historians on america

Decisions That Made a Difference

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Introduction

"If you would understand anything, observe its beginning and its development."
–Aristotle

Historians have used many lenses to analyze how historical change comes about. Thomas Carlyle, the 19th-century British writer, famously defined history as "at bottom the History of the Great Men who have worked there," and he saw heroic individuals as the drivers of change. In the 20th century, the French school of historians known as the Annales (for the journal where they published) reacted against Carlyle and other traditional historians who had presented history as largely a chronicle of wars and political events. In their quest for the roots of historical change, the Annales historians focused on the everyday lives of ordinary people in centuries long past.

Other recent historians have examined technology as a driving force or analyzed the effects of climate, natural resources, and environmental devastation. Under "theories of history," the online encyclopedia Wikipedia currently provides 121 listings.

In this book, we use a different lens – what might be called the tipping-point theory of history, a term borrowed from a recent best-seller in the United States written by the journalist Malcolm Gladwell.

"The 'Tipping Point'… comes from the world of epidemiology," writes Gladwell. "It's the name given to that moment in an epidemic when a virus reaches critical mass. It's the boiling point. It's the moment on the graph when the line starts to shoot straight upwards." Gladwell adds, "One of the things I explore in the book is that ideas can be contagious in exactly the same way that a virus is."

Our premise in this book is that by analyzing a few tipping-point events, one can come to a better understanding of not only how the United States became the country it is today but of the values woven into this nation's fabric. From the viewpoint of the present, it is easy to forget that, just 200 years ago, the United States was a fledgling democracy, the recently liberated colony of a world power, with a backwoods economy based on agriculture and exploitation of its natural resources. It's also easy to forget that the institutions, ideas, laws, and values that govern the United States in the present were the creations of individual human beings in a specific set of circumstances.

We asked 11 historians, each an expert in his field, to consider a development that led to the creation of an idea or an institution that is central to America today. Most of the time, our authors find that a heroic individual plays a distinct role: George Washington's decision to retire from the first presidency after two terms guaranteed that the new nation would not have a king. The 1954 Supreme Court decision that led to racial integration of American schools is hard to imagine without Earl Warren as chief justice. The Marshall Plan, which helped bring relief to a devastated Europe after World War II, is certainly well named.

Yet it is also possible to see less personalized and less dramatic transformative events – laws passed by Congress, court decisions, the development of public schools – as examples of the tipping-point theory in action. They occur at times when an accretion of ideas, social movements, economic interests, and other forces have attained a critical mass. When looked at closely, many sudden transformations do not turn out to be sudden.

We do not mean to suggest that historical tipping points occur only in America, of course. By telling these American stories, we hope to provide ways for readers to view history, societies, and institutions in a new light of understanding.


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by Doug Linder

The Trial of John Peter Zenger and the Birth of Freedom of the Press

NO COUNTRY VALUES FREE EXPRESSION MORE HIGHLY THAN DOES THE UNITED STATES, AND NO CASE IN AMERICAN HISTORY STANDS AS A GREATER LANDMARK ON THE ROAD TO PROTECTION FOR FREEDOM OF THE PRESS THAN THE TRIAL OF A GERMAN IMMIGRANT PRINTER NAMED JOHN PETER ZENGER. ON AUGUST 5, 1735, 12 NEW YORK JURORS, INSPIRED BY THE ELOQUENCE OF THE BEST LAWYER OF THE PERIOD, ANDREW HAMILTON, IGNORED THE INSTRUCTIONS OF THE GOVERNOR'S HAND-PICKED JUDGES AND RETURNED A VERDICT OF "NOT GUILTY" TO THE CHARGE THAT ZENGER HAD PUBLISHED "SEDITIOUS LIBELS." THE ZENGER TRIAL IS A REMARKABLE STORY OF A DIVIDED COLONY, THE BEGINNINGS OF A FREE PRESS, AND THE STUBBORN INDEPENDENCE OF AMERICAN JURORS.

Andrew Hamilton, represented in this oil, helped establish freedom of the press in colonial America, by defending publisher John Peter Zenger against a charge of libel.

The Villainous Colonial Governor

The man generally perceived to be the villain of the Zenger affair, William Cosby, arrived in New York on August 7, 1731, to assume his post as governor for New York Province, having been appointed by the Crown. Cosby quickly developed a reputation as "a rogue governor." It is almost impossible to find a positive adjective among the many used by historians to describe the new governor: "spiteful," "greedy," "jealous," "quick-tempered," "dull," "unlettered," and "haughty" are a sample.

