Commercial Speech and the History of the First Amendment: Just What Were Those Founders Thinking?

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Table of Contents

I. Introduction: “Commercial Speech” and the Originalist Narrative ................................. 2
II. The Problem of Historical Anachronism ........................................................................ 7
III. Colonial America’s Freedom of Speech and Press Heritage .......................................... 8
    A. Early Influences: John Milton ................................................................................. 10
    B. Benjamin Franklin: Colonial Printer ....................................................................... 11
    C. The Mid-Eighteenth Century: Voices that Influenced the Founding Generation .... 13
IV. The New Constitution and the Birth of the First Amendment ........................................ 22
    A. Understanding the Political Landscape: Federalists and Anti-Federalists ............ 22
    B. The Author of the First Amendment: James Madison’s Influence ....................... 24
V. The First Amendment: Just What Were Those Founders Thinking? .............................. 27
VI. Conclusion ................................................................................................................... 29

Abstract:

In the battle over government regulation of advertising, the originalist narrative has emerged as a potent argument. This narrative claims that governmental attempts to regulate advertising violate the First Amendment and fly in the face of the original intent of the founders of our nation. This narrative has been cited by influential figures, including Supreme Court Justice Clarence Thomas, in an effort to delegitimize governmental regulation of advertising. It adds a difficult-to-penetrate sheen of protection to commercial speech—the original intent of the founders and authors of the First Amendment.

There is just one problem with this argument. As a historical matter, it is dead wrong. From John Milton to Benjamin Franklin to James Madison, this piece examines the writings of the influential colonial and early American figures relied upon by proponents of the narrative. The originalist narrative’s historical analysis fails at every turn, because it is anachronistic, omits crucial historical context, and fails to understand the nuances of eighteenth-century views on freedom of speech and press. Careful historical analysis shows that the founders held political and religious speech, not commercial speech, at the core of the values that the First Amendment was designed to protect. This piece concludes that courts should analyze government regulation of advertising on the legal merits and not based on the historically inaccurate belief that commercial speech was central to the original intent of the First Amendment.

1 J.D. Candidate May 2011, UC Berkeley, School of Law. I would like to thank Professor Ted Mermin for his ideas, and encouragement, and Professor Jesse Choper for his help in editing this article.
I. Introduction: “Commercial Speech” and the Originalist Narrative

In our increasingly consumer-driven economy, advertisements can seem ubiquitous. While billboards, commercials, and online pop-ups tout the hottest new trends and latest technology, a battle over government regulation of advertising rages behind the scenes. One of the increasingly prominent arguments in this battle harkens back more than 200 years to the founding of our nation and the adoption of the First Amendment.

One side seeks to invalidate any legal distinction between advertising or other sales-based communications and speech that receives full First Amendment protection—such as political speech—in order to render most governmental attempts to regulate advertising violations of the First Amendment. An influential argument supporting this movement is the originalist narrative, which claims that the First Amendment has always protected commercial speech. This argument has been cited by some and relied upon by others. There is only one problem with it—as an historical matter, it is dead wrong.

The originalist narrative attempts to de-legitimize government regulation of advertising or sales-based communication and has been cited by Justice Clarence Thomas of the United States Supreme Court as well as former Justice Stanley Mosk of the California Supreme Court. Both jurists base their conclusion that the Founders intended the First Amendment to fully protect “commercial speech” on an article and amicus brief co-authored by Daniel E. Troy on behalf of the American Advertising Federation, American Association of Advertising Agencies, Magazine Publishers of America, and Direct Marketing Association.  

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2 Daniel E. Troy is currently the Senior Vice President & General Counsel of pharmaceutical and healthcare company GlaxoSmithKline and formerly the Chief Counsel of the FDA under President Bush. He wrote Advertising: Not “Low Value” Speech, 16 YALE J. ON REG. 85, 94 (1999). He also co-authored an amicus brief summarizing the historical evidence presented in his article filed on behalf of the American Advertising Federation, American Association of Advertising Agencies, Magazine Publishers of America, and Direct Marketing.
Close examination of Troy’s evidence as well as the historical development of freedom of speech and press in eighteenth century America reveals that trying to justify “commercial speech” protection on the basis of the Founders’ intent is a foolish exercise. While it is difficult to prove a negative fact, an examination of many examples of founding-era discussions of Freedom of Speech and Freedom of Press reveal no evidence that the Founders ever had protection of commercial speech in mind.

First Amendment protection for advertising and other sales-based communication (so called “commercial speech”) largely did not exist prior to the mid-1970s. In a typical earlier case, *Valentine v. Chrestensen*, the Court heard a First Amendment challenge to a state sanitary ordinance forbidding the distribution of commercial handbills or advertisements but allowing the distribution of materials “solely devoted to ‘information or a public protest.’” In a decision upholding the ordinance, the Court never conceptualized advertising as speech. Rather, prior to the mid-1970s, the Court viewed advertising as “a business activity, not as a means of expression.” As the evidence will reveal, the Founders, like the *Valentine* Court, did not view advertising as speech, and it would not have made conceptual sense to discuss advertising as speech in the Eighteenth century.

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4 Id. at 53. *See also* Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973) (“The critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court’s view, it did not more than propose a commercial transaction, the sale of admission to a submarine.”); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (“The Court in *Chrestensen* reaffirmed the constitutional protection for ‘the freedom of communicating information and disseminating opinion’; its holding was based upon the factual conclusions that the handbill was ‘purely commercial advertising’ and that the protest against official action had been added only to evade the ordinance.”).
In 1976, the Supreme Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.* In this case, the Court held that the First Amendment protected the right of pharmacists to advertise price information and the right of consumers to have access to certain commercial information. A few years later, in *Central Hudson Gas & Electric Corp v. Public Service Commission,* the Court outlined a test for protection of “commercial speech” such as advertising. *Central Hudson* subjects truthful, non-misleading commercial speech to a four factor test that weights the state interest in regulation against the speech interest. The *Central Hudson* test continues to be used by the Court in commercial speech cases, even though a substantial number of justices have advocated abandoning the test. One of the arguments against the more lenient “intermediate scrutiny” afforded by *Central Hudson* and in favor of the “strict scrutiny” accorded restrictions on political or artistic speech is the originalist narrative. This argument asserts that any distinction between commercial speech (such as a Pepsi advertisement) and non-commercial speech (such as a newspaper editorial) flies in the face of the intent of the founders, because the distinction results in less stringent protection for commercial speech.

