Libraries and the Constitution

F. William Summers

One searches in vain for any specific reference to or provision for libraries in the Constitution of the United States. This omission may, upon first glance, seem ironic since today we regard our libraries as one of the first lines of defense in protecting and defending the rights of people. We in the United States are not alone in this belief, for it has often been observed that one of the first concerns of totalitarian governments is to control the press and along with it the rights of access to and the contents of libraries.

Why then did our founding fathers, so farseeing in many ways, fail to make specific provision for the libraries as sources of information for the people. First, it must be noted that these people did not themselves come from a strong tradition of libraries. While one of them, Benjamin Franklin, had been responsible for founding a library in Philadelphia, it was not truly a public library. While some of them were college educated, they had probably encountered only the most limited of libraries in the schools in which they had studied. The one who might most likely have seen the need for some provision for libraries was not present. Thomas Jefferson was in Paris arranging for credit and representing the interests of the still frail and fledgling nation.

F. William Summers, President-Elect of the American Library Association, delivered this address, the Phillip S. Ogilvie Memorial Lecture, at the NCLA Biennial Conference.

Nevertheless, the principles which motivated these men, their view of their fellow men, and their desires for free government are akin to the principles we hold forth for libraries today. They would have well understood the principles which librarians support; the rights of free inquiry and citizen access would have not sounded strange to their ears.

The coming together of the fifty-five men who wrote our constitution was in itself a strange event. In the first place, they had no authorization to write a new constitution. The convention had been called for the specific and strictly limited purpose of revising the Articles of Confederation. These Articles, which had been quickly assembled following the revolution, had produced a structureless and ineffective government which could not pay its own bills except by subscriptions to the states which they were free to ignore, and many did. There was no national currency, and money from one state was not necessarily recognized in another. States were in dispute about their boundaries and were even levying tariffs on one another's goods. Some states were considering negotiating their own treaties with foreign nations. Prisoners and criminals fleeing from one state to another were or were not extradited depending upon the whims and honesty of local officials. Who were these men then who dared to exceed their authority and to lay before their countrymen a plan for a new nation, a plan unique in the world at that time, a document which has endured for two hundred years with only twenty-six amendments (ten of which had been planned for in the beginning and one of which fortunately, repealed an earlier one banning the sale of alcohol)?

Catherine Drinker Bowen, in the opening of her wonderful book *Miracle at Philadelphia*, sets the flavor and tone of the meeting with these words, which I quote in part, "Over Philadelphia the air lay hot and humid; old people said it was the worst summer since 1750. French visitors wrote home they could not breathe. At each inhaling of air, one worries about the next one. It was May when the convention met, it would be September before they rose." Among the fifty-five delegates from twelve states (Rhode Island

refused to attend) were some of the most luminous names in American history: Washington, Madison, Hamilton, Franklin, South Carolina's John Rutledge, and the two Pinckneys, Charles Cotesworth and Charles. Again quoting Bowen, "The roster reads like a Fourth of July oration, a patriotic hymn. It was a young gathering, Charles Pinckney was twenty-nine, Alexander Hamilton thirty. Rufus King was thirty-two, Johnathan Dayton of New Jersey twenty-six. Gouvenor Morris—he of the suave manners and the wooden leg was thirty-five. Even that staid and careful legal scholar, James Madison of Virginia, known today as 'father of the Constitution,' was only thirty-six. Benjamin Franklin's eighty-one years raised the average considerably but it never went beyond forty-three. Men aged sooner and died earlier in those days. John Adams at thirty-seven invited to give a speech in Boston, had said he was 'too old to make declamations'."

It is perhaps ironic, given the traditions of free and open government which it has produced, that all deliberations of the convention were in secret. Many of the delegates, Madison among them, believed that to open the debates to public scrutiny and publicity would have doomed the Constitution from the beginning. It is to Madison's indefatigable note-taking that we owe most of the present-day knowledge of what actually transpired in the debates. Madison, it should be remembered, took these notes not for the benefit of posterity but to fashion arguments for others to make in refutation of points with which he disagreed, for he himself was a weak public speaker.

Anyone who studies the history of the Constitution will inevitably identify among those fifty-five men their favorites, people who stood for principles they hold dear. Madison is probably most everyone's hero. Madison, the shy, bookish person in constant real and presumed ill-health, arrived at the convention with a forty-one page notebook in which he had inscribed the lessons of history which should be reflected in the Constitution. He also brought an outline of a plan of government that the convention eventually adopted, an outline based upon the principle that the more people who are brought into the system on a free and equal basis, the safer are the liberties and lives of all.