Within a year after arriving on American shores, Cosby embroiled himself in a controversy that would eventually lead to Zenger's trial. Cosby picked his first fight with Rip Van Dam, the 71-year-old highly respected senior member of the New York provincial council. Cosby demanded that Van Dam turn over half of the salary he had earned while serving as acting governor of New York during the year between Cosby's appointment and his arrival in the colony. The hard-headed Van Dam agreed – providing that Cosby also would agree to split with him half of the perquisites he earned during the same time period. By Van Dam's calculations, Cosby would actually owe *him* money – over £4,000.

Zenger's trial came when New York was still a British colony. Below: an account of the case printed in London in 1765.


THE
TRIAL
OF
JOHN PETER ZENGER,
Of NEW-YORK, PRINTER:
WITH
A NARRATIVE OF HIS CASE.
THE TRIAL
OF
Mr. WILLIAM OWEN,
LONDON:

Governor Cosby responded in August 1732 by filing suit for his share of Van Dam's salary. Knowing that he had no chance of prevailing in his case if the decision were left to a jury, Cosby designated the provincial Supreme Court to sit as a "Court of Exchequer" (without a jury) to hear his suit. Van Dam refused to roll over, and had his lawyers challenge the legality of Cosby's attempt to bypass the colony's established jury system. The decision on the legality of Cosby's meddling with the court system fell to the three members of the Supreme Court he was meddling with, which voted 2 to 1 to uphold Cosby's action.

Despite winning in the Supreme Court, Cosby expressed irritation that the vote for his plan was not unanimous. He wrote a letter to the dissenting judge, Chief Justice Lewis Morris, demanding that he explain his vote. Morris did so, but to Cosby's great displeasure, his explanation appeared not in a private letter to the governor, but in a pamphlet printed by John Peter Zenger. Cosby retaliated by removing Morris as chief justice, and replacing him with a staunch royalist, James DeLancey.

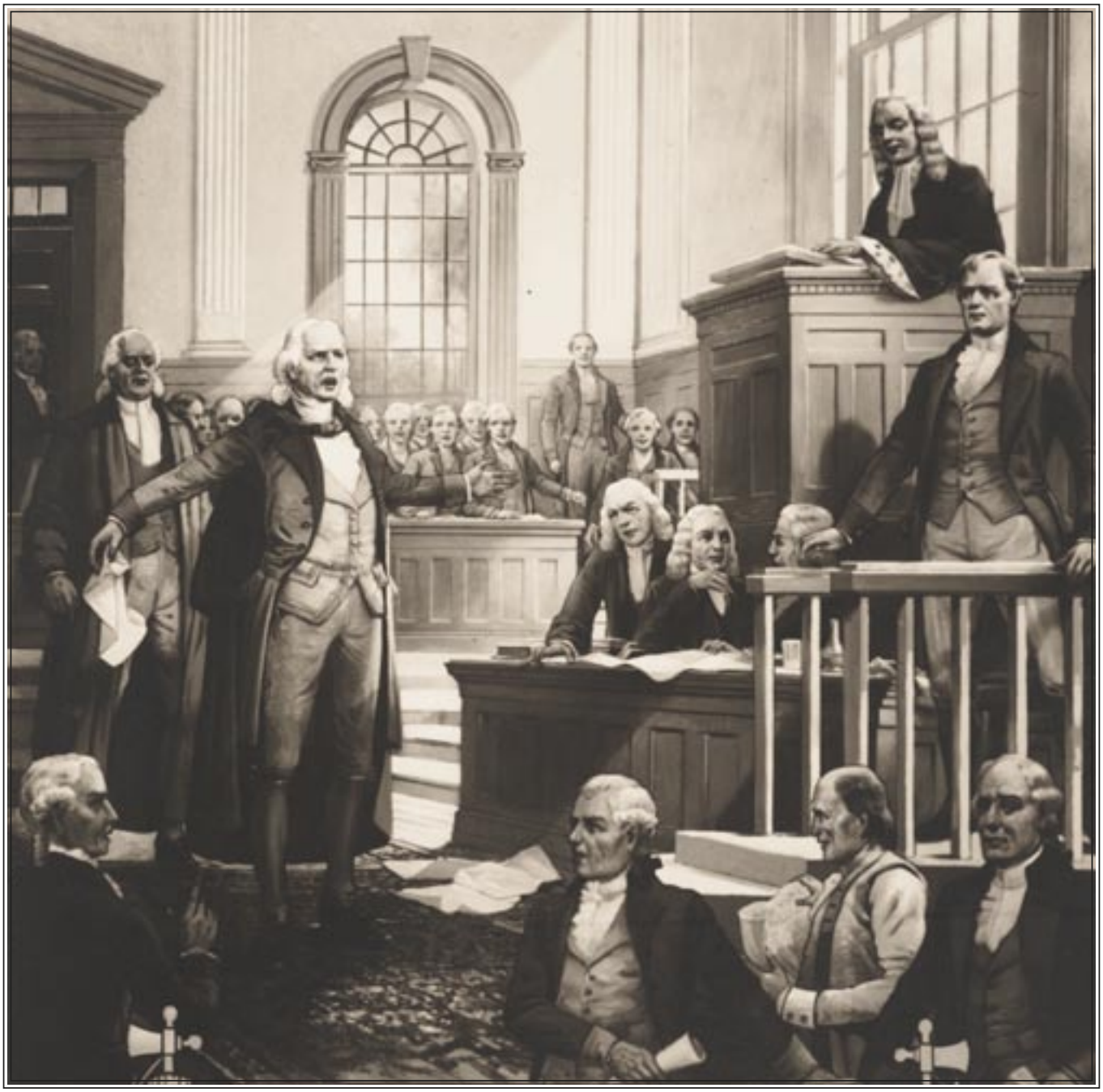
Cosby's firing of Morris intensified the growing opposition to his administration among some of the most powerful people in the colony. Rip Van Dam, Lewis Morris, and an energetic attorney named James Alexander organized what came to be known as the Popular Party, a political organization that would constitute a serious challenge to Cosby's ability to govern.

