

**FREEDOMS OF PRESS AND SPEECH
IN THE FIRST DECADE
OF THE U.S. SUPREME COURT**

by

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ABSTRACT

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This thesis examines the views of freedoms of press and speech held by the twelve earliest justices of the U.S. Supreme Court, as the Sedition Act of 1798 raised their earliest First Amendment questions including the breadth of those freedoms and of seditious libel.

The thesis discusses three aspects of the early justices' views, which add to existing studies. First, the context of those justices' views was growing challenges to the restrictive Blackstone and Mansfield definition of freedom of press as only freedom from prior restraint (licensing) and as not also freedom from subsequent restraint such as seditious libel prosecution. Those challenges were reflected in broad language protecting freedoms of press and speech, and in the absence of language stating that the English common law of rights or of seditious libel was left unaltered. That crucial context of growing challenges has not been detailed in existing literature. (Chapter 3.) Second, the views of each early justice on press and speech are chronicled for the period 1789-1798. That discloses express commitments to those freedoms, which are absent from existing literature, and no adoption of the Blackstone definition before the 1798 crisis. (Chapters 4-5.) Third, the cases and reasoning of the six sitting justices upholding the Sedition Act of 1798 are chronicled and assessed, along with the views of the six remaining justices. That reveals that most remaining justices and also a significant minority within the Federalist party rejected the Sedition Act. Yet positions on the Sedition Act have been only cursorily discussed for four sitting justices and have been overlooked for the other eight justices, as well as for the Federalist party's minority, for the critical period 1798-1800. (Chapters 6-7.) The thesis proposes reasons for that divergence between the pre-1798 commitment of all justices to freedoms of press and speech, and the support given by most sitting justices to the Sedition Act, in contrast to apparent opposition by most remaining justices. The primary reasons are their opposing positions on several connected issues: the extent of rights to dissent, the challenges to the Blackstone definition and to seditious libel, the effect of new state and federal constitutions on seditious libel and on common law rights, strength of attachment to freedoms of press and speech and to seditious libel, and most sitting justices' changes of position to embrace the Blackstone definition.

The thesis calls into question conventional views in existing literature on each of those three aspects. First, Levy and others express the dominant view that freedom of press in state declarations of rights and the First Amendment 'was used in its prevailing common law or Blackstonian sense to mean a guarantee against previous restraints and a subjection to subsequent restraints for licentious or seditious abuse,' so that contrary evidence 'does not exist,' and that 'no other definition of freedom of the press by anyone anywhere in America before 1798' existed. Instead, opposition to the essence of seditious libel had been mounting over the decades. Second, the early justices are usually portrayed as having nothing to say about freedoms of press and speech before 1798. Instead, nearly all exhibited commitment to those freedoms before that crucial year, though half the early justices upheld the Sedition Act during 1798-1800. Third, the Federalist party, the early justices, and the states except Virginia and Kentucky are all usually described as unanimously supporting the Sedition Act. Instead, the Federalists divided over the Act, and the early justices did as well, with an unrecognized but significant minority of the party, and nearly half of the early justices, opposing the Sedition Act, as did several additional states.

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Abbreviations in English cases, and in other citations, are as in Oxford's *OSCOLA*.

Abbreviations in American cases are as in *Uniform System of Citation*, per Oxford Faculty of Law instructions.

App.	Appendix
CP	Court of Common Pleas
Exch	Court of Exchequer
HC	House of Commons
HL	House of Lords
KB	Court of King's Bench
nd	no date given
np	no publisher given
s.c.	same case
s.v.	sub verbum
ser	series

MANUSCRIPTS

CCL	College of Charleston Library, Charleston
CLS	Charleston Library Society, Charleston
DU	Duke University (Perkins Library), Special Collections, Durham
HC	Haverford College (Magill Library), Haverford
HLS	Harvard Law School Library, Cambridge
HSP	Historical Society of Pennsylvania, Philadelphia
LC	Library of Congress, Manuscript Division, Washington
MHS	Massachusetts Historical Society, Boston
MdHS	Maryland Historical Society, Baltimore
MSA	Maryland State Archives, Annapolis
MVL	Mount Vernon Library, Mount Vernon
NA	National Archives, Washington
NCSA	North Carolina State Archives, Manuscript Dept., Raleigh
NJHS	New Jersey Historical Society, Newark
PBM	Peabody Essex Museum, Phillips Library, Salem
RU	Rutgers University, Special Collections, New Brunswick
SC	Swarthmore College, Friends Historical Library, Swarthmore
SCDAH	South Carolina Department of Archives and History, Columbia
SCHS	South Carolina Historical Society, Charleston
SCL	South Caroliniana Library, University of South Carolina, Columbia
UNC-SHC	University of North Carolina, Manuscripts Department (Southern Historical Collection), Chapel Hill
YUL	Yale University Library, Manuscripts & Archives, New Haven

PUBLISHERS

AHA	American Historical Association
BP-HUP	Belknap Press, Harvard University Press
BUP	Boston University Press
CAP	Carolina Academic Press
CAUP	Colorado Associated University Press
CP	Clarendon Press
CUP	Cambridge University Press
ColUP	Columbia University Press
CorUP	Cornell University Press
DUP	Duke University Press
FDUP	Fairleigh Dickinson University Press
GPC	Genealogical Publishing Co.

GPO	U.S. Government Printing Office
HCSC	Historical Commission of South Carolina
HP	Hambleton Press, London
HSP	Historical Society of Pennsylvania
HUP	Harvard University Press
JHUP	Johns Hopkins University Press
LB	Little, Brown, Boston
LF	Liberty Fund, Indianapolis
LSUP	Louisiana State University Press
MHS	Massachusetts Historical Society
MUP	Manchester University Press
NCDAH	North Carolina Dept. of Archives & History
NJHC	New Jersey Historical Commission
NJHS	New Jersey Historical Society
NYHS	New York Historical Society
OhUP	Ohio University Press
OUP	Oxford University Press
PHMC	Pennsylvania Historical and Museum Cm.
PSUP	Pennsylvania State University Press
PUP	Princeton University Press, Princeton
RHS	Royal Historical Society
RUP	Rutgers University Press
SCP	Saint Catherine Press
SHSW	State Historical Society of Wisconsin
SUNYP	State University of New York Press
SUP	Stanford University Press
THC	Tennessee Historical Commission
UCP	University of California Press
UChiP	University of Chicago Press
UCSB	University of California Santa Barbara
UDP	University of Delaware Press
UGP	University of Georgia Press
UIP	University of Illinois Press
UKP	University of Kentucky Press
UMP	University of Massachusetts Press
UMoP	University of Missouri Press
UNCP	University of North Carolina Press
UNP	University of Nebraska Press
UPK	University Press of Kentucky
UPKan	University Press of Kansas
UPP	University of Pennsylvania Press
UPitP	University of Pittsburgh Press
UPV	University Press of Virginia
URP	University of Rochester Press
USCP	University of South Carolina Press
UTP	University of Tennessee Press
UWP	University of Wisconsin Press
YUP	Yale University Press

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CHAPTER 1

THE RIGHT TO DISSENT, AND FREEDOMS OF SPEECH AND PRESS, IN THE SEVENTEENTH CENTURY

'Rights' obviously lay at the heart of the Anglo-American controversy:
the rights of Englishmen, the rights of mankind, chartered rights.

--Bernard Bailyn¹

A Introduction

How could America, and the Supreme Court justices, divide less than a decade after the First Amendment was adopted in 1789 and ratified in 1789-1791, on whether the Sedition Act of 1798 violated freedoms of press and speech? The Act was not ambiguous; it clearly made it a crime to 'write, print, utter or publish any false and malicious writing against the government[.]. . . congress, or the president, with intent. . . to bring them. . . into contempt, or disrepute; or to excite against them. . . the hatred of the good people of the United States.'² The common response that the dominant party, and the early justices, were Federalists is insufficient, because they generally supported the First Amendment as Congress approved it. Moreover, the early justices held a broad view of freedoms of press and speech before 1798.

Instead, the answer is found primarily in what Americans, including early justices, understood about English and colonial law restricting dissent and prohibiting seditious libel³ and about the effect of the new state and federal declarations of rights on that law. One view followed Blackstone, whose *Commentaries* stated in 1769 that English 'liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints

¹ *Ideological Origins* 307.

² Sedition Act of 1798, 1 Stat.596 [ch.74] (repealed 1801).

³ Defined as 'the intentional publication of a writing that "scandalized" the government, that is, tended to bring it into disesteem.' *Green* 40; accord *Hanburger* 725-26, 762; *OCSC* 765.

upon publications, and not in freedom from censure for criminal matter when published.⁴ The opposite view held that that Blackstone-Mansfield definition was overridden by American state declarations of rights and the Bill of Rights, and in fact was questionable as a matter of English law. The Sedition Act brought those clashing views into focus.

The Supreme Court in its first decade (and its first century) did not rule on the constitutionality of the Sedition Act or other First Amendment questions, but half of the first twelve justices did on circuit. The early justices' views of freedoms of press and speech are a significant, though understudied and generally misunderstood, part of constitutional history.⁵ Those views have not been chronicled for 1789-1798, and have only partially been chronicled for four of the twelve early justices for 1798-1800 in histories of the Sedition Act.⁶

This thesis, by addressing the pre-Marshall justices' views of the First Amendment, and its first test, the Sedition Act, fills a gap in the otherwise outstanding existing histories--of the 1790s by Elkins and Wood,⁷ of the Supreme Court in that decade by Goebel, Casto, Gerber, and others,⁸ of its documents by Marcus,⁹ and of the Bill of Rights by Schwartz and Cogan.¹⁰ The thesis also challenges some pervasive errors in other narratives, as indicated below.

Six sitting justices upheld the constitutionality of the Sedition Act of 1798, using the

⁴ *Blackstone's Commentaries* 4:151.

⁵ This discussion of legal history does not address the significance of original meaning or original intentions, subjects about which much ink has been spilled. E.g., Thomas I Emerson, 'Colonial Intentions and Current Realities of the First Amendment' (1977) 125 *University of Pennsylvania Law Review* 737, 739.

⁶ James M Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (COPUP, Ithaca 1956) 232, 233, 234, 321-22, 326-27, 347-48, 354, 379, 381 (about four justices excluding First Amendment argument, without their analysis); John C Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Little, Brown, Boston 1952) 129, 218 (same); see Phillip L Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law* (CUP, Cambridge 2010) 144-45 (same).

⁷ Stanley Elkins and Eric McKittrick, *The Age of Federalism* (OUP, New York 1993); Gordon S Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (OUP, Oxford 2009).

⁸ Julius Goebel, *History of the Supreme Court of the United States Vol. I—Antecedents and Beginnings to 1801* (Macmillan, New York 1971); William R Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (USCP, Columbia 1995); Scott D Gerber, *Seriatim: The Supreme Court before John Marshall* (NYUP, New York and London 1998).

⁹ Maeva Marcus (ed), *The Documentary History of the Supreme Court of the United States, 1789-1800* (COPUP, New York 1985-2007) (8 vols).

¹⁰ Bernard Schwartz, *The Bill of Rights: A Documentary History* (Chelsea House, New York 1971); Neil H Cogan (ed), *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (OUP, New York 1997).

Blackstone-Mansfield definition of freedom of press and limiting the First Amendment to the freedoms of press and speech recognized by English common law; most remaining early justices appear to have disagreed. Those sitting justices' rulings occurred, despite their prior support for freedoms of press and speech, and those other justices disagreed, primarily because of differing positions on the English and American historical background on freedoms of press and speech and on seditious libel, and on the American constitutions' impact on those doctrines.

Those first twelve¹¹ justices of the Supreme Court of the United States served during its formative decade, the 1790s, from the first session in February 1790 to Chief Justice John Marshall's accession in January 1801. Though they were appointed by Presidents George Washington and John Adams, their names are mostly not widely known. The six initial justices were John Jay of New York, John Rutledge of South Carolina, William Cushing of Massachusetts, James Wilson of Pennsylvania, John Blair of Virginia, and James Iredell of North Carolina. The six successor justices, as Rutledge, Jay, and Blair resigned and then as Wilson and Iredell died, were Thomas Johnson of Maryland (who also resigned), William Paterson of New Jersey, Samuel Chase of Maryland, Oliver Ellsworth of Connecticut, Bushrod Washington of Virginia, and Alfred Moore of North Carolina.

President Washington saw the initial appointments as critical to the new republic, and sought 'to select the fittest characters to expound the laws and dispense justice,' because he believed that 'the first organization of the federal judiciary is essential to the happiness of our country, and to the stability of our political system.' He deemed the Supreme Court to be 'the key-stone of our political fabric.'¹² Most initial justices were or had been chief justices of their state's highest courts, and half drafted their state constitutions. The first twelve justices included two signers of the Declaration of Independence, six participants in the Constitu-

¹¹ As conventionally counted. OCSC 965, 972; *Justices* 1:xv.

¹² George Washington to Robert Harrison (28 Sept.1789), *Washington Papers-Presidential* 4:98-99; George Washington to John Jay (5 Oct.1789), *ibid* 4:137.

tional Convention, four leaders in state ratification conventions, and two leading participants in congressional adoption of the Bill of Rights.

Why are the early justices' views of the First Amendment and of the Sedition Act important? The Sedition Act controversy was the first major debate on the meaning of the First Amendment, and the early justices were the first federal judges to interpret freedoms of press and speech. Their opinions stimulated the development of the Jeffersonian-Madisonian theories of freedoms of press and speech, and the nonjudicial debate about those freedoms. The Sedition Act and its defense by the sitting justices contributed greatly to national victory by the Republicans and eclipse of the Federalists, and remained for a century the most repressive federal action toward press and speech. The controversy illuminated fundamental philosophical cleavages between the first American political parties, showing two distinctive forms of republicanism, as the revolutionary generation and the post-revolutionary generation grappled with what republicanism meant beyond rejection of a king and adoption of representative government. Those issues, only partially discussed in forming revolutionary states and forming the federal government, brought the adoption of state declarations of rights and the federal Bill of Rights, addressing what rights individuals retained and did not surrender to government, including the right to dissent from the administration and its measures. Republican dissent, which ensued, brought the first party system and the first transfer of power over the federal government.

Chapters 1 and 2 discuss the context of developing freedoms of press and speech and constitutionalism in the seventeenth and eighteenth centuries. Chapter 3 addresses the crime of seditious libel, and challenges the dominant view of Levy and others that no 'critics had questioned [Mansfield's] narrow definition of a free press,' that '[n]o other definition of freedom of the press by anyone anywhere in America before 1798' existed, and that '[e]vidence does not exist to contradict the assertion [freedom of press] was used in its prevailing common law or Blackstonian sense to mean a guarantee against previous restraints and a subjection to sub-

sequent restraints for licentious or seditious abuse.¹³ Chapters 4 and 5 discuss views of the first twelve justices on liberties of press and speech, before 1798, and question the general assumption that they opposed or disregarded freedoms of press and speech. Chapters 6 and 7 consider the views of those justices on the Sedition Act of 1798, and the trials some presided over during 1798-1800, and challenge the prevailing view that they and the Federalist party uniformly supported the Sedition Act (that 'not a single Federalist questioned the constitutionality of the Sedition Law,' and that 'every Federalist favored its subsequent enforcement,' except Marshall¹⁴).

This and the next chapter are introductory. The remaining substantive chapters rely on primary sources and note the most recent secondary sources.¹⁵

B The Seventeenth Century Historical Background of Debate on Freedoms of Press and Speech

The American revolutionaries framed the state declarations of rights and constitutions in 1776 and after, and the federal Bill of Rights in 1789, in the context of English rights before independence and English debates about those rights.¹⁶ They all employed written constitutions because of the perceived inadequacy of English limits and rights,¹⁷ and their declarations of rights all employed broad language because of the English restrictions on those

¹³ Leonard W Levy, *Emergence of a Free Press* (OUP, New York 1985, repr 1987) 158; *Levy-Liberty* 27, 191; and others cited at pp.101, 64.

¹⁴ James M Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (CorUP, Ithaca 1956) 155; *accord Origins* 517; *Crisis* 182, 22; *Adams Federalists* 163; *Levy* 280; *Repressive Jurisprudence* 92-99; *Bushrod Washington* 88.

¹⁵ A word about terminology: To avoid confusion, throughout 'England' will be used unless the entire United Kingdom is meant, and 'America' will refer to the English mainland colonies before 1776 and to the United States after 1776. The 'patriots' and 'loyalists' will refer to prerevolutionary and revolutionary parties, 'federalists' and 'antifederalists' to those supporting and opposing the federal Constitution, and 'Federalists' and 'Republicans' to the emerging political parties of the 1790s. The 'early Supreme Court' will refer to the Court of the 1790s, until John Marshall became chief justice in early 1801, and the 'initial justices' and 'successor justices' to the two rough halves of those dozen justices.

A word about style: Per Oxford instructions, American cases are cited using *A Uniform System of Citation*. In quotations, original spelling is retained but capitalization is modified for consistency; all emphasis is original unless indicated. American spelling is used otherwise.

¹⁶ Which was their dominant heritage in the late eighteenth century. *Ideological Origins* 66; *Braddick* 337 n1.

¹⁷ *Creation* 261, 266, 268, 268-87; *Ideological Origins* 175, 182.

rights, including for freedoms of press and (as time went on) speech. More generally, they looked to English history for guidance in protecting against absolutism by subjecting governments to constitutional restraint,¹⁸ and in reconciling the state and rights as they collided.

In this context, the early Supreme Court justices developed their views and addressed the first cases raising First Amendment challenges¹⁹ (those against the Sedition Act of 1798).

Events of the seventeenth century affecting freedoms of press and speech were a reference point for both sides in eighteenth century constitutional debates, English and American, and in Sedition Act debates. Being well discussed,²⁰ the major events are briefly summarized here.

Tudor censorship of the press was formalized by Star Chamber²¹ and Privy Council regulation,²² particularly the Star Chamber decree of 1586²³ proscribing seditious and strengthening requirements for approval before printing.²⁴ James I required strict compliance with that decree,²⁵ and he and Charles I added proclamations censoring the press²⁶ and prohibiting 'intermeddl[ing] by penne or speech, with causes of state,'²⁷ and otherwise restricted speech.²⁸

The Star Chamber under Charles I sought to increase control of the press and speech, as Archbishop Laud 'argued that political dissidence expressed in words or writing amounted to treason,'²⁹ and launched six show prosecutions³⁰ along with others.³¹ The Star Chamber de-

¹⁸ *Ideological Origins* 182, 184; *Federalist* No.5, at 24 (Jay).

¹⁹ Sitting on circuit courts (Chapter 6).

²⁰ Fredrick S Siebert, *Freedom of the Press in England, 1476-1776* (UIP, Urbana 1952) 107-302; *Hamburger* 674-91.

²¹ *Clegg-Caroline* 18, 27; *Lambert* 13; *Kemp* 1:16.

²² *Clegg-Caroline* 18; *Oxford History* 5:411-14.

²³ Which was 'the basis of all licensing' is disputed. *E.g.*, *Lambert* 15, 11-12; *Clegg-Caroline* 23.

²⁴ *Lambert* 13-14; *Clegg-Caroline* 29; Tessa Watt, *Cheap Print and Popular Piety, 1550-1640* (CUP, Cambridge 1991) 44.

²⁵ *Clegg-Caroline* 14.

²⁶ *Ibid* 15; *Haller* 49-50, 232.

²⁷ *Ibid* 14-15.

²⁸ *Colclough* 77-119; *Brooks* 144, 153-55.

²⁹ *Brooks* 179; *Kemp* 1:307.

creed of 1637 prohibited printing 'any seditious, scismaticall, or offensive bookes or pamphlets, to the scandall of Religion, or the Church, or the Government, or Governours of the Church or State,' and any other book or pamphlet without prior licensing by censors.³²

Parliament, finally summoned in 1640, abolished the Star Chamber in mid-1641,³³ and with it the decree on censorship--'a revolution within the revolution.'³⁴ However, it reinstated censorship just two years later, and renewed it after various lapses through the Interregnum.³⁵

Army debates touched on these freedoms, in 1647-1649 in Putney³⁶ and Whitehall.³⁷ Freedom of speech appeared in the army's proposals and responses,³⁸ which were debated at Putney, and was touched upon in the officers' version of an Agreement of the People,³⁹ which resulted from debates at Whitehall (though their focus was freedom of religion). Freedom of press was practiced but not preached in the debates.⁴⁰

The Restoration regime, as it sought to rebuild society on earlier Stuart lines,⁴¹ issued

³⁰ Brooks 179-80, 217-18; Watts 66-68; Haller 232-33, 219-25, 253-59, 250-55, 259-61.

³¹ Brooks 178-79 (satire 1627); *Dangerous Talk* 16 (Alexander Gill 1628); Richard Burt, *Licensed by Authority: Ben Jonson and the Discourses of Censorship* (CorUP, Ithaca 1993) 89 (Christopher Malloy 1629); Brooks 180, 188-89 (Star Chamber cases 1637); *Dangerous Talk* 186-87 (William Pickering 1638); Sharpe 676 (Walter Long, David Foulis); Julian Davies, *The Caroline Captivity of the Church* (CP, Oxford 1992) 126-71; Haller 20, 230, 262-64.

³² Sharpe 649-50; Lambert 22-23.

³³ Aylmer 18; *Constitutional Documents* 179.

³⁴ Crassy 292; see *ibid* 292-302.

³⁵ Kemp 2:72 (1643), 2:183 (1647), 233 (1649), 345 (1653), 424 (1655)

³⁶ Michael Mendle (ed), *Putney Debates of 1647* (CUP, Cambridge 2001); 'Putney Debates,' *Army Debates* 1-124, 438-55.

³⁷ Austin Woolrych, *Soldiers and Statesmen: The General Council of the Army and Its Debates, 1647-1648* (CP, Oxford 1987); JC Davis, 'Religion and the Struggle for Freedom in the English Revolution' (1992) 35 *Historical Journal* 507; 'Whitehall Debates,' *Army Debates* 125-78, 456-73.

³⁸ Woolrych 160-65, 207-09, 279; Kishlansky 272, 288; Vallance 159; 'The Heads of the Proposals' (1 Aug.1647), *Army Debates* 422, 423, 424; [Edward Sexby], 'The Case of the Army Truly Stated' (15 Oct.1647), *ibid* 429, 434; 'An Agreement of the People' (3 Nov.1647), *ibid* 443, 444.

³⁹ Aylmer 155; Vallance 170; 'Agreement of the People' (15 Jan.1649), *Constitutional Documents* 359, 369; [Henry Ireton], 'A Remonstrance of Fairfax and the Council of Officers' (16 Nov.1648), *Army Debates* 456, 463; contra John Lilburne, 'A Plea for Common Right and Freedom' (28 Dec.1648), *ibid* 472.

⁴⁰ Michael Mendle, 'Putney's Pronouns,' in Mendle 125, 127-30. Most petitions and statements appeared as handbills. E.g., Notes, *Leveller Tracts* 51, 64, 88, 135, 147, 156; *Army Debates* 2, 45 & n1.

⁴¹ Paul Seaward, *The Cavalier Parliament and the Reconstruction of the Old Regime, 1661-1667* (CUP, Cambridge 1989) 16-17, 34, 162-95; Miller-Charles II 56-57; Zuckert 99.

early proclamations from Charles II suppressing several books and unlicensed newsbooks,⁴² prosecuted 'seditious pamphlet[s],'⁴³ and enforced warrants to search for unauthorized publications.⁴⁴ Parliament's first act criminalized words as high treason the next year.⁴⁵ The Licensing Act of 1662⁴⁶ soon followed, patterned on the Star Chamber's Decree of 1637, and when it lapsed in 1679,⁴⁷ proclamations from Charles took its place until it was reenacted.⁴⁸ During the later Stuart reigns 'a greater number of individuals fell [a]foul of the law, and were punished more severely for their actions, than had ever previously been the case.'⁴⁹

The Revolution brought relief, but the Bill of Rights of 1689 provided no protection for freedom of press, and little for nonparliamentary speech. When the Licensing Act finally lapsed in May 1695,⁵⁰ the press gained toleration, but freedom of press remained unsecured, as threats of seditious libel prosecution continued.⁵¹ Religious dissent similarly gained only toleration.⁵²

C The Seventeenth Century Historical Background of Absolutism and Constitutionalism and English State Formation

Controversy over freedoms of press and speech in the seventeenth century, and after, was part of a larger controversy over Stuart claims of absolute power and opposition demands for constitutional restraint. Government and its supporters proscribed criticism while the opposition

⁴² Greaves 1:208, 212; Peter Fraser, *The Intelligence of the Secretaries of State and Their Monopoly of Licensed News, 1660-1688* (CUP, Cambridge 1956) 35; Hutton 156; Aylmer 109; Sutherland vii; Joad Raymond, *Pamphlets and Pamphleteering in Early Modern Britain* (CUP, Cambridge 2003) 328-82.

⁴³ Greaves 1:210-11, 216-25.

⁴⁴ *Schwoerer-Liberty* 199, 201; Greaves 1:216.

⁴⁵ EHD 8:63-64 §1, 64 §2.

⁴⁶ Michael Treadwell, 'The Stationers and the Printing Act at the End of the Seventeenth Century,' in CHB 4:755, 755-65; Hill's *Century* 213-14; Weber 152-53.

⁴⁷ Scott 183; Timothy Crist, 'Government Control of the Press after the Expiration of the Printing Act in 1679' (1979) 5 *Publishing History* 49, 49-50; Sutherland vii.

⁴⁸ Dorothy Aukter, *Dictionary of Literary and Dramatic Censorship in Tudor and Stuart England* (Greenwood, Westport 2001) 382.

⁴⁹ Jason McElligott, "'A Couple of Hundred Squabbling Small Tradesmen'?", in Raymond 85, 98; accord Siebert 243; Weber 158.

⁵⁰ *Schwoerer-Liberty* 230; CHB 4:770.

⁵¹ *Hamburger* 724-25, 726-34.

⁵² EHD 8:400.

pressed for freedom to insist on rule of law and to criticize the administration and its measures.

The events of the century that affected development of freedoms of press and speech, and development of constitutionalism,⁵³ were studied and cited during America's revolutionary period, constitutional period, and 1798. One side derived warnings of repeating the absolutism⁵⁴ of the earlier and later Stuarts and their Star Chamber and nonindependent judiciary, while the other side emphasized warnings of repeating the revolutionary anarchy of the Civil War and the tyranny of the Interregnum. In 1798, dual lines of reasoning were available for those dreading the dangers of monarchy and tyranny and those fearing the perils of sedition and 'mobocracy.'

1 Absolutism and Constitutionalism

The controversy over absolute power of the King in the seventeenth century⁵⁵ circled around such Stuart assertions as James I's claim that 'the King is above the law, as both the author and giver of strength thereto . . . ,'⁵⁶ and Charles I's similar claim as he largely ruled by prerogative⁵⁷ and began to force loans.⁵⁸ These provoked parliamentary protests intimating or asserting limits on royal power.⁵⁹ The Star Chamber's exercise of unchecked power, particularly against dissenting press and speech and religion, brought repeal legislation condemning the court's 'intolerable burthen to the subjects, and the means to introduce an arbitrary power,' and its practice to 'punish where no law doth warrant, and . . . make decrees for

⁵³ Defined as that 'ordinary law defines the monarch's powers,' *Cromartie* 9; accord *ibid* 3, 7, 188; *Burgess* 89; see *Ideological Origins* 175, 182, 193.

⁵⁴ Defined in *Lake* 7 and *Cromartie* 148-49.

⁵⁵ *Brooks* 162-89; *Hirst* 86-87; *Smuts* 231-34, 238; *Zuckert* 29-48; *Absolute Monarchy* 91-123.

⁵⁶ James I, 'The Trew Law of Free Monarchies' (1603), in *The Workes of the Most High and Mightie Prince, James* (Robert Barker, London 1616) 191, 203; accord *Brooks* 131; *Cromartie* 148-49; and other absolutist claims, *Cromartie* 152-53, 196.

⁵⁷ *Brooks* 167-69; *Sharpe* 105-30 (knighthood, forest fines, projects, customs), 567-96 (ship money), 926-28 (exactions); *Hirst* 26-27; *Aylmer* 4-7; Kenneth R. Andrews, *Ships, Money and Politics* (CUP, Cambridge 1991) 128-59; e.g., *Stuart Proclamations* 2:1-1027 (519 proclamations during 1625-46).

⁵⁸ Richard Cust, *The Forced Loan and English Politics, 1626-1628* (CP, Oxford 1987) 13-149; *Brooks* 169-73; *Cromartie* 226, 236, 231, 256.

⁵⁹ *Brooks* 176-77; Conrad Russell, *Parliaments and English Politics, 1621-1629* (CP, Oxford 1979) 342-85; *Hirst* 152-54; *Ancient Constitution* 293-303; Petition of the House of Commons (7 July 1610), *Select Statutes* 302, 305-06; Petition of the House of Commons (9 Dec. 1621), *ibid* 311; Petition of Right (7 June 1628), *Statutes* 7:317.

things having no such authority.⁶⁰ The Civil War failed to establish constitutionalism.

At the Restoration, Charles II looked backward to the powers of the first Stuarts, and southward as well⁶¹ to the absolutism of France⁶² and other European states,⁶³ and followed his father's and grandfather's claims of authority to act with force of law and to suspend or dispense with the law, reaching a peak in the last years of his reign.⁶⁴ These were absolutist claims,⁶⁵ and led to persistent objections by the oppositionists in Parliament about a perceived march toward absolute monarchy,⁶⁶ objections that some modern historians find valid.⁶⁷ James II claimed the same powers,⁶⁸ and his use of them led the opposition⁶⁹ to object to his building 'a modern absolutist state,' again an objection that various scholars find sound.⁷⁰

One form of constitutionalism that was raised in opposition, the 'ancient constitution,' has suffered the strongest modern challenge. Though Coke's final stance in his posthumous *Second Institute* was historically influential,⁷¹ it has suffered modern attacks because of its heavy gloss on Magna Carta⁷² and its other historical flaws.⁷³ Pocock led in rejecting the

⁶⁰ Aylmer 18; *Statutes* 7:338; *Constitutional Documents* 179.

⁶¹ Childs 399; Ashcraft 235.

⁶² Ralph E Giesey, 'State-Building in Early Modern France: The Role of Royal Officialdom' (1983) 55 *Journal of Modern History* 191, 192-93; Childs 401; as did James II, *Pincus* 6, 475, 480; but see Speck 125-26.

⁶³ JH Shennan, *The Origins of the Modern European State, 1450-1725* (Hutchinson, London 1974) 103-11; Dickinson 18; Ralph E Giesey, 'State-Building in Early Modern France: The Role of Royal Officialdom' (1983) 55 *Journal of Modern History* 191, 192-93; *English Society* 122.

⁶⁴ Childs 407-08; Miller 261; John Miller, 'The Potential for "Absolutism" in Later Stuart England' (1984) 69 *History* 187, 207 (only in last years); Ashcraft 14, 19.

⁶⁵ *Absolute Monarchy* 219; Ashcraft 19, 14, 21, 28, 33, 38, 118, 128, 550.

⁶⁶ Clark 236, 239; Ashcraft 549-50, 21-22; Zuckert 97, 100; Scott 184-90.

⁶⁷ *Pincus* 475, 480-81; Robbins 24; Ashcraft 14, 18, 28, 38; see Dickinson 18.

⁶⁸ Speck 21, 242; Robbins 52; *Pincus* 478, 479; contra Miller 261.

⁶⁹ Robbins 52; *Oxford History* 7:49.

⁷⁰ *Pincus* 6, 8, 475, 478; Robbins 52; Speck 8-10, 21, 125-26, 137, 139-41, 242; see Ashcraft 139, 406, 538-42, 546.

⁷¹ JC Holt, *Magna Carta* (2nd ed CUP, Cambridge 1992) 404-05.

⁷² Brooks 120-21; Hill's *Intellectual Origins* 228-29.

⁷³ Anne Pallister, *Magna Carta: The Heritage of Liberty* (CP, Oxford 1971) 3 (transmogrifying feudal rights); *Ancient Constitution* 233-34, 231 ('delusion' of 'a supposedly actual English past'); Burgess 26-27, 58 ('radically incompatible' views fused).

'constitutionalist myth' of struggle to preserve an ancient constitution.⁷⁴ Burgess and Weston denied that the struggles between James and Parliament could be so characterized, and also rejected the bipolarity of absolutism and constitutionalism.⁷⁵ Others, without disagreeing that an 'ancient constitution' cannot be pulled out of the Saxon law hat, decoupled that from polarity of absolutism and constitutionalism, finding that constitutionalism was far from 'myth' and instead posed a real alternative to absolutism.⁷⁶ Yet the underlying point survives independent of mythical ancient constitutions: the needs for protection of rights of subjects from royal absolutism, and for subjection of the monarch to rule of law.⁷⁷ Coke and Parliament 'were arguing publicly for the right to oppose the government' without reprisal, and for a legal foundation for other liberties.⁷⁸

That different form of constitutionalism sought to limit the monarch by law in its English version, and later to limit the legislature and judiciary as well in its American version in the next century,⁷⁹ in order to protect liberty and rights.⁸⁰

That 'absolutist-constitutionalist dichotomy' has been rejected by some modern scholars as whiggish history.⁸¹ Nevertheless, recent literature has shifted back to supporting the real existence of a distinction between Stuart claims that 'the King is above the law' and opposition appeals to rule of law.⁸² Without meaningful constitutional limits, it is difficult to identi-

⁷⁴ *Ancient Constitution* 264, 234; refined in *Cromartie* 198-201 *passim*.

⁷⁵ Burgess 110-11, 115-38, 89, 162-72; more thoroughly developed in Corinne C Weston, 'England: Ancient Constitution and Common Law,' in *Burns* 375, 376.

⁷⁶ *Cromartie* 261; *Dickinson* 14, 62-63; see *Clark-Revolution* 168 n12, 167-68.

⁷⁷ See *Cromartie* 3; JH Hexter, 'Introduction,' to *Hexter* I, 1.

⁷⁸ *Raffield* 265; e.g., *Select Statutes* 311, 311-12.

⁷⁹ *Ideological Origins* 175-98; *Creation* 266, 257, 268-87; Gordon S Wood, 'The Origins of the Bill of Rights' (1992) 101 *Proceedings of American Antiquarian Society* 255, 262, 266.

⁸⁰ *Ibid* 230-32, 77-78, 184-98; *Creation* 128-29.

⁸¹ *Absolute Monarchy* 209-10; see *Sharpe* 929-33; *Ancient Constitution* 232, 264.

⁸² *Cromartie* 3, 196; accord JP Sommerville, *Politics and Ideology in England, 1603-1640* (Longman, London 1986) 10, 12, 41-46 (divine right), 61-66 (contractual), 89, 92, 100-05 (ancient constitution); *Ashcraft* 38; *Scott* 67-68 (Harrington), 73-74 (Aquinas, Fortescue), 300-05 (Nedham, Milton, Sidney); *Raffield* 265, 267; *Scott-Commonwealth* 131, 133; *Brooks* 176-77, 165-88; see *Lake* 7; Corinne Weston, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (CUP, Cambridge 1981) 4-5, 5-6.

lying anything preventing such state prohibitions as James I's of 'any seditious, schismatical or other scandalous books or pamphlets,'⁸³ or Charles I's of 'broach[ing] such dangerous opinions' as appeared in 'printed pamphlets, or rather indeed infamous libels, stuffed full of calumnies against our regall authority,'⁸⁴ particularly when proscriptions are less overt and more cleverly packaged.

Whether or not constitutionalism was central to England's seventeenth century struggles, it suffused American interpretations during the revolutionary and constitutional periods, as rights were at the center of conflict with England, and as constitutions were written whose 'primary function . . . was to mark out the boundaries of governmental powers.'⁸⁵

2 State Formation

The type of state the Stuarts were forming, of course, determined its implications for constitutional limitations and for rights, and those that deny the Stuarts were building an absolutist state include both outright deniers discussed in the next section, and many writers on state formation who seem to view expansion of state powers as a natural, inevitable process.

England's seventeenth century conflicts certainly can be seen from many other perspectives besides constitutionalism. A common state formation perspective, beginning with the modern English state being well underway as the century began,⁸⁶ notes its military and territorial aspects⁸⁷ and its fiscal and 'confessional' aspects,⁸⁸ but less commonly observes that the latter, as the early Stuarts asserted and enforced various powers, collided more and more with Parliament and the populace. Similarly, as such scholars note that 'state formation [in] the 1640s

⁸³ Clegg-Caroline 14; *Select Statutes* 394.

⁸⁴ 'Proclamation' (27 Feb. 1639), *Stuart Proclamations* 2:662, 663-64.

⁸⁵ *Ideological Origins* 307, 182; *accord Creation* 261, 266, 268, 268-87.

⁸⁶ Philip Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Blackwell, Oxford 1985) 53-71; *Brewer* 1-25.

⁸⁷ As 'crystallizations of power' are categorized by Michael J Braddick, *State Formation in Early Modern England, c.1550-1700* (CUP, Cambridge 2000) 428-29, 420, 96 (patriarchal state, confessional state, fiscal-military state, and dynastic state).

⁸⁸ *Braddick* 287; *accord* Brian P Levaack, *The Formation of the British State* (CP, Oxford 1987) 1.

occupie[d] a crucial place,⁸⁹ and note the 'military revolution' in government through dramatic expansion of army and navy,⁹⁰ and the redesigned fiscal system reliant not on feudal sources but 'customs, excise and assessments,'⁹¹ they mention the 'constitutional experiments' that occurred and failed after Charles I was beheaded,⁹² but generally not the clamor against absolutism and for rights, or on the Commonwealth's failure to protect liberty and rights.

A notable exception is Pincus, whose innovative reinterpretation of 1688-1689 integrates absolutist-constitutionalist concerns with state formation revisionism.⁹³ He posits that the Revolution provided 'a landmark moment in the emergence of the modern state,' when James II's opponents rejected the King's effort 'to develop a modern absolutist state' on the French model, and instead 'created a new kind of English state,'⁹⁴ a modern state partially on the Dutch model.⁹⁵ That Revolution included subjection of the King to rule of law,⁹⁶ shifting of some powers between King and Parliament,⁹⁷ and protection of some individual rights.⁹⁸ It was soon followed by massive expansion of the fiscal-military state, mostly from war with France,⁹⁹ a foreign policy revolution,¹⁰⁰ and a 'financial revolution'¹⁰¹ and administrative revolution.¹⁰²

⁸⁹ Tyacke 38; accord Braun 268.

⁹⁰ Braddick 178; see *ibid* 180; Tyacke 36; Braun 281-82.

⁹¹ *Ibid* 284; see *ibid* 233; Braun 282-88; Michael J Braddick, *The Nerves of State: Taxation and the Financing of the English State, 1558-1714* (MUP, Manchester 1996) 95-99; Tyacke 36.

⁹² Michael J Braddick, *God's Fury, England's Fire* (Allen Lane, London 2008) 591; Pincus 482.

⁹³ E.g., Pincus 6, 475.

⁹⁴ *Ibid* 6, 8, 475; accord Speck 242-43.

⁹⁵ Scott-Commonwealth 356; Pincus 6.

⁹⁶ Woolrych-Revolution 796; EHD 8:123, 122-23.

⁹⁷ Oxford History 7:41, 45; Brewer 137-38.

⁹⁸ Petition, free elections, arms, and fairly-chosen juries. EHD 8:123-24.

⁹⁹ Braddick 437, 435, 283-84; Brewer xiii, 23, 27, 29-31, 42; Oxford History 7:4; see Carswell 236. Local government also increased efficacy. Joan R Kent, 'The Centre and the Localities: State Formation and Parish Government in England, Circa 1640-1740' (1995) 38 Historical Journal 363, 403-04.

¹⁰⁰ Pincus 305-65, 477.

¹⁰¹ Braun 288; Dickinson 94; Brewer 137; Oxford History 7:4; W Fritschy, 'A "Financial Revolution" Reconsidered: Public Finance in Holland During the Dutch Revolt, 1568-1648' (2003) 56 Economic History Review 57, 58; Pincus 399, 366-99.

¹⁰² Brewer 69, 89; Dickinson 94; Henry Roseveare, *Financial Revolution, 1660-1760* (Longman, London 1991) 48.

State formation theory, Pincus excepted, tends to assume inexorable increase of the fiscal-military and administrative state. Yet England's example in the Restoration and Revolution is contrary, when its military was small compared to the army and navy of the Civil War,¹⁰³ and its fiscal system was small as well in comparison¹⁰⁴ and yet passably administered by cooperative local officials without a large central bureaucracy.¹⁰⁵ The Dutch Republic's example is also contrary as, despite its large standing army and navy and increased taxes, it used a small central bureaucracy and nonprofessional local governments.¹⁰⁶

State formation theory also tends not to focus on rule of law and rights, or even to treat those as real or at least sincere concerns.¹⁰⁷ However, something at least as striking as the growth of the English state, over the seventeenth century, was the growth in English rights. The dominant theory at the century's beginning was that a viable state must have only approved press, conforming speech, and uniform religious belief,¹⁰⁸ and that dissent was seditious if not treasonous.¹⁰⁹ The dominant view at the century's end was that a functional state might tolerate an unlicensed press, nonseditious dissenting speech, and other Protestant religions.¹¹⁰ Since that was not inexorable in the state formation process, as France's example

¹⁰³ Lawrence Stone, *The Past and the Present Revisited* (rev ed Routledge, London 1987) 170-71; Brewer 9, 11-12.

¹⁰⁴ Michael J Braddick, *The Nerves of State: Taxation and the Financing of the English State, 1558-1714* (MUP, Manchester 1996) 95-99; Braum 243, 282-88, 281-82; Brewer 89; Braddick-Social Change 2.

¹⁰⁵ Braddick-Social Change 2; Brewer 15-19.

¹⁰⁶ Jonathan I Israel, *The Dutch Republic: Its Rise, Greatness, and Fall, 1477-1806* (CP, Oxford 1995) 276, 277-84, 285-87, 291, 947; Marjolijn C 't Hart, *The Making of a Bourgeois State: War, Politics and Finance During the Dutch Revolt* (MUP, Manchester 1993) 195-97, 198-200, 205-08, 222; Martin van Gelderen, 'Aristotelians, Monarchomachs and Republicans: Sovereignty and *Respublica Mixta* in Dutch and German Political Thought, 1580-1650,' in van Gelderen 1:195, 200, 203-04; Scott-Commonwealth 356.

¹⁰⁷ E.g. Charles Tilly, 'Reflections on the History of European State-Making,' in Charles Tilly (ed), *The Formation of National States in Western Europe* (PUP, Princeton 1975) 71; JH Shennan, *The Origins of the Modern European State, 1450-1725* (Hutchinson University Library, London 1974) 111.

¹⁰⁸ *Ibid* 3, 37, 71, 77-78; JH Shennan, *supra* 108-09; Braddick 287.

¹⁰⁹ E.g., *Stuart Proclamations* 1:60 (24 Oct.1603), 1:495, 496 (24 Dec.1620), 1:599 (15 Aug.1624); 2:90, 92 (14 June 1626), 2:662 (27 Feb.1639), 2:703 (30 Mar.1640); see Bellamy 13-15, 27-28, 31-46 (later Tudors); Brooks 94-95 (Elizabeth).

¹¹⁰ Harris-Newspapers 153; *Oxford History* 7:9, 8:289; see EHD 8:400.

showed,¹¹¹ and is contrary to a realist state formation approach that treats demands for freedom as merely an opposition tactic, something else was at work alongside state building.

A difficulty of imposing such a state formation interpretation on English events is that, however defensible it may be, it was not the interpretation relevant to Americans in the revolutionary or constitutional period, and can be an interpretation that omits the very things that were relevant to Americans looking back at the seventeenth century: rule of law and rights.

D Interpretations of Major Events of England's Seventeenth Century Affecting Constitutionalism and Freedoms of Press and Speech

Americans' search of English history was complicated by historians' disagreements over critical points that still attract debate. Not only questions of absolutism and constitutionalism, but key historical events and their meanings, remain controverted. The following are illustrative.

The idea of Stuart absolutism has been challenged by determined revisionists. Though James I's claims were *prima facie* unlimited,¹¹² some historians argue that the King remained obligated 'to govern legally'¹¹³ and to respect subjects' rights to property.¹¹⁴ Even in Charles I's proclamations, evasive responses to the Petition of Right,¹¹⁵ and personal rule,¹¹⁶ some revisionists repaint his portrait in a much more favorable light,¹¹⁷ seeing 'little to link him . . . to "theories of absolute or arbitrary rule"'.¹¹⁸ Charles' modification of Church of England doc-

¹¹¹ Pincus 6, 475, 480; Childs 401; Michael P Breen, *Law, City, and King: Legal Culture, Municipal Politics, and State Formation in Early Modern Dijon* (URP, Rochester 2007) 17-21.

¹¹² Smith 19, though discussing that royal powers were not extended to theoretical limit and claimed harmony with subjects' interests; Raffield 264; Cromartie 152.

¹¹³ *Absolute Monarchy* 122, 209; accord *Ancient Constitution* 306; Burgess 5; Sharpe 929-33; Smith 18; see Cromartie 196.

¹¹⁴ Burgess 5; *Ancient Constitution* 284-85; Foster 14-15; Smith 23; Cromartie 206.

¹¹⁵ Brooks 177; Cromartie 231; *Coke's Works* 2:1291, 2:1295 & n239, 2:1275.

¹¹⁶ Sharpe 929-33; *Aylmer* 3-7; LJ Reeve, *Charles I and the Road to Personal Rule* (CUP, Cambridge 1989).

¹¹⁷ Sharpe 377-83 (High Commission), 665-82 (Star Chamber), 929-33 (nonabsolutism) *passim*; *Absolute Monarchy* 224, 211-13; Mark Kishlansky, 'Charles I: A Case of Mistaken Identity' (2005) 189 *Past & Present* 41, 56.

¹¹⁸ *Absolute Monarchy* 213; accord Mark Kishlansky, 'Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights' Case' (1999) 42 *Historical Journal* 53, 57-58; see Cromartie 236.

trine through Laud and others¹¹⁹ is similarly denied by a much larger group of revisionists,¹²⁰ who also detach ceremonial change from doctrinal change.¹²¹ Charles II's embrace of absolutism is limited to his last years by an equally determined minority,¹²² and James II's is minimized.¹²³

Star Chamber repressive activity has been treated by several scholars as 'myth,'¹²⁴ at least during James' reign,¹²⁵ or as not 'merit[ing] complete abolition,'¹²⁶ or, less directly, as not meriting much attention,¹²⁷ despite the six show trials and other repressive instances. More recent revisionists have tended in the same direction, rejecting the earlier Whig and Marxist position

¹¹⁹ *Anti-Calvinists* 245, 181-244; Nicholas Tyacke, 'The Rise of Arminianism Reconsidered' (1987) 115 *Past & Present* 201, 211-16; Nicholas Tyacke, *Aspects of English Protestantism, c. 1530-1700* (MUP, Manchester 2001) 203-21.

¹²⁰ Scott 123, 125; Peter White, 'The Rise of Arminianism Reconsidered' (1983) 101 *Past & Present* 34, 53-54; *Clark-Revolution* 107, 166-67; Peter White, 'A Rejoinder' (1987) 115 *Past & Present* 217, 229; Peter White, *Predestination, Policy and Polemic* (CUP, Cambridge 1992) 238-55; Peter Lake, 'The Laudian Style: Order, Uniformity and the Pursuit of the Beauty of Holiness in the 1630s,' in Kenneth Fincham (ed), *The Early Stuart Church: 1603-1642* (SUP, Stanford 1993) 161, 184-85; Roger Lockyer, *The Early Stuarts: A Political History of England, 1603-1642* (2nd ed Longman, London 1999) 212-17; Charles WA Prior, *Defining the Jacobean Church: The Politics of Religious Controversy, 1603-1625* (CUP, Cambridge 2005) 19, 8 (redefining issue as broadly ecclesiology); *Cromartie* 247.

¹²¹ Anthony Milton, *Catholic and Reformed: The Roman and Protestant Churches in English Protestant Thought, 1600-1640* (CUP, Cambridge 1995) 437-38, 435-36; see Julian Davies, *The Caroline Captivity of the Church: Charles I and the Remoulding of Anglicanism, 1625-1641* (CP, Oxford 1992) 93-95, 95-98, 117, 120-22, 125. Milton added that the 'unstable' content of Laudianism varied with the prelate and the parish. Anthony Milton, 'The Creation of Laudianism: A New Approach,' in Thomas Cogswell and others (eds), *Politics, Religion and Popularity in Early Stuart Britain* (CUP, Cambridge 2002) 162, 180-83.

¹²² John Miller, 'The Potential for "Absolutism" in Later Stuart England' (1984) 69 *History* 187, 207. His father is similarly defended. Mark A Kishlansky, 'A Lesson in Loyalty: Charles I and the Short Parliament,' in Jason McBelligott (ed), *Royalists and Royalism During the English Civil Wars* (CUP, Cambridge 2007) 16; Sarah Poynting, '"I Doe Desire To Be Rightly Understood": Rhetorical Strategies in the Letters of Charles I,' *ibid* 136.

¹²³ Miller 261; various revisionists criticized in *Pincus* 478.

¹²⁴ Thomas G Barnes, 'Star Chamber Mythology' (1961) 5 *American Journal of Legal History* 1, 2-3; accord Thomas G Barnes, 'Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber' (1962) 6 *American Journal of Legal History* 221, 224-25.

¹²⁵ Thomas G Barnes, *List and Index to the Proceedings in Star Chamber for the Reign of James I* (American Bar Foundation, Chicago 1975) 3:151, 152, 154-59; *Clegg-Caroline* 27; but see Samuel R Gardiner, *Reports of Cases in the Star Chamber and High Commission* (New Series v39 Camden Society, Westminster 1886) 89, 181, 186, 188, 190, 195, 197, 198, 239, 268, 269, 270, 274, 278, 284, 296, 298, 308, 310, 316.

¹²⁶ Henry El Phillips, 'The Last Years of the Court of Star Chamber, 1630-41,' in *Transactions of the Royal Historical Society* (4th Series RHS, London 1939) 21:103, 123, 119-20; accord *Sharpe* 670, 665-82.

¹²⁷ Cora L Scofield, *A Study of the Court of Star Chamber: Largely Based on Manuscripts in the British Museum and the Public Records Office* (UCHP, Chicago 1900) 52, 47-48; Edward P Cheyney, 'The Court of Star Chamber' (1913) 18 *American Historical Review* 727, 747-49.

that the Star Chamber was severely repressive,¹²⁸ and instead finding its censorship largely ineffectual because of desultory enforcement and an ineffective modern state.¹²⁹ It being beyond question that Laud's prosecutions made the court widely unpopular,¹³⁰ post-revisionists have insisted where there is persecutory smoke there is fire,¹³¹ and find further evidence of Star Chamber repression in the explosion of publications once censorship ended.¹³²

Explanations of the Civil War of 1642-1648 have multiplied with the years. Cavaliers saw its cause as a wicked sectarian rebellion (Clarendon¹³³), while supporters of the (parliamentary) 'good old cause' saw its provocation as an evil tyrannical king (Milton¹³⁴), and the debate has continued for three and a half centuries. Subsequent generations became 'bedewed with unsuborned tears' for the martyr Charles (Hume¹³⁵), or admired 'Puritan Reform-

¹²⁸ Siebert 112, 141-46, 191-201, 232-33; Donald Thomas, *A Long Time Burning: The History of Literary Censorship in England* (Routledge, London 1969) 11-14; Hill 14; *Hill's Essays* 1:35-41, 41-48; *Hill's Century* 82-83, 89, 91, 149, 265.

¹²⁹ Sharpe 651-52; John Barnard, 'Introduction,' to *CHB* 4:1, 3; Annabel M Patterson, *Censorship and Interpretation* (UWP, Madison 1984) 11 ('conventions' averting prosecution); Kevin Sharpe, *Remapping Early-Modern England: The Culture of Seventeenth-Century Politics* (CUP, Cambridge 2000) 46, 317-18; Clegg-Caroline 206, 18-19; Tue A Nexø, 'Between Lies and Real Books: The Breakdown of Censorship and the Modes of Printed Discourse During the English Civil War,' *Lærke* 77, 88-89.

¹³⁰ Baker 119; *Woolrych-Revolution* 81.

¹³¹ Nigel Smith, *Literature and Revolution in England 1640-60* (YUP, New Haven 1994) 304; Sheila Lambert, 'State Control of the Press in Theory and Practice: The Role of the Stationer's Company before 1640,' in Robin Myers and Michael Harris (eds), *Censorship and the Control of Print in England and France, 1600-1910* (St Paul's Bibliographies, Winchester 1992) 1, 7; Anthony Milton, 'Licensing, Censorship, and Religious Orthodoxy in Early Stuart England' (1998) 41 *Historical Journal* 625, 635-50; *McElligott* 210-11.

¹³² Joad Raymond, *Pamphlets and Pamphleteering in Early Modern Britain* (CUP, Cambridge 2003) 184; see *Hill's Century* 149; *CHB* 4:783; Colclough 10. For newsbooks, *McElligott* 1, 23, 232-33; Joad Raymond, *The Invention of the Newspaper: English Newsbooks, 1641-1649* (CP, Oxford 1996) 9, 20, 20-73, 86.

¹³³ *Clarendon's History* 4:511; see BHG Wormald, *Clarendon: Politics, Historiography and Religion, 1640-1660* (CUP, Cambridge 1964) 7; HR Trevor-Roper, 'Clarendon and the Practice of History,' in French R Fogle and HR Trevor-Roper, *Milton and Clarendon: Two Papers on 17th Century English Historiography* (Clark Memorial Library, Los Angeles 1965) 23-31, 33; Ronald Hutton, 'Clarendon's History of the Rebellion' (1982) 97 *English Historical Review* 70 (errors in Clarendon's history); *Aylmer* 62; Michael Mendle, 'Introduction,' to *Mendle* 1, 9 & n.24 (same).

¹³⁴ John Milton, *The History of Britain* (facsimile ed Paul Watkins, Stamford, 1991); *ibid*, in Don M Wolfe (ed), *Complete Prose Works of John Milton* (YUP, New Haven 1953-82) 5(1):1-451; John Milton, *Mr John Milton's Character of the Long Parliament and Assembly of Divines* (Henry Brome, London 1681); see Charles Firth, *Essays, Historical and Literary* (CP, Oxford 1938) 61-102; *Worden* 386-95, 410-26; Nicholas von Maltzahn (ed), *Milton's History of Britain: Republican Historiography in the English Revolution* (CP, Oxford 1991) 172-73, 198.

¹³⁵ David Hume, *The History of Great Britain* (Duncan Forbes (ed) Pelican, Harmondsworth 1970) 1:682.

ers' 'inspired by a Heavenly Purpose' and liberty (Carlyle¹³⁶). Victorian grand narratives, though portraying a generally unified sequence of revolutionary events,¹³⁷ divided Whigs between Puritan unreasonableness toward the monarchy and laws (Macaulay¹³⁸), and Puritan preservers of liberty¹³⁹ against an absolutist King (Gardiner¹⁴⁰). Later, Marxists found a bourgeois revolution against the monarch (Hill and Manning¹⁴¹).

An experiment of explaining the Civil War without major constitutional issues occupied revisionists of the later twentieth century as they found multiple revolutions¹⁴² and different causes for each,¹⁴³ and specialized in identifying new factors such as dominant local loyalties,¹⁴⁴ 'crisis within the elite,'¹⁴⁵ newly adversarial elections,¹⁴⁶ instability of three kingdoms,¹⁴⁷ unrecognized radicals,¹⁴⁸ and innumerable others.¹⁴⁹ The experiment failed and produced only 'a confusing array of short-term causes with the emphasis on personalities, faction

¹³⁶ Thomas Carlyle (ed), *The Letters and Speeches of Oliver Cromwell with Elucidations by Thomas Carlyle* (SC Lomas (ed) Methuen, London 1845 repr.1904) 1:72.

¹³⁷ *Cust* 2; *Clark-Revolution* 14.

¹³⁸ *Macaulay* 1:63-71, 89-90, 101-03, 106-07; see *Lang* 55, 76.

¹³⁹ Samuel R. Gardiner, *History of the Great Civil War, 1642-1649* (Longmans, London 1886-91) 1:1, 11, 13; *Lang* 168, 183.

¹⁴⁰ *Gardiner* 6:208-10, 211-13, 231-71; see *Cust* 1; *Absolute Monarchy* 211-13.

¹⁴¹ Christopher Hill, *The English Revolution 1640* (Lawrence and Wishart, London 1955) 6, 8; Hill 16; Brian Manning, *The English People and the English Revolution* (2d ed Bookmarks, London 1991) 47; *Cust* 1.

¹⁴² *Russell* 2; David Underdown, "'Honest' Radicals in the Counties 1642-1649," in Donald Pennington and Keith Thomas (eds), *Puritans and Revolutionaries* (CP, Oxford 1978) 186, 186; *Cust* 2; Peter Lake, 'Introduction: Puritanism, Arminianism and Nicholas Tyacke,' in Kenneth Fincham and Peter Lake (eds), *Religious Politics in Post-Reformation England* (Boydell Press, Woodbridge 2006) 1, 1.

¹⁴³ John S. Morrill, *Revolt in the Provinces: The People of England and the Tragedies of War 1630-1648* (Longman, London 1999) 29-30, 56, 74; *Sharpe* 934, 954. Parliament fell off the white horse of progressivism. *Cust* 4; *Absolute Monarchy* 211-13.

¹⁴⁴ Buchanan Sharp, *In Contempt of All Authority: Rural Artisans and Riot in the West of England, 1586-1660* (UCP, Berkeley 1980) 220-56, 264; John S. Morrill, *Revolt in the Provinces: The People of England and the Tragedies of War 1630-1648* (Longman, London 1999) 24-25, 74, 207-08; Dan Beaver, 'Behemoth, or Civil War and Revolution in English Parish Communities 1641-82,' in *Tyacke* 129, 146.

¹⁴⁵ *Ibid* 264; *Russell* 12 (within gentry). Woolrych finds each socioeconomic group split between sides. *Woolrych-Revolution* 250-51.

¹⁴⁶ Mark A. Kishlansky, *Parliamentary Selection* (CUP, Cambridge 1986) 73-85, 226.

¹⁴⁷ Conrad Russell, *The Fall of the British Monarchies 1637-1642* (CP, Oxford 1991) 27, 30-31, 43-70, 71-146, 373-99; Conrad Russell, *The Causes of the English Civil War* (CP, Oxford 1990) 213; *Brooks* 130-61.

¹⁴⁸ David Cressy, *Dangerous Talk: Scandalous, Seditious, and Treasonable Speech in Pre-Modern England* (OUP, Oxford 2010).

¹⁴⁹ *Cust* 8-23.

and accidents,¹⁵⁰ according to post-revisionists,¹⁵¹ who returned to explanation based on pre-war fracturing over constitutional issues,¹⁵² 'the central and recurrent conflict... over liberty and the rule of law' which cannot be denied without 'trying to build an arch of explanation without a keystone,'¹⁵³ and religious fault lines,¹⁵⁴ and who returned to continuities between the revolutions of 1640 and 1642¹⁵⁵ (or in Clark's view the non-revolutions of the 1640s and 1688¹⁵⁶). In effect,¹⁵⁷ revisionists' 'bold repudiation of Gardiner's views was followed by a gradual, though not always acknowledged, return to many of those same views.'¹⁵⁸

Evaluation of the Interregnum is complicated by the polarized views of Cromwell. Early generations heard mostly Clarendon's characterization of 'the greatest dissembler living'¹⁵⁹ and Hume's of 'perpetually' employing religion 'as the instrument of his ambition,'¹⁶⁰ with even many radical Whigs agreeing,¹⁶¹ until Carlyle exhumed Cromwell afresh by publishing his letters and portrayed him as a Christian 'hero.'¹⁶² Even Macaulay, no friend of Puritans,

¹⁵⁰ Andrew Foster, 'Church Policies of the 1630s,' in *Cust-Conflict* 193, 193; accord Braddick 2.

¹⁵¹ Richard Cust and Ann Hughes, 'Introduction: After Revisionism,' in *ibid* 1, 15-26, 33-38; Nicholas Tyacke, 'Introduction,' in *Tyacke* 1, 1-2.

¹⁵² *Cromartie* 261; *Aylmer* 41.

¹⁵³ JH Hexter, 'Power Struggle, Parliament, and Liberty in Early Stuart England' (1978) 50 *Journal of Modern History* 1, 47.

¹⁵⁴ *Cressy* 134-48; *Foster* 79-80; Anthony Milton, 'Religion and Community in Pre-Civil War England,' in *Tyacke* 62, 76; Ann Hughes, 'Religious Diversity in Revolutionary London,' *ibid* 111.

¹⁵⁵ Michael J Braddick, 'The English Revolution and Its Legacies,' in *Tyacke* 27, 38; *Scott* 5, 34.

¹⁵⁶ *Clark-Revolution* 3, 32. For his criticism of revisionism, see *ibid* 9-12, 15-16, 17 *passim*.

¹⁵⁷ Post-revisionists also addressed such issues as 'regional cultural traditions,' David Underdown, *Revel, Riot, and Rebellion: Popular Politics and Culture in England, 1603-1660* (CP, Oxford 1985) 206-07; contra *Clark-Revolution* 45-67, 140-41; the European context of troubles, Hugh Trevor-Roper, *Catholics, Anglicans and Puritans* (Secker and Warburg, London 1987) vii-xii; Ann Hughes, *The Causes of the English Civil War* (2nd ed Macmillan, Basingstoke 1998) 10-57; *Scott* 27-33, 166-70; and problems with the other kingdoms, *Woolrych-Revolution* 189-233; *Clark-Revolution* 66; see Patrick J Corish, 'The Rising of 1641 and the Catholic Confederacy, 1641-5,' in TW Moody and others (eds), *A New History of Ireland* (CP, Oxford 1976) 3:289-316; Peter Donald, *An Uncounselled King: Charles I and the Scottish Troubles, 1637-1641* (CUP, Cambridge 1990) 43-77, 119-71.

¹⁵⁸ Michael B Young, *Charles I* (Macmillan, Basingstoke 1997) 173.

¹⁵⁹ *Clarendon's History* 4:305 (10:¶170).

¹⁶⁰ David Hume, *History of Great Britain* (Duncan Forbes (ed) Pelican, Harmondsworth 1970) 1:580, 682-83.

¹⁶¹ *Robbins* 38, 70.

¹⁶² Thomas Carlyle (ed), *The Letters and Speeches of Oliver Cromwell with Elucidations by Thomas Carlyle* (SC Lomas (ed) Methuen, London 1845 repr.1904) 1:72.

found Cromwell sincere rather than pursuing 'selfish ambition',¹⁶³ and Gardiner concurred.¹⁶⁴ Modern writers continue to divide between seeing Cromwell as tyrant¹⁶⁵ and reformer.¹⁶⁶

The immediate influence of Locke and Sidney on constitutionalism or political theory continues to be debated. Dunn and others argued that they had very little influence on the Revolution of 1688 and for some years to come,¹⁶⁷ merely falling in the minority radical wing of the Whig party,¹⁶⁸ while Scott and others found an immediate influence of Locke on the Revolution,¹⁶⁹ on Europe, English Whig writers, and Whig jurists,¹⁷⁰ and on revolutionary America along with Sidney.¹⁷¹ Yet revisionists have not fully confronted Thompson's arguments,¹⁷² or such evidence of immediate influence as the three editions of the *Two Treatises* between 1689 and 1700,¹⁷³ extracts¹⁷⁴ in *Political Aphorisms* in 1690 (with 1709 and 1710

¹⁶³ Macaulay 1:115,108; Lang 76.

¹⁶⁴ Samuel R. Gardiner, *Oliver Cromwell* (Longmans, Green, London 1901) 2, 318, 7, 66-76; Samuel R. Gardiner, *Cromwell's Place in History* (Longmans, Green, London 1898) 109-10, 112-16; Lang 198-200.

¹⁶⁵ Blair Worden, *Roundhead Reputations: The English Civil Wars* (Allen Lane, London 2001) 218-20, 224-25, 314-15; see Laura L. Knoppers, *Constructing Cromwell* (CUP, Cambridge 2000) 194-95 *passim*.

¹⁶⁶ Aylmer 74, 132-34, 145, 173; Nancy L. Matthews, *William Sheppard: Cromwell's Law Reformer* (CUP, Cambridge 1984).

¹⁶⁷ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (CUP, Cambridge 1969) 5-10; Kenyon 18-19; Dickinson 72, 73, 77; Ashcraft 184, 572; Zuckert 98, 102, 117.

¹⁶⁸ Clark-Revolution 111-12; Dickinson 71, 72, 76, 79, 81-82; Jonathan I. Israel, *Radical Enlightenment 1650-1750* (OUP, Oxford 2001) 523-24, 527.

¹⁶⁹ As a manifesto for revolution, Ashcraft 9, 392; see JGA Pocock, 'The Significance of 1688: Some Reflections on Whig History,' in Robert Beddard (ed), *The Revolutions of 1688* (CP, Oxford 1991) 271, 274.

¹⁷⁰ Scott-Commonwealth 353-54 (particularly in America and Europe); Robbins 247, 251, 279, 295, 298, 301, 304, 311, 319, 341, 363 (Locke); *ibid* 117, 319, 359, 364-65, 376 (Sidney); Dickinson-Politics 196; Michael R. T. Macnair, 'When, by Their Labour and Industry, They Took Any Thing Out of the Common Stock, It Thereby Became Their Own'--Locke, the Constitution and the Law of Property in Early Eighteenth Century Whig Legal Writing,' American Society for Eighteenth Century Studies Symposium (Mar.1997) 3-6 (Sir Jeffrey Gilbert); *contra* Pocock-Whiggism 229.

¹⁷¹ Creation 16; Lamp 9; Thomas Jefferson to John Trumbull (15 Feb.1789), *Jefferson Papers* 1:4:561; Thomas Jefferson to Thomas Mann Randolph (30 May 1790), Joyce Appleby and Terence Ball (eds), *Political Writings: Thomas Jefferson* (CUP, Cambridge 1999) 261, quoted in Zuckert 19; *Adams-Jefferson* 2:598.

¹⁷² Martyn P. Thompson, 'The Reception of Locke's Two Treatises of Government 1690-1705' (1976) 24 *Political Studies* 184.

¹⁷³ Peter Laslett (ed), *Two Treatises of Government* (2nd ed CUP, Cambridge 1960 repr 1967) 121.

¹⁷⁴ Richard Ashcraft and M. M. Goldsmith, 'Locke, Revolution Principles, and the Formation of Whig Ideology' (1983) 26 *Historical Journal* 773, 774.

revisions),¹⁷⁵ commendation by a moderate Whig in 1690,¹⁷⁶ praise by four leading 'Commonwealthmen' in the 1690s,¹⁷⁷ 'a great noise' at Oxford in 1695,¹⁷⁸ quotation by Lord Somers in 1701,¹⁷⁹ and refutations in 1704 and 1705.¹⁸⁰

Their later influence on constitutional theory is also unsettled. Williams noted rejection of the once-'undisputed domination of Locke's political ideas' in Hanoverian England,¹⁸¹ and the republican synthesists reached the same conclusion about influence in America (Chapter 2.B), while Scott contended that '[n]o two works did more to shape the political vocabularies and sensibilities of the eighteenth century than Sidney's *Discourses* and Locke's *Two Treatises*.¹⁸² More concede that Locke was the most effective exponent of a contractarian and natural rights theory to counter absolute monarchy theories,¹⁸³ and that Sydney offered a cogent parallel theory.¹⁸⁴ Locke's primacy is debated, as some point out he was not the first to enunciate most of the concepts,¹⁸⁵ and others disagree as to key concepts.¹⁸⁶

¹⁷⁵ [Thomas Harrison], *Political Aphorisms: or, the True Maxims of Government* (Thos. Harrison, London 1690); [Thomas Harrison], *Political Aphorisms: or, the True Maxims of Government* (3rd ed Thos. Harrison, London 1691); revised as *Vox Populi, Vox Dei* (1709) and *The Judgement of Whole Kingdoms and Nations* (1710), cited in *Dickinson-Politics* 196.

¹⁷⁶ W[illiam] A[twood], *The Fundamental Constitution of the English Government* (JD, London 1690) 101-02.

¹⁷⁷ [Matthew Tindal], *An Essay Concerning Obedience to the Supreme Powers* (Richard Baldwin, London 1694) 50; James Tyrrell, [James Tyrrell], *Bibliotheca Politica* (R Baldwin, London 1694) 62, 73, 81-82, 82, 88 (cited in *Dickinson* 72, though finding references noninfluential); William Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament* (Joseph Ray, Dublin 1698) 26-27, 153; [Walter Moyle], *An Essay on the Lacedaemonian Government* (np, 1698) 58.

¹⁷⁸ Royal Commission on Historical Manuscripts, *Twelfth Report: Appendix, Part VII, The Manuscripts of Sir Isaac Newton* (HMSO, London 1890) 335.

¹⁷⁹ [Lord John Somers], *Jura Populi Anglicani: or the Subject's Right of Petitioning* (np, London 1701) 25.

¹⁸⁰ [Charles Leslie], *Cassandra* (Booksellers, London 1704) 18; *An Essay upon Government Wherein the Republican Schemes Reviv'd by Mr. Lock. . . Are Fairly Consider'd and Refuted* (G Sawbridge, London 1705).

¹⁸¹ Basil Williams, *The Whig Supremacy: 1714-1760* (2nd ed CH Stuart (reviser) CP, Oxford 1962) 3.

¹⁸² Jonathan Scott, *Algernon Sidney and the Restoration Crisis, 1677-1683* (CUP, Cambridge 1991) 210; accord Robbins 43 (Sidney); Kenyon 51 (Sidney); *Dickinson-Politics* 179 (Locke); Zuckert 187 (Locke); *Oxford History* 7:195 (Locke); contra *English Society* 45-47, 57-58, 192.

¹⁸³ Zuckert 3-26, 185-246; Tuck 168-73; Ashcraft 551; *Dickinson-Politics* 194; see ODNB 34:216.

¹⁸⁴ Jonathan Scott, *Algernon Sidney and the Restoration Crisis, 1677-1683* (CUP, Cambridge 1991) 214-38; Robbins 60; Scott 246; ODNB 50:537; Algernon Sidney, *Discourses Concerning Government* (np, London 1698) 5, 23.

¹⁸⁵ Markku Peltonen, *Classical Humanism and Republicanism in English Political Thought, 1570-1640* (CUP, Cambridge 1995) 1-2, 190-270; Martin Dzelzainis, 'Milton's Classic Republicanism,' in David Armitage, Armand Himy and Quentin Skinner (eds), *Milton and Republicanism* (CUP, Cambridge 1995) 3, 8-24; Blair Worden, 'Republicanism, Regicide and Republic,' in *Van Gelderen* 1:307; Jonathan Scott, 'Classical Republi-

The influence of what Robbins calls 'the Commonwealthmen',¹⁸⁷ and others call the 'republican canon',¹⁸⁸ and of the 'eighteenth-century Commonwealthmen' or radical Whigs,¹⁸⁹ has been more widely accepted, and even welcomed by adherents to America's republican synthesis,¹⁹⁰ though Robbins' approach has been refined by later scholars.¹⁹¹

The substantiality of the Revolution of 1688 and its implications for constitutionalism remain divisive issues. To some scholars 1688 was a major revolution,¹⁹² to others a mere continuation or culmination of the 1640s,¹⁹³ to some a restorative event,¹⁹⁴ and to others a less significant event still.¹⁹⁵ Neo-Whigs whose criteria include constitutionalism see a revolution, from Stuart repudiation of constitutional limits on royal power to written constitutional limits and greater Parliamentary powers¹⁹⁶ (though the original Whig view overstated a

canism in Seventeenth-Century England and the Netherlands,' in *ibid* 1:61,72-80; e.g., *Oceana* 1; 'Putney Debates' (29 Oct.1647), *Army Debates* 53, 56, 61.

¹⁸⁶ *Cromartie* 274, 282; *Dickinson* 65; *English Society* 200, 257, 279, 280-82.

¹⁸⁷ *Robbins* 1-3, 314, 372-74, 376; *contra Clark* 25.

¹⁸⁸ Blair Worden, 'The Revolution of 1688-9 and the English Republican Tradition,' in Jonathan I Israel (ed), *The Anglo-Dutch Moment: Essays on the Glorious Revolution* (CUP, Cambridge 1991) 241, 248-49; see *Ashcraft* 183, 190-227.

¹⁸⁹ *Robbins* 3-5; accord *Dickinson* 89; *Dickinson-Politics* 177,193.

¹⁹⁰ *Ideological Origins* 34-35, 40 n23; *Creation* 14, 50; JGA Pocock, *Politics, Language and Time: Essays on Political Thought and History* (Methuen, London 1972) 107-08.

¹⁹¹ *Ashcraft* 181, 212 n130, 393 n252; *English Society* 279; *Zuckert* 99; *Clark* 21-22, 25-26.

¹⁹² *Pineus* 474 ('drastically transformed, and was intended to transform, English foreign and imperial policy, English political economy, and the Church of England'); *ibid* 5, 8, 10, 474 *passim* ('the first modern revolution'); *Macaulay* 3:1310; *Carswell* 237; *Hill's Century* 235, 254 (though lesser than the 1640s, showed 'the ultimate solidarity of the propertied class,' and brought 'decisive changes in political thinking'); *Schworer* 282, 285, 291; *Ashcraft* 576-77; *Speck* 21, 242; John S Morrill, *The Nature of the English Revolution* (Longman, London 1993) 452-53 (a conservative one, but 'certainly a Revolution'); *Zuckert* 150; Tim Harris, *Revolution: The Great Crisis of the British Monarchy 1685-1720* (Allen Lane, London 2006) 182-236.

¹⁹³ *Scott* 205, 5, 34 (simply a continuation of that ideological process called [England's] troubles'); Corinne Weston, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (CUP, Cambridge 1981) 7 ('completion of an intellectual process at work since 1642'); *Hutton* 290; *Braddick-Social Change* 15 ('revolution of the entire century'); *Woolrych-Revolution* 795; Michael J Braddick, 'The English Revolution and Its Legacies,' in *Tyacke* 27, 38.

¹⁹⁴ *Burke* 3:57 n1; revisionists criticized in *Pineus* 477.

¹⁹⁵ *Clark-Revolution* 3-4 (not a revolution, merely a rebellion); *ibid* 90-91 (revolution only after 1832); *English Society* 7; JR Western, *Monarchy and Revolution: The English State in the 1680s* (Macmillan, London 1985) 3 (a 'little revolution'); *Harris-Politics* 238; *Oxford History* 7:23; *Vallance* 15-16.

¹⁹⁶ Lois G Schworer, *The Declaration of Rights, 1689* (JHUP, Baltimore 1989) 3-4; Corinne C Weston and Janelle R Greenberg, *Subjects and Sovereigns* (CUP, Cambridge 1981) 7, 266; Lois G Schworer, 'The Coronation of William and Mary,' in Lois G Schworer (ed), *The Revolution of 1688-1689* (CUP, Cambridge 1992) 107, 127.

rebalancing of 'supreme power in Parliament'¹⁹⁷), saving England from James II's move toward absolutism¹⁹⁸ and replacing the religious idiom of 1640s debate with a constitutionalist and natural law idiom.¹⁹⁹ Those whose criteria stress change of English law's basis to a supraconstitutional source such as natural law or contractarian theory²⁰⁰ find a very incomplete revolution²⁰¹ and little change from an ancient constitution coupled with an abdication argument.²⁰² If the criterion is expanding freedom of dissent, 1688 ushered in toleration of non-parliamentary speech, press, and conscience, but not secure rights.

The Whig division into a moderate majority and radical minority, which Dickinson and others outline,²⁰³ and antecedents in Grotius and others, which Kenyon, Zuckert, and others trace,²⁰⁴ helps explain division of American Whigs in 1787-1789 and in 1798, and division of the Supreme Court in philosophy and in views of the Sedition Act. (Section 2.C).

A weaker constitutionalism was generally offered by moderate Whigs,²⁰⁵ as they gathered together 'prominent' noncontractarian theories²⁰⁶ along with moderate contractarian the-

¹⁹⁷ Clayton Roberts, *The Growth of Responsible Government in Stuart England* (CUP, Cambridge 1966 repr 2008) 248; *Clark-Revolution* 90-91; *Oxford History* 7:25.

¹⁹⁸ Jonathan I Israel, 'General Introduction,' in Jonathan I Israel (ed), *The Anglo-Dutch Moment: Essays on the Glorious Revolution and Its World Impact* (CP, Cambridge 1991) 1, 4; accord, GM Trevelyan, *The English Revolution, 1688-1689* (OUP, Oxford repr 1954) 245; JR Jones, *The Revolution of 1688 in England* (Weidenfeld and Nicolson, London 1972) 331; *Speck* 8-10, 125-26, 137, 139-41, 242; Tim Harris, *Revolution: The Great Crisis of the British Monarchy 1685-1720* (Allen Lane, London 2006) 182-236, 482-85.

¹⁹⁹ Zuckert 98, 104; Kenyon 18; Dickinson 60-62, 65; Steven Pincus, "'To Protect English Liberties': The English Nationalist Revolution of 1688-89," in Tony Claydon and Ian McBride (eds), *Protestantism and National Identity* (CUP, Cambridge 1998) 75, 103; contra *Speck* 235; Tony Claydon, *William III and the Godly Revolution* (CUP, Cambridge 1996) 229.

²⁰⁰ Zuckert 104; Kenyon 200.

²⁰¹ Zuckert 117 (because 'Lockean and "left Grotian" contractionism' did not prevail); see *Clark-Revolution* 132, 90-91 ('not resolve the issue of sovereignty in favour of the representation principle,' or establish 'parliamentary supremacy').

²⁰² Dickinson 30-31; Kenyon 9, though the Commons resolution referred to 'breaking the Original Contract,' *ibid* 10; *Oxford History* 7:22; *EHD* 8:123.

²⁰³ Dickinson 79, 57, 68, 126-28; Kenyon 1-2; *Clark-Revolution* 111-12; Blair Worden, 'The Revolution of 1688-9 and the English Republican Tradition,' in Jonathan I Israel (ed), *The Anglo-Dutch Moment: Essays on the Glorious Revolution* (CP, Cambridge 1991) 241, 241; Zuckert 117.

²⁰⁴ Tuck 58; Kenyon 31; Zuckert 119.

²⁰⁵ Distinguished from radical Whigs in Dickinson 79, 57, 68, 126-28; Kenyon 1-2; *Clark-Revolution* 111-12; Blair Worden, 'The Revolution of 1688-9 and the English Republican Tradition,' in Jonathan I Israel (ed), *The Anglo-Dutch Moment: Essays on the Glorious Revolution* (CP, Cambridge 1991) 241, 241; Zuckert 117.

²⁰⁶ Dickinson 65, 132-40; accord *English Society* 56, 55, 57; Zuckert 105.

ory,²⁰⁷ and moderate natural law thinking.²⁰⁸ They said little more about individual rights or the role of government in protecting them, except to extol nonspecific 'rights to life, liberty and property,'²⁰⁹ and to emphasize limits on the King by parliamentary power, restricting resistance to egregious tyranny.²¹⁰ Those who trace this strand of Whig thinking primarily to Grotius, who 'dominated seventeenth century Whiggism,'²¹¹ and his *De Jure Belli ac Pacis*,²¹² note that Grotius taught a natural law shorn of revolutionary implications,²¹³ an original state of nature and social contract without possibility of return and replication,²¹⁴ and an illusory right of resistance with almost no place for revolution.²¹⁵ Grotian theory denied that 'sovereignty always resides in the people,'²¹⁶ rejected natural rights theory,²¹⁷ placed little focus on individual rights or government securing them,²¹⁸ and viewed those rights as alienable and typically transferred to kings.²¹⁹

In contrast,²²⁰ a stronger constitutionalism was propounded by radical Whigs and particularly by Locke. His *Two Treatises* offered a natural law pregnant with revolutionary implica-

²⁰⁷ Zuckert 105, 106-13; Kenyon 7-8; Dickinson 61; Harro Höpfl and Martyn P Thompson, 'The History of Contract as Motif in Political Thought' (1979) 84 *American Historical Review* 919, 937-41 (taxonomy of contractarianisms).

²⁰⁸ Zuckert 104; Ashcraft 210.

²⁰⁹ Zuckert 105-06; Dickinson 58.

²¹⁰ Dickinson 58, 80; Clark 291; see Dickinson-Politics 170.

²¹¹ Tuck 58; accord Kenyon 31; Zuckert 119.

²¹² Hugo Grotius, *The Law of War and Peace* (new ed Johan Bleu, Amsterdam 1646); Zuckert 111, 119.

²¹³ Zuckert 117, 119-20, 139-41; see Tuck 68, 73-74; Richard Tuck, 'The "Modern" Theory of Natural Law,' in Anthony Pagden (ed), *The Languages of Political Theory in Early-Modern Europe* (CUP, Cambridge 1987) 99, 112-13; Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (CUP, Cambridge 1996) 26-30; Grotius Prolegomena ¶¶39-40, Bk I c1.9-10, 12.

²¹⁴ Zuckert 120; Tuck 77, 68. Hooker and others similarly taught a nonLockean social contract. Dickinson 73.

²¹⁵ Tuck 78-79, 63, 65; Zuckert 115, 123; Haakonssen-Grotius 2:344; Scott-Commonwealth 110-11; Grotius Bk I c4.2.1, 4.6.1, 4.9-11 (abdication, alienating kingdom, openly enemy of people), 4.13, 4.15.1, 4.19.1, 3.8.1, 3.16.1; cf. Dickinson 131 (Blackstone).

²¹⁶ Zuckert 111; John N Figgis, *Studies of Political Thought from Gerson to Grotius* (2nd ed CUP, Cambridge 1916 repr 1956) 185; Tuck 78; Grotius Bk I c3.8.1; see *ibid* Bk I c3.8.14.

²¹⁷ Zuckert 141; Tuck 67, 74-75; David Kennedy, 'Primitive Legal Scholarship' (1986) 27 *Harvard International Law Journal* 1, 87-88; Haakonssen-Grotius 2:342; Grotius Bk I c3.8.1, c3.8.4, c4.7.7 (speech), see c3.16.1.

²¹⁸ Tuck 76, 79, 3; Zuckert 123; Haakonssen-Grotius 2:344, 352-55; Grotius Bk I c3.8.3-4, c3.16.1.

²¹⁹ Tuck 79-80, 66, 71, 77-78; Zuckert 111; Haakonssen-Grotius 2:343; Grotius Bk I c1.3.8, c3.8.3, c4.2.6.

²²⁰ Zuckert 123-24; Dickinson 57.

tions,²²¹ a state of nature that was reentered whenever government was dissolved by tyranny or other governmental violation of laws,²²² and a broad right of resistance and revolution.²²³ Sovereignty remained in the people, as did natural rights,²²⁴ and 'the design of all human laws is to secure those antecedent and natural rights,²²⁵ which could not be alienated and were not surrendered in the social contract.²²⁶ Locke and many radical Whigs saw 1688 as a time when Parliament 'let slip an opportunity' to 'set up a constitution that may be long lasting for the security of civil rights and the liberty and property of all the subjects.'²²⁷

E The American Colonies and Freedoms of Speech and Press in the Seventeenth Century

English dissent was not only mirrored, but magnified, in the American colonies. Causes included distance and de facto freedom from London government,²²⁸ weakness of colonial government,²²⁹ the much larger percentage of religious dissent,²³⁰ the corresponding reduced influence of the Church of England, and little obstruction to 'Commonwealthmen' and radical Whig thought. A breakthrough in expanding freedom to all thought occurred in the founding agreement of Rhode Island in 1637, which stated that the colony's powers reached 'only... civil things,'²³¹ though subsequent documents used only 'liberty of conscience' language.²³²

²²¹ Zuckert 216-88; Dickinson 61-62, 65; Ashcraft 190; Locke 2:¶134 *passim*.

²²² Ashcraft 193-96, 560, 563; Kenyon 57-58; Locke 2:¶¶149, 212-17, 219, 220, 221, 224-28, 243.

²²³ Ashcraft 315; Robbins 3, 40 (Sidney), 70 (radical Whigs, Tyrrell), 76 (Somers), 183 (Hutcheson); Kenyon 52, 46, 57, 156; Dickinson 62, 65, 66, 67, 70, 77; *English Society* 219, 239; *Dickinson-Politics* 171 (radical Whigs and Locke); Locke 2:¶¶231, 233; [Matthew Tindal], 'Of Obedience to the Supreme Powers,' in [Matthew Tindal], *Four Discourses* (np, London 1709) 1.

²²⁴ Ashcraft 577; Robbins 76; Dickinson 65, 66, 67; *Dickinson-Politics* 192, 193; Locke 2:¶¶149, 119, 243.

²²⁵ Ashcraft 190; Locke 2:¶119; *accord ibid* 1:¶92.

²²⁶ Ashcraft 397-98; Dickinson 58; Locke 2:¶¶23, 24, 209, 220, 222 *passim*.

²²⁷ John Locke to Edward Clarke (29 Jan.-8 Feb.1689), ES DeBeer, *The Correspondence of John Locke* (CP, Oxford 1976) 3:545-46, quoted in Ashcraft 592.

²²⁸ *Ideological Origins* 204; *Transatlantic* 1, 2, 4.

²²⁹ *Peripheries* 79-150; *Ideological Origins* 203.

²³⁰ Edwin S Gaustad, *New Historical Atlas of Religion in America* (OUP, Oxford 2001) 7, 8, 399; William G McLoughlin, *New England Dissent, 1630-1833* (HUP, Cambridge 1971) 2:833-54, 1:329-417, 1:420-76; Clark 205, 208, 209-10, 212, 268.

²³¹ Thomas W Bicknell, *History of the State of Rhode Island* (AHS, New York 1920) 1:196.

The press barely existed in America before the eighteenth century, starting with a first printing press in Massachusetts in 1634 and the colonies' second press in the same shop in 1660,²³³ the only newspaper of the century died after the first issue in 1690.²³⁴ Licensing came in Massachusetts the same year as England's Licensing Act of 1662, and in royal instructions in 1683,²³⁵ but was rarely enforced and died with a last abortive effort in 1723.²³⁶ Hence, freedom of press had only slight American discussion until seditious libel threats and prosecutions of the eighteenth century brought an outcry (Chapters 2.B and 3.C).

Freedom of speech received its first legal protection in the English-speaking world in Massachusetts in 1641, as the 'Body of Liberties' provided that 'every man' had 'libertie to come to any publique court, councel, or towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question,'²³⁷ anticipating the radical army proposals of 1647. However, with no newspapers and speech mostly by petition²³⁸ to distant government, the concept of freedom of speech took longer than freedom of press to become a popular demand, stimulated by threats against prerevolutionary expression (Chapter 2.B).

As in England, in America freedoms of press and speech were practiced, but not secured. However, demands for security grew throughout the eighteenth century (Chapter 2), as did criticism and rejection of seditious libel as a threat to those freedoms (Chapter 3).

²³² Plantation Agreement (27 Aug.-6 Sept.1640), *Federal-State Constitutions* 6:3205, 3206; Determinations of General Court of Election (16-19 Mar.1641), *ibid* 6:3207, 3208; Charter ¶¶1, 2 (8 July 1663), *ibid* 6:3211, 3212.

²³³ *Press-Mass.* 22-23, 42.

²³⁴ *Press-Mass.* 68-69; *Tyranny* 29.

²³⁵ *Ibid* 41-42; *Prelude* 61; *Royal Instructions* 2:495 (No.719).

²³⁶ *Ibid* 98-102; *Printers* 97-104.

²³⁷ 'The Body of Liberties of the Massachusetts Collonie in New England' §12 (10 Dec.1641), *Collections of the Massachusetts Historical Society* (3rd ser.) 8:216, 218. It was less charitable toward blasphemy, sec.94(3), *ibid* 8:232, which the courts regularly prosecuted along with profane swearing and womens' preaching. Jane Kamensky, *Governing the Tongue: The Politics of Speech in Early New England* (OUP, Oxford 1997) 7, 74-98. The provision was continued in the Laws and Liberties of Massachusetts (1648). Thomas G Barnes (ed), *The Laws and Liberties of Massachusetts: Reprinted from the Copy of the 1648 Edition* (Legal Classics Library, Birmingham 1982) 35.

²³⁸ Edmund S Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton, New York 1988) 227, 229-30; *Empire* 59.

CHAPTER 2

THE RIGHT TO DISSENT, AND FREEDOMS OF SPEECH AND PRESS, IN THE EIGHTEENTH CENTURY

Nothing but opinions circulated through the medium of a paper, produced the *American* struggle for liberty.... Had those illustrious worthies who maintained our cause been intimidated from publishing their sentiments under... prosecutions as a libeller, there is no doubt we should have sunk to the lowest class of slaves.

—Philadelphia Newspaper (1782)¹

The tortuous expansion of rights of dissent in the seventeenth century continued in the eighteenth century, as toleration of dissenting press and speech grew in England and was discussed in America, and particularly as the American Revolution prompted new state declarations of rights and as the ratification of the Constitution prompted the federal Bill of Rights.

A The Developing Freedoms of Press and Speech in Eighteenth Century England

Hoppit notes that in England '[f]reedom of speech, of worship, and of the press were all celebrated as never before,² Dickinson finds general agreement on freedom of press, 'liberty of conscience, [and] freedom of expression,³ and Voltaire believed that 'liberty has...been established' in England⁴--but was that all true? Some dissent indeed had come to be tolerated⁵ but, outside of freedom of petition and parliamentary speech, was not secured as a right.

1 Calls for Freedom of Press

Within weeks of the lapse of the Licensing Act in 1695, England's single official news-

¹ Junius Wilkes, 'For the Chronicle of Freedom' *Independent Gazetteer* (Philadelphia 9 Nov. 1782) 2.

² *Oxford History* 7:6.

³ *Dickinson-Politics* 5, 169; *ibid* 198 (Whigs).

⁴ Voltaire, 'On Parliament,' in Voltaire, *Letters on England* (Leonard Tancock trans Penguin Books, Harmondsworth 1980) 44, 45; accord *Oxford History* 7:7 (misquoting).

⁵ *Oxford History* 7:9, 8:289.

paper was joined by many alternatives in London⁶ and in the provinces,⁷ and its bookshops brimmed with books, pamphlets, and other works.⁸ Periodicals soon arose and multiplied.⁹

Yet numerous calls for freedom of the press were heard over the next century. While initial ones may be attributable to efforts to reinstitute licensing during 1695-1705, when there were thirteen parliamentary efforts for reinstatement,¹⁰ and to Tory attempts to introduce censorship under cover of a copyright bill¹¹ as well as to tax printed items from 1705-1714,¹² cries for freedom of press after 1714 cannot be so explained. Instead, they are best explained as alarm about the lack of legal security for the press, and the threat of prosecution for seditious libel.

The Whigs parried taxes on newspapers and pamphlets by sponsoring newspapers and writers, which the Tories matched,¹³ lending some institutional protection to the press.¹⁴ These parties, both Whig-Tory and Country-Court,¹⁵ owed their emergence and existence in part to ability to print and speak in defense or opposition to the administration's principles and measures¹⁶ (though some have argued that ideology merely masked pursuit of power,¹⁷ which others

⁶ *Macaulay* 5:2540-42; accord Michael Harris, 'London Newspapers,' in *CHB* 5:413, 417-18; RB Walker, 'The Newspaper Press in the Reign of William III' (1974) 17 *Historical Journal* 691, 699-701.

⁷ CY Ferdinand, 'Newspapers and the Sale of Books in the Provinces,' in *CHB* 5:434, 437; *Oxford History* 7:178; *Brewer-Party* 142-43.

⁸ *Oxford History* 7:9, 11, 178, 8:90-99, though the claim of an 'explosion of... books,' *ibid* 7:178, does not match the actual stable level for 1695-1700, *CHB* 4:784, and for 1703-1743, Michael F Suarez, 'Towards a Bibliometric Analysis of the Surviving Record, 1701-1800,' in *CHB* 5:39, 43. Accord *Dickinson-Politics* 7, 205, 206; *Brewer-Party* 138.

⁹ James Tierney, 'Periodicals and the Trade, 1695-1780,' in *CHB* 5:479; *Oxford History* 7:443-45.

¹⁰ *Calendar-William* 9:80 (9-11 Feb.1698), 9:151 (17-18 Mar.1698); *Deazley* 2, 7-29; Laurence Hanson, *Government and the Press, 1695-1763* (OUP, London 1936 repr 1967) 8-10.

¹¹ *Deazley* 33-36; *Kemp* 4:178; Julian Hoppit (ed), *Failed Legislation, 1660-1800: Extracted from the Commons and Lords Journals* (Hambledon, London 1997) 258.

¹² Mark Rose, 'Copyright, Authors and Censorship,' in *CHB* 5:118, 129; Act for Laying Several Duties upon All Sope and Paper... and upon Certain Printed Papers (1711), 10 Anne c19 [sometimes listed c18]; *Kemp* 4:200.

¹³ *Dickinson-Politics* 204; *Black* 140, 146-51; *Oxford History* 8:47.

¹⁴ Gordon S Adam, 'The Press and Its Liberty: Myth and Ideology in Eighteenth-Century Politics' (PhD thesis, Queen's University-Kingston 1978) 4-5, 15-16.

¹⁵ *Dickinson* 122-23, 2-4, 6-7, 57-90 (Whigs), 13-56 (Tories), 163-92 (Country), 121-62 (Court); *Ideological Origins* 45-52; *Creation* 14-15; Reed Browning, *Political and Constitutional Ideas of the Court Whigs* (LSUP, Baton Rouge 1982) 175-209; David Hume, 'Of the Parties of Great Britain' (1742), *Essays Moral, Political and Literary* (OUP, Oxford 1963) 63, 63-64.

¹⁶ *Dickinson* 122-23, 169, 6-7; *Dickinson-Politics* 2-3; *Kenyon* 35-169; *Brewer-Party* 30, 39-40, 267-69.

challenged¹⁸). Radical Whig thought poured forth along with religious and other radicalism.¹⁹

Advocates of freedom of press,²⁰ after beginning the century opposing licensing²¹ as Parliament debated it, generally called for something more than an unlicensed press: 'we ought to have some clear and explicit declaration in favour of the liberty of the press,' because even in 1742 it was 'very precarious.'²² Many books and tracts found it necessary to argue against restraining the press, because 'the liberty of the press is the great bulwark of the British liberties,'²³ a 'check upon vice, corruption, and misgovernment,'²⁴ the means of truth prevailing against error,²⁵ and the way to advance knowledge.²⁶ Some condemned the law of seditious libel--prosecution 'by suspicion only of a book or paper being libellous'--as being inconsistent

¹⁷ Sir Lewis Namier, *The Structure of Politics at the Accession of George III* (2nd ed Macmillan, London 1973) 156-57, 171-72.

¹⁸ Herbert Butterfield, *George III and the Historians* (Collins, London 1957) 191-299, esp. 219-20; WA Speck, *Tory and Whig: The Struggle in the Constituencies, 1701-1715* (Macmillan, London 1970) 111-14; Linda Colley, *In Defiance of Oligarchy: The Tory Party, 1714-60* (CUP, Cambridge 1982) 290-91, 177-262; Frank O'Gorman, *The Rise of Party in England: The Rockingham Whigs, 1760-82* (Allen & Unwin, London 1975) 476, 472.

¹⁹ Robbins 152-368; *English Society* 277-348.

²⁰ In view of this outpouring of public support, an otherwise insightful article is mistaken that 'the idea of freedom of the press was not publicly espoused even by radical Whigs.' *Hamburger* 745 n261.

²¹ [Daniel Defoe], *An Essay on the Regulation of the Press* (np, London 1704) 3-4; 'A Letter to a Member of Parliament, Shewing that a Restraint on the Press Is... Dangerous to the Liberties of the Nation,' *A Collection of State Tracts* (np, London 1706) 2:614; [Daniel Defoe], *The Representation Examined: Being Remarks on the State of Religion in England* (A Baldwin, London 1711) 11; see *The Thoughts of a Tory Author Concerning the Press* (A Baldwin, London 1712) 7, 12.

²² *The Independant Briton: Or, Free Thoughts... as to Securing the Liberty of the Press* (T Cooper, London 1742) 12, 14; accord *A Letter to the Reverend Dr. Zachary Pearce* (M Cooper, London 1743) (subtitled 'Observations as to the Danger of the Press, and the Necessity of Preserving its Freedom'); [Horace Walpole], *A Letter to the Whigs* (M Cooper, London 1747) 7.

²³ Eustace Budgell, *A Letter to Every Person in Great-Britain* (np, [London] 1733) 1; accord *A Short Vindication of the Ld Archbishop of Canterbury* (J Roberts, London 1719) 6; *The True Briton* (3 June 1723) 7; [Robert Lindsay], *A Third Letter from ___ to the ___* ([Dublin 1725]) 2; Caleb D'Anvers, *The Craftsman* (R Franklin, London 1731) 3:229 (no.117)(28 Sept.1728); Eustace Budgell, *The Second Part of Liberty and Property: A Pamphlet* (W Mears, London 1732) 2; 'The Great Importance of the Liberty of the Press,' *London Magazine* (T Astley, London 1738) 10; *A Collection of Letters Publish'd in Old England: or, the Constitutional Journal* (W Webb, London 1742) 59; *The Livery-Man; or, Plain Thoughts on Publick Affairs* (np 1740) 22.

²⁴ Charles D'Avenant [Davenant], *Essays upon Peace at Home, and War Abroad* (James Knapton, London 1704) 47; accord *Xenophon, Hiero: Or the Condition of a Tyrant* (3rd ed Bernard Lintott, London 1713) iv.

²⁵ *The Old Whig: or, the Consistent Protestant* (W Wilkins, London 1739) 220, 222, 223-25; accord *An Answer to the Defence of the Dissertation or Enquiry Concerning the Gospel According to S. Matthew* (R Knaplock, London 1733).

²⁶ 'To the Gentlemen, Merchants, Freeholders, and Others' (21 Jan.1738), *Commonsense: or, the Englishman's Journal* (J Purser, London 1738) 349; [Thomas Hayter], *An Essay on the Liberty of the Press* (J Raymond, London 1755) 5.

with 'liberty of the press,' which meant that 'no man can be safe who publishes a book.'²⁷ Worried support for freedom of press also appeared in brief passages of books or pamphlets on other subjects,²⁸ in coffeehouse debates,²⁹ and in newspapers and periodicals joining the chorus that 'liberty of the press' was 'the only remaining bulwark of the liberties of the people.'³⁰

The most avid champions of freedom of press without restraints were the radical Whigs,³¹ such as Matthew Tindal and John Toland,³² who as early as 1702 were described by Charles Davenant as differing from 'Modern Whigs' on that and other issues.³³ Tindal frequently expressed concern over the safety of freedom of press, which he saw as necessary to 'freedom either civil or ecclesiastical.'³⁴ *Cato's Letters* in 1721-1722 agreed it was 'liberty of writing... which secures all other liberties,' and preferred that 'many libels should escape, than the liberty of the press should be infringed.'³⁵ The 'principles of a real Whig' in the 1730s and 1740s included belief 'that the freedom of the press is the bulwark of religious and

²⁷ [Baron George Lyttleton], *Considerations upon the Present State of Our Affairs* (2nd ed T Cooper, London 1739) 34, 35; accord 'The Great Importance of the Liberty of the Press,' *London Magazine* (T Astley, London 1738) 10; [Hugh Hume, Earl of Marchmont], *A Serious Exhortation to the Electors* (T Cooper, London 1740) 16; *The Independent Briton: Or, Free Thoughts... as to Securing the Liberty of the Press* (T Cooper, London 1742) 12, 13, 15, 17; Gentleman of the Middle-Temple, *A Critical Review of the Liberties of British Subjects* (R Watkins, London 1750) 113.

²⁸ *The History of the Treaty of Utrecht* (np, London 1712) 302; [John Oldmixon], *The Secret History of Europe* (np, London 1712) 49; [John Arbuthnot], *An Invitation to Peace* (Lawrence, London 1713) 19; William Goldwin, *God's Judgments on a Sinful People* (Joseph Penn, Bristol 1722) ii; George Stephens, *National Righteousness, the Foundation of Public Prosperity* (T Cox, London 1728) 21; *An Epistle to Eustace Budgell* (John Hughs, London 1734) 13; *The Independent Briton: Or, Free Thoughts... as to Securing the Liberty of the Press* (T Cooper, London 1742) 50-51.

²⁹ *Arguments Relating to a Restraint upon the Press* (R and J Bonwicke, London 1712) 3, though the writer advocated restraints, 23; accord *Brewer-Party* 148-49.

³⁰ *Harris-Newspapers* 134 (*Champion*); e.g., 'To the Gentlemen, Merchants, Freeholders, and Others' (21 Jan. 1738), *Commonsense: or, the Englishman's Journal* (J Purser, London 1738) 349.

³¹ *Robbins* 373; *Dickinson-Politics* 194.

³² John Toland, 'Proposal for Regulating ye Newspapers' (1717), *Kemp* 4:203, 203.

³³ [Charles Davenant], *Tom Double Return'd Out of the Country or, the True Picture of a Modern Whig* (2nd ed np, London 1702) 92-93, 95-96.

³⁴ [Matthew Tindal], *Reasons against Restraining the Press* (np, London 1704) 14; accord [Matthew Tindal], *A Second Defence of the Rights of the Christian Church* (np, London 1708) 23; [Matthew Tindal], 'A Discourse for the Liberty of the Press' (1698), in [Matthew Tindal], *Four Discourses* (np, London 1709) iv, 292, 295.

³⁵ *Cato's Letters* 2:712, 713-14 (no.100) (27 Oct.1722), 1:228, 233 (no.32) (10 June 1721); accord *ibid* 1:12 (Preface); [John Trenchard and Thomas Gordon], *The Independent Whig* (J Peele, London 1721) 76.

civil liberty.³⁶ Though radical Whigs were only the minority of one party,³⁷ with questioned influence in England,³⁸ their influence was great on America's revolutionary generation.³⁹

These are significant evidence⁴⁰ of a widely held belief during 1695-1740 that the press was restrained rather than free, that freedom of press was future rather than present. The numbers only grew in the next half-century, as such essayists as 'Junius,' popular and oft-reprinted,⁴¹ stressed that 'the liberty of the press is the *palladium* of all your rights'⁴²

Freedom of the press grew in practice, though not in English legal protection, over the eighteenth century. '[P]ress intervention in politics was extremely vigorous.'⁴³ *Cato's Letters* found unparalleled demand.⁴⁴ Radical Whigs freely reprinted the republican writings of the English Revolution that originally had to be published anonymously in Holland, and freely disseminated those reprints to American and European libraries and leaders,⁴⁵ particularly 'that extraordinary one-man propaganda machine' Thomas Hollis and later the Society for Constitutional Information.⁴⁶ Whigs frequently published in support of America's claims be-

³⁶ William Talbot to Sir John Dutton (1734), James Dallaway (ed), *Letters of the Late Thomas Rundle, L.L.D.* (R. Raikes, Gloucester 1789) 2:241, 243, quoted in *Robbins* 277 & n13; accord *Cato's Letters* 2:717, 721 (no.101) (3 Nov.1722); *An Essay on Civil Government in Two Parts* (R. Willock, London 1743) 137-38, 354-56; accord *Ashcraft* 212 & n129 (Lawrence).

³⁷ *Robbins* 313, 377; *Dickinson* 103; accord *Dickinson* 198; *ibid* 198-99 (Priestley); *Dickinson-Politics* 192; e.g., [James Burgh], *Britain's Remembrancer; or, The Danger Not Over* (np, London 1746) 22.

³⁸ *English Society* 320; Ian R. Christie, *Stress and Stability in Late Eighteenth-Century Britain: Reflections on the British Avoidance of Revolution* (CP, Oxford 1984) 170-82, 183-214; *Vallance* 14.

³⁹ *Robbins* 1-3, 314, 376.

⁴⁰ Marie Peters, 'Historians and the Eighteenth Century English Press' (1988) 34 *Australian Journal of Politics and History* 37.

⁴¹ *Junius* xv-xvi; accord *Brewer-Party* 154-55.

⁴² *Junius* 10; accord *ibid* 8-9, 13-20, 23-24, 303, 308-10.

⁴³ *Harris-Press* 7 (before 1746); *ibid* 9; accord *Harris-Politics* 168 (early 1700s).

⁴⁴ *Zuckert* 297; *Cato's Letters* 2:951 (no.138) (27 July 1723); accord Marcus Wood, 'Radical Publishing,' in *CHB* 5:834.

⁴⁵ *Pamphlets-Revolution* 32; WH Bond, *Thomas Hollis of Lincoln's Inn: A Whig and His Books* (CUP, Cambridge 1990) xv, 29; accord George B. Hill (ed), *Boswell's Life of Johnson* (CP, Oxford 1934-64) 4:97 (Hollis); Prospectus of Society for Constitutional Information (1780), *EHD* 10:220.

⁴⁶ *Ideological Origins* 40; accord *Robbins* 258, 260-61, 317, 367.

fore and during its Revolution,⁴⁷ and newspaper columns debated the American question.⁴⁸

However, the English press remained under the shadow of possible prosecution, or at least arrest, for seditious libel, as the case of John Wilkes and the search for 'Junius' show. The press was merely tolerated, not free, as something permitted, not of right.⁴⁹ Its liberty was, as Blackstone described it, only freedom from 'previous restraints upon publications, and not freedom from censure for criminal matter when published.'⁵⁰

2 Seditious Libel as a Restraint on Freedoms of Press and Speech

That threat of seditious libel prosecution was a fact of English life throughout the eighteenth century.⁵¹ Following the example of William III, Anne, the month of her accession, issued a proclamation prohibiting seditious libel,⁵² and called for legislation against 'false and scandalous libels,'⁵³ seeking to punish 'unprecedented' 'volume of Whig polemic against the government.'⁵⁴ Parliament censured particular books in 1704, 1705, 1710, and 1720,⁵⁵ and royal proclamations sought out authors of others in 1700, 1704, 1705 and 1714.⁵⁶ The numerous seditious libel prosecutions are described in the next chapter.

⁴⁷ Robbins 328, 334, 340, 355-56, 357-59, citing Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (2nd ed T Cadell, London 1776) 1:32; Joseph Priestley, *The Present State of Liberty* (Johnson and Payne, London 1769); [Obadiah Hufme], *An Historical Essay on the English Constitution* (Edward and Charles Dilly, London 1771); *Burgh* 2:274-81, 291-302, 302-40; accord *Burke's Writings* 3:258, 277; *Brewer-Party* 154; *Dickinson-Politics* 225.

⁴⁸ E.g., *EHD* 10:755-61 (1766), 10:761-63 (1775).

⁴⁹ *Harris-Newspapers* 153.

⁵⁰ *Blackstone's Commentaries* 4:151 (emphasis in original).

⁵¹ E.g., *State Trials* 15:715 (1712); *ibid* 15:1323 (1719); *ibid* 17:626 (1731); *ibid* 18:1203 (1752); accord *Oxford History* 7:181 (Defoe 1703); *Case of Robert Clare, Printer* (1705-06), *Kemp* 4:118; see *State Trials* 12:1207 (1689-90).

⁵² 'By the Queen, Proclamation, for Restraining the Spreading of False News, and Printing and Publishing of Irreligious and Seditious Papers and Libels' (26 Mar. 1702), *Kemp* 4:107; *Tudor-Stuart Proclamations* 1:514. It was reissued a year later. *Ibid* 1:518 (25 Feb. 1703).

⁵³ *Kemp* 4:194 (Jan. 1712).

⁵⁴ *Kenyon* 158; accord *English Society* 15; Michael Harris, 'London Newspapers,' in *CHB* 5:413, 420-22.

⁵⁵ *Calendar-Anne* 4: no.945; *English Society* 285.

⁵⁶ *Calendar-William* 10:364 (11 Mar. 1700); *Calendar-Anne* 3: no.1023 (1704); 'Proclamation' ['The Memorial of the Church of England'] (no.4399)(20 Dec. 1705), *Tudor-Stuart Proclamations* 1:523; 'Proclamation, for Discovering the Author of a False, Malicious, and Factious Libel, Intituled, The Public Spirit of the Whigs' (no.4538)(15 Mar. 1714), *ibid* 1:536.

The most contentious prosecution for seditious libel⁵⁷ before 1763 was directed at Dr. Henry Sacheverell's sermon in St. Paul's Cathedral in 1709, on the anniversary of William III's landing. Sacheverell 'preach[ed] fire and brimstone Toryism' and, in demanding civil obedience and condemning resistance any time and anywhere,⁵⁸ implied 'that the Revolution had involved resistance, and was therefore wrong,'⁵⁹ which further implied that William and his successors were usurpers.⁶⁰ The charges were that he acted 'to create jealousies and divisions among her Majesty's subjects, and to incite them to sedition and rebellion.'⁶¹ At the parliamentary trial in 1710,⁶² Sacheverell backed down from his apparent position on the Revolution,⁶³ but the Whigs did so as well by 'modifying the general right of resistance almost out of existence'⁶⁴ and avoiding any discussion of natural rights.⁶⁵ The Whigs snatched defeat from the jaws of victory, throwing themselves as well as Sacheverell out of office.⁶⁶

The tool of choice, after numerous prosecutions early in the century, was intimidation by arrest.⁶⁷ Seditious libel served as 'the most important legal instrument of press control.'⁶⁸

The law of seditious libel drew growing criticism during the eighteenth century. The 'im-

⁵⁷ 'Articles of Impeachment against Henry Sacheverell' (1710), *EHD* 8:205, 206-07; *Trial of Henry Sacheverell* (1710) *State Trials* 15:1, 2 (HL) (his books were 'scandalous and seditious libels'); accord Geoffrey Holmes, *The Trial of Doctor Sacheverell* (Eyre Methuen, London 1973) 81, 99-100, 101, 154; Mark Rose, 'Copyright, Authors and Censorship,' in *CHB* 5:118, 128.

⁵⁸ *Oxford History* 7:46.

⁵⁹ Kenyon 130; Henry Sacheverell, *The Perils of False Brethren, Both in Church and State* (H King, London 1709).

⁶⁰ Robbins 77.

⁶¹ Kenyon 2; Robbins 77; *EHD* 8:206-07.

⁶² Geoffrey Holmes, *The Trial of Doctor Sacheverell* (Eyre Methuen, London 1973); Kenyon 128-45.

⁶³ Dickinson 49-50.

⁶⁴ Kenyon 138-39, 141-42; accord Dickinson 78, 79; contra Robbins 81.

⁶⁵ Robbins 82. The trial before the Lords is reconstructed in Clyve Jones, 'Debates in the House of Lords on "The Church in Danger", 1705, and on Dr Sacheverell's Impeachment, 1710' (1976) 19 *Historical Journal* 759, 762-71.

⁶⁶ Kenyon 132, 145; Geoffrey Holmes, 'The Sacheverell Riots,' in Paul Slack (ed), *Rebellion, Popular Protest, and the Social Order in Early Modern England* (CUP, Cambridge 1984) 232; *Tudor-Stuart Proclamations* 1:531.

⁶⁷ Black 135-88, esp.136-37; *Harris-Newspapers* 134-54, esp.141-46; e.g., *A Collection of Political and Humorous Letters, Poems, and Articles of News* (J Clark, London 1748) (title page noting printer's arrest).

⁶⁸ Mark Rose, 'Copyright, Authors and Censorship,' in *CHB* 5:118, 128; accord Deazley 5-6.

mensely popular' essayists,⁶⁹ *Cato's Letters*, found it irreconcilable with freedom of speech:

This secret was so well known to the court of King Charles I that his wicked ministry procured a proclamation to forbid the people to talk of Parliaments, which those traitors had laid aside. To assert the undoubted right of the subject, and defend his Majesty's legal prerogative, was called disaffection, and punished as sedition. . . .

....
The administration of government is nothing else, but the attendance of the trustees of the people upon the interest and affairs of the people. And as it is the part and business of the people, for whose sake alone all publick matters are, or ought to be, transacted, to see whether they be well or ill transacted; so it is the interest, and ought to be the ambition, of all honest magistrates, to have their deeds openly examined, and publicly scanned: Only the wicked governors of men dread what is said of them. . . .⁷⁰

Letters 100 and 101 further discussed the danger and inefficacy of seditious libel, though Trenchard and Gordon⁷¹ genuflected toward a need to punish libel against government.⁷²

Others criticized seditious libel restraints as inconsistent with freedoms of press and speech as the century drew on.⁷³ By 1769, a wide range of Whigs argued, as Burke did, that 'the law of libels leaves not the shadow of the liberty of the press,'⁷⁴ with various objections.⁷⁵

Their criticism had no effect on the judiciary, whose almost unanimous view was that seditious libels posed mortal danger to government and must be criminally punished. Lord Chief Justice Raymond added a parallel theme in 1731, charging the jury that 'the liberty of the press is only a legal liberty, such as the law allows,' not a 'liberty to print what he pleases.'⁷⁶

⁶⁹ *Printers* 25, 29; *accord Prelude* 96 n34; *Open Press* 35, 44-47; Zuckert xix, 289-319.

⁷⁰ *Cato's Letters* 1:110-11 (no.15) (4 Feb.1720).

⁷¹ *ODNB* 22:960, 55:307.

⁷² *Cato's Letters* 2:712, 713-16 (no.100) (27 Oct.1722), 2:717, 718-22 (no.101) (3 Nov.1722)

⁷³ Chapter 3.B; [Baron George Lyttleton], *Considerations upon the Present State of Our Affairs* (2nd ed T Cooper, London 1739) 34-35; [Hugh Hume, Earl of Marchmont], *A Serious Exhortation to the Electors* (T Cooper, London 1740) 16; *The E— of C—f—d's Speech in the H—se of L—ds, against the Bill for Licensing All Dramatic Performances* (np, Dublin 1739) 13; see [Lord Bolingbroke], *The Doctrine of Innuendo's Discuss'd, or the Liberty of the Press Maintain'd* (np, London 1731) 16, 11 ('forced constructions upon every paper. . . support unreasonable prosecutions,' and will 'destroy the liberty of the press').

⁷⁴ Edmund Burke, 'Speech on Wilkes's Privilege' (23 Jan.1769), *Burke's Writings* 2:100, 101.

⁷⁵ *Junius* 16-17 &n (Junius' preface); *Burgh* 3:246-66; Joseph Priestley, *An Essay on the First Principles of Government; and on the Nature of Political, Civil, and Religious Liberty* (James Williams, Dublin 1768) 173-74.

⁷⁶ *Trial of Mr. Richard Francklin* (1731) *State Trials* 17:625, 671, 628 (KB); *The Craftsman* (London 2 Jan.1731) no.235, *EHD* 10:248.

The cause célèbre for freedoms of press and speech was the prosecution of John Wilkes for seditious libel during 1763-1769, kept alive by his expulsions from and reelections to Parliament,⁷⁷ followed by the prosecutions of publishers of 'Junius' essays for seditious libel in 1770. These and other cases are discussed in Chapter 3.

3 Nascent Calls for Freedom of Speech

Freedom of speech inside Parliament had fared better in the Bill of Rights than freedom of press,⁷⁸ and freedom of speech outside Parliament, except in petitions, was unprotected.

Pleas for freedom of speech came particularly from the Whigs. John Tutchin, two years after his seditious libel trial, wrote that 'here we dare speak and write the truth, this is an essential part of our freedom,' whereas France's lack of that freedom evinced 'vassalage.'⁷⁹ A 1742 publication, similarly using 'freedom in speech' synonymously with freedom 'of the press,' affirmed that to be part of the 'right to liberty.'⁸⁰ An essay in *Commonsense* in 1738 extolled 'freedom of inquiry' and 'free discussion of all subjects, unrestrained but by equitable laws, which constitutes the very essence of our civil liberty.'⁸¹ Horace Walpole wrote that '[l]iberty of speech and liberty of writing are the two instruments by which Englishmen call on one another to defend their common rights.'⁸² Country Whigs, at odds with Court Whigs and Tories, similarly tended to support 'free expression and free association.'⁸³

Cato's Letters gave the strongest call for unrestrained freedom of speech, so long as it

⁷⁷ *Rudé* 35, 67, 68, 70; *Thomas* 47-54, 79, 80, 92-98, 98-99, 99-101, 101-03; Simon MacCoby, *English Radicalism* (Allen & Unwin, London 1935-61) 1:13-33; *Dickinson* 211; *Select Statutes-Cases* 332-33.

⁷⁸ 1 W&M (sess 2) c2; *EHD* 8:122, 123-24; *Statutes* 9:67.

⁷⁹ John Tutchin, *Observer* (London 1706), *Kemp* 4:309, 310.

⁸⁰ *The Independant Briton: Or, Free Thoughts. . . as to Securing the Liberty of the Press* (T Cooper, London 1742) 11; accord [Thomas Hayter], *An Essay on the Liberty of the Press* (J Raymond, London 1755) 8.

⁸¹ 'To the Gentlemen, Merchants, Freeholders, and Others' (21 Jan. 1738), *Commonsense: or, the Englishman's Journal* (J Purser, London 1738) 349, 350.

⁸² Derek Jarrett (ed), *Memoirs of the Reign of King George III: Horace Walpole* (YUP, New Haven 2000) 1:212.

⁸³ *Dickinson* 179-80; *Dickinson-Politics* 198. E.g., Charles D'Avenant [Davenant], *Essays upon Peace at Home, and War Abroad* (James Knapton, London 1704) 47; *The Livery-Man: or, Plain Thoughts on Publick Affairs* (np 1740) 50, 22.

did not injure another. The fifteenth letter opened with that call:

Without freedom of thought, there can be no such thing as wisdom, and no such thing as public liberty, without freedom of speech: Which is the right of every man, as far as by it he does not hurt or control the right of another; and this is the only check which it ought to suffer, the only bounds which it ought to know.

This sacred privilege is so essential to free government, that the security of property; and the freedom of speech, always go together. . . .⁸⁴

Implicit in 'the only bounds which it ought to know' was that speech should not be limited by seditious libel doctrines. Continuing in essays republished as the *Independent Whig*, Trenchard and Gordon further described why speech is essential to free government through a 'right of examining all publick measures and, if they deserve it, of censuring them.'⁸⁵ Gordon later devoted a section to 'Freedom of Speech' in essays introducing his translation of *Tacitus*.⁸⁶

Such radical Whigs were the consistent party of free speech, as of free press.⁸⁷ One in 1712 recalled that 'Republican writers have ever been extolling the benefit of freedom of speech,' and that 'Whigs have argu'd for allowing the press its full swing.'⁸⁸ A number of Robbins' 'eighteenth-century commonwealthmen' advocated protection for freedom of speech.⁸⁹ James Burgh in 1775 devoted a chapter of his *Political Disquisitions* to 'Of the Liberty of Speech and Writing in Political Subjects.'⁹⁰

The step from advocacy of liberty as 'the inherent right of all mankind,'⁹¹ to identification of freedom of speech or freedom of press as among those rights, began to be made by

⁸⁴ *Cato's Letters* 1:110, 110 (no.15) (4 Feb.1720); accord *ibid* 1:111-16; 2:712, 713 (no.100) (27 Oct.1722); 2:717, 721 (no.101) (3 Nov.1722).

⁸⁵ Quoted in Robbins 115 & n62.

⁸⁶ Thomas Gordon (ed), *The Works of Tacitus* (Tho.Woodward, London 1728) 1:105-06 (Discourse 9, §1), mentioned in Robbins 115 & n61.

⁸⁷ Dickinson-Politics 194.

⁸⁸ *The Thoughts of a Tory Author Concerning the Press* (A Baldwin, London 1712) 7, 12.

⁸⁹ Robbins 8; 123 & n83 (John Toland); 127 & n93 (Anthony Collins); 199 & nn48-49 (Robert Wallace); see 66 (Sir Isaac Newton).

⁹⁰ Burgh 3:246-66.

⁹¹ William Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament in England Stated* (Joseph Ray, Dublin 1698) 3, mentioned in Robbins 136-37 & n9.

various moderate⁹² and radical Whigs.⁹³

By the time of the American Revolution, freedoms of press and speech in England were insufficient to protect Wilkes and Junius from prosecution, but had broadened from the Stuart period to the point that the Whig opposition could question Tory prosecution of the war,⁹⁴ at least in parliamentary speech,⁹⁵ and that England's press could pour forth a notably increasing number of imprints.⁹⁶ Freedom of press had almost no relation to freedom from licensing, which had not existed for eighty years; freedom of speech never had any relation to freedom from licensing. Freedoms of press and speech enjoyed toleration but no security as rights.⁹⁷

B The Developing Freedoms of Press and Speech in Eighteenth Century America

The foregoing events in English history figured large in the American colonies, and were endlessly cited as the colonists' own heritage.⁹⁸ The political philosophers in English history also figured large in the constitutional period, though earlier assumptions of Lockean dominance were thrown in question by rediscovery of the 'Commonwealthmen' and others,⁹⁹ and

⁹² [Horace Walpole], *A Letter to the Whigs* (M Cooper, London 1747) 12 (liberty of the press); [Thomas Hayter], *An Essay on the Liberty of the Press* (J Raymond, London 1755) 7; David Williams, *A Letter to the Body of the Protestant Dissenting Ministers of All Denominations* (1777) 23-24, quoted in Dickinson 202; accord HT Dickinson, 'Whiggism in the Eighteenth Century,' in John Cannon (ed), *The Whig Ascendancy: Colloquies on Hanoverian England* (Edward Arnold, London 1981) 28, 32.

⁹³ George Stephens, *National Righteousness, the Foundation of Public Prosperity* (T Cox, London 1728) 21 (natural right of inquiry); *A Collection of Letters Publish'd in Old England: or, the Constitutional Journal* (W Webb, London 1742) 59 (freedom of press); [John Asgill], *An Essay for the Press* (A Baldwin, London 1712), Kemp 4:245, 245. However, freedom of press was not sufficiently accepted as a core freedom to appear in Richard Price's definition of civil and religious liberty in 1776. Richard Price, *Observations on the Nature of Civil Liberty* (2nd ed T Cadell, London 1776) 21-22.

⁹⁴ Bradley 7-18, 147-53; Thomas 175; Burke 3:30.

⁹⁵ The 'Junius' letter prosecuted in 1770 was nonparliamentary criticism of the approach to America.

⁹⁶ Michael F Suarez, 'Towards a Bibliometric Analysis of the Surviving Record, 1701-1800,' in CHB 5:39, 43 (England, Scotland, and Wales).

⁹⁷ See Oxford History 8:289. Cressy disagrees, *Cressy-Dangerous* 235, 239, 243, but his numerous examples of eighteenth century prosecution of words for sedition show limited freedom. *Ibid* 226-35, 236-58.

⁹⁸ E.g., *Trial of Mr. John Peter Zenger, State Trials* 17:675, 682, 697, 707, 711, 717, 723 (N.Y.S.Ct. 1735); William Bollan, *The Freedom of Speech and Writing upon Public Affairs Considered* (S Baker, London 1766); *Wilson's Considerations* 9-13; *Federalist* No.5, at 24; accord *Creation* 7.

⁹⁹ Robbins 19-51, 52-129, 216-312; *Ideological Origins* 34-35; *Creation* 14, 50; *Glorious Cause* 51; James Harrington, *The Commonwealth of Oceana and A System of Politics* (JGA Pocock (ed) CUP, Cambridge 1992) xv; Jenni Parrish, 'Law Books and Legal Publishing in America, 1760-1840' (1979) 72 *Law Library Journal* 355, 356-57.

were pushed aside¹⁰⁰ by the republican synthesis, led by Bailyn's and Wood's broader ideological origins and Pocock's classical and renaissance influences.¹⁰¹ Neolockeans counterattacked and rejected a republican-Locke antithesis,¹⁰² and condemned the 'contemporary infatuation with "classical republicanism"' and the synthesis itself.¹⁰³ Others joined in finding undue emphasis on classical republicanism over individualistic liberalism,¹⁰⁴ and in not welcoming Machiavelli's 'long, somber shadow' over political thought.¹⁰⁵

1 Treatment of Dissenting Press and Speech and the Zenger Trial

Freedom of speech was frequently suppressed in colonial America, as Eldridge and others have thoroughly chronicled.¹⁰⁶ Freedom in practice for spoken words did grow in the eighteenth century,¹⁰⁷ after frequent prosecution of seditious words in the prior century.¹⁰⁸

However, colonial laws continued to make it a crime to 'speak any seditious words or speeches, or spread abroad false news, write or disperse scurrilous libels against the present government,' or to 'instigate others to sedition.'¹⁰⁹ Legislatures often charged critics for 'writ-

¹⁰⁰ Bernard Bailyn, *The Origins of American Politics* (Knopf, New York 1968) ix-x, 57; *Ideological Origins* 34-35; *Creation* 29; accord Robert E Shalhope, 'Toward a Republican Synthesis' (1972) 29 *William and Mary Quarterly* (3rd ser) 49, 49 & n1, 51.

¹⁰¹ *Ideological Origins* 23-42; *Creation* 47, 49, 114-17; JGA Pocock, *The Machiavellian Moment* (PUP, Princeton 1975); accord Quentin Skinner, *The Foundations of Modern Political Thought* (CUP, Cambridge 1978) 1:3-22, 49-65, 71-84, 139-89 (medieval and Renaissance); 2:12-19, 241-54 (Reformation).

¹⁰² E.g., Thomas L Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (UChiP, Chicago 1988) 28-39; Jerome Huyler, *Locke in America* (UPKan, Lawrence 1995) 31-41, 175-273; cf. JGA Pocock, 'Empire, Revolution and an End of Early Modernity,' in *Varieties* 283, 287.

¹⁰³ E.g., *ibid* 29; Zuckert 150-83, esp. 164-66; Clark 24, 25-29.

¹⁰⁴ E.g., Isaac Kramnick, 'Republican Revisionism Revisited' (1982) 87 *American Historical Review* 629, 634-55; MNS Sellers, *The Sacred Fire of Liberty: Republicanism, Liberalism, and the Law* (NYUP, New York 1998) ix; David J Bederman, *The Classical Foundations of the American Constitution* (CUP, Cambridge 2008) 1-49; cf. *Ideological Origins* 351-52.

¹⁰⁵ E.g., Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (UCP, Berkeley 1993) 269; *Cato's Letters* 1:230 (no.32).

¹⁰⁶ Larry D Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (NYUP, New York 1994) 5-19, 23-41, esp. 14-19 on criticism of government; Levy 16-88.

¹⁰⁷ *Ibid* 65-66, 77, 91-113, 114, 132.

¹⁰⁸ Larry D Eldridge, 'Before Zenger: Truth and Seditious Speech in Colonial America, 1607-1700' (1995) 39 *American Journal of Legal History* 337, 337; e.g., George L Haslins, *Law and Authority in Early Massachusetts* (Macmillan, New York 1960) 28, 183, 196.

¹⁰⁹ E.g., Act for the More Effectual Observing of the Queen's Peace (1713), in *Collection of All the Acts of Assembly, of the Province of North-Carolina* (James Davis, Newbern 1765) 1:8; accord Act against Intemperance,

ing, signing and publishing a false, scandalous, virulent and seditious libel against the last house of assembly,' and jailed authors and accomplices.¹¹⁰ Governors intermittently sought to prosecute newspaper critics of government for seditious libel.¹¹¹ Court prosecutions were frequently threatened, though less frequently brought, against authors for seditious libel.¹¹²

Judicial suppression of printing reached a decisive point in the 1735 trial of John Peter Zenger for publishing seditious libel in New York,¹¹³ by criticizing the governor and Crown ministers.¹¹⁴ Zenger's defense primarily relied on the arguments that truth could not be libelous, and that the jury should decide whether words were false and libelous,¹¹⁵ both contrary to English law from 1688-1792. Though the judge rejected those arguments, the jury ignored his instructions and acquitted Zenger,¹¹⁶ after deliberating only ten minutes.¹¹⁷

Discussion of seditious libel in America continues in the next chapter.

2 The Central Place of Dissenting Press and Speech in Prerevolutionary Debates

The colonies were jarred out of a century of 'salutary neglect'¹¹⁸ by the Stamp Act¹¹⁹ cri-

Immorality and Prophaneness, *Acts and Laws, Passed by the Great and General Court... Massachusetts-Bay [1711-1712]* (np, Boston 1712) 371; *Journal of the Votes and Proceedings of the House of Representatives of the Province of Pennsylvania* (np, Philadelphia 1727) 30 (requesting enforcement); Act Against Spreading False News and Defamation (1741), in *Laws of the Government of... Delaware* (James Adams, Wilmington 1763) 217.

¹¹⁰ E.g., *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania* (Henry Miller, Philadelphia 1774) 4:769 (William Moore-William Smith, 1758); accord *Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York [1769-1770]* (Hugh Gaime, New York 1770) 49, 51 (Le-gion-John Lamb, 1769); *Prelude* 62-64.

¹¹¹ E.g., *Letters to the Ministry from Governor Bernard, General Gage, and Commodore Hood* (Samuel Hall, Salem 1769) 6-7 (Boston Gazette, 1768); Gov. William Cosby, *A Proclamation* (np, New York 1734); accord Lt.Gov. Spencer Phips, *A Proclamation* (John Draper, Boston 1751).

¹¹² *Prelude* 63-64; Levy 17.

¹¹³ *Trial of Mr. John Peter Zenger, State Trials* 17:675 (N.Y.S.Ct. 1735).

¹¹⁴ 'Information,' *Ibid* 17:692; James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (Stanley N Katz (ed), BP-HUP, Cambridge 1968).

¹¹⁵ *Ibid* 17:693, 694, 704, 705, 713, 716, while not directly attacking seditious libel, Levy 127-28.

¹¹⁶ *Ibid* 17:699, 706, 722, 723.

¹¹⁷ *Open Press* 49.

¹¹⁸ *Oxford History* 8:171-72; Jacob M. Price, 'Who Cared about the Colonies?', in Bernard Bailyn and Philip D Morgan (eds), *Strangers within the Realm* (UNCP, Chapel Hill 1991) 395, 396.

¹¹⁹ 5 Geo 3 c12 (22 Mar.1765); *Statutes* 26:179; along with the Revenue Act, 4 Geo 3 c15 (1764); *Statutes* 26:33; and Quartering Act, 5 Geo 3 c33 (15 May 1765); *Statutes* 26:305.

sis and the Declaratory Act¹²⁰ of 1763-1767,¹²¹ followed by the Townshend duty¹²² conflict of 1767-1773,¹²³ and then by escalation from tea party¹²⁴ to Coercive Acts¹²⁵ to armed conflict to independence during 1773-1776.¹²⁶

Those provocations unleashed a torrent of colonial dissent--speech, press, and petition--which brought increasing awareness of dissent's precarious legal status. Newspapers doubled from 20 to 43 between 1762 and 1775,¹²⁷ and 'Patriot newspapers were one of the most important factors in turning American public opinion.'¹²⁸ Colonial legislatures increasingly spoke and voted in opposition to Crown measures.¹²⁹

That growing dissent developed theories of colonists' rights. As conflict grew the ancient constitution was increasingly seen as corrupted,¹³⁰ and the ill-defined and restricted nature of English rights demanded alternate grounds,¹³¹ which were natural rights and charter

¹²⁰ 6 Geo 3 c12 (18 Mar.1766); *Statutes* 27:19; adopted the same day as the Stamp Act was repealed, Act Repealing the Stamp Act, 6 Geo 3 c11 (18 Mar.1766); *Statutes* 27:19.

¹²¹ E.g., Peter DG Thomas, *British Politics and the Stamp Act Crisis* (CP, Oxford 1975) 85-114, 131-84, 185-252; Edmund S Morgan, *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766* (UNCP, Chapel Hill 1959).

¹²² Act Creating the American Board of Customs Commissioners, 7 Geo 3 c41, c46 (29 June 1767); *Statutes* 27:447, 505; repealed 10 Geo 3 c17 (1770).

¹²³ E.g., Peter DG Thomas, *The Townshend Duties Crisis* (CP, Oxford 1987) 18-75, 76-141, 161-79.

¹²⁴ Following the Tea Act, 13 Geo 3 c44 (1773); see 7 Geo 3 c56 (1766); *Statutes* 27:600. E.g., Benjamin W Labaree, *The Boston Tea Party* (OUP, Oxford 1964) 126-35; Bernard Knollenberg, *Growth of the American Revolution, 1766-1775* (Free Press, NY 1975) 90-102.

¹²⁵ Boston Port Act, 14 Geo 3 c19 (31 Mar.1774); *Statutes* 30:336; Massachusetts Administration of Justice Act, 14 Geo 3 c39 (20 May 1774); *Statutes* 30:367; Massachusetts Government Act, 14 Geo 3 c45 (20 May 1774); *Statutes* 30:381; Quartering Act, 14 Geo 3 c54 (2 June 1774); *Statutes* 30:410; Quebec Act, 14 Geo 3 c83. (22 June 1774).

¹²⁶ E.g., Peter DG Thomas, *Tea Party to Independence* (CP, Oxford 1991) 26-142, 220-319, 320-334; Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* (rev ed OUP, New York 2007) 180-339; David McCullough, 1776 (Simon & Schuster, New York 2005).

¹²⁷ *Chronological Tables* 6-9, 9-13 (including partial-year ones); *Tyranny* 33.

¹²⁸ *Tyranny* 33; *Prelude* 51-301; Robert M Weir, 'The Role of the Newspaper Press in the Southern Colonies,' in *Press-Revolution* 99, 99.

¹²⁹ *Peripheries* 79-150; Jack P Greene, *The Quest for Power: The Lower Houses of Assembly* (UNCP, Chapel Hill 1963) 357-79.

¹³⁰ *Creation* 28-36, bringing a 'pattern of tyranny,' *ibid* 36-43; *Ideological Origins* 129-40.

¹³¹ *Transatlantic* 7; *Great Rights* 24.

rights (later replaced by revolutionary declarations of rights).¹³² Colonial theorists most often relied heavily on the 'radical Whig understanding of politics'.¹³³ Radical Whig ideas were adopted much more widely in America than in England,¹³⁴ in part because America was in search of a theory for challenging Parliament, and in part because 'radical Whigs were only dissenting Protestants, once removed,'¹³⁵ and America's majority were religious dissenters.¹³⁶

"Rights" obviously lay at the heart of the Anglo-American controversy,¹³⁷ as Bailyn noted and American petitions evinced.¹³⁸ Beyond that common denominator, theories of the origin of the Revolution vary enormously from the 'republican synthesis' and its 'repudiation not only of parliamentary sovereignty over the colonies, but... as an acceptable form of government' along with monarchy,¹³⁹ to post-revisionist critics returning to the centrality of natural rights¹⁴⁰ or constitutional rights,¹⁴¹ to others seeing the Revolution as an outgrowth from radical Whig ideology¹⁴² or other sources.¹⁴³

¹³² E.g., Samuel Adams, 'The Rights of the Colonists' (Nov. 1772), *Samuel Adams* 2:350, 351, 356; accord Dickinson's *Essay* 114; Wilson's *Considerations* 2; Lamp 190; Creation 9-10; *Ideological Origins* 77-78, 191-93, 307; Clark 2, 4, 18.

¹³³ *Glorious Cause* 51; accord Creation 13, 15-17, 49, 200; Lamp 185-86, 9-10; Clark 271.

¹³⁴ JGA Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (CUP, Cambridge 1985) 253-73; Lamp 59-193; Kenyon 205; Creation 13, 14, 15-17, 49, 200.

¹³⁵ Edwin S. Gaustad, *Neither King Nor Prelate: Religion and the New Nation, 1776-1826* (Eerdmans, Grand Rapids 1993) 34; accord *Glorious Cause* 52.

¹³⁶ Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* (OUP, Oxford 1986) 188; accord John Adams to Abigail Adams (16 Sept. 1774), LH Butterfield and others (eds), *The Book of Abigail and John: Selected Letters of the Adams Family* (HUP, Cambridge 1975) 75, 76; [Joseph Priestley], *An Address to Protestant Dissenters* (Thomas and John Fleet, Boston 1774) 5, quoted in Clark 45; *ibid* 13, 203; *Federalist* Nos. 10, 51, at 65, 351-52.

¹³⁷ *Ideological Origins* 307.

¹³⁸ E.g., 'Declarations of the Stamp Act Congress' ¶2 (19 Oct. 1765), *EHD* 9:672; John P. Reid, *Constitutional History of the American Revolution: The Authority of Rights* (UWP, Madison 1986) 4; Clark 383-85.

¹³⁹ Pocock-Whiggism 216-18; accord Pocock-Machiavellian 83-422; *Ideological Origins* 22; Creation 47; *Empire* 6-7.

¹⁴⁰ E.g., Thomas Pangle, *The Spirit of Modern Republicanism* 35-36, 32-34, 247-49; Zuckert 164-66.

¹⁴¹ Jack P. Greene, *The Constitutional Origins of the American Revolution* (CUP, Cambridge 2011) 18, richly documenting developing colonial arguments, *ibid* 19-186; Jack P. Greene, 'Law and the Origins of the American Revolution,' in Michael Grossberg (ed), *Cambridge History of Law in America* (CUP, Cambridge 2008) 1:447, 447-80; John P. Reid, *Constitutional History of the American Revolution: The Authority of Law* (UWP, Madison 1993) 172-73.

¹⁴² *Glorious Cause* 51; Lamp 193.

Colonial theorists, though typically discussing only sources of rights and identifying only the rights to life, liberty, and property,¹⁴⁴ or rights to representation and to taxation with consent,¹⁴⁵ sometimes moved to specific rights including press and speech. Thus, Dulany began his influential 1765 pamphlet by noting that 'the Liberty of the Press is of the most momentous consequence' in disseminating truth, and protesting that petitions were often deemed seditious libels.¹⁴⁶ In the first Continental Congress, the Address to the Inhabitants of Quebec was unequivocal, exalting freedom of press as the last of five 'grand rights' or 'invaluable rights' without which 'a people cannot be free,' and was the 'first declaration by an official assembly' proclaiming that freedom.¹⁴⁷ It listed as one benefit of the press that 'oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs,'¹⁴⁸ which made clear that freedom of press must include liberty to criticize government officials. Many essayists such as Dickinson warned that the Crown claimed the right of 'stopping the press.'¹⁴⁹ Cato was regularly reprinted on freedom of speech.¹⁵⁰ These examples and many others show growing colonial demands for secure freedoms of press and speech,¹⁵¹ which culminated in the new states' declarations of rights.

3 State Formation, Declarations of Rights, and Freedoms of Press and Speech

Rights remained in center stage as most new states adopted declarations of rights, or

¹⁴³ Clark 295, 22-23; *Clark-Revolution* 4, 93, 169; Alan Heimert, *Religion and the American Mind, from the Great Awakening to the Revolution* (HUP, Cambridge 1966); Jack P. Greene, *Interpreting Early America* (UPV, Charlottesville 1996) 311-33, 41-59, 493-509.

¹⁴⁴ E.g., Dickinson's *Essay* 41; Wilson's *Considerations* 18.

¹⁴⁵ E.g., Dulany 6, 30; Dickinson 217-18, 215-16; *Ideological Origins* 162-75; *Brewer-Party* 208-16.

¹⁴⁶ Dulany 4 (he also commended 'the excellent *Letter Concerning Libels*,' *ibid* 33n).

¹⁴⁷ *Bill of Rights* 1:221.

¹⁴⁸ 'Address to the Inhabitants of Quebec' (26 Oct. 1774), *JCC* 1:105, 108. Similarly, the Declaration of Colonial Rights adverted to freedom of speech when it affirmed the right to assemble and 'consider of their grievances.' 'Declarations of Colonial Rights and Grievances' (14 Oct. 1774), *JCC* 1:63, 70.

¹⁴⁹ Dickinson's *Essay* 63, 66; and had done so, Tradesman of Philadelphia [John Drinker], 'Observations on the Late Popular Measures' (np, Philadelphia 1774) 5.

¹⁵⁰ E.g., Zenger's *New-York Weekly Journal* (11 Nov. 1734) 1 (quoting No. 15); Franklin's *New-England Courant*, *Printers* 9 (same).

¹⁵¹ Richard Buel, 'Freedom of the Press in Revolutionary America,' in *Press-Revolution* 59, 72-82.

similar provisions in constitutions. Seven of the thirteen new states (plus independent Vermont) adopted such declarations, and four others listed various rights in new constitutions; the remaining two continued under their old, more republican charters.¹⁵²

Freedom of press, among the rights specifically protected, was guarded by nine of the revolutionary declarations and constitutions (ten including Vermont). The first, Virginia's Declaration of Rights, adopted three weeks before the Declaration of Independence, provided

That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.¹⁵³

That was 'the first enactment, constitutional or statutory, expressly protecting freedom of the press' in history.¹⁵⁴ The next, Pennsylvania's Declaration of Rights, affirmed the right 'of writing, and publishing their sentiments,' and added that 'freedom of the press ought not to be restrained.' Delaware, in September 1776, declared that 'the liberty of the press ought to be inviolably preserved.'¹⁵⁵ Six other states adopted variations of these (seven with Vermont).¹⁵⁶

Three things stand out most about these protections of freedom of press. Press provisions were the most prevalent of the dozens of new state protections, except for free exercise of religion (eleven states plus Vermont) and jury trial (ten plus Vermont). All nine press provisions employed broad language and gave no restriction. Conversely, not one said it was adopting freedom of press as it existed, or as it was restricted, under English law. Most began by quoting or paraphrasing Blackstone's language on the indispensability of freedom of press,

¹⁵² Act Containing an Abstract and Declaration of the Rights and Privileges of the People of This State (Conn.1776), *Federal-State Constitutions-Poore* 1:257; *Creation* 133; *Transatlantic* 5.

