

# THE CHALLENGE OF DEMOCRACY: INFORMATION

## Why We Have Freedom of the Press

### Overview

In this lesson, students learn about the historical context for the First Amendment's guarantee of freedom of the press. First, students read about the historical background for a free press in medieval Europe, England, and England's American colonies in the 18th century. Next, they work in small groups to determine if several hypothetical situations are proper uses of prior restraint. This lesson is Part 1 of a two-part lesson sequence that continues with Part 2: **'Falsely Shouting Fire': The Free Press and the Courts**. Both Parts 1 and 2 may also be done independently of one another.

### Standards and Topics

- **CCSS.ELA-LITERACY.RH.9-10.2; RH.11-12.2:** Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.
- **CCSS.ELA-LITERACY.RH.11-12.4:** Determine the meaning of words and phrases as they are used in a text, including analyzing how an author uses and refines the meaning of a key term over the course of a text (e.g., how Madison defines *faction* in *Federalist* No. 10).
- **CCSS.ELA-LITERACY.SL.9-10.1; 11-12.1.B:** Work with peers to promote civil, democratic discussions and decision-making, set clear goals and deadlines, and establish individual roles as needed.
- **CCSS.ELA-LITERACY.SL.9-10.4:** Present information, findings, and supporting evidence clearly, concisely, and logically such that listeners can follow the line of reasoning and the organization, development, substance, and style are appropriate to purpose, audience, and task.
- **CCSS.ELA-LITERACY.SL.11-12.4:** Present information, findings, and supporting evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternative or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and a range of formal and informal tasks.

**Topics:** free press, freedom of the press, freedom of expression, Henry VIII, history of law, U.S. Constitution, First Amendment

### Objectives

Students will be able to:

- Define *prior restraint*, *freedom of expression*, and *freedom of the press*.
- Explain the development of the notion of a free press leading up to the adoption of the First Amendment to the U.S. Constitution.
- Prepare and present arguments on the proper uses of prior restraint on freedom of expression.

## Materials

- [Handout A – Why We Have a Free Press](#) (one per student).
- [Handout B – Not So Fast! Judging Prior Restraint](#) (one per group of four students each)

## Procedure

### I. Focus Discussion

- A. Ask students: *What does freedom of the press mean to you?* (Accept reasonable responses, but look for the definition of information that is published and presented independent of the government’s influence or control.)
- B. Tell students: *Today, you’re going to learn about how the idea of a free press has not always been part of world history or the history of the United States. The founders of the nation had to decide to include that freedom among our fundamental freedoms.*

### II. Reading – Why We Have a Free Press

- A. Distribute [Handout A - Why We Have a Free Press](#) to each student. Give students time to complete the reading.
  1. Allow students to work in pairs to discuss and answer the Writing & Discussion questions, or have each students write answers for homework.
- B. Conduct a whole-class discussion using the **Writing & Discussion** questions or assign the questions for assessment (see Part IV).
  1. What are the two basic methods used by Henry VIII to of control the press? (*Only licensed printers could publish anything, and the Henry’s government had to approve anything published in advance; and the government could punish critics of Henry VIII under the law of seditious libel.*)
  2. What is freedom of the press? (*The meaning would be clarified over time by the U.S. Supreme Court, but generally it means (1) publishers can print information without prior restraint by the government, and (2) publishers could not be punished after the fact for criticizing the government.*)
  3. Do you think freedom of expression is important? Explain. (*Accept reasonable responses, provided that students understand that the rights in the First Amendment, including freedom of the press, are collectively understood by courts and lawmakers as freedom of expression.*)

### III. Activity: Not So Fast! Judging Prior Restraint

- A. Divide the class into groups of four students each. Distribute the [Handout B - Not So Fast! Judging Prior Restraint](#) to each group. Review the instructions and answer any questions that students may have.
  1. Make sure every group understands that its task is to decide if the example of a prior restraint (through court order) in each case is proper.
- B. Each group should select a group chair who will keep the group’s discussion on task and moving through the fact situations on Handout B. Each group should also select one reporter who will share the group’s decisions for each fact situation with the class.

#### IV. Assessment/Closure

- A. For each fact situation on Handout B, survey the groups to see how they decided and why. At least one student per group should report out the group's decisions noted on Handout B.

1. It may be helpful to debrief after each fact situation with the following notes:

**Fact Situation 1:** According to the U.S. Supreme Court, this would be a proper use of prior restraint unless the order itself is “transparently invalid or had only a frivolous pretense to validity.” (*Walker v. City of Birmingham* (1967).) The protestors nonetheless chose **civil disobedience**, breaking a law considered unjust, by protesting in violation of the order. The legal method of challenging the court order is to appeal the order to a higher court. Is that fair? Would appealing the order in court mean the protestors would have to postpone exercising their right to freedom of expression? If the court order turns out to be unconstitutional, is it fair that protestors had to obey it in order to appeal it?