Others may find themselves drawn to the more enigmatic Alexander Hamilton, who supported a strong central government for the nation, not because of concerns about liberty or the rights of citizens, but because he saw it as the only way to guarantee an economic system which could function for the benefit of all.

Many, including your speaker, are drawn to the crusty old Virginian, George Mason, who had written a Bill of Rights for Virginia which became the Bill of Rights in the new government and, indeed, is the basis of the bills of rights of most modern governments. Mason had a strong dislike and distrust for politicians, and his efforts were to empower the people with rights to protect themselves against politicians.

Despite the fact that this document makes no mention of libraries, it is the foundation upon which rests the structure of most of our social institutions. The Constitution makes no provision for public schools either; yet the necessity for an informed citizenry which it demands made the development of a public school system a mandatory condition for our society to function. So it is with libraries. We all like the implications in the title of Sidney Ditzion's study of censorship efforts in public libraries, *Arsenals of a Democratic Culture.* It is this view of the library as the place to which the citizen can go for unbiased, diverse, and current information which is our most fundamental claim to public support.

Despite this fundamental support which the Constitution gives to libraries, there are many places in which the document impacts directly upon our work. Despite the lack of specific language, a great deal of our library tradition and practice and some of our current issues are grounded in the language of the Constitution. We must remember that our Constitution, though written, is organic and changes over time. The recent hearings on the confirmation of Robert Bork demonstrated clearly the conflict between those who regard the Constitution as fixed and limited and those who look upon it as organic and flexible, changing over time in response to the beliefs, attitudes, and values of the people. That difference of opinion was present in Philadelphia, and it is with us today. Those who wish to see the Constitution as a fixed contract between the government and the people set in 1787 have great difficulty with the fact that our society and our government have changed enormously in the intervening two hundred years. There are many factors present in our world today that the framers could not have foreseen.

Let us examine that principle as we look at some of the ways in which the Constitution does impact today upon libraries and library services.

Copyright

One matter directly affecting libraries is specifically enumerated among the powers of the

Congress, "to promote the Progress of Science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and discoveries." A strict reading of that provision could suggest that only materials in the areas of science and the useful arts should have such protection. But in enacting the various copyright laws, Congress has used its power to extend copyright to works of fiction, religion, and history. It has also extended that right to television and radio programs, to motion pictures and now to such things as computer software programs. Libraries find themselves in the difficult position of having readily available technology in the form of copy machines, VCR's and microcomputers which can very easily permit them or users to violate the terms of copyright. We have wisely refused to be the policemen in the battles between technology and copyright. The real battleground for libraries has shifted, at least for the moment, from photocopying of books and journals to video-cassettes and computer software. There is a clear antagonism between the goals of libraries and those of copyright holders. Libraries exist to make materials as widely available to users as possible; copyright holders prefer that every use of a copyright item result from a purchase. Meanwhile, technology continues to provide the processes for duplicating copyrighted materials far in excess of the law.

The so-called "shrink-wrap" issue, which involves the rights of use of computer soft-ware, is a very thorny one. The copyright holder's contention that what is conveyed to the purchaser is not a piece of property but a license to use, is a new extension of the copyright principle. In all other instances, when a purchaser buys a piece of copyrighted material, it is theirs, and they may do with it what they please. They can lend it to others, they can destroy it, they can make an additional copy for their own use, but in the case of computer software, it is claimed that only the purchaser has the right to use. We will certainly see this issue tested in the courts in the future, but it is not the last such issue we will face. We can anticipate that copyright holders will continue to seek technological methods to control and measure the access of users to their copyright protected works. Now the library which buys the *World Almanac*, for example, is free to make it available to any users who want it, the only limit being that the format makes it difficult to serve more than one user at a time. It is likely that we will see this type of information soon put into an interactive format, CD-ROM for example, which has the capacity to monitor each use. The copyright holder may then wish to seek payment on a per use basis rather than simply for the cost of acquiring the information collection. As technology provides more and more ways to store, acquire, and manipulate information, we will see many future issues dealing with the constitutional powers given to Congress and the rights of "authors and inventors" as opposed to the rights of the people and their social institutions.

It would have been very helpful in today's world if the founding fathers had been as precise about setting out society's rights of access to information as they were in protecting those of author's and inventors. We librarians believe and argue that the purpose of copyright is for the benefit of society as well as for the benefit of the creators, but the language of the Constitution addresses only the rights of those who create and invent.

... today we regard our libraries as one of the first lines of defense in protecting and defending the rights of people.

