AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 4: The Early National Era—Democratic Rights/Free Speech/National Free Speech Controversies

The Sedition Act of 1798 (expanded)

Political tensions increased during the 1790s. Newspapers were filled with scandalous, often anonymous, gossip and opinion about political leaders. Few commentators practiced any restraint when commenting on political opponents. The President of Yale asserted that Thomas Jefferson would have "the bible cast into a bonfire, . . . our wives and daughters the victims of legal prostitution."[1] Jefferson, no stranger to intemperance, described Washington and Adams as "apostates who have gone over to [English] heresies, men who were Samsons in the field and Solomons in the council, but who have had their heads shorn by that harlot England."[2] New forms of political organization heated up the political environment. Thomas Jefferson and James Madison organized an anti-administration faction in the Congress and in the states. George Washington denounced Democratic-Republican clubs for their scrutiny and often-harsh criticism of government officials. War with France was increasingly likely. Americans were outraged when the French foreign minister demanded bribes before meeting with an American delegation sent to negotiate a new peace treaty. With anti-French passions peaking, Federalists in Congress and the Adams administration hoped to put an end to the "factions" that were dividing the nation and encouraging foreign enemies.

These tensions culminated in the Sedition Act of 1798. That measure cracked down on speech and writings that brought the government into contempt. In keeping with colonial and founding era practice, Federalists permitted truth as a defense. The Sedition Act also required that a jury determine whether the writing was seditious. Federalists claimed that the law was a constitutional means for maintaining support for the government. Harrison Otis stated, "Every independent Government has a right to preserve and defend itself against injuries and outrages which endanger its existence."

Adams administration officials implemented the Sedition Act immediately. The resulting prosecutions and convictions shut down several prominent Jeffersonian newspapers. Matthew Lyon of Vermont, a Jeffersonian representative in Congress, was another victim of the Sedition Act. Sentenced to prison for criticizing the Adams Administration, he became a popular hero and easily won reelection.

Jeffersonians conducted a public campaign against the Sedition Act. The Virginia and Kentucky Resolutions of 1798 were the most visible and significant protest. These Resolutions, secretly penned by James Madison and Thomas Jefferson, condemned both the Sedition Act and other Federalist measures. One year later, James Madison submitted a report to the Virginia Legislature which elaborated both federalism and free speech criticisms of Federalist policy. States, he insisted, had reserved the power to determine when seditious speech should be punished. Going beyond the reigning free speech orthodoxy, Madison declared that constitutional republicans must protect opinion, as well as true criticisms of public officials.

The Virginia and Kentucky Resolutions and Madison's Report became celebrated touchstones of Jeffersonian political ideology and constitutional thought. Their immediate influence on free speech practice is less certain. President Jefferson and his political allies in Congress refused to extend the Sedition Act when that measure expired after the election of 1800. This suggests a commitment to broad free speech principles. Nevertheless, many Jeffersonians in the states, often with Jefferson's permission, prosecuted Federalists who made what they believed

[1] Stephen M. Feldman, *Free Expression and Democracy in America: A History* (Chicago: University of Chicago Press, 2008), 78.

[2] Thomas Jefferson to Phillip Mazzel, *The Writings of Thomas Jefferson,* ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1896), 7:76.

were unfair criticisms of Republican politicians and policies. This suggests federalism was the more practical grounds for criticizing the Sedition Act.

When reading the following materials, think about the following interpretation of how Federalists understood popular government.

> *Federalists claimed the people "deliberated" only via their representatives in the legislature and therefore that only the legislature could authoritatively declare what public opinion was or fully participate in the political deliberations of the polity. The "representative" quality of political debate justified Federalist repression. The modern system of political deliberation, in which the people "discuss" politics via the mass media and political organizations, the Federalists argued, only empowers nonrepresentative minorities. Instead, if popular participation is restricted to the right of petition and election, methods that inform and motivate representatives without intruding directly into political deliberations, the whole people can participate equally in debate via their representatives.*[3]

Does this passage explain why Federalists supported the Sedition Act (and condemned private political clubs), even when Thomas Jefferson was president? How did Federalists understand political participation in a constitutional republic? How did opponents of the Sedition Act understand the role of political participation in a constitutional republic?

