

1-1-1978

The Antagonism between Freedom of Speech and Seditious Libel

June Eichbaum

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly

 Part of the [Constitutional Law Commons](#)

Recommended Citation

June Eichbaum, *The Antagonism between Freedom of Speech and Seditious Libel*, 5 HASTINGS BUS L.J. 445 (1978).
Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol5/iss1/6

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository.

The Antagonism Between Freedom of Speech and Seditious Libel

By JUNE EICHBAUM*

Introduction

One of the greatest ironies in the history of the United States was the Sedition Act of 1798.¹ Enacted shortly after the adoption of the First Amendment, which guarantees the freedoms of speech and press to all citizens, this Act was designed to silence voices critical of the federal government. In providing a statutory ground for prosecution of those who spoke against the President or Congress, the Sedition Act drew upon the British common law crime of seditious libel. Convictions secured under this Act's harsh edict, however, never came before the Supreme Court for constitutional review,² although the Court did have occasion to rule in one common law prosecution for seditious libel that federal tribunals are without common law jurisdiction in criminal cases.³

The Sedition Act, which expired in 1801, has been posthumously regretted as a constitutionally impermissible abrogation of the rights of freedom of speech and press. In *New York Times v. Sullivan*,⁴ the Court decried the Act as "inconsistent with the First Amendment" because of "the restraint it imposed upon criticism of government and public officials."⁵ The view that the First Amendment, by its own terms, repudiated the very concept of seditious libel was first espoused by Justice Holmes in his dissent in *Abrams v. United States*,⁶ in which Justice Brandeis joined.

* B.A., 1972, University of Pennsylvania; J.D., 1975, Georgetown University Law Center; LL.M., 1978, New York University. Member, New York Bar.

1. Ch. 74, §§ 1-4, 1 Stat. 596 (1798), reprinted in J. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES*, app. at 441-42 (1956) [hereinafter cited as *FREEDOM'S FETTERS*].

2. This historical omission is noted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). See also Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 738-39 (1977).

3. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

4. 376 U.S. 254 (1964). In this case, the Court held that a state can award damages to a public official for defamation only if actual malice is proven. *Id.* at 279-80.

5. *Id.* at 276.

6. 250 U.S. 616 (1919).

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to be against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . , by repaying fines that it imposed.⁷

Scrutinized under present First Amendment standards, it seems most unlikely that the Sedition Act would survive constitutional challenge.⁸ The possibility of criminal prosecution for open criticism of the federal government is at odds with a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁹ For this reason, prosecution for seditious libel has been condemned as a blatantly political undertaking. In the words of Justice Black, "[s]editious libel as it has been put into practice throughout the centuries, is nothing in the world except the prosecution of people who are on the wrong side politically; they have said something and their group has lost and they are prosecuted."¹⁰

Despite the modern consensus, the question whether the First Amendment repudiated seditious libel at the time of its adoption remains open. The issue is clouded by the dual, and possibly conflicting, interests that the First Amendment served in 1790. It has been persuasively argued that the primary purpose of the First Amendment was to reserve to the states exclusive authority in the area of speech and press regulation.¹¹ According to this view, guaranteeing the citizen's rights of free speech and press vis-à-vis the federal government was a secondary purpose.¹² Thus, these substantive rights were extended to the citizen vis-à-vis the state governments only if secured by the various *state* constitutions. The national uproar following

7. *Id.* at 630 (citation omitted) (Holmes, J., dissenting).

8. Some doubt remains, however, as to the constitutionality of *state* sedition acts. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court expanded the *New York Times* rule such that state power to impose criminal sanctions for criticism of public officials' conduct was limited. Justice Douglas expressed the fear that "[t]he philosophy of the Sedition Act of 1798 which punished 'false, scandalous and malicious' writings . . . is today allowed to be applied by the States It is disquieting to know that one of its instruments of destruction is abroad in the land today." *Id.* at 83 (Douglas, J., concurring, joined by Black, J.).

9. 376 U.S. at 270.

10. Black, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 557 (1962).

11. L. LEVY, *Liberty of the Press from Zenger to Jefferson*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 138 (1972) [hereinafter cited as JUDGMENTS]: "The primary purpose of the First Amendment was to reserve to the states an exclusive authority, as far as legislation was concerned, in the field of speech and press." See also W. BERNIS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976) [hereinafter cited as BERNIS]. But see Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 5-6 (1948).

