

# THE AI ATTENUATION PROBLEM: WHETHER THE PRINTING PRESS PROVIDES A HISTORICAL ANALOG FOR AI

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## ABSTRACT

In *Moody v. NetChoice* the Supreme Court addressed whether social media algorithms are protected by the First Amendment. Justice Barrett's concurrence highlighted that emerging technologies such as artificial intelligence (AI) may attenuate content moderation decisions from human decision-makers. This Comment addresses that the attenuation problem and other legal issues spurred by generative AI are analogous to legal issues presented by the introduction of the printing press in England.

## TABLE OF CONTENTS

1. <i>MOODY V. NETCHOICE</i> AND THE ATTENUATION PROBLEM.....	264
2. WHAT IS SPEECH? .....	266
3. WHAT IS AI? .....	267
4. THE ATHENIAN ROMANCE & PHILOSOPHERS' IDEAL .....	269
5. HISTORY OF THE PRESS AND SPEECH IN ENGLAND .....	271
5.1. The Printing Press in England .....	272
5.2. Freedom of Speech, A "Parliamentary Privilege" .....	301

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6. THE AMERICAN COLONIES TO THE UNITED STATES CONSTITUTION .....	306
7. THE PAST, THE PRESENT, AND MOVING FORWARD .....	316

### 1. *MOODY V. NETCHOICE* AND THE ATTENUATION PROBLEM

In 2024, the Supreme Court released an opinion addressing statutes Florida and Texas enacted in 2021 that regulate social media companies.<sup>1</sup> The laws differed in entities regulated and activities limited.<sup>2</sup> “But both contain content-moderation provisions, restricting covered platforms’ choices about whether and how to display user-generated content to the public.”<sup>3</sup> Additionally, “both [laws] include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices.”<sup>4</sup> Trade associations whose membership includes social media companies such as Facebook and YouTube “brought facial First Amendment challenges against the two laws[, and] [d]istrict courts in both States entered preliminary injunctions.”<sup>5</sup> The Eleventh Circuit “held that the State’s restrictions on content moderation trigger First Amendment scrutiny under this Court’s cases protecting ‘editorial discretion’”; “that the content-moderation provisions are unlikely to survive ‘intermediate—let alone strict—scrutiny’”; and “the statute’s individualized-explanation requirements [are] likely to fall . . . [because] the obligation to explain ‘millions of [decisions] per day’ is ‘unduly burdensome and likely to chill platforms’ protected speech.”<sup>6</sup> Thus, the injunction was upheld by the Eleventh Circuit.<sup>7</sup> The Fifth Circuit did not consider the platform’s content moderation to be speech and thus did not warrant First Amendment protection.<sup>8</sup> The Fifth Circuit also did not think the “individualized-explanation provisions” were problematic

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<sup>1</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707, 720 (2024).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 720.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 721.

<sup>6</sup> *Id.* at 722 (quoting *NetChoice, LLC v. Attorney General*, 34 F.4th 1196, 1227–28, 1230 (11th Cir. 2022)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

as “the platforms needed only to ‘scale up’ a ‘complaint-and-appeal process’ they already used.”<sup>9</sup>

The Supreme Court vacated and remanded the cases because neither circuit conducted the proper First Amendment analysis of the facial challenges.<sup>10</sup>

Justice Barrett was alone in recognizing a potential “attenuation problem” raised by modern technologies:

Consider, for instance, how platforms use algorithms to prioritize and remove content on their feeds. Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop. In that event, the algorithm would simply implement human beings’ inherently expressive choice “to exclude a message [they] did not like from” their speech compilation.<sup>11</sup>

Justice Barrett considers an algorithm under human direction to be an extension of human editorial judgment and thus protected under modern First Amendment precedent. She continued:

But what if a platform’s algorithm just presents automatically to each user whatever the algorithm thinks the user will like—*e.g.*, content similar to posts with which the user previously engaged? The First Amendment implications of the Florida and Texas laws might be different for that kind of algorithm. And what about AI, which is rapidly evolving? What if a platform’s owners hand the reins to an AI tool and ask it simply to remove “hateful” content? If the AI relies on large language models to determine what is “hateful” and should be removed, has a human being with First Amendment rights made an inherently expressive “choice . . . not to propound a

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<sup>9</sup> *Id.* at 722.

<sup>10</sup> *See id.* at 743–45.

<sup>11</sup> *Id.* at 745–46 (Barrett, J., concurring) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995)).

particular point of view”? In other words, technology may attenuate the connection between content-moderation actions (e.g., removing posts) and human beings’ constitutionally protected right to “decide for [themselves] the ideas and beliefs deserving of expression, consideration, and adherence.” So the way platforms use this sort of technology might have constitutional significance.<sup>12</sup>

This “attenuation problem” was completely unaddressed by the majority opinion and the Eleventh and Fifth Circuits. As algorithmic technology and AI advance and proliferate, this question (and others) shall demand answers.

## 2. WHAT IS SPEECH?

Speech necessarily consists of two components: a message and the promulgation. The message is the idea, the contents. The promulgation is how the idea is transmitted from one human to another; thus, verbal speaking and a written message both qualify as speaking (they transmit a message), but the mode of promulgation is different.

In terms of jurisprudence, a third component is usually necessary for speech—a recipient, or in other words, an audience. Technically one could speak to oneself. In fact, “thought crimes” such as “imagining the death of the king” once did exist.<sup>13</sup> These such laws very quickly ran into practical problems of proof, leading to the development of the overt act requirement for prosecution. Similarly, many speech-related causes of action today, such as libel and slander, require an audience for there to be a harm.<sup>14</sup> The audience however, is not always necessary if the creation of the message is harmful in itself, such as child pornography.<sup>15</sup>

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<sup>12</sup> *Id.* at 746 (emphasis in original) (first quoting *Hurley*, 515 U.S. at 575; and then quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

<sup>13</sup> See generally *Treason Act 1351*, 25 Edw. 3 Stat. 5, c. 2, § 2 (Eng.), <https://perma.cc/LRY7-YZAY> (An example of a thought crime. The original statute does not use modern English, so the traditional translation was used).

<sup>14</sup> See *Defamation*, CORN. L. SCH.: LEGAL INFO. INST. (June 2023), <https://perma.cc/3ZQR-ZSL3> (stating that defamation requires a plaintiff to publish or communicate a false statement to a third party).

<sup>15</sup> See *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (ruling that states can proscribe statutes against the possession of child pornography without distribution).

Having preliminarily answered what speech is, another important question remains: why does the First Amendment protect it? The answer will become clear through the forthcoming analysis of the origins of the First Amendment.

### 3. WHAT IS AI?

AI is the abbreviation for “artificial intelligence.”<sup>16</sup> It is also a catch-all term.<sup>17</sup> “Traditional AI,” sometimes also known as Weak AI or Narrow AI, “is a subset of artificial intelligence that focuses on performing preset tasks using predetermined algorithms and rules.”<sup>18</sup> It is the only kind of AI that currently exists.<sup>19</sup> Traditional AI specializes in one task, such as facial recognition or search engine optimization.<sup>20</sup> For now, more advanced AI such as a General AI—AI that “can apply knowledge broadly . . . to learn, adapt, and implement information across domains”—and Superintelligent AI—“AI [that] surpasses human intelligence in most cognitive tasks, demonstrating superior problem-solving, learning, and adaptability”—remain the stuff of science fiction.<sup>21</sup> There are, however, many subsets of traditional AI, such as decision trees, natural language processing, and generative AI.<sup>22</sup>

Recently, much of the ado about something AI has been about generative AI. Generative AI is a “deep learning model[] that can create complex original content such as long-form text, high-quality images, realistic video or audio and more in response to a user’s prompt or request.”<sup>23</sup> “Deep learning is a subset of machine learning that uses multilayered neural networks, called deep neural networks, that more closely simulate the complex

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<sup>16</sup> AI, OXFORD ENGLISH DICTIONARY, <https://perma.cc/6XUT-3DGC>.

<sup>17</sup> Will Douglas Heaven, *What is AI?*, MIT TECH. REV. (July 10, 2024), <https://perma.cc/Q3S6-QGD8>.

<sup>18</sup> Emily Heaslip, *What’s the Difference Between Traditional and Generative AI?*, U.S. CHAMBER OF COM. (May 21, 2025), <https://perma.cc/UMX5-NTSC>.

<sup>19</sup> Aleksandra Yosifova, *How to Learn AI: A Beginner’s Guide*, 365 DATA SCI. (Apr. 30, 2025), <https://perma.cc/2869-FSF8>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Heaslip, *supra* note 18.

<sup>23</sup> Cole Stryker & Eda Kavlakoglu, *What is Artificial Intelligence (AI)?*, IBM (Aug. 9, 2024), <https://perma.cc/UC7S-HCWE>.

decision-making power of the human brain.”<sup>24</sup> A computer that utilizes machine learning can improve “from data without specific instructions on performing a given task.”<sup>25</sup> Machine learning models can make predictions or take actions with accuracy because they distill and analyze patterns within huge datasets.<sup>26</sup> Meanwhile, “[a] neural network consists of interconnected layers of nodes (analogous to neurons) that work together to process and analyze complex data. Neural networks are well suited to tasks that involve identifying complex patterns and relationships in large amounts of data.”<sup>27</sup>

In simplified terms, “generative [AI] models encode a simplified representation of their training data, and then draw from that representation to create new work that’s similar, but not identical, to the original data.”<sup>28</sup> Large language models (LLMs) are particularly interesting because of their capability to generate a “natural language”—human-seeming—output.<sup>29</sup> “In a nutshell, LLMs are designed to understand and generate text like a human, in addition to other forms of content, based on the vast amount of data used to train them. They have the ability to infer from context, generate coherent and contextually relevant responses, translate to languages other than English, summarize text, answer questions (general conversation and FAQs) and even assist in creative writing or code generation tasks.”<sup>30</sup>

At their heart, generative AI and LLMs that have been fed (trained on) human language samples, and due to their massive pattern recognition capabilities (based in immense mathematical computations), spit out human-looking language. But apart from being cool, why does this matter?

The issue is, historically, speech and publication have been protected by the United States Constitution. But if a message is generated by an AI, is the product still protected? If an editorial decision is made by an AI without human input, is the editorial decision protected?

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<sup>24</sup> *Id.*

<sup>25</sup> Yosifova, *supra* note 19.

<sup>26</sup> *Id.*

<sup>27</sup> Stryker & Kavlakoglu, *supra* note 23.

<sup>28</sup> *Id.*

<sup>29</sup> Cole Stryker, *What are Large Language Models (LLMs)?*, IBM, <https://perma.cc/7GPC-LJ92>.

<sup>30</sup> Brittany Collins, *What is AI, Really? An Overview of AI for Writers, Students, and Teachers*, WRITE THE WORLD: BLOG (June 18, 2024), <https://perma.cc/3W3Y-9J8Z>.

#### 4. THE ATHENIAN ROMANCE & PHILOSOPHERS' IDEAL

The world's first known democracy emerged in Athens.<sup>31</sup> All adult free men were expected to take part.<sup>32</sup> Pericles, a renowned Athenian statesman, "delivered an oration at the funeral of those who were killed in the first year of the Peloponnesian War" with Sparta.<sup>33</sup> The following is merely an excerpt:

It is true we are called a democracy, for the administration is in the hands of the many and not the few. . . .

. . . .

. . . An Athenian citizen does not neglect the state because he takes care of his own household; and even those of us who are engaged in business have a very fair idea of politics. We alone regard a man who takes no interest in public affairs, not as a harmless, but as a useless character; and if few of us are originators, we are all sound judges of a policy. *The great impediment to action is, in our opinion, not discussion but the want of that knowledge which is gained by discussion preparatory to action. For we have a peculiar power of thinking before we act, and of acting too, whereas other men are courageous from ignorance but hesitate upon reflection.*<sup>34</sup>

The citizens (free men) of Athens were not only expected to take part in government but also to have a working and informed knowledge of public affairs. Pericles viewed proper discussion as essential to good governance.

The development of democracy in Athens made a certain skill necessary to hold power: oration, or persuasive speaking.<sup>35</sup> The Sophists were traveling teachers who taught the skills of persuasive public speaking and logic.<sup>36</sup> The Sophists were not necessarily concerned with discovering the

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<sup>31</sup> *Democracy (Ancient Greece)*, NAT'L GEOGRAPHIC (May 30, 2025), <https://perma.cc/MMV4-6JSY>.

<sup>32</sup> *Id.*

<sup>33</sup> JAMES N. JORDAN, *WESTERN PHILOSOPHY: FROM ANTIQUITY TO THE MIDDLE AGES* 48 (1997).

<sup>34</sup> *Id.* at 48–49 (emphasis added).

<sup>35</sup> *Id.* at 51.