Cosby attempted to maintain his grip on power by employing Francis Harison – a man called by historians Cosby's "flatterer-in-chief" and "hatchetman"– to be censor and effective editor of the only established New York newspaper, the New York *Gazette*. Harison defended Cosby both in prose and strained verse, such as this poem that appeared in the *Gazette's* January 7, 1734, issue:

Cosby the mild, the happy, good and great,
The strongest guard of our little state;
Let malcontents in crabbed language write,
And the D...h H...s belch, tho' they cannot bite.
He unconcerned will let the wretches roar,
And govern just, as others did before.

Besieged by poetry, prose, and the threat of oppression, James Alexander, often described as the "mastermind" of the opposition, decided to take an unprecedented step by founding America's first independent political newspaper. Alexander approached John Peter Zenger who, along with William Bradford, the *Gazette's* printer, was one of only two printers in the colony, with the idea of publishing a weekly newspaper to be called the *New York Weekly Journal*. Zenger, who had made a modest living the past six years printing mainly religious tracts, agreed. In a letter to an old friend, Alexander revealed the *Journal's* mission: "Inclosed is also the first of a newspaper designed to be continued weekly, chiefly to expose him [Cosby] and those ridiculous flatteries with which Mr. Harison loads our other newspaper. ..."

On November 5, 1733, Zenger published the first issue of the *Weekly Journal*. The issue included a detailed account of the victory the previous week of Lewis Morris as Popular Party candidate for assemblyman from Westchester. Morris won the election despite the best efforts of Cosby to rig the election against him by having the sheriff disqualify Quaker voters (expected to be heavily pro-Morris) on the ground that the Quakers only "affirmed" rather than swore the oath required at the time of all voters. The election story, almost certainly written by Alexander, included this description of the sheriff's intervention:



A posthumous depiction of the Zenger trial by illustrator David Lithgow. Little does the mincing Justice DeLancey, upper right, know he is soon to be overruled by a jury of free men.

[T]he sheriff was deaf to all that could be alleged on that [the Quaker] side; and notwithstanding that he was told by both the late Chief Justice and James Alexander, one of His Majesty's Council and counsellor-at-law, and by one William Smith, counsellor-at-law, that such a procedure [disqualifying the Quakers for affirming rather than swearing] was contrary to law and a violent attempt upon the liberties of the people, he still persisted in refusing the said Quakers to vote. ...

No doubt to the surprise and disappointment of Cosby, Morris won the election even without the Quakers' votes. The *Journal* story recounted how Morris's election was celebrated with "a general fire of guns" from a merchant vessel and "loud acclamations of the people as he walked the streets, conducted to the Black Horse Tavern, where a handsome entertainment was prepared for him."

Subsequent issues of the *Journal*, in addition to editorializing about other dubious actions of the gover-

nor, contained ringing defenses of the right to publish, authored by Alexander, such as this argument offered in the second issue:

> *The loss of liberty in general would soon follow the suppression of the liberty of the press; for it is an essential branch of liberty, so perhaps it is the best preservative of the whole. Even a restraint of the press would have a fatal influence. No nation ancient or modern has ever lost the liberty of freely speaking, writing or publishing their sentiments, but forthwith lost their liberty in general and became slaves.*

Cosby put up with the *Journal's* attacks for two months before concluding that it must be shut down. The first effort to silence the *Journal* occurred in January 1734 when Chief Justice DeLancey asked a grand jury to return indictments based on the law of "seditious libel," a law that allowed criminal punishment of those whose statements impugned the authority and reputation of the government or religion, regardless of the truth of the statements.