12. See generally JUDGMENTS, *supra* note 11, at 136-38.

passage of the Sedition Act can thus be explained as a reaction to Congress' usurpation of state power. The substantive curtailment of speech and press freedoms, which resulted from implementation of the Act, was a less important source of national concern. This conclusion finds support both in the debates and writings of the founding fathers and in the history of state prosecutions for seditious libel in colonial as well as in post-revolutionary America.

I. The Original Understanding

The absence of debate in the First Congress complicates the task of reconstructing the meaning of the rights to freedom of speech and press as secured by the First Amendment at the time of its adoption.¹³ James Madison viewed the First Amendment as securing maximum protection for civil liberties. He stated: "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body"¹⁴ Madison supported a draft of the First Amendment that would have prohibited the states as well as the federal government from intervention in speech or press.¹⁵ St. George Tucker, a professor of law at the College of William and Mary and a member of the Virginia high court objected, however, to such a prohibition on the basis of federalism.¹⁶ Despite his advocacy of an absolutist view of the First Amendment during the Sedition Act controversy of 1798, Tucker argued that individual states should be left to their own devices. He stated in debate: "It will be much better, I apprehend, to leave the state governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words."¹⁷ Madison countered that the guarantee of speech and press freedoms was "the most valuable amendment in the whole list" and would be meaningless unless equally applicable to the states.¹⁸ The House of Representatives,

13. See 1 ANNALS OF CONG. 757-84 (Gales & Seaton eds. 1789) [hereinafter cited as ANNALS 1].

14. *Id.* at 766 (remarks of J. Madison).

15. This draft of the First Amendment provided: "Article 1. Section 10, between the first and second paragraph, insert 'no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.'" ANNALS 1, *supra* note 13, at 783-84. For commentary, see G. ANASTAPLO, THE CONSTITUTIONALIST 56 (1971); L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 221-23 (1960) [hereinafter cited as LEGACY].

16. See BERNS, *supra* note 11, at 114-15; LEGACY, *supra* note 15, at 282-83; ANNALS 1, *supra* note 13, at 783-84.

17. ANNALS 1, *supra* note 15, at 783-84.

18. *Id.* at 784.

persuaded by Madison, approved a draft of the First Amendment that explicitly applied to the states.¹⁹ If the Senate had not subsequently excised the controversial interdiction, the First Amendment would have contained the only provision in the Bill of Rights clearly restraining the states in their relations with the citizenry.²⁰ The record is silent on the ground for Senate action. Did the Senate intend to narrow the scope of the First Amendment solely out of deference to principles of federalism and states' rights, or did the Senate actually believe that states could regulate speech and press if they chose to do so?

An examination of early state constitutions also fails to elucidate the original understanding as to the extent to which the states themselves could protect or regulate the freedoms of speech and press. In the constitutions of the thirteen original states, twelve left speech unprotected.²¹ Only Pennsylvania secured the right of free speech in its first constitution of 1776.²² The absence of protection in other state constitutions was not necessarily the result of oversight. Massachusetts specifically rejected a variant of Pennsylvania's free speech clause that provided only for a free press.²³ Moreover, New Jersey and New York completely omitted both speech and press protections from their constitutions.²⁴ Such an omission makes the task of reconstruction extremely difficult.

A plausible explanation for the absence of speech and press protections in these constitutions was provided by Alexander Hamilton. In Number Eighty-four of the *Federalist Papers*, Hamilton contended that written speech and press protections established inherently unworkable standards; true protection for liberty of press depended on the spirit of a people, not on the letter of the law.

What signifies a declaration, that "the liberty of the press shall be inviolably preserved?" What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this, I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.²⁵

Because of this deep-seated faith in the spirit of the people, Hamilton opposed a national, and by implication, state Bill of Rights as being

19. *Id.*

20. G. ANASTAPLO, *THE CONSTITUTIONALIST* 56 (1971).

21. LEGACY, *supra* note 15, at 184-85.

22. *See id.* at 183.

23. *Id.* at 184.

24. *Id.* at 185.

25. *THE FEDERALIST* No. 84, at 580 (J. Cooke ed. 1961) (A. Hamilton).

superfluous and possibly harmful in that it could undermine the principle of popular sovereignty and the doctrine of enumerated powers.