<sup>36</sup> *Id.*

truth as much as they were with persuasion (and being paid).<sup>37</sup> Many of the Sophists, such as Protagoras and Gorgias, were individual relativists.<sup>38</sup> In other words, they taught “that there is no objective truth independent of what people believe”; thus “[i]f something appears true to you, then for you it is really true.”<sup>39</sup> If another person believes differently, then their belief is also true—for that person.<sup>40</sup> Despite this, the Sophists taught that there was a way to make an opinion or position sound “better” than others; such persuasive oration was the skill they taught.<sup>41</sup>

In contrast to the Sophists, philosophers such as Socrates, Plato, and Aristotle emerged. Contrary to the Sophists, each believed that an objective truth existed and could be found through logic and reason. Socrates’ methods had a particularly lasting impact on Western thought. None of Socrates’ own writings survive, although he is immortalized by the writings of his student Plato.<sup>42</sup> Socrates would engage with another in conversation and, through repeated questioning, break down and dissect *exactly* what they meant when they used a certain term.<sup>43</sup> As Aristotle later observed, Socrates was constantly “seeking the universal.”<sup>44</sup> Socrates “believed that the best way to foster enlightenment in others is not by a direct attempt to instruct them but by demolishing their self-complacency, by whetting their curiosity, and by showing them from the example of his conversation that, and how, progress toward knowledge is possible.”<sup>45</sup> Today, this is known as the “Socratic Method” and continues to be used as an educational tool, particularly in law schools.<sup>46</sup> It is considered “to develop critical thinking skills in students and enable them to approach the law as intellectuals.”<sup>47</sup>

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<sup>37</sup> See *id.* at 51–58, 60.

<sup>38</sup> *Id.* at 52–53, 55.

<sup>39</sup> *Id.* at 52.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 53.

<sup>42</sup> *Id.* at 61–62.

<sup>43</sup> *Id.* at 62–64.

<sup>44</sup> *Id.* at 64.

<sup>45</sup> *Id.* at 65.

<sup>46</sup> Elizabeth Garrett, *The Socratic Method*, UNIV. CHI. L. SCH., <https://perma.cc/U6GY-7LUK>.

<sup>47</sup> *Id.* Practically, law professors deeply vary in how adept they are at teaching through this method.

Unlike the Sophists, Socrates encouraged the development of virtue and deep examination of what actually the “good” is.<sup>48</sup> Ironically, Socrates was sentenced to death in Athens for “corrupting the youth”—his teaching of young men to question democratic principles.<sup>49</sup> Socrates’ friends tried to persuade him to escape, but he refused.<sup>50</sup> Socrates believed that an unlawful escape at that point would do more harm to the city, particularly when he had an earlier opportunity to escape lawfully.<sup>51</sup> Thus Socrates, a founding father of philosophy, willingly drank the executioner’s cup of poisoned hemlock.<sup>52</sup>

Ironically, his contribution to philosophy and education was something he died for. But the idea that the truth would be discovered via vigorous discussion and debate echoes through Western jurisprudence to this day.

## 5. HISTORY OF THE PRESS AND SPEECH IN ENGLAND

Today (likely because they are found in the same breath within the Bill of Rights), freedom of speech and freedom of the press often merge into an amorphous “freedom of expression.”<sup>53</sup> Historically however, these rights emerged on separate paths in England. Freedom of the press emerged as an innovative technology and skill—the printing press—shook off its shackles of licensing, monopoly, and censure.<sup>54</sup> Meanwhile, freedom of speech and discussion went from a privilege for the elected few of English Parliament to a privilege for the masses of the American people.<sup>55</sup>

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<sup>48</sup> See JORDAN, *supra* note 33, at 59–65.

<sup>49</sup> *Id.* at 61.

<sup>50</sup> Debra Nails & S. Sara Monoson, *Socrates*, STAN. ENCYC. OF PHIL. (May 26, 2022), <https://perma.cc/K36T-EE4N>.

<sup>51</sup> *Id.*

<sup>52</sup> *Socrates*, HIST. (MAR. 6, 2025), <https://perma.cc/3UKX-MT4C>.

<sup>53</sup> Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 249 (2017).

<sup>54</sup> See *infra* Section 5.1.

<sup>55</sup> See *infra* Section 5.2.

### 5.1. The Printing Press in England

It was considered a prerogative right of the crown to regulate and control the printing press from its very first introduction in England.<sup>56</sup> There are two conflicting accounts of the first printing press in England.<sup>57</sup> William Caxton independently set up the “first” press in Westminster in 1476.<sup>58</sup> Alternatively, the first printing presses were brought into England by request of the King.<sup>59</sup> The first account is more likely to be true,<sup>60</sup> regardless, “[i]n 1500 there were only five printers in London; by 1523 there were at least thirty-three printers and booksellers actively engaged in the trade.”<sup>61</sup> The royal proclamation was the main method first used to control printing in England.<sup>62</sup> Fred Siebert outlined the four steps that resulted in the English licensing system: “(1) protection of the native printer against foreign competition; (2) the appointment of royal or official printers; (3) grants of privilege for purposes of control and trade protection; and (4) grants of patents of monopoly.”<sup>63</sup> King Henry VIII began by regulating foreign printers in 1523 and by 1534 banned selling books printed outside of England and purchasing foreign books from foreigners.<sup>64</sup> The official position of the king’s printer was established in 1504.<sup>65</sup>

“Printing privileges” emerged by 1518.<sup>66</sup> Printing privilege indicated the approval of the King, some protection against piracy, and in some cases *exclusive* printing rights.<sup>67</sup> It is of note that the first case of exclusive printing right was “definitely given to the *printer* and *not the author*.”<sup>68</sup> By 1520, a protection that covered everything a printer printed—“general privilege”—

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<sup>56</sup> FRED S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476–1776, at 22 (1965).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 22, 24.

<sup>59</sup> *Id.* at 22.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 25.

<sup>62</sup> *Id.* at 30.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 31–32.

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 33–35.

<sup>67</sup> *Id.* at 35.

<sup>68</sup> *Id.* (emphasis added).

had developed.<sup>69</sup> Publishers' emblems included the phrase: "cum privilegio a rege."<sup>70</sup> King Henry VIII used the granting of printing privileges as a means to control the printers.<sup>71</sup> "Printers' privileges were grants for the protection from piracy of all works which a printer might issue."<sup>72</sup> From the very beginning of the press in England, tensions were present between the author and printer, with the latter being protected.

In 1529, King Henry VIII began positioning himself publicly as a "Defender of the Faith."<sup>73</sup> With the assistance of the clergy, he issued a proclamation of prohibited books directed at the heresies of Martin Luther.<sup>74</sup> Meanwhile, he privately encouraged heretical literature in his mechanisms to maneuver for divorce from his first wife.<sup>75</sup>

By 1539, privileges had begun to evolve into monopolies.<sup>76</sup> The patents of monopoly protected not only the reprinting of a specific work but also an entire field, such as common law, music books, Latin grammars, Latin books, almanacs, etc.<sup>77</sup> One of the first monopolies granted was for the printing of English Bibles.<sup>78</sup> Later, Henry VIII would manipulate the translations of the Bible available in England to support his break from the Roman Catholic Church, ultimately putting an Act through Parliament in 1542 that limited the ability of the working class to access and read the Bible.<sup>79</sup>

The Proclamation of 1538 was the first major attempt in England to censor and license the press.<sup>80</sup> "The purpose of the new order was 'for expelling and auoydinge the occasion of errorrs and *seditouse* opinions.'"<sup>81</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (roughly translated as "with privilege from the king").

<sup>71</sup> *Id.* at 36–37 (noting that printers who were considered troublemakers often had express conditions attached to their privileges).

<sup>72</sup> *Id.* at 38.

<sup>73</sup> *Id.* at 44–45.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 38.

<sup>77</sup> *Id.* at 38–39.

<sup>78</sup> *Id.* at 38.

<sup>79</sup> *Id.* at 47–48.

<sup>80</sup> *Id.* at 48.

<sup>81</sup> *Id.* (emphasis added) (roughly translated as "for expelling and avoiding the occasion of errors and seditious opinions").

Regulation of religious books was transferred from the Church to the Crown.<sup>82</sup> The licensing system was expanded to all English-language books.<sup>83</sup> The punishment for infringement was forfeiture of chattels to the king as well as fines and imprisonment.<sup>84</sup> In 1544, Henry VIII restricted books printed on the “news of the success of the king’s army in Scotland,”<sup>85</sup> another instance of government press control to influence public opinion.

In the beginning printers were found among different guilds and companies in England, but by the end of Henry VIII’s reign most were members of the Stationers Guild.<sup>86</sup> King Philip and Queen Mary granted the charter for the incorporation of the Stationer’s Company in 1557.<sup>87</sup> The charter “prohibited all printing within the realm except by members of the Company or by those having special license from the queen.”<sup>88</sup> Queen Elizabeth granted printing monopolies as rewards and revoked them with her disfavor; however, the practice ultimately increased “secret and surreptitious presses” as printers produced prohibited books to make financial ends meet.<sup>89</sup>

Queen Elizabeth was outraged by the appearance of a pamphlet in 1579 decrying her potential marriage to the (Catholic) French prince, the Duke of Anjou.<sup>90</sup> The pamphlet renounced the potential match as a betrayal to the Reformation.<sup>91</sup> Queen Elizabeth decried the pamphlet as “lewde and seditious.”<sup>92</sup> Despite the omission of the author’s and publisher’s names on the pamphlet, within three days the author John Stubbe and printer Hugh Singleton were apprehended.<sup>93</sup> While Queen Elizabeth wished them to hang, ultimately both the author and printer “were condemned to lose their right hands.”<sup>94</sup> After the author Stubbe lost his hand, he saluted the queen

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<sup>82</sup> *Id.* at 49.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 50.

<sup>86</sup> *Id.* at 65.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 68.

<sup>89</sup> *Id.* at 39–40.

<sup>90</sup> *Id.* at 91.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 91–92.

with his remaining hand.<sup>95</sup> Meanwhile, the printer Singleton did not lose his hand “due to his connection to the Earl of Leicester.”<sup>96</sup>

William Carter was the only printer put to death in the Tudor period.<sup>97</sup> He was a Roman Catholic.<sup>98</sup> The Bishop of London (of the schismatic Church of England) observed on December 30, 1579:

I have found out a presse of pryntyng with one Carter, a verye lewd fellowe, who hath byne Dyvers tymes before in prison for the printinge of Lewde pamphlettes. But nowe in search of his House amongst other naughtye papysticall Bookes, wee have founde one wrytten in Ffrenche inty [t] led *the innosency of the Scotysse Quene* a very Dangerous Book wherein he calleth her *the heire apparent of this Crown!*<sup>99</sup>

While today lewd is often most used to mean licentious, in the fourteenth century it was used to mean wicked, or in this specific case, Catholic.<sup>100</sup> Carter refused to answer when he was examined by the High Commission, but ultimately the evidence was insufficient to convict, and he was released after a term in prison.<sup>101</sup> His legal troubles were not over, however, as the next year he was arrested after an investigation by the Stationers Company and authorities credited him with printing *A treatise of Schism* by Dr. Gregory Martin.<sup>102</sup> The book included “a paragraph where confidence was expressed that the Catholic Faith would triumph, and pious Judith would slay Holofernes. This was interpreted as an incitement to slay the queen, though it obviously had no such meaning.”<sup>103</sup> Torture did not force a confession.<sup>104</sup> His wife died while he was imprisoned.<sup>105</sup> He was condemned to death for

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<sup>95</sup> *Id.* at 92.

<sup>96</sup> Katherine Durr, *Hugh Singleton, 1548-1582--Printer's Mark*, VASSAR COLL. DIGIT. LIBR., <https://perma.cc/48BF-XRHV>.

<sup>97</sup> SIEBERT, *supra* note 56, at 88.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 90 (alteration in original).

<sup>100</sup> *Lewd*, MERRIAM-WEBSTER, <https://perma.cc/A3W5-YCMZ>.

<sup>101</sup> SIEBERT, *supra* note 56, at 90.

<sup>102</sup> *See id.*

<sup>103</sup> *Id.*; John Wainewright, *Ven. William Carter*, CATH. ENCYC.: NEW ADVENT, <https://perma.cc/FEB9-AD4X>.

<sup>104</sup> *See* SIEBERT, *supra* note 56, at 90.