¹⁵³ Va. D.O.R. sec.12 (1776), *Federal-State Constitutions* 7:3812, 3814.

¹⁵⁴ *Great Rights* 71.

¹⁵⁵ Pa. D.O.R. art.XII (1776), *Federal-State Constitutions* 5:3081, 3083; Del. D.O.R. sec. XXIII (1776), *In Convention, at New-Castle, for the Delaware State, Begun the 27th Day of August, 1776* (James Adams, Wilmington 1776) 4.

¹⁵⁶ Md. D.O.R. art. XXXVIII (1776), *ibid* 3:1686, 1690; N.C. D.O.R. art. XV (1776), *ibid* 5:2787, 2788; Ga. Const. art. LXI (1777), *ibid* 2:777, 784; Vt. D.O.R. art. XIV (1777), *ibid* 6:3737, 3741; S.C. Const. art. XLIII (1778), *ibid* 6:3248, 3257; Mass. D.O.R. art. XVI (1779), *ibid* 3:1888, 1892; N.H. B.O.R. art. XXII (1783), *ibid* 4:2453, 2456.

but then ended with a stark contradiction of his language on its common law limitations.¹⁵⁷

Freedom of speech was protected for 'the first time in any constitutional enactment'¹⁵⁸ (outside legislative speech) by Pennsylvania's revolutionary declaration (copied by Vermont):

That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.¹⁵⁹

Freedom of petition, the common form of nonlegislative speech, was secured by five states.¹⁶⁰

4 Federal Government Formation, the Bill of Rights, and Freedom for Dissent

During the days of the Continental Congress, freedom of press had been discussed on at least four occasions. Each case involved objections to newspaper criticisms of Congress or its members, and each resulted in lopsided congressional majorities refusing to prosecute press criticism under doctrines of seditious libel or legislative privilege.¹⁶¹

¹⁵⁷ *Open Press* 97; e.g., Mass. Const. art. VI §6 (1779), *Federal-State Constitutions* 3:1888, 1910; N.H. Const. pt. II (1776), *ibid* 4:2451, 2469.

¹⁵⁸ *Great Rights* 73.

¹⁵⁹ Pa. D.O.R. art.XII (1776), *Federal-State Constitutions* 5:3081, 3083; Vt. D.O.R. art.XIV (1777), *ibid* 6:3739, 3741.

¹⁶⁰ Pa. D.O.R. art.XVI (1776); Del. D.O.R. art.IX (1776); Md. D.O.R. art.XI (1776); Mass. D.O.R. art.XIX (1780); N.H. B.O.R. art.XXXII (1783).

¹⁶¹ In December 1778, the president of Congress, Henry Laurens, objected that an address Silas Deane published in the *Pennsylvania Packet* was a libel that 'created anxieties' and 'excited tumults' by insulting Congress and the United States; but Laurens could not even garner support for appointing a committee to recommend prosecution of the published address, and consequently resigned his position. *JCC* 12:1203, 1205, 1206 (9 Dec.1778).

In May 1779, the tables were turned as Laurens was criticized for a letter 'derogatory to the honor of Congress' and the United States; but a unanimous vote of states declined to require him 'to declare whether he wrote that letter' (the prelude to prosecution), and a majority even declined to enter the movant's written apologia into the legislative journal. *Ibid* 14:588, 591-92, 610-11 (14, 18 May 1779); Henry Laurens to John Houstoun (27 Aug.1778), *Letters of Delegates* 10:509, 511 n4.

Two months later, the publisher of a pseudonymous attack on Congress over national finance in the *Pennsylvania Packet* was assailed by a motion to bring him before that body; but the motion was unanimously rejected by the states and only drew the support of two legislators. *Ibid* 14:799, 800 (3 July 1779); 'Henry Laurens' Notes of Debates' (3 July 1779), *Letters of Delegates* 13:139. Instead, opponents warned of dire consequences '[w]hen the liberty of the press shall be restrained,' and declaimed that the 'liberty of the press ought not to be restrained.' *Letters of Delegates* 13:139.

Finally, in December 1782, a member of Congress, who acknowledged writing a letter reprinted in the *Boston Gazette* that commented on presumptively secret discussion of loan negotiations, objected to appointment of a committee to investigate the publication, as 'establish[ing] a precedent dangerous to the freedom of the press' and violating his legislative freedom 'by deterring the minority from writing freely to their constituents.' *JCC* 23:814, 815, 816 (18 Dec.1782). Congress, though rejecting his motion condemning the committee on those grounds and instead upholding diplomatic secrecy, did not prosecute him and temporized by appointing a committee 'to report such measures' as would be proper. *Ibid* 23:816-18, 818-19.

At the Constitutional Convention,¹⁶² no one opposed the rights of press and speech, though there was opposition to the advisability of a bill of rights. As Washington himself noted, 'there was not a member of the convention, I believe, who had the least objection to what is contended for by the advocates for a *Bill of Rights* and *Try[al] by Jury*.'¹⁶³ In fact, a provision for freedom of press was proposed several times, discussed, and at one point supported by a majority.¹⁶⁴ Failure to approve it turned out to be a major federalist political miscalculation.

The resulting contribution of the federalists was the Constitution, and the contribution of the antifederalists was the Bill of Rights,¹⁶⁵ together the 'third phase of the revolution.'¹⁶⁶

The antifederalist attack in newspaper essays included 'their strong hold,'¹⁶⁷ the lack of a bill of rights, and particularly the lack of protection of freedom of press¹⁶⁸ and of the other

¹⁶² David O Stewart, *The Summer of 1787* (Simon & Schuster, New York 2007) (excellent account); Max Farrand, *The Framing of the Constitution* (YUP, New Haven 1913).

¹⁶³ George Washington to Lafayette (28 Apr.1788), *Washington Papers-Confederation* 6:242, 244; accord James Madison to Thomas Jefferson (17 Oct.1788), *Madison Papers* 11:295, 297-300; James White to Richard Caswell (13 Nov.1787), *Letters of Delegates* 24:554.

¹⁶⁴ As the Convention began, Charles Pinckney offered a draft constitution prohibiting Congress from 'touching or abridging the liberty of the press.' *Elliot's Debates* 1:145, 148 (29 May 1787); see *Farrand's Records* 3:604, 609. He later 'most anxiously,' *Farrand's Records* 3:290 (Luther Martin), proposed to add to the draft Constitution 'that the liberty of the press should be inviolably observed,' and there was enough support that an affirmative vote sent the proposal to the committee of detail. *Ibid* 2:334, 340-41 (20 Aug.1787); *Elliot's Debates* 1:249. Later, Gerry's and Mason's motion 'for a committee to prepare a bill of rights' was rejected by all ten states voting. *Farrand's Records* 2:588 (12 Sept.1787). The reason given for opposition was that '[i]t is unnecessary--The power of Congress does not extend to the press,' *ibid* 2:618 (Roger Sherman), as Pinckney's cousin Charles Cotesworth Pinckney reported back to South Carolina, *ibid* 3:256--not opposition to that right itself or its breadth, as was evident in Pinckney's later assurances. *Elliot's Debates* 4:259; accord *ibid* 3:203 (Randolph). Yet again, Pinckney renewed that proposal, and it was narrowly defeated by a vote of five to six states. *Ibid* 2:611, 617-18, 620 (14 Sept.1787); *Elliot's Debates* 5:545, 1:310; see *Prelude* 299. Richard Henry Lee introduced his own proposed bill of rights with a free press provision. Richard Henry Lee to Elbridge Gerry (29 Sept.1787), *Letters of Delegates* 24:451, 452; *JCC* 33:540-44 (27 Sept.1787). Toward the end of the convention, proposals for a bill of rights by Pinckney, Mason and Gerry, and Randolph similarly failed. *Farrand's Records* 2:340-41, 587-88, 631, 633.

¹⁶⁵ *Ideological Origins* 350-51; Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition* (UNCP, Chapel Hill 1999) 26-42.

¹⁶⁶ Bernard Bailyn, *Faces of Revolution* (Knopf, New York 1990) 228.

¹⁶⁷ Aristides [Alexander C Hanson], 'Remarks on the Proposed Plan of a Federal Government (1788), in *Pamphlets-Constitution* 217, 241.

¹⁶⁸ For press, e.g., Plebeian [Melancton Smith], 'Address to the People of New-York' (1788), in *Pamphlets-Constitution* 87, 113-14; George Mason, 'Objections of the Hon. George Mason' (1787), *ibid* 327, 331; Federal Farmer [Richard Henry Lee], 'Observation Leading to a Fair Examination of the System of Government' (1787), *ibid* 277, 315-17; [Elbridge Gerry], 'Observations on the New Constitution' (1788), *ibid* 2, 9, 12-13; Luther Martin, 'Letters of Luther Martin' (7 Mar.1788), in *Essays-Constitution* 337, 365; Hugh H Brackenridge, 'Cursory Remarks by Hugh Henry Brackenridge' (Apr.1788), *ibid* 315, 365; Brutus, 'Letters of Brutus' (1788), in *Bill of Rights* 1:505, 509.

'great rights' (as Madison called them, listing jury trial, press, and conscience).¹⁶⁹ In response, the federalist argument why a bill of rights was superfluous emphasized that the federal government had no power to invade the rights at issue,¹⁷⁰ and that a list was both 'unnecessary' and 'dangerous' in implying that such federal power existed, as *The Federalist* said.¹⁷¹

The state ratification debates, particularly the later ones where federalists were less dominant, witnessed frequent antifederalist criticisms of the absence of a bill of rights, and of the unprotected status of freedom of press¹⁷²--as Patrick Henry thundered, 'liberty of the press' is rendered 'insecure, if not lost.'¹⁷³ They also saw federalist replies that protections were unnecessary¹⁷⁴--as Wilson said, 'there is given to the general government no power whatsoever concerning it; and no law... can possibly be enacted to destroy that liberty.'¹⁷⁵

Virginia, the largest state, ratified the Constitution subject to reservations or subsequent amendments including '[t]hat the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.'¹⁷⁶ Similarly, New York proposed amendments including that 'freedom of the press ought not to be violated,' which Rhode Island later echoed; and North

¹⁶⁹ *Creating Bill of Rights* 69, 85 (8 June 1789); *Bill of Rights* 2:1028; accord *Madison Papers* 10:199; *Elliot's Debates* 4:259, 3:587; Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (OUP, Oxford 2006) 178-212.

¹⁷⁰ E.g., *Federalist* No.84, at 579 (by Hamilton); John Jay, 'An Address to the People of the State of New-York' (1788), in *Pamphlets-Constitution* 67, 76-77; Marcus [James Iredell], 'Answers to Mr. Mason's Objections' (1788), *ibid* 333, 360-61; Citizen of America [Noah Webster], 'An Examination into the Leading Principles' (1787), *ibid* 25, 48; Landholder [Oliver Ellsworth], 'The Letters of a Landholder' (1787-1788), in *Essays-Constitution* 135, 163-64; Countryman [Roger Sherman], 'Letters of a Countryman' (Nov.-Dec.1787), *ibid* 213, 218-19; James Wilson, 'State House Yard Speech' (6 Oct.1787), *Wilson Works* 1:171, 172.

¹⁷¹ E.g., *ibid*, *Bill of Rights* 2:1028 (Madison); Hugh Williamson, 'Remarks on the New Plan of Government' (1788), *Essays-Constitution* 393, 398.

¹⁷² E.g., *Elliot's Debates* 1:503 (R.H.Lee), 2:399 (Tredwell), 2:552 (Md. minority), 3:44-45, 3:149, 3:442 (Mason), 3:448-49, 3:462, 3:587-88, 3:594 (Henry), 4:205 (Lenoir), 4:314-15 (Lincoln); *DHRC* 2:204, 2:288, 2:310, 2:441, 2:453, 2:454, 2:504, 2:597, 3:243, 5:587, 5:780, 5:782, 10:1326, 20:624; see *Complete Antifederalist* 1:64; *Jefferson Papers* 12:438, 440; 14:649, 650.

¹⁷³ *Ibid* 3:44.

¹⁷⁴ E.g., *ibid* 1:497-98 (Jay), 2:449, 2:468 (Wilson), 3:103, 3:246 (Nicholas), 3:203, 469 (Randolph), 4:208-09 (Spaight), 4:259 (C.Pinckney), 4:315 (C.C.Pinckney); *DHRC* 2:168, 454-55 (Wilson).

¹⁷⁵ *Ibid* 2:449.

¹⁷⁶ *Ibid* 3:659 (27 June 1788).

Carolina, rejecting ratification, asked for a similar amendment.¹⁷⁷ Minority reports in three more states also demanded protection of the press and, in Pennsylvania's case, of speech.¹⁷⁸

The first Congress appeased these calls by approving the Bill of Rights in September 1789, with the support of both federalists and antifederalists.¹⁷⁹ Particularly interesting among the discussion of freedoms of speech¹⁸⁰ and press¹⁸¹ was Madison's explanation of the committee-approved language: 'The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government'¹⁸² Nine states ratified the Bill of Rights by June 1790,¹⁸³ but with admission of new states eleven were required. Virginia became that eleventh state on 15 December 1791.¹⁸⁴

C Differing Understandings of Limits to the Right of Dissent, or of the Scope of Freedoms of Press and Speech

The early justices held divergent views about the limits of legitimate dissent which, at least in substantial part, brought division over the Sedition Act. Those views derived principally from the English legal history of the right to dissent, and led to at least principal differences: (1) the legitimacy of factions and parties, (2) the legitimacy of opposition to the present administration, (3) a right to evaluate laws as illegal and void, (4) a right to disobey unconstitutional laws, (5) the nonextension of treason to an opposition, (6) the nonexistence of a federal common law of crimes, and, critically, (7) the effect of state and federal freedoms of press and speech on the

¹⁷⁷ *Ibid* 1:328 (N.Y. 26 July 1788); *ibid* 1:332, 4:244 (N.C. 1 Aug. 1788); *ibid* 1:335 (R.I. 29 May 1790); *DHFFC* 4:21 (N.Y.); Michael P Zuckert and Derek A Webb (eds), *The Anti-Federalist Writings of the Melancton Smith Circle* (LF, Indianapolis 2009) 344, 347 (N.Y. proposals July 1788).

¹⁷⁸ See *DHRC* 2:618, 623, 631 (Pa. minority 18 Dec. 1787); *ibid* 17:244 (Md. minority); *Complete Bill of Rights-Sources* 93 (Mass. minority 6 Feb. 1788).

¹⁷⁹ *DHRC* 4:9-48; *DHFFC* 1:134-99.

¹⁸⁰ *Bill of Rights* 2:1026, 1089-90, 1096, 1104, 1122, 1148-49, 1153.

¹⁸¹ *Ibid* 2:1026, 1034-35, 1042, 1089-90, 1096, 1104, 1148-49, 1153, and provisions restricting state abridgment, 2:1027, 1033, 1112-13.

¹⁸² *Annals* 1:766 (15 Aug. 1789).

¹⁸³ *DHC* 2:325, 330, 335, 340, 345, 347, 352, 357, 363.

¹⁸⁴ *Ibid* 2:373, 374-76, 377; accord J Gordon Hylton, 'Virginia and the Ratification of the Bill of Rights, 1789-1791' (1991) 25 *University of Richmond Law Review* 433, 450-56, 456-68, 460-64.

Blackstone definition and seditious libel law. Though different, these views parallel the 'two strains of English and American jurisprudence' described by Presser.¹⁸⁵

Parallel divergences had distinguished Grotius from Sidney, Locke, and other republicans,¹⁸⁶ the moderate Whigs from radical Whigs in and after 1688,¹⁸⁷ and the New Whigs from Old Whigs of Hanoverian times.¹⁸⁸ Such Grotian-moderate Whig and Lockean-radical Whig differences continued to influence the constitutional generation's beliefs, and the early justices' beliefs. For example, Iredell and Chase viewed Grotius as 'of very high authority,'¹⁸⁹ while Wilson was highly critical of Grotius¹⁹⁰ but laudatory toward Locke. Those differences included belief in noncontractarian or singular contract beliefs versus full contractarianism; in natural law without natural equality or original sovereignty in the people versus natural law with both; in surrender of rights to civil government versus retention of inalienable rights; in narrow natural rights versus extensive natural rights; in a very limited right of revolution versus an ongoing right to resist tyranny; and in satisfaction with freedom from prior restraint versus insistence on freedom from subsequent punishment for press and speech. (Chapter I.D.)

1 The Legitimacy of Parties and Factions

Classical and English history and philosophy condemned parties and factions. Alexander Pope pronounced a 'curse on the word *party*,'¹⁹¹ and David Hume cautioned that '[f]actions subvert government, render laws impotent, and beget the fiercest animosities.'¹⁹² Though

¹⁸⁵ *Misunderstanding* 9, 47-54; *Saving* 777-78, 784-85, 788-90.

¹⁸⁶ E.g., *Locke* 2:¶¶202, 206, 207, 222, 223-30, 228, 232, 237-39, 242; accord *Ashcraft* 297, 307, 305, 315, 319.

¹⁸⁷ *Robbins* 82-83, 84; *Dickinson* 126-28.

¹⁸⁸ *Burke* 3:44, 115; *Kenyon* 170.

¹⁸⁹ *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 160 (1795); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230, 258-59 (1796).

¹⁹⁰ *Wilson Works* 1:480-82, 528-29; *Wilson* 37, 43-45.

¹⁹¹ Alexander Pope to Charles Jervas (27 Aug. 1714), George Sherburne (ed), *The Correspondence of Alexander Pope* (CP, Oxford 1956) 2:244, 245.

¹⁹² David Hume, 'Of Parties in General' (1742), *Essays Moral, Political and Literary* (OUP, Oxford 1963) 54, 55.

eighteenth century parties dominated Britain (both Tory-Whig¹⁹³ and Court-Country¹⁹⁴), each generally denied its existence while cautioning of others' factions and parties.¹⁹⁵

Colonists attributed factions to the corruption of English court and legislature,¹⁹⁶ and similarly condemned them.¹⁹⁷ Madison's famous discussion of 'the spirit of party and faction' in *The Federalist* treated it as baneful, though inevitable, like crime 'sown in the nature of man.'¹⁹⁸ Similar views prevailed in the 1790s.¹⁹⁹ Because incipient parties expected 'civic harmony and consensus,' they 'unconsciously interpreted political events along *sectional* and *partisan* lines,' and 'with great conviction and great sincerity... could believe that [their] policies *alone* reflected and served the national public good.'²⁰⁰

Newspapers became visible representatives of less visible political parties.²⁰¹ An opposition press was of disputed legitimacy, just as an opposition political party was, particularly given the colonial background of nominal newspaper neutrality²⁰² and the 1790s change to sharp partisanship.²⁰³ Some defined only support of the administration as nonpartisan.²⁰⁴

A few of the early justices reacted mildly to faction and party. Jay initially shared the

¹⁹³ *Dickinson* 8, 13-90; Clayton Roberts, *The Growth of Responsible Government in Stuart England* (CUP, Cambridge 1966 repr 2008) 197-99.

¹⁹⁴ *Dickinson* 121-23, 123-92, revised by *Dickinson-Politics* 198-99 (from c.1714-1760s).

¹⁹⁵ [John Douglas], *Seasonable Hints from an Honest Man on the Present Important Crisis* (A Millar, London 1761) 18-34; *Robbins* 47 (Marchamont Nedham), 50 (Andrew Marvell), 287 (Edward Montagu), 303 (John Brown); accord *Dickinson* 153-54; *Brewer-Party* 39-54, 55-76; Alison G Olson, *Anglo-American Politics, 1660-1775* (OUP, Oxford 1973) 159-82.

¹⁹⁶ *Wilson Works* 1:733; *Dickinson* 102, 110, 112, 169-75; *Dickinson-Politics* 175.

¹⁹⁷ Bernard Bailyn, *The Origins of American Politics* (Knopf, New York 1968) 64-65; *Federalism* 533; *Wilson Works* 1:427, 733; *Ames Works* 1:260.

¹⁹⁸ *Federalist* No.10, at 59, 58, 61 (Madison); accord Morton White, *Philosophy, The Federalist, and the Constitution* (OUP, Oxford 1987) 56-61, 72-74.

¹⁹⁹ E.g., *Empire* 207; *Crisis* 10-11; Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (UCP, Berkeley 1969).

²⁰⁰ James R Sharp, *American Politics in the Early Republic* (YUP, New Haven 1993) 276; see *Creation* 57.

²⁰¹ 'Jefferson, Freneau, and the Founding of the *National Gazette*,' *Jefferson Papers* 20:718n-53n; Alexander Hamilton to Rufus King (11 Nov.1793), *Hamilton Papers* 15:395-96; *Tyranny* 51-59, 60-78.

²⁰² *Open Press* 55-58; *Tyranny* 27-28.

²⁰³ *Tyranny* 22-23; *Jefferson Papers* 20:749n; Marcus Daniel, *Scandal and Civility: Journalism and the Birth of American Democracy* (OUP, Oxford 2009) 8.

²⁰⁴ *Tyranny* 55-56.

common fear that factions opposing the ineffectual confederation might produce tyranny,²⁰⁵ but noted the coexistence of two parties in Pennsylvania.²⁰⁶ During the ratification debates, he lamented that America had 'unhappily become divided into parties,' federalist and antifederalist.²⁰⁷ By the time debate raged over his 1795 treaty, Jay viewed parties as unfortunate but legitimate: 'Differences in opinion, and other causes equally pure and natural, will unavoidably cause parties; . . . and are probably no less conducive to good government, than moderate fermentation is necessary to make good wine.'²⁰⁸ Wilson, while attributing English parties to corrupt bestowal of offices and hoping to avoid American parties as he wrote in 1790-1791,²⁰⁹ acknowledged that even 'friends of freedom . . . unanimous in their sentiments' could disagree on measures and timing.²¹⁰ Blair affirmed that citizens have a right to think of government as they please, even in sharp disagreements.²¹¹

Successor justices in particular anathematized faction and party. Paterson combined that with aversion to the French Revolution as he excoriated a 'party-spirit' as 'the madness of many for the gain of a few,' delighting in blood as in France.²¹² Ominously, his next paragraph painted American newspapers with the same brush, finding 'no station so elevated, no character so pure, . . . as to escape the malignant breath of faction.'²¹³ Earlier, Chase was quick to attribute intrigues, including his exclusion from Congress, to 'party and faction.'²¹⁴ During the federalist-antifederalist debates, Ellsworth worried that 'a thousand existing fac-

²⁰⁵ John Jay to Thomas Jefferson (27 Oct.1786), *ibid* 3:212, 213; *accord ibid* 3:174, 188.

²⁰⁶ John Jay to John Adams (14 Oct.1785), *Jay Correspondence* 3:172, 174; John Jay to Francis Hopkinson (29 Mar.1786), *ibid* 3:187, 188.

²⁰⁷ John Jay, 'An Address to the People of the State of New York' (1788), *ibid* 3:294; *accord ibid* 3:311.

²⁰⁸ John Jay to Gen.Henry Lee (11 July 1795), *ibid* 4:178, 178-79; *accord ibid* 4:261, 262.

²⁰⁹ James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427, 733, 705.

²¹⁰ *Ibid* 1:710, 695, 701.

²¹¹ John Blair's Charge (U.S.Cir.Ct.Del. 27 Oct.1794), *DHSC* 2:485, 489; *accord DHSC* 3:35-36.

²¹² William Paterson, 'July 4 Oration' (c.1792), *Paterson Papers-LC* 2; *accord* William Paterson, 'Jury Charge' (n.d.), *Paterson Legal Papers-LC* 3; *Paterson Essays* 7 (c.1789).

²¹³ *Ibid*.

²¹⁴ Censor [Samuel Chase], 'Censor IV,' *Maryland Gazette* (Annapolis 21 June 1781), *Carroll Papers* 3:1449, 1450, 1454.

tions, and acts of public injustice, thro' the temporary influence of parties,' might lead to anarchy, which in turn would bring a usurper and tyranny.²¹⁵ As parties appeared, Iredell equated the Federalist party with government, and described the Republicans as 'the little barkings of ill-humor which are now perpetually assailing our ears.'²¹⁶ Paterson inveighed about the menace of those who are 'a fool to party, or a madman in politics.'²¹⁷ He protested in 1797 that 'it is high time that we should be done with parties.'²¹⁸ Ellsworth deplored 'a spirit of party' whose 'object still is to sep[a]rate the people from the government.'²¹⁹ After Sedition Act prosecutions began, Iredell complained that 'ever since the first formation of the present government, every act which any extraordinary difficulty has occasioned, has been uniformly opposed,' and every 'effort[] made to vilify and undermine the government,' by the minority that trumpeted 'republicanism, the perpetual theme of their declamation.'²²⁰ Cushing denounced 'the clamors of faction, the unaccountable rage of pretended patriots to subvert the government' to foreign interests, including newspapers that proclaimed the 'same evil spirit' of democratic societies 'set up to pull down *free republics*' that spoke in 'unbounded licentiousness. . . by the grossest misrepresentation of public men; and almost every measure.'²²¹

2 The Legitimacy of Opposition to the Present Administration

Even after English dissent ceased to be *ipso facto* treason, the King's role as head of state brought the dual fictions that disagreement with the administration was castigated by the party in power as disagreement with the King, and justified by the opposition party as only disagreement with his 'evil counsellors' and 'wicked ministers.'²²² Some seventeenth century

²¹⁵ Landholder [Oliver Ellsworth], 'Landholder IX,' in *Essays-Constitution* 178, 179-80.

²¹⁶ James Iredell to James Wilson (24 Nov.1794), *Iredell Correspondence* 2:429; accord *Iredell Papers* 1:383.

²¹⁷ *Paterson Essays* 56 (at time Jay Treaty was public and debated, *ibid* 56-57); accord *DHSC* 3:57; *Iredell Correspondence* 2:495, 496.

²¹⁸ William Paterson to James Iredell (7 Mar.1797), *Iredell Correspondence* 2:495.

²¹⁹ Oliver Ellsworth's Charge (U.S.Cir.Ct.N.Y. 1 Apr.1797), *DHSC* 3:158, 158-59; accord *ibid* 3:119.

²²⁰ James Iredell's Charge (U.S.Cir.Ct.Pa. 11 Apr.1799), *DHSC* 3:332, 350.

²²¹ William Cushing's Charge (U.S.Cir.Ct.Va. 23 Nov.1798), *DHSC* 3:305, 306.

²²² *Blackstone's Commentaries* 1:237; accord *Dickinson-Politics* 206.

laws overtly demanded support of the administration, such as the Restoration's Act for Preservation of the King that prohibited words endeavoring 'a change of government either in church or state,'²²³ and the Act of Uniformity of 1662 that required oaths by Anglican clergy forswearing 'any alteration of government either in Church or State.'²²⁴ The eighteenth century perpetuated condemnation of 'opposition to the king's ministers' as faction or treason.²²⁵

Colonial America, still 'dominantly British and traditional' before the Revolution,²²⁶ embodied most of English society's deference and hierarchical assumptions.²²⁷ Post-revolutionary America continued widespread censure of opposition to the administration.²²⁸

The initial justices who were inclined to believe in inalienable rights that were never surrendered to government,²²⁹ while encouraging obedience to laws, did not press the point to treat an opposition as seditious. Wilson disparaged identification of the government with the state, and the claim of ministers to be 'the sovereigns of the state.'²³⁰ His lecture on government began by denying that a 'change of government' was hazardous, and asserting that 'prostituted characters' should be turned out of office.²³¹ Jay allowed for differing opinions, including on political questions²³² and distinguished criticism of government from sedition.²³³

The early justices who were prone to view rights in a state of nature as surrendered when

²²³ Act for the Preservation of the King §§II, III (1661), 13 Car.2, stat 1, cl.

²²⁴ EHD 8:377, 379-80; accord *ibid* 8:382, 383.

²²⁵ Dickinson 175, 178-81. Even defenders of parties distinguished factions. Edmund Burke, 'Thoughts on the Cause of the Present Discontents,' *Works of Edmund Burke* (Bohn's Standard Library, London 1886) 1:306, 375.

²²⁶ Gordon S Wood, *The Radicalism of the American Revolution* (Knopf, New York 1992) 12-13; *ibid* 15-16, 20-23, 24-42.

²²⁷ Dickinson 43; *English Society* 25, 7; *Misunderstanding* 8; *Ideological Origins* 301.

²²⁸ John Adams to John Quincy Adams (12 Dec.1795), DHSC 1:811; John Adams to Abigail Adams (17 Dec.1795), *ibid* 1:813.

²²⁹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457, 470-71 (1793) (Wilson, Jay); *Wilson Works* 2:1054, 1055, 1057; *Jay Correspondence* 1:162; DHSC 2:27, 363 (Jay); *Bill of Rights* 2:896 (Jay).

²³⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793).

²³¹ James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427, 689, 701.

²³² DHRC 2:26, 27, 364.

²³³ DHRC 2:363.

government was formed²³⁴ spoke of obedience as the price of government granting civil rights. When Chase offered himself to President Washington as one of the five initial justices, he pledged that 'I will support the present Government.'²³⁵ He later 'conclude[d] that *liberty and rights* (and also *property*) must arise out of civil society' and obedience to its laws, and so 'must be for ever subject to the modifications of particular government.'²³⁶ Cushing, before joining the Supreme Court, charged a grand jury that 'all good citizens. . . persevere peaceably in doing their duty, in supporting the magistrate in the execution of his office.'²³⁷ Later, he continued to urge 'the necessity of giving our confidence and support to our own Government.'²³⁸ Iredell charged grand juries that the 'security of each individual consists in a due obedience' to law, which 'is the depository of the common happiness and security of all the citizens.'²³⁹ He later extended the duty of obedience beyond the laws to 'the government of the United States.'²⁴⁰ Paterson, before joining the bench, praised the industrious citizen who 'has not leisure. . . to revile the government, to disseminate dangerous principles,' and inveighed against the 'mob of politicians' who 'are occupied. . . in criticising and canvassing the acts of government.'²⁴¹ Once on the bench, he charged grand juries that to support 'the constitution, government, and constituted authorities of the United States' is 'our primary duty--to attempt their destruction is an offence of deep malignity.'²⁴² Ellsworth charged that the federal government was 'entitled to affection, as well as support,' and that an unnamed element instead 'poisons the sources of public

²³⁴ *Chase Trial App.61*; William Cushing's Charge (U.S.Cir.Ct.R.I. 7 Nov.1794), *DHSC* 2:491, 492.

²³⁵ Samuel Chase to George Washington (3 Sept.1789), *Washington Papers-Presidential* 3:597.

²³⁶ Samuel Chase's Charge (U.S.Cir.Ct. c.1803), *Chase Charge Book* 38, 42-43; accord *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 223 (1796); *Chase Trial App.61*.

²³⁷ 'Substance of the Charge Delivered at Salem,' *American Herald* (Boston 27 Nov.1786) 4.

²³⁸ *Newport Mercury* (Newport 19 June 1798), *DHSC* 3:278.

²³⁹ James Iredell's Charge (U.S.Cir.Ct.N.J. 2 Apr.1793), *DHSC* 2:348, 348-50.

²⁴⁰ James Iredell's Charge (U.S.Cir.Ct.Pa. 11 Apr.1797), *DHSC* 3:163, 164.

²⁴¹ William Paterson, 'July 4 Oration' (c.1792), *Paterson Papers-LC* 3-4.

²⁴² William Paterson's Charge (U.S.Cir.Ct.Vt. 3 Oct.1798), *DHSC* 3:292, 294.

confidence.²⁴³ Before the election of 1800, Chase charged juries that citizens must 'support . . . the present administration'²⁴⁴--but after Jefferson won, he dropped that phrase.²⁴⁵

That second group of justices increasingly gave as their rationale government's right of self-preservation or reasons of state. Discussing the Sedition Act, Paterson warned that 'written or printed detraction' would 'destroy confidence' and 'alienate the affections of the people from their government,' and without stopping that poison '[n]o government, indeed, can long subsist.'²⁴⁶ Cushing asked rhetorically if government 'has no power to protect itself by laws to prevent crimes which tend directly to its overthrow and destruction?'²⁴⁷ By contrast, Wilson denounced 'reasons of state' as 'terrible instruments of arbitrary power.'²⁴⁸

3 The Right To Evaluate Laws as Illegal and Void

Parliament for centuries used the formulation that Crown actions being overturned were illegal or unconstitutional.²⁴⁹ Coke was widely understood in colonial America²⁵⁰ as teaching that parliamentary action too could be illegal and void,²⁵¹ though interpretations vary.²⁵² Many reasoned that the 'command of any magistrate, where he has no authority, [are] as void.'²⁵³

The right to evaluate Parliament's enactments as illegal and void, violating ancient, charter, or natural rights, was integral to American challenge to the Stamp Act and other laws.

²⁴³ Oliver Ellsworth's Charge (U.S.Cir.Ct.N.Y. 1 Apr.1797), *DHSC* 3:158, 158-59; accord *ibid* 3:119, 120.

²⁴⁴ Samuel Chase's Charge (U.S.Cir.Ct.Pa. 12 Apr.1800), *DHSC* 3:408, 416.

²⁴⁵ Samuel Chase's Charge (U.S.Cir.Ct.Md. Nov.1802), *Chase Charge Book* 33, 33.

²⁴⁶ William Paterson's Charge (U.S.Cir.Ct.Vt. 3 Oct.1798), *DHSC* 3:292, 293.

²⁴⁷ William Cushing's Charge (U.S.Cir.Ct.Va. 23 Nov.1798), *DHSC* 3:305, 315.

²⁴⁸ *Wilson Works* 1:706.

²⁴⁹ E.g., Bill of Rights (16 Dec.1689), 1 W&M (sess 2) c2 §XII; *Statutes* 9:67; Speech (5 Feb.1621), *Coke's Writings* 3:1195.

²⁵⁰ E.g., James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427, 738-39.

²⁵¹ *Dr.Bonham's Case* (CP) 8 Co Rep 107a, 118a, 77 ER 638, 652 (1610); Raoul Berger, 'Doctor Bonham's Case: Statutory Construction or Constitutional Theory?' (1969) 117 *University of Pennsylvania Law Review* 521, 526, 545.

²⁵² E.g., Charles M Gray, 'Bonham's Case Reviewed' (1972) 116 *Proceedings of American Philosophical Society* 35, 46-51; JP Sommerville, *Politics and Ideology in England, 1603-1640* (Longman, London 1986) 97-98.

²⁵³ E.g., *Locke* 2:¶206; accord *Animadversions upon Mijñ Heer Fagel's Letter* (George Larkin, London 1688) 6; Gilbert Burnet, *Bishop Burnet's History of His Own Time* (Company of Booksellers, London 1725-34) 2:807.

All the early justices believed that a law contrary to the federal Constitution was void,²⁵⁴ and all believed that they as judges could declare such a law unconstitutional.²⁵⁵

Those justices more influenced by radical Whig principles generally left to each citizen a right initially to determine whether governmental action was illegal and void. Thus, Wilson disagreed sharply with Blackstone's claim that the 'power and jurisdiction of Parliament' was 'transcendent and absolute,' and thus incapable of being illegal or void,²⁵⁶ and taught instead that 'an act of parliament against law and reason is, therefore, void' and that an American 'act, manifestly repugnant to some part of the constitution,' similarly 'is void.'²⁵⁷ Rutledge, while out of federal office, led a citizen rally condemning the Jay Treaty. Blair, both at the inception and after the suppression of the Whiskey Rebellion, acknowledged the right to resist an unconstitutional law nonviolently, and implicitly, the right of individuals to evaluate the constitutionality of laws, while cautioning against violent resistance.²⁵⁸ Jay later said people were only bound to support war as 'constitutional laws do or shall prescribe' support.²⁵⁹

By contrast, the justices inclined to moderate Whig principles limited the determination whether action was illegal and void to federal judges,²⁶⁰ even though in revolutionary days most had been quite comfortable with the opposite.²⁶¹ Chase said it was 'a vain, conceited individual who can think himself as capable to judge' whether laws violate the Constitution--only judges should do so.²⁶² Paterson agreed.²⁶³ Iredell charged grand juries that '[t]he part

²⁵⁴ E.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 433 (1793) (Iredell); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 399 (1798) (Chase, Iredell); Samuel Chase's Charge (U.S.Cir.Ct.Pa. 12 Apr.1800), *DHSC* 3:408, 412.

²⁵⁵ E.g., Samuel Chase's Charge (U.S.Cir.Ct.Pa. 12 Apr.1800), *DHSC* 3:408, 412.

²⁵⁶ *Blackstone's Commentaries* 1:156; *contra Wilson Works* 1:552-53, 579-81, 738-40.

²⁵⁷ James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427, 738-39, 742, 38.

²⁵⁸ John Blair's Charge (U.S.Cir.Ct.Ga. 27 Apr.1795), *DHSC* 3:31, 33; *accord DHSC* 2:487.

²⁵⁹ John Jay to Peter Van Schaack (28 July 1812), *Jay Papers* doc. 9440.

²⁶⁰ Samuel Chase's Charge (U.S.Cir.Ct.Md. 8 Oct.1802), *Chase Charge Book* 25, 28, 29.

²⁶¹ Censor [Samuel Chase], 'Censor IV,' *Maryland Gazette* (Annapolis 21 June 1781), *Carroll Papers* 3:1449, 1452.

²⁶² Samuel Chase's Charge (U.S.Cir.Ct.Pa. 12 Apr.1800), *DHSC* 3:408, 412.

²⁶³ *Paterson Draft Opinions* 47; *accord DHSC* 3:455.

for every man who loves his country, but who disapproves of any public authoritative decision, is to submit to it with diffidence and respect, considering . . . his own opinion may be really wrong.²⁶⁴ Chase, even after being impeached and after stripping his charge of controversy, admonished each grand juror 'to submit to the laws, although he should conscientiously believe them to be *unconstitutional, unjust, or even oppressive*.'²⁶⁵

4 The Right To Disobey Unconstitutional Laws

The demand for unequivocal obedience had an ancient lineage, descending from Tudor statutes treating dissent as treason and Stuart precepts of divine right. The 'duty of passive obedience, or non-resistance to all their commands,'²⁶⁶ was taught by the established church generally²⁶⁷ and, as zealously, by the Tory party.²⁶⁸ The right of legitimate resistance also had a long pedigree²⁶⁹ that included the Revolution of 1688 in all Whigs' views,²⁷⁰ other times of tyranny in radical Whig theory,²⁷¹ and the Revolution of 1776 in American patriots' eyes.²⁷² That right was supported by England's dissenting pulpits and by their Reformation heritage,²⁷³ as well as at times by judges.²⁷⁴ Colonial 'presses and . . . pulpits' taught the 'obligation to disobey' tyrannical government,²⁷⁵ citing such historical beacons as Coke's principle that in case of

²⁶⁴ James Iredell's Charge (U.S.Cir.Ct.Md. 8 May 1797), *DHSC* 3:173, 176.

²⁶⁵ Samuel Chase's Charge (U.S.Cir.Ct.Md. 1 May 1805), *Chase Charge Book* 47, 52.

²⁶⁶ Samuel Parker, *Religion and Loyalty* (John Baker, London 1684) (quoting subtitle); accord *ibid* 581, 583.

²⁶⁷ *Dickinson* 19-20, 43; *English Society* 123, 124-35; *ibid* 236, 248, 259.

²⁶⁸ *Ibid* 15, 28-29; *English Society* 158-59, 181, 221-22, 227, 199-276; *Absolute Monarchy* 216-17; e.g., Sir Robert Filmer, *Patriarcha* (Walter Davis, London 1680); Edmund Bohun, *A Defence of Sir Robert Filmer* (W Kettilby, London 1684) 5, 9.

²⁶⁹ *Scott-Commonwealth* 109-30; *Clark* 257-89; *Treason* 9-11.

²⁷⁰ *Kenyon* 5; *Dickinson* 58, 65, 77.

²⁷¹ *Creation* 23-24; *English Society* 219, 239.

²⁷² *Dickinson's Essay* 40.

²⁷³ *Bradley* 154-56; Quentin Skinner, *The Foundations of Modern Political Thought* (CUP, Cambridge 1978) 2:189-358.

²⁷⁴ E.g., *Case of the Reforming Constables* (1708) Holt KB 485, 90 ER 1167 (KB) (resistance to unlawful arrest).

²⁷⁵ *Ideological Origins* 304; accord *Bradley* 154-58 (Nonconformists); *Clark* 274-75, 279 (nonAnglicans); e.g., Jonathan Mayhew, *A Discourse Concerning Unlimited Submission and Non-Resistance* (D Fowle, Boston 1750) 40, 52, reprinted J[onathan] M[ayhew], *A Mysterious Doctrine Unriddled, or Unlimited Submission and Non-Resistance* (D Carpenter, Newry 1775).

conflict 'the law is to be obeyed and not the [King's] proclamation,'²⁷⁶ and Locke's affirmations that a ruler who violates the law 'has no right to obedience,'²⁷⁷ and that subjects have an 'inalienable right of armed resistance'²⁷⁸ toward governmental violation of law. Whig leaders condemned 'the most mischievous of all doctrines, that of passive obedience and nonresistance,'²⁷⁹ and proclaimed that 'English history affords frequent examples of resistance by force.'²⁸⁰ The two approaches were not reconciled in 1642, 1688-89, or 1776.

Most initial justices acknowledged that revolutionary heritage. Jay, even in Sedition Act years, recalled that the colonists resisted the Stamp Act and ultimately 'recurred to arms.'²⁸¹ Wilson, who during the Revolution affirmed the 'right to resist every attempt upon their liberties' and believed '[w]e have taken up arms in the best of causes' to defend 'constitutional rights,'²⁸² continued upon taking the bench to maintain 'the right of rescuing themselves from. . . oppression' by changing the form of government or by revolution.²⁸³ Blair allowed for nonforcible 'resistance. . . to an unconstitutional act of Congress,' as 'entitled to the protection of the law,' and for opposition 'to any self constituted authority' as 'resistance of tyranny.'²⁸⁴

Most successor justices left far less freedom for legitimate dissent. Paterson, the year before taking the bench, prophesied that "'Order is Heaven's first law'" and that 'habitual and cheerful submission to the laws of our country, and the powers legally established is a social duty of primary importance,' ironically in a speech extolling the Revolution.²⁸⁵ He had long

²⁷⁶ Speech (5 Feb.1621), *Coke's Writings* 3:1195.

²⁷⁷ *Locke* 2:¶151; *ibid* ¶¶202, 206, 207, 222, 223-30, 228, 232, 237-39, 242; *accord* *Ashcraft* 297, 305,307, 305, 315, 319.

²⁷⁸ *Cromartie* 278; *accord* *Locke* 2:¶¶209, 222, 228, 230; *Ashcraft* 319.

²⁷⁹ E.g., John Adams, 'Dissertation on the Canon and the Feudal Law' (1765), *Adams Works* 3:447, 454; Milton M Klein (ed), *The Independent Reflector* (HUP, Cambridge 1963) 27-28, 326.

²⁸⁰ Farmer [John Dickinson], *Letters from a Farmer* (Edes and Gill, Boston 1768) 17.

²⁸¹ John Jay to Rev.Samuel Miller (28 Feb.1800), *Jay Correspondence* 4:261; *accord* *ibid* 4:288, 289.

²⁸² James Wilson, 'An Address to the Inhabitants of the Colonies' (1776), *Wilson Works* 1:46, 52, 53.

²⁸³ James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427, 714; *accord* *ibid* 1:427, 2:1041, 2:1082-83.

²⁸⁴ John Blair's Charge (U.S.Cir.Ct.Ga. 27 Apr.1795), *DHSC* 3:31, 33; *accord* *DHSC* 2:487, 486.

²⁸⁵ William Paterson, 'July 4 Oration' (c.1792), *Paterson Papers-LC* 4, 1.

taught that to contravene the 'declared will of the people by their representatives or a majority' is 'subversive of government' and is practiced by 'tyrants in heart and traitors in practice',²⁸⁶ and on the Supreme Court continued to write variations with even darker overtones for dissent.²⁸⁷ Iredell charged that it was 'necessary that an obedience to the laws of our country be enforced.'²⁸⁸ Chase again changed his pre-Jefferson charge--'it is the indispensable duty of every citizen to submit to the laws, although ever so repugnant to his *private* opinion; until they are repealed, or declared *void*' by the judiciary²⁸⁹--to a post-election version striking that language and, for the first time, adding that unconstitutional laws need not be obeyed.²⁹⁰

5 The Nonextension of Treason to Opposition to the Administration

The English law of treason²⁹¹ expanded like a tree to encompass not only levying war but planning or imagining the king's death (including 'words [that] be set down in writing'), five other branches as Blackstone summarized them,²⁹² innumerable additional limbs such as treason by words alone under Henry VIII and some successors,²⁹³ and constructive treason.²⁹⁴

The Constitutional Convention repudiated such definitions and limited treason to levying war or adhering to enemies.²⁹⁵ As Wilson explained, 'a very great part of [other governments']

²⁸⁶ William Paterson, 'Jury Charge' (n.d.), *Paterson Legal Papers-LC* 2; accord William Paterson, 'Notes Apparently of the Debate in the Senate' (8 Sept. 1789), *Paterson Papers-NYPL* 367, 379.

²⁸⁷ William Paterson's Charge (U.S.Cir.Ct.Pa. 4 May 1795), *DHSC* 3:40, 42; accord *ibid* 3:12, 294, 463, 465. A fellow senator in the first Congress described Paterson as 'a Summum Jus Man. 'Diary of William Maclay' (12 June 1789 entry), *DHFFC* 9:290 &n15 (he 'believe[d] in the supreme rigor of the law and applie[d] it without concern for justice').

²⁸⁸ James Iredell's Charge (U.S.Cir.Ct.Conn. 25 Apr. 1795), *DHSC* 3:28, 29; accord *ibid* 3:14.

²⁸⁹ Samuel Chase's Charge (U.S.Cir.Ct.Pa. 12 Apr. 1800), *DHSC* 3:408, 413. This contradicted not only Chase's 1776 position, but his 1787 position on the 'right in the people to resist their rulers' when tyrannical. 'Samuel Chase to His Constituents' (Broadside 9 Feb. 1787), Melvin Yazawa (ed), *Representative Government and the Revolution: The Maryland Constitutional Crisis of 1787* (JHUP, Baltimore 1975) 55, 60.

²⁹⁰ Samuel Chase's Charge (U.S.Cir.Ct.Md. Nov. 1802), *Chase Charge Book* 33, 34-35.

²⁹¹ *Orr* 11-13; *Treason* 59-101. It grew out of 25 Edw 3 stat 5 c2.

²⁹² *Blackstone's Commentaries* 4:81, 76, 80, 74-93; see *Montesquieu* 1:233 (bk.12, ch.7).

²⁹³ *Orr* 16-23; e.g., Act for the Preservation of the King (1661), 13 Car 2, stat 1, c1; *EHD* 8:63.

²⁹⁴ *Blackstone's Commentaries* 4:81; *Orr* 27, 28.

²⁹⁵ U.S.Const. art.III §3; James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427, 2:1151-52.

tyranny over the people has arise from the extension of the definition of treason.²⁹⁶

Thus, Wilson instructed the first grand jury that, because '[t]reasons, capricious, arbitrary and constructive, have often been the most tremendous engines of despotic or of legislative tyranny,' treason only meant what the Constitution defined it as, lest as in Tudor England 'so many "pains of treason were ordained by statute, that no man knew how to behave himself, to do, speak or say, for doubt."²⁹⁷ He defined levying war equally narrowly.²⁹⁸

In contrast, Paterson painted treason and sedition with a broad brush, evidently to enhance the culpability of sedition after passage of the Sedition Act by treating it as a variety of treason, in charges that he wrote but may not have delivered. Crimes 'of a treasonable and seditious nature' required 'particular attention' and shared the same evils. 'Treasonable and seditious offences have a tendency to deprive government of the confidence and affection [of the] people Hence seditious language, seditious writings, and seditious actions. Hence riots, and tumults, and insurrections. . . .'²⁹⁹ Under his broad view of treason, whoever 'is lawless. . . is a tyrant and of course a traitor to the government.'³⁰⁰ Cushing similarly defined treason to include almost any armed resistance to any government action.³⁰¹ The zeal of other justices in stamping out sedition also seemed to emanate from seeing it as a sibling, if not a parent, to treason. In Iredell's case, the association went back far, as during the Revolution he had prosecuted criminal charges for sedition and treason by words alone.³⁰²

6 The Nonexistence of a Federal Common Law of Crimes

A recurrent contention between King and Parliament had been the former's claims of

²⁹⁶ *Farrand's Records* 3:163; accord *ibid* 2:348 (Franklin).

²⁹⁷ James Wilson's Charge (U.S.Cir.Ct.Pa. 12 Apr.1790), *DHSC* 2:33, 42; accord James Wilson's Charge (U.S.Cir.Ct.Va. 23 May 1791), *ibid* 2:166, 172, precluding constructive treasons, 2:173.

²⁹⁸ James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427, 2:1153, 2:1154.

²⁹⁹ William Paterson's Charge (No.5 c.1798), *DHSC* 3:464, 465; accord William Paterson's Charge (No.4 c.1798), *ibid* 3:462, 463.

³⁰⁰ William Paterson, 'Jury Charge' (n.d.), *Paterson Legal Papers-LC*.

³⁰¹ William Cushing's Grand Jury Charge 6, 'Nathan Peaslee Sargent Papers' (Phillips Library of Peabody Essex Museum, Salem, Papers 1757-1809, Box 2),

³⁰² *Iredell Papers* 1:464, 2:124, 2:190; accord *Jacobin* 97.

prerogative powers to create or punish offenses not legislated.³⁰³ Star Chamber opponents, Hume, and others applied that concern to prosecution of the press, warning of 'giving very large discretionary powers to the court to punish whatever displeases them.'³⁰⁴

The issue of nonlegislatively authorized crimes reappeared as the first federal courts grappled with whether their jurisdiction included English common law crimes under an unlegislated federal common law. The pre-1798 conclusion of the early Supreme Court justices that 'the penal code of the U. States is plain and concise, and reduced. . . to written exactitude and precision,'³⁰⁵ along with the law of nations for international controversy, was then altered by most sitting justices (Chapter 3.E).

7 The Effect of American Constitutions on the Blackstone-Mansfield Definition and on Seditious Libel Law

The ultimate point of disagreement between early Supreme Court justices was whether recent state constitutions and the new federal Constitution, in forbidding violation or abridgment of freedoms of press and speech, adopted the narrow Blackstone-Mansfield definition of those freedoms and its support for seditious libel prosecutions, or rejected that definition and proscribed prosecution for printed or spoken words. The Blackstone-Mansfield definition of freedom of press and the English common law of seditious libel are discussed in the next chapter. The early justices' nonacceptance of that definition before 1798 is discussed in Chapters 4-5. Those justices' division over that definition and over seditious libel in response to the Sedition Act of 1798, with most sitting justices shifting to accept the Blackstone-Mansfield definition and seditious libel, and most remaining justices diverging from them, is the subject of Chapters 6-7.

³⁰³ *Proclamations* (1610) 12 Coke's Reports 74, 77 BR 1352, 1353 (PC); Bill of Rights (1689), 1 W&M (sess 2) c2; EHD 8:122; accord Brooks 116-17.

³⁰⁴ David Hume, 'Of the Liberty of the Press' (1742), *Essays Moral, Political and Literary* (OUP, Oxford 1963) 8.

³⁰⁵ William Paterson's Charge (U.S.Cir.Ct.Pa. 4 May 1795), DHSC 3:40, 41; accord James Iredell's Charge (U.S.Cir.Ct.N.Y. 6 Apr. 1795), *ibid* 3:14, 22.

CHAPTER 3

SEDITIONOUS LIBEL AND THE NEW FREEDOMS OF PRESS AND SPEECH

Were it not for such writings as have been called libels, there would have been no revolution either in England or America, nor the least vestige or jot of civil liberty remaining among us.

--Philadelphia Newspaper (1789)¹

William Blackstone, in the last volume of his *Commentaries* in 1769,² described England as enjoying 'liberty of the press' and defined that liberty as the absence of licensing, even though there were other restraints:

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, . . . 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. 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 consequence of his own temerity. . . .³

That passage immediately followed Blackstone's description of the crime of seditious libel,⁴ that crime is what he principally meant in referring to 'censure for criminal matter when published.' Blackstone's characterization of an England without licensing but with restraints on the press is an accurate description of the legal status quo when he wrote; the development of English law to that point is summarized in Section A.⁵ His equation of England's status quo with freedom of the press, and his declaration that freedom of the press meant only absence of li-

¹ 'Philadelphia, June 15' *Independent Gazetteer* (Philadelphia 15 June 1789) 2.

² Blackstone is cited herein as influential in America in the later eighteenth century, not as authoritative (which the *Commentaries* are not). *OHLE* 11:75.

³ *Blackstone's Commentaries* 4:151-52 (emphasis in original).

⁴ *Ibid* 4:150.

⁵ The focus is on seditious libel, so blasphemous libel is not discussed, nor is obscene libel.

censing and not freedom from seditious libel restraints, are open to question and were questioned by growing numbers in England and America; those critics are described in Sections B-C. Their questions were simply whether seditious libel and other restraints were consistent with freedom of press—whether the press could be called free when it was restrained.

Did freedom of the press mean to Americans in 1776 and 1789, as it did to Blackstone, the absence of licensing despite the presence of seditious libel restrictions? Blackstone was certainly influential in America,⁶ as in England,⁷ for the rest of the eighteenth century and into the next century. However, his English critics were read in America,⁸ and his American critics included Adams and Jefferson.⁹ American revolutionists did not accept everything he said uncritically, and differed with him on monarchical and antirepublican themes,¹⁰ which Blackstone laid as the foundation of criminal law in Book IV,¹¹ including seditious libel.¹² America's ubiquitous religious dissenters similarly did not accept Blackstone's parallel definition of relig-

⁶ Dennis R. Nolan, 'Sir William Blackstone and the New American Republic: A Study of Intellectual Impact' (1976) 51 *New York University Law Review* 731; *Ideological Origins* 30-31; see Wilfrid Prest, *Blackstone and His Commentaries* (Hart Publishing, Oxford 2009).

⁷ Tariq A. Baloch, 'Law Booksellers and Printers as Agents of Unchange' (2007) 66 *Cambridge Law Journal* 389, 405 n85, 404-08; SFC Milsom, *Studies in the History of the Common Law* (HP, London 1985) 198.

⁸ E.g., *An Interesting Appendix to Sir William Blackstone's Commentaries... Containing Priestley's Remarks... Furneaux's Letters* (Robert Bell, Philadelphia 1772) 5, 51, 120; *The Palladium of Conscience... Containing, Furneaux's Letters to Blackstone, Priestley's Remarks on Blackstone* (Robert Bell, Philadelphia 1774); *Burgh* 3:275, 285, 303; [Jeremy Bentham], *A Fragment on Government; Being An Examination of... Sir William Blackstone's Commentaries* (T. Payne, London 1776) iii *passim*; *An Interesting Address to the Independent Part of the People* (G. Kearsly, London 1777) 16-17 *passim* (refuting Blackstone on informations).

⁹ E.g., Thomas Jefferson, 'Communication from House of Delegates to Senate Concerning Money Bills' (9 Jan. 1778), *Jefferson Papers* 2:54, 57; *ibid* 2:43; Thomas Jefferson to John Tyler (17 June 1812), *Jefferson Papers-Retirement* 5:134, 136; [John Adams], 'Novanglus No. X,' C. Bradley Thompson (ed), *The Revolutionary Writings of John Adams* (LF, Indianapolis 2000) 262, 268.

¹⁰ E.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458, 460, 462 (1793); *Wilson Works* 1:4, 1:25, 1:190, 1:196, 1:443, 1:467-68, 1:471-74, 1:549, 2:1049; *Wilson's Considerations* 2-3, 27-28; *Dickinson's Essay* 38-39, 97n; accord Albert W. Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, 9-16; *Ideological Origins* 171; *Creation* 7, 375, 530, 599.

¹¹ E.g., *Blackstone's Commentaries* 4:2, 74-75, 82, 94, 102, 119, 127. Many recognized, as Blackstone did not, the inconsistency of his parliamentary supremacy with other Whig principles, including the Revolution of 1688, the right of revolution, contractarian theory, and natural rights. Michael Lobban, 'Blackstone and the Science of Law' (1987) 30 *Historical Journal* 311, 326-27, 328-29; HT Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament' (1976) 26 *Transactions of the Royal Historical Society* (5th ser) 189.

¹² *Ibid* 4:150-51, 123. Thus, Chipman, showing queasiness about English criminal law, complained that Blackstone defended all English laws 'not the least those, which are the most faulty.' Nathaniel Chipman, 'Sketches of the Principles of Government' (1793), in Perry Miller (ed), *Legal Mind in America* (CorUP, Ithaca 1969) 19, 29.

ious liberty as meaning mere toleration of qualifying sects,¹³ a disagreement widened by Blackstone's bumbling apologia that conceded that '*reviling the ordinances of the church* is a crime' on the part of any dissenter, and that '*non-conformity* is still a crime' on the part of those dissenters not qualifying for toleration.¹⁴ American revolutionists could not fail to notice the Crown's use of seditious libel to stifle opposition press and speech, and many criticized that.

The Sedition Act of 1798 forced thought and development of theory on the effect of the First Amendment on seditious libel. In the debate around the Act, Madison, the 'father of the Constitution,' best formulated the argument that the First Amendment prohibited criminalization of discussion of public officials and measures, and that it and the American Revolution overrode the Blackstone-Mansfield definition.¹⁵ He explicitly rejected Blackstone's account as inconsistent with American bills of rights:

this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.¹⁶

Hamilton, in contrast, contended that freedom of press in the First Amendment meant the same thing as in English common law as stated by Blackstone, which continued in force in the new nation, and that the Constitution allowed 'laws for restraining and punishing incendiary and seditious practices,' including 'writings &c which at common law are libels if levelled against any officer whatsoever of the U[nited] States.'¹⁷ More than a century later, the lines were still simi-

¹³ *Blackstone's Commentaries* 4:53, 425.

¹⁴ William Blackstone, 'A Reply to Dr. Priestley's Remarks' (1773), in *The Palladium of Conscience* (Robert Bell, Philadelphia 1774) 37, 41, 40; accord *Blackstone's Commentaries* 4:50-58.

¹⁵ James Madison, 'Report on the Virginia Resolutions' (Dec.1799-Jan.1800), *Elliot's Debates* 4:546, 561, 569.

¹⁶ *Ibid* 4:569; accord St. George Tucker, 'Of the Right of Conscience; and of the Freedom of Speech and of the Press,' in Clyde N Wilson (ed), *View of the Constitution of the United States* (LF, Indianapolis 1999) 371, 379-94.

¹⁷ Alexander Hamilton to Jonathan Dayton (Oct.-Nov.1799), *Hamilton Papers* 23:599, 604; accord Alexander Hamilton, 'An Address to the Electors' (21 Mar.1801), *ibid* 25:349, 364. He later argued for the common law of seditious libel with Zenger amelioration. *People v. Croswell*, 3 Johns. Cas. 337 (N.Y.1804); Julius Goebel and others (eds), *The Law Practice of Alexander Hamilton* (ColUP, New York 1964-81) 1:808, 809.

larly drawn, with the Madison view expressed by Chafee and various professors¹⁸ and justices,¹⁹ while the Blackstone-Hamilton view was expressed by Levy and other professors.²⁰

This chapter's addition to existing literature is to challenge the dominant thesis of Leonard Levy that the Blackstone-Mansfield definition was unquestioned in England and America (Sections B-C). It also adds corroboration of Hamburger's thesis, and charts the step-by-step departures of seditious libel doctrine from other libel law and other criminal law (Section A), provides historical support for an expansive meaning of freedom of press (Section D), and challenges the prevalent view that Supreme Court justices accepted a federal common law of crimes before 1797 (Section E).

A Development of the English Crime of Seditious Libel

The doctrine of seditious libel as it existed in England and America at the time of the American Revolution was summarized by Blackstone as follows:

Of a nature very similar to challenges are *libels*, *libelli famosi*, which. . . in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. . . .²¹

¹⁸ Thomas M Cooley, *A Treatise on the Constitutional Limitations* (LB, Boston 1868) 426-30; Zechariah Chafee, *Free Speech in the United States* (HUP, Cambridge 1946) 18, 20-21; *Freedom's Fetters* 427-31; Brant 17; Thomas A Green, 'The Jury, Seditious Libel, and the Criminal Law,' in RH Helmholz and Thomas A Green, *Juries, Libel and Justice* (Clark Memorial Library, Los Angeles 1984) 37, 40; William T Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression' (1984) 84 Columbia Law Review 91, 95, 96-99, 114; *Harling* 112.

¹⁹ *Abrams v. United States*, 250 U.S.616, 630-31 (1919) (Holmes, J, dissenting), though Holmes had migrated from an inconsistent prior opinion, *Patterson v. Colorado*, 205 U.S.454, 462 (1907); *Thornhill v. Alabama*, 310 U.S.88, 101-02 (1940); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S.1, 159 n46 (1961) (Warren, CJ, dissenting); *New York Times Co. v. Sullivan*, 376 U.S.254, 273-74 (1964); *First National Bank v. Bellotti*, 435 U.S.765, 776 (1978).

²⁰ Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Harper, New York 1859) 317-18; Edward S Corwin, 'Freedom of Speech and Press under the First Amendment: A Résumé' (1920) 30 Yale Law Journal 48, 49; Thomas F Carroll, 'Freedom of Speech and of the Press in the Federalist Period: The Sedition Act' (1920) 18 Michigan Law Review 615, 636-37, 648; Westel W Willoughby, *The Constitutional Law of the United States* (2nd ed Baker, New York 1929) 1196; *Creation* 63; *Levy* xi-xii, 170-72; William R Casto, 'Oliver Ellsworth' (1996) *Journal of Supreme Court History* 73, 83; *Hamburger* 745-46 n261; *Federalism* 700 & n 25; *Repressive Jurisprudence* 5-6, 57-71 (which was published after this chapter was written).

²¹ *Blackstone's Commentaries* 4:150 (emphasis in original).

(A 'libel' meant 'literally a little book,'²² but commonly referred to 'any defamation in writing or permanent form'²³ and in seditious libel prosecutions referred to a 'seditious libel.'²⁴)

Broadly, the common opinion of legal historians for many years has been that the doctrine of seditious libel 'largely derive[d] from... work of the [S]tar [C]hamber' in the seventeenth century,²⁵ as did criminal libel generally,²⁶ and emerged by adoption by the King's Bench during the Restoration of the former Star Chamber jurisdiction.²⁷ The judicial choice to follow Star Chamber precedent for seditious libel, which deviated from the existing defamation law and criminal law of the King's Bench, rather than to apply prevailing rules for defamation and crime (or even to question the legitimacy of seditious libel itself) amounted to a political choice by English judges²⁸ to facilitate Crown prosecution of dissidents and to minimize jury interference with successful prosecutions.

Hamburger, like Baker, sees significant borrowing from the Star Chamber in seditious li-

²² Giles Jacob, *A New Law-Dictionary* (Nutt, London 1729) s.v. libel [unnumbered]. Libel also meant a statement of claim (and hence a claim more generally) in ecclesiastical courts and Admiralty. *OHLE* 1:321-23.

²³ *Ibid.*; Bacon 3:490; *Blackstone's Commentaries* 3:126.

²⁴ E.g., *Calendar-William* 10:350-51, 364, 400 (calling same publication a 'seditious libel,' 'false, scandalous and traitorous libel'); *Calendar-Anne* 3: no.112, 138, 660 (calling same publications 'scandalous libels' and 'libel[s]'); *Hawkins* 1:193; *R v Woodfall* (1770) 5 Burr 2661, 2665, 98 ER 398, 400 (KB).

²⁵ *Milsom* 390; accord *ibid* 388-89; *Fifoot* 131, 128 n14; *Brant* 5, 11; e.g., *R v Lucas* (1515) *Hudson* 2:102 (Star Chamber) ('scandalous words against the lord cardinal,' Wolsey); JA Guy, 'Wolsey, the Council and the Council Courts' (1976) 91 *English Historical Review* 481, 484 (1516 case involving 'two sleaunderous bills aswell againste the kinges heighnes' and Council); *R v Perkins* (1625) *Rushworth* 8 (Star Chamber); *Proceedings against Wm. Prynne* (1632-33) *State Trials* 3:561, 576, 579, 580 (Star Chamber).

²⁶ *Baker-Introduction* 119, defined in *Blackstone's Commentaries* 4:151; *Levy* 7.

²⁷ *Fifoot* 131; see Theodore FT Plucknett, *A Concise History of the Common Law* (5th ed Butterworth, London 1956) 496; e.g., *Trial of Dover, Brewster, and Brooks* (1663) *State Trials* 6:539, 563, 547 (KB); *Trial of Benjamin Harris* (1680) *State Trials* 7:925 (KB); *Trial of Sir Samuel Barnardiston* (1684) *State Trials* 9:1333, 1351 (KB); *Proceedings against Richard Baxter* (1685) *State Trials* 11:493, 493, 497 (KB); s.c. 3 Mod 68, 87 ER 43; *R v Johnson* (1685) 2 Show KB 488, 89 ER 1058 (KB); *Trial of the Seven Bishops* (1688) *State Trials* 12:183, 426, 426-27, 427-28, 429 (KB); s.c. 3 Mod 212, 87 ER 136.

The accuracy of *State Trials* has been questioned (like that of most nominate reports). E.g., John H Langbein, 'The Criminal Trial Before the Lawyers' (1978) 45 *University of Chicago Law Review* 263, 265-67. However, after 1688 most proceedings in *State Trials* were '[t]aken down in short hand, and transcribed into long hand,' *Trial of Mr. Richard Francklin* (1731) *State Trials* 17:625, 625n (KB); e.g., *Trial of John Almon*, *State Trials* 20:803, 803. Hale and Hawkins treated *State Trials* 'as a source of legal authorities.' MRT Macnair, 'Review' (1993) 11 *Law and History Review* 450, 452; *Hale* 1:112 n(n), 116 n(z), 118 n(h)-(i), 168 n(m), 370 n(i), 390 n(e), 502 n(e), 697 *passim*; *Hawkins* 2:259, 364, 391, 395, 397, 401, 406, 409, 412, 413, 418, 420, 422, 424, 425, 428, 429, 430 *passim*.

²⁸ See *Hamburger* 752-63; *Green* 68.

bel doctrine.²⁹ However, Hamburger suggests that 'prior to the eighteenth century the law of seditious libel was a relatively insignificant means of restraining the printed press and was the basis of a relatively small number of prosecutions,³⁰ identifying the basis of most prosecutions as statutes governing scandalous language about magnates (*scandalum magnatum*), cases on infamous libel (*libellis famosis*) which he sees as then limited to magistrates, and particularly violation of licensing ordinances and laws³¹ such as those of 1637 and 1662.³² Disagreeing with legal historians of earlier generations who undifferentiatedly treated Star Chamber and other prosecutions for seditious words and seditious publications as prosecutions for seditious libel,³³ or for an 'offence of sedition,'³⁴ Hamburger instead dates the beginning of extensive reliance on and development of seditious libel just after the final lapse of press licensing in 1695³⁵ as the result of a quest for replacement restraints on the press.³⁶ Thus, the defining decisions on seditious libel occurred between 1695 and 1704, and prosecutions followed.

²⁹ *Hamburger* 691-97, 701, 703, 712, 730, 740.

³⁰ *Hamburger* 663. He identifies most of those pre-eighteenth century prosecutions as 'against manuscripts rather than printed material,' since manuscripts could not support prosecution under licensing requirements. *Ibid* 665.

³¹ *Hamburger* 763-65, 664, 674; accord *Mansfield Manuscripts* 2:775.

³² 'A Decree of Starre-Chamber, Concerning Printing' (11 July 1637), *Arber* 4:528; *Kemp* 1:346; Licensing Act (1662), 13-14 Car 2 c33; *EHD* 8:67.

³³ Sir James F Stephen, *A History of the Criminal Law of England* (Macmillan, London 1883) 2:316, 343, 348, 300-01, 307-33; *Stebert* 117-26, 269-70, 302, 80-81; Sir William S Holdsworth, *A History of English Law* (Methuen, London repr 1966) 10:674, 5:208-12, 8:338-42, though Holdsworth is overstated as advocating continuity between pre-1695 and post-1695 decisions, *ibid* 10:673-74, 676, 695 and William S Holdsworth, 'Press Control and Copyright in the 16th and 17th Centuries' (1920) 29 *Yale Law Journal* 841, 857; cf *Hamburger* 663, 759-60.

³⁴ Roger B Manning, 'The Origins of the Doctrine of Sedition' (1980) 12 *Albion* 99, 100. Hamburger is supported by the paucity of descriptions of a sedition offense in treatises. E.g., *Bacon* 4:409-65 (no section); Sir John Comyns, *A Digest of the Laws of England* (H Woodfall, London 1762) 5:688 (not in index).

³⁵ During prior lapses, the Crown brought seditious libel prosecutions under claimed prerogative power to prosecute seditious libels under proclamations, *Trial of Henry Carr* (1680) *State Trials* 7:1111, 1114 (KB) (describing decision of all judges); and the judges claimed authority to punish books 'scandalous to the government' under common law, *Harris, State Trials* at 7:929-30, 931-32; accord *Dover, State Trials* at 6:563, 564, 548, and libel, *Memorandum* (1604) Cro Jac 37, 79 ER 30 (Assemblage of all Justices) (false rumors of King were indictable 'by the rules of the common law'); *Dover, State Trials* at 6:548 (from private libels); *Seven Bishops, State Trials* at 12:426 (from *libellis famosis*).

³⁶ He reasons that most prior prosecutions were for violation of licensing requirements, and so were not 'historical evidence of seditious libel doctrine.' *Hamburger* 674. In 1695, the Commons stated that offenders of the former Licensing Act could 'be punished at common law.' *Ibid* 717 n168, citing *JHC* 11:305 (17 Apr.1695).

Hamburger's view has been broadly accepted.³⁷ The discussion below adds to the evidence supporting his thesis in four ways: a decision of the administration to use seditious libel, a rise of prosecutions initiated on that basis, and formal instructions to the judges, as well as a decision of the Commons to follow essentially the same approach.³⁸ Thus, immediately after the Licensing Act lapsed, the Ministry in May 1695, to confirm the legitimacy of a warrant 'for suppressing all scandalous and seditious books and pamphlets' and newspapers, posed the question to the Solicitor General 'what may be done according to law (now that the act about licensing is expired) for preventing the abuses of the press.'³⁹ The Attorney General and Solicitor General responded that seditious publications 'were still punishable when detected,'⁴⁰ and a round of warrants for 'seditious and treasonable books, papers and printing presses'⁴¹ soon followed.⁴² Reacting to a particularly infuriating publication in 1696, the King asked the Attorney General 'how far the writer, printer and dispersers of them may be punished,' and declared he was 'resolved to have the prosecutions thereof carried as far as the law may be.'⁴³ As substitute authority for the licensing statute, the Crown relied on proclamations proscribing seditious publications and issued additional ones,⁴⁴ and supplemented those with periodic instructions to

³⁷ E.g., *Mansfield Manuscripts* 2:778; *B&M* 778; Shannon C. Stimson, *The American Revolution in the Law* (PUP, Princeton 1990) 162 n87; Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820' (1990) 10 *Oxford Journal of Legal Studies* 307, 309 n10; Lois G. Schworer, 'Liberty of the Press and Public Opinion: 1660-1695,' in JR Jones, *Liberty Secured? Britain Before and After 1688* (SUP, Stanford 1992) 199, 208; *Repressive Jurisprudence* 54; *Reclaiming* 188 n70.

³⁸ The Commons adopted a rule 'that to print, or publish, any books or libels, reflecting upon the proceedings of the House of Commons, or any member thereof, for, or relating to, his service therein, is a high violation of the rights and privileges of the House of Commons.' *JHC* 13:767 (26 Feb. 1701). It enforced the rule by the legislative prosecutions, and recommendations for Crown prosecutions, cited in Chapter 2.

³⁹ *Calendar-William* 5:465 (9 May 1695).

⁴⁰ *Ibid* 5:483 (30 May 1695).

⁴¹ *Ibid* 5:498 (18 June 1695); *accord*, *ibid* 6:29, 30, 49 (July-Aug. 1695); *Cressy-Dangerous* 228-29.

⁴² Attempts to prosecute dissenting press for treason collided with the Trial for Treason Act of 1696. 7&8 Wm 3 c3, *EHD* 8:89; *Statutes* 7:6-7; *Hamburger* 722-23.

⁴³ Sir William Trumbull (Secretary of State) to Attorney General (26 Oct. 1696), *Calendar-William* 7:424.

⁴⁴ 'Proclamation for the Better Discovery of Seditious Libellers' (no. 4101) (13 Sept. 1692), *Tudor-Stuart Proclamations* 1:491; 'Proclamation, for Restraining the Spreading of False News, and. . . Seditious Papers and Libels' (26 Mar. 1702), *Kemp* 4:107; *Tudor-Stuart Proclamations* 1:514, reissued 1:518 (25 Feb. 1703); 'Proclamation for Preventing and Punishing Immorality and Profaneness' (24 Feb. 1698), *Calendar-William* 9:107 (heresy). Thus, Tutchin's prosecution was 'according to the proclamation.' *Calendar-Anne* 4: no. 80 (15 May 1704).

prosecute particular publications.⁴⁵

The Crown's prosecutions of print, writing, and speech after the 1695 lapse of licensing that are mentioned in the *Calendar of State Papers* were indeed primarily based on allegations of seditious libel, during the remaining seven years of William III's reign and the first five years of Anne's reign. In 70 Crown prosecutions, the focus was on 'seditious libel' (12),⁴⁶ or the equivalent 'seditious books and pamphlets' (17)⁴⁷ or 'seditious news' (15),⁴⁸ or sometimes just 'libels' (16),⁴⁹ along with treasonous (4) or heretical (6) publications.⁵⁰ The government's 20 other prosecutions were also primarily based on seditious words in unpublished writings (3),⁵¹ and seditious or scandalous spoken words (17).⁵² In framing those cases, prosecutors followed the lines of seditious libel doctrine from the Star Chamber.⁵³ Indictments included elements drawn, instead of from licensing statutes or ordinances, from defamation and *scandalum magnatum*,⁵⁴ and allegations of treason by words⁵⁵ (though those only constituted overt acts⁵⁶). Reliance on seditious libel and increase of prosecutions continued, as 'from 1702

⁴⁵ *Calendar-William* 6:72-73, 7:431, 9:261-62, 10:255; *Calendar-Anne* 3: no.138; 'Proclamation, for Apprehending John Tutchin' (no.4368) (24 Feb.1704, *Tudor-Stuart Proclamations* 1:519).

⁴⁶ *Ibid* 6:30, 6:49, 6:117, 7:425, 7:431, 7:432, 8:51, 8:262, 10:237-38, 10:350-51; *Calendar-Anne* 3: no.690, 4: no. 796.

⁴⁷ *Ibid* 5:498(2), 6:72-73, 6:73, 7:422, 7:424, 7:488, 8:257, 8:301, 9:422, 10:253(2), 11:352; *Calendar-Anne* 2: 474, 2:476, 3: no.22, 4: no.1278.

⁴⁸ *Ibid* 6:29, 6:30, 8:171, 8:175, 8:316, 8:426, 10:220, 10:249, 10:255(2), 10:341; *Calendar-Anne* 2:471, 477(2), 2:535.

⁴⁹ *Ibid* 8:249, 8:274, 9:261-62, 11:109, 11:425-26, 11:456; *Calendar-Anne* 1:336, 1:540-41, 2:39, 2:60, 3: no. 112, 138, 660, 2215, 4: no.366, 945.

⁵⁰ Treason: *ibid* 6:53, 6:73, 8:222, 10:364 (same 10:400). Heresy: *ibid* 8:300, 8:388, 9:107 (same 8:301); *Calendar-Anne* 2:49, 3: no.967, 1372 (same no.1023).

⁵¹ *Ibid* 7:422 (same in other at 7:422), 10:85, 10:256; accord WJ Hardy (ed), *Calendar of the Middlesex County Records, Session Books 1689 to 1709* (Harrison, London 1903) 327, 351 (John Denton, Thomas Pudsey).

⁵² *Ibid* 6:49, 7:415(2), 7:437, 8:53, 8:461, 10:179, 10:300, 10:400, 11:52, 11:149, 11:349; *Calendar-Anne* 1:66, 1:124, 1:509(2), 2:147-48, in addition to treasonable words.

⁵³ As discussed in Section A.1-4 below.

⁵⁴ By calling publications 'scandalous,' e.g., *Calendar-William* 7:425, 8:53, 10:364; *Calendar-Anne* 2:476, 3: no.22, 112, 4: no.366, 796, 945; and by calling newspapers 'false news,' *ibid* 6:29, 6:30, 7:431, 8:171, 8:175, 10:249; *Calendar-Anne* 2:477, 4: no.945.

⁵⁵ By often calling publications and words treasonable as well as seditious, e.g., *Calendar-William* 7:5:498, 6:30, 6:49(2), 6:117, 7:422, 8:262, 10:364, 10:400; *Calendar-Anne* 1:90. See Orr 11-29.

⁵⁶ *Blackstone's Commentaries* 4:79-80; *Hawkins* 1:38-39; e.g., *Case of Hugh Pine* (1628) Cro Car 117, 79 ER 703 (KB); *R v Tayler* (1703) 3 Salkeld 198, 91 ER 775; 2 Ld Raym 879, 92 ER 88 (KB) (treasonable words); *R v Whitmore* (1749) 1 Black W 37, 96 ER 20 (KB) ('speaking treasonable words').

to 1756, there were 123 prosecutions for political libels,' and 'a further sixty-six in the years 1760-89,'⁵⁷ followed by an explosion of about 200 in the 1790s.⁵⁸

The Crown also gave instructions to the judges 'to have a watchful eye over the writers, printers and dispersers of false and seditious news' and to prosecute them, in 1697, and repeated those instructions two years later.⁵⁹ The King in Council instructed judges to include in their charges for grand juries, in 1700, 'to proceed against the printers, vendors and disposers of popish books and of other seditious books' and 'to proceed against writers and dispersers of false news.'⁶⁰

The judges complied with those instructions, as had prosecutors, by shaping the distinctive eighteenth century form of seditious libel that Blackstone described. With the Stuarts fallen and licensing expired, the courts, particularly King's Bench, faced the implicit question whether seditious libel would remain a crime, and the explicit question whether it would be governed by Star Chamber precedent for seditious words and seditious libel, or by the common law of libel and of criminal law generally. The choice was made by the Lord Chief Justice at the time licensing lapsed in 1695, John Holt,⁶¹ and after near-neglect for a half century was reaffirmed by his successors,⁶² to base seditious libel on Star Chamber precedent from the early Stuarts⁶³ and on King's Bench precedent from the later Stuarts,⁶⁴ claiming that the Star Chamber was only abolished because all offenses punishable there were also punishable

⁵⁷ Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820' (1990) 10 *Oxford Journal of Legal Studies* 307, 309 n11; *accord* Harling 108; *Hamburger* 724-25 ('at least 115' in King's Bench, with additional ones in Common Pleas).

⁵⁸ Clive Emsley, 'Repression, "Terror" and the Rule of Law in England During the Decade of the French Revolution' (1985) 100 *English Historical Review* 801, 824; *accord* Michael Lobban, 'Treason, Sedition and the Radical Movements in the Age of the French Revolution' (2000) 22 *Liverpool Law Review* 205, 206-10, 210-24, 224-30, 230-34 (seditious libel, treason, gag act prosecutions, then detentions).

⁵⁹ *Calendar-William* 8:171 (27 May 1697); *accord* *ibid* 10:237-38 (13 July 1699).

⁶⁰ *Ibid* 10:388 (22 Feb. 1700).

⁶¹ JR, *The Life of the Right Honourable Sir John Holt. . . with a Table of References to All His Lordship's Arguments* (J Worral, London 1764); *see* ODNB 27:830.

⁶² *Proceedings. . . against Rev. William Davies Shipley, Dean of St. Asaph* (1784) *State Trials* 21:847, 1036 (KB) (following *Bear and Tutchin*); *accord* *Mansfield Manuscripts* 2:777, 789.

⁶³ *Prynn's Case* (1690) 5 Mod 459, 87 ER 764, abridged in Holt KB 362, 90 ER 1100 (KB); *e.g.*, *R v Bear* (1699) 2 Salkeld 417, 419, 91 ER 363, 365 (KB); *Hamburger* 730 & n212.

⁶⁴ In fact, Holt prosecuted some of those seditious libel trials. *Trial of Francis Smith* (1680) *State Trials* 7:931, 931; *Trial of Jane Curtis* (1680), *ibid* 7:959, 959; *accord* ODNB 27:830, 830.

in King's Bench.⁶⁵ They did so even though those seditious libel precedents diverged starkly from rules governing other libel actions and other criminal actions. Those divergences were not logically unified, except for their Star Chamber derivation and their uniform beneficence to prosecutors and corresponding deleterious effect on the accused.

Those rules governing criminal prosecution of seditious libel, particularly their transparent bias and facilitation of prosecutions, brought swelling criticism of their deviation from general libel law and other criminal law, and for their restraint on freedoms of press and speech. The six unique rules that drew the most criticism, and that interlaced discussion advocating broader freedom of press and speech, were (1) rejection of a defense of truth, (2) elimination of a requirement to prove criminal intent, (3) criminalization of criticism of government officials, (4) criminalization of criticism of government generally, (5) withholding from jury determination the issues of crime and criminal intent, and (6) use of general warrants, in addition to (7) definition of freedom of press as consistent with seditious libel restraints.⁶⁶

That criticism provoked defenses, and the most influential was Lord Mansfield's,⁶⁷ not only by adamantly supporting the royal judges' position, but by rewriting the history of seditious libel.⁶⁸ Mansfield took 'up an eighteenth-century formulation of seditious libel and treated it as age-old,' as Oldham notes,⁶⁹ while misstating that 'every lawyer for near 100 years, has so far acquiesced,'⁷⁰ and misstating that '[n]o counsel ever complained' of his narrow jury issues.⁷¹ In his history, Mansfield chose his starting point as the Holt decisions, entirely ignoring the

⁶⁵ *Prynn's Case*, 5 Mod at 464, 87 ER at 767, adopting the argument of Sir William Williams for the Crown.

⁶⁶ This section undertakes to discuss only cases relevant to development of criminal libel, not all decisions.

⁶⁷ Or William Murray, first Earl of Mansfield 1776. *Mansfield Manuscripts* 1:8-43; *ODNB* 39:992.

⁶⁸ *Proceedings . . . against Rev. William Davies Shipley, Dean of St. Asaph* (1784) *State Trials* 21:847, 1035-39 (KB); s.c. 3 TR 428, 100 ER 657; 4 Dougl 73, 99 ER 774, responding to defense argument to Judge Buller that doctrines of seditious libel were 'new doctrines' not supported by 'ancient precedents,' *ibid* 21:923; accord *Ham-burger* 756.

⁶⁹ *Mansfield Manuscripts* 2:775; e.g., *St. Asaph* at 21:1036; *R v Almon* (1770) *Mansfield Manuscripts* 2:833, 836 (KB) ('an established rule from the beginning of time'). Mansfield also altered a ballad in *St. Asaph*, *ibid* 21:1037-38; see *Trial of Mr. Richard Francklin* (1731) *State Trials* 17:625, 672n (KB).

⁷⁰ *Contra* the eloquent defense counsels' challenges in *Owen*, *Wilkes*, *Almon*, *Woodfall*, *Miller*, and especially *St. Asaph*.

⁷¹ *Contra R v Cook* (1758) *Mansfield Manuscripts* 2:810 (KB); *R v Wilkie* (1776) *ibid* 2:849 (KB).

contrary authority of *Seven Bishops* just before⁷² and *Owen* afterward.⁷³ He was correct only in identifying the 'true creator' of the newly minted doctrine of seditious libel as 'Chief Justice Holt at the turn of the eighteenth century.'⁷⁴ The persistence of Mansfield's fairy tale, however, results from its further acceptance by Tory legal historians, such as Stephen and Holdsworth.⁷⁵ They, and Mansfield, ignored six inconsistencies of the law of seditious libel with civil libel and criminal liability, and contrary definitions of freedom of press.

1 Rejection of a Defense of Truth

Defamation liability⁷⁶ developed in the sixteenth century⁷⁷ through the action on the case for words (slander),⁷⁸ which remained the dominant basis of liability until well into the eighteenth century.⁷⁹ The era was a time of widespread abusive language,⁸⁰ and courts developed limitations on actionable invective.

Truth was a defense across a wide spectrum of law. The very 'gist of the action on the

⁷² *Mansfield Manuscripts* 2:807; accord *ibid* 2:777, 782, 836 n1.

⁷³ *Trial of William Owen* (1752) *State Trials* 18:1203 (KB); s.c. Sayer 30, 96 ER 792. Mansfield claimed the report in *State Trials* was false, which its later editor disputed. *Ibid* 1203n.

⁷⁴ James Oldham, *English Common Law in the Age of Mansfield* (UNCP, Chapel Hill 2004) 209.

⁷⁵ Sir James F Stephen, *A History of the Criminal Law of England* (Macmillan, London 1883) 2:316, 343, 347, 350, 355, 358; Sir William S Holdsworth, *A History of English Law* (Methuen, London repr 1966) 10:680 ('[t]he view of the law held by Lord Mansfield and the other judges was the historically correct view of the law'); accord *ibid* 10:687-88, 692, 674, 677, 683, 684, 687.

⁷⁶ There is an extensive literature displaying variant views on its development. *Milsom* 379-92; *B&M* 686-716; DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, Oxford 1999) 112-25; Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, Oxford 2005).

⁷⁷ Paralleling its development by canon law in ecclesiastical courts, *Helmholz* 58-61; *Helmholz-Cases* xxvi-xli; *Baker* 2:236, 238-40; *OHLE* 1:564-98, 6:788-91; *B&M* 686-91; *Milsom* 380-84; *Fifoot* 126-28; David Hewitt, 'Some Cases from the Defamation Jurisdiction of the Archdeaconry of Richmond' (1998) 19 *Journal of Legal History* 251, 253-66. Defamation 'largely died out by 1400' in local courts. DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, Oxford 1999) 113; see Sandy Bardsley, 'Sin, Speech and Scolding in Medieval England,' in Thelma Fenster and Daniel L Small (eds), *Fama: The Politics of Talk and Reputation in Medieval Europe* (CorUP, Ithaca 2003) 145, 152-61.

⁷⁸ *Baker* 2:237-44; *ibid* 2:239-40, quoting and translating [Richard Pynson], *Natura Breviu[m] Newly and Moost Trewly Corrected* (np [1528]) clxxxv-clxxxvi; *OHLE* 6:783-88; *Helmholz* 56; *Helmholz-Cases* lxxxvii-cvi; *Fifoot* 129-37.

⁷⁹ *Cressy-Dangerous* 235, 240; e.g., *R v Edgar* (1724) Sess Cas 133, 93 ER 135; Sess Cas 128, 93 ER 129 (KB).

⁸⁰ *Worsley v Lyddal* (1669) 3 Sid 433, 82 ER 1201; 2 Keble 577, 581, 84 ER 363, 366 (KB); Laura Gowing, *Domestic Dangers: Women, Words, and Sex in Early Modern London* (CP, Oxford 1996) 121; *Cressy-Dangerous* 17-38; but see Robert B Shoemaker, 'The Decline of Public Insult in London 1660-1800' (2000) 169 *Past & Present* 97, 99-103.

case for slander was the speaking of false words,' Baker says of common law courts,⁸¹ and truth was from the outset a defense.⁸² The same applied to civil actions for libel,⁸³ which 'may be justified in an action upon the case' in the seventeenth century,⁸⁴ once distinction began to be made between libel and slander in the latter part of that century,⁸⁵ as written words were more readily found actionable⁸⁶ and malicious or damaging.⁸⁷ In the early eighteenth century, the influence of criminal libel on the emerging action on the case for libel (or inevitable confusion from the integration in King's Bench of its libel jurisdiction with its inherited Star Chamber jurisdiction including criminal libel) led to some commentators and judges saying that truth could not be pleaded in the action on the case for libel, any more than in criminal libel.⁸⁸ This view, however, was never consistently followed and was rejected by the

⁸¹ *Baker* 2:245, 247; *OHLE* 6:794; *Helmholz-Cases* cvii.

⁸² *Reymond v Lord Fitzwauter* (1521) *Spelman* 1, 93 *Selden Society* 2 (KB) ('if he was a villein in fact, then he has no cause of action'); *Legat v Bull* (1533) *Spelman* 6, 93 *Selden Society* 6 (KB) (one judge); *Sheppard* 6, 7, 12; *Bacon* 3:495, 4:516; *Blackstone's Commentaries* 3:125.

⁸³ *OHLE* 6:796 (after 1533 'truth seems to have been generally accepted as a distinct defence'); *Ibbetson* 115; *Lloide v Breverton* (1604) *Hudson* 2:101 (Star Chamber) ('defendant would have undertaken to have proved the contents of the letter to have been true'); see *Edwardes v Woolf[ton]* (1607) 12 Co Rep 35, 77 ER 1316; *B&M* 708 (Star Chamber) ('honesty... of the said complainant'); [*Col.*] *King v Lake* (1667) *Hardres* 470, 145 ER 552 (Exch) ('a false libel,' per Hale, CB).

⁸⁴ *Lake v Hutton* (1619) *Hobart* 252, 253, 80 ER 398, 399; *Hobart* 253, 80 ER 400 (Star Chamber) (though not in a criminal prosecution).

⁸⁵ *Austin v Culpeper* (1683) 2 Shower KB 313, 89 ER 960; *Skinner* 122, 90 ER 57 (KB); *Yoxon v Bennet* (1702) 7 Mod 91, 87 ER 1115 (KB); accord *Sheppard* 1, 3; *Milsom* 388; *Fifoot* 132; Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, Oxford 2005) 4. Mitchell argues persuasively that *Austin* and the earlier *King v Lake* were actions on the case for words, and used the term 'libel' only to indicate the existence of writing and to use it to escape the *mitior sensus* rule, rather than to designate an independent cause of action.

⁸⁶ [*Col.*] *King v Lake* (1667) *Hardres* 470, 145 ER 552, 553; *Hardres* 364, 388, 145 ER 499, 511 (Exch); accord *R v Summer [Somers] & Hillard* (1665) 1 Sid 270, 271, 82 ER 1099, 1100 (KB); *R v Langley* (1703) 2 Ld Raym 1029, 92 ER 184; 6 Mod 124, 87 ER 882; 2 Salkeld 697, 91 ER 590; 3 Salkeld 190, 91 ER 769; *Holt* KB 654, 90 ER 1261 (KB); *Harman v Delany* (1731) *Fitz-G* 253, 254, 94 ER 743, 744; 1 Barn KB 289, 438, 94 ER 197, 294 (KB). *Holt* KB reports are not always accurate, and are copies and abridgments of other reports by William Nelson.

⁸⁷ *R v Roberts* (1734) *Cunningham* 94, 94 ER 1084; 1 Barn KB 90, 94 ER 62 (KB).

⁸⁸ *Bacon* 3:495, 4:516 ('no scandal in writing is any more justifiable in a civil action... than in an indictment or information'). King's Bench still could decline 'granting an information for an offence' if the 'libel happens to be true.' *Bacon* 3:492. Words were still not actionable if adequately 'explained by other words.' *Comyns* 1:207. There was similar confusion in ecclesiastical courts, which for defamation actions similarly required 'that the imputation of a crime had been a false one,' and 'truth could in some circumstances serve legally to excuse defamatory utterances,' though 'truth in itself was not a sufficient justification.' *OHLE* 6:582; see *Helmholz* 64 & n32, modifying *Helmholz-Cases* xxx.

time of Lord Mansfield.⁸⁹ Criminal law outside libel allowed truth-based defenses, such as (taking examples from Holt decisions when not punishing seditious libel) the defense to fraud and deceit that amounts due were actually paid,⁹⁰ to forgery that the bond was valid,⁹¹ and to prosecution of a cheat and imposter that 'he did not counterfeit' facts⁹² or his claims 'are true.'⁹³

By contrast, truth was not a defense in the Star Chamber in criminal prosecutions for seditious words or seditious writings,⁹⁴ where the *Case de Libellis Famosis* early in the seventeenth century held, as tendentiously described by Sir Edward Coke, '[i]t is not material whether the libel be true. . . .'⁹⁵ (Coke supported the deviation from civil cases, saying in Star Chamber in a civil libel case about alleged poisoning that 'if it had been true, . . . Hatton might have justified the writing.'⁹⁶) Truth was also made no defense by the Star Chamber, where most such actions were heard,⁹⁷ in criminal prosecutions for *scandalum magnatum*,⁹⁸ even though the statutes defined the offence as 'false news' about magnates⁹⁹ and ostensibly

⁸⁹ *Anonymous* (1706) 11 Mod 99, 88 ER 921, 921-22 (KB) (per Holt, 'A man may justify in an action upon the case for words, or for a libel'); *Cropp v Tylney (Tylney)* (1706) 3 Salkeld 225, 91 ER 791; abridged in Holt KB 422, 90 ER 1132 (KB) (incorrectly dated in reports); *Hargrave v Le Breton* (1769) 4 Burr 2422, 2425, 98 ER 269, 271 (KB) (Mansfield, LCJ: suits against employers for 'giving the true character of a servant' nonactionable); *Ward v Mortimer* (1776) *Mansfield Manuscripts* 2:844 (KB); *Weatherston v Hawkins* (1786) 1 TR 110, 111-12, 99 ER 1001, 1002 (KB) (in such suits plaintiffs must 'prove the falsehood'); Giles Jacob, *A New Law-Dictionary* (Nutt, London 1729) [unnumbered under 'Libel'] ('in actions on the case, one may justify that the matter is true,' but not in criminal prosecutions); *Blackstone's Commentaries* 3:126, 4:150.

⁹⁰ *Trial of Charles Duncombe* (1699) *State Trials* 13:1061, 1104 (KB); s.c. 32 Mod 224, 88 ER 1278, though the judges disagreed.

⁹¹ *Trial of Mary Butler* (1699) *State Trials* 13:1249, 1262 (KB), other than where forgery was admitted.

⁹² *Trial of Richard Hathaway* (1702) *State Trials* 14:639, 689-90 (KB).

⁹³ *Trial of William Fuller* (1702) *State Trials* 14:517, 534 (KB).

⁹⁴ *Hudson* 2:102; accord *Milsom* 390, 389; *Green* 41.

⁹⁵ *Case de Libellis Famosis* (1605) 5 Coke's Rep 125a, 77 ER 250, 250 (Star Chamber), which is Coke's report stating his argument as attorney general but describing it as the judgment of the court in the case of *Attorney General v Pickering* (1605) Hawarde 222, 225 (Star Chamber). Accord *Sheppard* 116; *Milsom* 389 (whether written or spoken).

⁹⁶ *Lake v Hatton* (1619) Hobart 252, 253, 80 ER 398, 399 (Star Chamber) (dissent).

⁹⁷ John C Lassiter, 'Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum*, 1497-1773' (1978) 22 *American Journal of Legal History* 216, 217.

⁹⁸ 3 Edw 1 c34 (1275); 2 Rich 2, stat 1, c5 (1378); 12 Rich 2 c11 (1388); 1 & 2 Mary c3 (1554); 1 Elizabeth 1 c6 (1559); *Sheppard* 16; *Blackstone's Commentaries* 3:123; e.g., *Duke Schomberg v Murrey* (1701) 12 Mod 420, 88 ER 1423; Holt KB 640, 90 ER 1254 (KB); IS Leadam (ed), *Select Cases Before the King's Council in the Star Chamber . . . 1477-1509* (Selden Society v16, Bernard Quaritch, London 1903) 36-37n; accord *Baker* 2:244-45; *OHLE* 6:781; *Fifoot* 128.

⁹⁹ Edward Coke, *The Second Part of the Institutes of the Laws of England* (Brooke, London 1797) 227; 3 Edw 1 c34 (1275) (Coke's translation, *ibid* 225: 'to tell or publish any false news or tales, whereby discord, or occasion

allowed truth as a defense.¹⁰⁰ That same rule came to apply to all libel actions in Star Chamber, whether brought by the Crown or by private litigants:¹⁰¹ while 'the defendant may justify. . . as true' any spoken words, 'if he put the scandal in writing, it is then past any justification. . . .'¹⁰² During the Restoration, King's Bench followed the Star Chamber rule that 'whether true or faux' is irrelevant (with the chief justice dissenting).¹⁰³ The Restoration ended with a split of judges in the *Seven Bishops*: only Justice Powell's opinion required that to be seditious libel 'it must be false,' while Justice Allynbone's position was that 'there may be every tittle of a libel true, and yet it may be a libel still.'¹⁰⁴

Holt followed that Star Chamber rule for the crimes of libel and seditious libel, that truth was irrelevant,¹⁰⁵ even while acknowledging that in private actions for libel the defendant 'may justify' the printed or spoken words, saying the rule was 'otherwise in an indictment' where no justification of truth was allowed.¹⁰⁶ Thus in the years after 1688, the Crown's charges against publications or words rarely alleged falsity,¹⁰⁷ except in charges against seditious news that generally recited that it was 'false news,'¹⁰⁸ probably seeking to build upon

of discord or slander may grow between the king and his people, or the great men of the realm'); *Sheppard* 17; *Comyns* 1:187; *Blackstone's Commentaries* 4:149.

¹⁰⁰ *Sheppard* 17 (undifferentiated); *Hudson* 2:104 (if spoken, not if written); accord [Capel Lofft], *An Essay on the Law of Libels* (C Dilly, London 1785) 31; *Hamburger* 668-69.

¹⁰¹ The Star Chamber heard nonseditious libel cases as well. *Frize v Bennet* (1625) *Rushworth* 6 (Star Chamber); *Moore v Mercer* (1632) *Rushworth* 3:35 (Star Chamber); *R v Walker* (1633) *Rushworth* 3:59 (Star Chamber); Richard Crompton, *Star-Chamber Cases, Shewing What Causes Properly Belong to the Cognizance of That Court* (John Grove, London 1630) 10.

¹⁰² *Hudson* 2:104; accord *Wants Case* (1601) Moore KB 627, 72 ER 802 (Star Chamber) ('un libeller est punishable, coment que le matter del libel soit vray'); *Caston v Hitcham* (1632) *Rushworth* 35, 36 (Star Chamber); see *Smith v Tuston* (1632) *Rushworth* 3:47 (Star Chamber).

¹⁰³ *R v Banks* (1666) 2 Keble 22, 84 ER 14 (KB); s.c. 2 Keble 4, 84 ER 3. One later treatise said the most an accused could do was to 'explain the words by shewing the occasion.' *Bacon* 4:408.

¹⁰⁴ *State Trials* 12:183, 426-27, 429 (KB).

¹⁰⁵ Theodore FT Plucknett, *A Concise History of the Common Law* (5th ed Butterworth, London 1956) 496; Thomas A Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (UChiP, Chicago 1985) 253.

¹⁰⁶ *Anonymous* (1706) 11 Mod 99, 88 ER 921, 921-22 (KB), evidently s.c. *Cropp v Tylney* (Tylney) (1706) 3 Salkeld 225, 91 ER 791; Holt KB 422, 90 ER 1132 (KB); accord *Hawkins* 1:194; *Green* 41.

¹⁰⁷ *Calendar-William* 10:249, 10:255, 10:256, 10:364, 10:400; *R v Orme and Nutt* (1699) 1 Ld Raym 486, 91 ER 1224 (KB).

¹⁰⁸ *Calendar-William* 6:29, 6:30, 7:431, 8:171, 8:175, 10:249; *Calendar-Anne* 4: no.945; e.g., *Trial of Mr. Richard Francklin* (1731) *State Trials* 17:625, 628, 655 (KB).

scandalum magnatum. In Crown prosecutions for seditious libel and other criminal libel during the eighteenth century, truth was no defense¹⁰⁹ and was 'immaterial. . . since the provocation, and not the falsity, is the thing to be punished criminally.'¹¹⁰ Mansfield, like other judges, acknowledged that '[i]n the case of a civil action, it is different.'¹¹¹

There is no logical reason why truth should not be a defense to seditious libel, or why its admissibility in civil actions for libel should not apply to criminal actions involving libel of the King or magistrates. The obvious explanation is that government wanted power to punish criticism, even if true. The illogic underlying that rule was shown by decisions and treatises carrying the point further: it was not just neutral (no justification) that the seditious libel was true, but was an aggravating factor that it was true.¹¹² True criticism was worse than false criticism!

Those counterintuitive standards began to be challenged by the late seventeenth century, most notably in the *Harris* case and the *Seven Bishops* case (where the attempt to raise truth as a defense was rebuffed¹¹³ but the even division of the judges allowed the jury to decide all issues and to reach a general verdict of acquittal¹¹⁴). Challenges, rejected by Holt, continued to be rejected by his successors¹¹⁵ including Mansfield, who found it 'totally immaterial' whether the 'libel' was 'true or false,'¹¹⁶ and ultimately all the judges.¹¹⁷

¹⁰⁹ *R v Dormer* (1726) 1 Barn KB 13, 94 ER 9 (KB); *R v Lofeild* (1731) 2 Barn KB 128, 152, 193, 94 ER 399, 416, 442 (KB) (rejecting defense); *R v Griffin and Banyere* (1733) 2 Barn KB 558, 94 ER 558; W Kel 292, 25 ER 621 (KB); *R v Roberts* (1734) Cunningham 94, 94 ER 1084 (KB) ('you may justify for words spoken, but not for words put into writing,' because words in writing are more 'deliberate' and are 'supposed to spread the scandal').

¹¹⁰ *Blackstone's Commentaries* 4:150; *ibid* 3:125-26; *accord* Bacon 3:491; *St. Asaph, State Trials* at 21:1034.

¹¹¹ *Earl of Sandwich v Miller* (1773) *Mansfield Manuscripts* 2:806 (KB); *s.c.* Lofft 210, 98 ER 614, citing *The Evidence, (as Taken Down in Court) in the Trial Wherein The Rt. Hon. John, Earl of Sandwich, was Plaintiff, and J. Miller, Defendant* (G Kearsley, London 1773) 33; *Onslow v Horne* (1770) *Mansfield Manuscripts* 2:839, 840 n8; 2 Black W 750, 96 ER 439 (KB); *Blackstone's Commentaries* 3:125-26.

¹¹² *Hudson* 2:102; *Bacon* 3:495.

¹¹³ *Trial of the Seven Bishops* (1688) *State Trials* 12:183, 427, 429 (KB); *Hamburger* 709.

¹¹⁴ *Ibid* 12:425-29, 430-31.

¹¹⁵ *Trial of Mr. Richard Francklin* (1731) *State Trials* 17:625, 659 (KB), where the defense was well argued, *ibid* 17:659-60.

¹¹⁶ *Trial of John Almon* (1770) *State Trials* 20:803, 836 (KB); *s.c.* 5 Burr 2686, 98 ER 411; *accord* *Case of Henry Sampson Woodfall* (1770) *State Trials* 20:895, 902 (KB); *s.c.* Lofft 776, 98 ER 914; 5 Burr 2661, 98 ER 398; 2 Strange 1131, 93 ER 1082; *Earl of Sandwich v Miller* (1773) *Mansfield Manuscripts* 2:806 (KB); *R v*

2 Elimination of the Requirement To Prove Criminal Intent

In the law of defamation generally, malicious intent had to be shown throughout the sixteenth¹¹⁸ and seventeenth centuries.¹¹⁹ Private actions continued to treat malice as 'the "foundation" of the action for defamation' and as 'an essential aspect of the plaintiff's claim'¹²⁰ through the next century. For slander 'malice is the gist of this action.'¹²¹ Criminal libel consisted of 'malicious defamations,'¹²² and seditious libel averred malice. Other criminal law, too, made criminal intent a *sine qua non*,¹²³ as Holt recognized.¹²⁴

The Star Chamber, however, began to imply criminal intent when it found a libel seditious. A 1610 case stated its older rule for civil libel actions, that 'every one who shall be convicted ought to be a contriver, procurer, or publisher of it, knowing it to be a libel,'¹²⁵ but cases during the Laudian days dispensed with any requirement of knowledge or intent, such as when Prynne was told 'you can never make any defence at all out of that' because his words were 'plain' and 'wicked, infamous, scandalous, and seditious libel.'¹²⁶ Cases in the Restoration, such as of the printers and booksellers in the 1684 *Barnardiston* case, similarly

Horne (1777) 2 Cowp 672, 679, 98 ER 1300, 1304 (KB); *R v Dean of St. Asaph* (1784) 3 TR 428, 429, 100 ER 657, 658 (KB) ('published without a lawful excuse').

¹¹⁷ *Opinion of the Judges* (1792) *State Trials* 22:297, 298-99 (HL).

¹¹⁸ *Brook v Montague* (1605) Cro Jac 90, 91, 79 ER 77, 78 (KB) (describing decision of Wray, CJ, who died 1592, as good law); accord *Ibbetson* 115 & nn114-16.

¹¹⁹ *Peacock v Reynal* (1612) 2 Brownlow & Goldesborough 151, 123 ER 868 (Star Chamber) ('with what mind it was made is to be respected,' and 'the defendant intended his profit, and his own benefit,' whereas the same words to apprise a father of a wayward child would lack defamatory intent); *R v Eades* (1686) 2 Show KB 468, 89 ER 1046 (KB) (though that exception was later waived in the case); *Sheppard* 7 (slander); accord *OHLE* 6:785; *Hamburger* 730.

¹²⁰ Paul Mitchell, 'Duties, Interests, and Motives: Privileged Occasions in Defamation' (1998) 18 *Oxford Journal of Legal Studies* 381, 381-82; accord *Bacon* 3:490 (libel); *Comyns* 1:212.

¹²¹ *Smith v Richardson* (1737) Willes 20, 24, 125 ER 1034, 1036 (Exch); e.g., *Cr[awford] v Middleton* (1662) 1 Lev 82, 83 ER 308; 1 Keble 344, 353, 377, 83 ER 984, 990, 1004 (KB) ('non-suit, for it was not maliciously').

¹²² *Blackstone's Commentaries* 4:150.

¹²³ *Ibid* 4:27; accord *Hale* 1:532, 683, 425, 439-40, 443-44, 475-76, 508-09, 519-22, 548-51 (all listed felonies); *Blackstone's Commentaries* 4:4-5 (criminal law); *Baker-Introduction* 523 (felonies).

¹²⁴ Among Holt decisions, e.g., *Trial of Sarah Baynton and others* (1702) *State Trials* 14:597, 629 (KB); see *Trial of Charles Duncombe* (1699) *State Trials* 13:1061, 1106 (KB).

¹²⁵ *Lamb's Case* (1610) 9 Co Rep 59b, 77 ER 822; 5 Co Rep 23b, 77 ER 85 (Star Chamber); accord *Wants Case* (1601) Moore KB 627, 72 ER 802 (Star Chamber); see *Brant* 6-7.

¹²⁶ *Proceedings against Wm. Prynne* (1632-33) *State Trials* 3:561, 580 (Star Chamber); *ibid* 3:576, 579-80; see *Proceedings against Mr. Wraynham* (1618) *State Trials* 2:1059, 1072-73 (Star Chamber); *Milsom* 391.

held that if anyone 'write libels, or publish any expressions which in themselves carry sedition and faction, and ill-will towards the government,' 'proof of the thing itself proves the evil mind' and is 'proof enough of the words maliciously, seditiously, and factiously.'¹²⁷ In the last seditious libel decision before the Revolution, *Seven Bishops*, a judicial fracture appeared as two of four judges required a seditious libel to have 'an ill intention of sedition,' and to be shown to be malicious.¹²⁸ However, the other judges were followed by Holt.

The first seditious libel decision by King's Bench after the Licensing Act lapsed in 1695 was *R v Paine*.¹²⁹ There, Holt confronted a defendant who physically wrote but did not compose a libel (it was 'dictated to him by another'), which was deemed seditious because it was 'against the late Queen'; the libel was 'by mistake delivered' and not intentionally published (his servant picked up the wrong sheet of paper).¹³⁰ Counsel for the defense argued that something 'delivered by mistake' lacked 'proof of a malicious and seditious publication of this paper.'¹³¹ Holt disagreed entirely, ruling that the person 'who writes it' as dictated 'is maker of a libel,'¹³² and even though 'delivering it by mistake is no publication,' the 'making a libel is an offence, though never published' and the reading by either the recipient or the amanuensis 'is a publication.'¹³³ In doing so, he applied the rule of the Star Chamber and the later Stuart prosecutions that inferred criminal intent,¹³⁴ and also applied the rule of the Star Chamber that did not require publication for a criminal action,¹³⁵ contrary to precedents of

¹²⁷ *Trial of Sir Samuel Barnardiston* (1684) *State Trials* 9:1333, 1352 (KB); accord *Trial of Dover, Brewster and Brooks* (1663) *State Trials* 6:539, 547, 559 (KB).

¹²⁸ *State Trials* 12:183, 426, 427 (KB) (Holloway and Powell, JJ).

¹²⁹ *R v Paine* (1696) 5 Mod 163, 87 ER 584; Comberbach 358, 90 ER 527; abridged Holt KB 294, 90 ER 1062; Carthew 405, 90 ER 834; 1 Ld Raym 729, 91 ER 1387 (KB); discussed in *Hamburger* 729.

¹³⁰ 5 Mod at 163, 87 ER at 584.

¹³¹ 5 Mod at 165, 87 ER at 585.

¹³² Comberbach at 359, 90 ER at 527.

¹³³ 5 Mod at 167, 87 ER at 585-86.

¹³⁴ Even if the printer or seller was ignorant of a publication's content. *E.g.*, *Dover*, *State Trials* at 6:564.

¹³⁵ *Barrow v Lewellin* (1603-25) Hobart 62, 80 ER 211 (Star Chamber).

King's Bench requiring publication.¹³⁶ Holt made clear where he stood on seditious libels, concluding with comparison of 'murdering a man's reputation' to murdering a life,¹³⁷ although the court adjourned without clearly entering a final decision against such 'murders.' Thereafter, the jury verdict finding Paine guilty of writing the libel (though not publishing it) was challenged, primarily on the ground that the jury 'found nothing as to the intent,' and that a criminal intent was required in any case such as perjury, where the verdict is void 'if the jury find only the false swearing, and say nothing as to the corruption and malice.'¹³⁸ The court, apparently standing on implied criminal intent, upheld the verdict on the counterintuitive basis that Paine writing what was dictated committed criminal libel, while '[h]e who dictated cannot be indicted for making this libel, because he did not write it.'¹³⁹ Holt made the same point more explicitly in a case involving treasonable words in 1703, *R v Tayler*. Responding to the objection that no intent to injure the Queen or Government had been alleged, he held that 'there needs no averment that they were spoken with an intent to injure the Government, for the words import a crime of themselves.'¹⁴⁰

Subsequent cases reaffirmed that it is not material 'whether he who disperses a libel knew any thing of the contents or effect of it,'¹⁴¹ finding the absence of intent no defense.¹⁴² They inferred criminal intent from seditious libels,¹⁴³ even finding that 'the circumstances of

¹³⁶ *Barnardiston*, *State Trials* at 9:1356.

¹³⁷ *R v Paine*, 5 Mod at 167, 87 ER at 587.

¹³⁸ Carthew 405, 406, 90 ER 834, 835.

¹³⁹ *Ibid*.

¹⁴⁰ *R v Tayler* (1703) 3 Salkeld 199, 91 ER 775; 2 Ld Raym 879, 92 ER 88 (KB).

¹⁴¹ *Hawkins* 1:195; accord *R v Clerk* (1728) 1 Barn KB 304, 94 ER 207 (KB); *R v Kneil* (1728) 1 Barn KB 305, 306, 94 ER 207, 208 (KB); *Anonymous [R v Mayer & Dowling]* (1731) 2 Barn KB 43, 94 ER 345 (KB); *Hamburger* 749.

¹⁴² *R v Nutt* (1728) 1 Barn KB 306, 94 ER 208; Fitz-G 47, 94 ER 697 (KB) (same for bedridden bookseller selling or illiterate servant carrying libel, though jury refused to render general verdict and Attorney General created mistrial); *Francklin*, *State Trials* at 17:674-75; *Almon*, *State Trials* at 20:838; *R v Miller* (1776) *Mansfield Manuscripts* 2:847, 848n1 (KB); accord *Bacon* 3:497; *Hamburger* 752.

¹⁴³ E.g., *Francklin*, *State Trials* at 17:675, 659; *Almon*, *State Trials* at 20:836; *Woodfall*, 5 Burr at 2666-67, 98 ER at 401; *Woodfall*, *State Trials* at 20:913; *Miller*, *State Trials* at 20:894; *R v Horne* (1777) 2 Cowp 672, 681, 98 ER 1300, 1305 (KB); *St. Asaph*, 3 TR at 429, 100 ER at 659. Willes, J dissented on this point. *St. Asaph*, *State Trials* at 21:1040-41; 4 Dougl 171, 99 ER 824 (1784).

malice are [e]ntirely immaterial,¹⁴⁴ or, as Mansfield directed, that the 'inference of law' of intent 'drawn upon the printing and publishing a libel' was satisfied by 'the lowest to the highest degree of guilt, even to a very venial degree of guilt.'¹⁴⁵ Decisions similarly inferred intent from the fact of publication of alleged criminal libels.¹⁴⁶ As the House of Lords addressed the issue (in its legislative capacity), it determined that the 'criminal intention charged' for a seditious libel 'requir[ed] no proof by the prosecutor and 'admitt[ed] no proof by the accused, and the same was true of the 'criminality or innocence' of the publication.¹⁴⁷

3 Criminalization of Criticism of Government Officials

Spreading false news about the King or a limited class of 'magnates' and officials--*scandalum magnatum*--had been criminalized since 1275 (as the Act was amended in 1378 and 1388). However, the statute did not prohibit making true statements, or false statements about lesser magistrates or prominent people.

The Star Chamber found the statutory framework inadequate. Its decision in *Pickering's Case* (*Case de Libellis Famosis*) in the early seventeenth century,¹⁴⁸ as reported by Coke, slightly extended *scandalum magnatum* to libeling the deceased Archbishop of Canterbury. In his printed report, Coke tagged the case with the name of the capital offense in late Roman law,¹⁴⁹ and generalized the *scandalum magnatum* concept into the claim that a libel 'against a magistrate, or other public person,' is a 'greater offence' than against a private person. The Star Chamber's reason was because 'it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked magis-

¹⁴⁴ *R v Clerk* (1728) 1 Barn KB 304, 94 ER 207 (KB).

¹⁴⁵ *Miller*, *State Trials* at 20:894; accord *R v Cook* (1758) *Mansfield Manuscripts* 2:810, 811 (KB); *R v Wilkie* (1776) *ibid* 2:849 (KB).

¹⁴⁶ E.g., *Blackstone's Commentaries* 4:151 (whether the book or writing 'be criminal'); *R v Topham* (1791) 4 TR 126, 127-28, 100 ER 931, 932 (KB).

¹⁴⁷ *Opinion of the Judges* (1792) *State Trials* 22:297, 300, 297-98 (HL).

¹⁴⁸ Also called *Attorney General v Pickering* (1605) Hawarde 222, *Hudson* 2:103 (Star Chamber); background in *Coldclough* 217-19; *Brant* 4-10.

¹⁴⁹ The civil law offense *de famosis libellis*, Paulus Krueger (ed), *Codex Justinianus* (Weidmann, Berlin 1877) §9.36, at 856.

trates to be appointed and constituted by the King to govern his subjects under him?¹⁵⁰ Coke's report misleadingly claimed to restate the common law, when in fact it fabricated a new crime of seditious libel.¹⁵¹ The Star Chamber regularly found censure of magistrates and bishops to be criminal libel,¹⁵² and in the 1620s-1630s stretched the jurisdiction further to public criticism of 'the King and State'¹⁵³ or of 'all magistrates, and particularly against the king'¹⁵⁴ as seditious libels, which King's Bench under Charles I followed.¹⁵⁵

King's Bench in the Restoration and after continued to treat criticism of magistrates as *libellis famosis*¹⁵⁶ or seditious libel.¹⁵⁷ Even after *Seven Bishops*, it followed the Crown's view of 'publick magistrates' that 'every charge of abuse in the execution of that office is libellous' (even if true), 'as reflecting upon their persons in particular' and 'also a reflection upon the Government'.¹⁵⁸ Consequently, throughout the eighteenth century, prosecutions were brought against critics of governmental officials as criminal libels¹⁵⁹ or seditious libels.¹⁶⁰

¹⁵⁰ *Case de Libellis Famosis* (1605) 5 Coke's Rep 125a, 77 ER 250, 251 (Star Chamber); accord *Shepard* 115, 117; *Hawkins* 1:194; *Conyns* 1:195.

¹⁵¹ *Brant* 5, 7-10; though *Baker* 1:lxii-lxiii cited Star Chamber proceedings against seditious books from the 1560s.

¹⁵² *Proceedings against Mr. Wraynham* (1618) *State Trials* 2:1059; s.c. *Wrennum's Case*, Popham 135, 79 ER 1237 (Star Chamber) (slander); *Whitacre v Moody* (1627) *Rushworth* 7 (Star Chamber); *Thelwel v Holman* (1627) *ibid* 3:12 (Star Chamber); *Bishop of Worcester v Boyer* (1629) *ibid* 3:21 (Star Chamber); *R v Norton* (1630) *ibid* 3:29, 30 (Star Chamber); *R v Jones* (1630) *ibid* 3:31 (Star Chamber); *R v Morgan* (1630) *ibid* 3:33 (Star Chamber); *R v Reynolds* (1633) *ibid* 3:58 (Star Chamber); *R v Bowyer* (1633) *ibid* 3:61 (Star Chamber). *Wraynham*, *Bishop of Worcester*, *Reynolds*, and *Bowyer* were under the Act of 1381, and the others involved extension to other judicial officials.

¹⁵³ *R v Perkins* (1627) *Rushworth* 8 (Star Chamber).

¹⁵⁴ *Prynn*, *State Trials* at 3:575; see *R v Cavley* (1602) *Hawarde* 146 (Star Chamber) ('infamous libel' that officials embezzled).

¹⁵⁵ *Case of Eliot, Hollis and Valentine* (1629) *State Trials* 3:293, 308 (KB); s.c. *Cro Car* 181, 605, 79 ER 759, 1121; *Jeffes' Case* (1629) *Cro Car* 175, 79 ER 753 (KB).

¹⁵⁶ E.g., *R v Banks* (1666) 2 Keble 22, 84 ER 14 (KB); *R v Dangerfield* (1685) 3 Mod 68, 87 ER 43 (KB); *R v Dutton* (1698) 12 Mod 250, 88 ER 1298 (KB); *R v Orme and Nutt* (1699) 1 Ld Raym 486, 91 ER 1224; s.c. *Alme & Nott* 3 Salkeld 224, 91 ER 790 (KB).

¹⁵⁷ E.g., *Seven Bishops*, *State Trials* at 12:426, 427, 429; *R v Bell* (1700) 12 Mod 348, 88 ER 1372 (KB).

¹⁵⁸ *R v Griffin* (1733) W Kel 292, 294, 25 ER 621, 622 (KB).

¹⁵⁹ *R v Bedford* (1702-15) Gilb Cas 297, 93 ER 334 (KB) (seditious libel); *R v Smith* (1725) Sess Cas 134, 93 ER 135 (KB); *R v How* (1725) Sess Cas 134, 93 ER 136; 2 Strange 699, 93 ER 793 (KB) (though judgment for defendant because indictment inadequately specific); *R v Dormer* (1726) 1 Barn KB 13, 94 ER 9 (KB); *Anonymous* (1731) 2 Barn KB 43, 94 ER 345 (KB); *R v Pownell* (1731) W Kel 68, 25 ER 488 (KB); *R v Griffin and Banyere* (1733) 2 Barn KB 558, 94 ER 558 (KB); *Bolingbroke v Woodfall* (1777) *Mansfield Manuscripts* 2:847 (KB); *R v Bew* (1781) *ibid* 2:853 (KB); *R v Jolliffe* (1791) 4 TR 285, 100 ER 1022; 2 TR 90, 100 ER 50 (KB).

The reason why libel of magistrates was deemed more serious than libel of private persons, 'that it tends to scandalize the Government,'¹⁶¹ generated constant pressure to treat libel of the government generally as a still more serious offence. Laws such as those of the Cavalier Parliament often trumpeted the threat of spoken or published words to government. The Licensing Act of 1662 castigated 'heretical, schismatical, blasphemous, seditious and treasonable books, pamphlets and papers' during the late war, and prohibited printing (to be enforced by denial of licensing) such publications that 'tend or be to the scandal of religion, or the Church, or the government or governors of the Church, State or commonwealth.' The Act for the Preservation of the King of 1661 criminalized criticism of King or government,¹⁶² and the Act against Tumultuous Petitioning that year criminalized many petitions disparaging laws or government.¹⁶³ Royal decrees on dissent, political and religious, more and more proscribed expression critical of government as well as governors,¹⁶⁴ and were supported by the judges whose opinion to Charles II was that publications 'scandalous to the government' may be seized and their authors and printers punished under common law.¹⁶⁵ Monarchs after the Revolution were particularly sensitive to criticism as the ex-King and the ex-Prince sat across the channel, and criticism of the government multiplied with the expansion of newspapers and periodicals after 1695.

Suppression of criticism of government was a punishment in search of a crime, reaching its apogee in Justice Allybone's opinion in *Seven Bishops* that 'no private man can take upon him to write concerning the government at all,' because 'it is the business of subjects to mind only their own properties and interests,' or else that person is 'a libeller'--and 'every libel

¹⁶⁰ E.g., *Franklin*, *State Trials* at 17:659; *Trial of William Owen* (1752) *State Trials* 18:1203 (KB); s.c. Sayer 30, 96 ER 792; *Almon*, *State Trials* at 20:803; *Miller*, *State Trials* at 20:869; *Information* (1772-74) Lofft 462, 98 ER 748 (KB); *Information* (1772-74) Lofft 544, 98 ER 791 (KB).

¹⁶¹ *Hawkins* 1:194; accord *Bacon* 3:491; *Colclough* 217.

¹⁶² 13 Car 2, stat 1, c1 (1661); *EHD* 8:63-64 §§I-II.

¹⁶³ 13 Car 2, stat 1, c5 (1661); *EHD* 8:66 §I (petitions disparaging laws or raising grievances against government if signed by more than twenty persons or delivered by more than ten).

¹⁶⁴ E.g., 13-14 Car 2 c33 (1662); *EHD* 8:67 §I.

¹⁶⁵ *Harris*, *State Trials* at 7:929; see *Brant* 12, 13.

against the government carries in it sedition.¹⁶⁶ The Lord Chief Justice agreed, frantically stretching libel, that 'any thing that shall disturb the government... is certainly within the case of "Libellis Famosis".'¹⁶⁷ Judges had long festooned seditious libel cases with declarations about the perfidiousness of criticizing the government,¹⁶⁸ though in dicta.¹⁶⁹ The Crown's charges in seditious libel cases had long alleged libel of the Government as well as of the King or particular officials, before¹⁷⁰ and after the Revolution,¹⁷¹ doubtless recognizing that censure of 'the Government' had the same effect as censure of the King or the Secretary of State, and such charges became a larger proportion after 1695.¹⁷²

4 Criminalization of Criticism of Government Generally

The law of defamation generally required that a writing 'must descend to particulars and individuals to make it a libel.'¹⁷³ It was actionable only if 'the person who is scandalised is certain,'¹⁷⁴ and cases for libel of a large group could not be maintained.¹⁷⁵ Generally in criminal law, a specific victim was generally required--a person murdered, a person robbed.

The Star Chamber, however, as it found publications to be seditious libels, interlaced discussion of their negative reflection on the King with their negative reflection on government gener-

¹⁶⁶ *Seven Bishops*, *State Trials* at 12:428, 429.

¹⁶⁷ *Ibid* 12:426.

¹⁶⁸ E.g., *Dover*, *State Trials* at 6:540n, 548, 558, 564; *Barnardiston*, *State Trials* at 9:1351, 1353, 1365, 1367, 1369.

¹⁶⁹ *Hamburger* 701, 714; accord *R v Prin [Pym]* (1664) 1 Keble 773, 83 ER 1235; 1 Sid 219, 82 BR 1068 (KB).

¹⁷⁰ *Prynn*, *State Trials* at 3:574; *Seven Bishops*, 3 Mod at 213, 214, 87 ER at 137.

¹⁷¹ *R v Bear* (1699) Holt KB 422, 422, 423-24, 90 ER 1132, 1132, 1133 (abridgment); 1 Ld Raym 414, 91 ER 1175; 1 Salkeld 324, 91 ER 287; 2 Salkeld 417, 646, 91 ER 363, 547; 3 Salkeld 226, 91 ER 791; Carthew 407, 90 ER 836; (*Beere*) 12 Mod 218, 88 ER 1274 (KB); *R v Tayler* (1703) 3 Salkeld 199, 91 ER 775; 2 Ld Raym 879, 92 ER 88 (KB); *R v Langley* (1703) 6 Mod 124, 87 ER 882 (KB).

¹⁷² *Hawkins* 1:194; *Calendar-William* 6:30, 6:117, 7:425, 7:431, 7:488, 8:51, 8:53, 10:364; *Calendar-Anne* 4: no. 945. Some alleged libel of Parliament. *Calendar-William* 7:431, 7:488.

¹⁷³ *R v Alme & Nott* (1699) 3 Salkeld 224, 91 ER 790; s.c. *Alme & Nott* 3 Salkeld 224, 91 ER 790 (KB); accord *Hawkins* 1:195; *OHLE* 6:795.

¹⁷⁴ *Jeames v Rutleth* (1599) 4 Coke's Rep 17a, 17b, 76 ER 900; *B&M* 702, 703 (KB); accord *Bacon* 3:493; *Conyns* 1:207.

¹⁷⁵ *R v Osborne* (1732) W Kel 230, 25 ER 584; 2 Barn KB 166, 94 ER 425 (KB); see *Anonymous* (1731) 2 Barn KB 138, 94 ER 406 (KB) (though different result stated in Kelynge report).

ally,¹⁷⁶ ignoring that criticism of government generally does not 'descend to particulars and individuals.' Holt followed the Star Chamber approach, departing from the defamation approach.

Holt appears to have searched for the right case to expand seditious libel doctrine to prohibit criticism of government. In 1699, he wrote that 'transcribing and collecting' material critical of government 'was highly criminal, without publishing it, and . . . was of dangerous consequence to the Government,'¹⁷⁷ but did not dispose of the case on that basis because it was enmeshed in challenges to the wording of the indictment. In 1703, he characterized spoken words calling a mayor 'a rogue and a rascal' as 'a disparagement of the Government, who put an ill man into office,' but did not base the decision on that ground where the words were not written but spoken, acknowledging that 'this is an extraordinary thing to indict a man for these [spoken] words.'¹⁷⁸ On further argument, Holt remained 'not satisfied that these words will maintain an indictment,' but ominously added that if Langley 'had abused him in writing, that would have been indictable.'¹⁷⁹ A year later, a case involved exactly that.

John Tutchin, publisher of the *Observer*, regularly printed such criticisms as 'that the Government is maladministred by corrupt persons.'¹⁸⁰ Prosecuted for seditious libel in *R v Tutchin* in 1704,¹⁸¹ his primary defense was that 'there can be no libel, where no person certain is reflected upon, or scandalized.'¹⁸² Holt rejected the defense and ruled that 'a libel, reflecting on the Government,' could be prosecuted as well as criticism of particular officials.

¹⁷⁶ *R v Perkins* (1627) *Rushworth* 8 (Star Chamber); and in cases alleging miscarriage of justice, treated as defamation of judges, *R v Mady* (1628) *ibid* 3:15 (Star Chamber); *Smith v Crokey* (1632) *ibid* 3:37 (Star Chamber); see *Whitacre v Moody* (1627) *ibid* 3:7 (Star Chamber).

¹⁷⁷ *R v Bear* (1699) Carthew 407, 409, 90 ER 836, 837 (KB).

¹⁷⁸ *R v Langley* (1703) 2 Ld Raym 1029, 1029-30, 92 ER 184, 184; 6 Mod 124, 87 ER 882 (KB). Raymond's report is far superior to Modern's.

¹⁷⁹ 2 Ld Raym at 1031, 92 ER at 185.

¹⁸⁰ *Trial of John Tutchin* (1704) *State Trials* 14:1095, 1125 (KB); *s.c.* 6 Mod 164, 268, 90 ER 922, 1014; 2 Ld Raym 1061, 92 ER 204; 1 Salkeld 51, 91 ER 50; Holt KB 56, 424, 90 ER 929, 1133; see *ODNB* 55:708. *State Trials* provides the most thorough report, based on a courtroom stenographer.

¹⁸¹ Holt KB at 424, 90 ER at 1133; Holt KB 56, 90 ER 929; 6 Mod 268, 90 ER 1014; *State Trials* at 14:1125-28.

¹⁸² *State Trials* at 14:1119.

Holt's justification for extending the bounds of seditious libel was overtly partisan:¹⁸³

If men 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 every Government, that the people should have a good opinion of it. And nothing can be worse to any Government, than to endeavour to procure animosities as to the management of it. This has been always look'd upon as a crime, and no Government can be safe unless it be punished.¹⁸⁴

Consequently, he instructed the jury to 'consider, whether these words I have read to you, do not tend to beget an ill opinion of the administration of the government?'¹⁸⁵ Though dicta existed to that effect, Holt is described as 'the first to rely upon this doctrine in a decision,'¹⁸⁶ at least other than *R v Pym* in 1664.¹⁸⁷ This dramatic extension of seditious libel doctrine occurred only five years after Holt held that a libel 'must descend to particulars and individuals to make it a libel!'¹⁸⁸

Libel of government quickly became the central claim in seditious libel prosecutions,¹⁸⁹ such as the seditious libel prosecution of printer Richard Francklin for publishing a diplomatic letter that was charged with tending to 'vilify the administration of his present majesty's government.'¹⁹⁰

The amorphous nature of expanding seditious libel to criticism of government generally was reflected in the treatises. A 1662 treatise asserted that 'there is a slander of the state'

¹⁸³ As was Holt's reversal on a technicality as Tory power waned and Whig power grew. Holt KB at 425, 90 ER at 1134; Holt KB 56, 57, 90 ER 929; 6 Mod 268, 90 ER 1014; 2 Ld Raym 1061, 92 ER 204 (1704); accord Lee S Horsley, 'The Trial of John Tutchin, Author of the "Observer"' (1973) 3 Yearbook of English Studies 124, 136-37; Kenyon 109. The Raymond report is more precise than Modern, which is abridged in Holt.

¹⁸⁴ Holt KB at 424, 90 ER at 1133-34; accord *State Trials* at 14:1128; *Hamburger* 735.

¹⁸⁵ *State Trials* at 14:1128.

¹⁸⁶ *Hamburger* 735, 736. Two years earlier, Holt told an accused the law forbid him 'to make libels, nor traduce ministers of state.' *Trial of William Fuller* (Isaac Cleave, London 1702) 12; accord *Trial of William Fuller* (1702) *State Trials* 14:517, 536 (KB).

¹⁸⁷ *R v Pym* (1664) 1 Sid 219, 82 ER 1068 (KB) ('containe matter de grand scandal al government car fist le late government melior que cel--contains matter of great scandal to government of the city by representing the late government was better than the present).

¹⁸⁸ *R v Alme & Nott* (1699) 3 Salkeld 224, 91 ER 790 (KB). That rule was still being stated in 1716. *Hawkins* 1:195.

¹⁸⁹ E.g., *R v Earbury* (1732) 2 Barn KB 293, 94 ER 509; 2 Barn KB 346, 374, 94 ER 544, 562; Fortescue 37, 92 ER 751 (KB); s.c. *State Trials* 19:1016; *R v Rayner* (1732) 2 Barn KB 232, 293, 94 ER 469, 509 (KB); Owen, *State Trials* at 18:1204; *Almon*, Wilm at 243-44, 97 ER at 95; *Almon*, *State Trials* at 20:803; *Woodfall*, *State Trials* at 20:902; *R v Bostock* (1790) *State Trials* 22:308 (KB). The same is true of the *Miller*, *Williams*, *Horne*, *St. Asaph/Shipley*, *Gordon*, and *Stockdale* cases.

¹⁹⁰ *Trial of Mr. Richard Francklin* (1731) *State Trials* 17:625, 628 (KB); see *ODNB* 20:752.

without categorizing it,¹⁹¹ and one in 1716 listed 'contempts against the King's person or government' (including 'any thing which may lessen him in the esteem of his subjects, and weaken his Government') without calling it sedition.¹⁹² Neither listed seditious libel or seditious words as a 'plea of the Crown'.¹⁹³ However, Holt's necessity of state reasoning took hold, and even near the end of the eighteenth century, the chief justice, allowing criminal prosecution of criticism of a court decision, declared that nothing was 'of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made on courts of justice'; and was joined by another justice bewailing that 'there is no case which calls more loudly for the interference of this court' in allowing prosecution.¹⁹⁴

5 Elimination of Jury Finding of a Crime and Criminal Intent

Trial by jury was often described as 'the palladium of English liberty' and figured large in 'the "ancient constitution" ideology',¹⁹⁵ though juries commonly were packed by prosecutors¹⁹⁶ and commonly deferred to judges' instructions that were 'pointed and leading, if not coercive'.¹⁹⁷ Common law enshrined the jury's right to determine factual matters¹⁹⁸ and to apply law given by the judge to those facts. In criminal law generally, the jury determined if

¹⁹¹ *Sheppard* 2, other than differentiating it from *scandalum magnatum* or *libellis famosus*, *ibid* 16, 115.

¹⁹² *Hawkins* 1:60; accord *Blackstone's Commentaries* 4:123 (relying on *Hawkins*); *State Law: or, the Doctrine of Libels, Discussed and Examined* (2nd ed Nutt, London [1714]) 67 (seditious libel).

¹⁹³ Hale's discussion of crimes was limited to felonies. *Hale* 1:i-iv, 2:i-iv (though there were occasional references to sedition, 1:77-78, 115, 311-12, 319, 324, 333-34, 681; 2:28, 115); accord Matthew Hale, *Pleas of the Crown* (Richard Atkyns, London 1682) i-v. Blackstone reflected continuing confusion in 1769 by describing 'speaking or writing' against 'the King's person and government' as a different crime from seditious libel toward magistrates. *Blackstone's Commentaries* 4:123, 150 (though the first reference treated sedition as a type of contempt, and the second as criminal defamatory libel).

¹⁹⁴ *R v Watson* (1788) 2 TR 199, 205, 207, 100 ER 108, 113 (KB).

¹⁹⁵ *Baker-Introduction* 508; Michael RT Macnair, *The Law of Proof in Early Modern Equity* (Duncker & Humblot, Berlin 1999) 286; see *ibid* 288; accord Bill of Rights (1689), *EHD* 8:122, 124.

¹⁹⁶ *Harling* 116-17; *Mansfield Manuscripts* 2:783, 835; e.g., [George Lyttleton], *Considerations upon the Present State of Our Affairs* (T Cooper, London 1749) 36.

¹⁹⁷ Thomas A Green, *Verdict According to Conscience* (UChiP, Chicago 1985) 271; accord *Mansfield Manuscripts* 2:835 n1; e.g., *Trial of Benjamin Harris* (1680) *State Trials* 7:925, 929-30 (KB).

¹⁹⁸ *Hale* 2:277.

the accused 'be guilty or not guilty,'¹⁹⁹ which included whether the facts constituted the offense and whether the accused acted with criminal intent. Holt himself described the normal provinces of jury and judge in criminal cases, saying that criminal intent 'is matter of evidence for a jury to find the fact, and not for judges to intend it' or to 'condemn him as guilty of it.'²⁰⁰ In the law of defamation generally, the province of the jury presumptively was to determine if the defendant was guilty or liable (as in *Seven Bishops* and *Owen*²⁰¹), which would incorporate the factual determinations whether the words or writing were defamatory, and whether the defendant acted with malicious intent.²⁰² However, the courts narrowed the scope of jury determinations uniquely in cases of libel.

The Star Chamber had determined seditious libel and other criminal cases without grand jury indictments²⁰³ and without trial juries.²⁰⁴ Similarly, its use of informations for seditious libel²⁰⁵ (and other cases) was followed by King's Bench,²⁰⁶ as was its elimination of a defense of truth and of an affirmative showing of malice or criminal intent in seditious libel and other criminal libel prosecutions. Instead, the King's Bench of the later Stuarts instructed the jury that its only function was finding the accused guilty or innocent of publication: 'the question before you is, whether the defendant be guilty of writing these malicious, seditious letters.'²⁰⁷

¹⁹⁹ *Hale* 2:294; for examples in Holt's cases, *Trial of Charles Duncombe* (1699) *State Trials* 13:1061, 1106, 1103 (KB) (fraud and deceit); *Trial of Mary Butler* (1699) *State Trials* 13:1249, 1262 (KB) (forgery); *Trial of Haagen Swendsen* (1702) *State Trials* 14:597, 596 (KB) (criminal seduction). In non-felonies where offences did not involve forfeiture, 'the jury need not find the special matter' but could render a general verdict. *Hale* 2:303; accord *Mansfield Manuscripts* 2:928, 1069-70.

²⁰⁰ *R v Plummer* (1701) 12 Mod 627, 627-28, 88 ER 1565, 1565; Kelyng 109, 84 ER 1103 (KB).

²⁰¹ *Seven Bishops*, *State Trials* at 12:430; *Owen*, *State Trials* at 18:1228.

²⁰² RH Helmholtz, 'Civil Trials and the Limits of Responsible Speech,' in RH Helmholtz and Thomas A Green, *Juries, Libel and Justice* (Clark Memorial Library, Los Angeles 1984) 1, 22.

²⁰³ *Baker-Introduction* 506-07; e.g., *Prynn*, *State Trials* at 3:561.

²⁰⁴ *OHLE* 6:351, 197; *Baker-Introduction* 119.

²⁰⁵ *Baker-Introduction* 507; e.g., *Harris*, *State Trials* at 7:925; *Barnardiston*, *State Trials* at 9:1333; *Tutchin*, *Holt KB* at 56, 90 ER at 929; *Holt KB* at 424, 90 ER at 1133; *Francklin*, *State Trials* at 17:625.

²⁰⁶ E.g., *Barnardiston*, *State Trials* at 9:1333; *Baxter*, *State Trials* at 11:497; *Seven Bishops*, *State Trials* at 12:430.

²⁰⁷ *Barnardiston*, *State Trials* 9:1355; accord *ibid* 9:1352; *Dover*, *State Trials* 6:563; *Seven Bishops*, *State Trials* 12:425; see *Hudson* 2:103. Where reference was indirect, another issue was whether words referred to particular officials. *Baxter*, *State Trials* at 11:501.

The judges determined whether they were 'seditious, and malicious,' publications.²⁰⁸

The danger of a jury acquitting the accused of seditious libel was highlighted by *Paine*,²⁰⁹ *Seven Bishops* eight years before,²¹⁰ and other cases afterward.²¹¹ Leaving to the jury whether the publication was a seditious libel, as *Seven Bishops* effectively did because of the even division of the bench,²¹² had been lethal to prosecution. Further, grand juries could refuse to indict, which led to sedition prosecutions being brought by information in King's Bench after 1690,²¹³ as they had been in Star Chamber, despite challenge.²¹⁴

Holt and his colleagues reaffirmed the Star Chamber and subsequent King's Bench rule that the determination whether content was libelous should be by judge rather than jury,²¹⁵ and took a further step to keep it that way, in *R v Bear* in 1699.²¹⁶ Bear was found guilty of copying 'false and scandalous libels' about 'the King and Government,' though not of writing or publishing them.²¹⁷ Holt ruled that 'the Court must be judge of the words themselves,' and he required the indictment or information to give 'a transcript' of the accused's words,²¹⁸ obviously to make that possible without jury fact-finding. The latter requirement again broke with precedent,²¹⁹ while seventeenth century decisions generally had recited the libelous words,²²⁰ prior

²⁰⁸ *Barnardiston*, *State Trials* 9:1352; accord *ibid* 9:1355; *Seven Bishops*, *State Trials* 12:425.

²⁰⁹ *R v Paine*, 5 Mod at 165, 87 ER at 585 (verdict of physical writing but not 'composing and making the libel').

²¹⁰ *Seven Bishops*, *State Trials* at 12:430-31.

²¹¹ *R v Bear* (1699) 2 Salkeld 417, 417, 419, 91 ER 363, 363, 365 (KB) (verdict of physical writing but not composing); *Hamburger* 729 (other case).