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.²⁶

In short, Hamilton feared that the First Amendment's interdiction could erroneously be interpreted as presupposing the authority to regulate the freedoms of speech and press, thereby affording either state or federal officials with a plausible pretense to claim power that did not exist. His position in Number Eighty-four of the *Federalist Papers* supports a maximum protection view of the First Amendment. It builds upon the premise that there is no authority to interfere with the expression of the people in a democratic system of government.

The eighteenth century concept of popular sovereignty, similar to that espoused by Hamilton, is also useful in the determination of whether British common law limitations on the freedoms of speech and press survived the American revolution. The idea of a sovereign people supports the right of every man to speak freely. A government that is the people's agent, existing by their consent, has no authority to silence their criticism. Alexis De Tocqueville focused on popular sovereignty as the root of freedoms of speech and press in the American republic:

The sovereignty of the people and the freedom of the press are therefore two entirely correlative things, whereas censorship and universal suffrage contradict each other and cannot long remain in the political institutions of the same people. Among the twelve million people living in the territory of the United States, there is not *one single man* who has dared to suggest restricting the freedom of the press.²⁷

De Tocqueville's analysis recognizes the inherent contradiction between popular sovereignty and the very concept of seditious libel, thereby supporting an absolutist view of the First Amendment:

Americans, having accepted the dogma of sovereignty of the people, apply it with perfect sincerity [C]ourts are powerless to check the press; [W]here the press is concerned, there is not in reality any middle path between license and servitude. To cull the inestimable benefits assured by freedom of the press, it is necessary to put up with the inevitable evils springing therefrom.²⁸

26. *Id.* at 579.

27. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 182 (1969).

28. *Id.* at 183.

In theory, then, popular sovereignty should have displaced the crime of seditious libel, which had been nurtured by a philosophical perspective that elevated the rulers of the world to a position of superiority over the people.²⁹ The value protected by the British common law crime was the people's respect of and affection for such a form of government, and the crux of the offense was the tendency of the speech to instill disaffection. As stated by Chief Justice Holt in *Tutchin's Case* in 1704: "If People should not be called to account for possessing the People with an ill Opinion of the Government, no Government can subsist. For it is very necessary for all Governments that the People should have a good Opinion of it."³⁰ In a similar vein, Sir William Blackstone also recognized the crime of seditious libel in defining the outer limits of speech and press freedoms by the absence of prior restraint.

In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less, degree of severity, the liberty of the press, properly understood, is by no means infringed or violated. 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.³¹

Practical realization of the theoretical antagonism between Blackstone's limitations on freedoms of the press through seditious libel and the concept of popular sovereignty developed only after the Sedition Act controversy of 1798.³² In Pennsylvania, the one state that secured both the freedoms of speech and press, for example, these freedoms were interpreted as consistent with the Blackstonian view. In 1788, Chief Justice Thomas McKean, a signatory to the Declaration of Independence and president of the Continental Congress, ruled that the constitutional guarantee of a free press in Pennsylvania and the federal Bill of Rights did not alter British common law.

What then is the meaning of *the Bill of Rights*, and *the Constitution of Pennsylvania*, when they declare, "That the freedom of the press shall not be restrained," and "that the printing presses shall

29. See generally FREEDOM'S FETTERS, *supra* note 1, at 418-33; JUDGMENTS, *supra* note 11, at 147.

30. This excerpt from *Tutchin's Case*, Regina v. Tutchin, 14 Howell's St. Tr. 1095 (1704), was read to the jury during the libel trial of journalist John Peter Zenger in 1735 by James DeLancey, Chief Justice of Pennsylvania. FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 60 (L. Levy ed. 1966) [hereinafter cited as FREEDOM OF THE PRESS]. See also LEGACY, *supra* note 15, at 10 & n.14.

31. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769), reprinted in FREEDOM OF THE PRESS, *supra* note 30, at 104.

32. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-75 (1964).

be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?" . . . [T]hey effectually preclude any attempt to fetter the press by the institution of a *licenser*. The same principles were settled in *England*, so far back as the reign of *William the Third*, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation.³³

In 1790, Pennsylvania adopted a new constitution, which had been drafted principally by James Wilson, an influential framer of the United States Constitution. Freedom of the press was again guaranteed, but once more with the caveat of citizen responsibility for abuse of that liberty.³⁴ Wilson explained the proposed constitution to members of the Pennsylvania assembly, commenting also on the proposed First Amendment to the federal constitution, as follows:

I presume it was not in the view of the honorable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press, is not carried so far as this in any country—what is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual.³⁵

Chief Justice McKean also interpreted the new Pennsylvania constitution to be consistent with the common law: "The liberty of the press is, indeed, essential to the nature of a free State, but this consists in laying no previous restraints upon public actions, and not in freedom from censure for criminal matter, when published."³⁶

Another perspective on the meaning of the freedoms of speech and press in eighteenth century America may be found in the exchange of letters in 1789 between William Cushing, Chief Justice of Massachusetts, and John Adams. Cushing wrote to Adams inquiring whether the Massachusetts Constitution's guarantee of a free press embodied or altered Blackstonian principles:

Judge Blackstone says . . . the liberty of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter, when published. Wherein he refers to a public licenser, inspector or controller of the press. That is, no doubt, the liberty of the press as allowed by the law of England.

33. FREEDOM OF THE PRESS, *supra* note 30, at 138-39. This excerpt is from the libel prosecution of Eleanor Oswald, printer of the *Independent Gazetteer* in Philadelphia.

34. LEGACY, *supra* note 15, at 203.

35. Address of James Wilson, Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in* FREEDOM OF THE PRESS, *supra* note 30, at 130.

36. STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATION OF WASHINGTON AND ADAMS 323-24 (F. Wharton ed. 1849) (libel trial of William Cobbett), *reprinted in* LEGACY, *supra* note 15, at 206.

But the words of our article understood according to plain English, make no such distinction, and must exclude *subsequent* restraints, as much as *previous restraints*. . . .

The question upon the article is this—What is that liberty of the press, which is essential to the security of freedom?³⁷

John Adams replied:

The difficult and important question is whether the Truth of words can be admitted by the court to be given in evidence to the jury, upon a plea of not guilty? In England I suppose it is settled. But it is a serious Question whether our Constitution is not at present so different as to render the innovation necessary? . . . I therefore, am very clear that under the Articles of our Constitution which you have quoted, it would be safest to admit evidence to the jury of the Truth of accusations, and if the jury found them true and that they were published for the Public good, they would readily acquit.³⁸

Adams' reply has dual significance. While it goes significantly beyond British common law in permitting a defendant to introduce evidence to prove the truth of the "libel," it also seems to provide that truth is not a defense per se. Truth is relevant only insofar as it tends to show honesty of motive, offsetting any inference of malice that could be drawn from the statement in issue. This distinction is troublesome, however, because it would permit a conviction for governmental criticism that is true if it is made with malice. The Cushing-Adams correspondence is nevertheless a rare exposition of the meaning of free press prior to the Sedition Act controversy of 1798,³⁹ and indicates a broad understanding of the freedom of both speech and press even while it accommodates a variant of British seditious libel law. Ironically, the Sedition Act of 1798, which nearly abolished the freedom of speech and press, was signed by John Adams, but it embodied the very reforms in the law of seditious libel that he had proposed in his letter to Cushing.

Like Hamilton and Adams, Thomas Jefferson also assumed that state prosecutions for false statements were harmonious with a free press. His draft of the Virginia Constitution in 1783 proposed that the press "shall be subject to no other restraint than liableness to legal prosecution for false facts printed and published."⁴⁰ This clause was designed to amend Virginia's Declaration of Rights of 1776, which broadly proclaimed, "[t]hat the freedom of the press is one of the great bulwarks of liberty, and can

37. Letter from William Cushing to John Adams (Feb. 18, 1789), *reprinted in* FREEDOM OF THE PRESS, *supra* note 30, at 150 (citation omitted).

38. Letter from John Adams to William Cushing (Mar. 7, 1789), *reprinted in* FREEDOM OF THE PRESS, *supra* note 30, at 153.