<sup>105</sup> Father Silas Henderson, *Saint of the Day: Bl. William Carter*, ALETEIA, <https://perma.cc/EN7J-KU9F>.

treason after only fifteen minutes of deliberation; meanwhile, he made confession to a priest imprisoned with him.<sup>106</sup> On January 11, 1584, he was hanged, drawn, and quartered.<sup>107</sup> In 1987 he was beatified with eighty-four other English, Scottish, and Welsh martyrs by Pope Saint John Paul II.<sup>108</sup>

The Puritans objected to the limitations on their printing but not “to the doctrine that the press should be controlled.”<sup>109</sup> The Puritans employed pamphlets to use the printing press to appeal to the public after their appeals to Parliament and the Church of England failed.<sup>110</sup> In 1572 Puritans John Field and Thomas Wilcocks authored a pamphlet criticizing the ecclesiastical organization of the Church of England and advocated for “a return to the church organization” of the apostles.<sup>111</sup> The authorities failed to apprehend the printer or uncover his identity.<sup>112</sup> Field and Wilcocks defended the pamphlet as legal because it was written “in Parliament time, which should be a time of speaking and writing freely.”<sup>113</sup> This was the first time the right to petition Parliament was transformed to an apology for free press.<sup>114</sup> Despite their novel defense, both were sentenced to a yearslong imprisonment.<sup>115</sup>

Printing was further regulated by the Star Chamber Decree of 1586.<sup>116</sup> It required: all printers to register their presses with the Stationers Company; all printing to be done inside of London (with exceptions for Oxford and Cambridge); that new master printers be approved by the Archbishop of Canterbury and Bishop of London; penalties for binding unlawfully printed books; limitations on the number of printing apprentices; that “[t]he Wardens of the [Stationers] Company [be] given authority to search and

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (Pope Saint John Paul II said, “Among these eighty-five martyrs we find *priests and laymen, scholars and craftsmen*. The oldest was in his eighties, and the youngest no more than twenty-four. There were among them a printer, a bartender, a stable-hand, a tailor. What unites them all is the sacrifice of their lives in the service of Christ their Lord.”).

<sup>109</sup> SIEBERT, *supra* note 56, at 89.

<sup>110</sup> *Id.* at 95.

<sup>111</sup> *Id.* at 95–96.

<sup>112</sup> *Id.* at 96.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 69.

seize all unlawful printing and secret presses”;<sup>117</sup> and printers to “set up their presses in places to which the [Stationers] Company’s searchers had ready access.”<sup>118</sup> This increased ecclesiastical control of the trade in England,<sup>119</sup> and “[t]he ultimate penalty [for violating the Star Chamber’s Decree] was the seizure of press and printing implements and the defacement of the type.”<sup>120</sup> The defaced instruments were to be returned to the owner as a reminder of his sin.<sup>121</sup> Seized books were returned to the patent or copyright owner if they merely infringed the patent or copyright, but unlicensed books were burnt.<sup>122</sup>

The introduction of the printing press and the subsequent explosion of literature available tested laws developed prior to the invention. The Statute of Westminster in 1275 introduced *De Scandalis Magnatum*, also known as *Scandalum Magnatum* laws,<sup>123</sup> translated literally as “libels upon peers.”<sup>124</sup> The statute announced “[t]hat from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm.”<sup>125</sup> Thus, it was illegal to spread rumors. The purpose of the statute was “not to give damages to defamed persons” but preserve public peace.<sup>126</sup> To accomplish its purpose:

the statute provided for the imprisonment of the teller [publisher] until such time as he was willing to reveal the original inventor. The inventor [author] was punishable *without* the statute; the reporter or disseminator was punishable *under* the statute, “and he that doth so, shall be taken and kept in Prison

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<sup>117</sup> *Id.* at 69–70.

<sup>118</sup> *Id.* at 84.

<sup>119</sup> *Id.* at 72.

<sup>120</sup> *Id.* at 73.

<sup>121</sup> *Id.* at 85.

<sup>122</sup> *Id.* at 85–86.

<sup>123</sup> James L. Turk, *Making it Illegal Will Not Stop the Spread of Misinformation*, CTR. FOR FREE EXPRESSION BLOG (May 6, 2020), <https://perma.cc/YWM6-4TJY>.

<sup>124</sup> Robert A. Kahn, *De Scandalis Magnatum*, FREE SPEECH CTR. (July 2, 2024), <https://perma.cc/3YBN-BNW7>.

<sup>125</sup> Turk, *supra* note 123 (alteration in original).

<sup>126</sup> SIEBERT, *supra* note 56, at 118; *see also* Kahn, *supra* note 124 (noting that the “goal of the statutes was to preserve good relations between the Crown and the nobility as well as among the nobles themselves”).

until he hath brought him into the Court which was the first Author of the Tale.” . . . [Prior to the adoption of the statute, a person apprehended for spreading rumors] could successfully defend himself by pleading that he was merely repeating what he had heard. He had invented nothing.<sup>127</sup>

Now the new statute of 1275 required repeaters of rumors about nobles to reveal sources or go to prison.<sup>128</sup> Under the statute truth was a defense.<sup>129</sup> Additionally, while both the invention and promulgation of a lie was a crime, “the invention was the greater offense.”<sup>130</sup> Thus, even before the printing press, there existed some level of attenuation between the idea expressed and the transmission of the idea. In 1606 the Star Chamber shirked precedent in the case *de Libellis Famosis*.<sup>131</sup> The new doctrine of seditious libel established:

- (1) “Libel against an ordinary person is a criminal offense”;<sup>132</sup>
- (2) Defaming a dead person is still libel;<sup>133</sup>
- (3) Libel can be prosecuted in the Star Chamber or at common law;<sup>134</sup>
- (4) Truth is no longer a defense to libel;<sup>135</sup> and
- (5) Publication of libel is “just as criminal as” the invention of libel.<sup>136</sup>

Despite the advancement in laws and royal promulgations, controlling printing was not an easy task. The Star Chamber Decree of 1637 tightened restrictions by requiring *all* books and pamphlets to be licensed and requiring the name of the licenser, author, and printer to be on everything printed.<sup>137</sup> In 1640 the Long Parliament assumed control of printing, and in

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<sup>127</sup> SIEBERT, *supra* note 56, at 118 (quoting Statute of Westminster of 1275, 3 Edw. I. c. 34 (Eng.)) (brackets in original).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 119.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 119–20.

<sup>137</sup> *Id.* at 142.

1641 the Star Chamber was abolished.<sup>138</sup> Enforcement of printing licensure and regulation lapsed as Parliament was preoccupied with the brewing English Civil War.<sup>139</sup> Attempts to regain control of the printers were foiled.<sup>140</sup> Publication of pamphlets became more and more widespread.<sup>141</sup>

In 1641 the essay *A description of the famous kingdome of Macaria* was anonymously published as an address to Parliament.<sup>142</sup> In 1847 Samuel Hartlib (a friend of John Milton<sup>143</sup>) was believed to be the author;<sup>144</sup> but later scholars have credited Gabriel Plattes as the author.<sup>145</sup> Regardless of authorship, reflecting on the Reformation, the essay presciently observed “the Art of Printing will so spread knowledge, that the common people, knowing their own rights and liberties, will not be governed by way of oppression.”<sup>146</sup>

The printing press carried the reverberations of King Henry VIII’s separation from the Catholic Church and the winds of the Reformation blowing in from abroad to the hands of the people.<sup>147</sup> In June or July of 1644 a pamphleteer, William Walwyn, published *The Compassionate Samaritane Unbinding The Conscience*.<sup>148</sup> Walwyn advocated for the expansion of religious tolerance to the Brownists and Anabaptists.<sup>149</sup> Addressing Parliament, he begins by assurance: “I shall make bold as a Common of England to lay claime to that priviledge, being assured that I write nothing scandalous, or dangerous to the State, (which is justly and upon good grounds prohibited by Your

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 173–74.

<sup>140</sup> *Id.* at 174, 176.

<sup>141</sup> *Id.* at 185, 191.

<sup>142</sup> Charles Webster, *The Authorship and Significance of Macaria*, PAST & PRESENT, Aug. 1972, at 34, 35.

<sup>143</sup> SIEBERT, *supra* note 56, at 192.

<sup>144</sup> Webster, *supra* note 142, at 36.

<sup>145</sup> *Id.* at 37.

<sup>146</sup> GABRIEL PLATTES, A DESCRIPTION OF THE FAMOUS KINGDOME OF MACARIA (1641), *reprinted in* SAMUEL HARTLIB AND THE ADVANCEMENT OF LEARNING 79, 89 (Charles Webster ed., 1970).

<sup>147</sup> *Reformation*, ENCYC. BRITANNICA (Nov. 25, 2025), <https://perma.cc/S6MN-9TD5>.

<sup>148</sup> WILLIAM WALWYN, THE COMPASSIONATE SAMARITANE UNBINDING THE CONSCIENCE (1644), *reprinted in* 2 TRACTS ON LIBERTY BY THE LEVELLERS AND THEIR CRITICS (1644–1645), at 97, 97–98 (David M. Hart & Ross Kenyon eds., 2014).

<sup>149</sup> *Id.* at 99–100.

Ordinance to that effect) . . . .”<sup>150</sup> Walwyn was not advocating for a complete freedom of the press, as he supported the suppression of literature that was “scandalous” or “dangerous” to the state.<sup>151</sup> But he decried the Licensors for having “stopt the mouthes of good men, who must either not write at all, or no more then is sutable to the judgments and interests of the Licencers.”<sup>152</sup> He goes on to further explain:

There they brand men with the name of Hereticks, and fasten what errours they thinke are most hatefull to the people, upon those men they purpose to make odious: There they confute all opinions, and boldly they may doe it, for as much as no liberty of reply or vindication in publike is allowed to any, though never so much scandalized by them. And that men may not vindicate themselves by writing, their next interest is to be Masters of the Presse, of which they are lately become by an Ordinance for licensing of Bookes, *which being intended by the Parliament for a good & necessary end (namely) the prohibition of all Bookes dangerous or scandalous to the State, is become by meanes of the Licencers (who are Divines and intend their owne interest) most serviceable to themselves (scandalous Books being still disperst) in the stopping of honest mens writings, that nothing may come to the Worlds view but what they please, unlesse men will runne the hazard of imprisonment, (as I now doe) so that in publike they may speake what they will, write what they wil, they may abuse whom they will, and nothing can be said against them: well may they presume of making themselves Masters of the people having these foundations laid, and the people generally willing to beleive they are good.*<sup>153</sup>

Like most of his compatriots, Walwyn did not believe this right should be extended to the Catholics and believed that freedom of speech and the presses would be dangerous if extended to “some politike Bishop, or Dr. Ignorant University man, or knave Poet [who] would endeavour by such a

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<sup>150</sup> *Id.* at 99.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 106 (emphasis added).

suggestion to the people to misguide their credulous hearts.”<sup>154</sup> But conversely Walwyn held “that the Brownist and Anabaptist are rationally examiners of those things they hold for truth, milde discourseres, and able to give an account of what they believe,” and thus deserving of protection.<sup>155</sup> He ended his argument by asking “[t]hat all Statutes against the Separatists be reviewed, and repealed, especially that of the 35. of Eliz. That the Presse may be free for any man, that writes nothing scandalous or dangerous to the State.”<sup>156</sup>

In 1643 the merchant Henry Robinson<sup>157</sup> published the pamphlet *Liberty of Conscience* advocating for religious toleration.<sup>158</sup> He begins his address, “TO EVERY CHRISTIAN READER THAT SEEKS TRUTH AS WELL AS PEACE.”<sup>159</sup> Robinson appeals to the Christian call of evangelization—“I presume no Protestant will deny, but that we are bound to endeavour the conversion of Papists, Jewes, Turkes, Pagans, Hereticks, with all Infidel & misbelievers unto the only true and saving faith in Jesus Christ”<sup>160</sup>—and to the biblical instruction of Mark 3:27 that evangelization requires that “no one can enter a strong man’s house to plunder his property unless he first ties up the strong man. Then he can plunder his house.”<sup>161</sup> Robinson interprets this to mean “before you can prevaile and reduce a Turk or Papist to the true reformed Religion, you must first convince him in the errours of his owne, by the evidence of Scripture, and by the power of the Holy Ghost.”<sup>162</sup> Robinson’s faith in apologetics was so great that he proclaimed “this combat therefore must be sought out upon eaven ground, on equall termes, neither side must expect to have greater liberty of speech, writing, Printing, or whatsoever else, then the other.”<sup>163</sup> Compared to his compatriots, Robinson

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<sup>154</sup> *Id.* at 101.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 113.

<sup>157</sup> Guillaume Calafat, *For a “Livorno-on-Thames”: The Tuscan Model in the Writings of Henry Robinson*, 37 *SEVENTEENTH CENTURY* 535, 535 (2021).

<sup>158</sup> HENRY ROBINSON, *LIBERTY OF CONSCIENCE* (1643), reprinted in *PAMPHLETS ON RELIGION AND DEMOCRACY: 16TH TO 19TH CENTURIES* 68, 68 (1940).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 101.

<sup>161</sup> *Mark* 3:27 (New Am. Bible, rev. ed.).

<sup>162</sup> ROBINSON, *supra* note 158, at 102.

