could be tried without a jury of their peers in admiralty courts. Influence of Sir Coke was once again present when the Massachusetts Assembly declared the Stamp Act "against the Magna Carta and the natural rights of Englishmen, and therefore, according to Coke, null and void" (National Archives & Records Administration 2016).

As angry colonists decided to condemn the Stamp Act they turned to a defense argument used by Coke, who claimed that the common law has a superiority over the acts of Parliament. He stated that: "When an act of parliament is repugnant, against common right or reason, or impossible to be performed, the common law will control it and adjudge such an act void." Since the Stamp Act seemed to be based on the concept of consensual taxation, the colonists agreed with Coke's view

[4] The Seven Years' War was a world war fought between 1754 and 1763, the main conflict occurring in the seven-year period from 1756 to 1763. It involved every European great power of the time except the Ottoman Empire, spanning four continents, and affected Europe, the Americas, West Africa, India, and the Philippines. The conflict split Europe into two coalitions, led by Great Britain on one side and France on the other (Wikipedia 2016).

and believed the act to be invalid. In England Benjamin Franklin along with others eloquently argued the American case, and Parliament shorty rescinded the bill. But the political climate was changing and the damage was already done (Rights Of The People 2016).

Relations between the colonies and Great Britain continued to deteriorate. The more Parliament tried to suppress the growing unrest and raise revenue, the more the colonists demanded the charter of rights; finally in April of 1775, an armed resistance broke out. After fifteen months, the immortal words of the Declaration of Independence: "We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the Pursuit of Happiness" announced the final break. With these words the colonies had irrevocably and finally expressed their goal, but the road to Independence was not swift. The military struggle was won in 1781 when the British forces surrender at Yorktown; the constitutional battle, however, was just beginning (Kemp 2010, 14).

4.3 Petition of Rights (1628)

The Petition of Rights, produced in 1628 by the English Parliament and sent to King Charles I as a statement of civil liberties, was the next recorded milestone in the development of human rights (United for Human Rights 2016). It is one of England's most famous Constitutional documents and was written by Parliament as an objection to an overreach of authority by King Charles I. During his reign, English citizens saw this overreach of authority as a major infringement on their civil rights. The Petition of Right, initiated by Sir Edward Coke, was based upon earlier charters and statues and asserted four main points: no English subject could be imprisoned without cause – thus reinforcing the right of *habeas corpus*, no taxes could be imposed without Parliament's consent, no quartering of soldiers in citizens' homes, and no martial law may be used in peace time. These four points enumerated specific civil rights that Englishmen felt Charles I had breached throughout his reign when he abused his power for financing foreign policies, forced imprisonment without cause, the billeting of soldiers, and enactment of martial law (Study.com 2003-2016).

After the disputes between the King and Parliament over the execution of the thirty years war, Parliament refused to grant subsidies to support the war effort, leading to Charles gathering "forced loans" without Parliamentary approval and arbitrarily imprisoning those who refused to pay. Even more, the war footing of the nation led to the forced billeting of soldiers within the homes of private citizens, and the declaration of martial law over large swathes of the country (Wikipedia 2015). Although Charles I had never been popular as a monarch, his abuse of power escalated to an intolerable level after Parliament refused to finance his unpopular foreign policies (Study.com 2003-2016).

In passing the Petition of 1628, the English Parliament was actually setting up a bill of rights with corresponding limits on the power of the King. The language of this petition contains much of the impetus of the 17th century move toward limited government (Pleasants 1966, 6). This was the first document approved by the Parliament of England that set forth and acknowledged the rights and liberties in the American colonies (Kemp 2010, 2).

4.4 English Bill of Rights (1689)

The English Bill of Rights that was approved by the Parliament of England on December 16, 1689 set forth the rights and liberties of citizens and residents from other countries and required the Crown to seek consent from the Parliament before taking certain actions impacting citizens (Kemp 2010, 3). The Bill limits the powers of the king and queen, creates separation of powers, supports freedom of speech and enhances democratic election (Study.com 2003-2016).

The Bill of Rights was later adjoined by the Act of Settlement[5] in 1701. Both of these contributed to the establishment of parliamentary sovereignty, which gives the legislative body of Parliament

[5] The Act of Settlement is an Act of the Parliament of England that was passed in 1701 to settle the succession to the English and Irish crowns and thrones on the person, and lawful descendants of the Electress Sophia of Hanover and her non-Roman Catholic heirs. Along with the Bill of Rights 1689, the Act of Settlement remains today one of the main constitutional laws governing the succession not only to the throne of the United Kingdom, but to those of the other Commonwealth realms, whether by assumption or by patriation (Wikipedia 2016).

absolute sovereignty and makes it supreme over all other government institutions (Study.com 2003-2016).

As already stated at the beginning of this chapter, political liberty and the right to speak freely about government has a checkered history of many advances and setbacks. At first, only royalty and high church officials had anything like a right to speak their minds about the King and regime. For others, criticism might be equated with treason and risk severe penalty. It was not until the English Bill of Rights that this freedom was officially given to members of Parliament, and then only when in session. Such limits were directed mainly at two "evils": sedition – criticism of authority assumed to lead to disloyalty and insurrection against the state, and blasphemy – criticism of religion. Out of this struggle over political and religious expression the modern Anglo-American freedom of speech emerged (Longman 2003, 130).

The English Bill of Rights, the first fruits of the Glorious Revolution, set forth the liberties of the subject that the parliamentary party had struggled for most of the seventeenth century to affirm against Stuart absolutism, and it was a direct forerunner of the American Bill of Rights, which was adopted a century later (Hall et al. 1991). As one of our theses argues, that without English legal influence the protection of speech and of the press would not be part of the United States Bill of Rights, we can say that the document explicitly protected that right in the following manner: "That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament" (Hall et al. 1991, 7-8).

5 AMERICA'S FIRST PROTECTIONS OF FREEDOM OF EXPRESSION

5.1 Freedom of speech and of the press in the American colonies

Let us first explain that the colonial America time period represents the time from 1607 to 1776 in early American history, when events led up to the American Revolutionary War and establishment of the constitution. In this colonialism period settlers and colonists arrived from Europe looking for opportunity for wealth, land and religious freedom. Because settlers were governed by the laws of the European homelands, the dissension, rebellion and anger during the colonial America time period and the creation of the new nation of the Unites States of America was inevitable (Alchin 2015). The first permanent colony settled in America by the British Empire was at Jamestown, Virginia in 1607, it was also the first of 13 colonies in North America. We can divide the 13 colonies into three regions: New England, Middle, and Southern colonies. After Virginia the rest of the colonies were founded as follows: Massachusetts (1620), New Hampshire (1623), Maryland (1634), Connecticut (1635), Rhode Island (1636), Delaware (1638), North Carolina (1653), South Carolina (1663), New Jersey (1664), New York (1664), Pennsylvania (1682) and Georgia (1732) (About.com 2016).

In the colonies, as in England, licensing and censorship followed very close the introduction of printing. Shortly after English settlers set up colonies in Virginia and Massachusetts, America got its first press. The first book to be published in the colonies was one published by Steven Days in Massachusetts in 1639; in 1656 Samuel Green established a press in Massachusetts, the second in the colonies. Religious books which were thought to be dangerous had appeared in 1662, and two licensors were appointed – without whose permission nothing could be published. Early in 1663, the General Court repealed the licensing act, only to reimpose a similar one the following year. The act of 1664 followed the pattern set in England: no printing press could be established elsewhere than in Cambridge, and nothing could be printed without the permission of the licensors. Violations were punished by forfeiture of equipment and the right to engage in the occupation. From this early beginning, a license continued to be a prerequisite to publication in Massachusetts until 1719, twenty-four years later than in England. As in the mother country after the expiration

of the licensing act, freedom of the press meant nothing more in this colony than freedom from prior restraint (Hudon 1963, 16-17). Ingelhart (1987) also points out that until the appointment of Governor William Burnet in 1720 of New York, every colonial governor had been instructed to allow no press, book, pamphlet, or other printed matter "without especial leave and license first obtained."

The first colonial newspaper in America, *Public Occurrences Both Foreign and Domestic* was published on September 25, 1690. Although some English newspaper and single-page broadsides had been available to read before, this was the first true multi-page colonial newspaper. However, it was suppressed after its first edition. The British governor forced publisher Benjamin Harris and printer Richard Pierce to close down the newspaper for "reflections of a very high nature" and for failing to obtain a correct printing license. Harris hoped to publish the Boston newspaper every month, but his September 25th edition remained the only issue printed. After *Public Occurrences Both Foreign and Domestic* ended, there were no regularly published colonial papers for about fourteen years. People continued to read English newspapers, broadsides and publications. First continuously published colonial newspaper became the *Boston News-Letter*, which was founded on April 17, 1704. This *News-Letter* was discontinued in 1776 at the beginning of the American Revolution (The Poynter Institute 2016).

When reflecting on the evolution of English and colonial common law, the Chief justice of Massachusetts in 1768 registered the prevailing understanding of free speech and press as follows:

> *Formerly, no Man could print his Thoughts, ever so modestly and calmly, or with ever so much Candor and Ingenuousness, upon any subject whatever, without a License. When this restraint was taken off, that was the true Liberty of the Press. Every Man who prints, prints at his Peril; as every man who speaks, speaks at his Peril. It was in this manner I treated this Subject at the last Term, yet the Liberty of the Press and the Danger of an Imprimatur was canted about, as if the Press was going under some new and illegal Restraint. No gentlemen of the Bar, I am sure, could have so misunderstood me. This Restraint of the Press, in the Prevention of Libels, is the only Thing which will preserve your Liberty. To*

suffer the licentious Abuse of Government is the most Way to destroy its Freedom (Forgotten Books 2013).

William Penn, who founded the Pennsylvania colony in 1628, brought master printer William Bradford to Philadelphia, but Bradford soon realized that he could not run a profitable business under the oppressive moral code that was in force in Penn's colony. He produced several religious publications and a small amount of other printed material, after which the law prevented him from printing even the most trivial news. Bradford moved to New York and in 1725 established the first newspaper in New England, called the *New York Gazette*. In colonial life newspapers played an important role; in a society where communication between towns and the 13 colonies was discouraged, they provided the only means of spreading news other than by mere hearsay. This importance was recognized by Colonist and British rulers during years preceding the War of Independence, when they both employed the press to spread heated propaganda among people. In democracy the newspapers are the forum for political discussion, the black and white evidence of the importance of free speech, and the newspapers were the ones who announced the Declaration of Independence (The Walden Font Co. 2010).

As stressed at the beginning, in the colonies not even the laws could be printed without a license. In 1682, John Bucknew was arrested for printing the laws of Virginia without one. The advice of the King was sought in the matter and his instructions were quite simple: no printing press on any occasion whatsoever. Thereafter, printing was not allowed in Virginia from 1683 to 1729. From 1729 until 1765, just one press which was largely controlled by the governor existed in the colony (Hudon 1963, 18).

One of the significant figures in fighting for freedom of the press in the colonial time was Ben Frankin, who in 1731 wrote "An Apology for Printers". He said that the opinions of men are quite variable and the business of printing deals chiefly with these opinions, offending some and pleasing others and argued that printers realize that equal space perhaps should be provided for both sides of a dispute. Since printers tend to conform to this plan, it is not the fault of the press that some are offended. If a printer were to publish only things that would please everybody, very little would be published: "When people have different opinions, both sides should have equal

advantage to be heard by the public." He further remarked that unless a person is in the printer's position, he can hardly be critical of the way the printer handles his own job (summarized by Ingelhard 1987).

In the development of printing the southern colonies lagged behind those of the north. However, that did not displease the authorities. Indeed, in 1671 Governor Berkeley expressed his pleasure at this lack of progress in Virginia in the following manner: "But, I thank God, we have no free schools nor printing; and I hope we shall not have these hundred years; for learning has brought disobedience and heresy and sects into the world; and printing has divulge them, and libels against the government. God keep us from both." The first newspaper to be published in Virginia, the *Virginia Gazette*, appeared in 1736 and it expired with its owner in 1750. But it was soon revived and continued until 1778. The value of this enterprise is reported to have been described by Jefferson as follows: "Till the beginning of our revolutionary disputes we had but one press; and that having the whole business of the government, and no competition for public favor, nothing disagreeable to the governor could find its way into it" (Hudon 1963, 18-19).

If summarizing the colonial era, say around the year 1745, 22 newspapers were published in the colonies. In New York the important step to freedom of the press was made by the appearance of the John Peter Zenger who was with his *New York Weekly Journal* the opposition to the government (summarized by Ferfila 2002). The case of this printer and journalist is discussed next.

5.2 John Peter Zenger and the fundamental freedom

John Peter Zenger (October 26, 1697 – July 28, 1746) was a German American journalist and printer who lived and worked in New York City, where he printed *The New York Weekly Journal*. The first generation of American editors realized that readers liked the criticism of the local governor, just as the governors realized they have the power to shut down the newspapers. In 1734, the most dramatic confrontation took place in New York, where Zenger was, after the publication

of satirical attacks, sued by the governor for criminal libel. Zenger who became the iconic American hero for freedom of the press was acquitted by the jury (Wikipedia 2016).

In order to voice his disagreement with the actions of newly appointed colonial governor William Cosby, Zenger in 1773 printed copies of a newspaper. When Cosby arrived in New York he found himself in a dispute with the Council of the colony over his salary. Since he could not control the Supreme Court, he replaced the Chief Justice, and Zenger's *New York Weekly Journal*, supported by members of the popular party, continued to publish articles critical of the royal governor. After that, Cosby issued a proclamation condemning the newspaper's "diver's scandalous, seditious, false and virulent reflections" and charged Zenger with libel (Archiving Early America 1995-2016).

At the trial Zenger's attorney Andrew Hamilton openly admitted that Zenger had published the articles allegedly attacking the governor, but he argued that since they contained the truth, they were not libelous. In his address to the jury at the conclusion of the case, Hamilton fought for the right of the jury to judge whether a matter was libelous. The authority to make this judgment would therefore increase the stature of the jury. In his concluding address he set the stage as follows: "The question before the Court and you, gentlemen of the jury, is not of small or private concern. It is the best cause. It is the cause of liberty, your upright conduct this day, will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempts of tyranny." The jury withdrew and returned a verdict of not guilty. In England, 100 years earlier, the jurors might have suffered fines and imprisonment for such a decision. The Zenger trial was a landmark in the struggle for a free press and the jury trial (summarized by Pleasants 1996). In this landmark case Zenger's attorney Hamilton established the precedent that a statement, even if defamatory, is not libelous if it can be proved. With that freedom of the press got its affirmation (Archiving Early America 1995-2016).

To better understand the importance and significance of this historic case, we should observe an actual issue of the *New York Weekly Journal*, dated February 25, 1773, prior to Zenger's arrest,

which presents an attack against the government in article under the pseudonym "Cato". That was a pen-name of Thomas Gordon and John Trenchared, two British writers whose essays were published and republished for decades in Britain as Cato's Letters (1723) and were largely popular in America. That article gave its readers a preview of the same argument Attorney Hamilton and William Smith presented a year and a half later in the government's libel case against Zenger – that truth is an absolute defense against libel (Wikipedia 2016). Number 15 of Cato's letter from the essay titled "Freedom of Speech is the Great Bulwark of Liberty" has stated as follows:

> *A libel is not less the libel for being true. But this doctrine only holds true as to private and personal failings; the exposing therefore of public wickedness, as it is a duty which every man owes to the truth and his country, can never be a libel in the nature of things? It has been hitherto generally understood, that there was no other Libels but those against Magistrates and those against private men. Now to me there seems to be a third set of libels, full as destructive as any of the former can probably be, I mean libels against the people. Almost all over the earth, the people for one injury they do their governor, receive ten thousand from them. Nay, in some countries it is made death and damnation, not to bear all the oppression and cruelties, which men made wanton by power inflict upon those that gave it them* (Don Surber).

While this was a victory for a free press, the battle continued. New York State did not officially recognize the truth as a defense in libel until 1805. As for Zenger, he resumed publishing the *New York Weekly Journal* until his death on July 28, 1746 (Don Surber).

At the end is revealed the answer of Governor Morris to the question: Why should an English speaking nation owe its greatest debt to a German-born "indifferent printer" whose main claim to fame is the amount of trouble he got into? By way of answering this question, near the start of his eventful life in service to the United States of America, Morris wrote: "The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America" (Putnam 1997, 4).

5.3 Press in revolutionary times

In short, it is important to first point out that the American Revolutionary War (1775–1783), the American War of Independence, or simply the Revolutionary War in the United States, was the armed conflict between the Kingdom of Great Britain and thirteen of its former North American colonies which had declared themselves the independent United States of America. The war had its origins in the resistance of many Americans to taxes imposed by the British parliament, which they claimed were unconstitutional. In July 1776, the Continental Congress formally declared independence (Wikipedia 2016).

In the years preceding the Revolutionary War, freedom of expression faced a challenge from rival political factions. Patriot newspapers were staunch supporters of separation from England. The Patriots argued that freedom of the press was a natural, God-given right, and they exercised it vigorously during the Partisan press period. But they would not extend the same right to Tory newspapers, published by those who opposed revolution and separation. Tories were threatened with violence and destruction of their printing equipment by mobs who wanted only the Patriot side to be heard (Carter et al. 1988, 28).

The turbulent years during the American Revolutionary War were a time of great disturbance and trial among newspapers. Suppression, interruption, and lack of support hindered the growth of their publishing to such an extent that near the end of the war they were in most respects less vital than at its outbreak. When the treaty of peace was signed there were around forty-three newspapers in the United States, and on the date of the battle of Lexington, that number had decreased to thirty-seven. Between the two events only a dozen had maintained continuous existence, and most of those had to face difficulties and delays through lack of type, patronage and paper. Even in the principal cities like Philadelphia, New York and Boston there was no newspaper that would continue publication throughout the war. At the times of the British occupation Revolutionary papers had to move away, or become royalist and suffer at the next turn of military fortunes, or were discontinued, and when the colonial forces held the region, royalist papers were suppressed. Nevertheless, it was possible for the papers to continue without interruption in the smaller inland

places; therefore, an exodus of publishers took place. Still they faced the acute scarcity of paper, and worn out type could not be replaced. Issues sometimes failed to be produced, thus the appearance of the newspapers deteriorated. Postal service was poorer than ever, foreign papers that were an important source of information could rarely be obtained, and many of the excellent writers who previously filled the columns with essays about government and colonial rights were now otherwise occupied (Bartleby.com 1993-2015).

The newspapers of the Revolutionary era were an effective force working toward the awakening of a consciousness of a common purpose, the unification of sentiment, interest, a determination to see the war through to a successful issue, and destiny among the separate colonies. They bore no small share of the burden of arousing and supporting the often discouraged and indifferent public spirit, and they were more single-minded than the people themselves. Still, a great number of the papers which kept running or were brought to life during the war did not manage to adapt themselves to the following conditions of peace (Bartleby.com 1993-2015).

In this regard it should be noted that after the Revolutionary War American journalism underwent changes. Many colonial newspapers stopped publishing, but a number of new papers were started. During the period before and after the Revolution, papers could be started with ease, though not all were able to survive financially. More than 60 new papers were begun. After the war, newspapers were arms of political parties rather than products of printers. They were run by editors who would slant the contents as they wished. This was one feature that remained from the pre-war period: partisanship in the press. But instead of being Patriot versus Tory, it became Federalist versus Republican (summarized by Carter et al. 1988).

As McClellan (2000) states, in the time of war civil rights were sorely battered. By the year 1783 when the fighting ended, from New Hampshire to Georgia, little freedom of speech or of the press was allowed – except freedom of a sort for whichever side, Loyalist or Patriot that happened to be in control of a town or a region. At the time when the first state constitutions were drafted, those two decades of violent interference with publication and public speaking had not been forgotten.

5.4 First documents protecting free speech and free press

Since one of the theses argues that freedom of speech and of the press would not be part of the First Amendment of the American Constitution had this basic human right not already been protected by the first state documents of the 13 colonies protecting them, the following is an overview of those early documents.

5.4.1 Massachusetts Body of Liberties – 1641

The first legal code established by European colonists in New England was the Massachusetts Body of Liberties, compiled by the Puritan minister Nathaniel War and established by the General Court in 1641. The laws blended the English legal tradition into the colonial legal system and were heavily influenced by the Magna Carta (Mass.Gov 2016). The Body of Liberties was one of the earliest protections of individual rights in America. Contrary to many of the English legal sources of the time, it was far more supportive of individual rights. In different degrees it contained some rights, among them freedom of speech, that were later included in the Bill of Rights (Wikipedia 2016).

Section 12 of the document reads as follows: "Every man whether Inhabitant or foreigner, free or not free shall have liberty to come to any public Court, Counsel, or Town meeting, and either by speech or writing to move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting had proper cognizance, so it be done in convenient time, due order, and respective manner" (Hanover Historical Texts Project).