39. LEGACY, *supra* note 15, at 196.

40. L. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 46 (1963) [hereinafter cited as JEFFERSON AND CIVIL LIBERTIES].

never be restrained but by despotic governments.”⁴¹ In 1788, Jefferson reiterated his position in favor of prosecution for “false facts.” In his letters to James Madison, he urged Madison to support a federal Bill of Rights, “[a] declaration that the federal government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed.”⁴² Jefferson’s “false facts” limitation on the right to freedom of press is especially significant in light of his creation of the “overt acts” test, which insured the free exercise of religion. By limiting the government’s power to interfere with free religious expression to those instances in which it “break out into overt acts against peace and good order.”⁴³ Jefferson’s “overt acts” standard provided more protection for such expression than Blackstone’s “bad tendency” test for political speech,⁴⁴ but Jefferson did not advocate a corresponding “overt acts” test to limit prosecution of the press for “false facts” printed, although he had ample opportunity to do so.

The problem in reconstructing the original meaning of the First Amendment thus centers on a deep and unspoken ambivalence of the founding fathers concerning the primacy of free speech and press in the new republic. Although the drafters of the Bill of Rights uniformly declared the supremacy of the freedoms of speech and press, none questioned whether these freedoms yielded to or repudiated the common law crime of seditious libel. At most, there were proposals for a relaxation of the libel laws, but even then, the result was not reached by analyzing the contradiction between British common law and a free press. In addition to the drafters’ reluctance to recognize the antagonism between popular sovereignty and seditious libel, principles of federalism restrained the fledgling Congress from commanding the states on matters considered to be internal affairs. The Senate’s excision of the clause designed to restrain the states as well as the federal government in abridging the freedom of speech and press supports the thesis that the First Amendment was primarily a statement of the exclusive authority of the states to regulate speech and press.⁴⁵ When the Bill of Rights was adopted, it would appear that the founding fathers had not achieved a thorough understanding of the freedoms of speech and press, although they had recognized rudimentary principles that would later provide the basis for maximum protection of these rights. It is thus not surprising that a “national awareness of the central meaning of the First Amendment” did not crystallize until “the great controversy over the

41. *Id.*

42. *Id.* at 48.

43. JUDGMENTS, *supra* note 11, at 134.

44. *Id.* See also BERNs, *supra* note 11, at 81-82.

45. See JUDGMENTS, *supra* note 11, at 138.

Sedition Act of 1798.⁴⁶ Out of this controversy as well emerged the maximum protection theory of the First Amendment, so conspicuously absent in the debates of the First Congress.

II. The Emergence of Modern First Amendment Doctrine

In 1798 the Federalists enacted the Sedition Act,⁴⁷ which was allegedly designed to "protect" the federal government against advocates of subversion.⁴⁸ The law established a federal statutory crime of seditious libel.⁴⁹ Ironically, the Sedition Act incorporated a liberal definition of the common law crime, allowing truth as a defense and expanding jury powers.⁵⁰

The speeches of Harrison Gray Otis of Massachusetts exemplify the position legitimatizing the Sedition Act. Otis argued that the First Amendment's guarantee of the rights of freedom of speech and press reinforced Blackstonian principles, according to which the freedom of press "is merely an exemption from all previous restraints."⁵¹ He actually read from Blackstone's *Commentaries* to support his justification of the repressive measure.⁵² For illustration, Otis cited laws of New Hampshire, Massachusetts, Pennsylvania, and Virginia, and, for added support, he quoted Chief Justice McKean in the *Oswald* case.⁵³ Otis' position carried majority support and the Sedition Law passed the House of Representatives by a vote of 44 to 41.⁵⁴

By contrast, opponents of the Sedition Act challenged its constitutionally impermissible nature on three distinct grounds. First, they argued that the Act went beyond the enumerated powers of the federal government.⁵⁵ Second, it intruded into an area reserved exclusively for state regulation.⁵⁶

46. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

47. FREEDOM'S FETTERS, *supra* note 1, at 418-33; BERNS, *supra* note 11, at 86-146.

48. The Sedition Act had an expiration date of March 3, 1801, which was one day after the inauguration of the next President. Ch. 74, § 4, 1 Stat. 596 (1798).

49. Ch. 74, §§ 1-4, 1 Stat. 596 (1798).

50. *Id.* at §§ 1-2.

51. 5 ANNALS OF CONG. 2148 (1798). In 1791, Otis had defended Edmund Freeman, an editor, against a charge of gross libel upon a member of the state legislature. LEGACY, *supra* note 15, at 207-08.

52. 5 ANNALS OF CONG. 2148 (1798) (remarks of Rep. Otis).

53. *Id.* at 2148-49. See note 33 and accompanying text *supra*.

54. 5 ANNALS OF CONG. 2171 (1798).