The originalist narrative appears in judicial decisions at the highest levels. Justice Thomas has stated in multiple concurrences that he sees no reason for a distinction between commercial and non-commercial speech, and he advocates applying strict scrutiny to most

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7 *Id.* In Bigelow v. Va., 421 U.S. 809 (1975), the Court found that a Virginia statute, which prohibited advertisements of abortion services, was unconstitutional as applied. However, *Virginia Pharmacy* was the first case to find a generally applicable First Amendment protection for advertisements.
9 Under *Central Hudson,* the government may regulate false or misleading commercial speech or commercial speech proposing unlawful activity without implicating the First Amendment. *Central Hudson,* 447 U.S. at 565. However, if the advertisement provides only truthful information about a lawful activity, then the speech may be regulated only if the government fulfills three criteria. First, the government must show a “substantial interest in support of its regulation.” *Id.* at 564. Second, the governmental regulation must directly and materially advance the state interest. *Id.* Third, the regulation must not be more extensive than necessary to serve the government’s interest. *Id.*
11 Troy, *supra* note 2, at 89.
regulation of commercial speech. In a concurring opinion in *Liquormart v. Rhode Island*, Thomas wrote: “I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.” In support of his conclusion, Thomas cited Benjamin Franklin’s “Apology for Printers” as well as the American Advertising Federation’s *amicus* brief in *Liquormart* co-authored by Troy. In a concurring opinion in *Lorillard Tobacco Co. v. Reilly*, in which the Supreme Court struck down provisions of a Massachusetts law restricting tobacco advertising on the grounds that the regulations failed to pass the *Central Hudson* test, Thomas again used the originalist narrative, contenting that no defensible line can be drawn between commercial and noncommercial speech. In a 2002 decision, *Thompson v. Western States Medical Center*, the Supreme Court found unconstitutional certain provisions of the Food and Drug Administration Modernization Act that prohibited the advertising of compounded drugs. Justice Thomas wrote a very brief concurrence in which he cited his statements from *Liquormart* confirming his commitment to the originalist narrative. Far from being settled Supreme Court jurisprudence, the issue of the proper level of protection for commercial speech is in flux and likely soon to come to a head. Nearly a decade has passed since the Court’s decision in *Thompson*, and a challenge to recently enacted federal laws restricting tobacco advertising, very similar to the Massachusetts regulations stuck down in *Lorillard*, is currently pending in the federal court of appeals.

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13 Id.
14 *Lorillard*, 533 U.S. at 575 (Thomas, J. concurring).
16 Id. at 360.
17 *Liquormart*, 517 U.S. at 523.
The California Supreme Court also relied upon the originalist narrative in Justice Mosk’s majority opinion in *Gerawan Farming v. Lyons (Gerawan I).* Justice Mosk’s opinion for the majority in *Gerawan I* found that the freedom of speech clause of the California Constitution protected plum growers from having to participate in a government-sponsored generic advertising campaign. Justice Mosk cited directly to the article written by Troy in support of the assertion that “American courts had similarly kept commercial speech free from regulation by common law, except as to messages that were false or misleading in their particulars.”

Continuing to cite Troy, Justice Mosk wrote: “Since colonial times, commercial speech, operating through advertising . . . was ‘thought to have independent value in educating and informing the reading public.’”

Justice Mosk’s use of the originalist narrative parallels that of Justice Thomas in *44 Liquormart* and *Lorillard.* Both jurists use it to create doubt as to the justification for any regulations that treat advertising differently than political, religious, or other speech.

Instead of viewing commercial speech as an area that has recently acquired some degree of First Amendment protection, the originalist narrative positions commercial speech as a category of speech that has recently been wrongly stripped of its historical importance and historical entitlement to protection. The argument seeks to change the lens through which courts view commercial speech. Where courts might have begun from the assumption that First Amendment protection for commercial speech must be justified on its own merits, the originalist narrative moves the starting place for the discussion, because it adds a difficult-to-penetrate sheen of protection to commercial speech—the original intent of the Framers of the First

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20 *Id.* at 494.

21 *Id.* (quoting Troy, *Advertising,* supra note 1, at 100).
Amendment. Thus it is important to examine the basis for the originalist narrative in order to determine whether its historical claims pass muster.

This article will examine the historical support for the assumptions underlying Troy’s originalist thesis: (1) that the framers embraced a shared consensus concerning what freedom of speech and press meant and (2) that advertising was part of the framer’s intent and understanding of the meaning of freedom of speech and the press. Ultimately, careful examination reveals that the supposed historical evidence marshaled in support of the originalist narrative either mis-reads the relevant history or is altogether absent.

II. The Problem of Historical Anachronism

In writing about history, historians recognize that it is important to avoid representing an idea in a way that is “not consistent with its proper historical time” and that ideas commonly used today may not have been considered or may have been understood differently during the relevant time period. In the interest of historical accuracy, it is important to acknowledge anachronisms and offer explanation in order to avoid confusing modern assumptions with the historically contemporary view. Yet in his article which provides the basis for the amicus brief cited by Justice Thomas in 44 Liquormart, Troy repeatedly uses two phrases which are anachronistic with respect to the eighteenth century and warrant discussion: “freedom of expression” and “commercial speech.”