An Act for the Punishment of Certain Crimes Against the United States[4]

. . .

SEC. 2. And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, 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, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

SEC. 3. And be it further enacted and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in Republication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

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The Debate in Congress[5]

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[3] James P. Martin, "When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798," *University of Chicago Law Review* 66 (1999): 117.

[4] 1 *U.S. Stat.* 596, 596–97 (1798).

[5] *Annals of Congress*, 5th Cong., 2nd sess. (1798), 2113, 2140–62.

REPRESENTATIVE SAMUEL W. DANA (Federalist, Connecticut)

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. . . Against this bill, the freedom of speech and of the press has been insisted on; and the bill has been condemned as violating one of the articles adopted as amendments to the Constitution. . . . Could the framers of the Constitution intend to guarantee, as a sacred principle, the liberty of lying against the Government? What do gentlemen understand by "the freedom of speech and of the press?" Is it a license to injure others or the Government, by calumnies, with impunity?

. . . What, then, is the rational, the honest, the Constitutional idea of freedom of language or of conduct? Can it be anything more than the right of uttering and doing what is not injurious to others? This limitation of doing no injury to the rights of others, undoubtedly belongs to the true character of real liberty. Indeed, can it, in the nature of things, be one of the rights of freemen to do injury?

REPRESENTATIVE JOHN NICHOLAS (Republican, Virginia)

. . .

It has been the object of all regulations with respect to the press, to destroy the only means by which the people can examine and become acquainted with the conduct of persons employed in their Government. If there could be safety in adopting the principle, that no man should publish what is false, then certainly there would be no objection to it. But it was not the intention of the people of this country to place any power of this kind in the hands of the General Government—for this plain reason, the persons who would have to preside in trials of this sort, would themselves be parties, or at least they would be so far interested in the issue, that the trial of the truth of falsehood of a matter would not be safe in their hands. . . . [I]t is not lying that will be suppressed, but the truth. If this bill be passed into a law, the people will be deprived of that information on public measures, which they have a right to receive, and which is the life and support of a free Government; for, if printers are to be subject to prosecution for every paragraph which appears in their papers, that the eye of a jealous Government can torture into an offence against this law . . . they would be afraid of publishing the truth, as, though true, it might not always be in their power to establish the truth to the satisfaction of a court of justice. . . .

. . .

. . . [I]n direct opposition to the clause of the Constitution, which says, "Congress shall pass no law to abridge the freedom of the press," Congress is now about to pass such a law. For it is in vain to talk about the licentiousness of the press, the prohibition is express, "shall pass no law to abridge," etc. And as to what gentlemen called the licentiousness of the press, it was so indefinite a thing, that what was decried licentiousness today by one set of men, might, by another set, tomorrow, be enlarged, and thus the propriety of the information to be given to the public would be arbitrarily controlled. . . .

. . .

REPRESENTATIVE HARRISON GRAY OTIS (Federalist, Massachusetts)

. . . [E]very independent Government has a right to preserve and defend itself against injuries and outrages which endanger its existence; for, unless it has this power, it is unworthy the name of a free Government, and must either fall or be subordinate to some other protection. . . .

. . . The terms "freedom of speech and of the press," he supposed, were a phraseology perfectly familiar in the jurisprudence of every State, and of a certain and technical meaning. It was a mode of expression which we had borrowed from the only country in which it had been tolerated, and he pledged himself to prove that the construction which he should give to those terms, should be consonant not only with the laws of that country, but to the laws and judicial decisions of many of the States composing the Union. This freedom . . . is nothing more than the liberty of writing, publishing, and speaking one's

thoughts, under the condition of being answerable to the injured party, whether it be the Government or an individual, for false, malicious, and seditious expressions, whether spoken or written; and the liberty of the press is merely an exemption from all previous restraints. . . .