55. See *id.* at 2139:

Mr. Nicholas rose, he said, to ask an explanation of the principles upon which this bill is founded. He confessed it was strongly impressed upon his mind, that it was not within the powers of the House to act upon this subject. He looked in vain amongst the enumerated powers given to Congress in the Constitution, for an authority to pass a law like the present.

56. *Id.* at 2151:

Mr. Macon then proceeded . . . to show, from the opinions of the friends of the

The third challenge, which took a back seat to the more traditional lines of attack, was based on the novel theory that seditious libel was antithetical to free speech and to a free press. In retrospect, these challenges blur under the aegis of the First Amendment, which supported not only claims of states' rights, but also the freedom of speech and press. But the loudest outcry against the federal seditious libel law came from those who claimed that the First Amendment was the states' bulwark against federal intrusion.

Thomas Jefferson, author of the Kentucky resolution that condemned the Sedition Act, did not question the authority of state governments to prosecute citizens for the offense; rather, he claimed that Congress had acted in excess of its authority in enacting the law. His claim was grounded both in a states' rights reading of the First Amendment and in the doctrine of enumerated powers:

[A]nother and more special provision has been made by one of the amendments to the Constitution which expressly declares, that "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," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, defamation equally with heresy and false religion, *are withheld from the cognizance of Federal tribunals*. That therefore [the Sedition Act], which does abridge the freedom of the press, is not law, but is altogether void and of no effect.⁵⁷

In attacking the Sedition Act, Jefferson's position was consistent with his earlier statements concerning state power to regulate speech. According to Jefferson, the states retained the common law power to punish the press for false declaration; accordingly, he had excised protection for publication of "false facts" from the term freedom of the press secured in the Constitution.⁵⁸ His limited definition of that term is borne out in an 1803 letter to Pennsylvania Governor McKean,⁵⁹ in which Jefferson advocated a few "wholesome" state prosecutions of a "licentious" federalist press, under

Constitution, that it was never understood that prosecutions for libels could take place under the General Government; but that they must be carried on in the State courts, as the Constitution gave no power to Congress to pass laws on this subject.

57. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 541 (J. Elliot ed. 1942), *quoted in* FREEDOM OF THE PRESS, *supra* note 30, at 352. Even James Madison's condemnation of the Act can be interpreted as not questioning the relation between the principles of seditious libel and free speech. In his speech to the Virginia Assembly, Madison claimed that "[e]very libellous writing or expression might receive its punishment in the State courts . . ." LEGACY, *supra* note 15, at 266.

58. See generally JEFFERSON AND CIVIL LIBERTIES, *supra* note 40.

59. Prior to assuming office as governor, Thomas McKean was Chief Justice of the Pennsylvania Supreme Court. See text accompanying notes 33-36 *supra*.

the guise of restoring newspaper credibility: "And I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses."⁶⁰ In an 1804 letter to Abigail Adams, he reiterated his view: "While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so."⁶¹ To his credit, Jefferson pardoned all those who had been convicted under the expired federalist Sedition Act upon assuming the office of Presidency.⁶²

Outrage over the Sedition Act's impingement on states' rights did not necessitate a rethinking of the First Amendment's impact on common law limitations on the freedom of speech and press. A states' rights attack could safely proceed along well-established lines. Nevertheless, there were those who did confront the antagonism between the First Amendment and seditious libel; in so doing, they developed an independent challenge to the laws of seditious libel. The very concept of prosecuting those who publicly criticized the government and its officials, they objected, was the product of repressive and tyrannical thinking and therefore inconsistent with the concepts of freedom and civil liberty. The following expression by Congressman Albert Gallatin in 1798 is consistent with the modern consensus:

[L]aws against writings of this kind had uniformly been one of the most powerful engines used by tyrants to prevent the diffusion of knowledge, to throw a veil on their folly or their crimes, to satisfy those mean passions which always denote little minds, and to perpetuate their own tyranny. The principles of the law of political libels were found in the rescripts of the worst Emperors of Rome, in the decisions of the Star Chamber. . . . [T]o resort to coercion and punishments in order to suppress writings attacking their measures, was to confess that these could not be defended by any other means.⁶³

Gallatin's political consciousness suggests an empathetic grasp of the natural displacement of seditious libel by a popular form of government. Intellectually, he could not accept a "liberalized" version of libel, unlike Adams, Cushing, Hamilton or Jefferson, who, despite disputes of party politics, were unified in legitimatizing the concept of seditious libel itself. Gallatin would, therefore, interpret the First Amendment as repudiating British common law—a major advance in American constitutional theory.