Troy uses the term “freedom of expression” in his article to imply that the eighteenth-century figures situated freedom of the press and speech within a broader context—that they

22 MARY LYNN RAMPOLLA, A POCKET GUIDE TO WRITING IN HISTORY 44 (3d ed. 2001).
23 44 Liquormart, 517 U.S. at 522 (Thomas, J. concurring).
24 Troy, supra note 2, at 94, 102 (using the term “freedom of expression” in an anachronistic context). Troy’s use of the term “commercial speech” is too numerous to individually cite every example.
were part of a conceptual bundle of rights that made up “freedom of expression.”\textsuperscript{25} However, “to use a concept in the belief that it is self-evident is to risk an implicit anachronism,”\textsuperscript{26} and Troy’s use of “freedom of expression” to mean “the notion of an interrelated complex of protections for thought, belief, and expression” takes a modern concept and attempts to apply it to the eighteenth century.\textsuperscript{27} The fact that the First Amendment includes several different rights (speech, press, religion, assembly) in its text does not mean that the Framers viewed these rights as a cohesive group furthering the goal of individual freedom. Rather, they constituted “specific solutions to concrete grievances” and only later did an idea of a related group of rights constituting “freedom of expression” evolve.\textsuperscript{28}

The term “commercial speech” is also anachronistic for this era. Modern First Amendment jurisprudence uses the term “commercial speech” to refer to advertising and other speech that proposes or concerns a commercial transaction. The term “commercial speech” first appeared in a published court opinion in 1971.\textsuperscript{29} Prior to 1971, activities such as “advertising” or “soliciting and canvassing” connoted business activities, and lawyers and judges did not generally regard them as speech activities.\textsuperscript{30} Chief Judge Alex Kozinski of the 9th Circuit, himself an opponent of any distinction between commercial speech and speech core to the First Amendment like political speech, argues that advertising was conceptualized as a business activity, not speech, and that this explains why the Supreme Court gave so little thought to the

\begin{itemize}
  \item \textsuperscript{25} See Troy, \textit{supra} note 2, at 94, 102 (“Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights . . .” (“The opposition of newspapers to the Stamp Act of 1765 was based largely, if not primarily, on their concern that it encroached on the freedom of expression.”)).
  \item \textsuperscript{26} \textsc{Paul Veyne}, \textit{Writing History: Essay on Epistemology} 138 (Mina Moore-Rinvolucri trans., 1984).
  \item \textsuperscript{27} David A. Anderson, \textit{The Origins of the Press Clause}, 30 UCLA L. REV. UCLA 455, 488 (1983).
  \item \textsuperscript{28} Id.
  \item \textsuperscript{30} Kozinski & Banner, \textit{Anti-History, supra} note 5, at 757.
\end{itemize}
First Amendment implications of pre-1970s advertising cases.\textsuperscript{31} Although this Article uses the term “commercial speech” for the purposes of consistency, colonial Americans would have thought about this activity as advertising, as would most Americans today. The historical documents show that, like the pre-1970s Supreme Court, the Framers considered advertising a business activity rather than speech. With this analytical framework in mind, this Article now turns to the colonial and early American history that informs the critique of the originalist narrative.

III. Colonial America’s Freedom of Speech and Press Heritage

The American colonial concept of freedom of speech and the press was shaped by England’s seventeenth-century struggles to define the extent of press freedom. In England during the 1600s, those wishing to publish faced both the obstacle of licensing and the threat of seditious libel\textsuperscript{32} prosecution.\textsuperscript{33} Until the expiration of the Licensing Acts in 1694, the government controlled printing with a heavy hand. In 1606, the Court of the Star-Chamber limited the number of presses and prohibited the printing of any new publications without a license.\textsuperscript{34} These restrictions continued largely unabated until 1694 and were imported to the American colonies. All colonial governors received instructions from the king directing them to carefully control the press: “you are to provide by all necessary orders, that no person keep any press for printing; nor that any book, pamphlet, or other matters whatsoever, be printed without

\textsuperscript{31} Id. at 758.
\textsuperscript{32} Seditious libel was a criminal offense under English common law consisting of (1) the publication (2) of defamatory material against an individual in the government or against the Crown with (3) a rebuttable presumption that the defendant possessed knowledge and malice. Truth was not a defense to seditious libel under common law. Philip Hamburger, The Development of the Law of Seditious Libel and the Control of the Press, 37 STAN. L. REV. 661, 700-08, 712 (1985).
\textsuperscript{33} JUHANI RUDANKO, JAMES MADISON AND FREEDOM OF SPEECH 9 (2004) [hereinafter RUDANKO, JAMES MADISON].
\textsuperscript{34} Id.
your especial leave and license first obtained.”35 It was against this background of both licensing and threat the of libel prosecutions that early defenders of freedom of the press developed the arguments and intellectual frame of free speech and press discourse during the colonial era.

A. Early Influences: John Milton

In response to the Licensing Act of 1643, which required printers to obtain a license prior to publishing anything new, John Milton wrote Areopagitica, perhaps the “mother document of Anglo-American free-press theory.”36 Areopagitica lay the groundwork for the understanding of freedom of the press that would persist through the colonial and revolutionary generations. Milton makes a stirring case against licensing of printers and the resulting suppression of new publications: “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 knowledge in the land, to mark and license it like our broad-cloth and our woolpacks.”37 Despite Milton’s rhetoric, he took pains to clarify that not all subjects are fair game and that the expression of some ideas should not go without punishment. “I mean not tolerated popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely either against faith or manners no law can possibly permit.”38 This apparent contradiction between a professed desire for the free flow of truth, which sounds familiar to modern readers, and a heavy qualification of that desire is common among English and colonial defenders of freedom of speech and press.39 As Milton

37 Id. at 35-36.
38 Id. at 38.
39 See, e.g., infra text accompanying note 53.
illustrates, when intellectuals of this era spoke of freedom of speech and press, they meant something far from absolute, unfettered freedom.

B. Benjamin Franklin: Colonial Printer

By the 1700s, licensing was largely a thing of the past, but the memory of prior restraint still informed the debate over press freedom. Among the most famous writings on freedom of the press in the early 1700s is Benjamin Franklin’s “An Apology for the Printers.” Franklin, who went on to become a prolific inventor, America’s ambassador to France, and a member of the Philadelphia Convention of 1787, got his start as an apprentice printer working for his brother, James, who owned the New England Courant. The “Apology” stems from an incident in 1731 in which Franklin published an advertising circular for a passenger ship that contained language offensive to the church. The text of the advertisement read: “N.B. No Sea Hens nor Black Gowns will be admitted on any Terms.” “Sea Hens” referred to prostitutes and “Black Gowns” to the clergy. In response to public outcry over the offensive language, Franklin wrote the “Apology.” In it, he humorously proposes that “I have sometimes thought it might be necessary to make a standing Apology for my self, and publish it once a Year, to be read upon all Occasions of that Nature.”