The grand jury, however, refused to return the requested indictments. DeLancey tried again when another grand jury met in October. He presented the grand jurors with broadsides and "scandalous" verse from Zenger's *Journal*, but the jurors, claiming that the authorship of the allegedly libelous material could not be determined, again decided not to indict.

Cosby responded to these frustrations by proclaiming a reward of £50 for the discovery of the authors of the libels and by issuing an order that Zenger's newspapers be publicly burned by "the common hangman." Then, in an effort to get around the grand jury's refusal to indict, Cosby ordered his attorney general, Richard Bradley, to file "an information" before Justice DeLancey and Frederick Philipse, another justice. Based on the information, the justices issued a bench warrant for the arrest of John Peter Zenger. On November 17, 1734, the sheriff arrested Zenger and took him to New York's Old City Jail, where he would stay for the next eight months.

The *Weekly Journal* was not published the next day, November 18. It would be the only issue missed in its publishing history. The next week, with the help of Zenger's wife, Anna, the *Journal* resumed publication with an issue that included this "apology":

> *As you last week were disappointed of my* Journal, *I think it incumbent on me to publish my apology, which is this. On the Lord's Day, the seventeenth, I was arrested, taken and imprisoned in the common jail of this City by virtue of a warrant from the Governor, the honorable Francis Harison, and others in the Council (of which, God willing, you will have a copy); whereupon I was put under such restraint that I had not the liberty of pen, ink or paper, or to see or speak with people, until my complaint to the honorable Chief Justice at my appearing before him upon my habeas corpus on the Wednesday following. He discountenanced that proceeding, and therefore I have had since that time the liberty of speaking thro' the hole of the door to my wife and servants. By which I doubt not you will think me sufficiently excused for not sending my last week's* Journal, *and hope for the future, by the liberty of speaking to my servants thro' the hole of the door of my prison, to entertain you with my weekly* Journal *as formerly.*

The enormous (in those days) bail of £800 set for Zenger turned into an important tactical advantage for the imprisoned printer. As a result of his stream of "letters" from prison, an outpouring of public sympathy for his cause developed.

Illustration depicting the burning of Zenger's Weekly Journal *on Wall Street, November 6, 1734, on orders of New York governor William Cosby. The stockade in the foreground, where two hands and a head of a standing man could be shackled, reminds of the laws of that period.*

The Seditious Libel Trial

James Alexander, who – as the author of the opinions that so offended Cosby – probably should have been in the prisoner's dock instead of Zenger, undertook with fellow lawyer William Smith the task of preparing the printer's defense. Both Alexander and Smith found themselves disbarred, however, in April 1735 by Chief Justice DeLancey after they audaciously objected on the

grounds of bias to the two-man court Cosby had hand-picked to try Zenger's case. Alexander recruited 60-year-old Andrew Hamilton of Philadelphia, perhaps the ablest and most eloquent attorney in the colonies, to argue Zenger's case. Hamilton relied heavily on Alexander's behind-the-scenes work, including a detailed brief of the argument that he prepared.

Jury selection began on July 29, 1735, and once again Cosby attempted to influence events by having his henchman, Francis Harison, produce a roll of potential jurors that included 48 nonfreeholders. (Nonfreeholders were persons holding estates at the will or sufferance of the governor, who thus had considerable incentive to produce a verdict that would please him.) The jury roll also included former magistrates and persons in Cosby's employ. This departure from normal procedures was too much even for Cosby's handpicked judges who, sitting behind an ornate bench in their scarlet robes and huge white wigs, rejected the ruse. Twelve jurors were quickly selected.

The trial opened on August 4 on the main floor of New York's City Hall with Attorney General Bradley's reading of the information filed against Zenger. Bradley told jurors that Zenger, "being a seditious person and a frequent printer and publisher of false news and seditious libels," had "wickedly and maliciously" devised to "traduce, scandalize, and vilify" Governor Cosby and his ministers. Bradley said, "Libeling has always been discouraged as a thing that tends to create differences among men, ill blood among the people, and oftentimes great bloodshed between the party libeling and the party libeled."

Hamilton had almost no law to support his position that the truth should be a defense to the charge of libel.

After a brief statement from defense co-counsel John Chambers, Andrew Hamilton rose to announce that his client – sitting in an enclosed box in the courtroom– would not contest having printed and published the allegedly libelous materials contained in the *Weekly Journal* and that "therefore I shall save Mr. Attorney the trouble of examining his witnesses to that point."