60. Letter from Thomas Jefferson to Thomas McKean (Feb. 19, 1803), *reprinted in* FREEDOM OF THE PRESS, *supra* note 30, at 364.

61. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *reprinted in* FREEDOM OF THE PRESS, *supra* note 30, at 367.

62. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964); Kelly, *Criminal Libel and Free Speech*, 6 U. KAN. L. REV. 295, 315 (1958).

63. 5 ANNALS OF CONG. 2164 (1798).

Gallatin argued that the First Amendment protected the press from subsequent punishment as well as from prior restraint, eschewing the Blackstonian claim that liberty remained unbridled while sedition alone was the target of abuse.

[T]he amendment . . . declares . . . that Congress shall pass no law abridging the freedom of speech or the liberty of the press. . . . The sense, in which he and his friends understood this amendment, was that Congress could not pass any law to punish any real or supposed abuse of the press. . . . [I]t appeared to him preposterous to say, that to punish a certain act was not an abridgement of the liberty of doing that act. It appeared to him that it was an insulting evasion of the Constitution for gentlemen to say, "We claim no power to abridge the liberty of the press; *that*, you shall enjoy unrestrained. You may write and publish what you please, but if you publish anything against us, we will punish you for it. So long as we do not prevent, but only punish your writings, it is no abridgment of your liberty of writing and printing." Congress were by that amendment prohibited from passing any law abridging, &c.; they were, therefore, prohibited from adding any restraint, either by previous restrictions, or by subsequent punishment, or by any alteration of the proper jurisdiction, or of the mode of trial, which did not exist before; in short, they were under an obligation of leaving that subject where they found it—of passing no law, either directly or indirectly, affecting that liberty.⁶⁴

To those who countered that the "liberal" provisions of the law allowed an accused to raise the defense of truth, Gallatin pointed out the inadequacy of truth as a defense to criminal libel.

It was true that, so far as related merely to facts, a man would be acquitted by proving that what he asserted was true. But the bill was intended to punish solely writings of a political nature, libels against the Government, the President, or either branch of the Legislature; and it was well known that writings, containing animadversions on public measures, almost always contained not only facts but opinion. And how could the truth of opinions be proven by evidence?⁶⁵

The repressive nature of the Sedition Act generated the political consciousness that was necessary to appreciate the antagonism between seditious libel and free speech in a democracy. Like Gallatin, John Nicholas of Virginia, for example, collapsed the distinction between liberty and license as standards with which to delimit the bounds of improper exercise of the freedom of speech and press; he argued that the defense of truth was deficient.⁶⁶ Nicholas set forth the sophisticated theory that the First Amendment also protects the public's right to free speech and a free press. "If this

64. *Id.* at 2159-60 (remarks of A. Gallatin).

65. *Id.* at 2162.

66. *Id.* at 2140.

bill be passed into a law, the people will be deprived of that information on public measures, which they have a right to receive, and which is the life and support of a free Government."⁶⁷ Building upon the House debates, Tunis Wortman, a New York lawyer prominent in Tammany politics, also expanded upon the theoretical ground for a maximum protection understanding of the First Amendment. In his book, *Treatise Concerning Political Enquiry and the Liberty of the Press*,⁶⁸ published in 1800, Wortman fleshes out the inherently political nature of a libel prosecution: "A statute of sedition may stifle the open declarations of dissatisfaction . . . but (is) illy calculated for permanent establishment of tranquility or for effecting a radical cure of complaint."⁶⁹ George Hay, writing under the pen name Hortensius, also interpreted language of the First Amendment as expressly forbidding legislation punishing the written or spoken word.⁷⁰ Hay analyzed the relationship between popular sovereignty and the First Amendment, and concluded that limitation of the press to British notions of freedom of the press was meaningless in a country in which the people are the sovereign rulers: "The freedom of the press, therefore means the total exemption of the press from any kind of legislative control, and consequently the Sedition Bill, which is an act of legislative control is an abridgement of its liberty and expressly forbidden by the constitution."⁷¹