Franklin defended printing as a business and defended advertising to the extent that it was an integral part of his business model. For example, in the second of the Apology’s “particulars” Franklin states: “That the Business of Printing has chiefly to do with Mens opinions; most things that are printed tending to promote some, or oppose others.” In the third, he continues:

40 FREEDOM OF THE PRESS, supra note 36, at 40. In 1729 at the age of 23, Franklin bought the Pennsylvania Gazette and realized his dream of being a printer. Id.
41 BENJAMIN FRANKLIN, AN APOLOGY FOR THE PRINTERS, reprinted in FREEDOM OF THE PRESS, supra note 36, at 41.
That hence arises the peculiar Unhappiness of that Business, which other Callings are no way liable to; they who follow Printing being scarce able to do anything in their way of getting a Living, which shall not probably give Offence to some, and perhaps to many; whereas the Smith, the Shoemaker, the Carpenter, or the Man of any other Trade, may work indifferently for People of all Persuasions.42

Taken together, these statements begin to paint a picture of Franklin’s concept of his role as printer. He is in the business to make a living, and that necessarily entails printing things that excite people. It is in his business interest to be able to print free of regulation. However, he does not argue that a free press means that advertisers may write anything they desire, only that printers should be able to print what is brought to them without fear of punishment or reprisal.

Defending himself against the backlash that resulted from the offensive advertisement, Franklin emphasizes the indifference of the printer as to what he publishes: “Printers naturally acquire a vast Unconcernedness as to the right or wrong Opinions contain’d in what they print; regarding it only as the Matter of their daily labour.”43 This last statement brings together two important issues running through the “Apology.” First, that Franklin’s argument in favor of press freedom means the freedom to publish ads for profit, not necessarily the freedom of advertisers to print any content. Second, to the extent that Franklin’s defense touches on the right of people to their opinions, he couches it in terms of “right or wrong Opinions” not of advertisement copy or commercial statements. Thus, he sees the scuffle over the offensive language in the advertising circular as a difference of political or religious opinion and not as a debate about whether advertisers should be able to publish specific content. Franklin paints himself as just the messenger and subtly re-directs the public’s anger back to those who wrote the advertisement.

42 Id.
43 Id. at 42.
Troy relies heavily on Franklin’s “Apology” to support his argument that commerce was central to the understanding of freedom of the press in colonial America. Franklin’s “Apology,” however, is far from a dramatic endorsement of commercial speech. Instead, the “Apology” defends advertising as a business activity; it does not explicitly defend the content or the right of an advertiser to publish particular content.

C. The Mid-Eighteenth Century: Voices that Influenced the Founding Generation

Franklin’s “Apology” was far from the only influential writing on freedom of speech and press circulating during the colonial period. During the mid-eighteenth century, the writings of Cato, the reporting surrounding the Zenger trial, and Sir William Blackstone’s *Commentaries* all contributed to the colonial debate on freedom of the press.

From the 1720s-1750s, letters written under the pseudonym of Cato were the “most popular, quotable, esteemed source of political ideas in the colonial period.” Cato, in reality Englishmen John Trenchard and Thomas Gordon, criticized the monarchy and advocated fundamental liberties. Through letters published in the colonies from the 1720s through the 1750s, Cato argued for expanded freedom of the press. Cato situated freedom of the press as fundamental to liberty: “The Loss of Liberty in general would soon follow the Suppression of the Liberty of the Press; for as it is an essential Branch of Liberty, so perhaps it is the best Preservation of the whole.” As Cato explains it, freedom of the press is fundamental to the English Constitution precisely because of its ability to keep government in check: “[The] advantage therefore of Exposing the exorbitant Crimes of wicked Ministers under a limited

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44 Troy, supra note 2, at 100-01.  
45 MARTIN, supra note 35, at 45.  
Monarchy makes the Liberty of the Press not only consistent with, but a necessary Part of, the Constitution itself."  

Legal historian David A. Anderson explains that, in Cato’s time, “liberty” had a more narrow and specific meaning than it does today. “Liberty in eighteenth century America, meant political liberty; it was not a guarantee of personal autonomy or self-fulfillment. Cato touted freedom of speech, not for its own sake, but for its value in combating governmental oppression and tyranny.”  

Cato advocated a particularly expansive vision of freedom of the press, where truth would prevail and no restraint would be tolerated. However, that freedom extended primarily to political discourse.

Troy places considerable weight on writings by Cato and others that discuss the importance of liberty of property. Describing what Troy calls Cato’s view of “freedom of expression,” he quotes Cato in support of the “importance of free speech and its inextricable link with property rights”: “This sacred privilege is so essential to free government, that the security of property; and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own.”  

Troy’s use of the anachronistic term masks the fact that eighteenth century thinkers would have considered these rights as separate, not part of a “freedom of expression” bundle. With this in mind, Cato’s point makes more sense. Rather than suggesting that freedom of speech is indivisible from or conceptually tied to liberty of property, he is emphasizing that protection of both rights is necessary for freedom under a government—that speech rights are no less necessary for true freedom than property rights.

While Cato’s expansive vision influenced colonial thinkers, the Zenger trial demonstrates that even those influenced by Cato did not themselves define press freedom so broadly. In 1735,

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47 *Id.* at 48.
49 Troy, *supra* note *Error! Bookmark not defined.*, at 94.
after spending eight months in jail, John Peter Zenger was acquitted of seditious libel—the beneficiary of jury nullification. While the circumstances surrounding the prosecution amount to political wrangling between the colonial governor of New York, William Cosby, and his rival, Chief Justice Lewis Morris, the writings defending Zenger, published during the trial, demonstrate the state of progressive colonial discourse on freedom of speech and the press and helped to firmly establish truth as a defense to seditious libel in the colonies.