<sup>163</sup> *Id.*

stands out as a radical, for few others extended such liberties to Catholics and non-Christians. As Robinson's argument continues, he repeatedly appeals to different parts of scripture (1 Corinthians 7:15; Matthew 28:19; Romans 10:17; Romans 10:14; and many, many more) to defend why this freedom and equity of debate is necessary.<sup>164</sup> Robinson's position clearly comes from his Christian faith rather than an appeal to reason. He notes that "the Apostles baptise or teach in the name of Jesus, [despite] being expressly commanded by the civill Magistrate to the contrary."<sup>165</sup> To Robinson, freedom to debate is a tenement of divine law and "Liberty of Conscience . . . is the greatest liberty the Gospel brings."<sup>166</sup>

Also in 1644, a foundational tract in freedom of religion was published: *The Bloody Tenent of Persecution, for Cause of Conscience, Discussed in a Conference Between Truth and Peace*.<sup>167</sup> The author, Roger Williams, later established the colony of Rhode Island in the Americas.<sup>168</sup> Williams decried "[t]hat the blood of so many hundred thousand souls of protestants and papists, spilt in the wars of present and former ages, for their respective consciences, is not required nor accepted by Jesus Christ the Prince of Peace."<sup>169</sup> He also believed "[i]t is the will and command of God that, since the coming of his Son the Lord Jesus, a permission of the most Paganish, Jewish, Turkish, or anti-christian consciences and worships be granted to all men in all nations and countries."<sup>170</sup> While Williams' book did not explicitly focus on the printing press, the religious tolerance he preached was groundbreaking for the time.

John Lilburne was a Puritan who wrote extensively on natural or "freeborn rights," resulting in the moniker of "Free-born John."<sup>171</sup> In 1645 he published his (unlicensed) pamphlet *A copie of a letter, To Mr. William*

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<sup>164</sup> *Id.* at 105–06.

<sup>165</sup> *Id.* at 108.

<sup>166</sup> *Id.* at 157.

<sup>167</sup> Roger Williams, ENCYC. BRITANNICA (Sep. 13, 2025), <https://perma.cc/ZDS7-KK9G>.

<sup>168</sup> *Id.*

<sup>169</sup> ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION 1 (Edward Bean Underhill ed., J. Haddon 1848) (1644).

<sup>170</sup> *Id.* at 2.

<sup>171</sup> John Lilburne, ENCYC. BRITANNICA (Aug. 25, 2025), <https://perma.cc/4JTZ-JYBE>.

*Prinne Esq.*<sup>172</sup> William Prynne was a lawyer who also published Puritan pamphlets.<sup>173</sup> In Lilburne's pamphlet, he criticized Prynne, saying he had: not dealt fairly with your Antagonists in stopping the *Presse* against us, while things are in debate, yea robbing us of our Liberty (as we are Subjects) in time of freedome, when the *Parliament* is sitting, who are sufficiently able to punish that man (whatsoever he be) that shall abuse his penne. So that whill we are with the hazard of our dearest lives, fighting for the *Subjects Liberty*, . . . for if you had not beene men that had been affraid of your cause, you would have been willing to have fought and contended with us upon even ground and equall termes, namely that the *Presse* might be as open for us as for you, and as it was at the beginning of this *Parliament*, which I [conceive] the *Parliament* did of purpose, that so the freeborne *English* Subjects might enjoy their Liberty and Priviledge.<sup>174</sup>

Richard Overton ran "one of the most notorious and successful underground presses of the Civil War period."<sup>175</sup> Overton was "neither trained as a printer nor a member of the Stationers' Company."<sup>176</sup> Overton published his own pamphlets and the writings of other radicals, such as Lilburne.<sup>177</sup>

John Milton's pamphlet *Areopagitica* was in direct response to the June 1643 Order of the Lords and Commons for the Regulating of Printing.<sup>178</sup> Milton had been frustrated by an earlier attempt to publish his writings advocating for divorce, a taboo subject at the time.<sup>179</sup> It was entitled in reference to the meeting place of the Athenian "parliament" and a speech

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<sup>172</sup> JOHN LILBURNE, A COPIE OF A LETTER, WRITTEN BY JOHN LILBURNE LEUT. COLLONELL., TO MR. WILLIAM PRINNE ESQ. (1645).

<sup>173</sup> *William Prynne*, ENCYC. BRITANNICA (Oct. 20, 2025), <https://perma.cc/XG3K-VDAZ>.

<sup>174</sup> LILBURNE, *supra* note 172, at 2–3.

<sup>175</sup> David R. Adams, *The Secret Printing and Publishing Career of Richard Overton the Leveller, 1644–46*, 11 LIBRARY 1, 4 (2010).

<sup>176</sup> *Id.* at 5.

<sup>177</sup> *Id.* at 4–5.

<sup>178</sup> JOHN MILTON, AREOPAGITICA, at xxiii (Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644).

<sup>179</sup> SIEBERT, *supra* note 56, at 195.

given by Isokrates.<sup>180</sup> As Isokrates had addressed the Athenian lawmakers, Milton addressed the English lawmakers.<sup>181</sup> However, Milton addressed them not by a speech, but by an unlicensed pamphlet entitled: *Aeropagitica*: A Speech of Mr. John Milton, For the Liberty of Unlicensed Printing, to the Parliament of England.<sup>182</sup> “Milton issued his oration in an unlicensed form and courageously put his own name, but not that of his printer, on the cover.”<sup>183</sup>

Milton first begins with why he wrote the *Areopagitica*, followed by his exploring the origins of restrictions on printing, the usefulness of books, “the [n]egative [a]rgument against the [o]rder,”<sup>184</sup> and “the [p]ositive [a]rgument”<sup>185</sup> against the order. Milton begins his introduction by explaining that “when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for.”<sup>186</sup> He explains how he is inspired by the Athenian democracy, where the government was receptive of good faith critiques.<sup>187</sup> Milton’s argument harkens to a romanization of Athenian democracy and the Socratic method. He appeals to the legislature’s “voice of reason” to repeal their own act.<sup>188</sup> Milton also acknowledges that the legislature’s fears about books are not unfounded:

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<sup>180</sup> MILTON, *supra* note 178, at xxiii.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1.

<sup>183</sup> *Areopagitica (1644) (Jebb ed.)*, ONLINE LIBR. LIBERTY (2006), <https://perma.cc/BT8X-8K57>.

<sup>184</sup> MILTON, *supra* note 178, at xxxi.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 2.

<sup>187</sup> *See id.* at 4–5 (“I might defend myself with ease, if any should accuse me of being new or insolent, did they but know how much better I find ye esteem it to imitate the old and elegant humanity of Greece, than the barbaric pride of a Hunnish and Norwegian stateliness. And out of those ages, to whose polite wisdom and letters we owe that we are not yet Goths and Jutlanders, I could name him who from his private house wrote that discourse to the parliament of Athens, that persuades them to change the form of democracy which was then established. Such honour was done in those days to men who professed the study of wisdom and eloquence, not only in their own country, but in other lands, that cities and signiories heard them gladly, and with great respect, if they had aught in public to admonish the state.”).

<sup>188</sup> *Id.* at 5.

I deny not, but that it is of greatest concernment in the church and commonwealth, to have a vigilant eye how books demean themselves, as well as men; and thereafter to confine, imprison, and do sharpest justice on them as malefactors; for books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; nay, they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them. I know they are as lively, and as vigorously productive, as those fabulous dragon's teeth: and being sown up and down, may chance to spring up armed men. And yet, on the other hand, unless wariness be used, as good almost kill a man as kill a good book: who kills a man kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself, kills the image of God, as it were, in the eye. Many a man lives a burden to the earth; but a good book is the precious life-blood of a master-spirit, embalmed and treasured up on purpose to a life beyond life. It is true, no age can restore a life, whereof, perhaps, there is no great loss; and revolutions of ages do not oft recover the loss of a rejected truth, for the want of which whole nations fare the worse. We should be wary, therefore, what persecution we raise against the living labours of public men. how we spill that seasoned life of man preserved and stored up in books; since we see a kind of homicide may be thus committed, sometimes a martyrdom; and if it extend to the whole impression, a kind of massacre, whereof the execution ends not in the slaying of an elemental life, but strikes at that ethereal and fifth essence, the breath of reason itself: slays an immortality rather than a life.<sup>189</sup>

Ideas, Milton understood, are dangerous. As dangerous as “dragon's teeth.”<sup>190</sup> To kill a book (idea), however, was to kill “reason itself.”

<sup>189</sup> *Id.* at 6–7.

<sup>190</sup> Stephen B. Dobranski, *Principle and Politics in Milton's Areopagitica*, in *THE OXFORD HANDBOOK OF LITERATURE AND THE ENGLISH REVOLUTION 190, 198–99* (Laura Lunger Knoppers ed., 2012) (Milton's “dragon's teeth” alludes to the Cadmus myth of sowing the dragon's teeth to produce “armed” men, and that “[w]hen Milton writes that books are as

Next, Milton outlines the history of censorship. He observes that the Greeks only restricted the atheistic or libelous books,<sup>191</sup> and the Romans also only restricted the blasphemous and libelous ones.<sup>192</sup> It was when Rome became a Christian empire, in Milton's view, that censorship truly began, as the "[P]opes of Rome, engrossing what they pleased of political rule into their own hands, extended their dominion over men's eyes, as they had before over their judgments, burning and prohibiting to be read what they fancied not."<sup>193</sup> Church control declared that "no book, pamphlet, or paper should be printed (as if St Peter had bequeathed them the keys of the press also out of Paradise) unless it were approved and licensed under the hands of two or three" Church officials.<sup>194</sup>

Milton then turns to addressing the benefits of books. Appealing to Protestant sensibilities, he reminds the reader that Moses, Daniel, and Paul were all educated and thus must have read.<sup>195</sup> Reason is a gift from God to man, as is free will.<sup>196</sup> Because man has been gifted reason and free will, he can be exposed to "error."<sup>197</sup> In fact, man could not understand virtue without understanding vice and could not understand lies without understanding the truth.<sup>198</sup> Thus, Milton believed there was actually a benefit to reading "bad" books:<sup>199</sup>

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'lively' and 'vigorously productive' as Cadmus' 'fabulous Dragons teeth,' he conjures the image of letters as the life-giving seed that books preserve" and only when sown in the readers' mind do "the words stored in books give birth . . . to people 'armed' with an author's insights.").

<sup>191</sup> *Id.* at 7–8.

<sup>192</sup> *Id.* at 10.

<sup>193</sup> *Id.* at 11.

<sup>194</sup> *Id.* at 12.

<sup>195</sup> *Id.* at 15.

<sup>196</sup> *Id.* at 19 ("God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser; there were but little work left for preaching, if law and compulsion should grow so fast upon those things which heretofore were governed only by exhortation.").

<sup>197</sup> *Id.* at 21.

<sup>198</sup> *Id.* ("Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates, and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read.").

<sup>199</sup> *Id.*

Good and evil we know in the field of this world grow up together almost inseparably; and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many cunning resemblances hardly to be discerned . . . . It was from out the rind of one apple tasted, that the knowledge of good and evil, as two twins cleaving together, leaped forth into the world. And perhaps this is that doom which Adam fell into of knowing good and evil; that is to say, of knowing good by evil. As therefore the state of man now is; what wisdom can there be to choose, what continence to forbear, without the knowledge of evil? He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring Christian. I cannot praise a fugitive and cloistered virtue unexercised and unbreathed, that never sallies out and seeks her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather; that which purifies us is trial, and trial is by what is contrary.<sup>200</sup>

Milton understood that the true charge of Christian life was not to live apart from the world but within it.<sup>201</sup> True virtue was not found in reclusion but daring adversity.

Additionally, Milton juxtaposes the burning of books by Christians converted by St. Paul with the current legal state in England by explaining that “[i]t was a private act, a voluntary act, and leaves us to a voluntary

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<sup>200</sup> *Id.* at 19–20.

<sup>201</sup> See *John* 17:11–15 (New Am. Bible, rev. ed.) (“And now I will no longer be in the world, but they are in the world, while I am coming to you. Holy Father, keep them in your name that you have given me, so that they may be one just as we are. When I was with them I protected them in your name that you gave me, and I guarded them, and none of them was lost except the son of destruction, in order that the scripture might be fulfilled. But now I am coming to you. I speak this in the world so that they may share my joy completely. I gave them your word, and the world hated them, because they do not belong to the world any more than I belong to the world. I do not ask that you take them out of the world but that you keep them from the evil one.”).

imitation: the men in remorse burnt those books which were their own; the magistrate by this example is not appointed.”<sup>202</sup>

Next, Milton turned to the way the English licensing endeavor was doomed to fail. First, he discusses Plato’s book of laws, which supported very strict laws on education and art (while noting that no city has ever enacted them).<sup>203</sup> However, Milton recognizes that Plato “knew this licensing of poems had reference and dependence to many other provisos . . . [and without the others would be] vain and fruitless.”<sup>204</sup> Thus, “[i]f we think to regulate printing, thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man.”<sup>205</sup> Milton quickly points out that to “license” all dancing, musicians, and mixed conversations of male and female youth becomes absurd, unless one wishes to take up Plato’s path and regulate everything.<sup>206</sup>

Plato’s extreme position, however, is undoubtedly rebuked by Milton: “Foolish tongues! When God gave him reason, he gave him freedom to choose, for reason is but choosing; he had been else a mere artificial Adam, such an Adam as he is in the motions.”<sup>207</sup> Milton indicated that true virtue resists temptation and that manners of sin cannot be expelled.<sup>208</sup> “For God sure esteems the growth and completing of one virtuous person, more than the restraint of ten vicious.”<sup>209</sup>

Milton also criticizes the licensing system for two practical reasons. First, regarding the concern that the printing press spreads falsehoods, “schisms,” and “sects” in Christianity, these concerns arose before the press was introduced.<sup>210</sup> Second, Milton was very concerned about the effect that licensing would have on the licensors themselves.<sup>211</sup> To be a good licensor, one would have to be uncommonly “studious, learned, and judicious.”<sup>212</sup>

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<sup>202</sup> MILTON, *supra* note 178, at 19.