Following Hamilton's surprise announcement, the prosecution's three witnesses (Zenger's journeyman associate and two of his sons), summoned to prove that Zenger had published the offending expression, were sent home. There followed a prolonged silence. Finally, Bradley spoke: "As Mr. Hamilton has confessed the printing and publishing of these libels, I think the Jury must find a verdict for the king. For supposing they were true, the law says that they are not the less libelous for that. Nay, indeed the law says their being true is an aggravation of the crime." Bradley proceeded to offer a detailed and generally accurate account of the state of law on seditious libel of the time, supporting his conclusion that the fact that libel may be true is no defense.

Andrew Hamilton rose to argue that the law ought not to be interpreted to prohibit "the just complaints of a number of men who suffer under a bad administration." He suggested that the Zenger case was of transcendent importance:

> *From what Mr. Attorney has just now said, to wit, that this prosecution was directed by the Governor and the Council, and from the extraordinary appearance of people of all conditions, which I observe in Court upon this occasion, I have reason to think that those in the administration have by this prosecution something more in view, and that the people believe they have a good deal more at stake, than I apprehended. Therefore, as it is become my duty to be both plain and particular in this cause, I beg leave to bespeak the patience of the Court.*

Hamilton argued that the libel law of England ought not to be the libel law of New York:

In England so great a regard and reverence is had to the judges that if any man strikes another in Westminster Hall while the judges are sitting, he shall lose his right hand and forfeit his land and goods for so doing. Although the judges here claim all the powers and authorities within this government that a Court of King's Bench has in England, yet I believe Mr. Attorney will scarcely say that such a punishment could be legally inflicted on a man for committing such an offense in the presence of the judges sitting in any court within the Province of New York. The reason is obvious. A quarrel or riot in New York can not possibly be attended with those dangerous consequences that it might in Westminster Hall; nor, I hope, will it be alleged that any misbehavior to a governor in The Plantations will, or ought to be, judged of or punished as a like undutifulness would be to our sovereign. From all of which, I hope Mr. Attorney will not think it proper to apply his law cases, to support the cause of his governor, which have only been judged where the king's safety or honor was concerned. ... Numberless are the instances of this kind that might be given to show that what is good law at one time and in one place is not so at another time and in another place.

His arguments might have been well received by jurors, but Hamilton had almost no law to support his position that the truth should be a defense to the charge of libel. Not surprisingly, Chief Justice DeLancey ruled that Hamilton could not present evidence of the truth of the statements contained in Zenger's *Journal*. "The law is clear that you cannot justify a libel," DeLancey announced. "The jury may find that Zenger printed and published those papers, and leave to the Court to judge whether they are libelous."

In response to DeLancey's ruling, Hamilton revealed the true nature of the defense strategy – jury nullification. With the law on his side of the prosecution, Hamilton hoped to convince the jury that the law ought to be ignored and his client acquitted. The jury's power in this regard, he argued, was unquestioned:

> *[Jurors] have the right beyond all dispute to determine both the law and the fact; and where they do not doubt of the law, they ought to do so. Leaving it to judgment of the court whether the words are libelous or not in effect renders juries useless (to say no worse) in many cases. But this I shall have occasion to speak to by and by.*

Hamilton's lengthy summation to the jury still stands as an eloquent defense not just of a German-born printer, but of a free press:

> *It is natural, it is a privilege, I will go farther, it is a right, which all free men claim, that they are entitled to complain when they are hurt. They have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow. ...*
>
> *The loss of liberty, to a generous mind, is worse than death. And yet we know that there have been those in all ages who for the sake of preferment, or some imaginary honor, have freely lent a helping hand to oppress, nay to destroy, their country. ... This is what every man who values freedom ought to consider. He should act by judgment and not by affection or self-interest; for where those prevail, no ties of either country or kindred are regarded; as upon the other hand, the man who loves his country prefers its liberty to all other considerations, well knowing that without liberty life is a misery. ...*
>
> *Power may justly be compared to a great river. While kept within its due bounds it is both beautiful and useful. But when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If, then, this is the nature of power, let us at least do our duty, and like wise men who value freedom use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition the blood of the best men that ever lived. ...*
>
> *I hope to be pardoned, Sir, for my zeal upon this occasion. ...While we pay all due obedience to men in authority we ought at the same time to be upon our guard against power wherever we apprehend that it may affect ourselves or our fellow subjects. ...*
>
> *You see that I labor under the weight of many years, and am bowed down with great infirmities of body. Yet, old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land where my services could be of any use in assisting to quench the flame of prosecutions upon informations, set on foot by the government to deprive a people of the right of remonstrating and complaining, too, of the arbitrary attempts of men in power. ...*
>
> *But to conclude: The question before the Court and you, Gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under a British government on the main[land] of America. It is the best cause. It is the cause of liberty. And I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny, and by an impartial and uncorrupt verdict have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right to liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth.*