Yet, even with expiration of the Sedition Act in 1801, the horizon in American libertarian theory remained beyond the politics of the day. In 1804, Harry Crosswell, editor of a New York journal, *The Wasp*, was convicted of seditious libel upon Thomas Jefferson.⁷² The common law indictment did not charge false or wanton criticism of the President, but hearkened back to principles of royal sovereignty, alleging that Crosswell had represented President Jefferson as "unworthy the confidence, respect and attachment of the people . . . [thereby] alienat[ing] and withdraw[ing] . . . obedience, fidelity, and allegiance of the citizens . . .".⁷³ The appeal, argued by Alexander Hamilton, resulted in liberalization of state libel laws and allowed truth as a defense, but did not lead to the repudiation of the crime itself.⁷⁴ Such accusations were all too reminiscent of those by the

67. *Id.*

68. T. WORTMAN, *TREATISE CONCERNING POLITICAL ENQUIRY AND LIBERTY OF THE PRESS* (1800).

69. *Id.* at 164.

70. G. HAY, *TWO ESSAYS ON THE LIBERTY OF THE PRESS* (1799).

71. *Id.* at 30.

72. Source material for the Crosswell trial is found in BERNIS, *supra* note 11, at 128-31; LEGACY, *supra* note 15, at 297-99; FREEDOM OF THE PRESS, *supra* note 30, at 377-99; *Beauharnais v. Illinois*, 343 U.S. 250, 295-99 (1951) (Jackson, J., dissenting).

73. *People v. Crosswell*, 3 Johns. Cas. 337, 338 (N.Y. 1804).

74. Although Hamilton's argument did not carry a majority of the New York appellate court, which was evenly divided on the appeal, the state legislature revised the common law

royal governor in the King's colonial court against journalist John Peter Zenger in 1735.⁷⁵ Although Zenger's ultimate acquittal is heralded in the annals of freedom of the press as the popular repudiation of British seditious libel in colonial America, the verdict was more clearly attributable to forceful defense counsel and the jury's willingness to ignore the King's law by exercising its inherent powers of nullification.⁷⁶ After all, the law of seditious libel survived the Zenger case.

Conclusion

Even though the modern consensus is that the Sedition Act of 1798 violated the First Amendment guarantee of the rights to freedom of speech and press, the proposition that the First Amendment at its adoption repudiated the common law crime of seditious libel remains doubtful. The modern understanding of the First Amendment as securing maximum protection for civil rights is not the work of alchemy or historical error, but rather is the product of developing principles of popular sovereignty and of freedom of speech and press. The antagonism between the First Amendment and the sedition law represents the historical gap between theoretical principle and practical contingencies of the everyday political world in which theory must find its expression. Resolution of this historic conflict produced the maximum protection of First Amendment guarantees, thereby eliminating the very notion of seditious libel itself.

definition of seditious libel in 1805 along lines suggested in the opinion of Judge Kent. LEGACY, *supra* note 15, at 299; BERNS, *supra* note 11, at 142.

75. See generally G. DARGO, *ROOTS OF THE REPUBLIC: A NEW PERSPECTIVE ON EARLY AMERICAN CONSTITUTIONALISM*, 108-28 (1974); LEGACY, *supra* note 15, at 129-33; JUDGMENTS, *supra* note 11, at 117-25. Zenger was charged with criminally libeling the colonial governor of New York, William Cosby, through articles in his paper, *Weekly Journal*.

76. The trial judge, James DeLancey, had refused Zenger's request to admit evidence proving the truth of the allegedly libelous remarks: "Mr. Ch. Justice: You cannot be admitted . . . to give the Truth of a Libel in Evidence. A Libel is not to be justified; for it is nevertheless a Libel that it is true." FREEDOM OF THE PRESS, *supra* note 30, at 47. Ignoring the court's ruling, Andrew Hamilton, the defense attorney, presented his case to the jury, essentially arguing for jury nullification:

[E]very Man who prefers Freedom to a Life of Slavery will bless and honour You, as Men who have baffled the Attempt of Tyranny; and by an impartial and uncorrupt Verdict, have laid a noble Foundation for securing to ourselves, our posterity, and our Neighbours, That, to which Nature and the Laws of our Country have given us a Right—The Liberty—both of exposing and opposing arbitrary Power (in these Parts of the World, at least) by speaking and writing Truth.

Id. at 59.