5.4.2 Letter to the Inhabitants of the Province of Quebec – October 26, 1774

After the Quebec Act was adopted, the delegates of the First Continental Congress addressed the people of the Province of Quebec with the Letter to the Inhabitants of the Province of Quebec in

order to inform them of five important rights of British constitutional law that were not in force in their colony over a decade after the peace treaty of 1763, which ended the French and Indian War, and resulted in every French subject becoming a new British subject equal in rights to all other British subjects (Wikisource 2011). These five guaranteed rights were trial by jury, representative government, Habeas Corpus, freedom of the press and land ownership (Wikipedia 2015). The importance of the right that regards freedom of the press consist not only in the advancement of morality, science, truth, and art in general, but also in its enhancement of liberal thought on the administration of Government, its consequential promotion of union among subjects, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs and its ready communication of thoughts between them (Wikisource 2011).

5.5 First Constitutional guarantees of free speech and free press

5.5.1 Pennsylvania Declaration of Rights

In Pennsylvania, the rights of freedom of religion, speech, press, assembly, and petition were guaranteed with the first Constitution, 15 years before ratification of the federal First Amendment in 1791. The Pennsylvania's Constitution of 1776 was the most democratic and radical of the first state constitutions and also included a Frame of Government and a Declaration of Rights. This constitution protected individual liberties as a means towards ends and was designed to support the development of republican government. The Declaration preserved all freedoms that were later enumerated in the federal First Amendment, namely: the right of conscience in the free exercise of religious worship, freedom of speech, press, assembly, and petition, and a guarantee that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government (Hsp.org 2013).

Article XII stated: "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 to be restrained" (Founders Revolution).

5.5.2 Virginia Declaration of Rights

Virginia's Declaration of Rights was adopted by the Virginia Constitutional Convention on June 12, 1776. It was written by George Mason and drawn upon by Thomas Jefferson for the opening paragraphs of the Declaration of Independence. It became the basis of the Bill of Rights and it was widely copied by the other colonies (National Archives 2016). Some provisions of this declaration as well as other bills of rights can be found in previous English legal documents, such as the Magna Carta, the Petition of Right, and the English Bill of Rights (McClellan 2000, 150). The declaration was largely the work of George Mason, but Madison procured an important change in it respecting religious freedom, substituting a phraseology which declared freedom of conscience to be natural right and not merely an object of toleration. This was his only contribution to the new frame of government, but it would scarcely be denied that it was a notable one, particularly in view of the fact that most of the older and more prominent delegates were strongly committed to the idea of state control of religion (Burns 1938, 6).

Section 12 determined: "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments" (National Archives 2016).

5.6 Charters of freedoms (Bill of Rights) and other early State Constitutions

The year 1776 was the first time in the world's history that a large group of communities – thirteen independent and sovereign States – had begun the formation of their own governments under written constitutions. That marked the birth of the American nation as well as the birth of constitutional government in the United States, and in the world at large. This was also the time when the first national constitution, the Articles of Confederation was written, a first frame of governing document of sorts. The majority of the colonial leaders who participated in the creation of these first constitutions would later meet together in Philadelphia to draft the Constitution of the United States. Therefore, the writing of these constitutions was a valuable experience in the art of constitution-making as well as a rehearsal for the Federal Convention of 1787 (McClellan 2000, 141-142).

Although not all of the earliest constitutions contained bills of rights, the examples set by such States as Pennsylvania, Virginia, and Massachusetts set the course for future constitutions (McClellan 2000). Between the time of January 1, 1776 and April 20, 1777, 10 of the 13 states had adopted their own constitutions (Olson 1990).

For the purpose of this work, focus will only point to the provisions of the declarations of rights concerning the freedom of speech and press.

5.6.1 Delaware Declaration of Rights – September 11, 1776

Section 23: "That the liberty of the press ought to be inviolably preserved" (Founders Revolution).

5.6.2 North Carolina Declaration of Rights – December 14, 1776

XV. "That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained" (Founders Revolution).

5.6.3 Maryland Declaration of Rights – November 3, 1776

VIII. "That freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature" (TeachingAmericanHistory.org 2006-2016).

XXXVIII. "That the liberty of the press ought to be inviolably preserved" (TeachingAmericanHistory.org 2006-2016).

5.6.4 Vermont[6] Declaration of Rights – July 8, 1777

XIV. "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 to be restrained" (Founders Revolution).

5.6.5 Massachusetts Declaration of Rights – October 25, 1780

XVI. "The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restricted in this commonwealth" (Founders Revolution).

5.6.6 New Hampshire Bill of Rights – June 2, 1784

XXII. "The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved" (Lonang Institute 2014).

XXX. "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever" (Lonang Institute 2014).

As can clearly be seen, early States realized the importance of free speech and free press and recognized them as one of the great bulwarks of liberty, and therefore protected them. The continuation explores whether the Founding Fathers included these to freedoms in the First Amendment of the United State Constitution and fought for them because they saw them as one of the basic human rights, or if the reason for it was more pragmatic and one of a political nature.

[6] The State of Vermont was not admitted into the Union until 1790 (McClellan 2000, 146).

6 BILL OF RIGHTS

This introduction identifies the Bill of Rights as the first ten amendments to the United States Constitution. The amendments were originally proposed in order to calm the fears of Anti-Federalists who refused to ratify the Constitution on account of its lack of a provision that would guarantee personal freedoms. Therefore, the Bill of Rights alongside a number of personal freedoms also limit the judicial and government's power and reserve some power to the states and the public. At the beginning the amendments applied only to the federal government, however, most were subsequently by way of the Fourteenth Amendment, through a process known as incorporation, applied to the government of each state (Wikipedia 2016). Discussion of the importance of the Fourteenth Amendment for incorporation of the First Amendment occurs in the latter chapter.

To properly understand why the incorporation of the Bill of Rights was of such great importance, it must first be explained that after Madison and other members of the Constitutional Convention had completed drafting the Constitution during the summer of 1787, they sent copies of the documents to the states for ratification. They agreed that the new government would not go into effect until nine of the thirteen states had ratified it in special conventions called for that purpose, since the government would derive its power from the people. At the constitutional conventions the draft was not in general accepted. Most Americans seemed supportive of the new government, but a comparatively small but vigorous opposition emerged (Shmoop University 2016).

Since one of the main theses argues that freedom of speech and of the press would not be a constitutional guarantee if the Anti-Federalists had not opposed the ratification of the Constitution without the Bill of Rights, it is essential to fully examine and overview the historical context, factors and colorful events that led to its incorporation and adoption.

6.1 Individual freedom, rights of the people and the Bill of Rights

For the introduction of the long struggle over the Bill of Rights, let it first be pointed out that for many Americans, the Bill of Rights is the most important part of the Constitution. One can only guess how those men who framed the original document over two hundred years ago might react to contemporary popular understanding over their work. But there is little doubt that during the formative years of the early Republic and during the summer of 1787, there was substantial disagreement over the idea of adding a bill of rights to the new Constitution, as there was considerable controversy over the Constitution itself (Hickok 1996, 1).

As we have mentioned earlier after the constitutional convention came to an end in September 1787, the draft Constitution was sent to the states for the ratification. The delegates from the 13 new American states decided that the Constitution would go into effect after a nine-state ratification. But what they did not foresee was the opposition that arouse shortly after the circulation of the documents. While the new constitution provided the frame for the new government, it did not say anything about the rights of individual citizens. Opponents of the document who were aware that individual rights had been guaranteed in earlier documents, like the Virginia Declaration of Rights in 1776 or the English Bill of Rights, were convinced that some specific provisions stating the rights of individuals was necessary. On the other side, advocates of the draft constitution believed that protection of individual rights is not needed (Urofsky 2003). Those who were unhappy with the Constitution as it was presented to the states for ratification considered that the omission of a guarantee of individual liberties was contrary to the sentiment throughout the states that favored such a guarantee and which had already promoted eight states to adopt written bills of rights (Hudon 1963).

Shortly after the Philadelphia convention adjourned, James Madison asked his mentor and friend, Thomas Jefferson for his opinion about the new Constitution. After reviewing the document Jefferson replied that in general he could agree with the proposed draft, but that it had one big deficiency, it had no bill of rights, and “such a listing is what people are entitled to against every government on earth” (Urofsky 2003). He further elaborated that a bill of rights should clearly and

without sophism provide for freedom of religion and freedom of the press. When he wrote his opinion to the delegate to the Continental Congress from Virginia, he said:

> *The good sense of the people is always going to be the greatest asset of American government. Sometimes they might go astray, but they have the ability to right themselves. The people should always have media to express opinions through. The basis of our government being the opinion of the people, the very first object should be to keep that right; and where it left to me to decide whether we should be to keep that right; and were it left to me to decide whether we should have government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter* (Baritz 1996 and Ingelhart 1987).

When defending the liberty in the work History of Freedom and other Essays of 1907, Lord John Acton argued: "Liberty is not a means to higher political end. It is itself the highest political end" (Urofsky 2003).

Some of the men who drafted the Constitution were surprised by Jefferson's comment; they believed that since the entire document strictly limited the powers of the new government, that is to be understood that it comprised a bill of rights; therefore, they saw no need of any specific assurance for instance that Congress would not establish a church, since Congress had been given no power to do so. But the main author of the Declaration of Independence did not share their view. He believed that in the past the governments had too many times gone into areas where they had supposedly no power to act, and no authority to be, which resulted in loss of individual rights or their curtailment. Jefferson was clear: "Do not trust assumed restraints, make the rights of the people explicit, so that no government could ever lay hands on them" (Urofsky 2003).

6.2 Whether a Bill of Rights Was Necessary

One of the facts of the adoption of the Bill of Rights is that consideration of its inclusion to the Constitution did not occur to any delegate any sooner than in the final hours of the Convention (McClellan 2000). The convention that started on May 25, 1787 adjourned on September 17, and only five days earlier George Mason, a delegate from Virginia suggested the addition of a Bill of Rights to the Constitution. He proposed the Bill of Rights to be shaped on previous state

declarations, and a delegate from Massachusetts Elbridge Gerry made a proposal to a formal motion. But after only a brief discussion of the state delegation, the motion was defeated by a unanimous vote. James Madison, a delegate from Virginia who was at first an opponent to a Bill of Rights had explained the vote by calling the state bills of rights "parchment barriers" that offered only an illusion of protection against tyranny. Another delegate, James Wilson from Pennsylvania argued that any act that would enumerate the rights of the people would be dangerous, since it would imply that rights which are not explicitly mentioned do not exist. Since Gerry and Mason had emerged as opponents of the proposed new Constitution, their proposal introduced only a few days before the end of the convention could also have been understood by other delegates as a tactic of delay; however, the swift rejection of the proposal indeed later endangered the entire ratification process. Some have called the omission of a Bill of Rights "a political blunder of the first magnitude", while others believed it was "the one serious miscalculation the framers made as they looked ahead to the struggle over ratification" (Wikipedia 2016).

To encourage public support for the Constitution, James Madison, Alexander Hamilton and John Jay wrote a series of letters explaining the advantages of the Constitution and debunking criticism of it. Collectively, the eighty-five essays are known as The Federalist Papers – the supporters of the Constitution were known as the Federalists. They essays were initially published in a series of New York publications *The Independent Journal, Packet and Daily Advertiser* in 1787 and 1788. Hamilton wrote fifty-one essays, Madison fifteen, and Jay five. All of these articles were signed *"Publius"* (Bruun and Crosby 2012, 169).

On the other side, the opponents of the proposed Constitution gathered in the group that became known as Anti-Federalist. They were composed of some leading revolutionary figures like Richard Henry Lee, Samuel Adams and Patrick Henry. The most popular Anti-Federalist tract featured the title "Hon. Mr. Gerry's Objections", focusing on the lack of a bill of rights in the proposed constitution, was written by Elbridge Gerry. Many raised the concern over the strong national government, since they believed it represented a threat to individual rights and even the possibility that the President could one day become a king (Wikipedia 2016).

Between September 17, 1787, the day that the Constitution was signed by the Constitutional Convention, and May 29, 1790, the day Rhode Island became the thirteenth and last state to ratify the Constitution, the Federalists and Anti-Federalists engaged in a fierce national debate on the merits of the Constitution (The Free Dictionary 2003-2016). A systematic criticism of the proposed Constitution and full elaboration of Anti-Federalist thought was provided in a series of articles published in New York in the *Poughkeepsie Country Journal* from November, 1787 through January, 1788, usually titled *Letters from the Federal Farmer* (Constitution Society 2016).

For much of the ratification period the Federalists opposed a bill of rights in part due to the procedural uncertainties it would create. In *Federalist* No. 84 Hamilton argued that "The constitution is itself in every rational sense, and to every useful purpose, a Bill of Rights." In his opinion the ratification would not cause the surrendering of the rights of the American people, so the protections of rights was unnecessary: "Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations." To the objections of the critics who pointed out that earlier political documents had protected specific rights, Hamilton has answered that the Constitution was inherently different: "Bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was Magna Carta obtained by the Barons, swords in hand, from King John." Madison opposed a Bill of Rights in Federalist 46, suggesting that state governments were sufficient guarantors of personal liberty. In contrast, Patrick Henry was of the belief that legislature must be firmly informed "of the extent of the rights retained by the people, being in a state of uncertainty, they will assume rather than give up powers by implication" (Wikipedia 2016).

Hamilton further asserted that a bill of rights was not only unnecessary but also dangerous. "For why declare that things shall not be done which there is no power to do?" The new Constitution created a government of enumerated and limited powers. It had no power to regulate speech or press. Why then, he asked, say it shall not regulate speech and press. Moreover, the danger in explicitly stating the limitations on governmental power was not to be dismissed lightly. Any bill of rights "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted." Hamilton saw the

possibility that a bill of rights aimed at keeping government in its place might provide the vehicle for the exercise of governmental power in areas beyond those delegated to it by the Constitution. He continued his attack on the critics of the Constitution, arguing that a bill of rights would be, at best, only a partial barrier against governmental action. And it would be a problematic barrier at that. Any rights listed would need interpretation, after all "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?" (summarized by Hickok, Jr. 1996).

According to Levy, the fact that the Framers of the Constitution actually believed their own arguments to justify the omission of a bill of rights is difficult to credit. He is of the opinion that some of the points they made were patently absurd, like the one that the inclusion of the bill of rights would be dangerous, and on historical grounds, unsuitable and that the argument made in *The Federalist*, No. 84 was so porous that it could persuade no one. Excepting Rhode Island and Connecticut, the two corporate colonies that retained their charters (with all royal references deleted), eleven states had framed written constitutions during the Revolution, and seven drew up a bill of rights; even the four without such bills inserted in their constitutions provisions normally found in a bill of rights. Levy further argues that to imply that bills of rights were un-American or unnecessary merely because in America the people were the source of all power was without historical precedent. The new American nation had over a period of one century and a half become accustomed to the idea that the people created government, that government existed by the consent of the governed, that the written compact constituted fundamental law, that the government must be subject to the limitations that are necessary for the security of the rights of the people, and that the reserved rights of the people were usually enumerated in a bill of rights. Counting Vermont (an independent republic from 1777 until its admission to the Union in 1791), eight states had bills of rights – notwithstanding any opinion that such bills properly belonged only in a compact between a king and his subjects (Levy 1999).

On the other side, the Anti-Federalists complained that the new system threatened liberties, and failed to protect individual rights. The Anti-Federalists were not exactly a united group nor organized as well as the Federalists; instead they involved many elements. One faction opposed the Constitution because they thought stronger government threatened the sovereignty of the states.

Others argued that a new centralized government would have all the characteristics of the despotism of Great Britain they had fought so hard to remove themselves from. And still others feared that the new government threatened their personal liberties. Although the Anti-Federalists were unsuccessful in the prevention of the adoption of the Constitution, their efforts were responsible for the creation and implementation of the Bill of Rights (ConstitutionFacts.com).

Since the next section examines the discussions about freedom of speech and of the press in the State Ratifying Conventions, it must be added that arguments made by Madison and Hamilton in the newspapers of New York that appeared in the press among the thirteen states provided much of the fuel for deliberations.

6.3 Discussions about freedom of speech and freedom of the press and State Ratifying Conventions

The Constitutional Convention of 1787 adopted a rule that "nothing spoken in the house be printed, published, or communicated without leave" (Ingelhard 1978, 123).

A motion to add the Bill of Rights to the Constitution was defeated 10 to 0. The proposal to include a statement that the liberty of the press should be preserved was defeated because Delegate Roger Sherman said it was unnecessary since the power of Congress did not extend to the press. During the week of September 12 to 17, the Constitutional Convention rejected 7 to 4 a proposal by Charles Pinckney and Elbridge Gerry that the words "The liberty of the press should be inviolably preserved" be added. Edmund Randolph, governor of Virginia, refused to sign the proposed United States Constitution because he thought it was dangerous to liberty, and a second convention was needed to eliminate its dangers. George Mason refused to sign because it had no Bill of Rights and so fought for its defeat. "There is no declaration of any kind preserving the liberty of the press, or the trial by jury in civil cases," he said. As the Constitutional Convention closed, both James Madison and Richard Henry Lee of Virginia attacked the proposed Constitution because it had no provisions for a Bill of Rights or for freedom of the press (Ingelhard 1987, 123).

Federalists maintained that nothing in the Constitution threatened freedom of the press, while Anti -Federalists criticized it for not protecting press freedom. On September 27, Richard Henry Lee proposed to Congress the Constitution be amended in order to include a guarantee of the right of free press. Similar amendments were also proposed or adopted by seven state ratifying conventions (Ingelhard 1987, 123).

Ratification in many States was conditioned on the understanding that the first order of business in the first Congress would be the preparation of a bill of rights for submission to the States, although no such formal agreement was adopted. In order for that to happen five States sent long lists of proposed amendments to Congress for consideration. The amendments were inspired as much by a desire to protect civil liberties as by a desire to reduce the powers of the Federal government. But the outcome of the review of the proposals of the first three States, New Hampshire, South Carolina, and Massachusetts shows that members were indeed much more concerned about the rights and powers of the States than about the rights of the people (McClellan 2000, 406-407).

In fact, the Bill of Rights was actually a concession to the States Rightists and Anti-Federalists who feared Federal misuse of State power, especially in the sensitive area of civil liberties, since the Bill of Rights exempted the States as by its terms, it applied only to Congress (the Federal government). In historical perspective, it had two major purposes: to assure each State that the Federal government would not have jurisdiction over most civil liberties disputes between a State and its citizens and to assure each individual that the Federal government would not encroach upon his civil liberties. Each amendment was a guarantee to the individual and to the States that limited the powers of the Federal government, but not those of the States. Regarding the right to free speech, only Congress was prohibited by the First Amendment from abridging such freedom, and the States were left to their own judgment when establishing the standards of free press under their own constitutions and State bills of rights (McClellan 2000, 408).

6.3.1 Continental Congress, 26 – 28 September, 1787

In the Continental Congress Nathaniel Gorham, the delegate from Massachusetts was of the opinion that a bill of rights was not needed. He expressed his view in the following manner: “No necessity of a bill of rights, because a bill of rights in state governments was intended to retain certain powers in the people as the legislatures had unlimited powers.” James Madison who was of the same opinion continued: “A bill of rights is unnecessary because the powers are enumerated and only extend to certain cases, and the people who are to agree to it are to establish this.” On the other side, Richard Henry Lee from Virginia, shared the opposite opinion: “It is admitted and a fact that this Constitution was to be sent to Congress, but surely it was to be considered and altered, and not to be sent forward without the bill of rights. It will be brought forward. A bill of rights is not necessary in the Confederation because it is expressly declared that no power should be exercised, but such as is expressly given, and therefore no constructive power can be exercised. To prevent this is the great use of a bill of rights” (University of Chicago Press and the Liberty Fund 2000).

6.3.2 Records of the Federal Convention

August, 20, 1787, 2:340; Madison

In order to refer to the Committee of detail, Mr. Pinkney submitted to the House a number of propositions, among them one regarding the liberty of the Press: “The liberty of the Press shall be inviolably preserved” (University of Chicago Press and the Liberty Fund 2000).

6.3.3 Richard Henry Lee to George Mason

October 1, 1787, Masons Papers 3:997–98

Richard Henry Lee was a statesman from Virginia and signatory to the Articles of Confederation, and George Mason, also from Virginia, was most known as the author of the Virginia Declarations

of Rights. They both did not approve the work of the Convention of 1787. In advocating that the new constitution should have a declaration or a bill of rights, Lee was convinced that universal experience has shown that the most expressed reservations and declarations are necessary for protection of the just rights and liberties of humanity from the silent powerful and ever active conspiracy of those in power, and it seems to be the sense of the good people of America by the numerous Declarations or Bills of Rights, upon which Governments of the greater number of the States are founded. He further argued that such cautions must properly restrain and regulate the exercise of the great powers necessarily given to the government in conformity with these principles. Regarding the rights of free speech and of the press he concluded: "And from respect for the public sentiment on this subject it is submitted, that the new Constitution proposed for the Government of the United States be bottomed upon a declaration, or Bill of Rights, clearly and precisely stating the principles upon which this Social Compact is founded to wit, that the right of conscience in matters of religion shall not be violated, that the freedom of the press shall be secured" (University of Chicago Press and the Liberty Fund 2000).