The gentlemen from Virginia had inquired how a line could be drawn between the liberty and licentiousness of the press? He would inform him, that an honest jury was competent to such a discrimination, they could decide upon the falsehood and malice of the intention. . . .

REPRESENTATIVE NATHANIEL MACON (Republican, North Carolina)

. . . He believed the best way of coming at the truth of the construction of any part of the Constitution, was, by examining the opinions that were held respecting it when it was under discussion in the different States.

Mr. M. then proceeded to quote the opinions of the leading members in several of the State conventions, in order to show, from the opinions of the friends of the Constitution, that it was never understood that prosecutions for libels could take place under the General Government; but that they must be carried on in the State courts, as the Constitution gave no power to Congress to pass laws on this subject. Not a single member in any of the conventions gave an opinion to the contrary. . . .

REPRESENTATIVE ALBERT GALLATIN (Republican, Pennsylvania)

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. . . The Government of the Union was not a consolidated one, possessing general power; it was only a federal one, vested with specific powers, defined by the Constitution; and though it should seem that no one could, on reading that instrument, mistake its principle, yet for greater security, it had been provided, by an amendment which now made a part of the Constitution, that the power not delegated to the United States, nor prohibited to the individual States, remained respectively with the States, or with the people. . . . [I]t would be found that the Constitution had actually specified the cases in which Congress should have power either to define or to provide for the punishment of offences; and they were the following: piracies, felonies on the high sea, and offences against the law of nations, which they had a right to define and punish; counterfeiting the coin or public securities of the United States; treason . . . .

. . .

. . . It appeared to him that it was an insulting evasion of the Constitution for gentlemen to say, "We claim no power to abridge the liberty of the press; that, you shall enjoy unrestrained. You may write and publish what you please, but if you publish anything against us, we will punish you for it. So long as we do not prevent, but only punish your writings, it is no abridgment of your liberty of writing and printing." . . .

. . .

The advocates of this measure must show to us a necessity for carrying into operation the power vested in the President, or in either branch of the Legislature—who are its objects. They must prove that the President dare not, cannot, will not, execute the laws, unless the abuse poured upon him from certain presses is suppressed. . . . Are they ready to say that they are prevented from voting according to the dictates of their conscience, for voting is only power belonging to them, by newspaper paragraphs? . . . Is it not their object to frighten and suppress all presses which they consider as contrary to their views; to prevent a free circulation of opinion; to suffer the people at large to hear only partial accounts, and but one side of the question; to delude and deceive them by partial information, and, through those means, to perpetuate themselves in power?

. . . [I]t was well known that writings, containing animadversions on public measures, almost always contained not only facts but opinions. And how could the truth of opinions be proven by evidence? If an individual thinking, as he himself did, that the present bill was unconstitutional, and that it had been intended, not for the public good, but solely for party purposes, should avow and publish his

opinion, and if the Administration thought fit to prosecute him for that supposed individual offence, would a jury, composed of the friends of that Administration, hesitate much in declaring the opinion ungrounded, or, in other words, false and scandalous, and its publication malicious? And by what kind of argument or evidence, in the present temper of parties, could the accused convince them that his opinion was true?

The Report of a Select Committee on the Petitions Praying for a Repeal of the Alien and Sedition Laws [6]

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[A] law to punish false, scandalous, and malicious writings against the Government, with the intent to stir up sedition, is a law necessary for carrying into effect the power vested by the Constitution in the Government of the United States, and in the departments and officers thereof, and, consequently, such a law as Congress may pass; because the direct tendency of such writings is to obstruct the acts of the Government by exciting opposition to them, to endanger its existence by rendering it odious and contemptible in the eyes of the people, and to produce seditious combinations against the laws, the power to punish which has never been questioned; because it would be manifestly absurd to suppose that a Government might punish sedition, and yet be void of power to prevent it by punishing those acts which plainly and necessarily lead to it; and, because, under the general power to make all laws proper and necessary for carrying into effect the powers vested by the Constitution in the Government of the United States, Congress has passed many laws for which no express provision can be found in the Constitution, and the constitutionality of which has never been questioned, such as the first section of the act now under consideration for punishing seditious combinations . . . .