²¹² *Seven Bishops*, *State Trials* at 12:425-29; accord *Green* 41-42.

²¹³ *Baker-Introduction* 507; *Mansfield Manuscripts* 2:775.

²¹⁴ *Prynne's Case* (1690) 5 Mod 459, 463-64, 87 ER 764, 766; Holt KB 362, 90 ER 1100 (KB); *Mansfield Manuscripts* 2:775. Modern's report is more detailed and accurate than Holt's.

²¹⁵ *Mansfield Manuscripts* 2:781.

²¹⁶ *R v Bear* (1699) (*Beare*) 1 Ld Raym 414, 91 ER 1175; 1 Salkeld 324, 91 ER 287; 2 Salkeld 417, 646, 91 ER 363, 547; 3 Salkeld 226, 91 ER 791; Carthew 407, 90 ER 836; Holt KB 422, 90 ER 1132; (*Beere*) 12 Mod 218, 88 ER 1274 (KB); accord *Hamburger* 728-34. The report by Lord Raymond gives by far the most detail; Holt appears to abridge Carthew and is limited; Salkeld is still more abbreviated.

²¹⁷ 1 Ld Raym at 414-15, 91 ER at 1175; Holt KB at 422, 90 ER at 1132. Bear's first of eight ballads about King William was unflatteringly entitled the 'Belgick Boar.'

²¹⁸ 2 Salkeld at 417, 91 ER at 364. The indictment must state 'the specific words mentioned in the libel'; giving the libelous words 'in effect' would be insufficient, 1 Ld Raym at 415, 91 ER at 1175, 1176; accord Holt KB at 423, 90 ER at 1133; 3 Salkeld at 226, 91 ER at 791-92; accord *Hamburger* 729.

²¹⁹ *Hamburger* 731.

decisions held that only the substance of the libelous words need be pleaded.²²¹

Holt and the other judges likewise reaffirmed the rule (discussed above) that malice or criminal intent need not be affirmatively proved, but instead was inferred by the judges from writings. In *Bear*, he held that the person 'putting the infamous matter into writing' is 'highly criminal' and 'cannot be construed to be innocent' of the crime, and the same was true of each person who re-wrote or printed it.²²² This too broke with precedent²²³ that it was necessary for the accused to have known of publication or to have intended to publish.²²⁴ Anticipating those criticisms, Holt ended by brandishing the claim that 'this notion of libelling is as old as the law,' and again filled in what relevant precedent did not provide with necessity of state:

And if the law were otherwise it might be very dangerous, for then men might take copies of [libels] with impunity; and for the same reason the printing of them would be no offence; and then farewell[!] to all government. . . . Libelling against a private man is a moral offence; but when it is against a government, it tends to the destruction of it.²²⁵

Both rulings greatly assisted prosecution of dissent, not only by adopting Star Chamber rules but by adding further jury impediments; juries could not properly acquit dissidents by finding their writings nonlibelous, by finding that the accused lacked criminal intent, or by finding publication unintentional or unknown to the accused. Later courts in seditious libel cases bypassed any jury determination of a criminal writing or criminal intent, as discussed earlier.

The ruling about the indictment or information was followed in *R v Drake*²²⁶ in 1706.

²²⁰ *Baker* 2:238, 243 (but see *ibid* 2:238); *OHLE* 6:784-85.

²²¹ *Sheppard* 19, 114.

²²² 2 *Salkeld* 417-18, 91 ER at 364; accord *Holt* KB at 423, 90 ER at 1133 ('highly criminal, without publishing it'); accord *Hamburger* 7732,733. The mere putting a libel into writing, without composing it, makes one 'a libeller' and 'is criminal.' 1 *Ld Raym* at 416, 91 ER at 1176. Holt's list of elements of the crime did not include either publication or intent. 1 *Ld Raym* at 417, 91 ER at 1177; 2 *Salkeld* at 419, 91 ER at 365; *Tuchin*, *Holt* KB at 424, 90 ER at 1133.

²²³ *Hamburger* 730.

²²⁴ See *Anon.* (1562) *B&M* 707 (KB) (not defamation if written statement 'neither published nor made known to others'); *Edwardes v Woolfjton* (1607) 12 Co Rep 35, *B&M* 708 (Star Chamber); *Dover, State Trials* at 6:563; accord *OHLE* 6:798; *Ibbetson* 116-17.

²²⁵ 1 *Ld Raym* at 417-18, 91 ER at 1177; accord *Holt* KB at 424, 90 ER at 1133.

²²⁶ *R v Drake* (1706) 3 *Salkeld* 224, 91 ER 790; 2 *Salkeld* 660, 91 ER 563; 11 *Mod* 95, 88 ER 919; *Holt* KB 347, 349, 350, 425, 90 ER 1092, 1093, 1093; 1134 (KB); accord *Hamburger* 736-37.

There, Holt stated that, unlike an information saying the defendant wrote words 'to the effect following' which would 'leave the construction of it to the jurors,' specifying the words leaves interpretation 'to conclude the court.'²²⁷ If Modern's report is accurate,²²⁸ Holt encouraged prosecutors to quote libels in Latin (which was more readily understood by judges than jurors), rather than in English,²²⁹ by creating the different standards that any variance (even one letter) 'in these English words. . . spoils the whole information' and requires judgment for the accused, while '[i]f it had been in Latin it had been good.'²³⁰

Mansfield later interpreted *Bear* in the same way: the reason for requiring 'that the writing complained of must be set out' is that 'the court may judge of the very words themselves; whereas, if it was to be *according to the effect*, that judgment must be left to the jury.'²³¹ Thus, 'the question remains entirely for the Court' whether the writing was criminal, and the issue for the jury is limited to 'the fact of publication' and whether any innuendos meant the person defamed.²³² Mansfield bootstrapped that requirement for setting out the libelous words to create a mandate that the judge rather than the jury must determine whether a publication is libelous: 'It is almost peculiar to the form of the prosecution for a libel, that the question of law remains entirely for the Court *upon record*,' and that availability of the publication 'open upon the record' creates a 'duty of the judge to advise the jury to separate. . . the question of law.'²³³ He thereby acknowledged the 'peculiar' deviation from what a jury determined in other areas of criminal law.

The effect of Holt's rulings was to narrow to triviality what the jury was to determine. Holt

²²⁷ *Hamburger* 736-37, quoting *R v Drake*, Hardwicke Papers (British Library Add. M.S. 35980) at 13-14, though the point is not mentioned in other reports. Holt upheld judgment for the defendant because the information misquoted the libel, though by only one letter. 91 ER at 791, 3 Salkeld at 225.

²²⁸ Holt's and Salkeld's reports do not contain the statement that the quotation in Latin would have been good. Salkeld's report is more precise than Holt's, which appears to copy him.

²²⁹ As they commonly were recited, *OHLE* 6:784-85, 786; e.g., *R v Harrison* (1677-78) 3 Keble 841, 84 ER 1044 (KB).

²³⁰ 88 ER at 920, 11 Mod at 96-97. Latin indictments ended in 1731. 4 Geo 2 c26.

²³¹ *St. Asaph*, *State Trials* at 21:1036; accord *Woodfall*, 5 Burr at 2666, 98 ER at 400; *Hamburger* 737 n232.

²³² *St. Asaph*, 3 TR at 428, 100 ER at 658-59, 660; accord *Woodfall*, *State Trials* at 20:902.

²³³ *St. Asaph*, *State Trials* at 21:1035; accord *Woodfall*, 5 Burr at 2666, 98 ER at 400 ('upon the face of the record').

began to state that the issue to be determined by the jury was whether the accused 'is guilty of writing, composing, or publishing these libels.'²³⁴ Lord Chief Justice Raymond stated the jury issues similarly in *R v Francklin*, as simply whether the accused published the item and whether its expressions refer to the libeled persons, leaving to the judge '[w]hether these defamatory expressions amount to a libel.'²³⁵ Lord Chief Justice Lee did the same in *R v Owen*, adding that 'the fact of publication was fully proved' and so 'the jury ought to find the defendant guilty,'²³⁶ at the urging of then-Solicitor General Murray over the opposition of then-defense counsel Pratt.²³⁷

The battle was joined in the cases of John Wilkes and 'Junius,' both well publicized and watched in America,²³⁸ as Murray became Lord Chief Justice Mansfield and Pratt became Lord Chief Justice Pratt and, in 1766, Lord Chancellor Camden.²³⁹ As Wilkes was prosecuted for seditious libel for criticizing the King's speech²⁴⁰ in his newspaper *North Briton No. 45* in 1763,²⁴¹ Pratt released him based on Wilkes' parliamentary privilege,²⁴² and later ruled that the general warrant by which Wilkes and his papers were seized was illegal, after which the jury

²³⁴ *Tutchin*, Holt KB at 424, 90 BR at 1133; accord *The Tryal of William Fuller* (Isaac Cleave, London 1702) 13. And if relevant, whether words were irony. *R v Dr. Browne* (1706) Holt KB 425, 90 ER 1134 (KB).

²³⁵ *Francklin*, *State Trials* at 17:671-72. Not surprisingly he was found guilty, *ibid* 676, and the verdict was upheld over posttrial motions. *R v Franklin* (1731) W Kel 76, 25 ER 499; Sess Cas 220, 93 ER 222; 2 Barn KB 117, 94 ER 393; Fitz-G 5, 94 ER 628 (KB); W Kel 86, 25 ER 504 (1732). Accord *R v Clerk* (1728) 1 Barn KB 304, 94 BR 207 (KB). For background, see *Harris-Newspapers* 146-53.

²³⁶ *Trial of William Owen* (1752) *State Trials* 18:1203, 1228 (KB).

²³⁷ *Ibid* 18:1222-23, 1228, 1226; *Parliamentary History* 29:1408 (31 May 1792); see CHS Fifoot, *Lord Mansfield* (OUP, Oxford 1936) 44-45. The jury acquitted Owen of seditious libel for selling a publication that reflected negatively on the Commons. *Ibid* 1228-29.

²³⁸ Pauline Maier, 'John Wilkes and American Disillusionment with Britain' (1963) 20 *William and Mary Quarterly* 373, 374; e.g., *An Authentick Account of the Proceedings against John Wilkes* (np, [Boston] 1763); *An Interesting Appendix to Sir William Blackstone's Commentaries . . . The Case of the Late Election of the County of Middlesex* (Robert Bell, Philadelphia 1772) 59, 61-63, 103-04; *The Palladium of Conscience . . . Containing . . . Blackstone's Case of the Middlesex Election* (Robert Bell, Philadelphia 1774).

²³⁹ Charles Pratt, first Baron Camden 1765, first Earl Camden 1786. *ODNB* 45:211.

²⁴⁰ *North Briton No.45* (23 Apr.1763), *EHD* 10:252, 252-53; accord *Thomas* 27-29.

²⁴¹ *Case of John Wilkes* (1763) *State Trials* 19:982 (KB); see generally George Rudé, *Wilkes and Liberty* (CP, Oxford 1962); Peter DG Thomas, *John Wilkes: A Friend to Liberty* (CP, Oxford 1996); Arthur H Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (YUP, New Haven 2006); Vallance 205-29. The cynical view of Wilkes is in *Dickinson-Politics* 224-25; *Thomas* 215-20; Jonathan G Conlin, 'High Art and Low Politics: A New Perspective on John Wilkes' (2001) 64 *Huntington Library Quarterly* 356, 375-78.

²⁴² *R v Wilkes* (1763) 2 Wils KB 151, 159-60, 95 ER 737, 742 (CP); *State Trials* 19:982, 990-93; accord *Rudé* 26-27; *Thomas* 30-31.

awarded Wilkes damages.²⁴³ Though the House of Commons disagreed that seditious libel was protected by parliamentary privilege,²⁴⁴ concern about the doctrine was sufficiently stirring that seventeen of the House of Lords dissented and challenged 'the severity of the law touching libels' and its propensity 'to be abused by outrageous and vindictive prosecutions.'²⁴⁵ A year after Camden's decisions, Mansfield presided over Wilkes' trial and conviction for seditious libel, which were upheld.²⁴⁶ Wilkes responded by condemning the 'Star Chamber proceedings,' standing on freedoms of speech and press, and accusing Mansfield of suppressing them.²⁴⁷

There can be no such thing, my lord, as public liberty, without freedom of speech, which is the right of every man; this sacred privilege is so essential to free governments, that the security of property and freedom of speech always go together . . .

. . . Freedom of speech, my lord, is the great bulwark of liberty, they prosper and die together; the liberty of the press is the terror of traitors and oppressors, and a barrier against them. . . .²⁴⁸

In the *Wilkes* case as in other seditious libel actions, Mansfield limited the jury issues in the same way as Holt, Raymond, and Lee.²⁴⁹ By the end of his career he said he had 'uniformly' in seditious libel cases limited juries to determining whether the accused published the libel and whether 'the meanings of the innuendos were as stated,' and instructed juries that if they found those points proved 'they ought to find the defendant guilty.'²⁵⁰ (Mansfield also said juries routinely followed his directions 'except in political causes.'²⁵¹) Camden, by contrast, believed juries

²⁴³ *Wilkes v Wood* (1763) Lofft 1, 19, 98 ER 489, 499 (CP); *State Trials* 19:1153, 1166-67; accord *Rudé* 28-30; *Thomas* 32-35, 46.

²⁴⁴ *Select Statutes-Cases* 302, reprinting *JHC* 29:667, 675 (14 Nov. 1763, 24 Nov. 1763); accord *Rudé* 33-34; *Thomas* 36-42. Simultaneously Parliament found his 'Essay on Women' an obscene libel. *Rudé* 33; *English Society* 309-10.

²⁴⁵ *State Trials* 19:994-99; *JHL* 30:426 (29 Nov. 1763), reprinted in *Select Statutes-Cases* 302, 305, 308; accord *Thomas* 45.

²⁴⁶ *Wilkes v R* (1769) Wilm 322, 323, 339-40, 97 ER 123, 124, 130; 4 Brown PC 360, 2 ER 244 (HL). Mansfield reversed Wilkes' outlawry, and the judges sentenced Wilkes to fines totaling £1000 and imprisonment 22 months. *R v Wilkes* (1770) 4 Burr 2527, 2565-66, 2574, 98 ER 327, 349, 353-54 (KB).

²⁴⁷ John Wilkes, *A Letter to the Right Honourable William Lord Mansfield* (John Wilkes, London 1768) 13.

²⁴⁸ *Ibid* 12-13, 24.

²⁴⁹ *Woodfall*, 5 Burr at 2666, 98 ER at 400; *R v Horne* (1777) 2 Cowp 672, 679, 98 ER 1300, 1304 (KB); accord *Mansfield Manuscripts* 2:777; *R v Nutt* (1755) *Mansfield Manuscripts* 2:784 (KB) (as prosecutor).

²⁵⁰ *St. Asaph*, *State Trials* at 21:1038, though Mansfield arrested judgment for deficiency in indictment, *ibid* 21:1044. The trial judge, Buller, similarly limited the jury issues. *Ibid* 21:946.

²⁵¹ Frederick A. Pottle and Marion S. Pottle (eds), *Private Papers of James Boswell* (YUP, New Haven 1950) 7:177; accord *Mansfield Manuscripts* 2:835 n1.

should render general verdicts on all issues, as he instructed his Wilkes jury to do,²⁵² including determining whether writings were libelous and whether statements were with criminal intent.²⁵³

Mansfield and Camden disagreed over broader issues of constitutionalism as well, with the former claiming and practicing judicial power to imply 'exceptions' that soon 'form a system of law,'²⁵⁴ to the point of using prior common law rules to avoid specific limitations of statutes, which Camden led in reversing,²⁵⁵ and the latter declaring a duty of judges to apply the law as they find it and to leave lawmaking to the legislature.²⁵⁶ Their divergences spilled over to such other issues as the American war, with Mansfield supporting prosecution²⁵⁷ and Camden advocating conciliation as hostilities spread (citing Locke on resistance to absolutism).²⁵⁸

The trials of the printers and sellers of a 'Junius' essay in 1770,²⁵⁹ which had censured corruption in Britain's administration²⁶⁰ and Mansfield's decisions,²⁶¹ featured counsel for the defense echoing Pratt's arguments in *Owen*, and Mansfield limiting the jury to determination of 'whether he did publish' the pamphlet and 'whether the construction... where there are dashes... is to be made to the king, to the administration of his government, to his ministers.'²⁶² Mansfield said the jury 'were not to concern themselves' with malice or seditiousness; 'the Court would consider of that' and 'were the only proper judges of that' as 'inferences

²⁵² *Wilkes v Wood* (1763) Lofft 1, 17, 98 ER 489, 498 (CP).

²⁵³ *Owen*, *State Trials* at 18:1227 (Pratt's argument); see *R v Shipley* (1784) 4 Dougl 73, 171, 175, 99 ER 774, 826 (KB) (Willes, J, dissenting).

²⁵⁴ *Mansfield Manuscripts* 1:199; accord 1:197.

²⁵⁵ *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 201 (KB), rev'd, 4 Burr 2416-17, 98 ER 262 (1769); *Donaldson v Beckett* (1774) 2 Brown PC 129, 1 ER 837 (HL) (Copyright Act); accord *Mansfield Manuscripts* 1:199-200; cf. *Perrin v Blake* (1770) 1 Black W 672, 96 ER 392; 4 Burr 2579, 98 ER 355 (KB) (modifying rule in *Shelley's Case*), rev'd (1772) 1 Black W 67, 96 ER 393 (Exch Ch); William R Leslie, 'Similarities in Lord Mansfield's and Joseph Story's View of Fundamental Law' (1957) 1 *American Journal of Legal History* 278, 279-84.

²⁵⁶ *Entick v Carrington* (1765) 2 Wils KB 275, 291, 292, 95 ER 807, 817, 818 (CP).

²⁵⁷ *Mansfield Manuscripts* 1:30; ODNB 39:997.

²⁵⁸ RC Simmons and PDG Thomas (eds), *Proceedings and Debates of the British Parliaments Respecting North America, 1754-1783* (Kraus, Millwood 1982-87) 6:53-54, 252-53; ODNB 45:213-14.

²⁵⁹ Reprinted in *Almon*, *State Trials* at 20:805-19.

²⁶⁰ *Junius* 25, 320; see *Brewer-Party* 154-55; *Thomas* 126. The identity of Junius is summarized in TH Bowyer, 'Junius, Philip Francis and Parliamentary Reform' (1995) 27 *Albion* 397, 397 n1.

²⁶¹ *Junius* 15-18, 302 (no.61)(17 Oct.1771), 320 (no.68)(21 Jan.1772).

²⁶² *Ibid* at 20:836; accord *Woodfall*, *State Trials* at 20:902; *Miller*, *State Trials* at 20:893.

of law' from the fact of publication.²⁶³ Juries convicted one newspaper printer, Almon,²⁶⁴ but ignored Mansfield's instructions and found another printer, Woodfall, 'guilty of printing and publishing only,'²⁶⁵ and acquitted two other newspaper printers, Miller²⁶⁶ and Baldwin.²⁶⁷

The 'Junius' trials ignited debates in the House of Lords over seditious libel in 1770-71, which again pitted Mansfield and allies against Camden and supporters,²⁶⁸ following debates in the Commons.²⁶⁹ Camden had the better of the argument on the issues for the jury in a libel case. Mansfield's severe limitation of the jury's issue for decision left almost nothing for the jury to decide except the 'virtually undeniable' fact of whether the accused wrote or published²⁷⁰ what already had been determined to be a seditious libel with what already had been implied as criminal intent, thereby causing 'the jury's role in seditious libel cases... to be uniquely and awkwardly restricted' in comparison to other criminal cases, as he conceded.²⁷¹ Mansfield nominally said that the legal inference of criminal intent was rebuttable: 'the proof of justification, or excuse, lies on the defendant',²⁷² but he prohibited the logical justifications or excuses, that the publication was true and was without criminal intent.²⁷³ In doing that, Mansfield effectively tricked the jury into giving a special verdict on two minor issues that was then treated as a general verdict on all issues,²⁷⁴ because when he instructed the jury, if it

²⁶³ *Woodfall*, *State Trials* at 20:901-02, 918; accord *Miller*, *State Trials* at 20:893-94.

²⁶⁴ *Almon*, *State Trials* at 20:839; see *Mansfield Manuscripts* 2:833. Almon is poorly chronicled in Deborah D Rogers, *Bookseller as Rogue: John Almon* (Peter Lang, New York 1986) 19-42, 43-56.

²⁶⁵ *Woodfall*, 5 Burr at 2667, 98 ER at 401; see *Mansfield Manuscripts* 2:837. This led to his being granted a new trial, *State Trials* at 20:921, which was never held, ostensibly because the evidentiary copy of his newspaper was misplaced, and really because the Miller-Baldwin acquittals made a guilty verdict unlikely.

²⁶⁶ *Miller*, *State Trials* at 20:896; see *Mansfield Manuscripts* 2:841.

²⁶⁷ *R v Baldwin* (1770) *Mansfield Manuscripts* 2:842 (KB).

²⁶⁸ *Parliamentary History* 16:1312 (10 Dec.1770), where Camden directed written questions to Mansfield addressing all these issues, *ibid* 16:1321 (11 Dec.1770); *Woodfall*, *State Trials* at 20:921-22.

²⁶⁹ *Parliamentary History* 16:1175, 1211 (27 Nov.1770).

²⁷⁰ *Green* 65.

²⁷¹ *Mansfield Manuscripts* 1:201; *St. Asaph*, *State Trials* at 21:1035.

²⁷² *Woodfall*, *State Trials* at 20:919.

²⁷³ *Ibid* 20:902, 913, 918, 919.

²⁷⁴ As Erskine argued about Buller's instructions, which Mansfield upheld. *Shipley*, 4 Dougl at 134, 99 ER at 805 (1784); *St. Asaph*, *State Trials* at 21:984-88; accord Phileleutherus Anglicanus [Henry S Woodfall], *A Summary of the Law of Libel* (S Bladon, London 1771) 13.

found publication was by the accused and innuendos referred to the Government or ministers, 'to find the defendant *guilty*,' he did not tell them the court had already made a determination of law that the jury was incorporating and applying ('in that shape they take the opinion of the Court upon the law' since 'the judge is not called upon necessarily to tell them his own opinion'²⁷⁵), or what his determination of law was in terms of the accused's publication being a criminal libel with criminal intent. Camden, claiming that violated the fundamental right to jury trial, said 'the Court ought not. . . to take away of the office of a jury,' but ought to leave the jury's role the same as in other criminal cases, applying the law given in the judge's instructions to the facts of the case,²⁷⁶ including on issues of libelous content and criminal intent.²⁷⁷ Despite swirling controversy, judges generally followed Mansfield's limitation of juries to the issues of publication and innuendo,²⁷⁸ until 1792.

The central pillar in Camden's argument was adopted, and in Mansfield's and the other royal judges' was rejected,²⁷⁹ by Parliament in Fox's Libel Act in 1792. The Act provided that juries in criminal libel actions may give general verdicts and may not be required 'to find the defendant or defendants guilty, merely on the proof of the publication by such defendant. . . and of the sense ascribed to the same in such indictment or information.'²⁸⁰ The reform reset the balance between judge and jury in seditious libel cases, and restored the jury's roles as a 'safeguard against tyranny' and a potential force of mitigation,²⁸¹ though juries in the Act's aftermath still largely functioned as rubber stamps rather than safeguards. However, the Libel Act did not decriminalize seditious libel, and prosecutions afterwards escalated with the French

²⁷⁵ *St. Asaph*, *State Trials* at 21:1035.

²⁷⁶ *Wilkes*, *State Trials* at 19:992; *Green* 64-65.

²⁷⁷ *Parliamentary History* 29:1405-06 (31 May 1792).

²⁷⁸ *R v Shipley* (1784) 4 Dougl 73, 82, 99 ER 774, 779 (KB) (Buller, J); *R v Gordon* (1787) *State Trials* 22:175, 207 (KB); *R v Watson* (1788) 2 TR 199, 206, 100 ER 108, 113 (KB); *R v Stockdale* (1789) *State Trials* 22:237, 292 (KB); *R v Withers* (1789) 3 TR 428, 429-30, 100 ER 657, 657-58 (KB); *R v Topham* (1791) 4 TR 126, 127, 100 ER 931, 931 (KB); *Opinion of the Judges* (1792) *State Trials* 22:297, 303-04 (HL); *contra St. Asaph*, *State Trials* at 21:1040-41; 4 Dougl 171, 99 ER 824 (1784) (Willes, J, dissenting).

²⁷⁹ *Oxford History* 8:302; *Opinion of the Judges* (1792) *State Trials* 22:297 (HL).

²⁸⁰ 32 Geo 3 c 60; *EHD* 11:363; *Statutes* 37:627; *accord Green* 67-72.

²⁸¹ *Green* 69-71.

Revolution and the wars it detonated in the 1790s²⁸² to nearly 200 cases.²⁸³

6 Use of General Warrants

Each Star Chamber licensing ordinance and decree expressly authorized general searches of any premises where unlicensed or seditious publications were suspected to be, and general arrests of any persons in possession.²⁸⁴

Subsequent courts chose to continue use of general warrants in seditious libel cases, relying primarily on the Licensing Act of 1662, which was modeled on the Star Chamber Decree of 1637. For a brief time after the statutory authorization lapsed in 1695, the King's attorney concluded that 'a general warrant could not now be granted to search houses for printing presses, but it must be done upon particular informations upon oath.'²⁸⁵ However, after repeated failures to reenact a licensing law, government reversed itself and reverted to the practice of general warrants without a supporting statute, and the courts upheld it.²⁸⁶

The most relentless objection to general warrants was made by Wilkes, after suffering search and arrest under such a warrant. Steering the case to Pratt, he was not disappointed with the decision that general warrants were 'illegal, and contrary to the fundamental principles of the constitution,' as well as 'totally subversive of the liberty of the subject.'²⁸⁷ Pratt reaffirmed that in another libel case, *Entick v Carrington*, stating that no law authorized general warrants and that judicial practice 'cannot make law' or provide authority.²⁸⁸ The popular cat already out of the bag, Mansfield also rejected such warrants, on the basis of insuffi-

²⁸² E.g., *State Trials* 22:317, 22:753, 22:785, 22:953, 22:1033, 22:1189, 22:1237; and seditious words, *ibid* 22:471, 22:823, 22:875, 22:909, 22:1019; accord John Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide 1793-1796* (OUP, Oxford 2000) 108-12, 630-31, 633-37.

²⁸³ Boyd Hilton, *A Mad, Bad, and Dangerous People? England 1783-1846* (CP, Oxford 2006) 72-73; Harling 108-09; see Clive Emsley, 'An Aspect of Pitt's "Terror": Prosecutions for Sedition during the 1790s' (1981) 6 *Social History* 155.

²⁸⁴ Star-Chamber Ordinance (23 June 1586), *Select Statutes* 169, 169; A Decree of Starre-Chamber, Concerning Printing (11 July 1637), *Arber* 4:528. See generally William J Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* (OUP, Oxford 2009) 446-58.

²⁸⁵ *Calendar-William* 5:483 (30 May 1695).

²⁸⁶ *R v Derby* (1711) Fortescue 140, 144, 92 ER 794, 796 (KB); *Blackstone's Commentaries* 4:288n.

²⁸⁷ *Wilkes v Wood* (1763) Lofft 1, 19, 18, 98 ER 489, 499, 498 (CP).

²⁸⁸ *Entick v Carrington* (1765) 2 Wils KB 275, 292, 95 ER 807, 818; *State Trials* 22:237 (CP).

ciently long practice rather than insufficient statutory authorization.²⁸⁹

Other invasions of rights were debated besides general warrants, such as the use of informations in lieu of grand jury indictments to prosecute seditious libels and other crimes,²⁹⁰ and the practice of prosecution followed by a *nolle prosequi* to intimidate authors and printers.²⁹¹ All figured in criticisms of seditious libel.

7 Contradiction of Seditious Libel Doctrine and Freedoms of Press and Speech

However signal Holt's other contributions and Mansfield's commercial law decisions, their decisions about seditious libel and other criminal libel were unified only by promoting successful prosecution of dissent, as they ruled that the truth of speech or publication was irrelevant and even exacerbated a seditious libel, and that criminal intent was inferred from the fact of publishing or copying a libel; that it was criminal speech to criticize individual officials, and even to criticize the government as a whole; that Crown-appointed judges determined libelousness and criminal intent while the jury determined the generally undisputed detail of publication; and that authors, printers, and booksellers could be searched, arrested, imprisoned, and brought to trial under general warrants merely identifying a publication as a seditious libel.

Defense counsel in the seditious libel cases began to mention, and then to argue, that prosecution for seditious libel violated freedom of the press. In *Francklin* in 1731, counsel cautioned that prohibiting true as well as false news of public affairs as seditious libel, because it reflected negatively on the King or his ministers, threatened 'suppression of the liberty of the press' and would bring 'dangerous and fatal consequence' and would result in life 'in darkness and ignorance.'²⁹² The judge responded by ending his jury charge with the ad-

²⁸⁹ *Money v Leach* (1765) 3 Burr 1742, 1766-67, 97 ER 1075, 1088; 3 Burr 1692, 97 ER 1050; 1 Black W 555, 96 ER 320 (KB).

²⁹⁰ *Mansfield Manuscripts* 2:775; *Case of Mr. Earbery* (1737) *State Trials* 19:1016 (KB).

²⁹¹ James Oldham, 'The Work of Ryder and Murray as Law Officers of the Crown,' in Thomas G Watkin (ed), *Legal Record and Historical Reality* (HP, London 1989) 157, 173; *Harling* 110-11, 112-20, though prosecutors encountered obstacles, *ibid* 120-33; e.g., *R v Almon* (1765) Wilm 243, 243 n(a), 97 ER 94 (KB). Or the exclusion of testimony by parties. James Oldham, 'Truth-Telling in the Eighteenth-Century English Courtroom' (1994) 12 Law and History Review 95, 107-12.

²⁹² *Francklin*, *State Trials* at 17:659-60; accord *ibid* 17:655.

monition that a newspaper publisher is not 'to take the liberty to print what he pleases; for the liberty of the press is only a legal liberty, such as the law allows; and not a licentious liberty.'²⁹³ Yet 'liberty... such as the law allows' was tautologous and manipulable. In *Owen* in 1752, Pratt's co-counsel warned the jury that if a court decision was 'not to be called in question' and if a parliamentary vote could not be complained of as wrong, then the legal right to 'complain or petition for redress' would be meaningless.²⁹⁴ In the 'Junius' trials in 1770, Almon's counsel proclaimed 'that the freedom of political discussion is of the utmost consequence to all our liberties,' which included 'censur[ing] the acts of government,' though he conceded that 'liberty of the press,' though 'the most sacred of all' other liberties, if abused was criminal.²⁹⁵ Representing Woodfall, the same defense counsel cautioned that 'the liberty of the press' was 'in some degree of danger'²⁹⁶ because 'the people needed that kind of information,' and the printer's intent was the 'laudable motive of informing his fellow-subjects.' Further, 'the public acts of government often demanded public scrutiny,' all of which would be thwarted if 'ministerial scribblers' could abuse those not in office but made it 'dangerous to answer them' so that 'the hands of every publisher would be tied.'²⁹⁷ These arguments did not ask the jury to acquit on grounds that seditious libel prosecution conflicted with that liberty of the press, but did ask the jury to acquit, within the existing framework, because the publication was not a seditious libel and the printer's intent was nonmalicious.²⁹⁸ In *St. Asaph* in 1783, the most forceful attack by any defendant's counsel was directed at the noncongruence of seditious libel with other criminal law, and among the many grounds was 'the danger which has often attended the liberty of the press in former times, from the arbitrary proceedings of abject, unprincipled, and dependent judges,' from licensors and Star Chamber, and

²⁹³ *State Trials* at 17:675.

²⁹⁴ *Owen*, *State Trials* at 18:1223-24.

²⁹⁵ *Almon*, *State Trials* at 20:832, 834.

²⁹⁶ *Woodfall*, *Lofft* at 778, 98 ER at 914.

²⁹⁷ *Woodfall*, *State Trials* at 20:899.

²⁹⁸ *Ibid.*

from government perception of 'the seeds of its destruction in a free press.'²⁹⁹

'Junius' joined defense counsel in shelling seditious libel from the heights of freedom of press. He boldly published a letter to Mansfield soon after the 1770 trials of Almon, Woodfall, Miller, and Baldwin, which warmed up by reminding the public that the 'language has no term of reproach. . . which has not already been happily applied to you,' that Mansfield had been a Jacobite, and that his apparent plan was 'to enlarge the power of the crown, at the expense of the liberty of the subject.'³⁰⁰ 'Junius' then responded to the trials by stating that Mansfield's doctrine 'in cases of libel' showed 'a settled plan to contract the legal power of juries,' which 'in effect, attack[ed] the liberty of the press,' particularly by limiting the jury issues, ignoring criminal intent that other crimes required, and disallowing a general verdict.³⁰¹ The unmistakable claim was that Mansfield's doctrine of seditious libel violated freedom of press, though 'Junius' chose to argue on judge-made features different from other criminal law rather than on irreconcilability with liberty. England did not enjoy liberty of press; there was 'distress and danger with which the press is threatened' because of Mansfield and his doctrine.³⁰²

Prosecutors and judges joined Mansfield in fighting back, such as the claim in *Williams'* case in 1774 that 'liberty of the press' must be restrained from such 'excess' as seditious libel, and the judge's agreement that the liberty is 'frequently abused' by such attacks, though he was silent on seditious libel restraints.³⁰³ Over the next two decades the royal judges held the line,³⁰⁴ for example as Judge Buller rejected a freedom of press defense because 'it goes to give a general licence to printers to print whatever they may think proper; which cannot be

²⁹⁹ *St. Asaph*, *State Trials* at 21:900, 924, 1023. The jury found the Dean 'guilty of publishing only,' like *Woodfall*. *Ibid* 21:950. Erskine, defendant's counsel, was even more eloquent in Thomas Paine's case after the period relevant to the First Amendment. *R v Paine* (1792) *State Trials* 22:357, 414-15 (KB).

³⁰⁰ *Junius* 206, 207, 208 (Letter 46) (14 Nov. 1770).

³⁰¹ *Ibid* 211, 211-12.

³⁰² *Ibid* 207.

³⁰³ *R v Williams* (1774) Lofft 759, 763, 98 ER 905, 907 (KB) (Alston, J).

³⁰⁴ Georges Lamoine (ed), *Charges to the Grand Jury 1689-1803* (RHS, London 1992) 402, 452, 473-74, 492-93.

endured in this or in any other country.³⁰⁵

Mansfield, in his last seditious libel decision in *St. Asaph*, clearly saw the threat posed by such advocates of freedom of press to the common law of seditious libel, as he echoed Blackstone by proclaiming that '[t]he liberty of the press consists in printing without any previous license, subject to the consequences of law,' which were necessary 'to protect individuals, or to guard the state.'³⁰⁶ This Blackstone-Mansfield definition was not merely reactive at the end of his career, however, but underlay all his seditious libel decisions. Early in his legal career in 1747, he wrote of liberty of the press that the patience of government was 'provoked to stretch power' because 'vermin' or 'the sons of sedition *overstrain liberty*.'³⁰⁷ Shortly before taking the bench, he argued that in seditious libel cases 'uncommon pains [were] taken to misapply the principles of the liberty of the press,' a liberty he defined meaninglessly as 'printing *everything that don't offend the laws*.'³⁰⁸ His conclusion in that case, as in every seditious libel case coming before him on the bench,³⁰⁹ was that '[i]f defendant is concerned in the publication, none of this jury *can have a doubt* of his guilt.'³¹⁰ Midway through his judicial years, he defined liberty of the press similarly: 'If an author is at liberty to write, he writes as his peril, if he writes or publishes that which is contrary to law . . .'³¹¹ Mansfield, the trailblazer for modern commercial law, led the rear guard against liberalizing seditious libel.³¹² He effectively argued that any published 'reflection' on government was the crime of seditious libel, which left no protection for freedom of press and speech about things that mattered the most to many people, which was admitted by Mansfield's contentless definition of freedom of press as mere freedom from li-

³⁰⁵ *R v Wilkins* (1787) *State Trials* 22:209, 213 (KB).

³⁰⁶ *St. Asaph*, *State Trials* at 21:1040 (emphasis in original).

³⁰⁷ William Murray, *The Thistle . . . The Rose: Being a Detection of the Pernicious Tendency of Two Libels* (3rd ed np, London 1747) 31.

³⁰⁸ *R v Nutt* (1755) *Mansfield Manuscripts* 2:784 (KB) (quoting Ryder shorthand manuscript).

³⁰⁹ See *Mansfield Manuscripts* 2:808.

³¹⁰ *Ibid* 2:785 (emphasis in original).

³¹¹ *Almon*, *State Trials* at 20:836; accord *Woodfall*, *State Trials* at 20:903; *Woodfall*, *Lofft* at 781, 98 ER at 916.

³¹² *Ibid* 2:808.

censing, an historical phantom that had not existed for nearly a century.

B Rising Objection in England to Seditious Libel as a Violation of Freedoms of Press and Speech.

Thus, English courtroom arguments were raised, though only briefly and secondarily until 1784, that existing doctrines of seditious libel violated or were inconsistent with freedoms of press and speech. Far more arguments were raised in English and American books, pamphlets, and newspapers.³¹³

Levy concluded that in England 'no one rejected the crux of the common law' of seditious libel until 'late in the eighteenth century,' while in America it was not the 'intent of the American Revolution or the Framers of the First Amendment to abolish the common law of seditious libel.'³¹⁴ Thus, Levy argued that the meaning of freedom of press when state constitutions were adopted in and after 1776, and when the federal Bill of Rights was congressionally approved in 1789 and ratified in 1791, was the Blackstone-Mansfield definition of freedom of the press as merely freedom from prior restraint. His summaries of various publications were

³¹³ This chapter focuses on arguments about seditious libel, and ignores all the 'speeches made, all the papers wrote in defence of the press in it[is utmost latitude,' [Horace Walpole], *A Letter to the Whigs* (M Cooper, London 1747) 10, in the first four decades of the eighteenth century (Chapter 2.A), and their continuation for the remainder of that century. E.g., [Horace Walpole], *A Second and Third Letter to the Whigs* (M Cooper, London 1748) 3, 13; *The Importance of the Liberty of the Press* (M Cooper, London 1748) 10, 12, 27; [Thomas Hayter], *An Essay on the Liberty of the Press* (J Raymond, London [c1755]) 7, 36, 39. There were similar defenses of freedom of speech, since 'printing is a more extensive and improved kind of speech.' *Ibid* 18; accord *An Address to Sir John Cust, Bart.* (Gretton, London 1763) 5-6; *Letter Concerning Libels* 27. Many joined Wilkes in proclaiming that '[f]reedom of speech . . . is the great bulwark of liberty' and 'the right of every man.' John Wilkes, *A Letter to the Right Honourable William Lord Mansfield* (J Wilkes, London 1768) 24, 12; accord Derek Jarrett (ed), *Memoirs of the Reign of King George III: Horace Walpole* (YUP, New Haven 2000) 1:212; David Williams, *The Nature and Extent of Intellectual Liberty* (J Dodsley, London 1769) 15n. Others condemned the 'licentiousness' of the press, while generally professing equal devotion to its freedom, E.g., *Detraction. An Essay . . . with Some Just Remarks on the Liberty of the Press* (J Bouquet, London 1755) 18-23; [Francis Squire], *A Faithful Report of a Genuine Debate Concerning the Liberty of the Press* (T Becket, London 1764, reprinting 1740 edition) 27-28; *The Liberty of the Press* (W Nicoll, London c.1770) 6, 26-27, 30, 57; *Literary Liberty Considered in a Letter to Henry Sampson Woodfall* (J Johnson, London 1774) 4, 8, 11-15; and claiming it was free. E.g., Henry Fielding (ed), *The Champion* (J Hugonson, London 1741) 94-95; Samuel Johnson (ed), *An Account of the Life of Mr Richard Savage* (2nd ed E Cave, London 1748) 58n; accord *Observations on the Conduct of Great-Britain* (T Cooper, London 1742) 52; *Physicians. A Satire* (2nd ed M Lewis, London 1774) 30, 36, 38. Nearly everyone agreed that libel against private reputations, which was endemic to the culture, M Lindsay Kaplan, *Culture of Slander in Early Modern England* (CUP, Cambridge 1997) 112, along with slander, *ibid* 1, 109; Eric Burns, *Infamous Scribblers* (Public Affairs, New York 2006) 8, should be civilly prohibited and perhaps criminally prosecuted.

³¹⁴ Leonard W Levy, *Emergence of a Free Press* (OUP, New York 1985, 1987) 89, xii; accord *Repressive Jurisprudence* 21. Other Levy claims are quoted at the end of Section B and beginning and end of Section C.

meticulous and accurate, though not comprehensive, as he did not consider most publications cited in this chapter. His conclusions were 'widely accepted,' making him 'the premier historian on colonial free speech,'³¹⁵ and were followed by numerous scholars,³¹⁶ though not all.³¹⁷ However, Levy's standard for criticism of seditious libel was unrealistic--writer after writer was dismissed as failing to develop a full-blown theory, giving only a conclusion and not a 'reasoned or extended judgment,' or stating only criticism of key elements and not repudiation of the concept.³¹⁸ Yet short hard-hitting attacks, such as the 1788 assertion that 'the rights of the press... are fundamentally struck at' by the 'doctrine of libels,'³¹⁹ reached more readers and roused more opposition to seditious libel than full treatises, and certainly should be counted in assessing prevailing beliefs.³²⁰ Further, Levy acknowledged that his original edition overlooked that, after 1765, 'American newspapers *practiced* freedom of the press' by denouncing 'public men and measures.'³²¹ Even then, his revision still cited few newspapers in comparison to tracts, and continued to overlook the improbability that prerevolutionary newspapers, essayists, and officials, threatened with seditious libel prosecution, would leave 'the common law of

³¹⁵ Larry D Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (NYUP, New York 1994) 1; accord Levy vii; Loren P Beth, 'Review' (1986) 91 *American Historical Review* 1266; *Origins* 461 n38, 534 (though disagreeing); Robert C Post, 'Defaming Public Officials: On Doctrine and Legal History' (1987) 12 *American Bar Foundation Research Journal* 539, 541-42 (though disagreeing); see *Citizens United v. FEC*, 130 S.Ct.876, 952 & n.58 (2010) (Stevens, J, concurring and dissenting with Ginsburg, Breyer & Sotomayor, JJ).

³¹⁶ E.g., *Creation* 63; William W van Alstyne, 'Congressional Power and Free Speech: Levy's *Legacy* Revisited' (1986) 99 *Harvard Law Review* 1089, 1099; *Hamburger* 745 n261; Norman L Rosenberg, 'Seditious Libel,' *OCSC* 765, 766; *Repressive Jurisprudence* 5-9, 52-71; see Merrill Jensen, 'Review' (1961) 75 *Harvard Law Review* 456, 458; Philip A Hamburger, 'Natural Rights, Natural Law, and American Constitutions' (1993) 102 *Yale Law Journal* 907, 911-12.

³¹⁷ E.g., Akhil R Amar, 'The Bill of Rights and the Fourteenth Amendment' (1992) 101 *Yale Law Journal* 1193, 1266-67; William T Mayton, 'From a Legacy of Suppression' (1986) 39 *Stanford Law Review* 139; William T Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression' (1984) 84 *Columbia Law Review* 91, 93; Gerald A Berlin, 'Review' (1963) 72 *Yale Law Journal* 631, 637; *Origins* 509, 494-509, 509-23 (though it is limited to Levy's historical evidence).

³¹⁸ *Levy* 118, 167, 170.

³¹⁹ Eleazer Oswald, 'To the Public' *Independent Gazetteer* (Philadelphia 1 July 1788) 3.

³²⁰ Similarly, colonial treatises were not required for the non-loyalists to reject many other parts of English common law, such as arbitrary searches and seizures, informations in place of grand jury indictments, excessive bail requirements, cruel and unusual punishments, and limitless definitions of treason.

³²¹ Leonard W Levy, 'The *Legacy* Reexamined' (1985) 37 *Stanford Law Review* 767, 768-69.

sedition libel. . . unchanged³²² as they adopted state and federal constitutional provisions.

Levy has not gone without criticism. Anderson reinterpreted many of Levy's sources, not 'claim[ing] to have proven Levy wrong' but to have 'reopened the issue,' but without original research for sources that Levy overlooked, he concluded 'one cannot guess how widespread the repudiation of seditious libel was.'³²³ Smith gave strong contextual arguments against Levy, but did not add many primary sources to Levy's canon.³²⁴ As the present author reviewed several thousand period sources, the conclusion became inescapable that Levy's thesis was more and more an inaccurate description of published views as the eighteenth century lengthened, if the weighing is of attacks on seditious libel, regardless of length, rather than disqualification of anything but fully developed theory. Two features dominate those sources.

First, the six unique rules for Crown prosecutions of seditious libel and other criminal libel, contrary to the rules applicable to other crimes or private libel, drew mounting challenge as the century lengthened. Critics assailed prosecuting true statements,³²⁵ unintentional or nonmalicious acts,³²⁶ and criticism of government or officials,³²⁷ as well as restricting jury issues,³²⁸ allowing general warrants³²⁹ and informations,³³⁰ and other features.³³¹ Those as-

³²² *Ibid* 769.

³²³ David A Anderson, 'The Origins of the Press Clause' (1983) 30 UCLA Law Review 455, 535, 529; see *ibid* 494-509, 523-33.

³²⁴ Jeffery A Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (OUP, Oxford 1988).

³²⁵ E.g., *Doctrine of Libels* 26; *Burgh* 3:248; Philip Withers, *Alfred or a Narrative of the Daring and Illegal Measures To Suppress a Pamphlet* (3rd ed Withers, London 1789) 4; Nauticus, 'Messrs. Robertsons' *New-York Chronicle* (New York 5 June 1769) 44.

³²⁶ E.g., *Hawkins* 1:195, 196; [William Eden], *Principles of Penal Law* (B White, London 1771) 208-09; 'By Capt. Mooney' *New-Hampshire Gazette* (Portsmouth 14 Mar.1766) 2.

³²⁷ E.g., 'The Great Importance of the Liberty of the Press,' *London Magazine* (Jan.1738), reprinted *The London Magazine: and Monthly Chronologer 1738* (T Astley, London 1736-46) 10, 11; *Doctrine of Libels* 26; [Thomas Hayter], *An Essay on the Liberty of the Press* (J Raymond, London [c1755]) 10-17; *Letter Concerning Libels* 6-7, 27-28 (violating freedom of press); *Court of Star Chamber* (Staples Steare, London 1768) 21; *Junius* 14; *Burgh* 3:247, 250, 254, 255, 256; 'On the Freedom of the Press,' *The Templar; or, Monthly Register* (GGJ, London 1789) 1:306; see *London Magazine: and Monthly Chronologer 1737* (C Ackers, London 1736-46) 324.

³²⁸ E.g., [Joseph Towers], *An Enquiry into the Question, Whether Juries Are, or Are Not, Judges of Law, as Well as of Fact* (J Wilkie, London 1764) 9-10; Joseph Towers, *British Biography* (R Goadby, London 1766-70) 6:63-67n, 6:143; *Letter Concerning Libels* 14 (violating freedom of press); see *Doctrine of Libels* 27; Robert Morris, *A Letter to Sir Richard Aston. . . Doctrine of Libels* (George Pearch, London 1770) 21; *Junius* 16; Manasseh Dawes, *England's Alarm!* (John Stockdale, London 1785); Manasseh Dawes, *The Deformity of the Doctrine of*

saults struck near the heart of seditious libel, but are not the focus of this section.

Second, the very concept of criminalizing seditious libel--punishing written and spoken expression opposing government and officials--also drew mounting condemnation based on freedoms of press and speech, usually interlaced with denunciation of those unique rules.

1 Criticism of Seditious Libel on Press and Speech Grounds in the 1760s

The 1760s, reverberating with Wilkes' prosecution,³³² brought a steady stream of books and tracts describing seditious libel as a restraint on press and speech.³³³ The argument that prosecutions of 'what they have stiled libels, defamatory and seditious pamphlets' had 'infringed upon the laws of freedom' including 'freedom of the press,'³³⁴ was made by Wilkes,³³⁵

Libels (John Stockdale, London 1785) 12; 'Boston, April 17' *Connecticut Gazette* (New London 21 Apr. 1769) 2. Frequent reprints also occurred of John Hawles' *The English-mans Right* (Richard Janeway, London 1680).

³²⁹ E.g., *Letter Concerning Libels* 40 (violating freedom of press); *Copies Taken from the Records of the Court of King's-Bench* (np, London 1763); *A Postscript to the Letter on Libels, Warrants, &c.* (J Almon, London 1765); *Burgh* 3:252, 254.

³³⁰ E.g., [George Lyttleton], *Considerations upon the Present State of Our Affairs* (T Cooper, London 1749) 29-39; *Letter Concerning Libels* 19 (violating freedom of press); *Junius* 18; *Burgh* 3:252.

³³¹ E.g., *ibid* (imprisoning or requiring security when charged); J[ohn] A[llen], *The Spirit of Liberty: or, Junius's Loyal Address* (np, London 1770) 3; *Burgh* 3:253; *Levy* 151, 153, 163-65 (bad tendency test rather than overt act or direct incitement test); see generally John Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide 1793-1796* (OUP, Oxford 2000) 348-56.

³³² Transcripts of Wilkes' 1763 proceedings were widely read, as indicated by numerous reprints--for 1763 pamphlets alone, John Wilkes, *An Authentick Account of the Proceedings against John Wilkes* (J Williams, London 1763); [Philip Carteret Webb], *Some Observations on the Late Determination for Discharging Mr. Wilkes* (A Millar, London 1763); see John Wilkes, *The North Briton* (J Williams, London 1763).

They were accompanied by extensive public commentary on the cases (and philo-Wilkite publications similarly poured forth in 1768-1770)--for 1763 pamphlets alone (ignoring numerous dedications of works), *England's Constitutional Test for the Year 1763* (J Morgan, London 1763) 47-48; *A Letter to the Right Honourable Earl Temple* (W Nicoll, London 1763); Philo-Britannicus, *A Letter from Scots Sawney the Barber, to Mr. Wilkes* (np, Edinburgh 1763); *Two New Comic Satiric Dialogues That Lately Passed in the Tower* (J Pridden, London 1763); *Number 45. Wilkes and Liberty* (np, 1763).

³³³ [Richard Grenville-Temple], *Principles of the Changes in 1765 Impartially Examined* (4th ed J Almon, London 1766) 55; *Court of Star Chamber* (Staples Steare, London 1768) 22; John Wilkes, *A Letter to the Right Honourable William Lord Mansfield* (J Wilkes, London 1768) 26.

³³⁴ *Court of Star Chamber* (Staples Steare, London 1768) 22. Wilkes himself did not question seditious libel itself, e.g., 'Saturday Morning Last' *Providence Gazette* (Providence 16 June 1770) 99; 'Saturday Last' *Boston Chronicle* (Boston 18 June 1770) 195; but inspired others to do so.

³³⁵ John Wilkes, *A Letter to the Right Honourable William Lord Mansfield* (J Wilkes, London 1768) 26; [John Wilkes], *Life and Political Writings of John Wilkes* (J Sketchley, Birmingham 1769) 374, 372-73 (prosecutions with innocent words 'ingeniously construed into whatever crime misinterpreters shall think fit, if they prevail, 'bid adieu to the liberty of the press'); John Wilkes, *The North Briton* (J Williams, London 1763) 1-2 (North Briton No.1).

by writings resulting from his trial,³³⁶ by a parliamentary minority disputing his disqualification,³³⁷ by reprints of the *Owen* and *Zenger* trials,³³⁸ and by other publications.³³⁹

A new genre appeared: book-length publications attacking foundation stones of criminal libel law as contrary to English liberties, including liberties of press and speech.³⁴⁰ The most reprinted book, *A Letter Concerning Libels*, attacked the Star Chamber origin and the singularities of seditious libel, and found prosecution of criticism of officials 'inconsistent with every idea of liberty,' including 'liberty of the press.'³⁴¹ The author was quickly prosecuted for seditious libel.³⁴² Though a minority of publications supported such prosecutions,³⁴³ the strong majority indirectly but unambiguously attacked seditious libel, decrying 'no liberty of the press, but what the judges. . . might think proper to grant.'³⁴⁴

³³⁶ *England's Constitutional Test for the Year 1763* (J Morgan, London 1763) 49-50; 'No Paper Ought to Be Esteemed a Libel, Till a Jury Have Found It So,' *Weekly Amusement* (London 21 Jan. 1764), reprinted *Weekly Amusement from Saturday Decem. 24, 1763* (R Goadby, London 1764) 67, 68.

³³⁷ Edmund Burke, 'Speech on Wilkes's Privilege' (23 Jan. 1769), *Burke's Writings* 2:100, 101 (from manuscript).

³³⁸ *The Trial of John Peter Zenger. . . The Trial of Mr. William Owen* (J Almon, London 1765); *A Select Collection of the Most Interesting Tracts* (J Almon, London 1766) 1:1.

³³⁹ Derek Jarrett (ed), *Memoirs of the Reign of King George III: Horace Walpole* (YUP, New Haven 2000) 1:212; Joseph Towers, *British Biography* (R Goadby, London 1766-70) 6:63-64n, 6:143. Typical claims were that 'rigorous crown prosecutions' were 'restraint on the freedom of the press,' [Richard Grenville-Temple], *The Principles of the Changes in 1765 Impartially Examined* (4th ed J Almon, London 1766) 55, that judges using 'every mean in their power to restrain and punish those writings which may be necessary to expose their designs' must be countered by jury use of general verdicts to preserve 'liberty of the press,' William Bolla, *The Freedom of Speech and Writing upon Public Affairs Considered* (S Baker, London 1766) 137; accord *ibid* 62, and that Mansfield 'labour[ed] to suppress the glorious freedom of the press.' *A Collection of the Most Interesting Political Letters Which Appeared in the Public Papers* (J Almon, London 1766) 169; see *A Short Examination into the Conduct of Lord M-f-d* (Staples Steare, London 1768) 24, 16-21.

³⁴⁰ *An Enquiry into the Doctrine, Lately Propagated, Concerning Libels, Warrants, and the Seizure of Papers* (J Almon, London 1764) 32, which was probably written by Almon, *Mansfield Manuscripts* 2:776, and was reissued as *A Letter Concerning Libels; A Letter Concerning Libels, Warrants, the Seizure of Papers, and Sureties* (2nd ed J Almon, London 1764) 28, 30; William Bolla, *The Freedom of Speech and Writing upon Public Affairs Considered* (S Baker, London 1766) 62, 137; [John Rayner], *An Enquiry into the Doctrine, Lately Propagated, Concerning Attachments. . . Prosecutions for Libels* (J Williams, London 1769) 96.

³⁴¹ *Letter Concerning Libels* 28, 6-7, 44 (totaling seven editions).

³⁴² *R v Almon* (1765) Wilm 243, 243, 97 ER 94, 94-95 (KB), though prosecution was dropped.

³⁴³ *A Letter from Candor* (2nd ed J Almon, London 1764); *Considerations on the Legality of General Warrants* (W Nicoll, London 1765) 38-47; John Brown, *Thoughts on Civil Liberty, on Licentiousness and Faction* (L Davis, London 1765) 153; *Queries upon Liberty, the Freedom of the Press, Independency, &c.* (James Hoey, Dublin 1768) 27, 6-7.

³⁴⁴ [Joseph Towers], *An Enquiry into the Question, Whether Juries Are, or Are Not, Judges of Law, as Well as of Fact* (J Wilkie, London 1764) 10; accord *Weekly Amusement from Saturday Decem. 24, 1763* (R Goadby, London 1764) 67, 68; Joseph Towers, *Observations on Public Liberty, Patriotism, Public Liberty* (J Towers, London 1769) 6; Marie Peters, 'The "Monitor" on the Constitution, 1755-1765: New Light on the Ideological Origins of English

2 Criticism of Seditious Libel on Press and Speech Grounds in the 1770s and 1780s

The 1770s began with seditious libel charges and arrest warrants for the author of *Letters of Junius*, which ensured great demand³⁴⁵ for his arguments that seditious libel prosecutions restrained freedom of press, and his attacks on 'the false and absurd doctrines laid down by Lord Mansfield'.³⁴⁶ The prosecutions were widely watched and broadly condemned as violating freedom of press³⁴⁷ or rights to jury trial.³⁴⁸

The steady stream became a torrent of publications attacking 'the doctrine of seditious libels, and the criminal prosecutions' as endangering 'the *Liberty of the Press*'.³⁴⁹ Bentham repudiated seditious libel.³⁵⁰ Burgh's *Political Disquisitions*, the 'key book of this generation'

Radicalism' (1971) 86 *English Historical Review* 706,715 (Radical and Whig newspapers and periodicals supported 'a generous interpretation of freedom of the press,' and condemned seditious libel as a violation).

³⁴⁵ For 1770 alone, Junius, *The Letters of Junius* (np, London 1770) (2 vols) (reprinted thrice that year); Junius, *A Complete Collection of Junius's Letters* (A Thomson, London 1770) (reprinted twice that year); Junius Americanus [Arthur Lee], *The Political Detection; or, the Treachery and Tyranny of Administration* (J and W Oliver, London 1770); *The Political Contest; Containing Junius's Letter to the King* (np, Dublin 1770). There were five reprintings in 1772. For 1770 tracts alone and taking opposing positions, *The State of the Nation, As Represented to a Certain Great Personage by Junius and the Freeholder* (W Martin, London 1770); *An Address to Junius* (J Dodsley, London 1770); Charles Fearn, *An Impartial Answer to the Doctrine Delivered in a Letter* (J Murray, London 1770).

³⁴⁶ *Junius* 20.

³⁴⁷ *A Second Postscript to a Late Pamphlet, Entitled, A Letter to Mr. Almon* (J Miller, London 1770) 46 ('high time to ring out the alarum bell... to root out the grand cankerworm of the state,' the Crown's law of libels, because 'the liberty of the press is struck at'); accord [John Almon], *The Trial of John Almon, Bookseller* (J Miller, London 1770) 46; [George Rous], *A Letter to the Jurors of Great-Britain Occasioned by... the King and Woodfall* (G Peach, London 1771) 2-3; *Burgh* 3:265, 246-47.

³⁴⁸ E.g., *Another Letter to Mr. Almon, in Matter of Libel* (J Almon, London 1770). The prosecutions also brought Parliamentary debates, and request by the attorney for the 'Junius' defendants for an inquiry into the courts' treatment of liberty of the press and the power of juries. *Vox Senatus* (W Woodfall, London 1771) 42, 45; accord *ibid* 5, 6, 16, 36, 71-72, 89-90, 100 *passim*; *Junius* 16-17 & n (Lord Chatham's speech); *Burgh* 3:248.

³⁴⁹ [Baron Francis Maseres], *Additional Papers Concerning the Province of Quebec* (W White, London 1776) 395 (this section was later republished as a book); accord *Essays, Historical, Political and Moral* (np, Dublin 1774) 206-07 (other than the public not supporting scandalous publications, no 'other discouragement... can be effectively applied, consistent with true liberty' of the press); *An Interesting Address to the Independent Part of the People* (G Kearsly, London 1777) 16-17 (Blackstone supported the 'wicked' power of officials 'in prosecuting *ex officio* for libels' without addressing 'its purpose, which is to stop the pen and mouths, and stifle the complaints of an injured people,' illegally since 'minds and pens ought to be free'); [Edward Long], *English Humanity No Paradox* (T Lowndes, London 1778) 86 (despite 'freedom of the press,' '[j]udges may endeavour to muzzle the press'); Hugo Arnot, *The History of Edinburgh* (W Creech, Edinburgh and J Murray, London 1779) 447 (a seditious libel prosecution tended to 'complete suppression of the liberty of the press'); see *Another Letter to Mr. Almon, in Matter of Libel* (J Almon, London 1770) 6; Joseph Priestley, *An Essay on the First Principles of Government, and on the Nature of Political, Civil, and Religious Liberty* (2nd ed J Johnson, London 1771) 277.

³⁵⁰ [Jeremy Bentham], *A Fragment on Government* (T Payne, London 1776) 154 (under 'liberty of the press' and 'liberty of public association,' malcontents 'may communicate their sentiments, concert their plans, and practise every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them'); see *ODNB* 5:221.

(bought by most members of Congress),³⁵¹ argued that '[p]unishing libels public or private is foolish,' and that criticism of government was 'the *right* which every free subject has to speak and write of public affairs.'³⁵² Specters of the *Wilkes* and *Zenger* trials continued to walk.³⁵³

The 1780s saw the torrent become a flood, as the Dean of St. Asaph's trial and Mansfield's cumulative opus provoked cries that 'freedom of the press hath been invaded' by '[t]he doctrine lately advanced by high judicial authority, respecting the trial by jury, and law of libels,' something 'justly alarming.'³⁵⁴ In that case, the most eloquent English argument was given that the Holt-Mansfield doctrine of seditious libel put 'the freedom of the press. . . at an end.'³⁵⁵ A strong majority of publications warned that the doctrine of seditious libel 'assailed' the rights of '*trial by jury*, and a *free press*, the very ramparts of our constitution, whether as their thesis'³⁵⁶ or incidental comments,³⁵⁷ or attacked the Holt-Mansfield limitation of jury issues,³⁵⁸ though a minority disagreed.³⁵⁹ Assailants argued that 'the doctrine of libels, . . . have the most fatal aspect

³⁵¹ *Ideological Origins* 41; *Lamp* 19; see *ODNB* 8:781.

³⁵² *Burgh* 3:246, 247, 254, among other grounds, *ibid* 3:250-51, 252-54, 255.

³⁵³ *The Controversial Letters of John Wilkes* (T Sherlock, London 1771) 317-18 *passim*; *Magna Charta, Opposed to Assumed Privilege* (G Kearsly, London 1771); *Case of William Bingley, Bookseller* (William Bingley, London 1773) (Wilkes' printer); Francis Hargrave (ed), *A Complete Collection of State-Trials* (T Wright, London 1776-81) 9:275 (Zenger); *The Trial of John Peter Zenger* (np, London 1784).

³⁵⁴ John Disney (ed), *The Works Theological, Medical, Political, and Miscellaneous, of John Jebb* (T Cadell, London 1787) 1:204, 206 (written 1784); accord *ibid* 3:368-69; Joseph Towers, *Observations on the Rights and Duty of Juries, in Trials for Libels* (J Debrett, London 1784) 2, 3, 88, 133, 146; see J Hartley, *History of the Westminster Election* (2nd ed J Debrett, London 1785) 238.

³⁵⁵ *State Trials* 21:847, 1005-06; accord *The Rights of Juries Vindicated. The Speeches of the Dean of St. Asaph's Counsel* (H Goldney, London 1785) 45-46 *passim*; *The Speeches of the Hon. Thomas Erskine. . . Connected with the Liberty of the Press* (J Ridgway, London 1810); see *ODNB* 18:567.

³⁵⁶ [James Adair], *Discussions of the Law of Libels* (T Cadell, London 1785) 97; accord [Joseph Cavendish], *The Arguments of the Two Gentlemen* (np, Dublin 1783) 34, 35; Philip Withers, *Alfred or a Narrative of the Daring and Illegal Measures To Suppress a Pamphlet* (3rd ed Withers, London 1789) 4-5; 'Ireland,' *The Weekly Entertainer* (Goadby, Sherborne 1790) 16:158-59; 'National Affairs' (July 1790), reprinted *The English Review* (J Murray, London 1795) 16:74, 80; *Four Letters on the Subject of Mr. Stockdale's Trial* (new ed John Stockdale, London 1790) 5-6; *Letters on the Subject of the Proper Liberty of the Press* (P Byrne, London-Dublin 1790) 17 (repetition of these attacks 'by criminal libel prosecutions 'cannot fail to complete the downfall of the Press'); *A Review of the Constitution of Great Britain* (2nd ed J Ridgway, London 1791) 43; see *A General Index to the Monthly Review* (R Griffiths, London 1785) 290-91 (listing articles); *Historical Sketches of Civil Liberty* (GGI, London 1788).

³⁵⁷ *A Tour Sentimental and Descriptive through the United Provinces* (W Lowndes, London 1788) 1:136.

³⁵⁸ E.g., Anthony Highmore, *Reflections on the Distinction Usually Adopted in Criminal Prosecutions for Libel* (T Farnworth, London 1791) 13-16, 27, 32, 35; [Thomas Leach], *Considerations on the Matter of Libel* (J Johnson, London 1791) 2-4.

³⁵⁹ E.g., *The Miscellaneous Works, in Verse and Prose, of Gorges Edmond Howard* (R Marchbank, Dublin 1782) 2:319-36; [John Foster], *Observations on the Parliamentary Conduct of the Right Hon. John Foster* (R

upon the liberty of the press,³⁶⁰ and that 'if the Star-chamber doctrines concerning libels are suffered to prevail, . . . there will be a total end to the freedom of the press.'³⁶¹

These criticisms of seditious libel doctrine as contrary to freedom of press show that, in the period before 1776 and 1789, freedom of press did not uniformly hold Blackstone's and Levy's meaning of mere freedom from prior restraint (licensing)—that was the view of a receding minority. Freedom of press instead also meant freedom from subsequent punishment by seditious libel doctrine, to the growing majority of writers.

Levy, in contending that '[n]o English libertarian protested the fact that the law punished words against the state' and 'either failed to confront [seditious libel] or acquiesced in it,'³⁶² overlooked most of these cited claims that freedom of press was violated by seditious libel either inherently or as contorted by unique rules. He also understated the reach of many who he cited, such as Towers' 1784 treatise, which Levy described to 'never actually propose[] more than the power of juries to decide the criminality of the accused's statements,' in the face of its explicit conclusion that 'if the Star-chamber doctrines concerning libels are suffered to prevail, . . . there will be a total end to the freedom of the press in this country.'³⁶³ Levy's assertion

Marchbank, Dublin 1784) 18-23; *An Examination into the Rights and Duties of Jurors* (T Whieldon, London 1785) 126-27; John Bowles, *Considerations on the Respective Rights of Judge and Jury* (2nd ed Whieldon, London 1791) viii.

³⁶⁰ [Francis Maseres], *An Enquiry into the Extent of the Power of Juries, on . . . Seditious, or Other Criminal Writings, or Libels* (J Debrett, London 1785) 51; accord *ibid* 52 (Thus, 'to pretend to be in possession of a freedom of the press, would be ridiculous' when courts 'might punish as a violator of the laws, any author. . . which they might be displeased with, and think proper to declare a libel.'). 70-71, 72-73.

³⁶¹ *The English Review* (J Murray, London 1785) 50,52 (reprinting v5, article 11). Judges 'never find[ing] any difficulty. . . to construe any writing into a libel' meant that 'all liberty of the press is nearly at an end.' Robert Pigot, *Liberty of the Press* (np, Paris 1790) 5. Others proclaimed a core part of liberty of press as the right to criticize government, inferentially unrestrained by seditious libel prosecutions. [Capel Lofft], *An Essay on the Law of Libels* (C Dilly, London 1785) 59-60, 61 (right to criticize government; free people should not have criminal libel); 'An Essay on the Law of Libels,' *The Political Herald, and Review* (GGJ, London 1785) 1:74-76; 'Liberty of the Press,' *The Weekly Entertainer* (v11 R Goadby, Sherborne 1788) 230-31. The Society for Constitutional Information, formed in 1780, championed those freedoms of press and speech. *At a Meeting of the Society for Constitutional Information* (np, London 1783).

³⁶² Levy 116, 169.

³⁶³ Levy 283; Joseph Towers, *Observations on the Rights and Duty of Juries, in Trials for Libels* (J Debrett, London 1784) 146; which was quoted as well as sold in America, e.g., 'Observations on the Rights and Duties of Juries' *Independent Gazetteer* (Philadelphia 30 Oct.1789) 2.

that no 'critics had questioned [Mansfield's] narrow definition of a free press'³⁶⁴ overlooked claims that could only mean that judicial definition was unduly constrictive.³⁶⁵

C Rising Objection in America to Seditious Libel as a Violation of Freedoms of Press and Speech

Many if not most of these English books and tracts were read in the American colonies,³⁶⁶ for which England was the primary source.³⁶⁷ English newspapers were routinely copied,³⁶⁸ Colonial libraries were stocked with the cited books,³⁶⁹ and printers reprinted some³⁷⁰ while newspapers excerpted others.³⁷¹ *Cato's Letters* were quoted in all newspapers,³⁷² Wilkes was

³⁶⁴ Levy 158; *ibid* 158, 170 (that there was 'nearly universal acceptance' of liberty extending only 'so far as the laws of a community will permit, and no further,' and that there was similar 'acceptance, too, of a definition of freedom of the press as a freedom from prior restraint,' the Blackstone-Mansfield definition).

³⁶⁵ Levy, in order to argue that the 'weight of talent and reputation rested exclusively on the conservative side,' had to ignore half of Defoe's and Davenant's writings and dubiously to identify Addison as 'Tory Author,' Levy 104; see ODNB 1:321, though he could have cited Dr. Johnson instead.

³⁶⁶ *Ideological Origins* 23 (generally), 35, 41, 42 (Cato, Burgh, Gordon's *Tacitus*); *Dulany* 33n ('excellent' *Letter Concerning Libels*).

³⁶⁷ *Lamp* 18; e.g., 'Isaiah Thomas Hath Just Received from London' *Worcester Magazine* (Worcester Sept. 1786) [unnumbered] (including Cato and Zenger). England was the source of well over 90% of the Philadelphia library's collection. See *A Catalogue of the Books, Belonging to the Library Company of Philadelphia* (Poulson, Philadelphia 1789). Booksellers offered *Doctrine of Libels*, and *Rights and Duty of Juries, in Trials for Libel*. E.g., Robert Bell, *A Catalogue* (Robert Bell, Philadelphia 1783) 29; Rice and Co., *Catalogue of Books* (Rice and Co., Philadelphia 1791) 37.

³⁶⁸ E.g., 'Junius's Remarkable Plan of an Address, &c., Received by the Last Vessel from London' (np, Boston 8 Feb. 1770); *Ideological Origins* 43 (Cato).

³⁶⁹ *Lamp* 10-16, 199-232. The Library Company of Philadelphia, the congressional library before and when the Constitution was framed in 1787, *ibid* 107, had many of the English publications cited in the prior subsection, including *Letter Concerning Libels*, *Tacitus*, *Trial of Zenger*, *The North Briton* and Wilkes' *Letters*, *Letters of Junius*, Priestley, and Burgh, along with Blackstone. *A Catalogue of the Books, Belonging to the Library Company of Philadelphia* (Poulson, Philadelphia 1789) 230, 14, 46, 223, 226, 185, 212, 185, 186, 227 (closest catalogue to 1787). Its *Letter Concerning Libels* had been on the shelves since before 1770. *The Charter, Laws, and Catalogue of Books, of the Library Company of Philadelphia* (Joseph Cruikshank, Philadelphia 1770) Item 443(3). It also had a shelf of 'Commonwealthmen.' *A Catalogue of the Books, Belonging to the Library Company of Philadelphia* 181, 341 (Locke), 176, 181 (Sidney), 27, 34, 39, 181, 232; see *Ideological Origins* 34-35.

The library in New York City, where the Bill of Rights was adopted in 1789, similarly contained many, including *Cato's Letters*, *Tacitus*, *Junius*, Mably, Priestley, and Towers, along with Blackstone and Buller. *The Charter, Bye-Laws, and Names of the Members of the New-York Society Library, with a Catalogue of the Books* (Hugh Gainé, New York 1789) 27, 28, 36, 44, 52, 57, 69, 20, 21.

³⁷⁰ Such as Gordon's *Independent Whig*, Burgh's *Disquisitions*, Towers' *Juries*, and in the year the First Amendment was ratified, *Junius*. [Thomas Gordon and John Trenchard], *The Independent Whig* (np, Philadelphia 1724) 143; James Burgh, *Political Disquisitions* (Robert Bell, Philadelphia 1775); 'New Books, Just Published' *Pennsylvania Packet* (Philadelphia 19 Nov. 1785) 3 (Towers); *Junius, The Letters of Junius* (Prichard and Hall, Philadelphia 1791). The *Junius* reprint came out by September 1791. 'Catalogue of Books, for Sale at Carey, Stewart, & Co.'s Store' *Universal Asylum and Columbian Magazine* (Philadelphia Sept. 1791) 217, 219.

³⁷¹ E.g., [James Chalmers], *Plain Truth* (R. Bell, Philadelphia 1776) [unnumbered after 135]; [Joseph Green], *Observations on the Reconciliation of Great-Britain* (Robert Bell, Philadelphia 1776) 4; and for excerpts, e.g.,

someone 'of whom you all have heard,'³⁷³ and Junius was later canonized 'the celebrated Junius' by *The Federalist*.³⁷⁴ 'Opposition thought,' as Bailyn noted, 'was devoured in the colonies.'³⁷⁵

Further, publishers in America printed their own books, pamphlets, and newspapers that addressed the interaction of seditious libel and press and speech freedoms, and that is the subject of this section. Most colonial publications were widely circulated³⁷⁶ and influential.³⁷⁷

Levy, extending his conclusion about England to America, described the period up to the Revolution as a 'comparatively impoverished condition of American thinking on the subject of the theory of the freedom of the press,' best summarized by 'acquiescence in the concept that seditious libel criminally assaulted government'; he described the post-revolutionary period as 'not much [liberal thought] after, not until 1798.'³⁷⁸ Others agreed that Cato's 'definition of a free press to mean freedom from seditious libel prosecutions apparently died out in the second decade of the eighteenth century and thus did not cross the Atlantic.'³⁷⁹ Certainly, some Americans accepted the propriety of criminal libel³⁸⁰ to restrain calumny,³⁸¹ 'the fashion of the day,'³⁸² and it would be surprising if some did not embrace Blackstone on seditious

'Extracts from Burgh's *Political Disquisitions*' *Dunlap's Pennsylvania Packet* (Philadelphia 20 Nov. 1775) 2 (libel section).

³⁷² Elizabeth C Cook, *Literary Influences in Colonial Newspapers 1704-1750* (ColUP, New York 1912) 81. It became to the 'colonists the most important' opposition writings as the Revolution approached. *Ideological Origins* 35, published in the colonies by James and Ben Franklin and by Zenger, *ibid* 43, and 'republished. . . again and again,' *ibid* 36, 37 n19, 43-44. *Accord* Levy 62, 65; *Prelude* 96 n34, 137.

³⁷³ Quincy 263; *accord* [Benjamin West], *Bickerstaff's Boston Almanack* (Mein and Fleeming, Boston 1768) iii; Abraham Weatherwise, *New-England Town and Country Almanack* (Sarah Goddard, Providence 1768) ii-iv; *accord* Levy 62.

³⁷⁴ *Federalist* No. 70, at 479; e.g., 'Anecdote of Junius' *Worcester Magazine* (Worcester June 1787) 154; 'Anecdote' *Columbian Magazine* (Philadelphia Dec. 1789) 729; 'For the Weekly Museum' *Weekly Museum* (New York 25 June 1791) 2.

³⁷⁵ *Ideological Origins* 43, 23.

³⁷⁶ *Observations on a Late Pamphlet Entitled 'Considerations on the Society or Order of the Cincinnati'* (Hudson & Goodwin, Hartford 1784) 2.

³⁷⁷ *Ideological Origins* 2; *Prelude* 303-04 (newspaper circulations); *Tyranny* 1, 5, 9.

³⁷⁸ Levy 172, 136.

³⁷⁹ *Hamburger* 745 n261.

³⁸⁰ William Livingston, 'Of the Use, Abuse, and Liberty of the Press' *Independent Reflector* (New York 30 Aug. 1753), in Milton M Klein (ed), *The Independent Reflector* (HUP, Cambridge 1963) 336, 339-41.

³⁸¹ *A View of the Scandal Late Spread in Some Printed Libels* (Andrew Bradford, Philadelphia 1729) 1.

³⁸² 'My Dear Trifler!' *Columbian Magazine* (Philadelphia July 1787) 528; *accord* 'Cursory Reflexions on Newspaper Calumny' *American Museum* (Philadelphia Oct. 1787) 404.

libel. However, as in England, the preponderance after 1760 (or earlier), and the heavy preponderance after 1765, of preserved pre-revolutionary and post-revolutionary sentiment addressing seditious libel viewed it as in conflict with freedom of press and, occasionally, freedom of speech. That concept *did* cross the Atlantic, and in the wake of the Stamp Act and the *Wilkes* cases, became more and more the belief of the popular party.³⁸³

1 Criticism of Seditious Libel in the Period Leading Up to Revolutionary State Declarations of Rights

The storm in Anglo-American relations in the 1760s and 1770s was accompanied by a tempest over seditious libel, following recurrent threats from royal governors that pro-American publications and speeches were seditious libels.³⁸⁴ The ideological origins of the revolutionary declarations of rights, like those of the Revolution, were in this 'decade after 1763'.³⁸⁵ The popular party responded to the threats by identification with freedom of press and disavowal of seditious libel, as Massachusetts Chief Justice Thomas Hutchinson acknowledged when he lambasted carrying 'this absurd notion of the liberty of the press to the length some would have it--to print every thing that is libelous and slanderous,'³⁸⁶ and when he said that if seditious libels were prosecuted 'some will cry out, our liberties are endangered--the liberty of the press is struck at.'³⁸⁷ The royalist party's identification with prosecution of seditious libel was equally recognized by Hutchinson, as he repeatedly charged the grand juries to prosecute 'seditious libels upon Government or the rulers,'³⁸⁸ and recited the Mansfield definition of freedom of press.³⁸⁹ Massachusetts' lower legislative house refused

³⁸³ Publications are only discussed through 1791, when the First Amendment was ratified; subsequent publications are more and more suspect as statements of broad understandings, as partisan disagreement grew.

³⁸⁴ E.g., Samuel Smith, *History of the Colony of Nova-Caesaria* (James Parker, Burlington 1765) 346, 383 (N.J.); Cadwallader Colden, 'A Proclamation' (np, New York 1769) (N.Y.); 'By the Governor. A Proclamation' *Royal American Magazine* (Nov. 1774) 436 (Mass.); accord [Martin Howard], *A Defence of the Letter from a Gentleman at Halifax* (Samuel Hall, Newport 1765) 28 (R.I.).

³⁸⁵ See Bailyn 22.

³⁸⁶ Quincy 244; see DAB 9:439.

³⁸⁷ *Ibid* 265.

³⁸⁸ *Ibid* 305 (Aug. term 1768); accord *ibid* 236-37, 242-43, 262-64, though he eventually found himself 'discouraged,' *ibid* 309.

³⁸⁹ *Ibid* 244 (Aug. term 1767), 266 (Mar. term 1768).

to support Hutchinson's proposed prosecution of the *Boston Gazette's* printers for seditious libel, and instead responded with the first American legislative proclamation recognizing press freedom, implicitly finding the one opposed to the other.³⁹⁰

The *Wilkes* seditious libel cases brought extensive discussion in American newspapers in the 1760s.³⁹¹ Two American reprintings of Wilkes' account featured 'his support of the liberty of the press' and its violation by seditious libel.³⁹²

Various newspapers of the 1760s pointed out that opposition between seditious libel and freedom of press.³⁹³ For example, one observed that an official alleging libel would 'crush the liberty of the press' by 'constru[ing] a libel against him,' unless thwarted by '[b]lessed juries.'³⁹⁴ The 1760s ended with the Middlesex Petition, one of many supporting Wilkes, being published in nearly every American paper with its complaint that biased 'attacks on the liberty of the press' regularly occurred as 'the slightest libel against a minister is punished.'³⁹⁵

³⁹⁰ 'The Liberty of the Press is a great bulwark of the liberty of the people: It is therefore the incumbent duty of those who are constituted the guardians of the people's rights to defend and maintain it.' *Ibid* 275 (3 Mar.1768). While the house and the newspaper did not elaborate on their reasoning for opposing seditious libel based on freedom of press, they clearly found the two incompatible. *Ibid* 270, 272 (grand jury), 274-75 (house), 277, 278 (*Boston Gazette*).

³⁹¹ E.g., 'Boston, March 27' *New-York Gazette and Weekly Mercury* (New York 3 Apr.1769) 2; 'Extract of a Letter from London' *Pennsylvania Chronicle* (Philadelphia 27 Mar.1769) 78; 'London' *Penny Post* (London 25 Jan.1769) 29, 30; accord *Ideological Origins* 110.

³⁹² John Wilkes, *An Authentick Account of the Proceedings against John Wilkes* (Richard and Samuel Draper, Boston 1763) 22; John Wilkes, *An Authentick Account of the Proceedings against John Wilkes* (W Dunlap, Philadelphia 1763) 24; contra *A Letter from Scots Sawney the Barber, to Mr. Wilkes* (np, Boston 1763) 6-8.

³⁹³ *Pennsylvania Journal* (Philadelphia 11 Sept.1766), quoted in *Press-Mass*.128 n1 ('every friend of his country' should show 'honest and generous indignation against the wretch that would attempt to enslave his countrymen by restraints on the press'); Populus [Samuel Adams], 'Messrs. Bdes and Gill' *New-York Journal* (New York 26 Mar.1768) supp.1 (because '[t]here is nothing. . . so justly terrible to tyrants, and their tools and abettors, as a free press,' those malefactors 'pronounce it a libel'); Nauticus, 'Messrs. Robertsons' *New-York Chronicle* (New York 5 June 1769) 44 (war against 'liberty of the press' by 'corrupt and arbitrary rulers' who 'endeavoured to effect its destruction,' particularly by 'Mansfield's method' and 'dungeons of the modern inquisition'). A number of colonial newspapers, reporting on Wilkes' sentence for seditious libel in 1768, reprinted the London source's challenge: 'Quære, to the gentlemen of the law, Are both of the sentences valid?' E.g., 'Copies of Two Sentences against Mr. Wilkes' *New-York Gazette* (New York 30 Aug.1768) supp.1; 'Copies of Two Sentences against Mr. Wilkes' *Connecticut Journal* (New Haven 9 Sept.1768) 1.

³⁹⁴ Paoli, 'Messieurs Edes & Gill' *Boston Gazette* (Boston 30 Jan.1769) 2, 3. Articles reminded readers that the humble petition of the seven bishops 'had been called a false and seditious libel' by a lawless ministry. Farmer, 'It Is Thought that the Reprinting the Following Extracts' *Pennsylvania Chronicle* (Philadelphia 27 June 1768) 177, 178; Farmer, 'It Is Tho't that the Reprinting the Following Extracts' *Boston Evening-Post* (Boston 1 Aug. 1768) 1.

³⁹⁵ E.g., 'The Middlesex Petition' *Newport Mercury* (Newport 7 Aug.1769) 1; 'The Middlesex Petition' *New-York Journal* (New York 10 Aug.1769) supp.1.

Nevertheless, Levy claims that 'finding a broad libertarian theory in America before the American Revolution--or even before the First Amendment--proves difficult.'³⁹⁶ Yet precisely such a theory was provided by Bollan³⁹⁷ for freedoms of speech and press in 1766 and again in 1772.³⁹⁸ His thesis was that the crime of seditious libel is inconsistent with liberty including liberties of press and speech, based on such points as that the criminality of libels arose 'from a source in general unfavourable to liberty,' Roman law, and that 'the liberty of the press. . . hath in times past been so severely restrained by law, or lawless power,' particularly by the Stuarts and their Star Chamber.³⁹⁹ Such a theory was also offered by 'Centinel' in 1771-1772. He began that seditious libel 'is repugnant to all our notions of a free government,' because it punished 'freedom of writing,'⁴⁰⁰ and, in a passage Levy overlooked,⁴⁰¹ 'Centinel' concluded the essays on seditious libel by warning that 'freedom of writing is now attacked' by seditious libel, and that 'A FREE PRESS IS A RIGHT' threatened with destruction by seditious libel.⁴⁰² Bollan provided a theoretical basis for overturning seditious libel, as 'Centinel' did for overturning half.

The decade of the 1770s began with public toasts to 'total abolition of the Star-Chamber doctrine of libels, as held upon the trials of Zenger,'⁴⁰³ and with an article urging 'all the American assemblies to bring in bills for the banishment of such tyrannical tenets' as the 'hor-

³⁹⁶ Levy 121; *accord* *ibid* 88.

³⁹⁷ A Massachusetts attorney who was then London agent for that colony's council. William Bollan, *The Petition of Mr. Bollan* (J Almon, London 1775); DAB 2:420.

³⁹⁸ William Bollan, *The Freedom of Speech and Writing upon Public Affairs Considered* (S Baker, London 1766). By 'writing' he meant freedom of press. *Ibid* 62, 129, 137. This was abridged as William Bollan, *An Essay on the Right of Every Man in a Free State To Speak and Write Freely* (J Almon, London 1772).

³⁹⁹ *Ibid* 5, 137. Bollan also assaulted the six unique features of seditious libel doctrine. *Ibid* 4, 130, 131, 132, 135.

⁴⁰⁰ Centinel, 'Centinel No.XXVI' *Massachusetts Spy* (Worcester 19 Dec.1771) 165 (freedom of writing was essential to identifying rulers' contravention of law--'[h]ow can rulers be accountable, if their actions are not to be discussed?'); *accord* 'Extracts from the Boston Papers' *Essex Gazette* (Salem 17 Dec.1771) 178; Centinel, 'Centinel No.XXIV' *Massachusetts Spy* (Worcester 5 Dec.1771) 157. Centinel also attacked the six unique features of seditious libel.

⁴⁰¹ Levy 161-62, though Levy is correct that Centinel limited his argument to true publications and allowed prosecution of false statements.

⁴⁰² Centinel, 'Centinel No.XXVIII' *Massachusetts Spy* (Worcester 2 Jan.1772) 173 (and thus, crushing a critic of government 'is the crushing the press itself'); see Centinel, 'Centinel No.XXV, XXVII' *Massachusetts Spy* (Worcester 12, 26 Dec.1771) 161, 169.

⁴⁰³ 'The Following Patriotic Toasts Were Drank' (np, New York 1770); 'New-York, March 26,' *New-York Gazette* (New York 26 Mar.1770) 1.

rid doctrine' of seditious libel.⁴⁰⁴ The latter is an example of Levy's unreasonable standard, because he dismissed it and another article because 'neither ever attacked the concept of seditious libel.'⁴⁰⁵ 'Son of Liberty' found Hawkins on seditious libel to be 'utterly subversive of the liberty of the press' and mere 'Star-Chamber trumpetry,' as did other articles.⁴⁰⁶

The *McDougall* case presented 'the Wilkes of New-York'⁴⁰⁷ in a seditious libel prosecution by the colony's legislature, as the newspaper publisher denounced prosecution as 'oppress[ion] by the relentless hand of power' of his right to criticize government based on 'liberty of the press.'⁴⁰⁸ McDougall's apologia, reprinted in most colonial newspapers, excoriated the 'Star Chamber doctrine of libels' and contrasted it to 'freedom of speech and freedom of writing.'⁴⁰⁹ Other commentary pronounced a 'curse on the Star Chamber law' of libel,⁴¹⁰ and reprinted a Whig article from London contrasting 'liberty of the press' and 'the case of libels.'⁴¹¹ Boston essays warned that Mansfield 'want[ed] to destroy the *liberty of the press*' and that the *Wilkes* case was an 'attack on the *liberty of the press*.'⁴¹² Royal governors were

⁴⁰⁴ [Alexander McDougall], 'Mr. Printer' *New-York Gazette* (New York 9 Apr.1770) 1 (and further, 'to refuse any support to *Government* until *Government* will concur in a law' doing so), cited in Levy 77-78.

⁴⁰⁵ Levy 78. The latter article also gave as the grounds that the 'blasphemies' of seditious libel could ensnare every author, because they are enforced by 'minions of power. . . upon the bench in the mother country,' so that 'the wicked arm of oppression' could produce 'a silent press' and 'immediate perdition to liberty.' [Alexander McDougall], 'Mr. Printer' *New-York Gazette* (New York 9 Apr.1770) 1.

⁴⁰⁶ A Son of Liberty, 'Mr. Printer' *New-York Gazette*, and *Weekly Mercury* (New York 9 Apr.1770) 1; A Son of Liberty, 'Mr. Printer' *New-York Gazette*, or the *Weekly Post-Boy* (New York 9 Apr.1770) 1. Articles in the *New-York Gazette* called for 'repeals, or material alterations,' of the 'law of libels' or 'Star-Chamber law,' 'The New York Satyrists' *New-York Gazette* (New York 16 Apr.1770) 2; and in the *Boston Gazette* attributed apparent non-prosecution of 'Junius' to 'the Star Chamber doctrine relative to libels' being 'conceived in England to be as unfriendly to the liberty of the press, as it is dangerous to the rights of the people.' 'New-York, March 12,' *Boston Gazette* (Boston 19 Mar.1770) 2; 'New-York, March 12,' *New-York Journal* (New York 15 Mar.1770) 3.

⁴⁰⁷ 'Charlestown, South Carolina' *Georgia Gazette* (Charleston 25 Apr.1770) 1; accord 'New-Haven, February 16' *Connecticut Journal* (New Haven 16 Feb.1770) 2.

⁴⁰⁸ Alexander McDougall, *To the Freeholders and Freemen of the City and Colony of New-York* (McDougall, New York 1771) col.1; *DAB* 12:21.

⁴⁰⁹ E.g., Alexander McDougall, 'To the Freeholders' *New-York Gazette* (New York 12 Feb.1770) 2; Alexander McDougall, 'To the Freeholders' *Essex Gazette* (Salem 20 Feb.1770) 121. The case prompted a judge of New York's highest court to deride the law of libels as malignant because such cases were 'conducted according to resolutions absurd in themselves and subversive of a free state,' by punishing truth and making it an aggravating factor, and by limiting the jury's consideration to the trivial fact of publication. [William Smith, Jr.], 'The Law Concerning Libels' *New-York Weekly Post-Boy* (New York, 19 Mar.1770).

⁴¹⁰ 'Mr. Printer' *New-Hampshire Gazette* (Portsmouth 9 Mar.1770) 3.

⁴¹¹ 'The Case of Libels' *New-York Gazette* (New York 12 Mar.1770) 1.

⁴¹² Millions, 'A Letter to the King' *Boston Gazette* (Boston 31 Aug.1772) 1.

said to 'meddle with the press' by applying 'the star chamber law of libels'.⁴¹³

American newspapers provided a regular drumbeat of news on English prosecution of the press for seditious libel: the 'Junius' trials,⁴¹⁴ Camden's questions to Mansfield,⁴¹⁵ the *Horne* and *Elphinston* cases,⁴¹⁶ and Parliament's condemnation of various seditious libels.⁴¹⁷ John Adams, as 'Novanglus,' expressed alarm that newspapers and leaders were threatened with seditious libel.⁴¹⁸ American reprints of English books and pamphlets in the 1770s contended that seditious libel violated freedom of press,⁴¹⁹ as did widespread newspaper reprints of 'Junius'--particularly the letters flaying seditious libel,⁴²⁰ Cato--particularly on freedoms of speech and libels,⁴²¹ and articles reprehending 'Lord Mansfield, . . . with all the aid of false construction,

⁴¹³ Hyperion, 'To the Man Whom Conscience Forbids to Stile My Governor' *Boston Gazette* (Boston 25 Nov.1771) 2. Similarly, a North Carolina book asserted the right of 'public complaint' which must not 'be deemed lib[el]s against those who caused' public oppressions or else rights would be 'but shadows' and grievances could 'never be redressed. . . without the press,' [Herman Husband], *A Continuation of the Impartial Relation of the First Rise and Cause of the Recent Differences* (np, Newbern 1770) 13; see DAB 9:427; while an almanac there warned that 'severe prosecutions against libels' brought 'the declension, and, in a short time after, the dissolution of Roman liberty.' Thomas Fox, *The Wilmington Almanack* (Adams, Wilmington 1770) [unnumbered].

⁴¹⁴ E.g., 'London, June 1' *Providence Gazette* (Providence 18 Aug.1770) 136; 'London, June 2' *Boston News-Letter* (Boston 23 Aug.1770) 2.

⁴¹⁵ E.g., 'London, December 18' *Essex Gazette* (Salem 29 Jan.1771); 'London, December 18' *Boston Evening-Post* (Boston 11 Feb.1771) 2.

⁴¹⁶ E.g., 'Proceedings of the British Parliament' *New-York Gazette and Weekly Mercury* (New York 25 Apr.1774) 1; 'London, February 16' *Boston News-Letter* (Boston 28 Apr.1774) 1; 'London, June 3' *Connecticut Gazette* (New London 9 Sept.1774) 2.

⁴¹⁷ E.g., 'London, February 21' *Boston Post-Boy* (Boston 10 Apr.1775) 2; 'London' *Boston Evening-Post* (Boston 17 Apr.1775) 2; 'House of Commons, Feb. 13' *Pennsylvania Ledger* (Philadelphia 22 Apr.1775) 3; 'London, February 11' *Norwich Packet* (Norwich 20 Apr.1775).

⁴¹⁸ Novanglus [John Adams], 'To the Inhabitants' ['Novanglus V'] *Essex Gazette* (Cambridge 14 Mar.1775) 1 (ending quoting Chief Justice Hutchinson), reprinted *Adams Works* 4:57, 74.

⁴¹⁹ *A Collection of Speeches and Writings on the Commitment of the Lord-Mayor* (repr John Holt, New York 1771) 34 ('the liberty of the press is the object of this criminal alliance' of Parliament, which imprisoned Wilkes and others, and the King, who issued proclamations against publications). *The Englishman's Right* was reprinted in Boston in 1772, and Chesterfield's speech supporting press and stage against regulation was reprinted in 1775. *Life of the Late Earl of Chesterfield* (repr John Sparhawk, London 1775) 25-32.

⁴²⁰ E.g., 'Letter of Junius' *Boston Gazette* (Boston 28 Jan.1771) 1; 'London, April 21' *Massachusetts Spy* (Worcester 4 July 1771) 69; 'London, April 21' *Essex Gazette* (Salem 2 July 1771) 197.

⁴²¹ E.g., 'We Are Requested To Publish Here' *Boston Evening-Post* (Boston 6 Mar.1769) 2; 'Cato,' 'From the Bristol Gazette' *New-York Gazette* (New York 2 Apr.1770) 2; 'From Cato's Letters' *Massachusetts Spy* (Worcester 19 Apr.1771) 25; *ibid* (25 Apr.1771) 29; 'Having Read a Very Sensible Discourse on Libelling' *Boston Post-Boy* (Boston 20 Sept.1773) 1; accord *Levy* 113-14 & nn102-10.

Though Cato allowed or at least genuflected to punishment of libels against government, those letters gave ample reason why seditious libel was irreconcilable with liberty of press. *Cato's Letters* 1:228, 232, 233 (no.32) (10 June 1721) (punishment 'would make all writing. . . and even all speaking unsafe,' as partisans 'watch to stifle liberty under a pretence of suppressing libels'; subjects should 'rather many libels should escape, than the liberty

and forced innuendos.⁴²² An American edition of Furneaux's 1770 attack on Blackstone's treatment of liberty of conscience laid down principles devastating toward seditious libel: 'penal laws should be directed against *overt acts only*, which are detrimental to the peace and good order of society, . . . and not against *principles*, or the *tendency* of principles.'⁴²³

An extensive report on libel, from a London association for defense of the press, was reprinted in a large number of American newspapers at the beginning of 1776, just before state declarations of rights began to be adopted. Usually front page material, the report found the foremost threat of 'destruction of that liberty' by despotism to lie in seditious libel prosecutions,⁴²⁴ and listed that threat to 'liberty of the press' as different--and greater--than licensing.⁴²⁵

These statements, though typically short, contradict Levy's conclusion that Americans did not question seditious libel itself or 'underst[an]d the incompatibility between seditious libel and free government.'⁴²⁶ To be sure, a far lesser number of essays saw danger in seditious li-

of the press should be infringed'); *Cato's Letters* 2:712, 712-13, 714, 715, 717 (no.100) (27 Oct.1722) (opponents 'have called every opposition. . . sedition,' and 'give one side liberty to say what they will, and not suffer the other to say anything,' which extinguishes liberty; suppressing wrong opinion produces 'tyranny, and the most stupid ignorance,' and destroying calumny 'will inevitably destroy all liberty'); *Cato's Letters* 2:717, 718, 719, 720 (no.101) (3 Nov. 1722) (prosecutors' procedures thwart questioning whether libels are criminal, wrongly infer criminal intentions, 'strain their genuine signification' into a seditious meaning, and thereby 'overturn every species of liberty'). Also, No.32 argued truth should be a defense.

⁴²² *The Crisis Number VIII* (repr Benjamin Towne, Philadelphia 1775) 58; *accord The Crisis Number XVIII* (repr John Anderson, New York 1775) 153.

⁴²³ Philip Furneaux, 'Letters to the Honourable Mr. Justice Blackstone,' in *An Interesting Appendix to Sir William Blackstone's Commentaries* (Robert Bell, Philadelphia 1772) 120, 34 (nonsequentially numbered); *accord* Levy 163-65; Andrew Kippis, *A Vindication of the Protestant Dissenting Ministers* (2nd ed G Robinson, London 1773) 98-99, cited in Levy 166-67.

⁴²⁴ It said:

Prosecutions have been commenced by the officers of the crown, apparently for no other purpose, than that of silencing the press Nor is this all, in the very mode of prosecution, an eye hath been had to *Star Chamber tyranny*.--The printers of our news-papers, have not been presented on the *oaths* of jurors, but on a bare *suggestion* of an officer of the crown, who, by filing *informations*, . . . thereby supersedes the utility of *Grand Juries*

Conceiving an opposition to such oppressive measures, to be a duty incumbent on the people at large--desirous, as well of rescuing the press from the shackles of ministerial slavery, . . . the members of the *London Association*, have determined to support the freedom of the press upon true constitutional grounds

'London Association. Liberty of the Press' *The Pennsylvania Magazine; or, American Monthly Museum* (Philadelphia Jan. 1776) 47, 48; e.g., 'London Association. Liberty of the Press' *Boston Gazette* (Boston 25 Dec.1775) 1; 'London Association. Liberty of the Press' *New-York Gazette, and Weekly Mercury* (New York 8 Jan.1776) 1; 'London Association. Liberty of the Press' *Essex Journal* (Newburyport 12 Jan.1776) 1; 'London Association. Liberty of the Press' *Pennsylvania Packet* (Philadelphia 15 Jan.1776) 2.

⁴²⁵ *Ibid*

⁴²⁶ Levy 121.

bel,⁴²⁷ supported its prosecution,⁴²⁸ and used the Blackstone-Mansfield definition;⁴²⁹ and a far greater number of articles criticized libel doctrine for its six unique features.⁴³⁰ As in England, only a minority of publications addressing seditious libel in the 1760s or 1770s supported it, and then by repeating shibboleths rather than citing Blackstone,⁴³¹ with very few exceptions.⁴³²

2 Criticism of Seditious Libel in the Period Leading Up to the Federal Bill of Rights

Pamphlets and widely-reprinted newspaper articles opposing seditious libel as contradictory to freedoms of press and speech continued to predominate and multiplied. Most were overlooked by Levy, though an exception was the 'Junius Wilkes' essay in 1782, which clearly rejected seditious libel as a violation of freedom of press:

If a printer is liable to prosecution and restraint, for publishing pieces on public measures, conceived libellous, the liberty of the press is annihilated and ruined. . . . The danger is precisely the same to liberty, in punishing a person *after* the performance appears to the world, as in preventing its publication in the *first* instance. *The doctrine of libels*, is of pernicious consequence to the freedom of the press. . . .⁴³³

That language squarely rejected the Blackstone-Mansfield definition that freedom of press meant only freedom from prior restraint, not subsequent punishment.⁴³⁴ 'Candid,' the same

⁴²⁷ 'To the Inhabitants' *New-Hampshire Gazette* (Portsmouth 20 Jan.1775) 2.

⁴²⁸ 'A Lover of His King and Country,' 'To the Editor' *New-York Gazette, and Weekly Mercury* (New York 31 July 1769) 2; 'The Dougliad No.3' *New-York Gazette, and Weekly Mercury* (New York 23 Apr.1770) 1; 'The Dougliad No.7' *New-York Gazette, and Weekly Mercury* (New York 21 May 1770) 1; see *Prelude* 116. Holt's approach appeared in three pages of a multivolume handbook for justices of the peace adapted from an English work. *An Abridgment of Burn's Justice of the Peace* (Joseph Greenleaf, Boston 1773) 258-60; [James Davis], *The Office and Authority of a Justice of the Peace* (James Davis, Newbern 1774) 240-42.

⁴²⁹ 'The Tribune of the People,' 'On the Liberty of the Press' *Providence Gazette* (Providence 12 May 1770) 81; William Blackstone, *Commentaries on the Laws of England* (Robert Bell, Philadelphia 1772) 4:150-53 (the only American version until 1790).

⁴³⁰ E.g., 'Copy of a Late Letter from an Eminent Counsellor' *New-York Gazette* (New York 19 Mar.1770) 1; 'Britannicus,' 'To a Jurymen' *New-York Gazette, and Weekly Mercury* (New York 26 Feb.1770) 2; 'A Dialogue between a Lawyer and a Printer' *Massachusetts Spy* (Worcester 29 Nov.1770) 2.

⁴³¹ 'Continuation of Extracts from the Independent Whig' *The Censor* (Boston 14 Mar. 1772) 68, 70; 'Considerations on the Mischievous Tendency of Libels' *The Censor* (Boston 7 Mar. 1772) 62, 64; 'Observations on the Liberty of the Press' *American Monitor* (Boston Oct.1785) 3, 5 (paraphrasing Hume that present 'sedition and libelling' laws are 'as strong as they can possibly be made' without violating press); see [Leonard Daniel], *Massachusettsensis* (Mills & Hicks, Boston 1775) 18.

⁴³² 'To the People of Pennsylvania' *Freeman's Journal* (Philadelphia 30 Oct.1782) 2, 3.

⁴³³ Junius Wilkes, 'For the Chronicle of Freedom' *Independent Gazetteer* (Philadelphia 9 Nov.1782) 2, cited in Levy 208-09.

⁴³⁴ The essay also provided rationales for liberties of press and speech, such as the right to examine public subjects and public officials, as 'public servants and stewards,' the necessity of those liberties to the Revolution and

year, concurred that 'the doctrine of libels' is 'an engine of the most intolerable oppression,' particularly against liberty of press as prosecutions occurred; 'the press should by no means be restrained.'⁴³⁵ Again, the Blackstone-Mansfield doctrine was flatly contradicted. Facing these two counterexamples, Levy dismissed them and insisted 'nor did anyone else attack the validity of sedition laws until the Sedition Act controversy in 1798.'⁴³⁶ That was mistaken.⁴³⁷

In 1785, 'Chevy Chase' was equally devastating, arguing that '[p]ursuing libels in a *criminal* way is alien from the nature of a free constitution,' and deprecating Blackstone as a mere 'ministerial writer' in a 'corrupt administration.'⁴³⁸ Even more explicit, 'Greybeard' described America as 'rejecting the doctrine of *Libels*; a doctrine extravagant and detestable in itself--a star-chamber doctrine, derogatory of the constitution, the bane of freedom of every kind, and incongruous with the genius of republican governments!'⁴³⁹ The next year, excerpts from Towers asserted that seditious libel was 'a mere assumption of some of the judges, calculated for. . . the subversion of the liberty of the press.'⁴⁴⁰ These were all published where Congress sat.

The federalist-antifederalist debates of 1787-1788 showed widespread belief that doctrines of seditious libel conflicted with freedoms of press and speech. James Wilson's speech in the Pennsylvania State House Yard in October 1787,⁴⁴¹ the earliest public defense of the

protection of other liberties, the association of a free press with freedom in other countries, and the 'oppression accompanying the '*doctrine of libels*' and the 'arbitrary construction of the judges.' *Ibid*.

⁴³⁵ Candid, 'Mr. Oswald' *Independent Gazetteer* (Philadelphia 14 Dec.1782) 2, 3, cited in Levy 209.

⁴³⁶ Leonard W Levy, 'The Legacy Reexamined' (1985) 37 Stanford Law Review 767, 780 n60. Hamburger agreed the 'early eighteenth century' English questioning of seditious libel 'does not, however, provide any reason to think that the idea found support or was considered a natural or constitutional right in the decades prior to the 1790s.' *Hamburger* 745 n261.

⁴³⁷ Identification of anonymous authors is from *Pamphlets-Constitution* 437-41, Paul L Ford, *Bibliography and Reference List of the History and Literature Relating to the Adoption of the Constitution* (np, Brooklyn 1888), and DHRC 3:471 n2, 19:160-61n, and from Early American Imprints and Early American Newspapers.

⁴³⁸ Chevy Chase, 'From a Late London Paper' *Independent Gazetteer* (Philadelphia 13 Apr.1785) 2.

⁴³⁹ Gregory Greybeard, 'For the Independent Gazetteer' *Independent Gazetteer* (Philadelphia 14 May 1785) 2. Consequently, 'if the notion of libels pervade a free country,' speech and press would be silenced toward rulers and measures. *Ibid*.

⁴⁴⁰ E.g., 'An Extract from. . . Trials for Libels' *State Gazette of South-Carolina* (Charleston 11 Sept.1786) 3 (part in italics); 'An Extract from. . . Trials for Libels' *Independent Gazetteer* (Philadelphia 14 Oct. 1786) 2. Towers' 1784 book was on juries and libels.

⁴⁴¹ James Wilson, 'State House Yard Speech' (6 Oct.1787), DHRC 13:339; *Wilson Works* 1:171.

proposed Constitution by a convention participant,⁴⁴² set the theme for federalists by stating that the federal government had no power touching the press.⁴⁴³ That federalist argument would fail if the federal government had a common law power to prohibit or prosecute seditious libel. Federalists typically reiterated that argument,⁴⁴⁴ and did not generally quote or follow the Blackstone-Mansfield definition of freedom of press.⁴⁴⁵

Arthur Lee, writing one of the earliest antifederalist essays, set the theme for the other side of the debate by fearing liberty of the press 'would be pulled down' by seditious libel prosecutions, or would be 'restrained' by prosecution 'for a libel,' contending that freedom of press and seditious libel doctrine were inconsistent.⁴⁴⁶ Also in October 1787, 'Democratic Federalist' worried that federal courts 'may claim a right to the cognizance of all offences against the general government, and *libels* will not probably be excluded,' which would imperil 'the safety of our boasted liberty of the press,' without an express protection.⁴⁴⁷

A number of other antifederalists believed express protection for freedom of press was essential because of the possibility of seditious libel prosecutions with or without constitutional warrant--and obviously presupposed that freedom of press was irreconcilable with seditious libel.⁴⁴⁸ William Findley found potential 'destruction' of freedom of the press: 'The

⁴⁴² *DHRC* 13:337,

⁴⁴³ *Ibid* 340; *Wilson Works* 1:172. Wilson's further statements are discussed in Chapter 4.D.

⁴⁴⁴ E.g., *DHRC* 5:736-37, 5:489-90, 3:243, 3:247, 3:524, 3:525.

⁴⁴⁵ For example, 'Plain Truth,' replying to Findley, did not deny that liberty of the press could be infringed by seditious libel prosecutions, but argued that 'liberty of the press in each state, can only be in danger from the laws of that state' because the federal government was limited to 'defined powers,' and that the Constitution's definition of federal jurisdiction said 'not a word' about "'libels or pretended libels'." Plain Truth, 'Answers to the Objections to the New Constitution' *American Museum* (Philadelphia Nov.1787) 422, 426; *Debate* 1:105, 108. E.g., 'Civis Rusticus,' in *Debate* 1:353, 360 (quoting Hume); *ibid* 2:228 (Hugh Williamson) (licensing one of various restraints); *ibid* 2:715 (Edmund Randolph); though Noah Webster and Tench Coxe came close, America [Noah Webster], 'America,' in *Debate* 1:553, 555-56; Philodemos [attrib. Tench Coxe], 'Address to the Printers of Newspapers' *American Museum* (Philadelphia Aug.1788) 79.

⁴⁴⁶ Cincinnatus [Arthur Lee], 'Cincinnatus I,' in *Debate* 1:92, 95-96; Cincinnatus [Arthur Lee], 'Cincinnatus Number I' *New-York Journal* (New York 1 Nov.1787) 2; see *DAB* 11:96. He summarized this, and condemned Mansfield's treatment of suspicion toward rulers as seditious libel, in 'Cincinnatus Number II' *New-York Journal* (New York 8 Nov.1787) 2.

⁴⁴⁷ Democratic Federalist, 'Messieurs Printers' *Pennsylvania Packet* (Philadelphia 23 Oct.1787) 2; *Debate* 1:70.

⁴⁴⁸ Confederationalist, 'To the Editor' *Pennsylvania Herald* (Philadelphia 27 Oct.1787) 2; Confederationalist, 'From the Pennsylvania Herald' *Cumberland Gazette* (Portland 30 Nov.1787) 2. 'Centinel' worried that Congress might 'restrain the printers, and put them under regulation,' which would 'shackle or destroy... the liberty of the

LIBERTY OF THE PRESS is not secured, and the powers of Congress are fully adequate to its destruction, as they are to have the trial of libel or pretended libel against the United States ⁴⁴⁹ Widely reprinted essays⁴⁵⁰ saw the two as in conflict, and saw the purpose for a bill of rights as to override seditious libel doctrines.⁴⁵¹ The drumbeat continued of news about English prosecutions for seditious libel.⁴⁵²

In 1788, a year before Congress drafted the Bill of Rights, a one-man battle over 'prosecuti[on] for pretended libels' as an 'attack[] upon the freedom of the press' was launched by a newspaper printer, Eleazer Oswald, and was publicized nationally.⁴⁵³ Oswald claimed that 'the rights of the press . . . are fundamentally struck at' by the 'doctrine of libels,' and that 'the

press.' Centinel [Samuel Bryan], 'Centinel No.II' *New-York Journal* (New York 1 Nov.1787) supp.1, 2; *Debate* 1:77, 80. A Bostonian confuted the federalist challenge, "'Where is the liberty of the press taken away'" to necessitate a Bill of Rights provision, by pointing to the risk that federal prosecutors will 'have the power to prosecute any printer for a pretended libel against the United States.' One of the Common People, 'Messieurs Edes' *Boston Gazette* (Boston 3 Dec.1787) 2.

⁴⁴⁹ An Officer of the Late Continental Army [William Findley], *Address from an Officer in the Late Continental Army* (np, Philadelphia 1787) 2; reprinted from 'Objections to the New Constitution' *American Museum* (Philadelphia Nov.1787) 422, 426; An Officer of the Late Continental Army, 'To the Citizens of Philadelphia' *Freeman's Journal* (Philadelphia 7 Nov.1787) 2; *Debate* 1:97, 98-99; see *DAB* 6:345.

⁴⁵⁰ E.g., Plain Truth, 'Answers to the Twenty[-]three Objections to the New Federal Government' *Worcester Magazine* (Worcester Jan. 1788) 170, 172, which stated that it was reprinted from the *Independent Gazetteer*; *DHRC* 3:126, 133, 230, 329-31.

⁴⁵¹ E.g., 'Democratic Federalist,' in *Debate* 1:70, 71 (Zenger case is an example of means 'to destroy effectually the liberty of the press'); 'Mr. Wheeler' *United States Chronicle* (Providence 13 Dec.1787) 3 (if a printer published something 'in which some proceedings of the continental legislature were freely commented upon--and the Attorney General should be ordered to prosecute the printer for a libel; in that case, I take it, as the United States are a party, the continental court will have *appellate jurisdiction*'); Philadelphensis [Benjamin Workman], 'Philadelphensis No.IX' *Freeman's Journal* (Philadelphia 6 Feb.1788) 2 (governments 'under the pretence of writing a libel' prosecute and imprison, inflict cruel and unusual punishment, and seize property, and 'the unfortunate citizen has . . . no bill of rights, to protect him'); Libertas, 'For the Newport Herald' *Newport Herald* (Newport 9 Oct.1788) 3 ('Libertas,' acknowledging an 'unrestrained' press will sometimes 'breathe a spirit of licentiousness,' asked rhetorically, 'Should the liberty of the press therefore be violated? Surely not,' because infringement even in that instance would cause 'the liberty of the press' to be 'totally abolished.') (citing Junius); see Federal Farmer, 'Federal Farmer IV,' in *Debate* 1:274, 280 (the author may not have been R.H.Lee, *DHRC* 4:205). Similarly, 'Scanderbeg' wrote a parody of a seditious libel trial and ended it with execution. E.g., Scanderbeg, 'The Trial, Conviction, and Death of the Celebrated Laco' *Independent Chronicle* (Boston 9 Apr.1789) 2; Scanderbeg, 'The Trial, Conviction, and Death of the Celebrated Laco' *Essex Journal* (Newburyport 15 Apr.1789) 3.

⁴⁵² E.g., 'European Intelligence' *American Magazine* (New York Apr. 1788) 349 (second Gordon case); 'Foreign Intelligence' *American Magazine* (New York Apr. 1788) 386 (same); see *R v Gordon* (1787) *State Trials* 22:175, 177-78, 213, 222 (KB); see also *R v Gordon* (1781) 2 Dougl 590, 99 ER 372 (KB).

⁴⁵³ E.g., [Eleazer Oswald], 'To the Public' *New-York Journal* (New York 13 Nov.1788) 1 (reprinted from *Chronicle of Freedom*).

liberty of the press is invaded and endangered in consequence of the suit' against him.⁴⁵⁴ He added that such libel prosecutions introduce 'creatures of Star-Chamber despotism' and 'pull down the FREEDOM OF THE PRESS,'⁴⁵⁵ leaving it 'invaded' and 'restrained.'⁴⁵⁶

As several states coupled ratification with proposals for a bill of rights, an essay discussed the impact of the proposed bill of rights on seditious libel. It would provide 'a small security against warrants, jails, inquisitions, prosecutions for libels &c.,' because of 'the freedom of the press granted.' The essay then addressed the Constitution's departure from Britain's definitions of treason, and said it '*is in this respect, and many other[s], more liberal than that of Great Britain, which is so much vaunted by some amendments. See Blackstone on treason, riots, libels.*'⁴⁵⁷ With amendments, the Constitution deviated from British law and Blackstone on libels.

Three days after the Bill of Rights was proposed by Madison in Congress on June 8, 1789,⁴⁵⁸ Oswald escalated his battle into a one-man war by turning his Philadelphia newspaper into a national forum for essays and reprints attacking seditious libel on the basis of liberties of press and speech. (Both Oswald's battle and his war were overlooked by Levy.⁴⁵⁹) In each succeeding issue, Oswald launched salvos, beginning with lengthy essays praising '*the freedom of the press, and the privilege of speaking*' and stating that criminal treatment of libels conflicted with ancient law;⁴⁶⁰ Cato's letter on seditious libel⁴⁶¹ (bringing a paroxysm of

⁴⁵⁴ Eleazer Oswald, 'To the Public' *Independent Gazetteer* (Philadelphia 1 July 1788) 3; accord A Sincere Federalist, 'Mr. Oswald' *Independent Gazetteer* (Philadelphia 15 Aug. 1788) 3. His salvo also included that the 'doctrine of libels' was incompatible with liberty and 'destructive of... communication of our thoughts,' and that lovers of liberty 'will not allow the freedom of the press to be violated upon any refined pretence, which oppressive ingenuity or courtly study can invent' (seditious libel doctrine). *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 320 (Pa.S.Ct. 1788) (quoting article).

⁴⁵⁵ Eleazer Oswald, 'To the Public' *Pennsylvania Packet* (Philadelphia 26 July 1788) 2.

⁴⁵⁶ Eleazer Oswald, 'Philadelphia, August 11' *Independent Gazetteer* (Philadelphia 11 Aug. 1788) 2, 3; accord Eleazer Oswald, 'The Address and Memorial of Eleazer Oswald' *Independent Gazetteer* (Philadelphia 6 Sept. 1788) 1, 2.

⁴⁵⁷ Foreign Spectator, 'Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions... Number XXVIII' *Federal Gazette* (Philadelphia 16 Feb. 1789) 2, 3 & n; Foreign Spectator, 'Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions... Number XXVIII' *New-York Daily Gazette* (New York 7 July 1789) 654.

⁴⁵⁸ *Complete Bill of Rights-Sources* 83.

⁴⁵⁹ Though he did summarize Oswald's lawsuits and antifederalist campaign of 1787-88. Levy 206-11, 236-39.

⁴⁶⁰ 'Philadelphia, June 11' *Independent Gazetteer* (Philadelphia 11 June 1789) 2 (misattributed to Lord Camden, and also condemning seditious libel for its six unique features); 'Extracts from the Great Lord Camden's Letter'

newspaper reprints⁴⁶²); Cato's letter on 'liberty of the press' asserting that prosecuting libels would bring tyranny;⁴⁶³ articles that the 'doctrine of libels' is 'dangerous and ridiculous';⁴⁶⁴ the *Zenger* account including liberty of 'speaking and writing the truth' embellished by Zenger's counsel arguing 'the absurdity of *libels*, and shew[ing] the infamous doctrine was not in force in America';⁴⁶⁵ and a reader's letter calling 'the exploded doctrine of libels one of the most detestable engines of oppression,' and a reprinted essay contending the 'doctrine of libels is contrary to law' and its punishment of truth made 'the liberty of the press. . . a chimera.'⁴⁶⁶

Just before the Bill of Rights was approved by Congress,⁴⁶⁷ letters to the editor in September 1789 condemned those 'attempting to restrain the press' with seditious libel prosecutions, contrary to the proposed Bill of Rights, and those imprisoning printers for 'the appearance of a libel,' also 'contrary to the spirit of the constitution.'⁴⁶⁸ As the Bill of Rights was disseminated for ratification, Oswald denied that there is any 'such thing as a *public libel* known to the law,' and said that the Star Chamber's 'abominable doctrine is moreover, totally repugnant to the constitution of our land,' as amended by the 'first Congress'; he added that state seditious libel prosecutions threatened 'to put an end at once to the *liberty of the press*.'⁴⁶⁹ A correspondent quoted Towers' similar caution that libel prosecutions will bring 'a

Independent Gazetteer (Philadelphia 12 June 1789) 2; accord 'Philadelphia, June 11' *New-York Packet* (New York 18 June 1789) 2.

⁴⁶¹ 'Philadelphia, June 13' *Independent Gazetteer* (Philadelphia 13 June 1789) 2.

⁴⁶² E.g., 'Liberty of the Press' *United States Chronicle* (Providence 2 July 1789) 4; 'Liberty of the Press' *New-York Packet* (New York 20 July 1789) 2.

⁴⁶³ 'Philadelphia, June 15' *Independent Gazetteer* (Philadelphia 15 June 1789) 1.

⁴⁶⁴ *Ibid* 2; 'A Hint to Grand Juries' *ibid* 3.

⁴⁶⁵ 'Sketches of the Trial of John Peter Zenger' *Independent Gazetteer* (Philadelphia 16 June 1789) 3. Another article called seditious libel prosecutions 'destructive of the principles of liberty and the American revolution,' for then 'how must a man speak or write?' 'Philadelphia, June 16' *Independent Gazetteer* (Philadelphia 16 June 1789) 2.

⁴⁶⁶ 'Mr. Oswald' *Independent Gazetteer* (Philadelphia 17 June 1789) 1; 'Sentinel No. 13' *ibid* 1; 'Philadelphia, June 17' *ibid* 2 (another correspondent found that 'Star-Chamber doctrine of libels' to have 'the most pernicious effect in destroying the most valuable uses of the press').

⁴⁶⁷ *Complete Bill of Rights-Sources* 88-92 (21-28 Sept. 1789).

⁴⁶⁸ 'Mr. Oswald' *Independent Gazetteer* (Philadelphia 12 Sept. 1789) 3; Libero, 'Mr. Oswald' *Independent Gazetteer* (Philadelphia 26 Sept. 1789) 2; see Casca, 'For the Independent Gazetteer' *Independent Gazetteer* (Philadelphia 6 Aug. 1789) 2.

⁴⁶⁹ Eleazer Oswald, 'To the Public' *Independent Gazetteer* (Philadelphia 19 Oct. 1789) 2.

total end to the *freedom of the press*.⁴⁷⁰

Other publications while the Bill of Rights was considered by Congress, and then by the states from October 1789 through mid-December 1791, also attacked seditious libel. A pamphlet argued for abolishing all laws against libels, on grounds including that 'a law against libels cannot exist without endangering the liberty of the press.'⁴⁷¹ Like many, it was excerpted in American newspapers.⁴⁷² 'Junius' continued to be reprinted on liberty of press and seditious libel.⁴⁷³ A magazine scoffed at an 'Essay on Libels' as being, 'like the law, gloriously unintelligible.'⁴⁷⁴ Reprinted London articles pronounced that the doctrine of libels 'reduced the liberty of the press to a name' after long persecution,⁴⁷⁵ and that Pitt's ministry 'sap[s] the freedom of the press, by harassing and prosecuting the printers, for libels--i.e. for telling the truth.'⁴⁷⁶ Its 'prosecution of printers for pretended libels' left 'the liberty of the press reduced to a mere name in England,' as amounting to 'overt attacks on the liberty of the English press.'⁴⁷⁷ Dispatches lamented that the English 'have no such thing as a *free press*,⁴⁷⁸

⁴⁷⁰ 'On Libels' *Independent Gazetteer* (Philadelphia 20 Oct. 1789) 2.

⁴⁷¹ It explained that such laws are more 'calculated to lend arms to the tyranny of power, than to afford relief to injured innocence.' *Candid Considerations on Libels* (Freeman and Andrews, Boston 1789) 16, 20; 'This Day Published' *Herald of Freedom* (Boston 20 Mar. 1789) 7.

⁴⁷² E.g., 'Philadelphia, Wednesday, November 18' *Independent Gazetteer* (Philadelphia 18 Nov. 1789) 2, 3.

⁴⁷³ E.g., 'Philadelphia, Friday, November 20' *Independent Gazetteer* (Philadelphia 20 Nov. 1789) 3; 'There Is Something' *Middlesex Gazette* (Middletown 12 Dec. 1789) 1.

⁴⁷⁴ E.g., 'Acknowledgments to Correspondents' *Massachusetts Magazine* (Boston Feb. 1791) 2.

⁴⁷⁵ E.g., 'Extract from a London Paper' *New-York Journal* (New York 29 June 1791) 203; 'The Press' *New-Hampshire Spy* (Portsmouth 10 Aug. 1791) 123.

⁴⁷⁶ E.g., 'London, May 16' *Independent Gazetteer* (Philadelphia 16 July 1791) 3, which lamented that seditious libel 'is now-a-days a much greater crime in England, and much more severely punished than wilful and corrupt perjury.' Further, '[p]rosecutions for pretended libels' had 'extinguished five of the seven *candles of liberty*,' 'New-York, Thursday, June 30' *New-York Packet* (New York 30 June 1791) 3; 'Philadelphia, June 21' *Massachusetts Spy* (Worcester 7 July 1791) 2, so that unless Fox's libel bill passed, Britain would be 'reduced to depend on the American printers, for a supply of literature.' E.g., 'July 14th' *Dunlap's American Daily Advertiser* (Philadelphia 9 Aug. 1791) 3; 'Of Libels' *New-York Journal* (New York 17 Aug. 1791) 259.

⁴⁷⁷ E.g., 'New-York, September 10' *New-York Journal* (New York 10 Sept. 1791) 287; 'Foreign Intelligence' *Dunlap's American Daily Advertiser* (Philadelphia 3 Sept. 1791) 2.

⁴⁷⁸ E.g., 'New York, Tuesday, September 7, 1790' *Daily Advertiser* (New York 7 Sept. 1790) 3; 'New York, September 8' *Independent Gazetteer* (Philadelphia 11 Sept. 1790) 3. Accord William Paley, *The Principles of Moral and Political Philosophy* (7th ed Thomas Dobson, Philadelphia 1788) 417 (noted moral philosopher's book condemned English punishments of 'libel against the state' as exposing 'the laws to mockery and insult').

having been 'robbed by a renewed Star Chamber.'⁴⁷⁹ Articles reported Lord Camden's warning that seditious libel prosecutions imperiled 'liberty of exposing and opposing bad men and bad measures,'⁴⁸⁰ and 'threaten[] the utter extinction of the LIBERTY OF THE PRESS.'⁴⁸¹ While articles often praised '[t]hat great and exalted character Lord Chief Justice *Camden*,'⁴⁸² most addressing seditious libel did not deem his nemesis Mansfield 'great,'⁴⁸³ preferring herpetological terminology such as 'the old viper.'⁴⁸⁴ The unavoidable meaning of these articles was that freedoms of press and speech were irreconcilable with seditious libel doctrine.

As before, a small minority of newspaper essays supported criminalization of 'licentious' publications as seditious libel,⁴⁸⁵ defended the concept that truth could be a libel,⁴⁸⁶ or assumed the unimpaired illegality of seditious libel.⁴⁸⁷ A much larger number assailed seditious libel doctrine for prosecuting true statements⁴⁸⁸ or limiting jury issues,⁴⁸⁹ sometimes

⁴⁷⁹ 'London, June 5' *General Advertiser* (Philadelphia 20 Aug. 1791) 2. London articles were reprinted noting a record number of prosecutions for seditious libel. E.g., 'London, February 26' *Dunlap's American Daily Advertiser* (Philadelphia 22 Apr. 1791) 2; 'London, June 6' *Essex Journal* (Newburyport 24 Aug. 1791) 2.

⁴⁸⁰ 'Philadelphia, Tuesday, November 19' *Independent Gazetteer* (Philadelphia 19 Nov. 1789) 2, 3.

⁴⁸¹ E.g., 'Libel. A Case Which Threatens the Utter Extinction of the Liberty of the Press' *Dunlap's American Daily Advertiser* (Philadelphia 27 Apr. 1791) 2; 'Libel. A Case Which Threatens the Utter Extinction of the Liberty of the Press' *Independent Gazetteer* (Philadelphia 7 May 1791) 2.

⁴⁸² E.g., 'Philadelphia, August 4' *Independent Gazetteer* (Philadelphia 4 Aug. 1788) 3; accord 'Philadelphia, June 11' *Independent Gazetteer* (Philadelphia 11 June 1789) 2.

⁴⁸³ *Printers* 62, 146; e.g., 'American Intelligence' *American Museum* (Philadelphia Dec. 1790) D28, D30 (American reports on a Ireland seditious libel trial in 1790 glowed that a 'virtuous jury, in direct opposition to the opinion of that great law luminary, Lord Mansfield,' and to the presiding judge's charge, 'refused to find truth a libel' and instead acquitted a newspaper publisher).

⁴⁸⁴ E.g., 'History of the American Revolution' *Universal Asylum* (Nov. 1790) 301, 302; 'A Few Reflections on Reading the King's Most Gracious Speech' *Freeman's Journal* (Philadelphia 5 Mar. 1783) 1.

⁴⁸⁵ N[oa]h Webster, 'To the Public' *Independent Gazette* (Philadelphia 10 May 1787) 3; Liberty, 'For the Independent Chronicle' *Independent Chronicle* (Boston 20 Aug. 1789) 1.

⁴⁸⁶ 'Truth Is a Libel' *New York Daily Gazette* (New York 30 Mar. 1790) 2; 'London, January 2' *Pennsylvania Packet* (Philadelphia 5 Apr. 1790) 2 (same); 'Libels' *Federal Gazette* (Philadelphia 7 Oct. 1790) 2.

⁴⁸⁷ 'To Honestus' *Massachusetts Centinel* (Boston 10 Mar. 1787) 198; Atticus, 'For the Independent Chronicle' *Independent Chronicle* (Boston 9 Aug. 1787) 1; 'On the Respect Due to Office' *New-Hampshire Gazette* (Portsmouth 4 Sept. 1788) 1; 'An Answer to Dr. Priestley's Letter' *Federal Gazette* (Philadelphia 12 Oct. 1791) 2. Some reprints from English newspapers accepted seditious libel doctrine if unique features were changed, 'Political State of Europe' *New-York Daily Gazette* (New York 20 Aug. 1791) 2; or lauded Fox's Libel Act, 'Libels' *Argus* (Boston 16 Aug. 1791) 2; 'Summary of Foreign Intelligence' *Massachusetts Magazine; or, Monthly Museum* (Boston Aug. 1791) 519, 523.

⁴⁸⁸ E.g., Centinel [Samuel Bryan], 'Centinel No. XXXVI' *Independent Gazetteer* (Philadelphia 28 Oct. 1789) 1, 2; 'The Press' *Herald of Freedom* (Boston 6 Nov. 1789) 61.

⁴⁸⁹ E.g., 'To the Printer' *Independent Gazetteer* (Philadelphia 3 July 1790) 1; Common Sense, 'To the Editor' *Pennsylvania Mercury* (Philadelphia 24 Dec. 1789).

finding those to violate freedom of press⁴⁹⁰ or to require abolishing seditious libel.⁴⁹¹ Blackstone was imported, reprinted in America in 1790,⁴⁹² occasionally quoted on seditious libel,⁴⁹³ and sometimes explicitly attacked.⁴⁹⁴ Similar positions appeared in a few American imprints,⁴⁹⁵ a distinct minority of newspaper essays,⁴⁹⁶ and state knockoffs of an old English handbook for justices of the peace.⁴⁹⁷ The great majority of publications disagreed.

In summary, the heavy preponderance of these publications, stating or assuming that freedom of press was inconsistent with seditious libel, conflict with Levy's conclusions that '[n]o other definition of freedom of the press by anyone anywhere in America before 1798' existed, other than the definition in "'the common and statute law of England"; and that '[e]vidence does not exist to contradict the assertion [freedom of press] was used in its prevailing common law or Blackstonian sense to mean a guarantee against previous restraints and a subjection to subsequent restraints for licentious or seditious abuse.'⁴⁹⁸ Contrary to Blackstone's claim that liberty of the press 'consists in laying no *previous* restraints upon publications,' these articles found liberty of press violated when there had been no previous re-

⁴⁹⁰ 'Liberty of the Press' *Independent Gazetteer* (Philadelphia 13 Nov. 1790) 2; 'Abridgement of the State of Politics' *Dunlap's American Daily Advertiser* (Philadelphia 26 Apr. 1791) 2; 'State of Politics' *New-York Daily Gazette* (New York 29 Apr. 1791) 2; 'London, March 3' *Freeman's Journal* (Philadelphia 27 Apr. 1791) 2 (judges limiting juries); 'Foreign Intelligence' *Independent Gazetteer* (Philadelphia 7 May 1791) 2 (same).

⁴⁹¹ E.g., 'London, July 8' *Freeman's Journal* (Philadelphia 29 Sept. 1790) 2; 'London, July 8' *Pennsylvania Packet* (Philadelphia 4 Oct. 1790) 2; 'Considerations on the Matter of Libel' *Dunlap's American Daily Advertiser* (Philadelphia 31 Oct. 1791) 2; 'Considerations on the Matter of Libel' *Argus* (Boston 25 Nov. 1791) 2.

⁴⁹² William Blackstone, *Commentaries on the Laws of England* (Isaiah Thomas, Worcester 1790) 4:150-53.

⁴⁹³ Philo-Justitiae, 'Thoughts on the Freedom of the Press' *Independent Gazetteer* (Philadelphia 19 June 1790) 2; 'London, June 6' *Federal Gazette* (Philadelphia 22 Aug. 1791) 2; 'A Pennsylvanian' *Freeman's Journal: or, The North-American Intelligencer* (Philadelphia 13 June 1781) 2.

⁴⁹⁴ E.g., Chevy Chase, 'From a Late London Paper' *Independent Gazetteer* (Philadelphia 13 Apr. 1785) 2.

⁴⁹⁵ Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (5th ed Hugh Gaine, New York 1788) 5-12; Isaac Espinasse, *A Digest of the Law of Actions at Nisi Prius* (Cruckshank & Young, Philadelphia 1791) 2:243-50; Samuel Stearns, *The American Oracle* (Hodge and Campbell, New York 1791) 614.

⁴⁹⁶ E.g., Hugh Williamson, 'Remarks on the New Plan of Government' (1788), *Essays-Constitution* 393, 398, including reprints from London, 'General Observer No. XXII' *Massachusetts Magazine; or, Monthly Museum* (Boston Mar. 1791) 156, 157; 'On Libels' *Pennsylvania Mercury* (Philadelphia 19 Nov. 1789) 2; 'On Libels' *Federal Gazette* (Philadelphia 20 Nov. 1789) 2.

⁴⁹⁷ James Parker, *Conductor Generalis. . . Justices of the Peace* (John Patterson, New York 1788) 286-89; *The South-Carolina Justice of Peace* (R. Aitken, Philadelphia 1788) 323-25; Francois-Xavier Martin, *The Office and Authority of a Justice of the Peace* (Francois-Xavier Martin, Newbern 1791) 191-93.

⁴⁹⁸ *Levy-Liberty* 27, 191.

straints for most of a century, by subsequent restraints of seditious libel.

D Response to Seditious Libel Restraints in State Formation and the First Amendment

Did these objections affect the writing of state declarations of rights and the federal Bill of Rights, as in state formation a calibration was chosen between rights and government powers?

1 Context of Multiplied Threats but Few Seditious Libel Prosecutions in America

In the ten years before the Revolutionary War, America found the air thick with threats that patriot speech and publications were seditious libels,⁴⁹⁹ though that smoke was not accompanied by much fire of prosecutions for that crime. To ignore those threats would be to miss the context and a major reason for the revolutionaries' predominant belief that written protection of freedom of press was needed, and to ignore those prosecutions would be to misassess the content of colonial common law. Royal instructions to royal governments in 1768 labeled colonial opposition to London's taxes and edicts as 'seditious and libellous publications,'⁵⁰⁰ and royal governors repeated the party line.⁵⁰¹ Colonial newspapers widely reported that the London administration called John Dickinson's essays 'an impudent, seditious, infamous libel,'⁵⁰² and that royal governors issued proclamations against 'infamous libel[s]; tending to bring his Majesty's person and government in that province into hatred. . . ; and to stir up sedition.'⁵⁰³ Massachusetts' lieutenant governor repeatedly pressed grand juries to indict seditious libelers, particularly Boston newspaper printers,⁵⁰⁴ while the governor implored Lon-

⁴⁹⁹ *Adams Works* 3:457; *Elliot's Debates* 3:45; see *Press-Massachusetts* 123-24.

⁵⁰⁰ *Privy Council-Colonial* 5:261, 262 § 155; accord Lord Dartmouth to Gen. Thomas Gage (3 June 1776), Clarence E. Carter (ed.), *Correspondence of General Thomas Gage* (YUP, New Haven 1931) 2:163, 165.

⁵⁰¹ E.g., Gov. Horatio Sharpe to Lower House (20 June 1768), *Maryland Archives* 61:399; Gov. Francis Bernard to House of Representatives (1 Mar. 1768), Alden Bradford (ed.), *Speeches of the Governors of Massachusetts, 1765-1775* (Russell and Gardner, Boston 1818) 118; see Lt. Gov. Cadwallader Colden to Admiral Graves (20 Feb. 1775), *Collections of the New-York Historical Society* (NYHS, New York 1878) 10:387.

⁵⁰² E.g., 'Extract of a Letter' *New-York Gazette* (New York 13 Feb. 1769) 3; 'Extract of a Letter' *Boston Chronicle* (Boston 23 Feb. 1769) 67.

⁵⁰³ E.g., 'New-York, February 11' *New-York Gazette* (New York 11 Feb. 1765) 2.

⁵⁰⁴ *Quincy* 236-37, 242-43, 262-64, 305.

don to take action.⁵⁰⁵ Further Crown proclamations decried sedition and rebellion.⁵⁰⁶

After the press victory in the *Zenger* trial, the number of judicial prosecutions declined markedly,⁵⁰⁷ at least partially from royal governors' concern that juries would continue to acquit defendants.⁵⁰⁸ Nevertheless, one scholar's claim that '[c]ourt trials for seditious libel ended as a serious threat to printers in the American colonies with the decision in the *Zenger* case' was mistaken.⁵⁰⁹ In the prerevolutionary decade, royal government prosecutions led to court trials of Richard Johnson⁵¹⁰ and John Gill,⁵¹¹ grand jury indictment of Alexander McDougall,⁵¹² at-

⁵⁰⁵ *Copy of Letters Sent to Great Britain* (Edes and Gill, Boston 1773) 10; Gov. Francis Bernard to Earl of Hillsborough (25 Jan. 1769), *Journal of the Commissioners for Trade and Plantations* (HMSO, London 1937) 13:125; see *Prelude* 310.

⁵⁰⁶ 'King's Proclamation for Suppressing Rebellion and Sedition' (23 Aug. 1775), *EHD* 9:850; accord *Privy Council-Colonial* 5:417 § 322 (23 Aug. 1775); Samuel Ward to Henry Ward (2 Nov. 1775), *Letters of Delegates* 2:290, 291.

⁵⁰⁷ There were over 1,200 prosecutions for 'seditious speech' alone in the seventeenth century. Larry D Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (NYU Press, New York 1994) 3; Larry D Eldridge, 'Before *Zenger*: Truth and Seditious Speech in Colonial America, 1607-1700' (1995) 39 *American Journal of Legal History* 337, 337; accord William E Nelson, *The Common Law in Colonial America* (OUP, Oxford 2008) 1:21-22, 31, 54, 90, 103; e.g., Theo. Philathes [Thomas Maule], *New-England Pe[r]secutors Mauld with Their Own Weapons* (np, Boston 1697) 61 (Maule 1697); *Open Press* 40 (Bradford 1690s, Checkley 1724).

There were also a score of legislative prosecutions of newspapers and other writings for contempt by criticizing the legislature or members, plus scores for similar speech. Mary P Clarke, *Parliamentary Privilege in the American Colonies* (YUP, New Haven 1943) 123 (S.C. 1728, N.Y. 1717, Va. 1699 and 1705, Va. 1710, Ga. 1762), 124 (Md. 1662, N.J. 1682, S.C. 1722), 125 (N.J. 1718 and 1719, Pa. 1728, N.Y. 1756), 126 (Mass. 1721), 128-29 (Va. 1677 and 1763, N.H. 1720, S.C. 1722, N.Y. 1735), 220-21 (Pa. 1756); and 'scandalous' petitions, *ibid* 123, 129, 216, and inaccurate reports of proceedings, 126 (Mass. 1722, N.Y. 1735).

⁵⁰⁸ A couple of seditious libel prosecutions after *Zenger* did result in acquittal or dismissal, presaged by several notable prosecutions before *Zenger*. Harold L. Nelson, 'Seditious Libel in Colonial America' (1959) 3 *American Journal of Legal History* 160, 165-66 (three of four); *Levy* 63 (all after 1724); *Press-Massachusetts* 108 (Checkley 1724). Others can be added. E.g., Russell K. Osgood, 'John Clark, Esq., Justice of the Peace, 1667-1728,' in *Law in Colonial Massachusetts, 1630-1800* (Colonial Society of Massachusetts, Boston 1984) 107, 120 (Mass. 1706); Arthur P. Scott, *Criminal Law in Colonial Virginia* (UChP, Chicago 1930) 185 (Va. 1702).

⁵⁰⁹ *Ibid* 164 (original in italics); accord *Levy* 63. As was the similar claim that excepted only the McDougall case of 1770. *Levy* 17. Erring the other direction, *Freedom's Fetters* 426-27 saw 'an accelerated use of the law of seditious libel.'

⁵¹⁰ Johnson of Virginia in 1770 was 'prosecuted, on behalf of the King, for a libel' and fined £1000, *Journal of the House of Delegates [Virginia]* (np, Richmond 1785) 48.

⁵¹¹ In Boston in 1775 for seditious newspaper articles. 'Connecticut Committee of Safety' (14 Sept. 1775), *American Archives* (4th) 3:710, 712; see *DAB* 7:284.

⁵¹² In New York in 1770 for sedition, after the New York assembly's prosecution of McDougall for handbills he printed criticizing the legislature's action provisioning British troops. *Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York [1770-1771]* (Hugh Gaine, New York 1771) 8; 'New-York Supreme Court' *New-York Gazette* (New York 7 May 1770) 1. The case 'did more to publicize the cause of liberty of the press than any event since *Zenger's* trial.' *Levy* 77, 79.

tempted indictments of Col. Robert Bolling,⁵¹³ Joseph Hawley,⁵¹⁴ *Boston Gazette* printers,⁵¹⁵ and Providence's newspaper printer,⁵¹⁶ and attempted arrest of newspaper printer John Holt,⁵¹⁷ along with threatened prosecutions.⁵¹⁸ Colonial legislatures were even more active in prosecutions.⁵¹⁹

Even with those threats, the 'printing presses were notoriously the great instruments of the American Revolution,'⁵²⁰ from the Stamp Act controversy to 1770⁵²¹ and thereafter to the Revolution.⁵²² Royal threats impelled the popular party identification with freedoms of press and speech, and suspicion of conspiracy,⁵²³ fostering belief that those freedoms were endangered and needed solid protection in written constitutions.

2 Treatment by the New States of Freedoms of Press and Speech and English Common Law

Levy contends that 'the revolutionary generation did not seek to wipe out the core idea of seditious libel, that the government may be criminally assaulted by mere words' and may punish that.⁵²⁴ There are a number of reasons for disagreeing with that contention, besides the foregoing book, tract, and newspaper statements.