6.3.4 James Wilson, State House Speech

October 6, 1787, McMaster 143–44

James Wilson was one of the signatories of the United States Declaration of Independence and one of the Founding Fathers of the United States. He represented Pennsylvania in the Continental Congress and had a major influence on drafting the United States Constitution (Wikipedia 2016). He believed that a special list of freedoms is not needed and justified his conviction with the opinion that as people have established the powers of legislation under their separate governments, they have trusted their representatives with every authority and right which they have not explicitly reserved, and that means if the frame of government does not regulate every question respecting the jurisdiction of the House of Assembly, the jurisdiction is complete and efficient. But in delegating the federal powers, another criterion needed to be introduced, since congressional power should be established from positive approval expressed in the instrument of the union and not only from silent implication. From that perspective it is clear that in the first case everything which is not reserved is given, and in second the opposite proposition prevails, meaning that

everything which is not given is reserved. This distinction should provide the answer to those who find the omission of a bill of rights a defect in the proposed constitution, since it would have been absurd and superfluous to have determined with a federal body that people should enjoy those privileges of which they are not divested, either by the act that has brought the body into existence or by intention. He set as the example the liberty of the press, which had been an extensive source of opposition and declamation and asked what control can derive from the Federal government to destroy, obstruct or hinder that sacred palladium of national freedom. Wilson combined his considerations with resolution that the proposed system does not possess any influence on the freedom of the press and therefore it would be insignificant to pass a formal declaration upon the subject (University of Chicago Press and the Library Fund 2000).

The writings of James Wilson concerning freedom of the press were widely read. He believed that the government does not have any general power whatsoever concerning the freedom of the press, and no law with respect to the Constitution could possibly be adopted to destroy that liberty. He accepted the legal position of William Blackstone allowing prosecution after publication. Wilson said liberty of the press was not secured and that Congress could license the press and declare what would be a libel. Congressional power of self-preservation could be used to destroy liberty of the press. But Wilson insisted nothing in the Constitution gave Congress such power of authority. As he saw the situation, he said that indeed the Constitution does not say anything with respect to the press, but there is also no need to do so, since we can see that general government has no power concerning that liberty, just like no law in pursuance of the Constitution can possibly be enacted to destroy that liberty. According to his belief, the idea of the press was not carried as far in any other country as it was in America. What could be understood as the liberty of the press is that there should be no prior restraint upon it, but also that every author holds the responsibility for attacks on welfare or security of the government or the character, property or safety of the individual. The press is undoubtedly free, but he asked whether it is necessary to that freedom for every man's tenets on government to be printed at public cost (Ingelhart 1987, 128).

6.3.5 A Democratic Federalist

October 17, 1787, Storing 3.5.1–4

In the days preceding the general election the Honorable Mr. Wilson expressed his opinion in the speech given at the State House. He first reminded the audience that the case of John Peter Zenger of New York should not be forgotten, and it should remind people about how displeasing liberty of the press is to men in high power, therefore he proposed as a general rule that wherever the powers of a government extend to the persons, lives and properties of the subject, all their rights must be expressly and clearly defined, or else they will have poor security of their liberties. Since the new confederation had enormous power, which extended to the States of America as well as to the individuals, a number of means could be used to destroy effectively the liberty of the press. He concluded his speech with the thought that we cannot know what wicked and corrupt judges may do in the course of time when they are not restrained by express laws (University of Chicago Press and the Liberty Fund 2000).

6.3.6 Brutus, no. 2

November 1, 1787, Storing 2.9.23 – 33

In one of the series of the essays that was signed by Brutus, Robert Yates who was known as the recognized leader of the Anti-Federalists, sent a message to a citizen of the State of New York regarding the importance of freedom of press. He listed what rights were necessary to reserve, among them the liberty of the press should be held sacred and elections should be free (University of Chicago Press and the Liberty Fund 2000).

6.3.7 James Wilson, Pennsylvania Ratifying Convention

November 28, December 4, 1787, Elliot 2:434–37, 453–5

While trying to explain the omission of a bill of rights to the President of the Convention, James Wilson offered his defense mainly based on the justification of reasons for non-enumeration of powers. But first he started by explaining the happening at the Constitutional Convention, where he believed it to be true that the idea of adding bill of rights never entered the minds of many members of the convention, and where the proposal was only mentioned a few days before the end of deliberation. In his opinion a proposition to adopt a measure that would have supposed that the general government has every power that is not expressly reserved by the people would be rejected with greatest exacerbation. Even in a government where powers of the people derive from the same establishment as is expressed in this Constitution, a bill of rights is by no means a necessary measure. In a government that possesses enumerate powers, such a measure would be completely unnecessary and even dangerous. He did not understand why the notion that there is no security without a bill of rights in the United States occurred. There were several states, like South Carolina, New Jersey, Connecticut, Rhode Island and New York that had no bill of rights, and that did not mean that they had no security for their liberties. He was not sure that he in fact listed exactly the states that thought that adding a bill of rights to their constitutions was necessary, but the enumeration served to show by principle and experience, that, even in single governments, a bill of rights is not necessary or an essential measure. In his humble opinion in government consisting of enumerated powers, as it was proposed for the United States, a bill of rights is otherwise unnecessary, also highly imprudent. With regard to enumeration, everything that is not enumerated is presumed to be given, and in all societies there are many rights and powers which cannot be particularly listed. An imperfect enumeration of the powers of government would mean that all implied powers are reserved for the people, and by that means the constitution would become incomplete, just as an imperfect enumeration of such powers of the people would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. He combined his deliberation like this: “But of the two, it is much safer to run the risk on the side of the constitution, for an omission in the enumeration of the powers of government is neither as dangerous nor important as an omission in the enumeration of the rights of the people” (University of Chicago Press and the Liberty Fund 2000).

6.3.8 John Smilie, Pennsylvania Ratifying Convention

November 28, 1787, McMaster 249–51, 254–56

Contrary to the previous opinion, John Smilie at the same Convention argued for the inclusion of a bill of rights, and in address to the President of the Convention he first pointed out that in his opinion arguments which were introduced had not satisfactorily shown that a bill of rights is not a necessary appendix to the proposed system, nor that it would be improper. He reminded the President that Delaware had a bill of rights and, in fact, some of the honorable members who contested the propriety and necessity of that instrument took a very conspicuous part in the formation of the Delaware government. It was the impression that the members of the federal convention were in some degree convinced of the propriety and expediency of a bill of rights, since they expressly declared that the trial by jury in criminal cases shall not be infringed or suspended and maintained the writ of habeas corpus. This is not in accordance with the maxim that whatever is not given is reserved; it rather means that everything else not specified is included in the powers delegated to the government, which proves the necessity of a full and explicit declaration of rights. If we further consider the undefined, extensive powers wasted in the administration of the American system, if we consider the system itself as a great political compact between the governors and the governed, then an accurate, strong and plain criterion on the basis of which the people could immediately determine in what instance and when their rights are violated, is preliminary, without which this plan should not to be adopted, Smilie concluded (University of Chicago Press and the Liberty Fund 2000).

6.3.9 Federal Farmer, no. 6

December 25, 1787, Storing 2.8.86

In a series of articles under the name *Letters from the Federal Farmer* a systematic criticism of the proposed Constitution, and full elaboration of the Anti-Federalist position was provided (Constitution Society 2016). Number six of the letters stipulates that among enumerated liberties should be fundamental and unalienable rights in the United States, including freedom of press:

“The freedom of the press ought not to be restrained” (University of Chicago Press and the Liberty Fund 2000).

6.3.10 Federal Farmer, no. 16

January 20, 1788, Storing 2.8.196–203

In further advocating the necessity of a bill of rights, the Federal Farmer also posited some arguments. It states that as is seems, all parties agree that the freedom of the press is a fundamental right, and should not be restrained in any way whatsoever, not be taxed nor bound by duties. So why should people not declare this in adopting a federal constitution while also declaring that even if there is only doubt about the right, and it is a great question, are not powers given, in the exercise of which this right may be destroyed? The claim of the people or the printers to a free press is founded in the fundamental law in state constitutions and compacts, made by the people. If people can alter or annihilate those constitutions, so can they limit or annihilate this right, which can be done by using particular words, as well as by giving general powers. As no right guaranteed under a state constitution will avail against a law of the union, the question that can be raised is: What laws particularly relating to the press will congress have the right to make with a constitution of the union? Printing must be exempt from taxes beyond its profits, so the power to tax the press at discretion is a power to restrain or destroy the freedom of it. A free press has many functions, first being a channel of communication as to public affairs and mercantile; by means of it the people in large countries can ascertain each other’s sentiments and are enabled to unite, to become more formidable to those rulers who adopt improper measures. It is true that the newspapers can occasionally be the means of abuse, and of many things not true, yet these are but small inconveniences among many advantages. By the final establishment of the freedom of the press the keystone was set to the arch (University of Chicago Press and the Liberty Fund 2000).

6.3.11 A (Maryland) Farmer, no. 1

February 15, 1788, Storing 5.1.4–16

The volume of Farmer number one also defended freedom of the press. It stated that all precaution to human wisdom means the exertion of a negative. In the language of a bill of rights this would require that no one can authorize or justify the legislature power or action that would infringe or abolish the liberty of conscience and freedom of the press (University of Chicago Press and the Liberty Fund 2000).

6.3.12 Patrick Henry, Virginia Ratifying Convention

June 5–16, 1788, Storing 5.16.2, 24, 36–37

Virginia's leader of the Anti-Federalists Patrick Henry opposed the United States Constitution, since he was concerned that it endangered the freedoms of individuals as well as the rights of the states (Wikipedia 2016). At the Virginia Ratifying Convention he raised his concern for protection of a freedom of press stating that he hoped the integrity of the gentlemen who will compose Congress would take care to infringe human rights as little as possible. He believed that they should abstain from violating the rights of their constituents who are, however, not expressly restrained. But whether they will inter-meddle with that palladium of our liberties or not, it is still left for them to determine (University of Chicago Press and the Liberty Fund 2000).

6.3.13 Thomas Tredwell, New York Ratifying Convention

July 2, 1788, Elliot 2:398–400

At the New York Ratifying Convention Thomas Tredwell, senator of the State of New York also expressed his wish for some individual freedoms to be protected. He believed that for securing some liberties of the people, like a responsible and sufficient representation, freedom of election,

freedom of the press and trial by jury both in criminal and civil cases, greater caution should be used (University of Chicago Press and the Liberty Fund 2000).

6.4 Final adoption of the Bill of Rights and the role of James Madison

As shown from the debates presented thus far, it is clear that Madison's first endeavor was not in favor of a Bill of Rights, but during the ratification debates he gradually came to support its inclusion to the Constitution. Believing that he could preempt a second Constitutional Convention, which could open the entire Constitution to reconsideration and risk the dissolution of the new federal government, undoing the difficult compromises reached in 1787, he took the initiative of proposing amendments to the Congress himself. In a letter to his friend Jefferson he summed up the concerns of the so-called friends of the Constitution who generally agreed that the system should be revised, some by spirit of conciliation and some by approbation of particular amendments. But their wish for revision was to be carried out no further than to provide additional guaranties of liberties. He was convinced that amendments guaranteeing personal liberties would provide the Government its stability and due popularity, as well as 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. Let it also be noted that historians continue to debate the degree to which Madison considered the amendments of the Bill of Rights politically expedient and to what degree he considered them necessary. In the outline of his address he wrote, "Bill of Rights – useful – not essential" (Wikipedia 2016).

Hickok believes that the fact that Madison came to the position of proposing a bill of rights after having opposed one for so long can be assigned to the inconsistency of politics. After the ratification struggle in Virginia, Patrick Henry made it his business to end the public career of James Madison. In the legislature Henry was able to make sure that Madison was not chosen as a senator to the new Congress. Madison then sought a seat in the House of Representatives. His victory had been easily saved by the fact that Patrick Henry was able to prevail upon James Monroe to contest the seat. Monroe was Madison's friend. Moreover, Madison disliked campaigning. He hit upon the strategy aimed at securing the support of those who remained wary of the new

government – he would admit that he had changed his mind and that he now felt a bill of rights was needed as a means for providing additional guards in favor of liberty and as a means of satisfying the minds of well-meaning opponents. Writing during the campaign, Madison asserted: "it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, etc." (Hickok, Jr. 1996, 3-4).

Levy also agrees with the political expediency argument for Madison's change of heart, stating that although he first agreed with the Federalist arguments for the omission of a bill of rights, he later conceded that the Constitution would have been defeated without a pledge from its supporters to back subsequent amendments (Levy 1999). Madison's new opinion could largely change the balance in the country; stating that the provided constitution was a moderate one, he came to agree to its revision. He said that he was at first unwilling to see a door opened for re-consideration of the whole structure of the government, but then he looked into consulting earlier guarantees of individual liberties and personal freedoms and drafted a set of amendments to the proposed document he had composed in 1787. The compromise won over enough holdouts to secure a Federalist victory and therefore proved to be effective. The states agreed to ratify the Constitution under the condition that the first Congress would set a catalog of fundamental rights to work (The Colonial Williamsburg Foundation 2016).

With reference to the above-mentioned requirement of the states Madison sought to fulfill his pledge of subsequent amendments in the First Congress. For his accomplishments in the face of apathy and opposition, he is entitled in the country's memory as the father of the Bill of Rights even more than as the father of the Constitution (Levy 1999). He offered a series of revisions to the Constitution, hoping that they would satisfy the opposition without offending its supporters. He notified Jefferson of his intention in the following manner: "A bill of rights, incorporated in the Constitution will be proposed, with a few other alternations most called for by the opponents of the Government and least objectionable to its friends" (Hickok, Jr. 1996, 3). It could be argued that as Madison proposed the addition of the Bill of Rights over a series of amendments, he was

acting politically more than philosophically, since his belief remained that a list of explicit protections was unnecessary in terms of the structure of the new government. But he became aware that in order to guarantee the stability of the young nation a list was politically necessary (Shmoop University 2016).

The original proposal that Madison presented to the House of Representatives contained a list of seventeen Constitutional revisions. Congress reduced the list to twelve as presented as the bill of twelve amendments – not the famous bill of ten that was sent to the states for ratification. In the process another two were rejected, one about Congressional salaries, which was after 201 years, in 1992, passed as the 27th Amendment, and the other about apportioning members of the House, which was never ratified. The successful ten could provoke controversy, for example the one that today stands as the First Amendment, protecting freedom of religion, speech, the press, assembly, and petition. For Americans there is nothing more fundamental than the freedom of religion, therefore it seems appropriate that it is listed first, but what is today known as the First amendment was in Madison's original proposal fourth and was third at the time the list was sent to the states for ratification (The Colonial Williamsburg Foundation 2016).

On September 28, 1789, the twelve articles of amendments approved by Congress were officially submitted to the Legislatures of the States for consideration (Wikipedia 2016). On December 15, 1791, when the Virginia Senate finally voted for ratification final adoption of the Bill of Rights occurred (Ingelhart 1987, 133).

7 THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

"Congress shall make no law abridging the freedom of speech, or of the press." More than anything else in the Constitution, the First Amendment's protection of free speech and free press symbolizes the American commitment to liberty under law. These fourteen words have inspired and provoked not only Americans, but also reformers and constitution-makers all over the world. By prohibiting any law "abridging the freedom of speech", the American Constitution is understood to impose a formidable barrier to official censorship, perhaps the most serious danger to democratic government. The First Amendment, it is often said, forbids government from ordaining any official orthodoxy. It prevents majorities from entrenching their own preferred positions. It even guarantees a large number of outlets for free expression (Sunstein 1993, xi).

7.1 Shaping the First Amendment

According to Sunstein, we can identify a conception of free expression that is in principle attractive and draws strong historical support. Continuity lies above all in the distinctive American contribution to the concept of sovereignty. In England, sovereignty lay with the King. In the United States, as James Madison explained, the case is quite the opposite because the people and not the government possess the absolute sovereignty. The placement of sovereignty in "We the People", rather than the government, may well have been the most important American contribution to political theory. That contribution also carried important lessons for the freedom of speech. It created an ambitious system of "government by discussion", in which outcomes would be reached through broad public deliberation. It put a premium not on authority or privilege, but on the arguments set out and resolved through general discussion. It set out a defending principle of political equality, in which no citizen counted for more or less than one. Madison explicitly linked the First Amendment to the American revision of sovereignty and to a particular conception of democracy. He placed a high premium on the deliberative functions of politics and on political (not economic) equality, and he understood the free speech principle of the American Constitution, for which he above all was responsible, in light of these commitments. Keeping Madison's pronouncement in mind, one might even think of the American tradition of free expression as a

series of struggles to understand the relationship among this new conception of sovereignty, the commitment to political equality, the belief in democratic deliberation, and the system of free expression (Sunstein 1993, xvii).

7.2 Original intent of freedom of speech and of the press

If the text of the First Amendment is ambiguous, perhaps history can help to understand it better. Being especially concerned with the specific views of those who wrote the First Amendment yields many puzzles and would likely lead an unacceptably narrow understanding of the principle of free speech. One will find, for example, that some framers thought that many government restrictions on free speech were not in fact abridgements. As a matter of history, the notion of an abridgement was a limited one; it was not coextensive with the notion of a restriction. The word abridgement, read in light of history, therefore, introduces a large degree of ambiguity at the outset. And a separate question for interpretation is what does history say about the freedom of speech? In turning to history, one finds some evidence that in the founding period the phrase "the freedom of speech" was a term of art, one with highly specialized meaning. The term may well have referred primarily or even exclusively to the protection against what are described as prior restraints. Prior restraints consist mainly of two things: licensing systems before speech can reach the public, and court ordered injunctions against expression, banning speech in advance. If the framers intended the free speech principle to apply only to prior restraints, the First Amendment, as originally understood, offered precious little protection against what amounts to official censorship. There is a major obstacle to free speech if someone who utters a criticism of the President is subject to a sentence of life imprisonment, but there is no prior restraint. Most censorship occurs through subsequent punishment, and perhaps the framers did not intend to ban subsequent punishment at all. If this is so, the history reveals an extraordinarily narrow free speech principle (Sunstein 1993, xii–xiii).

To approach the discussion about the words "freedom of speech" or "of the press", one should first understand why these words are found in the First Amendment. In 1799, Madison explained: "Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt, that no power whatever over the press was supposed to be delegated by the Constitution, as it

originally stood; and that the (first) amendment was intended as a positive and absolute reservation of it." We must further explain that these two freedoms should be understood as freedoms from government restrictions, meaning that government officials should not judge writings or speech they find too critical of their affairs as seditious libel and make charges for seditious crime. As we could see from the Zenger case and the times of common law, people needed to be careful of any criticism, verbal or written, about official conduct, government policy or laws for fear of being charged with seditious libel where truth would not be a defense, where in fact truth would make the defense even more severe. With reference to that, freedom of speech and of the press was in the service of one purpose in America, namely to give citizens the right to speak freely or to publish their grievances against the conduct of public officials or public policy, free from license and, consequently, from fear of the common law doctrine of seditious libel (The Federalist Blog).

In the opinion of the leading early commentator of the Constitution, Joseph Story the First Amendment is an expression of the great doctrine that every man shall be at liberty to publish what is true, with justifiable ends and good motive. Therefore it is plain that the language of the amendment comprises nothing more, that every man shall have a right to speak, write, and print his opinion, without license, penalty or prior restraint, about any subject whatsoever, but that he does not thereby attempt to subvert the government, disturb the public peace or injure any other person in his rights, reputation, person or property (University of Chicago Press and the Liberty Fund 2000).

The view that the First Amendment is limited to prior restraints has, as stated in the introduction of this paragraph, considerable historical support. Nonetheless, it is probably too extreme as a simple matter of history. Many members of the founding generation believed that the First Amendment banned at least some forms of subsequent punishment. But even if this is so, it seems clear that during the founding period, much of what is now considered free speech was thought to be unprotected, and the government could regulate speech if it was harmful or dangerous. This means that there is much ambiguity in the seemingly clear text. The text of the First Amendment is not rigid and it is not absolute. It is notable that in the First Amendment area, even those who usually emphasize history tend to see free speech as a broad and evolving concept (Sunstein 1993, xiv–xv).