The Bill of Rights

The constitutional issues which have most concerned librarians have been those relating to the Bill of Rights, that series of amendments to the Constitution, promised by the drafters and adopted by the Congress at its first session in 1789. These amendments were quickly ratified by the states and became part of the Constitution on December 15, 1791, when ratified by the last necessary state, Virginia. (Ironically Massachusetts, Georgia, and Connecticut did not get around to ratification until 1939 when it was a symbolic act to have the last of the thirteen original colonies ratify the Bill of Rights.) It is also interesting to note that the questions of specifically what action by a state constitutes ratification and whether a state can rescind its ratification came up in the consideration of these amendments as it did in the recent considerations of the Equal Rights Amendment. The Constitution itself is silent upon both of these matters.

George Mason, who had drafted the Bill of Rights, did not originally support the Constitution and, in fact, refused to sign it because the Bill of Rights was not part of the document. Those who had supported the Constitution had committed themselves to the prompt submission of the Bill of

Rights for approval. In fact, a number of the states made their approval of the Constitution contingent upon submission of a bill of rights, and many of them in their ratification resolutions contained provisions which should be included in such a statement.

The First Amendment

When as either citizens or librarians we think of the Constitution, it is most often the First Amendment which comes to our minds. These forty-five clear and direct and, to many, unambiguous words have probably provoked more debate, legislation, and court deliberations than all the rest of the Constitution combined. The amendment says things rather simply:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

The First Amendment is a paradox in that it can force people to change political colors in the face of its power. The late Justice William O. Douglas is generally considered to have been a far left liberal; yet when it came to the First Amendment, he was a conservative, strict constructionist who argued that when the Constitution said "Congress shall make no law," it meant precisely that. The Reverend Jerry Falwell, on the other hand, is generally a conservative strict constructionist, but when it comes to the First Amendment, Rev. Falwell wants a more liberal position and favors many restrictions on the right of free speech and a free press.

The First Amendment also produces paradox in that some, who stoutly defend one right it grants, may be willing to permit tampering with another. Thus, people who would die at the barricades defending their right to go to the church of their choice are less sure that they want other people to come to their community to write or speak about matters of which they disapprove. The First Amendment hoists us on our own petard, and as a nation we have frequently been uncomfortable with the cognitive dissonance which it generates within us. We rejoice in the freedom it gives us, but we are sometimes uncomfortable when we see others using those same rights in ways of which we do not approve.

The First Amendment is under assault and public scrutiny today as it has never been before. The government assaults it when it attempts to stifle citizen access to government information. The press assaults it when it intrudes on the privacy of citizens. We are not comfortable with the First Amendment, but none of us would be comfortable living in a country without it.

It is this amendment which comes into consideration whenever library materials are criticized and when some citizens seek to have them removed from our libraries. Because it receives the most publicity, we tend to think that these efforts have most often been based upon issues of alleged obscenity, which the Supreme Court has ruled does not have constitutional protection. It is well to remember that the efforts at cleaning up library collections are also directed against the alleged political affiliations of authors and toward offenses which writings have given to various groups. A recent issue of the ALA *Intellectual Freedom Newsletter* indicated that objections had been raised to materials alleged to address the following themes: the occult, eviction of tenants, abortion, sex education, AIDS information, and secular humanism. Along with many books which had been challenged on grounds of obscenity, there also appeared *Rumplestiltskin*, *MacBeth*, and *The Diary of Anne Frank*. We must also remember that sometimes objections are raised in the name of obscenity when, in reality, some other less emotional principle is at stake. A clear example occurred when ministers who really felt that Sinclair Lewis's book *Elmer Gantry* was unflattering sought to have it banned on the ground of obscenity.

Librarians sometimes tell me that in censorship conflicts they feel ALA and, occasionally, they themselves are defending books, films, and people such as magazine publishers, dealers, and adult book store operators which really aren't very savory and with which they would rather not be associated. Let me reassure you that what is being defended in these cases is the First Amendment and, by so doing, we stand solidly with the founding fathers. The First Amendment is first because it is the foundation of our liberty.

The Right of Association

We seldom think about the right of association granted by the First Amendment. It is one of those rights which we use everyday. You are using it today to assemble here as a group of librarians representing the needs and interests of your state. You did not require any approval from state or local authorities for this meeting. You are free to take any positions you wish on matters of concern to you, and you may not be prohibited from

participating or be punished for so doing. Your association is free under the Constitution to propose any changes you may wish other than the violent overthrow of the government. You may even advocate violent action in the future so long as you don't actively plan for it.

The right of association also protects you from being subjected to any kind of loyalty oath. If the American Library Association falls out of favor with the state, you may not be required to swear that you are not a member of it. That may seem far-fetched, but some of us can recall times when the NEA was out of favor at the local level, and people were pressured not to join.