**Fact Situation 2:** According to the U.S. Supreme Court, this is an improper use of a prior restraint. (*Carroll v. President and Commissioners of Princess Anne* (1968).) When a court only hears from one side in a case, it is called an **ex parte proceeding**. When the other side receives no notice of the hearing and cannot present evidence to defend their constitutional right to freedom of expression, the order is invalid.

**Fact Situation 3:** This would be an improper use of prior restraint. (*New York Times Co. v. United States* (1971), aka the “Pentagon Papers case.”) The United States government may seek prior restraints on publications that may jeopardize national security. In this case, information showing that members of the government lied to the public is, in itself, not a threat to national security. (See the lesson [The People's Right to Know](#) for a moot court activity related to national security issues.)

**Fact Situation 4:** This would almost certainly be a proper use of prior restraint. News outlets may not publish information that endangers U.S. military personnel. Courts have firmly established that publishing troop movements and whereabouts during wartime would endanger them and jeopardize national security. (See Fact Situation 3 above.)

2. Further debrief the activity in a whole-class discussion by asking the following questions:
- What facts from the reading caused your group to decide some examples were proper or improper prior restraints?
  - Was there consensus in your group on each fact situation? Or did any member of your committee have a dissenting opinion? What was it?
- B. Have each student write answers to the **Writing & Discussion** questions after having done the reading, activity, and debriefing. Look for answers that use the text and the activity discussions as evidence.

## Source List

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## Why We Have Freedom of the Press

We live in the Information Age. Modern communications technology is bringing information to us faster and in greater volume than ever before. People can walk down the street and talk on smartphones with others thousands of miles away. Cable and satellite television delivered almost 500 scripted TV shows in 2017 alone, not including hundreds more reality shows, news programs, and documentary series. The internet connects computers globally delivering an ever-increasing number of news and information websites. We live in a revolutionary age that is changing how we think and act. In fact, we have been changed before.



Johannes Gutenberg standing by his printing press in 15th century Germany.

A little more than 500 years ago in Europe, another information revolution took place. It was caused by a single invention: the printing press. This invention revolutionized the distribution of information, making books, especially the Bible, available to common people. Soon, the first newspapers appeared.

Monarchs tried to control printing presses in order to harshly punish any criticism of their rule. The Roman Catholic Church, the only church at the time, set up an Index of Forbidden Books and persecuted heretics, those who dissented from church doctrine. But controlling the printed word wasn't easy, and powerful new movements grew, such as Protestantism, which challenged the singular authority of the Catholic Church.

In 1534 in England, King Henry VIII broke from the Catholic Church. He assumed leadership of the Church of England as well as of the state. To control the press, Henry allowed only licensed printers to publish, and anything they printed had to be approved in advance. Through the courts, Henry also punished critics under the law of seditious libel. This law made it a crime to print “scandalous and malicious writing” that might damage the king’s reputation, even if the writing was true.

Over the next century and a half, power shifted from the king to parliament. But Henry VIII’s methods of controlling the press remained in place. In 1644, English poet John Milton wrote a classic essay, *Areopagitica*, against the licensing system. Milton argued that it was improper to restrain printers from publishing. But Milton did not see anything wrong with punishing printers after the fact for seditious libel.

Milton’s essay struck a chord with English sentiments. By 1695, the licensing system had ended. But seditious libel remained. And many even believed that this was consistent with a free press. According to Blackstone’s *Commentaries* on English common law first published in 1765: “The

liberty of the press is indeed essential to . . . a free state; but this consists in laying no *previous* restraints upon publications, and not in the freedom from censure for criminal matter when published.” The practice of government censoring materials before they are published is called *prior restraint*.

The English colonies in America carried English law with them. Unlike England, prosecutions for seditious libel ended in 1735 after the trial of John Peter Zenger. As publisher of the *New York Weekly Journal*, Zenger was tried for seditious libel following his paper’s attacks on the royal governor of New York. According to law at the time, it did not matter whether Zenger’s words were true. If critical of royal authority, even true statements could be punished. In fact, the greater the truth, the greater was the libel. Zenger’s lawyer, however, argued that the attacks were true and that therefore Zenger should not be convicted of libel. The judge ruled the lawyer’s arguments out of order. But the jury disregarded the judge and acquitted Zenger. This trial marked a major victory for freedom of the press in the colonies.

In 1765, the English Parliament enacted the Stamp Act. This was a tax on all documents, including newspapers, in the American colonies. The English said they needed the tax to pay for troops protecting the colonies. But the colonists protested this “taxation without representation.” After the colonists boycotted English goods, Parliament repealed the Stamp Act in 1766.

During the American Revolutionary War, Thomas Paine’s pamphlet *Common Sense*, which argued the case for the revolution, sold more than 100,000 copies. Newspapers informed colonists of battles and issues of the day. Colonists came to see newspapers as an integral part of life.

Following the revolution, the most important early debate was whether the Constitution should be adopted. Newspapers carried the arguments of the Federalists and Anti-Federalists, those for and against adoption of the Constitution. Seventy-seven essays, written anonymously by Alexander Hamilton, James Madison, and John Jay, argued the Federalist position in New York newspapers.