7.3 Limits of free speech and press protection

The provision of the First Amendment "Congress shall make no law... abridging the freedom of speech, or of the press" restricts the government from adopting any measures that would constrain the freedom of expression of its citizens. But restriction on abridgment is not absolute; some types of speech may be prohibited entirely and certain types of speech may be more easily constrained than others. Speech can also be more easily regulated depending on the location where it occurs (Ruane 2014). We can say that the First Amendment restricts government both more and less than it would were it applied literally. It restricts government less because it only limits the protection to others and does not provide protection of some specific types of speech. And it restricts government more, since it applies to all branches of the federal government, to all branches of state and local government – not only to Congress (Cohen 2009).

Interpretation of the guarantee of freedom of speech and of the press under the authority of the Supreme Court offers limited protection or no protection for some types of speech. The Court has decided that the First Amendment does not provide full protection of speech that may be harmful to children, commercial speech, defamation, a public employee's speech and speech broadcast on the television and radio, as opposed to speech transmitted over the Internet. Furthermore, the Court decided that child pornography and speech that constitutes offense or fighting words have no protection under the First Amendment. Even speech that enjoys the most extensive First Amendment protection may be regulated under the restrictions of time, place and manner of speech, which is content-neutral, made in order to serve a significant interest of the government, and leaves space for alternative channels of communication. Another type of speech that may be restricted is speech that breaches strict scrutiny, like in cases when the government can show that the restriction serves to promote a compelling interest and is the least restrictive means to further the articulated interest (Cohen 2009).

Among the layers upon layers of issues related to the constitutional law of speech, two main tracks have been established. The first is generally referred to as categorization, which means that it determines what speech is included under the First Amendment for protection and what is not. Despite the seeming absolute nature of the wording of the First Amendment, there are categories

of speech that have been excluded, though as we listed them above, we can see there have not been many. One have not mentioned above is obscenity; other excluded categories include libel, perjury, and commercial speech. The second main track of analysis addresses to what extent the government can regulate speech that is constitutionally protected; that category is commonly referred to as time, place, and manner restrictions (Barker et al. 1999, 165–166).

At the heart of the debate on how to make a distinction between non-protected and protected speech is the question of the reasons for extending the umbrella of constitutional protection over some type of speech. One area that should clearly be protected and for which general consensus was reached was political speech. Madison and Jefferson well understood that democratic society cannot live and function without free political speech (Urofsky 2003, 22).

8 IMPORTANCE OF THE INCORPORATION OF THE FOURTEENTH AMENDMENT TO THE UNITES STATES CONSTITUTION FOR GUARANTEES OF FREE SPEECH AND PRESS

The First Amendment to the U.S. Constitution contains a clear prohibition: "Congress shall make no law…abridging the freedom of speech." The wording specifically and exclusively limits the powers of Congress, reflecting the fact that the Bill of Rights was added to the Constitution because of fear that the Federal government might become too powerful and encroach upon individual rights. Does the language of the First Amendment mean that the state legislatures my enact laws curtailing their citizens' free speech?

We shall next explain why the incorporation of the Fourteenth Amendment of the United States is important for the application of the First Amendment freedom of speech and press guarantee.

8.1 Importance of the Fourteenth Amendment on incorporation of freedom of speech and of the press against State government

The role of the Fourteenth Amendment is important on account of it greatly expanding the protection of civil liberties and rights to all Americans, as it extended the restrictions set by other amendments also to the states. It was ratified on July 9, 1868, and it forbids states from denying any person within its jurisdiction the equal protection of the laws and denying any person liberty, life or property without due process of law. It also granted citizenship to all persons born or naturalized in the United States, which at the time of ratification included former slaves recently freed (The Library of Congress 2015).

Section 1 of this Amendment is crucial to the research topic, reading as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Cornell University Law School 1992).

Many state constitutions are shaped in compliance with federal laws and on the example of the United State Constitution, but not all of them include provisions that could be compared to those in the Bill of Rights. In the judicial case of 1833, *Barron v. Baltimore,* the Supreme Court by unanimous vote ruled that the Bill of Rights restrain only the federal government and not also the states. Later, however, the Court argued that most provisions of the Bill of Rights do apply to the states under the doctrine called incorporation, which means through the Due Process Clause of the Fourteenth Amendment (Wikipedia 2016).

The First Amendment was fully incorporated, which means that regarding the constitutional rights of freedom of speech and of the press, State governments are held to the same standards as the Federal Government (Cornell University Law School 1992). The first major amendment question came to be heard before the Supreme Court only in 1919, when issues arising under World War I legislation were presented, and it was not before 1925 that the First Amendment was held applicable to the States (Emerson 1997).

The following section take as closer look at two important cases with regard to the Fourteenth Amendment.

8.2 Gitlow v. New York – 1925

This was one of a series of Supreme Court cases that defined the scope of the First Amendment's protection of free speech and established the standard to which a state or the federal government would be held when it criminalizes speech or writing. The Court ruled that the Fourteenth Amendment to the United States Constitution had extended its reach beyond certain limitations on Federal government authority set forth in the First Amendment, especially the provisions protecting freedom of speech and freedom of the press, over the governments of the individual states (Wikipedia 2016).

The issues proceeded in this case arose when fear of communist subversion affected the United States during the early period of the twentieth century. In order to fight against the so-called red menace, some states, including New York, created commissions with the task of investigating

subversive organizations. At the time of a prepared incursion on socialists in 1919 and 1920, the New York commission seized their materials. Several people were arrested, among them the socialist Benjamin Gitlow who was charged with distributing a pamphlet called the *Left Wing Manifesto.* His *Manifesto* called for mass action to subvert the capitalist system of the United States. Gitlow was prosecuted and found guilty for violating the state's criminal anarchy law. In appeal his defense attorney argued that the statute violated the First Amendment's guarantee of freedom of expression. His defense was not successful, and Gitlow's sentence was upheld by the Supreme Court (Epstein and Walker 2004, 224).

Here, while the ruling upheld Gitlow's sentence, the Court ruled that the federal right to free speech did, in fact, extend to the states. They reached this conclusion by incorporating the right guaranteed to all citizens under the Fourteenth Amendment, which guaranteed two enormously important things to Americans: the right to due process and the right to equal protection. Due process means that governments cannot deprive people of life, liberty, or property without constitutional acts of legislation. This applied to both federal and state governments, so the Court reasoned that the U.S. Constitution's guarantee of rights must apply to the states. The right of equal protection means that each state must provide equal protection under the law to all people living within that state. Because the Fourteenth Amendment allowed the federal government to require states to ensure certain rights, the Supreme Court reasoned the rights of the First Amendment could be considered part of the rights guaranteed by due process and equal protection (Study.com 2003-2016).

8.3 Near v. Minnesota – 1931

The decision in this case has become the principal constitutional precedent that protects the press from non-authorized government interference in the newsroom. It was not until the United States Supreme Court issued this landmark ruling in 1932 that the presumption that the press cannot be restrained from publishing stories was established (Encyclopedia.com 2016). The Court recognized the freedom of the press via succinct rejection of prior restraints on publication. This principle was in later jurisprudence generally applied to free speech. The subject of the dispute was a Minnesota law, for which the Court declared that in targeted publishers of scandalous and

malicious newspapers it was in violation of the First Amendment to the United States Constitution, as applied through the Fourteenth Amendment. This case, which columnist and legal scholar Anthony Lewis called the "first great press case", later became the main precedent in the case of *New York Times Co. v. United States* (1971), which is known by the Court's decision against the attempt of Nixon administration to prohibit the publication of the Pentagon Papers (Wikipedia 2016).

The Minnesota Gag Law that gave judges the power to stop the publication of any newspaper that defames a person or created a scandal was passed in Minnesota in 1925. It was designed in order to fight against so-called yellow or tabloid journalism which was at that time a trend in the newspaper industry resulting in printing false or exaggerated stories. J. M. Near expressed his prejudice against African Americans, Jews and Catholics in the *The Saturday Press*, which was published in Minneapolis, Minnesota. On the other hand, however, the newspaper also printed many articles about corruption in city politics that were true. The paper published articles that stated that Minneapolis was controlled by a Jewish gangster and accused the chief of police, the county attorney and the city mayor of accepting bribes and refusing to stop the gangster. The county attorney charged Near and *The Saturday Press* for violating the Gag Law by publishing defamatory and scandalous material that produced lies about public officials, suing them on behalf of the state of Minnesota (Gale Cengage Learning 2015). The attorney requested from the state judge to issue a restraining order that would prohibit the publication of the *Saturday Press* (Epstein and Walker 2014, 320).

Near argued that under the due process clause of the Fourteenth Amendment, states also need to respect the freedom of the press and that the Gag Law violated the First Amendment freedom of the press, which says "Congress shall make no law...abridging the freedom...of the press." He made an unsuccessful motion to have the lawsuit dismissed from court (Gale Cengage Learning 2015).

The Supreme Court rejected the injunction, ruling the Minnesota statute, regarding the prior restraint on the press, unconstitutional. Chief Justice Charles Evans Hughes marked the law as

"unusual, if not unique", but also emphasized that it did raise some important issues regarding the two freedoms that concern this thesis. In the preceding decisions the Court started to interpret some of the provisions of the Bill of Rights in respect to the Fourteenth Amendment, and therefore made these rights applicable not only to the actions of the federal government, but also to the state governments. Hughes noted that freedom of speech and freedom of the press are without a doubt protected by the Fourteenth Amendment's due process clause against actions by local and state governments. What is important is that these freedoms were, however, not absolute, and a state could imply punishment for those who abused them. Chief Justice Hughes did not pay much attention to mere errors by the trial court, he dismissed them, and in his majority opinion discussed constitutional issues. He argued that the purpose of the Gag Law was to protect general welfare and public morals of the community, rather than to seek a redress for individual wrongs, such as libel against the mayor or chief of police. These public officials could still demand damages from Near for his defamatory statements and were free to sue him. But the troubling part of the law was that the prosecutor did not have to prove the falsity of the charges in the newspaper – that the defense of truth was limited to showing the justifiable ends and good motives. These points were clear when the Minnesota court stated that there is "no constitutional right to publish a fact merely because it is true." Another problem caused by the Minnesota statute was that it protected public as well as private citizens. Charges brought against public officials created scandal by their very nature, and the second concern was that the punishment under the statute meant the suppression of the newspaper. With reference to that, a publisher who would not comply with a court order and the law would be shut down by the state if he continued to expose official corruption. A publisher who wishes to continue publication must print a newspaper that is not defamatory, scandalous or malicious (Encyclopedia.com 2016).

In defending the liberty of the press Hughes also resorted to the history of the freedom in England, and shared Blackstone's view that the freedom of the press does not mean freedom from censure for criminal matter when published, it rather consists in laying no previous restraints upon publication. He concluded with the thought that this principle had been respected since the birth of the Republic and that there had been "almost an entire absence of attempts to impose previous restraints upon publications." The government should have the right to grant prior restraint only in

exceptional circumstances, as public officials should be subject to public criticism and investigation, but they should also have the right to file charges for libel if the allegations are false (Encyclopedia.com 2016).

Of interest to the thesis at the end of this case is also the dissenting opinion of Justice Pierce Butler, who criticized the Court for broadening the scope of freedom of the press and even violating principles of Federalism by using the Fourteenth Amendment to diminish a state law. He believed that after the court concluded the writings were malicious, the state's police power could be used to prohibit many types of questionable expression, and that the action of the law did not constitute a prior restraint (Prezi Inc. 2016).

9 EARLY SUPREME COURT JURISPRUDENCE REGARDING FREE SPEECH AND FREE PRESS

The free speech tradition really began to develop in the second century after the United States of America was founded. Before 1919, there were very few free speech cases in the federal courts; although government censorship did occur, the courts rarely concluded that such censorship violated the free speech principle. For example, and somewhat astonishingly, it was reasonably clear that the government was permitted to stop people from criticizing America's participation in war. There were two governing ideas in the courts: the First Amendment was limited to prior restraints, and government could restrict speech so long as the speech had a tendency to cause harm. It was not until a series of remarkable cases involving suppression of political speech during the World War I period that the Court moved slowly in the direction of a more protective standard, one that would allow government to suppress speech only if it could show a clear and present danger. In the 1920s, the clear and present danger test became a serious alternative to the harmful tendency approach, and it received prominent support among the justices, particularly Justices Brandies and Holmes. In this period, the Court started to consider the possibility of offering a large degree of constitutional protection at least to political protests, and free speech then began an era of dramatic expansion (Sunstein 1993, 4).

In California for example the majority of the Court upheld seditious libel law as constitutional by applying the clear and present danger test, as the Court held that the states have every power to punish those who abuse their right of free expression by utterances tending to incite crime, are inimical to the public welfare, disturbing the public peace, threatening to overthrow the government or endangering the foundations of it. Holmes and Brandies did not share the Court's opinion; Brandies drew the lines that connected the First Amendment to political democracy and emphasized the importance of the amendment as an indispensable condition of other freedoms (Urofsky 2003, 22).

According to Barendt (2005, 48), it is rare that such an apparently simple legal text as the text of the First Amendment produced so many problems of interpretation. In order to find the solution various free speech theories have been developed, but analysis of the rich case-law of the Supreme

Court of the United States can show that the court resisted committing itself to any of these theories, although some members of the Court have taken a distinctive approach to free speech issues. The most popular positive justification for the place of freedom of speech in U.S. constitutional law is clearly the argument pertaining to a functional democracy, and its influence is evident from the particularly strong protection given to political speech. The second most significant influence on shaping the Supreme Court rulings on free speech was made via the marketplace of ideas version of the argument from truth, which was developed by Justice James Holmes in his dissenting opinion in the famous Abrams case. On the other hand, arguments deriving from fundamental human rights to self-fulfillment and dignity have not played a significant part of shaping U.S. free speech jurisprudence, although some commentators have still found these rights-based arguments attractive. Further evidence can be found that the U.S. courts have departed from a strict or literal constitutional approach to the interpretation of the First Amendment in one way of particular interest: for comparative free speech jurisprudence. The Court has for example never taken the injunction "shall make no law…abridging the freedom of speech" literally, although Justice Black, who was a member of the Supreme Court from 1937 until 1971 frequently emboldened it. This was known as the absolutist position and it is found to be unendurable, since the regulation and even prohibition of speech can be justified with the argument to protect the free speech rights of others. Even Meiklejohn, who took a very wide view of the protection to be afforded political speech under the First Amendment, recognized that addresses at public meetings could be limited and cut short on valid free speech grounds. Absolutists could try to defend their view point by stating that the provision of abridging does not include all forms of regulation and that the freedom of speech is not actually the same as speech, so when understood strictly and rigidly the term would not exclude restriction on some types of speech (Barendt 2005, 49–50).

Although the freedoms guaranteed in the First Amendment could be understood as absolutes, the Court has repeatedly attempted to distinguish between speech that is protected by the Constitution and speech that is not, and it has never interpreted the guarantees without limitations. In doing so, the Court developed several tests or doctrines to serve as guidelines. The first and most famous test to be adopted was the "clear and present" test (Barker et al. 1999, 166).

The first cases that were presented to the Court had their roots in the measures adopted during wartime, with aim to prevent criticism of the government and military disruption, and the Court initially approved them. The justices provided the opinion confirming that the freedom of speech is the rule, but the rule is not absolute, and it may be at certain periods, especially in wartime restricted for the public good (Urofsky 2003, 20). The new definition defined in a series of World War I cases moved in two directions. The first was that the federal government as well as the states were obliged to respect expression, and the second was to see freedom of expression as a public issue. The second came into the consideration especially when it touched on political issues, not primarily as a private property right to be protected by civil actions for libel and related matters. Expression was on the public agenda to stay (Stevens 1983, 54).

9.1 Schenck v. United States – 1919

Schenck was the first Supreme Court case to interpret the speech and press clauses of the First Amendment. In this case Justice Oliver Wendell Holmes, Jr. set out the "clear and present danger test" that was, as stated in the introduction to this chapter, the first and most famous test to be adopted by the Court, dominating First Amendment jurisprudence for next half century (Kermit, Wieck and Finkelman 1991, 412).

Its historical background can be found in a great effort to promote and enhance national unity of American involvement in World War I, particularly in the years 1917 and 1918. That was the time when Congress adopted several laws that severely restricted freedoms in the First Amendment in order to diminish antiwar dissent. One of them was the Espionage Act, which set severe penalties for uttering "false" statements and circulating them with intention to interfere with the war effort, as any effort that would hamper the draft or cause disturbance in the military forces was forbidden. The second act that breached the First Amendment freedoms was the Sedition Act, the first of its kind adopted in 120 years and which also prohibited saying or publishing anything disrespectful of the United States government, also making it a crime to interfere with the sale of government securities, known as a war bonds (Infoplease 2000–2016).

Charles Schenck was the general secretary of the Socialist Party in Philadelphia. In 1917, he printed fifteen thousand pamphlets that urged resistance to the draft and sent them to all men that were listed in a local newspaper as eligible for service. The government marked the leaflets as passionate, bitter and frank resistance to the Selective Service Law and charged Schenck with violating the Espionage Act, as he attempted to obstruct recruitment and illegally used the mail to reach his goal. Schenck's attorney argued that the Espionage Act violates the Free Speech Clause of the First Amendment by placing a negative effect on expression, but he did not dispute the charges made by the government. The defense attorney's argument stated that the Act prohibited speech or publication before the words are uttered, and not after, as the Constitution mandated (Epstein and Walker 2003, 217).

When Justice Holmes developed the "clear and present danger test", he relied on common law reasoning, rather than precedents (Kermit, Wieck and Finkelman 1991, 412). As he was very proud of his own Civil War military engagement, he considered that if we suppose that what was the tendency of the mailing is protected by the First Amendment, then we condone that in ordinary times and in many places the defendants in expressing that what was stated in the mailing would have been within their constitutional rights. But we must understand that the character of every act is dependently constructed from the circumstances in which it was accepted. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." It is the question of degree and proximity. Things that might be said in the time of peace are, when a nation is at war, such an impediment to its effort that their expression will not be tolerated as long as men fight and that no Court would regard them as protected by any constitutional right. In an actual obstruction of the recruiting service, liability for words that produced their intended effect might be enforced. The Espionage Act made punishable the conspiracies to obstruct as well as actual obstruction, and the Supreme Court in a unanimous opinion delivered by Holmes concluded that a defendant who distributed leaflets could be convicted of an attempt to obstruct the draft, a criminal offense (Stevens 1982, 51–52).

9.2 Debs v. Unites States – 1919

Debs v. United States was a second case that involved the breach of the Espionage Act, under which providing the information with intent to interfere with the success or operation of the United States armed forces or to promote the success of its enemies, was a criminal act (Oyez 2016). Only a week after the Court decided Schenck, Justice Holmes upheld the conviction of Eugene V. Debs for conducting a speech in which he had attacked militarism, war and the draft. Debs was sentenced to ten years of imprisonment and a loss of citizenship (Hall, Wieck and Finkelman 1991, 413).

Debs was an American political leader and a candidate of the Socialist Party of America for the American Presidency who won the nomination five times. In June 1918, he made an anti-war speech in Ohio, protesting the United States involvement in World War I. When praising the virtues of socialism and the Bolshevik Revolution, he among other thoughts promoted the Socialist ideas as great, that they have an expanding philosophy that is speeding over the face of the earth and that it is as useless to resist to these ideas as it is to resist the rising sun. It is rather a privilege to serve those convictions, he believed, and further argued that he regretted many times that he could do only so little for the movement that had done so much for him. He said that people should not be concerned over the charges of treason to their masters, they should instead be worried about the treason that involves themselves. Debs also incited the crowd to sweep into power and destroy capitalistic institutions and re-create them (Epstein and Walker 2004, 219). Since he firmly believed in his strong convictions, at his trial, Debs bravely declared: “I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone” (Hall, Wieck and Finkelman 1991, 413).

Justice Holmes said that in this case the jury was very carefully instructed that they could find the defendant guilty only if the words he used had as their natural tendency the reasonably probable effect of obstructing the recruiting service and if the defendant had the specific intent to do so in his mind, but that they should not find him guilty for advocacy of any of his opinions unless these conditions were met (FindLaw 2016).

Before the ruling was made, the Supreme Court examined several statements that Debs had made regarding the war and found that he had in fact shown the "intention and effect of obstructing the draft and recruitment for the war" (Wikipedia 2016).

9.3 Abrams v. United States – 1919

This was another Supreme Court decision that concerned the Espionage Act and upheld the Amendment to the Act, adopted in 1918, which determined that the curtailment of production of the materials needed for the war against Germany with intent to hinder the war's progress was a criminal offense. The Amendment is known as a separate act, namely the Sedition Act (Wikipedia 2016).