Chief Justice DeLancey seemed unsure how to react to Hamilton's eloquence, founded, essentially, in aspects of British common law that permitted ordinary people to have certain privileges and liberties, and theories of "natural law" propounded during the European enlightenment. Finally, he instructed the jury that its duty under the law was clear. There were no facts for it to decide, and it was not to judge the law. DeLancey all but ordered the jury to return a verdict of "Guilty":

> *The great pains Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of judges, and his insisting so much upon the conduct of some judges in trials of this kind, is done no doubt with a*

design that you should take but very little notice of what I might say upon this occasion. I shall therefore only observe to you that as the facts or words in the information are confessed, the only thing that can come in question before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt, and which you may leave to the Court.

The jury withdrew to deliberate. A short time later, it returned. The clerk of the court asked the jury foreman, Thomas Hunt, to state the verdict of the jury. "Not guilty," Hunt answered. There followed "three huzzas" and "shouts of joy" from the crowd of spectators in the courtroom. Chief Justice DeLancey demanded order, even threatening spectators with arrest and imprisonment, but the celebration continued unabated. Defeated, DeLancey "left the courtroom to the jubilant crowd."

Anti-administration supporters hosted a congratulatory dinner for Andrew Hamilton at the Black Horse Tavern. The next day, as Hamilton began his return trip to Philadelphia, a "grand salute of cannon was fired in his honor."

The "Morning Star" of Press Freedom

The Zenger trial established no significant new law and did not, at least for another generation, dramatically reshape notions of press freedom. Yet, Zenger's acquittal signaled, in unmistakable terms, the colonial public's opposition to prosecutions for published criticism of unpopular officials.

Concern about likely jury nullification discouraged similar prosecutions in the decades following the trial. The Zenger case reinforced the tradition in British and colonial American law that jurors had the power, if not the right, to return a verdict of "Not Guilty" – even when they had no reasonable basis for concluding that the defendant was not guilty of the offense charged. To this day, juries may in effect nullify laws that they believe are either immoral or are being wrongfully applied to the defendant whose fate they are charged with deciding. No trial most famously or forcefully illustrates that key principle of jurisprudence better than the 1735 trial; thus, the trial was a milestone in lending an ethical, or political, dimension to American law.

"The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."

The effect of the Zenger trial on American ideas and attitudes towards press freedom is harder to measure. Prior to 1735, published arguments for press freedom took a narrow view that suggested protection for printers, but not necessarily for the authors of controversial comments about officials or public institutions. Benjamin Franklin, for example, in his "Apology for Printers" published in 1731 in the *Pennsylvania Gazette*, contended that a printer is primarily the seller of goods, and as such should no more be blamed for selling a publication that contained some dubious and controversial ideas than a seller of pots and pans should be responsible because some of the goods he stocks are less than perfect. A printer, in Franklin's view, served the public by providing information, and should not be seen as endorsing all, or even most, of the views presented in his publication. If someone was to be blamed for dangerous or malicious ideas, the law should focus on the person whose idea is alleged to be troublesome – not the poor printer who is simply trying to make an honorable living.

James Alexander's arguments went much further than those of Franklin. Cosby's chief tormenter matters to the history of our free press not just because of his role in masterminding the 1735 Zenger trial, but also because he became America's first champion of an abstract theory of press freedom that extended beyond protecting printers. In Zenger's paper, Alexander reprinted "Cato's Letters," a series of essays written by two British journalists that presented a reasoned case for a freer press and, especially, for the principle that truth ought to be a complete defense to a charge of libel. Abusers of power, he contended, "sap the foundation of government." To expose such abuses the law should be modified. "Truth," Alexander argued, "ought to govern the whole affair of libels."

Alexander also promoted the cause of a free press in the public mind by editing and printing in 1736 a famous account of the Zenger trial called "A Brief Narrative of the Case of John Peter Zenger." Naturally, Alexander's trial account served to enhance and perpetuate the reputation of both the printer and the Philadelphia lawyer who defended him. The "Brief Narrative" was reprinted 15 times before the end of the 18th century.