In 1733, the New-York Gazette, run by William Bradford, who received a salary from the colonial government headed by Governor Cosby. James Alexander, part of the Morris faction, recruited Zenger and his New York-based Journal to print tracts critical of the government, which were influenced by Cato’s critiques of the monarchy. Under the common law definition of seditious libel, any “reflections” on the government or governmental officers were illegal, and truth was not a defense. According to then contemporary thought, rumors or libelous statements against the government were more potent than poison and more destructive than swords. Truth could not serve as a defense, because the statements would be even more damaging should they prove true. The law notwithstanding, Cosby’s officials were unable to get a grand jury indictment of Zenger and eventually used tyrannical tactics to put him on trial without an indictment.

While Zenger sat in jail awaiting trial, debates about freedom of the press raged around him. In Philadelphia, rival printer, Andrew Bradford, published a powerful essay on press freedom that has been called “one of the very few well-reasoned statements on the liberty of the

50 FREEDOM OF THE PRESS, supra note 36, at 57.
51 MARTIN, supra note 35, at 47-48; FREEDOM OF THE PRESS, supra note 36, at 57.
52 MARTIN, supra note 35, at 48.
53 Id. at 48; FREEDOM OF THE PRESS, supra note 36, at 46-47.
54 MARTIN, supra note 35, at 48.
55 Id. at 50.
56 Id.
57 Id. at 49.
press made by an American of the colonial period.” In his “Sentiments on the Liberty of the Press” Bradford, like Milton before him, makes clear that freedom of the press does not mean complete freedom. In his defense of liberty of the press, Bradford begins by cautioning the reader: “By the Liberty of the Press then, I am far from understanding, (as I hope every Englishman is) a treasonable Licence, of calling into Question his most Sacred Majesty’s undoubtedly Title.” After describing a hypothetical situation in which citizens would need to exercise the freedom of the press to tell a dishonest governor that “Such a conduct did not become him,” Bradford goes on to describe what he does mean by liberty of the press. First, he means freedom to discuss religion and government: “But, by the Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious.” Second, he means the freedom to expose bad politicians: “I mean a Liberty of detecting the wicked and destructive Measures of certain Politicians; of dragging Villany out of it’s obscure lurking Holes, and exposing it in it’s full Deformity to open Day.” Third, he means the freedom to address grievances: he writes of “attacking Wickedness in high Places, of disintangling the intricate Folds of a wicked and corrupt Administration, and pleading freely for a Redress of Grievances.” In essence, he means “a Liberty of examining the great Articles of our Faith, by the Lights of Scripture and Reason, a Privilege derived to us in it’s fullest Latitude, from our most excellent Charter.” Bradford artfully explains his conception of freedom of the press as it pertains to the rights of a free people, but in this carefully constructed and well-written

59 Id. at 52.
61 Id. at 55.
description of freedom of the press, Bradford does not mention or even allude to commerce or advertising as an essential component of freedom of the press in the colonial era.

No discussion of speech and press discourse in colonial America would be complete without including the work of Sir William Blackstone, the renowned British legal thinker. Troy uses Blackstone to show that fraud, libel, and solicitation were not protected in colonial America, but he fails to explore Blackstone’s free speech and press theories or the extent of their influence in America. However, Blackstone did not stand for broad freedom of speech; he believed that freedom of speech only meant freedom from prior restraint.

First published between 1765 and 1769, Blackstone’s Commentaries on the Law of England explained the legal boundaries of freedom of the press. “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.”

Blackstone believed: “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 consequences of his own temerity.”

Blackstone found prior restraint, and licensing in particular, most offensive to liberty, because it subjected “all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points on learning, religion, and government.” While Cato argued that the truth would prevail, Blackstone maintained that holding people responsible for their speech after the fact actually protected freedom of the press:

the only plausible argument heretofore used for restraining the just freedom of the press . . . will entirely lose its force, when it is shewn (by a seasonable exertion of the laws) that

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62 Troy, supra note 2, at 106.
63 Id.
65 Id.
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.  

Fundamental to press freedom, in Blackstone’s opinion, was a limit on that very freedom. Without the ability to censure people for their speech after the fact, Blackstone worried that arguments in favor of prior restraint would gain favor and England would return to a system of press licensing. Additionally, Blackstone rejected truth as a defense to libel, because he saw the crime of seditious libel as about provocation rather than truth or falsity.

Blackstone’s Commentaries were both widely influential and controversial in colonial America. His views on freedom of speech and press—that truth was not a defense to seditious libel and that freedom from prior restraint was enough—put him at odds with Hilton, Bradford, and others. Furthermore, Blackstone’s restrictive position fails to bolster Troy’s argument concerning freedom of commercial speech. Troy asserts that Blackstone’s Commentaries confirms that the First Amendment was “adopted against the background of a venerable common law tradition prohibiting commercial misrepresentation,” which then left room for protection of accurate commercial speech. However, Blackstone’s actual views on speech favored restrictions, and Troy’s attempt to use Blackstone to marshal support for his argument that thinkers from the colonial era believed in protection of commercial speech is not supported by the historical evidence.