Just a few weeks before World War I ended, in October 1918, Jacob Abrams along with four other defendants was found guilty for violating the Espionage Act. The defendants were well educated Russian immigrants who all asserted social, anarchist or revolutionary political views. They had published and distributed leaflets which criticized the decision of President Woodrow Wilson to send U.S. troops into Russia and were inviting people to protest and strike against such policy. The leaflets were written in English and Yiddish and they contained a language that was characteristic of the rhetoric of the Russian Revolution, using the word like: "Workers of the World! Awake! Rise! Put down your enemy and mine!" and "Yes! Friends, there is only one enemy of the workers of the world and that is capitalism." The protesters branded President Wilson a "Kaiser" and described his government as a cowardly, hypocritical and capitalistic enemy. Abrams and others were charged with intent to "cripple or hinder the United States in the prosecution of the war," and the Court sentenced them to prison terms of fifteen to twenty years (Epstein and Walker 2003, 219).

Justice Holmes provided the dissenting opinion in this case and, according to Stevens (1982, 52), he could not see how this pamphlet's distribution harmed the American war effort and was also of the opinion that the decision of the majority resulted in injustice to the defendants. America was not at war with Russia, and even the Court's majority recognized that Abrams' primary intent was to aid Russia.

Holmes dissent in this case is known as one of his lasting monuments. He argued that he finds the persecution for the expression of opinions reasonable, since if one has no doubt of his power of premises and wishes for a certain result with all of his heart, he will naturally express these wishes in law, and settle the opposition. It seems that if the opposition through speech is allowed, it indicates that we consider speech impotent, similar to when one doubts his premises or power or does not care genuinely about the result. “But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out safely. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.” He further expressed his belief that the government should be infinitely careful with attempts to check the expression of opinions which are undesirable unless they so imminently threaten immediate interference with the pressing and lawful purposes of the law that an immediate check is needed to save the country (Cornell University Law School 1992).

This dissent is also often seen as the beginning of the Supreme Court’s concern with speech as a key right in democratic society, putting forward the notion of democracy as resting upon a free marketplace of ideas. Some expressed ideas and thoughts might be unsettling, some may be unpopular, and some may even be false, but in a democracy all these ideas need to have an equal chance to be heard – in the faith that the ignoble, the useless and the false will be crowded out by the rights ideas, which will facilitate progress in a democratic manner. Because of its support for intellectual liberty, Holmes’ marketplace analogy is also still admired by many people (Urofsky 2003, 22).

9.4 Whitney v. California – 1927

In this case argued before the United States Supreme Court a decision upholding the conviction of an individual who had engaged in speech that raised a threat to society was upheld. The defendant Anita Whitney was a member of a distinguished California family. Under the Criminal Syndicalism Act adopted in California in 1919, she was convicted for allegedly helping to establish

the Communist Labor Party of America. Along with others, she was charged with being devoted to teaching and enhancing the violent overthrow of the government. Whitney in her defense stated that it was not her intention, nor the intention of other organizers, for the party to become violent. The question raised before the court was whether the Criminal Syndicalism Act violated the due process and equal protection clauses of the Fourteenth Amendment. The Court delivered a unanimous decision that the Act was not in violation of those two clauses. The majority opinion written by Justice Sanford included the Holmes "clear and present" test, and more significantly it stated that if the words bear a bad tendency, they can be punished (Wikipedia 2016).

Justice Louis Brandies, joined by Justice Holmes, concurred in the technical result of the case with one of the most eloquent defenses of freedom of expression in American legal history (Hall, Wiecek and Finkelman 1991, 419). Brandies had in his concurring opinion stated that in order for the Court to adopt sound conclusions on these matters it must first have in mind why a state is usually denied the power to prohibit the dissemination of political, economic and social doctrine, which a great majority of citizens believes to be false. He remembered that those who won the independence of America believed that the final purpose of the states was to make people free to develop their capabilities, and that in their government the forces of deliberation should prevail over the arbitrary ones. They valued liberty as both a means and an end and believed that in liberty lies the secret of courage and happiness. "They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth, that, without free speech and assembly, discussion would be futile, that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people, that public discussion is a political duty, and that this should be a fundamental principle of the American government." He continued that when the Founding Fathers recognized the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly could be guaranteed, since fear of serious injury cannot alone justify the suppression of these two rights. To justify suppression of free speech there must be reasonable grounds to believe that the danger apprehended from it is imminent and that the evil to be prevented is a serious one. In simple terms, he asserted that the only justification for suppression of free speech is an emergency. In his opinion that is the order of the Constitution and such should be the rule if authority is to be reconciled with freedom. Therefore, the possibility to

challenge a law abridging free speech and assembly while showing that there was no emergency justifying it will always be an open possibility for citizens of the United States of America (Cornell University Law School 1992).

As we can see for Brandies, the most important role in a democracy is the right of the people to participate in public debate over crucial issues, and the precondition for that is for one not to be afraid to speak about unpopular things, or to weigh all of the known available options, unless other people holding different views are also free to express their beliefs. Therefore, free speech is at the heart of the democratic process. He believed that the Constitution's Framers wrote the First Amendment to prevent the majority from silencing those who oppose popular ideas or express ideas that challenge the accepted views. As Holmes famously wrote, the principle of free thought is "not free thought for those who agree with us but freedom for the thought we hate" (Urofsky 2003, 23).

9.5 Dennis v. United States – 1951

This case concerned the defendant Eugenie Dennis, General Secretary of the Communist Party of the United States of America. The Supreme Court made a decision to deny Dennis the exercise of his rights to free speech, publication and assembly, nominally guaranteed under the First Amendment to the United States Constitution, if such exercise involved the creation of a plan to overthrow the government (Wikipedia 2016).

The circumstances of the case present events that occurred in 1948 when eleven leaders of the National Board of the Communist Party were charged and tried for conspiring to advocate and instruct overthrowing the government by violence and force as the purpose of organizing the Communist Party. Such actions presented the violation of the Smith Act, under which such actions were unlawful. The trial extended to nine months and generated sixteen thousands of pages of evidence. The great deal of the testimony on both sides involved the inner workings of the Communist Party and Marxist-Leninist theory. The prosecutor's allegations read like a spy novel, full of international conspiracies, aliases, codebooks, secret passwords and plans to overthrow the

United States government. The defense used a more philosophical approach and attempted to demonstrate that the leaders of this particular branch of the party wanted “to work for the improvement of conditions under capitalism and not for chaos and depression” (Epstein and Walker 2003, 235).

The main question that was raised was whether or not the restrictions of the Smith Act violate the First Amendment. The Court found that the Smith Act did not inherently violate the First Amendment and sentenced each defendant to five years of imprisonment as well as a fine. In the majority opinion the Court held that there is a difference between active advocacy of communist philosophies and the mere teaching of those ideas, since in the first case clear and present danger was created that threatened the government. Considering the gravity of the consequences of an attempted rebellion, the Court held that success or probability of success was not necessary to justify restrictions on the freedom of speech (Oyez 2016).

The Court decision, however, was not unanimous; two dissenting opinions were provided, one from Justice Black and one form Justice William O. Douglas, asserting that indeed there comes a time when even speech loses its constitutional immunity, but that can only happen in cases of objective and plain proof of danger where the evil advocated in the speech is imminent and with no time to avoid its threat. Free speech cannot be sacrificed on the basis of senseless fear, hate of prejudice should not be the basis for restrictions, and mere allegations of the opposing views only indicated how important it is to know the facts before the government acts.

> *Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. In America Communists are miserable merchants of unwanted ideas; their wares remain unsold. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech.*

According to opinion of Justice Douglas that means that the Court is acting on the basis of judicial notice (Cornell University Law School 1992).

After the Cold War era passed, Americans realized the wisdom of the arguments presented in dissenting opinions of the Justices, among them those from Holmes and Brandies, following Black and Douglas. They came to the simple understanding that the cure for bad speech is good speech – not repression of it, but replacing one set of ideas with another. It is true that a majority will always find itself uncomfortable with extreme ideas attacking their respective beliefs, but the crucial policy of American democracy is that speech must be protected, no matter how unpopular. In 1969, the Court finally put an end to the whole idea of seditious libel as well as the possibility for the people to be prosecuted for advocating ideas the majority condemned as subversive (Urofsky 2003, 24).

9.6 New York Times v. Sullivan – 1964

This case is one of the key decisions supporting the freedom of the press. It was the case in which the Supreme Court established the "actual malice" standard, thus prior to press reports about public officials being considered libel and defamation, the adopted standard must be met. The "actual malice" standard further requires that the plaintiff in a libel or defamation case prove that the publisher of the statement in question acted in reckless disregard of its truth or falsity or that he knew the statement to be false. Notably, because of the exceedingly high burden of proof that lies on the side of the plaintiff, and difficulty of proving the intentions and knowledge of the defendant, such cases involving public figures rarely prevail (Wikipedia 2016).

The circumstances of the case occurred on March 29, 1960 in Montgomery, Alabama, when the New York Times newspaper published and advertisement in support of the struggle for civil rights and to raise money for that purpose. The add gave an account of a radical incident that had occurred in Montgomery and suggested that the police has participated in wrongdoing. Although it did not mention any name specifically, L.B. Sullivan, who was in charge of the police in the city of Montgomery, took offense to the ad and filed a libel action against the paper, alleging that the add contained falsehoods, which, in fact, it did. It for example stated that demonstrating students sang songs with particular words, when in fact they sang a song which contained some different words. When the judge addressed the jury with the charge against Sullivan, he said that because the ad contained falsehoods, it was unprotected speech and "libelous per se", and that if the jury find that

the statements were uttered “of and concerning” Sullivan, the New York Times could be held accountable. The jury indeed listened to the advice of the judge and awarded Sullivan the amount of 500.000 USD in damages. As the Supreme Court of Alabama affirmed the judgment, it specified that words are “libelous per se” when they have the intention of injuring a person labeled by them in his reputation, business, trade or profession, when they intend to bring the individual into public context, or when they intend to charge him with an indictable offense. The New York Times appealed the decision of the court and argued that the libel standard presumes falsity and malice, and that such a rule of liability actually presents an abridgment of the free press. The publication’s attorney further stated that the court decision implicitly showed that speech which is critical of governmental action may not be repressed upon the ground that it diminishes the reputation of those officers whose conduct it deplores (Epstein and Walker 2004, 396).

The constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, meaning with knowledge that it was false or with reckless disregard to whether it was true (CaseBriefs 2016).

The opinion of the U.S. Supreme Court was provided by Justice William Brennan, Jr. The explanation of the ruling among other things included the opinion that judges considered this case against the background of a sound national commitment to the principle that discussion on public issues should not be inhibited, but be broad and powerful, and that they may include caustic, vehement, and sometimes inconveniently strong attacks on public officials and government. The advertisement that was presented as an expression of protest and grievance on one of the major public issues would seem distinctly to qualify for constitutional protection, but the question that arises is whether it forfeits that protection by the falsity of some of its claims to fact and by its alleged defamation of the respondent. Brennan further elaborated that authoritative interpretation of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether given by administrative officials, juries or judges themselves, especially not one that places the burden of truth on the one that uttered the words.

He also remarked that the constitutional protections do not turn upon popularity, any social utility of the ideas and beliefs which are presented or upon truth itself, and that injury to official reputation does not afford any more warrant for repressing speech that would otherwise be free than does factual error. Criticism of official conduct does not lose its constitutional protection only because it is effective criticism and therefore diminishes official reputation (Urofsky 2003, 30).

The decision of the court was unanimous and in favor of the New York Times. The court found the rule of law applied by the Alabama court as constitutionally deficient, since it failed to provide the safeguards for freedom of speech and of the press, as required by the First and Fourteenth Amendment. In summing up, the court found that the First Amendment protects the publication of all statements, even if they are false in regard to conduct of public officials, except in cases when the statements are made with actual malice, meaning that the party who made the statements knows that they are false or makes them in reckless disregard of their falsity or truth (Wikipedia 2016).

9.7 Brandenburg v. Ohio – 1969

This was another landmark United States Supreme Court case based on the First Amendment to the United States Constitution in which the court decided that the government cannot punish inflammatory speech unless that speech has intent to incite and is probable to incite imminent lawless action. The court specifically struck down the Criminal Syndicalism Act adopted in Ohio on account of it widely prohibiting the mere advocacy of violence. In the process, the case Whitney v. California was also explicitly overruled, and some doubt was placed on several other cases like *Abrams v. United States, Schenck v. United States, Dennis v. United States and Gitlow v. New York* (Wikipedia 2016).

Under the Ohio Criminal Syndicalism Act it was illegal to advocate violence or terrorism, sabotage and crime as a means to accomplish political or industrial reform. The Act also prohibited assembling with any group, society, or several persons formed to advocate or teach the doctrines of criminal syndicalism. The defendant, Clarence Brandenburg was a leader in the Ku Klux Klan and made a speech promoting taking revenge against the government if it did not stop suppressing

the white race and was consequently convicted under the Act (CaseBriefs 2016). In front of local TV cameras Brandenburg among other things proclaimed that if the President of the U.S., the Congress, and the Supreme Court continued to suppress the white, Caucasian race, there would be the possibility of some vengeance. His speech included statements as, "the nigger should be returned to Africa, the Jew returned to Israel" and indicating an impending Independence Day march on Washington, DC. The court of first instance found Brandenburg guilty of violating Ohio state law, but the Supreme Court overturned the conviction, declaring that the Ohio law compromised Brandenburg's freedom of speech, as protected by the First Amendment of the United States Constitution. The Court held that "Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Supreme Court argued that it was not obvious that the rally intended to incite specific acts of violence, and it was not likely that that would happen, so it determined that the Ohio restriction of Brandenburg's speech was unconstitutional (FreeSpeechDebate 2013).

The Brandenburg test that court developed in this case became recognized as the standard to determine when inflammatory speech that has the intention to advocate illegal actions can be restricted. In order for speech that advocates the use of crime or force to be proscribed, two conditions need to be met: first, the advocacy must be directed to inciting or producing imminent lawless action, and second, the advocacy must also be likely to produce or incite such action (Cornell University Law School 1992).

9.8 New York Times v. United States – 1971

In this case the Supreme Court decision made it possible for the Washington Post and New York Times newspapers to publish classified Pentagon papers without fear of government censorship or punishment. Since President Richard Nixon demanded via executive authority a request of the New York Times newspaper to suspend the classified information in his possession, the question to which the court needed address was whether the constitutional freedom of the press, guaranteed by the First Amendment, was subordinate to a claimed need of the executive branch of government

to maintain the secrecy of information. The Supreme Court ruled in favor of the New York Times and declared that the First Amendment did protect the right of the newspaper to print the materials (Wikipedia 2016).

The circumstances of the case begin with the Pentagon Papers, known in U.S. history as outlining the decision making process on Vietnam policy and which were illegally copied and leaked to the Washington Post and New York Times. The United States district court in New York had on the request of the government, which claimed that the publication of the papers would jeopardize the security of the United States, issued a prior restraint and directed the New York Times not to publish the documents in their possession. The New York Times filed an appeal to the United States Supreme Court and argued that the temporary injunction presented a breach of the First Amendment freedom of the press right (Infoplease 2005).

One of the appellate judges, James L. Oakes said that the government did not show how the publication would seriously endanger the security of the nation. He believed that the government's indiscrimination over classification of documents cast serious doubts on how vital the material was to national security. Permitting the publication, on the other hand, allowed the positive good flowing and congressional communication about the whys and wherefores of our involvement in a war that nearly everyone, including perhaps even the executive branch, wanted to end. Involved in short was what the First Amendment prohibition was aimed at promoting, alerting the public duties of rulers (Stevens 1982, 89).

From the beginning until the end, it took the Supreme Court only two weeks to decide this major constitutional dispute. The decision of the court was not adopted unanimously, 6 votes were concurring and 3 dissenting. Justice William O. Douglas in his concurring opinion believed that in fact the disclosure of the classified papers could have a serious impact, although that alone is not grounds to order a prior restraint on the press. The main purpose of the First Amendment was the prohibition of the widespread practice of governmental suppression of embarrassing and self-incriminating information. He further argued that for the national health, open discussion and debate of public issues are vital and that in this case the majority of the content relates to the

question of the nation's involvement in Vietnam (Urofsky 2003, 31). The Ambassador to Vietnam and former general Maxwell Taylor also agreed with the opinion of Justice Douglas and said that the rights of the citizens to know are limited to those things they need to know in order for them to be a good citizens and discharge their functions and not more than that. So the purpose of the decision of the Court was to allow the citizens to do their duty. As Justice Douglas emphasized, there was an important public debate going on about the American role in Vietnam, and the citizens could not carry out their duty and intelligently participate in that discussion if the right to the important information were denied to them (Urofsky 2003).

On the other hand, Justice Blackmun who wrote the dissenting opinion stated that the First Amendment represents only one part of the whole Constitution, and reminded the Court that the second Article of the Constitution vest the primary power over the conduct of foreign affairs and responsibility for the Nation's safety in the Executive branch. He believed all the provisions of the Constitution to be important and could not subscribe the doctrine of unlimited absolutism to the First Amendment at the cost of downgrading other provisions, as First Amendment absolutism has never commanded the majority of the Supreme Court. He summed up that in the present case, weighing the very broad right of the press to print on one hand and the very narrow right of the Government to prevent the printing is needed, since such standards were not yet developed (Epstein and Walker 2003, 334).

It is valuable to know that after the end of this publicly and politically well-known landmark case, legal scholars still debate it. Some defend the decision by arguing that it was the Court's or at least an individual justice's strongest statement to date on the freedom of the press and that justices literally eradicated major national security exception to prior restraint. They believe that the justices said to the government that there are only few, if in fact any, compelling reasons that could justify censorship of the press by government. Those who disagree argue that while the result of the case might be clear, the individual opinions were not a resounding defense of the free speech guarantee, since the justices were not unanimous in their opinions; therefore, greater divergence of opinions would be possible while still voting for the same outcome (Epstein and Walker 2003, 334).

9.9 Richmond Newspapers, Inc. v. Virginia – 1980

The subject of this dispute was whether the First Amendment right to free press was violated when the Virginia court system closed the trial to the public. The circumstances of the case date to July 1976, when John Paul Stevenson was convicted for stabbing a hotel manager to death. The conviction was due to a procedural error reversed by the appellate court, and a new trial before the first instance court occurred. The new proceedings, like the previous ones, ended in mistrial, and as the date for the fourth trial was set in 1978, the case draw major media and public interest. Stevenson's attorney believed that such attention could interfere with jury selection and asked the judge to close the trial to the public. Under Virginal law the judge had the power to grant the request, and since the prosecutor did not object he did so. Reporters who covered the case then brought suit against the state and argued that its law violated the First Amendment. The claim gained a large support from several media and civil liberties organizations which believed that the public and the press have a constitutionally protected right of access to criminal pretrial and trial proceedings (Epstein and Walker 2004, 608).

The Supreme Court granted the suit and decided with a 7 to 1 vote that the right to attend the criminal trial is implicit in the First Amendment guarantees. The Court further argued that the First Amendment does not only include the right to speak but also the freedom to receive information and ideas, including the freedom to listen, and it also guarantees the right of assembly in public places, like courthouses. The Court emphasized that some unarticulated rights are implicit in enumerated guarantees and are often indispensable to the enjoyment of rights explicitly defined (Oyez 2016).

The judgment of the Court was announced by Justice Warren E. Burger, who first brought back the memory of the Bill of Rights that was adopted on the background of the long history of trials being presumptively open. Public access to the trials was at that time understood as a significant aspect of the process itself; to have the trial proceeding in front of as many people as decided to attend represented the invaluable advantages of a free English constitution of government. The judgment further alleged that when guaranteeing freedoms like those of speech and of the press, the First Amendment can be understood as the protection of everyone's right to attend trials as

directly giving meaning to those explicit guarantees. The judges believed that the text of the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the amount of information useful to public audience because free speech also includes the freedom to listen and to receive information and ideas. “What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted” (Exploring Constitutional Law).

It should also be emphasized at the end that although the presented case was criminal, the same rule is applicable in civil trials as well. Justice Oliver Wendell Holmes was of the opinion that public inspection provided some security for the proper performance of justice. He said that it is desirable for a trial to take place before public eyes because it is one of the greatest democratic moments that those who administer justice must act under the feeling of the public responsibility – that every citizen should be able to have access to see for himself in which mode public duty is performed (Urofsky 2003, 32–33).

9.10 Texas v. Johnson – 1989

The last case to be presented here is the dispute over the right to flag burning and the question of whether it is protected by the First Amendment. The decision the Supreme Court adopted with a majority of five votes declared that act of flag burning was indeed protected speech under the First Amendment to the United States Constitution, although in 48 of the 50 states desecration of the American flag was prohibited (Wikipedia 2016).