<sup>203</sup> *Id.* at 25.

<sup>204</sup> *Id.* at 26.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 26–28.

<sup>207</sup> *Id.* at 28.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 30.

<sup>210</sup> *Id.* at 31.

<sup>211</sup> *Id.* at 31–32.

<sup>212</sup> *Id.* at 32.

Milton considered it the greatest waste of men of such high characters that there could be no worst waste of such a man's time "than to be the perpetual reader of unchosen books and pamphlets, oftentimes huge volumes."<sup>213</sup> Thus, Milton did not find any usefulness in licensing.

However, Milton took his treatise even further. Licensing was not merely "no good" but a "manifest hurt."<sup>214</sup> "Truth and understanding are not such wares as to be monopolized and traded in by tickets, and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broad-cloth and our woolpacks."<sup>215</sup> Milton was deeply concerned that licensing disrupted both learning and scholarship.<sup>216</sup> The state of intellectual freedom in England was something longed for in other countries.<sup>217</sup> Milton believed that faith and knowledge required exercise to be healthy.<sup>218</sup> Astutely, he recognized that "[a] man may be a heretic in the truth; and if he believe things only because his pastor says so, or the assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."<sup>219</sup> True faith and knowledge require work, not complacency.

"Truth is compared in scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition."<sup>220</sup> Milton wrote to address his audience's fears that the printing press would further proliferate Christian and political schisms and sects. Milton opined:

Truth indeed came once into the world with her divine Master, and was a perfect shape most glorious to look on: but when he ascended, and his apostles after him were laid asleep, then straight arose a wicked race of deceivers, who, as that story goes of the Egyptian Typhon with his conspirators, how they dealt with the good Osiris, took the virgin Truth, hewed her lovely form into a thousand pieces, and scattered them to

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 33.

<sup>215</sup> *Id.* at 37.

<sup>216</sup> *See id.* at 33–36.

<sup>217</sup> *Id.* at 39–40.

<sup>218</sup> *Id.* at 43.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

the four winds. From that time ever since, the sad friends of Truth, such as durst appear, imitating the careful search that Isis made for the mangled body of Osiris, went up and down gathering up limb by limb still as they could find them. We have not yet found them all, lords and commons, nor ever shall do, till her Master's second coming; he shall bring together every joint and member, and shall mould them into an immortal feature of loveliness and perfection. Suffer not these licensing prohibitions to stand at every place of opportunity forbidding and disturbing them that continue seeking, that continue to do our obsequies to the torn body of our martyred saint. . . . There be who perpetually complain of schisms and sects, and make it such a calamity that any man dissents from their maxims. 'Tis their own pride and ignorance which causes the disturbing, who neither will hear with meekness, nor can convince, yet all must be suppressed which is not found in their Syntagma. They are the troublers, they are the dividers of unity, who neglect and permit not others to unite those dis severed pieces which are yet wanting to the body of truth. To be still searching what we know not, by what we know, still closing up truth to truth as we find it (for all her body is homogeneal, and proportional), this is the golden rule in theology as well as in arithmetic, and makes up the best harmony in a church; *not the forced and outward union of cold, and neutral, and inwardly divided minds.*<sup>221</sup>

By long allegory, Milton compares truth to the myth of the decollated limbs of the Egyptian god Osiris. In his view, unity would not be achieved until the second coming of Christ, and those who complained of the separation and advocated for suppressing dissent actually *fed* the disunity. Wisely, Milton recognized that an outwardly forced union was meaningless if it was comprised of "inwardly divided minds." In other words, unity is false without free will and freedom of conscience.

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<sup>221</sup> *Id.* at 48–50 (emphasis added).

In conclusion, Milton flatters Parliament to make his appeal.<sup>222</sup> Milton moves beyond flattery, however, to credit Parliament with the seeds of the love of liberty in the English people:

Believe it, lords and commons, they who counsel ye to such a suppressing, do as good as bid ye suppress yourselves; and I will soon shew how. If it be desired to know the immediate cause of all this free writing, and free speaking, there cannot be assigned a truer than your own mild, and free, and humane government; it is the liberty, lords and commons, which your own valorous and happy counsels have purchased us, liberty which is the nurse of all great wits; this is that which hath rarefied and enlightened our spirits like the influence of heaven; this is that which hath enfranchised, enlarged, and lifted up our apprehensions degrees above themselves. Ye cannot make us now less capable, less knowing, less eagerly pursuing of the truth, unless ye first make yourselves, that made us so, less the lovers, less the founders of our true liberty. We can grow ignorant again, brutish, formal, and slavish, as ye found us; but you then must first become that which ye cannot be, oppressive, arbitrary, and tyrannous, as they were from whom ye have freed us. That our hearts are now more capacious, our thoughts more erected to the search and expectation of greatest and exactest things, is the issue of your own virtue propagated in us; ye cannot suppress that, unless ye reinforce an abrogated and merciless law, that fathers may dispatch at will their own children.<sup>223</sup>

Not only does Milton credit free writing and free speaking to the English political tradition, but to the religious as well. “Now once again by all concurrence of signs, and by the general instinct of holy and devout men, as they daily and solemnly express their thoughts, God is decreeing to begin some new and great period in his church, even to the reforming of

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<sup>222</sup> See *id.* at 50 (“Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governors: a nation not slow and dull, but of a quick, ingenious, and piercing spirit; acute to invent, subtile and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to.”).

<sup>223</sup> *Id.* at 56.

reformation itself . . .”<sup>224</sup> The invention of the printing press and the subsequent proliferation of printed Bibles were integral to the Protestant Reformation.

Lest one be concerned that Milton was a true libertarian, take heed:

And as for regulating the press, let no man think to have the honour of advising ye better than yourselves have done in that order published next before this: “That no book be printed, unless the printer’s and the author’s name, or at least the printer’s be registered.” Those which otherwise come forth, if they be found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectual remedy that man’s prevention can use.<sup>225</sup>

Here, Milton refers to the Order of the House in 1642 (as compared to the Order of 1643).<sup>226</sup> “The Order of 1642 provided merely that no book should be printed unless the name of the printer and of the author, or at least the printer’s, were registered.”<sup>227</sup> The Order of 1643 was put into place in the best interest of “monopolizer” booksellers.<sup>228</sup>

Milton observed “[w]here there is much desire to learn, there of necessity will be much arguing, much to writing, many opinions; for opinion in good men is but knowledge in the making.”<sup>229</sup> He demands “give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”<sup>230</sup> Milton asserts that the truth should be let free, and “by licensing and prohibiting [we] misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing.”<sup>231</sup>

However, it is important to understand that Milton did not advocate for complete freedom of speech or the press.<sup>232</sup> Milton is read

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<sup>224</sup> See *id.* at 51.

<sup>225</sup> *Id.* at 64.

<sup>226</sup> *Id.* at xxxix.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at xxxix–xl, 64–65.

<sup>229</sup> *Id.* at 52.

<sup>230</sup> *Id.* at 57.

<sup>231</sup> *Id.* at 58.

<sup>232</sup> Nicholas McDowell, *Milton Versus the Mob*, AEON (Apr. 26, 2021), <https://perma.cc/D2ZJ-9W5J>.

“anachronistically if we fail to realize that free speech is similarly for him, as for the great Renaissance humanists, primarily the exercise of virtuous character, not a right enshrined in law.”<sup>233</sup> While Milton cried out against the licensors, if a book or pamphlet was to “be found mischievous and libelous [after publishing], the fire and the executioner will be the timeliest and the most effectual remedy that man’s prevention can use.”<sup>234</sup> Some are surprised to learn that Milton became an official licensor (and censor) of newsbooks in 1651.<sup>235</sup> Milton did not advocate for a universal freedom of the press but for “freedom of discussion for serious-minded men who held honest, although differing, opinions.”<sup>236</sup> He was unwilling to extend this freedom to the uneducated, Catholics, or “ephemeral” publications such as the newsbooks.<sup>237</sup>

Walwyn, Overton, and Lilburn all became members of the Leveller movement during the civil war, continuing to write pamphlets in support.<sup>238</sup> The Levellers received their name by opposing factions that wanted to imply “that its supporters wished to ‘level men’s estates.’”<sup>239</sup> The movement capitalized in the lapse of censorship to produce pamphlets supporting their positions:<sup>240</sup>

The Levellers held themselves to be freeborn Englishmen, entitled to the protection of a natural law of human rights which they believed to originate in the will of God - rights vested in the people to whom alone true sovereignty belonged. These sovereign rights were only loaned to Parliament, which should be elected on a wide popular franchise and hold the people's rights in trust.<sup>241</sup>

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<sup>233</sup> *Id.*

<sup>234</sup> MILTON, *supra* note 178, at 64.

<sup>235</sup> SIEBERT, *supra* note 56, at 196.

<sup>236</sup> *Id.* at 197.

<sup>237</sup> *Id.*

<sup>238</sup> Tony Benn, *The Levellers and the Tradition of Dissent*, BBC (Feb. 17, 2011), <https://perma.cc/4XCY-JN8R>.

<sup>239</sup> *Leveler*, ENCYC. BRITANNICA (June 17, 2022), <https://perma.cc/SUH7-FS42>.

<sup>240</sup> Benn, *supra* note 238.

<sup>241</sup> *Id.*

Ultimately, however, Leveller leaders were imprisoned, and a mutiny of Leveller troops was put down in 1649.<sup>242</sup>

Parliament tried to regain control and adopted the following regulations at the recommendation of a committee in 1647:

[A]uthors of an unlicensed publication were to be fined forty shillings or imprisoned forty days. The printer was to be fined twenty shillings or spend twenty days in prison and to lose his printing materials and presses. Booksellers or stationers were sentenced to ten shillings or ten days in jail. Hawkers and peddlers were to forfeit their wares and be whipped as common rogues.<sup>243</sup>

Following the English Civil War, in 1649 Parliament passed a new and more stringent Printing Act.<sup>244</sup> The Stationers Company was now to be notified if any printing implements were even made; all printers were to enter into a bond; “all books and pamphlets were required to be licensed”; and all publications were to be affixed with the author’s and licensor’s names.<sup>245</sup> The new act also suppressed the publication of newsbooks and withdrew all prior licenses.<sup>246</sup> In response, the licensor of newsbooks resigned and published a scathing indictment of licensing in *The Perfect Diurnal*.<sup>247</sup> He observed that licensing was a “great . . . monopoly . . . in that all men’s judgements, reasons, etc. are to be bound . . . [by] the fancie [of one man].”<sup>248</sup> He believed it would be lawful to print without licensing, provided the authors and printers affixed their names such that “they may be lyable to answer the contents thereof, and if they offend therein, then to be punished by such lawes as are or shall be for those cases provided.”<sup>249</sup>

Facing political pressure, in 1653 Parliament removed exclusive printing rights from the Stationers Company to the Council of State but otherwise Parliament attempted to maintain strict control that resembled the Star

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<sup>242</sup> *Leveler*, *supra* note 239.

<sup>243</sup> SIEBERT, *supra* note 56, at 190–91.

<sup>244</sup> *Id.* at 222.

<sup>245</sup> *Id.* at 223.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 217.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 217–18.