⁵¹³ In Virginia in 1766. 'Williamsburg, October 17' *New-York Mercury* (New York 3 Nov.1766) 2; 'Williamsburg, October 17' *Providence Gazette* (Providence 8 Nov.1766) 3.

⁵¹⁴ In Massachusetts indictment in 1767; he was instead disbarred, *Quincy* 246-47, 248-50n; see *Prelude* 95; *Press-Massachusetts* 125.

⁵¹⁵ In Massachusetts in 1768, *Quincy* 266-67, 270; see *Tyranny* 38.

⁵¹⁶ In Rhode Island in 1773. 'Providence, July 3' *Connecticut Journal* (New Haven 9 July 1773) 3.

⁵¹⁷ In Virginia in 1775 for seditious libel; his printing type was confiscated. *Prelude* 239, citing *Virginia Gazette or Norfolk Intelligencer* (Norfolk 13 Sept.1775).

⁵¹⁸ E.g., *Prelude* 63-64; *Press-Massachusetts* 130 (Isaiah Thomas).

⁵¹⁹ *Prelude* 62-64; Levy 82; e.g., *The Journal of the House of Assembly. North-Carolina [1770-1771]* (np, Newbern 1771) 20-21; 'Newbern' *Boston Post-Boy* (Boston 4 Mar.1771) 3; 'New-London, March 1' *Connecticut Gazette* (New London 1 Mar.1771) 3 (N.C. 1770 of Herman Husbands); 'Friday, the 3d Day of September, 1773' *Boston Post-Boy* (Boston 27 Sept.1773) 1 (S.C. 1773 of Thomas Powell); Nathaniel Bouton (ed), *State Papers. Documents and Records Relating to the State of New-Hampshire* (Edward Jenks, Concord 1874) 8:25-27 (N.H. 1776 of Daniel Fowle).

⁵²⁰ Samuel Bryan to Aedanus Burke (post-5 Dec.1789), *DHFFC* 17:1732, 1738; see *Prelude* 51-301.

⁵²¹ Alexander McDougall, 'To the Freeholders' *Boston Evening-Post* (Boston 26 Feb.1770) 4; Alexander McDougall, 'To the Freeholders' *Boston Gazette* (Boston 26 Feb.1770) 2, 3.

⁵²² David Ramsay, *History of the American Revolution* (R Aitken, Philadelphia 1789) 2:319; see *Prelude* 297.

⁵²³ *Ideological Origins* 144-59; *Creation* 40-42; *DHRC* 2:643; *Clark* 277-78.

⁵²⁴ Levy xii; accord *Hamburger* 745 n261.

First, the colonists' context, that patriot '[p]etitions and remonstrance were considered as seditious libels,' in London and by royal governors,⁵²⁵ quenched love and ignited hostility toward that doctrine. Patriots complained at opposition being 'constantly stigmatized with the opprobrious title of sedition.'⁵²⁶ The threatened danger was prosecution, not licensing; licensing had not existed in most colonies since the collapse of English licensing in 1695, and the last colonial licensing ended in 1723 (Massachusetts).⁵²⁷ Those threatened with imprisonment for sedition, if not hanging for treason, saw urgent need for written protections, and that best explains why such a high proportion of new states (nine of eleven that adopted new fundamental law) secured press freedom, and what the new protections meant. Those press provisions were the 'fruits of. . . historical experience,' Edmund Randolph observed.⁵²⁸

Second, the new state declarations of rights or constitutions that protected freedom of press did so in every case with unqualified expansive language. Typical of the unrestricted language was Virginia (the first state to adopt a declaration of rights): 'freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.'⁵²⁹ The two states that did not address liberty of press in new declarations or constitutions surprised a foreign observer: 'It seems extraordinary that the states of New York and New Jersey. . . maintain, in their *new* constitutions, a profound silence respecting this important subject,' whereas 'other governments are extremely pointed on the occasion.'⁵³⁰ A partial explanation is that the first followed old charters with few rights listed, and the second adopted a

⁵²⁵ [James Murray], *An Impartial History of the War in America* (Coverly and Hodge, Boston 1781) 1:159; *accord* [Alexander Hamilton], *A Full Vindication of the Measures of the Congress* (James Rivington, New York 1774) 7; [Josiah Quincy], *Observations on the Act of Parliament* (Edes and Gill, Boston 1774) 76.

⁵²⁶ Pliny Junior, 'An Original Essay on the Causes of Seditions' *Boston Chronicle* (Boston 12 Mar. 1770) 85; see *Press-Massachusetts* 123.

⁵²⁷ *Press-Massachusetts* 102; see *Prelude* 61.

⁵²⁸ 'Edmund Randolph's Essay on the Revolutionary History of Virginia 1774-1782 (Continued)' (1936) 44 *Virginia Magazine of History and Biography* 35, 46.

⁵²⁹ Va. Decl. of Rights sec. 12 (1776), *Federal-State Constitutions* 7:3812, 3814.

⁵³⁰ Abbé de Mably, *Remarks Concerning the Government of the United States* (J Debrett, London 1784) 144.

very short constitution and was one of the only two states without a local newspaper.⁵³¹ The public quickly learned of press protections as new declarations and constitutions were printed in newspapers, circulated as pamphlets, and later reprinted by congressional directive.⁵³²

In contrast to unqualified broad language about freedom of press, not one new fundamental law excepted or otherwise provided for seditious libel, an obvious need if it was not to be overridden.⁵³³

Third, nearly all of the new states limited the English common law that was received to that which was not repugnant to new constitutions and declarations of rights. The first reception provision, New Jersey's, was typical.⁵³⁴ 'the common law of England, as well as so much of the statute law, as have been heretofore practised in this colony, shall still remain in force,' unless altered legislatively or 'repugnant to the rights and privileges' of the new constitution.⁵³⁵

A complicating factor is that nine of the new states, enmeshed in war, adopted statutes punishing seditious libel and treason by loyalists.⁵³⁶ The very adoption of such sedition statutes was inconsistent with the notion that the new states carried over English common law of seditious libel. Though adopting sedition statutes was inconsistent with the notion that the

⁵³¹ *Federal-State Constitutions* 5:2594-98; Davidson 225 n3.

⁵³² E.g., *The Constitutions of the Several Independent States of America* (Francis Bailey, Philadelphia 1781), with reissues in 1785 and 1786. State provisions on freedom of press were widely quoted. E.g., Josiah Tucker, *The True Interest of Britain, Set Forth in Regard to the Colonies* (Robert Bell, Philadelphia 1776) 67.

⁵³³ It is true, as Levy notes, that North Carolina and South Carolina qualified their freedom of conscience provisions by saying 'nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment.' N.C. Const. art. XXXIV (1776), *Federal-State Constitutions* 5:2787, 2793; S.C. Const. art. XXXVIII (1776), *ibid* 6:3241, 3257; Levy 197-98. But it is equally true, though he omits it, that this concept was carried over from the 1669 Fundamental Constitutions of Carolina, and that similar language was considered and rejected by Massachusetts and others. Art.103 (1669), *ibid* 5:2772, 2784; 'An Act of the General-Convention of . . . Massachusetts' (27 Feb.1777) (draft), in *The Remembrancer . . . For the Year 1777* (J.Almon, London 1778) 119, 121.

⁵³⁴ Del. Const. art. XXV (1776), *ibid* 1:562, 566-67; Md. D.O.R. art. III (1776), *ibid* 3:1686, 1686; N.Y. Const. art. XXXV (1777), *ibid* 5:2623, 2635-36; Mass. Const. art. VI §6 (1779), *ibid* 3:1888, 1910; see N.H. Const. pt. II (1776), *ibid* 4:2451, 2469; *Hening's Statutes-Va.* 9:127 (1776).

⁵³⁵ N.J. Const. art. XXII (1776), *Federal-State Constitutions* 5:2594, 2598; accord Ford W Hall, 'The Common Law: An Account of Its Reception in the United States' (1951) 4 *Vanderbilt Law Review* 791, 799-800, 806-07; *Transatlantic* 187.

⁵³⁶ Claude Halstead Van Tyne, *Loyalists in the American Revolution* (MacMillan Co, New York 1902) 327-29; e.g., 'Act for Restraining and Punishing Persons, Who Are Inimical to the Liberties of This, and the Rest of the United Colonies' (Conn. 1775); Act To Prevent Sedition and Punish Insurgents (4 Apr.1776), *Journals of General Assembly-S.C.* 29; Act for the Punishment of Certain Offences (Oct.1776), *Hening's Statutes-Va.* 9:170; An Ordinance Declaring Certain Practices Misdemeanors (1776), *Colonial Records-N.C.* 23:998.

new freedoms of press overrode seditious libel, it is better explained by the new constitutional freedoms not applying to loyalists, such as rights to property not preventing confiscation laws. During the Revolution, not only was loyalist speech and press disallowed and treated as traitorous if not treasonous,⁵³⁷ but loyalists were disenfranchised, barred from public office, banished, specially taxed, subjected to confiscation, and penalized in every way patriot imagination could devise.⁵³⁸ Furthermore, though other actions against loyalists were widespread, seditious libel prosecutions against loyalists were surprisingly few.⁵³⁹

By contrast, the patriot 'presses operated as if the law of seditious libel did not exist.'⁵⁴⁰ Patriots only very occasionally were prosecuted for seditious libel, for criticizing officials or legislatures.⁵⁴¹ Wartime practices did not measure the breadth of constitutional protections, any more than they did when sedition was prohibited in World War I or World War II.⁵⁴²

Fourth, a number of contemporaries clearly understood and expressed that the unbounded freedom of press in new declarations of rights or constitutions did override seditious libel or criminal libel generally. Those were in addition to the above writers who stated that freedom of press (whatever its basis) was violated by seditious libel, whose unavoidable corollary was that once secured freedom of press overrode seditious libel. For example, a suggested grand jury charge of 1785 saw the doctrine of libels as banished by natural rights, and

⁵³⁷ *Prelude* 216-17, 297; *Levy* 173; *Press-Massachusetts* 131.

⁵³⁸ *Prelude* 74-79, 297-98, 107-08, 174-76, 185, 189-90, 210-11, 215, 221, 239-40; *Davidson* 251, 252, 254, 256-57, 259, 260-61; Claude Halstead Van Tyne, *The Loyalists in the American Revolution* (MacMillan Co, New York 1902) 327-41. John Adams saw a benefit of independence, and its test oaths, as that '[t]he presses will produce no more seditious or traitorous speculations' and '[s]landers upon public men and measures will be lessened.' John Adams to John Winthrop (23 June 1776), *Adams Papers* 4:331, 332.

⁵³⁹ *Levy* lists only two states, Pennsylvania and Massachusetts, *Levy* 191, with a single prosecution each between 1776 and 1789.

⁵⁴⁰ *Levy* x; accord *Securing the Revolution* 246; John Nerone, *Violence against the Press* (OUP, New York 1994) 18-52.

⁵⁴¹ E.g., 'New-York' *Freeman's Journal* (Philadelphia 9 May 1781) 3 (William Thompson); *October, 1779. At the General Assembly of . . . Rhode-Island* (Bennett Wheeler, Providence 1779) 18, 42 (John Case); Jurispritus, 'A True Narrative' *Freeman's Journal* (Philadelphia 5 Feb. 1783) 2 (Bleazer Oswald). An exception was British-controlled territory. *Press-Massachusetts* 131-32.

⁵⁴² Espionage Act, 40 Stat. 217 (1917); Sedition Act, 40 Stat. 553 (1918); see Zechariah Chafee, *Free Speech in the United States* (HUP, Cambridge 1946) 3; David M Rabban, *Free Speech in Its Forgotten Years* (CUP, Cambridge 1997) 248-98.

'especially' by freedom of press in the state constitution:

[S]upport the great prerogative of freemen, the *liberty of speech* and of *writing* on public affairs. Where some judge and censure the actions of their superiors in possession of power, it is called *libelling*. But in a *free* country where *public officers* are treated not with the blind submission of tyrants and despots, but are the public *servants* and the *public trustees* the doctrine of libels cannot sound partial in the public ears, and more especially where the press is sanctified by the very constitution of the state. . . . [I]n this independent state, while men keep within the limits of truth, I am of opinion they may with safety *speak* and *write* their sentiments of men *trusted* the power. . . .⁵⁴³

A South Carolina essayist began with concern that, if the 'wicked doctrine' of seditious libel should 'be once established amongst us, . . . what else would it tend to but to abolish the sacred freedom of the press, that *palladium* of our liberties.' By contrast, '[o]ur constitution has reared the liberty of the press on a pedestal of the most perfect freedom; . . . to exhibit to the people (that *real majesty* of every free state) the *misconduct* of their SERVANTS, and the *errors* of GOVERNMENT.'⁵⁴⁴ He saw seditious libel not as ensconced in South Carolina, but as precluded by freedom of press and its right to criticize government. While the first writer limited the overriding of seditious libel to true statements, the second and others treated seditious libel as overridden entirely.

A Pennsylvanian understood that state's constitution to mean that 'members of assembly, judges, or even jurors' were 'proper subjects for the fair and free criticism of the press,'⁵⁴⁵ by its provisions that 'freedom of the press ought not to be restrained' and that 'printing presses shall be free . . . to examine the proceedings of the legislature, or any part of government.'⁵⁴⁶ In response, 'Candid' criticized 'libel acts, extended to this country, improperly,' and wished 'that Congress would select and declare what British statutes, are suitable to be re-enacted within the United States.' 'Impartial' disagreed while acknowledging the first author's 'knowledge and

⁵⁴³ 'A Patriot Charge to a Grand Jury in a Free Government' *Independent Gazetteer* (Philadelphia 23 Apr. 1785) 2, 3.

⁵⁴⁴ Spear of Ithuriel, 'To the Impartial Public' *South-Carolina Gazette* (Charleston 1 Oct. 1785) 1.

⁵⁴⁵ 'To the People of Pennsylvania' *Freeman's Journal* (Philadelphia 30 Oct. 1782) 2, 3.

⁵⁴⁶ *Federal-State Constitutions* 5:3083, 3090.

sublimity. . . in legal matters.⁵⁴⁷ However, in 1787 'Civis' argued that at least the unique features of seditious libel conflicted with 'liberty of the press' under the Pennsylvania constitution.⁵⁴⁸ The next year, Oswald agreed with the first writer, citing the 'indubitable right, to think and speak, and write if I chuse, on public occurrences,' and rejoiced that the 'doctrine of libels,' as 'a doctrine incompatible with law and liberty, and at once *destructive* of the privileges of a free country in the communication of our thoughts, has not hitherto gained any footing in Pennsylvania.'⁵⁴⁹ Four months before, another writer made the same point about lack of footing, fearing that a judge might 'revive the doctrine of libels.'⁵⁵⁰

Fifth, Virginia, in its Statute of Religious Liberty in 1785, indirectly addressed seditious libel, and directly addressed English common law restraints on opinion. Overriding the common law authority of magistrates to punish religious dissenters, Virginia denied authority of government over opinion entirely, in language written by Jefferson and reviewed by Madison:⁵⁵¹

to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy. . . ; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order ⁵⁵²

Virginia's statute not only introduced that fully-developed principle four years before the First Amendment was drafted, but was reviewed and approved by the same Virginia representative who drafted and sponsored that amendment. It was one of 126 bills revising state law and largely

⁵⁴⁷ 'On Libels' *Freeman's Journal: or, The North-American Intelligencer* (Philadelphia 1 Jan. 1783) 2, 3. English law on seditious libel was often mentioned negatively. E.g., 'Review of the History of the Revolution of South Carolina' *Columbian Magazine* (Philadelphia Sept. 1786) 22, 24. 'Candid' obviously did not want criminal libel to be reenacted, though he misassumed that it derived from statute rather than common law.

⁵⁴⁸ Civis, 'Messrs. Printers' *Charleston Morning Post* (Charleston 8 June 1787) 2.

⁵⁴⁹ Eleazer Oswald, 'To the Public' *Independent Gazetteer* (Philadelphia 1 July 1788) 3.

⁵⁵⁰ A Southern Liberty Republican, 'To Mr. Northern Liberty By-Stander' *Freeman's Journal* (Philadelphia 5 Mar. 1788) 2. His fear was not unfounded, because soon the chief justice of the state would do exactly that, though Massachusetts' chief justice would reach the opposite conclusion.

⁵⁵¹ *Jefferson Papers* 2:545, 305n; *Madison Papers* 8:399, 401 n1.

⁵⁵² Act for Establishing Religious Freedom (1785), *Hening's Statutes-Va.* 12:84, 85; *Sources-Revolution* 206, 207.

rejecting common law rules,⁵⁵³ a revisal process that most states undertook to some degree.

3 Implications of the Federalist-Antifederalist Debates and First Amendment Ratification for Federal Power Over Seditious Libel

What was true of the state declarations of rights was true of freedom of press in the Bill of Rights. Its context was recent threats of prosecution and existing state protections for freedom of press, repeated in state proposals for a Bill of Rights. Its language was unqualifiedly broad. It facially overrode much of English common law in regard to rights, securing and broadening them. There was general agreement that the federal government had no authority toward the press, between both antifederalists and federalists.

a The Federalist-Antifederalist Debates on Seditious Libel

Most antifederalist writers in the newspaper debates who mentioned the press professed to believe the press was endangered and needed a freedom of press provision,⁵⁵⁴ and many gave as a reason that the federal government might breach the banks of enumerated powers and flow over into prosecuting seditious libel. Those antifederalists clearly believed that a freedom of press provision would preclude seditious libel prosecutions.

Most federalist essayists addressing the issue denied that the federal government had any power over the press,⁵⁵⁵ so that a freedom of press provision was unnecessary. Those federalists, in their emphatic denials, did not make an exception for federal power to criminalize and prosecute seditious libel. Thus, future Chief Justice John Jay assured antifederalists that silence on freedom of press 'neither grant[s] nor take[s] away anything,'⁵⁵⁶ and his successor Oliver Ellsworth concurred that a press provision was unnecessary because 'Congress have

⁵⁵³ Daniel L Dreisbach, 'A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context' (1991) 35 *American Journal of Legal History* 172, 178.

⁵⁵⁴ *DHRC* 2:135, 2:204, 2:288, 2:310, 2:441, 2:504, 2:597, 2:668, 2:691, 2:711 (Pa.), 4:233, 4:290, 4:368-69, 4:395, 5: 561, 5:587, 5:595, 5:640, 5:710-11, 5:881, 5:960 (Mass.); *ibid* 19:132, 19:135, 19:162-64, 19:167-68, 19:199, 19:258, 19:320, 19:336, 20:624, 20:903, 20:960-61, 20:1059, 21:1263, 21: 1381, 23:2532-34 (N.Y.).

⁵⁵⁵ *E.g.*, *DHRC* 2:168, 2:190, 2:192, 2:454-55 (Pa.), 5:736-37, 489-90 (Mass.); 3:243, 247 (Ga.); 3:524, 525 (Conn.).

⁵⁵⁶ John Jay, 'An Address to the People of the State of New-York' (1788), in *Pamphlets-Constitution* 61, 76.

no power to prohibit' its freedom.⁵⁵⁷ Future Justice James Iredell was even more emphatic that 'Congress will have no other authority over this than to secure to authors' a copyright, so that '[i]f the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny'.⁵⁵⁸ James Wilson said the same, but uniquely affirmed a state power to do so, until he reconsidered the issue, as discussed in the next chapter. 'Plain Truth' assured opponents that in the Constitution's specification of federal court jurisdiction 'not a word is said of "*libels or pretended libels*".⁵⁵⁹ A decade later, opponents of the constitutionality of the Sedition Act 'well remember[ed]' these assurances that the constitution 'contained no delegation of power which could possibly affect their rights,' so that a bill of rights was unnecessary.⁵⁶⁰

The ratification debates paralleled the newspaper debates. Most antifederalist speakers gave as a reason for opposing the Constitution its lack of a bill of rights,⁵⁶¹ and most commonly, its lack of protection for the press,⁵⁶² conscience, and jury trial. The most immediate threat to press freedom, to those who specified the danger, was seditious libel. Thus, Richard Henry Lee wrote of that hazard to delegate Samuel Adams, just before the Massachusetts convention, asking him to suppose that the new administration saw a necessity 'that the freedom of the press should be restrained because it disturbed the operations of the new government,' much as Holt supported the Crown in *Bear*, which Mansfield 'availed himself of for the restraint of the press' in *Woodfall*.⁵⁶³ Lee's premise was that freedom of press would be restrained by seditious libel. Silas Lee wrote to George Thacher, during the same convention, that a person finding fault with the administration who 'should boldly publish his sentiments,' however well-

⁵⁵⁷ Landholder [Oliver Ellsworth], 'Landholder VT (10 Dec.1782), in *DHRC* 3:487, 490.

⁵⁵⁸ Marcus [James Iredell], 'Answers to Mr. Mason's Objections to the New Constitution' (1788), in *Pamphlets-Constitution* 333, 361; *DHRC* 16:162, 382.

⁵⁵⁹ Plain Truth, 'Answers to the Objections, *Debate* 1:105, 108.

⁵⁶⁰ E.g., 'Extract of a Letter from Virginia' *Independent Chronicle* (Boston 10 Dec.1798) 2; *Creation* 536-43.

⁵⁶¹ *Great Rights* 120-21, 164; *accord Ideological Origins* 350-51.

⁵⁶² E.g., *Elliot's Debates* 1:496 (Mason), 1:503 (R.H.Lee), 2:399 (Tredwell), 3:44-45, 149 (Henry), 4:205 (Lenoir), 4:314 (Lincoln); *DHRC* 2:441 (Smilie).

⁵⁶³ Richard Henry Lee to Samuel Adams 5 Oct.1787), *DHRC* 9:36, 37-38; see *Great Rights* 125-29.

grounded, 'would no doubt be complimented by Congress, with the ap[p]ellation of *libels against Government*' and stopped, with an obvious effect on liberty of press.⁵⁶⁴ Most federalist speakers denied that the new government had any power that could threaten press freedom,⁵⁶⁵ so that protection was superfluous.⁵⁶⁶ Charles Cotesworth Pinckney, a strong supporter of freedom of press, believed that 'liberty of the press,' and a bill of rights generally, need not be addressed in the Constitution because the federal government 'has no powers but what are expressly granted to it,' and 'therefore has no power to take away the liberty of the press.'⁵⁶⁷

Other participants in the ratification debates explicitly addressed the issue of seditious libel, among the many that mentioned freedom of press. Had there been widespread support for seditious libel and its enforcement, it would have appeared in the debates, because of the prominence of freedom of press in antifederalist attacks on the proposed Constitution (typically one of their three principal attacks⁵⁶⁸). In the Pennsylvania convention, when Smilie raised the need for a freedom of press provision because of concern Congress may otherwise have 'a power, or right, to declare what is a libel' or 'to pass an act for the punishment of libels and restrain the liberty of the press,'⁵⁶⁹ Wilson (a Constitutional Convention participant and the federalist leader) replied categorically that 'there is given to the general government no power whatsoever concerning it' (the press).⁵⁷⁰ Three days later, Wilson denied that Congress had power to 'declar[e] what shall be a libel,' and appeared to agree that that would be a

⁵⁶⁴ Silas Lee to George Thatcher (23 Jan. 1788), *DHRC* 5:780, 782.

⁵⁶⁵ E.g., *Elliot's Debates* 1:497-98 (Jay), 4:315 (C.C. Pinckney), 3:203, 469 (Randolph); *DHRC* 2:168, 454-55 (Wilson).

⁵⁶⁶ Besides those in the preceding footnote, e.g., *ibid* 2:449 (Wilson), 4:208 (Spaight), 4:259 (C. Pinckney).

⁵⁶⁷ *Elliot's Debates* 4:315 (18 Jan. 1788); *Farrand's Records* 3:255, 256; see *Great Rights* 133.

⁵⁶⁸ James Madison to Edmund Randolph (21 Oct. 1789), *Madison Papers* 10:199; accord *Elliot's Debates* 4:259 (C. Pinckney); e.g., *ibid* 1:496 (Mason), 1:503 (R.H. Lee), 2:399 (Tredwell), 3:44-45, 149 (Henry), 4:205 (Lenoir), 4:314 (Lincoln); *DHRC* 2:204, 2:288, 2:310, 2:504, 2:597, 3:243, 5:587, 20:624; see *Complete Antifederalist* 1:64; *Jefferson Papers* 12:438, 440, 14:649, 650.

⁵⁶⁹ *DHRC* 2:453 (1 Dec. 1787), 2:441 (30 Nov. 1787); a concern Whitehill joined in, *ibid* 2:454, see *ibid* 2:597; *Great Rights* 122-25.

⁵⁷⁰ *ibid* 2:455 (1 Dec. 1787); *Elliot's Debates* 2:449 (1 Dec. 1787); cf. *ibid* 2:468 (Randolph).

power 'to interfere' with the press.⁵⁷¹ In the Virginia convention, George Mason objected that a writer who 'expose[d] to the community at large the abuses of [federal] powers' might be viewed by Congress as 'encouraging sedition, and poisoning the minds of the people,' and Congress might, 'to provide against this, lay a dangerous restriction on the press.'⁵⁷² When former Gov. Patrick Henry built upon that to read the freedom of press provision of the Virginia Declaration of Rights and to say that freedom should be secured before the federal Constitution was ratified,⁵⁷³ Gov. Edmund Randolph (a Constitutional Convention participant and state convention federalist leader, with Madison) denied that freedom of press was left insecure, and queried, 'Where is the page where it is restrained? If there had been any regulation about it, leaving it insecure, then there might have been reason for clamors. . . . I again ask for the particular clause which gives liberty to destroy the freedom of the press.' He moved immediately to the next objection, denying that citizens were 'deprived of these valuable rights' recognized by the common law, and stated that 'the common law ought not to be immutably fixed' by the Constitution.⁵⁷⁴ Randolph, had he seen the common law of seditious libel as constitutionalized, could not have made the first statement (and would not have, as a supporter of freedom of press), and would not have made the second statement but instead its opposite. In the North Carolina convention, when a delegate argued that the lack of press protection meant '[t]hey might make it treason to write against the most arbitrary proceedings,'⁵⁷⁵ Spaight responded that the Constitution 'can do nothing to injure' the press and that 'the constitution of every state' secures it,⁵⁷⁶ and Iredell (the future Justice) said the first delegate was mistaken because Congress 'have no power to define any other crime whatever.'

⁵⁷¹ *Ibid* 2:482 (4 Dec.1787).

⁵⁷² *Elliot's Debates* 3:442; *DHRC* 10:1326 (16 June 1788); see *Great Rights* 134-41.

⁵⁷³ *Ibid* 3:442, 462.

⁵⁷⁴ *Ibid* 3:469.

⁵⁷⁵ *Ibid* 4:205 (Lenoir); see *Great Rights* 154-56.

⁵⁷⁶ *Ibid* 4:209.

asking, 'Where is the power given to them to do this?'⁵⁷⁷ As in the newspaper debates, in each case, when the antifederalists expressed concern that seditious libel could continue in the absence of a freedom of press clause, the federalists responded that the federal government could not define that as a crime or 'do this.' In each case, the antifederalist claimed that a freedom of press clause would ensure that seditious libel did not rear its head, and the federalist assured that the federal government could not act to restrain the press.

Several state ratification resolutions called for post-ratification amendments including a freedom of press provision. The critical state's, Virginia's, used language strongly implying that the provision would repeal seditious libel, calling in its form of ratification for a provision that 'liberty... of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States.'⁵⁷⁸ That is nearly impossible to reconcile with seditious libel. It evidently meant the same thing as Virginia's proposed wording: 'That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.'⁵⁷⁹ Similarly, New York stated the principle that 'freedom of the press ought not to be violated,' which Rhode Island later echoed; and North Carolina, rejecting ratification, asked for a similar amendment.⁵⁸⁰

Maryland's ratification convention witnessed initial committee agreement on twelve amendments, including that 'freedom of the press be inviolably preserved,'⁵⁸¹ but the federalist majority became frustrated with the minority's insistence on further amendments, and decided to heed federalist calls to ratify without any amendments. The minority's protest gave as its reason for the press provision that '[i]n prosecutions in the federal courts for libels, the

⁵⁷⁷ *Ibid* 4:219.

⁵⁷⁸ *Elliot's Debates* 1:327, 3:656 (26 June 1788); *DHFFC* 4:15-17. Virginia was critical as the largest state. *Great Rights* 134.

⁵⁷⁹ *Ibid* 3:659 (27 June 1788).

⁵⁸⁰ *Ibid* 1:328 (N.Y. 26 July 1788); *ibid* 1:332, 4:244 (N.C. 1 Aug. 1788); *ibid* 1:335 (R.I. 29 May 1790); *DHFFC* 4:21 (N.Y.); Michael P Zuckert and Derek A Webb (eds), *The Anti-Federalist Writings of the Melancton Smith Circle* (LP, Indianapolis 2009) 344, 347 (N.Y. proposals July 1788).

⁵⁸¹ *Ibid* 2:549, 555 (26-28 Apr. 1788); *DHRC* 17:242; John B Cutting to Thomas Jefferson (11 July 1788), *Jefferson Papers* 13:331, 336. This is discussed further in Chapter 5 in connection with Justice Chase.

constitutional preservation of this great and fundamental right may prove invaluable.⁵⁸² Though clumsily worded, the only way the freedom of press provision would 'prove invaluable' in libel prosecutions would be by blocking them. That freedom of press provision did not refer to the *Zenger* modifications of a defense of truth or jury determination of all issues (another amendment did). The minority clearly thought freedom of press good, criminal libel actions bad, and the freedom of press provision an invaluable antidote. That was the interpretation of a leading sponsor, Samuel Chase (before his view of the press deteriorated a decade later), as he wrote that the 'liberty of the press' amendment would enable people to 'write what they please about Government.'⁵⁸³ Other states were aware of the minority's protest, as its proposal was 'reprinted forty-four times' over the next month and a half.⁵⁸⁴

b The Adoption of the First Amendment and Rejection of the Common Law Limitation

The most striking thing about the First Amendment⁵⁸⁵ was that it was relatively noncontroversial, in contrast to the high drama over the Constitution and over the absence of a bill of rights that filled a year of pamphlet wars and state ratification conventions. Congress debated and amended Madison's draft of the Bill of Rights,⁵⁸⁶ but it was nothing in duration or polarity like the four months of the Constitutional Convention; approval was by strong majorities.⁵⁸⁷ The congressional trope of the season was to call amendments 'a tub to the whale' (referring to Swift's satire);⁵⁸⁸ Pierce Butler, a signer of the Constitution and a senator voting for the Amendment, changed the imagery to say '[a] few milk-and-water amendments have been proposed by Mr. M[adison], such as liberty of conscience, a free press, and one or two gen-

⁵⁸² Elliot's *Debates* 2:552 (May 1788 [date corrected]); *DHRC* 17:244.

⁵⁸³ Samuel Chase, 'Notes of Speeches Delivered to the Maryland Ratifying Convention' (Apr.1788), *Complete Anti-Federalist* 5:79, 89.

⁵⁸⁴ *DHRC* 17:238n; see *Great Rights* 130.

⁵⁸⁵ It was the third of the twelve amendments offered by Congress, the first two of which were not ratified.

⁵⁸⁶ *DHFFC* 4:3-48; see *Great Rights* 160-87; Paul Finkelman, 'James Madison and the Bill of Rights: A Reluctant Paternity' (1990) *Supreme Court Review* 301, 309-13, 319-22, 331-33.

⁵⁸⁷ *DHFFC* 4:46 (House 37-14); *Journal of the First Session of the Senate of the United States* (Thomas Greenleaf, New York 1789) 141-42 (House two-thirds).

⁵⁸⁸ *Creating Bill of Rights* 245 (Clymer), 175 (Burke), 259 (Peters), 276 (N.Webster), 278 (W.L.Smith).

eral things already well secured.⁵⁸⁹ Similarly, the state assemblies ratifying the Bill of Rights lacked the acrimony of the conventions ratifying the Constitution, with so little debate⁵⁹⁰ that every state holding conventions approved nearly all of the ten rights provisions,⁵⁹¹ often by great majorities⁵⁹² and with 'virtually no opposition.'⁵⁹³

That relative lack of opposition to the First Amendment as it was adopted by Congress and ratified by the states can only mean that the protections of the First Amendment, and of the rest of the Bill of Rights, were not objectionable to most people in 1789-1791. They were understood by antifederalists as ample protections of press and speech, not as crabbed prohibitions against only licensing and similar prior restraint; it is difficult to find antifederalist writing or speech calling them insufficiently broad, and the provisions' wording was indeed expansive. The press and speech provisions were not viewed by most federalists as too broad, and those in the Senate that attempted to limit press and speech to a Blackstonian common law breadth were defeated; it is difficult to find a federalist writing or speech calling for rejection of the press and speech provisions in the Bill of Rights, and their prior reasons for opposition were instead the superfluity and potential negative pregnant of a bill of rights.

Madison's speech to the House of Representatives,⁵⁹⁴ as he offered the Bill of Rights, gave as the rationale for provisions guarding press and conscience from the states that 'every government should be disarmed of powers which trench upon those particular rights.'⁵⁹⁵ He gave as one rationale why press and conscience 'should be so secured' from the federal gov-

⁵⁸⁹ Pierce Butler to James Iredell (11 Aug. 1789), *Iredell Papers* 3:511, 512.

⁵⁹⁰ E.g., 'Boston, February 3' *Massachusetts Spy* (Worcester 11 Feb. 1790) 3.

⁵⁹¹ *Elliot's Debates* 1:339-40; *DHC* 2:325-90.

⁵⁹² E.g., 'Proceedings of Assembly' *New-York Daily Gazette* (New York 27 Jan. 1790) 2 (N.Y. 'by a great majority'); *Bill of Rights* 2:1181, quoting *Maryland Journal* (Baltimore 13 Nov. 1789) (Conn. by 'large majorities'); *ibid* 2:1176 (Md. unanimous).

⁵⁹³ *Bill of Rights* 2:1171.

⁵⁹⁴ For drafting of the First Amendment, Robert A. Rutland, *The Birth of the Bill of Rights 1776-1791* (UNCP, Chapel Hill 1955) 190-218; *Origins* 475-85.

⁵⁹⁵ *Creating Bill of Rights* 69, 85 (8 June 1789).

ernment that '[f]ears respecting the judiciary system, should be entirely done away.'⁵⁹⁶ Each would be true for the press only if the Bill of Rights disarmed government of power to prosecute seditious libel. When his proposed language was favorably reported on by the House committee, Madison again assessed its effect: 'The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government'⁵⁹⁷ Liberty of press would be 'beyond the reach of this Government' only if power to prosecute seditious libel was no longer in reach.

His speech was followed by Rep. James Jackson, who opposed spending time on a bill of rights when federal revenue legislation and other critical legislation required attention and when the Constitution had not first been tested in practice to identify needed amendments. Jackson said that a liberty of press amendment was not needed at the time because the press was unendangered even for what in past times was seditious libel.⁵⁹⁸ Jackson's statement was that criticism of government officials occurred without prosecution, and Congress had no power 'to regulate this subject.' The other record of his speech fortifies the point.⁵⁹⁹

The Senate, the day before it adopted the First Amendment in essentially its present form, considered and rejected an amendment to narrow freedom of press and, in effect, to create an exception for seditious libel. The motion would have added, after 'freedom of

⁵⁹⁶ 'Sketch of Proceedings of Congress' *Gazette of the United States* (New York 10 June 1789) 66, 67.

⁵⁹⁷ *Annals* 1:766 (15 Aug. 1789).

⁵⁹⁸ An incident not discussed by Levy, though after writing this, I found it is discussed by *Palmer* 281-83. Jackson said:

The gentleman endeavours to secure the liberty of the press; pray how is this in danger? There is no power given to Congress to regulate this subject as they can commerce, or peace, or war. Has any transaction[] taken place to make us suppose such an amendment necessary? An honorable gentleman, a member of this house, has been attacked in the public news-papers, on account of sentiments delivered on this floor. Have Congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege . . . ? No, these things are suffered to public view These are principles which will always prevail; I am not afraid, nor are other members I believe, our conduct should meet the severest scrutiny. Where then is the necessity of taking measures to secure what neither is nor can be in danger?

Creating Bill of Rights 87 (8 June 1789), reprinting *Congressional Register* (8 June 1789) 1:437-38; *Annals* 1:460 (8 June 1789).

⁵⁹⁹ 'The press, Mr. Jackson observed, is unboundedly free--a recent instance of which the House had witnessed in an attack upon one of its members.' 'Sketch of Proceedings of Congress' *Gazette of the United States* (New York 10 June 1789) 66, 67.

speech, or of the press,' the words '[i]n as ample a manner as hath at any time been secured by the common law.'⁶⁰⁰ Its rejection supports the view that the First Amendment protections of speech and press were not limited by the common law, and extended beyond Blackstone's common law definition. That is particularly true in light of the Seventh Amendment, which showed that Congress expressly incorporated common law when it meant for an Amendment to incorporate common law, and the Fourth Amendment, which showed that Congress expressly limited broad language when it meant to impose boundaries on rights. The rejected language could hardly be said to be redundant, when the Amendment otherwise used unbounded language, at a time when 'freedom of the press' was widely and preponderantly used to mean freedom from restraints such as seditious libel rather than freedom only from prior restraints. Similarly, Sherman's proposal a month earlier, to protect 'speaking, writing and publishing their sentiments with decency and freedom,'⁶⁰¹ with its narrow language only protecting decent speech, went nowhere and was never adopted by the Senate.

The first Congress, the same year it adopted the First Amendment, had two further chances to confirm seditious libel doctrine, and again rejected those opportunities. Two days after final House action approving the First Amendment, the House considered Burke's motion criticizing newspapers for 'distorting the arguments' in debate, which elicited Hartley's retort that the motion involved 'an attack upon the liberty of the press,' but produced no support for the motion.⁶⁰² Four months later, the Senate considered and rejected a provision of the first criminal bill treating criticism of ambassadors as seditious libel under the law of nations, though it did not record the reasons for rejection.⁶⁰³

c State Ratification of the First Amendment

Records of state proceedings ratifying the First Amendment are limited, and only one

⁶⁰⁰ *DHFC* 1:152 (3 Sept.1789); *ibid* 4:36 n9.

⁶⁰¹ *Creating Bill of Rights* 266, 267 (21-28 July 1789).

⁶⁰² *Annals* 1:952, 954 (26 Sept.1789).

⁶⁰³ Crimes Act §29, *DHFC* 6:1730 & n81 (1790); 'An Act for the Punishment of Certain Crimes against the United States' (Thomas Greenleaf, New York 1789).

record (which does not appear in the standard compilation⁶⁰⁴) has been found that refers to seditious libel or other criminal libel. During New York's ratification of the First Amendment, speeches of two delegates discussed freedom of press and seditious libel, before ratification was 'carried by a great majority.' Samuel Jones 'hoped that something might be done...to discriminate between the liberty and the licentiousness of the press,' but did not ascribe that hope to support of seditious libel, instead basing it on the need 'to punish the injuries that might be done to individuals by the indiscriminate publication of libels.' Rufus King, later a leading Federalist, responded with the Blackstone-Mansfield definition of freedom of press as 'exemption from previous restraint.' Unmoved, Jones 'concluded by observing, that it would have been more satisfactory to him, had the constitution of the United States provided something like a remedy against the licentiousness of the press,' which he had defined as personal defamation; and the vote was taken.⁶⁰⁵ The most that can be said is both viewpoints were presented--Jones believed the broad wording prevented federal action (legislative, judicial, or both) toward personal libel and, apparently, seditious libel, and was not persuaded by the Blackstone-Mansfield definition that cut the reach of freedom of press; while King accepted the Blackstone-Mansfield definition and continuing seditious libel.

Yet Levy's conclusion was that the framers 'shared Blackstone's view,' and that 'neither the American Revolution nor the framers of the first amendment intended to abolish the common law of seditious libel.'⁶⁰⁶ That is contrary not only to the context and the broad language, but to the narrowly defeated Pinckney proposal that the Constitutional Convention adopt an unexceptional freedom of press provision and a senator's immediately defeated proposal that the First Amendment be limited to common law press and speech protection. Levy's conclusion also denies the existence of antifederalist concerns about future seditious libel prosecutions and federalist assurances of no federal power affecting the press, and the

⁶⁰⁴ *Bill of Rights* 2:1171-1203.

⁶⁰⁵ 'Proceedings of Assembly' *New-York Daily Gazette* (New York 27 Jan.1790) 2.

⁶⁰⁶ Levy xi; Leonard W Levy, 'The Legacy Reexamined' (1985) 37 *Stanford Law Review* 767, 769.

existence of one side of the subsequent debates in Pennsylvania and Massachusetts.

Two events that occurred during ratification--discussion of the effect of Massachusetts' freedom of press provision on seditious libel in early 1789, and of the convention to amend Pennsylvania's constitution including freedom of press and seditious libel in late 1789 and in 1790--are discussed in connection with Justices Cushing and Wilson (Chapter 4.C-D).

Thus, many antifederalists expressly feared and opposed the Blackstone-Mansfield doctrine, and federalists responding to them gave express assurance that the federal government had no power touching the press. That was true both in the newspaper debates and in the statehouse debates. The preponderance of those discussing seditious libel objected to it and believed it would be repealed by a freedom of press provision, and little disagreement with that was expressed in 1787-1791. Instead, there was strong support for the First Amendment, with its unqualified and expansive language, as there had been for state declarations of rights.

E The Question of a Federal Common Law of Crime

Criminal law before and during the eighteenth century, both in England and America, was largely 'a common law field,' as Langbein notes,⁶⁰⁷ though it was steadily being modified by statute.⁶⁰⁸ Crimes under common law included 'writing a libel and publishing it,' which was 'a matter indictable at common law.'⁶⁰⁹ However, not all of English common law carried over to the new states, as most provided and the rest assumed that common law repugnant with their constitution or laws was not received. Whether any common law carried over to the new federal government, to create additional federal crimes and additional federal court jurisdiction, soon generated a storm.

The Hamiltonian view soon became that America had a federal common law of crimes

⁶⁰⁷ John H Langbein, 'Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources' (1983) 50 University of Chicago Law Review 1, 40; *accord* Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (Stevens, London 1948-86) 1:ix; JM Beattie, *Crime and the Courts in England, 1660-1800* (CP, Oxford 1986) 5, 113, 140, 182.

⁶⁰⁸ Leon Radzinowicz, *supra* 1:611-726; Peter Linebaugh, *The London Hanged* (CUP, Cambridge 1992) 74-82.

⁶⁰⁹ *A Prohibition* (1687-88) Comberbach 71, 90 ER 350 (KB); *accord* *Opinion of the Judges* (1792) *State Trials* 22:297, 300 (HL).

as well as state common law, since the Constitution expressly authorized very few crimes such as treason. The Madisonian view soon became that there was no federal common law of crimes, because the Constitution did not enumerate such federal powers and the Bill of Rights countered much of English common law. Between these viewpoints, there was no controversy that states adopted the bulk of English common law not repugnant to state constitutions and laws, or that Americans extolled the ideal of the common law as a repository of English rights⁶¹⁰ and particularly jury trial rights,⁶¹¹ canonized by prerevolutionary 'identification of English rights with natural rights.'⁶¹² However, even then the common law was seen as 'not sufficient, to secure [people] from oppression,' as Dulaney said in his influential 1728 pamphlet.⁶¹³ The controversy between these viewpoints has been thoroughly discussed by Jay and Palmer,⁶¹⁴ and so is summarized and supplemented principally with sources they do not cite. That controversy determined the continued vitality of seditious libel and the scope of constitutional rights of press and speech.

I Discussion of the Common Law of Seditious Libel During the Ratification Period

Nine days after the first Congress rejected the amendment limiting freedoms of speech and press to 'as ample a manner as hath at any time been secured by the common law,' and thirteen days before it adopted what became the First Amendment, a Philadelphia essayist described the status of seditious libel and the impact of state and federal freedoms of speech and press:

It is really often curious to see some of our *Lawyers* attempting to restrain the press, by quoting as LAW for this country, the opinions of arbitrary and corrupt *English* judges; some of whom have done their utmost to change and new model the *British* constitution, . . . without the liberty of speech, or of press. . . . It is high time to make

⁶¹⁰ E.g., *Elliot's Debates* 1:328 (N.Y. ratification), 1:494, 3:508 (Mason), 3:446 (Henry); *DHSC* 2:179, 2:402, 2:415-16 (Wilson).

⁶¹¹ E.g., 'Declaration of Colonial Rights and Grievances' (10 Oct. 1774), *EHD* 9:805, 807.

⁶¹² *Lamp* 189; see David McCullough, *1776* (Simon & Schuster, New York 2005) 54.

⁶¹³ Daniel Dulaney, *The Right of the Inhabitants of Maryland to the Benefit of the English Laws* (W Parks, Annapolis 1728) 18.

⁶¹⁴ Stewart Jay, 'Origins of Federal Common Law, Part I' (1985) 133 *University of Pennsylvania Law Review* 1003; Stewart Jay, 'Origins of Federal Common Law, Part II' (1985) 133 *University of Pennsylvania Law Review* 1231; Robert C Palmer, 'The Federal Common Law of Crime' (1986) 4 *Law and History Review* 267; see *History of Supreme Court* 1:623-33.

use of our own common sense, and be guided by the spirit of our own constitutions, if we mean to preserve that invaluable liberty for which we so ardently struggled. And should we apply this doctrine of the tyrant Lord Mansfield, even to private life, in what a disagreeable predicament will it place our printers. . . .

. . . . Surely such slavish, such childish doctrines, will not prevail in America; rather let the sophistry and maxims of court casuists be disregarded, and the language of our new government alone become the guide of freemen--"No state shall infringe the freedom of speech, or of the press". . . .⁶¹⁵

It was the pending Bill of Rights of which the essay spoke, because the quotation in the last sentence was part of Madison's proposed wording for freedom of speech and press, not any state constitution.⁶¹⁶ The essayist viewed seditious libel as not properly 'law for this country,' and as 'restrain[ing] the press,' in conflict with freedoms of speech and press in 'our own constitutions' (state) and in 'our new government' Constitution (federal). He rejected the Mansfield definition.

He was not alone. The day after the Bill of Rights was approved, 'Libero,' finding imprisonment of printers for libels 'contrary to the spirit of the constitution,' proclaimed that 'our laws have not drawn a line between the liberty and licentiousness of the press.'⁶¹⁷ Days after the first state ratification, another writer queried, 'Shall we, who have renounced the tyranny of *England*, acknowledge the most *tyrannic* part of its laws?', referring to 'the *Star-Chamber* practice' of seditious libel.⁶¹⁸ The point was not that English common law was not adopted by the American states, but that the parts repugnant to their rights and powers were not received but rejected. As an article said in 1788, though freedom of press was claimed as the 'bulwark of *English* liberty,' it 'is but a name' there and 'is not *secured*' under English common law, whereas the situation of Pennsylvanians differed because in addition to 'the advantages assigned by the *common law* of England, our rights and privileges are ascertained and fixed. . . by the *constitution* of the state.'⁶¹⁹ Consequently, while for common law generally Blackstone was influential,

⁶¹⁵ 'Mr. Oswald' *Independent Gazetteer* (Philadelphia 12 Sept. 1789) 3.

⁶¹⁶ Proposal (8 June 1789), *DHFFC* 4:9, 10, 11; Articles of Amendment (24 Aug. 1789), *ibid* 4:35, 39, until amended 9 September, *ibid* 4:45. The essayist was not aware of the current language yet, because the first Congress was in New York.

⁶¹⁷ 'Libero, 'Mr. Oswald' ' *Independent Gazetteer* (Philadelphia 26 Sept. 1789) 2.

⁶¹⁸ 'Philadelphia, Friday, November 20' *Independent Gazetteer* (Philadelphia 20 Nov. 1789) 3; accord 'There Is Something' *Middlesex Gazette* (Middletown 12 Dec. 1789) 1.

⁶¹⁹ 'Philadelphia, August 13' *Independent Gazetteer* (Philadelphia 13 Aug. 1788) 3.

for the purpose of defining our rights '[w]e have no business nor necessity, like the people of England, to refer to *Blackstone*, or any other writer and commentator on the laws of England.'⁶²⁰ The common law did not define the boundary of freedom of press or of rights generally, nor did the restrictions that 'mutilated' it; English rights had 'precarious' security, were 'undefined,' and depended on 'a mass of mutilated laws, in volumes of contradictory reports.'⁶²¹

2 Effect of the First Amendment, and the Bill of Rights, in Modifying the Common Law

The Hamilton view faced a severe difficulty, in claiming a federal common law of crimes including seditious libel. That would require state declarations of rights and the new Bill of Rights to incorporate the common law meaning of freedom of press, as mere freedom from prior restraint, in order for seditious libel not to be repugnant. Yet the effect of every other clause of the First Amendment, and of the other amendments (as even Levy conceded⁶²²), was seriously to modify common law and statutory law to broaden rights and eliminate restrictions.

Thus, in the First Amendment, the Free Exercise Clause changed English toleration of some faiths⁶²³ to a right and broadened it to all faiths; the Establishment Clause rejected the English common law establishing religion.⁶²⁴ The Assembly Clause ended English restrictions on assemblies exceeding twelve individuals and criminalization after warning;⁶²⁵ the Petition Clause ended English restrictions on signatories (twenty) and deliverers (ten) and criminal prosecution of 'indecent' petitions as seditious libel.⁶²⁶ The rest of the Bill of Rights overturned major parts of English common law of crime, which Wilson and other contem-

⁶²⁰ *Ibid.*

⁶²¹ One of the Common People, 'Messieurs Edes' *Boston Gazette* (Boston 3 Dec.1787) 2.

⁶²² Leonard W Levy, *Origins of the Bill of Rights* (YUP, New Haven 1999) 4.

⁶²³ *Blackstone's Commentaries* 4:53-59; Toleration Act (1689), 1 W&M c18.

⁶²⁴ *Ibid* 4:49-53, 57-58; *Royal Instructions* 2:482; Mark McGarvie and Elizabeth Mensch, 'Law and Religion in Colonial America,' in Michael Grossberg (ed), *Cambridge History of Law in America* (CUP, Cambridge 2008) 1:324, 326-62. Madison criticized the common law for importing 'the ecclesiastical hierarchy itself.' James Madison to George Washington (18 Oct.1787), *Madison Papers* 10:196, 197.

⁶²⁵ *Ibid* 4:142-43.

⁶²⁶ *Ibid* 4:147, 1:143; Act against Tumults (1661), 13 Car 2, stat 1, c5.

poraries called 'defective to a degree both gross and cruel,'⁶²⁷ with the 'ensanguined hue' of 160 capital offenses,⁶²⁸ the denial of counsel and confronting witnesses,⁶²⁹ and inquisitorial extraction of confessions and limitation of jury trial rights⁶³⁰ (which Milsom similarly called '[t]he miserable history of crime in England' with its 'savage laws' and unjust judges⁶³¹).⁶³²

Madison said as much in his speech introducing the Bill of Rights: 'freedom of the press and rights of conscience... are unguarded in the British constitution'; and according to his notes, Britain offered 'no freedom of press--conscience,' so that the Bill of Rights was needed as a 'check on... common law.'⁶³³ Gov. Edmund Randolph, the other federalist leader in the most critical state's ratification convention, declared that constitutionalizing the common law 'would in many respects be destructive to republican principles,' such as reviving 'the writ of burning heretics' and other examples in 'many parts of the common law.'⁶³⁴ Thus, the argument that the First Amendment, with unrestricted language and without saying so, incorporated the parts of English common law most restrictive of press and speech (the Blackstone-Mansfield definition of freedom of press) conflicts with its *raison d'être*, just as much as incorporating common law on conscience and establishment, or on assembly and petition.

3 Actions of the First Congress Relevant to Federal Adoption of Common Law Crimes and Seditious Libel

The first Congress, in adopting the first Judiciary Act, used language about lower federal

⁶²⁷ *Wilson Works* 2:1104.

⁶²⁸ *DHSC* 2:167, 189, and the 'savage butchery' that 'disgraces humanity' of treason penalties, *ibid* 2:145; *accord ibid* 2:186, 2:223 (Iredell).

⁶²⁹ *Ibid* 2:188; *accord ibid* 2:314 (Iredell); John H Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 *American Journal of Legal History* 313, 316.

⁶³⁰ JH Baker, 'Criminal Courts and Procedure at Common Law 1550-1800,' in JS Cockburn (ed), *Crime in England, 1550-1800* (PUP, Princeton 1977) 15, 21-22, 24-25; John H Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (HUP, Cambridge 1974) 16-20, 77-97; *ibid* 9-15 (excessive bail).

⁶³¹ *Milsom* 403.

⁶³² Similarly, the Constitution overturned parts of common law such as defining treason, JG Bellamy, *The Law of Treason in England in the Later Middle Ages* (CUP, Cambridge 1970) 212-15; *Blackstone's Commentaries* 4:74-93; and the Revolution jettisoned parts of common law such as conflict of laws rules. William E Nelson, 'The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws,' in *Law in Colonial Massachusetts, 1630-1800* (Colonial Society of Massachusetts, Boston 1984) 419, 441-51.

⁶³³ *DHFFC* 11:818, 821-22 (8 June 1789); *ibid* 16:724, 725 (8 June 1789).

⁶³⁴ *DHRC* 10:1353 (17 June 1788); *Elliot's Debates* 3:469-70; *see Elliot's Debates* 4:63 (MacLaine-N.C.).

court jurisdiction that advocates of a federal common law of crime would cite: they would have 'cognizance of all crimes and offences that shall be cognizable under the authority of the United States.'⁶³⁵ If that had given federal courts jurisdiction over common law crimes, the Crimes Act was not needed, because English common law addressed all the crimes it prescribed.

However, that first Congress, a half year later, saw the Crimes Act as necessary, and more significantly, did not reference common law crimes, or prescribe a large collection mirroring the common law.⁶³⁶ Ellsworth and Paterson, drafting committee members,⁶³⁷ said the bill would 'define the crimes and offences that will be cognisable under the authority of the United States,'⁶³⁸ ruling out incorporation of common law crimes as federal crimes, though a decade later they reversed that position. The bill did define crimes that were federal, and consistent with the assurance that the new federal government was one of enumerated powers, created only federal crimes arising from constitutional provisions.⁶³⁹ Those crimes were treason, acts on federal military bases and property, acts on high seas and nonstate waters, counterfeiting federal securities, forging federal court records, stealing federal property, other offenses toward federal courts, and offenses toward foreign envoys,⁶⁴⁰ along with revenue crimes. It was a draft of this act that made it a crime to 'defame, libel, or slander any Ambassador'--a provision that was jettisoned.⁶⁴¹ In that first Congress, Baldwin noted that 'we have not adopted the common law,'⁶⁴² and others acted consistently with that, though that Congress showed no objection to federal court enforcement of the law of nations,⁶⁴³ or definition of non-self-defining terms with

⁶³⁵ Judiciary Act § 9, 1 Stat.73 (24 Sept.1789); *DHFFC* 5:1150, 1153.

⁶³⁶ *Palmer* 271-72, 280-84; *Preyer* 225-26

⁶³⁷ *DHFFC* 6:1741.

⁶³⁸ Oliver Ellsworth to Charles Chauncey (15 June 1789), 'Chauncey Family' (YUL, Box 2, Folder 17).

⁶³⁹ An Act for the Punishment of Certain Crimes, 1 Stat. 112 (30 Apr.1790); *DHFFC* 6:1733.

⁶⁴⁰ *Ibid* §§1-2, 3-7, 8-13, 14, 15, 16-17, 18-23, 24-27.

⁶⁴¹ *DHFFC* 6:1730 & n81.

⁶⁴² *Annals* 1:1108 (20 Jan.1790); *Palmer* 279.

⁶⁴³ *Ibid* 1:828 (29 Aug.1789).

nonrepugnant common law.⁶⁴⁴ That Congress a decade later saw the Sedition Act as necessary also implied that common law did not already create such federal crimes as seditious libel.⁶⁴⁵

4 Statements of the Early Supreme Court Relevant to Federal Adoption of Common Law Crimes and Seditious Libel

The first Supreme Court justices individually addressed the issue. Levy assured us that '[a]ll the early Supreme Court judges . . . assumed the existence of a federal common law of crimes,'⁶⁴⁶ Stewart Jay called them 'virtually unanimous,' and Horowitz and others concurred.⁶⁴⁷ Preyer stated, with equal confidence, that the evidence 'is hardly conclusive for the proposition that there was a widely shared view among the early federal judges supportive of a federal common law of crimes,' finding 'only Wilson, Jay, Iredell and Ellsworth' to share that view.⁶⁴⁸ Her characterization of Wilson's and Jay's views, and Iredell's before 1796, was overblown, as their grand jury charges and opinions show, though as 1798 arrived Ellsworth and other sitting justices shifted as they entered the fray over the Sedition Act. Palmer was most accurate in finding little acceptance of *federal common law* by any justices until 1797.⁶⁴⁹

The early Supreme Court justices, when they traveled on circuit, charged grand juries, and tried cases, generally treated the body of federal crimes as those proscribed in express federal laws and those supported by express constitutional provisions. Before the Crimes Act was passed in April 1790, Jay, after discussing the law of nations and federal revenue laws, ended his charge by discussing official corruption and encouraging indictment of 'all offences of every kind

⁶⁴⁴ James Wilson's Charge (23 May 1791), *DHSC* 2:166, 176; *Elliot's Debates* 3:531 (Madison).

⁶⁴⁵ *History of Supreme Court* 2:638; *Origins* 505.

⁶⁴⁶ *Levy-Liberty* 29; accord *ibid* 275.

⁶⁴⁷ Jay 1016; Morton J Horowitz, *Transformation of American Law, 1780-1860* (HUP, Cambridge 1977) 9; accord Warren 1:433; *Misunderstanding* 96; Stephen B Presser, 'A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence' (1978) 73 *Northwestern Law Review* 26, 70; *Repressive Jurisprudence* 5 n6; Ellsworth 115; *Reclaiming* 44 (except Chase).

⁶⁴⁸ Kathryn Preyer, 'Jurisdiction To Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic' (1986) 4 *Law and History Review* 223, 231; accord Levy 279. Warren and Presser add Justices Patterson, Washington, and Cushing. Warren 1:433-34; Stephen B Presser, 'The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer' (1986) 4 *Law and History Review* 325, 326.

⁶⁴⁹ Palmer 272, 285-306; accord *History of Supreme Court* 1:229-30, 496, 623-33.

committed against the United States,⁶⁵⁰ which Palmer persuasively found to refer to statutes and the law of nations.⁶⁵¹ Jay with Cushing then presided over an indictment and trial for mutiny and murder on the high seas, which was consistent with his reference to the law of nations, admiralty, and maritime jurisdiction.⁶⁵² Wilson listed only treason under the Constitution and acts criminalized by revenue laws,⁶⁵³ and Cushing, urging completion of the criminal statute, feared 'what predicament our courts will be as to carrying into execution punishments for pyracies & felonies on the h[igh] seas & some other matters.'⁶⁵⁴ Earlier during ratification debates, Iredell had stated that Congress 'have no power to define any other crime whatever.'⁶⁵⁵

After the Crimes Act was passed, Wilson 'enumerated. . . the crimes and offences known to the constitution and the laws of the United States' by listing every offence in that act and in revenue acts, and identified the role of the common law as 'for the definition or description of the crimes and offences, which, in the laws of the United States, have been *named*, but have not been *described* or *defined*.'⁶⁵⁶ That statement is inconsistent with belief that the common law created additional federal crimes, but consistent with Wilson's statement at the Constitutional Convention that strictness or precision is 'necessary in enacting' federal criminal laws.⁶⁵⁷ Iredell, agreeing that crimes should be specified 'by fixed and general laws,' read the Crimes Act in its entirety to the grand jury,⁶⁵⁸ and later stressed the 'express authority given in the Constitution to define and punish' the various crimes including 'offences against the

⁶⁵⁰ John Jay's Charge (12 Apr.1790), *DHSC* 2:25, 30; Notes, *ibid* 1:8 (13-14 Apr.1790).

⁶⁵¹ *Palmer* 289-90 n145; *contra* *Jay* 1040.

⁶⁵² *Cf. Palmer* 286-90.

⁶⁵³ James Wilson's Charge (12 Apr.1790), *DHSC* 2:33, 42-44.

⁶⁵⁴ William Cushing to John Lowell (4 Apr.1790), *DHSC* 2:21, 22.

⁶⁵⁵ *Elliot's Debates* 4:219 (30 July 1788); *accord* Marcus [James Iredell], 'Answers to Mr. Mason's Objections' (1788), in *DHRC* 16:379, 381.

⁶⁵⁶ James Wilson's Charge (23 May 1791), *DHSC* 2:166, 181, 176; James Wilson's Charge (21 Feb.1791), *ibid* 2:142, 144-52, 147; *accord* *Wilson Works* 2:1104 (listing all federal crimes); *contra* *Jay* 1041.

⁶⁵⁷ *Farrand's Records* 3:315 (17 Aug.1787); *accord* *Wilson Works* 1:226.

⁶⁵⁸ James Iredell's Charge (17 Oct.1791), *DHSC* 2:216, 219, 220; *see* James Iredell's Charge (26 Apr.1792), *ibid* 2:263, 264, 265; James Iredell's Charge (12 Oct.1792), *ibid* 2:308, 314-15.

law of nations.⁶⁵⁹ Jay, consistent with his earlier misunderstood charge, identified crimes under the penal law and excise laws, and under the law of nations and treaties,⁶⁶⁰ but did not list crimes under common law. The other justices continued defining crimes in that manner until partisan escalation in 1797,⁶⁶¹ and added violations of the Neutrality Proclamation of 1793⁶⁶² and Neutrality Act of 1794,⁶⁶³ and treason during the Whiskey Rebellion.⁶⁶⁴ Though Iredell spoke of the law of nations⁶⁶⁵ when he stated that 'the common law therefore as to such offences [of neutrality] is still in force,'⁶⁶⁶ he became the first to break out of the box of constitutional and statutory crimes (including the law of nations) in 1796, when he stated that a violation of the law of nations 'is an offence at common law, in the same manner . . . as any other offence committed against the common law,' when no federal statute addressed the act.⁶⁶⁷ Not until 1797 did other justices begin to join him (which is where Levy's summary begins of the justices' charges),⁶⁶⁸ in a reprise of the Mansfield-Camden debate over whether the judiciary could authorize warrants or create new property rights without statutory authority, in the new form of whether the judiciary could entertain prosecution of common law crimes without statutory authority. Before the political polarization leading to the Sedition

⁶⁵⁹ James Iredell's Charge (2 Apr.1793), *DHSC* 2:348, 355; accord *ibid* 2:268, 3:79-80; Jay 1041; see *United States v. Mundel*, 10 Va. (6 Call) 245, 257 (U.S.Cir.Ct.Va. 1795).

⁶⁶⁰ John Jay's Charge (5 Apr.1792), *DHSC* 2:253, 255-56; John Jay's Charge (25 June 1792), *ibid* 2:282, 283-85; John Jay's Charge (22 May 1793)(under Neutrality Proclamation), *ibid* 2:380, 381; see Jay 1045. He stated that Congress could criminalize 'oppos[ing] the operation of this Constitution and of the Government,' apparently by armed force, but did not claim judicial capability of prosecuting it without statute. *Ibid* 2:390.

⁶⁶¹ William Paterson's Charge (2 Apr.1795), *DHSC* 3:10, 11; James Iredell's Charge (6 Apr.1795), *ibid* 3:14, 19-22; James Iredell's Charge (25 Apr.1795), *ibid* 3:28, 30; John Blair's Charge (27 Apr.1795), *ibid* 3:31, 37; William Paterson's Charge (4 May 1795), *ibid* 3:40, 41; [Oliver Ellsworth], *Essays-Constitution* 155, 159, 164.

⁶⁶² James Wilson's Charge (22 July 1793), *DHSC* 2:414, 420-21; James Iredell's Charge (12 May 1794), *ibid* 2:454, 455-57, 459-61.

⁶⁶³ William Cushing's Charge (7 Nov.1794), *ibid* 2:491, 495, as well as statutory crimes, 2:493-94; William Paterson's Charge (8 June 1795), *ibid* 3:57, 58.

⁶⁶⁴ John Blair's Charge (27 Apr.1795), *DHSC* 3:31, 32; William Paterson's Charge (4 May 1795), *ibid* 3:40, 41-42; James Iredell's Charge (23 Nov.1795), *ibid* 3:74, 77-78.

⁶⁶⁵ *Palmer* 299, 301; contra Jay 1041.

⁶⁶⁶ James Iredell's Charge (12 May 1794), *DHSC* 2:454, 469, 467; see James Iredell's Charge (23 Nov.1795), *ibid* 3:74, 75; *Palmer* 299. Paterson agreed in a draft charge, *Paterson Papers-NYPL*, which Stewart Jay called an 'original,' Jay 1052 n243, but which is a nineteenth century handwritten copy of the original at Rutgers.

⁶⁶⁷ James Iredell's Charge (12 Apr.1796), *ibid* 3:106, 111.

⁶⁶⁸ Oliver Ellsworth's Charge (7 May 1799), *ibid* 3:357, 358; *Paterson's Draft Opinions* 45-46; see Levy 277-78.

Act of 1798, no grand jury charge by a Supreme Court justice expressly took the position that all common law crimes were indictable as federal crimes (though Iredell implied that and Chase rejected that), or that seditious libel was indictable, nor did any opinion. Yet, if Levy was correct, they should have done so, and would have even before the Crimes Act created the first federal crimes. Instead, John Marshall, in the midst of partisan strife and differing with his party in 1800, denied that even 'one man can be found who maintains' that the common law of England was 'adopted as the common law of America by the constitution.'⁶⁶⁹

The early justices' decisions in circuit courts were consistent with their grand jury charges, though their decisions in *Henfield's Case*,⁶⁷⁰ *Ravara*,⁶⁷¹ *Smith*,⁶⁷² and other decisions have been cited to show acceptance of federal common law of crimes. Much of the confusion arises from inverting the common statement that the law of nations was 'adopted in' the common law,⁶⁷³ into an assertion that prosecution under the law of nations was identical to prosecution under all the common law. Instead, the early justices generally used law of nations references and authorities in decisions, not to import the entire common law,⁶⁷⁴ but to implement constitutional provisions empowering Congress '[t]o define and punish . . . offences against the law of nations' (and under corresponding Crimes Act sections), or empowering the courts to adjudicate 'cases affecting ambassadors, other public ministers and consuls' (and Crimes Act sections) and 'admiralty and maritime jurisdiction.'⁶⁷⁵ *Henfield's Case*, in which Wilson and Iredell allowed federal prosecution for treaty violations, was un-

⁶⁶⁹ John Marshall to St. George Tucker (27 Nov.1800), *Marshall Papers* 6:23; cited in *Preyer* 237 n.47; *Jay* 1326-28.

⁶⁷⁰ Charles G Haines, *The Role of the Supreme Court* (UCaIP, Berkeley 1944) 126-27; Editor's note in *Henfield's Case*, 11 F.Cas.1099, 1099 n1 (C.C.D.Pa.1793); *Wilson Works* 1:xxiv; *Levy* 126; see *Jay* 1253.

⁶⁷¹ *Ibid* 126; *Levy* 126.

⁶⁷² Editor's headnote in *United States v. Smith*, 27 F.Cas.1147, 1147 (C.C.D.Mass.[1797]) (No.16,323); *Levy* 126.

⁶⁷³ See *Blackstone's Commentaries* 4:67.

⁶⁷⁴ *Palmer* 275 n61.

⁶⁷⁵ U.S.Const. art.I, §8, cl.10; art.III, §2; accord *Federalist* No.42, at 279.

der the law of nations and treaties,⁶⁷⁶ not under general common law.⁶⁷⁷ *United States v. Ravara*, in which the same justices sanctioned federal court indictment of a foreign consul, likewise was under constitutional and statutory jurisdiction involving consuls,⁶⁷⁸ not under general common law.⁶⁷⁹ *Wiscart v. Dauchy*, in which Ellsworth ruled an enabling statute is required for appellate jurisdiction,⁶⁸⁰ did not recognize federal common law, and in fact would seem to preclude it because there was no enabling statute. *United States v. Smith*, in which unnamed justices permitted federal prosecution for counterfeiting bills of the congressionally-authorized Bank of the United States, stated that it arose under federal law and, without federal statutory punishments, that it used punishments under state law, while noting that the offence could also be prosecuted under *state* common law in state courts.⁶⁸¹ That was obviously not a general federal common law of crime,⁶⁸² but instead adapted the Judiciary Act authorization for federal diversity cases to use state law including state common law.⁶⁸³ *United States v. Worrall*, where Chase split the panel by holding that 'the United States, as a federal government, have no common law,'⁶⁸⁴ did not hold for long because he immediately joined in sentencing,⁶⁸⁵ and 'reversed himself' a year later⁶⁸⁶ after helping establish the necessity of the Sedition Act (Chapter 6.C, though some argue his opposition continued⁶⁸⁷).

⁶⁷⁶ 11 F.Cas. at 1120; see *Palmer* 290-99. They were joined by a district judge, Peters.

⁶⁷⁷ *History of Supreme Court* 1:624; *Preyer* 230; cf. *Jay* 1054.

⁶⁷⁸ *United States v. Ravara*, 27 F.Cas.713, 714 (C.C.D.Pa.1793) (No.16,122, 16,122a); see *Palmer* 301-05; *Jay* 1063-64.

⁶⁷⁹ See *History of Supreme Court* 1:627; *Preyer* 230.

⁶⁸⁰ *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796); see *Palmer* 306-09.

⁶⁸¹ *United States v. Smith*, 27 F.Cas.1147, 1147-48 (C.C.D.Mass. [1797]) (No.16,323); see *Palmer* 212-14; *Jay* 1064 n306. Its reported date was corrected by Goebel. *History of Supreme Court* 1:630 n82; *Palmer* 212 n282.

⁶⁸² *History of Supreme Court* 1:630; *Preyer* 230.

⁶⁸³ Judiciary Act §34, 1 Stat.92.

⁶⁸⁴ *United States v. Worrall*, 28 F.Cas.774, 779 (C.C.D.Pa.1798) (No.16,766). Judge Peters disagreed, *ibid* 779-80. See *History of Supreme Court* 1:631-33; *Jay* 1067-73.

⁶⁸⁵ Editor's note, *ibid* 780n; *Wharton's State Trials* 199n.

⁶⁸⁶ Stephen B Presser and Becky B Hurley, 'Saving God's Republic: The Jurisprudence of Samuel Chase' [1984] *University of Illinois Law Review* 771, 796 n164, 798-99; *DHSC* 3:322 n29; *Levy* 278; *contra Jay* 1070 n332.

⁶⁸⁷ *Preyer* 235-36; *ibid* 240, citing Richard Peters to Timothy Pickering (8 Dec.1806), *Pickering Papers* 27:334; Richard Peters to Timothy Pickering (5 Dec.1807), *ibid* 28:99.

As the crisis of 1798 arrived, several justices did begin to support federal common law crimes including seditious libel in cases,⁶⁸⁸ as well as in grand jury charges.⁶⁸⁹ However, *United States v. McGill* is not one of them, though it is called 'the clearest case' of endorsing the concept.⁶⁹⁰ Its sentence beginning that 'federal courts have a common law jurisdiction in criminal cases,' is less quoted for its ending: coming under 'admiralty and maritime jurisdiction' rather than common law, without an enabling act, 'the indictment cannot be sustained.'⁶⁹¹

The status of federal common law of crimes was finally resolved in 1812, when the Marshall Court⁶⁹² ruled that there is none, in a case involving libels against the President and Congress.⁶⁹³ Even so, the First Amendment status of seditious libel had to wait a century and a half for its denouement, until 1964.⁶⁹⁴ The continuing travails of criminal libel in nineteenth century America, after the period covered here, are interestingly chronicled by Blumberg.⁶⁹⁵

The argument that the First Amendment, or the state constitutions, incorporated the Blackstone-Mansfield definition, that freedom of press meant only what English common law as-

⁶⁸⁸ *United States v. Greenleaf*, discussed in *History of Supreme Court* 1:629; Preyer 230; Palmer 305-06; contra Levy 276; accord *Anonymous*, 1 F.Cas.1032 (U.S.Cir.Ct.Pa. 1804)(Washington, J); see *Williams' Case*, 29 F.Cas.1330, 1331 (C.C.D.Conn.1799) (No.17,708) (Ellsworth, CJ); Palmer 319 n330; contra Levy 277 & n142; Jay 1086 n406.

⁶⁸⁹ Oliver Ellsworth's Charge (U.S.Cir.Ct.S.C. 7 May 1799), *DHSC* 3:357, 357-58; *Paterson Draft Opinions* 45 (n.d.); *Paterson Third Opinion* 530 (n.d.).

⁶⁹⁰ Jay 1017 n52.

⁶⁹¹ *United States v. McGill*, 26 F.Cas. 1088, 1090 (C.C.D.Pa.1806) (No.15,676); see Palmer 276 n62.

⁶⁹² A biographer suggests Marshall disagreed, Robert K. Faulkner, *The Jurisprudence of John Marshall* (PUP, Princeton 1968) 88; Jay 1332-33; but that is incorrect, John Marshall to St. George Tucker (27 Nov.1800), *Marshall Papers* 6:23, 24; accord Preyer 246-47; R. Kent Newmyer, *Supreme Court Justice Joseph Story* (UNCP, Chapel Hill 1985) 101.

⁶⁹³ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)(Johnson, J.); accord *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834); see Preyer 242-49, 253-61. For the history of civil federal common law, see 'Note, Federal Common Law and Article III: A Jurisdictional Approach to Erie' (1964) 74 Yale Law Journal 325.

⁶⁹⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73, 273-77 (1964) (civil libel and Sedition Act); *Garrison v. Louisiana*, 379 U.S. 64, 74-78 (1964) (criminal libel); see Robert C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 California Law Review 691, 721-39. For an insightful overview of doctrinal factors and social currents, see Robert C. Post, 'Defaming Public Officials: On Doctrine and Legal History' (1987) 12 American Bar Foundation Research Journal 539, 542-46, 550-57.

⁶⁹⁵ Phillip L. Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law* (CUP, Cambridge 2010) 8-12, 148-373; accord Alfred H. Kelly, 'Constitutional Liberty and the Law of Libel: A Historian's View' (1968) 74 American Historical Review 429, 432-52; Norman L. Rosenberg, 'The Law of Political Libel and Freedom of the Press in Nineteenth Century America: An Interpretation' (1973) 17 American Journal of Legal History 336, 337-52.

cribed to it, a freedom from licensing that ended nearly a century earlier and not a freedom from seditious libel prosecution that persisted, is undercut at many turns. The preponderance of English and American essayists addressing the issue saw freedoms of press and speech as inconsistent with seditious libel, and all revolutionary state constitutions addressing freedom of press conferred unqualified protection without any seditious libel exception. As the federal Constitution was ratified, antifederalists saw a bill of rights as adequate protection against seditious libel prosecutions, and federalists assured them that the new government possessed no power that could restrain the press. The postulated incorporation of English common law limits into the press provision clearly did not apply to the parallel speech provision, since the historical restraint by licensing had only applied to the press and not speech. English common law was directly limited by every other First Amendment provision, whether on establishment, free religious exercise, petition, or assembly, and nearly every other Bill of Rights provision. (Levy and supporters concede that no implied common law limitations attached to those freedoms.) As Madison said on introducing the First Amendment, 'freedom of the press, and the rights of conscience. . . are not guarded by the British Constitution,' and instead 'should be. . . secured.'⁶⁹⁶ The federal amendment, like the state provisions, was unqualifiedly broad. Though Levy cavils that Virginia's 'pattern for all American free press clauses...gave no hint of what it meant by freedom of the press or by the word "restrained",⁶⁹⁷ he defends an unstated drastic limitation against express unqualified words that Madison and other framers thought were perspicuous, at a time when most addressing the issue called seditious libel prosecutions a restraint.

The next four chapters will discuss how the initial justices of the Supreme Court, including three major and three minor participants at the Constitutional Convention, three leaders in ratification conventions, and two major participants in the first Congress that adopted the First Amendment, viewed freedoms of speech and press, and assessed the Sedition Act of 1798.

⁶⁹⁶ 'Sketch of Proceedings of Congress' *Gazette of the United States* (New York 10 June 1789) 66, 67.

⁶⁹⁷ *Levy* 184.

CHAPTER 4

THE INITIAL SUPREME COURT JUSTICES AND THEIR VIEWS ON FREEDOMS OF PRESS AND SPEECH

The impression given by period histories is that the justices of the first decade of the Supreme Court (all Federalists) had nothing to say about freedoms of press and speech before 1798,¹ and supported the Sedition Act with alacrity. That does not accurately describe the pre-Sedition Act understanding of any of those twelve justices, or the Sedition Act views of about half.

The twelve justices' views on freedoms of press and speech in the first decade of the Supreme Court have not been studied or discussed, other than, cursorily, the views of four justices on the Sedition Act of 1798 as they enforced it at the end of that decade. Even for those four, their prior understanding of freedoms of speech and press has not been addressed.

The six initial justices, who constituted the initial Court, are discussed individually in this chapter, and their six successors are discussed in the next chapter.

The initial justices have been assumed to have viewed freedoms of speech and press after the American Revolution as limited by the English common law of seditious libel, but that assumption is open to question, at least before the political crisis of the late 1790s altered the thinking of two initial justices. Not one of them articulated the Blackstone definition of freedom of press before 1798, and only two initial justices did during 1798-1800. Those initial justices have also been assumed to have supported the Sedition Act as part of a unanimous Federalist party, but that assumption also appears inaccurate for most (addressed in Chapter 7).

¹ E.g., no mention of their views in Bernard Schwartz, *A History of the Supreme Court* (OUP, Oxford and New York 1993) 1-31; David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (UChiP, Chicago 1985) 1:1-58; Charles G. Haines, *The Role of the Supreme Court in American Government and Politics, 1789-1835* (UCalP, Berkeley 1944) 7-159; John D. Cushing, 'A Revolutionary Conservative: The Public Life of William Cushing, 1732-1810' (PhD thesis, Clark University 1959) 328 ('there is nothing to indicate what, if anything, Cushing contributed. . . as a circuit judge,' and 'little of significance' in Supreme Court sessions); cf. William G. Brown, *The Life of Oliver Ellsworth* (Macmillan, New York 1905) 200.

This chapter's addition to existing literature is locating and summarizing each initial justice's views of freedoms of press and speech before 1798, including many passages that have never been quoted other than some being printed in documentary compilations or in two justices' incomplete collected works. It challenges narratives that treat the early justices as opposed or indifferent to those rights, showing that they expressed commitment to those rights before 1798.

The opinions of the early justices on the constitutionality of the Sedition Act, and shifts by some on the Blackstone definition, are addressed in Chapters 6 and 7. Prevailing misconceptions about the early justices' views of freedoms of speech and press are discussed in Chapter 8.

The original six justices, appointed by President George Washington,² were Chief Justice John Jay (who served 1789-1795), John Rutledge (1789-1791 and 1795), William Cushing (1789-1810), James Wilson (1789-1798), John Blair (1789-1795), and James Iredell (1790-1799). (The original sixth justice, Robert Harrison, died before taking office, and after some delay Iredell was nominated.³ Thus, Iredell could instead be categorized as a successor justice.) Their views on freedoms of speech and press will be summarized in their order of commissioning.⁴

A Chief Justice John Jay

John Jay was the first chief justice of the Supreme Court, though he is better known as co-author of *The Federalist*, and as the primary negotiator of the Treaty of Paris of 1783, ending the Revolutionary War, and of the Jay Treaty of 1795, averting war with Great Britain.⁵

He discussed freedoms of press and speech, though his views have never been described.

² 'Nominations,' *Washington Papers-Presidential* 4:75 (24 Sept. 1789); *DHFFC* 2:44; confirmed two days later, *DHFFC* 2:44-45. Iredell was only nominated after Robert Harrison's declination, *ibid* 5:121-22, *DHFFC* 2:59; confirmed shortly after, *ibid* 2:61.

³ *DHSC* 1:34, 36, 37, 42; *DHFFC* 4:99, 102.

⁴ The commission dates determine the conventional order. 'The First Judges of the Federal Courts' (1957) 1 *American Journal of Legal History* 76, 77; *ANB* 19:133, 134.

⁵ See generally Herbert A. Johnson, *John Jay, 1745-1829* (Office of State History, Albany 1970); Herbert A. Johnson, 'John Jay: Colonial Lawyer' (PhD thesis, Columbia University 1965); Richard B. Morris, *John Jay, the Nation, and the Court* (BUP, Boston 1967); *OCSC* 446; *Justices* 1:3. The treaty was only effective in 1795.

1 Jay and Freedom of Press

Jay, as other justices, relied on newspapers for information.⁶ He disapproved of destruction of the loyalist press of James Rivington, soon after hostilities began.⁷ He submitted his *Federalist* essays and other essays to newspapers for publication over the years. He sent statements to newspapers when the French minister, Edmond Genet, appealed over the president's head to the American people for support.⁸ Jay also was on the receiving end at times.

Jay's first baptism by fire in the newspapers came as withering criticism for the Treaty of Paris, in 1783, particularly for its protection of British claims for pre-Revolutionary debts and abandonment of American claims for confiscated slaves.⁹ Though the criticism was of his actions as an American minister, he did not urge prosecution of the critics or the editors.

Jay's second baptism by fire in the press came from sustained attacks by an ingrate ward, Lewis Littlepage, in 1785, after Jay enforced debts owed by Littlepage.¹⁰ The attacks forced Jay to develop a view of freedom of press, which he maintained lifelong. When threatened by Littlepage, Jay responded 'publish when and what you please,' and when newspaper attacks by Littlepage began with selective snippets from their correspondence, Jay replied simply by publishing the full text of the correspondence.¹¹ Though the dispute was widely publicized and enjoyed,¹² Jay never took or threatened legal action against either Littlepage or the press. Late that year, Jay warned Jefferson, then minister to France, that the issue may

⁶ E.g., John Jay to Benjamin Franklin (18 Apr.1781), *Franklin Papers* 34:554; John Jay to Alexander Hamilton (28 Sept.1783), *Hamilton Papers* 3:459.

⁷ John Jay to Nathaniel Woodhull (26 Nov.1775), *Letters of Delegates* 2:394 & 2; see Alexander Hamilton to John Jay (26 Nov.1775), *Hamilton Papers* 1:176; *Prelude* 239-40.

⁸ John Jay and Rufus King to *Daily Advertiser* (14 Aug.1793), *Hamilton Papers* 15:233; John Jay and Rufus King to Alexander Hamilton and Henry Knox (26 Nov.1793), *ibid* 15:411.

⁹ James Madison, 'Memorandum on a Discussion of the President's Retirement' (5 May 1792), *Madison Papers* 14:299, 303.

¹⁰ John Jay to Thomas Jefferson (9 Dec.1785), *Jefferson Papers* 9:86; Thomas Jefferson to Gov. Patrick Henry (24 Jan.1786), *ibid* 9:212, 213; see *Jay-Peace* 218.

¹¹ *Letters, Being the Whole of the Correspondence Between the Hon. John Jay, Esquire, and Mr. Lewis Littlepage. A Young Man Whom Mr. Jay, When in Spain Patronized and Took into His Family* (Francis Childs, New York 1786); accord William Livingston to Susannah Livingston (12 Dec.1785), *Livingston Papers* 5:214.

¹² E.g., Charles Pettit to James Hutchinson (11 Dec.1785), *Letters of Delegates* 22:58, 60; Lambert Cadwalader to Robert Magaw (14 Dec.1785), *ibid* 22:61; James Monroe to James Madison (26 Dec.1785), *Monroe Writings* 1:109, 112; James Monroe to James Madison (10 Mar.1786), *ibid* 1:123.

come up with the French government,¹³ because Littlepage was soon to be in Paris.¹⁴

Jefferson replied by commiserating that a public servant could be so attacked by any individual despite 'faithful services,' while adding that 'it is a part of the price we pay for our liberty, which cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it.'¹⁵

Jay responded in agreement with Jefferson (in a letter not in his published correspondence):

The Liberty of the Press is certainly too important to the public, to be restrained for the sake of personal considerations; especially as it is in every man's power to frustrate calumny, by not deserving censure; for altho slander may prevail for a while, yet truth and consistent rectitude will ultimately enjoy their rights. While I possess the esteem of those who merit esteem, the effusions of unmerited malevolence will give me no greater concern, than what naturally results from the various other evils to which we are liable. We cannot indeed be insensible to them, but we may bear them with fortitude . . .¹⁶

Jay was an American official, and such public criticism of public officials historically had been treated as seditious libel, as discussed in the preceding chapter. Yet Jay treated liberty of the press as extending to newspaper coverage of Littlepage's criticisms, and seditious libel as not reaching it. He recognized that restraint of the press included not just prior restraints but subsequent ones, since talking legal action against completed articles would restrain the press and its liberty. Jay did not rely on the Blackstone-Mansfield definition of and rationale for freedom of the press, as merely freedom from prior restraint, but instead adopted a more republican rationale, of the liberty's 'importan[ce] to the public.' Jay's remedy, rather than any restraint on the press, was simply to bear calumny 'with fortitude' and to wait for truth to prevail; he did not take private legal action or seek government prosecution.

¹³ John Jay to Thomas Jefferson (9 Dec. 1785), *Jefferson Papers* 9:86-87.

¹⁴ Thomas Jefferson to John Jay (25 Jan. 1786), *ibid* 9:215.

¹⁵ *Ibid.*

¹⁶ John Jay to Thomas Jefferson (5 May 1786), *ibid* 9:450.

2 Jay and Freedom of Speech

Jay more often extolled liberty than discussed specific rights.¹⁷ However, his occasional discussions of freedom of speech were consistent over his lifetime. During the turmoil of the American Revolution, Jay pointed to the foundation of liberty, and then connected it to freedom of expression (a full decade before the First Amendment was written):

Under governments which have just and equal liberty for their foundation, every subject has a right to give his sentiments on all matters of public concern; provided it be done with modesty and decency. . . .¹⁸

He and other leaders were very aware that speech and press--'petitions and affectionate remonstrances'--had been pivotal in seeking redress of grievances, and then in joining colonists against the Crown.¹⁹ He noted that the new state constitutions provided security to 'the rights of . . . private judgment.'²⁰ (Much later, Jay gave his definition of decency, as being not 'harsh and violent,' and did not equate lack of decency with seditious libel.²¹)

In 1788, Jay developed the point in a published essay supporting ratification of the federal Constitution.

They [the framers] were likewise sensible that, on a subject so comprehensive and involving such a variety of points and questions, the most able, the most candid, and the most honest men will differ in opinion. The same proposition seldom strikes many minds in exactly the same point of light. Different habits of thinking, different degrees and modes of education, different prejudices and opinions, early formed and long entertained, conspire, with a multitude of other circumstances, to produce among men a diversity and contrariety of opinions on questions of difficulty. Liberality, therefore, as well as prudence, induced them to treat each other's opinions with tenderness ²²

Jay later applied the principle equally to elections--'propriety forbids that differences in opinion respecting candidates should suspend or interrupt that mutual good-humour and benevo-

¹⁷ E.g., John Jay, 'To the King[']s Most Excellent Majesty' (3-19 June 1775), *Jay-Revolutionary* 152-53; John Jay, 'Address of the Convention of the Representatives of the State of New York' (Dec.1776-Feb.1777), *Jay Correspondence* 1:102, 102, 103, 105, 118, 120.

¹⁸ John Jay, 'A Hint to the Legislature of the State of New York' (15 Jan.-2 Apr.1778), *Jay-Revolutionary* 461.

¹⁹ 'Jay's Charge to the Grand Jury of Ulster County' ([9 Sept.] 1777), *Jay Correspondence* 1:158, 160.

²⁰ *Ibid* 1:162.

²¹ John Jay to Peter Van Schaack (28 July 1812), *ibid* 4:360, 361.

²² John Jay, 'An Address to the People of the State of New York' (spring 1788), *ibid* 3:294, 309.

lence which harmonizes society ²³ In saying that, he was not speaking theoretically; he had just won the governorship of New York, but had been denied the office by vote manipulation in 1792.²⁴

He expressed the same view in a draft grand jury charge, written before²⁵ the Neutrality Proclamation of April 1793.²⁶ (This, like most other grand jury charges of the 1790s, was only published as the *Documentary History of the Supreme Court* took form over the last twenty-five years.) The charge wanders far from the path of modern jury charges, because in the early years of the republic charges as court sessions opened typically sought to educate the public about the principles of the new government²⁷ (just as they wandered freely in England²⁸), and were widely printed in newspapers.²⁹ Jay wended his way to freedom of speech of citizens in peacetime:

... until[] war is constitutionally declared--the nation and all its members must observe and preserve peace, and do the duties incident to a state of peace--Such at present is our situation, and in that light gentlemen you will regard it. As free citizens we have a right to think and speak[] our sentiments on these subject[s], in terms becoming free men--that is in terms explicit and decorous--As judges and grand jurors the merits of those political questions are without our province.³⁰ . . .

The draft unwaveringly affirmed freedom of speech, and did not limit it to 'decent' or non-seditious speech.³¹ It left speech, even about 'political questions,' simply 'without [the] prov-

²³ John Jay, 'Jay's Reply to the New York Committee' (July 1792), *ibid* 3:442, 444.

²⁴ Robert Troup to John Jay (13 June 1792), *Jay Correspondence* 3:433; Robert Troup to John Jay (20 May 1792), *ibid* 3:424.

²⁵ Had it been written after the Proclamation, the charge surely would have mentioned it and discussed obligations under it, as the final charge did. Around the same time, Jay was asked by Hamilton to draft a neutrality proclamation, and did.

²⁶ *ASP* I:140 (22 Apr. 1793). It was followed by the Neutrality Act of 1794. 1 Stat. 381.

²⁷ George Clinton to Pierre Van Cortlandt, Jr. (2 Mar. 1805), Jacob Judd (ed), *Correspondence of the Van Cortlandt Family* (Sleepy Hollow Restorations, Tarrytown 1976-81) 3:185; Ralph Lerner, 'The Supreme Court as Republican Schoolmaster' [1967] *Supreme Court Review* 127.

²⁸ *Dickinson* 161; e.g., Georges Lamoine (ed), *Charges to the Grand Jury 1689-1803* (RHS, London 1992) 399-410, 549-51.

²⁹ E.g., for 1793, *DHSC* 2:368, 373, 377, 392, 412, 414n.

³⁰ John Jay's Charge (Draft) (U.S. Cir. Ct. Va. 22 Apr. 1793), *DHSC* 2:359, 364.

³¹ Similarly, he wrote to a friend in 1785 that he wished 'that the time may soon come when all our inhabitants of every colour and denomination shall be free and equal partakers of our political liberty.' John Jay to Benjamin Rush (24 Mar. 1785), *Jay Correspondence* 3:139, 140.

ince' of the legal system--not subject to consideration by judges and grand jurors. Shortly before in that charge, Jay instructed the grand jury to present any 'seditious practices,'³² so he clearly did not include speech critical of the administration on political questions as seditious. This was Jay's view uninfluenced by crisis or loyalty to the administration.

Instead, Jay's reference to sedition defined it as much more than mere words. 'If you find any foreigners in this district committing seditious practices ende[a]voring to seduce our citizens into acts of hostility, or attempting to withdraw them from their allegiance to the United States--present them--such men are guilty of high misdemeanors.'³³ That is the first known reference to sedition in any grand jury charge of a Supreme Court justice.

This grand jury charge for 1793 was rewritten after the Neutrality Proclamation was issued.³⁴ Jay fully revised and polished his draft, and replaced the passage on freedom of speech with the obligations of citizens under the Proclamation.

... It is natural in all contests, even for the best men to take sides, and wish success to one party in preference to the other. Our wishes and partialities becoming inflamed by opposition, often cause indiscretions and lead us to say and to do things that had better have been omitted. It is not certain that the irritability of the belligerent powers, combined with some indiscretions on our part, will not involve us in war with some of them. . . . It is very desirable that such an event do not find us divided into parties, and particularly into parties in favor of this or that foreign nation. . . .³⁵

While Jay encouraged 'union and harmony among ourselves,' his words were only hortatory, and he recognized that it was possible 'such parties should arise among the people.' He did not warn that parties would verge on seditious libel, but merely reasoned with his audience about the ill effects of parties, as Madison had in *The Federalist*.³⁶ Continuing, Jay instead cited the Bill of Rights (his only reference to it in his grand jury charges or Supreme Court

³² DHSC 2:363.

³³ *Ibid.*

³⁴ It may also have been revised because of comments from Alexander Hamilton, since Jay and he discussed drafts of a neutrality proclamation. Alexander Hamilton to John Jay (9 Apr. 1793), *Jay Correspondence* 3:472; Alexander Hamilton to John Jay (9 Apr. 1793), *ibid* 3:473; John Jay to Alexander Hamilton (11 Apr. 1793), *ibid* 3:473; 'Draft of Proclamation of Neutrality, by John Jay' (1793), *ibid* 3:474.

³⁵ John Jay's Charge (U.S.Cir.Ct.Va. 22 May 1793), DHSC 2:380, 389.

³⁶ *Federalist* No.10, at 56, 57.

opinions), and the importance of government recognition that citizens 'are entitled to be protected' in their rights:

Happy it would be for mankind, and greatly would it promote the cause of liberty and the equal rights of men, if the free and popular governments which from time to time may take place, should be so constructed, so balanced, so organized and administered, as to be evidently and eminently productive of a higher and more durable degree of happiness than any of the other forms [of government].--It is not sufficient to tell men by a Bill of Rights, that they [word inked out] are free, that they have equal rights, and that they are entitled to be protected in them--men will not believe they are really free, while they experience oppression--they will not think their title to equal rights, realized, until they enjoy them; nor will they esteem that a good government, whatever may be its name, which does not uniformly impartially and effectually protect them.³⁷

His last clause seemed to rule out the federal government restricting speech by seditious libel doctrines. Though it was a dangerous time when war with Britain or France easily could be provoked, Jay here, after describing the legal requirements of the Neutrality Proclamation, reaffirmed the First Amendment protections for expression.

Jay's revision also changed his draft's mention of sedition, warning that '[t]o oppose the operation of this Constitution and of the government established by it, would be to violate the sovereignty of the people, and would justly merit reprehension & punishment.'³⁸ His reference was not to opposing the operation of government by speech, but by unneutral acts risking war, because the reference to sedition was made between the two quoted passages on rights, and because he began the charge by summarizing the law of nations (including the Neutrality Proclamation) and federal criminal laws and ended it with an exhortation that 'the laws be observed and irresistibly executed.'³⁹ That is evident from the proclamation itself.

It was Jay who drafted the Neutrality Proclamation of 1793, at Washington's request through Hamilton, at a precarious time when unneutral acts could cause war, and when speeches and newspapers were reaching new depths of personal attack. Jay's draft sternly mandated neu-

³⁷ DHSC 2:390. Jay went on to say that '[t]he more free the people are, the more strong and efficient ought their governm[en]t to be,' in order to protect a large number of rights. *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* 380-88, 391.

tral conduct and enjoined unneutral actions by American citizens,⁴⁰ but it couched two provisions as merely a 'recommend[ation]' and a 'wish'--those on speech and press:

.... I do also recommend it to my fellow-citizens in general to omit such public discussions as may tend not only to cause divisions and parties among ourselves, and thereby impair that union on which our strength depends, but also give unnecessary cause of offence and irritation to foreign powers. And I cannot forbear expressing a wish that our printers may study to be impartial in the representation of facts, and observe much prudence relative to such strictures and animadversions as may render the disposition of foreign governments and rulers unfriendly to the people of the United States.⁴¹

The transition in language from command (he believed the proclamation to have the force of law⁴²) to precaton was striking and intentional. Jay's reason was not practical concern that strong requirements would not be upheld, because President Washington was still extremely popular, Congress was dominated by his supporters, and the Supreme Court was solidly supportive as well. Jay instead softened the speech and press provisions because of his principles, principles he identified in his grand jury charge that he had just drafted, including that 'we have a right to think and speak[] our sentiments on these subject[s].'⁴³

3 Rights and Declarations of Rights in the Continental Congress, the New York Constitution, and the Bill of Rights

Jay showed the same ebullience for freedom and concern for rights in the prelude to the Revolutionary War. At the first Continental Congress in 1774, he took a leading role as draftsman of numerous addresses and messages, such as his⁴⁴ 'Address to the People of Great Britain.'⁴⁵ The address repeatedly proclaimed 'the rights of men and the blessings of liberty' under the British Constitution, and listed a half dozen that were widely recognized.⁴⁶ The address did not undertake to list liberties with weaker British support, such as speech or

⁴⁰ 'Draft of Proclamation of Neutrality, by John Jay' (Apr.1793), *Jay Correspondence* 3:474, 476.

⁴¹ *Ibid* 3:476-77. Hamilton's copy differed in sequence, but was the same in substance. 'A Proclamation,' *Hamilton Papers* 14:308-10.

⁴² John Jay's Charge (U.S.Cir.Ct.Va. 22 May 1793), *DHSC* 2:380, 382-83.

⁴³ John Jay's Charge (Draft) (U.S.Cir.Ct.Va. 22 Apr.1793), *DHSC* 2:359, 364.

⁴⁴ *JCC* 1:81 n2; Thomas Jefferson to William Wirt (4 Aug.1805), *Letters of Members* 1:79 n3; John Jay to Richard Henry Lee (12 Feb.1823), *Jay Correspondence* 4:468, 469-70; *ibid* 1:17n1.

⁴⁵ John Jay, 'Address to the People of Great Britain' (5 Sept.1774), *Jay Correspondence* 1:17.

⁴⁶ *Ibid* 1:18, 19, 28.

press, but Jefferson praised it as 'a production of the finest pen in America.'⁴⁷

At the second Continental Congress a year later, Jay's⁴⁸ 'Letter from Congress to the "Oppressed Inhabitants of Canada"'⁴⁹ shifted the argument from the ancient rights of the English⁵⁰ to natural rights ('rights bestowed by the Almighty'), and strengthened the plea for liberty to a 'determin[ation] to live free, or not at all.'⁵¹ He urged Canada to rise in 'defence of our common liberty' and 'the rights of mankind.'⁵²

At the Provincial Congress of New York, after leading the campaign to approve the Declaration of Independence in July 1776,⁵³ Jay was the principal author⁵⁴ of the state constitution that was adopted the following April.⁵⁵ The preamble gave as the purpose 'to secure the rights and liberties of the good people of this state.'⁵⁶ However, the instrument did not provide a comprehensive list of those rights, instead following the approach of all of the colonial

⁴⁷ Thomas Jefferson to William Wirt (4 Aug. 1805), *Letters of Members* 1:158 n2; accord 'Thomas Jefferson's Notes on Patrick Henry' (bef 12 Apr. 1812), *Jefferson Papers-Retirement* 4:598, 601.

⁴⁸ *JCC* 2:68 n2.

⁴⁹ *Jay Correspondence* 1:32.

⁵⁰ In September 1774, Adams quoted Jay as arguing it 'is necessary to recur to the laws of nature' along with the British Constitution, 'Diary' (8 Sept. 1774), *Adams Works* 2:370.

⁵¹ *Jay Correspondence* 1:34, 35.

⁵² *Ibid* 36.

⁵³ 'Resolutions of New York Convention Approving Declaration of Independence' (9 July 1776), *Jay Correspondence* 1:72 &n1.

⁵⁴ He was on the committee of fourteen to draft it, 'New-York Convention and Committee of Safety,' *American Archives* 3:201, 202. He was one of the three legislators who dominated discussion of the state constitution, in the convention journal. Correspondence immediately after the constitution was adopted called various provisions 'your ideas.' Robert Livingston and Gouverneur Morris to John Jay (26 Apr. 1777); Reply (29 Apr. 1777). He is generally described as the chair of the committee and the 'chief author.' *Constitutional History-N.Y.* 1:471; *Federal-State Constitutions* 5:262An; accord Bernard Schwartz, *Great Rights of Mankind: A History of the American Bill of Rights* (OUP, New York 1977) 80; *Bill of Rights* 1:301; Patrick T Conley and John P Kaminski, *The Constitution and the States* (Madison House, Madison 1988) 235; William Jay, *Life of John Jay: Selections from His Correspondence and Miscellaneous Papers* (J&J Harper, New York 1833) 1:69; Frank Monaghan, *John Jay* (Bobbs-Merrill, New York 1935) 94; Richard B Morris, *John Jay, the Nation, and the Court* (BUP, Boston 1967) 10; George Pellew, *John Jay* (Houghton Mifflin, Boston 1890) 58 (chair); E Wilder Spaulding, 'The State Government Under the First Constitution', Alexander C Flick (ed), *History of the State of New York* (ColUP, New York 1933) 4:156. His son stated that the committee's draft was 'in Mr. Jay's handwriting,' *Life of John Jay* 1:69, but that draft is not extant. *Constitutional History-N.Y.* 1:496-97.

Jay's proposal of a number of amendments as the draft was debated may indicate that the draft was not entirely or even primarily his. *Constitutional History-N.Y.* 1:425, 432, 535, 544-45, 554; Elizabeth M Nuxoll (ed), *Selected Papers of John Jay* (UVP, Charlottesville 2010) 1:400-01n. However, his son states that he intentionally left controversial points for amendments in order not to kill the draft. *The Life of John Jay* 1:69.

⁵⁵ *Federal-State Constitutions* 5:2623.

⁵⁶ *Ibid* 5:2623, 2636-37, 2628.

charters and of three other state constitutions during the Revolution,⁵⁷ by listing four rights in the body of the constitution.⁵⁸ Those did not include freedom of press, which nine of the revolutionary constitutions ultimately listed,⁵⁹ or freedom of speech, which had recently been accorded protection for the first time⁶⁰ in the Pennsylvania and Vermont bills of rights,⁶¹ though not in other states' constitutions.

Jay's lack of a declaration of rights did not signify antipathy to declarations of rights, which Virginia had only recently broken ground in adopting. The most obvious explanation is that Jay simply followed the approach of existing colonial charters⁶² and of the revolutionary constitutions of nearby New England states.⁶³ Similarly, the absence of declarations of rights in the New Jersey, Georgia, and South Carolina constitutions,⁶⁴ and in the Declarations and Resolves of the Continental Congress,⁶⁵ did not reflect lack of commitment to rights. New York itself did not add provisions for freedom of speech and press when the Republicans gained control of the legislature in 1800, or thereafter until the constitutional revision of 1821.⁶⁶ Jay instead believed that unlisted rights were granted and protected by natural law, and so were 'inviolable' without need for enumeration, as he said in his first grand jury charge for the state supreme court after the adoption of the state constitution:

⁵⁷ *Ibid* 5:2594 (N.J.), 2:777 (Ga.), 6:3241 (S.C.).

⁵⁸ Those were liberty of conscience, the right to counsel, trial by jury, and protection from attainders. *Ibid* 5:2636-37, 2635, 2637.

⁵⁹ *Ibid* 7:3814 (Va. Decl. of Rights §12), 5:3083 (Pa. Decl. of Rights art.XII), 1:562 (Del. Decl. of Rights §23), 3:1690 (Md. Decl. of Rights art.XXXVIII), 5:2788 (N.C. Decl. of Rights art.XV), 2:785 (Ga. Const. art.LXI), 6:3257 (S.C. Const. art.XLIII), 3:1892 (Mass. Decl. of Rights art.XVI), 4:2456 (N.H. Bill of Rights art.XXII), plus Vermont's, 6:3741 (Vt. Decl. of Rights art.XIV).

⁶⁰ Other than for legislators in legislative debates.

⁶¹ *Ibid* 5:3083 (Pa. Decl. of Rights art.XII), 6:3741 (Vt. Decl. of Rights art.XIV).

⁶² *Federal-State Constitutions* 1:519, 523, 529 (Connecticut), 1:557, 558, 560 (Delaware, except conscience and criminal witnesses-counsel), 2:765 (Georgia), 3:1870 (Massachusetts), 4:2445 (New Hampshire), 5:2535, 2537 (New Jersey, except conscience), 5:2743, 2752-53 (Carolinas, except conscience), 6:3211, 3213 (Rhode Island, except conscience), 7:3802 (Virginia); *contra* 5:3047 (Pennsylvania).

⁶³ Massachusetts did not adopt a declaration of rights until 1780; Connecticut's new constitution did not list rights; and Rhode Island never adopted a declaration of rights or constitution during the Revolution or Confederation. *Ibid* 3:1888 (Mass.); *Federal-State Constitutions-Poore* 1:257 (Conn.).

⁶⁴ *Federal-State Constitutions* 5:2594 (N.J.), 2:777 (Ga.), 6:3241 (S.C.).

⁶⁵ *JCC* 1:67-71.

⁶⁶ *Constitutional History-N.Y.* 215 (reprinting it).

... the highest respect has been paid to those great and equal rights of human nature, which should forever remain inviolate in every society Your lives, your liberties, your property, will be at the disposal only of your Creator and yourselves. . . .

Adequate security is also given to the rights of conscience and private judgment. They are by nature subject to no control but that of the Deity, and in that free situation they are now left. . . .⁶⁷

While 'the rights of conscience' were protected by a paragraph of the New York constitution, the rights of 'private judgment' were seen by Jay as equally inviolate even without an explicit paragraph, because they were conferred by natural law and immune from any 'control'.⁶⁸

Jay's approach to rights did not reflect allegiance to property rights to the neglect of personal rights. He did not add a clause protecting property rights either. In fact, he periodically lamented the 'private rage for property [that] suppresses public considerations'.⁶⁹ At least on one occasion, toward the end of the Revolution as Jay negotiated with Spain, he addressed the relative importance he ascribed to personal liberty and to property:

Provided we preserve our liberty and independence I shall be content, under their auspices, in a fruitful country and by patient industry, a competence may always be acquired; and I shall always think myself a gainer when I find my civil rights secured at the expense of my property.⁷⁰

At New York's ratification convention in 1788, 'Mr. Hamilton, Mr. Jay and Chancellor Livingston had conducted the federalists',⁷¹ and Jay made the actual motion to ratify the Constitution.⁷² He had already encouraged ratification by publishing an essay.⁷³ The divided convention was only able to approve ratification with language that it acted 'in full confi-

⁶⁷ 'Jay's Charge to the Grand Jury of Ulster County' ([9 Sept.] 1777), *Jay Correspondence* 1:158, 162. His reasoning was evidently, as in 1788 ratification debates, that the state only had enumerated powers and no such power to interfere with rights.

⁶⁸ He believed strongly in natural law and natural rights. E.g., John Jay, 'Letter from Congress to the "Oppressed Inhabitants of Canada"' (spring 1775), *Jay Correspondence* 1:32, 34; John Jay to John Murray (15 Apr. 1818), *ibid* 4:403.

⁶⁹ John Jay to George Washington (27 June 1786), *Washington Papers-Confederation* 4:130, 131; accord John Jay to Thomas Jefferson (27 Oct. 1786), *Jefferson Papers* 10:488, 489.

⁷⁰ John Jay to Elbridge Gerry (9 Jan. 1782), *Jay-Peace* 123. He revised the nonbelletristic final clause to say 'I shall never cease to prefer a little with freedom, to op[er]ulence without it.' *Ibid*.

⁷¹ James Madison to Thomas Jefferson (17 Oct. 1788), *Letters of Delegates* 25:426, 427; accord Edward Carrington to William Short (26 July 1788), *ibid* 25:249, 250.

⁷² *Elliot's Debates* 2:410 (11 July 1788); see *DHRC* 18:295.

⁷³ John Jay, 'An Address to the People of the State of New York' (1788), *Jay Correspondence* 3:294; see *DHRC* 17:103, 103-05.

dence' that amendments would be adopted, and with a proposed bill of rights attached.⁷⁴ That bill of rights included provisions '[t]hat the freedom of the press ought not to be violated or restrained,' and that people had 'an equal, natural and unalienable right freely and peaceably to exercise their religion according to the dictates of conscience.'⁷⁵

Jay agreed with Madison's initial position⁷⁶ that a bill of rights was not necessary, because the Constitution did not enumerate any power for the federal government to abridge freedom of press, trial by jury, or other rights.⁷⁷ Thus, he disagreed 'that the liberty of the press is left insecure,' finding it 'absurd to construe the silence. . . relative to a great number of our rights, into a total extinction of them'; and consequently he disagreed that the Constitution should be 'accompanied by a bill of rights,' noting that the government may 'exercise no rights but such as the people commit to them.'⁷⁸ However, his disagreement was not adamant, because he supported ratification with those additions.⁷⁹ His significance at the ratification convention was acknowledged by George Washington, who wrote to 'congratulate you on the success of your labours' in bringing about ratification.⁸⁰

In fact, Jay's view of the superfluity of a bill of rights was not opposition to its substance, because he then wrote⁸¹ the circular letter that the governor of New York sent to the other states in August 1788. It reaffirmed that 'nothing but the fullest confidence of obtaining a revision' of the Constitution could permit states to ratify 'without stipulating for previous amendments,' and that 'amendments have been proposed' that make it important to call a con-

⁷⁴ *Elliot's Debates* 2:412 (23 July 1788); *DHRC* 18:297.

⁷⁵ *DHRC* 18:300, 298.

⁷⁶ James Madison to Edmund Randolph (10 Apr.1788), *Madison Papers* 11:18, 19; George Turberville to James Madison (16 Apr.1788), *ibid* 11:23 (responding to 'those powerful reasons that may be urged agt. the adoption of a Bill of Rights'); James Madison to Thomas Jefferson (10 Aug.1788), *ibid* 11:226, 226; *accord Federalist* No.84, at 579 (Hamilton).

⁷⁷ John Jay, 'An Address to the People of the State of New York' (1788), *Jay Correspondence* 3:294, 305.

⁷⁸ *Ibid* 305, 306.

⁷⁹ *Elliot's Debates* 2:413 (26 July 1788) (30-27 margin); *DHRC* 18:300; *Bill of Rights* 2:897.

⁸⁰ George Washington to John Jay (3 Aug.1788), *Washington Papers-Confederation* 6:419.

⁸¹ *Jay Correspondence* 3:353; *accord Washington Papers-Revolutionary* 1:81n; *DHRC* 18:296; Richard B Morris, *John Jay, the Nation, and the Court* (BUP, Boston 1967) 37.

stitutional convention.⁸² In fact, Jay's personal view had changed by that time, because in a private letter he supported a second convention to propose amendments, though he preferred to wait three or four years so the new Constitution could first gain popular support.⁸³

Jay and the other initial justices did not participate in Congress' approval of the Bill of Rights, because they served in other branches of government and not in Congress in 1789. They could not participate in the states' ratifications of the Bill of Rights, because during the week Congress approved the Bill of Rights to be sent to the states, they were appointed to the Supreme Court, in late September 1789.⁸⁴

4 Freedoms of Press and Speech in Practice in the 1790s

Jay, like the other early justices, remained well aware of the importance of the press to the Revolution. He had seen the press as equally important to the Constitution, as he with Hamilton conceived the idea of encouraging ratification by publishing essays and hoping for dissemination by newspapers across the nation (which later were collected as *The Federalist*); they soon enlisted Madison in the project.⁸⁵ Though Jay's essays were fewer in number than originally planned,⁸⁶ because of illness,⁸⁷ his participation was important because he was (in Madison's words) 'more known by character throughout the United States' than his co-authors.⁸⁸ The essays lived up to their purpose, proving significant in securing ratification. Jay's only reference in those essays to the press was negative--'it is fresh in our memories how soon the press began to teem with pamphlets and weekly papers against those very

⁸² 'Circular Letter from the Convention of the State of New York, to the Executives of the Different States' (Aug. 1788), *Jay Correspondence* 3:353; accord *Elliot's Debates* 2:413-14.

⁸³ John Jay to George Washington (21 Sep. 1788), *Washington Papers-Confederation* 6:527, 528.

⁸⁴ Except James Iredell, who was still working toward North Carolina's ratification of the Constitution itself, which occurred 21 Nov. 1789, *State Records-N.C.* 22:48-49, before he was appointed to the Supreme Court on 9 Feb. 1790. *DHFFC* 2:59, 61.

⁸⁵ James Madison to Thomas Jefferson (10 Aug. 1788), *Madison Papers* 2:225, 227.

⁸⁶ *Federalist* 8-27, 432-38 (numbers 2-5, 64).

⁸⁷ James Madison to Thomas Jefferson (10 Aug. 1788), *Madison Papers* 2:225, 227.

⁸⁸ James Madison to Thomas Jefferson (27 May 1789), *Jefferson Papers* 12:185, 185 and 186 n4 (Madison's correction of quotation).

measures' recommended by the Continental Congress⁸⁹--but at the same time his reference to the press was favorable in another published essay.⁹⁰

Jay's view of freedoms of press and speech, which had been molded in the Treaty of 1783 debate, the Littlepage dispute, and the Neutrality Proclamation quarrel, continued in the later 1790s as Jay had the political power to spur prosecution of a libelous and vitriolic press, and very consciously did not exercise it in any way.

The negotiator along with his Jay Treaty of 1795 were the subject of unparalleled excoriation in the press and in speeches, some even given as Jay was burned in effigy.⁹¹ One of the milder was Thomas Paine calling him a 'sycophant of every thing in power' and a 'disguised traitor.'⁹² Even friends like Gouverneur Morris believed the attack was so clamorous that the treaty would 'hang about Mr. Jay's neck like a millstone in his political voyages.'⁹³ Jay did not attempt to silence the press in any way, though his political influence could have spurred federal prosecutions or congressional action. Instead, he wrote privately at the peak of the storm:

The treaty is as it is; and the time will certainly come when it will very universally receive exactly that degree of commendation or censure which, to candid and enlightened minds, it shall appear to deserve. In the meantime I must do as many others have done before me--that is, regretting the depravity of some, and the ignorance of a much greater number, bear with composure and fortitude the effects of each. It is as vain to lament that our country is not entirely free from these evils, as it would be to lament that our fields produce weeds as well as corn.

Differences in opinion, and other causes equally pure and natural, will unavoidably cause parties; but such parties... are probably no less conducive to good government, than moderate fermentation is necessary to make good wine.

My good friend, we must take men and things as they are, and enjoy all the good we meet with. I enjoy the good-will to which I am indebted for your letter...⁹⁴

⁸⁹ *Federalist* 11.

⁹⁰ If a new constitutional convention were held, we would 'again see the press teeming with publications for and against it.' 'Address to the People and State of New York,' *Jay Correspondence* 3:294, 314.

⁹¹ James Callender, *Sketches of the History of America* (Snowden & McCorkle, Philadelphia 1798) 145; William Cobbett, *Porcupine's Works* (Cobbett & Morgan, London 1801) 1:333; John S. Littell (ed), *Memoirs of His Own Time, by Alexander Graydon* (rev ed Lindsay & Blakiston, Philadelphia 1846) 376-77; accord Todd Estes, *The Jay Treaty Debate* (UMF, Amherst 2006) 106, 75-76; *Opposition* 177-235.

⁹² Thomas Paine, *Letter from Thomas Paine to George Washington* (2d ed HD Symonds, London 1797).

⁹³ 'Diary' (14 June 1795), in Anne C. Morris (ed), *Diary and Letters of Gouverneur Morris* (Kegan Paul, Trench, London 1889) 2:91.

⁹⁴ John Jay to General Henry Lee (11 July 1795), *Jay Correspondence* 4:178, 178-79.

He continued his 1783 and 1785 approach to press attack, trusting the judgment of the future, accepting differences in opinion, and treating such criticism as permissible.

A half decade later and after the Sedition Act was passed, Jay was still the victim of demonstrable falsehoods in the press about his diplomatic mission. He quoted an example from 'Greenleaf's paper,'⁹⁵ which misstated the expenses of his diplomatic mission as \$52,721 instead of \$18,000, and was 'calculated. . . to impress an opinion. . . that I derived extravagant emoluments from it,' even though he received no compensation except his Supreme Court salary. Jay had taken no action in the two and a half years since that and similar publications, though the Sedition Act had been passed, believing that calumny 'is without remedy, and consequently is to be borne patiently.'⁹⁶ That virtually echoed his conclusion during the Littlepage assault. Again, Jay showed no thought of using seditious libel laws, though he was a high government official, and the attacks were on his governmental mission.

Jay, as governor of New York when the Sedition Act was passed, again had the opportunity to cause prosecution of Greenleaf's newspaper and other critics, either by federal prosecution under the Sedition Act, or by state prosecution under the common law of seditious libel. Yet there is not one example of Jay seeking prosecutions during his stormy five years as governor, even with Federalist control of the federal government and the state government as well. Jay impeded not his critics, but the Sedition Act itself, as described in Chapter 7.B.

B Justice John Rutledge

John Rutledge, one of the two initial justices who received their legal training in the Inns of Court,⁹⁷ was a major participant at the Constitutional Convention. He briefly served as the second chief justice by recess appointment, but became the first federal appointee denied

⁹⁵ Unrelated to Jay's concern, Greenleaf's widow and the very Republican *Argus* suffered Sedition Act prosecution in 1799-1800 (discussed in Chapter 6).

⁹⁶ John Jay to Henry Van Schaack (23 Sept. 1800), *ibid* 4:275, 276.

⁹⁷ E. Alfred Jones, *American Members of the Inns of Court* (Saint Catherine Press, London 1924) 189; CEA Bedwell, 'American Middle Templars' (1920) 25 *American Historical Review* 680. John Blair was the other.

confirmation, ironically because of exercise of freedom of speech about the Jay Treaty.⁹⁸

Rutledge went to great lengths to support freedom of press at three critical junctures.

1 South Carolina Assistance to John Wilkes in His Seditious Libel Case

England's prosecution of John Wilkes for seditious libel in 1763, for criticism of a speech by King George III,⁹⁹ and his expulsion from the House of Commons and exclusion despite reelection¹⁰⁰ reverberated in the colonies. Wilkes was widely viewed as a martyr for liberty,¹⁰¹ for his defense of freedom of press and of parliamentary speech.¹⁰²

South Carolina's lower house, joining with the English crowds shouting 'Wilkes and Liberty!',¹⁰³ voted to contribute £10,500 in colonial money for 'the support of the just and constitutional rights and liberties of the people of Great Britain and America,' in December 1769.¹⁰⁴ The rights and liberties at issue were clearly identified the next day, in a letter signed by seven legislators including Rutledge to notify Wilkes' committee of the contribution, and

⁹⁸ See generally James A. Haw, *John and Edward Rutledge of South Carolina* (University of Georgia Press, Athens 1997) (the best biography); *OCSC* 750; *Justices* 1:33.

⁹⁹ *R v Wilkes* (1763) 2 Wils KB 151, 159-60, 95 ER 737, 742 (CP).

¹⁰⁰ *Rudé* 35; *Thomas* 47-54, 79-80, 92-98.

¹⁰¹ E.g., *An Authentic Account of the Proceedings against John Wilkes...* (Boston repr., np 1763); Committee of the Boston Sons of Liberty to John Wilkes (6 June 1768), *Adams Papers* 1:214; James Madison to Thomas Martin (10 Aug. 1769), *Madison Papers* 1:42, 43; Robert A. Rutland (ed), *Papers of George Mason 1725-1792* (UNCP, Chapel Hill 1970) 1:290; Jack P. Greene, *The Diary of Colonel Landon Carter of Sabine Hall* (UPV, Charlottesville 1965) 1:404; see Robert Middlekauff, *The Glorious Cause: The American Revolution* (rev ed OUP, New York 2007) 183.

¹⁰² Arthur H. Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (YUP, New Haven 2006); Peter DG Thomas, *John Wilkes: A Friend to Liberty* (CP, Oxford 1996).

¹⁰³ *Rudé* 27, 34, 40, 42, 44, 49, 50, 53, 65.

¹⁰⁴ *Journals of Assembly-S.C.* 38:215 (8 Dec. 1769); accord Peter Manigault, Christopher Gadsden, John Rutledge and others to Robert Morris (9 Dec. 1769), *Garth Correspondence* 31:132; 'Additional Instructions' (15 Aug. 1770), *Drayton's Memoirs* 1:91, 92; *ibid* 1:65, 67; *Leigh's Considerations* 7; Henry Laurens to William Williamson (28 Nov. 1771), *Laurens Papers* 8:55, 57-58; Henry Laurens to James Habersham (10 Apr. 1770), *ibid* 7:272, 273 and n9.

Drayton's Memoirs are by John Drayton, one of the expelled council members, whose father was another, William H. Drayton. *DAB* 5:448. *Leigh's Considerations* are by Sir Egerton Leigh, the council president, anonymously but with immediate attribution. Henry Laurens to John L. Gervais (24 Jan. 1774), *Laurens Papers* 9:250, 251; *Drayton's Memoirs* 1:64. *Garth Correspondence* is with South Carolina's London agent. *Laurens Papers* and *Gadsden Writings* are by legislators. See generally Jack P. Greene, 'Bridge to Revolution: The Wilkes Fund Controversy in South Carolina, 1769-1775' (1963) 29 *Journal of Southern History* 19; Jack P. Greene (ed), *The Nature of Colony Constitutions: Two Pamphlets on the Wilkes Fund Controversy in South Carolina* (USCP, Columbia 1970).

those were freedoms of press and speech.¹⁰⁵ The contribution was designated for the British Society of the Gentlemen Supporters of the Bill of Rights (and was addressed to its secretary),¹⁰⁶ an organization formed to fund Wilkes' defense and fines.¹⁰⁷ Another letter the same day transferred the funds to the organization's bankers.¹⁰⁸

Rutledge was a leading supporter of that Wilkes contribution. He was one of the seven legislators appointed as the committee to deliver it,¹⁰⁹ and was still joining letters defending the contribution nearly a year later.¹¹⁰ He and the house were sincerely trying to assist Wilkes and not to provoke a dispute with the royal government or to fight over legislative powers, because the house buried the item in its annual tax bill¹¹¹ under the opaque words 'To Jacob Motte, Esq. advanced by him, to certain members of the House, by a resolution of the House of the eighth of December last, 10,500 l.'¹¹²

The acting governor soon questioned the appropriation, by letter to the Crown,¹¹³ and his council refused to approve the tax bill because it found the item 'highly affrontive to His Majesty's Government,' in April 1770.¹¹⁴ The house moved toward adopting resolutions con-

¹⁰⁵ Peter Manigault, Christopher Gadsden, John Rutledge and others to Robert Morris (9 Dec.1769), *Garth Correspondence* 31:132.

¹⁰⁶ *Ibid* 31:133, 132; see *Leigh's Considerations* 8.

¹⁰⁷ 'Adams Elected to Membership in Supporters of the Bill of Rights' (21 Sept.1773), *Adams Papers* 1:353; *Garth Correspondence* 31:132 n2; see Edward M McCrady, *History of South Carolina in the Revolution* (MacMillan, New York 1901) 2:707; *Robbins* 354; *Rudé* 61.

¹⁰⁸ Peter Manigault, Christopher Gadsden, J Rutledge and others to Hankey and Partners (9 Dec.1769), John Almon (ed), *Correspondence of the Late John Wilkes* (Richard Phillips, London 1805) 5:42, 43; *Leigh's Considerations* 8; see *Gadsden Writings* 95n; *Laurens Papers* 273 n9.

¹⁰⁹ *Ibid* 5:42-43; *Journals of Assembly-S.C.* 38:387 (quoted 5 Apr.1770); *Garth Correspondence* 31:132, 133; 'Additional Instructions' (15 Aug.1770), *Drayton's Memoirs* 1:91, 92.

¹¹⁰ Peter Manigault and others (including Rutledge) to Charles Garth (6 Sept.1770), *Garth Correspondence* 31:244, 246.

¹¹¹ Motte was the state treasurer; it was a relatively common practice for him to expend available funds and restore them from the next year's taxes. *Leigh's Considerations* 26; Committee of Correspondence to Charles Garth (6 Sept.1770), *Laurens Papers* 7:338, 338-39 and *Garth Correspondence* 31:244, 244, 246-53 (examples).

¹¹² *Leigh's Considerations* 10; *Journals of Assembly-S.C.* 38:387.

¹¹³ Lt.Gov. William Bull to Lord Hillsborough (12 Dec.1769), *Privy Council-Colonial* 6:474.

¹¹⁴ *Journals of Assembly-S.C.* 38:386, 387 (message of 5 Apr.1770); accord *Leigh's Considerations* 10-11; see *Drayton's Memoirs* 1:61, 65-66; *Gadsden Writings* 95n; *Laurens Papers* 274n.

demning royal authority over this and other colonial taxation and spending,¹¹⁵ and the governor dissolved the house before the resolutions could be adopted.¹¹⁶ The Crown responded with instructions to the royal governor requiring future tax bills to contain express restrictions on disbursements.¹¹⁷ Accordingly, the council and acting governor reiterated their veto.¹¹⁸

The house similarly stood firm on principle.¹¹⁹ It again approved a tax bill restoring the same amount for the same purpose, in August 1770,¹²⁰ which inevitably provoked the council's and lieutenant governor's rejection,¹²¹ rather than passing a tax bill that would gain approval. The dominant issue was still supporting Wilkes, rather than asserting legislative authority.¹²²

Rutledge delivered the report of the 'Committee to whom His Majesty's Additional Instructions and . . . the Lieutenant Governor's messages relative thereto, were referred,'¹²³ once those Instructions reached the legislators, and 'probably wrote' the report.¹²⁴ It attacked with no holds barred, positing that the 'House hath an undeniable right . . . to give and grant money . . . for any purposes whatsoever,' and that it was an ancient practice for the treasurer to advance funds to be repaid from incoming taxes.¹²⁵ Rutledge's report expressly defended the legality of the Wilkes contribution, and defiantly said its purpose was opposing the unjust and unconstitutional measures of an arbitrary and oppressive ministry.¹²⁶ He added that the 'In-

¹¹⁵ *Journals of Assembly-S.C.* 38:300-02 (10 Apr.1770). The council refused the house's request for reconsideration. *Leigh's Considerations* 11.

¹¹⁶ *Ibid* 38:303, 393 (11 Apr., 4 June 1770); accord *Drayton's Memoirs* 1:66; see *Leigh's Considerations* 11.

¹¹⁷ *Royal Instructions* 1:203-04; 'Additional Instructions' (15 Aug.1770), *Drayton's Memoirs* 1:91, 93-94; *Privy Council-Colonial* 5:229.

¹¹⁸ *Journals of Assembly-S.C.* 38:434-38 (29 Aug.1770) (council); 38:443-44 (31 Aug.1770)(lieutenant governor).

¹¹⁹ *Leigh's Considerations* 17; Committee of Correspondence to Charles Garth (6 Sept.1770), *Laurens Papers* 7:338, 339; Henry Laurens to John Rose (5 Dec.1771), *Laurens Papers* 8:79-80.

¹²⁰ *Drayton's Memoirs* 1:68, 104; *Leigh's Considerations* 12-13; see *Journals of Assembly-S.C.* 38:438 (29 Aug.1770).

¹²¹ *Journals of Assembly-S.C.* 38:434 (23 Aug.1770)(council), 38:443 (31 Aug.1770)(lieutenant governor).

¹²² Though the issue certainly spilled into that. Committee of Correspondence to Charles Garth (10 Apr.1772), *Garth Correspondence* 33:136.

¹²³ *Journals of Assembly-S.C.* 38:430 (29 Aug.1770). The report is reprinted in *Lee's Answer*, 30-36.

¹²⁴ Rutledge 53; *Journals of Assembly-S.C.* 38:434 (29 Aug.1770) (assigned to write message).

¹²⁵ *Journals of Assembly-S.C.* 38:431; *Lee's Answer* 43.

¹²⁶ *Ibid* 38:431-32.

struction . . . is founded upon a false, partial and insidious representation,' so that 'the House should not submit thereto.' Moreover, the Instructions are 'an infringement of the privileges of this House,' and 'whosoever made the false, partial and insidious representation . . . are guilty of high misdemeanors. . . .'¹²⁷ The report was approved by the house.¹²⁸ The council reiterated its rejection of the tax bill and the £10,500 contribution, leading to a house protest to the lieutenant governor, who hewed to the council's position and noted that consequently 'there is no prospect of doing any business during this sitting of the General Assembly.'¹²⁹ The house responded by directing its London agent to challenge the Instructions by petition,¹³⁰ which the Privy Council predictably rejected.¹³¹

Rutledge was also a member of the grievance committee that continued to deal with the Wilkes contribution and the legislature's powers,¹³² and of the committee of correspondence whose direction he co-signed requiring the London agent to defend the contribution and challenge the restrictions.¹³³

Two years after the original contribution, the council still refused to approve an annual tax bill with the £10,500, and the house still refused to approve a tax bill without it.¹³⁴ The house called the new co-treasurers to testify about the issue, and jailed them for refusing to approve the £10,500.¹³⁵ A year afterward, the new governor in his first speech to the house

¹²⁷ *Ibid* 38:432, 433; *Lee's Answer* 35.

¹²⁸ *Ibid* 38:444 (31 Aug.1770)(resolutions 1-3), 38:446 (4 Sept.1770)(resolutions 4-10).

¹²⁹ *Journals of Assembly-S.C.* 38:453 (7 Sept.1770)(council), 38:454 (7 Sept.1770)(house), 38:455 (7 Sept.1770) (governor).

¹³⁰ *Ibid* 38:446 (4 Sept.1770, order), 38:449 (5 Sept.1770, report and order), 38:451 (6 Sept.1770, report 'unanimously agreed'); *Leigh's Considerations* 14.

¹³¹ 'Petition of Charles Garth' (22 Nov.1770), *Garth Correspondence* 33:120; Privy Council (27 Mar.1771), *ibid* 33:130; *Privy Council-Colonial* 5:235. The legislature later petitioned to remove the governor. Committee of Correspondence to Charles Garth (30 Oct.1772), *ibid* 33:262, 264, (20 Nov.1772), *ibid* 33:275, 277.

¹³² *Journals of Assembly-S.C.* 39:11 (10 Oct.1772); see *Drayton's Memoirs* 1:69.

¹³³ Committee of Correspondence to Charles Garth (6 Sept.1770), *Laurens Papers* 7:338, 340; Committee of Correspondence to Charles Garth (10 Apr.1772), *Garth Correspondence* 33:136; see *Drayton's Memoirs* 1:69.

¹³⁴ *Journals of Assembly-S.C.* 38:577 (4 Nov.1771), 38:578-79 (4 Nov.1771); *Leigh's Considerations* 14. The treasurer, Motte, had by now died, so the issue became whether that amount should be deducted from amounts his estate owed the colony. *Ibid* 38:578 (4 Nov.1771).

¹³⁵ *Ibid* 38:580-81 (5 Nov.1771), 38:583 (5 Nov.1771).

chided them for the tax bill remaining unpassed, and the grievance committee called for his removal from office for that and other reasons.¹³⁶ The house remonstrated against 'that most unreasonable and unconstitutional [Instruction] of the Ministry, to direct and control the House of Assembly in framing money bills.'¹³⁷

The house's continued refusal to place in tax bills the Crown's language barring similar contributions 'set up a constant collision' so that 'the tax-bills since August 1770, were rejected by the Council.'¹³⁸ The house continued to assemble for its quarterly sessions, but was dissolved by the governor each session¹³⁹ as it 'repeatedly persisted' in omitting the language required by the Additional Instructions or in reimbursing the Wilkes contribution.¹⁴⁰ This produced an impasse in colonial government,¹⁴¹ effectively closing it down, until the Revolution began and the house was replaced by a new assembly.

2 Support of Thomas Powell in His Seditious Libel Prosecution

The new acting governor, William Bull, and his council retaliated by refusing to approve various other enactments. Two members of the council, John Drayton and William H. Drayton, placed their dissents in the council records,¹⁴² believing that needed legislation was held hostage, and gave a copy of their protest to a newspaper printer.¹⁴³

This provoked a Wilkes-like battle of the press in South Carolina. When the South Caro-

¹³⁶ *Ibid* 39:2, 5 (10 Oct.1772)(speech), 39:20-21 (29 Oct.1772)(committee on grievances report). The report is reprinted in *Lee's Answer* 71.

¹³⁷ *Journals of Assembly-S.C.* 38:21, 23 (29 Oct.1772).

¹³⁸ *Drayton's Memoirs* 1:69; see *Leigh's Considerations* 13, 15.

¹³⁹ *Journals of Assembly-S.C.* 38:456 (8 Sept.1770), 39:1 (describing 10 Apr.1772); *Drayton's Memoirs* 1:66, 68 (Aug.1770); *Laurens Papers* 7:432 (Jan.1771); *Leigh's Considerations* 14 (Oct.1771); *Garth Correspondence* 33:262,263 (Aug.1772), 33:273, 274 (Nov.1772); *Drayton's Memoirs* 1:136 ('repeatedly' Mar.1773-Apr.1774), 1:112 (Apr.1774, June 1774), 1:140 (Aug.1774); *Gadsden Writings* 97 (June 1774); Thomas Farr to Ralph Izard (8 Aug.1774), *Izard Correspondence* 6:7-8 (Aug.1774 session); *Drayton's Memoirs* 140 (same); *Journals of Provincial Congress-S.C.* 28 (before 1775), 29 (until Jan.1775), 258 (Sept.1776).

¹⁴⁰ *Leigh's Considerations* 17.

¹⁴¹ Committee of Correspondence to Charles Garth (6 Sept.1770), *Laurens Papers* 7:338, 339 ('puts a full stop to the payment of public debts, and the necessary provision for the expences of government.'). Henry Laurens to John Hopton (29 Jan.1771), *ibid* 7:428, 432; Charles Garth to Committee of Correspondence (3 June 1772), *Garth Correspondence* 33:238, 239; see *Leigh's Considerations* 15.

¹⁴² Opinion of J. Lowndes, *Drayton's Memoirs* 1:118, 123; *ibid* 1:101; *Leigh's Considerations* 33; see Henry Laurens to John Laurens (19 Nov.1773), *Laurens Papers* 9:152, 154.

¹⁴³ 'Three Councillors Removed' (1 June 1775), *Privy Council-Colonial* 6:564; *Lee's Answer* 85-86.

lina *Gazette* printed the council members' dissent without the council's permission, in August 1773, the majority of the council found it 'a high breach of privilege and a contempt'¹⁴⁴ and a seditious libel.¹⁴⁵ Consequently, the 'printer and publisher, of . . . the South Carolina Gazette,' Thomas Powell,¹⁴⁶ was imprisoned by the council.¹⁴⁷ He was defended by Edward Rutledge,¹⁴⁸ whose motion for habeas corpus was granted by two justices of the colony's courts,¹⁴⁹ on the grounds that imprisonment of Powell was not justified by the law of the land, and that the council was not an upper house of the legislature whose acts could claim any legislative privilege.¹⁵⁰ In response to the council's request for the assembly to take action against the justices,¹⁵¹ the house passed resolutions sardonically agreeing with the justices, thanking them, and asking the governor to suspend the other members of the council.¹⁵²

John Rutledge continued to support the cause of the press, leading the committee that asked the governor to suspend the council members who cited Powell, while the London representative petitioned to have them removed.¹⁵³ Powell published commentary on his prosecution as 'the most violent attempt that ever had been made in this province upon . . . the liberty of the press.'¹⁵⁴ Edward Rutledge brought suit for Powell against the council president

¹⁴⁴ *Journals of Assembly-S.C.* 39:80 (8 Sept.1773, reprinting warrant 31 Aug.1773); 'Opinion of J.Lowndes,' *Drayton's Memoirs* 1:118, 118; see *ibid* 101; *Leigh's Considerations* 33; *Privy Council-Colonial* 6:564.

¹⁴⁵ *Drayton's Memoirs* 1:101; see *Leigh's Considerations* 33, 82.

¹⁴⁶ *Journals of Assembly-S.C.* 39:82 (8 Sept.1773, reprinting habeas corpus 1 Sept.1773); 'Opinion of J. Lowndes,' *ibid* 1:118, 118.

¹⁴⁷ *Privy Council-Colonial* 6:389; Henry Laurens to James Laurens (5 Feb.1774), *Laurens Papers* 9:264, 267; *ibid* 9:111 n1; *Leigh's Considerations* 33; *Drayton's Memoirs* 1:101, 103; *Laurens Papers* 9:111 n1; *Journals of Assembly-S.C.* 39:80 (8 Sept. 1773, reprinting warrant 31 Aug.1773).

¹⁴⁸ *ANB* 19:131, 131-32.

¹⁴⁹ 'Opinion,' *Journals of Assembly-S.C.* 39:82 (reprinting 8 Sept.1773); 'Opinion of J. Lowndes,' *Drayton's Memoirs* 1:118, 124; *Leigh's Considerations* 33; see *Privy Council-Colonial* 6:564, 565.

¹⁵⁰ *Ibid* 39:83-86; 'Opinion of J. Lowndes,' *Drayton's Memoirs* 1:118, 121-23; *ibid* 1:101; *Leigh's Considerations* 34; *Lee's Answer* 86; *Privy Council-Colonial* 6:564, 566.

¹⁵¹ *Journals of Assembly-S.C.* 39:77 (7 Sept.1773); *Leigh's Considerations* 34.

¹⁵² *Ibid* 39:88 (8 Sept.1773); *Drayton's Memoirs* 1:101-02; *Leigh's Considerations* 34.

¹⁵³ *Ibid* 39:88, 93, 96 (8, 11, 13 Sept.1773).

¹⁵⁴ *Leigh's Considerations* 79-80.

who had spearheaded the attack on Powell.¹⁵⁵ In response to complaints by both the council and the Draytons,¹⁵⁶ the Privy Council surprised no one and found in favor of the Crown.¹⁵⁷

In a repeat performance a year later, the council postponed action on a bill to punish counterfeiting, and William H. Drayton protested it in February 1775.¹⁵⁸ The protest was similarly published in the *South Carolina Gazette*.¹⁵⁹ The council president accused Drayton of libeling the King and stirring up sedition,¹⁶⁰ by disseminating his protest and by anonymously publishing a pamphlet.¹⁶¹ As the house supported Drayton,¹⁶² the council again suspended him¹⁶³ and sued Powell, who Edward Rutledge again defended.¹⁶⁴

Was this all a fight merely over legislative prerogative, and not over freedom of press? The selection of Wilkes to receive a contribution did not involve a dispute over colonial legislative powers but over freedom particularly of the press. The appropriation of the contribution was obscured to avoid a fight. The Powell incident did not extend legislative powers but instead asserted Powell's freedom of press and Drayton's freedom of speech.¹⁶⁵ While legislative rights ultimately were caught up in the controversy, the beginning and the end of these incidents was the press and its freedom. Finally, a decade later, it was Rutledge along with Madison who proposed the provision at the Constitutional Convention that Congress must

¹⁵⁵ Henry Laurens to John Laurens (19 Nov. 1773), *Laurens Papers* 9:152, 154; *Leigh's Considerations* 77-78 (on 12 Oct. 1773 after motion 18 Sept. 1773); *Lee's Answer* 124; *Privy Council-Colonial* 6:564, 566-67.

¹⁵⁶ *Privy Council-Colonial* 6:564, 566; Henry Laurens to James Laurens (5 Feb. 1774), *Laurens Papers* 9:264, 266; see *Leigh's Considerations* 14, 34.

¹⁵⁷ *Privy Council-Colonial* (1 June 1775) 6:564; see *Drayton's Memoirs* 69.

¹⁵⁸ 'Dissentient of William H Drayton' (8 Feb. 1775), *Drayton's Memoirs* 1:233-35; *ibid* 1:209-10; see *Lee's Answer* 128.

¹⁵⁹ *South-Carolina Gazette* (Charleston 13 Feb. 1775), *ibid* 1:235; *ibid* 1:211.

¹⁶⁰ 'Address of Council' (11 Feb. 1775), *ibid* 1:235-36; *ibid* 1:211-12; *Privy Council-Colonial* 5:409.

¹⁶¹ 'Dissentient,' *ibid* 1:240, 242.

¹⁶² *ibid* 1:214-15; see 'Dissentients of William H Drayton' (Feb. 1775), *ibid* 1:237-40, 1:240-42; *Prelude* 162-63.

¹⁶³ William Bull to William H Drayton (1 Mar. 1775), *ibid* 1:243; *Privy Council-Colonial* 5:409, 410, 6:564-67.

¹⁶⁴ *ANB* 19:131, 131-32.

¹⁶⁵ Drayton neatly placed the council in a dilemma: either it was not an upper legislative house, in which case it could not claim breach of legislative privilege, or it was an upper house, in which case his statements were protected as legislative speech. *Privy Council-Colonial* 6:564, 566.

publish journals of its proceedings.¹⁶⁶ They led the vanguard; only recently had a third and fourth state authorized reporting on and observation of legislative proceedings.¹⁶⁷

3 His Proposed Resolution on Treason by Words

Rutledge prepared a draft of the Declaration and Resolves in 1774, but it was not adopted by the Continental Congress,¹⁶⁸ apparently because Congress sought a list of rights and violations, which became the core of the final document.¹⁶⁹ Nevertheless, what appears to be Rutledge's draft¹⁷⁰ tells much about his view of freedoms of speech and press.