The circumstances of the case can be found in the events that occurred in the summer of 1984, when the President Ronald Reagan held his reelection bid in Dallas, Texas and the Republican Party held its national convention. During the party meeting, a group of protesters who opposed the president’s administration polices gathered in the city. One of the protesters who was marching with the United States flag was Gregory Lee Johnson. At the end of the march Johnson set flag on fire. As it burned, the protesters chanted: “America, the red, white, and blue, we spit on you.” Johnson was arrested and charged by state government with the violation of the Texas Flag

Desecration Law. He was found guilty and sentenced to one year of imprisonment and a 2,000 USD fine. After the Court of Criminal Appeals in Texas reversed the conviction, the case was set before the United States Supreme Court (Epstein and Walker 2004, 259).

The Court found that Johnson's actions had a distinctively political nature and that they fell into the category of expressive conduct. The Court further argued that the fact that the audience finds offense by certain expression or ideas does not justify prohibition of speech and that it was not in the authority of the state officials to designate symbols to be used to communicate only limited messages. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (Oyez 2016).

Justice Brennan delivered the opinion of the Court that among other things contained the explanation that Johnson was not convicted on account of potentially uttering insulting words, but for flag desecration, in this case burning the flag, which somewhat complicated the consideration of his conviction under the First Amendment. The Court needed to determine if the act of the defendant constituted expressive conduct that would give him the right to challenge his conviction by invoking the First Amendment. The First Amendment read literally forbid the abridgment of speech only, but the Court has already recognized that speech protection does not end at written or spoken word. A national flag serves the purpose of a symbol of the country the United States, i.e. it is the visible manifestation of two hundred years of nationhood, deliberated the Court. Saluting the flag is a form of utterance and symbolism while being a primitive and effective way of communicating ideas. The Court found that the circumstances in which Johnson burned the flag was sufficiently pervaded with elements of communication to invoke the First Amendment and that his political expression was restricted regarding the content of the message he presented. At his trial, Johnson explained his reasons for burning the flag in this way: "The American Flag was burned as Ronald Reagan was being re-nominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position. We had new patriotism and no patriotism." With reference to his statement the Court maintained its rationale that government may not prohibit the expression of an idea just because a society finds the idea itself disagreeable of offensive, and that nothing in the precedent

of the Court suggests that a State may impose its own view of the flag by prohibiting expressive conduct relating to it. “We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents” (FindLaw 2016).

In his dissenting opinion Justice Rehnquist, with whom Justice White and Justice O’Connor joined, expressed his discontent saying that for him the American flag occupied a unique position as the symbol of the Nation for more than two hundred years: therefore, this uniqueness justifies the government’s prohibition of flag burning in the way the defendant Johnson did. The flag does not represent views of any particular political philosophy or political party, and it is not just another idea or point of view that would compete for its recognition in the marketplace of ideas. Millions of Americans regard the flag with almost mystical reverence, regardless of their political, social or philosophical beliefs, so he could agree that the First Amendment invalidates the Act of Congress and the laws of all 48 of the 50 States which incriminate the public burning of the flag (Epstein and Walker 2003, 262).

10. CONCLUSION

Since the aim of the present work was to establish and describe the events that led to the establishment of the First Amendment of the Unites States Constitution's guarantee of freedom of speech and of the press, we can at the end ascertain that all of our thesis could be confirmed.

We first argued that the Bill of Rights would not be included in the Constitution and freedom of speech and of the press would not be constitutionally guaranteed if the Anti-Federalists had not oppose the ratification of the Constitution. We can conclude that events in the years of 1787 through 1790 – the years of the Constitutional Convention and ratification process of the Constitution – have shown just that. Namely, when the Constitution was finished and sent to the states for ratification, some of them were not willing to sign it without the protection of some previously established human rights, among them freedom of speech and of the press, all of which were ultimately included in the Bill of Rights. The fight of the Anti-Federalists was successful enough for the Federalists to come to the understanding that the Constitution would not be ratified without a bill of rights; therefore, they agreed to include what has become the Bill of Rights and that is how citizens of the United States received the protected rights to free speech and press.

Our next thesis stated that without English influence the protection of speech and the press would not be part of the Bill of Rights. What we had in mind and what we could see from early English legal history is severe repression of these two freedoms. Not only was freedom of speech not protected and speaking freely was not allowed, one could also be punished for criticizing government. It is true that initially these punishments came from the English Monarchy and the relations between the King, who was sovereign, and the people, yet this suppression also continued in the American colonies. Early English legal documents like the Magna Carta, the Petition of Rights and the English Bill of Rights all protected civil liberties and were the documents to which opponents of the United States Constitution without the Bill of Rights refer in their fight for its inclusion. Although the first 13 Colonies were a new nation and claimed independence from the British Empire on 4 of July 1776, the memory of early suppressions by the English was still alive and it is not a surprise that they struggled for freedom of speech and the press and wonted to protect them, so no government could ever deny these right to them.

The third thesis argued that the early American states' Bills of Rights provided the basis for the United States Bill of Rights, including the protection of freedom of speech and press. As the research has shown, some of the states of the first Union of 13 American colonies recognized the importance of the individual liberties before the United States Constitution was adopted and accepted their own declarations, charters or bills of rights. Among them Pennsylvania was the first to do so, and in its Declaration of Rights from the year 1776, 15 years prior to the ratification of the United States Constitution, gave the people the right to freedom of speech, and to writing and publishing their sentiments as well as declared that freedom of the press ought not to be restrained. Other states like Delaware, North Carolina, Maryland, Vermont, Massachusetts and New Hampshire also followed the example. The one most significant and noteworthy is Virginia's Declaration of Rights which was drawn by Thomas Jefferson for the opening paragraphs of the Declaration of Independence and was copied by other colonies.

Since our work mostly relies on researching primary and secondary sources, we could not test our thesis empirically, rather only with the descriptive method of the events, political background, motives and all combined circumstances on the adoption of the First Amendment. Although my first impulse when choosing this subject of freedom of speech and freedom of the press was the belief that the two freedoms became the part of the First Amendment due to the Founding Fathers concern about the civil liberties and basic human rights, the analysis of the sources and historical text have shown the reason to be more of a pragmatic and political nature, the result of political strategy. Even James Madison who is today known as the father of the Constitution did not see the need for the Bill of Rights at first, only changing his mind after the strong and long opposition by the Anti-Federalists. As a result, he wrote the Bill of Rights, including the First Amendment which protects freedom of speech and of the press.

Although it must be emphasized that in the discussions during the ratification conventions, arguments defending the civil liberties and people's rights did occur. Statesman from Virginia Richard Henry Lee was of the opinion that it is evident from the Universal experience that the most express declarations and reservations are necessary to protect the just rights and liberties of mankind. Patrick Henry, leader of the Anti-Federalists, also from Virginia hoped that the Congress would take care to minimize infringing natural human rights, and one of the Founding Fathers

Thomas Jefferson believed that a bill of rights is what every people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.

After the adoption of the First Amendment, which only applied to the federal government, as it states that Congress shall make no law abridging the freedom of speech or of the press, we must emphasize the importance of the Fourteenth Amendment, ratified on July 9, 1868, seventy seven years after the First Amendment. By the doctrine of incorporation, a constitutional doctrine through which selected provisions of the Bill of Rights are made applicable to the states through the Due Process clause of the Fourteenth Amendment, the First Amendment was fully incorporated, meaning its jurisdiction was extended to the states. Subsequently, they were obligated to respect the primacy of freedom of speech and of the press.

At the conclusion of this Master's thesis we must also stress the importance of early Supreme Court jurisprudence regarding free speech and press, since it established numerous tests and set up some limitations to the freedom of speech. In the case *Schenck v. United States* the "clear and present danger test was established, it was the first and most famous test to be adopted by the Court. In *Abrams v. United States* Justice Holmes wrote the dissenting opinion that is often seen as the beginning of the Supreme Court's concern with speech as a key right in democratic society, putting forward the notion of democracy resting upon a free marketplace of ideas. In *Whitney v. California* the Court upheld the conviction of an individual who engaged in speech that raised a threat to society. The *New York v. Sullivan* case established the "actual malice standard". The decision of the Court in the *New York Times v. United States* case made it possible for the New York Times and Washington Post newspapers to publish then classified Pentagon Papers without risk of government censorship or punishment on account of the Court ruling that the First Amendment did protect the right for the papers to be printed. In the case *Texas v. Johnson* the Court overturned prohibitory laws on desecrating the American flag in 48 of the 50 states.

As we can see, the fight for constitutional protection of the freedom of speech and press in the United States was far from easy, as was the fight for the right to free speech and press after the adoption of the First Amendment. Thus, the two freedoms should be all the more cherished.

11 POVZETEK V SLOVENŠČINI

11.1 Uvod

Cilj predmetnega magistrskega dela je bil raziskati dogodke in okoliščine, ki so pripeljali do inkorporacije pravice do svobode govora in tiska v prvi amandma ustave Združenih držav Amerike. Uvodoma smo pregledati zgodovinske dogodke in politične razmere v prvih ameriških kolonijah ter menja filozofskih mislecev, ki so vplivala na razvoj pravice do svobode govora in tiska v ZDA.

Deklaracija o neodvisnosti ZDA, sprejeta 4. julija 1776, je oznanila rojstvo nove nacije in hkrati ustvarila filozofijo človekovih pravic, ki so bile od takrat naprej dinamična sila v celotnem zahodnem svetu. Deklaracija vsebuje širok nabor individualnih svoboščin, ki so dobile široko podporo po vsej Ameriki. Politična filozofija deklaracije je eksplicitna: "Za nas je sledeča resnica samoumevna, da so vsi ljudje ustvarjeni kot enakovredni, da so jim od Stvarnika podarjene določene neodtujljive pravice, med katerimi so življenje, svoboda in zasledovanje sreče." Ideali našteti v deklaraciji so ljudem vcepili občutek lastne vrednosti in jih spodbudili k boju za osebne svoboščine, med katerimi so dostojno mesto v družbi, osebna svoboda in samo vlada (Olson 1990). Vendar leto 1776 ni pomenilo samo rojstva ameriškega naroda, v Združenih državah je pomenilo tudi rojstvo konstitucionalizma oziroma na ustavi temelječe politične ureditve (McClellan 2000, 141–142).

Ko so države prvih 13 kolonij začele sprejemati svoje ustave, so večinoma v njih že vključile Listine ali deklaracije pravic, ki so varovale pravico do svobode govora in tiska. Prvi dve državi, ki sta sprejeli deklaracijo pravic leta 1776, sta bili Pennsylvania in Virginia. Ustava Pennsylvanije je v Deklaraciji pravic že varovala svoboščine, ki so bile kasneje vključene v prvi amandma, in sicer: pravico do svobode vesti in svobodnega izražanja vere; pravico do svobode govora, tiska, zbiranja in pritožbe; in pravico do svobode tiska za vse, ki želijo preveriti zakonodajne postopke ali kateri drugi del vlade (Liliam Goldman Law Library 2008). Virginijska deklaracija je Thomasu Jeffersonu služila kot navdih za uvodne odstavke Deklaracije o neodvisnosti, prav tako pa so jo v veliki meri kopirale ostale države. Ameriški konstitucionalizem, pisan ali nepisan, temelji na

angleških običajih in navadah. Skoraj brez izjeme lahko vse individualne svoboščine, ki so varovane v zvezni in državnih ustavah, zasledimo v angleških precedensih (McClellan 2000, 25–26).

Zgodovina svobode govora obsega zgodovino poskusov s cenzuro, omejevalnimi zakoni, dejanskimi in implicitnimi grožnjami z nasiljem, sežiganjem knjig, zaporom in v najbolj ekstremnih primerih z usmrtitvijo preprečiti ljudem, da bi izrazili svoje mnenje (Warburton 2009, 8). Svoboda govora in tiska nista odvisni zgolj od deklaracij pravic in njihovega ustavnega varstva – temeljita na pogumu, osebnih prepričanjih in spoznanju, da pravici, ki sta temelj demokratične družbe, ne moreta biti samoumevni, ampak zmeraj predmet, vreden posebne pozornosti (Hudon 1963).

V skladu z navedenim smo v delu uvodoma pregledali in predstavili nekaj vidikov in razlogov za varovanje teh pravic. Ker je prvi amandma del Listine pravic, ki je del ustave ZDA, smo morali raziskati, kako je prišlo do vključitve Listine v ustavo. Prvi cilj dela je bil raziskati dogajanje pri sprejemanju ustave in razmerja moči med federalisti ter antifederalisti, ki so nasprotovali sprejemu ustave brez Listine pravic, saj smo iz teh okoliščin razvili tezo št. 1: **Če antifederalisti ne bi nasprotovali ratifikaciji ameriške ustave brez Listine pravic, Listina pravic ne bi bila vključena v ustavo in pravici do svobode govora in tiska ne bi bili ustavno varovani.**

Drugi cilj je bil temeljit pregled angleške zgodovine razvoja in varovanja obravnavanih pravic in svoboščin skozi analizo prvih pisanih dokumentov, ki so varovali človekove pravice in svoboščine, saj se naša teza št. 2 glasi: **Brez angleškega pravnega vpliva pravici do svobode govora in tiska ne bi bili del Listine pravic.**

Tretji cilj pa je bil preveriti ali so deklaracije in listine pravic v prvih državah ZDA že vsebovale zaščito pravic do svobode govora in tiska, saj se naša teza št. 3 glasi: **Zgodnje ameriške deklaracije in listine pravic so zagotovile podlago za Listino pravic, ki je del ustave ZDA, vključno z varovanjem pravice do svobode govora in tiska.**

11.2 Raziskovalno vprašanje in metodologija

Raziskovalno vprašanje, ki ga magistrsko delo preučuje, je:

- Kako sta angleška dediščina pravic in zgodnje ameriške kolonialne tradicije prispevale k razvoju pravice do svobode govora in tiska v Ameriki.

Prvi Amandma ameriške ustave se glasi "Kongres ne sme sprejeti nobenega zakona, ki bi urejal ustanovitev vere ali prepovedal njeno svobodno izražanje; ali omejil pravico do svobode govora, tiska ali pravico ljudi do mirnega združevanja; ali omejil pravico do peticije zoper vlado za popravo krivic" (National Constitution Center).

Sprejetje Listine pravic, prvih desetih amandmajev k ustavi ZDA, je bilo težavno, vendar je zagotovilo antifederalistom podporo za njeno ratifikacijo. Poleti 1787 so se delegati iz 13 ameriških držav, do nedavno angleških kolonij, zbrali v Philadelphiji, da bi spisali ustavo za združeno nacijo. Do septembra so pripravili osnutek, ki so ga poslali državam v ratifikacijo. Ustava je vsebovala načrt, kako naj bi nacionalna vlada delovala, ni pa vsebovala dela, ki bi posebej uredil individualne pravice državljanov, kar je hitro povzročilo javno razpravo. Zagovorniki ustave, znani kot federalisti, so vztrajali, da varovanje individualnih pravic državljanov ni potrebno, saj sama ustava, ki daje vladi široka pooblastila, preko vzpostavljenega sistema ločenih pooblastil ter sistema zavor in ravnovesij, že varuje svoboščine državljanov. Nasprotniki ustave, znani kot antifederalisti, ki so se zavedali, da so bile posamezne pravice eksplicitno varovane v zgodnjih dokumentih, kot angleški Listini pravic in Virginijski deklaraciji pravic iz leta 1776, so menili, da so nujne posamezne določbe, ki bi varovale individualne pravice državljanov (Urofsky 2003).

Zato smo v delu temeljito preučili dogajanja ob sprejetju ustave, ratifikacijske debate, razmerje med federalisti in antifederalisti in njihove argumente ter vpliv in vlogo Jamesa Madisona, ki je znan kot oče ameriške ustave in Listine pravic. James Madison je kot federalist sprejetju Listine pravic sprva nasprotoval, ob koncu razprav, ko je ugotovil, da ustava brez listine ne bo dobila zadostne politične podpore, pa se je vendarle strinjal, da je listina potrebna in jo tudi sam predlagal.

Glede na dejstvo, da se večina dela ukvarja z zgodovinskimi dogodki, smo za opis razvoja zgodovinskih dogodkov uporabili analizo njihovega razvoja. Gre za kvalitativni pristop, ki analizira in interpretira primarne in sekundarne vire. Za raziskovalni namen smo uporabili primarne vire (zgodovinske tekste, kot sta angleška Listina pravic in Magna Carta) in sekundarne vire (publikacije in akademske članke na izbrano temo). Analiza primarnih virov je bila naša najbolj pomembna raziskovalna metoda, saj smo z njo preučili zgodovinska besedila, kar nam je omogočilo razumeti vpliv tistih, ki so oblikovali, se borili za in pomagali pri ratifikaciji ustavnega varstva svobode govora in tiska. Delo v glavnem temelji na tuji literaturi.

11.3 Razlogi za varovanje pravice do svobode govora in tiska

Najbolj razširjen in znan argument v prid zaščiti svobode govore in tiska je ta, ki pravi, da imata pravici posebno mesto v demokratični družbi. Vsem ljudem je skupen interes, da se imajo pravico izraziti ter možnost, da slišijo in berejo mnenja drugih ljudi. V demokraciji je volivcem v interesu, da slišijo in prerekajo širok nabor mnenj ter imajo dostop do dejstev in interpretacij, kot tudi da prerekajo poglede, če menijo, da so izražena mnenja politično, moralno ali osebno žaljiva. Članom demokracije je prav tako v interesu, da državljani aktivno sodelujejo v političnih razpravah in niso samo pasivni prejemniki politik, ki prihajajo iz vrha. Nekateri so šli celo dlje in trdili, da vlada brez široke pravice do svobode govora in tiska ne bi bila legitimna in je ne bi mogli imenovati "demokratična" (Warburton 2009, 2–3). Svoboda govora ima več funkcij – njena osrednja vloga pri demokraciji je zgolj ena od številnih. Brez široke zaščite pravice do drugačnega mnenja proces demokracije in intelektualno razpravljanje nista mogoča. Svoboda govora varuje pravico do drugačnega mnenja in drugačno mnenje je nujno, če želijo suvereni ljudje imeti priložnost biti del procesa sprejemanja odločitev in dobiti popolne informacije. Informacije in priložnost za sodelovanje pa sta seveda pogoj za inteligentno odločanje, ki bo deležno široke podpore (Curtis 2000, 19).

V delu smo poleg vpliva svobode izražanja na demokracijo in udeležbe državljanov v njej predstavili še teorijo o ideji trga (marketplace of ideas) in iskanja resnice, teorijo ustvarjanja bolj prilagodljivega in stabilnega okolja ter teorijo zagotavljanja individualne samoizpolnitve.

Teorija o ideji trga (marketplace of ideas) zagovarja tezo, da bodo teorije, predlogi in gibanja ob minimalnem posredovanju vlade uspele ali spodletele same po sebi. V kolikor so svobodni posamezniki prepuščeni lastni racionalnosti, so sposobni ločiti tekmovalne predloge v odprtem okolju razprav in izmenjav, prav tako pa jim je dana možnost, da se na koncu ugotovi resnica ali najboljši možni rezultat (Civil Liberties in the United States 2015). Zagovorniki tega modela so menili, da je trg nujen za prizadevanje družbe, da spozna resnico in spodbuja efektivno splošno udeležbo v vladi (Ingber 1981, 1). Metaforo o ideji trga je prvi razvil John Stuart Mill, ki je trdil, da je svoboda izražanja koristna na individualni in socialni ravni, ker služi razvoju in ohranjanju racionalnih zmogljivosti človeka in v uporabnem smislu spodbuja iskanje resnice (Civil Liberties in the United States 2015). Za Milla je pravica do svobode govora v širšem smislu predpogoj ne samo za individualno srečo, ampak tudi uspešno družbo. Brez svobode izražanja je človeštvo lahko oropano idej, ki bi sicer pripomogle k njegovemu razvoju. Varovanje pravice do svobode govora maksimira možnost, da resnica izide iz trka z napako ali pol-resnico (Warburton 2009, 22). Kot navaja Urofsky (2003, 22) je teorija o ideji trga povezana s temelji demokracije, tj. s pravico ljudi, da se odločijo. Thomas Jefferson je verjel v demokracijo na podlagi dobre presoje ljudi, ki bodo znali sami izbrati, kar je prav. Na drugi strani pa kritiki omenjene teorije opozarjajo na faktorje, ki preprečujejo uspešno iskanje resnice ali generiranje primerne socialne perspektive ter pravih odločitev. Zaradi monopolnega nadzora medijev, pomanjkanja dostopa nezaželenih in osiromašenih skupin, tehnik in manipulacij, iracionalnih odzivov na propagando in neobstoja objektivne resnice ter osvobojene presoje, teorija o svobodi trga ne uspe doseči želenega rezultata (Baker 1997–1978, 965–966). Sunstein trdi (1993, xvii–xx), da obstaja velika razlika med "teorijo o svobodi trga" kot dereguliranega ekonomskega trga in sistema demokratične razprave. Pravi, da dereguliran trg ni niti zadosten niti nujen pogoj za sistem svobode izražanja.