66 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, reprinted in FREEDOM OF SPEECH, supra note 64, at 24.
67 MARTIN, supra note 35, at 68-70.
68 Troy, supra note Error! Bookmark not defined., at 106-7 ("In the words of Sir William Blackstone, ‘[E]very kind of fraud is equally cognizable . . . in a court of law.’ Thus, false or misleading commercial speech is clearly not entitled to First Amendment protection.").
D. Attack on Colonial Publishing: The British Stamp Act of 1765

In 1764 and 1765, the British government, seeking to relieve the burden on British taxpayers and offset military costs, levied first the Sugar Act and then the Stamp Act on the American colonists. The colonial reaction to these taxes illuminates thinking on freedom of speech and press in the pre-Revolutionary period. The effect of the first tax, the Sugar Act of 1764, was limited to merchants, but the Stamp Act, which taxed any transaction involving official paper, affected virtually all colonists, including merchants, lawyers, farmers and of course, printers.69 The far-reaching nature of the tax “brought everyone from north to south together in common resentment, giving unity of feeling to thirteen colonies that never before had occasion to think of themselves as one.”70

The Stamp Act jeopardized the ability of newspapers and printers to earn a living and galvanized opposition to the British government—as illustrated by the cry “no taxation without representation.” Many colonists believed that the new taxes, imposed without the input of individual colonial governments, violated the basic compact that the colonists had with the crown as well as their rights as British subjects. A Bostonian wrote to his friend that the Stamp Act “is universally esteemed here as arbitrary and unconstitutional, and as a breach of charter and compact between K[ing] and subject; and we think we have a right to refuse submission to it.”71 These concerns drove many in the colonies to openly question the authority of the government to enact the tax. Lieutenant Governor Cadwallader Colden wrote to H.S. Conway, secretary of state for the colonies, reporting that newspapers had been “filled with every falsehood . . . At first they only denied the authority of Parliament to lay internal Taxes in the Colonies,

69 E.P. Richardson, Stamp Act Cartoons in the Colonies, 96 THE PA. MAG. OF HIST. AND BIOGRAPHY 275, 276 (1972).
70 Id.
but at last they have denied the Legislative Authority of the Parliament in the Colonies, and these Papers continue to be published.”

Perhaps the oddest of Troy’s arguments is his characterization of newspaper and printer opposition to the British Stamp Act of 1765 as “based largely, if not primarily, on their concern that it encroached on the freedom of expression.” Even Troy’s evidence contradicts his theory and instead confirms the well-established view that colonists saw the Stamp Act as an unfair and draconian imposition by the far-away Crown that threatened the livelihoods of everyone whose business involved transactions using paper. Arguing that opposition stemmed from concern over “freedom of expression,” Troy cites the extreme cost of the Stamp Act Tax relative to the profit margin of the average printer (2 shillings tax on each advertisement relative to the 3 to 5 shillings that newspapers received from advertisers). On the contrary, opposition to the Stamp Act stemmed from the economic burden it imposed rather than ideas concerning advertisers’ rights of expression. While the effects of the Stamp Act reached far and wide, it especially impacted colonial printers. The Act taxed everything from newspapers to almanacs to legal documents, and it placed special taxes on documents printed in languages other than English as well as on the printing of advertisements. Printers worried about the concrete problem of making a living, not about an abstract right to freedom of expression.

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73 Troy, supra note Error! Bookmark not defined., at 102.
74 See, e.g., J.A. Leo Lemay, John Mercer and the Stamp Act in Virginia, 1764-1765, 91 VA. MAG. OF HIST. AND BIOGRAPHY 3 (1983); Reid, supra note 71, at 21-22; Richardson, supra note 69.
75 Troy, supra note 2, at 101-02. In addition, Troy quotes the slogans of several newspapers that operated in open defiance of the Stamp Act. Connecticut Gazette wrote: “[t]he press is the test of truth, the bulwark of public safety, the guardian of freedom, and the people ought not to sacrifice it.” The New York Gazette or Weekly Post-Boy adopted the motto: “The United Voice of all His Majesty’s free and loyal subjects in America—LIBERTY, PROPERTY, and no STAMPS.” This sampling of newspaper quotes decrying the Stamp Act shows the economic pressure that the tax placed on newspapers as well as the newspapers’ desire to publish, but it does not suggest that advertising content was viewed as part of the freedom of the press. However, Troy’s response to this evidence is to conclude that that opposition to the Stamp Act was primarily because it affected commercial speech. Id.
76 Schlesinger, supra note 72, at 66.
77 Id. at 67.
The repeal of the Stamp Act in 1766 marked a victory for newspapers, because it freed them from a tax that made it nearly impossible to run a viable business, and advertisers, because it enabled newspapers to continue to use advertising revenue as a means of support. However, the repeal of the Stamp Act did not, as Troy suggests, mean that newspapers believed themselves to have a “freedom of expression” interest in the content of the advertisements that they published, only that they had a business interest in being able to function without a debilitating tax. Troy asserts that the repeal of the Stamp Act was “a powerful victory for an independent press and for advertising.” This is true. The repeal removed a major obstacle to a continuing vibrant and economically viable press in colonial America, but the rhetoric surrounding the opposition to the Stamp Act does not support the inclusion of commercial speech in the colonial vision of a free press.

In part as a result of their Stamp Act victory and their defiance of the tax, printers gained a new sense of importance as “makers and molders of opinion.” Newspaper emerged with an elevated status that would carry through the revolutionary era, but, contrary to Troy’s argument, the Stamp Act victory had little to do with a fight over advertising content. The restrictions on newspapers were met with passionate opinion pieces and calls to political and legal action that helped transform colonial newspapers into shapers of public opinion. This transformation had, at its root, everything to do with the galvanizing reaction against an unjust tax that threatened their ability to exist, rather than with the content of the advertisements they carried. In other words, the printers did not defeat the Stamp Act so that they could more freely disseminate the content of their advertisements. Newspapers helped defeat the Stamp Act so that they could continue printing news and opinion and have the advertising revenue necessary to support their printing.

78 Id. at 81.
IV. The New Constitution and the Birth of the First Amendment

While colonial understandings of freedom of speech and press evolved considerably from the late 1600s through the Revolutionary era, the views of the Founders—authors of the Constitution and, later, the Bill of Rights—were far from homogenous. On the contrary, they held deeply divergent views on the meaning of freedom of speech and press and the wisdom of memorializing protection for those freedoms in the new Constitution.