Rutledge took an approach very different from listing rights and grievances. He instead defined what English law did and did not apply to the colonies, extending the resolution of the Stamp Act Congress about taxation to a broad range of subjects,¹⁷¹ as some other Americans like the new chief justice of Rhode Island did when he proclaimed that 'the King and Parliament had no more right to pass any Acts of Parliament and govern us than the Mohawks' had.¹⁷² Rutledge's draft flatly stated that Parliament did not have power to legislate regarding 'taxation and internal policy' for the colonies, and that much of English law did not apply to the colonies. It identified the English law that *did* apply to the colonies: royal charters with privileges and immunities and colonial legislative powers over taxation and internal policy, and 'parts of the common civil & maritime law and of the statutes' of Great Britain.¹⁷³ The draft also specified the English law that *did not* apply: besides any legislation on taxation and internal policy, statutes enacted after 'the settlement of the colonies,' statutes enacted before that were inapplicable to or impracticable in the colonies, some of 'the common civil &

¹⁶⁶ *Farrand's Records* 2:259 (11 Aug. 1787); see U.S. Const. art. I, §5.

¹⁶⁷ Willi P. Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions* (UNCP, Chapel Hill 1980) 249-51.

¹⁶⁸ 'Thomas Jefferson's Autobiography,' *Letters of Members* 1:157 n2.

¹⁶⁹ JCC 1:63; EHD 9:805; John Adams to Edward Biddle (12 Dec. 1774), *Adams Papers* 2:199, 201.

¹⁷⁰ 'John Rutledge's[?] Proposed Resolutions to the Committee on Rights' (7-22 Sept. 1774), *Letters of Delegates* 1:44 & n1.

¹⁷¹ 'Declaration of Rights' s5 (19 Oct. 1765), EHD 9:672.

¹⁷² 'Opposition to the Jurisdiction of the Privy Council' (22 Nov. 1771), *Privy Council-Colonial* 6:505, 506 (Stephen Hopkins); see *Ideological Origins* 209-13.

¹⁷³ *Ibid.*

maritime law,' and, most interestingly, two statutes that were singled out:

We do not however admit into this collection but absolutely reject the statutes of Henry the 8 and Edward 6 respecting treasons and misprisions of treasons.¹⁷⁴

The great emphasis placed on two specific statutes on treason invites inquiry. The statutes were the High Treason Act of 1534 (or the Treason Act of 1543 that amended it),¹⁷⁵ and the Repeal of Statutes as to Treasons, Felonies, Etc. of 1547 (which was only a partial repeal).¹⁷⁶ The common element of those statutes was criminalization as treason of speech and writing, changing the law established by the Treason Act of Edward III that proscribed acts but not words.¹⁷⁷ The 1534 statute made it high treason to harm the royal family or to 'slanderosly and maliciously publish and pronounce, by express writing or words, that the King our sovereign lord should be heretick, schismatick, tyrant, infidel or usurper of the Crown. . . .'¹⁷⁸ The 1547 statute, though repealing some treason statutes,¹⁷⁹ made it high treason 'by writing, printing, overt-deed or act' to affirm that the King is not the 'Supream Head in Earth of the Church of England and Ireland,' that the Bishop of Rome instead is, that the King is not king of England, France, or Ireland, or that anyone else ought to be King.¹⁸⁰ Its speech provision criminalized the 'open preaching, express words or sayings' that affirmed the same things.¹⁸¹ Though procedural safeguards had been added, dissent by certain words could still cost one's life.¹⁸²

¹⁷⁴ *Ibid.*

¹⁷⁵ 26 Hen 8 c 13; 35 Hen 8 c 2; *accord Orr* 18-19; *Brooks* 48.

¹⁷⁶ 1 Edw 6 c 12; *see Orr* 20.

¹⁷⁷ Statute of Treason 1350, 25 Edw 3 stat 5, c2; *Source Book* 376; *see Brooks* 55-56.

¹⁷⁸ 26 H 8 c 13 s II. It also provided, when treason was committed out of the realm, for presentment in a shire appointed by the Crown and trial before King's Bench, *ibid* s IV, which the 1543 statute expanded to allow trial before commissioners in a shire assigned by the Crown. 35 H 8 c 2.

¹⁷⁹ *Ibid* s II. While worded broadly, De Lolme could only claim this 'repeal[ed]' many of the treason laws introduced under Henry VIII.' Jean Louis De Lolme, *The Constitution of England; Or, An Account of the English Government* (David Lieberman (ed) Liberty Fund, Indianapolis 2007) 69n; though Blackstone asserted it repealed all. *Blackstone's Commentaries* 4:86-87, 89-90.

¹⁸⁰ *Ibid* s VII.

¹⁸¹ *Ibid* s VI.

¹⁸² Trials for Treason Act (1696), 7 & 8 Wm 3 c3; *EHD* 8:89.

One other issue of colonial concern¹⁸³ was raised by the 1534 statute and its amendment, but not by the 1547 statute: that persons 'outside the Realm' committing treason or misprision would be presented and tried in England.¹⁸⁴ However, that was not Rutledge's objection because it was not a common element of both. Treason by words remained a threat to nonbeligerent but vocal colonial leaders, as James Wilson showed in reprobating the same statute of Henry VIII.¹⁸⁵ Rutledge, a lawyer trained in England, doubtless knew that both treason statutes were commonly understood to be repealed,¹⁸⁶ but also knew that repeal left 'a heritage of procedural confusion' with 'treasonable words also continu[ing] to play a part in early Stuart treason law'¹⁸⁷ and in threats during colonial disputes.

Rutledge's objection was aimed at the restriction on speech and press, not only because the venue issue was not common to both statutes, but for two other reasons. The controversy in South Carolina, which was still ongoing, involved treason by words by Wilkes, but did not involve transporting a colonist to England. Further, earlier in the year of Rutledge's draft,¹⁸⁸ he had been threatened by the president of South Carolina's royal council with prosecution for his words--for 'high contempts and misprisions against the King's person and government, by doing any thing that has an immediate and direct tendency to weaken his government, or

¹⁸³ E.g., 'Declaration and Resolves' (14 Oct.1774), *EHD* 9:805, 808; Benjamin Franklin to William Strahan (29 Nov.1769), *Franklin Papers* 16:243, 248; William Bollen to Council of Massachusetts (1 Sept.1773), 'Bowdoin and Temple Papers,' *Collections of the Massachusetts Historical Society* (6th series MHS, Boston 1897) 9:308; John Adams, 'Heads of Grievances and Rights' (ante 9 Sept.1774), *Adams Papers* 2:152, 154; 'Franklin's "Hints" or Terms for a Durable Union' (4 Dec.1774), *Franklin Papers* 21:365, 368; James Wilson, 'Speech Delivered in the Convention' (Jan.1775), *Wilson Works* 1:32, 35; James Iredell, 'The Principles of an American Whig' (ca 1775), *Iredell Papers* 1:328, 337.

¹⁸⁴ 26 Hen 8 c 13 s 4; 35 Hen 8 c 2 s 1. The House of Lords called for enforcement, in December 1768, and the House of Commons followed suit, a couple of months after. *Franklin Papers* 16:248 n.7; accord *Parliamentary History* 16:1005 (Edmund Burke in 1770: Parliament took 'up the menace of Henry the 8th's Act'). Besides the obvious prejudice to a colonist that witnesses and attorney would not be available in England, this violated the common law right of trial by a jury from the vicinage. Michael Macnair, 'Vicinage and the Antecedents of the Jury' (1999) 17 *Law and History Review* 537.

¹⁸⁵ James Wilson, 'Lectures on Law,' *Wilson Works* 2:1151.

¹⁸⁶ *Case of John Williams* (KB) Cro Car 126, 79 ER 711; *Blackstone's Commentaries* 4:86.

¹⁸⁷ Orr 21, 27, leaving it 'unclear which statutes and which particular provisions. . . were actually in force,' *ibid* 11; Ashcraft 340.

¹⁸⁸ On January 20, 1774. Jack P Greene (ed), *The Nature of Colony Constitutions: Two Pamphlets on the Wilkes Fund Controversy in South Carolina* (USCP, Columbia 1970) 38.

to raise jealousies between him and his people.¹⁸⁹ That threat was directed at 'six eminent gentlemen of the bar, all members of the house,' including Rutledge.¹⁹⁰ It followed a warning from the provincial agent that parliamentary debate about forcing American acknowledgment of its authority mentioned 'the terrors of an old act of Henry 8th.'¹⁹¹

4 His Wartime Powers and Freedom of Press During the Revolutionary War

At the start of Rutledge's wartime presidency of South Carolina,¹⁹² as he was made commander in chief of the state's troops,¹⁹³ he was given authority approaching dictatorial powers¹⁹⁴ when the state legislature was out of session.¹⁹⁵ The legislature also passed a sedition act early in the war in 1776,¹⁹⁶ as did Virginia and other states, which Rutledge signed.¹⁹⁷

There is no evidence of Gov. Rutledge using those unlimited powers to restrict speech or press, or enforcing that sedition act, among the large number of his directives preserved from the Revolution.¹⁹⁸ Though the state had wartime restrictions on loyalists typical of all the states, Rutledge made an offer of amnesty¹⁹⁹ that was lenient enough to contribute to anti-

¹⁸⁹ *Leigh's Considerations* 82, which immediately followed Leigh's discussion of an English prosecution and conviction for seditious libel. *Ibid* 81-82.

¹⁹⁰ *Ibid* 80.

¹⁹¹ Charles Garth to Capt. Ball (12 Jan. 1770), *Garth Correspondence* 31:139 (copy provided to South Carolina Committee of Correspondence).

¹⁹² *Journals of Provincial Congress-S.C.* 265, 267.

¹⁹³ *Ibid* 265, 267.

¹⁹⁴ John Rutledge to Nn (18 Sept. 1781), *Rutledge Letters* 18:155, 159; William B Reed (ed), *Life and Correspondence of Joseph Reed* (Lindsay & Blakiston, Philadelphia 1847) 2:74; see Robert W Barnwell, Jr, 'Rutledge, "The Dictator"' (1941) 7 *Journal of Southern History* 215, 216, 217, 221-22.

¹⁹⁵ *Journals of General Assembly-S.C.* 229 (Bill 19), 184-85 (Ordinance 16), 209-10 (Resolution 91), 272-73 (Ordinance 28).

¹⁹⁶ Act To Prevent Sedition and Punish Insurgents (4 Apr. 1776), *ibid* 29.

¹⁹⁷ *Journals of General Assembly-S.C.* 52.

¹⁹⁸ *Documentary History-S.C.* 12-223 (37 letters); *ibid* 165, 175, 233 (3 proclamations or messages); *American Archives* 3:4-79 (22 letters); *Journals of General Assembly-S.C.* 52, 63; *Rutledge Letters* 17:131, 18:42, 18:59, 18:131, 18:155; Henry Bunbury (ed), *Lee Papers* (NYHS, New York 1872-75) 2:53, 57, 236; *Greene Papers* 11:11, 384, 674, 12:395 *et seq.*; 'John Rutledge to Benjamin Lincoln' (1924) 25 *South Carolina Historical and Genealogical Magazine* 133. After Rutledge left the governorship, the William Thompson incident provides an ugly exception.

¹⁹⁹ 'Proclamation' (27 Sept. 1781), *Documentary History-S.C.* 175, 237; 'Thomas Sumter Papers, 1734-1832' (LC, Washington, MMC2064) 2:1458.

loyalist riots.²⁰⁰ He also exercised his pardon power in individual cases, such as pardoning some people for violation of the state sedition law.²⁰¹ An objective of his administration was 'to restore every encroachment on the liberties of the people.'²⁰²

Rutledge appreciated the importance of publishing and disseminating newspapers and information, during the war. The beleaguered state government went to some effort to set up a press²⁰³ that was 'of great use in printing proclamations, commissions, & hand bills,' and Rutledge asked the state's delegates in Congress to help procure smaller type so that a newspaper could be produced, 'which wd. be of great service.'²⁰⁴ Fourteen years later, he found himself defended as well as attacked in the press over his speech on the Jay Treaty of 1795.

Rutledge's appreciation for civil rights had grown over two and a half decades, from satisfaction with the rights of British citizens to assertions of broader rights, and from contributing to John Wilkes' defense against seditious libel to becoming an editor himself while avoiding interference with press and speech. His evident opposition to the Sedition Act, and his brother's express opposition, are discussed in Chapter 7.C.

C Justice William Cushing

William Cushing entered government by birth--his father and grandfather served on the governor's council and on Massachusetts' highest court--but entered the major controversies of the time by stumbling repeatedly into them: independence, slavery, Shays' Rebellion, and freedom of press.²⁰⁵

²⁰⁰ Nathaniel Pendleton to Nathanael Greene (10 July 1784), *Greene Papers* 13:349, 350; John Lewis Gervais to Henry Laurens (15 Apr.1784), *Laurens Papers* 16:429, 430-31; John Lewis Gervais to Henry Laurens (12 Feb.1784), *ibid* 16:387, 391.

²⁰¹ *Drayton's Memoirs* 2:386.

²⁰² John Rutledge to Gen.Francis Marion (10 Oct.1781), *Documentary History-S.C.* 185, 186.

²⁰³ John Rutledge to Francis Marion (13 Aug.1781), William G Simms (ed), 'A Sketch of the Life and Public Services of John Rutledge of South Carolina' (1847) 6 *American Review* 277, 281.

²⁰⁴ John Rutledge to Delegates (ca Nov.1781), *Rutledge Letters* 18:162-63; John Rutledge to Nn (22 Nov.1781), *ibid* 163,166.

²⁰⁵ See generally John D Cushing, 'A Revolutionary Conservative: The Public Life of William Cushing, 1732-1810' (PhD thesis, Clark University 1959); Arthur P Rugg, 'William Cushing' (1920) 30 *Yale Law Journal* 128; *OCSC* 213; *Justices* 1:57.

The only thesis written on Cushing (the closest thing to a full-length biography) devotes only seven pages to his Supreme Court role and only one sentence in a footnote to his view on the Alien and Sedition Acts.²⁰⁶ Yet his view on those Acts warrants more than a footnote (Chapter 6.F), and contrasts sharply with his prior wrestling over the state declaration of rights on press freedom.

1 Freedom of Press and Limitation of Seditious Libel under the Massachusetts Declaration of Rights

Cushing, toward the end of his service as chief judge of Massachusetts' highest court in 1789, confronted two cases that involved prosecutions of the press for seditious libels.²⁰⁷ The Massachusetts Declaration of Rights of 1780 protected freedom of the press broadly, saying '[t]he liberty of the press is essential to the security of freedom in a state[;] it ought not, therefore, to be restricted in this commonwealth.'²⁰⁸ Cushing pondered the implications of that provision and of the state constitution for the crime of seditious libel. His deliberation did not involve the First Amendment, which was not approved by Congress until later in 1789 and was not ratified by the requisite number of states until two years after; but the federal and state freedom of press provisions are similar in their breadth and unqualified language.

Cushing wrote a seven page letter to his old colleague,²⁰⁹ John Adams, who drafted that Massachusetts provision²¹⁰ (before rewording in the state convention²¹¹), outlining his own thinking and inviting Adams' thoughts, in February 1789.²¹² Adams' works are not yet pub-

²⁰⁶ *Ibid* 334.

²⁰⁷ *Press-Mass.* 142 n1. The cases arose out of publications in 1786, but never reached trial because the publishers were pardoned. *Ibid*

²⁰⁸ Mass. Declaration of Rights art. XVI, *Federal-State Constitutions* 3:1888, 1892.

²⁰⁹ From years of cases together. E.g., William Cushing to John Adams (20 May 1776), *Adams Papers* 4:199; William Cushing to John Adams (14 Jan.1777), *ibid* 5:71.

²¹⁰ *Empire* 82; *Federalism* 532; *Press-Mass.* 133.

²¹¹ *Adams Papers* 8:279, 379; *Journal of Convention-Mass.* 41.

²¹² William Cushing to John Adams (18 Feb.1789), 'Microfilms of the Adams Papers' (MHS, Boston, reel 372). After writing this, I discovered brief summaries in John D Cushing, 'A Revolutionary Conservative: The Public Life of William Cushing, 1732-1810' (PhD thesis, Clark University 1959) 232-37, *Levy* 198-201, *Printers* 67-68, 88-89, and *Repressive Jurisprudence* 67-68, and a very brief reference in *DHSC* 3:314 n19.

lished for that year.²¹³ The John Adams who Cushing consulted was not the embattled Adams who signed the Sedition Act nearly ten years later, but the post-revolutionary Adams who said ten years earlier, after framing that state declaration of rights, 'I think there ought to be an article in the declaration of rights of every state, securing freedom of speech, impartiality, and independence at the bar. There is nothing on which the rights of every member of society more depend. . . .'²¹⁴ It was the Adams who had condemned British threats of prosecuting 'slander and sedition' and had warned that 'the jaws of power are always stretched out . . . to destroy the freedom of thinking, speaking, and writing.'²¹⁵ It was the Adams who had proclaimed, 'A free press maintains the majesty of the people.'²¹⁶

The Massachusetts chief justice construed freedom of the press to be quite broad, providing 'a liberty to treat all subjects and characters freely' so long as it was done truthfully:

But when the article says--"The liberty of the press is essential to the security of freedom," and, "it ought not to be restrained" does it not comprehend a liberty to treat all subjects and characters freely within the bounds of truth?

. . . .
 . . . Without this liberty of the press, could we have supported our liberties against British Administration? Or could our revolution have taken place? Pretty certain, it could not at the time it did. Under a sense and impression of this sort I conceive this article was adopted. . . .²¹⁷

His focus was on the targets of the common law of seditious libel--'all subjects' including criticism of government, and all 'characters' including criticism of officials.

Cushing criticized English common law that treated true statements as potentially seditious libels, and that even treated true statements as more libelous than false ones. He asked 'whether it is consistent with this article' to punish a publication supported by truth 'that may arraign the conduct of persons in office'?²¹⁸ Cushing noted that English law, while requiring a civil action

²¹³ It can also be found, paginated differently as the retained copy, in *Cushing Papers* (MHS, Boston, Box 1).

²¹⁴ John Adams to Benjamin Rush (4 Nov. 1779), *Adams Works* 9:507.

²¹⁵ John Adams, 'A Dissertation on the Canon and Feudal Law' (1765), *Adams Works* 3:445, 457; *Adams Papers* 1:103, 121.

²¹⁶ *Press-Mass*, 143-44.

²¹⁷ William Cushing to John Adams 3, 5 (18 Feb. 1789); *Cushing Papers* 8, 11.

²¹⁸ *Ibid* 1; *Cushing Papers* 1-2.

for libel to show the publication was 'false as well as scandalous,' treated truth or falsity as 'immaterial' in a criminal indictment for libel, and in some cases treated a true charge as a greater provocation than a false charge.²¹⁹ He found it incongruous 'that a man ought to be punished more for declaring truth than for telling lies.'²²⁰ However incongruous, English law did not permit truth to be pled as a defense in a criminal indictment, only in a civil action.²²¹

Cushing next addressed whether English law on criminal libels was applicable in Massachusetts. The state constitution, like many others, adopted colonial law and English common law unless repealed by the legislature or 'repugnant to the rights and liberties contained in this constitution.'²²² The case was one of first impression, so far as Cushing knew, so there was no precedent to bind him.²²³ His belief was that the declaration of rights' wording of freedom of press was 'very general and unlimited,' though some 'guard or limitation' should be placed on the press rather than making the provision absolute.²²⁴ Cushing suggested two limitations: that private libel actions should be allowed so the press was 'restrainable from injuring characters' of people, and that criminal libel actions might be allowed so the press was 'restrained from injuring the public or individuals, by propagating fals[e]hoods,' so long as the latter cause of action departed from English law by being limited to false statements.²²⁵ He recognized that the same rules would apply to speech as to press.²²⁶

Cushing concluded that Massachusetts' freedom of the press overrode the English law of libel in at least three aspects. As mentioned, the first was that only false statements could be libelous, so truth may be pled as a defense. But he went beyond this *Zenger* amelioration.

He also found jettisoned the Blackstone-Mansfield definition of freedom of press as

²¹⁹ *Ibid* 1; *Cushing Papers* 2-3 (citing Blackstone and Coke).

²²⁰ *Ibid* 2; *Cushing Papers* 3.

²²¹ *Ibid* 2; *Cushing Papers* 5-6.

²²² Mass. Const. ch.VI, art.6, *Federal-State Constitutions* 3:1888, 1910.

²²³ William Cushing to John Adams (18 Feb.1789) 3; *Cushing Papers* 7.

²²⁴ *Ibid* 3; *Cushing Papers* 7.

²²⁵ *Ibid* 3; *Cushing Papers* 8.

²²⁶ *Ibid* 3; *Cushing Papers* 8 ('by word, writing or printing'), at least as to criminal libel.

merely freedom from prior restraint, noting that a subsequent punishment could as effectively destroy the freedom, and must be equally prohibited by the declaration of rights:

Judge Black. says, (4 vol. p.151) the liberty of the press consists--"in laying no previous restraint upon publications," and not in freedom from censure for criminal matter when published. Wherein he refers to a public licenser or inspector of the press. *That* is, no doubt, the liberty of the press as allowed by the law of England.

But the words of our article, understood according to plain English and common sense--make no such distinction, and must exclude *subsequent* restraints--as much as *previous restraints*. In other words, if all men are restrained, by the fear of jails, scourges and loss of ears, from examining the conduct of persons in administration, *and*, where their conduct is illegal, tyrannical and tending to overthrow the constitution and introduce slavery, *are so* restrained from declaring it to the public; *that* will be as effectual a restraint, as any *previous* restraint whatever.²²⁷

This was the part of Cushing's analysis that most overturned the English common law of seditious libel. If the Blackstone-Mansfield definition was wrong that liberty of press meant only freedom from prior restraint, a meaningless freedom in a land without licensors, then liberty of press prohibited subsequent restraints, a far-reaching freedom against real-world regulation.

And he repudiated the rule that freedom of press did not include criticism of government, finding it potentially the most important type of expression, so long as it was truthful.

The propagating literature and knowledge by printing or otherwise, tends to illuminate men["]s minds and to establish them in principles of liberty. But it cannot be denied also--that a free scanning the conduct of administration, and shewing the tendency of it, and, where truth will warrant, making it manifest, that it is subversive of all law, liberty and the constitution, it cannot be denied, I think, that this liberty tends "*to the security of freedom in a state*"; even more directly and essentially, than the liberty of printing upon literary and speculative subjects in general. . . . This liberty of publishing truth can never effectually injure a good government, or honest administration; but it may save a state and prevent the necessity of a revolution, as well as bring one about, when it is necessary. . . .

But the liberty of the press, when it had truth for its basis, who can stand before it? Besides it may facilitate a legal prosecution that is well-founded, which might not otherwise have been dared to be attempted. When the press is made the vehicle of fals[e]hood and scandal, let the authors be punished with becoming rigour. But why need any honest man be afraid of truth? The guilty only fear it--and I cannot but be inclined to think with Gordon (in his letter upon libels vol.3 no.28 of Cato's Letters) that truth sacredly adhered to, in all cases without exception, can never upon the whole prejudice, right religion, equal government, or a government founded upon proper bal[an]ces and checks, or the happiness of society in any respect; but must promote them all.

Suppressing this liberty I am speaking for by penal laws; will it not carry

²²⁷ *Ibid* 4; *Cushing Papers* 9-10.

greater danger to freedom, than it will do good to governments? The weight of government is sufficient to prevent any very dangerous consequences occasioned by *provocations* resulting from charges founded in truth, whether such charges are made in a legal cause, or otherwise. . . .²²⁸

In this, Cushing acknowledged a major rationale: freedom to criticize government as a fundamental means to protect liberty and to arrest tyranny, and as a check on bad government and officials. He reversed the seditious libel concern over a bad tendency, when he found that 'this liberty tends to the security of freedom.' He cited Cato by book and page. He echoed the words of *Areopagitica* about truth vanquishing error, and turned the burden of proof on those who would hide from truth. And he applied the same rule to the English rule of blasphemous libel, finding that 'truth . . . can never upon the whole prejudice, right religion.'

Cushing has been criticized for pedestrian judicial analysis elsewhere, more because several of his earlier Supreme Court opinions were brief and to the point than because they were undiscerning, and probably because his abilities declined to leave him 'superannuated & contemptible' in his later years.²²⁹ The Adams letter is an example of the opposite, addressing a question that few people were raising, following instead of avoiding the broad language of the protection of press and speech, and nicely stating a rationale for the clear meaning of that broad language. John Adams aptly noted, a half year later and apparently in reference to this and another letter, that Cushing's letters 'contain profound and careful enquiries.'²³⁰

Adams replied to the letter, not disagreeing with any part of the analysis, but focusing on Cushing's points of departure from English law. Adams was 'very clear' that the state constitution required a right to present the defense of truth in a criminal case, where if truth were shown, 'they would readily acquit.'²³¹ He agreed that publishing information about govern-

²²⁸ *Ibid* 4-6; *Cushing Papers* 10-14. The last quoted sentence responds to the objection, *ibid* 5, 'that a public prosecution is the regular course--in case of mal[ic]iousness,' rather than public criticism.

²²⁹ Jeremiah Smith to William Plumer (24 Feb. 1795), *DHSC* 1:753.

²³⁰ John Adams to William Cushing (8 Sept. 1789), *DHRC* 17:1485.

²³¹ John Adams to William Cushing (7 Mar. 1789) at 2, *Cushing Papers* (MHS, Boston, Box 1). Adams did question whether a civil action could be brought for publishing scandalous though true information maliciously, without 'just cause for publishing it,' which today would amount to invasion of privacy. *Ibid* 1.

ment officials was particularly important in a government 'by the people,' because 'how are their characters and conduct to be known to their constituents but by the press? If the press is to be stopped, and the people kept in ignorance, we had much better have the first magistrate and senators hereditary.'²³² Adams in 1789 still believed in the expansive protection of the press that his draft Massachusetts provision had given, along with equally expansive protection of speech²³³ that he had said every state's declaration of rights should secure.²³⁴

Cushing soon had a chance to address these issues publicly, in a grand jury charge in the aftermath of Shays' Rebellion in his home state. He addressed what he viewed as dangerous--defamation of character--and does not appear to have warned of seditious libel, unless the reference to licentiousness of the press pointed in that direction:

Chief Justice Cushing gave a most excellent charge to the jury. Among other things, his Honour took notice of the evil tendency of libels: He pointed out, in a very clear and concise manner, the distinction between the liberty and licentiousness of the press--the difference between a citizen's publishing his sentiments on publick measures with a spirit becoming a freeman, and his stabbing and wounding private and publick characters, and robbing them of their good name.²³⁵

Though a newspaper summary may lose much of Cushing's actual charge, a spectator's diary similarly described it.²³⁶

2 Freedom of Press in Drafting the Massachusetts Declaration of Rights

Cushing was quite familiar with the Massachusetts Declaration of Rights, because he had been a delegate to the convention to prepare it and the state constitution, in 1779-1780, and had been one of the thirty members of its drafting committee.²³⁷ The legislature's prior attempt at a new constitution in 1778 had been rebuffed, primarily because a special conven-

²³² *Ibid.*

²³³ *Adams Papers* 8:236, 240; *accord Press-Mass.* 133.

²³⁴ John Adams to Benjamin Rush (4 Nov.1779), *Adams Papers* 8:279.

²³⁵ 'Worcester, April 23' *Salem Mercury* (Salem, 28 Apr.1789) 3; 'Worcester, April 23' *Independent Chronicle* (Boston, 30 Apr.1789) 3.

²³⁶ William Bentley, *Diary of William Bentley* (Essex Institute, Salem 1905-14) 1:122.

²³⁷ *Journal of Convention-Mass.* 15, 30.

tion was not elected and a declaration of rights was not included.²³⁸ The convention in 1779 began with drafts prepared by John Adams.²³⁹ The drafting committee adopted his declaration of rights without significant change,²⁴⁰ evidently unanimously.²⁴¹

The committee's provision for the press was slightly reworded by a committee of three, and was then adopted without apparent disagreement,²⁴² with expansive language:

XVI. The liberty of the press is essential to the security of freedom in a state[;] it ought not, therefore, to be restricted in this commonwealth.²⁴³

Cushing's and the full committee's role was limited, but there was no indication of dissent on his part.²⁴⁴ Similarly, his exchange with Adams ten years later did not give any hint of disagreement with the provision; instead Cushing embraced it and read it broadly in 1789.

Cushing also attended the Massachusetts ratification convention of 1788, serving as its vice president.²⁴⁵ He wrote his thoughts on a federal bill of rights in a prepared speech,²⁴⁶ though he did not actually deliver it because he was the acting presiding officer and sought to remain neutral on disputed issues.²⁴⁷ His speech embraced the usual federalist rationale that a bill of rights was not necessary because the new federal government had only enumerated pow-

²³⁸ See *ibid* 255, 264; *accord Press-Mass.* 132.

²³⁹ John Adams to Edmund Genet (29 Feb.1780), *Adams Papers* 8:378, 379; 'Report of a Constitution,' *ibid* 8:236; 'Editorial Note,' *ibid* 8:230-31.

²⁴⁰ John Adams to Elbridge Gerry (4 Nov.1779), *ibid* 8:276; 'Editorial Note,' *ibid* 8:230-31.

²⁴¹ *Journal of Convention-Mass.* 35.

²⁴² *Ibid* 41; see Caleb Strong to Nn. (31 May 1819), William V Wells, *Life and Public Services of Samuel Adams* (Little, Brown, Boston 1865) 3:88 ('almost unanimous vote'). Adams' protection for speech was deleted by the three, without explanation or debate. *Press-Mass.* 134.

²⁴³ Declaration of Rights art.xvi, *ibid* 226; *Federal-State Constitutions* 3:1892; cf. Adams draft art.xvii, *Adams Papers* 8:240.

²⁴⁴ He was aligned with Adams, and one of 'the principal members of the convention.' Caleb Strong to Nn. (31 May 1819), William V Wells, *The Life and Public Services of Samuel Adams* (Little, Brown, Boston 1865) 3:84n.

²⁴⁵ *Elliot's Debates* 2:2. He voted for ratification. *DHRC* 6:1466,1483. See Charles Warren, 'Elbridge Gerry. . . and the Ratification of the Federal Constitution in Massachusetts' (1932) 64 *Proceedings of Massachusetts Historical Society* 143.

²⁴⁶ William O'Brien, 'Justice Cushing's Undelivered Speech on the Federal Constitution' (1958) 15 *William and Mary Quarterly* 74, 80; *ibid* 77; *DHRC* 6:1428 (ca 4 Feb.1788).

²⁴⁷ *Ibid*, Convention to William Cushing (7 Feb.1788), *Cushing Papers*.

ers and not unlimited powers that could touch upon the rights at issue.²⁴⁸ However, he added that he 'would not object to any' amendments amounting to a bill of rights.²⁴⁹ Cushing also sat on the 'Committee of Twenty-Five' to consider proposed amendments, and signed its report.²⁵⁰ Its 'recommendatory amendments,' like amendments from many of the states, addressed structural issues and other rights, though they did not include freedoms of press or speech.²⁵¹ In view of Cushing's 1789 letter, he clearly had no objection to such rights themselves, but only the general federalist objection to the superfluity of a federal bill of rights.

3 Freedoms of Speech and Press and Seditious Libel under the Federal Constitution

Cushing's approach to the state Declaration of Rights and to the First Amendment, once approved, should have been similar. Each provided a very broad protection of freedom of press, and each lacked any limiting language or any hint of embodying common law restrictions.

In 1794 Cushing continued to express an expansive view of freedoms of speech and press in his grand jury charge, despite the recent Whiskey Rebellion:

... In this enlightened ag[e], we may well suppose a free government best adapted to maintain liberty, security and general happiness. Such governments we now enjoy. As to religious liberty and the rights of conscience, it is difficult to say how they could be enjoyed in greater latitude. The same, I presume, may be said of civil rights[.] Particularly, due allowance is made for liberty of speech, liberty of the press; and a decent freedom in examining and canvassing all public measures; with the reasonable restrictions of not injuring private characters, or not actually attempting to stir up sedition, or forcible opposition to government.²⁵²

He reiterated the freedom to examine public measures, evidently defining 'decent' as truthfully, and limited his only reference to sedition to 'actually attempting to stir up sedition.' He further implied a narrow reach for 'sedition' by pairing it with 'forcible opposition to government.'

²⁴⁸ *Ibid* 82-83; accord Landholder [Oliver Ellsworth], 'Landholder VI' (10 Dec.1787), *DHRC* 3:478, 489; *Elliot's Debates* 4:167 (Iredell); James Wilson, 'State House Yard Speech' (6 Oct.1787), *DHRC* 13:339, 340; James Madison to Edmund Randolph (10 Apr.1788), *Madison Papers* 11:18, 19; James Madison to Thomas Jefferson (10 Aug.1788), *ibid* 11:226, 226.

²⁴⁹ *Ibid* 90-91. He wrote, then deleted, that 'a number of those [amendments] proposed by your Excellency are proper.' *Ibid* 91 n49.

²⁵⁰ *DHRC* 6:1412, 1414, 1415 n9 (4 Feb.1788).

²⁵¹ *Ibid* 16:64, 6:1415 n9.

²⁵² William Cushing's Charge (U.S.Cir.Ct.R.I. 7 Nov.1794), *DHSC* 2:491, 492.

The grand jury charge of 1794 also praised the goals of the American Revolution and 'the rights of man,' a topic raising Federalist suspicions though bringing Republican cheers:

The great end of government, you know, is peace and protection; peace with nations, protection against foreign force:--peace and order within; protection of individuals, of all classes of men, whether poor or rich, in the undisturbed enjoyment of their just rights, and which are comprehended under a few, but important words--*security of person and property*, or, if you please, *rights of man*. Hence government involves in it a sacred regard to the principles of justice, and to all moral obligations.

Where people are not permitted to enjoy these blessings, *security of person and property*, unmolested, there is tyranny, whether it arises from monarchy, aristocracy, or a mob. Where all men are equally and promptly protected in the free exercise of these rights, there is liberty and equality;--liberty to do whatever just laws made by a free representative allow; equality, that is, as to right of protection respecting the great objects of life, liberty and property, when not forfeited to the state by criminal conduct; respecting property ²⁵³

Though he summarized the 'great objects' as 'life, liberty and property,' Cushing's passion appears to have been the rights of property, judging by his initial summary of the rights of man as 'security of person and property,' and his extended discussion of property after the quoted language.²⁵⁴ Unlike 1789, he did not describe the rights of 'life, liberty and property' in the terminology of inalienable rights or natural law, but in terms of grants of rights, defining 'liberty' as being able 'to do whatever just laws made by a free representative allow.'

Four years later, Cushing restated his understanding of freedom of press and seditious libel, in response to some newspapers' objection to the Sedition Act, in his grand jury charge for circuit courts in the latter half of 1798.²⁵⁵ As addressed in Chapter 6, much of what Cushing gave in 1789, Cushing took away in 1798, by strongly implying that Republican expression fell in the category of 'scandalous and malicious falsehoods.' He changed from a comparatively unlimited reading of the expansive constitutional protection for the press to an almost limitless reading of an unstated seditious libel limit on that freedom.

²⁵³ *Ibid* 2:491-92.

²⁵⁴ *Ibid* 2:492.

²⁵⁵ William Cushing's Charge (U.S.Cir.Ct.Va. 23 Nov.1798), *DHSC* 3:305, 314.

4 Alarm about Shays' Rebellion and Seditious Libel

Cushing, badly shaken by Shays' Rebellion,²⁵⁶ had reacted by enlarging the reach of seditious libel, and his 1798 retrogression may have been a similar response, as he was alarmed by foreign and domestic dangers in the Quasi-War. In Shays' Rebellion, rebels sought to prohibit the enforcement and collection of debts in Massachusetts, in 1786 during a difficult economic period,²⁵⁷ and their focus became preventing the courts from meeting and operating. Cushing, the state's chief justice, encountered the rebels as the justices traveled around their circuit in August through November of 1786. The supreme judicial court was prevented by insurgents from sitting at Northampton in August, as they had taken over the courthouse; it was barred by bayonets from entering the courthouse at Worcester, though courageously the 'chief justice remonstrated with the rioters'; it met in Springfield only because troops took the courthouse before the insurrectionists arrived; it could not meet in Berkshire because insurrectionists were marching through town;²⁵⁸ it only sat in Taunton and Cambridge because the militia supported the court with superior numbers.²⁵⁹ Not backing down, Cushing gave a grand jury charge at Salem in November that warned that it was high treason 'to stop the courts of law,' and referred to the insurgents at Worcester who 'thrust bayonets at the breast of judges. . . --courts of justice stopped with force of arms.'²⁶⁰ The rebellion was widely viewed as a crisis of government 'bordering on a civil war,'²⁶¹ which was why it was widely cited as reason for a new federal

²⁵⁶ The earliest contemporary history was George R. Minot, *History of the Insurrection in Massachusetts in the Year MDCCLXXXVI* (Isaiah Thomas, Worcester 1788); accord Leonard L. Richards, *Shays' Rebellion* (UPP, Philadelphia 2002); David P. Szatmary, *Shays' Rebellion* (UMP, Amherst 1980).

²⁵⁷ E.g., 'Address' (Dec.1786), *ibid* 83; Isaac Backus, *An Address to the Inhabitants of New-England, Concerning the Present Bloody Controversy Therein* (S. Hall, Boston 1787); Christopher Babbitt, 'To His Excellency John Hancock, Esquire, Governor' (np, Boston 1787).

²⁵⁸ George R. Minot, *History of the Insurrection in Massachusetts in the Year MDCCLXXXVI* (Isaiah Thomas, Worcester 1788) 38-39, 39-40, 47-49; accord Elbridge Gerry to Rufus King (25 Dec.1786), *King Correspondence* 1:198 (Worcester).

²⁵⁹ *Ibid* 59-60; James Warren to John Adams (22 Oct.1786), Worthington C. Ford (ed), *Warren-Adams Letters* (MHS, Boston 1925) 2:278, 280 (Taunton); Elbridge Gerry to Rufus King (29 Nov.1786), *King Correspondence* 1:197 (Cambridge).

²⁶⁰ 'Substance of the Charge Delivered at Salem,' *American Herald* (Boston 27 Nov.1786) 4.

²⁶¹ James Warren to John Adams (22 Oct.1786), Worthington C. Ford (ed), *Warren-Adams Letters* (MHS, Boston 1925) 2:278.

constitution.

The rebellion collapsed in the face of superior numbers of Massachusetts troops and militia, and of indemnity offered by Gov. James Bowdoin on a case-by-case basis determined by a commission and with disqualifications from some activities.²⁶²

Trying the leading rebels dominated the supreme judicial court's circuits in 1787, while the legislature and governor granted pardons without restrictions for lower ranking participants.²⁶³ Cushing sentenced at least fourteen rebels to be hanged for high treason, and ten to jail for other offenses, beginning in March of that year.²⁶⁴ Ten of those received reprieves from the death penalty from the commission, followed by the governor's pardons, and the other four were later pardoned as well.²⁶⁵ Cushing was also described as sentencing to jail 'large numbers convicted of seditious words and practices' and other offenses, if a contemporaneous account is accurate.²⁶⁶ Though his surviving grand jury charge did not use the word 'sedition,' it did condemn 'bold inflammatory misrepresentations, and falsehoods,' along with treason by force of arms.²⁶⁷ During the second circuit, Cushing sentenced at least four more insurrectionists to be hanged for treason, and others to jail for other acts, in October 1787, and that time some of them were hanged.²⁶⁸ By 1798 Federalist alarm was even greater, and Cushing's partial and tepid change of position on freedom of press and seditious libel may have been part of it.

D Justice James Wilson.

James Wilson was one of America's political theorists who blazed original paths, one of only

²⁶² James Bowdoin, 'Commonwealth of Massachusetts, By His Excellency James Bowdoin' (Adams & Nourse, Boston 12 Jan. 1787); 'Commonwealth of Massachusetts, In the Year of Our Lord, One Thousand Seven Hundred and Eighty-Seven, An Act' (Adams & Nourse, Boston 16 Feb. 1787); accord Rufus King to John Adams (10 Feb. 1787), *King Correspondence* 1:213.

²⁶³ John Hancock, 'Commonwealth of Massachusetts, By His Excellency John Hancock' (Adams & Nourse, Boston 15 June 1787); accord James Sullivan to Rufus King (14 June 1787), *King Correspondence* 1:222, 223.

²⁶⁴ George R. Minot, *History of the Insurrection in Massachusetts in the Year MDCCCLXXXVI* (Isaiah Thomas, Worcester 1788) 171-73.

²⁶⁵ *Ibid* 172, 187, 188.

²⁶⁶ *Ibid* 172.

²⁶⁷ 'Charge to the Middlesex Grand-Jury' *American Herald* (Boston 28 May 1787) 2.

²⁶⁸ Leonard L. Richards, *Shays' Rebellion* (UPP, Philadelphia 2002) 41.

six signers of both the Declaration of Independence and the Constitution, a leader at the Constitutional Convention, and America's third law professor.²⁶⁹ He also stood out among the framers of the Constitution as the most thoroughgoing advocate of democracy.²⁷⁰

Wilson's views of natural law and political theory have been widely studied, more than any other justice of the first decade, but his views of speech and press have never been the subject of study. The little that has been written generally confuses his earlier views with his later views. Wilson's fully-evolved views appeared in his 1790-1791 law lectures.

1 The Law Lectures and the Meaning of the First Amendment Freedoms of Speech and Press

Wilson's law lectures began a year after congressional approval of the Bill of Rights in September 1789, during the ratification process which ended December 1791.²⁷¹ They were viewed as sufficiently important that the audience for the first lecture included President Washington, Vice President Adams, and a number of members of Congress.²⁷²

Wilson described a very broad First Amendment in the law lectures, without the qualifications that had appeared in his 1787 speeches (which are summarized below):

The citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures.²⁷³

²⁶⁹ See generally Mark D Hall, *The Political and Legal Philosophy of James Wilson, 1742-1798* (UMoP, Columbia 1997) (best biography); Mark D Hall, 'The Political and Legal Philosophy of James Wilson (1742-1798)' (PhD thesis, University of Virginia 1993); Charles Page Smith, *James Wilson: Founding Father, 1742-1798* (UNCP, Chapel Hill 1956); Charles Page Smith, 'James Wilson, 1787-1798' (PhD thesis, Harvard University 1951); Julius Goebel, Book Review of 'James Wilson, Founding Father' (1957) 105 *University of Pennsylvania Law Review* 1027, 1030, 1032 (Smith biography incompetent, 'meagerly footnoted,' 'smothered with so much undocumented, indeed palpably fanciful detail').

²⁷⁰ *Farrand's Records* 1:52 (direct election of senators as well as representatives), 1:68 (direct election of president), 1:127 (people's ratification of Constitution), 1:179 (proportional representation of people in each state); see Ralph A Rossum, 'The Popular Pyramid and the Federal Republic: The Political Thought of James Wilson' (PhD thesis, University of Chicago 1973).

²⁷¹ Tobias Lear to George Washington (24 Oct.1790), *Washington Papers-Presidential* 6:573, 575 (beginning December 1790). Some were actually delivered, including at least the first 37 lectures (some of Justice Iredell's notes remain). 'Mr. Wilson's Lectures,' *Iredell-Johnson Collection* (Box 26, item 4). Others were written but not taught. The final sections were never written. See James Wilson, 'Lectures on Law,' *Wilson Works* 1:427, 461 (listing additional topics not in published editions or manuscripts).

²⁷² *Wilson Works* 1:403; Stephen Decatur, *Private Affairs of George Washington, from the Records and Accounts of Tobias Lear, Esquire, His Secretary* (Houghton Mifflin, Boston 1933) 185; see Edward P Cheyney, *History of the University of Pennsylvania, 1740-1940* (UPP, Philadelphia 1940) 159.

²⁷³ *Ibid* 2:1046; see *ibid* 1:172, 206-08, 2:952.

He gave no limitation but 'decency and truth.' Shortly before in the lectures, he observed that patriots 'disseminate knowledge'; depots 'extinguish it.'²⁷⁴

The critical question is what he meant by 'decency and truth'—whether he referred to the common law of seditious libel or to libel and slander of character. Wilson's reference was clearly to defamation of private character, as two considerations show. First, he addressed the next lecture to 'the natural rights of individuals,'²⁷⁵ where he discussed character as one of four natural rights: 'a natural right to his property, to his character, to liberty, and to safety' (life).²⁷⁶ That natural right to character allowed opinion, though '[o]pinions, upon this as upon every other subject, ought to be founded in truth,' so that justice 'requires, concerning characters, accuracy and impartiality of opinion.'²⁷⁷ This filled in Wilson's meaning of 'decency and truth.' He made that clear three pages later, when he stated that '[t]he subject of reputation will again come under your view, when I treat concerning prosecutions for libels and actions of slander: both of which suppose an unjustifiable aggression of character.'²⁷⁸ With that, Wilson proceeded to discuss 'liberty and life,' the 'gifts of heaven.'²⁷⁹

Further, just four lectures later he addressed libel law and rejected English common law on libel of government as an 'unwarranted attempt made in the star chamber. . . to wrest the law of libels to the purpose of ministers,' warning that 'the reasonings on this crime are inaccurate.'²⁸⁰ By inaccurate reasoning, he particularly meant Blackstone, whose *Commentaries* stated that seditious libel was a crime, and who Wilson reprehended on virtually the entire English law of libel. Thus, Wilson disagreed with Blackstone on whether libel of ministers is

²⁷⁴ *Ibid* 2:907.

²⁷⁵ *Ibid* 2:1053.

²⁷⁶ *Ibid* 2:1062.

²⁷⁷ *Ibid* 2:1062,1063.

²⁷⁸ *Ibid* 2:1066.

²⁷⁹ *Ibid*. That discussion of liberty, that 'man is naturally free,' was in the prior chapter at 2:1043-46, and in the introductory lecture, 1:432-35,

²⁸⁰ *Ibid* 2:1134-35.

any different from libel of individuals, whether libel is a breach of the peace instead of an injury to reputation, whether there is any injury if a statement is true (whether truth is a defense), whether there must be proof of actual injury instead of an assumed tendency to breach the peace, and whether the determination if a libel is 'a crime against the right of reputation' must be by jury rather than judge.²⁸¹ In effect, Wilson denied the crime of seditious libel, and claimed to go back to earlier English law,²⁸² treating the only crime or civil offense as a false statement injuring reputation. Later lectures dealt with treason, and while he agreed that government may prosecute actual treason,²⁸³ he defined that to require warlike acts and to require far more than just words.²⁸⁴

Wilson omitted a crime of seditious libel in his lengthy sections on criminal law,²⁸⁵ just as he omitted the concept from his section on libel actions and from his description of freedoms of speech and press. His omission was intentional, as evident when comparison is made to Blackstone and his framing of discussion of freedom of press around seditious libel.

Wilson was predisposed to disagree with Blackstone on seditious libel, because his law lectures regularly departed from Blackstone on issues of individual rights and government, just as his longest Supreme Court decision did.²⁸⁶ In those lectures, Wilson disagreed that individuals surrender liberty to government for it to secure civil rights, that liberty derives from government instead of from natural law, that Parliament may 'do everything that is not naturally impossible,' and that people must obey government when it violates their rights.²⁸⁷ Wilson cautioned that Blackstone defined law on 'dangerous' principles, that he misstated the 'first principles of government' and was not 'a zealous friend of republicanism,' that on public

²⁸¹ *Ibid* 2:1134-36.

²⁸² *Ibid* 2:1133.

²⁸³ *Ibid* 2:1152, 1096.

²⁸⁴ *Ibid* 2:1153-54.

²⁸⁵ *Ibid* 2:1085-1204.

²⁸⁶ He criticized Blackstone for saying 'the individuals of England. . . surrendered the supreme power to the state of government, and reserved nothing to themselves' *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457-58 (1793). 'As described by him. . . , the British is a despotic government.' *Ibid* at 462.

²⁸⁷ *Wilson Works* 2:1054, 1056-57; 1:160-61, 151; *accord* 1:190-91; *DHRC* 2:348.

law Blackstone must be 'consulted with a cautious prudence,' and that on common law Blackstone was simply wrong that none applied to America.²⁸⁸ While Wilson frequently cited Blackstone, he did so for summaries of complex doctrines, not on individual liberties and citizen-state relations. He rejected Blackstone on seditious libel--and on freedom of press.

2 The Misunderstanding in Scholarly Writing of Wilson's Views of Freedoms of Speech and Press

Two things are remarkable about scholarly writing on Wilson and seditious libel. First, references to his views on seditious libel almost always cite his pre-First Amendment statements, while his post-First Amendment statements are generally unmentioned. For example, Jenkins wrote that 'Wilson apparently had no reservations about the constitutionality of federal seditious libel prosecutions,' and that his 'statements to the Pennsylvania convention [in 1787] are among the clearest expressions of a possible intent of the framers to permit federal seditious libel prosecutions.'²⁸⁹ Second, the few references to Wilson's views on freedoms of press and speech utterly misinterpret his post-First Amendment understanding, pinning on him a 'Blackstonian view,'²⁹⁰ with two exceptions twenty-five years ago.²⁹¹

More broadly, scholarly writing on the initial justices has widely cited the statements of some justices about freedoms of speech and press during the political crisis of the late 1790s, while ignoring their statements closer to the time of the First Amendment, as discussed in Chapters 6-7. Thus, Cushing's support for the Sedition Act is widely cited, but his analysis in 1789 about the state's revolutionary constitution overriding the common law of seditious libel is generally overlooked. Jay's, Rutledge's, and Johnson's, as well as Wilson's, support of

²⁸⁸ *Ibid* 1:473, 443, 444; 2:1049.

²⁸⁹ David Jenkins, 'The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence' (2001) 45 *American Journal of Legal History* 154, 168-69; e.g., *Origins* 504-05 n285; *Levy-Liberty* 29 & n30; Leonard W Levy, *Legacy of Suppression* (BP-HUP, Cambridge 1960) 201; and the otherwise excellent *Hamburger* 746 n261.

²⁹⁰ *Open Press* 111, 113; e.g., David Jenkins at 168-69; *Hamburger* 746 n261; Andrew Lenner, 'A Tale of Two Constitutions: Nationalism in the Federalist Era' (1996) 40 *American Journal of Legal History* 72, 77; Leonard W Levy, 'The *Legacy* Reexamined' (1985) 37 *Stanford Law Review* 767, 787.

²⁹¹ William T Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression' (1984) 84 *Columbia Law Review* 91, 103, 113 n122, 125 n180; Norman L Rosenberg, *Protecting the Best Man: an Interpretive History of the Law of Libel* (UNCP, Chapel Hill 1986) 66.

freedom of press in the constitutional period are overlooked.

3 Wilson's 1787 Speeches on Freedom of Press, and the Redundancy of a Bill of Rights

Wilson addressed freedom of press in speeches in 1787, but those were not his final word on the issue. They were superseded by his law lectures of 1790-91, as well as his draft of the Pennsylvania Constitution in 1789-90. The speeches only reflect his evolving understanding before two Pennsylvania events occurred and before the First Amendment was adopted.

After the federal Constitutional Convention in 1787, Wilson gave the first public speech by a delegate in support of ratification,²⁹² a speech that was widely reprinted in newspapers and pamphlets²⁹³ and equally widely read.²⁹⁴ That 'State House Yard' speech in October 1787 discussed freedom of the press in the context of the usual pro-constitutional argument why a bill of rights was unnecessary, two years before the Bill of Rights was drafted and four years before it was ratified. Wilson asserted that 'the leading d[i]scrimination between the state constitutions, and the constitution of the United States,' was that state constitutions 'invested their representatives with every right and authority which they did not in explicit terms reserve,' while the federal Constitution gave powers only 'from the positive grant.' Thus, 'in the former case every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given, is reserved.'²⁹⁵

That was Wilson's basis for stating that a bill of rights was unnecessary, and that the 'sacred palladium of national freedom' of the press was fully protected from the federal government:

This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd to have stipulated with a foederal body of our own

²⁹² James Wilson, 'State House Yard Speech' (6 Oct.1787), *DHRC* 13:339, 340; see *id* 13:337; *Wilson Works* 1:171.

²⁹³ *DHRC* 13:337; James Iredell, 'Answers to Mr. Mason's Objections to the New Constitution' (Feb.1788), *DHRC* 16:163, 168. Washington was sufficiently impressed that he asked to have Wilson's speech published, and quoted it. George Washington to David Stuart (17 Oct.1787), *Washington Papers-Confederation* 5:379; George Washington to Lafayette (28 Apr.1788), *ibid* 6:242, 244.

²⁹⁴ E.g., James Madison to Thomas Jefferson (17 Oct.1788), *Madison Papers* 11:295, 297; Thomas Jefferson to James Madison (20 Dec.1787), *ibid* 10:335, 336.

²⁹⁵ *DHRC* 13:339; *Wilson Works* 1:171-72.

creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence. For instance, the liberty of the press, which has been a copious source of declamation and opposition, what controul can proceed from the foederal government to shackle or destroy that sacred palladium of national freedom? If indeed, a power similar to that which has been granted for the regulation of commerce; had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation. . . . But this could not be an object with the convention, for it must naturally depend upon a future compact, to which the citizens immediately interested will, and ought to be parties; and there is no reason to suspect that so popular a privilege will in that case be neglected. In truth then, the proposed system possesses no influence whatever upon the press, and it would have been merely nugatory to have introduced a formal declaration upon the subject--nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent.²⁹⁶

His reference to what 'could not be an object with the convention' referred to a power to regulate literary publications and a needed protection from that power for liberty of the press. Thus, the federal government was simply not empowered to legislate in regard to the press--'the proposed system possesses no influence whatever upon the press.' This speech did not affirm any state power to forbid seditious libel, but the next did, though not a *federal* power.

That 'sacred palladium' of freedom of the press, though free from federal control, was not safe from states retaining the common law of seditious libel, as Wilson said two months later, at least in his views as of 1787.

In the Pennsylvania ratification convention in late 1787,²⁹⁷ where Wilson was the leader of forces favoring the federal Constitution,²⁹⁸ he gave another speech which also addressed freedom of the press. He reiterated that the *federal* Constitution gave 'no power whatsoever concerning [the press],' but said some *states'* provisions for freedom of press were limited by common law restrictions on libel including seditious libel:

... on the subject of the press, I beg leave to make an observation. It is very true, sir, that this Constitution says nothing with regard to that subject, nor was it neces-

²⁹⁶ *Ibid* 13:340; *Wilson Works* 1:172.

²⁹⁷ It met 20 Nov. 1789 - 11 Dec. 1789, *Elliot's Debates* 2:415, simultaneously with the Pennsylvania convention to amend the state constitution, which attained a quorum on 2 Nov. 1789. *Wilson Writings* 1:593.

²⁹⁸ John S. Littell (ed), *Memoirs of His Own Time*, by Alexander Graydon (rev ed Lindsay & Blakiston, Philadelphia 1846) 344, 352; see *DHRC* 13:337.

sary; because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.

... It has been asked, If a law should be made to punish libels, and the judges should proceed under that law, what chance would the printer have of an acquittal? And it has been said he would drop into a den of devouring monsters!

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.²⁹⁹

Wilson was not addressing the meaning of the First Amendment, because the Bill of Rights had not been drafted and would not be until mid-1789. Nor was he addressing federal government powers when he discussed libels, because he had just said that 'no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.'³⁰⁰ That is made clear by his very next prepared speech, three days later, when he said he would not further address freedom of press 'until it is shown that Congress have any power whatsoever to interfere with it, by licensing it, or declaring what shall be a libel.'³⁰¹ Yet this is the passage generally cited as Wilson's view of the meaning of the First Amendment and as his lifelong acceptance of the Blackstone-Mansfield approach.

This 1787 viewpoint about state libel laws was indeed different from the one Wilson later expressed in his law lectures in 1790-91--and in his draft Pennsylvania constitution in 1789. The 1787 viewpoint contradicts the later viewpoints. Wilson's views simply changed after his second 1787 speech, both as part of his continuing evolution, and in response to intervening events--Congress' approval of the First Amendment in September 1789, and its ratification through December 1791, his further thought in his Pennsylvania provision for the

²⁹⁹ *Elliot's Debates* 2:443, 449-50 (1 Dec.1787); *Wilson Works* 1:201, 206-07.

³⁰⁰ And in the next paragraph, he asked 'even if it [the federal government had the power to make laws on this subject,' whether the person would be in a worse position, with the federal right of jury trial, 'than he is at present under the state government?' *Ibid* 2:450; *Wilson Works* 1:207. He obviously spoke hypothetically. *Origins* 504; *Palmer* 291 n152.

³⁰¹ *DHRC* 2:482 (4 Dec.1787), which is punctuated differently than *Elliot's Debates* 2:453, 468; *Wilson Works* 1:210, 225-26. He may have been describing current practice instead of his own views. *Printers* 69; Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Bobbs-Merrill, Indianapolis 1965) 229.

press in November 1789, and a landmark Pennsylvania case and an influential essay. Wilson's view of freedoms of speech and press in his law lectures changed and superseded his earlier view in 1787, just as his vote and his signature on the Declaration of Independence superseded his earlier reticence about independence.

4 Wilson's 1789 Pennsylvania Declaration of Rights and Freedoms of Press and Speech

That evolution after the 1787 speeches can be seen in Wilson's 1789 draft of the Pennsylvania Declaration of Rights, where his position diverged greatly from the second 1787 speech and was well on the way to his 1790-1791 law lectures.

Wilson is generally credited with drafting the Pennsylvania Constitution of 1790,³⁰² which replaced the Constitution of 1776 and included the new Pennsylvania Declaration of Rights.³⁰³ He led the delegates seeking complete amendment,³⁰⁴ and worked out a ceasefire with the leader of opposing delegates,³⁰⁵ so that Wilson could begin the convention with three successful motions to alter the legislative, executive, and judicial sections of the 1776 constitution.³⁰⁶ He dominated the convention, making and seconding more motions than anyone, and being listed first in all vote tallies.³⁰⁷ He chaired the resulting committee 'to revise the instrument.'³⁰⁸ The revision 'was reported out' by him.³⁰⁹

The protection for freedoms of press and speech in his draft was expansive:

³⁰² *Justices* 1:90; *Palmier* 296; *DAB* 20:326, 329; see Robert G McCloskey (ed), 'Introduction,' *Works of James Wilson* (HUP, Cambridge 1967) 1:5 ('his personal handiwork'); *Minutes-Pa.* 9.

³⁰³ Pa.Const. art.9, sec.7, *Federal-State Constitutions* 5:3092, 3099-3101.

³⁰⁴ Howard M Jenkins, *Pennsylvania Colonial and Federal* (Pennsylvania Historical Publishing, Philadelphia 1903-04) 247, 249; see Burton A Konkle, *George Bryan and the Constitution of Pennsylvania 1731-1791* (William J Campbell, Philadelphia 1922) 353. Wilson's first speech noted that he was 'the only member of [the Constitutional Convention] who have the honour to be also a member of this.' 'Remarks of James Wilson in the Pennsylvania Convention' (26 Nov.1787), *Wilson Works* 1:178, 178.

³⁰⁵ William Findley to William Plummer (27 Feb.1812), *Wilson Writings* 2:387-88; see Howard M Jenkins, at 247; Robert L Brunhouse, 'The Counter-Revolution in Pennsylvania, 1776-1790' (PhD thesis, University of Pennsylvania 1942) 225.

³⁰⁶ *Minutes-Pa.* 4-5, 6.

³⁰⁷ E.g., *ibid* 5, 7, 10, 11, 13, 14, 17, 19, 22, 24, except of course when he was away on Supreme Court duties. His speeches are collected in *Wilson Works* 1:178-284

³⁰⁸ *Wilson Writings* 1:612, 617, 601.

³⁰⁹ *Ibid* 1:13.

[Sec.7.] The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall ever be made restraining the right thereof. The free communication of thoughts and opinions is one of the *most* invaluable rights of man, and every citizen may freely speak, write and print, being responsible for the abuse of that liberty.³¹⁰

That protection was worded to prohibit not just prior restraints, which Wilson knew Blackstone described as the extent of freedom of press under English law,³¹¹ but subsequent restraints as well. The provision secured freedom to discuss the subjects that suffered most prosecution (criticism of 'the legislature or any branch of government'), and then repeated the rights to 'speak, write and print' on all subjects as stated in the 1776 constitution.³¹² The draft included a boundary ('abuse of that liberty'), but did not equate that boundary with seditious libel; in light of Wilson's law lectures a year later, the boundary was private defamation of individuals' character.³¹³ Benjamin Franklin so understood it.³¹⁴

That draft was amended by other delegates to add language that did presuppose a cause of action for seditious libel and to restrict it by a truth defense and a broad jury right:

In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.³¹⁵

This was not a casual amendment; 'the regulation of the press was the ground of most acrimony in the convention' except for the debate on the second legislative chamber.³¹⁶ However, Wilson did not sponsor or support the amendment, and did not have the chance to op-

³¹⁰ *Minutes-Pa.* 85.

³¹¹ *Elliot's Debates* 2:449 (1 Dec.1787); *Blackstone's Commentaries* 4:151.

³¹² Pa.Declaration of Rights art.12, *Federal-State Constitutions* 3081, 3083, which read: "XII. That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."

³¹³ *Printers* 154-55.

³¹⁴ Benjamin Franklin, 'An Account of the Supreme Court of Judicature in Pennsylvania, Viz. the Court of the Press' (12 Sept.1789), *Franklin Writings* 10:36, 38.

³¹⁵ *Minutes-Pa.* 86 (3 Feb.1790), 91-92 (5 Feb.1790), 93. Delegate statements in debate were not recorded. Delegates also deleted the word 'most' and added the words 'on any subject' to the original draft. *Ibid* 86.

³¹⁶ John S Littell (ed), *Memoirs of His Own Time, by Alexander Graydon* (rev ed Lindsay & Blakiston, Philadelphia 1846) 349.

pose it, because he was serving that week in the first session of the U.S. Supreme Court in New York City,³¹⁷ as the delegates in Philadelphia debated and adopted the amendment and the full constitution and adjourned,³¹⁸ all before his return. This amendment was the most controversial one in the article on rights, which caused it to be postponed for further discussion and alternative proposals, and was the last provision approved before the full constitution was adopted.³¹⁹ The convention reassembled in August 1790, with Wilson present, and the press provision was only materially modified by two changes, which Wilson then supported: reaffirming the *Zenger* modifications, and expanding cases in which they applied, very broadly, to 'where the matter published is proper for public information.'³²⁰

The amendment probably did not reflect a groundswell of support by the delegates to create a qualification of freedoms of press and speech by the common law of seditious libel, but was instead a response to the Pennsylvania Supreme Court's adoption of that qualification in 1788. That response was to add the *Zenger* protections, allowing truth as a defense³²¹ and allowing jury determination of law as well as fact.³²² Whatever the other delegates believed, Wilson had not proposed in his draft either to embrace the state court's adoption of English common law of seditious libel, or to modify it with protections, evidently thinking along the lines of his law lectures the following winter and not criminalizing seditious libel law at all. Wilson stated the reason why he accepted the amendment, a year later in his law lectures, to

³¹⁷ *DHSC* 1:171, 175, 176; *accord Minutes-Pa.* 79-80, 82-83, 84-85, 88, 90-91, 92-93.

³¹⁸ *Minutes-Pa.* 85-86, 91-93.

³¹⁹ *Ibid* 86, 92, 93.

³²⁰ *Minutes-Pa. (2nd)* 178, 180, 182-83, 219 (24 Aug. 1790).

³²¹ Howard M Jenkins, *Pennsylvania Colonial and Federal* (Pennsylvania Historical Publishing, Philadelphia 1903-04) 2:249.

³²² The final provision read:

Sec.7. That the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

Pa.Const. art.9, sec.7, Federal-State Constitutions 5:3092, 3100; *Minutes-Pa.* 100; *Minutes-Pa. (2nd)* 219.

be because it protected the right of jury determination of all issues in prosecutions for defamation of character³²³--immediately after he rejected prosecutions for seditious libel (by attacking 'the foundation of the law on this subject,' *Case de Libellis Famosis*, as 'unwarranted' and wrongly reasoned, and rejecting its concept that 'a libel against a magistrate or other public person, is a greater offence than one against a private man'³²⁴), and shortly before he excluded seditious libel from his catalogue of appropriate crimes.³²⁵

Wilson had opposed the 1776 constitution,³²⁶ but not because of its broad protections for freedoms of speech, press, or religion,³²⁷ which he retained in different words. His opposition instead was based on three major factors, along with others: the adoption of the earlier constitution by the legislature rather than a specially elected convention,³²⁸ the dangerous concentration of power in a unicameral legislature,³²⁹ and the 'arbitrary and unreasonable oath'³³⁰ requiring voters, before casting their ballots for or against the new constitution, to swear or affirm that they would not 'do any act or thing prejudicial or injurious to the [new] constitution or government thereof, as established by the convention.'³³¹ Because the defenders of the 1776 constitution attacked Wilson and his 'republican' party as opposing its protec-

³²³ *Wilson Works* 2:1136.

³²⁴ *Ibid* 2:1134-35 & note k.

³²⁵ *Ibid* 2:1085-1204.

³²⁶ James Wilson, 'Objections to the Pennsylvania Constitution (1776): An Address by the Republican Society to the Citizens of Pennsylvania' (24 Mar.1779), *Wilson Writings* 3:76 (not in his *Works*); James Wilson to Jasper Yeates & John Montgomery (10 Aug.1776), 'Wilson, James Papers' (HC, Haverford); James Wilson to William Atlee & Jasper Yeates (13 Mar.1777), *ibid*. His continual opposition from 1776 to 1790 was courageous, because the 1776 constitution had been adopted unanimously with the support of Franklin. *The Proceedings Relative to Calling the Conventions of 1776 and 1790* (John S Wiestling, Harrisburg 1825) 54, 66.

³²⁷ *Federal-State Constitutions* 5:3081, 3082, 3083.

³²⁸ James Wilson to Horatio Gates (ca June 1776) (1912) 36 *Pennsylvania Magazine* 473, 474-75; James Wilson to Arthur St.Clair (3 July 1777), William Henry Smith (ed), *The St.Clair Papers: The Life and Public Services of Arthur St.Clair* (R. Clarke, Cincinnati 1882) 417, 418.

³²⁹ James Wilson to Jasper Yeates & John Montgomery (10 Aug.1776), 'Wilson, James Papers' (HC, Haverford); Burton A Konkle, *George Bryan and the Constitution of Pennsylvania 1731-1791* (William J Campbell, Philadelphia 1922) (quoting document written by Wilson).

³³⁰ Robert L Brunhouse, 'The Counter-Revolution in Pennsylvania, 1776-1790' (PhD thesis, University of Pennsylvania 1942) 28.

³³¹ *Journal of House-Pa.* 88 (26 Sept.1776); accord William Duane (ed), *Extracts from the Diary of Christopher Marshall* (J Munsell, Albany 1877) 98-99.

tions of liberty,³³² Wilson responded with his views on freedom and on that threat to speech.

The broadside Wilson and his allies had issued during the debate over the 1776 constitution affirmed full support for freedom of press, as well as for freedom of conscience.³³³

... we wish for no alterations to be made in the Constitution which shall affect the great and fundamental principles of a free government, such as, Liberty of Conscience--Trial by Juries--Freedom of the Press--Annual Elections--and the Division and Rotation of Offices.--But while we acknowledge these parts of the Constitution to be perfectly just, and highly agreeable to us, we think ourselves bound to declare, that it contains flaws which in a little while will render those inestimable blessings of no efficacy.³³⁴

Those flaws were identified as 'evils in our new frame of government,' such as 'the political inquisition, called the Counsel of Censors.'³³⁵ Wilson's affirmation of these liberties was sincere, since he did not diminish them in his 1789 draft or in the convention, when he had the votes to change them.

Wilson had imbibed a liberal view of freedom of press for over two decades, since he studied law under John Dickinson, who formulated the first clear statement of that freedom in an official governmental document, in his³³⁶ 'Address to the Inhabitants of Quebec.'³³⁷ There, Dickinson listed 'freedom of the press' as the last of five 'invaluable rights, that form a considerable part of our mild system of government.' 'These are the rights, without which a people cannot be free and happy;' '[t]hese are the rights, you are entitled to and ought at this moment' exercise but for the Crown 'striving, by force of arms, to ravish from us.'³³⁸ Wilson's law lectures were consistent with that.

5 Intervening Freedom of Press Events and the Pennsylvania Constitution of 1790

This interpretation is supported by two additional events involving the press, both occur-

³³² James Wilson, 'A Personal Explanation: An Address "To the Citizens of Pennsylvania",' *Wilson Writings* 1:114 (not in *Wilson Works*).

³³³ 'At a Meeting of a Number of Citizens of Philadelphia, at the Philosophical Society's Hall' (2 Nov.1776).

³³⁴ *Ibid* (original in capitals).

³³⁵ *Ibid* (original in capitals).

³³⁶ John Jay to Richard Henry Lee (12 Feb.1823), *Jay Correspondence* 4:468, 470-71; 'John Dickinson's Draft Letter to Quebec' (24-26 Oct.1774), *Letters of Delegates* 1:236, 239; *ibid* 1:243n (in Dickinson's handwriting).

³³⁷ JCC 1:117.

³³⁸ JCC 1:122-23.

ring after Wilson's speeches in 1787, and before his draft press clause for the Pennsylvania Constitution in 1789 and his law lectures on individual rights and libel actions in 1790-1791.

A highly publicized case in the Pennsylvania Supreme Court, *Respublica v. Oswald*,³³⁹ was tried and decided in 1788. It was a seditious libel and criminal contempt action brought by the state against Oswald, a newspaper editor, because of Oswald's printed statement that the justices were biased in a pending criminal libel suit against Oswald.³⁴⁰ The court followed the Blackstone-Mansfield approach that freedom of the press under the state constitution only meant freedom from prior restraint, not from subsequent punishment, and did not bar either the seditious libel prosecution by the state for publishing criticism of future 'judgments of the court. . . to bias [*sic*] and intimidate with respect to matters still in suspense,' or the criminal libel action by a teacher for 'input[ing] crimes to another.'³⁴¹ Criminal libel actions could 'enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame' for which there was no 'protection and impunity.'³⁴² Moreover, it was a criminal contempt (in the case, seditious libel) if a publication had 'the tendency. . . of prejudicing the public. . . and of corrupting the administration of justice,' a 'tendency' that could be determined by the court both as to fact and law without a jury and without any defense of truth. That is what the court immediately proceeded to do in finding Oswald guilty and sentencing him to a month in prison.³⁴³

In light of that decision, Wilson's subsequent statements make sense. Pennsylvania's freedom of press under the 1776 constitution had been deracinated by the *Oswald* decision, and Wilson's draft in late 1789 sought to restore a broad protection by his broad language protecting criticism of 'the official conduct of officers or men in a public capacity,' with only

³³⁹ 1 U.S. (1 Dall.) 319 (Pa.S.Ct. 1788) (later editions at 343).

³⁴⁰ *Ibid* 324.

³⁴¹ *Ibid* 325.

³⁴² *Ibid*.

³⁴³ *Ibid* 326, 329.

the qualification that individuals were 'responsible for the abuse of that liberty' (by defamation of character). With Wilson absent and not able to argue that his language overrode *Oswald* entirely, the convention added its amendment to override it partially with the Zenger ameliorations of truth and jury determination of fact and law. Meanwhile, the new First Amendment was approved by Congress in September 1789, and Wilson's summary in his law lectures in 1790-1791 described freedom of press even more expansively without any qualification except defamation of character, and described libel with specific disagreement toward Blackstone (whose approach was followed by *Oswald*) and with no provision for a crime of seditious libel.

A satire on the press was published by Benjamin Franklin, whose vocation had been as a printer and writer, just before Congress approved the First Amendment in September 1789. The satire was of the press as a court which, because it was unreachable under the broad protection of 'liberty of the press,' should be subject to 'a good drubbing' by a private citizen when it 'attacks your reputation.'³⁴⁴ Franklin stated that liberty of the press was so extensive that for checks against its 'abuse of power' 'there are none,' and he was 'at a loss to imagine any that could avoid being construed an infringement of the sacred liberty of the press.'³⁴⁵ His concern was that the press could calumniate and defame a person, 'tearing your private character to flitters,' which he clearly thought required an effective tort remedy against private libel.³⁴⁶ He did not identify as a check, or otherwise support, public prosecution for seditious libel,³⁴⁷ nor did he in an unpublished essay six years before.³⁴⁸ Just one year before, Franklin had encouraged a Philadelphia paper to print another satirical article to make the

³⁴⁴ Benjamin Franklin, 'An Account of the Supremest Court of Judicature in Pennsylvania, Viz. the Court of the Press' (12 Sept. 1789), *Franklin Writings* 10:36.

³⁴⁵ *Ibid* 39.

³⁴⁶ *Ibid* 38. Franklin similarly was 'concern'd in the pieces of personal abuse, so scandalously common in our newspapers.' Benjamin Franklin to Francis Hopkinson (24 Dec. 1782), *ibid* 8:647.

³⁴⁷ *Printers* 11, 152; *Freedom's Fetters* 137.

³⁴⁸ Where he said, similarly, that liberty of press was jeopardized by the 'abuse' of 'personal accusation, detraction, and calumny.' *DHRC* 16:218n.

point that 'nothing is more likely to endanger the liberty of the press, than the abuse of that liberty, by employing it in personal accusation, detraction, and calumny.'³⁴⁹ Wilson was likely aware of both, because they appeared in newspapers in their common hometown,³⁵⁰ and he was a friend and colleague of Franklin in Pennsylvania's delegations to the Continental Congresses and the Constitutional Convention and in various organizations.³⁵¹

These Franklin satires, and Wilson's own detraction in the press, illuminate his addition of character to the triad of rights, and his concern that speech and writing be nondefamatory.

6 Wilson's Other Remarks on Freedoms of Press and Speech

Wilson's other remarks on that freedom and speech, which have gone unnoticed, are consistent with his broad view of freedom of press as the First Amendment was ratified.

Wilson's opposition to the oath requirement of the 1776 state constitution was based on its restriction of dissent. While a biographer attributes that opposition to the oath preventing citizens from voting who opposed the new state constitution,³⁵² that biographer also concludes that Wilson wrote the 'Addison' essays calling for amendment of the constitution.³⁵³

Those essays emphasize the right of dissent as the central ground of objection:

I will take the liberty of asking a few plain questions concerning this oath--the most extraordinary, perhaps, that was ever heard of. The convention, it will be said, were elected, for the express purpose of framing a constitution; and consequently had authority to frame one. But does it follow from this, that the people did not reserve to themselves the power of approving or disapproving of the constitution, after it was framed? Does it follow that the people were bound by it, notwithstanding any subsequent dissent? . . . For if the people, by electing the Convention, did not part with the power of approving or dissenting from what the Convention did, *on what pretence* could the right of voting for representatives be taken away from those, who exercised that power in one way, while it was left open to those, who exercised the

³⁴⁹ 'Benjamin Franklin to the Editors of the Pennsylvania Gazette' (30 Mar.1788), *Franklin Writings* 9:639.

³⁵⁰ In the *Federal Gazette* (12 Sept.1789) and the *Pennsylvania Gazette* (Mar.1788), *Franklin Writings* 10:36, 9:639.

³⁵¹ They were fellow founding members of the Society for Political Enquiries, which met regularly in town. *Rules and Regulations of the Society for Political Enquiries, Established at Philadelphia, 9th February, 1787* (Robert Aitken, Philadelphia 1787) 5, 17. Additionally, Franklin was president and Wilson a vice president of the American Philosophical Society. 'From the American Philosophical Society' (7 Feb.1781), *Jefferson Papers* 4:544.

³⁵² Charles Page Smith, *James Wilson: Founding Father, 1742-1798* (UNCP, Chapel Hill 1956) 114.

³⁵³ *Ibid.*

same power in *another way*?³⁵⁴

A week before, he signed, and probably drafted, an address from 41 political leaders objecting that the majority of citizens 'have not had a fair opportunity of expressing their sentiments upon this very important point' of a new convention to amend the constitution, because of the oath.³⁵⁵

Wilson anticipated the modern concept of a right to know during the Constitutional Convention of 1787, when he objected to the last part of a proposal by Madison and Rutledge that the federal House and Senate should 'keep a journal of its proceeding, & shall publish the same from time to time except such part of the proceedings of the Senate . . . as may be judged by that house to require secrecy.'

Mr[.] Wilson thought the expunging of the clause would be very improper. The people have a right to know what their agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings. . . .³⁵⁶

He similarly advocated disclosure of the secret article of the Treaty of Paris.³⁵⁷

Wilson ended his speech in the Pennsylvania State House Yard in October 1787 by noting that everyone has an equal right to express opinions, a fact which necessitated compromise in the federal Constitution, though he like others would prefer some changes:

But, when I reflect how widely men differ in their opinions, and that every man (and the observation applies likewise to every state) has an equal pretension to assert his own [opinion], I am satisfied that any thing nearer to perfection could not have been accomplished. . . . I am bold to assert, that it is the best form of government which has ever been offered to the world.³⁵⁸

One reason for this freedom of speech was its inherence in and centrality to the Revolution and to republicanism. Local forums, provincial conventions, and the Continental Congress met '[t]hat the sentiments of every individual concerning that important object, his liberty,

³⁵⁴ Addison, 'For the Pennsylvania Journal' *Pennsylvania Journal and Weekly Advertiser* (Philadelphia 14 May 1777) 2.

³⁵⁵ 'An Address' *Pennsylvania Journal and Weekly Advertiser* (Philadelphia 21 May 1777) 2.

³⁵⁶ *Farrand's Records* 2:260; *Wilson Works* 1:144, except 'where public safety would not allow open.' 'Madison's Notes of Debates' (18 Feb. 1783), *Letters of Delegates* 19:702, 704.

³⁵⁷ 'Madison's Notes of Debates' (19 Mar. 1783, 24 Mar. 1783), *Letters of Delegates* 20:56, 61, 83, 84.

³⁵⁸ James Wilson, 'State House Yard Speech' (6 Oct. 1787), *DHRC* 13:339, 343; *Wilson Works* 1:171, 176.

might be known and regarded.³⁵⁹ Ratification conventions likewise 'produced a proportioned diversity of sentiment.'³⁶⁰

Wilson's law lectures based rights of opinion on 'the inherent and inalienable right of judging for themselves'--'a natural and an unquestionable right' to 'mental... freedom.'³⁶¹ He based freedom of conscience on a similar broad right, saying that government has the obligation 'to preserve the rights of conscience inviolate,' because the 'right of private judgment is one of the greatest advantages of mankind,' whose deprivation 'is insufferable.'³⁶²

Wilson's 1790 and 1791 view of these freedoms made almost unavoidable opposition to the Sedition Act, as discussed in Chapter 7.D.

E Justice John Blair

John Blair³⁶³ was one of the six justices in the first decade of the Supreme Court who attended the Constitutional Convention, and of the four who signed the Constitution.³⁶⁴

He addressed freedoms of press and speech, though the literature largely ignores his views.

1 His Grand Jury Charge of 1794 and Speech and Press

Blair's grand jury charge for 1794 came after the Neutrality Proclamation and the 'convulsions of some of the western counties of the state of Pennsylvania,'³⁶⁵ which became known as the Whiskey Rebellion. He stated that even if 'the law ought to be repealed,' that 'will not justify a forceable resistance,' and that there was no basis for 'a violent opposition to the Constitution.'³⁶⁶ Then he changed topics from violence to peaceful dissent, and acknowledged the right to petition for redress of grievances (the fifth clause of the First Amendment):

³⁵⁹ James Wilson, 'Speech Delivered in the Convention for the Province of Pennsylvania' (Jan.1775), *Wilson Works* 1:32, 36.

³⁶⁰ *DHRC* 2:351 (24 Nov.1787) (Pa. ratification convention).

³⁶¹ James Wilson, 'Law Lectures,' *Wilson Works* 2:952, 1131.

³⁶² *Ibid* 1:539.

³⁶³ No biography has been written of him except encyclopedia pages. See generally *OCSC* 77; *Justices* 1:109.

³⁶⁴ *JCC* 33:500.

³⁶⁵ John Blair's Charge (U.S.Cir.Ct.Del. 27 Oct.1794), *DHSC* 2:485, 485.

³⁶⁶ *DHSC* 2:486, 487; accord John Blair's Charge (U.S.Cir.Ct.Ga. 27 Apr.1795), *DHSC* 3:31, 33-34.

...[All] men have a right in a decent manner to lay open their grievances before the whole legislature, and expose the ground of their complaint. All these modes of redress... may be also used, where the evil complained of is an unconstitutional exercise of legislative authority, or an extension of the legislative powers beyond their prescribed limits. . . .³⁶⁷

He moved from there to freedom of speech, prefacing the discussion with mention of the national debate about France, and noting that pro-French 'sentiments themselves deserve no reproof.'³⁶⁸ He then stated his understanding of freedom of speech, and government's disability to require correct thinking:

Government . . . could have no pretensions to the character of free, if it should aim at a correction of the minds as well as the actions of the citizens; while men pay an external obedience to the laws, they have a right to think of them as they please, and even beyond this, to express their opinion decently, yet strongly, as a means of obtaining an alteration; but one step farther is culpable: actual disobedience, or prompting others to disobey, can never be justified; for the evil of such behavior must ever outweigh infinitely the evil--whatever it may be--of the law itself.³⁶⁹

First Amendment freedom was not limited to a 'right to think,' but included a right 'to express their opinion decently,' and Blair's decency caveat was not very limiting, because expression could be made 'strongly.' The dividing line between what the federal government may not touch, and may punish, was 'actual disobedience.' Blair's next paragraph acknowledged that expression is an 'unalienable right[],' and gave a paen to liberty that would have warmed Jeffersonian hearts:

Can chains be necessary to preserve order? If the sacred and unalienable rights of man must bend at the shrine of power and be sacrificed to protection, what will remain worth protecting? . . .³⁷⁰

Blair ended with recognition that the price of freedom is some excesses, in the context of speech:

And if some few excrescences, the natural price of freedom, must still remain unlopped, let us be consoled by the reflection, that the good order of government is substantially effected, and as far as is practicable without bearing its reigns [*sic*] so tight as to frustrate the most valuable object of the social compact. . . .³⁷¹

³⁶⁷ DHSC 2:487; accord DHSC 3:34.

³⁶⁸ DHSC 2:488; accord DHSC 3:34.

³⁶⁹ DHSC 2:489; accord DHSC 3:35-36.

³⁷⁰ *Ibid.*, accord DHSC 3:36.

³⁷¹ *Ibid.*, accord DHSC 3:36.

Freedom, including expressive freedom, was the 'most valuable object' of the social compact.

2 His Grand Jury Charge of 1795 and the Right To Express Dissent

Blair's grand jury charge for 1795 was given soon after the end of the Whiskey Rebellion and, while retaining most of the language from the prior year's charge, he added a sharp condemnation of insurrection:

... it will be salutary to keep in perpetual memory, that a scene of convulsive disorder, exhibited in some of the western counties in the state of Pennsylvania, threatening a calamity no less dreadful than the eversion of our happy government, stood forth lately a melancholy exception to such a pleasing state of things. To those who wish the general prosperity of our nation, it will afford a useful lesson, how dangerous it is to indulge too freely discontent with respect to the measures of government, to oppose with pertinacious petulance private to public opinion, and to urge the removal of grievances, imaginary or real, without the line of constitutional redress. And to those who though they have not undergone so diabolical a perversion as to feast on distress, and delight in disturbing the orderly course of things, though they love not evil for its own sake, can yet consent to introduce it for the sake of advancing their own ill understood, their own distorted good, ... it will be happy for the public if by fear they may be restrained from annoying the general peace.³⁷²

Standing alone, his words could be misread to extend to discontented speech about the measures of government, and to contradict directly the First Amendment protection for the right to assemble and 'to petition the government for a redress of grievances.' However, he allowed for 'constitutional redress,' and his subsequent words made clear that the prohibited discontent was 'forcible resistance,' 'an appeal to arms,' and 'insurrection.'³⁷³ After mentioning the right of petition, Blair repeated that 'all men have a right in a decent manner to lay open their grievances before the whole legislature.'³⁷⁴

Blair reiterated his 1794 language acknowledging the right to express dissent from the laws, and to do so strongly. He repeated the 1794 language on freedom of speech that was quoted above.³⁷⁵ He kept the 1794 language warning of chains on freedom, lauding 'sacred

³⁷² John Blair's Charge (U.S.Cir.Ct.Ga. 27 Apr.1795), *DHSC* 3:31, 32.

³⁷³ *Ibid* 33, 34, 36; see *ibid* 35.

³⁷⁴ *Ibid* 34; accord *DHSC* 2:487.

³⁷⁵ *Ibid* 35-36. Changes, which may be attributable to newspaper editing rather than Blair, were replacing 'correction of the minds' with 'coercion of the minds'; and italicizing that citizens have a right to 'express their opinion decently, yet strongly.' *Ibid* 36.

and unalienable rights,' and conceding that 'excrescences' are 'the natural price of freedom.'³⁷⁶ The great danger remained that the reins of government might become 'so tight as to frustrate the most valuable object,' freedom.

Notably absent from either of Blair's grand jury charges was any hint of seditious libel--any restriction on criticizing government, officials, or measures, any criminalization of separating citizens from support of government, any hint of common law crimes or federal prosecution. For the reason, his earlier involvement in declarations of rights must be examined.

3 The Virginia Declaration of Rights, and the First Freedom of Press Clause in Revolutionary Constitutions

Blair had been a member of the committee in Virginia responsible for producing its constitution and its declaration of rights in 1776.³⁷⁷ Although George Mason drafted Virginia's declaration of rights,³⁷⁸ the committee and not Mason drafted the 'freedom of the press' paragraph.³⁷⁹ Blair clearly agreed with that press paragraph, because it was he who reported the final version of the declaration of rights from the committee of the whole house,³⁸⁰ without change³⁸¹ in the drafting committee version of the press paragraph.³⁸² That declaration of rights was the earliest and the most philosophically groundbreaking of the colonies' provisions for rights at the time of the Revolution, with far-reaching freedoms of press and conscience (though it lacked a speech provision, like most revolutionary constitutions).

Virginia's freedom of press provision, the first in colonial or new state charters, stated:

³⁷⁶ *Ibid* 36.

³⁷⁷ *Proceedings of Convention-Va.* 32-33.

³⁷⁸ *Mason Papers* 1:274-89 (versions); George Mason to Nn (2 Oct.1778), *ibid* 1:433, 434; 'Edmund Randolph's Essay on the Revolutionary History of Virginia' (1936) 44 *Virginia Magazine of History & Biography* 35, 44.

³⁷⁹ 'First Draft of the Virginia Declaration of Rights' (ca 20-26 May 1776), *Mason Papers* 1:278 (The last paragraph of the draft was the following note: 'The above clauses . . . have already been agreed to in the Committee appointed to prepare a declaration of rights,' under which was the signature 'T.L.Lee.');

³⁸⁰ *ibid* 1:278n (press paragraph, and the foregoing note, are 'in Thomas Ludwell Lee's hand,' with the committee making 'their additions on G[eorge] M[ason]'s own Ms.');

³⁸¹ *ibid* 1:284 (press provision remained with only stylistic change in the committee draft); see Irving Brant, *James Madison* (Bobbs-Merill, Indianapolis 1941-61) 1:237.

³⁸² *Proceedings of Convention-Va.* 91 (10 June 1776). Also, the Declaration 'was passed unanimously.' Hugh B Grigsby, *The Virginia Convention of 1776* (1855, repr DaCapo Press, New York 1969) 19.

³⁸¹ 'Final Draft of the Virginia Declaration of Rights' (12 June 1776), *Mason Papers* 1:287, 288; cf. *ibid* 282, 284.

³⁸² 'Committee Draft of the Virginia Declaration of Rights' (27 May 1776), *Mason Papers* 1:282, 284.

That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.³⁸³

Blair's continued support is evident from the unanimous approval of Virginia's declaration of rights in June 1776.³⁸⁴

4 Virginia's Proposed Amendments, the Federal Bill of Rights, and Jefferson's Confidence in Blair

Twelve years later, Blair voted with Madison in favor of ratification of the federal Constitution without amendments.³⁸⁵ However, when that motion lost, Blair was considered friendly enough to a bill of rights to be appointed to Virginia's committee 'to prepare and report such amendments as shall by them be deemed necessary.'³⁸⁶ The committee's proposals included an amendment saying that 'the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.'³⁸⁷ The second half obviously came from Virginia's Declaration of Rights, which Blair had approved. That and other proposed amendments were approved by the Virginia assembly to accompany its ratification of the Constitution.³⁸⁸ Blair must have voted for the proposed amendments, in order for Jefferson and Madison soon after to attest to his political orthodoxy.

Jefferson, in his principal letter to Madison about a federal Bill of Rights,³⁸⁹ urged Madison to introduce amendments, just days before Madison began discussion of the Bill of Rights in Congress in March 1789.³⁹⁰ Jefferson wrote that an argument with 'great weight' in favor of a Bill of Rights was 'the legal check which it puts into the hands of the judiciary,' so

³⁸³ Declaration of Rights § 12, *Federal-State Constitutions* 7:3812, 3814; *Proceedings of Convention-Va.* 102; *Mason Papers* 1:288.

³⁸⁴ *Proceedings of Convention-Va.* 100 ('nem. con.' or nemine contradicente); *Hening's Statutes-Va.* 9:109 ('Unanimously adopted').

³⁸⁵ *DHRC* 10:1538, 1540.

³⁸⁶ *Ibid* 10:1541; *Elliot's Debates* 3:656 (25 June 1788).

³⁸⁷ *Elliot's Debates* 3:659 (27 June 1788).

³⁸⁸ *Ibid* 3:661, 662 (27 June 1788).

³⁸⁹ *Creating Bill of Rights* 218.

³⁹⁰ Thomas Jefferson to James Madison (15 Mar. 1789), *Jefferson Papers* 14:659.

long as the judiciary is independent. He then added,

In fact, what degree of confidence would be too much for a body composed of such men as Wythe, Blair, and Pendleton? On characters like these the "civium ardor prava jubentium" would make no impression. . . .³⁹¹

For his part, Madison offered no objection when he learned that Washington was planning to nominate Blair to the Supreme Court, later that year.³⁹²

Jefferson knew Blair well. Before the Revolution, Blair had retained Jefferson in some of his cases,³⁹³ and when Blair became clerk of the Governor's Council, he transferred at least a significant part of his law practice to Jefferson.³⁹⁴ Though over the next twenty years there was only one letter between them, in which Jefferson stated his view of appropriate federal-state relations during the Constitutional Convention,³⁹⁵ they lived in the same state, albeit at different ends, and traveled in the same circles.

Madison also knew Blair well, particularly during that twenty year period. Beginning in 1784, they were founding members of the Constitutional Society of Virginia, along with Patrick Henry, John Marshall, Monroe, Randolph, and other leading lawyers.³⁹⁶ Evidently with Madison present, Blair 'was unanimously elected by a voice vote' to its presidency.³⁹⁷ Two weeks later with Blair presiding and signing the document, the society's statement of purpose was adopted with what would come to be Republican emphases: to preserve the 'sacred principles of liberty,' to give 'free and frequent information to the mass of people,' which is 'the surest mode to secure republican systems of government from lapsing into tyranny,' and 'to

³⁹¹ *Ibid.* The internal quotation, from Horace, *Odes* 3:3, means 'the frenzy of his fellow citizens bidding what is wrong.' *Creating Bill of Rights* 218 n2.

³⁹² George Washington to James Madison (ca 23 Sept.1789), *Washington Papers-Presidential* 4:67.

³⁹³ James A Bear and Lucia C Stanton (eds), *Jefferson's Memorandum Books* (PUP, Princeton 1997) 1:101, 275.

³⁹⁴ *Ibid* 1:196, 199, 215, 216, 225; Frank L Dewey, 'The Waterson-Madison Episode: . . . Jefferson's Law Practice' (1982) 90 *Virginia Magazine of History & Biography* 165, 176.

³⁹⁵ Thomas Jefferson to John Blair (13 Aug.1787), *Jefferson Papers* 12:27, 28.

³⁹⁶ 'Virginia Constitutional Society Subscription Paper' (23 Apr.1785), *Marshall Papers* 1:140, 142; 'Rules of the Constitutional Society of Virginia' (ca 14 June 1784), *Madison Papers* 8:71, 72.

³⁹⁷ 285 n6. Early meetings were at 'the president's home in Williamsburg.' *Ibid.*

keep a watchful eye over the great fundamental rights of the people.³⁹⁸ In 1786, Madison reported to Jefferson that, among the several Virginia judges serving as a committee to revise state laws, 'Mr. Blair is the only remaining character in which full confidence could be placed,³⁹⁹ to complete the project and to do so properly. In 1787, they served together at the Constitutional Convention.⁴⁰⁰ By March 1789, when Jefferson wrote to Madison on the Bill of Rights, Madison had come around to Jefferson's position that a Bill of Rights was essential; the two appeared to believe that Blair agreed. Even after 1795 when Blair resigned, Madison exclaimed, 'Chase in the place of Blair!!! . . . Through what official interstice can a ray of republican truth now penetrate to the P[resident],⁴⁰¹ clearly viewing Blair as a window through which republican verities could shine.

Yet in 1797, Jefferson and Madison found their judgment wrong,⁴⁰² as Blair supported a grand jury presentment against a member of Congress, Samuel Jordan Cabell, for what amounted to seditious libel.⁴⁰³ Blair had abandoned his belief that citizens have 'a right to think of [laws] as they please, and even beyond this, to express their opinion decently, yet strongly, as a means of obtaining an alteration.' That change will be discussed in Chapter 7.

F Justice James Iredell

James Iredell, seated four months after the other initial justices,⁴⁰⁴ replaced Robert Harrison, who declined the seat after being confirmed.⁴⁰⁵ He is best known for his opinion in *Calder v. Bull*⁴⁰⁶ disagreeing with Justice Chase on judicial use of natural law, finding that not a 'fixed

³⁹⁸ 'Minutes of the Constitutional Society' (29 June 1784), *Monroe Papers* 2:110.

³⁹⁹ James Madison to Thomas Jefferson (4 Dec. 1786), *Madison Papers* 9:189, 190.

⁴⁰⁰ *Farrand's Records* 3:558, 587-89.

⁴⁰¹ James Madison to Thomas Jefferson (7 Feb. 1796), *Jefferson Papers* 28:606, 607.

⁴⁰² 'Petition to the Virginia House of Delegates' (draft 3 Aug. 1797), *Jefferson Papers* 29:493, 498-99 (draft initially listed Blair but removed names); Thomas Jefferson to Peregrine Fitzhugh (4 June 1797), *ibid* 29:415, 417.

⁴⁰³ *DHSC* 3:181.

⁴⁰⁴ *DHSC* 1:64 (Feb. 8, 1790), 65 (Feb. 10, 1790).

⁴⁰⁵ *DHSC* 1:34, 36, 37, 42; *DHFFC* 4:99, 102.

⁴⁰⁶ 3 U.S. (3 Dall.) 386 (1798).

standard' for voiding otherwise valid laws.⁴⁰⁷ History has generally treated him well.⁴⁰⁸

He expressed a commitment to liberty generally⁴⁰⁹ and to freedom of press specifically, before his position changed with the conflict between Federalists and Republicans.

1 Pre-First Amendment Position on Freedoms of Press and Speech

Iredell drafted resolutions in 1783, which asserted that 'it is the undoubted right of the people at all times, either collectively or individually, to express their sentiments on the situation of public affairs,' with 'zeal' as well as anxiety.⁴¹⁰ His newspaper essays before and after that date depended on that right.

He published 'Answers to Mr. Mason's Objections to the New Constitution' in early 1788, and responded to Mason's opening point that '[t]here is no Declaration of Rights.'⁴¹¹ Iredell recited the standard federalist argument that a declaration was unnecessary when the general government only had enumerated powers, and hazardous 'as implying that without such a reservation the Congress would have authority' to invade individual rights.⁴¹² He gave the same argument later that year in the first ratification convention in North Carolina.⁴¹³

Iredell then responded to Mason's separate point that '[t]here is no declaration [of rights] of any kind for preserving the Liberty of the Press.'⁴¹⁴ He dismissed the point on the basis that the Constitution gave Congress no power over the press except to protect authors with a copyright law, assuring his readers that if Congress asserted any other power 'they will do it without any warrant from this Constitution' and would instead commit an 'act of tyranny':

⁴⁰⁷ *Ibid* 399. Iredell did not reject natural law, however. James Iredell's Charge (U.S.Cir.Ct.Ga. 26 Apr.1792), *DHSC* 2:263, 267; 'Causes of the American Revolution' (June 1776), *Iredell Papers* 1:370, 386; 'To the Inhabitants of Great Britain' (Sept.1774), *ibid* 1:251, 264.

⁴⁰⁸ See generally Willis P Whichard, *Justice James Iredell* (CAP, Durham 2000) (the best biography); Willis P Whichard, 'The Sixth Justice: A Life of James Iredell' (SJD thesis, University of Virginia 1994); Nettie S Herndon, 'James Iredell' (PhD thesis, Duke University 1944); *OCSC* 440; *Justices* 1:121.

⁴⁰⁹ E.g., James Iredell to Richard D Spaight (26 Aug.1787), *Iredell Papers* 3:307.

⁴¹⁰ [James Iredell], 'Resolutions of the Citizens of Edenton' (1 Aug.1783), *Iredell Papers* 2:430, 430.

⁴¹¹ George Mason, 'Mason's Objections to the Constitution of Government Formed by the Convention' (17 Nov.1787), *DHRC* 13:348, 348; *Pamphlets on Constitution* 14:§8.

⁴¹² *DHRC* 16:163, 163, 168n; *Iredell Papers* 3:341, 341, 367 n4 (8 Jan.1788).

⁴¹³ *Elliot's Debates* 4:167; accord *ibid* 144-49, 165-67.

⁴¹⁴ *DHRC* 13:350; *ibid* 16:163, 379; *Iredell Papers* 3:341, 356 (8 Jan.1788).

The Liberty of the Press is always a grant topic for declamation; but the future Congress will have no other authority over this than to secure to authors for a limited time the exclusive privilege of publishing their works. This authority has long been exercised in England, where the press is as free as among ourselves, or in any country in the world, and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own If the Congress should exercise any other power over the press than this, they will do it without any warrant from this Constitution, and must answer for it as for any other act of tyranny.⁴¹⁵

His assurance was absolute. Moreover, Iredell had just denied any congressional power to create new crimes, in the immediately preceding paragraph, responding to Mason's charge that the Necessary and Proper Clause might authorize Congress to 'constitute new crimes.'⁴¹⁶ Iredell instead found Congress' power limited to crimes enumerated in the Constitution (treason, counterfeiting, piracies and felonies on the high seas), and to crimes 'to enforce their acts of legislation in the cases where express authority is delegated to them.'⁴¹⁷

Iredell said much the same at the North Carolina ratification convention in 1788:

A gentleman who spoke some time ago (Mr. Lenoir) observed, that the government might make it treason to write against the most arbitrary proceedings. He corrected himself afterwards, by saying he meant *misprision of treason*. But in the correction he committed as great a mistake as he did at first. Where is the power given to them to do this? They have power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. They have no power to define any other crime whatever. . . .⁴¹⁸

His restatement was again absolute. His concluding sentence reaffirmed that Congress could not create any new crime, such as treason by words, or seditious libel. His absoluteness excluded any federal common law crimes, as he later expressly acknowledged.

2 Initial Disavowal of a Federal Common Law of Such Crimes as Seditious Libel

Eleven years later, Iredell acknowledged that that ratification speech, in saying Congress had 'no power to define any other crime whatever,' meant he 'did think Congress could not provide for the punishment of any crimes but such as are specifically designated in the particular

⁴¹⁵ *Ibid* 382; *Iredell Papers* 3:359-60.

⁴¹⁶ *Ibid* 381, 379; *Iredell Papers* 3:358-59, 356.

⁴¹⁷ *Ibid* 381; *Iredell Papers* 3:358.

⁴¹⁸ *Elliot's Debates* 4:219 (30 July 1788).

powers enumerated.⁴¹⁹ He admitted his reversal of position, as in 1799 he held that Congress could provide for the punishment of criticism of government in the Sedition Act.

Iredell still held to his earlier position in 1791, when his grand jury charge said that crimes should be specified 'by fixed and general laws,' and defined federal crimes as simply those specified in the Crimes Act.⁴²⁰ His position was unchanged in 1792, when his grand jury charge reiterated his denial of federal court jurisdiction over common law crimes.⁴²¹ That grand jury charge addressed what the federal criminal law was, and found it carefully 'defined . . . in certain Acts of Congress.'⁴²² Criminal law must 'be careful' to 'prevent an abuse of authority' that would violate 'personal liberty and safety,' and 'ought to be passed with the most trembling solicitude, lest any unfortunate individual should become the object of injustice or oppression.'⁴²³ That standard could not be met by filling a federal criminal code automatically with the 160 capital crimes and innumerable other crimes that filled the common law. As Iredell said, the presumption in criminal law must be in favor of liberty.⁴²⁴

3 Drift on Freedoms of Press and Speech in the Mid-1790s

Iredell was drifting by late 1795, as his charges evinced in touching on freedom of speech. In similar charges for fall 1795 and spring 1796, after noting that citizens 'who love their country may be expected to obey its laws,' he found obedience to include 'a deference of private sentiment to that of the public constitutionally expressed.'⁴²⁵ In context, he seemed to refer to sentiments amounting to insurrection like the recent Whiskey Rebellion or violating

⁴¹⁹ James Iredell's Charge (U.S.Cir.Ct.Pa. 11 Apr.1799), *DHSC* 3:332, 341.

⁴²⁰ James Iredell's Charge (U.S.Cir.Ct.Ga. 17 Oct.1791), *DHSC* 2:216, 219, 220; see James Iredell's Charge (U.S.Cir.Ct.Ga. 26 Apr.1792), *ibid* 2:263, 264, 265; James Iredell's Charge (U.S.Cir.Ct.Mass.12 Oct.1792), *ibid* 2:308, 314-15.

⁴²¹ James Iredell's Charge (U.S.Cir.Ct.Mass. 12 Oct.1792), *DHSC* 2:308, 314; see *DHSC* 2:216, 219.

⁴²² *Ibid* 2:314; see *DHSC* 2:216, 219.

⁴²³ *Ibid* 2:312.

⁴²⁴ *Ibid* 2:312.

⁴²⁵ James Iredell's Charge (U.S.Cir.Ct.Va. 23 Nov.1795), *DHSC* 3:74; accord James Iredell's Charge (U.S.Cir.Ct.Pa. 12 Apr.1796), *ibid* 3:106.

the Neutrality Act (both of which he described later in the charge⁴²⁶), because his sentence continued that 'men of morality will in all instances abstain from any criminal conduct which may injure any individual, or community, or mankind at large.'⁴²⁷ However, limiting the point to 'criminal conduct' gave little comfort, because Iredell deemed some undefined set of 'sentiments' as criminal conduct. The grand jury so understood, agreeing 'that the opinions, passions and interests of individuals, or of any particular part of the community, should be subordinate to the *general will*, and that a deviation from this principle . . . produced that most daring and dangerous insurrection which you have described. . . .'⁴²⁸

Iredell expanded that charge in his May 1796 circuit, adding both the point upon which others grounded criminalization of seditious libel and, inconsistently, an acknowledgment of the legitimacy of difference of sentiments:

All governments depend more or less upon the confidence and support of the people [H]is individual interest, when it comes into competition, must yield to that of the state in which he resides; and that the interest of the state itself, when it stands in competition with that of the United States, must yield At the same time that he exercises with zeal, and maintains with firmness, the right of each individual to express his sentiments on all public concerns, he should endeavour as well as his opportunities will admit to understand them thoroughly, that he may neither be unwarily misled himself nor unwarily mislead others. . . . [V]arious opinions will be entertained upon the subject of political regulations. They embrace a variety of interests all of which cannot equally be promoted, though all ought to be consulted and as much as possible to be reconciled. . . . The ablest men will often differ about the proper means of obtaining the same common object. . . . [T]here will be always ill-disposed men ready to take advantage of opportunities to do mischief. . . .⁴²⁹

Having allowed for various opinions, he quickly limited the bounds of legitimate divergence of opinion, by saying that 'ill grounded discontent' led to 'actua[l] disobedience,' which would be punished.⁴³⁰ Continuing his dialectic, Iredell ended by saying he had not heard of local crimes connected with political dissent--but strongly implying that crimes could include po-

⁴²⁶ *Ibid* 3:77, 80 &n.13; accord *ibid* 3:108, 110-11 & n.6.

⁴²⁷ *Ibid* 3:74; accord *ibid* 3:106.

⁴²⁸ Reply of the Grand Jury (C.C.D.N.J. 2 Apr.1796), *ibid* 3:102. This followed the same charge, since Iredell typically 'deliver[ed] the same [charge] substantially at other courts.' James Iredell to Simeon Baldwin (15 July 1795), *DHSC* 3:67.

⁴²⁹ James Iredell's Charge (U.S.Cir.Ct.Va. 23 May 1796), *DHSC* 3:124, 126.

⁴³⁰ *Ibid* 3:127.

litical dissent. 'I have heard, gentlemen, of no offences likely to come before you but such as are unquestionably of a very immoral & dangerous nature, & altogether unconnected with political dissensions.'⁴³¹ But by 1797 he was hearing of such crimes.

4 Continued Drift on Freedoms of Press and Speech in the Late 1790s

In 1797, Iredell's grand jury charge shifted into more intolerance of dissent, and used language that could be, and was, interpreted as outlining limitations on freedom of speech.⁴³² 'If after all, any individual disapproves of the voice of his country, what does duty and common modesty require of him? To be perfectly confident he is right in his opinion, and those intrusted, to decide are wrong! Who is the man entitled to so arrogant an estimation of his own abilities?' With poorly veiled reference to Republican newspapers, Iredell condemned aspersion of motives of officials and calumny toward them, and called for the opposition to submit to all actions of elected representatives, if they loved their country:

The part surely for every man who loves his country, but who disapproves of any public authoritative decision, is to submit to it with diffidence and respect, considering the many chances there are that his own opinion may be really wrong . . . ; and that the very basis of all republican governments in particular, is, the submission of a minority to the majority, where a majority are constitutionally authorised to decide. . . .⁴³³

That left no room for dissenting speech against officials and their actions, once a majority elected them, and had ominous overtones for criminal treatment of dissent. It was so interpreted by the grand jury as it presented a member of Congress for seditious libel (Chapter 6.G).

When examined closely, Iredell's words may not have addressed dissenting speech, just disobedience to laws. A paragraph later, his charge expressly allowed for differences of opinion and identified the danger as 'if we disunite, if we suffer differences of opinion to corrode into enmity,' which would produce a ruinous fate. He concluded by saying that 'every man

⁴³¹ *Ibid* 3:128 (*DHSC* also shows draft language that Iredell struck out).

⁴³² James Iredell's Charge (U.S.Cir.Ct.Va. 22 May 1797), *DHSC* 3:181, 173, 173n.

⁴³³ *DHSC* 3:175-76.

should sacredly obey the laws of the country actually in being,⁴³⁴ without any demand for subordinating individual sentiments to government. As Iredell drafted a new grand jury charge for 1798, he restated the point in a way that did not seem to prohibit or even address speech disagreeing with government.⁴³⁵

However, when Iredell prepared his charge for 1799, it came full-circle and criminalized speech in exactly the way his critics objected in 1797.⁴³⁶ The press became a dangerous weapon, as the pen might 'inflam[e] the passions of weak minds, delude many into opinions the most dangerous, and conduct them to actions the most criminal.'⁴³⁷ The First Amendment was defanged, because the meaning of liberty of press was 'no where more happily or justly expressed than by... the Commentaries,' and consisted in 'laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.' Thus, 'Congress may make a law *respecting* the press, provided the law be such as not to *abridge its freedom*.'⁴³⁸ The young Iredell had read Blackstone with 'infinite pleasure & improvement,'⁴³⁹ and by the time he sat on the Supreme Court that infinite pleasure had not worn off.

Iredell did give periodic clues before his changes of position that, when the administration clashed with critics, he might interpret governmental powers to prevail and individual liberties to yield. During the Revolution, he was a prosecutor and crimes he prosecuted included political dissent.⁴⁴⁰ In his 1788 response to Mason, his statement that in England 'the press is as free as among ourselves,'⁴⁴¹ while not expressly addressing the English law of seditious libel, intimated that Iredell found that consistent with freedom of press and speech, as

⁴³⁴ *Ibid* 3:177, 178.

⁴³⁵ James Iredell's Charge (U.S.Cir.Ct.S.C. 7 May 1798), *DHSC* 3:258, 259.

⁴³⁶ Scaevola, 'To James Iredell' *Daily Advertiser* (Richmond 11 June 1797), *DHSC* 3:192; Marius, 'To Jugurtha' *Virginia Gazette, and General Advertiser* (Richmond 24 June 1797), *DHSC* 3:203-04.

⁴³⁷ James Iredell's Charge (U.S.Cir.Ct.Pa. 11 Apr.1799), *DHSC* 3:332, 345.

⁴³⁸ *Ibid* 3:347.

⁴³⁹ 'Diary' (13 Dec.1772), *Ibid* 3:169, 194.

⁴⁴⁰ John C Waldrup, 'James Iredell and the Practice of Law in Revolutionary Era North Carolina' (PhD thesis, University of North Carolina 1985) 40-90.

⁴⁴¹ *DHRC* 16:382; *Iredell Papers* 3:359.

he ultimately said in 1799. In his 1792 grand jury charge, he warned that 'liberty itself, in order to be truly enjoyed, must submit to reasonable and considerate restraints.' Indeed, '[t]rue liberty certainly consists in such restraints, and no greater, on the actions of each particular individual as the common good of the whole requires.'⁴⁴² A restraint the judge liked, of course, would always be found 'reasonable.' By late 1795, he found obedience to include 'a deference of private sentiment to that of the public constitutionally expressed.' In 1798 decisions, he readily subordinated private rights to public interests and restraints.⁴⁴³

In 1799, these shifts made it no surprise that Iredell supported the constitutionality of the Sedition Act, as described in Chapter 6.G, though he did not conduct any trials under it.

Thus, five of the six initial justices of the Supreme Court failed to live up to their reputations as having nothing to say about freedoms of press and speech, before the time of the Sedition Act. They participated in and supported the framing of state constitutions during the Revolutionary War, with broad protections of the press and sometimes of speech. The initial justices, except Iredell, addressed the extent of protection of speech and press, and concluded that it was expansive in terms congenial to the later Jeffersonians, though all but Wilson joined in the framers' mistrust of unlimited democracy. Jay proclaimed the 'right to think and speak[] our sentiments on these subject[s],' however controversial. Rutledge supported a contribution to a symbol of freedoms of press and speech, and did it so resolutely that he and others shut down the colonial government in South Carolina. Cushing pondered whether the revolutionary constitution's unqualified language meant that freedoms of press and speech were no longer qualified by English common law of seditious libel, and concluded that they were not. The provision's 'words . . . being very general and unlimited,' he noted that they 'make no such distinction' as the Blackstone definition, and 'must exclude *subsequent* re-

⁴⁴² James Iredell's Charge (U.S.Cir.Ct.Mass. 12 Oct.1792), *DHSC* 2:308, 310.

⁴⁴³ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798); *Minge v. Gilmour*, 17 F.Cas. 440, 445 (U.S.Cir.Ct.N.C. 1798).

straints--as much as *previous restraints*.' Wilson ultimately found the First Amendment to protect press and speech without the qualification of seditious libel and with only narrowly defined limitations against defaming private reputation, though he initially defended that qualification of expressive freedom in state legislation but not federal. Blair believed that men 'have a right to think of them as they please, and even beyond this, to express their opinion decently, yet strongly,' and that 'some few excrescences, the natural price of freedom, must still remain unlopped.' Even Iredell initially proclaimed that the 'liberty of the press is indeed valuable,' and when appointed believed that there was no federal common law of crimes such as seditious libel nor could be unless expressly authorized by the Constitution and adopted by statute. However, Iredell retreated from his position, as the crisis of the Quasi-War enveloped the Court in 1798, and the senescent Cushing followed him and the successor justices. Most successor justices similarly affirmed expansive understandings of freedoms of speech and press, but retreated from them in 1798-1800.

If the Blackstone-Mansfield definition had been embraced by the initial justices, it should have appeared explicitly, or at least implicitly, in their pre-1798 statements about freedom of press or speech. Instead, it was not embraced by any initial justice before 1798, and was expressly rejected by Wilson (Chapter 7.D) and partially rejected by Cushing (as seen in the 1789 Cushing-Adams correspondence). The Blackstone-Mansfield definition of freedom of press was only adopted during 1798-1800, when motives were suspect, by two initial justices who supported the Sedition Act, and by four successor justices who enforced the Sedition Act. Even then, it was not embraced by the other four initial justices, or by two successor justices.

CHAPTER 5

THE SUCCESSOR SUPREME COURT JUSTICES AND THEIR VIEWS ON FREEDOMS OF PRESS AND SPEECH

[A] licentious press is the bane of freedom, and the peril of society . . .
--Supreme Court Justice Samuel Chase¹

With the second group of six successor justices, President Washington completed his record of ten appointments, and President Adams had opportunity for two appointments. They were Thomas Johnson (serving 1791-1793), William Paterson (1793-1806), Samuel Chase (1796-1811), Oliver Ellsworth (1796-1800), Bushrod Washington (1798-1829), and Alfred Moore (1799-1804). While the successor justices included two leaders at the Constitutional Convention and two former governors, they differed from the initial justices in not including any leaders in creating state governments and the confederation government during the American Revolution (except Johnson) or chief justices of state supreme courts. In contrast, most initial justices were leaders in forming the state governments and the Philadelphia government to replace royal colonial governments, and had national reputations; three were drafters of their state constitutions.² Two successor justices did not participate at all in revolutionary government, and two held secondary offices in their states, while only two were prominent during the war and one of those became known for scandal and was recalled from Congress.

The dominant assumption is that the six successor justices, three of whom presided over Sedition Act trials,³ said nothing about the First Amendment before 1798. However, their pre-Sedition Act views generally evinced friendly views of speech and press. The views of the three who presided over Sedition Act trials, and of Ellsworth and Iredell, changed when the

¹ Samuel Chase to James McHenry (4 Dec. 1796), *McHenry Correspondence* 203.

² Chief Justices Jay and Rutledge, and Justice Wilson.

³ William Paterson, most notoriously Samuel Chase, and Bushrod Washington.

Quasi-War thundered and the Sedition Act passed. At that point, those five justices defended the Sedition Act and embraced the Blackstone-Mansfield definition, differing from most other initial justices (Jay, Rutledge, and Wilson) and successor justices (Johnson and Moore).

This chapter's addition to existing literature is each successor justice's pre-1798 views of press and speech, which contradicts the prevailing assumption that they devalued press and speech. For example, Johnson's proclamation has not been included in discussions of press and speech, and his support for a bill of rights has barely received notice. Paterson's and Ellsworth's leadership in Senate action on the First Amendment has not been noted in discussions of press and speech, nor have Paterson's essays that are discussed or Ellsworth's speech on freedom of opinion. Chase, though the most discussed early justice, has not been described as the ungrateful beneficiary of newspaper wars, nor has his fight for a bill of rights in the Maryland ratification convention and after been developed. Washington has not been considered in terms of pre-Sedition Act views on press and speech. The successor justices' later views during the Sedition Act controversy of 1798-1800 are discussed in Chapters 6-7.

A Justice Thomas Johnson

Thomas Johnson, the first successor to an initial Supreme Court justice (unless Iredell gets that title), participated in the pre-Revolutionary debates and presided over the formation of Maryland's new government as its first governor. Later, he was chief judge of a state court.⁴

His commitment to freedoms of press and speech was evident in two episodes of his life.

1 First Proclamation in Maryland History on Freedom of Press

Johnson found himself at the center of a fight over freedom of press in 1777, as he took office as Maryland's governor. When credible evidence arrived that the British general would convey a peace proposal to end both taxation and independence, Samuel Chase of Annapolis

⁴ See generally OCSC 448; *Justices* 1:149; Edward S Delaplaine, *The Life of Thomas Johnson* (Hitchcock, New York 1927). He was chief judge of the state's general court, but not of its supreme court.

wrote a satire and a critique.⁵ Chase⁶ published them in the same newspaper issue, with the satire under the signature 'Tom Tell-Truth,' urging acceptance of Britain's peace proposal 'with gratitude to the patriotic virtuous King, and august incorruptible Parliament, and wise disinterested Ministry,' assuming even the village idiot would immediately see his dripping irony. His critique warned of nothing but fraud 'from the hands of the tyrant of Britain.'⁷

Unfortunately, Baltimore was overrun by village idiots, who gathered at the local Whig Club to identify the traitor they must ferret out. The club sent a deputation to demand that the publisher disclose the name of the perfidious 'Tom Tell-Truth.'⁸ When the publisher, William Goddard, refused, the club summoned him to appear the next evening since the article 'has given great offense.'⁹ When Goddard declined, the club's posse dragged him there, while refusing to give their own names, and the club again demanded the traitor's name.¹⁰ As he again refused, the Whig Club passed a resolution banishing Goddard, requiring that he 'leave this town by twelve o'clock to-morrow morning, and the county within three days.'¹¹

Goddard went straight to the Maryland legislature, and delivered a memorial which, in case village idiots abounded in Annapolis as well, began by disclosing the satire was 'written by a member of the honourable Congress.'¹² A legislative committee quickly concluded that the Whig Club's proceedings were 'a manifest violation of the constitution' and that it, not Tell-Truth, threatened 'the overthrow of all regular government.'¹³ The club, deciding to twist the facts rather than admit error, responded that it knew all the time that Tell-Truth meant

⁵ [William Goddard], *The Prowess of the Whig Club, and the Manoeuvres of Legion* (William Goddard, Baltimore 1777) app.2 (Tom Tell-Truth), app.3 (Caveto), reprinting *Maryland Journal and Baltimore Advertiser* (Baltimore 25 Feb.1777).

⁶ *Ibid* app.4.

⁷ *Ibid* (published 25 Feb.1777).

⁸ *Ibid* 4-5.

⁹ *Ibid* 5-6.

¹⁰ *Ibid* 6-8.

¹¹ 'Copy of the Vote of Expulsion in Whig Club' (4 Mar.1777), *ibid* 11; *ibid* 9.

¹² 'The Memorial of William Goddard, Late of Baltimore, Printer' (6 Mar.1777), *ibid* 10.

¹³ 'By the Committee of Aggrievances and Courts of Justice' (Mar.1777), *ibid* 12-13.

'ironically to sneer' at the British proposal, and recast its objection as a literary critique, thinking 'the author rather unfortunate in framing his piece' so that 'the ignorant and uninformed might mistake his intention.' Goddard's escort to the club was *only* because of his 'mulish obstinacy' and 'brutal impoliteness,' and banishment merely 'recommended it to him to leave.'¹⁴

However, still more idiots sailed on Baltimore's harbor. Two weeks after the initial incident, Commodore Nicholson marched to the printing press, ordered Goddard to accompany him to the Whig Club, and carried Goddard by force.¹⁵ The Club resented the publisher with the original terms of banishment, conspicuously without the word 'recommend.'

Gov. Thomas Johnson received the new petition Goddard sent. Johnson was sufficiently shocked to forward it immediately to the legislature,¹⁶ which adopted resolutions, drafted by none other than Tom Tell-Truth himself, again concluding the Whig Club's proceedings were 'a most daring infringement, and manifest violation of the Constitution of this state, directly contrary to the Declaration of Rights.'¹⁷

Johnson promptly issued a proclamation condemning the Whig Club's actions for 'presuming to exercise any power over the persons or property of any subject of this state,' and as 'unlawful assemblies.'¹⁸ That proclamation was 'the first vindication of the liberty of the press in Maryland' history.¹⁹ Goddard reissued his pamphlet on the affray crowned by the governor's proclamation and the legislature's resolution.²⁰ Johnson, a new governor, was not obligated to become involved, to forward the petition, or to issue the proclamation. He evidently felt strongly about the attack on the press, an institution that two and a half years earlier he

¹⁴ Whig Club, 'A Late Affair Between The Whig Club and Mr. William Goddard' (11 Mar.1777), *ibid* app.1-2 ('rather unfortunate,' 'mulish obstinacy,' and 'brutal impoliteness' in italics).

¹⁵ *Ibid* 8 (the commodore was president of the Club).

¹⁶ *Ibid* app.2.

¹⁷ Resolves (17 Apr.1777), *ibid* 'Postscript' 2; *Maryland Gazette* (Annapolis 17 Apr.1777).

¹⁸ Thomas Johnson, 'A Proclamation' (17 Apr.1777), *ibid* 'Postscript' 3; *Maryland Gazette* (Annapolis 17 Apr.1777).

¹⁹ J Thomas Scharf, *Chronicles of Baltimore* (Turnbull, Baltimore 1874) 161.

²⁰ *Ibid*; accord W Bird Terwilliger, 'William Goddard's Victory for the Freedom of the Press' (1941) 36 *Maryland Historical Magazine* 139.

relied on to disseminate his jointly written essay shutting off the royal governor's revenue.²¹

2 First Influential Federalist Support of a Bill of Rights

Johnson's support for declarations of rights was first manifested the year before, in 1776, when he was added to the committee to draft a declaration of rights and constitution for the new state of Maryland.²² The declaration, which he supported, stated that 'the liberty of the press ought to be inviolably preserved.'²³

Johnson similarly supported a federal bill of rights, and was the only pre-Marshall justice to do so during the 1787-1788 ratification debates, except Jay by mid-1788 and the lone justice who opposed the Constitution.²⁴ (After ratification, most federalists supported a post-ratification bill of rights as a ratification compromise). Johnson's position was expressed, and pressed, in his first letter to his friend George Washington after the Constitutional Convention:

any necessary guards for personal liberty is [*sic*] the common interest of all the citizens of America. And if it is imagined that a defined power which does not comprehend the interference with personal rights needs negative declarations I presume such may be added by the foederal legislature with equal efficacy & more propriety than might have been done by the Convention--Strongly and long impressed with an idea that no governm[en]t can make a people happy unless they very generally entertain an opinion that it is good in form and well administered I am much disposed to give up a good deal in the [form] the least essential part. . . .²⁵

The letter clearly called for a bill of rights--'negative declarations' about 'personal rights'--even though the federalist argument had been laid down by Hamilton and Madison and, recently, Wilson and others that 'defined power[s]' did not comprehend 'interference with personal rights.' Johnson was 'much disposed to give up a good deal' on this point. He may have been the first influential federalist to support a federal bill of rights, after the Convention.

²¹ Thomas Johnson, Samuel Chase and William Paca, "To John Hammond" *Maryland Gazette* (Annapolis 9 Sept.1773) 1, 1.

²² "Proceedings of the Convention of the Province of Maryland" (14 Aug.1776-), *American Archives* 3:97; *Proceedings of the Convention of the Province of Maryland. . . the Fourteenth of August, 1776* (Frederick Green, Annapolis 1776) 14.

²³ *American Archives* 3:143, 147, 145-46 (3 Nov.1776); Maryland Declaration of Rights art.xxxviii, *Federal-State Constitutions* 3:1686, 1690, 1689.

²⁴ Chase, discussed below.

²⁵ Thomas Johnson to George Washington (11 Dec.1787), *Washington Papers-Confederation* 5:482, 484.

Johnson continued his support for a bill of rights at the Maryland ratification convention. He did not do so to obtain ratification, because the convention had an obvious preponderance of supporters of the Constitution,²⁶ making no tactical compromise necessary. When William Paca, an antifederalist, requested a day's delay in order to formulate amendments, Johnson surprised his fellow federalists by making a motion to grant the requested adjournment.²⁷ Then, as a member of the committee on amendments,²⁸ Johnson supported twelve amendments including one on freedom of press.²⁹ When tempers flared among the committee over further amendments and the federalists withdrew support for any, Johnson departed from his fellow federalists and joined the antifederalist supporters of amendments in unsuccessful votes to recommend the twelve amendments and three additional ones, and to delay adjournment to allow a vote on the amendments including freedom of press.³⁰

Five months later, Johnson again wrote to Washington, responding in part to rumors that he left the federalists. While assuring Washington he had engaged in no active conduct 'to bring about any amendments' as a condition to ratification, he stuck to his guns on his preference for them: he 'should be better pleased with the Constitution with some alterations.'³¹

B Justice William Paterson

William Paterson, though not participating in Congress during the Revolution and not being then in the front rank of his state's leaders, later became its governor.³² With his appointment,

²⁶ The ratification margin was 63-11. *Elliot's Debates* 2:547, 549; *DHRC* 17:242.

²⁷ AC Hanson to James Madison (2 June 1788), *DHC* 4:645, 652 (24 Apr.1788); James McHenry to George Washington (18 May 1788), *ibid* 4:618; *Chesapeake Politics* 291.

²⁸ *Ibid* 2:549; John B Cutting to Thomas Jefferson (11 July 1788), *Jefferson Papers* 13:331, 333.

²⁹ *Elliot's Debates* 2:549, 555; *DHRC* 17:242; John B Cutting to Thomas Jefferson (11 July 1788), *Jefferson Papers* 13:331, 336.

³⁰ *Maryland* 92-93; *Chesapeake Politics* 292-93.

³¹ Thomas Johnson to George Washington (10 Oct.1788), *Washington Papers-Presidential* 1:42.

³² See generally John E O'Connor, *William Paterson: Lawyer and Statesman, 1745-1806* (RUP, New Brunswick 1979); John E O'Connor, 'William Paterson and the American Revolution, 1763-1787' (PhD thesis, City University of New York 1974); Richard C Haskett, 'William Paterson, Councillor at Law' (PhD thesis, Princeton University 1952); *OCSC* 624; *Justices* 1:163.

the Supreme Court entered its only period when half its justices were born abroad.³³

Though Paterson presided over Sedition Act trials, like Justices Chase and Washington, he had not always seen speech and press as dangerously tempestuous.

1 Involvement in Congressional Passage of the Bill of Rights

Several critical states, including New York and ultimately Virginia, only ratified the Constitution with recommendation or promise of a bill of rights.³⁴ North Carolina initially voted against ratification, and Rhode Island refused even to call a convention, while Virginia delayed. Madison shifted from his earlier position that a bill of rights was superfluous, to support 'safeguards to liberty.' Washington added his weight by calling for approval of a bill of rights in his inaugural address.

Early in the first Congress, Madison guided the adoption of the Bill of Rights, first by making a motion to debate amendments in May 1789, and then by proposing a Bill of Rights in early June 1789³⁵ containing the provisions recommended most by the states. Federalists had been concerned that amendments with rights could lead to amendments disempowering the new government, but through the ratification compromise they generally supported the Bill of Rights.³⁶ Madison's House committee report approved the Bill of Rights at the end of July,³⁷ and the House approved it with 17 provisions and sent it to the Senate in late August.³⁸

That is when Paterson, and also Ellsworth, became involved as the Bill of Rights came to them and the other senators by a reading of the House version on 25 August 1789.³⁹ The

³³ Paterson in Ireland of Scottish ancestry, Wilson in Scotland, and Iredell in England. William Paterson to John Macpherson (12 Nov.1771), W Jay Mills (ed), *Glimpses of Colonial Society and the Life at Princeton College, 1766-1773* (Lippincott, Philadelphia 1903). While this book purports to be Paterson's essays and letters, it must be used with caution because it is 'consistently inaccurate.' Richard C Haskett, 'Princeton Before the Revolution: Notes on a Source' (1949) 6 *William & Mary Quarterly* (3rd ser) 90, 91.

³⁴ Amendments Proposed by the Virginia Convention (27 June 1788), *DHFFC* 4:15; Amendments Proposed by the New York Convention (26 July 1788), *ibid* 4:19.

³⁵ *DHFFC* 4:9 (8 June 1789). He envisioned inserting amendments throughout the Constitution, until a motion by Roger Sherman provided that they would be added at the end.

³⁶ E.g., 'An Address to the Electors of the State of New-York' (21 Mar.1801), *Hamilton Papers* 25:356.

³⁷ *DHFFC* 4:27 (28 July 1789).

³⁸ *DHFFC* 4:35 (24 Aug.1789).

³⁹ *DHFFC* 1:135 (25 Aug.1789).

House-approved speech and press provisions were as follows: 'The freedom of speech, and of the press, . . . shall not be infringed.'⁴⁰ Initially, amendments to those provisions were rejected on 3 September,⁴¹ but then amendments bringing them to their current language were approved on 9 September: 'Congress shall make no law . . . abridging the freedom of speech, or the press'⁴² The House, rejecting Senate changes to various other provisions, requested a conference committee, and named Madison to head its delegation.⁴³

Paterson, Ellsworth, and Charles Carroll were the three senators appointed to the Senate delegation to the conference on 21 September.⁴⁴ All three supported the conference committee report on 24 September, which approved the final language of the First Amendment⁴⁵ except for a subsequent minor stylistic change⁴⁶:

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 House then approved the final Bill of Rights on 24 September,⁴⁷ and the Senate agreed to the House resolutions on 25 and 26 September 1789.⁴⁸ Then, the Bill of Rights was submitted to the states for ratification,⁴⁹ which reached the required three-fourths on 15 December 1791. Unfortunately, the ratification process was not extensively documented.⁵⁰

Paterson supported the Bill of Rights as it reached the Senate. Neither he nor Ellsworth

⁴⁰ DHFFC 4:36 (24 Aug.1789).

⁴¹ DHFFC 1:152 (3 Sept.1789).

⁴² DHFFC 4:43, 44, 1:166 (9 Sept.1789), 4:45, 46 (14 Sept.1789). See *Ibid* 1:153 (4 Sept.1789).

⁴³ DHFFC 1:181 (21 Sept.1789).

⁴⁴ DHFFC 4:8, 1:182 (21 Sept.1789).

⁴⁵ DHFFC 4:47, 1:186 (24 Sept.1789). It then was the third of twelve amendments, but the first two were rejected by the states; the phrase 'First Amendment' is used for simplicity.

⁴⁶ The next day, the Senate changed 'peaceably to assemble and petition' to 'peaceably to assemble, and to petition.'

⁴⁷ DHFFC 4:48, 1:189 (24 Sept.1789).

⁴⁸ DHFFC 1:192 (25 Sept.1789), 1:198 (26 Sept.1789).

⁴⁹ DHFFC 4:1 (28 Sept.1789). The amendments approved by Congress were entitled 'Amendments to the Constitution,' rather than 'Bill of Rights,' and numbered twelve, only the last ten of which were ratified in 1789-91. *Ibid*.

⁵⁰ DHC 2:321-90.

initiated any Senate consideration of rights, or drafted any version before receiving the House version; they simply responded to and edited the House version. Their involvement was limited, though critical, and was hard to distinguish from other committee assignments, where their task was to get the job done. Paterson's concern can perhaps be measured by his waiting nearly a half year to write to New Jersey's governor to remind him that 'Congress have not received the ratification of the Amendments to the Constitution by the State of New Jersey,'⁵¹ after New Jersey voted in favor of ratification. With equal ennui, New Jersey waited two more months before sending its confirmation.⁵²

2 Essays on Politics and Dissent Before and After the Bill of Rights

Paterson wrote essays, some of which were published in local newspapers under the pseudonyms 'Aurelius,' 'Horatius,' and 'Hortensius.'⁵³ His opening essay (which has not been published or quoted) began with acknowledgment of the legitimacy of 'diversity of sentiments':

In free governments, where men enjoy the right of judging for themselves, diversity of sentiments respecting public men and measures must be expected, and is, indeed, unavoidable. This diversity, however, is attended with good or bad effects according to the principle from which it flows. If the agent be an honest and candid inquirer, if his object be truth and information, he will be ever open to conviction, and, when convinced, will think it no dishonor to retract, and acknowledge his error. But, on the contrary, if his mind be darkened by prejudice, be guided by selfish view, or actuated by party spirits, his opinions, however erroneously formed, no course of reasoning nor invocation of facts can induce him to forego. He may be refuted, but will never be convinced; truth may dazzle him by its brightness, but will never irradiate or cheer. To attempt conviction under such circumstances would be labor unprofitably betra[y]ed.⁵⁴

Though acknowledging other viewpoints, Paterson attributed sentiments different from his own to contumacy, and darkly ascribed much of that contumacy to the demons of 'party spirits.' Such dark thoughts began to predominate, as the next essay recited a recurrent maxim in his thinking, that "'Party is the madness of many for the gain of a few,'" in effect treating his

⁵¹ William Paterson to William Livingston (29 May 1790), 'William Livingston Family Papers' (MHS, Boston, Ms. N-1579.2, Box 3).

⁵² An Act To Ratify (19 Nov. 1789), *DHC* 2:326-29; Elisha Lawrence to George Washington (4 Aug. 1790), *ibid* 2:325.

⁵³ *Paterson Essays* 2, 6, 10, 12 etc. (Aurelius), 54, 56, 58, 60 etc. (Horatius), 78, 80, 82, 83 etc. (Hortensius).

⁵⁴ *Ibid* 1-2.

own view as objective and the antifederalists as partisans,⁵⁵ foreshadowing his future approach to the Republican opposition⁵⁶ and to Sedition Act violators. Both essays preceded ratification of the Constitution in 1788 and his joining the Supreme Court in 1793.⁵⁷

He took a more tolerant tack toward 'diversity of sentiment' in another essay, sometime after his appointment but when he still saw some positive aspects to the French Revolution, as he discussed the difficulty of 'fix[ing] upon a constitution and frame of government.'

Our notions with respect to government are extremely mutable and various. On this point, men of the soundest heads and purest hearts entertain very different sentiments; and, in all probability, will continue to do so till the end of time. Nor is this to be wondered at when we consider, that, in matters of opinion, the same person, in his various stages of progression through life, scarcely differs from others more than he does from himself. This diversity of sentiment arises from a thousand sources[]....⁵⁸

Missing was reprobation of opposing views, based on prejudice, selfishness, or party spirits. Instead, Paterson spoke of freedom of speech in much the way he spoke of freedom of assembly, a couple of essays later. 'The people have a right to assemble in town-meetings about politics, and to talk them over, and argue pro and con, and resolve and re-resolve upon them. It is the right of man and the birth-right of Americans. True, very true....'⁵⁹

The first and second essays and the third could have been written by two different people, one intolerant and the other open to dissenting expression. The First Amendment intervened, but did not resolve the tug of war in Paterson's thinking; the 1798 crisis did.

Paterson added another maxim that could justify anything: the new government's right of self-preservation. In 1789, he offered it as a justification for the new criminal law.⁶⁰ It was essentially the ancient reason of state argument, dressed in prettier clothing. Not only could

⁵⁵ *Ibid* 7.

⁵⁶ *Ibid* 54, 56.

⁵⁷ *Ibid* 13 (ratification), 16 (appointment).

⁵⁸ *Ibid* 48.

⁵⁹ *Ibid* 58.

⁶⁰ 'Notes of William Paterson' (22-23 June 1789), *DHFFC* 9:474, 475, 476, 479.

it justify anything, but it did. A decade later, Paterson used it to justify the Sedition Act.⁶¹

C Justice Samuel Chase

Samuel Chase became the first Supreme Court justice to be impeached, though he was not convicted when the Senate vote fell short of the required two-thirds majority.⁶² In his wake in the Continental Congress and throughout his career was contention,⁶³ scandal,⁶⁴ or both.⁶⁵

He expressed support of freedoms of press and speech, before the Sedition Act crisis.

1 Chase's Rise Through Newspaper Debates

Chase's rise to a leading position in Maryland politics, and consequently to the Continental Congress, resulted in large part from his use of the press. In the opening of one essay, he relied on freedom of speech and condemned those who labeled dissent 'sedition':

Freedom in enquiry and opinion we hold with you a natural right; and therefore the terms... "the sowers of sedition and discord"--"state-lawyers who pushed forward this publick resolve for the promotion of their own private gains," applied to those, who differed from you in sentiment, are intemperate. . . .⁶⁶

A quarter century later, Chase's fall in public esteem also resulted primarily from newspapers, over whose prosecutions he zealously presided (Chapter 6.D).

During the Stamp Act debates of 1765, he led⁶⁷ demonstrations by predecessors to the Sons of Liberty who, as the royal governor related, 'hang'd or burn't in effigie' the stamp collector in front of the gallows, though Chase may not have been involved in the 'mob of three

⁶¹ *Paterson Draft Opinions* 45; William Paterson's Charge (U.S.Cir.Ct.Vt. 3 Oct.1798), *DHSC* 3:292, 293.

⁶² *Chase Trial* 268.

⁶³ E.g., Samuel Chase, *Maryland Gazette* (Annapolis 23 Aug.1781), in *Carroll Papers* 3:1474 (with Charles Carroll); Daniel of St. Thomas Jenifer to Charles Carroll (2 Aug.1779), *ibid* 3:1251,1260 (with Samuel Wilson); altercations with Walter Dufaney and John J Zubly; and examples in this section; accord Neil Strawser, 'Samuel Chase and the Annapolis Paper War' (1962) 57 *Maryland Historical Magazine* 177 (1766 controversy over city expenditures).

⁶⁴ Charles F Adams (ed), *Memoirs of John Quincy Adams* (Lippincott, Philadelphia 1874-77) 5:213.

⁶⁵ See generally Stephen B Presser, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* (CAP, Durham 1991); Jane S Elsmere, 'The Impeachment Trial of Justice Samuel Chase' (PhD thesis, Indiana University 1962); *OCSC* 137; *Justices* 1:185.

⁶⁶ Thomas Johnson, Samuel Chase and William Paca, 'To John Hammond' *Maryland Gazette* (Annapolis 9 Sept.1773) 1, 1.

⁶⁷ Samuel Chase, 'To the Publick' *Maryland Gazette* (Annapolis 18 July 1766).

of four hundred people' that then destroyed the collector's house.⁶⁸ Opponents soon described Chase as a 'reckless incendiary, a ringleader of the mob,' and Chase shot back that they were 'despicable pimps, and tools of power.'⁶⁹ The printer of the *Maryland Gazette*, which had published what Chase called 'the most inveterate and false reflections' against him, 'refused to give [his response] a place in his paper' because its libelous vitriol would 'subject him to prosecutions, and the dislike of *many* of *his* friends.'⁷⁰ Chase responded with a broadside as a 'vindication' of himself,⁷¹ benefiting from the press even while criticizing it.⁷²

In 1772-1773, Chase entered another major altercation in print opposing the colonial government and the established church. Compensation for many governmental officials was paid from tobacco inspection fees, and under the same law, compensation for the established church clergy was paid in tobacco or money from a related tax on each head in every parish. The law authorizing these taxes expired in 1770,⁷³ and the lower legislative house refused to extend it,⁷⁴ supported by Chase.⁷⁵ The governor tried to reinstate the colony's revenue stream by proclamation,⁷⁶ and the Anglican ministers tried by petition, which the lower house rejected.⁷⁷ The ministers argued that nonextension of the 1747 act⁷⁸ revived the higher tax of the original 1702

⁶⁸ Horatio Sharpe to Lord Baltimore (10 Sept.1765), *Maryland Archives* 14:222, 223; accord, Horatio Sharpe to Thomas Gage (23 Sept.1765), *ibid* 14:224; *Maryland Gazette* (Annapolis 6 Mar.1766).

⁶⁹ Samuel Chase, 'To the Publick' (18 July 1766); accord *Creation* 253-54.

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

⁷² He occasionally published other broadsides, more than any other early justice, again presumably because newspapers would not provide free space. E.g., 'To the Citizens of Baltimore-Town' (4 May 1794); 'To the Voters of Baltimore-Town' (3 Oct.1788); 'To the Voters of Anne-Arundel County' (25 Oct.1786).

⁷³ The most recent reenactments extended the fees until 25 Dec.1769, and then until 1 Oct.1770. An Act Continuing an Act Entit[le]d an Act for Amending the Staple of Tobacco for Preventing Frauds in His Majesty[']s Customs and for the Limitation of Officers['] Fees (13 Nov.1766), *Maryland Archives* 51:222; similar Act (13 Dec.1769), *ibid* 62:123.

⁷⁴ *Maryland Archives* 62:200-01 (31 Oct.1770) (upper house passed), *ibid* 62:411-14 (17 Nov.1770) (lower house rejected).

⁷⁵ *Maryland Archives* 62:414 (17 Nov.1770).

⁷⁶ 'Proclamation' (26 Nov.1770), *Maryland Archives* 63:109-10.

⁷⁷ Hugh Neill to Daniel Burton (18 July 1771), William S. Perry (ed), *Historical Collections Relating to the American Colonial Church* (np, Hartford 1870-78) 4:342, 343.