The Constitution was ratified in 1788, but several states had conditioned their approval on a bill of rights being added to it. This would ensure that the new government would not abuse the people’s newly won freedom, such as freedom of the press.

When the first Congress met in 1789, James Madison, now a Congressman from Virginia, prepared a list of proposed amendments. Eventually, ten amendments, known as the Bill of Rights, were ratified by the states in 1791. The First Amendment declared:

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.

Thus the First Amendment enshrined in the Constitution religious liberty and all the various freedoms known collectively as freedom of expression. But the meaning of these freedoms was subject to interpretation. For example, did freedom of the press simply mean, as the English legal expert Blackstone believed, that the press should be free from prior restraint? This would mean that newspapers could print whatever they wanted, with few exceptions, but could be punished after the fact under laws like the English law of seditious libel. Or did the First Amendment protect the press from being punished after the fact?



The first challenge to freedom of the press arose just a few years after the adoption of the Bill of Rights. In 1798, with war seeming likely between the United States and France, Congress passed the Sedition Act. This was a law similar to the English law of seditious libel. It required criminal penalties for anyone who expressed anything “false, scandalous, or malicious” against the federal government and specifically against the president. Twenty-five Americans were arrested, including several newspaper editors. But the highly controversial act expired in 1801, when Thomas Jefferson became president. Jefferson believed the act violated the Constitution.

The Supreme Court of the United States never ruled on the Sedition Act. During the act’s short life, no one appealed a conviction to the court. In fact, the Supreme Court did not make any important rulings on free expression until early in the 20th century.

The main reason the Supreme Court did not rule on any case of free expression for over 120 years was that the First Amendment only applied to Congress. In that time, except for the Sedition Act, Congress did little to suppress free expression. But

the meaning of freedom of the press eventually would be determined by the U.S. Supreme Court as Congress began passing laws constricting that freedom during World War I.

Today, the government generally may seek prior restraints on expression (speech, assembly, or the press) in one of two ways: a law or statute might require speakers to get an official license before speaking on public property at a certain time and place; or a court might issue an order called an **injunction** to stop a speech or a publication from occurring in specific circumstances. For example, the United States government may seek an injunction against a website from posting an article that the government believes will jeopardize national security (the safety of the nation’s citizens and military personnel, and the security of its institutions and economy).

## Writing & Discussion

1. What are the two basic methods used by Henry VIII to control the press?
2. What is freedom of the press?
3. Do you think freedom of expression is important? Explain.

### Prior Restraint and High School Newspapers

May a high school newspaper publish anything it wants without prior restraint? After the landmark U.S. Supreme Court case of *Hazelwood v. Kuhlmeier* (1989), high school administrations may censor student-run publications, provided that (1) the publication is not a “public forum,” and (2) the administration shows it has a reasonable educational purpose for the censorship.

Nonetheless, 14 states have passed laws that give students greater free-expression protection. These laws protect student expression that is not libelous, an invasion of privacy, a “clear and present danger” to the school, or a “material and substantial disruption” of the school. Those states are Arkansas, California, Colorado, Illinois, Iowa, Kansas, Oregon, Maryland, Massachusetts, Nevada, North Dakota, Rhode Island, Vermont and Washington.

## Not So Fast! Judging Prior Restraint

The rules of prior restraint are generally the same when restricting freedom of speech or freedom of the press. We often call the freedoms of the First Amendment collectively *freedom of expression*. The government may place a prior restraint on some expression by getting a *court order* (also called an injunction) issued by a judge to prevent the speech or publication from occurring.

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In your group, discuss each of the following situations. In each situation, a court issues an order that is a prior restraint on speech. Determine as a group (a) if each seems to be a proper use of prior restraint on freedom of expression or not, and (b) what evidence from the text helped your group decide. Your group may decide that a situation is *likely proper* or *likely improper* depending on the available evidence.

1. Protestors against school-funding cuts plan to hold a demonstration on a city sidewalk. They did not get a license from the city government for the demonstration, so the city sued them in court to get an injunction to stop the demonstration. The court agreed with the city and issued the injunction.
2. Demonstrators for campaign-finance reform plan to hold a demonstration in front of city hall. Lawyers for the city seek a court order to prevent the demonstration. The judge hears from those lawyers privately and then issues an injunction against the demonstration that will last for ten days. The demonstrators were not informed of the private hearing, so they could not present any evidence to challenge the injunction.
3. A newspaper receives classified documents from a government “whistleblower” (someone who exposes government misdeeds to the public). (Classified documents are confidential or secret documents meant to be read only by designated government officials.) The documents expose the fact that members of the federal administration lied to the American people about why the U.S. is waging war in a foreign country. The newspaper publishes one of the documents and states it will soon publish more. The U.S. government sues the newspaper and gets a court order to prohibit the newspaper from publishing more classified documents.
4. Another newspaper receives classified documents from a different whistleblower. This time, the documents include information about the current location and movements of U.S. military troops in the foreign country during the war. The U.S. government sues the newspaper and gets a court order to prohibit the newspaper from publishing any classified documents.