Chambers.<sup>250</sup> Unsatisfied with their control, Oliver Cromwell's set forth his own orders to control the press in August 1655.<sup>251</sup> "Within a month all the official as well as the unofficial newsbooks were suppressed."<sup>252</sup>

Apart from the abolishment of the Star Chamber, regulation of printing did not change much during the Restoration.<sup>253</sup> In fact, one of the first acts of King Charles II on August 13, 1660, was to suppress John Milton's work via proclamation.<sup>254</sup> King and Parliament regulated in tandem, as in June of 1662 an "Act for preventing the frequent Abuses in printing seditious, treasonable, and unlicensed Books and Pamphlets, and for regulating of Printing and printing Presses" went into effect.<sup>255</sup> This act was very similar to previous acts regulating printing, and it further limited who could sell books.<sup>256</sup>

Partisan newspapers emerged in 1679.<sup>257</sup> Following the Titus Oates and other plots, King Charles II sought to calm the public by regulating the news publications.<sup>258</sup> He conferred with the judges to determine how he could regulate the newsbooks.<sup>259</sup> Allegedly, he was told that he may prohibit the printing and publishing of any unlicensed work "as manifestly tending to the Breach of Peace, and disturbance of the Kingdom."<sup>260</sup>

Sir Roger L'Estrange was appointed Surveyor of the Press by King Charles II in 1663 after previously publishing a pamphlet advocating for the creation of such a position.<sup>261</sup> L'Estrange believed the Stationers Company was unfit to regulate stationers and printers because such self-regulation would necessarily fail.<sup>262</sup> At the same time, L'Estrange was compensated for

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<sup>250</sup> *See id.* at 228–29.

<sup>251</sup> *Id.* at 230–31.

<sup>252</sup> *Id.* at 231.

<sup>253</sup> *Id.* at 237.

<sup>254</sup> *Id.* at 238.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 240.

<sup>257</sup> *Id.* at 296.

<sup>258</sup> *Id.* at 297–98.

<sup>259</sup> *Id.* at 298.

<sup>260</sup> *Id.* (footnote omitted).

<sup>261</sup> *Id.* at 256.

<sup>262</sup> *Id.* at 257.

his work with a monopoly in news sheets.<sup>263</sup> Allegedly, L'Estrange “would wink at unlicensed books if the printer’s wife would but smile on him.”<sup>264</sup>

Two printers were executed for treason in this period.<sup>265</sup> The original statute was passed in 1352 during the reign of King Edward III.<sup>266</sup> Imagining the death of the king, going to war against the king, or adhering to his enemies all constituted treason.<sup>267</sup> The overt act requirement developed over time to address the fact that some visible outward action was needed to prosecute successfully. In 1547 “by printing” was added to a treason statute for the first time in England.<sup>268</sup>

Under the direction of L'Estrange, printer John Twyn was found guilty of treason for publication of a book that “contained such seditious matter as that the supreme magistrate is accountable to the people and that people are entitled to revolt and take the government into their own hands.”<sup>269</sup> He was hanged, drawn, and quartered.<sup>270</sup> Printer William Anderton was also hanged in this period for “treasonous” books in his possession.<sup>271</sup>

The Regulation of Printing Act expired in 1695 after the House of Commons was influenced by John Locke.<sup>272</sup> The Stationers Company and printers opposed the measure, arguing that “the printing trade would be ‘open to all Persons; which may not only be of dangerous Consequence to the Government, but will be ruinous to the said Trade.’”<sup>273</sup> Locke’s argument against the Printing Act was pragmatic and focused on the economic failures of monopolies.

Siebert credits the move away from such active censorship because as the dust of the Reformation settled into a two-party system, the censor was

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<sup>263</sup> *Id.* at 292.

<sup>264</sup> *Id.* at 257 (footnote omitted).

<sup>265</sup> *Id.* at 265.

<sup>266</sup> Treason Act 1351, 25 Edw. 3 Stat. 5, c. 2, § 2 (Eng.), <https://perma.cc/LRY7-YZAY> (The original statute does not use modern English, so the traditional translation was used).

<sup>267</sup> *Id.*

<sup>268</sup> SIEBERT, *supra* note 56, at 266.

<sup>269</sup> *Id.* at 267.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 268.

<sup>272</sup> *Id.* at 261; *Press Censorship in England*, EBSCO (2022), <https://perma.cc/9G7Q-GUL3>.

<sup>273</sup> SIEBERT, *supra* note 56, at 261 (footnote omitted).

deemed too powerful, and thus dangerous.<sup>274</sup> It was too important a position to allow the other side to hold, and “[t]he work was too arduous for a leader in the party and too dangerous for an underling.”<sup>275</sup>

The expiration of the Printing Act did not change the doctrine of seditious libel.<sup>276</sup> In 1707 an Act of Parliament “made it treason to maintain by printing or writing that the Pretender or his offspring had a legitimate title to the crown of England.”<sup>277</sup> John Matthews was a printer’s apprentice convicted of treason and hanged under the statute.<sup>278</sup> Only nineteen, he had printed material in support of James III (the Pretender) to the throne.<sup>279</sup>

Attempts to revive the Printing Act were unsuccessful.<sup>280</sup> Instead, taxation was turned to as a matter of control under the reign of Queen Anne.<sup>281</sup> The 1712 Act taxed pamphlets, newspapers, advertisements, and paper and required newspapers and pamphlets be registered.<sup>282</sup> Soon publishers utilized loopholes to continue production, and the tax was felt most heavily by printers loyal to the government.<sup>283</sup> In 1724 the Stamp Act was amended to better address the loopholes.<sup>284</sup> In 1757 the tax was raised to help fund the Seven Years’ War.<sup>285</sup>

In 1728 the trial of a printer John Peter Zenger in the New York Colony was published in London four times within the year.<sup>286</sup> The Zenger trial was sensational because, in a break from English common law at the time, Zenger’s lawyers had successfully argued truth as a defense to defamation.<sup>287</sup>

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<sup>274</sup> *Id.* at 263.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 271.

<sup>277</sup> *Id.* at 366.

<sup>278</sup> *Id.* at 367.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 306.

<sup>281</sup> *Id.* at 307–08.

<sup>282</sup> *Id.* at 311–12.

<sup>283</sup> *Id.* at 316–17.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 320.

<sup>286</sup> *Id.* at 383.

<sup>287</sup> *Argument in the Zenger Trial (1735)*, NAT’L CONST. CTR., <https://perma.cc/3URD-QRD4>.

In 1775 pamphlets on the “crisis” in the American colonies were voted by the House of Commons and House of Lords to be “scandalous libels on the king” and publicly burned.<sup>288</sup>

William Blackstone “was an English jurist whose *Commentaries on the Laws of England* is the best-known description of the doctrines of English law.”<sup>289</sup> He was known to be a better commentator than a judge.<sup>290</sup> His *Commentaries* are regarded as descriptions of the state of English law in the mid-18th century.<sup>291</sup>

Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law: and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason *it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate it's guilt, and enhance it's punishment.* In a civil action, we may remember, a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace:

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<sup>288</sup> SIEBERT, *supra* note 56, at 374.

<sup>289</sup> *Sir William Blackstone*, ENCYC. BRITANNICA (July 6, 2025) (citation omitted), <https://perma.cc/EE92-2L6J>.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law. And therefore, in such prosecutions, the only facts to be considered are, first, the making or publishing of the book or writing; and secondly, whether the matter be criminal: and, if both these points are against the defendant, the offence against the public is complete. *The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in it's discretion shall inflict; regarding the quantity of the offence, and the quality of the offender.* By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Augustus, the punishment became corporal only. Under the emperor Valentinian it was again made capital, not only to write, but to publish, or even to omit destroying them. Our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were established in the dark and tyrannical ages of the antient *decemviri*, or the later emperors.<sup>292</sup>

At that time in England, truth was generally immaterial to the criminal prosecution of libel.<sup>293</sup> Additionally, “making, repeating, printing, or publishing” a comment was also considered libel, regardless of if one was the “inventor” of the message.<sup>294</sup>

In this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the *liberty of the press*, properly understood, is by no means

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<sup>292</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*150–51 (emphasis added) (footnotes omitted).

<sup>293</sup> *Id.* at 150.

<sup>294</sup> *Id.* at 151.

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 of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: 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 (says a fine writer on this subject) 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 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 shewn (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 will it be found, that to censure the licentiousness, is to maintain the liberty, of the press.<sup>295</sup>

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<sup>295</sup> *Id.* at 151–53 (footnotes omitted).

By the time Blackstone summarized the status of English law, a transformation had occurred in the handling of the press. The age of the licensor and censor—the previous restraints—was over. An improper infringement on the press was one incurred prior to publication. In contrast, the appropriate limitation was to prosecute what had already been said or published, if it was something “improper, mischievous, or illegal” or otherwise “destructive of the ends of society.”

Notably, Blackstone’s critique of a single licensor echoes Milton’s and the Levellers’ arguments. To leave the library of human thought to one man for judgment necessarily fails as arbitrary, capricious, and fallible. Blackstone also held that licensing and censorship would prevent the press from being used for good ends.<sup>296</sup>

## 5.2. Freedom of Speech, A “Parliamentary Privilege”

Historically, free speech emerged in England as a special “parliamentary privilege rather than a right for everyone.”<sup>297</sup> “The earliest evidence of a shift of emphasis away from reliance on traditional assumptions and attempts to avoid the visitation of royal displeasure on the Speaker, and towards a distinct claim of privilege for the House, appears to be the petition of Speaker Sir Thomas More in 1523,” to King Henry VIII.<sup>298</sup> More, a lawyer, advised the King that Parliament was compromised of “the most discreet persons out of every quarter that men could esteem meet” but that even such a wise man can, when “his mind is fervent in the matter, somewhat to speak in such wise as he would afterward wish to have been uttered otherwise.”<sup>299</sup> More believed that such fears created a “great hindrance” and silenced advice and counsel from Parliament.<sup>300</sup> Thus, More requested that the King:

*[G]ive to all your Commons here assembled your most gracious licence and pardon, freely, without doubt of your dreadful displeasure, every man to discharge his conscience, and boldly in*

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<sup>296</sup> *Id.*

<sup>297</sup> Elizabeth Tunstall, *The Brothers Who Asserted Their Right to Free Speech in Tudor England*, SMITHSONIAN MAG. (July 24, 2024), <https://perma.cc/C8UA-TAPW>.

<sup>298</sup> *Freedom of Speech*, UK PARLIAMENT: ERSKINE MAY, <https://perma.cc/JB42-36B6>.

<sup>299</sup> *Thomas More’s Petition for Free Speech*, THOMAS MORE STUD., <https://perma.cc/797N-Z8BK>.

<sup>300</sup> *Id.*

*everything incident among us to declare his advice, and whatsoever happen any man to say, that it may like your Noble Majesty, or your inestimable goodness, to take all in good part, interpreting every man's words, how uncunningly soever they be couched, to proceed yet of good zeal towards the profit of your realm and honor of your royal person, the prosperous estate and preservation whereof, most excellent Sovereign, is the thing which we all, your most humble loving subjects, according to the most bounden duty of our natural allegiance, most highly desire and pray for.*<sup>301</sup>

Conscience would go on to be something Thomas More would die for. In 1534 he refused to accept the annulment of Henry VIII's marriage and swear to an oath of succession that renounced the Pope.<sup>302</sup> When summoned to the palace, More explained:

My purpose is not to put any fault either in the Act or any man that made it, or in the oath or any man that swears it, nor to condemn the conscience of any other man. But as for myself in good faith my conscience so moves me in the matter, that though I will not deny to swear to the succession, yet unto the oath that here is offered to me, I cannot swear without the jeopardizing of my soul to perpetual damnation.<sup>303</sup>

More was tried for treason and executed in July of 1535 for his refusal to bow to the King's will.<sup>304</sup> The martyr was canonized as a Catholic saint on May 19, 1935, and is the patron saint of lawyers, civil servants, and politicians.<sup>305</sup> To this day, he serves as the namesake and patron of societies of Catholic and Christian lawyers across the United States.<sup>306</sup>

In 1566, Queen Elizabeth criticized Parliament for speaking of the succession to the throne:<sup>307</sup>

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<sup>301</sup> *Id.* (emphasis added).

<sup>302</sup> *Thomas More (1478–1535)*, BBC, <https://perma.cc/V2WA-VB44>.

<sup>303</sup> ROBERT J. CONRAD JR., JOHN FISHER AND THOMAS MORE: KEEPING THEIR SOULS WHILE LOSING THEIR HEADS 17 (2021).

<sup>304</sup> *St. Thomas More*, CATH. ONLINE, <https://perma.cc/EY76-VCE9>.

<sup>305</sup> *Id.*

<sup>306</sup> *See generally* ST. THOMAS MORE SOC'Y FORT WORTH, <https://perma.cc/2DS4-XNGW> (an example of such an organization).

<sup>307</sup> Tunstall, *supra* note 297.

Your petition is to deal in the limitation of the succession. At this present it is not convenient, nor never shall be without some peril unto you, and certain danger unto me. But as soon as there may be a convenient time and that it may be done with least peril unto you, although never without great danger unto me, I will deal therein for your safety and offer it unto you as your prince and head without requests. For it is monstrous that the feet should direct the head.<sup>308</sup>

When her admonishment failed, she ordered the members to stop via royal prerogative.<sup>309</sup> Throughout the following years, Queen Elizabeth would continue similar intrusions into the discussions of Parliament.<sup>310</sup> Peter Wentworth addressed the House of Commons on the first day of the new session:<sup>311</sup>

Sweet is the name of Liberty, but the thing it self a value beyond all inestimable Treasure. So much the more it behoveth us to take care lest we contenting our selves with the sweetness of the name, lose and forgo the thing, being of the greatest value that can come unto this noble Realm. The inestimable Treasure is the use of it in this House. . . .