⁷⁸ An Act for Amending the Staple of Tobacco, for Preventing Frauds... (1747), *Maryland Archives* 44:595, 604.

act,⁷⁹ and filed suits for the higher tax.⁸⁰ Chase first entered the controversy involuntarily when his private legal opinion to a minister was printed, supporting that claim.⁸¹ Chase stanchd criticism by arguing that the original 1702 law was unconstitutional,⁸² which both paid the established clergy with the poll tax and established the Anglican Church.⁸³ Chase, with William Paca and Thomas Johnson, offered free defense to parishioners declining to pay the poll tax.⁸⁴ A leading Anglican minister, goaded by a precipitous drop in income,⁸⁵ published an attack on Chase and Paca,⁸⁶ whose response began a newspaper war,⁸⁷ which became front page material.⁸⁸ Other essayists debated the officials' fees.⁸⁹ Finally, the lower house almost unanimously resolved that the 1702 law was unconstitutional, with Chase's and Johnson's support, in June 1773,⁹⁰ and replaced it with a lower tax for the clergy.⁹¹ Chase and Paca published scathing

⁷⁹ An Act for the Establishm[en]t of Religious Worsh[ip] in This Province According to the Church of England: and for the Maintenance of Ministers (16 Mar.1702), *Maryland Archives* 24:264.

⁸⁰ Samuel Chase and William Paca, 'To the Rev. Mr. Jonathan Boucher' *Maryland Gazette* (Annapolis 14 Jan.1773) 2, 3; Samuel Chase and William Paca, 'To the Reverend Mr. Jonathan Boucher' *Maryland Gazette* (Annapolis 18 Mar.1773) 1.

⁸¹ *Ibid.* This is often misdescribed as an opinion that the 1702 law was unconstitutional.

⁸² 'Old True-Penny,' *Maryland Gazette* (Annapolis 20 Aug.1772).

⁸³ An Act for the Establishm[en]t of Religious Worsh[ip] in This Province According to the Church of England: and for the Maintenance of Ministers (16 Mar.1702), *Maryland Archives* 24:264.

⁸⁴ Thomas Johnson, Samuel Chase and William Paca, 'To John Hammond' *Maryland Gazette* (Annapolis 9 Sept.1773) 1, 2. They defended at least four suits. See Charles A Barker, *The Background of the Revolution in Maryland* (YUP, New Haven 1940) 363.

⁸⁵ Jonathan Boucher, *Reminiscences of an American Loyalist, 1738-1789* (Kennikat Press, Port Washington 1967) 70.

⁸⁶ Jonathan Boucher, 'To Samuel Chase and William Paca, Esqrs.' *Maryland Gazette* (Annapolis 31 Dec.1772) 2.

⁸⁷ Samuel Chase and William Paca, 'To the Rev. Mr. Jonathan Boucher' *Maryland Gazette* (Annapolis 14 Jan.1773) 2, 3; Jonathan Boucher, 'To Samuel Chase, and William Paca, Esqrs.' *ibid* (Annapolis 4 Feb.1773) 2; William Paca, 'To the Rev. Mr. Jonathan Boucher' *Maryland Gazette* (Annapolis 25 Feb.1773) 2.

⁸⁸ Jonathan Boucher, 'To William Paca, Esq.' *Maryland Gazette* (Annapolis 4 Mar.1773) 1; William Paca, 'To the Reverend Mr. Jonathan Boucher' *ibid* (Annapolis 11 Mar.1773) 5-6; Samuel Chase and William Paca, 'To the Reverend Mr. Jonathan Boucher' *ibid* (Annapolis 18 Mar.1773) 1-4; Jonathan Boucher, 'To William Paca, Esq.' *Supplement to the Maryland Gazette* (Annapolis 18 Mar.1773) 1; Samuel Chase and William Paca, 'To the Reverend Mr. Jonathan Boucher' *Maryland Gazette* (Annapolis 18 Mar.1773) 1, 1, 3.

⁸⁹ Most notably Charles Carroll writing as 'First Citizen,' *Maryland Gazette* (Annapolis 4 Feb.1773, 11 Mar.1773, 6 May 1773, 1 July 1773); Daniel Dulany writing as 'Antilon,' *ibid* (7 Jan.1773, 18 Feb.1773, 8 Apr.1773, 3 June 1773); and John Hammond, 'To the Printers' *ibid* (29 July 1773) 1.

⁹⁰ *Maryland Archives* 63:347 (19 June 1773); *ibid* 64:130 (14 Dec.1773) (reaffirming illegality). The upper house disagreed. *Ibid* 64:254 (21 Dec.1773).

⁹¹ *Maryland Archives* 64:254 (21 Dec.1773).

criticism of the opposition,⁹² and their fight vaulted them into the Maryland delegation to the Continental Congress.⁹³ That was largely attributable to the press.

2 The Maryland Declaration of Rights and Freedom of Press

The Maryland Declaration of Rights of 1776 was drafted by a committee of seven of the delegates.⁹⁴ Chase's motion brought about the appointment of that committee,⁹⁵ and Chase was initially on it⁹⁶ but lost his seat when he resigned from the convention (because he disagreed with instructions from constituents).⁹⁷ The committee's draft included freedom of press, and was prepared before his resignation, though not debated until two months later.⁹⁸

Chase voted for the final declaration of rights,⁹⁹ which contained strong protection for freedom of press:

XXXVIII. That the liberty of the press ought to be inviolably preserved.¹⁰⁰

Two things underscore Chase's commitment to that liberty, or at least to his enjoyment of that liberty. A month before his motion to form the committee, he asked John Adams to obtain a book on 'Civil Liberties' written by a prominent advocate of press and conscience.¹⁰¹ As soon

⁹² Thomas Johnson, Samuel Chase and William Paca, 'To John Hammond' *Maryland Gazette* (Annapolis 9 Sept. 1773) 1-6.

⁹³ See Jonathan Boucher, *Reminiscences of an American Loyalist, 1738-1789* (Kennikat Press, Port Washington 1967) 69-71; *Maryland Archives* 64:xviii-xix; Anne Y Zimmer, 'The "Paper War" in Maryland, 1772-73: The Paca-Chase Political Philosophy Tested' (1976) 71 *Maryland Historical Magazine* 177; Jean H Vivian, 'The Poll Tax Controversy in Maryland, 1770-76: A Case of Taxation with Representation' (1976) 71 *Maryland Historical Magazine* 151; Anne Y Zimmer, *Jonathan Boucher: Loyalist in Exile* (Wayne State University Press, Detroit 1978) 118-31; David C Skaggs, *Roots of Maryland Democracy, 1753-1776* (Greenwood Press, Westport 1973) 128-30.

⁹⁴ 'Proceedings of the Convention of the Province of Maryland' (14 Aug. 1776-), *American Archives* 3:83, 91.

⁹⁵ *Ibid* 3:90 (17 Aug. 1776).

⁹⁶ *Ibid* 3:91. Additional members were added, including Thomas Johnson, when Chase and two others resigned. 3:97.

⁹⁷ *Proceedings of the Convention of the Province of Maryland. . . Fourteenth of August, 1776* (Frederick Green, Annapolis 1776) 12 (on 27 Aug. 1776).

⁹⁸ Reported 10 Aug. 1776, and debated *American Archives* 3:135, 138 (31 Oct. 1776).

⁹⁹ See *ibid* 3:143-47 (3 Nov. 1776).

¹⁰⁰ *Ibid* 3:143, 147 (3 Nov. 1776); Maryland Declaration of Rights art. xxxviii, *Federal-State Constitutions* 3:1686, 1690.

¹⁰¹ Samuel Chase to John Adams (9 July 1776), *Letters of Delegates* 4:415 n1, referring to Richard Price, *Observations on the Nature of Civil Liberty* (repr John Dunlap, Philadelphia 1776).

as the committee draft was printed, he sent a copy for comment to John Dickinson,¹⁰² the recent author of the Continental Congress address that first recognized freedom of press.

Twelve years later, in April 1788, Chase again expressed commitment to the state declaration of rights, or at least his own enjoyment of it. His published essay began by affirming that he was 'a friend to our present state government because it is wisely calculated to secure all the civil and *religious* rights of the people and fully adequate for all internal state purposes' He then listed ten provisions of the state declaration of rights, evidently those he found most fundamental, such as trial by jury and freedom of press.¹⁰³ Similarly, the day the proposed federal Constitution arrived in Maryland, Chase expressed concern that it 'will alter, and in some instances, abolish our [Maryland] Bill of Rights,'¹⁰⁴ and his concern continued.

3 The Necessity of a Federal Bill of Rights and of Freedom of Press

Chase was the only early justice who opposed the Constitution in 1787-1788, and part of his reason was its omission of a bill of rights. After the Maryland ratification convention, he summarized his reasons for opposition as the lack of amendments 'to declare & secure the great and essential rights of the people' and to limit some of the new government's powers.¹⁰⁵

At the Maryland ratification convention, Chase's speeches, according to his notes, addressed five topics, and the fourth was his concern that the proposed Constitution threatened freedom of press and of conscience. His notes for that fourth topic were:

Old Whig No.5-4 Brutus No.2
Liberty of Conscience
Bill or Declaration of Rights
Liberty of Press¹⁰⁶

Chase's references to three recent essays fill in many of the gaps, and indicate that he used

¹⁰² Samuel Chase to John Dickinson (29 Sept.1776), *Letters of Delegates* 5:261; see Samuel Chase to John Dickinson (4 & 19 Oct.1776), *ibid* 5:262 n2.

¹⁰³ 'Objections to the Federal Government,' in 'Samuel Chase Papers' 61 (NYPL, Bancroft Collection v.168).

¹⁰⁴ *Maryland Journal* (28 Sept.1787), reprinted in *Essays on Constitution* 325

¹⁰⁵ Samuel Chase to John Lamb (13 June 1788), Isaac Q Leake, *Memoir of the Life and Times of General John Lamb* (J Munsall, Albany 1850) 310; *DHRC* 18:47.

¹⁰⁶ 'Objections to the Federal Government,' in 'Samuel Chase Papers' 97 (NYPL, Bancroft Collection v.168).

their reasoning. 'Old Whig' No. 5 discussed 'some of those liberties' that should be included in a bill of rights.¹⁰⁷ The essay listed five freedoms, beginning with liberty of conscience, followed by 'freedom of speech and of writing and publishing their thoughts on public matters.'¹⁰⁸ The sequence in the essay matches Chase's sequence of conscience and press in his notes. 'Old Whig' No. 4 gave reasons why 'we ought carefully to guard ourselves by a bill of rights against the invasion of those liberties which it is essential for us to retain.'¹⁰⁹ Without such a bill of rights, it warned, 'government is always in danger of degenerating into tyranny.'¹¹⁰ 'Brutus' No. 2 similarly insisted that the foundation of a new government must be expressly reserved rights, beginning with criminal law rights, then freedom of conscience and free elections, and then 'that the liberty of the press should be held sacred.'¹¹¹ Chase's notes also listed two common arguments of opponents of a bill of rights, to be refuted.¹¹²

The vote for ratification at the Maryland convention in May 1788, which was by a heavy federalist majority of 63 to 11,¹¹³ was both preceded and followed by discussion of a bill of rights. When former Gov. William Paca proposed amendments, the committee of thirteen appointed to consider them¹¹⁴ included Chase as well as Johnson.¹¹⁵ The only plenary record of Maryland's ratification convention, which is printed in *Elliot's Debates*, is the address written by the minority supporting the amendments,¹¹⁶ which included Chase.¹¹⁷ It recited, ap-

¹⁰⁷ 'An Old Whig' V (Oct.-Nov.1787), *Complete Anti-Federalist* 3:34, 34 (§3.3.25-30).

¹⁰⁸ *Ibid* 3:37.

¹⁰⁹ 'An Old Whig' IV (Oct.-Nov.1787), *ibid* 3:30, 34 (§3.3.18-24).

¹¹⁰ *Ibid* 3:33.

¹¹¹ 'Brutus' II (1 Nov.1787), *ibid* 2:372, 373, 375 (§2.9.24-33).

¹¹² 'Objections to the Federal Government,' in 'Samuel Chase Papers' 97 (NYPL, Bancroft Collection v.168).

¹¹³ 'Address to the People of Maryland' ([1 May] 1788), *Elliot's Debates* 2:547, 548, 549; *DHRC* 17:242 (excerpts); accord Bernard C Steiner, 'Maryland's Adoption of the Federal Constitution' (1900) 5 *American Historical Review* 207.

¹¹⁴ *Ibid* 2:549; see *DHRC* 17:237n. Paca's amendments are reprinted in *DHRC* 17:240 (29 Apr.1788).

¹¹⁵ *Ibid* 2:549; John B Cutting to Thomas Jefferson (11 July 1788), *Jefferson Papers* 13:331, 333.

¹¹⁶ *Ibid* 2:547; *DHRC* 17:242.

¹¹⁷ *Ibid* 2:556.

parently accurately,¹¹⁸ that the committee agreed unanimously to twelve amendments including one on freedom of press, but that the federalist majority on the committee made a strategic decision to recommend no amendments at all,¹¹⁹ evidently out of frustration or fear at Chase's insistence on arguing for at least three additional amendments.

The minority address reprinted not only the freedom of press provision, which the committee had approved but not reported, but its reason for deeming the provision critical:

12. That the freedom of the press be inviolably preserved.
In prosecutions in the federal courts for libels, the constitutional preservation of this great and fundamental right may prove invaluable.¹²⁰

The way that this provision could 'prove invaluable' in prosecutions for libels, was in thwarting them by elevating constitutionally-protected freedom of press over the common law of seditious libel. Only then would freedom of press 'be inviolably preserved.' The provision did not mean preservation of the right to jury trial, or of the jury's right to determine facts, because those were protected by a separate amendment for all criminal cases. The provision did not mean creation of a defense of truth, because it did not even hint at that.

As the new Congress convened the next year, Chase lobbied for amendments to be adopted to check the new government (though drowned in pessimism about the prospects), by contacting a leading supporter of a federal bill of rights, Sen. Richard Henry Lee:

I observed that a day is appointed to consider amendments to the new Constitution. I am one of the number that expect no essential alterations. I hope I may be mistaken. I fear that no check will be placed on the exercise of any of the powers granted. I am satisfied that, every amendment must flow from grace & favor. Our people will not contend for any, the most important. In this state we are prepared to submit to any government. The hearts of our people are broke, they are bow[ed] down to the earth with their debts.¹²¹

His reference to only the 'grace and favor' of Providence bringing amendments was because

¹¹⁸ AC Hanson to James Madison (2 June 1788), *DHC* 4:645; John B Cutting to Thomas Jefferson (11 July 1788), *Jefferson Papers* 13:331-36; J Thomas Scharf, *History of Maryland* (JB Fiet, Baltimore 1879) 2:542-46.

¹¹⁹ *Ibid* 4:656-67; *Elliot's Debates* 2:549, 555; *DHRC* 17:242; John B Cutting to Thomas Jefferson (11 July 1788), *Jefferson Papers* 13:331, 336. The issues in that strategic decision are summarized in *Maryland* 91-93.

¹²⁰ 'Address to the People of Maryland' ([1 May] 1788), *Elliot's Debates* 2:552; *DHRC* 17:244.

¹²¹ Samuel Chase to Richard Henry Lee (16 May 1789), *DHFC* 15:565-66.

in Maryland the 'people will not contend for any' because of being broken and laden with debt. He similarly wrote a year earlier that amendments were favored by the people, but 'they are depressed and inactive' and 'seem ready to submit to any master.'¹²² Chase continued to lobby for freedom of press by again writing to Lee, two months later, to express opposition to the Senate doors being closed as contrary to 'Republican principles' that demanded openness to public viewers and the press.¹²³

4 Later Reversal on Freedom of Press

In 1787, Chase had marched into the debate over the Constitution by urging caution and delay, so fellow citizens could 'lay their sentiments and reasons for or against the measure before you,' and urging that 'you ought to hear *both* sides, as the man who determines on hearing one part only, will almost always be mistaken in his judgment.'¹²⁴

By late 1796, his first year on the Supreme Court, Chase had enough of hearing both sides, and was far more concerned with the recently emerged Republican press than with protections of the Bill of Rights.¹²⁵ He sent a letter amounting to an advisory opinion on the French minister's effort to influence the 1796 election, in response to the secretary of war sending a copy of the *Aurora*, the leading Republican newspaper, criticizing the government. Chase's advice was for the government to bring a criminal libel prosecution of the printer:¹²⁶

I thank you for the *Aurora*, but my absence prevents me from any knowledge of the sentiments of the people here, respecting Mr. Adet's abuse of our *whole administration*, and appeal to the people. I think the printer ought to be indicted for a false & base *libel* on our government. A free press is the support of liberty and a republican gov[er]nment, but a licentious press is the bane of freedom, and the pest of society, and will do more to destroy real liberty than any other instrument in the hands of knaves & fools. I see no difference between Genet and Adet. . . .¹²⁷

¹²² Samuel Chase to John Lamb (13 June 1788), *DHRC* 18:47, 48.

¹²³ Samuel Chase to Richard Henry Lee (2 July 1789), *DHFFC* 16:916, 917; see *Chesapeake Politics* 291-93.

¹²⁴ [Samuel Chase], 'Letter of Caution' (12 Oct. 1787), reprinted in *Essays on Constitution* 327, 328.

¹²⁵ His partisanship while on the bench was also manifested in his advisory opinion on an official printer, calling for a 'trusty or faithful discreet person of unquestionable attachment to the government' ([Apr.] 1800), *McHenry Correspondence* 431 n3; and his active campaigning for Adams in 1800, *Aurora* (Philadelphia 9 Aug. 1800), *DHSC* 1:895.

¹²⁶ Samuel Chase to James McHenry (4 Dec. 1796), 'Chase Papers' (James S Copley Library, La Jolla).

¹²⁷ *Ibid.* 'Pest' may be 'peril'; the writing is difficult to read.

Chase saw little value in an opposition press, and readily identified its statements as criminal libels and licentiousness. He was primed for prosecutions two years before the Sedition Act.

Chase's change was dramatic from the Maryland ratification convention, where he found a bill of rights indispensable to protect liberty, and called for 'freedom of the press [to] be inviolably preserved' because it would be invaluable for defense of libel prosecutions, to that 1796 advisory opinion, in which he urged indicting an opposition newspaper for criminal libel. His change became even more stark once he was armed with the Sedition Act in 1798, as he became the most zealous justice in prosecuting those 'knaves and fools' of the press. (Chapter 6.D.) Under it, he charged grand juries that it was a 'false patriot' who 'without just cause, creates distrust and suspicion of the legislature, or of the executive, or of the principal officers of government,' and that a true patriot must 'give up his private sentiments to the public will.'¹²⁸ By his impeachment trial in 1805, Chase had expanded the category of knaves and fools to include all his enemies.¹²⁹

Chase's reversals on opposing the Constitution, on professing strong commitment to freedom of press, and on believing that freedom of press shielded against federal libel prosecutions, were not his only reversals. He also reversed positions on a federal common law of crime, on criticism of the administration (Chapters 3.E, 2.C), and on the Blackstone-Mansfield definition.

D Chief Justice Oliver Ellsworth

Oliver Ellsworth, the third chief justice, held that position as the Sedition Act was passed and as trials under it occurred, though he did not preside over any and was in France on a diplomatic mission during most. The only book-length biography of Ellsworth¹³⁰ devotes one sentence to his role in and views of the First Amendment,¹³¹ but Ellsworth's role was as signifi-

¹²⁸ Samuel Chase's Charge (U.S.Cir.Ct.Pa. 12 Apr.1800), *DHSC* 3:408, 413.

¹²⁹ Samuel Chase to Joseph Hopkinson (10 Mar.1805), 'Samuel Chase Papers' (LC, Washington).

¹³⁰ See generally William G Brown, *Life of Oliver Ellsworth* (Macmillan, New York 1905); *OCSC* 252; *Justices* 1:223. No thesis has been written on Ellsworth, but a judicial biography has been. William R Casto, *Oliver Ellsworth and the Creation of the Federal Republic* (Second Circuit Committee on History, New York 1997) (the best source).

¹³¹ *Ibid* 200.

cant, though brief, as Paterson's in adopting the Bill of Rights.

1 Revision and Congressional Passage of the Bill of Rights

The Senate amendments of September 9, 1789, which were the final Senate action on the Bill of Rights, were in Ellsworth's handwriting¹³² though they were doubtless not based entirely on his preferences but on Senate debate. It is significant that the changes did not show hostility toward the House version, but instead mainly improved syntax and renumbered the House amendments. It is equally significant that 'he was not particularly enthusiastic about the task.'¹³³ The substantive changes included the final language of the freedoms of speech and press clauses, rewording of the establishment provision to refer to 'articles of faith or a mode of worship,' the final language of the free exercise clause (deleting freedom of conscience as duplicative),¹³⁴ deletion of a conscientious objector provision (perhaps also because duplicative), and revision of the grand jury and double jeopardy provisions.¹³⁵

Ellsworth led the three senators, joined by Paterson and Carroll, when they were appointed to the conference committee on 21 September.¹³⁶ He delivered the conference committee report to the Senate on 24 September,¹³⁷ and it too was in his hand.¹³⁸ He retained, without damage, the final language of the speech and press clauses. In writing these drafts,

¹³² *DHFFC* 1:168 n35, 4:45n (9 Sept.1789).

¹³³ *Ellsworth* 77.

¹³⁴ Thus, what became the First Amendment was changed from the two provisions in the House version of 24 August 1789 (*DHFFC* 4:35):

ARTICLE THE THIRD

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

ARTICLE THE FOURTH

The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for a redress of grievances, shall not be infringed.

to the Senate version of 9 and 14 September 1789 (*Ibid* 4:46):

ARTICLE THE THIRD

Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.

¹³⁵ *DHFFC* 4:43-45 (9 Sept.1789), 45-47 (14 Sept.1789).

¹³⁶ *DHFFC* 4:8, 1:182 (21 Sept.1789). Ellsworth was listed first, and presented their report.

¹³⁷ *DHFFC* 1:185 (24 Sept.1789).

¹³⁸ *DHFFC* 1:48n.

he did not try to reintroduce the limitation that the Senate had rejected three weeks earlier, which would have reaffirmed the vitality of the common law of seditious libel: '[i]n as ample a manner as hath at any time been secured by the common law.'¹³⁹

Did Ellsworth support the Bill of Rights because he believed in it or because the ratification compromise required it? He at least was not opposed to it, because he had an opportunity to tamper with its wording, and did not when he was the draftsman of at least two Senate versions. However, his time and imprint were miniature compared to his drafting and defending¹⁴⁰ the Judiciary Act of that year,¹⁴¹ which was intricately crafted to restrict federal court jurisdiction and authority to less than the Constitution's grant in debated areas in order to neutralize objections. The contrast implies strongly that Ellsworth's commitment may have been simply to get a job done in acceptable form,¹⁴² as a skilled negotiator and dutiful implementer,¹⁴³ on the ratification compromise. He had, after all, opposed a bill of rights a year and a half before in an influential essay, as discussed next, and had led the Connecticut convention to ratification without any amendments.¹⁴⁴

A mixed signal about Ellsworth's fervency about freedoms of speech and press soon came with the issue of making Senate proceedings available to the press and the public. At the Constitutional Convention, he had been willing to delete¹⁴⁵ the constitutional requirement for Congress to publish its journal.¹⁴⁶ As the Senate reconsidered its closed-door policy in

¹³⁹ *DHFFC* 1:152 (3 Sept. 1789); *ibid* 4:36 n9.

¹⁴⁰ Abraham Baldwin to Joel Barlow (14 June 1789), *DHFFC* 16:774, 775; Paine Wingate to Nathaniel P Sargeant (18 July 1789), *ibid* 16:1069, 1070; William Smith to Edward Rutledge (10 Aug. 1789), *ibid* 16:1283, 1284; 'Diary of William Maclay' (29 June 1789), *ibid* 9:91; see *ibid* 1:11, 14; Charles Warren, 'New Light on the History of the Federal Judiciary Act of 1789' (1923) 37 *Harvard Law Review* 49, 60, 50.

¹⁴¹ 1 Stat. 73 (1789).

¹⁴² *DHFFC* 14:992-97.

¹⁴³ John Adams to Abigail Adams (5 Mar. 1796), *DHSC* 1:842; John Adams to William Tudor (9 May 1789), *DHFFC* 15:489.

¹⁴⁴ *DHRC* 3:560-62, 541, 548; see *Elliot's Debates* 2:196.

¹⁴⁵ *Farrand's Records* 2:260 (11 Aug. 1787).

¹⁴⁶ U.S. Const. art. I, §5.

1794, Ellsworth supported opening Senate proceedings to the press and public,¹⁴⁷ and felt strongly enough to vote against the Federalist majority. But nothing indicates that he based that on freedom of speech or press, or a public right to know.

2 Position During Constitutional Ratification Debates on Freedom of Press

Ellsworth's dutiful approach to the Bill of Rights in September 1789 was doubtless tied to that opposition a year and a half earlier, in December 1787. When the Constitution was newly written and most federalists opposed a bill of rights, Ellsworth as 'Landholder' wrote a series of essays to encourage ratification,¹⁴⁸ the sixth of which responded to demands for a bill of rights. He advocated the federalist position that declarations of rights originated and were necessary when 'kings claimed all power' and rights existed only as granted, but were unnecessary when 'all the power government now has is a grant from the people.'¹⁴⁹

He then responded to the antifederalist warning that freedom of press was endangered:

*There is no declaration of any kind to preserve the liberty of the press, etc. Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress have no power to prohibit either, and can have no temptation. This objection is answered in that the states have all the power originally, and congress have only what the states grant them.*¹⁵⁰

Ellsworth's premise that 'congress have no power to prohibit' liberty of press set as the standard that only an enumerated power could justify prohibitory regulation. His premise that Congress 'can have no temptation' to direct legislation at the press unavoidably approved an opposition press, since the antifederalist press was precisely what he wrote to refute.

Those assurances clash with the concept that a federal common law authorized Congress or the Supreme Court to prosecute seditious libel, or that freedom of press only meant the Blackstone-Mansfield definition and thus did not restrict prosecuting seditious libel. There

¹⁴⁷ James Monroe to Thomas Jefferson (3 Mar.1794), *Monroe Papers* 2:690, 691.

¹⁴⁸ Landholder [Oliver Ellsworth], 'Landholder I-XIII' (5 Nov.1787-24 Mar.1788), *Essays on Constitution* 135-202.

¹⁴⁹ Landholder [Oliver Ellsworth], 'Landholder VI' (10 Dec.1787), *Essays on Constitution* 160, 163; *DHRC* 3:487, 489.

¹⁵⁰ *Ibid* 164 (emphasis in original); *DHRC* 3:398, 400.

was no hint of Ellsworth embracing the Blackstone-Mansfield definition of freedom of press. However, in 1798 his position on that changed dramatically, similar to Iredell, Paterson, Chase, and Washington. (Chapter 6.H.)

3 Advocacy of Freedom of Opinion and Rejection of Libel against the Church

Ellsworth's next essay addressed freedom of conscience, and the antifederalist claim that the constitutional prohibition of religious tests made the Constitution 'unfavorable to religion.' He responded that the provision, far from endangering religious liberty, was 'to exclude persecution, and to secure to you the important right of religious liberty.' He described freedom of conscience in broad terms, and implicitly repudiated one species of seditious libel, libel against the established church (which Connecticut still had).¹⁵¹

He tied this freedom of conscience into a more general freedom of private opinion:

Civil government has no business to meddle with the private opinions of the people. If I demean myself as a good citizen, I am accountable, not to man, but to God, for the religious opinions which I embrace, and the manner in which I worship the supreme being. If such had been the universal sentiments of mankind, and they had acted accordingly, persecution, the bane of truth and nurse of error, with her bloody axe and flaming hand, would never have turned so great a part of the world into a field of blood.¹⁵²

However, what Ellsworth gave he immediately took away, much as he did a decade later with freedom of press. He criticized mandatory religious oaths as 'unjust and tyrannical,' but would allow some; he condemned 'meddl[ing] with the private opinions of the people,' but believed 'the civil power has a right, in some cases, to interfere in matters of religion' by prohibiting and punishing 'gross immoralities and impieties' and 'profane swearing, blasphemy, and professed atheism.'¹⁵³ He offered no principle to distinguish permissible from persecutory ones.

Ellsworth, according to his son-in-law's quite favorable biography, conceded that 'he had no imaginative powers.'¹⁵⁴ His approach to these freedoms did not disprove his self-description.

¹⁵¹ Landholder [Oliver Ellsworth], 'Landholder VII' (17 Dec. 1787), *ibid* 167, 168.

¹⁵² *Ibid* 170.

¹⁵³ *Ibid* 171, 169-70, 171.

¹⁵⁴ Joseph Wood, 'Draft Biography of Oliver Ellsworth' (Mar. 1880), *Ellsworth Papers-NYPL* 31.

E Justice Bushrod Washington

Bushrod Washington, one of the longest serving justices for a total of thirty-one years, now languishes not only in the large shadow of John Marshall, in the company of the other early justices, but in the still larger shadow of his uncle, the commander-in-chief and first president.¹⁵⁵

1 The Patriotic Society and Freedom of Speech

Bushrod Washington, early in his legal career in 1786, joined with other sons of the Virginia aristocracy to form a Patriotic Society. Its purposes, as a debating society, were to discuss 'public affairs' and 'the conduct of those, who represent us,' and 'to give them our sentiments upon those laws, which ought to be or are already made.'¹⁵⁶ When his advice was sought, George Washington only had time to send hurried 'first thoughts' that were overall negative, seeing 'as much evil as good result from such societies' particularly when they undertook to instruct representatives on national matters with partial information.¹⁵⁷

The nephew, in a rare break from his usual deference to his uncle's opinion, defended the society with an emphasis on speech: the 'motives which gave birth to the society' were the need of representatives to hear the 'sentiments of the people,' and the people's 'right to instruct their delegates' lest the representatives hear 'only the opinion of a few.'¹⁵⁸ His uncle remained concerned that constituent instructions to national representatives might prove disunifying.¹⁵⁹

Washington had some positive ties to the press, like other early justices, by publishing his Virginia reports and the George Washington biography. He twice delivered to newspapers essays written anonymously by Marshall defending *McCulloch v. Maryland*,¹⁶⁰ and later deliv-

¹⁵⁵ See generally David L. Annis, 'Mr. Bushrod Washington, Supreme Court Justice on the Marshall Court' (PhD thesis, Notre Dame University 1974); OCSC 917; *Justices* 1:243; Obituary, 28 U.S. (3 Pet.) vii (1832). Washington lacks any published biography, except an inadequate 1858 work.

¹⁵⁶ Bushrod Washington to George Washington (27 Sept. 1786), *Washington Papers-Confederation* 4:274.

¹⁵⁷ George Washington to Bushrod Washington (30 Sept. 1786), *ibid* 4:278.

¹⁵⁸ Bushrod Washington to George Washington (31 Oct. 1786), *ibid* 4:322.

¹⁵⁹ George Washington to Bushrod Washington (15 Nov. 1786), *ibid* 4:368, 368-70.

¹⁶⁰ John Marshall to Bushrod Washington (17 June 1819), *Marshall Papers* 8:316, 317; accord Gerald Gunther, *John Marshall's Defense of McCulloch v. Maryland* (SUP, Stanford 1969).

ered his own letter to the editor after newspapers criticized his sale of slaves.

Even as he was publishing his Virginia reports, however, he embraced a Blackstonian approach to freedom of press as he presided over three Sedition Act trials. (Chapter 6.E.) His past swimming against southern tides to support the Jay Treaty, and standing for Congress as a Federalist in 1798,¹⁶¹ became more a perception of life or death struggle. He was concerned in 1800 that Hamilton's pamphlet attacking Adams would cause 'the election of Mr. J[efferson]--which God forbid.'¹⁶² Since it turned out that God did not forbid it, Washington's fears deepened by 1804 to certainty 'that the present government could not exist for any considerable length of time.'¹⁶³ The next year, he confided 'what I have always thought of that [Republican] party, that the most violent democrat is, at heart, the greatest tyrant.'¹⁶⁴

2 The Privileges and Immunities Protected against State Encroachment

Justice Washington, part way through the Marshall years and his own tenure on the Supreme Court, addressed the meaning of the constitutional provision that he saw as the primary protection against state governments, parallel to the Bill of Rights protection against the federal government. He became the first justice to interpret the Privilege and Immunities Clause,¹⁶⁵ and to rule that it protects a number of specific liberties.¹⁶⁶ He said that his list was not exclusive (a complete list would be 'more tedious than difficult to enumerate'), and that under 'the general heads' of 'the enjoyment of life and liberty' 'many others . . . might be mentioned.'¹⁶⁷ His relatively broad description of rights was treated by the Supreme Court exactly fifty years later as a statement of the privileges and immunities of state citizenship un-

¹⁶¹ Thomas Jefferson to James Monroe (6 Sept.1795), *Jefferson Papers* 28:448, 449.

¹⁶² Bushrod Washington to Oliver Wolcott (1 Nov.1800), *Hamilton Papers* 25:249-50 n7. He supported Adams. *Ibid.*

¹⁶³ Joseph S Watson to David Watson (17 Feb.[1804]), 'Letters from William and Mary College, 1798-1801' (1921) 29 *Virginia Magazine of History and Biography* 129, 169 (quoting the justice, original underscored).

¹⁶⁴ Bushrod Washington to Nn (18 June 1805), 'Bushrod Washington' (NYPL, Misc. Personal Name File).

¹⁶⁵ U.S.Const. art.IV, §2, cl.1.

¹⁶⁶ *Corfield v. Coryell*, 6 F.Cas. 546, 551-52 (No.3,230) (U.S.Cir.Ct.Pa. 1823) (Washington, J.).

¹⁶⁷ *Ibid.*

der Article IV (though not of federal citizenship under the Fourteenth Amendment),¹⁶⁸ and has generated its share of modern day legal controversy.¹⁶⁹

His list of privileges and immunities did not expressly include the rights protected in the First Amendment--religion or conscience, speech or press, petition or assembly--among the rights that states must accord to citizens of other states. Neither did it exclude them, in view of his statement that 'many others . . . might be mentioned,' and his identification of mostly fundamental rights. The omission does reflect on the relative value he accorded them.

F Justice Alfred Moore

Alfred Moore, though a leading North Carolina attorney, made such little mark on the Supreme Court during his four years there that a modern judge nominated Moore as the most insignificant justice, with the painful sobriquet, 'Some men achieve insignificance; others have insignificance thrust upon them.'¹⁷⁰ His longest biography is half a pamphlet.¹⁷¹ Yet that nomination should be challenged, because Moore was the only successor justice between Johnson and Marshall who refused to press grand jurors for Sedition Act presentments. (Chapter 7.G.)

Nothing is evident of Moore's views on freedoms of speech and press before he joined the Supreme Court in the midst of Sedition Act prosecutions. He only wrote one Supreme Court opinion (*seriatim*),¹⁷² and apparently no circuit court opinions; few papers have survived.

All these successor justices expressed commitment to freedoms of press and speech before 1789, and supported the Bill of Rights as it was adopted¹⁷³ (except Moore, whose views at the

¹⁶⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

¹⁶⁹ E.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S.371, 394, 395-96 (1978) (Brennan, J, dissenting with White, J and Marshall, J); David A. Faber, 'Justice Bushrod Washington and the Age of Discovery in American Law' (2000) 102 West Virginia Law Review 735, 768-69.

¹⁷⁰ Frank H Easterbrook, 'The Most Insignificant Justice: Further Evidence' (1983) 50 University of Chicago Law Review 481, 485.

¹⁷¹ See generally OCSC 560; *Justices* 1:269 (though half is about cases and arguments in which he did *not* participate); Junius Davis, 'Alfred Moore and James Iredell: Revolutionary Patriots' (North Carolina Society of the Sons of the Revolution, Raleigh 1899).

¹⁷² *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39 (1800); *History of Supreme Court* 2:652.

¹⁷³ Justice Washington presumably supported the Bill of Rights, since his uncle President Washington did.

time have not survived). Paterson and Ellsworth successfully shepherded the First Amendment through the Senate, and did not introduce destructive changes, but showed more enthusiasm for other topics in their essays of the period. Chase expressed commitment to a bill of rights and to freedoms of press and speech, though his conduct over the years can easily be interpreted as commitment to whatever benefited himself. Only Johnson had shown sufficient commitment to a bill of rights to depart from his party on that issue, though Moore later did the same.

Nowhere in the successor justices' expressions before 1798 was any support for the Blackstone-Mansfield definition of freedom of press, though four rapidly embraced that definition and seditious libel doctrines in the 1798 crisis.

CHAPTER 6

THE SITTING SUPREME COURT JUSTICES PRESIDING OVER SEDITION ACT CASES, AND FREEDOMS OF SPEECH AND PRESS

And be it further enacted, That if any person shall write, print, utter or publish, . . . or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing[,] any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States. . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

--Sedition Act of 1798¹

The Supreme Court justices sitting at the time of the Sedition Act of 1798 upheld its constitutionality, and enforced it by presiding over all of the federal trials, as members of circuit courts. (The Supreme Court itself did not rule on the Sedition Act at the time.) The circuit court trials were sufficiently notorious that one provided the main basis for impeachment of Justice Chase.

Those sitting justices at the time the Sedition Act took effect were Chief Justice Ellsworth and Justices Cushing, Iredell, Paterson, Chase, and Wilson. After Wilson died one month later, he was replaced by Justice Bushrod Washington. After Iredell died in 1799, he was replaced by Justice Alfred Moore. All but Wilson and Moore vigorously defended the Sedition Act, and Paterson, Chase, and Washington on circuit courts presided over trials and sentenced violators. Their opinions on the constitutionality of the Act and of seditious libel prosecutions, in light of the First Amendment, are the subject of this chapter.²

¹ Sedition Act of 1798, 1 Stat. 596-97 [ch.74] (expired 1801).

² Information about trials is based in part on *Wharton's State Trials*, the best available record for most, which was adapted and reprinted in 1885 in *Federal Cases*, which are incompletely included in Westlaw. Information

This chapter's addition to existing literature is principally each sitting justice's reasoning about the Sedition Act and freedoms of press and speech; existing literature only cursorily discusses four of the six sitting justices on point,³ and ignores the analysis of Iredell and Cushing,⁴ and remaining justices. This chapter also adds discussion of grand jury charges and unpublished language on the Act and press and speech, and numerous hitherto uncited statements and primary sources on the justices' positions on the Sedition Act.⁵ It challenges ubiquitous statements about a clean party division on the Act, and pervasive assertions that the Virginia and Kentucky Resolutions failed to attract support from any other states.

A The Sedition Act

The Sedition Act of 1798, along with the Alien Acts, was enacted during the hysteria of the Quasi-War and the partisanship of the Federalist-Republican conflict. When the Sedition Act was signed by President Adams on 14 July 1798, Secretary of State Timothy Pickering wrote of 'the impending war with France,' and an ailing George Washington was planning to command a new army and was commissioning generals.⁶ To the real imminence of war,⁷ many Federalists added conspiratorial fears of nefarious Jacobins⁸ and of, in their parlance, the Ja-

about congressional debates comes in part from *Annals of Congress*, which is dually titled *Debates and Proceedings in the Congress*, the most accurate source for these years. *DHFFC* 10:xxiii-xxiv, xxvii.

³ E.g., *Repressive Jurisprudence* 144-45 (about four justices and First Amendment, only mentioning constitutionality 'raised in only three of the cases' plus Ellsworth letter); *History of Supreme Court* 1:645, 646 (about four justices and First Amendment, only mentioning defense raising and justices' exclusion of those arguments); *Freedom's Fetters* 232, 233, 234, 321-22, 326-27, 347-48, 354, 379, 381 (same); *Crisis* 129, 218 (same); *Ellsworth* 115-17 (only two pages, not on First Amendment).

⁴ E.g., Willis P Whichard, *Justice James Iredell* (CAP, Durham 2000) 113-15; John D Cushing, 'A Revolutionary Conservative' (PhD thesis, Clark University 1959) 334 (one footnote).

⁵ These include details of each Sedition Act prosecution, analysis of Paterson's ignored draft opinions and overlooked indictments, suggestion of Chase's craftiness in dodging an express constitutional ruling and in rejecting federal common law crimes, identification of probable sources of Washington's thought on seditious libel and freedom of press, and ironies of Iredell's position on the Act.

⁶ Timothy Pickering to Alexander Hamilton (16 July 1798), *Hamilton Papers* 22:22; George Washington to Alexander Hamilton (14 July 1798), *ibid* 22:17, 18, 19; which continued through 1800, John Adams to John Marshall (4 Sept. 1800), *Adams Works* 9:80, 81.

⁷ *Empire* 247, 239-75; *McHenry Correspondence* 439-40; *Adams Writings* 2:360, 362.

⁸ E.g., Fisher Ames, *Works of Fisher Ames* (TB Wait, Boston 1809) 94, 101; Stephen Higginson to Timothy Pickering (9 June 1798), *Higginson Letters* 1:806, 808.

cobin party or faction.⁹ Harper, a House sponsor of the Sedition Act, warned that 'there existed a domestic . . . conspiracy, a faction leagued with a foreign power, to effect a revolution or a subjugation of this country, by the arms of that foreign power,' which necessitated not only alien legislation but 'laws against seditious practices.'¹⁰ Hamilton identified the threat as 'a decided *French faction*,' the Republican party.¹¹ Ames, just leaving his House seat, attributed the apparent shortage of visible Jacobins to their resting 'in their lurking-places, . . . like serpents in winter, the better to concoct their venom.'¹² Republicans had their own fears, of creeping tyranny by, as they called them, the Tories and the British party,¹³ led by 'the quer[u]lous and cankered murmurs of *blind, bald, crippled, toothless Adams*'!¹⁴

1 Debates over Freedoms of Press and Speech

Congressional debates over the proposed Sedition Act, while raising many issues dividing Federalists and Republicans, focused on whether it violated freedoms of press and speech.¹⁵ As soon as the motion was made to read the bill, a countermotion was made to read the Bill of Rights.¹⁶ Supporters of the bill found no abridgment of the First Amendment because that Amendment did not 'guarantee, as a sacred principle, the liberty of lying against the Government,'¹⁷ or the liberty to 'offend against the laws,'¹⁸ or the liberty of making 'false and groundless charges' against magistrates;¹⁹ nor did that Amendment 'give the right

⁹ E.g., John Adams to John Trumbull (10 Sept. 1800), *Adams Works* 9:83; *Ames Works* 1:257, 250, 262; *Higginson Letters* 1:814.

¹⁰ *Annals* 8:2024, 2025 (21 June 1798); *ibid* 8:2165, 2166.

¹¹ *Hamilton Works* 5:460; *accord Ames Works* 1:250, 262.

¹² Fisher Ames, 'Laocoon No. I,' *Ames Works* 2:109, 113.

¹³ E.g., [William Duane], *Copy of an Indictment* ([Duane, Philadelphia 1799]) 2; James Monroe to Thomas Jefferson (4 Jan. 1800), *Monroe Writings* 3:169, 170; *Jacobin* 119.

¹⁴ 'For the Mercury' *Massachusetts Mercury* (Boston 8 May 1798) 2 (quoting *Aurora*); *accord* 'Extract of a Letter' *Independent Chronicle* (Boston 7 May 1798) 2.

¹⁵ *Jefferson* 3:386; *Chesapeake Politics* 532.

¹⁶ *Annals* 8:2093, 2133.

¹⁷ *Annals* 8:2112; *accord ibid* 8:2097, 2156.

¹⁸ *Annals* 8:2102; *accord ibid* 8:2112.

¹⁹ *Annals* 8:2150.

of . . . exciting sedition, insurrection, and slaughter.²⁰ Instead, some proponents claimed that the First Amendment meant only what the common law allowed: 'the liberty of the press is merely an exemption from all previous restraints' as described in Blackstone.²¹ The bill only criminalized false statements and things already forbidden by common law,²² and provided the defense of truth and the protection of a jury's general verdict.²³ Other proponents warned that seditious libel could dissolve loyalty to government,²⁴ and could bring 'revolution and Jacobinic domination' by the 'Jacobins of our country'²⁵ and the party supporting them.²⁶ Surely government had the right of self-preservation and self-defense,²⁷ which included proscribing 'all means calculated to produce these effects, whether by speaking, writing, or printing,'²⁸ and included 'restrain[ing] abuses of the press' and 'licentiousness of the press.'²⁹

Opponents rejoined that the First Amendment forbade the government 'to touch the press,'³⁰ and 'prohibited [government] from adding any restraint, either by previous restrictions, or by subsequent punishment.'³¹ The bill 'abridg[ed] freedom of speech and of the press' by deterring expression 'the least offensive to a power which might so greatly harass them' by prosecution,³² restraining all opinion that 'certain measures of government' were unwise or unconstitutional,³³ and by striking 'the root of free republican government' by re-

²⁰ *Annals* 8:2097; accord *ibid* 8:2102, 2100, 2101.

²¹ *Annals* 8:2148; accord *ibid* 8:2149, 2167-68, 2146.

²² *Annals* 8:2112, 2113, 2141, 2147, 2150.

²³ *Annals* 8:2150, 2149, 2168.

²⁴ *Annals* 8:2098; accord *ibid* 8:2099.

²⁵ *Annals* 8:2098; accord *ibid* 8:2100.

²⁶ *Annals* 8:2100; accord *ibid* 8:2024.

²⁷ *Annals* 8:2101, 2146, 2167.

²⁸ *Annals* 8:2146.

²⁹ *Annals* 8:2112, 2149.

³⁰ *Annals* 8:2140; accord *ibid* 8:2142, 2152, 2160.

³¹ *Annals* 8:2160.

³² *Annals* 8:2140-41; accord *ibid* 8:2104, 2105, 2106-07, 2142, 2151, 2153, 2156.

³³ *Annals* 8:2110, 2143, 2144, 2145.

stricting 'speaking and writing' necessary to an informed citizenry.³⁴ Truth could vanquish error, and newspapers allowed that battle to occur by existing 'on both sides,'³⁵ though the Federalist majority of newspapers believed government 'can do no wrong' and 'reject[ed] everything which does not approve of governmental measures.'³⁶ Opponents also warned that the bill's defense of truth was chimerical, because 'how could the truth of opinions be proven by evidence?',³⁷ and 'what writings, what opinions, could escape the severity of the intended law?'³⁸ They warned that jury general verdicts provided little protection when 'juries [were] selected by the marshal' and 'judges [were] appointed by the President.'³⁹ Other Republicans disputed whether seditious libel was still a crime, saying the Act 'creat[ed] crimes which were never before thought of in this country,'⁴⁰ or at least that 'the doctrine of libels was very unsettled in this country' and that prosecution 'very rarely happened';⁴¹ and they disagreed that there was 'any such thing as a common law of the United States' giving federal courts jurisdiction over libel⁴² whether or not states could prosecute seditious libel.⁴³ Ultimately there was no meaningful line between allowing liberty and forbidding licentiousness, as the shibboleth went, or between restricting the press and censoring newspapers and books.⁴⁴

2 Enactment and Provisions of the Sedition Act

The Act was approved by an overwhelming margin of 18-6 in the Senate, but by a close vote of 44-41 in the House.⁴⁵ The developing political parties⁴⁶ divided in the vote, though

³⁴ *Annals* 8:2104; accord *ibid* 2110, 2140, 2144.

³⁵ *Annals* 8:2105, 2106; accord *ibid* 2109, 2145, 2154, 2164.

³⁶ *Annals* 8:2143, 2150.

³⁷ *Annals* 8:2162; accord *ibid* 2109, 2113, 2141, 2144, 2154.

³⁸ *Annals* 8:2108; accord *ibid* 2109, 2113, 2141.

³⁹ *Annals* 8:2140; accord *ibid* 2153, 2162, 2163; *Truth* ii.

⁴⁰ *Annals* 8:2133; accord *ibid* 2154, 2164.

⁴¹ *Annals* 8:2135.

⁴² *Annals* 8:2137; accord *ibid* 2113, 2141, 2151, 2156-57.

⁴³ *Annals* 8:2151, 2152, 2153.

⁴⁴ *Annals* 8: 2105, 2140, 2141, 2142.

⁴⁵ *Annals* 7:599 (4 July 1798), 8:2171 (10 July 1798).

the frequent statement that, besides John Marshall, '[e]very other Federalist who is on record favored the passage of the law,' and all Republicans opposed it,⁴⁷ is belied by some Federalist opponents and a few Republican supporters inside Congress,⁴⁸ as well as outside Congress.⁴⁹ Moreover, a steady stream of congressional Federalists became Republicans,⁵⁰ some of whom were among the opposing votes.⁵¹

The Act's central provisions, quoted above, expressly targeted press and speech ('writing, printing, uttering or publishing'), and enacted into statute the common law crime of seditious libel ('with intent to defame' Government, Congress, or the President; 'to bring them. . . into contempt or disrepute; or to excite against them. . . the hatred of the good people of the United States'), with two modifications. Those modifications were adoption of the *Zenger* shields to that crime (truth and a jury general verdict), ameliorating the common law doctrine. However, they were small comforts to individuals having to defend themselves against the might of Federalist prosecutors and Federalist judges. Far reaching as the final Sedition Act was, the earlier versions went further, in following Blackstone strictly, declaring France an enemy, imposing capital punishment on giving it aid and comfort, and criminalizing any 'unlawful assembly.'⁵²

That targeting of critical press and speech was for political gain, and not primarily for

⁴⁶ Emerging in the Third, Fourth, or Fifth Congress, David J. Siemers, *Ratifying the Republic* (SUP, Palo Alto 2002) 138-40, 144, 151, 156-60; cf. James R. Sharp, *American Politics in the Early Republic* (YUP, New Haven 1993) 50, 187-275.

⁴⁷ E.g., *Freedom's Fetters* 151-52; accord Norman K. Risjord, *Chesapeake Politics 1781-1800* (ColUP, New York 1978) 532 (Senate); *Printers* 59.

⁴⁸ In the Senate, Federalist John Howard opposed, and Republicans James Lloyd and Alexander Martin supported, the Act. *Annals* 7:599; *Origins-Parties* 217-18. In the House, Federalists William Matthews, and Stephen Bullock voted against, along with in-transition Abraham Baldwin and George Dent. *Annals* 8:2171; *Origins-Parties* 207-09. Republican Thomas Tillinghast voted for. *Annals* 8:2171; *Origins-Parties* 208.

⁴⁹ Federalist opponents are described in Chapter 7.A. Republican supporters included the party's Massachusetts leader, [James Sullivan], *A Dissertation upon the Constitutional Freedom of the Press in the United States of America* (David Carlisle, Boston 1801), and future Massachusetts Governor Elbridge Gerry, *Press-Mass*. 153-54; Pennsylvania Chief Justice Thomas McKean supported seditious libel prosecution, *Trial of William Cobbett, Wharton's State Trials* 322, 322-25 (Pa.S.Ct. 1797), but not the Act.

⁵⁰ John Jay to Peter A. Jay (17 May 1798), *Jay Papers* doc. 90220; David J. Siemers, *Ratifying the Republic* (SUP, Palo Alto 2002) 142.

⁵¹ In-transition, Abraham Baldwin, George Dent, Joseph Hiester, John Trigg, and Abraham Venable voted against, as did others in subsequent votes. *Annals* 8:2171; *Origins-Parties* 207-09 (which summarizes five sources giving political affiliation); *Chesapeake Politics* 532. Others are described in Chapter 7.A.

⁵² *Crisis* 67; *Securing* 181; see *Annals* 8:2115-16, 2134. Drafts are in *Adams Federalists* 343-48.

perceived war necessities, as several features showed.⁵³ The Act did not prohibit libel of the vice president, a Republican, though it did interdict libel of the president, a Federalist. Systematic enforcement did not begin immediately, but instead a half-year before the elections of 1800, with trials scheduled for that election year. Finally, enforcement was against leading Republican newspaper editors--most of them--along with a few Republican politicians, but no federal action was brought against equally scurrilous Federalist editors⁵⁴ or officeholders.⁵⁵ The Act's expiration date is also sometimes described as partisan,⁵⁶ because it was not the end of hostilities but the end of Adams' term, but that date was proposed by an opponent.⁵⁷ Jefferson, on hearing a sedition bill would be proposed, immediately perceived that its 'object. . . is the suppression of the whig presses.'⁵⁸ A Federalist sponsor of the Sedition Act, Allen, admitted that charge: 'it is our business to wrest' the engine of the press from the 'Jacobins.'⁵⁹ The Republican newspapers condemned the Act as violative of freedoms of press and speech,⁶⁰ christening its supporters as the 'Tories.'⁶¹

The Federalists were fighting a rising tide of newspapers, as the total newspapers of all political stripes more than doubled from 79 at the beginning of 1790 to 174 at the end of 1799.⁶² They did slow that rise, as newspapers only rose from 172 at the end of 1797 to 174 two years later, but they did not contain the flood of over 44 new Republican newspapers in those two years.⁶³ The Federalists' appearance of fighting the Constitution itself, and launching partisan attacks on those holding different opinions, helped turn the elections of 1800 in

⁵³ *Origins* 520; *accord Annals* 8:2162; *Freedom's Fetters* 252 (Thomas Adams); *Empire* 259.

⁵⁴ *Annals* 8:2107; *Freedom's Fetters* 14, 15, 25-26, 178-79.

⁵⁵ *Annals* 8:2110; *Freedom's Fetters* 15, 24, 102, 104; *Crisis* 131-33.

⁵⁶ *E.g.*, *Open Press* 132; *Freedom's Fetters* 130.

⁵⁷ *Annals* 8:2138, 2171.

⁵⁸ Thomas Jefferson to James Madison (26 Apr. 1798), *Jefferson Papers* 30:299, 300.

⁵⁹ *Annals* 8:2098.

⁶⁰ *E.g.*, *Truth* i; [No Caption] *Time Piece* (New York 20 July 1798) 3 (quoting *Aurora*).

⁶¹ *E.g.*, 'Talleyrand[']s Letter' *Aurora* (Philadelphia 21 June 1798), *Truth* 2, 6; 'From the N.York-Gazette' *Aurora* (Philadelphia 23 June 1798), *ibid* 6, 8; 'The Plot Unravell'd' *Greenleaf's New York Journal* (27 June 1798) 2.

⁶² *Chronological Tables* 22-43.

⁶³ *Tyranny* 408-09; *Crisis* 221.

favor of Republicans and helped destroy the Federalist party in the process.

America was not quite unique. Great Britain launched a record number of prosecutions for sedition and treason in the 1790s,⁶⁴ and enacted its own Treasonable and Seditious Practices Act and Seditious Meetings and Assemblies Act in 1795.⁶⁵ However, scant comfort came from emulating the King whose tyranny had been denounced and fought so recently.⁶⁶

B The Sedition Act Prosecutions

There were sixteen documented federal prosecutions for seditious libel, whose story has been well told by Smith and by Miller.⁶⁷ Their accounts will be supplemented here with trial records⁶⁸ that Smith lightly used and Miller virtually ignored,⁶⁹ grand jury charges that as non-lawyers they rarely noted, and cautious use of newspaper accounts supplementing their sources.⁷⁰ In contrast, the reasoning of the sitting Supreme Court justices about the constitutionality of the Sedition Act and of those seditious libel prosecutions is a story that has been overlooked,⁷¹ except in small part in Smith and Miller and various articles,⁷² and in smaller

⁶⁴ *Cressy-Dangerous* 244-51; *Harling* 109.

⁶⁵ 36 Geo 3 c7 & c8.

⁶⁶ E.g., 'Mr. Editor' *Time Piece* (New York 28 Aug. 1798) 3; *Freedom's Fetters* 67; and lifting core wording from the British acts, *Adams Federalists* 157-58.

⁶⁷ James M Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (CorUP, Ithaca 1956); John C Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Little, Brown, Boston 1952). *Freedom's Fetters* incorporated prior essays, which are not cited. They discuss 15 prosecutions, but not Shaw.

⁶⁸ *Wharton's State Trials*, supplemented by *Federal Cases* and some newspaper accounts.

⁶⁹ Both rely primarily on newspaper accounts; Wharton was only cited by Miller incidentally on the Cooper case, *Crisis* 207-08; accord Frank M Anderson, 'The Enforcement of the Alien and Sedition Acts' (1912) 18 *American Historical Review* 113.

⁷⁰ Period newspapers must be and are used with care, because virtually all had editorial bias and reprinted undocumented articles, but they are often the best available evidence of details. *DHRC* 2:37; Julius Goebel, 'Book Review' (1957) 105 *University of Pennsylvania Law Review* 1027, 1029.

⁷¹ E.g. discussions of the Act and prosecutions without justices' reasoning on constitutionality, in *History of Supreme Court* 1:633-51; Susan Dunn, *Jefferson's Second Revolution* (Houghton Mifflin, Boston 2004) 101-20; David Jenkins, 'The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence' (2001) 45 *Am J Legal History* 154, 164-83, 188-97; Mark A Smith, 'Crisis, Unity, and Partisanship: The Road to the Sedition Act' (PhD thesis, University of Virginia 1998) 310-63; Norman L Rosenberg, *Protecting the Best Man: an Interpretive History of the Law of Libel* (UNC Press, Chapel Hill 1986) 79-100; Daniel N Hoffman, 'Contempt of the United States' (1981) 25 *American Journal of Legal History* 343, 353-60; Walter Berns, 'Freedom of the Press and the Alien and Sedition Laws: A Reappraisal' [1970] *Supreme Court Review* 109, 111-35; William L Richter, 'Federalism and Civil Liberties: A Reappraisal of the Alien and Sedition Act Controversy of 1798' (MA thesis, University of Chicago 1963) 37-82; Thomas F Carroll, 'Freedom of Speech and of the Press in the Federalist Period: The Sedition Act' (1920) 18 *Michigan Law Review* 615, 627-48.

part in the justices' leading biographies,⁷³ when not whitewashed.⁷⁴ That reasoning about the First Amendment is the focus of this chapter.

1 Summary of Federal Prosecutions for Seditious Libel

Those sixteen documented prosecutions (sometimes described as eighteen individuals),⁷⁵ and the justices involved, were the following:

1 Benjamin Franklin Bache of Philadelphia <i>Aurora</i>	Arrested 26 June 1798 (Dismissed upon death)	(No Justice Involved)
2 John Daly Burk/James Smith of New York <i>Time Piece</i>	Arrested 6 July 1798 (Settled with agr. to expatriate)	(No Justice Involved)
3 Rep. Matthew Lyon of Lyon's <i>Republican Magazine</i>	Trial 8 Oct. 1798 Rutland, Vermont	Justice William Paterson (Indictment Too)
4 Thomas Adams of Boston <i>Independent Chronicle</i>	Arraigned 23 Oct. 1798 (Dismissed upon death)	Justice William Paterson (No Trial)
5 Benjamin Fairbanks	Pleaded guilty 7 June 1799 Dedham, Massachusetts	Justice Samuel Chase
6 David Brown	Pleaded guilty 8 June 1799 Dedham, Massachusetts	Justice Samuel Chase
7 William Duane of Philadelphia <i>Aurora</i>	Indicted 4 Aug. 1799 & 17 Oct. 1800 Philadelphia, Pennsylvania	Justice Bushrod Washington (hearing) Justice William Paterson (latter)
8 Ann Greenleaf of New York <i>Argus</i>	Indicted Sept. 1799 New York, New York	Justice William Paterson (No Trial--Suspended Apr. 1800)
9 Rep. Jedidiah Peck of New York Assembly	Indicted Sept. 1799 New York, New York	Justice William Paterson (No Trial--Suspended Apr. 1800)
10 Luther Baldwin/Brown Clark	Trial/Plea Oct. 1799 Trenton, New Jersey	Justice Bushrod Washington (Indictment William Cushing)
11 William Durrell of Mount Pleasant <i>Register</i>	Trial 3 Apr. 1800 New York, New York	Justice Bushrod Washington (Arraignment J. William Paterson)
12 Thomas Cooper of Northumberland <i>Gazette</i>	Trial 16 Apr. 1800 Philadelphia, Pennsylvania	Justice Samuel Chase (Indictment Too)
13 Charles Holt of New London <i>Bee</i>	Trial 11-12 Apr. 1800 New Haven, Connecticut	Justice Bushrod Washington (Arraignment C.J. Oliver Ellsworth)
14 Anthony Haswell of Vermont <i>Gazette</i>	Trial 5 May 1800 Windsor, Vermont	Justice William Paterson (Arraignment Justice Wm. Cushing)

⁷² E.g., David J. Katz, 'Grand Jury Charges Delivered by Supreme Court Justices Riding Circuit During the 1790s' (1993) 14 *Cardozo Law Review* 1045, 1079-81; *Jay* 1084.

⁷³ E.g., Willis P. Whichard, *Justice James Iredell* (CAP, Durham 2000) 113 (half-page); James Haw and others, *Stormy Patriot: The Life of Samuel Chase* (MHS, Baltimore 1980) 194-99, 202-07 (in brief Sedition Act discussion, no mention of First Amendment or press-speech); John E. O'Connor, *William Paterson: Lawyer and Statesman, 1745-1806* (RUP, Rutgers 1979) 245-49 (same); David L. Annis, 'Mr. Bushrod Washington' (PhD thesis, Notre Dame University 1974) 88-94 (same); Nettie S. Herndon, 'James Iredell' (PhD thesis, Duke University 1944) 291 (5 sentences, same); *Johnson* 492-510 (same).

⁷⁴ E.g., John D. Cushing, 'A Revolutionary Conservative: The Public Life of William Cushing, 1732-1810' (PhD thesis, Clark University 1959) 328 (no mention of Act; 'there is nothing to indicate what, if anything, Cushing contributed. . . as a circuit judge,' and 'little of significance' in Supreme Court sessions); William G. Brown, *The Life of Oliver Ellsworth* (Macmillan, New York 1905) 265-66 (denying supported constitutionality); Leonard B. Rosenberg, 'William Paterson: New Jersey's Nation-Maker' (1967) 85 *New Jersey History* 7, 32 ('never challenged the constitutionality').

⁷⁵ *Freedom's Fetters* 185 (14 indictments under Act, 3 under common law); John C. Miller, *The Federalist Era, 1789-1901* (Harper, New York 1960) 235 (15); *History of Supreme Court* 1:637, 638 n107 (unspecified 15); see *DHSC* 3:233 (unspecified 15); 'New London, (Bee) Oct. 1' *Alexandria Times* (Alexandria 13 Oct. 1800) 2 (listing 7 and Spooner).

15 Dr. Samuel Shaw	Trial ca 6-9 May 1800 Windsor, Vermont	Justice William Paterson (Indictment or Information Too)
16 James T Callender of <i>The Prospect Before Us</i>	Trial 6 June 1800 Richmond, Virginia	Justice Samuel Chase (Indictment Too)

A seventeenth was of publisher John Israel of the *Herald of Liberty* for printing the Kentucky Resolutions.⁷⁶ The first two were prosecutions for common law seditious libel, neither of which reached trial. The remaining ones were prosecutions under the Sedition Act, of which ten reached trial. There may have been nine other prosecutions,⁷⁷ which Blumberg has well described and deemed unconfirmed,⁷⁸ and which did not involve the justices,⁷⁹ plus later common law libel efforts against newspapers.⁸⁰ Others escaped contemplated prosecutions such as Gov. James Garrard of Kentucky for 'a very impudent and inflammatory speech' opposing the Act on the basis of the First Amendment,⁸¹ and philosopher-scientist Joseph Priestley.⁸²

Even before the Sedition Act, the Adams administration girded its loins for war against critics. Pickering itched to use seditious libel against them, having been personally stung in January 1798 by allegations of his 'shameful breach of the laws' by charging to issue a passport, and in the preceding year he had personally authorized and supported a seditious libel prosecution against an editor for criticism of the Spanish minister and of his letter to Pickering.⁸³ From that 1797 prosecution, Pickering had in hand an opinion from the attorney general that the fed-

⁷⁶ Alexander Addison to Timothy Pickering (22 Nov.1798), *Pickering Papers* r.23, fol.322, 323 (mistakenly calling it 'Herald of Freedom'; two grand juries refused to find true bill); 'Federal Circuit Court' *Herald of Liberty* (Washington [Pa.] 18 Nov.1799) (indicted).

⁷⁷ *Crisis* 185 (25 indictments and 12 trials); *Empire* 260 (25 total arrests and 17 indictments); 'From the *Aurora*, Oct.26' *Constitutional Telegraph* (6 Nov.1799) 1 (22 prosecutions).

⁷⁸ *Repressive Jurisprudence* 139-44 (Daniel Dodge-Aaron Pennington, Judah P.Spooner-James Lyon, Conrad Fahnestock-Benjamin Moyer/Mayer/Meyer, James Bell, Dr. John Tyler, Dr. John Vaughan); *accord Freedom's Fetters* 185 (same); *DHSC* 3:299 n2 (Lespenard Colie); [No Caption] *Centinel of Freedom* (Newark 25 Dec.1798) 3 (same); Dwight F Henderson, 'Treason, Sedition, and Fries' Rebellion' (1970) 14 *American Journal of Legal History* 308, 312, 315 (Eyerman, Meyer, Fahnestock, 1799); see 'Domestic' *Vergennes Gazette* (Vergennes 7 Mar.1799) 3 (Rev. S.C. Ogden pretextually arrested for debt, 1798).

⁷⁹ Except, probably, Paterson presiding as Spooner was indicted, and Cushing presiding as James Lyon was indicted, *ibid* 140-41, events Smith denies, *Freedom's Fetters* 229 n22.

⁸⁰ Warren 1:195-98 (*National Intelligencer*, 1801); Charles Warren, *A History of the American Bar* (Little Brown, Boston 1911) 237 (Lillie, 1801); *Press-Massachusetts* 146 (Lillie; Carleton, 1803).

⁸¹ Timothy Pickering to Rufus King (14 Dec.1798), *King Correspondence* 2:493; 'Legislature of Kentucky' *Claypoole's American Daily Advertiser* (Philadelphia 10 Dec.1798) 2.

⁸² Timothy Pickering to Charles Hall (1 Aug.1799), *Pickering Papers* r.11, fol.528, 529; Timothy Pickering to William Rawle (5 July 1799), *ibid* r.11, fol.390 (German-language newspaper).

⁸³ Charles W Upham, *The Life of Timothy Pickering* (Little Brown, Boston 1873) 3:309-10, 397-400.

eral government could prosecute seditious libel under the Blackstone-Mansfield interpretation of the common law,⁸⁴ which soon after passage of the Sedition Act was supplemented by the attorney general's pamphlet defense, again following the *Commentaries*.⁸⁵ The Supreme Court justices supported the cause, as Jefferson saw it, by charging 'the grand juries to become inquisitors on the freedom of speech, of writing and of principle of their fellow citizens.'⁸⁶

Even while the Act was under debate in Congress, Pickering, whose responsibilities included directing federal prosecutors,⁸⁷ had them indict two editors of leading Republican papers. After the Act passed, Pickering caused two more prosecutions to be filed immediately, against a Republican member of Congress and the leading Republican paper in New England, and then four additional prosecutions, of less notable speakers.⁸⁸ Pickering's full-scale assault on Republicans, however, was held until a half year before elections in 1800 (which occurred from spring onward),⁸⁹ when he pressed federal attorneys to prosecute editors of most other leading Republican newspapers,⁹⁰ knowing that the cases would reach trial in the first half of 1800 and would best thwart the 'Jacobins.'⁹¹ As Adams described it two years later, newspaper editors 'Callender, Duane, Cooper, and Lyon' were 'the most influential men in the

⁸⁴ Charles Lee, 'Libellous Publications' (27 July 1797), Benjamin F Hall and others (eds), *Official Opinions of the Attorneys General of the United States* (GPO, Washington 1852-1919) 1:71, 72 (on libeling King of Spain); accord *ibid* 1:52 (from Thomas Greenleaf prosecution, *Jay* 1075 n351).

⁸⁵ Virginiensis [Charles Lee], *Defence of the Alien and Sedition Laws* (John Fermo, Philadelphia 1798) 23-31, 25-26.

⁸⁶ Thomas Jefferson to Peregrine Fitzhugh (4 June 1797), *Jefferson Papers* 29:415, 417; e.g., James Iredell's Charge (U.S.Cir.Ct.Md. 8 May 1797), *DHSC* 3:173, 174, 175, 177; William Paterson's Charge (nd), *ibid* 3:462, 463.

⁸⁷ *History of Supreme Court* 1:633 n89.

⁸⁸ And proposed a case against another member of Congress, Clopton, *Marshall Papers* 3:497 (Oct.1798).

⁸⁹ *Securing* 235; *Freedom's Fetters* 186.

⁹⁰ Timothy Pickering to William Rawle (24 July 1799), *Pickering Papers* r.11, fol.486 (Duane-*Aurora*); Timothy Pickering to John Adams (1 Aug.1799), *Adams Works* 9:5 (Cooper-Northumberland Gazette); Timothy Pickering to Charles Hall (1 Aug.1799), *Pickering Papers* r.11, fol.528 (same); Timothy Pickering to Richard Harison (12 Aug.1799), *Pickering Papers* r.11, fol.599 (Greenleaf-*Argus*); Timothy Pickering to Thomas Nelson (14 Aug.1799), *Pickering Papers* r.11, fol.611 (Callender-*Richmond Examiner*).

⁹¹ Though the straw that broke the camel's back may have been the *Aurora's* publication of diplomatic correspondence in July 1799. Kim T Phillips, 'William Duane: Revolutionary Editor' (PhD thesis University of California-Berkeley 1968) 77-80.

country, all foreigners and all degraded characters,⁹² who he agreed should be prosecuted. Jefferson had a parallel perspective of what was going on: 'this onset on the presses is to cripple & suppress the republican efforts during the campaign which is coming on.'⁹³

2 Common Law Prosecutions of Bache and Burk

The first federal prosecution, of Benjamin Franklin Bache,⁹⁴ the editor of the *Aurora* (the leading Republican paper⁹⁵) and the namesake of his famous grandfather, began with his arrest for 'libelling the President, & the Executive Government in a manner tending to excite sedition,⁹⁶ on 26 June 1798, three weeks before the Sedition Act was enacted. The alleged libels were Bache's criticisms of those officials, after he printed a letter from French minister Talleyrand before it was even received by the federal government. The administration investigated allegations that 'the French Printer' was a treasonous 'agent of the French Directory'⁹⁷ and discovered a letter to Bache from the French Office of Foreign Affairs, which Pickering and Wolcott intercepted and opened only to find innocuous pamphlets.⁹⁸ After his arrest, Bache was required to provide security of the princely sum of \$4,000, half from himself and half from sureties,⁹⁹ and his trial was set for October 1798, when Justice Cushing would be presiding over the federal circuit court in Philadelphia.¹⁰⁰ Believing the best defense to be a strong offense, Bache began printing articles denouncing the Sedition Act as an abridgment

⁹² John Adams to Christopher Gadsden (16 Apr. 1801), *Adams Works* 9:584; accord *ibid* 9:582.

⁹³ Thomas Jefferson to John W Eppes (21 Apr. 1800), *Jefferson Papers* 31:531.

⁹⁴ See generally *Freedom's Fetters* 188-204; *Crisis* 65-66, 93-97; *DAB* 1:462; Jeffrey A Smith, *Franklin and Bache* (OUP, Oxford 1990) 162-63.

⁹⁵ *Freedom's Fetters* 189, 278.

⁹⁶ James Tagg, *Benjamin Franklin Bache and the Philadelphia Aurora* (UPP, Philadelphia 1991) 387; Robert Troup to Rufus King (10 July 1798), *King Correspondence* 2:362, 364; 'From Saturday's Aurora' *Greenleaf's New York Journal* (New York 7 July 1798) 2.

⁹⁷ [Benjamin F Bache], *Truth Will Out!* ([Bache, Philadelphia 1798]) 1 (reprinting *Aurora* articles); accord Thomas Jefferson to James Madison (21 June 1798), *Jefferson Papers* 30:416, 417, 419n.

⁹⁸ 'The Plot Unravell'd' *Aurora* (Philadelphia 25 June 1798), *Truth* 8, 9; Stephen Higginson to Timothy Pickering (26 June 1798), *Higginson Letters* 1:813, 814.

⁹⁹ 'From Saturday's Aurora' *Greenleaf's New York Journal* (New York 7 July 1798) 2.

¹⁰⁰ *DHSC* 3:299 n1, though some mistakenly expected Paterson. Robert Troup to Rufus King (10 July 1798), *King Correspondence* 2:362, 364.

of the First Amendment and of the natural rights 'to speak or to publish.'¹⁰¹ His death in early September in Philadelphia's epidemic of yellow fever stopped his counterattack, and also ended the prosecution and his quest for review by the full Supreme Court.¹⁰² To the dismay of the Adams administration, Bache's widow arranged for the *Aurora* to continue, with William Duane at its helm.

The other early common law prosecution, of John Daly Burk,¹⁰³ editor of the *Time Piece* (the fastest growing Republican paper¹⁰⁴), was launched ten days after Bache's arrest.¹⁰⁵ The *Time Piece* trebly became a federal target, by Freneau having edited it after leaving the *National Gazette*, by Burk fleeing arrest in Ireland for sedition and defending the United Irish once here,¹⁰⁶ and by his being subject to the Alien Act. Pickering instructed the federal attorney to review the *Time Piece*, and though he believed 'no man is a fitter object for the operation of the alien act,' decided instead to 'punish him for his libels,' which he found 'the most profuse and atrocious [*sic*] slanders, of the Government, and a ready instrument of sedition,' before expelling him.¹⁰⁷ Burk was arrested for "'seditious and libellous" utterances against the President,' and security was again set at \$4,000 (half from him and half from sureties).¹⁰⁸ Burk's utterances were claims of presidential forgery, in a report on Adams forwarding a peace negotiator's letter to Congress: 'certain passages in the paper communicated to Congress as a copy of his letter, are a F___ adapted to promote certain ends.'¹⁰⁹ Burk, who had

¹⁰¹ *Freedom's Fetters* 203.

¹⁰² *United States v. Bache*, DHSC 1:521-22 (8 Aug.1798) (dismissing request for Supreme Court writ of prohibition).

¹⁰³ See generally *Freedom's Fetters* 204-20; *Crits* 97-102; *DAB* 3:279; Edward A. Wyatt, *John Daly Burk: Patriot-Playwright-Historian* (Historical Publishing Co, Charlottesville 1936).

¹⁰⁴ *Freedom's Fetters* 188, 207.

¹⁰⁵ Robert Troup to Rufus King (10 July 1798), *King Correspondence* 2:362, 364.

¹⁰⁶ [Masthead] *Time Piece* (New York 9 Mar.1798) 1; Robert Troup to Rufus King (10 July 1798), *King Correspondence* 2:362, 364; John Burk, *History of the Late War in Ireland* (Francis and Robert Bailey, Philadelphia 1799) iii-iv, 44-49, 50n.

¹⁰⁷ Timothy Pickering to Richard Harison (7 July 1798), *Pickering Papers* r.37, fol.315, 315A. Harison had already arrested Burk.

¹⁰⁸ *Freedom's Fetters* 211; 'Monday, July 9' *Time Piece* (New York 9 July 1798) 3.

¹⁰⁹ [No Caption] *Time Piece* (New York 2 July 1798) 3; accord *Pickering Papers* r.37, fol.315.

already reprinted Junius, Erskine, and others on freedom of press, after reporting his arrest made his next cover story the proposed Sedition Act counterpoised with the First Amendment,¹¹⁰ and then printed articles in every issue extolling freedom of press,¹¹¹ attacking the Sedition Act ('the Gagging Bill') on that basis,¹¹² and arguing that seditious libel 'ought to pass unpunished.'¹¹³ Co-owner Dr. James Smith, was also charged with libel, but escaped prosecution by leaving the business.¹¹⁴ Burk predicted that his trial 'for libels will determine whether the press is to be the *palladium* and *centinel* of liberty, or... the *register* of deaths, births and marriages,'¹¹⁵ but when he saw a 'certainty of fine and imprisonment from the violence of party spirit and the mode of packing juries,' and otherwise the certainty of deportation, he entered an agreement for voluntary deportation in exchange for dismissal.¹¹⁶ Though court had been set for October 1798, Burk's agreement cheated Justice Paterson of a Sedition Act trial. Burk also cheated Pickering out of an Alien Act deportation, by fleeing not to Ireland but to Virginia, where he used an assumed name until the Act expired.¹¹⁷

3 The Historical Context of Prosecutions

The Adams administration miscalculated the political benefits of the Sedition Act and of prosecutions, as the Act was attacked as a violation of freedoms of press and speech in a Republican firestorm¹¹⁸ that raged in speeches,¹¹⁹ newspapers and petitions, and pamphlets and

¹¹⁰ 'Congress of the United States' and 'Extract' *Time Piece* (New York 11 July 1798) 1; *Freedom's Fetters* 212.

¹¹¹ E.g., 'Mr. Curran in Defence of the Liberty of the Press' *Time Piece* (New York 11 July 1798) 2; *ibid* (13 July 1798) 2; *ibid* (16 July 1798) 2; *ibid* (18 July 1798) 2; *ibid* (20 July 1798) 1; 'Liberty of the Press' *Time Piece* (New York 13 July 1798) 1.

¹¹² E.g., 'Memento' *Time Piece* (New York 16 July 1798) 3; [No Caption] *Time Piece* (New York 20 July 1798) 3; [No Caption] *Time Piece* (New York 8 Aug. 1798) 3.

¹¹³ 'Political Justice' *Time Piece* (New York 25 July 1798) 2; *accord* 'Monday, July 23' *Time Piece* (New York 23 July 1798) 3.

¹¹⁴ 'Notice' *Time Piece* (New York 20 July 1798) 3.

¹¹⁵ [No Caption] *Time Piece* (New York 13 July 1798) 2.

¹¹⁶ John Daly Burk to Thomas Jefferson (bef. 19 June 1801), *Jefferson Papers* 34:385, 386-87; Timothy Pickering to Richard Harison (1 Jan. 1799), *Pickering Papers* r.37, fol.381.

¹¹⁷ *Ibid* 34:387.

¹¹⁸ Robert Goodloe Harper Letter (10 Feb. 1799), *Circular Letters* 1:146, 148; *accord* *Open Press* 132.

¹¹⁹ E.g., *Annals* 8:2104-05, 2105-06, 2106-07, 2107-11, 2134-35, 2136-37, 2151-52; John C Fitzpatrick (ed), *The Autobiography of Martin Van Buren* (GPO, Washington 1920) 439 (J.Randolph).

books.¹²⁰ That firestorm was further fueled by the appearance that the administration's prosecutions of Republican newspapers were a partisan vendetta, and that the Federalist judges were equally partisan. The Virginia and Kentucky Resolutions denounced the Act as a violation of the First Amendment,¹²¹ as described at the end of this chapter. A House committee report outlined the Federalist defense under that Amendment, misquoting the Amendment to eliminate freedom of speech and to reword 'the liberty of the press,' and limiting the meaning of that liberty to the Blackstone-Mansfield definition,¹²² while denying the claim that the Act 'had only halfhearted support.'¹²³ The report was narrowly adopted.¹²⁴ Various defenses of the Sedition Act were also published.¹²⁵ Congressional efforts to repeal the Sedition Act, based 'chiefly on [its] supposed unconstitutionality,' narrowly failed in 1799 and 1800,¹²⁶ as did efforts to extend it in 1801.¹²⁷

Meanwhile, war with France, appearing so imminent in mid-1798, continued to appear likely until the Convention of 1800 settled matters.¹²⁸ Adams' unilateral decision to send the envoys who negotiated that treaty left the Federalists 'in shock,'¹²⁹ and split the party with the High Federalist wing preferring war and opposing both the mission¹³⁰ and Adams.

The presidential election of 1800 was close, with the Federalists' split widening as Ham-

¹²⁰ E.g., besides Madison's Report and George Hay's essays, [St. George Tucker], *A Letter to a Member of Congress Respecting the Alien and Sedition Laws* (np, 1799); Tunis Wortman, *A Treatise Concerning Political Enquiry and the Liberty of the Press* (George Forman, New York 1800) 250-62.

¹²¹ Virginia Resolutions (21-24 Dec. 1798), *Elliot's Debates* 4:528; Kentucky Resolutions (10-13 Nov. 1798, 14 Nov. 1799), *ibid* 4:544.

¹²² *Annals* 9:2985-92, esp. 9:2988-89; *Wolcott Papers* 2:78-85.

¹²³ *Open Press* 131; *accord Federalism* 590.

¹²⁴ *Annals* 9:3016-17 (25 Feb. 1799); *Adams Federalists* 229.

¹²⁵ E.g., besides Alexander Addison and Charles Lee, Inhabitant of North-Western Territory, *Observations on a Letter from George Nicholas* (Edmund Freeman, Cincinnati 1799).

¹²⁶ Robert Goodloe Harper Letter (20 Mar. 1799), *Circular Letters* 1:163, 167; *Annals* 9:3017 (25 Feb. 1799); Samuel J. Cabell Letter (28 Mar. 1800), *Circular Letters* 1:177; *Crisis* 180.

¹²⁷ *Annals* 10:1047-50 (20 Feb. 1801); Robert Williams Letter (26 Feb. 1801), *Circular Letters* 1:240, 241.

¹²⁸ Convention (30 Sept. 1800), *Treaties* 1:457; *ASP* 2:295.

¹²⁹ Timothy Pickering to Rufus King (6 Mar. 1799), *King Correspondence* 2:548, 549; *accord ibid* 2:551.

¹³⁰ Stephen Higginson to Timothy Pickering (31 Jan. 1799), *Higginson Letters* 1:818, 819; Stephen Higginson to Timothy Pickering (22 Aug. 1799), *ibid* 1:822, 823; *McHenry Correspondence* 407-08, 416-17.

ilton's condemnation of Adams became public¹³¹ in what a leading Republican journalist called 'Hamilton's *glorious pamphlet*.'¹³² The exasperated secretary of war, James McHenry, voiced a common belief that the atrabilious Adams 'will destroy himself fast enough without such exposures,' since 'whether sportful, playful, witty, kind, cold, drunk, sober, angry,' he is 'almost always in the wrong place to the wrong persons,' and that 'while he is destroying himself, he will destroy the government also.'¹³³

After that election, the Federalists, knowing their days to control the presidency and Congress were numbered, sought to lengthen their days to control the judiciary. The Judiciary Act of 1801 enrobed numerous 'midnight judges,' while making some nonpartisan improvements in the system.¹³⁴ Taking office in December 1801, the new Republican-dominated Congress repealed that Act (leading to the case of *Marbury v. Madison*),¹³⁵ and the new President Thomas Jefferson ended all federal prosecutions under the Sedition Act.¹³⁶

C The Lyon, Adams, Duane, Greenleaf, Peck, Haswell, and Shaw Cases, the First Amendment, and Justice William Paterson

Robert G. Harper, a House cosponsor of the Sedition Act, crowed to his constituents in February 1801 that 'objections to the constitutionality of this law... have been fully considered and over-ruled in the only place where they could be properly urged, that is the courts of justice....'¹³⁷ Paterson had given a similar summary about a year earlier: 'the circuit courts of the U. States have uniformly declared, that congress were authorized to pass the law in question,

¹³¹ Alexander Hamilton, 'Letter from Alexander Hamilton, Concerning the Public Conduct and Character of John Adams' (24 Oct.1800), *Hamilton Papers* 25:186; *ibid* 25:169n; *McHenry Correspondence* 421-22.

¹³² James T Callender to Thomas Jefferson (17 Nov.1800), *Jefferson Papers* 32:254.

¹³³ James McHenry to Alexander Hamilton (16 Nov.1800), *McHenry Correspondence* 479; *accord* James McHenry to Oliver Wolcott (9 Nov.1800), *ibid* 477.

¹³⁴ 2 Stat. 89; *DHSC* 4:284; Kathryn Turner, 'The Midnight Judges,' in Mary S Bilder and others (eds), *Blackstone in America* (CUP, Cambridge 2009) 59.

¹³⁵ *History of Supreme Court* 2:163-68.

¹³⁶ 'Notes on a Cabinet Meeting' (9 Mar.1801), *Jefferson Papers* 33:232; *ibid* 33:251, 309.

¹³⁷ Robert Goodloe Harper Letter (26 Feb.1801), *Circular Letters* 1:234, 238; *accord* John Marshall to St.George Tucker (18 Nov.1800), *Marshall Papers* 4:14, 15.

that it is constl.¹³⁸ Both gave an accurate summary of nearly three years of prosecutions.

Paterson spoke of what he knew, because he had presided over the first and the penultimate Sedition Act trials, of Lyon and then of Haswell followed by Shaw. Even before the Act, Paterson was highly exercised over 'treasonable and seditious' (which he paired) 'language, writings, and actions,' and anathematized sedition in two grand jury charges.¹³⁹

1 Paterson's Draft Opinions on the Sedition Act and Freedom of Press

Paterson also wrote two opinions¹⁴⁰ upholding the constitutionality of the Sedition Act, over First Amendment challenge, though records and newspaper accounts of his trials do not describe their use. His opinions began by finding that the Act was justified by implied constitutional powers including an implied power of self-preservation:

1. It is a power, which comes under the general clause of the constitution; and besides is necessarily incidental to every government or civil institution. No government can long exist, where libellous publications against its executive and legislative authorities, their acts and measures are suffered to pass with impunity. The power of punishing such offences is a necessary instrument or mean[s] of self-preservation. . . .¹⁴¹

Paterson's Hobbesian power of self-preservation, or reasons of state, repeated a lifelong theme, which he had used in 1790 as authority for congressional creation of crimes not mentioned in the Constitution or necessary to constitutional powers: 'an axiom, that every coun'y ought to have within itself & to retain in its own hands the powers of self preservation.'¹⁴² His beginning his defense with implied powers, as presumably his strongest point, went a long way toward conceding Madison's and Jefferson's arguments in the Virginia and Kentucky Resolutions, that the Sedition Act was not justified by anything in the Constitution. Similarly, his beginning his First Amendment analysis with not its words but implied incor-

¹³⁸ *Paterson Draft Opinions* 544-45.

¹³⁹ William Paterson's Charge (nd), *DHSC* 3:462,463; William Paterson's Charge (nd), *DHSC* 3:464, 465. Both are transcribed from originals at Rutgers.

¹⁴⁰ The second calls it an opinion, finding it 'necessary for the court to deliver their opinion on it' (the Sedition Act). *Paterson Draft Opinions* 545.

¹⁴¹ *Paterson Draft Opinions* 531; accord *ibid* 545.

¹⁴² William Paterson, Notes, *Paterson Papers-NYPL* 375; accord *ibid* 369, 387.

poration of common law went some distance toward conceding the Madison-Jefferson arguments that the Act contradicted that Amendment.

His opinion proceeded to hold the Act warranted by the common law, which he found adopted by the federal government as well as the states, and already proscribed seditious libel:

And here the question arises, whether the common law extends to the United States in criminal cases. *I have no doubt* of its extension.

....
... To calumniate the government or oppose lawful acts is an offence at com. law.¹⁴³

In reaching the conclusions that federal courts had jurisdiction of common law crimes and that seditious libel continued unaltered as part of that American common law, Paterson joined the other sitting justices as they moved to that position, and departed from most of the initial justices who never moved to that stance (as summarized in Chapters 3.E and 7).

Paterson then discussed the impact of the First Amendment on federal powers and on the common law of libel:

[2.] The amendment to the const[itu]tion ordains, that the *liberty of the press* shall not be abridged. The expression is *relative*, and obviously refers to rule or principle then existing, or in other words, to the *common law*. You shall not abridge, that is, narrow or lessen, the liberty of the press. To determine whether this liberty of the press be abridged by any law, we must know in what it consists, or how it stood at the time of making the amendment. This is fully done by the passage, which has been read in Bl. Com. [evidently quoted immediately before, marked by '4 Bl.Com.']. The amendment declares, that Congress shall not abridge the freedom of the press. . . .¹⁴⁴

He thereby read the First Amendment to grant no right that the common law did not already grant. He also read it to disable no federal power, and exactly as antifederalists had feared in demanding a bill of rights, Paterson instead interpreted the First Amendment to acknowledge the federal government's power to regulate press and speech. 'The article supposes the power over the press to be in congress, and prohibits them only from abridging the freedom allowed to it by the common law.'¹⁴⁵ That conflicted with prior federalist responses to antifederalists,

¹⁴³ *Paterson Draft Opinions* 533, 541; accord *ibid* 553 (shifted to end of second opinion).

¹⁴⁴ *Ibid* 535, 537; accord *ibid* 553.

¹⁴⁵ *Ibid* 539; accord *ibid* 553.

as the former argued that a bill of rights was superfluous, asserting that the federal government lacked any enumerated power that could possibly restrain press or speech.

In case the common law of crimes did not govern federal courts, Paterson ended his first opinion by defining freedom of the press in the narrow Blackstone-Mansfield manner:

But 3dly admitting, that the common law does not extend to the U. States in criminal cases, we are then to inquire, *in what consists the liberty of the press?* Does it consist in a license to publish false, scandalous, and malicious calumnies, or libels agt. the government, its officers, and acts? . . .

. . . .
The *freedom of the press* is to be *determined* by the meaning of these terms in the *common law*.¹⁴⁶

What he cited from Blackstone, of course, defined 'liberty of the press' to 'consist[] in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published' or freedom for 'licentiousness' of the press.¹⁴⁷

Paterson's second draft opinion, written after 'numerous judl. decisions on this subject,' abandoned nothing but fortified much. Implied powers supporting the Sedition Act were expanded to ground the right of self-preservation in 'the law of nations' and 'the law of nature,' and to include from the Constitution's preamble the 'com. defence and general welfare' clauses and the necessary and proper provision. The common law prohibition was defended as protecting peace against '[f]alse, scandalous, and malicious writings agt. the president, or congress, or the laws,' which have a 'direct tendency to bring the government into contempt, to weaken its lawful authority,' and to destroy the foundations of republican government; to Paterson, the recent Whiskey Rebellion was 'beyond all doubt, from seditious writings.'¹⁴⁸ The rationale for the direct tendency test was given as the government's right to 'prevent insurrections' and to use 'precautionary measures' rather than waiting 'to interfere until it actually breaks out.' The reason for republican governments' fragility was described as the 'raging of the people' that 'drives with the impetuosity of a hurricane' and that causes '[l]ife, lib-

¹⁴⁶ *Ibid* 537, 539; accord *ibid* 553; *Paterson Papers-NYPL* 699, 747.

¹⁴⁷ *Blackstone's Commentaries* 4:151, 153.

¹⁴⁸ *Paterson Draft Opinions* 547, 545, 549.

erty, property, and government.' to be 'frequently prostrated before popular commotions.'¹⁴⁹

This was nothing less than a different philosophy--of republican government, rights of dissent and party activity, treatment of unconstitutional laws, and liberties of press and speech¹⁵⁰--when compared with the philosophy of Republicans and their radical Whig antecedents. Paterson added an equally different definition of liberty: 'Liberty implies the doing of what is right; and must be exercised in such a manner as not to be injurious to others or to the public. This is a necessary restriction. When a person therefore makes the press the vehicle of defamation and abuse, this restriction is disregarded, and he becomes an offender.'¹⁵¹

Paterson carried this philosophy into court as he presided over three trials and four other indictments under the Sedition Act--more than any other justice.

2 The Lyon Prosecution and *Lyon's Republican Magazine or Scourge of Aristocracy*

Paterson, scheduled to hold circuit court in Vermont in October 1798, was on the hunt for violators of the new Sedition Act. His grand jury charge, the first given under the Sedition Act, emphasized 'two species of offences, which, under the existing circumstances of the United States, merit your particular attention,' one of which was 'seditious practices, and false, scandalous, and malicious writings, publications, and libels against the government of the United States.'¹⁵² Paterson then read the Sedition Act to the grand jury, and incorporated some of the themes of his first opinion, stressing that the very survival of government and freedom depended on crushing seditious libel, while articulating the Holt-Mansfield rationale for criminalizing and prosecuting such alienation of 'the affections of the people from their government' that inevitably followed from criticizing its administration or its measures:

¹⁴⁹ *Ibid* 551-53.

¹⁵⁰ E.g., Marc Lender, "'Equally Proper . . .': Civility, Bad Tendency, and the Sedition Act' (2004) 24 *Journal of Early Republic* 419, 425-44; Andrew Lenner, 'A Tale of Two Constitutions: Nationalism in the Federalist Era' (1996) 40 *American Journal of Legal History* 72, 90-104; Andrew Lenner, 'Separate Spheres: Republican Constitutionalism in the Federalist Era' (1997) 41 *American Journal of Legal History* 250, 251-78; *Printers* 59.

¹⁵¹ *Paterson Draft Opinions* 539.

¹⁵² William Paterson's Charge (U.S.Cir.Ct.Vt. 3 Oct.1798), *DHSC* 3:292, 293, transcribed from the original at Rutgers, 'Grand Jury Charges' (folder 11), in *Paterson Correspondence*.

The offences specified in this act are of a serious nature, and, when perpetrated, demand instant and full attention. . . . The man, who is guilty of publishing false, defamatory, and malicious writings or libels against the government of his country, its measures, and its constituted authorities, must, if not callous to the dictates of the moral sense, stand self-condemned. He sins against light; for he must be sensible, that such publications are contrary to clear and known duty. In such case, nothing short of idiocy can operate as an excuse. They destroy confidence, excite distrust, disseminate discord and the elements of disorganization, alienate the affections of the people from their government, disturb the peace of society, and endanger our political union and existence. No government, indeed, can long subsist, where offenders of this kind are suffered to spread their poison with impunity. . . . The truth is, that libellous publications and seditious practices are inconsistent with genuine freedom, and subversive of good government. . . .¹⁵³

Paterson essentially prejudged the only issue he left to the jury in Lyon's case, seditious intent, by including in the charge that '[w]ritten or printed detraction' is a 'deliberate act[], perpetrated with a view to wound and do injury,' and 'contrary to clear and known duty,' excusable only by idiocy. He portrayed printed criticism of government as not freedom of press but acts of criminal violence like poisoning, 'more to be dreaded than hosts of external foes.'¹⁵⁴

The first person tried under the Sedition Act, Rep. Matthew Lyon,¹⁵⁵ incurred treble Federalist ire by being an immigrant from among what xenophobic sponsors of the Alien Act termed the 'wild Irishmen,'¹⁵⁶ by responding to a Federalist colleague in Congress' slur on his Revolutionary War record by spitting at him,¹⁵⁷ and by voting against the Alien and Sedition Acts.¹⁵⁸ '[T]he beastly Lyon'¹⁵⁹ further targeted himself by establishing a Republican magazine, *Lyon's Republican Magazine*, which changed its title to *The Scourge of Aristocracy*,¹⁶⁰ when he found it difficult to get papers to publish his responses during his reelection campaign.

¹⁵³ *Ibid* 3:293, 294.

¹⁵⁴ *Ibid*.

¹⁵⁵ See generally Wharton's *State Trials* 333; *Freedom's Fetters* 221-46; *Crisis* 102-11; *DAB* 11:532; *Empire* 227-30.

¹⁵⁶ Samuel E. Morison, *Life and Letters of Harrison Gray Otis* (Houghton Mifflin, Boston 1913) 1:108; *Ames Works* 1:259, 247.

¹⁵⁷ *Report of the Committee of Privileges . . . Relative to the Expulsion from this House, of Matthew Lyon* (Philadelphia, np 1798) 3-4; Wharton's *State Trials* at 337-39; cf. *Report of the Committee of Privileges . . . Expulsion of Roger Griswold and Matthew Lyon* (Philadelphia, np 20 Feb. 1798) 5-6 (ensuing fight). *Annals* 8:2171.

¹⁵⁸ Stephen Higginson to Timothy Pickering (22 Feb. 1798), *Higginson Letters* 1:801, 802.

¹⁶⁰ [No Caption] *Vergennes Gazette* (Vergennes 3 Jan. 1799) 3; Aleine Austin, *Matthew Lyon* (PSUP, Pittsburgh 1981) 169 n75.

The grand jury indicted Lyon under the Sedition Act, and on the same day unwittingly confirmed Lyon's allegations that it was packed with Federalists by writing a formal 'unanimous' reply to Paterson's 'solemn, momentous and invaluable charge,' which joined in his 'lament. . . that our liberties, in some instances, are abused to licentiousness,' which, the grand jury was quite sure, 'more endangers the liberties and independence of a free Government than hosts of invading foes.'¹⁶¹ The grand jury saw exactly such endangerment in Lyon. The first count of the indictment charged that Lyon libeled the President and the executive branch, with intent 'to stir up sedition, and to bring the President and government of the United States into contempt,' by writing in a newspaper letter that the President caused 'every consideration of the public welfare [to be] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, or selfish avarice,' and caused 'men of meanness [to be] preferred, for the ease with which they can take up and advocate opinions' required by the executive, in place of 'men of real merit.'¹⁶² The second and third counts were for libeling Adams and Congress by publicly reading a letter from France denouncing 'the bullying speech of your President,' who ought to be sent 'to a mad house,' and the 'stupid answer of your Senate,' supplemented with Lyon's own 'language highly disrespectful to the administration'; and aiding and abetting its publication by having an intermediary hand it to the printer.¹⁶³ Complicating matters, Lyon's newspaper letter had been written three weeks before enactment of the Sedition Act, though it was published two weeks after the effective date.¹⁶⁴ Paterson was aware of that complication, and when later challenged on it by a leading Republican in Congress on *ex post facto* and First Amendment grounds,¹⁶⁵

¹⁶¹ 'Reply of the Grand Jury' *Rutland Herald* (Rutland 5 Oct. 1798), *DHSC* 3:294, 294-95.

¹⁶² 'Mr. Spooner' *Spooner's Vermont Journal* (Windsor 31 July 1798) 1, 2; quoted slightly differently in *Wharton's State Trials* 333 (indictment 5 Oct. 1798).

¹⁶³ *Trial of Matthew Lyon*, *Wharton's State Trials* 333, 333-34 (U.S.Cir.Ct.Vt.1798), reprinted *In re Lyon's Case*, 15 F.Cas. 1183 (U.S.Cir.Ct.Vt. 1798).

¹⁶⁴ The dates were given in the newspaper article.

¹⁶⁵ William Paterson, 'U.States v Mr Lyon Notes,' *Paterson Papers-NYPL* 699, 701; Joseph H. Nicholson to William Paterson (23 June 1801), *ibid* 737, 739, 741, 747; William Paterson to Joseph H. Nicholson (23 Feb. 1801), *ibid* 721, 725-29.

stood firm with Holt and Mansfield that the 'criminality consists chiefly in the publication,' and that 'he, who procures another to publish a libel, becomes the publisher himself.'¹⁶⁶

Paterson (sitting with District Judge Samuel Hitchcock), at the beginning of the trial, rejected Lyon's argument 'that the sedition law was unconstitutional,' parrying that it merely restated and relaxed the common law of seditious libel.¹⁶⁷ However, Paterson (according to Lyon's account) allowed him to 'appeal to the jury, on the unconstitutionality of the law, the innocence of the passage in my letter, and the innocence of the manner in which I read the letter.'¹⁶⁸ Nevertheless Paterson's jury charge began with the instruction that the jury may not question the constitutionality of the Sedition Act:

You have nothing whatever to do with the constitutionality or unconstitutionality of the sedition law. Congress has said that the author and publisher of seditious libels is to be punished; and until this law is declared null and void by a tribunal competent for the purpose, its validity cannot be disputed.¹⁶⁹

His circuit court was clearly not that tribunal for Lyon, though it had been three days earlier in another case when Paterson apparently gave the opposite instruction on jury treatment of unconstitutional laws.¹⁷⁰ Paterson instead proceeded to limit the jury to whether Lyon published the writing and, if he was quoted accurately and ruled contrary to other justices, whether it was done 'seditiously?'¹⁷¹ In doing so, Paterson contradicted, or at least ignored, the supposed ameliorative provision of the Sedition Act that the jury 'shall have a right to determine the law and the fact, under the direction of the court, as in other cases'; he did not inform the jury that conviction required finding the speech or writing false and finding Lyon's intent malicious, or that his attempted defenses could be full defenses to those requirements. Supplementing his biased

¹⁶⁶ William Paterson to Joseph H. Nicholson (29 June 1801), *ibid* 751, 753.

¹⁶⁷ *Wharton's State Trials* 334, 341.

¹⁶⁸ Matthew Lyon, 'In Jail at Vergennes' (14 Oct.1798), *Wharton's State Trials* 339, 340; *accord ibid* 335; *Paterson Papers-NYPL* 711, 715.

¹⁶⁹ *Ibid* 336.

¹⁷⁰ *DHSC* 3:236 n24 (law allowing seizure of glebe property); *History of Supreme Court* 1:592 n186, and earlier, 'Col. Lyon's Trial' *Alexandria Times* (Alexandria 27 Nov.1798) 2.

¹⁷¹ *Wharton's State Trials* 336; *accord* William Paterson, 'U.States v Mr Lyon Notes,' *Paterson Papers-NYPL* 699, 715.

grand jury charge on intent, Paterson charged the jury that if they found Lyon's intent was 'making odious or contemptible the President and government, and bringing them both into disrepute,' they 'must render a verdict of guilty'; but he did not charge the converse, or make any reference to the jury's power to render a verdict of not guilty.¹⁷² Though not reported in Wharton, Paterson's own notes show that he followed Blackstone and Holt-Mansfield even more sedulously, quoting the analogy that '[p]oison may be kept in a closet, but must not be administered as cordials,' and immediately after, conclusively inferring the crime from publication alone: 'The malignity consists in the publication. . . . The guilt consists in the public'n.'¹⁷³

Despite Lyon's arguments that the law violated the First Amendment, that he lacked seditious intent, that his writing and speech were true, and in an historical epiphany, that his expression was only 'a legitimate opposition,' the jury found him guilty.¹⁷⁴ After lecturing Lyon and the jury about the 'mischiefs which flow from an unlicensed abuse of government,' Paterson sentenced him to four months in prison and a \$1,000 fine, payable before release.¹⁷⁵ Articles about the trial, fawning over Paterson's handling, appeared in Federalist newspapers across the country.¹⁷⁶ Jefferson spoke for Republicans when he responded to Lyon's trial, 'I know not which mortifies me most, that I should fear to write what I think, or my country bear such a state of things,' a fear created by 'Lyon's judges,'¹⁷⁷ the month after he drafted the Kentucky Resolutions.

Lyon's travails were just beginning, as the federal marshal denied his requests to stop by his home to set affairs in order for his four month absence, and straightway incarcerated him forty-four miles away in an unheated cell throughout the Vermont winter. Detailing his ill

¹⁷² *Wharton's State Trials* 336. Other bias was alleged in Lyon's letter. *Ibid* 340.

¹⁷³ William Paterson, 'U.States v Mr Lyon Notes,' *Paterson Papers-NYPL* 699, 715.

¹⁷⁴ *Wharton's State Trials* 335, 336.

¹⁷⁵ *Ibid* 336-37, 337.

¹⁷⁶ E.g., 'Trial of Matthew Lyon for Sedition' *Albany Centinel* (Albany 19 Oct.1798) 2; 'Trial of Matthew Lyon for Sedition' *Vergennes Gazette* (Vergennes 11 Oct.1798) 3.

¹⁷⁷ Thomas Jefferson to John Taylor (26 Nov.1798), *Jefferson Papers* 30:588.

treatment, Lyon's letter from jail was printed in Republican newspapers nationally,¹⁷⁸ and his reelection campaign from his cell succeeded with a larger margin of victory than his prior election.¹⁷⁹ Upon his release, Virginians and Vermonters vied to pay his fine, and Lyon stepped out to a 'huge crowd' and led 'a triumphant procession' as he returned to Congress.¹⁸⁰ The prosecution widened the narrow Federalist margin in the House for a few months, but at a cost of making the 'first victim' of the Sedition Act 'a martyr' for freedom of press and speech.¹⁸¹

3 The Thomas Adams Prosecution and His Boston *Independent Chronicle*

The first prosecution of a prominent editor under the Sedition Act was directed at Thomas Adams,¹⁸² of the *Independent Chronicle*, the 'leading Republican journal in New England, second only to Bache's in the nation,'¹⁸³ a paper that excoriated the Sedition Act in nearly every issue. Beginning with its first issue after word reached Boston of the Act, the *Chronicle* announced that 'we are now "abridged the freedom of press"' until citizens spoke in the next election, and the lead article of the next issue dramatically juxtaposed the Sedition Act and the First Amendment,¹⁸⁴ followed by a drumbeat thereafter.¹⁸⁵ After Paterson followed his circuit from Rutland to Boston, the grand jury that he charged¹⁸⁶ presented Adams for 'libellous and seditious publications' that libeled the government of the United States.¹⁸⁷ Brought before Paterson and a district judge for arraignment on 23 October 1798, Adams pleaded not guilty, and trial

¹⁷⁸ Matthew Lyon, 'In Jail at Vergennes' (14 Oct. 1798), *Wharton's State Trials* 339, 341-42.

¹⁷⁹ Matthew Lyon, 'Colonel Lyon's Address to His Constituents' (np, 10 Jan. 1799); *Wharton's State Trials* 339, 343.

¹⁸⁰ *Freedom's Fetters* 244; cf. 'Vergennes' *Windham Herald* (Windham 7 Mar. 1799) 3.

¹⁸¹ 'Extract of a Letter from Virginia' *Independent Chronicle* (Boston 10 Dec. 1798) 2; 'Gen. Mason to Col. Lyon' *Vermont Gazette* (Bennington 27 Dec. 1798) 1.

¹⁸² See generally *Freedom's Fetters* 247-57; *Crisis* 120-23; *Press-Mass.* 144-45.

¹⁸³ *Freedom's Fetters* 247, 178.

¹⁸⁴ 'Boston' *Independent Chronicle* (Boston 19 Jul. 1798) 3; 'Sedition Bill' *Independent Chronicle* (Boston 23 Jul. 1798) 1.

¹⁸⁵ E.g., 'Freedom of Opinion and the Liberty of the Press' *Independent Chronicle* (Boston 30 Jul. 1798) 2, and immediately before Adams' arraignment, 'At a Meeting of the Citizens' *Independent Chronicle* (Boston 22 Oct. 1798) 1; 'Worcester' *ibid* 2 (Lyon, Haswell); 'Communication' *ibid* 2; 'Centinel' *ibid* 3.

¹⁸⁶ *DHSC* 3:300.

¹⁸⁷ 'Boston' *Independent Chronicle* (Boston 25 Oct. 1798) 3.

was set for June 1799.¹⁸⁸ That was not to happen, however, as he died the month before.¹⁸⁹

In the meantime, a state proceeding for seditious libel was filed against Thomas Adams and his brother Abijah for publishing what 'hath a direct and manifest tendency to stir up uneasiness, jealousy, distrust, and sedition,' in February 1799. The offending article censured the state assembly for violating their oaths of office by responding to the Virginia Resolutions by disclaiming any right to assess the constitutionality of federal laws. Though Thomas Adams was too sick to be tried, his brother was tried and convicted the next month of publishing, though not of printing, a libel against the Massachusetts assembly,¹⁹⁰ after the judge insisted freedom of press was limited to Blackstone's definition.¹⁹¹

The Sedition Act prosecutions are discussed by justice, rather than chronologically, so other cases occurred before Paterson's last two cases, as the chronological table indicated.

4 The Duane Prosecutions and His Philadelphia *Aurora*

William Duane,¹⁹² Bache's successor as the *Aurora's* editor (still the foremost Republican newspaper¹⁹³), was the first target of Pickering's 1799-1800 assault on Republican newspapers. An earlier state court prosecution for riot had been brought in Pennsylvania in February 1799, when Duane and compatriots sought after-church 'signatures to a memorial for the repeal of the *Alien Bill*' from Irish immigrants, producing a churchyard scuffle. But to Federalist dismay, they were acquitted.¹⁹⁴

The first federal prosecution of Duane was brought because of the *Aurora's* 'uninterrupted stream of slander on the American government,' and because, even worse, Duane was apparently an alien and 'doubtless a United Irishman,' who headed volunteers Pickering believed

¹⁸⁸ 'Boston' *Independent Chronicle* (Boston 29 Oct. 1798) 3.

¹⁸⁹ 'Died' *Massachusetts Mercury* (Boston 14 May 1799) 2.

¹⁹⁰ 'Trial of Mr. Abijah Adams' *Independent Chronicle* (Boston 8, 15, 22, 29 Apr. 1799) 1; *Press-Mass.* 144-45.

¹⁹¹ *Contemporary Opinion* 225, 228; see *ibid* 58-63, 225-28.

¹⁹² See generally Wharton's *State Trials* 345; *Freedom's Fetters* 277-306; *Crisis* 194-202; *DAB* 5:467.

¹⁹³ *Freedom's Fetters* 278.

¹⁹⁴ *Trial of Duane et al.*, Wharton's *State Trials* 345, 345, 348, 388 (Pa. Ct. Oyer & Terminer 1799); accord William Duane, *A Report of the Extraordinary Transactions Which Took Place in Philadelphia* (Aurora, Philadelphia 1799).

were 'probably formed to oppose the authority of the government; and in case of war and invasion by the French, to join them.'¹⁹⁵ President Adams approved the recommendation to prosecute, noting that there was nothing evil 'that the *Aurora* has not suggested of me,' and that if the federal prosecutor 'does not think this paper libellous, he is not fit for his office.'¹⁹⁶ The prosecutor, eager to show his fitness for continued service, indicted Duane in early August 1799, reciting that the *Aurora* libeled the President and the government by claiming 'British influence' including, in a letter 'in the hand-writin[g] of John Adams, . . . that British influence has been employed and with effect in procuring the appointment' of an important officer; he soon indicted Duane a second time.¹⁹⁷ When Duane appeared in court before Justice Washington in October 1800,¹⁹⁸ it turned out he indeed had such a letter,¹⁹⁹ and trial was postponed forever.²⁰⁰

Meanwhile, a separate effort to muzzle Duane was made by the Federalist-dominated Senate, after Duane published in February 1800 a pending bill that proposed to resolve disputed electoral college tallies like the 1796 election by an extraconstitutional committee dominated by Federalists.²⁰¹ The Senate alleged his criticism to be 'false, scandalous, defamatory and malicious' and his publication of secret Senate proceedings to violate its privileges, and summoned him to appear a month later.²⁰² Because Duane was only allowed to offer 'excuse or extenuation' of his publication and not defenses such as freedom of press or

¹⁹⁵ Timothy Pickering to John Adams (24 July 1799), *Adams Works* 9:3, 4; accord Timothy Pickering to William Rawle (24 July 1799), *Pickering Papers* r.11, fol.486. The volunteers assembled because Duane was attacked several times. *Violence* 66.

¹⁹⁶ John Adams to Timothy Pickering (1 Aug. 1799), *Adams Works* 9:5.

¹⁹⁷ [William Duane], *Copy of an Indictment* ([Duane, Philadelphia 1799]) 2; accord Timothy Pickering to John Adams (1 Aug. 1799), *Adams Works* 9:5, 7.

¹⁹⁸ *DHRC* 3:389 (12-22 Oct. 1799); 'Federal Circuit Court' *Herald of Liberty* (Washington [Pa.] 18 Nov. 1799) 1; 'Norristown (Penn.) Oct. 15' *City Gazette* (Charleston 5 Nov. 1799) 2.

¹⁹⁹ John Adams to Tench Coxe (May 1792), *Wolcott Papers* 2:424, 425; 'A Letter of John Adams' *Maryland Herald* (Elizabethtown 23 Oct. 1800) 1; Worthington C Ford, 'Letters Written by William Duane' (1906) *Proceedings of the Massachusetts Historical Society* 40:257, 260.

²⁰⁰ William Cobbett, 'The Electors of Pennsylvania' (1800), GDH Cole (ed), *Letters from William Cobbett to Edward Thornton* (OUP, Oxford 1937) 121, 122; Richard N Rosenfeld (ed), *American Aurora* (St Martin's Press, New York 1997) 859 (excerpting *Aurora* 3 Oct. 1800); *Freedom's Fetters* 285-86.

²⁰¹ 'Report of the Committee on Privileges' *Oracle of Dauphin* (Harrisburg 24 Mar. 1800) 2 (citing *Aurora* 19 Feb. 1800); 'Report of the Committee on Privileges' *Massachusetts Spy* (Worcester 26 Mar. 1800) 2.

²⁰² *Report, in Part, of the Committee of Privileges, on . . . Duane* (Philadelphia, Senate 1800) 3

truth, his counsel refused to participate and Duane refused to appear,²⁰³ following a carefully orchestrated plan.²⁰⁴ The Senate ordered Duane's arrest for contempt, but failed to find him, though the *Aurora* continued to appear regularly.²⁰⁵ Frustrated, the Senate, as it adjourned, asked for prosecution under the Sedition Act.²⁰⁶

President Adams was more than glad to instruct the attorney general and the federal attorney again to prosecute Duane under that Act.²⁰⁷ Merely two weeks after the earlier federal action ended, Duane was indicted by the grand jury for publishing the Senate bill, on the ground it was 'libellous against the Senate' under the Sedition Act,²⁰⁸ after Paterson roused the grand jury with his charge on the perfidiousness of criticism of government, apparently giving the same charge as to Lyon's grand jury and later to Haswell's.²⁰⁹ With the attorney general agreeing to postpone the trial, Paterson granted a continuance, and the unavailability of witnesses brought further delays. As in Thomas Adams' case, Paterson was shortchanged of a Sedition Act trial of Duane, when delays pushed the trial into Jefferson's term of office, and Jefferson discontinued the Sedition Act prosecution.²¹⁰ Not wanting to tread on sensitive Senate toes, Jefferson left the Senate's concerns about Duane's criticisms to a new prosecution, and as he clearly hoped, the grand jury refused to indict Duane.²¹¹

²⁰³ *Ibid* 4; William Duane to Thomas Jefferson (27 Mar.1800), *Jefferson Papers* 31:466; accord Anthony New Letter (8 Apr.1800), *Circular Letters* 1:194, 195; *Jefferson Papers* 31:454n.

²⁰⁴ Thomas Cooper to Thomas Jefferson (23 Mar.1800), *Jefferson Papers* 31:451,451-52.

²⁰⁵ William Bingham to Rufus King (6 Aug.1800), *King Correspondence* 3:284.

²⁰⁶ *Ibid* 3:285; Thomas Jefferson to Littleton Tazewell (10 Apr.1800), *Jefferson Papers* 31:491, 492; *Freedom's Fetters* 288-301.

²⁰⁷ John Adams to Attorney General and District Attorney (16 May 1800), *Adams Works* 9:56.

²⁰⁸ 'Federal Circuit Court' *Alexandria Times* (Alexandria 24 Oct.1800) 2 (indictment 17 Oct.1800); 'Federal Circuit Court' *American Citizen* (New York 23 Oct.1800) 3.

²⁰⁹ He was using the same charge a year after Lyon's grand jury. 'Raleigh, December 3' *Constitutional Diary* (Philadelphia 17 Dec.1799) 1. *DHSC* found no other charge during mid-1798 through 1800, nor did I in his papers; and the undated Paterson charges at *DHSC* 3:457-68 are pre-Sedition Act. Paterson's grand jury charges were rarely in newspapers, because his 'invariable rule' was 'never to give a copy of any of them for publication.' *DHSC* 3:295.

²¹⁰ Thomas Jefferson to James Madison (19 July 1801), *Madison Papers-Secretary* 1:442.

²¹¹ Thomas Jefferson to James Madison (22 Aug.1801), *ibid* 2:60, 61, 61-62 n5.

5 The Greenleaf Prosecution and Her *New York Argus*

Two other Sedition Act prosecutions, of Greenleaf and Peck, have never been identified with Justice Paterson, but the indictments appear to have been obtained after he gave the New York grand jury 'an elegant charge ag[ains]t riots, insurrections, & lies against the Government & its officers,' while he presided in September 1799, as ex-judge Robert Troup reported.²¹²

Ann Greenleaf²¹³ continued the *New York Argus* upon her husband's death from the yellow fever epidemic of 1798, and it was reviewed, at Pickering's instigation as part of his July-August 1799 offensive, for 'audacious calumnies against the government.'²¹⁴ Objectionable articles were found, with such outrages as 'advocacy of the right to erect liberty poles, denunciation of the Alien and Sedition Acts, and accusations that the "federal government was corrupt and inimical to the preservation of liberty."²¹⁵ Greenleaf was indicted but the trial was continued to April 1800, because of her health and another epidemic,²¹⁶ when Washington was to preside.²¹⁷

Meanwhile, Greenleaf was publicly charged with defamation by Alexander Hamilton, in a letter to New York's attorney general asking for prosecution. Hamilton's letter detailed the defamation as charging him 'with being at the "bottom" of an "effort recently made to suppress the Aurora," funded by "foreign gold."' Hamilton self-servingly claimed he only asked the state to prosecute because 'the faction to overturn our government' regularly aimed 'to destroy the confidence of the people' in government which would likely bring 'very fatal consequences.'²¹⁸ In a novel twist showing the plasticity of criminal libel, Hamilton also claimed that it was criminal libel to 'inspire the belief that the independence and liberty of the press are

²¹² Robert Troup to Rufus King (2 Sept.1799), *DHSC* 3:383; *ibid* 3:381 (2-6 September 1799).

²¹³ See generally *Freedom's Fetters* 398-417; *Crisis* 223.

²¹⁴ Timothy Pickering to Richard Harison (12 Aug.1799), *Pickering Papers* 1.11, fol.599.

²¹⁵ *Freedom's Fetters* 400 n50, citing 9 Feb. and 13 Aug.1799 articles.

²¹⁶ *Ibid* 400.

²¹⁷ *DHRC* 3:408.

²¹⁸ Alexander Hamilton to Josiah O Hoffman (6 Nov.1799), *Hamilton Papers* 24:5, 6; reprinted, e.g., 'New-York, November 6, 1799' *New-York Gazette* (New York 8 Nov.1799) 3; 'New-York, November 6, 1799' *Daily Advertiser* (New York 9 Nov.1799) 2.

endangered by the[se] intrigues,²¹⁹ echoing the libel charges against Sacheverell, even as he urged prosecution of the press. The offending article indeed said as much—that Hamilton offered '6,000 dollars down' and a larger balance for the *Argus*, and the money must either come from 'speculation. . . while he was secretary of the treasury' or from 'British secret service money'²²⁰—though the *Argus* merely reprinted what the *Aurora* and a host of earlier newspapers had published.²²¹ The overlooking of those papers and prosecution of New York City's only remaining Republican newspaper²²² did not escape the notice of Republican editors.²²³

New York's attorney general, having scruples Pickering lacked about charging a nonpartisan widow, instead arrested and charged David Frothingham, the journeyman running the *Argus*, in early November 1799. The state court indictment was for a common law libel, rather than a Sedition Act violation, for claiming Hamilton led efforts to buy the *Aurora*, and insinuating corrupt speculation or British funding.²²⁴ At trial just a week later, the court excluded evidence of truth or falsity, holding it irrelevant in a common law prosecution, and ensured a conviction, by giving the jury the judges' unanimous opinion that the article was libelous as charged.²²⁵ New York law also precluded a freedom of press defense, since it was one of the few states not having a constitutional press or speech provision. When the jury pronounced Frothingham guilty, he was sentenced to a \$100 fine and four months in prison, only to be released when he posted \$2,000 security (half from others).²²⁶ At sentencing, the state judges announced that the case had no implication for freedom of press, citing the Blackstone-

²¹⁹ *Ibid* 24:6.

²²⁰ *Ibid* 24:6-7 n2.

²²¹ E.g., 'Extract of a Letter, Philadelphia, Sept. 20' *Constitutional Telegraph* (Boston 26 Oct. 1799) 3; 'Extract of a Letter from Philadelphia' *City Gazette* (Charleston 2 Nov. 1799) 2.

²²² *Freedom's Fetters* 398.

²²³ E.g., [No Caption] *Alexandria Times* (Alexandria 18 Nov. 1799) 3; [No Caption] *Claypoole's American Daily Advertiser* (Philadelphia 11 Nov. 1799) 3.

²²⁴ *Trial of David Frothingham, Wharton's State Trials* 649, 649 (N.Y. Ct. Oyer & Terminer 1799). Wharton questioned the accuracy of the *New-York Gazette* report, *ibid* 650n; cf. 'New-York, November 25' *New-York Gazette* (New York 25 Nov. 1799) 2.

²²⁵ *Ibid* 650, 651.

²²⁶ *Ibid* 651. Wharton mistakenly states \$500, *Freedom's Fetters* 414 n80.

Mansfield interpretation, but had momentous implications for the survival of government.²²⁷

These two Federalist prosecutions had the desired effect, as Greenleaf was forced to sell the *Argus*, though she limited sale to 'republican printers.'²²⁸ With Greenleaf 'having discontinued her paper,' the federal attorney questioned the need for further prosecution,²²⁹ and Pickering with Adams' approval ordered the federal case discontinued.²³⁰

6 The Peck Prosecution for Petitioning against the Sedition Act

The prosecution of Jedidiah Peck,²³¹ a New York assembly member, showed how far the Sedition Act could be carried; the sole offense was his petition to repeal the Sedition Act as a violation of the Constitution and a precursor to tyranny.²³² Prosecution for an opinion that the Sedition Act was unconstitutional had been presciently predicted by Albert Gallatin in opposing the Act in 1798, as he objected that the truth defense would help little if an opinion was prosecuted and if a packed jury 'declar[ed] the opinion ungrounded, or, in other words, false and scandalous, and its publication malicious.'²³³ The Federalist press, reporting his September 1799 arrest, described Peck as 'an influential Jacobin,'²³⁴ though he had publicly condemned Jacobinism and praised Adams before the Sedition Act.²³⁵

Peck was paraded from his arraignment to prison, and the procession became 'the public exhibition of a suffering martyr for the freedom of speech and the press, and the right of petitioning,' with the result that a 'hundred missionaries in the cause of democracy, stationed be-

²²⁷ *Freedom's Fetters* 413, citing *Gazette and General Advertiser* (New York 5 Dec.1799).

²²⁸ 'To the Patrons of the Late *Argus*' *American Citizen* (New York 12 Mar.1800) 2; accord [No Caption] *Bee* (New London 26 Mar.1800) 4.

²²⁹ Richard Harison to Timothy Pickering (10 Apr.1800), *Pickering Papers* r.26, fol.77, 78.

²³⁰ Timothy Pickering to Richard Harison (22 Apr.1800), *Pickering Papers* r.13, fol.406.

²³¹ See generally *Freedom's Fetters* 390-98; *Crisis* 223; *Empire* 223-27.

²³² *Ibid* 390, 393; see *Journal-N.Y.* 123 (16 Feb.1799).

²³³ *Annals* 8:2162 (July 1798).

²³⁴ E.g., [No Caption] *Gazette of the United States* (Philadelphia 9 Oct.1799) 2; [No Caption] *Universal Gazette* (Philadelphia 17 Oct.1799) 3.

²³⁵ Plough-Jogger [Jedidiah Peck], *Political Wars of Otsego* (E Phinney, Cooperstown 1796) 95; Jedidiah Peck (Chairman), 'Address to John Adams' *Otsego Herald* (Cooperstown 31 May 1798) 3.

tween New-York and Cooperstown could not have done so much for the republican cause.²³⁶

On the eve of New York's elections of May 1800, Peck's trial was delayed and his prosecution suspended at the same time as Greenleaf's, because 'his consequence would be augmented by the measures, which might be taken for his punishment,' while 'he will be under greater restraint while he remains in his present situation.'²³⁷ He was reelected by a strong majority.²³⁸

7 The Haswell Prosecution and His *Vermont Gazette*

Paterson finally had two other Sedition Act trials, and other chances to use the reasoning of his draft opinions, as his semiannual circuit brought him back to Vermont in mid-1800.

Anthony Haswell,²³⁹ the editor of the 'leading Democratic-Republican newspaper in Vermont,'²⁴⁰ was another target of Pickering's assault a year before the 1800 election. His sin was to support Lyon, decrying his trial, supporting his reelection,²⁴¹ detailing his mistreatment in prison, and printing Lyon's advertisement for his lottery to pay his high fine, which included a strong political statement. Haswell was indicted under the Sedition Act in early October 1799, with one count for printing the advertisement²⁴² which described Lyon's incarceration by 'the oppressive hand of usurped power in a loathsome prison, ... and suffering all the indignities which can be heaped upon him by a hard-hearted savage' (the marshal),²⁴³ and with a second count for censuring 'British Influence' in the Federalist administration by placing 'the confidence of our government' in 'Tories, men who had fought against our independence, who had shared in the desolation of our towns, the abuse of our wives, sisters, and daughters.'²⁴⁴

²³⁶ *Political Parties-N.Y.* 1:132.

²³⁷ Richard Harison to Timothy Pickering (10 Apr.1800), *Pickering Papers* r.26, fol.77, 78A, 78.

²³⁸ *Freedom's Fetters* 397.

²³⁹ See generally *Wharton's State Trials* 684; *Freedom's Fetters* 359-73; *Crisis* 123-25; *DAB* 8:390.

²⁴⁰ *Freedom's Fetters* 359.

²⁴¹ E.g., Constitutional Federalist, 'Look at Federalists!' *Vermont Gazette* (Bennington 23 Nov.1798) 2; 'Col. Lyon, in Answer' *Vermont Gazette* (Bennington 12 Oct.1798) 1.

²⁴² After the original lottery advertisement without the commentary on 3 Jan.1799, 'To the Public' *Vermont Gazette* (Bennington 24 Jan.1799) 4; *ibid* (Bennington 31 Jan.1799) 4; *ibid* (Bennington 7 Feb.1799) 4.

²⁴³ *ibid*; *Trial of Anthony Haswell*, *Wharton's State Trials* 684, 684 (U.S.Cir.Ct.Vt.1800), reprinted *United States v. Haswell*, 26 F.Cas.218 (U.S.Cir.Ct.Vt.1800).

²⁴⁴ 'British Influence' *Vermont Gazette* (Bennington 15 Aug.1799) 2 (from the *Aurora*).

After being arrested without being told the charges, taken fifty-five miles by horseback in the rain, and denied security and kept overnight in a 'dungeon' by the same 'hard-hearted savage',²⁴⁵ Haswell was arraigned before Justice Cushing, pleaded not guilty, and had to post \$2,000 security until trial in May 1800.²⁴⁶ While Haswell awaited trial, the zealous federal attorney tried to indict him for an additional publication, but was stopped by an unwilling grand jury.²⁴⁷

Paterson presided over the trial (with District Judge Samuel Hitchcock again). Haswell defended the first count, among other things, by pointing out that if anyone was libeled it was the marshal and not, as the Sedition Act required, the President or Congress, and that reference to them should not be inferred.²⁴⁸ When Haswell sought to defend the second count with the secretary of war's letter stating that he 'can see no reason why' former 'Tories. . . should not also be considered' for office, Paterson ruled that it 'would not be admissible, even if [sender and recipient were] present,' unless Haswell proved the specific Tories considered were those that fought against independence, desolated towns, and abused wives and daughters.²⁴⁹ Haswell's later recollection of the trial had Paterson railing at Lyon as 'a seditious libeller of your government, a convict justly suffering the penalty of a mild law,' defending the Sedition Act as preventing 'base repetitions of his crime, like that which you now have under consideration,' characterizing Haswell's articles as 'dangerous and malignant publications' and 'base calumny,' and refusing to inform him where he would be incarcerated though his son's leg was about to be amputated.²⁵⁰ Whether or not Haswell's recollection was correct, Wharton's description of the jury charge rings true. Paterson instructed the jury that for the second count 'no attempt at justification has been made,' and that if the jury found 'intent was defamatory, and the publica-

²⁴⁵ *Wharton's State Trials* 687n.

²⁴⁶ *Freedom's Fetters* 363-64; see *DHSC* 3:388; [No Caption] *Bee* (New London 20 Nov. 1799) 3.

²⁴⁷ *Ibid* 364.

²⁴⁸ *Wharton's State Trials* 686n.

²⁴⁹ Anthony Haswell, 'A Brief Recital' *Green-Mountain Farmer* (Bennington 31 Mar. 1813) 1, cited in *Freedom's Fetters* 362 n8; James McHenry to William Darke, *Jefferson Papers* 31:493; *Wharton's State Trials* 685, 686.

²⁵⁰ *Ibid*.

tion was made, they must convict.²⁵¹ Thus, as with Lyon, Paterson restricted the jury to two narrow issues, and told the jury to convict if both were shown while again apparently not using parallel language about acquitting Haswell. After the jury quickly found the hapless printer guilty, Paterson sentenced Haswell to two months imprisonment and a \$200 fine plus court costs.²⁵² Like Lyon, Haswell left prison to a hero's welcome, with marching band and booming cannon.²⁵³

8 The Shaw Prosecution

Dr. Samuel Shaw²⁵⁴ was added by Goebel to the Smith-Miller lists of Sedition Act prosecutions confirmed in court records.²⁵⁵ Details come only from newspaper reports that, at the time Lyon was indicted in early October 1798 before Paterson, an '[i]nformation was also filed in the same court against Dr. Shaw, of Castleton, for sedition.²⁵⁶ At the time Haswell was tried in May 1800 before Paterson, 'Doctor Shaw of Castleton, was likewise tried for sedition, and acquitted.²⁵⁷ Little more is known about this only acquittal under the Sedition Act.

After Jefferson took office, Justice Chase believed Paterson and himself would be subject to impeachment, warning him that 'a day of severe trial is fast approaching for the friends of the Constitution, and we I fear must be principal actors, and may be sufferers therein.'²⁵⁸

D The Fairbanks, Brown, Cooper, and Callender Cases, the First Amendment, and Justice Samuel Chase

Justice Chase announced his intentions during one of the Sedition Act trials: 'I do not want to

²⁵¹ *Wharton's State Trials* 686.

²⁵² *Ibid* 686.

²⁵³ *Ibid* 687n.

²⁵⁴ *Repressive Jurisprudence* 138-39.

²⁵⁵ *History of Supreme Court* 1:638 n107.

²⁵⁶ 'New-York, Oct. 24' *Newport Mercury* (Newport 29 Oct.1799) 3; 'Domestic Occurrences' *Political Repository* (Brookfield 5 Nov.1799) 3.

²⁵⁷ 'Windsor, Tuesday, May 13, 1800' *Spooner's Vermont Journal* (Windsor 13 May 1800) 3; 'Windsor, (Ver.) May 13' *Connecticut Courant* (Hartford 26 May 1800) 2.

²⁵⁸ Samuel Chase to William Paterson (6 Apr.1802), *Paterson Papers-NYPL* 755, 759.

oppress, but I will restrain, as far as I can, all such licentious attacks on the government.²⁵⁹ Restraining that plague, Chase charged grand juries with vehemence, and three did not disappoint him. He presided over the two most controversial Sedition Act trials, those of Cooper and Callender, the latter in a manner that provided the basis for impeachment efforts in 1804-1805. He also sentenced a pair of other Sedition Act defendants, Fairbanks and Brown.

1 Chase's Opinion on the Constitutionality of Restricting the Press and Speech

Chase, in the first of those trials, addressed the constitutionality of the Sedition Act. He responded to the Federalist-Republican division, in which 'one thinks the liberties of our country endangered by the licentiousness, the other, by the restrictions of the press,' and to the defendant's complaint that 'the press is open to those who will praise, while the threats of the law [Sedition Act] hang over those who blame the conduct of men in power.'²⁶⁰ Beginning his jury charge, Chase emphatically supported the law of seditious libel and the Sedition Act, using language that later haunted his impeachment trial:

All governments which I have ever read of or heard of punish libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government. A republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press. This latter is the more slow, but most sure and certain, means of bringing about the destruction of the government. The legislature of this country, knowing this maxim, has thought proper to pass a law to check this licentiousness of the press. . . the Sedition Law.²⁶¹

With this historical framework in mind, Chase painted criticism of officials and the legislature, and 'licentiousness' of the press, as not just baneful but uniquely poisonous to America's new form of government, and prescribed prosecutions of seditious libel as the only antidote. Chase fully accepted the Blackstone-Mansfield rationale, and embellished their canvas.

This left unanswered the degree or kind of criticism that would destroy the confidence of the people in government. However, Chase had provided that answer in his grand jury

²⁵⁹ *Trial of Thomas Cooper, Wharton's State Trials* 664, 678 (U.S.Cir.Ct.Pa. 1800).

²⁶⁰ *Ibid* 665.

²⁶¹ *Ibid* 670-71.

charge one week earlier, making clear that any criticism whatsoever was prohibited as lethal:

we know that a *party* has since arisen, who wish that the administration of the Government had been entrusted to *other* hands . . . There can be no Government without subordination, which implies submission; and submission in matters of a *civil* nature implies that the *minority* surrender up their judgement and will to the decision of a *majority*. Every citizen in America has engaged to be bound by the acts of the *majority* of his fellow citizens, signified by their representatives in their *national* and *state* legislatures, however repugnant to his own views of *propriety*, or even *justice*. Private opinion must give way to public judgement, or there must be an end of government.²⁶²

His charge went on to address the claim that some laws were unconstitutional, and treated it as an improper claim for a citizen to make; only 'those whom the nation has chosen' may consider repeal of laws, and only judges may decide their constitutionality.²⁶³ '[U]ntil it is repealed, it is the *duty* of every citizen to submit to it; and to give up his *private sentiments* to the *public will*.'²⁶⁴

Thus, Chase, like Paterson, believed that, when a majority of representatives acted and passed legislation, or when a majority voted and elected a president, the '*minority* [must] surrender up their judgement' and 'give up [their] *private sentiments*,' and must not criticize Congress, the legislation, the President, or the President's acts. Necessarily, he believed that the First Amendment did not enshrine any right for the minority to dissent, from that point on. With these conclusions in mind about the constitutionality of the Sedition Act and a restricted scope of freedoms of press and speech, Chase presided over Cooper's and Callender's trials in the spring of 1800. He had similar conclusions in mind as he presided over Fairbanks' and Brown's pleas and sentences in 1799, persisting from at least late 1796, when he expressed his historical belief that republics fall from a licentious press and stated that the *Aurora's* 'printer ought to be indicted for a false & base *libel* on our Government.'²⁶⁵

²⁶² Samuel Chase's Charge (U.S.Cir.Ct.Pa. 12 Apr.1800), *DHRC* 3:408, 412.

²⁶³ *Ibid* 3:412.

²⁶⁴ *Ibid* 3:413.

²⁶⁵ Samuel Chase to James McHenry (4 Dec.1796), *McHenry Correspondence* 203.

2 The Fairbanks Prosecution and the Liberty Pole

Benjamin Fairbanks²⁶⁶ was a 'deluded ringleader' in raising a liberty pole in October 1798,²⁶⁷ topped by a placard saying, 'Liberty and Equality--No Stamp Act--No Sedition--No Alien Bills--No Land Tax--Downfall to the Tyrants of America--Peace and Retirement to the President--Long Live the Vice-President and the Minority--May Moral Virtue be the Basis of Civil Government.'²⁶⁸ Liberty poles had a glorious history as part of pre-Revolution protest,²⁶⁹ but all were regarded by Pickering and similar Federalists as 'sedition poles'²⁷⁰ or 'Jacobin poles,'²⁷¹ a position that left Republicans incredulous.²⁷² Though the placard merely advocated legislative change and electoral change, the pole was raised in the Massachusetts town of a leading Federalist, Fisher Ames, who viewed liberty poles as an 'insult on the law,'²⁷³ as he scrutinized the democrats who 'abound in Dedham' with constant concern that the 'devil of sedition is immortal.'²⁷⁴ The Federalist prosecutor wanted an arrest to stop that abounding, and Fairbanks was one of the first perpetrators identified. Fairbanks was indicted as 'an accessory in erecting this rallying point of insurrection and civil war,' and had to post security at \$4,000 (double the maximum fine for the offense under the Sedition Act).²⁷⁵

Fairbanks' trial was set for June 1799 before Chase (sitting with Judge John Lowell, who had issued a warrant 'to demolish the . . . symbol of sedition'²⁷⁶). Abandoning plans to present

²⁶⁶ See generally *Jacobin* 103-10; *Freedom's Fetters* 261-62, 265-70; *Crisis* 119-20.

²⁶⁷ 'The Jacobin Pole' *Gazette of the United States* (Philadelphia 14 Nov.1798) 3; 'The Jacobin Pole' *Oracle of the Day* (Portsmouth 17 Nov.1798) 3.

²⁶⁸ *Jacobin* 105; 'Boston, Nov.12' *Bee* (New London 21 Nov.1798) 2; 'Arrest of Mr.Fairbanks' *Independent Chronicle* (Boston 12 Nov.1798) 3.

²⁶⁹ Paul A Gilje, *The Road to Mobocracy* (UNCP, Chapel Hill 1987) 52-58.

²⁷⁰ E.g., 'Benjamin Fairbanks' *Massachusetts Mercury* (Boston 21 June 1799) 2 (Ames); 'The Centinel' *Albany Centinel* (Albany 16 Nov.1798) 3.

²⁷¹ E.g., 'The Jacobin Pole' *Gazette of the United States* (Philadelphia 14 Nov.1798) 3; 'The Jacobin Pole' *Oracle of the Day* (Portsmouth 17 Nov.1798) 3.

²⁷² E.g., 'Newark, November 20' *Centinel of Freedom* (Newark 20 Nov.1798) 3.

²⁷³ Fisher Ames to Christopher Gore (18 Dec.1798), *Ames Works* 1:245, 246.

²⁷⁴ Fisher Ames to Jeremiah Smith (22 Nov.1798), *Ames Works* 1:240.

²⁷⁵ *Jacobin* 106.

²⁷⁶ 'Fall of the Dedham Pole' *Massachusetts Mercury* (Boston 9 Nov.1798) 3.

a defense at trial, Fairbanks pleaded guilty, admitted his presence when the liberty pole was raised, and professed ignorance of 'how heinous an offense' it truly was.²⁷⁷ Ames was moved by such contrition, or at least by Fairbanks being 'an opulent farmer,'²⁷⁸ and urged mercy, leading to Chase's lightest sentence (a mistake he never repeated) of six hours in prison and a \$15.50 fine.²⁷⁹ The defendant in the parallel case was not so fortunate.

3 The Brown Prosecution as an 'Apostle of Sedition'

David Brown,²⁸⁰ an itinerant Republican speaker and colporteur, visited Ames' and Fairbanks' town in October 1798. Ames, sure that Jacobins 'have sent runners everywhere to blow the trumpet of sedition,' identified one of them as 'Brown, a vagabond ragged fellow, [who] has lurked around in Dedham, telling everyone the sins and enormities of the government' and whose poison 'got them ready to set up a liberty-pole.'²⁸¹ Finally arrested in March 1799, Brown's indictment charged him with 'seditious writings' intended to 'defame the Government of the United States, the Congress, and the President,' such as 'A Dagger for Tyrants,' in violation of the Sedition Act.²⁸² Bail at \$4,000 was far beyond his means, so he remained in jail until trial.²⁸³ Between indictment and trial, Ames published essays against such emissaries as Brown, imploring the public 'to repel the assaults of the jacobins, on law and liberty,' and warning that '[e]missaries are sent to every class of men, and even to every individual man,' by the wily Jacobins 'trained, officered, regimented and formed' more perfectly than the militia.²⁸⁴

Brown's trial was set the day after Fairbanks' trial, with Chase presiding again, and Brown

²⁷⁷ 'Benjamin Fairbanks' *Massachusetts Mercury* (Boston 21 June 1799) 2; 'Circuit Court Proceedings' *Connecticut Journal* (New Haven 26 June 1799) 3.

²⁷⁸ Fisher Ames to Timothy Pickering (22 Nov. 1798), *Ames Works* 1:241, 243.

²⁷⁹ 'Benjamin Fairbanks' *Massachusetts Mercury* (Boston 21 June 1799) 2; 'Circuit Court Proceedings' *Connecticut Journal* (New Haven 26 June 1799) 3.

²⁸⁰ See generally *Jacobin* 103-10; *Freedom's Fetters* 257-61, 262-65; *Crisis* 114-19.

²⁸¹ Fisher Ames to Christopher Gore (18 Dec. 1798), *Ames Works* 1:245, 247.

²⁸² 'Circuit Court' *Salem Gazette* (Salem 21 June 1799) 1, 2; 'Circuit Court' *Porcupine's Gazette* (Philadelphia 21 June 1799) 2.

²⁸³ 'Circuit Court' *Massachusetts Mercury* (Boston 7 June 1799) 2; 'Circuit Court' *Daily Advertiser* (New York 12 June 1799) 2.

²⁸⁴ Fisher Ames, *Works of Fisher Ames* (TB Wait, Boston 1809) 94, 95, 101.

also changed his plea from not guilty to guilty. This time, Ames did not urge mercy, but blamed Brown as the 'wandering apostle of sedition' who deluded Fairbanks,²⁸⁵ and Brown did not help himself by showing much contrition or divulging names of abettors. Chase's small store of clemency was exhausted, and despite the guilty plea he proceeded to call the government's witnesses to determine 'the degree of his guilt,' and then imposed the stiffest sentence of any under the Sedition Act, 18 months' imprisonment and a \$480 fine (with costs) that must be paid before release.²⁸⁶ Manifesting his zeal against seditious libel, Chase also lectured Brown on the 'malignity and magnitude of his offences, on the vicious industry with which he had circulated and inculcated his disorganizing doctrines, and impudent fals[e]hoods; and the very alarming and dangerous excesses to which he attempted to incite the uninformed part of the community.'²⁸⁷ Because Brown was unable to pay the fine, he remained imprisoned for a total two and a half years, until Jefferson pardoned him a week after taking office.²⁸⁸ The sequel came twelve years later, when the author of the placard on the 'Jacobin pole' was unmasked as none other than Ames' Republican brother, Dr. Nathaniel Ames!²⁸⁹

4 The Cooper Prosecution and His *Northumberland Gazette*

Thomas Cooper²⁹⁰ came to Pickering's attention²⁹¹ by publishing an essay, which the *Aurora* reprinted, describing what he would expect a self-aggrandizing president to do, including 'restrict[ing] by every means in my power the liberty of speech and the liberty of the press,' 'multiply[ing] laws against libel and sedition,' and enforcing 'doctrines of confidence in

²⁸⁵ 'Circuit Court-Boston' *Salem Gazette* (Salem 25 June 1799) 2; 'Benjamin Fairbanks' *American Mercury* (Hartford 27 June 1799) 2.