A. Understanding the Political Landscape: Federalists and Anti-Federalists

The original meaning of the First Amendment must be understood in context, as the necessity of political compromise as much as idealism gave birth to the Bill of Rights. The Federalists, who held a majority of seats in the Congress that passed the Bill of Rights, generally opposed the idea of amendments to the Constitution enumerating specific, individual rights. The Federalists disseminated their arguments, most famously, through a series of editorials and essays now called the Federalist papers. In Federalist No. 84, Alexander Hamilton argued for ratification of the new Constitution and addressed the issue of missing protection for individual rights by positing, counterintuitive though it may now seem, that enumerating certain rights might actually give the federal government more power over those rights. Setting out certain rights as protected would, Hamilton argued, “afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?” As for freedom of the press, Hamilton asked, “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it

80 Id.
would furnish, to men disposed to usurp, a plausible pretence for claiming that power.”

Another prominent Federalist, Noah Webster, echoed Hamilton’s arguments. In a letter aimed at the Pennsylvania state delegates who dissented from the ratification of the Constitution in large part because of the absence of the enumeration of individual rights, Webster raised concerns about attempting to define the contours of press freedom in the Constitution. Webster argued:

is it not better to leave the right altogether with your rulers and your posterity. No attempts have ever been made by a Legislative body in America to abridge [freedom of the press]; and in this free enlightened country, no attempts could succeed, unless the public should be convinced that an abuse of it would warrant the restriction.

In essence, Webster and Hamilton argued that leaving freedom of the press undefined and without a clearly agreed-upon meaning would help protect it. The general view that an enumeration of individual rights was unnecessary carried over to the first Congress since the Federalists won a sizeable majority in the first congressional elections.

Anti-Federalists generally favored a weak central government and found the lack of explicit protection of individual rights in the Constitution cause for concern. Thomas Jefferson, a prominent Anti-Federalist, felt strongly about the link between freedom of the press and democracy. In contrast with the Federalists who were suspicious of popular government, Jefferson believed that an informed populace was necessary to prevent the government from abusing its power. “The basis of our government being the opinion of the people, the very first object should be to keep that right; and were if left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a

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81 Id. at 70.
82 FREEDOM OF THE PRESS, supra note 36, at 71.
83 Id.
84 Anderson, supra note 27, at 497.
85 THOMAS JEFFERSON, LETTER TO EDWARD CARRINGTON, reprinted in FREEDOM OF THE PRESS, supra note 36, at 74.
moment to prefer the latter.”  Jefferson expressed these sentiments while serving as the American Minister in Paris in 1787 where he had the opportunity to observe European governments first hand. The governments of Europe, Jefferson wrote, “have divided their nations into two classes, wolves and sheep. I do not exaggerate.” Newspapers, to the extent that they help inform the people, are necessary, because “[i]f once [the American people] become inattentive to the public affairs, you and I, and Congress and assemblies, judges and governors, shall all become wolves.”

B. The Author of the First Amendment: James Madison’s Influence

Although a Federalist who campaigned for ratification, James Madison fought for the passage of the Bill of Rights. The seeming contradiction between his federalist sympathies and his support for the Amendments begins to elucidate the complexity of his role and of his vision for press freedom. Madison urged ratification, in part, because of the importance he placed on individual liberty. In Federalist No. 10, Madison argued that, because of the tendency of people to form factions, individual liberties would actually be more secure in a large country than in a smaller one:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party . . . the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.

Although Madison had voted against considering a Bill of Rights at the Constitutional Convention because he worried that proposing a Bill of Rights before ratification would derail

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86 Id.
87 Id. at 75.
88 RUDANKO, JAMES MADISON, supra note 33, at 13 (quoting THE FEDERALIST NO. 10 (James Madison)).
the effort to replace the Articles of Confederation, his writings in support of ratification show a continued concern for the protection of individual liberties. 89

During the election of the first House of Representatives, facing a strong Anti-Federalist challenger and largely still viewed as opposed to a Bill of Rights, Madison made a pledge. In a letter to a potential supporter, Madison explained that he had re-considered his prior opposition in light of changed circumstances. 90 Now that the Constitution was ratified and in place, “amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty.” 91 Madison then expressed his support for a Bill of Rights:

Under this change of circumstances, it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c. 92

With Madison’s support, the First Congress confronted the issue of a Bill of Rights during their first legislative session. Madison later explained his view of the nature of press freedom: “In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands.” 93 In large part as a result of Madison’s persistence, the Bill of Rights passed Congress and was ratified by the States in 1791. 94

89 Id.
90 Id.
91 Id. at 16.
92 Id.
94 See id.
While the words of Madison, the drafter of the First Amendment, shed some light on its meaning, the push for the passage of the Bill of Rights was also shaped by the political concerns of the day. Federalists dominated the first Congress and saw the Bill of Rights as a concern of their political opponents and legally superfluous. However, many Federalists were also concerned over the viability of the union and wanted to dispense with the divisive Bill of Rights issue in order to get on with the business of establishing the new government. Thus, many Congressmen likely voted for the Bill of Rights out of a sense of necessity—in order to keep the “distraction” of the Bill of Rights from destroying the union—than out of any sense of conviction. Thus, our understanding of the original intent or meaning of the First Amendment must be tempered by the knowledge that the scope of the Bill of Rights was influenced by political compromise and the belief among Federalists that, while legally unnecessary, passage of a Bill of Rights was needed to prevent further disruptions or a possible dissolution of the union.

In light of the messy political reality that accompanied the passage of the Bill of Rights, it is a tall order indeed to discern any coherent original intent with which to bind future generations in their interpretation of the First Amendment.

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95 Anderson, *supra* note 27, at 497.

96 The passage of the Alien and Sedition Acts of 1798 by the Federalists in the Fifth Congress manifests the Federalists’ ambivalence towards the exercise of the First Amendment protection to criticize the government. The Sedition Act criminalized the publishing of false, scandalous, or malicious writings against the government or government officials. Marshall Smelser, *George Washington and the Alien and Sedition Acts*, 59 AM. Hist. Rev. 322, 322 n.1 (1954). While the Alien and Sedition Acts seem to run contrary to the values of the Constitution, they reflect the Federalist view of proper government. The Federalists believed that “men of the right sort” would govern and the people would obey.” MARTIN, *supra* note 35, at 140. This sentiment helps to explain the Federalists’ wariness of extensive press freedom. In essence, the Federalists saw no distinction between dissent and seditious libel. Federalists accused the rival Republican papers that mocked the President or current administration of “openly vilif[ying] that very PEOPLE for whom they profess so deep a respect.” Id. The example of the Alien and Sedition Acts once again shows that the Founders did not have a generally agreed-upon view of freedom of the press or even the importance of a free press to the new democracy.