Drugi razlog za varovanje pravice do svobode govora temelji na predpostavki, da je družba, v kateri imajo jezni in odtujeni državljani pravico izraziti svoje mnenje, bolj stabilna, saj je verjetnost, da bi se ljudje zatekali k nasilju, manjša. Prav tako je bilo izpostavljeno, da dejstvo, da imajo odtujeni in nezadovoljni ljudje možnost svobodnega izražanja, omogoči vladi boljši nadzor nad potencialno nevarnimi skupinami, ki bi sicer delovale v tajnosti (Exploring First Amendment Homepage 2016).

Tretja velika teorija vidi svobodo govora kot integralen vidik posameznikove pravice do samorazvoja in izpolnitve. Omejitve tega, kar lahko povemo in napišemo ali slišimo in preberemo, omejujejo našo osebno rast. Pravica izraziti prepričanja in politične opredelitve odraža pomemben del človeštva. Argument zagovarja, da obstaja človekova pravica do svobode govora, četudi bi bila neugodna za dobrobit družbe (Barendt 2005, 13). Poudarek na posamezniku, vsebovan v številnih tako imenovanih teorijah o samoizpolnitvi ali samorealizaciji, je v pomembnosti izražanja kot poti do individualnega razvoja in izpolnitve. Ideja samoizpolnitve vključuje poskus posameznika, da v popolnosti razvije svoje potenciale. Emerson je bil mnenja, da omejitve prepričanj ali oblik izražanja ovirajo ta proces in žalijo dostojanstvo posameznika. Brez posameznikove svobode do iskanja resnice in razpravljanja o vprašanjih o tem, kaj je prav in kaj narobe, postane družba "tiranski poveljnik" in postavi človeka v "samovoljno kontrolo nad drugim" (Carter in drugi 1988, 33).

11.4 Angleška dediščina

Da smo lahko spoznali ozadje dogodkov, ki so pripeljali do tega, da sta pravici do svobode govora in tiska postali varovani pravici, smo morali najprej preučiti angleški vpliv na njun razvoj.

Ameriški kolonisti so v novi svet s seboj prinesli tudi del angleškega prava. Angleško pravo je Američanom že zagotovilo razloge za prepoved svobode govora, saj svoboda tiska ni bila nič drugega kot varovanje pred začasno odredbo, resnica ni opravičila kritike vlade ali njenih uradnikov, zakon pa je kaznoval širjenje idej, ki bi imele namen povzročiti škodo (velika škoda je bila povzročena, če so vlada ali njeni uradniki prišli na slab glas, pri čemer ni bilo potrebno, da bi škoda bila neposredna niti verjetna). Te ideje so se sprva razvile v monarhiji, kjer je bil kralj suveren, potem pa so služile mešani vladi kralja in parlamenta, kjer je imel oligarhičen parlament prevlado. V zgodnji ameriški zgodovini so se navedena angleška opravičila za zatiranje vedno znova pojavila v boju za predstavniško vlado in svobodo govora (Curtis 2000, 23).

Angleži so uveljavili pravno prepoved za tri vrste govora: uporniški govor (kritika vlade), obrekovanje (kritiziranje posameznika) in bogokletstvo (kritiziranje vere). Vsako od teh kršitev so imenovali "kleveta" ("libel"). V političnem smislu je bila najbolj pomembna kleveta uporniški

govor, ker so vladajoče elite v Blakstonovi eri verjele, da je vsaka kritika vlade ali njenih uradnikov, četudi resnična, pomenila spodkopavanje javnega reda in zmanjševanje zaupanja v vlado. Čeprav vlada po Blakstonu[7] ne more preprečiti nikomur, da jo kritizira, ga lahko kaznuje, če to stori (Urofsky 2003, 20). Na sojenih zoper uporniški govor je porota presojala, ali je obdolženi objavil gradivo in ali je vsebovalo pomen, za katerega ga vlada obtožuje. Sodniki pa so odločali, ali so bile besede objavljene zlonamerno in imele "slab" namen da škodujejo vladi. Obdolženi se pri obrambi ni mogel sklicevati na resnico, ta je pravzaprav naredila kršitev še večjo, saj bi resnične obtožbe povečale javno nespoštovanje vlade (Carter in drugi 1998, 25). Eden od načinov za nadzor nad tiskom je bila tudi uvedba dajatev.

V angleški ustavni zgodovini so kot vidni mejniki prepoznani trije veliki politični dokumenti, ki so bili v bistvu dogovori ali sporazumi med Krono in Narodom (ljudstvom in njihovimi predstavniki). Ti trije dokumenti so: Velika listin svoboščin (Magna Carta 1215), Peticija pravic (Petition of Rights 1628) in Listina pravic (Bill of Rights 1689), ki po besedah parlamentarnega voditelja lorda Chatmana predstavljajo "Biblijo angleške ustave". Veliko individualnih pravic, ki so varovane v teh dokumentih, se pojavi v ustavah prvih ameriških držav, v zvezni ameriški ustavi in ameriški Listini pravic (McClellan 2000). Za potrebe dela smo pobliže preučili vsakega od teh treh dokumentov, najprej Veliko listino svoboščin.

Velika listina svoboščin je bila brez dvoma najbolj pomemben zgodnji vpliv na obsežen zgodovinski proces, ki je pripeljal do vladavine prava in ustavnosti v angleško govorečem svetu. Dokument, ki je na splošno razumljen kot eden od najbolj pomembnih pravnih dokumentov pri razvoju demokracije, je bil ključna točka pri boju za ustanovitev svoboščin (United for Human Rights 2008–2016). Velika listina sicer pravice do svobode govora ni posebej omenila, je pa napovedala ustavne omejitve vlade v imenu individualne svobode (Longman 2003, 129–130). Uvedla je načelo, da nihče, vključno s kraljem ali zakonodajalcem, ni nad zakonom in osnovala okvir za bodoče dokumente, kot so Deklaracija o neodvisnosti in Listina pravic (Pleasants 1996, 5). Prav tako je imela pomembno vlogo pri kolonizaciji ameriških kolonij, saj so prve kolonije razvile svoj pravi sistem po vzoru angleškega pravnega reda (Wikipedia 2016).

[7] William Blackstone (10 July 1723 – 14 February 1780) je bil angleški pravnik, sodnik in politik osemnajstega stoletja. Najbolj znan je po delu *Commentaries on the Laws of England* (Wikipedia 2016).

Peticija pravic (1628) je bila naslednji mejnik pri razvoju človekovih pravic (United for Human Rights 2016). Z njo je angleški parlament omejil pravice kralja. Jezik peticije vsebuje spodbudo za premik v smeri omejene vlade v 17. stoletju (Pleasants 1966, 6). Peticija je bila tudi prvi dokument, ki ga je odobril angleški parlament, s čimer so bile vzpostavljene in potrjene pravice in svoboščine v ameriških kolonijah (Kemp 2010, 2).

Listina pravic, sprejeta v angleškem parlamentu 16. decembra 1689, je vzpostavila pravice in svoboščine državljanov ter rezidentov iz drugih držav, in od krone, pred sprejetjem ukrepov, ki so imeli vpliv na državljane, zahtevala potrditev s strani parlamenta (Kemp 2010, 3). Listina je ustvarila delitev oblasti, omejila oblast kralja in kraljice, povečala demokratične volitve in podprla svobodo govora (Study.com 2003–2016). Kot smo povedali že v uvodu dela, je zgodovina politične svobode in pravice do svobode govora pestra in polna pospeškov in nazadovanj. Najprej so o kralju in režimu lahko govorili samo kraljevi dostojanstveniki in visoki cerkveni uradniki, za druge bi kritiko lahko enačili z izdajo in tveganjem visoke kazni. Šele z Listino pravic je bila pravica do svobode govora dana tudi članom parlamenta, vendar samo med zasedanjem. Omejitve so bile usmerjene predvsem na kritiko vlade in kritiko cerkve. Sodobna anglo-ameriška pravica do svobode govora se je razvila prav iz tega boja za politično in versko svobodo izražanja (Longman 2003, 130). Listina je med drugim eksplicitno določala, da pravica do svobode govora in razprave ali postopki v parlamentu ne smejo biti predmet obtožb ali postavljene pod vprašaj pred nobenim sodiščem ali na nobenem kraju izven parlamenta (Hall in drugi 1991, 7–8).

11.5 Prva zaščita svobode izražanja v Ameriki

V tem poglavju smo ugotavljali, kako se je razvijal tisk v prvih kolonijah, katere zgodnje kolonije so že vključile Listine ali deklaracije pravic v svoje ustave, preučili pomembnost sodnega primera zoper tiskarja Johna Petra Zengerja za pravico do svobode govora in tiska ter na kratko pregledali, kako je bilo s svobodo tiska v času revolucije (od leta 1775 do 1783).

Tako v Ameriki, kakor Angliji je uvedbi tiska sledila cenzura. Prvi časopis so Američani dobili kmalu po ustanovitvi prvih kolonij. Naj pojasnimo, da kolonialni čas obsega obdobje zgodnje ameriške zgodovine od leta 1607 do 1776. Prva knjiga je bila natisnjena leta 1639 v

Massachusettsu, leta 1656 pa je bil v tej državi ustanovljen časopis (Hudon 1963, 16–17). William Penn, ki je leta 1628 ustanovil kolonijo Pennsylvanijo, je v kolonijo pripeljal tiskarja Williama Bradforda, ki pa zaradi zatiralskih omejitev ni mogel tiskati niti najbolj banalnih novic, zato se je leta 1725 preselil v New York. Tam je ustanovil *New York Gazzette*, prvi časopis v tem mestu in prvi v Novi Angliji. Časopis je predstavljal vitalen del kolonialnega življenja. V družbi, kjer je bila komunikacija med 13 kolonijami in celo mesti preprečena, so razen preko govoric časopisi predstavljali edini način širjenja novic. Pomembnost časopisa je bila prepoznana že leta pred vojno za neodvisnost, saj so oboji, tako kolonisti kot angleški oblastniki, uporabljali časopis za širjenje sovražne propagande med ljudmi. Časopis je oznanil Deklaracijo o neodvisnosti in bil forum za politično razpravo v demokraciji, dokaz za pomembnost svobode govora (The Walden Font Co. 2010). Če povzamemo kolonialno obdobje, lahko ugotovimo, da je bilo okoli leta 1745 v kolonijah objavljenih 22 časopisov. V New Yorku je bil pomemben korak k svobodi govora prisotnost tiskarja Johna Petra Zengerja, ki je bil s svojim časopisom *New York Weekly Journal* opozicija vladi (povzeto po Ferfili 2002).

John Peter Zenger je bil nemško-ameriški tiskar in novinar. Prva generacija ameriških urednikov je ugotovila, da je bralcem všeč kritiziranje lokalnih guvernerjev, guvernerji pa so ugotovili, da lahko ustavijo tiskanje časopisa. Guverner New Yorka je tako leta 1734 tožil Zengerja zaradi storitve kaznive klevete, potem, ko je slednji natisnil serijo publikacij s satiričnimi napadi nanj. Porota je Zengerja oprostila, sam pa je postal ikona, ameriški heroj za pravico do svobode govora in tiska (Wikipedia 2016). Primer je pomemben tudi zato, ker je ustvaril precedens, da izjava, četudi je opravljiva, ni kleveta, če je lahko dokazana (Archiving Early America 1995–2016). Zengerjev zagovornik je namreč med sojenjem javno priznal, da je Zenger objavil članke, ki so domnevno žalili guvernerja, vendar je trdil, da so vsebovali resnico, zaradi česar niso bili klevetniški (povzeto po Pleasants 1996).

Kot pričakovano je bil tisk v času revolucije (od leta 1775 do leta 1783) skoraj povsem okrnjen. Nobeno izmed glavnih mest, kot so Boston, New York in Philadelphia, ni nadaljevalo z objavami med vojno. Prisotnost tiska se je poslabšala in izvodi včasih sploh niso mogli biti natisnjeni (Bartleby.com 1993–2015). Kot je zapisal McClellan (2000) so bile osebne svoboščine med vojno neusmiljeno poteptane. Do konca boja, leta 1783, je bilo od New Hampshirja do Georgie dovoljene

malo svobode govora in tiska. Posledično ti dve desetletji nasilnega vmešavanja v objave in javni govor, v času, ko so se pisale prve državne ustave, nista bili pozabljeni.

Kar zadeva deklaracije ali listine pravic, sta bili prvi državi, ki sta jih sprejeli, Pennsylvania in Virginia, obe leta 1776. Zgledu so kmalu sledile tudi ostale države: Delaware, North Carolina, Maryland, Vermont, Massachusets in New Hampshire.

11.6 Listina pravic

Listina pravic je skupno ime za prvih deset amandmajev k ustavi Združenih držav. Predlagana je bila z namenom, da umiri strah antifederalistov, ki so nasprotovali ratifikaciji ustave in zagotavlja varstvo številnih osebnih svoboščin, omejuje oblast vlade in sodstva ter drugih postopkov in ohranja oblast posameznih držav ter javnosti. Izvirno je prvih deset amandmajev veljalo le na ravni zvezne vlade, kar se pa je kasneje spremenilo, saj jih večina preko procesa inkorporacije štirinajstega amandmaja velja tudi v razmerju do posameznih držav (Wikipedia 2016). Kot je zapisal Urofsky (2003) je Listina pravic Združenih držav Amerike zgodovinski produkt izjemnega časa in kraja, ki je izšla iz dolge tradicije točno določenih pravic znotraj angleškega pravnega sistema, ki je vladal ameriškim kolonijam.

Po koncu ustavodajne skupščine, leta 1787, je bila ustava poslana v ratifikacijo. Da bi bila sprejeta, jo je moralo potrditi devet od trinajstih kolonij. Ker pa ustava ni vsebovala Listine pravic in ni varovala osebnih svoboščin, je države niso želele ratificirati, saj je osem držav v svojih ustavah že imelo Listine pravic (Hudon 1963). Ko je James Madison poslal ustavo v pregled Thomasu Jeffersonu, mu je ta odgovoril, da mu je dokument sicer všeč, vendar ima eno veliko pomanjkljivost – "Nima Listine pravic. Takšna listina je nekaj, do česar so v razmerju do vlade upravičeni vsi ljudje na svetu" (Urofsky 2003). Jeffersonov odziv je nekatere, ki so ustavo pripravili, presenetil, saj so menili, da celoten dokument vsebuje Listino pravic, ker strogo omejuje oblast nove vlade. Menili so, da ni potrebe, da kongres posebej zagotovi na primer ustanovitev cerkve, ker te moči sploh nima. Vendar je Jefferson vztrajal, da ne gre verjeti domnevnim prepovedim, ampak morajo biti pravice jasno zapisane, tako da jih nobena vlada nikoli ne bo mogla kršiti (Urofsky 2003).

Glede sprejetja Listine pravic moramo povedati, da se je pravzaprav ideja o njeni vključitvi v ustavo porodila šele tik pred koncem ustavodajne skupščine (McClellan 2000). George Mason iz Virginije je dne 12. septembra predlagal, da se listina doda, Elbridge Gerry iz Massachusettsa pa je vložil uradni predlog, ki je bil soglasno zavrnjen. Da bi spodbudili javno podporo ustavi, so James Madison, Alexander Hamilton in John Jay napisali skupaj 85 esejev, znanih kot federalistični spisi. Na drugo strani pa so predstavniki antifederalistov, kot so bili Patrick Henry, Samuel Adams in Richard Henry Lee, javno nasprotovali podpisu ustave v antifederalističnih traktih (Wikipedia 2016). V obdobju od 17. septembra, 1787, ko je bila ustava podpisana, do 29. maja, 1790, ko je Rhode Island postal trinajsta oziroma zadnja država, ki jo je ratificirala, je med federalisti in antifederalisti na nacionalni ravni potekala goreča vsebinska razprava glede ustave (The Free Dictionary 2003–2016).

Federalisti so nasprotovali listini med drugim tudi zaradi procesnih nejasnosti, ki bi jih povzročila. V spisu številka 46 je Madison zagovarjal tezo, da je vlada zadosten garant osebnih svoboščin, Hamilton pa je v spisu številka 84 trdil, da je ustava kot taka v vseh racionalnih pogledih in v vseh koristnih namenih Listina pravic ter da glede na to, da se ljudje v bistvu ne odpovedo ničemur, saj ohranijo vse, pravzaprav ni potrebe po nobenih posebnih pridržkih (The Free Dictionary 2003–2016). Na drugi strani so se antifederalisti pritoževali čez nov sistem, ki po njihovem mnenju ogroža svoboščine in ne zagotavlja individualnih pravic, prav tako pa so menili, da je močna vlada lahko grožnja posameznim državam (ConstitutionFacts.com).

V tem poglavju smo pregledali razprave glede svobode govora in tiska, ki so se odvijale v ratifikacijskih konvencijah v posameznih državah in na kontinentalnem kongresu, prav tako pa smo podrobneje predstavili vlogo Jamesa Madisona pri končnem sprejemu Listine pravic. Madison je kljub temu, da je v začetku listini nasprotoval, postopoma skozi razprave mnenje spremenil in vključitev listine podprl. Hickock (1996) je mnenja, da gre spremembo mišljenja Madisona pripisati spremenljivemu značaju politike. Po ratifikacijskem boju v Virginiji se je namreč Patrick Henry odločil, da bo storil vse, da konča Madisonovo javno kariero in prepreči, da bi bil izbran kot senator v kongresu. Ker Madison ni maral kampanj, je hitro spremenil svojo strategijo in priznal, da si je glede listine premislil in da verjame, da je listina potrebna kot sredstvo,

ki bo zadovoljilo dobro misleče nasprotnike ustave, prav tako pa bo zagotovila dodatno zaščito svoboščin.

Posledično je Madison ob prvem zasedanju kongresa svojo obljubo izpolnil in predlagal dodatne amandmaje. Madison si glede na svoj dosežek ob upoštevanju apatije in ostrega nasprotovanja zasluži, da se ga še bolj kot očeta ustave ZDA spominjamo kot očeta Listine pravic (Levy 1999). Izvirni predlog je vseboval 17 amandmajev, ki jih je kongres zmanjšal na 12 in jih poslal v ratifikacijo. Dva sta bila zavrnjena in tako je nastalo 10 amandmajev oziroma Listina pravic, kot jo poznamo danes (TeachingAmericanHistory.org. 2006-2016).

11.7 Prvi amandma ustave Združenih držav Amerike

Del prvega amandmaja, ki kongresu prepoveduje, da bi sprejel kakršen koli zakon, ki bi "omejil pravico do svobode govora", gre razumeti kot veliko ustavno oviro za uradno cenzuro, saj slednja predstavlja morda največjo nevarnost za demokracijo (Sunstein 1993). Sunstein dalje navaja, da lahko podporo za zametke svobode izražanja najdemo v angleški zgodovini, ameriški vpliv pa je kasneje viden v drugačnem pristopu k načelu suverenosti. V Angliji je bila suverenost podeljena kralju, v Združenih državah pa je Madison pojasnil, "da je primer čisto drugačen, saj posedujejo absolutno suverenost ljudje in ne vlada." In ravno ta umeščenost suverenosti v "mi ljudje" ("We the People") namesto v vlado je morda najbolj pomemben ameriški prispevek k politični teoriji, ki prinaša pomembno lekcijo tudi za svobodo govora, saj je ustvarila ambiciozni sistem "vlade, ki razpravlja" in v kateri so cilji doseženi preko široke javne razprave ter posvetovanja. Poudarek je torej na predstavljenih argumentih in rešitvah, ki izhajajo iz splošnih razprav, ne pa na moči in privilegijih. Vzpostavljeno je bilo tudi načelo politične enakosti, v katerem noben državljan ne šteje več kot drug. Madison je prvi amandma izrecno povezal z ameriško revizijo suverenosti in še posebej z zametki demokracije ter stavil na politično (in ne ekonomsko) enakost in posvetovalno funkcijo politike. V luči teh obveznosti je razumel tudi funkcijo ustavno zagotovljene svobode govora, za katero je bil med drugimi odgovoren tudi sam.