²⁸⁶ 'Circuit Court' *Salem Gazette* (Salem 21 June 1799) 1, 2; 'Circuit Court' *Porcupine's Gazette* (Philadelphia 21 June 1799) 2.

²⁸⁷ *Ibid.*

²⁸⁸ 'Pardon for David Brown' (12 Mar.1801), *Jefferson Papers* 33:251.

²⁸⁹ 'Communication' *Columbian Centinel* (Boston 3 Aug.1811) 2, cited in *Jacobin* 110 n3.

²⁹⁰ See generally Wharton's *State Trials* 659; Dumas Malone, *The Public Life of Thomas Cooper, 1783-1839* (YUP, New Haven 1926) 111-49; *Freedom's Fetters* 307-33; *Crisis* 202-10; *DAB* 4:414.

²⁹¹ Though one interesting account suggests that Pickering wrote the anonymous attack that spawned Cooper's handbill defense. Peter C Hoffer, *The Free Press Crisis of 1800: Thomas Cooper's Trial for Seditious Libel* (UPKan, Topeka 2011) 74.

the executive.²⁹² President Adams readily agreed 'it is a libel against the whole government, and as such ought to be prosecuted,'²⁹³ but no action was taken during 1799, even when Cooper published another handbill defending himself against the charge that his Republican writing was 'in revenge' for being denied federal employment.²⁹⁴ Prosecution instead finally began shortly after Cooper's public denunciation of the Senate's 'gag' on defense counsel's argument as he dramatically refused to defend Duane.²⁹⁵ Two weeks after that in April 1800, Cooper was indicted under the Sedition Act for the criticisms of Adams in his handbill defense a half year before. The indictment charged as criminal libels Cooper's statements that when elected Adams was 'in the infancy of political mistake,' that some 'doubted his capacity,' that he saddled the country with 'the expense of a permanent navy' and 'a standing army,' that he reduced the nation's credit 'so low as to borrow money at eight percent, in time of peace,' that he 'interfered... to influence the decisions of a court of justice,' and wrongly delivered an accused British deserter for a British court martial.²⁹⁶ The issue was simple but fundamental: whether citizens have a right to criticize government and its officials.

The trial was a cause célèbre, with Pickering sitting with the judges and half the cabinet attending, along with many members of Congress including some Sedition Act sponsors.²⁹⁷ Pickering was evidently there because, growing up under a father who believed 'few if any' of New England clergy were 'sufficiently explicit in showing the people their sins,'²⁹⁸ he wanted

²⁹² Timothy Pickering to John Adams (1 Aug. 1799), *Adams Works* 9:5; Thomas Cooper, 'Mr. Cooper's Address to the Readers of the Sunbury and Northumberland Gazette' ([Andrew Kennedy, Northumberland] 29 June 1799).

²⁹³ John Adams to Timothy Pickering (13 Aug. 1799), *ibid* 9:13, 13-14; see Timothy Pickering to Charles Hall (1 Aug. 1799), *Pickering Papers* r.11, fol.528, 529.

²⁹⁴ Thomas Cooper, 'To the Public' ([George Schusler, Northumberland] 2 Nov. 1799), quoted in *Trial of Thomas Cooper*, *Wharton's State Trials* 659, 660n (U.S.Cir.Ct.Pa.1800), reprinted *United States v. Cooper*, 4 U.S. (4 Dall.) 341, 25 F.Cas. 626 (U.S.Cir.Ct.Pa.1800); Thomas Cooper, *An Account of the Trial of Thomas Cooper* (John Bioren, Philadelphia 1800) 4 (a pamphlet Cooper disclaimed compiling).

²⁹⁵ 'Mr. Cooper's Answer' *American Citizen* (New York 29 Mar. 1800) 2; 'Mr. Cooper's Answer' *Daily Advertiser* (New York 29 Mar. 1800) 2.

²⁹⁶ Indictment (9 Apr. 1800), *Cooper's Account* 7-8.

²⁹⁷ Thomas Cooper to Judge Chase (1 May 1800), *ibid* 58,64; 'Letter from an Anonymous Correspondent' *Aurora* (Philadelphia 7 May 1800), *DHSC* 3:424, 426.

²⁹⁸ Timothy Pickering to James McHenry (5 Jan. 1811), *McHenry Correspondence* 561.

to make sure federal judges were not similarly lax toward the sins of seditionists.

Cooper's defenses were that his statements were true, 'free from malicious imputation' (intent), and protected by 'freedom of the press' which 'sedition laws' attack.²⁹⁹ He questioned 'how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed,' if 'prosecutions in *terrorem* close all the avenues of information?'³⁰⁰ Although Chase (sitting with Judge Richard Peters) was generally lenient in relaxing evidentiary rules and allowing continuances,³⁰¹ he was adamant in excluding challenge to his refusal to subpoena the President for trial and in insisting that a publisher should already have 'proper evidence' in hand 'to justify your assertions' before printing any criticism of government.³⁰² Efforts at impartiality ceased as he charged the jury.

Chase's jury charge began with the language quoted above that decried the mortal danger of 'the licentiousness of the press' and implicitly upheld the Sedition Act.³⁰³ He then instructed that the prosecution only need prove two things: that Cooper 'did publish the matters contained in the indictment,' and 'did publish with intent to defame' (something he subsequently said was inferred from the publication itself);³⁰⁴ he thereby deprived the jury of any opportunity to determine if Cooper's statements were libelous at all. Chase then decided both issues for the jury: the 'fact of writing and publishing is clearly proved' and 'not denied,' and his 'motives in this publication were to censure the conduct of the President,' a point about intent Chase repeated as he went through each alleged libel.³⁰⁵ Lest the jury mistakenly assume that there was a right to criticize the President, Chase stated in several ways that, 'if you believe this, what opinion can you form of the President? Certainly the worst you can form:

²⁹⁹ *Wharton's State Trials* 664, 665; *Cooper's Account* 18-19. The free press defense doubtless tracked his essay, Thomas Cooper, 'On the Sedition Bill,' *Political Essays* (Andrew Kennedy, Northumberland 1799) 13-17.

³⁰⁰ *Ibid* 665; *Cooper's Account* 19.

³⁰¹ *Ibid* 662, 667; *Cooper's Account* 41, 8-9, 11, 12, 14, 22, 27, 28, 31.

³⁰² *Ibid* 662, 667; *Cooper's Account* 10, 13, 21.

³⁰³ *Ibid* 670-71; *Cooper's Account* 42-43.

³⁰⁴ *Ibid* 671, 677; *Cooper's Account* 43, 50.

³⁰⁵ *Ibid* 671, 672, 672, 673, 673, 674, 675; *Cooper's Account* 43, 44, 44, 45, 46, 46-47, 48.

you would certainly consider him totally unfit for the high station which he has so honourably filled.³⁰⁶ The 'improper motives' were proved not only by intent to criticize the President, but by Cooper's design 'to influence the minds against him on the next election,' so that his criticisms were 'made with intent to bring the President into contempt and disrepute, and excite against him the hatred of the people,' just as the indictment charged.³⁰⁷ Lest the jury fail to be outraged, Chase exclaimed that 'I cannot suppress my feelings at this gross attack upon the President,' protested that Cooper's publication was 'the boldest attempt I have known to poison the minds of the people,' and otherwise underscored the offense.³⁰⁸

To ensure that the Sedition Act defense of truth did not give aid and comfort to such sedition, Chase instructed the jury, in words remembered in his impeachment trial, that Cooper 'in his defence must prove every charge he has made to be true; he must prove it to the marrow. If he asserts three things, and proves but one, he fails; if he proves but two, he fails in his defence, for he must prove the whole of his assertions to be true.'³⁰⁹ Whatever proving 'to the marrow' meant, it obviously meant the defendant must go far beyond raising a reasonable doubt and must carry a heavy burden of proof. Chase appeared to shift the burden of proof to the accused not just for the truth defense but for all issues in the case.³¹⁰ His jury charge was described by a Republican senator, who observed it, as showing 'all the zeal of a well fee'd lawyer and the rancour of a vindictive and implacable enemy.'³¹¹ Not surprisingly, the jury's verdict was guilty.

Chase sentenced Cooper to a \$400 fine and a half year in prison, with release only upon providing \$2,000 bond (half himself and half others), though Chase made clear he would not be nearly so charitable if he thought 'a party inimical to the government. . . were to pay the

³⁰⁶ *Ibid* 672.

³⁰⁷ *Ibid* 674; *accord* 676.

³⁰⁸ *Ibid* 672, 675, 673, 676.

³⁰⁹ *Ibid* 676.

³¹⁰ *Ibid* 676-77; *accord* *Misunderstanding* 122.

³¹¹ Stevens Thomson Mason to James Madison (23 Apr.1800), *Madison Papers* 17:381, 382.

fine.³¹² That party inimical to government did rise to the challenge and raise money for the fine, with Jefferson contributing personally.³¹³ Cooper devoted much of his time in prison to a pamphlet containing the trial transcript and his commentary, and the public letter challenging Chase's rulings, both addressed from the 'prison of Philadelphia.' After his half year there, Cooper returned home to learn that his wife had died days before.³¹⁴ Ironically, soon after Chase's impeachment failed to result in conviction, Cooper's own career as a Pennsylvania judge ended by a successful impeachment.³¹⁵

5 The Callender Prosecution and His *Prospect Before Us*

James T Callender,³¹⁶ a fugitive from seditious libel charges in Britain,³¹⁷ fled again from Philadelphia to Richmond, where his newspaper columns produced a Pickering letter asking the federal attorney to prosecute.³¹⁸ However, it was Callender's political tract entitled *The Prospect Before Us* that brought him into court, because of its effort to influence the election of 1800 with such charged language as posing the choice 'between Adams, war and beggary, and Jefferson, peace and competency.'³¹⁹ On the way from Cooper's trial in Pennsylvania to Virginia, Chase was given, by Maryland's attorney general, a copy of the *Prospect* with the 'libelous' passages underlined.³²⁰ According to a lawyer's testimony at Chase's impeachment, Chase said 'if a jury of honest men could be found there, he would punish Callender' and 'would teach the lawyers in Virginia the difference between the liberty and the licentiousness of

³¹² *Wharton's State Trials* 679, 678 (24 Apr.1800).

³¹³ Stevens T Mason to Thomas Jefferson (11 July 1800), *Jefferson Papers* 32:48, 49, 50n, 129n.

³¹⁴ Dumas Malone, *The Public Life of Thomas Cooper, 1783-1839* (YUP, New Haven 1926) 136-37.

³¹⁵ *Wharton's State Trials* 680n; *DAB* 4:414. Cooper's subsequent history is in Seymour S Cohen, 'The Correspondence of Thomas Jefferson and Thomas Cooper' (2003) 147 *Proceedings of American Philosophical Society* 39.

³¹⁶ See generally *Wharton's State Trials* 688; Michael Durey, 'With the Hammer of Truth': *James Thompson Callender* (UPV, Charlottesville 1990) 129-37; *Freedom's Fetters* 334-58; *Crisis* 210-20; *DAB* 3:425.

³¹⁷ *State Trials* 23:79; *Hamilton Papers* 26:36 n5.

³¹⁸ Timothy Pickering to Thomas Nelson (14 Aug.1799), *Pickering Papers* 1:11, fol.611.

³¹⁹ *Trial of James Thompson Callender*, *Wharton's State Trials* 688, 690 (U.S.Cir.Ct.Va.1800), reprinted *United States v. Callender*, 25 F.Cas. 239 (U.S.Cir.Ct.Va.1800)

³²⁰ *Chase Trial* 43, 44; *DHSC* 3:438 (*Aurora*).

the press'; newspapers just before Callender's trial reported Chase's words similarly.³²¹ Chase clearly chafed to enforce the Sedition Act in the south for the first time, which Virginia's Republican governor branded 'an electioneering trick'.³²² In response, that governor and Jefferson hoped to bring the Virginia Resolutions and the Sedition Act's unconstitutionality to the nation by the state 'employing counsel to defend him' (Callender).³²³ Madison, far from bemoaning an electioneering trick, gloated that the Federalist party 'is so industriously co-operating in its own destruction'.³²⁴

Chase gave a rip-snorting charge to the grand jury in Richmond, the same charge he had given when Cooper was presented in Philadelphia, quoting 'our illustrious patriotic and beloved President' in warning that the United States "are still in jeopardy by the hostile designs, and insidious acts of a foreign nation; as well as by the dissemination among them of those principles, subversive of the foundation of all religious, moral, and social obligations. . . ."³²⁵ He instructed the grand jury that once congressional representatives act the minority must 'give up his private sentiments,' as quoted earlier.³²⁶ Noting that the constitutionality of the Sedition Act had been questioned, Chase refuted the main arguments of the Virginia and Kentucky Resolutions, and equated private sentiments disagreeing with such laws with openly opposing their execution.³²⁷ He told the grand jury it was their 'bounden and indispensable duty to present any violation of the Sedition Act'.³²⁸ When later asked whether his charge was 'a moral, a po-

³²¹ *Ibid* 43; [No Caption] *Alexandria Times* (Alexandria 5 June 1800) 3; *DHSC* 3:439 (*Aurora*).

³²² James Monroe to Thomas Jefferson (4 Jan. 1800), *Monroe Writings* 3:169, 170.

³²³ James Monroe to Thomas Jefferson (25 May 1800), *Monroe Writings* 3:179, 180; accord *Chase Trial* 34; Kathryn Preyer 'United States v. Callender: Judge and Jury in a Republican Society' in Maeva Marcus (ed), *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (OUP, New York 1992) 173, 180-81; *Misunderstanding* 133.

³²⁴ James Madison to James Monroe (23 May 1800), *Letters and Other Writings of James Madison* (Lippincott, Philadelphia 1865) 2:160.

³²⁵ Samuel Chase's Charge (U.S. Cir. Ct. Pa. 12 Apr. 1800), *DHSC* 3:408, 416; *ibid* 3:435.

³²⁶ *Ibid* 3:413, 411.

³²⁷ *Ibid* 3:412-13, 413.

³²⁸ *Ibid* 3:414.

litical, a religious or a judicial one,' Chase said 'it was a little of all.'³²⁹ The grand jury did not disappoint him, presenting Callender as a violator of the Act, citing his *Prospect*,³³⁰ and approving an indictment of him. The indictment cited about twenty passages from the tract, beginning with the claim that the 'reign of Mr. Adams has been one continued tempest of malignant passions' whose 'grand object' has been 'to calumniate and destroy every man who differs from his opinion,' resulting in 'despotism'; and ending with the description of Adams as '[f]oremost in whatever is detestable,' an aristocrat, and a 'hoary headed incendiary.'³³¹

The trial was to begin a mere four days after the presentment, and though motions for postponement gave the defense nine more days, the trial began on 6 June 1800 over their repeated objection of being far from prepared. Chase's bias frequently showed in the transcript, as he (supported by Judge Cyrus Griffin) denied further continuances, refused to allow jurors to be asked whether they had formed an opinion about the *Prospect*--or to strike a juror who 'had formed an unequivocal opinion, that such a book... came within the sedition law,' allowed only the question whether they had formed 'an opinion on this charge'--while refusing to have the indictment read to them,³³² declared that 'the defence had been conceived and continued in error' and had 'all along mistaken the law,' and insisted that the defense--but not the prosecution--must make an offer of proof before each witness was called to enable Chase to determine the relevance of the proposed questions.³³³

Chase's rulings were equally tilted: that wrong opinions were as criminal as misstatements of fact and equally must be proved true to provide a defense; that passages were nonlibellous only if they 'contain the truth in all parts' and are 'a candid and fair

³²⁹ *Chase Trial* 63 (Baltimore iteration).

³³⁰ Presentment (U.S.Cir.Ct.Va.24 May 1800), *DHSC* 3:435.

³³¹ *Wharton's State Trials* 694, 688, 689; cf. Indictment, *Chase Trial* app.48, 48, 52, citing James T Callender, *The Prospect Before Us: Vol.I* (Callender, Richmond 1800) [30, 274].

³³² *Wharton's State Trials* 694, 696, 697, 696-97.

³³³ *Ibid* 700, 708, 706.

discussion of constitutional subjects, of real grievances, or of political opinions';³³⁴ that the prosecution must only prove publication and falsity (except for once adding they must also prove libelousness); and most importantly, that the jury had no 'right to consider the Constitution' and in effect that no defense of freedoms of press and speech, and no attack on the constitutionality of the Sedition Act, could be offered.³³⁵ The latter ruling was aimed at bigger game than Callender; it was aimed at refuting the Virginia and Kentucky Resolutions, which explains its length and its prior preparation.³³⁶ Another ruling that particularly figured in Chase's impeachment was that no witness could be called or document offered to disprove only part of a charge--no evidence 'is admissible that does not go to justify the whole charge,' and instead '[y]ou must prove both these points, or you prove nothing,' even if the other half of the charge would be addressed by another witness.³³⁷ Not surprisingly, the witness thereby excluded was the former senator who had introduced the Virginia Resolutions.³³⁸ The reality that the case had two prosecutors and no impartial judge caused the defense attorneys to refuse to proceed, leaving the hapless Callender unrepresented.³³⁹ However, the defense had scripted that departure as part of the overall plan to score points for Republicanism, though not for Callender, which started with futile motions to postpone to generate sympathy,³⁴⁰ and continued with claims to be 'little acquainted with the doctrine of libels' though Hay had written anonymous essays attacking it.³⁴¹

When the jury found Callender guilty, Chase sentenced him to a \$200 fine and nine months imprisonment followed by a \$1,200 bond.³⁴² He apparently subjected Callender to a

³³⁴ *Ibid* 695, 698.

³³⁵ *Ibid* 708, 695, 697, 712; 710, 709, 711, 712-18.

³³⁶ *Ibid* 712-18.

³³⁷ *Ibid* 706-07; *contra Misunderstanding* 134-36.

³³⁸ John Taylor, *DAB* 18:331, 332.

³³⁹ *Wharton's State Trials* 712.

³⁴⁰ *Ibid* 690, 691, 692, 694, 709; *DHSC* 3:456.

³⁴¹ *Ibid* 692; Hortensius [George Hay], *An Essay on the Liberty of the Press* (Aurora, Philadelphia 1799) 1-2.

³⁴² *Ibid* 718.

blistering lecture (it did not appear in the transcript and may not be accurately reported in Republican newspapers). Chase reportedly said the verdict was '*pleasing to him*, because it showed that the laws of the U. States could be enforced in Virginia, *the principal object of this prosecution*,' and because 'he did not think there was so bad a man in the United States' as Callender.³⁴³ Addressing the First Amendment, he repeated much of his jury charge in the *Cooper* trial:

there was a very great difference between the liberty and the abuse or licen[t]iousness of the press:—that the licentiousness of the press would most certainly destroy any government, and particularly a republican form of government—that it would corrupt the public opinion, and destroy the morals of the people; . . . that the liberty of the press consisted in the unrestrained but fair discussion of principles and conduct, and would never be said to consist in securing impunity to wilful & malicious slanderers. . . .³⁴⁴

To this allusion to the Blackstone-Mansfield definition of freedom of press, Chase added a reproof of printers who 'seemed to mistake the licen[t]iousness for the liberty of the press,' and noted that it aggravated Callender's crime that his words were written 'avowedly for an electioneering purpose.' (To disagree with officials and the current administration was more seditious if its aim was to urge the electorate to oppose with votes than merely to oppose with opinion.)³⁴⁵ However, Chase never fulfilled his promise to elucidate for Virginia lawyers, or anyone else, 'the difference between the liberty and the licentiousness of the press,' unless 'liberty' meant praise of officials and government and 'licentiousness' meant dissent.

Why did Chase not directly discuss freedoms of press and speech, or quote the Blackstone-Mansfield definition rather than merely alluding to it, or expressly uphold the constitutionality of the Sedition Act, in his trials? Because he did not want to. He did not want to debate the Virginia Resolutions or the Virginians on their own terms, or enable defense counsel to respond to a constrictive interpretation of the First Amendment or to reasoning about

³⁴³ 'Richmond (Examiner) June 6' *Alexandria Times* (Alexandria 12 June 1800) 2; 'From the Examiner' *Constitutional Telegraph* (Boston 21 June 1800) 1.

³⁴⁴ 'Richmond, June 6' *Federal Gazette* (Baltimore 11 June 1800) 2; 'James Thompson Callender' *Daily Advertiser* (New York 14 June 1800) 2, 3.

³⁴⁵ *Ibid.*

the Sedition Act. Instead, Chase had cleverly devised a strategy to cut them off at the pass, by denying the jury's authority to consider the constitutionality of an act of Congress, extrapolating that to deny jury capacity to hear a defense based on First Amendment protections, and extrapolating that to handcuff defense lawyers from arguing either to the jury. It was a devised strategy, because Chase came into court with a lengthy prepared opinion, which was uncharacteristic.³⁴⁶ Why did Chase not couple his crafty approach with crafty trial management? Because he could not. As an essayist wrote early in his career, Chase's 'very existence depends on public convulsion,'³⁴⁷ drawing him to turbulent controversy as a moth to flame. Callender's counsel successfully provided that flame.

The sequel to the trial was that Pickering could only celebrate at a distance, having been dismissed by Adams the prior month,³⁴⁸ and Callender could not get his wish of 'sending Pickering to a *mad house*.'³⁴⁹ Joining Lyon and Cooper in turning a Sedition Act cell into a writer's garret, Callender wrote the other half of his *Prospect* from jail, until Jefferson's pardon released him.³⁵⁰ A year after Jefferson's election, Callender, long assisted by Jefferson³⁵¹ but denied a federal office as postmaster, turned on the Republicans and became an equally vitriolic Federalist writer.³⁵² Duane later did much the same.³⁵³ Jefferson finally characterized much of Callender's writings as 'scurrilities,'³⁵⁴ after Callender became the journalist who publicized the Sally Hemings account.

³⁴⁶ As he styled it in his impeachment exhibits, *Chase Trial* app.65-68; *Wharton's State Trials* 712-18.

³⁴⁷ *Maryland Gazette* (Annapolis 18 Mar.1773).

³⁴⁸ Gerard H. Clarfield, *Timothy Pickering and the American Republic* (UPittP, Pittsburgh 1980) 211-12.

³⁴⁹ *Prospect Before Us* 4.

³⁵⁰ James T. Callender to Thomas Jefferson (14 Aug.1800), *Jefferson Papers* 32:100; 'Pardon' (16 Mar.1801), *ibid* 33:309.

³⁵¹ *Jefferson Papers* 32:235, 244-45.

³⁵² Thomas Jefferson to James Monroe (15 July 1802), *Jefferson Writings* 8:164, 166; Thomas Jefferson to Albert Gallatin (7 Oct.1802), *ibid* 8:172, 173.

³⁵³ Thomas Jefferson to James Monroe (19 Oct.1823), *Jefferson Writings* 10:275.

³⁵⁴ Thomas Jefferson to Abigail Adams (22 July 1804), *Adams-Jefferson* 274, 275.

6 The Impeachment of Justice Chase

Chase was impeached because of his actions in that *Callender* trial, in the ensuing Delaware circuit court, in the *Fries* trial, and in a Maryland circuit court.³⁵⁵ The impeachment story has been oft told,³⁵⁶ but its repudiation of Chase's seditious libel trials warrants mention.

After the *Callender* trial, Chase held circuit court in Delaware, where he confirmed the Republican charge that he, hooded as grim reaper, was prowling the circuit with scythe aloft to smite any appearance of sedition. Though denied by Federalist newspapers,³⁵⁷ Delaware's only Republican paper³⁵⁸ reported that Chase rejected the grand jury's report that it could not find anyone to charge with violating federal law, and told them he was 'credibly informed, and [a] report says you have a printer who publishes a very seditious paper in this state,' which 'must be taken notice of,' because it is 'high time, sir, that the *spirit of sedition* which prevails among many of our printers should be checked.' Telling the federal attorney that review of newspaper issues 'must be done,' Chase refused to discharge the grand jury, despite their entreaties, and said he was 'determined to have those seditious printers prosecuted to the extremity of the law.'³⁵⁹ Just before the *Callender* trial, Chase had done the same thing in circuit court in Maryland, observing to the grand jury that 'one of the most *licentious* presses in the United States was supported in Baltimore,' and pressing for an indictment, at least according to Republican papers.³⁶⁰ Chase also gave a glimpse of his motivation, as he took time there to write to the

³⁵⁵ The Evans transcript is used here, and in relevant part corresponds to the other transcript, Samuel H Smith and Thomas Lloyd (transcriptionists), *Trial of Samuel Chase*. . . (Samuel H Smith, Washington 1805, repr Da Capo Press, New York 1970).

³⁵⁶ Peter C Hoffer and NEH Hull, *Impeachment in America, 1635-1805* (YUP, New Haven 1984) 228-55; William H Rehnquist, *Grand Inquests* (Morrow, New York 1992) 58-113; Adam A Perlín, 'The Impeachment of Samuel Chase: Redefining Judicial Independence' (2010) 62 Rutgers Law Review 725, 742-82; Richard B Lillich, 'Chase Impeachment' (1960) 4 American Journal of Legal History 49; Robert R Bair and Robin D Coblentz, 'The Trials of Mr. Justice Samuel Chase' (1967) 27 Maryland Law Review 365, 379-85.

³⁵⁷ [No Caption] *Daily Advertiser* (New York 9 July 1800), DHSC 3:446.

³⁵⁸ Which was Chase's quarry, *Wilmington's Mirror of the Times* and its editor James Wilson. *Madison Papers-Secretary* 2:398n; DHSC 443 n2.

³⁵⁹ [No Caption] *Mirror of the Times* (Wilmington 4 July 1800), DHSC 3:445, 446; accord 'Good People of America, Remember Judge Chase' *Carlisle Gazette* (Carlisle 23 July 1800) 3; 'Letter from an Anonymous Correspondent' *Aurora* (Philadelphia 28 June 1800), DHSC 3:442.

³⁶⁰ 'Alexandria, June 5' *Alexandria Times* (Alexandria 5 June 1800) 3; 'Baltimore, June 21' *Carolina Gazette* (Charleston 3 July 1800) 3; DHSC 3:439.

secretary of war to ask 'the state of the votes as you expect it will be in each state.'³⁶¹ As the *Callender* trial was about to begin, Chase took time to demand that Callender's newspaper release the name of the 'false, scandalous, wicked, and malicious *slanderer and calumniator*' who criticized Chase's bias in Cooper's trial, so that Chase could sue him.³⁶²

This resolute hunt for the demons of sedition raises suspicion about Chase's oft-cited denial of existence of federal common law and federal common law crimes such as seditious libel. That opinion was delivered during 11-20 April 1798.³⁶³ It came at a time when some Federalists were proposing a sedition law, but when most Federalists had not rallied to its support--just a week later, Jefferson wrote to Madison that 'one of the war-party, in a fit of unguarded passion declared some time ago they would pass. . . a sedition bill.'³⁶⁴ Federalists were equally aware of that declaration--the same day Abigail Adams wrote of 'a Sedition Bill, which I presume they [Congress] will do before they rise.'³⁶⁵ Chase's opinion destroyed the common objection that no federal Sedition Act was needed because it would merely duplicate common law, and his opinion was cited against that objection in debates over the proposed bill.³⁶⁶ Yet Chase had held the opposite opinion a year and a half earlier,³⁶⁷ and is alleged to have 'reversed' his 1798 position a mere year later.³⁶⁸ This suggests Chase's ruling was disingenuous, a crafty effort to demonstrate a need for a sedition law, a temporary posture rather than a sincere reversal.

A month before the *Callender* trial, Chase presided over the retrial of John Fries, who was charged with treason, in the form of levying war by forcibly preventing execution of a

³⁶¹ Samuel Chase to James McHenry (12 May 1800), *McHenry Correspondence* 456-57.

³⁶² *DHSC* 3:437, 440, 443, 424.

³⁶³ *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (U.S.Cir.Ct.Pa.1798); *DHSC* 3:248.

³⁶⁴ Thomas Jefferson to James Madison (26 Apr.1798), *Jefferson Papers* 30:299.

³⁶⁵ Abigail Adams to Mary Cranch (26 Apr.1798), Stewart Mitchell (ed), *New Letters of Abigail Adams* (Houghton Mifflin, Boston 1947) 164, 165.

³⁶⁶ *Annals* 8:2113.

³⁶⁷ Samuel Chase to James McHenry (4 Dec.1796), *McHenry Correspondence* 203.

³⁶⁸ E.g., *Saving* 798-99; *Misunderstanding* 95.

federal tax.³⁶⁹ In the most attacked ruling, Chase began the trial with a written opinion contradicting the central defense argument, which he also handed to the jury, and with the announcement that Fries' counsel may not argue or cite cases to the contrary.³⁷⁰ The planned defense argument, as in the original trial of Fries, was that treason (levying war) had been much abused in English history and required more than resistance to 'carrying a particular law or regulation into effect.'³⁷¹ With their argument gutted, defense counsel abandoned the case, and Fries was tried without counsel,³⁷² though illiterate and impecunious.³⁷³ Chase told Fries that the judges 'will be your counsel,' though the guilty verdict and sentence of hanging pointed to malpractice in that role; and his warning to Fries that 'whatever you say to your own crimination, is evidence...; but if you say anything to your justification, it is not evidence,' predictably caused Fries not to testify at all.³⁷⁴ Further prejudicing the case, Chase told the jury that Fries was convicted in his prior trial.³⁷⁵ Afterwards, Adams pardoned Fries and his doomed compatriots, adding to Hamilton's litany of Adams' sins.³⁷⁶

Eight articles of impeachment were approved by the House of Representatives in March 1804, and what is most significant is that all but two involved Sedition Act trials or allegations; Republican outrage over the Sedition Act had not died with its expiration. The first article alleged Chase was 'highly arbitrary, oppressive and unjust' in his opinion and exclusion of argument in the *Fries* trial. The second through sixth articles indicted acts in the *Callender* trial: refusing to exclude the juror who 'had formed an unequivocal opinion' that the book 'came within the sedition law'; refusing to allow the defense witness who would disprove half

³⁶⁹ *Second Trial of John Fries*, *Wharton's State Trials* 610, 610-12 (U.S.Cir.Ct.Pa.1800), reprinted *In re Fries*, 9 F.Cas. 924 (U.S.Cir.Ct.Pa.1800); see generally Dwight F. Henderson, 'Treason, Sedition, and Fries' Rebellion' (1970) 14 *American Journal of Legal History* 308, 309-16.

³⁷⁰ *Ibid* 615n, 646; William Lewis to Alexander Hamilton (11 Oct.1800), *Hamilton Papers* 25:151, 152-53.

³⁷¹ *Ibid* 647, rejected in the jury charge, *ibid* 634, and written opinion, *Chase Trial* app. 44, 45.

³⁷² *Ibid* 612, 625, 646 (motion for new trial), though he was offered appointed counsel, *ibid* 620n.

³⁷³ Oliver Wolcott to John Adams (25 May 1799), *Wolcott Papers* 2:240.

³⁷⁴ *Wharton's State Trials* 629, 636, 641.

³⁷⁵ *Ibid* 635.

³⁷⁶ 'Proclamation' (21 May 1800), *ibid* 641; John Adams to Charles Lee (21 May 1800), *Adams Works* 9:60.

of a charge; requiring the defense to write out questions and acting contemptuously and unjustly toward the accused and his counsel; and refusing to follow state procedure which summoned the accused to appear at the next court rather than arresting him and requiring him to stand trial immediately. The seventh article condemned Chase's efforts 'to procure the prosecution of the printer' in the Delaware circuit. The eighth censured his later grand jury charge in a Maryland circuit as an 'intemperate and inflammatory political harangue'³⁷⁷ that, article eight charged with deliberate irony,³⁷⁸ amounted to seditious libel against the state and federal governments. (Chase's charge in Maryland had lamented that loss of freedom was 'fast approaching' because of the 'late alteration of the federal judiciary' and 'universal suffrage' in Maryland that would bring 'mobocracy, the worst of all possible governments,' and that the cause was Jefferson's and the Republican party's delusion of 'the natural rights of man... in a state of nature' and 'under an established government.'³⁷⁹) Chase immediately fired off a newspaper volley at the attack of 'calumniators and party zealots,' and then filed a lengthy answer and defense to the charges.³⁸⁰

The trial in the Senate was delayed from January to February 1805, as Chase got the postponement he denied to Cooper and Callender, when he argued 'it is manifest, that for preparing such an answer as I have a right to make, . . . a considerable time must be necessary.'³⁸¹ After a trial lasting throughout February, Chase was acquitted because two-thirds did not vote to convict on any count, though a majority did on the third, fourth, and eighth counts.³⁸² The result

³⁷⁷ 'Articles of Impeachment,' *Chase Trial* app. 3-6.

³⁷⁸ Irony because the articles of impeachment were 'solely' drafted by John Randolph of Roanoke, *Chase Trial* 261, who had long believed that the Sedition Act was 'in open contempt of those solemn guarantees that insure the freedom of speech and of the press' and was 'odious, tyrannical and unconstitutional.' John C Fitzpatrick (ed), *The Autobiography of Martin Van Buren* (GPO, Washington 1920) 439, 440.

³⁷⁹ Samuel Chase's Charge (U.S.Cir.Ct.Md. 2 May 1803), reprinted *Chase Trial* app.60, 60-61.

³⁸⁰ 'Memorial of Judge Chase' *Commercial Advertiser* (New York 4 Apr.1804) 2 (widely reprinted); *Chase Trial* app.7-40.

³⁸¹ *Ibid* 5.

³⁸² *Ibid* 266.

surprised many observers,³⁸³ in a Senate with a Republican-Federalist division of 25-9,³⁸⁴ and came in large part from superior defense counsel,³⁸⁵ House prosecutors' ambiguity about impeachable offenses, and concern about too low a standard. Whether the charges were constitutional grounds for impeachment was debated then and remains controversial.³⁸⁶

That result put an end to Federalist fears, which had not lacked foundation, that Republicans would also try to 'swe[ep] the supreme judicial bench clean at a stroke.'³⁸⁷ Chase gloated that, while it was 'cruel persecution I have suffered' and a 'wicked prosecution,' the outcome showed his 'enemies are as great *fools* as *knaves*.'³⁸⁸ While he invited the prosecution by zealous and overbearing enforcement of the Sedition Act against press and speech, the Republicans were indeed looking for a target in the exclusively Federalist third branch of government. Had Chase not existed they might have found it necessary to invent him.

E The Baldwin, Durrell, and Holt Cases, the First Amendment, and Justice Bushrod Washington

Justice Washington presided over all or part of three trials or pleas under the Sedition Act: Baldwin and Clark, Durrell of Mount Pleasant's *Register*, and Holt of New London's *Bee*.³⁸⁹ He also presided over the October 1799 court appearance of Duane, and would have presided over the trials of Greenleaf and Peck had prosecution not been suspended.

Washington, methodical but not innovative, was not the justice who would question Federalist dogma about seditious libel. His mind was described tepidly by Van Buren, the future president, after observing him in court: 'a highly respectable order' but not the 'genius

³⁸³ Simeon Baldwin to Wife (4 Feb.1805), Simeon E Baldwin (ed), *Life and Letters of Simeon Baldwin* (Tuttle, New Haven 1919) 348; John Davenport to John C Smith (25 Feb.1805), 'John Cotton Smith Papers' (LOC).

³⁸⁴ *Ibid* 349; *History of Supreme Court* 244.

³⁸⁵ *Ibid*; Rufus King to Samuel Chase (6 Mar.1805), *King Correspondence* 4:444.

³⁸⁶ John Quincy Adams to John Adams (8 Mar.1805), *Adams Writings* 3:106, 107-08, 109, 113; *History of Supreme Court* 2:243; Raoul Berger, *Impeachment* (rev ed HUP, Cambridge 1974).

³⁸⁷ *Ibid* 3:108; accord Alexander Hamilton to Robert G Harper (19 Feb.1804), *Hamilton Papers* 26:190, 191.

³⁸⁸ Samuel Chase to Rufus King (13 Mar.1805), *King Correspondence* 4:444, 445, 446; Samuel Chase to Joseph Hopkinson (10 Mar.1805), *Chase Correspondence*; Timothy Pickering to John Marshall (26 Dec.1828), *Marshall Papers* 11:187, 191.

³⁸⁹ *Freedom's Fetters* 271, 285, 379, 388.

of Kent' (New York's chancellor).³⁹⁰

1 Shaping Washington's Opinion of the Sedition Act and Freedom of Press

Instead, Washington seems to have imbibed the Federalist position unquestioningly. Soon after his confirmation to the Supreme Court, retired President Washington recommended and sent his nephew a pamphlet discussing the Sedition Act,³⁹¹ which he had received from Pickering.³⁹² The pamphlet, a jury charge and essay by Pennsylvania Judge Alexander Addison,³⁹³ was one of the best Federalist defenses of seditious libel and the Sedition Act. It doubtless was studied by the justice, always deferential to his illustrious uncle's opinion and even more so after being designated his primary heir. As Justice Washington sentenced defendants under the Sedition Act, his actions and words were entirely consistent with Addison's pamphlet.

Addison began by stating that each person's rights extended so far 'as not to injure those of others,' and by deducing that liberty must be restrained 'from infringing the rights of others.' Applying the principle to reputation, he posited that '[r]eputation, character, good name or opinion is a kind of property or possession,' and concluded that reasoning and opinion must 'never infringe the right of reputation,' and 'must not represent. . . exercise of religion, as false or ridiculous,' and must not represent an 'act or motive of the administration as unlawful, pernicious, or dishonest.'³⁹⁴ Here was a first logical gap in Federalist reasoning; the first conclusion might follow, but the second and third did not. Addison then tried to map the tangled roads where a truth defense was allowed or excluded, and those roads led him to Blackstone; he also tried to state without contradiction the rules that 'the court will direct. . . whether the matter be libellous or not,' and yet that a 'jury [might] determine that a

³⁹⁰ John C Fitzpatrick (ed), 'The Autobiography of Martin Van Buren' (1918) *Annual Report of the American Historical Association* 2:5 (GPO, Washington 1919) 2:63.

³⁹¹ George Washington to Bushrod Washington (31 Dec.1798), *Washington Writings* 37:80, 81; see George Washington to John Marshall (30 Dec.1798), *Marshall Papers* 3:530, 531.

³⁹² Alexander Addison to Timothy Pickering (22 Nov.1798), *Pickering Papers* r.23, fol.322.

³⁹³ Alexander Addison, *Liberty of Speech, and of the Press. A Charge to the Grand Juries* (John Colerick, Washington 1798). The longer of two 1798 editions is used; 1799 and 1800 editions ensued.

³⁹⁴ *Ibid* 5, 6.

libel is no libel.³⁹⁵ The claim that rules applying to other criminal cases should not apply equally to seditious libel cases was a second logical gap in the Federalist case.

Defense of the Sedition Act was the pamphlet's dominant subject. Addison again cited Blackstone for the proposition that seditious libel was already 'an offence at common law,' so that the new 'law does not create any new offence.'³⁹⁶ He addressed the question whether the passage of the Sedition Act did not disprove an existing common law offense, with the arguments that some laws were 'declaratory of the common law,' that the Act addressed the claim that federal courts lacked jurisdiction of offenses not explicitly conferred by legislation, and that the Act benignly limited punishment and authorized truth as a justification.³⁹⁷

Responding to the first constitutional challenge, unrelatedness to a delegated power, Addison built his case on the Necessary and Proper Clause and asserted, without analysis, '[i]t is evident, that the attempts and writings declared punishable by this law, have a direct tendency. . . to prevent or obstruct the execution of the powers vested by the constitution.'³⁹⁸ The concepts that the direct tendency of actions should be punishable, rather than actions themselves, and that direct tendencies could be accurately distinguished from indirect tendencies, were a third logical leap in Federalist reasoning. Addison's claim remained unsupported that criminalizing seditious libel was necessary and proper to a delegated federal power.

Moving to the other principal constitutional challenge, the First Amendment, Addison like Paterson discussed not what was protected but what was not protected, saying that unless seditious libel was excluded 'the most false and malicious libels might be published, against the government, acts, or measures' of government with 'absolute impunity,' which he found to be 'a construction too absurd to be received as true' because it left government 'without defence

³⁹⁵ *Ibid* 7, 8, 9, 10.

³⁹⁶ *Ibid* 10, 12.

³⁹⁷ *Ibid* 12-13.

³⁹⁸ *Ibid* 13.

against the most dangerous enemy that can attack it, slander.³⁹⁹ His reasoning ended at this fourth logical leap, that government could not survive against 'false and malicious' criticism, that that was its 'most dangerous' foe. He instead returned to the safety of Blackstone, quoting his definition that 'liberty of the press... consists in laying no *previous* restraints upon publications, and not in freedom from censure... when published,' quoting a full page.⁴⁰⁰

Addison listed some consequences of his approach, which had long been points of criticism by opponents: 'Every man is free to speak, but he speaks at his peril, and is answerable for all he says'; 'Every repeater of the tale is, in like manner answerable as the author'; as a general rule 'truth is no justification' and true statements can be criminal; 'clubs, societies, and the press' pose identical dangers and implicitly must be equally restrained; and anyone who 'attempted to withdraw, from our excellent government, the only effectual support of any government, public opinion,' must be subject to criminal prosecution.⁴⁰¹ Here was a fifth logical leap of the Federalists, confounding the government and the administration, positing that depriving the administration of public support is also to 'deprive the constitution, the laws' of support and to destroy government,⁴⁰² ultimately relying on self-preservation or reasons of state for suppressing a limitless range of speech and press.

Addison ended by addressing the objection of wishing 'to hear both sides' of each issue, responding that 'truth has but one side,'⁴⁰³ with the implied corollary that an opposition party was simply the shameless faction of falsehood and licentiousness or slander against government. Here was a sixth logical break, rejecting a legitimate opposition and asserting impeccability for those in power. Addison's reasoning appeared to brand as seditious any criticism of government measures or officials, even of the Sedition Act or of those supporting it. He confirmed that interpretation in a letter to Pickering, notifying Pickering of a 'seditious ad-

³⁹⁹ *Ibid* 13-14.

⁴⁰⁰ *Ibid* 14-15, 16.

⁴⁰¹ *Ibid* 17, 18, 20.

⁴⁰² *Ibid* 20, 22.

⁴⁰³ *Ibid* 23.

dress to Mr. Gallatin pointedly censuring as unconstitutional and oppressive the Alien and Sedition Acts,' and objecting that a newspaper reprint 'contributed not a little to inflame the passions of the people and promote the unfavorable result' in a local election.⁴⁰⁴

Armed with Addison's briefing, Washington rode out to battle the forces of sedition.

2 The Baldwin and Clark Prosecution and Newark's Cannon

Luther Baldwin⁴⁰⁵ was indicted for 'seditious expressions,' after a rousing grand jury charge by Justice Cushing on the Sedition Act and its constitutionality.⁴⁰⁶ While initial newspaper reports described 'a wish that the President. . . was dead,'⁴⁰⁷ later reports gave more detail. As President Adams passed through Newark and was heralded with a cannon salute, an inebriated Baldwin 'coming towards John Burnet's dramshop, a person that was there [Brown Clark⁴⁰⁸] says to Luther, there goes the President, and they are firing at his a--: Luther, a little merry, replies, that he did not care if they fired through his a--; then exclaims the dram seller, that is sedition.'⁴⁰⁹ The case provided not only merriment for modern historians, who solemnly recorded that in this case 'enforcement of the Sedition Law hit bottom,' but for the early Republican press, which protested that no Republican would be 'firing at such a disgusting a target as the a-- of J.A.,' and found it laughable that the English crime of threatening the King's head was applied in America to 'speaking of the president's a--.'⁴¹⁰ While some reports said that the indictment was for common law seditious libel,⁴¹¹ other reports were probably correct that it was

⁴⁰⁴ Alexander Addison to Timothy Pickering (22 Nov. 1798), *Pickering Papers* r.23, fol.322, 323A.

⁴⁰⁵ See generally *Freedom's Fetters* 270-74; *Crisis* 112-14.

⁴⁰⁶ DHSC 3:305, 313-14, 314-15 (Cushing's charge preserved in November, probably used in September, 1798).

⁴⁰⁷ E.g., [No Caption] *Commercial Advertiser* (New York 9 Nov. 1798) 3; [No Caption] *Spectator* (New York 10 Nov. 1798) 3.

⁴⁰⁸ Called John Clark in some reports. [No Caption] *Salem Gazette* (Salem 22 Oct. 1799) 3; [No Caption] *Daily Advertiser* (New York 9 Oct. 1799) 3.

⁴⁰⁹ 'Men May be Conquered, but Principles Cannot' *Herald of Liberty* (Washington [Pa.] 11 Nov. 1799) 4; *Freedom's Fetters* 271 (other Republican papers).

⁴¹⁰ *Freedom's Fetters* 270, 273, 274 (quoting *Argus* articles).

⁴¹¹ E.g., 'New-Jersey, Trenton April 9' *Political Repository* (23 Apr. 1799) 2; [No Caption] *Daily Advertiser* (New York 9 Oct. 1799) 3.

under the Sedition Act,⁴¹² given Cushing's emphatic charge.⁴¹³

Justice Washington presided over the scheduled trial (with Judge Robert Morris) in October 1799,⁴¹⁴ and when Baldwin and Brown changed their pleas to guilty, sentenced them to fines of \$150 and \$50 respectively, without imprisonment.⁴¹⁵ That implied Washington approved of the constitutionality of the Sedition Act, something he confirmed a half year later in the *Holt* trial. Republican newspapers gave an apt epithet to Baldwin's case: 'ludicrous.'⁴¹⁶

3 The Durrell Prosecution and His *Mount Pleasant Register*

William Durrell,⁴¹⁷ a small-town Republican editor, was arrested and charged in late July 1798 'for reprinting a paragraph from a New Windsor Gazette, supposed to be a libel against the President,' in what Republicans immediately christened as 'The System of Terror.'⁴¹⁸ He was the first editor charged under the new Sedition Act, a mere half-week after its effective date,⁴¹⁹ after Pickering's instruction to the federal attorney to review the article and proceed.⁴²⁰ Durrell's bail was set at \$4,000 (half from sureties) which, coupled with the immediate suspension of the *Register* and his livelihood, left him impecunious and led to foreclosure sale of his home and furnishings.⁴²¹ After delay to September 1799, he was arraigned before Justice Paterson⁴²² for printing a 'false scandalous malicious and defamotry [*sic*] libel of and concerning John Adams'; it is unclear whether the basis was the Sedition Act or common law.⁴²³

⁴¹² E.g., [No Caption] *Spectator* (New York 10 Nov. 1798) 3; [No Caption] *Commercial Advertiser* (New York 9 Nov. 1798) 3.

⁴¹³ *Freedom's Fetters* 271 n74; *DHSC* 3:292, 493; 3:305, 313-15.

⁴¹⁴ *DHSC* 3:388 (1-7 Oct. 1799).

⁴¹⁵ [No Caption] *Daily Advertiser* (New York 9 Oct. 1799) 3; [No Caption] *Albany Centinel* (Albany 15 Oct. 1799) 3.

⁴¹⁶ 'From the *Aurora*, Oct. 26' *Constitutional Telegraph* (Boston 6 Nov. 1799) 1.

⁴¹⁷ See generally *Freedom's Fetters* 385-90; *Crisis* 223.

⁴¹⁸ E.g., 'The System of Terror' *Carey's United States Recorder* (Philadelphia 4 Aug. 1798) 2; accord 'Mount Pleasant, (N.Y.) July 24' *Bee* (New London 1 Aug. 1798) 3.

⁴¹⁹ *Freedom's Fetters* 385, 386.

⁴²⁰ Timothy Pickering to Richard Harison (28 June 1798), *Pickering Papers* 1.8, fol. 904.

⁴²¹ *Freedom's Fetters* 386, 387.

⁴²² *Ibid* 387; *DHSC* 3:381.

⁴²³ *Ibid*.

Justice Washington presided (joined by Judge John Sloss Hobart),⁴²⁴ in a trial for sedition delayed evidently by Pickering's election strategy until April 1800. Durrell offered no witness testimony and unsurprisingly was found guilty.⁴²⁵ Again implicitly approving and explicitly enforcing the Sedition Act, Washington sentenced Durrell to four months imprisonment and a \$50 fine, with release only after posting another prohibitive \$2,000 bond.⁴²⁶ After a couple weeks of the sentence was served, President Adams 'remit[ted]' Durrell's sentence,⁴²⁷ in the closest he came to clemency in a Sedition Act case, apparently with Washington's support but apparently more influenced by Durrell having 'discontinued his news paper.'⁴²⁸

4 The Holt Prosecution and His *New London Bee*

Charles Holt,⁴²⁹ another Republican editor, was indicted for seditious libel based on printing a 'false, scandalous and seditious writing of and concerning the government. . . the President. . . and. . . Congress.'⁴³⁰ The offending letter to the editor criticized the 'standing army' (not just a provisional army) that was being formed under Hamilton's effective command to repel a French invasion or insurrection, and excoriated 'the appointment of Alexander Hamilton to command our army, after the affair' he had recently admitted publicly, asking rhetorically if 'our young officers and soldiers. . . like this general are. . . to be found in the bed of adultery?'⁴³¹ The indictment followed Chief Justice Ellsworth's charge to the grand jury defending the constitutionality of the Sedition Act, which is quoted later.⁴³²

Justice Washington, following his circuit from New York to Connecticut, presided at

⁴²⁴ *Ibid* 387-88; *DHSC* 3:408.

⁴²⁵ *Ibid* 388.

⁴²⁶ [No Caption] *Commercial Advertiser* (New York 17 Apr.1800) 3; [No Caption] *Mercantile Advertiser* (New York 17 Apr.1800) 3; *Freedom's Fetters* 388.

⁴²⁷ [No Caption] *Prisoner of Hope* (New York 3 May 1800) 2; Timothy Pickering to Richard Harison (22 Apr.1800), *Pickering Papers* r.13, fol.406.

⁴²⁸ *Freedom's Fetters* 389; Richard Harison to Timothy Pickering (10 Apr.1800), *Pickering Papers* r.26, fol.77, 77A.

⁴²⁹ See generally *Freedom's Fetters* 373-84; *Crisis* 126-30.

⁴³⁰ 'District of Connecticut' *Bee* (New London 21 May 1800) 1 (reprinting indictment).

⁴³¹ *Ibid*; 'For the Bee' *Bee* (New London 8 May 1799) 2.

⁴³² *Ibid*; *DHSC* 3:385, presumably the charge at 3:357.

Holt's trial (with Judge Richard Law).⁴³³ Holt's counsel, admitting publication, 'rested his defense on two grounds--1st the unconstitutionality of the law to prevent sedition, and 2nd, the tenor of the publication itself in that facts were true and opinions were nonmalicious. The federal attorney countered with government's 'power to defend its measures, from such slanderous attempts,' and the lethal effect of criticism, so that '[i]n vain have the people delegated certain powers to the general government, if individuals may with impunity, publish malicious falsehoods respecting it and its officials.'⁴³⁴ The prosecutor argued that the 'standing army' opinion was a malicious falsehood, which deterred army recruiting, though he conceded the truth of Hamilton's infidelity. Washington came down squarely on the side of the Sedition Act in his jury charge, as a Connecticut Federalist newspaper described it:

Judge Washington in his charge to the jury (which was given in an unrivalled manner) established the act to be constitutional, by a train of reasoning too powerful to be resisted--he also proved the publication to be libellous, beyond even the possibility of doubt--he explained and pronounced the law in such a mild, clear and masterly manner, as to satisfy all parties, even the prisoner himself, who was thereby prepared for a verdict of *Guilty*.⁴³⁵

With such a charge, the prosecutor was superfluous, and the jury convicted Holt.

Washington did not miss the opportunity, in sentencing Holt, to scold him and the public, parroting Addison and the English royal judges from Holt to Mansfield, on the 'heinous' circumstances of his seditious libel, as the same Federalist newspaper reported:

The judge, after pointing out the tendency which libels on a free government have, to discredit and destroy the Government itself;--the heinous and aggravating circumstances which attended the publication of the libel; pronounced sentence... in a manner so commanding, and still so dignified, as to make the prisoner blush for his crime, and be satisfied with the punishment inflicted.⁴³⁶

At least according to the Federalist press, Holt left for prison singing hosannas to Bushrod Washington and satisfied with his three-month sentence and \$200 fine, which had to be paid

⁴³³ DHSC 3:417; [No Caption] *Commercial Advertiser* (New York 17 Apr.1800) 3.

⁴³⁴ 'New-York: Wednesday, April 23, 1800' *Commercial Advertiser* (New York 23 Apr.1800) 3.

⁴³⁵ 'New-Haven, April 24' *Connecticut Journal* (New Haven 24 Apr.1800) 3.

⁴³⁶ *Ibid.*

before release.⁴³⁷ While in jail Holt's newspaper was suspended,⁴³⁸ but upon his release he no longer 'blush[ed] for his crime' as he regularly attacked the Sedition Act.⁴³⁹ His lead counsel, David Daggett, went on to be a founder of Yale Law School.

F Jury Charges of Justice William Cushing and the First Amendment

Justice Cushing, like Paterson, Chase, Washington, Iredell, and Ellsworth from late-1798 through 1800, made the center of his grand jury charge the Sedition Act in late 1798.⁴⁴⁰ Levy is mistaken that he 'presided over some of the trials' under the Sedition Act;⁴⁴¹ the closest Cushing came was to be cheated out of the Bache trial by yellow fever, to preside over Baldwin's and Clark's indictment, and to preside over Haswell's and Shaw's arraignments. Cushing also was an incidental actor in the aftermath of Brown's trial, hearing a motion for redress after Fisher Ames' Republican brother was arrested for failing to appear as a subpoenaed witness (believing the subpoena invalid), and was without warning 'carried to circuit court prisoner & fin'd [\$]8.' Cushing refused redress for what the outraged Dr. Ames called a shakedown,⁴⁴² not realizing that he had in his grasp the much-sought author of the 'seditious' placard on Fairbanks' 'sedition pole.' Cushing would not condone questioning 'the necessity of giving our confidence and support to our own government,' and feared 'the dangerous tendency of jacobin principles,' as he said a year earlier.⁴⁴³

Cushing's grand jury charge, given in the Gallophilic lion's den of Virginia (and typically repeated at each circuit stop⁴⁴⁴), attempted to demonstrate the need for the Alien and Sedition Acts by devoting over half its length to France's 'foreign influence and intrigue,' its 'unpro-

⁴³⁷ *Ibid.*; 'New-York: Wednesday, April 23, 1800' *Commercial Advertiser* (New York 23 Apr.1800) 3.

⁴³⁸ 'New-London' *Bee* (New London 21 May 1800) 2; *Hamilton Papers* 25:174 n25.

⁴³⁹ *Freedom's Fetters* 384.

⁴⁴⁰ William Cushing's Charge (U.S.Cir.Ct.Va. 23 Nov.1798), *DHSC* 3:305, 313-15.

⁴⁴¹ *Levy* 202.

⁴⁴² 'The Ames Diary' (1899) 10 *Dedham Historical Register* 26.

⁴⁴³ [No Caption] *Newport Mercury* (Newport 19 June 1798), *DHSC* 3:278.

⁴⁴⁴ *DHSC* 3:159n.

voked war on property' at sea, its 'wild anarchy, terror and cruelty,' and its aggression against other nations.⁴⁴⁵ The remainder, though focusing more on the Alien Acts than the Sedition Act, began by expressly defending the latter's 'full and sufficient guard to innocence' in the forms of jury trial and a truth defense. Cushing denied that the Sedition Act 'abridged the liberty of the press,' asserting that that liberty did not include the right to publish 'scandalous and malicious falsehoods.' He then stated that such seditious libels were all the Act prohibited,⁴⁴⁶ and defended the Act's constitutionality by asserting that proscription of seditious libel was essential for government:

But can any reasonable man suppose, that a government, instituted for the protection of all the states and all the citizens, with full powers to do every thing necessary for that important end, has no power to protect itself by laws to prevent crimes which tend directly to its overthrow and destruction?⁴⁴⁷

That was the extent of Cushing's defense of the constitutionality of the Sedition Act, and it consisted, after the unadorned denial of violation of freedom of press, of three unsupported assertions. Those assertions were that all discourse consists of either truth or malicious falsehoods (ignoring unintentional mistakes and opinions), that 'crimes which tend directly to its overthrow and destruction' can be accurately identified and distinguished from falsehoods that do not have such a direct tendency (such crimes could include 'misrepresentations [about] public men' and about 'every measure taken for the safety of the country'),⁴⁴⁸ and that suppression of such falsehoods is essential to prevent 'overthrow and destruction' of government (a malleable form of reasons of state).⁴⁴⁹ Freedom of press stopped where seditious libel began, and the common law of seditious libel had been enacted in the Sedition Act, with the amelioration that truth was a defense.

⁴⁴⁵ William Cushing's Charge (U.S.Cir.Ct.Va. 23 Nov.1798), *DHSC* 3:305, 305-06, 306-07, 308-09, 310-11.

⁴⁴⁶ *Ibid* 3:314

⁴⁴⁷ *Ibid* 3:314-15.

⁴⁴⁸ *Ibid* 3:306.

⁴⁴⁹ Earlier, he similarly asked, 'How is it possible for any free government to stand the shock of such perpetual, inveterate, malicious, hostile attacks,' as the 'unceasing torrent of calumnies' against Washington and the 'same shameless indecencies and abuse towards his able and inflexibly patriotic successor.' *Ibid* 3:306.

Cushing's shift on freedom of press from his 1789 letter was not his only reversal of position; he shifted as well on President Adams, despite their long-term friendship. By Jefferson's inauguration in 1801, Cushing echoed Adams' High Federalist opponents, complaining to Paterson that '[t]he lies and lashes of Jacobinism were familiar and unheeded' by Adams.⁴⁵⁰

G Jury Charges of Justice James Iredell and the First Amendment

Justice Iredell, in contrast to Cushing, delivered the most thorough justification for the constitutionality of the Sedition Act, expressly adopting the Blackstone-Mansfield approach to liberty of press and to seditious libel, in a grand jury charge that Chief Justice Ellsworth called 'luminous & pointed.'⁴⁵¹

1 The 1799 Grand Jury Charge Upholding the Sedition Act

Iredell's defense of the constitutionality of the Sedition Act, in his grand jury charge for 1799, was meant to be his 'deliberate opinion as a judge,' not something less considered.⁴⁵² Newspaper reports similarly described it as a 'defence of the Alien and Sedition laws.'⁴⁵³

Iredell began with the Holt-Mansfield premise that seditious libel must be suppressed or government will fall:

... can it be tolerated in any civilized society that any should be permitted with impunity to tell falsehoods to the people, with an express intention to deceive them, and lead them into discontent, if not into insurrection, which is so apt to follow? It is believed no government in the world ever was without such a power. It is unquestionably possessed by all the state governments, and probably has been exercised in all of them: sure I am it has in some. If necessary and proper for them, why not equally so, at least, for the government of the United States, naturally an object of more jealousy and alarm, because it has greater concerns to provide for?...⁴⁵⁴

As a matter of logic, Iredell's justification for his premise was an inductive fallacy, that all governments claim such a power, or some have fallen because of seditious libel, and therefore gov-

⁴⁵⁰ William Cushing to William Paterson (18 Mar. 1801), *Paterson Papers-NYPL* 733, 735.

⁴⁵¹ Oliver Ellsworth to James Iredell (10 June 1799), *Iredell Papers-Duke*; which Republicans criticized, *DHSC* 3:366, 370.

⁴⁵² James Iredell's Charge (U.S.Cir.Ct.Pa. 11 Apr. 1799), *DHSC* 3:332, 334.

⁴⁵³ *DHSC* 3:328; 'New-Jersey, Trenton April 9' *Political Repository* (23 Apr. 1799) 2; [No Caption] *Federalist* (Trenton 8 Apr. 1799), *DHSC* 3:328, 330.

⁴⁵⁴ *Ibid* 3:346.

ernment power to suppress seditious libel must be indispensable to government. For example, the power to suppress seditious libel may be necessary to tyrannical governments, but not to free republican governments. Iredell's retort was that 'a republic more is dependent on the good opinion of the people for its support,' and without that good opinion 'the whole fabric crumbles into dust.' There, he equated a particular administration falling with the republican government itself crumbling. Yet an administration might fall without the institution of government dissolving, as England's history had illustrated. Iredell undercut his argument for the necessity of suppressing 'falsehoods' by acknowledging that they might merely lead to 'discontent' and not to 'insurrection,' which is only 'apt' and not certain to follow.⁴⁵⁵

Iredell then discussed whether prohibition of seditious libel violated freedom of press. His next premise was that liberty of press meant what Blackstone defined it as, 'laying no *previous* restraints upon publications' rather than 'freedom from censure. . . when published.' His basis was that Blackstone was influential in America, and was known to the framers of the First Amendment, so that Blackstone's definition was approved unless the Amendment were 'particularly worded, to guard against any possible mistake.'⁴⁵⁶ Iredell's argument ignored the fact that Blackstone's definitions of the other freedoms addressed by the First Amendment (establishment of religion, free exercise of religion, petition, and assembly), and of many other rights addressed by the Bill of Rights, were clearly not adopted but overridden, and yet in no case was the provision 'particularly worded' to abrogate Blackstone or common law. Further, Blackstone on freedom of press was far from universally accepted, and was instead widely challenged as contradicting the words of state and federal provisions for freedom of press, and as rendering those provisions purposeless if they only prohibited prior restraints by licensing that had not existed for nearly a century. Iredell bolstered his point by a generic reference to common law in all the states, without addressing whether the state decla-

⁴⁵⁵ *Ibid* 3:346.

⁴⁵⁶ *Ibid* 3:347.

rations of right abrogated or modified the portion of English common law dealing with freedom of press. He then genuflected to the Federalist argument that the Sedition Act ameliorated the common law by providing a truth defense and limiting punishments.⁴⁵⁷

Iredell ended the charge with denunciation of Republicans, implying that his references to prohibiting 'malicious falsehood' and 'bad sentiments' meant not insurrectionists but the opposition, and showing that he regarded criticism of the administration as criminal. He decried 'that ever since the first formation of the present government, every act . . . has been uniformly opposed before its adoption, and every art practi[c]ed to make the people discontented after it,' along with efforts 'to vilify and undermine the government,' accompanied by 'the principles of republicanism, the perpetual theme of their declamation.' He warned that, if people 'suffer this government to be destroyed,' the 'most dreadful confusion must ensue,' anarchy 'will ride triumphant, and all lovers of order, decency, truth and justice be trampled.'⁴⁵⁸

This was Iredell's defense of the constitutionality of the Sedition Act under the First Amendment.⁴⁵⁹ None of its components had appeared during his prior nine years on the Supreme Court, but during the Revolution as state attorney general he had prosecuted sedition. In 1779 and 1780, he prosecuted Theophilus Mann for 'seditious and inflammatory words,' and James Hobbs for 'seditions and disaffected expressions.'⁴⁶⁰ Also in 1780, he prosecuted Thomas Young for 'speaking seditious words,' such as that 'taking the said oath of allegiance would not avail him any thing' because the 'damned rebel's and villain's' [*sic*] would soon lose and the 'oath would be of no more service than swallowing a dumpling.'⁴⁶¹

Iredell had a deep abiding faith in precepts of the Federalist party, which when compared with his Revolutionary War faith brought unavoidable ironies. The revolutionary Iredell had

⁴⁵⁷ *Ibid* 3:348.

⁴⁵⁸ *Ibid* 3:350.

⁴⁵⁹ He also defended it against argument that the Act furthered no enumerated power, construing the Necessary and Proper Clause as expansively as he construed the First Amendment restrictively. *Ibid* 3:341-44.

⁴⁶⁰ *State v. Mann, Iredell Papers* 2:123, 124 (N.C.Super.Ct. 15 Nov.1779).

⁴⁶¹ Indictment, *State v. Thomas Young* (N.C.Super.Ct., Edenton Dist., May Term 1780), Alfred Moore (1755-1810) Papers (NCSA PC.774).

written eloquently about not being 'guilty of any other crime than *an ardent love of liberty*,' and liberty being 'dearer than life,'⁴⁶² and about English law being such that 'our ancestors... left that very country because freedom could not be enjoyed in it.'⁴⁶³ As recently as 1795, his Supreme Court opinion on Revolutionary War ship captures similarly found English law 'a doubtful and imperfect system of jurisprudence, which has been since happily changed for one so precise and so comprehensive....'⁴⁶⁴ Iredell abandoned that disenchantment with English law when he ardently embraced Blackstone's approach to seditious libel, just as he admittedly abandoned his earlier denial of a federal common law (Chapter 3.E). He similarly jettisoned his early insistence on protection of the accused's rights--such as his grand jury charge for 1792 calling for protection of the innocent and warning that criminal laws 'ought to be passed with the most trembling solicitude, lest any unfortunate individual should become the object of injustice or oppression';⁴⁶⁵ or his charge for 1795 asking 'what precaution can be too great where personal liberty is concerned'⁴⁶⁶--as he supported the Sedition Act's criminalization of a wide swath of expression based merely on its 'tendency.'

2 The First Fries Trial in 1799

After hearing that 1799 charge, one grand jury indicted John Fries and others for treason, for resisting collection of house taxes and rescuing fellow opponents from prison, with a body of over a hundred armed protesters.⁴⁶⁷ Fries' first trial began a fortnight later, on April 30, 1799, with Iredell presiding (joined by Peters).⁴⁶⁸ Both judges assumed the constitutionality of the Sedition Act, as they parried defense arguments that combinations, conspiracies,

⁴⁶² 'Causes of the American Revolution' (June 1776), *Iredell Papers* 1:370, 371 (emphasis in original); James Iredell to Joseph Hewes (28 June 1775), *ibid* 1:308, 309; *ibid* 2:16, 18.

⁴⁶³ James Iredell's Charge (N.C.Super.Ct. 2 May 1778), *State Records-N.C.* 13:431.

⁴⁶⁴ *Penhallow v. Doane's Administrators*, 3 U.S. (3 Dall.) 54, 107 (1795).

⁴⁶⁵ James Iredell's Charge (U.S.Cir.Ct.Mass. 12 Oct.1792), *DHSC* 2:308, 2:312; *accord ibid* 2:263, 2:351-52.

⁴⁶⁶ James Iredell's Charge (U.S.Cir.Ct.N.Y. 6 Apr.1795), *DHSC* 3:14, 16; *accord ibid* 3:163, 3:177.

⁴⁶⁷ Indictment (Apr.1799), *Trial of the Northampton Insurgents [Fries]*, *Wharton's State Trials* 458, 489 (U.S.Cir.Ct.Pa.1799), reprinted *In re Fries*, 9 F.Cas. 826 (C.C.D.Pa.1799), *modified*, 3 U.S. (3 Dall.) 515 (U.S.Cir.Ct.Pa.1799).

⁴⁶⁸ *Ibid* 491, 598n.

and insurrections under it were separate offenses from treason and so could not constitute treason, ruling that separately-defined crimes could be overt acts for treason.⁴⁶⁹ Iredell included in his trial notes, as evidence significant to treason, that one of the rebels 'damned the Alien & Sedition Laws--and finally all the laws of Gov.--and the laws Congress had made.'⁴⁷⁰ As the trial wound down, Peters ended his jury charge by assuring the jury that 'both facts and law... are too plain to admit a reasonable doubt,' an observation that Iredell did not modify in his own charge, and predictably the jury found Fries guilty.⁴⁷¹ However, when defense attorneys showed that a juror declared before trial that Fries 'ought to be hung,' Iredell reluctantly granted a new trial,⁴⁷² and Peters joined him with still more reluctance.⁴⁷³

Federalists, including most sitting justices, agreed with Peters that Pennsylvania was now 'twice disgraced by infamous insurrection,' and that any 'weak turn... will give strength & spirit to the [Republican] party, forever on the watch for such events.'⁴⁷⁴ Paterson advised Iredell to stay in Philadelphia 'till the criminals are tried,'⁴⁷⁵ and Chase had hoped 'a body of horse & foot are ordered' to crush the insurgents in Northampton.⁴⁷⁶

Iredell was no more a foe to partisanship than Peters. He disliked Republicans, 'the little barkings of ill-humor which are now perpetually assailing our ears,' as much as he liked 'a good government-man.'⁴⁷⁷ A month after the first statement he saw no inconsistency in condemning 'all party prejudices,' and two months after the second he received thanks from a

⁴⁶⁹ *Ibid* 585, 588-89.

⁴⁷⁰ James Iredell, 'Charge Book' 18-19 (Apr. Term 1799), *Iredell Papers-UNC* (Box 2, v.15); cf. *Wharton's State Trials* 529.

⁴⁷¹ *Wharton's State Trials* 587, 587-97, 598.

⁴⁷² James Iredell to Hannah Iredell (19 May 1799), *DHSC* 3:366; though it is often claimed that Iredell was reluctant to sentence Fries based on a prior letter, e.g., *Misunderstanding* 108.

⁴⁷³ *Wharton's State Trials* 601, 605-08, 609; 3 U.S. (3 Dall.) at 519.

⁴⁷⁴ Richard Peters to William Paterson (24 Apr. 1799), *DHSC* 3:352; see Henry Adams (ed), *Documents Relating to New-England Federalism* (Little, Brown, Boston 1905) 380.

⁴⁷⁵ William Paterson to James Iredell (27 Apr. 1799), *Iredell Papers-Duke*.

⁴⁷⁶ Samuel Chase to James Iredell 3 (17 Mar. 1799), *Iredell Papers-Duke*.

⁴⁷⁷ James Iredell to James Wilson (24 Nov. 1794), *Iredell Correspondence* 2:429; James Iredell to Hannah Iredell (1 May 1798), *ibid* 2:522.

Federalist candidate for 'the interest you are pleased to take in my election.'⁴⁷⁸

3 The Grand Jury Charge and Samuel Cabell Presentment in 1797

The 1799 charge did not appear without antecedents, but completed a process that Iredell began by reversing himself to affirm a federal common law, and continued in his 1797 grand jury charge on the illegitimacy of a political opposition, which incited the grand jury to present a member of Congress essentially for seditious libel.⁴⁷⁹ Iredell's charge used language that could be, and was, interpreted as outlining limitations on freedom of speech, though on close reading it did not address dissenting speech but civil disobedience, and he so corrected it in 1798; but he returned to the earlier implications in 1799 (Chapter 4.F).

The grand jury's presentment, later in the day after Iredell's 1797 charge, censured 'as a real evil the circular letters of several members of the late Congress, and particularly letters with the signature of Samuel J. Cabell,'⁴⁸⁰ as discussed in connection with Justice Blair in the next chapter. A written debate ensued. Cabell immediately attacked Iredell, in Republican newspapers, for being one of the federal judges who have a 'regular practice. . . to make political discourses to the grand jurors,' acting as 'a band of political preachers,' and for giving the Virginia grand jury by his charge 'authority for censuring the independence of private opinion.'⁴⁸¹ Iredell responded in a handbill that he 'never knew that Mr. Cabell had written any circular letter at all, until I heard the presentment read in court.'⁴⁸² Doubt is cast on that explanation, however, by the fact that Iredell had discarded his Pennsylvania charge of just two weeks earlier, which went no further than to say 'we must all stand or fall together,'⁴⁸³ to replace it with his Maryland and Virginia charge proclaiming that if people loved their country they would submit and not slander officials. Further, Iredell clearly approved the sedi-

⁴⁷⁸ James Iredell to Gov. Henry Lee (26 Dec. 1794), *ibid* 2:431, 432; David Stowe to James Iredell (2 July 1798), *Iredell-Johnson Collection* (PC.67.8, Box 8).

⁴⁷⁹ James Iredell's Charge (U.S.Cir.Ct.Va. 22 May 1797), *DHSC* 3:181, 173, 173n.

⁴⁸⁰ Presentment of the Grand Jury (U.S.Cir.Ct.Va. 22 May 1797), *DHSC* 3:181; *ibid* 173n, 181.

⁴⁸¹ 'Letter of Samuel Jordan Cabell' *Aurora* (Philadelphia 31 May 1797), *DHSC* 3:183.

⁴⁸² James Iredell, 'To the Public' (1797), *Iredell Correspondence* 2:511; *DHSC* 3:201.

⁴⁸³ James Iredell's Charge (U.S.Cir.Ct.Pa. 11 Apr. 1797), *DHSC* 3:163; *contra DHSC* 3:198.

tious libel presentment, saying it came from men with 'a temper highly suitable to our present situation,'⁴⁸⁴ and doing nothing to quash it.

Iredell, though generally treated well by historians for whom he preserved all correspondence, may have been most accurately described by his own assessment soon after joining the Supreme Court: 'This high appointment was as much beyond my expectation, as I fear it is above my merit.'⁴⁸⁵ Not an initial choice but a replacement for an initial justice, he was the only initial justice without any form of higher education. He proved unable to think outside the Federalist box, or even to recognize that there was a Federalist box, even as he progressively entered it by abandoning earlier positions. He jettisoned his earlier denial of federal power affecting press and speech in his 1788 'Marcus' essays, his rejection of federal court prosecution of common law crimes, his toleration of difference in sentiments in 1795-1796 charges, and his attack on civil disobedience but not dissent in 1797; and he shifted to his ardent 1799 defense of the Sedition Act over freedom of speech and press objections.

H Opinion and Charges of Chief Justice Oliver Ellsworth and the First Amendment

When Federalist alarm bells rang about newspaper mischaracterization of the Jay Treaty of 1795, Ellsworth did not advocate seditious libel prosecutions, but published responses. He said 'it is best to let them alone until[] the[y] begin to publish and then answer them.'⁴⁸⁶ However, his anxiety grew with the Quasi-War and the Republican party, so that when asked about the constitutionality of the Sedition Act, Ellsworth gave an advisory opinion supporting it.

1 His Advisory Opinion on the Sedition Act and Freedoms of Press and Speech

Five months after the Sedition Act passed, Chief Justice Ellsworth responded to a request from Pickering with an informal advisory opinion⁴⁸⁷ upholding the Act. He began by

⁴⁸⁴ James Iredell to Hannah Iredell (25 May 1797), *DHSC* 3:182.

⁴⁸⁵ James Iredell to John Rutledge 1 (9 Apr.1790), *Iredell Papers-Duke* (Box 2).

⁴⁸⁶ Jeremiah Wadsworth to George Washington (11-12 July 1795), *Hamilton Papers* 18:459, 460. Wadsworth, a Federalist, was alleging seditious libel by saying newspapers were 'slandering the Treaty,' and after reciting Ellsworth's advice, he said 'I believe otherwise.' *Ibid.*

⁴⁸⁷ *Ellsworth* 116; *Repressive Jurisprudence* 95, 145; *DHSC* 3:90.

stating that the Act merely codified, and ameliorated, the common law of seditious libel, explicitly following Addison:

[Judge Addison] is doubtless correct in supposing that the Sedition Act does not create an offence, but rather, by permitting the truth of a libel to be given in justification, causes that, in some cases, not to be an offence which was one before; nor does it devise a new mode of punishment, but restricts the power which previously existed, to fine & imprison. . . .

He then upheld the Sedition Act over freedom of press and speech challenge:

But, as to the constitutional difficulty, who will say that negating the right to publish slander & sedition, is 'abridging the freedom of speech & of the press,' of a right which ever belonged to it? Or will shew us how Congress, if prohibited to authorise punishment for speaking in *any* case, could authorise it for perjury, of which nobody has yet doubted?⁴⁸⁸

Notably, Ellsworth did not argue from the meaning of 'no law... abridging the freedom of speech, or of the press,' but, like Paterson and Iredell, from the worthlessness of a 'right to publish slander & sedition' or a right to speak perjury. Coupling Ellsworth's arguments, he presupposed the Blackstone-Mansfield definition of freedom of press, and did not choose to address whether the broad language of the First Amendment, and of most state constitutions, abrogated the common law for that freedom.

That was a striking change from Ellsworth's 1787 position, when he, like Iredell and Wilson, defended the proposed Constitution against antifederalist attack with the argument that 'Congress have no power to prohibit either' press or speech, or conscience or other rights.

2 The Grand Jury Charges Supporting the Sedition Act

Even before the Sedition Act, Ellsworth's grand jury charge of 1797 warned of sedition and urged presentment of such offences. He charted the downward progression from the 'baleful influence of those elements of disorganization, & tenets of impiety,' to an 'unhinged' mind that 'revolts at every institution which can preserve order or protect right,' to a heart 'insensible to social & civil obligations,' and then from 'disaffection' to 'a spirit of party' which 'poisons the sources of public confidence,' and most reprobately, 'opens a door to foreign in-

⁴⁸⁸ Oliver Ellsworth to Timothy Pickering (12 Dec.1798), *DHSC* 3:235; *Ellsworth Papers-NYPL* 47.

fluence.' To Ellsworth, the damnable object of disaffection and this declension could be nothing less than 'to sep[a]rate the people from the government; and of course to prepare them by sedition & rebellion, for a new order of things.'⁴⁸⁹ Republicans such as Greenleaf's *Argus* objected that 'free and manly investigation of public measures is stigmatized by the harsh epithets of "sedition and rebellion," stifling all enquiry, as 'a Chief Justice of the United States' joins 'the hue and cry of a party against the French nation' and against Thomas Paine's impiety, by which he 'wanders most egregiously from the line of his duty.'⁴⁹⁰

After enactment of the Sedition Act, Ellsworth's brief grand jury charge of 1799 began similarly to his advisory opinion, with an affirmation of common law in order to support federal court jurisdiction over seditious libel.⁴⁹¹ It then substituted an obligation of obedience in place of a defense of the constitutionality of the Act, apparently, like Chase, not wanting to invite grand jury consideration of 'the *policy*' of the law, which was only the purview of 'those who enact them.'⁴⁹² He warned that the Constitution and government are 'dependent... on public confidence' and on '*resistless*' obedience,⁴⁹³ and peppered his short charge with synonyms for seditious libel: 'acts manifestly subversive of the national government' and conduct 'clearly *destructive* of a government or its powers.'⁴⁹⁴ Though Ellsworth did not refer to the Sedition Act by name, he listed its essence as central to criminal law--crimes under common law, and acts destructive of government, including reducing public confidence--and thereby, though clumsily, defended the Act.⁴⁹⁵ Republican news reports stated that Ellsworth's charge

⁴⁸⁹ Oliver Ellsworth's Charge (U.S.Cir.Ct.N.Y. 1 Apr.1797), *DHSC* 3:158, 158-59.

⁴⁹⁰ [No Caption] *Argus* (New York 11 Apr.1797), *DHSC* 3:161, 161-62.

⁴⁹¹ As Casto points out, *Ellsworth* 116, though it is difficult to see the charge as 'another advisory opinion' or a 'comprehensive analysis.' *Ibid*.

⁴⁹² Oliver Ellsworth's Charge (U.S.Cir.Ct.S.C. 7 May 1799), *DHSC* 3:357, 358, 359.

⁴⁹³ *Ibid* 3:359.

⁴⁹⁴ *Ibid* 3:358.

⁴⁹⁵ *Ellsworth* 117; Alan F Westin, 'Out-of-Court Commentary by United States Supreme Court Justices' (1962) 62 Columbia Law Review 633, 639-40.

ruled 'that the Alien and Sedition Laws are constitutional.'⁴⁹⁶

The imprecision of that 1799 defense of the Sedition Act was similar to the imprecision in his 1797 charge that Abigail Adams had lambasted, when she asked 'did the good gentleman never write before? . . . the language is stiffer than his person. I find it difficult to pick out his meaning.'⁴⁹⁷ As Ellsworth 'wandered most egregiously' around the First Amendment, he said both that 'opposing the existence of the national government, or the efficient exercise of its legitimate powers' was an indictable misdemeanor, and three sentences later, that juries should 'look, not to the *opinions* of men, but their *actions*.'⁴⁹⁸ He was equally imprecise about whether there was room for peaceful assembly and petition for repeal of laws: 'Till then, the laws they prescribe are *sacred*, and should be *resistless*.'⁴⁹⁹ Ellsworth did not preside over any Sedition Act trials, however, because his diplomatic mission to France deprived him of other opportunity.

I James Madison and Thomas Jefferson, the Virginia and Kentucky Resolutions, and the First Amendment

The Republican fight against the Sedition Act, after failing to block its passage, included state resolutions condemning the Act under the First Amendment, and ended with newly-elected President Jefferson 'discharg[ing] every person under punishment or prosecution under the sedition law because I considered and now consider that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.'⁵⁰⁰

1 Jefferson's Kentucky Resolutions and Madison's Virginia Resolutions and Report

The Kentucky Resolutions, drafted by Jefferson⁵⁰¹ consistent with that conclusion and adopted by Kentucky in November 1798, declared the Alien and Sedition Acts unconstitu-

⁴⁹⁶ Hale, 'Thoughts on the Judiciary' *Argus* (New York 25 Oct.1799), *DHSC* 3:394; see Citizen, 'To Oliver Ellsworth' *Virginia Argus* (Richmond 9 Aug.1799), *DHSC* 3:375, 379.

⁴⁹⁷ Abigail Adams to John Adams (17 Apr.1797), *DHSC* 3:169.

⁴⁹⁸ *DHSC* 3:358.

⁴⁹⁹ *DHSC* 3:359.

⁵⁰⁰ Thomas Jefferson to Abigail Adams (22 July 1804), *Adams-Jefferson* 1:274, 275; accord 'Notes on a Cabinet Meeting' (9 Mar.1801), *Jefferson Papers* 33:232.

⁵⁰¹ 'Jefferson's Draft' (ante-4 Oct.1798), *Jefferson Papers* 30:536, 529n.

tional⁵⁰² in the following words:

that, no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people; . . . that 'Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press,' That therefore the [Sedition Act] of the Congress of the United States. . . , which does abridge the freedom of the press, is not law, but is altogether void, and of no force.⁵⁰³

While both Kentucky and Virginia went this far, Kentucky's Resolutions went well beyond Virginia's, in asserting each state's equal right to judge the constitutionality of federal laws, denying federal power to prescribe crimes beyond those constitutionally enumerated, decrying federal arrogation of state 'powers of self-government' and acquisition of 'unlimited powers,' and warning that such acts as the Alien and Sedition Acts 'may tend to drive these states into revolution and blood.'⁵⁰⁴ That claim of state power to treat as void and nullify unconstitutional laws⁵⁰⁵ would be remembered by South Carolina in 1832 and all southern states in 1861.

The Virginia Resolutions, drafted by Madison⁵⁰⁶ and adopted by Virginia in December 1798, condemned the Alien and Sedition Acts as 'palpable and alarming infractions of the Constitution.'⁵⁰⁷ Virginia's central resolution found the latter 'unconstitutional' under the First Amendment, because the Act

*exercises, in like manner, a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto, . . . the right of freely examining public characters and measures, and of free communication between the people thereon, which has ever been justly deemed the only effectual guardian of every other right.*⁵⁰⁸

These states' resolutions merely assumed a meaning of freedom of press, and it was left

⁵⁰² 'Resolutions Adopted by the Kentucky General Assembly' (10-13 Nov.1798), *Jefferson Papers* 30:550; *Elliot's Debates* 4:540; Additional Resolution (14 Nov.1799), *ibid* 4:544.

⁵⁰³ *Elliot's Debates* 4:540-41.

⁵⁰⁴ *Ibid* 4:540, 540, 542, 543, 543.

⁵⁰⁵ *Ibid* 4:545.

⁵⁰⁶ James Madison, 'Resolutions' (21 Dec.1798), *Madison Writings* 6:326.

⁵⁰⁷ 'Virginia Resolutions' (21-24 Dec.1798), *Elliot's Debates* 4:528; *Madison Writings* 6:341.

⁵⁰⁸ *Ibid* 4:528-29.

to Madison a year later forcefully to develop that meaning in his thorough *Report on the Virginia Resolutions*.⁵⁰⁹ While earlier historians often treated it dismissively for its states' rights facet, appreciation has grown for its broad theory of freedom of press and its equally broad attack on seditious libel.⁵¹⁰ Madison emphatically rejected the Blackstone-Mansfield definition as abrogated by state and federal constitutions, and as rendering those protections meaningless if they merely prohibited prior restraints but not other restrictions as the basis of punishment; instead, he asserted that 'shall make no law' in the First Amendment 'meant a positive denial to Congress of any power whatever on the subject' of the press, which was the only true freedom of press.⁵¹¹

2 The Other States' Responses and Their Undercount in History

Upon receiving copies of the Kentucky and Virginia Resolutions, just over half the sixteen states opposed them in some manner, when Elliot's list of six state legislatures and New York's senate⁵¹² is supplemented with Anderson's addition of the Maryland legislature (finding the 'recommendation to repeal . . . unwise and impolitic'⁵¹³ though not addressing the constitutional question) and the Pennsylvania house (finding sister states' resolutions objectionable and the Acts to 'contain nothing terrifying'⁵¹⁴). That counts Delaware though it, like Maryland, did not support the Acts' constitutionality but only found state resolutions on federal laws 'unjustifiable interference with the general government,' and two states that only approved resolutions by one house of the legislature,⁵¹⁵ and does not count minority reports (Pennsylvania's

⁵⁰⁹ James Madison, 'Report on the Virginia Resolutions' (Dec.1799-Jan.1800), *Elliot's Debates* 4:546-80.

⁵¹⁰ Adrienne Koch and Harry Ammon, 'The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties' (1948) 5 *William and Mary Quarterly* (3rd Series) 145; *Levy* 279-80; *Federalism* 723.

⁵¹¹ *Elliot's Debates* 4:561-67, 571, 572-73; see generally *Reclaiming* 55-75.

⁵¹² Delaware, Rhode Island, Massachusetts, New York's senate, Connecticut, New Hampshire, Vermont. *Elliot's Debates* 4:532-39; *Contemporary Opinion* 245-49; *Public Records-Conn.* 9:357.

⁵¹³ *Contemporary Opinion* 248 (16, 19 Jan.1799); *ibid* 245 (28 Dec.1798)(house); *Maryland* 200-01; *Jacobin* 119.

⁵¹⁴ *Ibid* 245, 246 (9 Feb.1799); *ibid* 248 (11 Mar.1799).

⁵¹⁵ *Elliot's Debates* 4:532, 537. New York's house approved a nonconforming resolution that 'the right of deciding on the constitutionality . . . appertains to the judiciary,' *Journal-N.Y.* 122-23 (16 Feb.1799); *Contemporary Opinion* 248-49.

and Vermont's for, Virginia's against).⁵¹⁶ New Jersey's 'dismissal of the resolves without explanation'⁵¹⁷ can be described as either a Republican victory or a Federalist triumph.

The claim is frequently made that the Virginia and Kentucky 'resolutions failed to attract support from any other states,⁵¹⁸ or that no states besides them questioned the constitutionality of the Sedition Act.⁵¹⁹ That claim is incorrect—one or both chambers of three southern states supported Virginia's and Kentucky's calls for repeal of the Sedition Act—if the same counting system is used. Tennessee's 'house and senate endorsed the report of a committee' that called for the repeal of the Alien and Sedition Acts as 'in several fronts opposed to the Constitution,' and 'impolitic, oppressive, and unnecessary.'⁵²⁰ Consequently, the leading Republican paper in New England reported that '[t]he legislature of Tennessee have adopted the resolutions of Virginia and Kentucky, respecting the Alien and Sedition Laws.'⁵²¹ Georgia's legislature resolved that they hoped the Alien and Sedition Acts would be 'repealed without the interposition of the state legislatures' passing 'violent resolutions' as two states had, by 21-16 in the house and, with slightly different wording, 16-4 in the senate.⁵²² North Carolina's house passed a resolution that the Acts were 'a violation of the principles of the Constitution' and should be 'repealed without delay,' by a 58-21 margin,⁵²³ though the Federalist-dominated senate⁵²⁴ rejected it by 31-8.⁵²⁵ South Carolina's legislature notified

~~Kentucky that:~~

⁵¹⁶ *Dissent of the Minority, of the House of Representatives [sic] of the Commonwealth of Pennsylvania* ([Duane], Philadelphia 1799); *Contemporary Opinion* 249; *Report of the Committee To Whom Was Committed the Proceedings of Sundry of the Other States* (General Assembly, Richmond 1800).

⁵¹⁷ *New Jersey* 35; accord *Contemporary Opinion* 52-55.

⁵¹⁸ *DHSC* 3:238; e.g., *Opposition* 474; *Crisis* 171; *Securing* 223; *Empire* 270; *Repressive Jurisprudence* 88; *Reclaiming* 75.

⁵¹⁹ *Crisis* 172 n30; *Jay* 1089; *Federalism* 720; *Contemporary Opinion* 235, 237 (whose discussion is mistaken).

⁵²⁰ *Tennessee Senate Journal 1798-1799* (Tennessee State Library & Archives, Nashville, RG no.60) at 189, cited in Mary L Gohmann, 'Political Nativism in Tennessee to 1860' (PhD thesis, Catholic University 1938) 50, after Gov. John Sevier forwarded the Kentucky Resolutions, 'Legislative Message' (7 Dec.1798), Robert H White (ed), *Messages of the Governors of Tennessee* (THC, Nashville 1952-72) 1:72. This was consistent with its congressional delegation having voted against the Sedition Act. *Annals* 7:599, 8:2171.

⁵²¹ [No Caption] *Independent Chronicle* (Boston 6 May 1799) 3.

⁵²² George R Lamplugh, *Politics on the Periphery* (UDP, Wilmington 1986) 156; William O Foster, *James Jackson* (UGP, Athens 1960) 164-65.

⁵²³ *Journal of the House of Commons* ([Hall, Wilmington 1798]) 78 (24 Dec.1798); accord *Prologue* 299.

⁵²⁴ Henry M Wagstaff, 'Federalism in North Carolina' (1910) 9 *James Sprunt Studies in History* 5, 30.

its session lacked time for 'that attention which the importance of the subject demands'⁵²⁶ (though its legislature had a Republican majority⁵²⁷ and its governor believed the Sedition Act unconstitutional⁵²⁸). Thus, distant newspapers reported South Carolina's 1799-1800 session was 'so short, that they had not time to take up the Kentucky resolutions,' though had the legislature done so those resolutions 'would certainly have been concurred in.'⁵²⁹

There were numerous petitions and speeches against the Sedition Act in most states besides these states that supported the Virginia and Kentucky Resolutions.⁵³⁰ The Resolutions were only part of a broad outcry, the opening shots of the elections of 1800.

That link to the elections was suspected. A Federalist writer ominously disclosed 'a plan of the Jacobins. . . to have a majority in our next legislature who will favour. . . the *Virginia* and *Kentucky* resolutions.'⁵³¹ Other Federalists worried that Republicans 'intend to get the state government into their hands,' and 'to transfer the country, its liberty, and property, at the next election of president and vice-president,' as ever-fretful Fisher Ames said.⁵³²

Epilogue

The impact of the Sedition Act was, as John Quincy Adams observed, an 'ineffectual attempt to extinguish the fire of defamation, . . . but it operated like oil upon the flames.'⁵³³

That oil upon the flames ignited Republican reasoning about the implications of the First Amendment for seditious libel, and for speech and press critical of administration, govern-

⁵²⁶ *Journal of the Senate, State of North-Carolina* ([Hall, Wilmington 1798]) 77 (24 Dec.1798); Samuel Johnston to James Iredell (9-30 Dec.1798), *Iredell Correspondence* 2:541, 542.

⁵²⁷ *Journals of Senate-S.C.* 177 (20 Dec.1799) (by 14-11 vote); *Journals of House-S.C.* 164-65 (20 Dec.1799).

⁵²⁸ *Prologue* 229, 236; *South Carolina* 123.

⁵²⁹ Edward Rutledge to John Rutledge, Jr. (29 July 1798), *Rutledge Jr. Papers-UNC*.

⁵³⁰ 'Richmond, January 21' *Constitutional Diary* (Philadelphia 28 Jan.1800) 3; [No Caption] *Independent Chronicle* (Boston 6 Feb.1800) 3.

⁵³¹ Douglas Bradburn, 'A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts' (2008) 65 *William and Mary Quarterly* 565, 567-94.

⁵³² 'Mr. Cushing' *Salem Gazette* (Salem 29 Mar.1799) 2.

⁵³³ Fisher Ames, 'Laocoon I,' *Works of Fisher Ames* (TB Wait, Boston 1809) 94, 101, 103, 114.

⁵³⁴ Worthington C. Ford, 'Jefferson and the Newspaper' (1904) 8 *Records of the Columbia Historical Society* 78, 88.

ment, and officials. The best product of that developed reasoning was Madison's Report, a powerful response to Addison, Lee, and other Federalist apologies. The oil upon the flames also propelled more leaders and voters across the divide from Federalist to Republican party, and assisted Jefferson in the close presidential election of 1800.⁵³⁴ The President's son recognized 'there never was a system of measures more completely and irrevocably abandoned and rejected by the popular voice.'⁵³⁵

Paradoxically, the Sedition Act was mostly ineffectual on its professed objects. Not a single Jacobin or insurrectionist was apprehended, though the Federalists gave assurances the country teemed with them; and similarly, not a single person was actually deported under the Alien Acts,⁵³⁶ though not for lack of Pickering's efforts and though many voluntarily repatriated. Instead, the Sedition Act was enforced against newspaper editors, not insurrectionists, with the result that some newspapers closed down permanently (Burk's *Time Piece*,⁵³⁷ Lyon's *Scourge*, Durrell's *Mount Pleasant Register*⁵³⁸), and some suspended publication while the editor was imprisoned (Holt's *Bee*⁵³⁹), while others had to be sold (Adams' *Independent Chronicle*, Greenleaf's *Argus*)⁵⁴⁰--but new Republican newspapers more than replaced them. No one would claim that what was termed seditious libel was quelled. Callender's prediction was fulfilled, that 'the more persecutions from the Treasury, so much the better. You know the old ecclesiastical observation, that *the blood of the martyrs was the seed of the church*.'⁵⁴¹

The prosecutions under the Sedition Act were partisan, all of Republicans. Not a single Federalist newspaper or speaker was federally prosecuted under the Act, though many railed

⁵³⁴ E.g., *New Jersey* 251; *Maryland* 206; *Federalism* 590.

⁵³⁵ John Quincy Adams to Rufus King (8 Oct.1802), *Adams Writings* 3:7, 9; accord *McHenry Correspondence* 452; *Maryland* 206, 208.

⁵³⁶ *DHSC* 3:234; *Federalism* 592.

⁵³⁷ *Chronological Tables* 34, which Miller mistakenly says was the only Republican newspaper closed, *Crisis* 222.

⁵³⁸ *Freedom's Fetters* 186.

⁵³⁹ *Chronological Tables* 23; *Madison Papers-Secretary* 2:292 n2.

⁵⁴⁰ *Freedom's Fetters* 255; *Crisis* 122.

⁵⁴¹ James Callender to William Duane (27 Apr.1800), Worthington C Ford, 'Thomas Jefferson and James Thomson Callender' (1896) 50 *New England Historical and Genealogical Register* 445, 451, 453.

against Republicans in Congress, and Hamilton with impunity published his 'disapprobation' of Adams and his 'serious errors' and disparaged the President for 'undermining the ground which was gained for the government by his predecessor' so that 'it might totter, if not fall, under his future auspices'⁵⁴²--while a drunk Republican could be prosecuted for wishing an errant cannonball would lodge itself in the President's ample posterior. Republicans immediately recognized the law 'is not equal in its operation but oppressive to one party only,' having been 'employed against almost every Republican press north of Potomac[]'.⁵⁴³ The Federalist justices were equally partisan; Chase openly campaigned in 1800 'mounted on a stump, with a face like a full moon, vociferating in favor of the present President,'⁵⁴⁴ and hoped to be chosen a Federalist elector.⁵⁴⁵ Paterson wrote an essay that year urging voters to support Adams over Jefferson.⁵⁴⁶ Washington wrote a letter 'extremely well calculated to induce a fair & equal vote for Pinckney' and Adams that year, warning that a Federalist split 'must end in the election of Mr. J.--which God forbid.'⁵⁴⁷ That letter was widely circulated, and Washington hosted the Federalist vice presidential candidate at Mt. Vernon 'for a few days.'⁵⁴⁸ Ellsworth had long given political advice,⁵⁴⁹ such as his informal advisory opinion supporting the Sedition Act.

The provisions of the Sedition Act that Federalists trumpeted as ameliorating the common law⁵⁵⁰ failed to sound. The defense of truth was never successfully raised, and instead its existence was used perniciously to reverse the presumption of innocence and the prosecution's bur-

⁵⁴² Alexander Hamilton, 'Letter' (24 Oct.1800), *Hamilton Papers* 25:186, 228, 233.

⁵⁴³ John Fowler Letter (15 May 1800), *Circular Letters* 1:207, 213, 212; accord Henry Tazewell to Andrew Jackson (27 Apr.1798), Sam B Smith and Harriet C Owsley (eds), *Papers of Andrew Jackson* (UTP, Knoxville 1980-) 1:205, 207; [No Caption] *Centinel of Freedom* (Newark 18 Dec.1798) 3.

⁵⁴⁴ *Aurora* (Philadelphia 9 Aug.1800), *DHSC* 1:895; accord John Rutledge, Jr. to Alexander Hamilton (17 July 1800), *Hamilton Papers* 25:30, 34. He also campaigned in 1798. *Chesapeake Politics* 549.

⁵⁴⁵ James McHenry to Oliver Wolcott (2 Aug.1800), *McHenry Correspondence* 465.

⁵⁴⁶ William Paterson, 'The Present Situation' 2 (1796), *Paterson Papers-LC*.

⁵⁴⁷ George Cabot to Alexander Hamilton (29 Nov.1800), *Hamilton Papers* 25:247, 248; Bushrod Washington to Oliver Wolcott (1 Nov.1800), *ibid* 25:249-50 n7; *History of Supreme Court* 3.

⁵⁴⁸ Charles C. Pinckney to James McHenry (10 June 1800), *McHenry Correspondence* 459.

⁵⁴⁹ E.g., Oliver Ellsworth to Oliver Wolcott (14 May 1797), *Wolcott Papers* 1:523.

⁵⁵⁰ E.g., *Paterson Draft Opinions* 535-37; *Wharton's State Trials* 341, 686; James Iredell's Charge (U.S.Cir.Ct.Pa. 11 Apr.1799), *DHSC* 3:332, 348; Oliver Ellsworth to Timothy Pickering (12 Dec.1798), *Ellsworth Papers-NYPL* 47.

den of proof.⁵⁵¹ The jury's decision of all issues by general verdict did not save defendants from the fire breathed by Federalist judges and marshals, except in Dr. Shaw's case. Equally compliant to the judges, grand juries in at least some cases were carefully packed⁵⁵² as shown by their sycophantic messages commending judge's charges;⁵⁵³ trial jury panels were chosen by the same presidentially-appointed marshal.⁵⁵⁴ Only one Sedition Act prosecution, of Shaw, resulted in an acquittal. But even as Pickering and federal prosecutors won Sedition Act battles, they and the Federalist party lost the war.⁵⁵⁵ Yet Pickering blamed the fall of the Federalist party not on the Alien and Sedition Acts, or other unpopular actions, but on 'intrigues' by Adams in which the country was 'sacrificed by Mr. Adams to his ambition and avarice,'⁵⁵⁶ which from any other mouth Pickering would have called a seditious libel.

How could Justices Paterson, Chase, Washington, Cushing, Iredell, and Chief Justice Ellsworth seemingly contradict their beliefs of a decade earlier on speech and press in order to support the Sedition Act and, in the case of the first three, to enforce it? A major reason, if not the primary one, was their broad view of the importance of forming a strong state and their correspondingly narrow view of the right of dissent--whether the administration could be opposed, whether citizens could evaluate laws as unconstitutional, whether they could disobey unconstitutional laws as void, whether old doctrines of seditious libel qualified freedoms of press or speech. By contrast, the majority of the remaining justices differed from the sitting justices in their views of legitimate dissent and of the Sedition Act.

⁵⁵¹ Though elsewhere that defense helped, as with Zenger's acquittal and in Massachusetts libel cases. William B. Nelson, *Americanization of the Common Law* (HUP, Cambridge 1975) 95.

⁵⁵² E.g., *DHSC* 3:294, 294-95 (Lyon's grand jury); *Freedom's Fetters* 217 (Burk's caused settlement); Brent Tarter and Wythe Holt, 'The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1809' (2007) 49 *American Journal of Legal History* 257; though not in all cases, *DHSC* 2:224, 332; *Adams Works* 8:643, 644.

⁵⁵³ E.g., *DHSC* 3:261, 294, 303, 327, 359, 363, 39, 61, 70, 102, 113, 120, 129, 168.

⁵⁵⁴ E.g., *Freedom's Fetters* 423 (*Callender*); Thomas Jefferson to Edmund Pendleton (19 Apr. 1800), *Jefferson Papers* 31:520, 521 (alleging in *Duane, Cooper, Fries*); *Annals* 8:2140, 2153, 2162, 2163.

⁵⁵⁵ *Warren* 1:191; *Repressive Jurisprudence* 146-47; *Chesapeake Politics* 533.

⁵⁵⁶ 'Timothy Pickering Notebook' (MHS ca.1811), *Pickering Papers* r.46, fol.85, 93; accord Timothy Pickering to Rufus King (28 May 1800), *King Correspondence* 3:248.

CHAPTER 7

THE REMAINING SUPREME COURT JUSTICES ON THE SEDITION ACT, AND FREEDOMS OF PRESS AND SPEECH

The citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures.

--Supreme Court Justice James Wilson¹

Did the passage of a mere nine years between the First Amendment and the Sedition Act establish the meaning of the first by the second? Anderson responds that

the Federalists who passed the Sedition Act in 1798 were a very different group from those who wrote the Constitution and the First Amendment. The men who pushed the Sedition Act through Congress--Harper, Lloyd, Otis, and Allen--were not Framers at all. They were political partisans, none of whom had been members of either the First Congress or the Convention of 1787.²

His point about sponsors is also true of most supporters of the Sedition Act,³ as congressional records confirm.⁴ Only 5 of the 18 senators, and only 3 of the 44 representatives, who voted for the Act in the Fifth Congress were members of the First Congress, which framed the First Amendment. Moreover, 2 of 6 senators, and 4 of 41 representatives, who voted *against* that Act were also members of that Congress that framed the First Amendment.⁵ Thus, of those veteran lawmakers, a majority of the senators voted for the Sedition Act, but a majority of the representatives voted *against* the Act. Of those who were also at the Constitutional Conven-

¹ James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 1:427.

² *Origins* 519 (footnotes omitted).

³ *Ibid* 517.

⁴ Based on comparing votes for Sedition Act, *Annals* 7:599, 8:2171, 9:2985, 10:423 with membership of Fifth Congress, *Origins-Parties* 207-09, 217-18, and of First Congress, *DHFFC* 1:xxiii-iv, 3:xxvii-viii.

⁵ Cf. *Annals* 7:599 with *Origins-Parties* 207-09 and *DHFFC* 1:xxiii-iv (for--Sens. Goodhue, Sedgwick, Livermore, Laurance, Foster; against--Brown, Langdon); cf. *Annals* 8:2171 with *Origins-Parties* 217-18 and *DHFFC* 3:xxvii-viii (for--Reps. Thacher, Sinnickson, Hartley; against--Baldwin, Hiester, W.Smith, Sumter); accord *Origins* 517 n349 (who omits Hiester and W.Smith).

tion, only one supported the Sedition Act, and two opposed it.⁶ However, the later votes of those who supported the First Amendment are nondispositive on constitutionality or meaning, because partisan battles intervened, war panic prevailed, and a constitutional objectives dominated as the Sedition Act was adopted.

That nonunanimity and change in Congress raises the question whether there may have been nonunanimity and change in the Supreme Court over its first decade on these same issues.

The conventional view is that the Federalist party unanimously supported the Sedition Act (with the lone exception of Marshall),⁷ and that the Federalist judiciary as part of that Federalist party unanimously supported the constitutionality of the Act as well.⁸ No further information is given about the individual remaining justices' positions on the Sedition Act in their biographies⁹ or in Supreme Court histories.¹⁰

This chapter challenges conventional views by showing that the Federalist party did not uniformly support the Sedition Act, and also by showing that the early justices did not either. Instead, there was extensive but unnoticed Federalist opposition to the Sedition Act beyond Marshall's 'unique' opposition, including many committed Federalists and many transitional Federalists provoked into party change. Further, in contrast to most sitting justices who upheld the Act and adopted the Blackstone-Mansfield definition of freedom of press, most remaining justices apparently opposed the Sedition Act and never embraced that definition.¹¹

⁶ Martin, Baldwin, and Langdon. *Origins* 517 n349.

⁷ Typical sources making this claim are cited in notes 21-22 *infra*.

⁸ Typical sources making this claim are cited in notes 23-25 *infra*.

⁹ E.g., *John Jay* 416-18; *Rutledge* 259-78; *Wilson* 30-31; *Johnson* 492-510.

¹⁰ *Warren* 191; *History of Supreme Court* 637, 645, 656; like *Justices* and *OCSC*.

¹¹ This chapter brings out facts about the remaining justices that are not found in existing literature, such as Jay's departures from Federalist orthodoxy, his Republican family, his nonenforcement of the Sedition Act, and his foot-dragging on the Virginia and Kentucky Resolutions; the Rutledge-Pinckney bloc's disavowal of the Sedition Act, Rutledge's other heterodoxies in Federalist eyes, and his virtual expulsion from the Federalist party; and Wilson's final position on freedoms of press and speech and its implications for seditious libel, his rejection of most Blackstonian thought about rights and government including seditious libel, his numerous departures from Federalist orthodoxy, and his close friends' rejection of the Sedition Act. Other examples are Johnson's recommendation by Jefferson for cabinet positions in the early 1790s, and his avoidance of identification as a Federalist and his disclaimer of being the instrument of any party in the late 1790s; and Moore's refusal to charge grand juries on the Sedition Act in contrast to all other sitting justices, and his friends' belief that he would emerge 'like purged gold' from the crucible of Sedition Act controversy in contrast to Chase and his 'undefensible' jury charges.

The justices not only divided but divided disproportionately--the sitting justices in 1798-1799 included two initial justices and four successors; the remaining justices were the reverse.

The commonly noted contrast between the sitting justices and the retired justices is their relative stature. The justices who were off the bench by September 1798 were 'first characters' in the nation (including Johnson), as Washington described them when selecting them,¹² while the sitting justices were 'second characters' (including the initial justices who remained past 1798, Cushing and Iredell). A New Hampshire Federalist leader observed that 'many of the officers who were first appointed. . . were men of superior talents to those of their successors,' speaking of Jay and Blair compared with Cushing and Chase, as well as the cabinet.¹³ With that difference in stature came a difference in independence, in willingness to differ with the Federalist party, in ability to see outside a Federalist box. Similarly, the initial cabinet was also selected by Washington from 'first characters' in the new nation,¹⁴ while among the successors by 1798 'none were "first characters"' in reputation¹⁵ (and in fact, Pickering was Washington's seventh choice,¹⁶ and Wolcott fourth choice, while McHenry was Adams' fourth choice¹⁷). The initial cabinet members such as Hamilton and Jefferson were independent-minded and diverged sharply on great policy issues, while the dominant three cabinet members in 1798-1800 were High Federalists secretly in league with Hamilton¹⁸ and insistent on conforming beliefs.

This chapter adds another striking contrast between sitting justices (except Moore) and initial justices who had left the bench: those sitting justices went out of their way to support the Sedition Act, defend its constitutionality, stress it in grand jury charges, urge indictments under it, and preside over prosecutions, while Jay, Rutledge, and Wilson, like Johnson and Moore, did

¹² George Washington to James Madison (23 Sept. 1789), *Washington Papers-Presidential* 4:67; accord *DHSC* 1:20, 29, 35, 51, 58, 66; *Warren* 1:30-46.

¹³ William Plumer to Jeremiah Smith (19 Feb. 1796), *DHSC* 1:838, 839.

¹⁴ *Federalism* 627.

¹⁵ *Ibid* 631.

¹⁶ *Warren* 1:142; *Federalism* 625.

¹⁷ *Federalism* 630.

¹⁸ *Ibid* 583, 631, 622; *Adams Federalists* 174.

nothing to support the Act in any way, despite ample opportunity, and despite the Alien and Sedition Acts being a defining issue of the Federalist party in 1798-1800. In stark contrast to the sitting justices, those five justices left no correspondence and no newspaper articles even implying support of the Sedition Act, and instead left a number of largely unnoticed indications of their opposition. To say five early justices probably opposed the Sedition Act is not to say that they repudiated the Federalist party; John Marshall also opposed the Act while remaining a leading Federalist, though some Federalists did leave the party, in part or whole, over the issue. However, it is to say that they, like Marshall, were Adams Federalists,¹⁹ in contrast to some of the sitting justices who were High Federalists, including Paterson and Ellsworth;²⁰ and that Jay, Rutledge, Wilson, Johnson, and Moore were committed to freedom of press and speech.

A The Overlooked Existence of Federalist Opposition to the Sedition Act

A number of Federalists opposed the Sedition Act, in addition to the handful in Congress who voted against it initially (discussed in the last chapter). That belies the ubiquitous assertions that 'not a single Federalist questioned the constitutionality of the Sedition Law,' and that 'every Federalist favored its subsequent enforcement,' except Marshall.²¹ Assertions such as Levy's, that '[n]ot a single Federalist in the United States opposed the constitutionality of the Sedition Act,'²² unavoidably include retired and active Federalist Supreme Court justices.²³ That standard portrait of the early justices is that because they were all Federalists, they must all have agreed with the sitting justices of 1798-1800 in supporting the constitutionality of the Sedition Act and in countenancing restriction of press and speech,²⁴ aggregating the early jus-

¹⁹ As documented below, and as inferred for Moore from Adams' nomination.

²⁰ *DHSC* 1:911, 909, 912 (Ellsworth), 1:902, 923, 928 (Paterson); John Marshall to Joseph Story (25 July 1827), *Marshall Papers* 11:35, 46 (Paterson); Stephen Higginson to Timothy Pickering (12 Jan. 1800), *Higginson Letters* 1:833, 835 & n2 (Ellsworth).

²¹ *Freedom's Fetters* 155; *accord Origins* 517; *Crisis* 182, 22; *Adams Federalists* 163; *Repressive Jurisprudence* 92-99; *Bushrod Washington* 88.

²² *Levy* 280.

²³ *E.g.*, R Kent Newmyer, 'Dusting Off Samuel Chase' (1992) 20 *Reviews in American History* 486, 487.

²⁴ *Opposition* 470; or implying that, *Crisis* 136, 139.

tices as a faceless Federalist judiciary.²⁵

That portrait is marred by the last Federalist appointee, John Marshall, who opposed the Act, though on grounds of expedience rather than constitutionality, and is marred far more by an overlooked coterie of Federalists, who also opposed the Act, often on grounds of unconstitutionality. The possibility of such heterodoxy is suggested by such fundamental divisions among Federalists as the High Federalist wing of the party opposing the sitting Federalist president's reelection, raising the possibility that some of the other wing might oppose a law sponsored by the High Federalists²⁶ and having serious implications for liberty.

1 John Marshall and Federalist Opponents of the Expediency of the Sedition Act

Marshall, recently returned from the first mission to France after the XYZ affair, was named a candidate for Congress in late 1798, in his words 'as a punishment for some unknown sins.'²⁷ In response to questions, he published a newspaper article saying he would have voted against the Alien and Sedition Acts, and planned to vote against their renewal.²⁸ His reasons were based on inexpedience, not unconstitutionality, as he said the laws were useless and divisive, while denying they were 'fraught with all those mischiefs which many gentlemen ascribe.'²⁹ Marshall did not hide his departure from Federalist orthodoxy, telling Washington he 'regret[ed] the passage of one of the acts' though he censured the Virginia Resolutions, and telling Pickering that many well-meaning people had concerns about the Sedition Act.³⁰ After he was elected and voted for repeal of the Sedition Act,³¹ Marshall responded to a letter from a leading Republican, St. George Tucker, who urged the Act's un-

²⁵ E.g., *Saving* 778; Charles F Hobson, Book Review (1996) 40 *American Journal of Legal History* 508, 508-09; Charles Kerr, 'The Thirty Years' War on the Supreme Court' (1931) 17 *Virginia Law Review* 629, 636.

²⁶ *Jefferson* 3:390; *Federalism* 692; *Adams Federalists* 237.

²⁷ John Marshall to Timothy Pickering (15 Oct.1798), *Marshall Papers* 3:516; see generally *History of Supreme Court* 2:102.

²⁸ John Marshall, 'To a Freeholder' (2 Oct.1798), *Marshall Papers* 3:503, 505-06.

²⁹ *Ibid.*

³⁰ John Marshall to George Washington (8 Jan.1799), *ibid* 4:3; John Marshall to Timothy Pickering (11 Aug.1798), *ibid* 3:484, 485.

³¹ *Annals* 10:423 (23 Jan.1800); *Marshall Papers* 3:496n, 4:37n.

constitutionality and asked for release of Callender,³² by noting 'doubts some of us may entertain' about the Act but rejecting the release because the 'laws are made, & those who violate them are prosecuted.' Nine days later, he added his belief that the Constitution's judicial power rather than common law gave federal courts jurisdiction over such sedition cases, though he believed state common law applied to federal courts.³³

There is debate whether Marshall drafted the Virginia minority's report³⁴ opposing the Virginia Resolutions. His authorship was generally assumed over the years,³⁵ but was rejected by the editors of his papers,³⁶ though their conclusion was persuasively disputed by several recent authors.³⁷ Costa argues that Marshall elsewhere showed some solicitude for freedom of speech and should not be prejudged by the minority report.³⁸ If Marshall drafted it, he both found the Sedition Act constitutional and embraced the Blackstone-Mansfield approach to seditious libel and the press;³⁹ that would fit with his opposing the Sedition Act only on practical grounds.

The fury that Marshall encountered from High Federalists and some other Federalists, even though his opposition was based on inexpediency rather than unconstitutionality, is important in explaining the later silence of other Federalist opponents of the Sedition Act. Fisher Ames denounced him: 'No correct man,--no incorrect man even,-- . . . would give his name to the base opposers of law. . . .--but his character is done for.'⁴⁰ Cabot joined King 'as well as Ames in reprobating the publication of Marshall's sentiments on the Sedition & Alien Acts,' though

³² St. George Tucker to John Marshall (6 Nov.1800), *Marshall Papers* 6:4, 5.

³³ John Marshall to St. George Tucker (18 Nov.1800), *ibid* 6:14, 15; John Marshall to St. George Tucker (27 Nov.1800), *ibid* 6:23, 24.

³⁴ *Address of the Minority of the Legislature of Virginia* (William Prentiss, Petersburg 1799).

³⁵ E.g., Theodore Sedgwick to Rufus King (20 Mar.1799), *King Correspondence* 2:579, 581; *Palmer* 277; *Jay* 1329-30; *Freedom's Fetters* 151; *Crisis* 183; *Contemporary Opinion* 239.

³⁶ *Marshall Papers* 3:498-99 &n1 (not including the report); *Repressive Jurisprudence* 97-98.

³⁷ Kurt T Lash and Alicia Harrison, 'Minority Report: John Marshall and the Defense of the Alien and Sedition Acts' (2007) 68 *Ohio State Law Journal* 435, 439-516; Andrew Lenner, 'A Tale of Two Constitutions' (1996) 40 *American Journal of Legal History* 72, 79-80 n26.

³⁸ Greg Costa, 'John Marshall, the Sedition Act, and Free Speech in the Early Republic' (1999) 77 *Texas Law Review* 1011, 1018, 1019-28, 1031-38, 1040-42; accord John Marshall to Talleyrand (3 Apr.1798), *Marshall Papers* 3:428, 442.

³⁹ *Address of the Minority* 13-14.

⁴⁰ Fisher Ames to Christopher Gore (18 Dec.1798), *Ames Works* 1:245, 246.

Cabot discouraged public attacks because of Marshall's usefulness and because 'the atmosphere of Virginia . . . doubtless makes every one who breathes it visionary.'⁴¹ Sedgwick censured Marshall's 'foolish declaration, relative to the alien & sedition laws,' as did many others.⁴²

Even stronger warnings soon came about speaking publicly against the Sedition Act. Pickering considered prosecuting Kentucky's governor for violating the Act by labeling it unconstitutional,⁴³ and the federal attorney indicted Jedidiah Peck for violating the Act by calling it unconstitutional. All the newspaper editors prosecuted under the Act had done the same.

Hamilton, oddly, is treated by any number of historians as an opponent of the Sedition Act,⁴⁴ based on his call not to 'establish a tyranny.'⁴⁵ That treatment is mistaken; he clearly supported the law⁴⁶ and sought to broaden it to criminalize 'libels . . . against any officer whatsoever' of the federal government.⁴⁷ Nevertheless, there were a large number of Federalist opponents of the Sedition Act, though hardly acknowledged in existing studies.

2 Federalist Opponents of the Constitutionality of the Sedition Act

Though Marshall was the most public Federalist opponent of the Sedition Act, he was not the only one. Marshall himself acknowledged that the Sedition Act was 'view[e]d by a great many well meaning men, as unwarranted by the Constitution.'⁴⁸ Most whose reasons were recorded rejected the Act because it abridged freedoms of press and speech, though many opponents' reasons were not captured as they voted against the Act or for the Virginia and Kentucky Resolutions. Those Federalist opponents were typically what George Cabot derided as 'half

⁴¹ George Cabot to Rufus King (26 Apr. 1799), *King Correspondence* 3:7, 9.

⁴² Theodore Sedgwick to Rufus King (11 May 1800), *ibid* 3:236, 237; accord *Freedom's Fetters* 151; *Crisis* 183-84.

⁴³ Timothy Pickering to Charles Hall (1 Aug. 1799), *Pickering Papers* r.11, fol.528, 529; *Contemporary Opinion* 55-56.

⁴⁴ E.g., *Freedom's Fetters* 153 n44 (sources); *Crisis* 71, 73.

⁴⁵ Alexander Hamilton to Oliver Wolcott (29 June 1798), *Hamilton Papers* 21:522.

⁴⁶ Alexander Hamilton to Theodore Sedgwick (2 Feb. 1799), *ibid* 22:452, 453; Alexander Hamilton, 'An Address to the Electors' (21 Mar. 1801), *ibid* 25:349, 364; *Freedom's Fetters* 109.

⁴⁷ Alexander Hamilton to Jonathan Dayton (Oct.-Nov. 1799), *ibid* 23:599, 604; see Robert WT Martin, 'Reforming Republicanism: Alexander Hamilton's Theory of Republican Citizenship and Press Liberty' (2005) 25 *Journal of Early Republic* 21, 33.

⁴⁸ John Marshall to Timothy Pickering (11 Aug. 1798), *Marshall Papers* 3:484, 485.

federalists,⁴⁹ and what Dauer called moderates⁵⁰ among the 'Adams Federalists'.⁵¹

Federalist opposition to the Sedition Act in Congress merely began with those voting against its passage in July 1798: Senator John Howard (Md.)⁵² and House members William Matthews (Md.), Stephen Bullock (Mass.), and in-transition George Dent (Md.) and Abraham Baldwin (Ga.).⁵³ Further Federalist defections came with each new vote on the Act, such as House members opposing adoption of the report defending the Act in February 1799: Thomas Skinner (Mass.), Josiah Parker (Va.), and Abram Trigg (Va.), along with Baldwin and Dent (Matthews and Bullock reverted to support the report).⁵⁴

As the new Sixth Congress was seated, still more Federalist defections came in the unsuccessful House attempt to repeal the Act in January 1800: James Jones (Ga.), Benjamin Taliaferro (Ga.), Willis Alston (N.C.), Archibald Henderson (N.C.), Thomas Hartley (Pa.), Samuel Goode (Va.), and John Marshall (Va.), along with recent opponents of the Act who still served in Congress (Dent, Trigg, though not Parker).⁵⁵ The next year, additional Federalists broke ranks as the House voted by opposing continuation of the Sedition Act, and by seeking repeal of parts, in early 1801:⁵⁶ Benjamin Huger (S.C.), Abraham Nott (S.C.), and Edwin Gray (Va.), along with some already mentioned (Taliaferro, Dent, Alston, Goode, and Parker).⁵⁷ In addition, Richard Spaight (N.C.) and David Stone (N.C.), though elected as Federalists, 'influenced by the Republican agitation for repeal of certain obnoxious legislation [Alien and Sedition Acts], soon left the Federalist ranks and joined the opposition,' voting for

⁴⁹ George Cabot to Rufus King (10 Mar. 1799), *King Correspondence* 2:551, 552.

⁵⁰ *Adams Federalists* 171; *ibid* 316, 321, 326 (10-12 moderates), 220 (Craik, Smith, Dent).

⁵¹ *Ibid* 218-37, 255-56.

⁵² *Annals* 7:599; *Origins-Parties* 217-18.

⁵³ *Annals* 8:2171 (10 July 1798); *Adams Federalists* 306-09; cf. *Chesapeake Politics* 532 (Matthews, Bullock); E Merton Coulter, *Abraham Baldwin* (Vandamere Press, Arlington 1987) 139, 142 (Baldwin earlier a Federalist).

⁵⁴ *Annals* 9:3016-17 (25 Feb. 1799); *Adams Federalists* 312-14; cf. 314 n1 (Skinner).

⁵⁵ *Annals* 10:423-24 (23 Jan. 1800); *Adams Federalists* 318-20; *Prologue* 187 (Taliaferro-Jones elected as Federalists).

⁵⁶ *Annals* 11:975-76 (23 Jan. 1801), 11:1038-39 (19 Feb. 1801); cf. *ibid* 11:1049 (22 Feb. 1801).

⁵⁷ *Annals* 11:975-76, 1038-39; *Adams Federalists* 323-25; cf. James H Broussard, *The Southern Federalists, 1800-1816* (LSUP, Baton Rouge 1978) 36 (Huger).

repeal and against extension.⁵⁸ In one of the few preserved explanations for these votes, Trigg found the Act 'in some parts unconstitutional.'⁵⁹ The magnitude of Federalist opposition is seen in these 18 House members (not counting Marshall) together being nearly half the size of the 44 House votes that passed the Sedition Act in the first place.

Because parties and party membership was not clearly defined at this early period, researchers differ as to whether all who ultimately changed parties were still Federalists at the time of their first heterodox vote. Dauer's categorization is used here,⁶⁰ and alternatives are discussed below.⁶¹ Even if party labels are questioned, a rougher barometer of Federalist opposition is simply that the Sedition Act, like the Alien Friends Act, passed by margins 'narrower than was the case with any of the other major legislation enacted in the crisis of 1798.'⁶²

Some Federalists in state government or out of office, like many in Congress, opposed the Sedition Act, though the identification of state-level opponents is hindered by the paucity of party affiliation research. The most notable was Charles Cotesworth Pinckney,⁶³ the Federalists' 1800 vice presidential candidate and 1804 and 1808 presidential candidate. Others were Edward Rutledge, South Carolina's governor, who found the Act contrary to 'liberty of the press, & the freedom of speech,'⁶⁴ and Patrick Henry, Virginia's advocate of liberty.⁶⁵

3 Transitional Federalist Opposition Toward the Sedition Act

Ongoing transitions from the Federalist party to the Republican party were noted by John Jay in early 1798, as he observed that '[t]hey who from honest motives are in the act of passing,

⁵⁸ Henry M Wagstaff, 'Federalism in North Carolina' (1910) 9 *James Sprunt Studies in History* 5, 30; *Annals* 10:423, 975, 1038.

⁵⁹ Abram Trigg, Circular Letter (25 Feb.1799), *Circular Letters* 1:155, 158.

⁶⁰ Except for Baldwin, *Origins-Parties* 202, 204, 207.

⁶¹ Using four other sources tabulated in *Origins-Parties* 192-219.

⁶² *Federalism* 590.

⁶³ William Vans Murray to John Quincy Adams (22 Mar.1799), Worthington C Ford (ed), 'Letters of William Vans Murray' (1912) *Annual Report of American Historical Association* 343, 529, 530 (in Europe with Pinckney); *accord Pinckney* 214; Marvin R Zahniser, 'The Public Career of Charles Cotesworth Pinckney' (PhD thesis, UCSB 1963) 281.

⁶⁴ Edward Rutledge to John Rutledge, Jr. (29 July 1798), *Rutledge Jr. Papers-UNC*.

⁶⁵ Douglas Bradburn, 'A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts' (2008) 65 *William and Mary Quarterly* 565, 593-94 & n46 (citing ms).

or preparing to pass, from one party to another' should not be 'roughly handled';⁶⁶ and later, as he looked back: 'Among those who had been active Federalists there were individuals who at subsequent points [after the Jay Treaty of 1795] were induced . . . to join the opposing party.'⁶⁷ Those transitions included Benjamin Rush and soon Elbridge Gerry,⁶⁸ and only occasionally went the other direction permanently, such as Patrick Henry⁶⁹ and Robert Goodloe Harper.⁷⁰

Some Federalists felt strongly enough to leave the party over the Sedition Act, just as many had over the Jay Treaty; as Beard observed, the Alien and Sedition Acts 'no doubt alienated many Federalists.'⁷¹ Some others left because of multiple factors including the Act. Not surprisingly, it was Dauer's moderate Federalists who generally made the transition,⁷² and they did so in a stream throughout the 1790s.⁷³

In the federal government, some of those voting against the Sedition Act or its extension were in transition, such as Dent, Baldwin, Skinner, Trigg, Jones, Alston, Goode, and Gray, leading to varying descriptions of their party affiliation at the time.⁷⁴ Their transitions, and a number of others such as House member and future governor John Page of Virginia, who similarly condemned the Act,⁷⁵ occurred so close in time to the enactment of the Alien and Sedition Acts⁷⁶ as to make it probable that the Acts were a major cause at least for some. Edmund Randolph, earlier the Federalist attorney general and secretary of state, had broken

⁶⁶ John Jay to Peter A Jay (17 May 1798), *Jay Papers* doc. 90220.

⁶⁷ John Jay to Richard Peters (12 Mar. 1821), *Jay Papers* doc. 1166.

⁶⁸ *Adams Federalists* 260, 246; Ronald P Formisano, *Transformation of Political Culture: Massachusetts Parties, 1790s-1840s* (OUP, Oxford 1983) 73; *ANB* 8:866, 867.

⁶⁹ *Chesapeake Politics* 466-67; *ANB* 10:615, 618.

⁷⁰ *Adams Federalists* 278; *ANB* 10:128.

⁷¹ Charles A Beard, *Economic Origins of Jeffersonian Democracy* (Macmillan, New York 1915) 356 (none identified); accord John R Nelson, *Liberty and Property* (JHUP, Baltimore 1987) 109.

⁷² *Adams Federalists* 259.

⁷³ *Ibid* 297, 303, 315, 326, 331 ('exF' columns, though understated).

⁷⁴ *Origins-Parties* 207, 209 (Dent); 207, 218, 219 (Baldwin); 207, 205 (Skinner); 209, 211, 214 (Trigg); 209 (Jones); 210, 213 (Alston); 211 (Goode); 211, 214 (Gray).

⁷⁵ John Page to James Madison (7 Apr. 1801), *Madison Papers-Secretary* 1:73, 74; see *DHFFC* 14:917, 923 (transition by 1800); *ANB* 16:902.

⁷⁶ *Adams Federalists* 234-35.

with Washington's administration over the Jay Treaty and other matters, but only aligned with the Republicans in 1798⁷⁷ at the time he privately condemned the Alien and Sedition Acts as 'the two execrable bills,'⁷⁸ and supported the 'close reasoning' of Madison's Report except one part.⁷⁹ His basis was likely the First Amendment, since he had been outspoken in demanding a bill of rights principally to protect jury trial, habeas corpus, and 'liberty of the press.'⁸⁰

Some transitions from Federalist to Republican parties had already occurred by 1798, and also swelled the ranks of opponents of the Sedition Act. Examples are Senator Charles Pinckney from South Carolina,⁸¹ who championed liberty of the press as an expansive right,⁸² and former revenue commissioner Tench Coxe, who believed Adams should be indicted for signing the Alien and Sedition Acts and wrote articles against them.⁸³ Other transitions were delayed and reflected internal struggle, such as House member Silas Lee, who earlier expressed concern that sentiments could be labeled '*libels against government*' and adversely affect 'liberty of the press,'⁸⁴ but consistently supported the Sedition Act, and yet soon shifted to the Republican party,⁸⁵ or district judge Cyrus Griffin, who sat quite silently with Chase in the *Callender* trial, but by 1802 was commended by Jefferson for abandoning support of the Sedition Act.⁸⁶ Another district judge, Gunning Bedford (a signer of the Constitution), who sat with Chase in Delaware, as Chase unavailingly pressed to prosecute a Republican newspaper, may have expressed his own view in telling Chase, 'I believe you do not know where you are[:] the people

⁷⁷ *Chesapeake Politics* 535; *Jefferson Papers* 30:534n.

⁷⁸ Edmund Randolph to St. George Tucker (13 Dec. 1798), quoted in John J. Reardon, *Edmund Randolph* (Macmillan, New York 1974) 474 n32.

⁷⁹ Moncure D. Conway, *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph* (GP Putnam's Sons, New York 1888) 368.

⁸⁰ *Elliot's Debates* 3:203.

⁸¹ Marty D. Matthews, *Forgotten Founder . . . Charles Pinckney* (UNCP, Columbia 2004) 94, 96, 100-01; see *ANB* 17:533, 535.

⁸² *Annals* 10:69-84 (Mar. 1800); *Speeches of Charles Pinckney* ([np, Philadelphia] 1800) 42, 119-28.

⁸³ Jacob B. Cooke, *Tench Coxe and the Early Republic* (UNCP, Chapel Hill 1978) 349, 344-45; see *ANB* 5:636, 637.

⁸⁴ Silas Lee to George Thacher (23 Jan. 1788), *DHRC* 5:780, 782.

⁸⁵ 'Notes on a Cabinet Meeting' (8 Mar. 1801), *Jefferson Papers* 33:219; *DHRC* 5:782n1.

⁸⁶ *ANB* 9:589, 590.

in this place are not well pleased with the sedition law'; he too soon was a Republican.⁸⁷

In state legislatures, similarly, some Federalist transitions to the Republican party were connected to the Sedition Act. If New York is selected as an example, legislators elected as Federalists but supporting the Virginia and Kentucky Resolutions included Jedidiah Peck, who was prosecuted under the Act for circulating a petition opposing it;⁸⁸ and Ambrose Spencer, who just before supporting the Resolutions changed parties in 1798.⁸⁹ John Armstrong, the author of Peck's petition,⁹⁰ was an 'acidulous Federalist who had been converted to Republicanism by the Alien and Sedition Acts,⁹¹ and attacked the latter as violating the First Amendment, believing a 'prohibition more express can scarcely be devised.'⁹² Other examples can be found in each state's list of legislators supporting the Resolutions, such as Joseph Bloomfield of New Jersey.⁹³

Other Federalists in state government had already made the transition before 1798, such as Chief Justice Edmund Pendleton of Virginia, who assailed the 'constitutionality of the sedition bill' under the First Amendment,⁹⁴ Governor Thomas McKean of Pennsylvania, who found the Act clearly unconstitutional,⁹⁵ and Virginia attorney George Hay, one of Callender's trial counsel, who assaulted the Act based on freedoms of press and speech.⁹⁶

Most of this Federalist opposition to the Sedition Act, besides voting, was private, because of the scathing criticism that would ensue like that encountered by Marshall, and the prosecu-

⁸⁷ John A. Munroe, *Federalist Delaware, 1775-1815* (RUP, Rutgers 1954) 207, 206n; ANB 2:455, 456.

⁸⁸ *Journal-N.Y.* 123; *Federalism* 705.

⁸⁹ *Journal of the Senate of the State of New-York. . . 1799* (Loring Andrews, Albany 1799) 67; *Political Parties-N.Y.* 1:125; ANB 20:441.

⁹⁰ *Political Parties-N.Y.* 1:131; *Freedom's Fetters* 393; *DAB* 1:356.

⁹¹ *Livingston* 305; accord *Hamilton Papers* 25:304 n3; see ANB 1:617; Robert Troup to Rufus King (9 Aug. 1800), *King Papers* 3:289.

⁹² [John Armstrong], 'To the Senate and Representatives of the United States' ([Nicholas Power, Poughkeepsie 1798]) 2.

⁹³ Carl E. Prince, *New Jersey's Jeffersonian Republicans* (UNCP, Chapel Hill 1967) 36.

⁹⁴ Edmund Pendleton, 'Address to Citizens of Caroline' (Nov. 1798), *Pendleton Papers* 2:650, 653; accord David J. Mays, *Edmund Pendleton* (HUP, Cambridge 1952, repr 1984) 312, 315; *Jefferson Papers* 30:662n; see *DAB* 17:417, 418 (former Federalist).

⁹⁵ GS Rowe, *Thomas McKean* (CAUP, Boulder 1978) 293, 264; Sanford W. Higginbotham, *Keystone in the Democratic Arch: Pennsylvania Politics, 1800-1816* (PHMC, Harrisburg 1952) 16; *Pennsylvania* 227.

⁹⁶ Hortensius [George Hay], *An Essay on the Liberty of the Press* (Aurora, Philadelphia 1799) 3, 10-16; *Levy* 313; ANB 10:364.

tion that could result like that suffered by Peck and threatened toward Gerard. Similarly, opposition by early justices of the Supreme Court would be expected to be nonpublic. Before public silence is condemned as cowardly on the presentist assumption that the constitutional infraction was obvious, it is important, and startling, to remember that even in the mid-twentieth century most historians⁹⁷ and legal commentators⁹⁸ treated the Sedition Act as not violating the First Amendment, and that after that date many persisted in treating the Act as constitutional as a restatement and amelioration of a common law not changed by the Amendment.⁹⁹

B Chief Justice John Jay and the Sedition Act

Jay, though leaving by far the most complete papers of the dozen early justices (over 13,000), from meticulously retaining correspondence and other papers throughout his life, did not leave a trace of support of the Sedition Act in his 509 letters from the beginning of 1798 to the end of 1802.¹⁰⁰ Nor did Jay, though serving as governor of New York from 1795 until the end of 1800, include any endorsement of or call to support the Act in his legislative messages, or see any mention of endorsement or support of the Act in the hundreds of newspaper articles mentioning him or his actions.¹⁰¹ By contrast, the governors of the eight other states that opposed the Virginia and Kentucky Resolutions emphatically stated their condemnation, and their positions were widely reported.¹⁰² Moreover, when New York's house and senate failed to reconcile their responses rejecting the Resolutions, Jay did nothing to get them to agree on a legally effective response (as all other opposing states but one did) or even to point out the inconsis-

⁹⁷ E.g., John C. Miller, *The Federalist Era, 1789-1801* (Harper, New York 1960) 232; *Crisis* 79 n10; Edward Channing, *A History of the United States* (Macmillan, New York 1923-25) 4:231-32.

⁹⁸ E.g., Mark D. Howe, Book Review (1956) 13 *William & Mary Quarterly* (3rd ser) 573, 575, 575-76; see Mark D. Howe, Book Review (1952) 66 *Harvard Law Review* 189, 190; *Misunderstanding* 119-20.

⁹⁹ Levy 297; *Repressive Jurisprudence* 89, 2; *OCSC* 764-65.

¹⁰⁰ His papers are meticulously gathered by Columbia University at <http://www.columbia.edu/cu/lweb/digital/jay/>, from which the totals derive.

¹⁰¹ Judging by the 19 New York papers, and 60 other papers, contained in the Early American Newspapers database for 14 July 1798-31 Dec. 1800. E.g., 'Virginia and Kentucky Resolutions' *Otsego Herald* (Cooperstown, 28 Feb. 1799) 2.

¹⁰² E.g., *Contemporary Opinion* 232, 247, 231 (Vt., Del., N.H.; others below).

tency, and only transmitted one of the resolutions to other states (because the state senate required him to). This section draws heavily on Jay's unpublished correspondence (cited as *Jay Papers*).

1 Departures from Federalist Orthodoxy

The French minister, Chevalier de la Luzerne, privately described Jay to Comte de Vergennes as negotiations began on the Treaty of 1783, saying he 'boasts of being independent.¹⁰³ Indeed, Jay did,¹⁰⁴ and was repeatedly described as independent-minded.¹⁰⁵

Jay's independence led to periodic departures from Federalist orthodoxy. Though Federalists generally stressed order strongly over liberty, Jay only believed 'a national government, as strong as may be compatible with liberty, is necessary' (as he wrote to John Adams while the Constitutional Convention met),¹⁰⁶ and found liberty as important as order, maintaining that 'Government without liberty is a curse; but, on the other hand, liberty without government is far from being a blessing' (as he wrote to Washington during the ratification debates).¹⁰⁷ Though Federalists favored the English and abhorred the French revolutionaries, Jay was suspicious of both,¹⁰⁸ pointed out that he had no British ancestry,¹⁰⁹ and initially rejoiced in the French Revolution as 'restor[ing] liberty to the people' by overturning an 'arbitrary government' and 'dreadful' monarchy, before it turned to the guillotine and abolished the constitution.¹¹⁰ He had developed close friendships with Lafayette, who called himself Jay's 'political aid[e] de camp' at the time of the first treaty, and other French notables.¹¹¹ Whereas

¹⁰³ William E O'Donnell, *The Chevalier de la Luzerne: French Minister to the United States* (Bibliothèque de L'Université, Louvain 1938) 237.

¹⁰⁴ John Jay to Samuel Huntington (6 Nov.1780), *Jay-Revolutionary* 825, 834; *Jay-Peace* 8.

¹⁰⁵ E.g., 'Diary' (27 Oct.1782), *Adams Works* 3:299.

¹⁰⁶ John Jay to John Adams (4 July 1787), *Jay Correspondence* 3:248, 248-49.

¹⁰⁷ John Jay to George Washington (21 Sept.1788), *ibid* 3:360; *accord*, 'An Address to the People of the State of New York' (spring 1788), *ibid* 3:294, 303.

¹⁰⁸ *Jay-Peace* 519, 549-50; *Jay Correspondence* 4:202.

¹⁰⁹ John Jay to Robert Goodloe Harper (19 Jan.1796), *Jay Correspondence* 4:198, 199; *Empire* 40.

¹¹⁰ *Ibid* 4:200-01; *accord* *Jay Papers* doc. 4787; *Federalism* 310. The letter was reprinted, evidently with approbation, by Republican newspapers. E.g., 'Letter from Governor Jay' *Argus* (New York 24 Feb.1796) 2.

¹¹¹ Lafayette to John Jay (15 Feb.1783), *Jay-Peace* 517, 518; *ibid* 12, 455-56; *Jay Correspondence* 4:472.

Federalists were chary of 'the rights of man,' Jay wrote in a 1793 opinion that rights are retained by the people, because 'the people exercised their own rights' to establish the Constitution, and were secured in their rights by that government,¹¹² joining Wilson in proclaiming 'the people to be the source of authority.'¹¹³ While Federalists narrowed the province of juries, Jay charged a jury in an unique Supreme Court trial that, while it should decide facts and the judges law, 'still both objects are lawfully, within your power of decision.'¹¹⁴ While Federalists called for limiting public office to 'federal men' and excluding 'jacobins,' Jay upon taking office as governor did not dismiss appointees of his Republican predecessor,¹¹⁵ and in office 'did not wish to hear what were the politics of a candidate for office.'¹¹⁶ Examples of Jay departing from the party line can be multiplied.¹¹⁷

Jay remained a Federalist,¹¹⁸ but was a more moderate 'Adams Federalist' rather than a High Federalist,¹¹⁹ as Adams recognized by renominating him as Chief Justice in late 1800 after purging Hamiltonian cabinet members.¹²⁰ Though Jay corresponded extensively with various High Federalists, and remained on generally good terms with them,¹²¹ he did the same with people of all stripes such as Republican governors.¹²² For example, he wrote to Pickering four days after the Sedition Act was signed and then a week later--not mentioning

¹¹² *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470-71, 479 (1793).

¹¹³ Richard B Morris, *John Jay, the Nation, and the Court* (BUP, Boston 1967) 70; accord *Jay Correspondence* 3:229; *DHSC* 2:390.

¹¹⁴ *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

¹¹⁵ George Pellew, *John Jay* (Houghton Mifflin, Boston 1890) 298-99; 'For the Albany Centinel' *Albany Centinel* (Albany 4 Sept.1801) 2; 'Council of Appointment' *Salem Gazette* (Salem 25 Aug.1801) 1.

¹¹⁶ *Ibid* 299-300; 'From the Albany Gazette' *Albany Centinel* (Albany 21 Aug.1801) 1; 'Communication of Thursday Last' *Daily Advertiser* (New York 24 Aug.1801) 2; *Jay Papers* doc. 9967, 3592.