The First Amendment also severely restricts the degree to which the government can interfere in the internal affairs of an association. You may set any membership requirements for this organization that you wish so long as you do not discriminate on the basis of age, race, national origin, religion, or physical handicap. You may notice that I did not include sex in that list because, due to the failure of the Equal Rights Amendment, discrimination on the basis of sex is not prohibited by the Constitution.

There is a clear antagonism between the goals of libraries and those of copyright holders.

You may within reasonable limits have marches, demonstrations, and similar meetings for the purpose of presenting your views to government and to the public at large. Reasonable limits set by the government must relate to such matters as protecting the public safety and the rights of other people. You may, for example, picket a movie theater showing a movie of which you disapprove; but you may not picket in such a way as to prevent others from entering nor may you go inside and disrupt the showing. It is also important to note that, in the case of libraries, others have these same rights with respect to our activities. People may and have demonstrated against the library and picketed it.

The government may not deprive you of other rights solely because you have used your right of association. If Mr. Reagan gets mad at the ALA because we do not support his nominee to be Librarian of Congress, he may not deny you a passport to travel or deny you employment in a federal library.

The government may not require you to disclose the names of your members, and it may not require you to identify yourself as a member of an organization. That may not sound like much of a right, but it has been crucial to organizations which have not gained or which fall out of public favor. It was very significant in the early days of the labor movement and to groups like the NAACP, because disclosure of their members might well have resulted in substantial pressure against those individuals.

Government Information

As you all know, we are engaged today in a major struggle about information by and about the United States government. I am proud, as I hope you are, that the American Library Association is playing a major role in that struggle. The question of government information also bothered the Constitutional Convention, and they thus required that each house of Congress keep and publish a journal, but gave them the right in their judgement to keep parts of it secret. Patrick Henry, who opposed the Constitution, said of this provision—and it certainly pertains to all government information—"The liberties of a people never were or never will be, secure when the transactions of their rulers may be concealed from them. The most iniquitous plots may be carried on against their liberty and happiness." Those who watched and read the Iran/Contra hearings would today find it hard to disagree with Henry.

The issue of access to government information has, today, a number of manifestations, all of which are very serious. Perhaps the most far reaching is the government effort in the name of economy and efficiency to contract out to private contractors as many of its information functions as possible. At first glance, we librarians may be seen to be self-serving when we oppose such efforts; but who better than we can understand the implications of placing increasing control over the information activities of the executive branch of government in private hands which are outside the constitutional system of checks and balances. Again the Iran/Contra hearings give clear evidence of the perils of conducting the public's business under the cloak of "private operations." Fortunately, the Congress is growing increasingly aware of the possible perils in this area. In this year's hearings on the Appropriations Bill, the Senate Appropriations Committee, commenting on the administration's proposal to privatize the National Technical Information Service, a service which operates at no cost to the taxpayers, mentioned "turning over government scientific and technical information to private contractors which may be controlled by foreign interests or

can be bought by foreign firms." It is encouraging that the committee concluded its report with these comments, "Given the dynamics of public policy development, the Committee believes that certain positions in nonrecreational library positions are presumptively governmental in nature ... Therefore, the Committee fully expects the head of each Federal agency to notify the applicable appropriations subcommittee and other appropriate authorizing committees, using the proper reprogramming procedures, before initiating the contracting out of any Federal library. " The struggle on this issue is far from over; but ALA's positions on the issue were early, they were clear, and they have been consistent. Isn't it ironic that those who have for decades called for government to be businesslike now seek to take out of government those activities which have succeeded in being businesslike?

We also face a major struggle to preserve the role of libraries as a principal component of the system for providing public access to the information which government itself produces and develops. From very early in our history the role of the public printer to ensure citizen access to government information was clearly established. Now, again in the name of efficiency, we are seeing increasing efforts to privatize, or place in private hands for public access, a wide variety of information collected, compiled, and paid for by the public. The public will have access only if it pays for access to value-added vendors or if libraries are able to pay the costs for them. The coalition of federal agencies seeking to lower their costs or transfer them to information users and private sector vendors anxious to increase their markets will be very difficult to resist. Patrick Henry's worst fears would be realized in some of the proposals we seek to resist today. We stand in the tradition of Francis Lieber, the great University of South Carolina faculty member and President who said, "Liberty is coupled with the public word and however frequently the public word may be abused it is nevertheless true that out of it rises oratory—the aesthetics of liberty. All governments hostile to liberty are hostile to publicity."