Če pa smo želeli pobliže spoznati razpravo o besedah svoboda govora in tiska, smo morali najprej razumeti, zakaj so te besede vključene v prvi amandma. Madison je trdil, da je treba ti dve besedi

razumeti kot svobodo pred vladnimi omejitvami, kar pomeni, da vladni uradniki ne smejo pisanja ali govorov, ki jih štejejo za kritiko njihovega dela, razumeti kot uporniški govor in vlagati obtožnice za dejanja, ki bi jih šteli kot kazniva dejanja uporniškega govora. Obdobje občega prava in primer tiskarja Zengerja jasno kažejo na to, da so morali biti ljudje previdni pri vsaki izrečeni kritiki glede dela javnih uslužbencev, vladne politike ali zakonodaje, sicer so lahko bili obtoženi za uporniški govor, kjer pa resnica ni bila sprejeta kot obramba. V skladu z navedenim sta svoboda govora in tiska v Ameriki služili enemu namenu, in sicer omogočiti ljudem pravico, da svobodno govorijo in objavljajo svoje pritožbe čez delo javnih uslužbencev ali politike, brez predhodnega dovoljenja in posledično temu, da se ljudje znebijo strahu pred doktrino občega prava in uporniške klevete (The Federalist Blog). Eden vodilnih komentatorjev ustave ZDA, Joseph Story, je menil, "da jezik prvega amandmaja ne vsebuje nič več kot to, da ima vsak človek pravico, da govori, piše ali natisne svoje mnenje glede katere koli teme, brez začasne odredbe, vendar tako, da pri tem ne krši pravic drugega, ne poškoduje premoženja in ne škoduje ugledu drugega, prav tako ne krši javni red ali poskuša spodkopati vlado. Prvi amandma ni nič več ali manj kot razširitev doktrine, da ima vsak pravico objaviti, kar je resnično, z dobrimi in upravičenimi nameni" (University of Chicago Press and the Liberty Fund 2000).

Vendar pravici do svobode govora in tiska nista absolutni. Določene vrste govora so lahko v celoti prepovedane, prav tako pa je govor lahko reguliran glede na kraj, kjer je bil izrečen (Ruane 2014). Vrhovno sodišče ZDA je pri interpretaciji prvega amandmaja odločilo, da nekatere vrste govora niso ali so le delno zaščitene. Otroška pornografija, govor, ki je označen kot "fighting words", in govor, ki vsebuje opolzkost, so v celoti prepovedani. Sodišče je prav tako odločilo, da prvi amandma ne zagotavlja zaščite določenega govora v celoti, in sicer: komercialnega govora, obrekovanja (klevete in žaljenja), govora, ki lahko škoduje otrokom, govora preko medijev, kot so radio, televizija in internet in govora javnih uslužbencev (Cohen 2009). Osrednje vprašanje pri razpravi o tem, kje je meja med dovoljenim in nedovoljenim govorom, je, zakaj bi odprli dežnik ustavno varovanih pravic za določen tip govora? Politični govor je bil eno od področij, za katerega je obveljal splošen konsenz, da ga prvi amandma, ne glede na to, kaj vse obsega, zagotovo varuje, saj sta tako Jefferson kot Madison razumela, da brez svobode političnega govora ni demokratične družbe (Urofsky 2003, 22).

Podrobneje smo omejitve svobode govora in tiska predstavili v devetem poglavju, kjer smo pregledali nekaj pomembnih odločitev Ustavnega sodišča ZDA.

11.8 Pomen inkorporacije štirinajstega amandmaja v ustavo ZDA za pravico do svobode govora in tiska

Prva amandma ustave ZDA vsebuje jasno prepoved, da kongres ne sme sprejeti nobenega zakona, ki bi omejeval svobodo govora. Besedilo posebej in izključno omejuje moč kongresa, kar odseva dejstvo, da je bila Listina pravic dodana ustavi ZDA zaradi strahu, da bi zvezna vlada lahko imela preveč moči in posegala na področje posameznih pravic. Prav zaradi tega je vloga štirinajstega amandmaja zelo pomembna, saj je razširila omejitve iz ostalih amandmajev tudi na posamezne zvezne države. Amandma je bil ratificiran 9. julija 1868 in v prvem odstavku določa, da nobena država ne sme sprejeti ali uveljaviti nobenega zakona, ki bi omejeval privilegije ali posebne pravice državljanov Združenih držav, da nobena država ne sme nikomur odvzeti prostosti, pravice ali premoženja brez pravnega procesa, kakor tudi zanikati osebi enako varstvo pravic (Cornell University Law School 1992). V sodnem primeru *Barron v. Baltimore* je Vrhovno sodišče ZDA leta 1883 odločilo, da pravila Listine pravic omejujejo samo zvezno vlado, kasneje pa je sodišče utemeljilo, da večina določb Listine pravic velja za zvezne države preko doktrine inkorporacije ali preko klavzule predpisanega postopka (due process clause), ki ga določa štirinajsti amandma (Wikipedia 2016). Glede na to, da je bil prvi amandma v celoti inkorporiran, to pomeni, da morajo zvezne države glede pravic do svobode govora in tiska upoštevati enake omejitve kot zvezna vlada (Cornell University Law School 1992).

11.9 Zgodnja pravna praksa Vrhovnega sodišča glede pravice do svobode govora in tiska

Tradicija svobode govora se je v Ameriki začela razvijati v drugem stoletju po njeni ustanovitvi. Pred letom 1919 je bilo malo primerov, ki bi pred zveznimi sodišči vključevali svobodo govora. Čeprav je vladna cenzura obstajala, so sodišča redko odločila, da je slednja pomenila kršitev načela svobode govora. Pred sodišči sta prevladovali dve ideji: prva je bila, da je prvi amandma omejen z začasnimi odredbami; in druga, da vlada lahko omeji govor, če je njegov namen povzročiti škodo. Šele po vrsti izjemnih primerov, ki so vključevali omejevanje političnega govora med prvo

svetovno vojno, je sodišče počasi razvilo bolj proaktivne standarde, ki so dovoljevali vladi, da prepove govor samo, v kolikor ta vsebuje jasno in takojšnjo nevarnost (Sunstein 1993, 4). Kot trdi Barendt (2005, 48) se redko zgodi, da bi na videz tako enostavno besedilo, kot je besedilo prvega amandmaja, povzročilo toliko težav pri interpretaciji kot je ta. Da bi prišli do rešitve, so bile razvite številne teorije o svobodi govora, vendar analiza bogatih sodnih primerov pokaže, da se je Vrhovno sodišče ZDA upiralo biti zavezano kateri od njih. Najbolj znan pozitiven argument za zagotavljanje svobode govora je gotovo argument demokracije, ki je še posebej jasno izražen pri zaščiti političnega govora. Drug velik vpliv na odločitve Vrhovnega sodišča ZDA je bila ideja o teoriji trga in različica argumenta o resnici, ki jo je razvil sodnik James Holmes v njegovem odklonilnem mnenju v znamenitem primeru Abrams. Po drugi strani argumenti, ki bi izhajali iz temeljnih človekovih pravic, kot sta samoizpolnitev in dostojanstvo, niso imeli pomembne vloge pri oblikovanju pravne prakse glede svobode govora v ZDA, kljub temu, da so se nekaterim komentatorjem ti argumenti zdeli privlačni (Barendt 2005, 49-50).

Čeprav bi v prvem amandmaju zagotovljene svoboščine lahko bile razumljene kot absolutne, je sodišče vedno znova poskušalo razmejiti govor, ki je ustavno zaščiten, od govora, ki ni, vendar zagotovljenih pravic ni nikoli interpretiralo brez omejitev. Pri tem je sodišče razvilo številne teste in doktrine, ki so služili kot smernice. Prvi in najbolj znan sprejet test je bil test "jasne in takojšnje" nevarnosti (Barker in drugi 1999, 166). Prvi sodni primeri so izvirali iz vladnih ukrepov, sprejetih med vojno, da bi preprečili kritiko vlade in vojaško nepokorščino. Sodniki so sprejemali odločitve, ki so potrjevale, da je svoboda govora pravilo, vendar ni absolutno, in da je lahko govor v določenem obdobju, še posebej med vojno, omejen v javno dobro (Urofsky 2003, 20). Sodni primeri v času prve svetovne vojne so razvili definicije v dveh smereh: prva je trdila, da so tako zvezna vlada kot države dolžne spoštovati izražanje; in druga, ki je trdila, da je svoboda izražanja javna zadeva (Stevens 1983, 54).

V skladu z navedenim smo v tem poglavju pregledali nekaj zgodnjih sodnih primerov, skozi katere je sodišče razvilo ključne teste in doktrine. Začeli smo s primerom *Schenck proti Združenim* državam iz leta 1919, ki je bil prvi primer, v katerem je Vrhovno sodišče ZDA interpretiralo klavzulo govora in tiska iz prvega amandmaja. V tem primeru je, kot smo že navedli, sodišče razvilo prvi in najbolj znan test "jasne in takojšnje" nevarnosti, ki ga je predstavil sodnik Oliver

Wendell Holmes ml. (Kermit, Wieck in Finkelman 1991, 412). Obdolženi Charles Schenck je bil generalni sekretar socialistične partije v Filadelfiji, ki je leta 1917 natisnil petnajst tisoč pamfletov, ki so spodbujali upor vojaški obveznosti, ter jih poslal vsem vojaškim obveznikom, katerih seznam je našel v lokalnem časopisu. Vlada je označila pamflete kot strasten, trpek in jasen upor zoper Zakon o vojaški obveznosti ter Schencka obtožila kršitve Zakona o vohunstvu, ki je strogo prepovedoval širjenje "lažne" propagande z namenom, da bi se ovirala vojna prizadevanja. Schenckov zagovornik je trdil, da zakon prepoveduje objavo besed preden so izrečene in ne po tem, ko so, kot to zahteva ustava (Epstein in Walker 2003, 217). Vendar je sodišče ocenilo, da tudi najbolj ostra zaščita pravice do svobode govora ne bi zaščitila osebe, ki bi v gledališču lažno vpila "požar" in s tem povzročila paniko. Torej je potrebno v vsakem primeru pogledati, ali so izrečene besede izrečene v takšnih okoliščinah in so takšnega značaja, da ustvarjajo jasno in takojšnjo nevarnost, ki bo povzročila znatno zlo, katerega ima kongres pravico preprečiti. V skladu s tem je sodišče enotno odločilo, da je vsak obdolženi, ki razdeljuje letake, lahko obsojen za kaznivo dejanje poskusa oviranja vojaške obveznosti (Stevens 1982, 51–52).

V primeru *Abrams proti Združenim državam,* prav tako leta 1919, je sodnik Holmes zapisal odklonilno mnenje, ki velja za enega njegovih večnih spomenikov (Cornell University Law School 1992). Tudi v tem primeru je bil obdolženi Jacob Abrams spoznan za krivega kršitve zakona o vohunstvu, ker je natisnil in delil letake, ki so kritizirali odločitev predsednika Woodrowa Wilsona, da pošlje čete v Rusijo in pozivali ljudi k uporu ter protestom zoper takšno politiko (Epstein in Walker 2003, 219). Sodnik Holmes, ki je uporabil argument ideje o svobodi trga, je v odklonilnem mnenju Vrhovnega sodišča ZDA zapisal, da so ljudje skozi preteklost spoznali, da se želeni cilj lahko bolje doseže skozi tekmovanje na trgu in da je najboljši preizkus resnice moč misli, ki je lahko sprejeta v tej tekmi na trgu, saj je resnica edini razlog, da so lahko želje ljudi uresničene. In to je pravzaprav teorija ustave, saj je slednja tako kot življenje eksperiment (Cornell University Law School 1992). S tem odklonilnim mnenjem se je Vrhovno sodišče ZDA začelo zavedati pomena svobode govora v demokratični družbi, prav tako pa je bila v ospredje postavljena ideja sodobnega trga v demokraciji (Urofsky 2003, 22).

V naslednjem primeru, ki smo ga pregledali, tj. *New York Times proti Sillivanu* iz leta 1964, je Vrhovno sodišče ZDA vzpostavilo standard "dejanskega naklepa" ("actual malice"), kar pomeni,

da so lahko novinarska poročila glede javnih uslužbencev označena kot kleveta ali obrekovanje šele, če je dosežen ta standard. To je bila ena od ključnih odločitev v podporo svobodi tiska. *Brandenburg proti Ohiu* iz leta 1969 je bil naslednji ključni primer, v katerem je Vrhovno sodišče ZDA razvilo tako imenovani Bradenburgov test, ko je odločilo, da vlada ne sme kaznovati podžigajočega govora, razen, če ima govor namen, da spodbuja in je verjetno, da bo spodbudil nezakonita dejanja (Wikipedia 2016). Obdolženi Clarence Brandenburg je bil vodja Ku Klux Klana, ki je v enem od shodov klana v svojem govoru zagovarjal maščevanje zoper vlado, v kolikor slednja ne bo preprečila zatiranja bele rase, zaradi česar je bil obsojen kršitve Kazenskega sindikalnega zakona iz Ohia, ki je določal, da so spodbujanje nasilja ali terorizma, sabotaže in storitve kaznivih dejanj z namenom doseči politične ali ekonomske reforme nelegalni (CaseBriefs 2016). Sodišče prve stopnje je Brandenburga spoznalo krivega kršitve nacionalnega prava Ohaia, vendar je Vrhovno sodišče ZDA sodbo razveljavilo in odločilo, da je zakon Ohia kršil Brandenburgovo pravico do svobode govora in tiska, varovano v prvem amandmaju ustave Združenih držav. Sodišče je odločitev argumentiralo z razlago, da pravici do svobode govora in tiska ne dovoljujeta posameznim državam, da bi prepovedale zagovarjanje uporabe sile ali nezakonitih dejanj, razen, ko je takšno zagovarjanje usmerjeno v spodbujanje ali ustvarjanje takojšnih nezakonitih dejanj in je verjetno, da bo spodbudilo takšna dejanja. Sodišče je odločilo, da v tem primeru ni bilo očitno, da bi zbor Ku Klux Klana imel namen spodbujati posamezna dejanja nasilja, niti ni bilo verjetno, da bi se to zgodilo, zaradi česar je bila vladna omejitev svobode govora neustavna (FreeSpeechDebate 2013).

V primeru *New York Times proti Združenim državam*, ki ga je Vrhovno sodišče ZDA obravnavalo leta 1971, je sodišče s svojo odločitvijo omogočilo časopisu New York Times objavo tako imenovanih pentagonovih dokumentov brez strahu pred vladno cenzuro ali kaznovanjem. Ker je predsednik Richard Nixon zahteval od izvršne oblasti, da prepreči New York Timesu objavo zaupnih informacij, ki jih je posedoval, je Vrhovno sodišče ZDA moralo odgovoriti na vprašanje, ali je zagotovljena pravica do svobode tiska iz prvega amandmaja podrejena zahtevi izvršne oblasti, da se ohrani zaupnost informacij. Sodišče je odločilo v prid New York Timesu in razglasilo, da prvi amandma varuje pravico časopisa, da natisne dokumente (Wikipedia 2016). V drugem primeru, pomembnem za svobodo tiska *Richmon Newspapers, Inc. Proti Virginiji* iz leta 1980, se je Vrhovno sodišče ZDA ukvarjalo z vprašanjem, ali je sodišče Virginije s tem, ko je

sojenje zaprlo za javnost, kršilo pravico do svobode tiska, zagotovljeno v prvem amandmaju (Epstein in Walker 2004, 608). S sedmimi glasovi za in enim proti je Vrhovno sodišče ZDA odločilo, da prvi amandma vključuje pravico do navzočnosti v kazenskih postopkih, saj ne zagotavlja zgolj pravice do svobode govora, ampak vključuje tudi pravico do sprejemanja informacij in idej, pravico do poslušanja, kakor tudi pravico do zbiranja na javnih mestih, kot so sodišča (Oyez 2016). V zadnjem primeru, ki smo ga predstavili, tj. *Texas proti Johnsonu,* je Vrhovno sodišče ZDA leta 1989 odločalo o tem, ali dejanje zažiganja ustave ZDA spada v obseg varovanih pravic iz prvega amandmaja. Sodišče je z večino petih glasov odločilo, da dejanje zažiganja zastave dejansko spada v obseg varovanega govora po prvem amandmaju, čeprav je bila skrunitev zastave prepovedana v 48-ih zveznih državah od skupno 50-ih (Wikipedia 2016).

11.10 Zaključek

Ker je bil namen dela raziskati in predstaviti dogodke, ki so pripeljali do inkorporacije pravice do svobode govora in tiska v prvi amandma ustave Združenih držav Amerike, lahko na koncu ugotovimo, da lahko potrdimo vse postavljene teze. Najprej smo predvidevali, da Listina pravic ne bi bila vključena v ustavo in pravici do svobode govora in tiska ne bi bili ustavno varovani, če antifederalisti ne bi nasprotovali ratifikaciji ustave brez Listine pravic. Pregled dogodkov od leta do 1787 do 1790, ko sta potekali ustavodajna skupščina in postopki njene ratifikacije, so potrdili našo tezo. Ko je bila ustava sprejeta in poslana državam v ratifikacijo, je nekatere brez zaščite nekaterih človekovih pravic, med katerimi sta bili pravici do svobode govora in tiska, niso želele podpisati. Boj antifederalistov je bil uspešen, saj so federalisti spoznali, da ustava ne bo ratificirana brez Listine pravic, zaradi česar so po vseh razpravah soglašali, da se jo vključi v ustavo, s čimer so Združene države Amerike dobile zaščito pravic do svobode govora in tiska.

Druga teza je predvidevala, da sta angleška pravna tradicija in vpliv ključna za vključitev pravic do svobode govora in tiska v Listino pravic. Glede na okoliščino, da sta bili v zgodnji angleški zgodovini pravici do svobode govora in tiska zelo omejeni, saj nista bili zaščiteni in so bili lahko ljudje kaznovani, če so kritizirali vlado, se je prvih trinajst ameriških kolonij zelo dobro zavedalo teh omejitev, zato ne preseneča, da so se borili za Listino pravic in vključitev svobode govora in tiska v njo.

Tretja teza je iskala povezavo med zgodnjimi ameriškimi deklaracijami in listinami pravic, ki naj bi zagotovile podlago za Listino pravic. Kot smo prikazali v delu, so nekatere od prvih kolonij prepoznale pomembnost posameznih pravic še pred sprejetjem ustave ZDA in Listine pravic ter že sprejele svoje deklaracije ali listine pravic. Prva, ki je sprejela takšno listino, je bila Pennsylvania, ki je sicer že 15 let pred ratifikacijo Ustave ZDA, leta 1776, zagotovila ljudem pravico do svobode govora in tiska ter prepovedala njuno omejevanje. Sledile so države Delaware, North Carolina, Maryland, Vermont, Massachusets in New Hampshire. Posebej pa velja izpostaviti Virginijsko deklaracijo pravic, ki jo je pripravil Thomas Jefferson za uvodne odstavke Deklaracije neodvisnosti in so jo kopirale ostale kolonije.

Glede na okoliščino, da delo temelji v glavnem na raziskovanju primarnih in sekundarnih virov, naših tez ni bilo mogoče empirično preveriti, smo jih pa lahko potrjevali z opisno metodo dogodkov, političnega ozadja, motivacije in povzetkom vseh okoliščin, ki so pripeljale do sprejema prvega amandmaja. Čeprav je bila moja prva misel ob izbiri teme prepričanje, da je bil prvi amandma sprejet zaradi skrbi ustanovnih očetov za zaščito človekovih pravic do svobode govora in tiska, je analiza virov in zgodovinskih besedil pokazala, da je bil razlog pravzaprav bolj politične narave in rezultat politične enačbe. Tudi sam James Madison, ki je danes znan kot oče ustave in Listine pravic sprva ni videl potrebe po slednji in je svoje mnenje spremenil šele po močnem in dolgem nasprotovanju antifederalistov ter na koncu sam pripravil Listino pravic, vključno s prvim amandmajem, ki varuje pravico do svobode govora in tiska, čeprav velja poudariti, da so tekom ratifikacijskih konvencij in razprav bili predstavljeni tudi argumenti v prid osebnih svoboščin. Državnik iz Virginije, Richard Henry Lee, je menil, da je iz splošnih izkušenj jasno, da so za zagotovitev varovanja pravic in svoboščin človeštva potrebne jasne deklaracije, Patrick Henry, vodja antifederalistov, prav tako iz Virginije, je izrazil zaskrbljenost, da kongres ne bo dosti skrbel glede kršitev človekovih pravic. Thomas Jefferson pa je bil prepričan, da je Listina pravic nekaj, do česar so upravičeni vsi ljudje na svetu in so te nekaj, česar nobena vlada ne bi smela zanikati.

Ker je prvi amandma ob sprejetju omejeval samo moč kongresa oziroma zvezne vlade, moramo poudariti vlogo štirinajstega amandmaja, ki je omogočil, da se omejitev skozi tako imenovani

proces inkorporacije razteza tudi na zvezne države. Prav tako pa ne gre prezreti vloge prvih sodnih primerov, skozi katere je Vrhovno sodišče ZDA razvilo več testov in doktrin in med drugim v svobodo govora in tiska uvrstilo pravico do sežiganja ustave ter pravico do prisotnosti tiska v sodnih dvoranah. Ob koncu lahko torej strnemo, da je bil boj za ustavno zaščito pravic do svobode govora in tiska daleč od enostavnega, prav tako pa se je boj nadaljeval po sprejetju prvega amandmaja.

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