. . . .

. . . I was never of Parliament but the last and the last Session, at both which times I saw the Liberty of free Speech, the which is the only Salve to heal all the Sores of this Common-Wealth, so much and so many ways infringed, and so many abuses offered to this Honourable Council, as hath much grieved me even of very Conscience and love to my Prince and State. . . .

. . . .

. . . I conclude, that in this House which is termed a place of free Speech, there is nothing so necessary for the

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<sup>308</sup> *Modern History Sourcebook: Queen Elizabeth I of England, Selected Writing and Speeches: Response to Parliamentary Delegation on Her Marriage, 1566*, FORDHAM UNIV., <https://perma.cc/4378-T7KC>.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Journal of the House of Commons: February 1576*, BRIT. HIST. ONLINE, <https://perma.cc/YZE8-E798>.

preservation of the Prince and State as free Speech, and without it is a scorn and mockery to call it a Parliament House, for in truth it is none, but a very School of Flattery and Dissimulation, and so a fit place to serve the Devil and his Angels in, and not to glorify God and benefit the Common-Wealth.<sup>312</sup>

Wentworth's soliloquy was shocking, and he was promptly arraigned for questioning by committee.<sup>313</sup> When Wentworth maintained that the Queen's directive infringed on the right of Parliament to free speech, he was detained and sent to the Tower of London.<sup>314</sup> He was later released and allowed to return to the House of Commons after a forced apology.<sup>315</sup> While Wentworth's defense of free speech did not catch on at the time, it preceded Milton by about 65 years.<sup>316</sup>

The House of Commons entered a "protestation" to King James I's meddling with their proceedings into their official journal.<sup>317</sup> Prior to the protestation, the members had petitioned to the King that he was abridging Parliament members of their "ancient Liberty . . . for freedom of Speech," among other complaints.<sup>318</sup> The protestation itself declared that in Parliament:

the arduous and urgent affairs concerning the King, State and defence of the realm, and of the Church of England, and the maintenance and making of laws, and the redress of mischiefs and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament; and that in the handling and proceeding of those businesses every member of the House of Parliament hath, and of right ought to have, freedom of speech to propound, treat, reason, and bring to conclusion the same.<sup>319</sup>

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> SIEBERT, *supra* note 56, at 101.

<sup>317</sup> See *Manuscript Journal of the House of Commons [The Torn Journal]*, UK PARLIAMENT: PARLIAMENTARY ARCHIVES, <https://perma.cc/Y47T-F5UQ> (detailing custodial history of the Manuscript Journal).

<sup>318</sup> SIEBERT, *supra* note 56, at 115.

<sup>319</sup> *Id.* (footnote omitted).

King James I “could not accept that the Commons held their privileges by inheritance; rather he believed that they were held as a royal gift.”<sup>320</sup> To resolve the question, the king summoned the Clerk of the House of Commons before him and promptly ripped the record of protestation from the journal.<sup>321</sup>

While the early printing press was heavily controlled in England, the chaos of the impending English Civil War in the 1640s and a distracted king and Parliament allowed domestic newsbooks and diurnals to arise.<sup>322</sup> Naturally, there was an interest in publishing and reporting on the speeches given in Parliament, something Parliament first sought to suppress.<sup>323</sup> On the eve of the civil war in 1642, however, the king and Parliament began publishing public pamphlets themselves to support their positions and gain support (while also trying to suppress adverse publications).<sup>324</sup>

Naturally, the trial of the century in 1649 raised public interest in the affairs of Parliament to unprecedented levels.<sup>325</sup> King Charles I was charged with tyranny and treason, tried, and ultimately executed.<sup>326</sup> Fearful of public perception, the House of Commons launched a forty-member special committee to suppress “printing and preaching” of the king’s trial and promulgate a trial report from Parliament’s perspective.<sup>327</sup> The new era of public-relations had entered with the printing press, but now those in power were aware of the dawn. Parliament’s efforts were supported by the Army.<sup>328</sup>

Throughout 1660–1714, Parliament actively suppressed libel on its members and proceedings.<sup>329</sup> In 1660 both the House of Commons and House of Lords appointed printers to publish official accounts of

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<sup>320</sup> *Manuscript Journal of the House of Commons [‘The Torn Journal’]*, *supra* note 317.

<sup>321</sup> *Id.*

<sup>322</sup> See SIEBERT, *supra* note 56, at 203–07.

<sup>323</sup> *Id.* at 204–05.

<sup>324</sup> *Id.* at 205; see Lloyd Bowen, *Royalism, Print, and the Clergy in Britain, 1639–1640 and 1642*, 56 *HIST. J.* 297, 310–11 (2013).

<sup>325</sup> SIEBERT, *supra* note 56, at 216.

<sup>326</sup> *The Trial of Charles I*, UK PARLIAMENT, <https://perma.cc/J6TS-432B>.

<sup>327</sup> SIEBERT, *supra* note 56, at 216.

<sup>328</sup> See *id.* at 216–17.

<sup>329</sup> *Id.* at 276.

proceedings.<sup>330</sup> However, in the House of Commons, a special permit was required for a speaker to publish his own speech.<sup>331</sup>

In 1689 the English Bill of Rights firmly established the “Parliamentary Privilege” of freedom of speech within Parliament.<sup>332</sup> It stated: “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.”<sup>333</sup>

However, this freedom of speech and debate did not extend past the walls and members of Parliament. For example, during the 18th century in England, coffeehouses (which also served alcohol) became hotspots of discussion, particularly among poets, writers, and other intellectuals.<sup>334</sup> The coffeehouses quickly developed a reputation as places of free speaking and free thinking.<sup>335</sup> Thus, King Charles II sought to suppress them by royal proclamation as places of “very evil and dangerous effects,” and “Disturbance of the Peace and Quiet of the Realm.”<sup>336</sup> However, the public outcry was so great that the King had to withdraw the edict and replace it with stricter regulations of what could be brought and read in coffeehouses, out of fear of libel.<sup>337</sup>

## 6. THE AMERICAN COLONIES TO THE UNITED STATES CONSTITUTION

In 1765, the English Parliament passed the Stamp Act to help fund the Seven Years’ War.<sup>338</sup> The Act taxed “every paper, commonly called a pamphlet, and upon every newspaper, containing publick news, intelligence, or occurrences, which shall be printed, dispersed, and made publick, within any of the said colonies and plantations, and for and upon such

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<sup>330</sup> *Id.* at 281.

<sup>331</sup> *Id.*

<sup>332</sup> *Bill of Rights 1689*, UK PARLIAMENT, <https://perma.cc/5PAV-D58B>.

<sup>333</sup> *Bill of Rights 1689*, 1 W. & M., c. 2 (Eng. & Wales).

<sup>334</sup> SIEBERT, *supra* note 56, at 296.

<sup>335</sup> *Id.*

<sup>336</sup> CHARLES II, BY THE KING. A PROCLAMATION FOR THE SUPPRESSION OF COFFEE-HOUSES ¶ 1 (1675).

<sup>337</sup> SIEBERT, *supra* note 56, at 296.

<sup>338</sup> *The Stamp Act, 1765*, THE GILDER LEHRMAN INST. OF AM. HIST., <https://perma.cc/F5HF-E8EW>.

advertisements as are herein after mentioned,” in addition to court documents, license papers (including liquor licenses), bonds, almanacks, calendars, and playing cards (and dice).<sup>339</sup> The public outrage in the American Colonies about the Stamp Act resulted in a meeting in New York City featuring delegates from nine colonies.<sup>340</sup> The “Stamp Act Congress” is considered “the first united action by the colonies.”<sup>341</sup> Parliament ultimately repealed the Stamp Act a year later but did not back down from its assertion that it could regulate the colonies.<sup>342</sup> The questions “raised by the Stamp Act festered for [ten] years before giving rise to the Revolutionary War and, ultimately, American independence.”<sup>343</sup>

One of the first unified American statements on “the freedom of the press” was the 1774 letter from the Continental Congress to the Inhabitants of the Province of Quebec in an attempt to enlist Canadian support for the Americans’ cause.<sup>344</sup> The letter appealed to several “invaluable” and God-given rights that the colonists believed to be ravished from the colonies, finishing with “the freedom of the press.”<sup>345</sup>

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

. . . .

These are the rights *you* are entitled to and ought at this moment in perfection, to exercise. And what is offered to you by the late Act of Parliament in their place? Liberty of

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<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Stamp Act*, HISTORY (May 28, 2025), <https://perma.cc/ECY9-TXBC>.

<sup>343</sup> *Id.*

<sup>344</sup> Holly A. Mayer, *Canada and the American Revolution*, MUSEUM OF THE AM. REVOLUTION, <https://perma.cc/TY8S-JCZ4>.

<sup>345</sup> CONTINENTAL CONGRESS TO THE INHABITANTS OF THE PROVINCE OF QUEBEC (1774), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 441, 442 (Philip B. Kurland & Ralph Lerner eds., 1987).

conscience in your religion? No. God gave it to you; and the temporal powers with which you have been and are connected, firmly stipulated for your enjoyment of it.<sup>346</sup>

While the American colonists had been alarmed by the Quebec Act's tolerance of Catholicism in the Northern colonies as a threat; the pragmatic concerns of escalating tensions with England were enough to warrant an attempt to recruit both Protestant and Catholic Canadians to the cause.<sup>347</sup> Regardless of what the Framers actually thought of the Catholics, the letter serves at minimum as a reference to the role of freedom of the press as a tool not only for self-improvement—"the advancement of truth, science, morality, and arts in general"—but government improvement—where the “ready communication of thoughts between subjects” will promote union and improve government officers via public shame.

By 1777 five of the original thirteen states and the Vermont territory had freedom of the press enshrined within their constitution or bill of rights.<sup>348</sup> In 1780 it was included in the Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.<sup>349</sup>

The Virginia Declaration of Rights of June 12, 1776, declared “[t]hat the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotick Governments.”<sup>350</sup> George Mason was the primary drafter,<sup>351</sup> an experience that undoubtedly later shaped his opposition to the new United States Constitution in 1787, which lacked a bill of rights.<sup>352</sup>

The Declaration of Rights from the Pennsylvania Constitution of 1776 stated:

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<sup>346</sup> *Id.* at 42.

<sup>347</sup> *See id.*; *Amdt 1.2.2.6 Continental Congresses and Religious Freedom*, CONST. ANNOTATED: ANALYSIS & INTERPRETATION OF THE U.S. CONST., <https://perma.cc/XH2G-N6DG>.

<sup>348</sup> *See State and Continental Origins of the U.S. Bill of Rights*, TEACHING AM. HIST., <https://perma.cc/X896-U8ZG>; Lia Ernst, *The Vermont Constitution: Early Grievances, Notable Early Protections, Still Evolving*, STATE CT. REP. (Sep. 24, 2025), <https://perma.cc/UXJ4-6S72>.

<sup>349</sup> 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS 1892 (1906).

<sup>350</sup> VA. DECLARATION OF RIGHTS of 1776, cl. 12.

<sup>351</sup> *The Virginia Declaration of Rights, June 12, 1776*, LIBR. OF VA., <https://perma.cc/AH6T-N4AV>.

<sup>352</sup> *Objections to the Constitution of Government formed by the Convention (1787)*, NAT'L CONST. CTR., <https://perma.cc/B8ZP-DXCR>.

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.

....

That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.<sup>353</sup>

Maryland's November 11, 1776, A Declaration of Rights, and the Constitution and Form of Government agreed to by the Delegates of Maryland, in Free and Full Convention Assembled, proclaimed:

That freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature.

....

That every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner.

....

That the liberty of the press ought to be inviolably preserved.

That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered.<sup>354</sup>

North Carolina's Declaration of Rights, from December 18, 1776, announced:

That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained.

....

That the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.

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<sup>353</sup> PA. DECLARATION OF RIGHTS of 1776, arts. XII, XVI.

<sup>354</sup> MD. DECLARATION OF RIGHTS of 1776, arts. VIII, XI, XXXVIII, XXXIX.

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.

....

That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.<sup>355</sup>

North Carolina's explicit condemnation of monopolies stands out, given that the history of the printing press trade in England (like many other trades) was one of monopoly and government control.

The first Georgia Constitution, from February 5, 1777, stated, "Freedom of the press and trial by jury to remain inviolate forever."<sup>356</sup> The Declaration of the Rights of the Inhabitants of the State of Vermont from July 8, 1777, affirmed "[t]hat 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."<sup>357</sup> The March 19, 1778, Act for Establishing the Constitution of the State of South Carolina set forth "[t]hat the liberty of the press be inviolably preserved."<sup>358</sup> The Massachusetts Constitution of 1780 included:

The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth.

