



1  **The First Amendment:**  
The Foundation of Media Freedoms

2  **Objectives**

- Grasp the historical origins of freedom of the press.
- Learn about the boundaries of the First Amendment and what types of speech may be restricted by the government.
- Understand First Amendment theories and how they may influence courts and the law.
- Develop an appreciation for the legal test involving incitement and its contemporary application to different forms of expression.
- Discover the development and limits of prior restraint by the government.
- Understand and be able to apply the forum analysis for time, place & manner restrictions on expression.

3  **Key Terms**

- 1  ■ Seditious libel
  - Prior restraint
  - Subsequent Punishment
  - Absolutist theory
  - Preferred positioning
  - Ad hoc balancing
  - Meiklejohnian theory
  
- 2  ■ Marketplace of Ideas
  - Emerson's four values
  - Alien & Sedition Acts (1798)
  - Espionage & Sedition Acts (1918)
  - Criminal syndicalism
  - Smith Act (1940)
  - Time Place, Manner
  - Forum Analysis

4  **First Amendment**

- Congress shall make no law respecting the 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.

5 

■ Historical Roots

■ Theories of application

■ Historical areas of litigation

■ Central cases

■ Justifications for a System of Free Expression

6 

**Historical Origins**

■ Ancient Athens 800-600 B.C.

- Certain citizens only
- No slander or sedition

7 

■ Roman Republic

- Until the Caesars
- Politicians enjoyed protections during senate deliberations

8 

**British Roots**

■ Caxton - 1st printer 1476

- Richard III actually encouraged foreign printers to set up shop and import foreign materials.

9 

■ Star Chamber

■ Puritan revolution threw enforcement of restrictions into chaos

■ 1643 Parliament created the Ordinance for the Regulating of Printing -

- very regressive
- To protect property rights of Stationers Company
- Suppress dangerous and seditious publications

10 

■ John Milton wrote [Areopagitica](#) 1644

11 

■ Ultimately, licensing fell apart - not because of a philosophical shift but because the system was unmanageable.

■ [Blackstone's Commentary](#) on the Laws of England (summation of common law)

- Prior restraint v. subsequent punishment

12 

■ Summary as of 1700s

- Common law protection against prior restraint
- Parliamentary right of free speech
- What about the common folk?
- What about subsequent punishment for things like seditious libel?

13  **Zenger Trial, 1735**

■ Truth as a defense against libel

■ Right of jury to determine facts of defamation

■ Truth as defense not codified for 50 years

14  **Rise of Constitution**

■ Articles of Confederation

■ 1787 Federal Constitutional Convention

- No recorded discussion of free speech
- No bill of rights discussed until the last days

■ Anti-federalists

■ Bill of Rights - bargaining chip

15  **Bill of Rights**

■ Madison introduced 17 amendments to the House in 1789.

■ Both houses finally agreed on 12 amendments and those went

to the states for approval in 10/1789

■ 12/15/1791 Bill of Rights passed

16 

■ By no means a finished story.

- First Amendment did not apply to the states
- Did not apply to rights of unpopular speakers: women, slaves, abolitionists, social reformers, political dissenters.....
- CT, GA, MA did not ratify the Bill of Rights until 1941 (not that it mattered).
- Now what the heck do those 45 words mean? And how do judges apply them?

17 

**Theories of First Amendment**

■ How do justices decide whether to protect expression?

■ Absolutist Theory

■ Ad Hoc Balancing Theory

■ Preferred Position Theory

■ Meiklejohnian Theory

■ Marketplace of Ideas

■ Access Theory

■ Self-fulfillment Theory

18 

**Justifications for a System of Free Expression**

■ Attainment of Truth

- John Milton
- John Stuart Mill
- Truth v. truth

■ Governance

- Meiklejohn

19 

■ Check on Government Power

- Government watchdog/4th branch of govt.

■ Change with stability

■ Individual self-fulfillment

- English libertarian thought


20 


**Historical Areas of Litigation**

■ Sedition

- Government restrictions

- Alien and Sedition Acts of 1798
  - 15 prosecutions
  - Constitutionality never tested
  - Expired 1801
- 1917/18 Espionage/Sedition Act
  - Clear and Present Danger Test
    - Schenck v. United States (1919)
    - Abrams v. United States (1919)
    - Gitlow v. New York (1925)
    - Smith Act (1940)
    - Brandenburg v. Ohio (1969)

21  **Degree of Danger Continuum**  
**Source: Thomas L. Tedford, Freedom of Speech, 3d, State College, PA: Strata Publishing**

22  **Recent incitement cases**  
 ■ Delgado v. American Multi-Cinema, (2001) (Basketball Diaries)  
 ■ James v. Meow Media, Inc (2002) (Natural Born Killers)  
 ■ Herceg v. Hustler (1987) (auto-erotic asphyxiation)  
 ■ Planned Parenthood v. ACLA (2002) ([Nuremberg files](#))  
 ■ Rice v. Paladin Ent. (1997) (Hit Man)