V. The First Amendment: Just What Were Those Founders Thinking?

While the founding generation did not generally explain what the freedoms of speech and press meant to them, one document does shed light on the scope of the meaning of freedom of speech and press. A declaration of the Continental Congress made in 1774 stated:

The last right we shall mention regards the freedom of the press. 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, in 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.\(^98\)

In this rare explanation of press freedom, the Continental Congress identified the specific purposes of this right, namely: the advancement of truth, science, morality, and the arts as well as political communication. This statement underscores that advertising was not central to the Continental Congress’ or their contemporaries’ vision of freedom of the press.

Beyond the explanations suggested by this declaration, historians generally agree that we cannot know for sure what the Founders intended by the freedoms of speech and press enshrined in the First Amendment.\(^99\) Legal historian Leonard Levy explains the disconnect between the generally acknowledged importance of these freedoms on the one hand and the lack of definition on the other: “[t]hroughout the nation, freedom of the press became a topic for grand declamation, but nowhere was the insistent demand for its constitutional protection accompanied by a reasoned consideration of what it meant, how far it extended, and whether any circumstances justified its limitation.”\(^100\)

Scholars have converged around two competing ideas concerning the original meaning of the First Amendment: (1) that the First Amendment provided nothing more than protection from

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\(^98\) Id. at 463-64 (quoting Address to the Inhabitants of Quebec (1774)).
\(^99\) See, e.g., id.
prior restraint or (2) that the First Amendment was designed to position the press as a check on
government and to protect its ability to report on and critique government action. The first
argument has been most famously expounded by Leonard Levy.¹⁰¹ Levy argued that the First
Amendment did nothing to displace the common recognition of seditious libel and that “free
speech in the revolutionary period was accorded only to those who had favorable opinions of the
struggle for independence.”¹⁰² This view also strongly credits the influence of Blackstone, who
also equated freedom of speech and press with prior restraint and nothing more.

The second view situated the origins of the press clause in the revolutionary fervor itself
and was epitomized by Justice Potter Stewart who said, “the primary purpose of the
constitutional guarantee of a free press was . . . to create a fourth institution outside the
Government as an additional check on the three official branches.”¹⁰³ According to this view,
the freedom of press clause relates primarily to the editorial autonomy of newspapers in
reporting on and investigating the actions of government. This view rejects Blackstone as a
controlling influence. “Blackstone’s limited, legalistic view of free speech was supplemented in
the New World by a tangible popular meaning: the right of unrestricted discussion of public
affairs.”¹⁰⁴ This reinforces the assertion of other historians that place political and government-
related speech at the core of the original understanding of the First Amendment.¹⁰⁵

Interestingly, even Chief Judge Kozinski of the Ninth Circuit, an ardent defender of
commercial speech, having examined the historical evidence, rejects the originalist narrative:
“the Framers’ commentary on freedom of speech focuses entirely on the importance of free

¹⁰¹ Anderson, supra note 27, at 498-99. Levy presented three main arguments about the meaning of the First
Amendment: (1) that it meant nothing more than a lack of prior restraint, (2) that, as to Congress, the First
Amendment was designed to prohibit any action concerning the press, and (3) that the press clause was designed to
leave to the states the power to regulate the press. Id.
¹⁰² LEVY, ORIGINS, supra note 100, at 105.
¹⁰⁴ RUDANKO, THE FORGING, supra note 93, at 96.
¹⁰⁵ Id.
speech to self-government.”106 Likewise, Kozinski is convinced that Madison also valued the First Amendment as protecting the right of citizens to criticize the government.107 Kozinski concludes with a veritable warning to proponents of the originalist narrative: “A myopic originalist view of freedom of speech does not get us very far.”108

VI. Conclusion

To the extent that the Framers’ intent can be known, the evidence shows that they did not have advertising or “commercial speech” in mind in drafting the First Amendment. From Franklin’s “Apology” to the opposition to the Stamp Act, what Troy mischaracterized as “freedom of expression” interests in “commercial speech” were, once contextualized, revealed to be economic concerns over public outcry or taxes that threatened the business of printing advertisements. Eighteenth century Americans balked at taxes or restrictions on their livelihood, but they did not conceive of the business of printing advertisements as part of a broader interest in “free expression.”109

Troy implicitly argues that the very lack of distinction between different types of speech in the First Amendment mediates in favor of protection for commercial speech. In essence, he contends, even if the Founders did not include “commercial speech,” neither did they draw a distinction excluding it. However, the Founders simply did not conceive of advertising as speech, so such a distinction would have made no conceptual sense. As the historical evidence reveals, the key writings on freedom of speech and press in Eighteenth century America focus on

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106 Alex Kozinski & Stuart Banner, Who’s Afraid of Commercial Speech?, 76 Va. L. Rev. 627, 632 (1990). Kozinski has authored multiple articles arguing that there is no rationale for differentiating between commercial and political speech. Unlike Troy, Kozinski rejects the originalist narrative and instead relies on the merits of commercial speech.
107 Id.
108 Id. 633.
109 See Anderson, supra note 27.
politics, government, or religion and not on commerce. While it may be impossible to definitively read the minds of the Founders, the historical evidence does not support Troy’s contentions; rather a careful reading of the evidence shows that, to the extent the founders had anything specific in mind, it was political and not commercial speech.

While modern First Amendment jurisprudence need not be bound by the worldview and intent of the founding generation, many courts and individual jurists, including Justice Thomas, place considerable weight on the intent of the Founders. However, to the extent that historians can discern the intent of the Founders, contemporary writings reveal a generation concerned with the political, religious, and humanist dimensions of freedom of speech and press, not the commercial ones. The evidence for the originalist narrative does not hold up to historical scrutiny. Arguments for the protection of “commercial speech” should be analyzed on their merits and not deferred to based on the mistaken belief that the Founders intended the First Amendment to protect commercial speech.