However, in spite of Alexander's personal popularity, the trial he made famous neither established the precedent that truth is a defense to seditious libel, nor

Writers posting their Internet blogs – personal observations – of the Democratic National Convention at FleetCenter in Boston, July 2004. Freedom of expression is now well established in democracies, thanks in part to Zenger.

decisively swung public opinion to a libertarian theory of speech – at least not right away. In the words of free speech scholar Leonard W. Levy, it was a victory for press freedom – like a stagecoach ticket – "good for this day only." With the exception of Zenger's publication, the colonial press remained timid, even when compared to the press of London of the same period. Alexander's essays on press freedom – and he was by no means an absolutist on the question – are among the precious few writings between the period 1735 and the mid-1760s that reflect libertarian thinking on the subject.

In the late 1760s, however, a lively debate about press freedom captured the attention of intellectuals on both sides of the Atlantic. The interest had, as its immediate cause, the policies of the increasingly unpopular King George III. King George's conduct sparked critical comments in the press, together with ever more noisy demands by George's supporters to put a stop to the negative commentary. Looking to history for examples that supported a broader view of the press's role in exposing official abuse, both English and American commentators turned to the famous trial of an earlier generation – the Zenger trial.

Press freedom in America began to blossom. A half-century after the Zenger trial, as members of the First Congress debated the proposed Bill of Rights to the U.S. Constitution and its guarantees of freedom of speech and of the press, the trial would be remembered by one of the Constitution's principal drafters, Gouverneur Morris, the man who wrote the famous words of the Preamble to the Constitution ("We the People of the United States, in order to form a more perfect Union. ..."). The great-grandson of Lewis, Morris wrote of the Zenger case: "The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."

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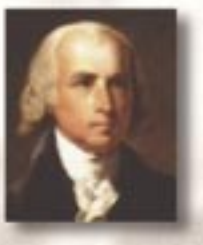
by A.E. Dick Howard

The Constitutional Convention of 1787

ON MAY 15, 1776, THE CONVENTION MEETING IN WILLIAMSBURG AND ACTING AS VIRGINIA'S DE FACTO GOVERNING BODY INSTRUCTED THAT COLONY'S DELEGATES AT THE CONTINENTAL CONGRESS IN PHILADELPHIA TO INTRODUCE A RESOLUTION DECLARING "THE UNITED COLONIES FREE AND INDEPENDENT STATES." THAT DECLARATION OF INDEPENDENCE FROM GREAT BRITAIN, ADOPTED BY THE CONTINENTAL CONGRESS SOON THEREAFTER ON JULY 4, SET THE FORMER COLONIES ON AN IRREVOCABLE COURSE THAT CREATED THE UNITED STATES OF AMERICA. BUT THE CREATION OF THE UNITED STATES OF AMERICA DID NOT OCCUR ALL AT ONCE. ELEVEN YEARS LATER, ANOTHER GROUP OF DELEGATES JOURNEYED TO PHILADELPHIA TO WRITE A CONSTITUTION FOR THE NEW NATION, A CONSTITUTION THAT STILL DEFINES ITS LAW AND CHARACTER.

The brilliant intellect of James Madison (1751-1836) did much to shape the U.S. Constitution.



The road from independence to constitutional government was one of the great journeys in the history of democratic government, a road characterized by experiment, by mistakes, but ultimately producing surely the most influential national constitution ever written. Even before the break with Great Britain, the American colonies saw to the nurturing of their future constitutional culture. The lower houses of the colonial assemblies were the most democratic bodies in the English-speaking world, and dialogue with the mother country sharpened the Americans' sense of constitutional issues. For a decade before the outbreak of revolution, disputes over taxes, trials without juries, and other points of contention led to an outpouring of pamphlets, tracts, and resolutions – all making essentially a constitutional case against British policy.

Declaring independence, the founders of American democracy understood, entailed establishing the intellectual basis for self-government. On the same day that the Williamsburg convention spoke for independence, the delegates set to work on a declaration of rights and on a constitution for Virginia. Virginia's 1776 Declaration of Rights was soon emulated in other states and even influenced France's Declaration of the Rights of Man and the Citizen (1789). The early American state constitutions – every state adopted one – varied in their specifics (for example, some created a unicameral legislature, others opted for bicameralism). But they shared a basic commitment to republican principles, principles that then seemed truly revolutionary in most parts of the world – consent of the governed, limited government, inherent rights, and popular control of government.

Political stability made possible by the Constitution, after the American Revolution, led to the development of a sprawling new nation, starting east of the Mississippi.

These early experiments in republican government carried significant flaws. Recalling their experience as North American colonists with British royal power (including colonial governors and courts), drafters of the initial state constitutions reposed excessive trust in legislatures. Checks and balances among branches of government were more theory than reality. Governors were typically elected by (and thus dependent on) the legislative branches, and judicial power was as yet largely embryonic. Another flaw in the original design was that constitutions were drafted by bodies that also served as legislative bodies, thus blurring the line between fundamental law and ordinary law. However, in 1780 Massachusetts took a great step forward in constitutional design when its people elected a convention to write a constitution which, in turn, was voted on in referendum.