Again, I hope that you are as proud as I am of the great and energetic leadership which your professional association is providing in this issue. It is we who stand in the tradition of the framers of the Constitution and who believe that government information, like government activity, ought to be open and apparent to its citizens, not hidden in secrecy or made unavailable in the name of cost cutting. We may truly need to cut the federal budget, but curtailing citizen access to public information, information by and about the United States government, is far too high a price to pay. George Mason's argument against slavery in which he said, "as nations cannot be rewarded or punished in the next world they must be in this ... [and] providence punishes national sins by national calamities" fits equally well a government which would control or limit the access of its citizens to information about its activities.

The Due Process Clause

The Fifth Amendment provides that no person may "be deprived of life, liberty or property without due process of law." For much of our history this provision was seen as relating to criminal matters and civil matters relating to the taking of real property for public purposes. In more recent years, however, statutes and court decisions have resulted in a broadening of the definition of "property" to include things other than real property. A tenured professor may now be seen as having a "property" interest in the position. A library staff member past a probationary period of employment may also have a property interest in his position and if those property rights are taken away or denied, then that individual must be given the rights of "due process." Due process, like

beauty or privacy, is an elusive matter and is highly circumstantial in nature. It is clear that at least in the employment area, due process means that the person must be informed of the charges against him, i.e., what he has done wrong. He must be given the opportunity to inquire into those charges and to examine those who bring them, and he must be able to present testimony in his own behalf. Usually it means that, if requested, he must also have the opportunity for legal counsel in these processes.

The rights of due process have also entered into the education of students who are seen as having a property right in their education. School administrators, teachers, and media specialists now deal with the necessity of imposing discipline in the schools while insuring at the same time that students receive their due process rights.

Many library administrators, particularly those of the old school, chaff at the seeming rigidity of due process provisions in employment, but would we really want to have it otherwise? We know that not all decisions to terminate employees are fairly reached. There are administrators who are capricious, discriminatory, authoritarian, and in some instances downright mean. Should not employees have at least the minimal protection which the Constitution can afford them in the face of such actions?

It is certainly true that due process provisions make employee terminations and other kinds of actions much more cumbersome than they once were. But the United States Constitution is not about convenience and expediency. It is fundamentally about fairness and how government and its agencies may treat and interact with citizens.

Conclusion

The richness of the Constitution provides material for a much longer presentation than circumstances of today permit. We could talk, for example, about the librarian's concern for the privacy of circulation records and the Fifth Amendment's right to be protected against self-incrimination. It is an important topic now that we again have federal law enforcement officials going into libraries and asking librarians to spy on their fellow citizen's use of libraries.

It is clear that the Constitution is as fundamentally a part of our libraries as it is our lives. Our libraries play the role in our lives that they do because of our Constitution, just as we are the kind of people that we are because of our Constitution. I have lived long enough to see that Constitution sustain us in economic disaster, in several wars, in presidential succession, in the dismissal of a president, and in periods of great national embarrassment. It is a remarkable document and because we live under it, we are a remarkable people.

Vendor exhibits were a huge drawing card at the conference.

We've taken book ordering out of the Dark Ages.

BaTaSYSTEMS™ is Baker & Taylor's newest generation of electronic book ordering services. It's especially designed to work with existing computer hardware, with built in flexibility that allows you to match the level of service to your library's unique needs.

Whichever service level you choose, you'll save time, reduce paperwork and speed book acquisitions—all at a lower cost. For example:

ORDER allows you to order books through your personal computer, using a modem and regular telephone lines. Just enter the ISBNs and the following day you'll receive electronic confirmation from which you can print order slips. All calls are toll free. You also save the cost and delay of postal delivery.

Or you can choose SEARCH AND ORDER. In addition to electronic ordering, this service gives you quick access to Baker & Taylor's diverse and comprehensive database of over 800,000 title records. It's your single source for virtually all the titles published or distributed in the United States. And you eliminate manual searching and purchase order typing.

Finally, BaTaSYSTEMS ACQUISITIONS offers on-line access to our database and electronic ordering plus a complete software package with fund accounting and full reporting functions.

These advanced service technologies are typical of how Baker & Taylor stays in step with the times, building on our experience to bring you the latest in library services.

BaTaSYSTEMS. It's nothing less than a renaissance in book acquisitions. Write or phone today for more information.

EXPERIENCE YOU CAN DEPEND ON
BAKER & TAYLOR
a GRACE company

Eastern Division, 50 Kirby Avenue, Somerville, NJ 08876 (201) 722-8000
Southern Division, Mt. Olive Road, Commerce, GA 30599 (404) 335-5000
Midwestern Division, 501 S. Gladiolus Street, Momence, IL 60954 (815) 472-2444
Western Division, 380 Edison Way, Reno, NV 89564 (702) 786-6700