¹¹⁷ *DHSC* 2:27, 363 (rights), 2:26, 27, 364, 389-90 (differing opinions); *Jay Correspondence* 3:224, 249 (Native Americans), 3:414, 443 (rights), 4:337 (democracy), 4:360, 379 (divergent opinions).

¹¹⁸ E.g., John Jay to Peter Van Schaack (4 May 1807), *Jay Papers* doc. 09435; John Jay to William Coleman (18 June 1807), *ibid* doc. 12552.

¹¹⁹ John Adams to John Jay (24 Nov.1800), *Adams Works* 9:90, 91; *Jay Papers* doc. 2872, 9007; *Warren* 1:175.

¹²⁰ John Adams to John Jay (19 Dec.1800), *Adams Works* 9:91; *DHSC* 1:144.

¹²¹ E.g., *King Correspondence* 2:428, 474, 475, 489, 578; 3:148; *Jay Correspondence* 4:254, 255, 270, 273.

¹²² E.g., John Jay to John Sevier (30 Nov.1798), *Jay Papers* doc. 3192; John Jay to John Drayton (28 Dec.1799), *ibid* doc. 9829; John Jay to James Monroe (14 June 1800), *ibid* doc. 5145; John Jay to James Monroe (3 June 1800), *ibid* doc. 9006.

the Act--but only to rejoice that Washington accepted command of the new army, and to suggest that the relative rank of generals be clarified.¹²³ While on good terms,¹²⁴ Jay was quite willing to disagree with his state's dominant Federalist, Hamilton, whether about Hamilton's suggestion to denounce the Whiskey Rebellion more strongly in grand jury charges,¹²⁵ his requested appointments or pardons,¹²⁶ his wish for continued defense spending,¹²⁷ his high fee for legal services,¹²⁸ his preference of Jefferson over his nemesis Burr,¹²⁹ or Hamilton's scheme that would have reversed the presidential election of 1800.

Jay demonstrated his independence and fidelity to principle when he faced the opportunity to change the 1800 election results from a narrow triumph of Jefferson to a second term for Adams. This opportunity was posed to him by Hamilton's Faustian proposal to call the New York legislature into special session and to choose presidential electors while its Federalist majority remained in office and before its new Republican majority took over.¹³⁰ Hamilton noted the high stakes, as he sought to 'prevent an *atheist* in religion and a *fanatic* in politics from getting possession of the helm of the state,' leading a party of which half seek 'the overthrow of the government by depriving it of its due energies' and the other half seek 'a revolution after the manner of Buonaparte.'¹³¹ Jay was quite aware that the Republicans were likely to win the presidential and congressional elections later that year,¹³² and Hamilton was right that it would have changed the presidential outcome.¹³³ Yet Jay rejected the proposal out of hand, writing on

¹²³ John Jay to Timothy Pickering (18, 26 July 1798), *Jay Papers* doc. 4790, 4791.

¹²⁴ John Jay to Alexander Hamilton (19 Apr. 1798), *Jay Papers* doc. 3139, 10775.

¹²⁵ Alexander Hamilton to John Jay (3 Sept. 1792), *Jay Correspondence* 3:446; *DHSC* 2:294, 237.

¹²⁶ *Hamilton Papers* 23:62, 22:169-70, 22:163-64.

¹²⁷ John Jay to Alexander Hamilton (3 Aug. 1799), *Jay Papers* doc. 5651.

¹²⁸ John Jay to David Jones (8 Aug. 1800), *Jay Papers* doc. 9009.

¹²⁹ Mary-Jo Kline (ed), *Political Correspondence and Public Papers of Aaron Burr* (PUP, Princeton 1983) 1:866-67.

¹³⁰ Alexander Hamilton to John Jay (7 May 1800), *Jay Correspondence* 4:270, 271-72.

¹³¹ *Ibid* 4:271.

¹³² John Jay to Dr. Jedidiah Morse (24 Apr. 1800), *ibid* 4:265, 266.

¹³³ *Federalism* 732; John E Ferling, *Adams vs. Jefferson: The Tumultuous Election of 1800* (OUP, Oxford 2004) 168.

the back of Hamilton's letter: 'Proposing a measure for party purposes, which I think it would not become me to adopt.'¹³⁴ Jay rejected the same proposal from Philip Schuyler, ostensibly supported by John Marshall, though they too believed that by the proposal 'Mr. Jefferson's election will be defeated and equally so that Mr. Adams and Mr. Pin[c]kney will be elected.'¹³⁵

Such independence drew Federalist criticism of Jay. Even before Jay's refusal to tilt the 1800 election--but after he was notably silent on the Sedition Act and the Virginia and Kentucky Resolutions--Robert Troup wrote, 'our influence on a general scale has been considerably diminished by Mr. Jay's administration,' despite the best of intentions.¹³⁶ When Jay was renominated as chief justice, Wolcott and Pickering were critical.¹³⁷

By contrast, Jefferson was less negative about the renomination: 'We were afraid of something worse.'¹³⁸ Jay proved worthy of that faint confidence, advising Federalists that the Jefferson administration should be supported in all that was 'intelligent and upright.'¹³⁹

2 Federalist in a Republican Family

Jay was as surrounded by Republicans as by Federalists. His law partner of many years and his wife's cousin, Robert R. Livingston, the chancellor of New York, was the state's leading Republican and an opponent of the Sedition Act;¹⁴⁰ he was later offered a cabinet position and appointed an ambassador by Jefferson.¹⁴¹ Robert's brother, Edward Livingston, was with Gallatin the leading congressional opponent of the Sedition Act as 'an abridgment of the lib-

¹³⁴ *Jay Correspondence* 4:272 n1.

¹³⁵ Gen. Philip Schuyler to John Jay (7 May 1800), *ibid* 4:273.

¹³⁶ Robert Troup to Rufus King (6 May 1799), *King Correspondence* 3:14; accord *ibid* 2:431; *Jay Papers* - doc. 6078.

¹³⁷ Timothy Pickering to Rufus King (5 Jan. 1801), *King Correspondence* 3:365; *Warren* 1:174.

¹³⁸ Thomas Jefferson to James Madison (19 Dec. 1800), *Jefferson Papers* 32:321, 322.

¹³⁹ John Jay to Committee of Federal Freeholders (27 Jan. 1801), *Jay Correspondence* 4:288, 289; John Jay, 'Answer' *National Intelligencer* (Washington 9 Feb. 1801) 3.

¹⁴⁰ *Livingston* 300; Mary-Jo Kline (ed), *Political Correspondence and Public Papers of Aaron Burr* (PUP, Princeton 1983) 1:395 n1. They diverged over Jay's Treaty and were opponents in the 1798 gubernatorial election.

¹⁴¹ Thomas Jefferson to Robert R. Livingston (14 Dec. 1800), *Jefferson Papers* 32:302, 303.

erty of the press, which the Constitution has said shall not be abridged';¹⁴² he repudiated the concept that there could be slanders against the federal government,¹⁴³ and soon defended a seditious libel case.¹⁴⁴ Their brother-in-law was John Armstrong, who had been converted to the Republican party by the Act.¹⁴⁵

The immediate family of Jay's wife,¹⁴⁶ Sarah Livingston Jay, was equally Republican,¹⁴⁷ and close.¹⁴⁸ Her brother, Brockholst Livingston, a Republican,¹⁴⁹ represented Frothingham in his seditious libel prosecution,¹⁵⁰ and was Jefferson's second nominee to the Supreme Court.¹⁵¹ Another brother, William Livingston, soon claimed 'reformation' from Republican allegiance.¹⁵² Their sister's husband, James Linn, was 'a leader of the Republican movement in New Jersey,' and as a Republican in Congress¹⁵³ voted for repeal of the Sedition Act and against extension.¹⁵⁴ Republicans were not limited to Jay's in-laws; one of two sons was one.¹⁵⁵

3 Aloofness from the Sedition Act

Jay called a special session of New York's legislature for August 1798 to implement recent federal defense legislation. He did so before the Sedition Act passed,¹⁵⁶ and so did not do so with the Sedition Act in mind, but in response to the federal plea for state defense measures.

¹⁴² *Annals* 8:2105; *accord Freedom's Fetters* 105, 112, 124.

¹⁴³ *Ibid* 8:2154, though he was ambiguous on state powers, 8:2153.

¹⁴⁴ *Trial of David Frothingham, Wharton's State Trials* 649, 649 (N.Y.Cl.Oyer & Terminer 1799).

¹⁴⁵ *Livingston* 305; *see ANB* 1:617.

¹⁴⁶ Carl E Prince (ed), *The Papers of William Livingston* (NJHC, Trenton 1979-) xxvi-xxix; *Jay-Revolutionary* 123.

¹⁴⁷ Richard F Ellis, *The Jeffersonian Crisis* (OUP, New York 1971) 239.

¹⁴⁸ E.g., *Jay Papers* doc. 13081, 4801; *Jay-Peace* 10-11.

¹⁴⁹ Edward Livingston to Thomas Jefferson (11 Apr.1800), *Jefferson Papers* 31:494; *Livingston* 259, 262; *ANB* 13:764,765.

¹⁵⁰ *Wharton's State Trials* 649, 649.

¹⁵¹ *OHSC* 507; *Warren* 1:299.

¹⁵² John Jay to Mathew Clarkson (13 Sept.1799), *Jay Papers* doc. 2863.

¹⁵³ *Jefferson Papers* 33:432n, 32:323n; *Origins-Parties* 210.

¹⁵⁴ *Annals* 10:423-24, 10:975, 1038; *Adams Federalists* 319, 324.

¹⁵⁵ Charles W Upham, *The Life of Timothy Pickering* (Little Brown, Boston 1867-73) 490-91; *see* James G Wilson and John Fiske (eds), *Appletons' Cyclopaedia of American Biography* (Appleton, New York 1888-89) 3:412; *Jay Papers* doc. 11634, 6231.

¹⁵⁶ 'Proclamation' (2 July 1798), *Jay Papers* doc. 3283; *Journal of the Assembly of the State of New-York. . . 1798* (Loring Andrews, Albany 1798) 3.

Opening that session with the customary governor's speech, Jay noted that the federal government had 'called upon the nation to prepare for defence,' and asked the legislature to determine whether 'and what measures conducive to that end, should now be adopted by this state,' listing as examples militia, arsenals, and funds—but not listing sedition laws.¹⁵⁷ He described 'the dangers which demanded immediate attention to their defence and security,' because France had rendered 'recurrence to arms necessary and justifiable.'¹⁵⁸ After discussing other matters and near the speech's end, Jay expressed his concern that '[t]he United States cannot be conquered but by civil discord,' which is to what 'all fallen republics have owed their destruction,' but did not call for any legislative action about such discord; he instead appealed for unity.¹⁵⁹

Most significantly, Jay did not ask the legislature for sedition legislation, as he asked for defense legislation, though New York had one of the nation's most influential Republican newspapers, which Pickering had recently prosecuted before the Sedition Act,¹⁶⁰ and which Pickering and Hamilton soon prosecuted (Greenleaf and Frothingham of the *Argus*, in addition to prosecuting Durrell of the *Mount Pleasant Register*). Jay's 55 letters to Pickering while the latter was in office did not ask for any investigation or prosecution under the Act, or complain about any opposition newspaper or legislator.¹⁶¹ Similarly, Jay's extensive correspondence with the federal attorney general during the storm of calumny about the Jay Treaty in 1795,¹⁶² while acknowledging that the 'treaty would be used as a pretext for attacks on the government, and for attempts to diminish the confidence' of the people in it, did not ask for or encourage seditious libel prosecutions; Jay instead trusted that truth would prevail.¹⁶³

The state senate, in its customary 'address on the governor's message,' did 'not hesitate in

¹⁵⁷ *Ibid* 5-6; Speech to the Legislature (9 Aug.1798), *Messages-N.Y.* 2:420, 422.

¹⁵⁸ *Messages-N.Y.* 2:420, 421.

¹⁵⁹ *Ibid* 2:423.

¹⁶⁰ *History of Supreme Court* 1:629.

¹⁶¹ *E.g.*, *Jay Correspondence* 4:183, 233, 241, 377.

¹⁶² John Jay to Henry Lee (11 July 1795), *ibid* 4:178; accord John Jay to George Washington (14 Dec.1795), *ibid* 4:197.

¹⁶³ John Jay to Edmund Randolph (20 Aug.1795), *ibid* 4:186, 187; accord John Jay to James Duane (16 Sept.1795), *ibid* 4:191, 192-94; *ibid* 4:197, 214.

declaring the measures of defence adopted by the general government. . . indispensably necessary, and entitled to our warmest approbation.¹⁶⁴ It agreed with the governor 'that the great source of danger to be apprehended to the United States may be found in the disunion of our citizens under the influence of foreign counsels.'¹⁶⁵ This address Jay 'receive[d] with great satisfaction,' but with no complaint of unfinished business.¹⁶⁶ The legislature also prepared an address to President Adams, stating that 'we unanimously approve of the measures you have taken for that purpose [preserving peace] with respect to France.'¹⁶⁷ Because the address was unanimously approved, the measures referred to clearly did not include the Sedition Act, which the Republican minority would ardently oppose,¹⁶⁸ but instead addressed the score of other federal defense laws.¹⁶⁹ Jay's letter transmitting the address to President John Adams assured him that the cooperation of the nation could be relied on 'in the measures necessary to protect the rights and maintain their honour and independence,'¹⁷⁰ but again did not say anything implying support for the Sedition Act. The resulting state legislation provided for defending the harbor and state, but not for restricting expression. Jay's letter transmitting that legislation to Adams again agreed with it, and suggested that Jay coordinate defense steps with Hamilton, the effective commander of the new army, but suggested nothing about coordinating enforcement of the Sedition Act.¹⁷¹ Jay, like the legislature's majority, saw danger of French aggression, and like that majority, commended Adams' measures for defense, but again avoided commending the Sedition Act.¹⁷²

¹⁶⁴ Address on the Governor's Message, *Messages-N.Y.* 2:442, 442-43 (Aug.1798).

¹⁶⁵ *Ibid* 2:443. The state house issued a similar address, but without the reference to the federal 'measures of defence,' to which Jay replied briefly. *Ibid* 2:444, 445.

¹⁶⁶ *Ibid* 2:444.

¹⁶⁷ *Ibid* 2:445.

¹⁶⁸ *Journal-N.Y.* 123; *Contemporary Opinion* 56-57.

¹⁶⁹ Defense legislation in 1798, besides tax laws, appeared at 1 Stat.547-608.

¹⁷⁰ John Jay to John Adams (21 Aug.1798), *Jay Correspondence* 4:248.

¹⁷¹ John Adams to John Jay (17 Oct.1798), *Adams Works* 8:607.

¹⁷² John Jay to John Adams (3 Jan.1799), *Adams Works* 8:619, 620, 621.

Jay thereafter took steps for New York's defense, ordering arms,¹⁷³ fortifying the harbor, and other measures.¹⁷⁴ His messages and letters showed calm preparation, but not Federalist hysteria about internal enemies or opposition speech, even after the Republicans won control of the legislature in spring 1800.¹⁷⁵

After that legislative changeover, Jay's opening speech¹⁷⁶ avoided 'any matter respecting national officers or measures,' though as he privately assured Adams he was careful to prevent 'improper inferences' of opposition to Adams, again in general terms.¹⁷⁷ (His opening speech at the January 1800 session, before the change, similarly had avoided the Sedition Act.¹⁷⁸)

Jay's biographers do not claim that he supported the Sedition Act,¹⁷⁹ nor do period histories¹⁸⁰ or even highly critical articles;¹⁸¹ the few publications that do lack any citation.¹⁸² Jay's voluminous messages and letters show no endorsement, and no proposal of legislation or prosecutions though he had numerous opportunities to do so. Jay is occasionally described as 'approv[ing] the Senate's original alien act,'¹⁸³ but the cited letter predated revision of the Naturalization Act (and both Alien Acts) and did not support anything but limiting federal offices to citi-

¹⁷³ John Jay to Rufus King (30 Sept. 1798), *King Correspondence* 2:475.

¹⁷⁴ *Jay Papers* doc. 2869, 4368, 3127, 3126, 3130, 3131, 3132, 3138, 3143, 0677, 8981, 3283, 4790, 2615, 10782, 3168, 3169, 0705, 3176, 2873, 10785, 3186, 2867, 3187, 3190 (chronologically).

¹⁷⁵ Even in private letters to friends such as Hamilton. *Jay Correspondence* 4:249; *Jay Papers* doc. 3169, 9224, 1534.

¹⁷⁶ Opening Speech (4 Nov. 1800), *Messages-N.Y.* 2:463.

¹⁷⁷ John Jay to John Adams (10 Nov. 1800), *Adams Works* 9:89, 90.

¹⁷⁸ Speech to the Legislature (28 Jan. 1800), *Messages-N.Y.* 2:448.

¹⁷⁹ E.g., *John Jay* 416-18, revising Frank Monaghan, 'John Jay: Defender of Liberty' (PhD thesis, Yale University 1936); James B. Scott, 'John Jay, First Chief Justice of the United States' (1906) 6 *Columbia Law Review* 289, 322; George Pellew, *John Jay* (Houghton Mifflin, Boston 1890) 292-302; William Whitelock, *The Life and Times of John Jay* (Dodd, Mead, New York 1887) 308-12; Henry B. Renwick, *Lives of John Jay and Alexander Hamilton* (Harper, New York 1846) 119-32.

¹⁸⁰ E.g., *Political Parties-N.Y.* 1:125-31; Paul A. Gilje, *New York in the Age of the Constitution, 1775-1800* (FDUP) 74, 90-93; Henry Flanders, *Lives and Times of the Chief Justices* (Lippincott, Philadelphia 1858) 1:417-23.

¹⁸¹ E.g., Sandra F. VanBurkleo, "'Honour, Justice, and Interest": John Jay's Republican Politics and Statesmanship on the Federal Bench' (1984) 4 *Journal of Early Republic* 239, 244-50, 270-74.

¹⁸² DeAlva S. Alexander, *Political History of the State of New York* (Friedman, Port Washington 1969) 85, 92; Morton Borden, *The Federalism of James A. Bayard* (ColumUP, New York 1955) 38.

¹⁸³ *Freedom's Fetters* 55 n14.

zens.¹⁸⁴ A recent biographer acknowledges that his concern was 'considerably less radical than the [alien] law'.¹⁸⁵ Jay's obituaries in Democratic newspapers praised him as an 'upright and learned judge,' to whom 'no reproach can be attached,' without any allegation of supporting the Sedition Act,¹⁸⁶ though the Act was still regularly castigated even the month of Jay's death.¹⁸⁷

4 Footdragging over Opposition to the Virginia and Kentucky Resolutions

The Virginia and Kentucky Resolutions, after adoption in late 1798,¹⁸⁸ were sent to the other states. Governor Jay transmitted them to the New York legislature, without recommendation,¹⁸⁹ as he transmitted Delaware's response¹⁹⁰ and as he transmitted about half the messages from other governments or departments.¹⁹¹ His approach was the same as for Massachusetts proposals for a constitutional amendment, which he transmitted five months earlier without recommendation,¹⁹² though he clearly supported them, and for Virginia's opposition to those proposals, which he also transmitted without recommendation,¹⁹³ though he clearly disapproved.

The state senate responded in March 1799 with a resolve denying that 'any unconstitutional powers' were assumed by the general government, and expressing 'anxiety and regret' about the 'inflammatory and pernicious sentiments and doctrines' in the Resolutions.¹⁹⁴ The resolve went further and endorsed the English common law of seditious libel, finding it es-

¹⁸⁴ John Jay to Timothy Pickering (13 May 1798), *Jay Papers* doc. 90219; see *ibid* 4793, 0706; *Constitutional History-N.Y.* 1:548.

¹⁸⁵ Walter Stahr, *John Jay: Founding Father* (Hambleton Press, London 2005) 354.

¹⁸⁶ E.g., 'Death of the Honorable John Jay' *Richmond Enquirer* (Richmond 26 May 1829) 3; 'Death of John Jay' *Farmer's Cabinet* (Amherst 23 May 1829) 3; [No Caption] *Aurora & Pennsylvania Gazette* (Philadelphia 21 May 1829).

¹⁸⁷ E.g., 'The Union' *Salem Gazette* (Salem 12 May 1829) 1, 2; 'The Union' *Richmond Enquirer* (Richmond 19 May 1829) 1, 2; 'Extracts from the Speech of Mr. Clay' *New-Bedford Mercury* (New Bedford 19 June 1829) 2, 3.

¹⁸⁸ *Elliott's Debates* 4:528, 540.

¹⁸⁹ *Journal-N.Y.* 69 (12 Jan.1799); *Journal of the Senate of the State of New-York. . . 1799* (Loring Andrews, Albany 1799) 15 (12 Jan.1799).

¹⁹⁰ *Messages-N.Y.* 2:438 (4 Mar.1799).

¹⁹¹ *Messages-N.Y.* 2:402, 403, 404-05, 405, 406, 409, 409, 413, 414-15, 415, 415-16, 416, 416-17, 417, 419, 419 (1798); *Journal-N.Y.* 7, 11, 69, 143, 193, 220, 251 (1799); while about half were with recommendation, *Messages-N.Y.* 2:404, 408, 410, 410, 411, 412, 413, 413-14, 416 (1798); *Journal-N.Y.* 6, 25, 36, 88, 101, 103, 119, 133-34 (1799).

¹⁹² *Messages-N.Y.* 2:424 (10 Aug.1798).

¹⁹³ *Ibid* 2:438-39 (16 Mar.1799).

¹⁹⁴ *Messages-N.Y.* 2:428 n11; *Elliott's Debates* 4:537 (5 Mar.1799).

sential that government 'have authority to defend and preserve its constitutional powers inviolate, inasmuch as every infringement thereof tends to its subversion,' and that people have 'a reasonable confidence in the constituted authorities and chosen representatives,' because 'every measure calculated to weaken that confidence, has a tendency to destroy the usefulness of our public functionaries.'¹⁹⁵ That was too strong for New York's house, which did not endorse the Sedition Act or seditious libel, but followed an inconsistent and narrower approach of disclaiming state power to decide on the constitutionality of federal enactments.¹⁹⁶ The house vote was a narrow 50-43,¹⁹⁷ and as that would imply, the house never approved the senate's resolve, nor did the senate approve the house's resolve.

Jay made no formal statement in response to these resolves. By contrast, the governors of the eight other states that opposed the Virginia and Kentucky Resolutions publicly opposed the Resolutions.¹⁹⁸ Jay on other occasions did make formal statements opposing legislation that he found problematic.¹⁹⁹ Further, Jay made no effort to get the state senate and house to agree on a common resolve. By contrast, the Virginia legislature and the Kentucky legislature had approved common resolutions, and all but New York and one other opposing state had as well. Nor did Jay transmit the inconsistent house resolution when he transmitted the senate resolution

¹⁹⁵ *Ibid*; 2:428 n11.

¹⁹⁶ *Journal-N.Y.* 122-23 (16 Feb.1799); *Contemporary Opinion* 248-49.

¹⁹⁷ *Ibid*; *Contemporary Opinion* 57.

¹⁹⁸ 'Speech of His Excellency Governor Tichenor' *Claypoole's American Daily Advertiser* (Philadelphia 16 Nov.1799) 2, 3 (Gov. Tichenor-Vt.); 'Speech of His Excellency Governor Trumbull' *Claypoole's American Daily Advertiser* (Philadelphia 18 May 1799) 2, 3 (Gov. Trumbull-Conn.); *ANB* 21:874, 875 (same), 11:349, 350-51 (Gov. Howell-N.J.); *Contemporary Opinion* 232 (Gov. Tichenor-Vt.), 247 (Gov. Rogers-Del.), 231 (Gov. Gilman-N.H.); *Elliot's Debates* 4:539 (same); 'The Genuine Spirit of '76' *Albany Centinel* (Albany 19 June 1798) 3 (Gov. Sumner-Mass.); Increase Sumner, 'Governor's Speech,' *Resolves, &c. of the General Court of Massachusetts* (np, 1799) 37, 38 (same); *Press-Mass.* 144 (same); see Thomas Mifflin, 'Opening Address to the Assembly' (7 Dec.1798), *Pennsylvania Archives* 4:405, 422-23 (4th ser State of Pennsylvania, Harrisburg 1900-02) (Gov.Mifflin-Pa.); *accord Iredell Correspondence* 2:577 (Gov. Davie-N.C.).

¹⁹⁹ Message to Assembly (24 Mar.1798)(impact of federal bill governing suits between claimants from different states), *ibid* 2:415; Opening Speech (28 Jan.1800)(concern under state constitution's separation of powers about annual legislative allowances to other branches), *ibid* 2:449; Message to Assembly (26 Feb.1801)(ambiguity under state constitution about who nominates lower state officers), *ibid* 2:472, 473-74; Opening Speech (4 Nov.1800)(concern that private acts involving wills and descent may be treated as precedents), *ibid* 2:463, 465-66.

to the sister states; Jay transmitted only the one that required him to disseminate it.²⁰⁰

Jay did advert to the issue in one private letter. He declined to join Federalist apoplexy that the 'country is to drink very deep of the cup of tribulation,' but agreed with their suspicion that 'the Jacobins are still more numerous, more desperate, and more active in this country than is generally supposed,' and criticized their leaders' 'opposition to their own government, and their devotion to a foreign one.' His next sentence asked rhetorically, 'Why, and by whom, were the Kentucky and Virginia resolutions contrived, and for what purposes?'²⁰¹ That did not signify support of the Sedition Act; many contemporaries who opposed the Act opposed the Resolutions because of their disunifying implications, such as John Marshall, Patrick Henry, and ex-Governor Henry Lee.²⁰² Jay's concern was directed at foreign influence and the resolutions' treatment of the Alien Acts--Jay had long been concerned with 'introduction of foreign influence into our national councils' if noncitizens were allowed to be elected to the Presidency or Congress²⁰³--while not stating or implying agreement with the Sedition Act. Six weeks later and soon after the state senate resolutions were passed, Jay specified the measures that should be taken toward the Jacobins, in private correspondence to a Federalist congressman:

Union, sedate firmness, and vigorous preparations for war generally afford the best means of counteracting the tendencies of insidious professions, and of too great public confidence in them.²⁰⁴

A year later, Jay said much the same thing.²⁰⁵ Entirely missing was any hint of seditious libel prosecutions or restrictions of speech or press. Jay's single reference to the Virginia and Kentucky Resolutions, among his extensive preserved correspondence, both private and official, questioning their treatment of the Alien Acts under his longstanding theme of foreign influ-

²⁰⁰ *Elliot's Debates* 4:538; *Journal-N.Y.* 123; *Contemporary Opinion* 248-49, 56.

²⁰¹ John Jay to Jedidiah Morse (30 Jan. 1799), *Jay Correspondence* 4:252, 253; *Jay Papers* doc. 1175.

²⁰² William W. Henry (ed), *Patrick Henry: Life, Correspondence and Speeches* (Scribner, New York 1891) 2:589; Norman K. Risjord, 'The Virginia Federalists' (1967) 33 *Journal of Southern History* 486, 505.

²⁰³ *Journal-N.Y.* 103 (12 Feb. 1799); *ibid* 6, 103 (proposed constitutional amendment); *Jay Correspondence* 4:230.

²⁰⁴ John Jay to Benjamin Goodhue (29 Mar. 1799), *Jay Correspondence* 4:256, 258.

²⁰⁵ John Jay to Theophilus Parsons (1 July 1800), *ibid* 4:274, 274.

ence but not defending the Sedition Act, contrasts starkly with his Federalist son's pointed constitutional arguments against the Resolutions and for the Act, among a fifth as much preserved correspondence.²⁰⁶

Jay took no official or private action to prosecute seditious libel during his five years as governor of New York, even while wincing at 'calumny' by Greenleaf's newspaper in 1797-1800,²⁰⁷ in contrast to Hamilton who caused prosecution of Greenleaf's printer, Frothingham, in 1799-1800. Yet Jay as governor could easily have caused such prosecution, since Hamilton as an influential private citizen successfully did. Even with Federalist control of all branches of New York's government and the federal government, Jay did not ask for official action or take private action against sometimes scathing criticism in other Republican newspapers and by Republican legislators,²⁰⁸ instead treating false criticism as 'an engine of party in all countries' which 'originating in the corruption of human nature, is without remedy, and consequently is to be borne patiently.'²⁰⁹ Just as he did not use his friendship to suggest any prosecution to the eager Pickering, Jay did not use his gubernatorial authority to instruct or hint to the state's attorney general or other officials that any seditious libel prosecution should be brought, though he did order other criminal prosecutions.²¹⁰ Instead, Jay's actions and extensive correspondence are consistent with his draft grand jury charge five years before the Sedition Act: 'As free citizens we have a right to think and speak[] our sentiments on these subject[s], in terms becoming free men--that is in terms explicit and decorous--As judges and grand jurors the merits of those political questions are without our province'--and those diverging sentiments were different from 'seditious practices,' which Jay defined as 'ende[a]voring to seduce our citizens into acts of

²⁰⁶ Peter A Jay to Augustus Woodward (17 Feb. 1799), *Jay Papers* doc. 10038.

²⁰⁷ John Jay to Henry Van Schaack (23 Sept. 1800), *Jay Correspondence* 4:275, 276.

²⁰⁸ E.g., John Jay to Peter A Jay (6 Apr. 1798), *Jay Papers* doc. 90216; 'Albany, June 19, 1798' *Albany Centinel* (Albany 19 June 1798) 3; 'Communication' *Greenleaf's New York Journal* (New York 7 July 1798) 3; 'To General Marshall' *Greenleaf's New York Journal* (New York 22 Dec. 1798) 3, 4.

²⁰⁹ John Jay to Henry Van Schaack (23 Sept. 1800), *Jay Correspondence* 4:275, 276; e.g., *ibid* 4:160, 161; *Jay Papers* doc. 90216.

²¹⁰ John Jay to Josiah Hoffman (3 Jan. 1798), *Jay Papers* doc. 3114; *accord Jay Papers* doc. 3033, 3109, 3129, 3195.

hostility' and that he found capable of commission only by 'foreigners.'²¹¹ Jay was still saying the same thing sixteen years after the Sedition Act, calling for vigilance in 'examining the conduct of the administration in all its departments, candidly and openly giving decided approbation or decided censure, according as it may deserve.'²¹²

Jay's silence on the Sedition Act was not from cowardice, though he was doubtless aware of Marshall's sufferings. It was his style, rather than public dispute. He had chosen dignified silence over entering the renewed debate about his Treaty of 1783, over challenge of the stolen governorship of 1792, and over entering the fray about his Treaty ratified in 1795.²¹³ Later, Jay similarly avoided public statements opposing the War of 1812, though he affirmed the right of fellow citizens to speak on public measures: 'there are certain occasions when it is not only their right, but also their duty, to express their sentiments relative to public measures.'²¹⁴ Moreover, even Republican governors who opposed the Sedition Act remained publicly silent, after Kentucky's governor was threatened with prosecution, such as Monroe of Virginia,²¹⁵ McKean of Pennsylvania,²¹⁶ and Rutledge of South Carolina.

Would the former chief justice have remained silent if he believed a violation of fundamental freedoms was occurring? He maintained public silence, until much later in life, about another issue he believed was a violation of even more fundamental rights: slavery.²¹⁷ He did not speak publicly as he rejected Hamilton's scheme to manipulate the presidential election results. He did not give public criticism of the Republican administrations for the next twenty-

²¹¹ John Jay's Charge (Draft) (U.S.Cir.Ct.Va. 22 Apr.1793), *DHSC* 2:359, 364, 363.

²¹² John Jay to Timothy Pickering (1 Nov.1814), *Jay Correspondence* 4:378, 379.

²¹³ *Jay-Peace* 3; *Livingston* 261-63; John Jay to Sarah Jay (18 June 1792), *Jay Correspondence* 3:434; Jay's Reply (1792), *ibid* 3:442, 444; John Jay to Henry Lee (11 July 1795), *ibid* 4:178; John Jay to Edmund Randolph (20 Aug.1795), *ibid* 4:186.

²¹⁴ John Jay to Peter Van Schaack (28 July 1812), *Jay Papers* doc. 9440.

²¹⁵ James Monroe to James Madison (22 Nov.1799), *Monroe Writings* 3:159; James Monroe to Thomas Jefferson (4 Jan.1800), *Jefferson Papers* 31:289 (opposition, constitutional grounds); James Monroe to Thomas Jefferson (18 Mar.1800), *ibid* 31:446.

²¹⁶ GS Rowe, *Thomas McKean* (CAUP, Boulder 1978) 293 (found clearly unconstitutional); *The Inagural [sic] Address of Thomas M'Kean, Governor of Pennsylvania* (Dickson, Lancaster 1800)(silence).

²¹⁷ *Jay Correspondence* 3:140, 185, 334, 341, 414.

four years, though he certainly disagreed with some actions.²¹⁸ Jay was at heart a diplomat, who twice had silently weathered national debate and personal attack over his treaties.

Jay was perhaps the framer most likely to follow his principles, and least likely to act on party wishes. He consistently showed a willingness to take unpopular action required by his principles, such as heading the New York Manumission Association,²¹⁹ ruling that states lacked sovereign immunity from suit,²²⁰ and concluding the Jay Treaty of 1795, despite certain and thunderous criticism. He similarly showed a willingness to refuse to take action prohibited by his principles, such as doing anything to enforce the Sedition Act, or implementing Hamilton's suggestion that would have thwarted the election of Thomas Jefferson as president.

Is this sufficient evidence to show probable opposition to the constitutionality of the Sedition Act? The best answer is that Jay's words and actions were virtually identical to another governor's words and actions—Edward Rutledge of South Carolina—whose opposition to the Sedition Act is discussed in the next section. Like Jay, he was elected as a Federalist, in a state controlled by Federalists until the 1800 state election. Like Jay, he said nothing publicly about the Sedition Act, cooperated with the federal call for defense measures by fortifying the state's major harbor, forwarded the Virginia and Kentucky Resolutions without a recommendation, and watched silently as the legislature failed to take binding action on the resolutions. Yet there is no question of Rutledge's position that the Sedition Act violated the First Amendment.

C Chief Justice John Rutledge and the Sedition Act

John Rutledge's brother, Edward Rutledge, opposed the Sedition Act, as did the other leader of the Rutledge-Pinckney faction, Charles Cotesworth Pinckney. Opposition by Edward Rutledge, and perhaps by John Rutledge, was a step in the same direction as their earlier support of South Carolina's grant to John Wilkes to defend his freedoms of press and speech, and of

²¹⁸ *Ibid* 4:314, 329.

²¹⁹ *Jay Correspondence* 3:329n, 344, 356.

²²⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471, 473, 479 (1793).

South Carolina's leading newspaper editor to defend his right to publish. It was a step in the same direction as John Rutledge's and the South Carolinians' support of Charles Pinckney's proposals to add a 'liberty of press' clause to the Constitution.²²¹ Opposition to the Sedition Act was almost predetermined by their opposition to the Jay Treaty of 1795, a major Federalist party test, as Rutledge's speech was branded as seditious, as he was rejected by the Federalist senate as chief justice on that basis and effectively expelled from the Federalist party, and as Edward Rutledge actually broke with that party temporarily.

1 Opposition to the Sedition Act by His Alter Ego, Edward Rutledge

Edward Rutledge privately opposed the Sedition Act. He wrote to his nephew in Congress, shortly after learning of its enactment, that

Not that we approve of all measures; among those that I disapprove is the Sedition Bill. The provisions of this bill are carried by much too far, & if I am not mistaken will, from doing so, defeat its own purpose. The Liberty of the Press, & the Freedom of Speech are points so essential to happiness, and on which is much national jealousy, that I may be allowed the election, and easily could [so elect], that I would much rather have left the measures of government to have been defended by the laws as they stood, [illegible word] the rectitude of those measures, than have created a new code of jurisprudence for their protraction. . . .²²²

Rutledge's disapproval centered on the Act's impact on liberties of press and speech, liberties that he praised. The few historians who noted the letter have seen it as a clear condemnation of the Sedition Act.²²³ The recipient, nephew John Rutledge, Jr., two weeks later described his uncle as a 'political heretic.'²²⁴ A half year later, Edward Rutledge wrote to a friend that 'I wish our own Government would repeal their Sedition Act, which is a good deal disapproved of, and has been made a handle of to lessen the confidence [in] the Administration.'²²⁵

Edward Rutledge soon became South Carolina's governor, in December 1798, elected as

²²¹ *Farrand's Records* 2:334, 340-41 (20 Aug.1787), 2:611, 617-18, 620 (14 Sept.1787); *Elliot's Debates* 1:249, 310.

²²² Edward Rutledge to John Rutledge, Jr. (29 July 1798), *Rutledge Jr. Papers-UNC*.

²²³ *Pinckney* 205; Richard B Clow, 'Edward Rutledge of South Carolina, 1749-1800' (PhD thesis, University of Georgia 1976) 296; though *Rutledge, Jr.* 134 and *Prologue* 211 quote only the non-press-and-speech part.

²²⁴ John Rutledge, Jr. to Bishop Smith (14 Aug.1798), *Rutledge Jr. Papers-UNC*.

²²⁵ Edward Rutledge to Phineas Miller (1 Jan.1799), quoted in *Pinckney* 206.

a Federalist and with a Federalist majority in both legislative houses.²²⁶ His inaugural message to the legislature focused on the danger of 'hostile invasion' by France, and Rutledge began it by saying 'it is incumbent on me to recommend to your consideration, such measures as I shall think the best calculated' for repelling French threats. He then recommended purchase of arms and artillery, ammunition and provisions, and impressment of property if necessary. He stressed the necessity of unity, and acknowledged that the French hoped to divide the nation and 'founded their hopes of success on the divisions of our fellow citizens,' but was silent on any enforcement of the Sedition Act or restriction of expression,²²⁷ even though Charleston had been home to Citizen Genet and 'French influence never appeared so open and unmasked' as recently with 'French flags, French cockades,' and the nation's largest French population.²²⁸ Obviously, Rutledge did not consider prohibition or prosecution of sedition a necessary measure. Like Jay, Rutledge did not publicly oppose the Sedition Act, but took no step to implement it, while sedulously implementing defense measures by seeking cannon and mustering troops,²²⁹ and supporting construction of a new fort to protect the harbor.²³⁰

Also like Jay, Governor Rutledge forwarded the Virginia and Kentucky Resolutions to the legislature, along with the Maryland response and some unrelated Delaware and Georgia enactments, and did so with a neutral transmittal letter not making any recommendation.²³¹ He responded to Virginia's governor less guardedly, assuring him that, as soon as the legislature's adjournment ended, he would be 'laying the letter before them, with the resolutions

²²⁶ *Pinckney* 206; *Prologue* 185.

²²⁷ 'Governor Rutledge's Speech' *City Gazette* (Charleston 27 Dec.1798) 2; 'Governor Rutledge's Speech' *Gazette of the United States* (Philadelphia 15 Jan.1799) 3.

²²⁸ William Smith to Ralph Izard (8 Nov.1796), *Federalist Correspondence* 784, 785; accord *South Carolina* 71-72, 76, 78.

²²⁹ Edward Rutledge to John Rutledge, Jr. (16 Oct.1798), *Rutledge Jr. Papers-Duke*; 'General Orders' *City Gazette* (Charleston 19 Apr.1799) 3.

²³⁰ Edward Rutledge to Nn (8 Mar.1799), 'Edward Rutledge Papers, 1790-1820' (DU Ms. Section A); Edward Rutledge to Dr. Blythe (12 Apr.1799), 'Edward Rutledge Papers' (SCHS, call no. 43/0792).

²³¹ 'Resolved, that 150 Copies of the Governor's Message. . . Be Printed' (Freneau, Columbia [1799]); 'Legislature of South-Carolina' *City Gazette & Daily Advertiser* (Charleston 11 Dec.1799) 2.

contained in it, at their next session.²³² When those Virginia Resolutions arrived, South Carolina's legislative session had just ended,²³³ and the next one was not until November 1799, after which the newspaper reports quoted earlier said the session was so short that the Resolutions could not be taken up but if considered 'would certainly have been concurred in.' That inaction cannot be attributed to opposition, because just a year earlier South Carolina's legislature was similarly ineffectual in response to Rutledge's recommendation of defense measures.²³⁴ Like Jay, Rutledge remained silent as the legislature failed to take binding action, and he soon fell ill and died in January 1800,²³⁵ as did his brother in July 1800. Edward Rutledge's stance cannot be attributed to Republicanism; though his earlier flirtation with Jeffersonianism is described below, by 1798 and after he was an Adams Federalist.²³⁶

John Rutledge, Sr.'s stance on the Sedition Act is not documented, in either newspapers or his scanty preserved correspondence from 1798-1800.²³⁷ However, a number of considerations indicate that he shared his brother's objection to the constitutionality of the Act.

The Rutledge brothers consistently agreed on major issues, to such an extent that their only published biography is a joint biography, as they served together at the continental congresses,²³⁸ in the state legislature, and in the state ratification convention.²³⁹ In John Rutledge's stands for freedoms of press and speech that were discussed in Chapter 4, Edward Rutledge joined him, voting for the Wilkes grant and actually representing Powell.²⁴⁰ (Char-

²³² Edward Rutledge to Gov. James Wood (11 Jan. 1799), 'Charles Francis Jenkins Collection' (HSP) (obverse identifies as Virginia Resolutions). Ratzlaff misconstrues this as a refusal to forward the resolutions. *Rutledge, Jr.* 151 n85.

²³³ *Ibid.*

²³⁴ 'Message of Governor Rutledge' (26 Nov. 1799), *Journals of Senate-S.C.* 10, 11 (26 Nov. 1799); *Journals of House-S.C.* 90-94 (12 Dec. 1799); see *Acts and Resolutions of the General Assembly. . . December, 1799* (Frenau & Paine, Charleston 1800).

²³⁵ [No Caption] *South-Carolina State-Gazette* (Charleston 25 Jan. 1800) 3; *Pinckney* 212, asking the legislature's consent to leaving even before his stroke, *Pinckney* 212 n46; *Journals of Senate-S.C.* 99 (13 Dec. 1799).

²³⁶ *Federalism* 528; *Pinckney* 205, 213; *Prologue* 163, 164.

²³⁷ All extant correspondence from 1798-1800 has been gathered and reviewed.

²³⁸ *JCC* 1:252n, 1:121, 2:162. The joint biography is by Haw.

²³⁹ *Elliot's Debates* 4:338.

²⁴⁰ *Laurens Papers* 9:111 n1, 155 n8.

les Cotesworth Pinckney joined them as well.²⁴¹) When John Rutledge denounced the Jay Treaty, Edward Rutledge shared his stance.²⁴² When Federalists in turn cursed John Rutledge, Edward Rutledge abandoned the party for a time, as discussed below.

John Rutledge's past positions, like his collaboration with his brother, pointed toward opposing the Sedition Act. His leadership of the small group spearheading the South Carolina legislature's grant of £10,500 to the Supporters of the Bill of Rights to assist John Wilkes, even to the point of causing repeated dissolutions of the legislature and stoppage of colonial government, had been fundamentally about freedom of press and speech. His leadership when the state's commons supported the newspaper editor Powell against seditious libel prosecution for printing the Drayton dissents, and against upper chamber claims of privilege, was also built upon freedom of press (Chapter 4.B).

The argument from family positions can only be taken so far. Unlike Rutledge's brother and their ally Charles Cotesworth Pinckney, his son John Rutledge, Jr. voted for the Sedition Act,²⁴³ and consistently supported it.²⁴⁴ Though the son became a High Federalist, he was not so before 1797, having befriended Jefferson during a grand tour in the late 1780s,²⁴⁵ developed strong Francophilia²⁴⁶ and Anglophobia,²⁴⁷ opposed the Jay Treaty,²⁴⁸ and voted for Jefferson as a presidential elector in 1796.²⁴⁹ The son's party leanings were not certain as he entered

²⁴¹ Committee of Correspondence to Charles Garth (6 Sept.1770), *Garth Correspondence* 31:244, 246; *Laurens Papers* 7:274 n2; *Pinckney* 25; *Founding Family* 43, 45-46, 57.

²⁴² William Read to Jacob Read (21 July 1795), 'Read Family Papers, 1787-1869' (SCHS ms.1088.00); *Wolcott Papers* 1:231.

²⁴³ *Annals* 8:2171.

²⁴⁴ *Ibid* 9:2985, 10:423, 10:975, 10:1038.

²⁴⁵ *Jefferson Papers* 12:340, 349, 492, 556, 605, 631; 13:124, 138, 262, 282, 318, 358, 454, 506, 530, 551, 567, 593, 615, 631; 14:404, 481, 538, 613, 701; 15:24, 63, 72; 16:266, 413, 426; 17:521; 18:52; 19:297.

²⁴⁶ *South Carolina* 71.

²⁴⁷ John Rutledge, Jr. to Thomas Jefferson (20 Nov.1790), *Jefferson Papers* 18:52, 53; John Rutledge, Jr. to Thomas Jefferson (26 Sept.1790), *ibid* 17:521.

²⁴⁸ William Smith to Ralph Izard (23 May 1797), *Federalist Correspondence* 786.

²⁴⁹ *South Carolina* 98; *Prologue* 138 n123.

Congress in 1796, and he was assumed to be a Republican,²⁵⁰ before he veered decisively to the Federalist party in 1797²⁵¹ and into Hamilton's orbit by 1800.²⁵² Even so, Rutledge Jr. could couple defense of the Act with affirmation that 'every man has the privilege of expressing unreservedly whatever he thinks on political subjects.'²⁵³ The father was closer to his brother than to his son, as the son spent three years away on his grand tour,²⁵⁴ then from the time of his conversion to Federalism, was far away in Philadelphia, Rhode Island, and a distant plantation.²⁵⁵

There were many examples of opposite allegiances of father and son, of course. Franklin's son was a loyalist during the Revolution.²⁵⁶ Even Chase's son-in-law was 'a democrat.'²⁵⁷

2 Departures from Federalist Orthodoxy

John Rutledge, like Jay, was a moderate Federalist rather than a High Federalist, as was his brother and as were Charles Cotesworth Pinckney and his brother Thomas Pinckney.²⁵⁸

That Rutledge-Pinckney faction²⁵⁹ was the moderate Federalist bloc in South Carolina. Its prominence and their alliance were reflected in President Washington's joint letter offering the Supreme Court position John Rutledge vacated in 1791 to Edward Rutledge or Charles Cotesworth Pinckney,²⁶⁰ and appointing Thomas Pinckney to negotiate a treaty with Spain.²⁶¹

²⁵⁰ *Ibid* ('counted on him as being on the other side,' but now 'federal'); see *Annals* 7:766-67, 8:1534; Thomas Jefferson to James Madison (1 June 1797), *Jefferson Papers* 29:411 (evidently counting Jr. among Republicans to call South Carolina 'evenly divided'); *South Carolina* 103.

²⁵¹ *Rutledge, Jr.* 113, 125-29; *Pinckney* 203.

²⁵² John Rutledge, Jr. to Alexander Hamilton (10 Jan. 1801), *Hamilton Papers* 25:308; accord *ibid* 25:30; *Prologue* 203 n62.

²⁵³ *Annals* 10:933.

²⁵⁴ James Iredell to Hannah Iredell (23 May 1790), *Iredell Correspondence* 2:289; *Rutledge, Jr.* 34.

²⁵⁵ Robert K. Ratzlaff, 'John Rutledge, Jr., South Carolina Federalist, 1766-1819' (PhD thesis, University of Kansas 1975) 95, 103, 117, 139, 154, 173, 77; as shown in 1797-1800 correspondence addresses in *Rutledge, Jr. Papers-UNC*.

²⁵⁶ Sheila L. Skemp, *William Franklin: Son of a Patriot, Servant of a King* (OUP, Oxford 1990) 227-76; *Jay-Peace* 284 n5.

²⁵⁷ John Sanderson, *Biography of the Signers to the Declaration of Independence* (RW Pomeroy, Philadelphia 1823-27) 9:181, 234. Cf. Stephen Higginson to Timothy Pickering (25 June 1798), *Higginson Letters* 812, 813.

²⁵⁸ David D. Wallace, *The History of South Carolina* (AHS, New York 1934) 2:356, 357; *Founding Family* 311; *Federalism* 544, 559; *Pinckney* 128; *South Carolina* 101, though Hamilton's schemes to manipulate the Pinckney vote in 1800 can be read to imply alliance.

²⁵⁹ *ANB* 17:536; *Founding Family* 314; *Pinckney* 202; *Federalism* 524.

²⁶⁰ George Washington to Charles Cotesworth Pinckney and Edward Rutledge (24 May 1791), *Washington Papers-Presidential* 8:205.

The political alliance was undergirded by close friendship and intermarriage,²⁶² and by a law partnership and plantation partnerships between the younger Rutledge and the elder Pinckney.

Charles Cotesworth Pinckney was reported to oppose the Sedition Act with 'his friends.'²⁶³ His friends, more than anyone else, were Edward Rutledge, who clearly opposed the Act, and John Rutledge.

Their Rutledge-Pinckney faction had departed from Federalist orthodoxy in a number of ways that lay the groundwork for objecting to the Sedition Act. They disliked Britain,²⁶⁴ having all studied law at Middle Temple²⁶⁵ and experienced social marginalization instead of their South Carolina prominence, followed by Edward Rutledge and Charles Cotesworth Pinckney being British prisoners during the Revolution;²⁶⁶ all suffered British depredations against their plantations when British troops controlled the Carolinas. They equally liked France, welcomed its revolution and its emissary Genet,²⁶⁷ and in 1795 remained appreciative of its critical assistance in the American Revolution,²⁶⁸ their Gallophilia continued into 1797 before cooling.²⁶⁹ Consequently, the Rutledge-Pinckney bloc rejected Federalist positions on foreign policy.²⁷⁰

When the Jay Treaty generated acerbic divisions between Federalists²⁷¹ and the emerging

²⁶¹ Samuel F Bemis, *Pinckney's Treaty* (YUP, New Haven 1960).

²⁶² *Pinckney* 127, 212-13; *Founding Family* 172, 332; *ANB* 17:536.

²⁶³ William Vans Murray to John Quincy Adams (22 Mar.1799), Worthington C Ford (ed), 'Letters of William Vans Murray' (1912) *Annual Report of American Historical Association* 343, 529, 530.

²⁶⁴ *Prologue* 106-07; *Federalism* 526 (Rutledges); *Pinckney* 124-25.

²⁶⁵ E Alfred Jones, *American Members of the Inns of Court* (SCP, London 1924) 171, 173, 187, 189.

²⁶⁶ *Pinckney* 66; *Federalism* 560.

²⁶⁷ *Prologue* 108; *Federalism* 561; *Pinckney* 117-18, 124; *South Carolina* 82.

²⁶⁸ Edward Rutledge to Thomas Jefferson (7 Oct.1791), *Jefferson Papers* 22:201, 202-03; Edward Rutledge to Thomas Jefferson (ca.1 Apr.1789), *ibid* 15:11, 12; Robert Troup to Rufus King (14 Sept.1800), *King Correspondence* 3:299; *Pinckney* 124, 128.

²⁶⁹ Edward Rutledge to John Rutledge, Jr. (19 May 1797), *Rutledge, Jr. Papers-Duke*; *Founding Family* 314, 325; *Pinckney* 212; *South Carolina* 101; see Thomas Pinckney to Rufus King (18 July 1798), *King Correspondence* 2:369.

²⁷⁰ Edward Rutledge to Thomas Jefferson (30 Apr.1796), *Jefferson Papers* 29:92; Edward Rutledge to Thomas Jefferson (7 Aug.1791), *ibid* 22:12, 13; see Edward Rutledge to Thomas Jefferson (4 May 1797), *ibid* 29:356; *Prologue* 105.

²⁷¹ Charles Cotesworth Pinckney struggled to remain publicly neutral while privately opposing the treaty, and his brother leaving a diplomatic position supported the administration. *Pinckney* 125-26, 126; *Federalism* 527. Southern Federalists widely opposed the treaty. *Adams Federalists* 290-92 (col.1-3); *Pinckney* 124.

Republicans,²⁷² Edward Rutledge was 'violent' in his opposition, which was attributed to his 'unconquerable aversion to the British nation,'²⁷³ and he expressed that opposition as he resumed correspondence with Thomas Jefferson.²⁷⁴ John Rutledge was even more violent, as he gave a scathing speech against the treaty²⁷⁵ that described it as 'a surrender of our rights,' and as 'prostituting the dearest rights of freemen,' such that Rutledge 'had rather, the President should die, dearly as he loves him, than he should sign that treaty. . . .'²⁷⁶ The speech was reprinted in newspapers across the country,²⁷⁷ and though it was probably given before news of his nomination reached Charleston,²⁷⁸ it doomed his confirmation as chief justice.

3 Denial of Confirmation by Federalists and Expulsion from the Federalist Party

John Rutledge, serving as chief justice by recess appointment in 1795, was denied confirmation by the Senate. The vote was a party-line vote: every one of the 14 votes against his confirmation was by a Federalist, and every one of the 10 votes in favor was by a Republican except the lone vote of a Federalist senator from South Carolina.²⁷⁹ The treaty had become a test of party loyalty.²⁸⁰

Rutledge was not just denied confirmation, but was disavowed by and expelled from the Federalist party. Hamilton published newspaper essays describing Rutledge's 'delirium of rage' that brought 'mortification.'²⁸¹ Adams branded him seditious.²⁸² Wolcott wrote that, 'to

²⁷² Jerald A Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* (UCP, Berkeley 1970) 152-53, 159-88; David J Siemers, *Ratifying the Republic* (SUP, Palo Alto 2002) 158-59; *Federalism* 548, 415-31; Warren 1:129-34.

²⁷³ William Smith to Oliver Wolcott (8 Sept.1797), *Wolcott Papers* 1:230, 231; *accord Pinckney* 124-25.

²⁷⁴ Edward Rutledge to Thomas Jefferson (12 Oct.1795), *Jefferson Papers* 28:502; Edward Rutledge to Thomas Jefferson (30 Apr.1796), *ibid* 29:92; *accord*, Edward Rutledge to John F Grimke (22 Oct.1798), 'Grimke Family Papers, 1761-1866' (SCHS Ms.1040.00).

²⁷⁵ New York Argus (New York July 30, 1795), reprinted in *Hamilton Papers* 18:510-11 n3; *Federalism* 526.

²⁷⁶ *South-Carolina State-Gazette* (Charleston 17 July 1795), *DHSC* 1:765, 766, 767.

²⁷⁷ *Ibid* 767n.

²⁷⁸ *DHSC* 1:768 n7.

²⁷⁹ *Journal of Executive Proceedings-Senate* (4th Cong., 1st sess.) (15 Dec.1795) 1:195-96.

²⁸⁰ George S McCowan, 'Chief Justice John Rutledge and the Jay Treaty' (1961) 62 *South Carolina Historical Magazine* 10, 23.

²⁸¹ Camillus [Alexander Hamilton], 'The Defence No.V' *Argus* (New York 5 Aug.1795) 2-3; *DHSC* 1:776.

²⁸² John Adams to Abigail Adams (17 Dec.1795), *DHSC* 1:813.

my astonishment I am told, that John Rutledge has had a tender of the office of Chief-Justice²⁸³--a 'driveller and fool appointed Chief Justice.'²⁸⁴ Randolph pressed Washington to withhold a commission.²⁸⁵ Then-Senator Ellsworth was shocked that 'J.R. should act like the devil,'²⁸⁶ Senator Trumbull called him 'dementated,'²⁸⁷ and Senator Read's brother objected to Rutledge's 'mad frolicks.'²⁸⁸ Davie, who would join Ellsworth as envoy to France, wondered if the 'Chief Justice raves on the bench as he does at a town meeting.'²⁸⁹ Rutledge was equally embraced by Republicans, beyond the senators voting for him, such as Chancellor Livingston, who was 'sorry for the mortification Rutledge will feel in being made the sport of a party.'²⁹⁰

Rutledge's worst enemies became the Federalist newspapers,²⁹¹ and his best friends were the Republican ones,²⁹² in the stormy five months between his speech and his Senate rejection. Widely reprinted Federalist articles branded his speech 'the silliest expressions that ever fell from human lips,' conferred satirical awards from 'French Republicans composing the Society of Sans Culottes,' condemned him as 'not very far above mediocrity' and immoral, described his past as 'fraudulent,' and just before the vote, proclaimed him 'a Republican,'²⁹³ and after as 'deranged in his mind.'²⁹⁴ Republican newspapers, equally fervent, praised Rutledge as a 'sage

²⁸³ Oliver Wolcott to Alexander Hamilton (28 July 1795), *Wolcott Papers* 1:219.

²⁸⁴ Oliver Wolcott to Alexander Hamilton (30 July 1795), *Hamilton Papers* 18:526, 531.

²⁸⁵ *DHSC* 1:772, 773, 776.

²⁸⁶ Oliver Ellsworth to Oliver Wolcott (15 Aug.1795), *Wolcott Papers* 1:225.

²⁸⁷ Jonathan Trumbull to John Trumbull (4 Mar.1796), *DHSC* 1:842.

²⁸⁸ William Read to Jacob Read (27 July 1795), 'Read Family Papers, 1787-1869' (SCHS ms.1088.00).

²⁸⁹ William R. Davie to James Iredell (4 Sept.1795), *Iredell Correspondence* 2:454.

²⁹⁰ Robert R. Livingston to Edward Livingston (20 Dec.1795), *DHSC* 1:815.

²⁹¹ E.g., *Federal Orrery* (Boston 6 Aug.1795), *DHSC* 1:777.

²⁹² E.g., *Independent Chronicle* (Boston 10 Aug.1795), *DHSC* 1:778; 'Society of the Sans-Culottes' *Independent Gazetteer* (Philadelphia 14 Aug.1795), *ibid* 1:781; *Independent Chronicle* (Boston 17 Aug.1795), *ibid* 1:783; *Independent Chronicle* (Boston 20 Aug.1795), *ibid* 1:784; *Aurora* (Philadelphia 21 Aug.1795), *ibid* 1:784; 'My Country's Friend,' *Citizens' Independent Chronicle* (Boston 27 Aug.1795), *ibid* 1:787; A South Carolinian, 'John Rutledge, Vindicated' *Columbian Centinel* (Boston 28 Aug.1795), *ibid* 1:789.

²⁹³ 'Vindication of the Treaty' *American Minerva* (New York 5 Aug.1795) 2; 'To Citizens Rutledge and Pinckney' *New-Jersey Journal* (Elizabethtown 19 Aug.1795) 3; Real Republican, 'To His Honor John Rutledge' *American Mercury* (Hartford 31 Aug.1795) 2; 'Mr. Rutledge' *Courier* (Boston 10 Oct.1795) 119; 'Extract of a Letter' *Dunlap's American Daily Advertiser* (11 Dec.1795) 3; e.g., *DHSC* 1:802, 805, 813.

²⁹⁴ E.g., 'December 24' *American Minerva* (New York 24 Dec.1795) 2; 'December 24' *Herald* (New York 26 Dec.1795) 2; [No Caption] *Federal Intelligencer* (Baltimore 30 Dec.1795) 3.

republican,²⁹⁵ lauded him as an 'illustrious patriot,' and countered the detractors.²⁹⁶ Edward Rutledge, outraged by the vote,²⁹⁷ lambasted 'that rascal Cobbett,'²⁹⁸ a leading Federalist editor.

Not surprisingly, the Rutledges moved closer to the Republicans, and Edward Rutledge is sometimes said to have become a Republican.²⁹⁹ In the election of 1796, Edward Rutledge strongly supported Jefferson over Adams,³⁰⁰ and in the electoral college, he and John Rutledge, Jr. were electors for Jefferson³⁰¹ (for whom all eight electors from South Carolina bestowed their votes in preference to Adams³⁰²), though a friend perceptively predicted 'remorse at having separated from the federalist party.'³⁰³ Jefferson was a longstanding friend of both John Rutledge, Sr.³⁰⁴ and Edward Rutledge.³⁰⁵ However, Edward Rutledge's flirtation with Jeffersonianism was short lived, and he was a committed Federalist in 1798,³⁰⁶ even if occasionally heretical, supporting his Federalist nephew's campaign against a Republican challenger,³⁰⁷ and jettisoning his earlier Francophilia.³⁰⁸ His brother, John Rutledge, simi-

²⁹⁵ E.g., 'Charleston, July 17' *Mercury* (Boston 7 Aug.1795) 1; 'Charleston July 17' *Independent Gazetteer* (Philadelphia 1 Aug.1795) 3.

²⁹⁶ [No Caption] *Independent Chronicle* (Boston 10 Aug.1795), *DHSC* 1:778; e.g., 'A Correspondent Observes' *Aurora* (Philadelphia 8 Sept.1795) 2; *DHSC* 1:783, 784, 787, 788, 789, 795, 800, 822, 823, 824, 826.

²⁹⁷ *Federalism* 527.

²⁹⁸ Edward Rutledge to John Rutledge, Jr. (13 Dec.1797), *Rutledge Jr. Papers-UNC*.

²⁹⁹ E.g., Joanne B Freeman, *Affairs of Honor* (YUP, New Haven 2001) 223; *Prologue* 111; *South Carolina* 122, 135.

³⁰⁰ William Smith to Ralph Izard (8 Nov.1796), *Federalist Correspondence* 784, 785; see William Smith to Ralph Izard (3 Nov.1796), *ibid* 781, 782; *Federalism* 525-26.

³⁰¹ South Carolina Certification (1796 election), 'Records of the U.S. Senate' (National Archives, Washington, Rec. Group 46, SEN4A-H1); Elizabeth Cometti, 'John Rutledge, Jr., Federalist' (1947) 13 *Journal of Southern History* 186, 188.

³⁰² *The Presidential Counts* (Appleton, New York 1877) 6.

³⁰³ Gabriel Manigault to Nn (22 Dec.1796) 3, 'Gabriel Manigault Papers, 1775-1839' (SCHS call no. 1068.02.02).

³⁰⁴ *Jefferson Papers* 3:179, 415; 7:283; 11:405; 12:287, 461; 13:41, 374, 426; 14:278, 577; in addition to Jefferson's help to Rutledge's son.

³⁰⁵ *Ibid* 10:463; 11:587; 12:225, 263; 13:377; 15:11, 451; 16:600; 22:12, 73, 201; 23:544; 24:373; 27:336, 638; 28:502, 541; 29:92, 231, 356, 386, 455.

³⁰⁶ *Prologue* 164; *Pinckney* 203; *Federalism* 528.

³⁰⁷ Edward Rutledge to Nn. (nd 1798), *Rutledge Jr. Papers-UNC*.

³⁰⁸ 'Governor Rutledge's Speech' *City Gazette* (Charleston 27 Dec.1798) 2; *Pinckney* 204.

larly remained a Federalist, or at least Iredell saw nothing amiss when visiting him in 1798,³⁰⁹ nor did others lamenting his death.³¹⁰

The underlying issue causing Rutledge's rejection has even greater implications for his position on the Sedition Act than his ostracism from the Federalist party. The Senate denied confirmation because of Rutledge's criticism of the administration and its measures, and because that amounted to seditious libel. His lone Federalist supporter in that Senate vote wrote, immediately after, that Rutledge 'head[ing] a tumultuous assembly which if repeated cou'd not fail to unhinge all order & destroy our Gouvernement [*sic*] was the true & real objection & in this the friends of order were immovable'--Rutledge's actions would 'totally destroy all gouvernement' [*sic*].³¹¹ Vice President Adams saw the issue in the same light, writing to his wife that the Senate's basis was that 'C. Justices must not go to illegal meetings and become popular orators in favour of sedition, nor inflame the popular discontents which are ill founded'; they must not go to 'unlawful assemblies to spout reflections [on government] and excite opposition to the legal acts of constitutional authority. . . .'³¹² It would have been supremely difficult, at best, for Rutledge in 1798 to approve of a Sedition Act that his exercise of free speech would have violated, that codified the basis of his rejection and humiliation, and that was sponsored by a party that virtually drummed him out and ridiculed him.

The objugation suffered by John Rutledge caused most Federalist opponents of the Jay Treaty to keep public silence and to confine opposition to private correspondence.³¹³ That also doubtless influenced Federalist opponents of the Sedition Act, three years later, as they avoided public statements and, other than votes, left only private letters disapproving the Act.

³⁰⁹ James Iredell to Hannah Iredell (11-12 May 1798), *DHSC* 3:264; James Iredell to Hannah Iredell (18 May 1798), *ibid* 3:272.

³¹⁰ Christopher Gadsden to John Adams (11 Mar. 1801), *Gadsden Writings* 2:305, 306.

³¹¹ Jacob Read to Ralph Izard (19 Dec. 1795), *DHSC* 1:814.

³¹² John Adams to Abigail Adams (17 Dec. 1795), *ibid* 1:813; John Adams to Abigail Adams (16 Dec. 1795), *ibid* 1:812.

³¹³ E.g., James Habersham, Jr. to Nn. Habersham (30 Mar. 1797), 'Preston Davie Collection' (UNC-SHC Series D, Item 224, Collection No. 3406).

The storm of censure in 1795 also made it unlikely that Rutledge himself would again publicly criticize a Federalist measure; his brother's criticism of the Sedition Act was certainly private.

There is one other theoretical explanation to consider for John Rutledge's public silence on the Sedition Act, besides opposition to it: his declining health in the late 1790s. After his Senate rejection, he suffered depression that fed rumors of insanity³¹⁴ and he made two suicide attempts.³¹⁵ However, by the summer of 1796 'his health is said to be mended.'³¹⁶ Two months before the Sedition Act passed, a physician who knew Rutledge's earlier condition,³¹⁷ Dr. William Read, told his brother, Sen. Jacob Read (who cast the lone Federalist vote for Rutledge) that 'I was this day at Mr. Rutledge[']s to visit Master States--the old gentleman was very chatty & communicative.'³¹⁸ Two weeks later, Justice Iredell, who had twice ridden much of the 2,000 mile circuit with Rutledge,³¹⁹ visited him (one of several times) and wrote that he had come out of seclusion and 'is perfectly recovered.'³²⁰ Two weeks after the Act passed, Thomas Pinckney told Rutledge Jr., who had been in Philadelphia and Newport for months, that 'your father has been occasionally less well than his friends wish,'³²¹ but reported nothing more dire. A few months after the Sedition Act, John Rutledge stood successfully for the state legislature, and participated actively in the late 1798³²² and late 1799 sessions, voting, chairing a committee, and being seen around town.³²³ Whatever the nature of Rutledge's breakdown after his December 1795 rejection, he was substantially recovered in and

³¹⁴ James Madison to Thomas Jefferson (7 Feb.1796), *Jefferson Papers* 28:606, 607; [Thomas Jefferson], Notes of a Conversation with Edmund Randolph (nd), *ibid* 28:568.

³¹⁵ William Read to Jacob Read (29 Dec.1795), *DHSC* 1:820.

³¹⁶ William L. Smith to Herman LeRoy (15 July 1796), 'William L. Smith Papers' (DUL), quoted in George C. Rogers, *Evolution of a Federalist: William Loughton Smith* (USCP, Columbia 1962) 288.

³¹⁷ *DHSC* 1:820.

³¹⁸ William Read to Jacob Read (27 Apr.1798), 'Read Family Papers, 1787-1869' (SCHS ms.1088.00).

³¹⁹ *DHSC* 2:536.

³²⁰ James Iredell to Hannah Iredell (11 May 1798), *Iredell Correspondence* 2:527, 528, 527; accord *DHSC* 3:263, 272; *Warren* 1:135 n1.

³²¹ Thomas Pinckney to John Rutledge, Jr. (1 Aug.1798), *Rutledge Jr. Papers-UNC*.

³²² 'Legislature of South-Carolina' *City Gazette & Daily Advertiser* (Charleston 4 Jan.1799) 3; *Rutledge* 260.

³²³ E.g., Charles Fraser, *Reminiscences of Charleston* (John Russell, Charleston 1854) 87.

after July 1798, though chastened about publicly speaking against Federalist orthodoxy.

Thus, John Rutledge began a trajectory in 1795, with a vehement speech opposing Federalist orthodoxy in the form of the Jay Treaty, that led to his rejection as chief justice by every Federalist senator but one (and support by every Republican) and that led to his brother Edward Rutledge becoming a Republican or at least coming close, for a time. That trajectory continued with ostracism from the Federalist party and in 1798, when the next test for Federalist orthodoxy loomed in the form of the Sedition Act, Edward Rutledge privately opposed it, as did the other leader of the Rutledge-Pinckney faction, Charles Cotesworth Pinckney, 'his friends,' and the sizable number of other Federalists, mostly southern, who were described above. The Rutledges cannot have failed to notice that the fateful speech, their opposition to the Jay Treaty, and their amity toward France would have been criminalized by the Sedition Act, if it had been enacted before 1798. John Rutledge is not likely to have had his first policy disagreement with his brother, in their thirty years of political partnership, over the Sedition Act. The earlier fights John Rutledge had led, in favor of a grant to John Wilkes to support freedom of press and speech, and in support of a newspaper editor when prosecuted for publishing a dissent, predisposed his principles to be in conflict with the Act. All indications, except the post-1797 zeal of his son, point toward his intellectual dissonance with the Sedition Act, like his brother, their colleague Pinckney, and many other southern Federalists.

D Justice James Wilson and the Sedition Act

Wilson appears not to have discussed the Sedition Act, though he lived just over a month after its passage, because he was ill from malaria and 'too weak to attempt' to write during that period.³²⁴ However, his final and most considered interpretation of the First Amendment and the rest of the Constitution, his advocacy of natural rights and antiBlackstonian views, his numerous other departures from Federalist orthodoxy ranging from democracy to treason, and his

³²⁴ Hannah Wilson to Bird Wilson (28 July 1798), *Wilson Writings* 2:535. He wrote only one preserved letter in that period, James Wilson to Bird Wilson (4 Aug. 1798), *ibid* 2:537, which like his other 1798 correspondence dealt with his financial problems. 'James Wilson Papers' (HSP) 6:1-10.

mentor's and colleagues' positions, all dictated rejection of the constitutionality of the Act.

1 Final Position on Freedoms of Press and Speech and on Seditious Libel

Wilson stated his fully-evolved understanding of the First Amendment in 1790-1791, when he wrote in his law lectures that '[t]he citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures.'³²⁵ The 'decency and truth' limitation meant, in context, avoidance of defamation of character, rather than avoidance of seditious libel, as discussed in Chapter 4.D.³²⁶

In a later law lecture, Wilson mentioned the English common law of seditious libel, characterizing it as an 'unwarranted attempt made in the star chamber. . . to wrest the law of libels to the purpose of ministers,' and warned that 'the reasonings on this crime are inaccurate.'³²⁷ The wrongly reasoned case that he cited as 'the foundation of the law on this subject' was *Case de Libellis Famostis*,³²⁸ and Wilson repudiated each of its major holdings described by Coke: 'that a libel against a magistrate or other publick person, is a greater offence than one against a private man' (which 'cannot be rationally admitted'), 'that it is immaterial whether the libel be false or true' (which was 'clearly extrajudicial' and contrary to the rule in civil actions), and that the 'provocation and not the falsity. . . is the thing to be punished criminally' (as defended by Blackstone, which 'very principle is mistaken,' since the defamation of character is the only valid offense).³²⁹ The first point of disagreement, that libel against a government official is a greater offense than against a private person, effectively rejected seditious libel as an offense at all, instead limiting the offense to defamation of character. In summary, Wilson stated that 'the reasonings on this crime are inaccurate,' particu-

³²⁵ James Wilson, 'Lectures on Law' (1790-91), *Wilson Works* 2:1046; accord *ibid* 1:36, 48, 50, 176, 539; 2:907, 952.

³²⁶ *Ibid* 2:1062-63.

³²⁷ *Ibid* 2:1134, 1135.

³²⁸ *Ibid* 2:1134 note k.

³²⁹ *Ibid* 2:1134-35.

larly those of Blackstone, and added a final example, the commentator's dictum that juries may only consider 'the making or publishing of the book or writing,' while judges should determine 'whether the matter be criminal' (something that is 'remote from a question of law' to be 'taken from juries').³³⁰ In essence, Wilson rejected the Mansfield-Blackstone approach to seditious libel, including most of the six unique rules for that crime, and carried that to its logical conclusion by entirely excluding seditious libel from his lengthy section on crimes.³³¹

Wilson's 'right to think, to speak, to write, to print, and to publish freely' except for defamation of character 'concerning publick men, publick bodies, and publick measures' demanded rejection of the Sedition Act, which prohibited almost precisely that ('writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or . . . Congress . . . , or the President'). Both Wilson and the Act disallowed falsehood, but there the overlap ended, because Wilson only listed as criminal a falsehood against character, not a falsehood against government officials or measures. Hence, he did not list seditious libel as a crime at all. Wilson's approach was not casual or tentative, but was carefully laid out in written versions of lectures, as he obviously aspired to become the American counterpart of Blackstone or Coke or Hale, and there is no evidence of his changing positions on freedom of press or speech or on seditious libel after 1791.

It is true that Wilson's position on seditious libel in the 1790-1791 law lectures, as well as in the 1789 Pennsylvania constitutional convention, diverged sharply from his 1787 speeches after the Constitutional Convention and at Pennsylvania's ratification convention (Chapter 4.D). What intervened was congressional approval of the First Amendment, and Wilson's refinement and formalization of his thinking, perhaps influenced by the 1788 *Oswald* case and the 1789 Franklin satire. His law lectures were his final opinion on expression and libel.

³³⁰ *Ibid* 2:1135-36.

³³¹ *Ibid* 2:1085-1204.

2 Stances on Natural Rights, Sovereignty, and Blackstone

Wilson's positions on freedoms of press and speech and on seditious libel were not idiosyncratic caprice, but instead were rooted in his beliefs on natural rights and on sovereignty. He began his lecture on natural rights, after expressing the common belief that such rights were conferred by God or nature,³³² with an assault on Blackstone's 'fallacious' concept that natural rights were surrendered to government in trust or were sacrificed in part to obtain governmental protection.³³³ Instead, natural rights were based on 'the stable foundation of nature' and not the 'precarious and fluctuating basis of human institutions,'³³⁴ a point again accompanied by denunciation of Blackstone.³³⁵ The function of government was not to grant but 'to secure and to enlarge the exercise of the natural rights,' and failing that it 'is not a government of the legitimate kind.'³³⁶ Such natural rights included rights to life or safety, liberty, property, and character, in Wilson's view,³³⁷ the latter of which was most threatened by falsehood, which Wilson later described as central to libel.³³⁸ Wilson concluded his lecture on natural rights by answering his opening question: 'man does not exist for the sake of government, but government is instituted for the sake of man.'³³⁹

Wilson's views on natural rights had strong implications for the future Sedition Act: what Wilson found paramount was natural rights including liberty which government existed to secure, not government officials or measures to which individuals must surrender rights or serve. Wilson found the right of private character important enough to be a fourth category of natural right, and its violation like violations of life, liberty, and property to be a crime.³⁴⁰

³³² *Ibid* 2:1054, 1055; accord *ibid* 2:1066.

³³³ *Ibid* 2:1054, 1055; accord *ibid* 2:1056, 1057.

³³⁴ *Ibid* 2:1056; accord *ibid* 2:1061; 1:39, 214, 638.

³³⁵ And Burke, *ibid* 2:1056-57.

³³⁶ *Ibid* 2:1061; accord *ibid* 2:1082.

³³⁷ *Ibid* 2:1062; accord *ibid* 2:1056-57.

³³⁸ *Ibid* 2:1062; accord *ibid* 2:1135.

³³⁹ *Ibid* 2:1083, 1053; accord *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 461, 455 (1793); *DHSC* 5:127.

³⁴⁰ *Ibid* 2:1130-36.

By contrast, he entirely omitted any right of government not to be reflected upon critically, or not to be divided from the affections of its subjects, or any crime of seditious libel from his lengthy discussion of crimes³⁴¹ (his only reference there to seditious libel was to the 'unwarranted attempt made in the star chamber').

The frequent references to Blackstone were not coincidental. Wilson regularly cited and excoriated 'his *bête noire*'³⁴² and the *Commentaries* in discussing rights and government,³⁴³ from the first lecture onward. In that first lecture, Wilson warned that he differed from Blackstone on some important principles, that Blackstone was not very friendly to republicanism, and that 'he ought not to be implicitly followed.'³⁴⁴ In this context, it is not surprising that Wilson did not adopt Blackstone's treatment of seditious libel, but citing it, said that the discussion 'flows from a wrong principle and is referred to a wrong end.'³⁴⁵

Wilson focused that first law lecture on 'the *vital* principle' of sovereignty, contrasting his belief that 'the supreme or sovereign power of the society resides in the citizens' with Blackstone's assumption that it resides in the Crown.³⁴⁶ That premise not only determined the source of individual liberties, but whether the people have a right to change government including by revolution, which Wilson affirmed while disapproving Blackstone's position.³⁴⁷ In view of such fundamental differences on sovereignty, Wilson asserted that 'many parts of the laws of England can... have neither force nor application here,' and in later lectures he applied the point to parts of the common law.³⁴⁸ Similarly, in the next lecture Wilson rejected the definition of law as 'prescribed by some superiour,' and the concept of superiority

³⁴¹ *Ibid* 2:1087-1204.

³⁴² Robert G McCloskey (ed), 'Introduction,' Robert G McCloskey (ed), *The Works of James Wilson* (HUP, Cambridge 1967) 1:39, 50.

³⁴³ *Wilson Works* 1:471-74, 549, 552-53, 580, 720, 739; 2:1049, 1054, 1113; accord *Chisholm*, 2 U.S. at 458, 460, 462.

³⁴⁴ *Ibid* 1:443-44.

³⁴⁵ *Ibid* 2:1133 &n.

³⁴⁶ *Ibid* 1:440-41, 441-42; accord *Chisholm*, 2 U.S. at 454, 458.

³⁴⁷ *Ibid* 1:443, 442, 441-42, 689.

³⁴⁸ *Ibid* 1:446, 35; 2:784.

of rulers, citing Blackstone as the font of 'dangerous' concepts; Wilson offered instead the requirement that human law is valid only with consent of the governed.³⁴⁹ As with rights, primacy went not to government or rulers, but to the people. Many of these themes reappeared in Wilson's longest Supreme Court opinion in 1793, as indicated in the footnotes.

The implications for the Sedition Act became clear as Wilson ended the law lectures with criminal law, but did not list seditious libel as a proper crime but as a Star Chamber corruption.

3 Other Departures from Federalist Orthodoxy

Wilson departed from Federalist orthodoxy on a wide range of additional issues. Aside from his support of some Hamiltonian programs such as a national bank, and his use of implied powers to justify them (though limited to carrying out enumerated powers),³⁵⁰ Wilson was closer to the radical Whigs³⁵¹ and to Jefferson on the following positions, and others.³⁵²

Wilson had been the only thoroughgoing advocate of democracy--of direct election of the President, Senate, and House and of proportional representation--at the Constitutional Convention.³⁵³ He favored a broad-based electorate, repeatedly using the analogy of a pyramid,³⁵⁴ and more generally, he welcomed what a recent scholar terms 'pluralism as the basis for national identity.'³⁵⁵ That democratic focus carried strong implications for seditious libel. If government was valid only because of consent of the people,³⁵⁶ their consent if real required a right to refuse consent, which amounted to a right to disagree with government. In a

³⁴⁹ *Ibid* 1:471, 473, 496; accord *Chisholm*, 2 U.S. at 458, 456, 458.

³⁵⁰ James Wilson, 'Comments on the Bank of North America' (1785), *Wilson Works* 1:60, 65-66; *Farrand's Records* 2:615; accord *Chisholm*, 2 U.S. at 453, 457, 465 (nationalism).

³⁵¹ E.g., *Chisholm v. Georgia*, 2 U.S. at 439, citing Francis Hotoman, *Franco-Gallia* (Edward Valentine, London 1721)(also repr 1775), whose preface by Molesworth was 'the liveliest definition of a Real Whig.' *Robbins* 88; accord *Clark* 17; *Scott-Commonwealth* 192.

³⁵² Geoffrey Seed, *James Wilson* (KTO Press, Millwood 1978) 180-82.

³⁵³ *Farrand's Records* 1:68, 52, 49, 179; accord *Wilson Works* 1:82, 92, 93, 94, 101-02, 104, 115, 165; see 'Notes of the Debate in the Pennsylvania Convention Taken by James Wilson' (Nov.-Dec.1787), John B McMaster and Frederick D Stone (eds), *Pennsylvania and the Federal Constitution 1787-1788* (HSP, Philadelphia 1888) 2:765, 766, 767.

³⁵⁴ *Wilson Works* 1:82, 299; 2:833.

³⁵⁵ William Pencak (ed), *Pennsylvania's Revolution* (PSUP, University Park 2010) 258.

³⁵⁶ *Wilson Works* 1:47, 92, 191, 201, 235; accord *Chisholm*, 2 U.S. at 455, 456, 462, 463.

government based on consent of the people, peaceful disagreement could not be a crime.

Wilson denied that an aristocracy of virtue or talent was entitled to rule, other than if 'elected for the exercise of authority' by the consent of the governed,³⁵⁷ just as he denied that law was 'prescribed by some superiour.' In his view, 'this notion of superiority contains the germ of the divine right . . . of princes, arbitrarily to rule,' and being 'absurd and ridiculous,' conferred no 'right of prescribing laws.'³⁵⁸

His references to sedition equated it with violent conduct, not disagreement with government. In his first reference in preserved essays and letters, in 1776, Wilson exclaimed that 'even this peaceful expedient,' the nonimportation agreement, was treated 'by high authority too, as a seditious and unwarrantable combination.'³⁵⁹ In 1780, he asked in defending his speech deriding and opposing Pennsylvania's 1776 constitution, 'has anything seditious appeared in my conduct or attempts? Have I endeavored to attain my ends by violence? My only aim has been to accomplish this by the consent and authority of the citizens of the state.'³⁶⁰ Criticism of government was permissible; only sedition amounting to violent actions was proscribable.

Wilson, like Rutledge and like Jay for a time, was decidedly pro-French, as the emerging parties divided over England and France. In 1793, Wilson charged a grand jury that 'the voice of all France is responsive to the language of our national Constitution,' and that 'a shout of acclamation' sounded when 'the decree was pronounced, that the lives and fortunes of twenty five millions of men should not be at the disposal of a single individual,' Louis XVI.³⁶¹ By contrast, most other early justices, except Rutledge and in part Jay, hewed to the Federalist party line of Gallophobia,³⁶² such as Cushing's warning against 'the dangerous tendency of jacobin princi-

³⁵⁷ *Ibid* 1:476, 572; *accord ibid* 1:477.

³⁵⁸ *Ibid* 1:472, 477, 501; *accord ibid* 1:572-73.

³⁵⁹ James Wilson, 'An Address to the Inhabitants of the Colonies' (1776), *Wilson Works* 1:46, 51.

³⁶⁰ James Wilson, 'To the Citizens of Pennsylvania' (18 Oct. 1780), *Wilson Writings* 1:114, 118.

³⁶¹ James Wilson's Charge (U.S. Cir. Ct. Pa. 22 July 1793), *DHSC* 2:414, 423.

³⁶² *DHSC* 3:158 (Ellsworth), 3:230 (Paterson), 3:230, 261 (Iredell), 3:306, 308-09, 310, 312, 313 (Cushing); *Federalism* 673 (Ellsworth); *McHenry Correspondence* 203 (Chase).

ples' that produced an 'alarming political situation of the United States.'³⁶³

Wilson similarly departed from Federalist orthodoxy in not accepting a federal common law of crimes. In several grand jury charges, he listed the statutory crimes of the federal government, then identified the role of the common law as providing 'definition of those crimes.'³⁶⁴ In another charge, he 'enumerated. . . the crimes and offences known to the constitution and laws of the United States,' and then contrasted the 'few. . . crimes' with the 'dismal list' of 160 capital felonies and the nearly innumerable other crimes under common law.³⁶⁵

He also gave broad latitude to juries, as Jay had, instructing them that they were 'the ultimate interpreters of the law, with a power to over-rule the directions of the judges.' Particularly in criminal cases, 'the question of law is so intimately and inseparably blended with the question of fact, that the decision of the one necessarily involves the decision of the other.'³⁶⁶

Wilson guarded the rights of criminal defendants, calling for 'liberty as the principle' governing the system, clear laws drawing unmistakable lines around criminal conduct, moderation of punishment, and avoidance of England's 'ensanguined' example.³⁶⁷ He decried 'Crimes against the state! and against the officers of the state!', on which 'more wrong' had been done in history than any other subject, and overinclusive treason laws by which 'a very great part of their tyranny over the people has arisen.'³⁶⁸

Finally, with obvious implications for his position on the future Alien Acts that accompanied the Sedition Act, Wilson censured England for its 'feudal system' of restricting alien friends, and praised the 'very different spirit' that pervaded America, where aliens could be-

³⁶³ *DHSC* 3:278 (Cushing).

³⁶⁴ James Wilson's Charge (U.S.Cir.Ct.Pa. 21 Feb.1791), *DHSC* 2:142, 144-52, 147, 150; accord *ibid* 2:42-44, 176.

³⁶⁵ James Wilson's Charge (U.S.Cir.Ct.Va. 23 May 1791), *DHSC* 2:166, 181, 189.

³⁶⁶ James Wilson's Charge (U.S.Cir.Ct.Pa. 12 Apr.1790), *DHSC* 2:33, 38-39.

³⁶⁷ James Wilson's Charge (U.S.Cir.Ct.Va. 23 May 1791), *DHSC* 2:166, 190, 190-91, 167-68, 167; James Wilson's Charge (U.S.Cir.Ct.Mass. 7 June 1793), *ibid* 2:396, 402.

³⁶⁸ *Elliot's Debates* 2:469, 487; accord *Wilson Works* 2:1150-52; *DHSC* 2:42, 145, 187.

come citizens in two years and public officials in seven.³⁶⁹ He had sought to abolish minimum citizenship periods for holding office at the Constitutional Convention,³⁷⁰ noting that he and half the Pennsylvania delegation were not American-born, and that 'inviting meritorious foreigners among us' was beneficial while 'degrading discrimination' drove away talent.³⁷¹

Wilson was criticized by Federalists for many of these positions, whether at the Constitutional Convention on democracy or elsewhere for his attacks on Blackstone.³⁷² He was bypassed by President Washington in nominating new chief justices in 1795 and 1796,³⁷³ after initial nominations of the most senior justice or former justice. Yet Wilson remained unshaken in his unorthodoxy. Certainly these departures from Federalist orthodoxy represent only a portion of his thinking, which can best be reviewed in Hall's summary.³⁷⁴ Still, it is impossible to imagine their exponent upholding the Sedition Act.

4 Opposition to the Sedition Act by Friends and Family

Wilson's law training occurred under John Dickinson,³⁷⁵ with whom he remained 'lifelong friends.'³⁷⁶ During those studies, Dickinson published his *Address*, stating that rights came 'from a higher source' than government--from God and natural law--and 'cannot be taken from us by any human power.'³⁷⁷ Just after Wilson's studies ended, Dickinson published his renowned *Letters from a Farmer*, proclaiming the right to freedom and denying Parliament's jurisdiction over many issues, with an argument Wilson adopted and extended in

³⁶⁹ *Wilson Works* 2:1052, 1050-51, 1051.

³⁷⁰ *Farrand's Records* 1:379-80; 2:230, 268, 272.

³⁷¹ *Ibid* 2:269, 237.

³⁷² E.g., John S. Littell (ed), *Memoirs of His Own Time, by Alexander Graydon* (rev ed Lindsay & Blackiston, Philadelphia 1846) 404.

³⁷³ *DHSC* 1:837, 838, 840, though Wilson's debts also were factors.

³⁷⁴ Mark D. Hall, *Political and Legal Philosophy of James Wilson, 1742-1798* (UMoP, Columbia 1997); Mark D. Hall, 'The Political and Legal Philosophy of James Wilson (1742-1798)' (PhD thesis, University of Virginia 1993).

³⁷⁵ *ANB* 23:586; *Wilson* 11.

³⁷⁶ Geoffrey Seed, *James Wilson* (KTO Press, Millwood 1978) 191 n4. Dickinson helped Wilson's advancement. Charles P. Smith, *James Wilson: Founding Father, 1742-1798* (UNCP, Chapel Hill 1956) 37, 170, 195.

³⁷⁷ North-American [John Dickinson], 'An Address to the Committee of Correspondence in Barbados' (William Bradford, Philadelphia 1766) 4.

his own essay the next year.³⁷⁸ It was Dickinson who formulated the first official statement listing 'freedom of the press' as one of Americans' 'invaluable rights,' in 1774.³⁷⁹ Wilson and Dickinson served together in the Continental Congress, and later at the Constitutional Convention, both being signers of the Constitution.³⁸⁰ In the 1790s, Dickinson opposed the Jay Treaty,³⁸¹ and shared Wilson's pro-French stance, publishing a series of letters and a pamphlet supporting France 'with transports of joy.'³⁸² By the late 1790s, Dickinson had become a zealous convert to the Republican party,³⁸³ and wrote to Jefferson in support of the Virginia Resolutions and of personal freedom.³⁸⁴ 'How incredible was it . . . that every measure and every pretence of the stupid and selfish Stuarts, should be adopted by the posterity of those who fled from their madness and tyranny to the distant and dangerous wilds of America?'³⁸⁵ Dickinson rivaled Wilson in zeal over liberty,³⁸⁶ including freedom of speech, noting that because of that commitment 'Republicans therefore, cannot in any consistency with the principles of their system, proscribe any of their fellow citizens, merely for a difference of political opinion.'³⁸⁷

Wilson's principal partner in the Pennsylvania ratification convention, Thomas McKean,³⁸⁸ had also been a colleague at the Continental Congress and a fellow signer of the

³⁷⁸ James Wilson, 'Considerations' (1768, 1774), *Wilson Works* 1:3.

³⁷⁹ 'Address to the Inhabitants of Quebec' (1774), *JCC* 1:117, 122-23, seeing it as a constitutional right, M. Embick Flower, *John Dickinson, Conservative Revolutionary* (UPV, Charlottesville 1983) 176.

³⁸⁰ *ANB* 6:566, 568; 23:587; *JCC* 33:500.

³⁸¹ *DHSC* 1:834 n1; *ANB* 6:568.

³⁸² Fabius [John Dickinson], *The Letters of Fabius* (Smyth, Wilmington 1797) 86; [John Dickinson], *A Caution* (Bache, Philadelphia 1798).

³⁸³ Charles J. Stille, *Life and Times of John Dickinson* (HSP, Philadelphia 1891) 280-96; e.g., John Dickinson to Thomas Jefferson (21 Feb. 1801), *Jefferson Papers* 33:31, 32; accord *ibid* 33:26, 34:590.

³⁸⁴ John Dickinson to Thomas Jefferson (18 Mar. 1800), *Jefferson Papers* 31:445; in response to a pamphlet containing the Resolutions, state responses, and Madison's Report, Thomas Jefferson to John Dickinson (7 Mar. 1800), *ibid* 31:417 & n.

³⁸⁵ *Ibid*; accord David L. Jacobson, *John Dickinson* (UCP, Berkeley 1965) 124-25.

³⁸⁶ Jane E. Calvert, *Quaker Constitutionalism and the Political Thought of John Dickinson* (CUP, Cambridge 2009) 304 *passim*, viewing dissent against injustice as a duty, *ibid* 201, 212, 216, 219, 287, 289-90, 295.

³⁸⁷ John Dickinson to Thomas Jefferson (27 June 1801), *Jefferson Papers* 34:464, 465.

³⁸⁸ *Pennsylvania* 12; *ANB* 15:97, 99. The two leaders' speeches were reprinted as *Commentaries on the Constitution of the United States of America* (Debrett, London 1792).

Declaration of Independence.³⁸⁹ They and Dickinson denounced Pennsylvania's Constitution of 1776, fought for its replacement in 1790, welcomed the French Revolution, and remained pro-French even in 1798.³⁹⁰ Even before Dickinson, McKean left the Federalist party around 1796, and equally opposed the Sedition Act as unconstitutional.³⁹¹

Wilson's eldest and only prominent child, Bird Wilson, who published his papers, also was a Republican by 1802, when he was appointed a state court judge³⁹² soon after Governor McKean limited appointments to the Republican party faithful.³⁹³ He was his father's son.

E Justice John Blair and the Sedition Act

Blair, one of the initial justices, was not one who questioned the constitutionality of the Sedition Act, though there is no evidence of his supporting the Act.

Two years after resigning from the Supreme Court, Blair appeared as foreperson of the Virginia grand jury that brought a presentment against Samuel Jordan Cabell, a Virginia member of Congress, in May 1797.³⁹⁴ The wording of the presentment, which Blair likely wrote, leaves little doubt that he believed the common law of seditious libel could be properly enforced by federal courts (though the Sedition Act would not appear until a year later):

We of the grand jury of the United States for the District of Virginia, present as a real evil the circular letters with the signature of Samuel J. Cabell, endeavoring at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom, and to [i]ncrease or produce a foreign influence ruinous to the peace, happiness and independence of these United States.³⁹⁵

The concepts that crimes included calumnies against the government, and attempts to sepa-

³⁸⁹ *JCC* 5:515.

³⁹⁰ *Pennsylvania* 225; *ANB* 15:97, 98, 99.

³⁹¹ GS Rowe, *Thomas McKean* (CAUP, Boulder 1978) 241-63, 264-87, 293; *Pennsylvania* 225, 227.

³⁹² James G. Wilson and John Fiske (eds), *Appletons' Cyclopædia of American Biography* (Appleton, New York 1888-89) 6:551; 'Philadelphia, Saturday Evening, March 1' *United States Gazette* (Philadelphia 1 Mar. 1806) 2.

³⁹³ *Pennsylvania* 263-68; *ANB* 15:97, 99.

³⁹⁴ *DHSC* 3:181 (22 May 1797). That it was the former justice is confirmed by Republican complaints. Scaevola, 'To James Iredell' *Daily Advertiser* (Richmond 11 June 1797), *ibid* 3:192, 193; [No Caption], *Aurora* (Philadelphia 21 June 1797), *ibid* 3:190.

³⁹⁵ *DHSC* 3:181; accord *ibid* 3:197.

rate the people from the government, were of course ingredients of the common law of seditious libel. What exercised Blair and the grand jury in Cabell's circular letter of January 1797 was the 'deep regret' at Adams' election--so that 'the patriotism of 76 and republicanism must sicken'--instead of the 'illustrious patriot' Jefferson, along with the agreement with the French minister that America's policy threatened war and the denunciation--for over half the letter's length--of 'the unwise, impolitic, nay, ungrateful sound of hostility with France' notwithstanding that 'the French *Republic* must be considered as the grand rallying point of the equal rights of man' and the decisive benefactor in the American Revolution.³⁹⁶

Though no action was taken by the federal attorney, Cabell and other Republicans were incensed at the threat of criminal action against a member of Congress' freedoms of speech and press.³⁹⁷ Cabell counterattacked with a public letter protesting violation of 'the freedom of opinion which a few years ago we fought and bled for,' and protesting Federalist judges' grand jury charges--particularly Iredell's--that 'complain of opinions which they seem to think tend to defeat their system of politics,' that make 'use of their power and influence both personally and officially to control the freedom of individual opinion,' and that 'shew a political influence over the judges by the executive' which imperils justice.³⁹⁸ Jefferson went still further, drafting a petition asking Virginia's legislature to take action, and initially suggesting it initiate proceedings to impeach the grand jurors for 'the crime committed.'³⁹⁹ His final version (which Virginia's lower house approved⁴⁰⁰) affirmed that 'the right of free correspondence between citizen and citizen. . . is a natural right of every individual citizen, not the gift of municipal law.'⁴⁰¹

³⁹⁶ 'From Samuel J. Cabell' (12 Jan.1797), *Circular Letters* 1:67, 70, 69; see 'From Samuel J. Cabell' (7 Mar.1796), *Circular Letters* 1:39.

³⁹⁷ E.g., Sen. Henry Tazewell to John Page (3 June 1797), *DHSC* 3:189; Thomas Jefferson to Peregrine Fitzhugh (4 June 1797), *ibid* 3:190; accord *ibid* 3:192, 199-200, 200-01, 203-04.

³⁹⁸ Samuel J Cabell, 'Fellow Citizens' *Aurora* (Philadelphia 31 May 1797), *DHSC* 3:183.

³⁹⁹ Thomas Jefferson, 'Petition to the Virginia House of Delegates' (ante-3 Aug.1797), *Jefferson Papers* 29:493, 497.

⁴⁰⁰ *Madison Papers* 17:34n.

⁴⁰¹ Thomas Jefferson, 'Petition to the Virginia House of Delegates' (ante-7 Sept.1797), *Jefferson Papers* 29:499, 502; accord Thomas Jefferson to James Monroe (7 Sept.1797), *ibid* 29:526.

Thus, the issue was quickly broadened to everyone's natural right of writing and speech.

This is quite different from the John Blair who Jefferson earlier had a high 'degree of confidence' would keep liberties safe, and who left the Court 'universally beloved.'⁴⁰² Blair's shift from his own jury charges, and from his commitment to Virginia's Declaration of Rights and proposal for a federal bill of rights, was noted by Virginia's Sen. Henry Tazewell as he was 'astonished' Blair's name appeared on the presentment.⁴⁰³ The cause of Blair's shift appears to have been alarm about the Whiskey Rebellion and then the 'real public danger' from France.⁴⁰⁴

That presentment was not the only place where Blair's name appeared. His last public act was to be listed as a proposed elector in the presidential election of 1800 on the 'American Republican Ticket.' Its name ostensibly came from being 'the most purely republican[s],'⁴⁰⁵ though it was really Virginia's Federalist party fleeing the national name.⁴⁰⁶ Blair's loyalty to the Federalists⁴⁰⁷ appears to have been undiminished by the Sedition Act, in the years between the grand jury presentment and the electoral ticket, and perhaps was augmented.

F Justice Thomas Johnson and the Sedition Act

Johnson's earlier years showed commitment to freedoms of press and speech. In the prewar years, Johnson was, like Jefferson, highly critical of Mansfield as part of the 'corrupt majority' opposing the colonies.⁴⁰⁸ During the Revolution, his proclamation curtailing the Whig Club's restraint of a free press was 'the first vindication of the liberty of the press in Maryland.'⁴⁰⁹ In the ratification convention, Johnson split from the federalist majority to support calls for a bill of rights with provision for freedom of press, and was the only early justice to do so publicly.

⁴⁰² Thomas Jefferson to James Madison (15 Mar.1789), *ibid* 14:659; Jeremiah Smith to William Plumer (5 Mar.1796), *DHSC* 1:843.

⁴⁰³ Henry Tazewell to John Page (3 June 1797), *DHSC* 3:189.

⁴⁰⁴ *DHSC* 3:31, 32, 35, 181; *cf. ibid* 2:485.

⁴⁰⁵ 'An Address to the Voters for Electors' (np, 26 May 1800).

⁴⁰⁶ *Chesapeake* 556-57.

⁴⁰⁷ John Adams to John Marshall (5 Sept.1800), *Marshall Papers* 4:258.

⁴⁰⁸ Thomas Johnson to Horatio Gates (18 Aug.1775), *Letters of Delegates* 1:702.

⁴⁰⁹ J Thomas Scharf, *The Chronicles of Baltimore* (Turnbull, Baltimore 1874) 161.

Johnson was not a typical Federalist in the 1790s. As the Jefferson-Hamilton conflict was reaching the boiling point and the political parties were coalescing, Jefferson recommended Johnson for the positions of secretary of state and secretary of the treasury.⁴¹⁰ (Washington actually offered him the former position, twice.⁴¹¹) Johnson later showed a similar comfort with Jefferson, by declining Adams' appointment as chief judge of the circuit court for the District of Columbia (one of the midnight judicial appointments),⁴¹² and making no effort to deliver his declination before Jefferson took office in March 1801⁴¹³ (though his home was less than fifty miles from the White House), which gave Jefferson the opportunity to fill the position. The year before in a eulogy at Washington's death, Johnson carefully avoided the Federalist position on France, condemning both 'British pride' and French despotism, and recognizing 'the injuries we have received from both sides.'⁴¹⁴

Jefferson's recommendation, out of all the potential candidates for those positions, raises the question why. Jefferson recognized that Johnson was a friend of Washington, but that was a reason against instead of a reason for Jefferson's recommendation, since much of the problem with Hamilton was friendship with Washington and his resulting disproportionate influence. Because Jefferson was discussing successors to himself for the first position and to his nemesis for the second, he had particular reason to limit his recommendation to someone compatible with his views. Evidently Jefferson saw that kindred spirit in Johnson.

Johnson disavowed party affiliation from at least late 1800 to 1810, though he was clearly an Adams Federalist earlier.⁴¹⁵ In standing for election to Congress in 1800, he as-

⁴¹⁰ Thomas Jefferson, 'Notes of a Conversation with George Washington' (6 Aug.1793), *Jefferson Papers* 26:627, 629; Thomas Jefferson to James Madison (2 Nov.1793), *ibid* 27:297, 298.

⁴¹¹ *Ibid*; George Washington to Thomas Johnson (24 Aug.1795), *Washington Papers-LOC*; Thomas Johnson to George Washington (29 Aug.1795), *ibid*.

⁴¹² Thomas Jefferson to Gabriel Duvall (13 Mar.1801), *Jefferson Papers* 33:267; accord *Marshall Papers* 6:90.

⁴¹³ *History of Supreme Court* 2:135 & n133.

⁴¹⁴ Thomas Johnson, 'Oration Delivered by Thomas Johnson' *Centinel of Liberty* (Georgetown 11 Mar.1800) 2, reprinted *Johnson* 500, 500, 503, 504.

⁴¹⁵ John Adams to Thomas Johnson (26 Apr.1798), *Adams Works* 8:572; Thomas Johnson to John Adams (8 Apr.1800), *ibid* 9:48, 49; Thomas Johnson to Mr.Thompson (1810), *Johnson Correspondence* 2-3.

sured voters that 'I never was an instrument in the hands of any man or party.'⁴¹⁶ As he stood unsuccessfully for selection as a presidential elector in 1804, and then as a governor's council member in 1810, he gave no party affiliation even though most electors listed a party.⁴¹⁷ Only later did he stand as a Federalist in 1812 for the governor's council, this time successfully--and soon his eldest son stood as a Republican in 1817 for the state legislature.⁴¹⁸ (Johnson's only biographer, ignoring these and other activities, incorrectly states that after April 1798 'he never emerged from seclusion.'⁴¹⁹)

That decided avoidance of the Federalist label also raises the question why. It is unlikely Johnson foresaw the Federalist congressional rout in 1800, since so few did until the votes were in and since the presidential election was widely expected to be as close as it actually was.⁴²⁰ The obvious explanation is that Johnson was disenchanted with Federalist policy. His amiable personality led him to remain on courteous terms with everyone including Pickering,⁴²¹ but that courtesy was not mutual. Pickering wrote scathingly about Johnson's brother, Joshua Johnson,⁴²² condemning Adams' nomination of him as commissioner of the stamp office in 1800, and reprehending that 'Jefferson gave the casting vote for Mr. Johnson' in the senate.⁴²³

Though Johnson's position on the Sedition Act has not survived in his limited remaining papers, his record on freedom of press, Jefferson's earlier recommendation, and his later dissociation from the Federalist label, imply discomfort and constitutional concern.

⁴¹⁶ Thomas Johnson, 'To the Freemen of the Fourth District' (np, 1800).

⁴¹⁷ 'American Election Returns 1787-1825' <http://elections.lib.tufts.edu/aas_portal/search.xq?new-search=true> accessed 16 Feb.2011. His 1801 candidacy for state senate did list the Federalist party, though that appears to have been assigned by vote tellers. *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Johnson* 506-07.

⁴²⁰ *Chesapeake* 559, 563 (Md. 5-5); John H Aldrich, 'Election of 1800,' in Kenneth R Bowling and Donald R Kennon (eds), *Establishing Congress* (OhUP, Athens 2005) 28-29.

⁴²¹ Thomas Johnson to Timothy Pickering (5 Oct.1808), *Pickering Papers* r.29, fol.107; Thomas Johnson to Timothy Pickering (9 Apr.1814), *ibid* r.15, fol.34.

⁴²² Paul C Nagle, *John Quincy Adams* (Knopf, New York 1997) 93; John Quincy Adams to Skelton Jones (17 Apr.1809), Adrienne Koch and William Peden (eds), *Select Writings of John and John Quincy Adams* (Knopf, New York 1946) 261, 266.

⁴²³ Timothy Pickering to Rufus King (28 May 1800), *King Correspondence* 3:248; accord Benjamin Goodhue to Timothy Pickering (2 June 1800), *ibid* 3:263, 264.

G Justice Alfred Moore's Refusal To Follow the Sitting Justices' Sedition Act Charges

Moore did not preside over any Sedition Act trials, after he joined the Supreme Court in early 1800, but the reason was not unavailability or chance. Instead, he avoided provoking cases under the Act, in contrast to Paterson, Chase, and Washington, whose grand jury charges focused on the Sedition Act and were immediately followed by presentments of violators. Instead, Moore consciously declined to follow that practice of the other sitting justices, and unlike them, refused to make reference to the Sedition Act at all. It is true that Iredell, Ellsworth, and Cushing did not preside over Sedition Act trials, but, unlike Moore, the first two focused grand jury charges on the Act, and only failed to provoke trials because they left the bench (Iredell died in October 1799, a month before Ellsworth sailed to France as envoy); Cushing gave tepid charges and was prematurely elderly. Contrasted with other justices, Moore's approach can only be described as an intentional refusal.

1 His Grand Jury Charge after Joining the Court

Moore's first circuit began with sessions in Savannah and Charleston,⁴²⁴ followed by sessions in Raleigh in June 1800 that are described in newspaper reports. That was Moore's first federal court in his home state, two months after the Durrell, Cooper, and Holt trials, a month after the Haswell trial, and two weeks after Callender was arrested. The reports began:

The Hon. Judge Moore arriving here in the afternoon of Tuesday last, the Circuit Court of the United States for this District proceeded to business on that evening[.] The Grand Jury being sworn, Judge Moore charged them with their duty; but, instead of expatiating at length on the several objects cognizable in that Court, and insisting on the necessity of carrying the Sedition Law into effect, in particular (as is usual) he barely reminded them of the oath they had taken to execute the trust reposed in them; said there was no necessity for them to take up their time in explaining the nature of their duty, which had been so often explained in that Court, and which they had doubtless frequently seen in the papers from various parts of the country, which would only tend to divert their minds from their proper business, referring them to the Attorney General of the District for legal information.⁴²⁵

⁴²⁴ *DHSC* 3:419, 424, 438.

⁴²⁵ [No Caption] *Raleigh Register* (Raleigh 10 June 1800) 1, reprinted *DHSC* 3:440; accord *Raleigh, (N.C.) June 10' City-Gazette* (Charleston 17 June 1800) 3.

Thus, unlike other Supreme Court justices on circuit, whose charges North Carolinians 'had doubtless frequently seen in the papers,' Moore 'barely' spoke of the grand jurors' oath, 'instead of . . . insisting on the necessity of carrying the Sedition Law into effect,' and apparently said that such charges or such papers 'would only tend to divert their minds from their proper business.' In other words, 'insisting on the necessity of carrying the Sedition Law into effect' was a diversion, not 'their proper business.'

The phrase 'instead of' referred to insistence on the 'Sedition Law,' a reading in which others concur,⁴²⁶ and any uncertainty about that is resolved by the context. The remainder of the article did not deal with any notable words Moore said about the Sedition Act, but with a case of a cabin-boy's death.⁴²⁷ Any words about the Sedition Act would have been deemed momentous news, because the *Raleigh Register* was a Republican paper,⁴²⁸ and the circuit court was the first local appearance of the state's son as a Supreme Court justice. The reprint in the *City-Gazette* from Charleston made the point as clearly, because that equally Republican paper (edited by the brother⁴²⁹ of Jefferson's protégé, Freneau) buried the article between reports of the ship *Iphigenia* arriving after being 'treated in the most friendly manner' by a French frigate, and the ship *Eugenia* arriving 'to stop a leak.'⁴³⁰ Even an intimation of Moore's endorsement of the Sedition Act would have been major news in North Carolina, where the lower house of assembly a year before opposed the Sedition Act, the senators were both Republicans, and the ten federal representatives included five Republicans and one independent.⁴³¹

2 Corroboration in Steele-Moore Correspondence and Death Notices

Moore's refusal to follow other justices supporting the Sedition Act is also implied in a

⁴²⁶ Delbert H Gilpatrick, *Jeffersonian Democracy in North Carolina, 1789-1816* (CUP, New York 1931) 108.

⁴²⁷ [No Caption] *Raleigh Register* (Raleigh 10 June 1800) 1; 'Raleigh, (N.C.) June 10' *City-Gazette* (Charleston 17 June 1800) 3.

⁴²⁸ *Opposition* 883.

⁴²⁹ Richard B Davis, 'Peter Freneau, Carolina Republican' (1947) 13 *Journal of Southern History* 395; *Tyranny* 407.

⁴³⁰ 'Norfolk, June 5' *City-Gazette* (Charleston 17 June 1800) 3; 'Savannah, June 2' *City-Gazette* (Charleston 17 June 1800) 3.

⁴³¹ *Origins-Parties* 218, 210; William Polk to John Steele (28 Nov. 1800), *Steele Papers* 1:190, 192.

1803 letter from John Steele, Moore's friend (according to the letter), to Nathaniel Macon, a longtime Republican member of Congress from North Carolina and the new Republican Speaker of the House,⁴³² who had been a leading Republican opponent of the Sedition Act.⁴³³ Steele, though a Federalist in 1796 when he was appointed federal comptroller,⁴³⁴ had long opposed Hamiltonian policies⁴³⁵ and, in the early 1790s, voted with Madison almost as often as against him.⁴³⁶ Steele had migrated sufficiently in politics to be invited by Jefferson to stay in office and to be a periodic dinner guest,⁴³⁷ and to be Macon's partner in extensive correspondence,⁴³⁸ and had taken a number of Republican stances by the time of the letter.⁴³⁹ Macon's preceding letter asked Steele if he had seen Justice Chase's 1803 charge (which later provided one article of impeachment), adding that he was 'dissatisfied with it' and that men like Chase 'are a real injury to the country.'⁴⁴⁰

Steele, reflecting political migration, responded that the 'charge of Judge Chase' was 'extra judicial,' 'extremely indecorous,' and 'indefensible,' and that '[t]he opinions of some of the judges on other subjects are so inaccurate and preposterous that I am not surpris[s]ed at this.'⁴⁴¹ However, Steele expressly excepted Moore from his criticism of the Federalist bench:

my only wish is that friend Moore may prove as I am sure he will, like purged gold, the more bright for being tried in such a crucible. . . .⁴⁴²

⁴³² DAB 12:157, 158; *Steele Papers* 1:370 n2; *Origins-Parties* 201, 203, 206, 208, 209.

⁴³³ *Annals* 8:2105-06, 2151-52, 2171; *History of Supreme Court* 1:653.

⁴³⁴ William Smith to Ralph Izard (3 Nov. 1796), *Federalist Correspondence* 781, 782.

⁴³⁵ Gilbert L. Lycan, 'Alexander Hamilton and the North Carolina Federalists' (1948) 25 *North Carolina Historical Review* 442, 453-54.

⁴³⁶ Noble E. Cunningham, *The Jeffersonian Republicans* (UNCP, Chapel Hill 1957) 272.

⁴³⁷ Thomas Jefferson to John Steele (30 June 1802), *Steele Papers* 1:285; Thomas Jefferson to John Steele (10 Dec. 1802), *ibid* 1:337; *accord ibid* 1:xxvii; DAB 17:557; *Origins-Parties* 198, 201. For invitations, *Steele Papers* 1:222, 238, 291, and Madison, 1:241.

⁴³⁸ Kemp P. Battle, *Letters of Nathaniel Macon, John Steele* (UNCP, Chapel Hill 1902) 28 *passim*.

⁴³⁹ E.g., John Steele to Nathaniel Macon (11 Apr. 1803), *Steele Papers* 1:376, 380-82 (disagreeing with *Marbury*); John Steele to Nathaniel Macon (12 Sept. 1803), *ibid* 1:407, 409 (objecting to Chase charge); John Steele to Nathaniel Macon (17 Jan. 1805), *ibid* 1:444, 444-45 (retained 'diff. party name' but Federalist party dead); *accord* 1:321; John Taylor to John Steele (3 Dec. 1801), *ibid* 1:241, 242 (from sponsor of Virginia Resolutions).

⁴⁴⁰ Nathaniel Macon to John Steele (7 Aug. 1803), *Steele Papers* 1:402, 403.

⁴⁴¹ John Steele to Nathaniel Macon (12 Sept. 1803), *ibid* 1:407, 409.

⁴⁴² *Ibid*.

Steele clearly believed that Moore was different in a positive way from Chase and 'some of the judges,' and that he thus far was passing his trial in the crucible. The 'crucible' did not refer to the Chase impeachment, because that was not initiated for a half year or tried for another year. The 'crucible' appears to have been the federal judiciary itself and its most severe testing, the Sedition Act prosecutions during the first year of Moore's service and the prior year. While a counterargument can be made that Steele was not referring to Sedition Act positions, because he added that 'Mr. Patterson I consider also a man of sterling integrity,'⁴⁴³ he may simply have repeated a common accolade for Paterson arising from his sponsorship of the New Jersey Plan despite his Sedition Act stance, an accolade even the most ardent Republicans sometimes gave.⁴⁴⁴

Even before Moore's appointment, Federalist ex-governor Samuel Johnston of his home state had questioned his Federalist orthodoxy. Johnston said that 'some complain that he pays too little deference to principles founded on respectable decisions, and that he is inclined to eccentricity or novelty.' Moore's 'strange inconsistency' did not provide 'satisfaction' to him.⁴⁴⁵

The best indication that Moore did not seek to enforce the Sedition Act or defend its constitutionality is that, upon his resignation from the Court, North Carolina's leading Republican newspaper lamented the loss of the 'services of so able, independent, and upright a judge,'⁴⁴⁶ and Republican South Carolina newspapers edited by Freneau's brother reprinted that.⁴⁴⁷ Later, at Moore's death, that leading Republican newspaper praised Moore as 'ranked with the highest judicial characters in the American Republic,'⁴⁴⁸ and another Republican paper effu-

⁴⁴³ *Ibid.*

⁴⁴⁴ Albert Gallatin to Hannah Gallatin (1 June 1795), *ibid* 3:52, 53; Warren 1:176 n1 (*Aurora* similarly praised); see Edward Rutledge to Henry M Rutledge (1 Nov.1796), *DHSC* 3:139.

⁴⁴⁵ Samuel Johnston to James Iredell (13-20 Apr.1799), *Iredell Correspondence* 2:572.

⁴⁴⁶ 'Raleigh, Monday, March, 5, 1804' *Raleigh Register* (Raleigh 5 Mar.1804) 3.

⁴⁴⁷ [No Caption] *City Gazette* (Charleston 5 Mar.1804) 3; [No Caption] *Carolina Gazette* (Charleston 8 Mar.1804) 3.

⁴⁴⁸ 'Died' *Raleigh Register* (Raleigh 1 Nov.1810) 4.

sively lauded his 'powers transcendently acute and ingenious' and his 'solid integrity'.⁴⁴⁹

H Justice William Cushing Revisited on the Sedition Act

The reason for revisiting Cushing, whose views were summarized in the preceding chapter, is to discuss whether his position on the Sedition Act was influenced by the successor justices who surrounded him. Cushing only briefly and tepidly addressed the Sedition Act in his grand jury charges, and did not expressly seek or provoke presentments or indictments as the more forceful charges of Justices Paterson, Chase, and Washington did.

Cushing was prematurely senescent. In 1796, he had turned down Washington's appointment as chief justice citing 'my infirm & declining state of health unequal to' the position.⁴⁵⁰ Iredell, after sitting in court with Cushing for a week, similarly described his 'infirm state of health,' and knew his colleague had cancer of the lip the previous year.⁴⁵¹ Others, though professing 'love and esteem,' said that 'time, the enemy of man, has much impaired his mental faculties'.⁴⁵² By 1800, a family friend from Massachusetts, the President's son, said Cushing was 'old __ infirm __ unable to travel' and would 'not be likely to retain his place much longer' owing to 'age & infirmities'.⁴⁵³ Contrary to that prediction, Cushing continued to cling to his position from sheer financial necessity.⁴⁵⁴ In his ten years on the Marshall court, he followed other justices and never dissented, and he only wrote four opinions though nominally presiding and able to write the opinion every time the chief justice was absent.⁴⁵⁵

Cushing followed the successor justices, but had the initial justices surrounded him, he would have found it easier to follow them the other direction on the Sedition Act. His 1789

⁴⁴⁹ 'Communication' *Star* (Raleigh 1 Nov. 1810) 175.

⁴⁵⁰ William Cushing to George Washington (2 Feb. 1796), *DHSC* 1:103; accord John Adams to Abigail Adams (2 Feb. 1796), *ibid* 1:834; Jeremiah Smith to William Plumer (29 Jan. 1796), *ibid* 1:833.

⁴⁵¹ U.S. Supreme Court, 'Fine Minutes' (3-10 Feb. 1796), *DHSC* 1:255-58; James Iredell to Hannah Iredell (10 Feb. 1796), *ibid* 1:836; James Iredell to Hannah Iredell (6 Mar. 1795), *Iredell Correspondence* 2:441.

⁴⁵² William Plumer to Jeremiah Smith (19 Feb. 1796), *ibid* 1:838.

⁴⁵³ Thomas B. Adams to William Cranch (15 Aug. 1800), *ibid* 1:897; Thomas B. Adams to Abigail Adams (20 Dec. 1800), *ibid* 1:904.

⁴⁵⁴ *Justices* 1:57, 70.

⁴⁵⁵ *History of Supreme Court* 2:652; *Justices* 1:57, 69; see *OCSC* 214.

views on freedoms of press and speech were at odds with the Sedition Act. He had found the state constitution's press clause to override common law and Blackstone in major ways. Similarly, his slavery opinion found the Massachusetts Constitution (its 'free and equal' provision) to override American common law in determining that slavery was inconsistent with it.⁴⁵⁶ Of the six sitting justices in 1798-1799, Cushing's grand jury charges were the most perfunctory and most timid on the Sedition Act, and may not have been given consistently.

Thus, a sizable minority of the Federalist party opposed the Sedition Act, generally on grounds of unconstitutionality, including the Federalists' vice presidential candidate in 1800 and presidential candidate in 1804 and 1808, two Federalist governors and an ex-governor, and other notable Federalists. Eighteen Federalist members of the House of Representatives voted against it at one time or another, often leaving the party just before or after. The new chief justice, John Marshall, indisputably opposed it, albeit on grounds of expediency. Half the initial justices--Jay, Rutledge, and Wilson--evidently viewed the Sedition Act as unconstitutional. The next successor justice and the last successor justice before Marshall--Johnson and Moore--evidently shared that view. Further, none of those remaining justices embraced the Blackstone-Mansfield definition of freedom of press, as the successor justices did in 1798, but instead continued to hold a more straightforward definition of freedoms of press and speech, which prohibited abridgment by subsequent punishment (seditious libel) as well as by prior restraint (licensing). All opposition to the Sedition Act by Federalists generally and Federalist remaining justices is heretofore unrecognized, except for Marshall and single cases in isolated references. Similarly, a significant minority of the states found the Act unconstitutional, and not just Virginia and Kentucky, but Georgia, Tennessee, and the North Carolina lower chamber (as discussed at the end of the preceding chapter). That too is unrecognized except single states in isolated references.

⁴⁵⁶ *Indictment v. Jennison*, *Cushing Notes* 55 (Mass.S.Judicial Ct.1783); William Cushing Judicial Notebook 95-98 (1783), *Cushing Papers* (microfilm P-406).

Is it conceivable that nearly half the early justices viewed the Sedition Act as unconstitutional? The best answer is that a significant minority of their party did, and the next chief justice did. The remaining justices certainly left no trace of public or private support for the Sedition Act, in marked contrast to five of the sitting justices who went out of their way to provoke grand juries to charge violators of the Sedition Act and to defend the constitutionality of that Act. Further, five remaining justices left no trace of embracing the Blackstone-Mansfield definition of freedom of press, again in marked contrast to five sitting justices who expressly adopted that definition in 1798-1800--though not in the preceding years. Those remaining justices were all moderate or Adams Federalists (except perhaps Blair), like the other Federalists who rejected the Sedition Act (which was sponsored by the High Federalists). They left a trail of departures from other extreme views of the Federalist party, and of close relations with others who more visibly challenged the Sedition Act or of other beliefs inconsistent with the Act.

The opposition of many Federalists to the Sedition Act is part of a more complex picture of the Federalists and the Republicans, as the final chapter discusses.

CHAPTER 8

THE FEDERALIST JUSTICES, THE REPUBLICAN CRITICS, AND HISTORICAL MISCONCEPTIONS ABOUT FREEDOM

The generally accepted view of First Amendment history¹ is that the Blackstonian viewpoint incorporated into the Sedition Act was the only, or at least the dominant, concept of freedom of press and speech in 1789-1791,² and that the opposing stance articulated in the Virginia and Kentucky Resolutions was virtually nonexistent before 1798. The accepted view is also that the earliest twelve justices of the Supreme Court had nothing to say, or nothing to say worth mentioning, about freedoms of press and speech before the Sedition Act.³ Further, the generally accepted view is that the earliest twelve justices all supported the constitutionality of the Sedition Act of 1798, blindly accepting the Blackstone definition,⁴ and that the Federalist party unanimously supported the Act as well (with one holdout),⁵ and that all states did too except Virginia and Kentucky.⁶ More broadly, the Federalists are collectively treated as the consistent opponents of liberty, and the Republicans as its consistent protectors.

This thesis reconsiders each of those points. For each, it both fills in a gap in historical scholarship and challenges existing studies.

A The Growing Rejection of the Blackstone-Mansfield Definition of Freedom of Press, and the Growing Attack on Seditious Libel

Blackstone's 1769 definition of freedom of press, as merely 'laying no *previous* restraints upon publications, and not... freedom from censure for criminal matter when published'

¹ E.g., p101 and n315.

² E.g., p101 and n316, p100 and n314, pp107-08 and nn362-65, p109 and n378, p112 and n396, pp124-25 and n498.

³ E.g., p156 and note 1.

⁴ E.g., pp334-35 and nn23-25, p332 and nn9-10, pp259-60 and notes 71-73, p253 and notes 3-4.

⁵ E.g., p334 and nn21-22.

⁶ E.g., p326 and nn518-19.

(such as seditious libel prosecutions),⁷ was the definition used by Congress and the states in approving and ratifying the First Amendment, according to the dominant view expressed by Leonard Levy⁸ and others.⁹ In Levy's own words, no 'critics had questioned [Mansfield's] narrow definition of a free press,' and '[n]o other definition of freedom of the press by anyone anywhere in America before 1798' existed, so that '[e]vidence does not exist to contradict the assertion [that] [freedom of press] was used in its prevailing common law or Blackstonian sense to mean a guarantee against previous restraints and a subjection to subsequent restraints for licentious or seditious abuse.'¹⁰

To the contrary, belief had been growing that criminalizing and prosecuting press and speech critical of government or officials violated freedom of press or speech, and had become the dominant viewpoint in both English and American books, pamphlets, and newspaper essays by 1776-1780, when state declarations of rights were adopted, and by 1789-1791, when the First Amendment was adopted and ratified. Parallel to that, criticism mounted of the Holt-Mansfield limitations that caused rules governing seditious libel prosecutions to conflict with those governing other criminal prosecutions and other jury trials. This is the first major area in which the thesis adds to and challenges existing legal histories. (Chapters 2-3.)

That growing opposition to the English common law of narrow press freedom and broad seditious libel was embraced by revolutionists as they adopted freedom of press provisions in new state constitutions, and by Congress and the states as they adopted and ratified freedoms of press and speech in the Bill of Rights. They did so by choosing unqualified language to protect those freedoms, and more broadly, by choosing to override English common law in all First Amendment clauses and in most remaining Bill of Rights provisions. They did not respond by adopting restrictive language specifying that those freedoms meant only the common law defi-

⁷ *Blackstone's Commentaries* 4:151-52 (emphasis in original).

⁸ Levy's thesis is summarized, as to England, America, and the revolutionary and constitutional periods, at the beginning and end of Chapter 3.B, 3.C, and 3.D.

⁹ E.g., p101 and n316, p64 and n20.

¹⁰ *Levy* 158; *Levy-Liberty* 27, 191.

nition as no prior restraint, or specifying that provisions that contrary state constitutions and laws abrogated English common law did not affect seditious libel. The growing opposition to the Blackstone-Mansfield definition was reflected in the fact that nine of the eleven new states adopting constitutions saw a need to include freedom of press protections, and chose in every instance to use the broadest language and to omit any restriction. The historical context for the new states' provisions for freedom of press was the revolutionists' essays and speeches being branded as seditious libel. The historical context for the First Amendment's protections for freedoms of press and speech was, besides the uniformly broad state provisions, the demands in the decisive state ratifications of the Constitution for express protection of freedom of press, using language from the expansive state provisions. As the First Amendment was introduced, Madison announced that it would leave government 'disarmed of powers which trench upon those particular rights,' and when the Senate considered the Amendment, it rejected a proposal limiting 'freedom of speech, or of the press,' to 'as ample a manner as hath at any time been secured by the common law.'¹¹ In this context the early justices pondered the First Amendment.

B The Early Justices' Commitment to Broad Freedoms of Press and Speech, and Rejection of the Narrow Blackstone-Mansfield Definition

The earliest twelve justices are usually portrayed as all having nothing to contribute on freedoms of press and speech, being averse or uncommitted to those freedoms, and assuming the Blackstone-Mansfield definition.

Instead, nearly all exhibited commitment to those freedoms before the crisis of 1798, and even more significantly, not one embraced the Blackstone-Mansfield definition of freedom of press as they discussed freedoms of press and speech before 1798. If the Blackstone-Mansfield definition had been accepted by all continually before that year, as Levy claims, it would have been endorsed in prior statements of all the justices, rather than being entirely absent, and would not have been repudiated by Wilson or mostly rejected by Cushing. Instead, that defini-

¹¹ *E.g.*, pp42-47, pp125-55.

tion was only endorsed for the first time in 1798, as most sitting justices changed positions in order to justify the Sedition Act, and similarly a federal common law of crimes was only endorsed for the first time in 1797 or 1798 for the same reason. Thus, in America, it was not the Blackstone-Mansfield definition that was dominant before 1798 but the broader definition of freedom of press, and it was not the broader definition that justices shifted to and retrieved from minority status in 1798 but the Blackstone definition. This is the second major area in which the thesis adds to and challenges existing legal histories. (Chapters 4-5.)

Yet the absence before 1798 of the Blackstone-Mansfield definition should not be surprising, given the recency of Blackstone's published language about freedom of press (1769), the greater recency of Mansfield's judicial adoption of it, the still more recent First Amendment with broad language and no restrictions, and the growing challenge to the narrow view and to seditious libel prosecutions on both sides of the Atlantic in the 1770s and 1780s.

C Federalists' and Early Justices' Division Over the Sedition Act and the First Amendment

The conventional view is that all the pre-Marshall justices joined in unanimous Federalist support of the Sedition Act (excepting only Marshall, only for expedience). The reasoning is that all early justices were Federalists, and all Federalists supported the Act. It is true that most of the sitting justices supported the constitutionality of the Sedition Act. Yet even for them, the reasoning about the constitutionality of the Act by the three who presided over prosecutions, and by the fourth who wrote a letter supporting the Act, has only been cursorily described. The similar opinions of the other two sitting justices, and the views of the six remaining justices, have been virtually ignored, along with the senescent condition of Cushing.

Instead, the early justices divided over the Sedition Act, with nearly half of the early justices apparently opposing it--most of the six remaining justices. Similarly, the Federalist party as a whole divided over the Sedition Act, with an unrecognized but significant minority opposing its constitutionality, some as a reason for leaving the Federalist party. This is the

third major area in which this thesis adds to and challenges existing legal histories. (Chapter 7.)

Why did initial justices and successor justices tend toward different positions in First Amendment commitment and on the Sedition Act?

The most striking difference between most initial justices and most successors, the stature of the former as 'first characters' nationally,¹² was accompanied by more independence of thought (prime examples were Wilson and Jay). While all first characters did not depart from Federalist orthodoxy (examples were Adams and Hamilton), more independent-minded statesmen were more prone to do so.

Another difference, connected to the first, is that the initial justices (except Iredell) appear to have had personal involvement with, and to have thought about, freedoms of press and speech much more than the successors (except Johnson), before the Sedition Act of 1798 forced sitting justices to address those freedoms. Their relative thought about those freedoms can be roughly gauged by the greater number of statements and stances located for Chapter 4 compared to Chapter 5, and by the greater willingness of sitting justices to subordinate the First Amendment to seditious libel as discussed in Chapter 6 compared to Chapter 7. More significantly, their greater personal involvement with those freedoms came with the 'first characters' as major leaders in the Revolution facing a much greater threat of prosecution for seditious libel or treason,¹³ compared with the successor justices who (except Johnson) were junior officers or officials and who did not face such threats. Thus, when Lord Hillsborough warned colonial governors and legislatures against 'any letter or paper that may have the smallest tendency to sedition,' Rutledge sat in the South Carolina legislature as the warning was read,¹⁴ and other 'first characters' knew Hillsborough meant their advocacy of colonial rights.¹⁵ Jay, Rutledge,

¹² E.g., p333.

¹³ E.g., James Wilson, 'An Address to the Inhabitants of the Colonies' (1776), *Wilson Works* 1:46, 51; Chapter 3.D.

¹⁴ *Journals of Assembly-S.C.* (17 Nov.1768), quoted in *Rutledge* 47; *Privy Council-Colonial* 5:261, 262, 417; as well as from the council president, *Leigh's Considerations* 82.

¹⁵ E.g., 'At the Court at St. James' *Boston Evening Post* (Boston 25 Apr.1774) 4; 'By His Excellency Josiah Martin' *Pennsylvania Ledger* (Philadelphia 4 Nov.1775) 1.

and Johnson, serving as their states' first governors, had wrestled with reconciling stable government and expressive freedoms, and Wilson uniquely reasoned about those tensions in constitutional theory. No such dangers attended the later public service of the successor justices.

A further striking difference between most initial justices and most successors was their divergent positions on seven concepts that potentially limited dissent. Hence, they generally divided on the legitimacy of parties, and of opposing the administration; on the individual right to evaluate laws as illegal and void, and to disobey illegal laws; and in 1798 on the existence of a federal common law of crimes, as well as on the Blackstone definition. (Chapter 2.C.)

Speaking publicly on the unconstitutionality of the Sedition Act appears to have been much more difficult than perceiving it. That doubtless resulted from the Sedition Act prosecution of Peck, and the threatened prosecution of Garrard, for publicly questioning the constitutionality of the Act; and the criticism of Marshall for opposing the Act as inexpedient, and the earlier excoriation of Rutledge for challenging the Jay Treaty. The public silence of the remaining justices is less difficult to understand in the context of the similar silence of the Supreme Court on later abridgments for the next hundred fifty years.¹⁶ Further, it was not just Federalists who failed to make public condemnation of such violations of liberty.

D Republican Words and Deeds on Seditious Libel and the First Amendment

Misconceptions are not unique to the Federalists. They also abound about Republicans, as the party of Jefferson and Madison is treated as the consistent party of liberty while the Federalists are castigated as the unanimous party opposing liberty.

Jefferson, though courageous in writing the Kentucky Resolutions and coordinating much Sedition Act opposition, did not live up to the common historical claim that 'no [seditious libel] charges would be brought, for his administration would not be stained by any such persecu-

¹⁶ *E.g.*, David M. Rabban, 'The First Amendment in Its Forgotten Years' (1981) 90 Yale Law Journal 514, 531-33, 539-40, 550-51, 582-86.

tions.¹⁷ His administration's federal attorney in Connecticut indicted three newspaper editors, an essayist, and two ministers for seditious libel in 1807 (all Federalists).¹⁸ Nor is Warren's statement true that 'Jefferson, who had not known of their existence, ordered their dismissal as soon as he learned of them.'¹⁹ Jefferson's order was quite delayed after learning of the cases (it only followed learning that embarrassing facts would come out at trial),²⁰ and did not include the case of two editors (Hudson and Goodwin, which proceeded until the Supreme Court ruled against federal common law).²¹ However, those that claim Jefferson was not Jeffersonian on state legislation and prosecution for seditious libel²² fail to read his affirmations of state power carefully; most are restricted to 'punishing slander,'²³ much like his limited proposals for Virginia laws.

Nor did various other Republicans live up to their pre-1801 opposition to seditious libel prosecution, as they instead prosecuted various Federalists.²⁴ The best known prosecution was of Harry Crosswell, editor of *The Wasp*, for seditious libel in maligning Jefferson, a case brought by Jay's successor in New York's governorship.²⁵ There, the Federalist-Jeffersonian inversion became complete as Alexander Hamilton entered the case to appeal the editor's seditious libel conviction, arguing that 'liberty of the press' meant freedom to 'publish with im-

¹⁷ *Opposition* 486; accord Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (BP-HUP, Cambridge 1963, repr 1989) 42-69, 158-76.

¹⁸ Levy 344-46; *Repressive Jurisprudence* 148-86.

¹⁹ Warren 1:436; *History of Supreme Court* 2:355.

²⁰ Levy 344-45; Jay 1014.

²¹ Jay 1014; *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

²² E.g., *Origins* 507; *Repressive Jurisprudence* 63; Levy 343.

²³ Thomas Jefferson to Abigail Adams (11 Sept.1804), *Adams-Jefferson* 278, 279; Thomas Jefferson to Levi Lincoln (24 Mar.1802), *Jefferson Writings* 8:139; Thomas Jefferson to Thomas Seymour (11 Feb.1807), *ibid* 9:28, 30; Thomas Jefferson to John Norvell (14 June 1807), *ibid* 9:71, 74. The apparent counterexample is Thomas Jefferson to Thomas McKean (19 Feb.1803), *ibid* 8:216, 219.

²⁴ E.g., Levy 341 (Joseph Dennie-Pa., 1803); [No Caption] *Raleigh Register* (Raleigh 5 Mar.1804) 3 (James Cheatham-N.Y.1804); *History of Supreme Court* 2:638 n110 (William Dickinson-Pa.1806); George A. Billias, *Elbridge Gerry* (McGraw-Hill, New York 1976) 322-23 (Federalist editors-Mass.); *Tyranny* 258-319.

²⁵ *Tyranny* 268-69, 271; Levy 338-39.

punity' true information 'reflecting on government, magistracy, or individuals.'²⁶

Further, it was principally Republican state legislatures that, throughout the first half of the nineteenth century, adopted provisions that seditious libel prosecutions must afford a defense of truth and jury determination of all issues (the *Zenger* modifications). Perhaps accidentally, they reaffirmed and perpetuated the crime of seditious libel, while trying to protect defendants, and doubtless trying to assist incumbent officials. The common law of seditious libel proved very difficult to shake off.

What of the constitutionality of the Sedition Act? In the author's view, the First Amendment's broadly worded protection of speech and press unavoidably and manifestly conflicted with prohibiting 'writing, printing, uttering or publishing[,] any false, scandalous and malicious writing or writings against the government... Congress... or... President.' Recognizing the conflict did not require two centuries of hindsight; it was perceived by a substantial minority of the Federalist party as well as by the great majority of the Republican party in 1798-1800.

Seditious libel proved in Sedition Act trials to be a plastic concept, easily manipulated by government to include virtually any dissent. The reason was that its elements, a negative 'reflection' on government or officials that might 'alienate' the affections of the people, and a 'tendency' to breach the peace, could reach any expression. By its indeterminacy and its threat to an opposition, seditious libel was inconsistent with rule of law and constitutionalism, as well as with the First Amendment. Seditious libel and the Sedition Act were not struck down under the First Amendment during 1798-1800, or during the next century and a half. However, the decision on their constitutionality had already been made by the First Amendment's use of unrestricted language protecting freedoms of press and speech.

²⁶ *People v. Croswell*, 3 Johns. Cas. 337, 393-94 (N.Y.1804); see Julius Goebel and others (eds), *Law Practice of Alexander Hamilton* (ColUP, New York 1964-81) 1:808, 809.

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Justice John Rutledge

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'Edward Rutledge Papers' (SCHS, Chapel Hill, call no.43/0792)
'John Rutledge Letters' (Charleston Library Society, Charleston)
'John Rutledge Letters' (CCL, Charleston, Ms. 0077-006)
'John Rutledge Papers,' 'Edward Rutledge Papers,' and 'Rutledge Family Papers' (SCL, University of South Carolina, Columbia)
'Papers of John Rutledge, 1761-1786' (LC, Washington, Manuscripts Microfilm 13.222-1P) (2 items)
'John Rutledge [Jr.] Papers' (UNC, Chapel Hill, Collection No.948)
'John Rutledge [Jr.] Papers, 1760-1862' (DU, Durham, Ms. 2nd 82:C and Oversize Box 20)
'John Rutledge, Sr. Papers' (DU, Durham)

Justice Bushrod Washington

'Bushrod Washington' (NYPL, New York, Misc. Personal Name File)
'Bushrod Washington Papers' (Mount Vernon Library, Mount Vernon Ladies' Association, Mt. Vernon)
'Letters of Bushrod Washington' (Free Library of Philadelphia, Philadelphia, Hampton L. Carson Collection)
'Papers of Bushrod Washington, 1669 [sic] -1829' (LC, Washington, Miscellaneous Ms. Collection Microfilm 12.837-1P)

Justice James Wilson

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- 'Wilson, James, 1742-1798, Papers, 1718-1857' (HSP, Philadelphia, Collection 721)

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- 'Preston Davie Collection' (UNC-SHC, Columbia, Series D, Item 224, Collection No.3406)
- 'Grimke Family Papers, 1761-1866' (SCHS, Charleston, Ms.1040.00)
- 'Charles Francis Jenkins Collection' (HSP, Philadelphia)
- 'Charles E. Johnson Collection' (NCSA, Raleigh, Ms. PC.67)
- 'Journals of the Commons House of Assembly, 1760-1775' (SCDAH, Columbia)
- 'Journals of the House,' 1790-1800' (SCDAH, Columbia)
- 'Journals of the Senate,' 1790-1800' (SCDAH, Columbia)
- 'William Livingston Family Papers' (MHS, Boston, Ms. N-1579.2, Box 3)
- 'Gabriel Manigault Papers, 1775-1839' (SCHS, Charleston, call no.1068.02.02)
- 'Robert Treat Paine Papers: Family Correspondence, 1713-1848' (MHS, Boston, Folder IV)
- 'Timothy Pickering Notebook' (ca.1811), in 'Timothy Pickering Papers' (MHS, Boston r.46, fol.85)
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TABLE OF JUSTICES BEFORE JOHN MARSHALL

THE EARLY JUSTICES

INITIAL JUSTICES	<i>Appointed</i>	<i>Resigned or Died</i>	<i>Discussed</i>
John Jay (C.J.)	24 Sept. 1789	29 June 1795	157, 343
John Rutledge	24 Sept. 1789	5 Mar. 1791	171, 357
(briefly C.J. until rejected)	1 July 1795	15 Dec. 1795	
William Cushing	24 Sept. 1789	13 Sept. 1810	183, 312
James Wilson	24 Sept. 1789	21 Aug. 1798	194, 369
John Blair	24 Sept. 1789	25 Oct. 1795	211, 378
James Iredell	8 Feb. 1790	20 Oct. 1799	217, 314
(Robert Harrison was the initial justice, who upon not taking office was replaced by James Iredell)			

SUCCESSOR JUSTICES

Thomas Johnson	5 Aug. 1791	16 Jan. 1793	226, 381
William Paterson	27 Feb. 1793,		
	4 Mar. 1793	9 Sept. 1806	231, 267
Samuel Chase	26 Jan. 1796	19 June 1811	233, 285
Oliver Ellsworth (C.J.)	3 Mar. 1796	15 Dec. 1800	243, 320
Bushrod Washington	29 Sept. 1798	26 Nov. 1829	248, 304
Alfred Moore	4 Dec. 1799	26 Jan. 1804	250, 383

THE SEDITION ACT ERA JUSTICES

SITTING JUSTICES (AS OF SEPTEMBER 1798)

William Cushing	24 Sept. 1789	13 Sept. 1810	183, 312
James Iredell	8 Feb. 1790	20 Oct. 1799	217, 314
William Paterson	27 Feb. 1793,		
	4 Mar. 1793	9 Sept. 1806	231, 267
Samuel Chase	26 Jan. 1796	19 June 1811	233, 285
Oliver Ellsworth (C.J.)	3 Mar. 1796	15 Dec. 1800	243, 320
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REMAINING JUSTICES (AS OF SEPTEMBER 1798)

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Source: OCSC 965; DHSC 1:9-10, 13, 19, 23, 28, 49-50, 52-53, 56-57, 59, 64-66, 68, 72-78, 80, 89-91, 96, 98-100, 112-13, 120-21, 123, 132-35, 140-41.