The Articles of Confederation

Even more daunting than adopting state constitutions was the framing of a government for the United States. When Great Britain finally concluded a peace treaty in 1783, letting the American colonies go, the nation was composed of 13 state governments. Early nationalist sentiments soon collided with parochial interests, with suspicions of how central power might be used to the disadvantage of individual states. Drafting of a structure to link the states had begun in 1776, but it was 1778 before the Articles of Confederation were adopted and 1781 before all the states had agreed to that document. Distrust of central power was manifest in Article II, which declared, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

The Articles created a central government that proved feeble and ineffective. In Congress, each state, regardless of population, had an equal vote. The state legislatures were allowed to decide how delegates to Congress were to be appointed, and a state could recall and replace its representatives at any time for whatever reason it chose. Congress lacked the powers essential to accomplishing national policies. It had no taxing power, having to rely instead on the states' willingness to provide funds – and the states often proved unwilling. The vote of nine of the 13 states was required for Congress to exercise its powers, such as

making treaties or borrowing money. Amendments to the Articles required the assent of all the states, giving every state a liberum veto, that is, sufficient veto power to paralyze democratic process. Tiny Rhode Island could thus thwart the will of the other 12 states – as it did in vetoing a proposal to give Congress the power to levy duties on imports.

In particular, commercial rivalries spawned trade discrimination among the states. Landlocked states found themselves at a notable disadvantage, dependent upon states with good seaports. James Madison likened New Jersey, situated between New York and Philadelphia, to "a cask tapped at both ends," and North Carolina, between the deep harbors of Hampton Roads and Charleston, to "a patient bleeding at both arms." The feebleness of the central government was further highlighted by the lack of executive or judicial power to deal with domestic disorder. For example, beginning in 1786, during a period of economic depression, mobs of impoverished farmers in western Massachusetts prevented the courts from functioning and ordering foreclosures. Daniel Shays, a farmer and former revolutionary officer, led a force attempting to seize the arsenal at Springfield but was repulsed. In general, perhaps no flaw in the Articles was as glaring as the inability of the central government to act directly upon individuals, rather than hope for the states to act.

Signed in 1787, the Constitution of the United States helped create modern democracies worldwide.

In 1785,Virginia and Maryland appointed commissioners to settle disputes over uses of the Chesapeake Bay and its tributary rivers. These delegates then called for the states to be invited to discuss whether a more "uniform system" of trade regulation might be in their "common interest." Congress responded by calling a meeting at Annapolis in 1786. Only five states attended that meeting, and its members recommended that there should be a constitutional convention in Philadelphia to consider what should be done "to render the constitution of the federal government adequate to the exigencies of the Union. ..." Virginia took the lead in appointing a delegation, and other states followed suit, forcing Congress's hand. Finally, in February 1787, Congress endorsed the calling of a convention. Significantly, however, Congress's resolution said that the convention should assemble "for the sole and express purpose of revising the Articles of Confederation" and reporting to Congress revisions which would become effective only when agreed to in Congress and confirmed by the states.

James Madison and the Virginia Plan

In spite of the innate conservatism of the states, however, once assembled, the convention proved decisive. A remarkable group of 55 men assembled in Philadelphia in May 1787. Their grasp of issues had been honed by wide experience in public life – over half had served in Congress, seven had been state governors, and a number had been involved in writing state constitutions. George Washington, the general from Virginia who had led the war against the British, brought special prestige to the gathering when he agreed to serve as its presiding officer. Other notables included Alexander Hamilton (New York), Benjamin Franklin (Pennsylvania), and James Wilson (Pennsylvania). Perhaps the most conspicuous absence was Thomas Jefferson, who had drafted the Declaration of Independence but who was now serving as the United States' minister to Paris.

It soon became apparent that the most important and respected voice at the convention was that of James Madison, of Virginia. Active in Virginia politics, Madison had acquired a national reputation as a member of the Continental Congress, where he was instrumental in bringing about Virginia's cession of its claim to western territories, creating a national domain. Madison became increasingly convinced that the liberty of Americans depended on the Union's being sufficiently strong to defend them from foreign predators and, at home, to offset the excesses of popular government in the individual states. No one came to Philadelphia better prepared. He had taken the lead in seeing that the nation's best talent was at the convention. Moreover, in the weeks before the meeting, he had read deeply in the experiences of ancient and modern confederacies and had written a memorandum on the "Vices of the Political System of the United States." First to arrive in Philadelphia, Madison