....

The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.<sup>359</sup>

Additionally, Pennsylvania, Massachusetts, and the Vermont territory all enumerated a person's right to his papers when outlining what

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<sup>355</sup> N.C. DECLARATION OF RIGHTS of 1776, arts. XV, XVIII, XIX, XXIII.

<sup>356</sup> GA. CONST. of 1777, art. LXI.

<sup>357</sup> VT. CONST. of 1777, ch. 1, art. XIV.

<sup>358</sup> S.C. CONST. of 1778, art XLIII.

<sup>359</sup> MASS. CONST. of 1780, art. XVI].

constituted an unlawful search and seizure.<sup>360</sup> In the English regime controlling the press, unlawful printing had been regulated by seizure of the printer's press and papers.<sup>361</sup>

As freedom of speech for Parliament and the regulation of the printing press had developed separately in England, the vestigial remnants of this distinction remained evident in the earliest state enumerations of rights. Some states, such as Massachusetts and Maryland, enshrined both, while others, such as Virginia and South Carolina, focused on the press. Vermont stands out in its linking of "speech" and "sentiments" resulting in a right to freedom of publication.

The Articles of Confederation in 1781 provided protections for the new Congress it established—" [f]reedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress"—echoing the tradition of protections for Parliament members.<sup>362</sup> But no mention was made of the printing press or other protections of speech.<sup>363</sup>

The pragmatic governance issues that the Articles of Confederation did not adequately address led to the Constitutional Convention in 1787, from May to September.<sup>364</sup> While the meetings of the Constitutional Convention were kept as secret as possible, when the question of ratification was turned to the state conventions, the Federalist and Anti-Federalist debates spilled into the public's discussion and the press, as pamphlets and essays were published back and forth. The debate encompassed far more than the freedoms of the printing press and conscience; it encompassed the extension of government power as a whole. One particular concern of the Anti-Federalists was that the proposed Constitution did not include a bill of rights.<sup>365</sup>

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<sup>360</sup> PA. DECLARATION OF RIGHTS of 1776, art. X ("That the people have a right to hold their . . . papers . . . free from search and seizure . . ."); MASS. CONST. of 1780, art. XIV ("Every subject has a right to be secure from all unreasonable searches, and seizures of . . . his papers . . ."); VT. CONST. of 1777, ch. 1, art. XI ("That the people have a right to hold . . . their . . . papers . . . free from search and seizure . . .").

<sup>361</sup> SIEBERT, *supra* note 56, at 68–73, 84–85.

<sup>362</sup> ARTICLES OF CONFEDERATION of 1781, art. V, para. 5.

<sup>363</sup> *See id.*

<sup>364</sup> *Constitutional Convention and Ratification, 1787–1789*, OFF. OF THE HISTORIAN, <https://perma.cc/T75D-3J4L>.

<sup>365</sup> *The Debate Over a Bill of Rights*, CTR. FOR THE STUDY OF THE AM. CONST., <https://perma.cc/L8W2-L396>.

The Federalists believed that a bill of rights was unneeded because all unenumerated powers were reserved for the states.<sup>366</sup> They believed a bill of rights could even be dangerous because “the new federal government could in no way endanger the freedoms of the press or religion since it was not granted any authority to regulate either[, and] it was dangerous because any listing of rights could potentially be interpreted as exhaustive.”<sup>367</sup>

After the Constitution was signed, the delegate James Wilson was one of the first to defend it.<sup>368</sup> Wilson posited that a Bill of Rights was not necessary because “every thing which is not given, is reserved.”<sup>369</sup> “For instance, the liberty of the press, which has been a copious source of declamation and opposition, what controul can proceed from the federal government to shackle or destroy that sacred palladium of national freedom?”<sup>370</sup>

An Anti-Federalist under the pseudonym of “Cincinnatus” published a series of essays refuting Wilson.<sup>371</sup>

I have proved, sir, that not only some power is given in the constitution to restrain, and even to subject the press, but that it is a power totally unlimited; and may certainly annihilate the freedom of the press, and convert it from being the palladium of liberty to become an engine of imposition and tyranny. It is an easy step from restraining the press to making it place the worst actions of government in so favorable a light, that we may groan under tyranny and oppression without knowing from whence it comes.

But you comfort us, by saying,—“there is no reason to suspect so popular a privilege will be neglected.” The wolf, in the fable, said as much to the sheep, when he was persuading them to trust him as their protector, and to dismiss their guardian dogs. Do you indeed suppose, Mr. Wilson, that if the people give up their privileges to these new rulers they will render them back again to the people? . . . But such men as Milton,

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> Stephen D. Solomon, *Cincinnatus to James Wilson, 1787*, FIRST AMEND. WATCH (Jan. 6, 2018), <https://perma.cc/Q5H4-KQWZ>.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

Sidney, Locke, Montesquieu, and Trenchard, have thought it essential to the preservation of liberty against the artful and persevering encroachments of those with whom power is trusted. You will pardon me, sir, if I pay some respect to these opinions, and wish that the freedom of the press may be *previously* secured as a *constitutional* and *unalienable right*, and not left to the precarious care of popular privileges which may or may not influence our new rulers.<sup>372</sup>

Cincinnatus believed that freedom of the press was unguarded and in danger without a bill of rights.

James Wilson addressed freedom of the press again at the ratifying convention for the state of Pennsylvania. He observed that there was “nothing” in the Constitution “on the subject of the press . . . nor was it necessary; because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.”<sup>373</sup> Wilson explained that:

What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.

With regard to attacks upon the public, the mode of proceeding is by a prosecution.<sup>374</sup>

Wilson’s understanding of freedom of the press lines up with Blackstone’s and the doctrine of no prior restraints.

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<sup>372</sup> Letter from Cincinnatus to James Wilson (Nov. 8, 1787), in 6 THE COMPLETE ANTI-FEDERALIST 10, 10–11 (Herbert J. Storing ed., 1981).

<sup>373</sup> *The Debates in the Convention of the State of Pennsylvania*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 449 (Jonathan Elliot ed., 2d ed. 1836).

<sup>374</sup> *Id.*

Scholars are unsure who the author who used the pseudonym Federal Farmer was.<sup>375</sup> Federal Farmer published a series of eighteen letters of Anti-Federalist criticism of the Constitution.<sup>376</sup>

A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures. Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniences, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, “lastly the key stone was put to the arch, by the final establishment of the freedom of the press.”<sup>377</sup>

The protection of newspapers and communication was more important than their abuse. In Federal Farmer No. 16, the author was expressly concerned that Congress’s powers of taxation would be abused to lay taxes on all papers and writings.<sup>378</sup> “Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it.”<sup>379</sup> Federal Farmer’s fears clearly echo the English taxation of paper under the Stamp Act in the Colonies and back in England.

The Federalists also published a series of newspaper articles defending the new Constitution and why a bill of rights was unnecessary.<sup>380</sup> *The Federalist Papers* were written by James Madison, Alexander Hamilton, and John Jay under the pseudonym Publius.<sup>381</sup> In Federalist No. 84, Hamilton

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<sup>375</sup> *Identifying the Federal Farmer: Unravelling the Mystery of an Antifederalist Treasure*, CTR. FOR THE STUDY OF THE AM. CONST. (Apr. 1, 2025), <https://perma.cc/B3KY-2TNU>.

<sup>376</sup> Stephen D. Solomon, *Federal Farmer Number 16, 1788*, FIRST AMEND. WATCH (Jan. 29, 2018), <https://perma.cc/PA3D-GW6N>.

<sup>377</sup> Letter from the Federal Farmer to the Republican (Jan. 20, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 372, at 323, 330 (footnote omitted).

<sup>378</sup> *Id.* at 329–30.

<sup>379</sup> *Id.* at 330.

<sup>380</sup> Mitzi Ramos, *Federalists*, FREE SPEECH CTR. (July 5, 2024), <https://perma.cc/DHV8-4XJA>.

<sup>381</sup> *Id.*

continued the argument that a Bill of Rights was not necessary because the Constitution was one of enumerated powers.<sup>382</sup> Hamilton also opined:

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: In the first place, I observe, that there is not a syllable concerning it in the constitution of this state; and in the next, I contend, that whatever has been said about it in that of any other state, amounts to nothing. What signifies a declaration that “the liberty of the press shall be inviolably preserved?” What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this, I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.<sup>383</sup>

Hamilton’s holding is interesting, given that he also quotes Blackstone’s commentaries in the same essay. As a lawyer, Hamilton was well aware of the doctrine of defamation and the legal remedies it provided.

In a personal letter to Edward Carrington, Thomas Jefferson observed that “the good sense of the people” will be the most important “censor” of government.<sup>384</sup> He believed that even if the people erred:

To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro’ the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. *The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a*

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<sup>382</sup> THE FEDERALIST NO. 84, at 575 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>383</sup> *Id.* at 580.

<sup>384</sup> See Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), reprinted in 5 THE FOUNDERS’ CONSTITUTION 121, 121–22 (Philip B. Kurland & Ralph Lerner eds., 1987).

*government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.*<sup>385</sup>

As the ultimate source of power in the American system of government was the people, Jefferson believed it necessary that the people have access to news.

Ultimately, the Federalists agreed to add a bill of rights.<sup>386</sup> James Madison was the primary author, despite his personal belief that it was unnecessary.<sup>387</sup> While writing and debating the clauses, Madison cautioned, “from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty.”<sup>388</sup>

Thus came the First Amendment in its final form: “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.”<sup>389</sup>

The First Amendment (and the rest of the Bill of Rights) was introduced on June 8, 1789.<sup>390</sup> By December of 1791, ten amendments had been ratified by three-fourths of the states.<sup>391</sup> Later, the Fourteenth Amendment would make the Bill of Rights applicable to the states, but the exact specifics of incorporation are beyond the scope of this paper.<sup>392</sup>

## 7. THE PAST, THE PRESENT, AND MOVING FORWARD

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<sup>385</sup> *Id.* at 122 (emphasis added).

<sup>386</sup> Ramos, *supra* note 380.

<sup>387</sup> *Id.*

<sup>388</sup> *Amdt1.7.1 Historical Background on Free Speech Clause*, CORN. L. SCH.: LEGAL INFO. INST., <https://perma.cc/G7YH-SP35> (quoting 1 ANNALS OF CONG. 738 (1789)).

<sup>389</sup> U.S. CONST. amend. I.

<sup>390</sup> *The Bill of Rights: How Did it Happen?*, NAT'L ARCHIVES, <https://perma.cc/MJH6-GWQA>.

<sup>391</sup> *Id.*

<sup>392</sup> *Incorporation Doctrine*, CORN. L. SCH.: LEGAL INFO. INST., <https://perma.cc/XPH6-XLVY>.

Justice Barrett was concerned that “technology may attenuate the connection between content-moderation *actions* (e.g., removing posts) and human beings’ constitutionally protected right to ‘*decide for [themselves]*’ the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>393</sup> She keenly observed that the way companies utilize these emerging technologies will likely have constitutional significance.

As startling as the attenuation problem aptly noticed by Justice Barrett seems at first glance, it is not actually as unprecedented as it may initially seem. For in fact, as early as the 1200s (and probably even before then), governments struggled with a kind of attenuation problem. Prior to the adoption of the Statute of Westminster in 1275, someone could successfully defend against a charge of libel by saying he did not invent the rumor.<sup>394</sup> Analogously, the repeater of libel was attenuated from the original source. Obviously, this situation differs from Barrett’s attenuation problem as every link within the rumor chain is human. However, it does show that pragmatic issues in regulation are not a new problem in governance.

The introduction of the printing press in England distanced the author of an idea from the one who copied and disseminated it. The English regime of control addressed this attenuation by restricting both the author and printer, demanding that both of their names be printed on any given work.<sup>395</sup> The printers’ motivations were not limited to selecting books and pamphlets to advance lofty ideals of civic discourse and the most elegant prose but often catered to mass appeal to maximize profits.

While the factual discovery in *Moody v. NetChoice, LLC* was lacking and thus worthy of remand, assuming that social media companies’ content moderation decisions *do* involve human input (and *not* “AI [that relied] on large language models to determine what is ‘hateful’”) <sup>396</sup> the Florida and Texas state laws would likely fail in the eyes of the Framers of the Constitution under the doctrine of prior restraint. To dictate an editorial or content moderation decision before it happens is to return to the age of the licensor and the censor. The law would not only hang over those who work in content

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<sup>393</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707, 746 (2024) (Barrett, J., concurring) (alteration in original) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

<sup>394</sup> See *supra* text accompanying notes 122–129.

<sup>395</sup> See *supra* Section 5.1.

<sup>396</sup> *Moody*, 603 U.S. at 746 (Barrett, J., concurring).

moderation departments, but also every user before he or she posts on a social media platform.

All technology, including AI, is constantly advancing. Regardless of the novel legal questions such advancements bring, the fundamental principles and reasoning behind them will not change.