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First Amendment Law  
Professor Teachout  
Fall Term, 2020

Session #1: The First Amendment in Historical Context/Sedition Act  
Trials

I. The First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

II. Historical Context:

A. Revolutionary Period: Role of Pamphlets – Freedom of Press is “the Bulwark of Liberty!”

B. The Political Revolution in the 18<sup>th</sup> Century: 1700-1800

1. Transformation of political institutions, of relations between rulers and the ruled: from a paternalistic and hierarchical political order to a more democratic and egalitarian one.
2. Colonial assemblies during the Revolution: not open to the public, votes not published.
3. Early state constitutions (1776-1780): officers of government are "trustees and servants" of the people

"[A]ll power being originally inherent in, and consequently, derived from, the people; therefore, all officers of government, whether legislative or executive,

are their trustees and servants, and at all times accountable to them."  
Vermont Constitution of 1777, Ch. I. Sec. V.

4. Provisions protecting freedom of speech and press in early state constitutions:

- 9 of the 13 original states had provisions protecting freedom of the press
- Only 1 of the 13 original states had a provision protecting freedom of speech

5. Vermont Constitution of 1777 had two provisions protecting freedom of the press, one in the rights and liberties section, another in the frame of government section:


(1) Art. XIV, Ch. 1 [Declaration of Rights and Liberties]:

“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.”

(2) Section XXXII, Ch 2 [Frame of Government]:

“The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government”

6. Two provisions combined into one as part of “housekeeping” revisions in 1786::

"[T]he people have a right to freedom of speech, and of writing  and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained."

[Vermont Constitution, Ch.](#)

[I, Art. 13](#) (from 1786)

### III. Meaning of “Freedom of the Press”? Evolution over Time

A. "Freedom of the Press" at Common Law: Blackstone's understanding:

1. Practice of official censorship: freedom from prior restraint

2. Seditious Libel prosecutions

- a. Thrust: Bringing government into disrepute
- b. Truth not a defense, in some cases, an aggravation
- c. Roles of judge and jury

d. Peter Zenger trial: impact

B. Federal Alien and Sedition Act of 1798

1. Political context

- a. Federalists vs. Republicans
- b. Context of bloody French Revolution
- c. "Liberalizing" aspects of the Act
- d. A federal crime to make "false statements" with the intent to "defame" the federal government or "to stir up sedition within the United States."
- e. "Responsible free speech" vs. "licentious speech"

C. Sedition Act Trials

- 1. Trials of Mathew Lyon, Thomas Cooper, and James Callender: 1798-1800
- 2. What courts? Composition of courts?
- 3. Jury selection?
- 4. Jury instructions?
- 5. Why was "truth" not a defense?



D. Was the Alien and Sedition Act "unconstitutional"?

E. What happened to seditious libel prosecutions after the Jeffersonians swept into power in elections of 1800?

F. 19<sup>th</sup> Century experience with First Amendment