. . . [T]he liberty of the press consists not in a license for every man to publish what he pleases without being liable for punishment, if he should abuse this license to the injury of others, but in a permission to publish, without previous restraint, whatever he may think proper, being answerable to the public and individuals, for any abuse of this permission to their prejudice. In like manner, as the liberty speech does not authorize a man to speak malicious slanders against his neighbor, nor the liberty of action justify him in going, by violence, into another man's house, or in assaulting any person whom he may meet in the streets. In the several States the liberty of the press has always been understood in this manner, and no other. . . .

. . .

. . . [H]ad the Constitution intended to prohibit Congress from legislating at all on the subject of the press, which is the construction whereon the objections to this law are founded, it would have used the same expressions as in that part of the clause which relates to religion and religious laws; whereas, the words are wholly different: "Congress," says the Constitution, . . . "shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or the press." Here it is manifest that the Constitution intended to prohibit Congress from legislating on all the subjects of religious establishments, and the prohibition is made in the most express terms. Had the same intention prevailed respecting the press, the same expressions would have been used, and Congress would have been "prohibited from passing a law respecting the press." They are not, however, "prohibited" from legislating at all on the subject, but merely from abridging the liberty of the press. . . . Its liberty, according to the well known and universally admitted definition, consists in permission to publish, without previous restraint upon the press, but subject to punishment afterwards for improper publications. A law, therefore, to impose previous restraint upon the press, and not one to inflict punishment on wicked and malicious publications, would be a law to abridge the liberty of the press, and, as such, unconstitutional.

Resolutions of Virginia of December 21, 1798[7]

[6] *Annals of Congress*, 5th Cong., 3rd sess. (1799), 2986–90.

. . .

5. That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "alien and sedition acts," passed at the last session of Congress, the first of which exercises a power nowhere delegated to the Federal Government; and which by uniting legislative and judicial powers to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the federal Constitution; and the other of which acts 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; a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

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Resolutions of the Kentucky Legislature (November 10, 1798)[8]

. . .

3. Resolved, That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;" and 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 thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this state by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference: and that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamations, equally with heresy and false religion, are withheld from the cognizance of federal tribunals: that therefore the act of the Congress of the United States, passed on the 14th day of July, 1798, entitled, "an act in addition to the act for the punishment of certain crimes against the United States," which does abridge the freedom of the press, is not law, but is altogether void and of no effect.

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Madison, "Virginia Report of 1799"[9]

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II. The second object against which the resolution protests, is the sedition-act.

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[7] *Resolutions of Virginia and Kentucky Penned by Madison and Jefferson in Relation to the Alien and Sedition Laws* (Richmond, VA: Robert I. Smith, 1835), 34.

[8] Ibid., 65.

[9] Excerpt taken from *The Virginia Report of 1799–1800, touching the Alien and Sedition Laws* (Richmond: J.W. Randolph, 1850), 210–27.

. . .

Is there any express power, for executing which it is a necessary and proper power?

The power which has been selected, as the least remote, in answer to this question, is that of "suppressing insurrections;" which is said to imply a power to *prevent* insurrections, by punishing whatever may *lead* or *tend* to them. But, it surely cannot, with the least plausibility, be said, that regulation of the press, and a punishment of libels, are exercises of a power to suppress insurrections. The most that could be said, would be, that the punishment of libels . . . might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.

Has the Federal Government no power, then, to prevent as well to punish resistance to the laws?

They have the power, which the Constitution deemed most proper, in their hands for the purpose. The Congress has the power before it happens, to pass laws for punishing it; and the executive and the judiciary have the power to enforce those laws when it does happen.

. . .

The freedom of the press under the common law; is, in the defences of the sedition-act, made to consist in an exemption from all *previous* restraint on printed publications, by persons authorized to inspect and prohibit them. It appears to the committee, that 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. . . .

In the British government, the danger of encroachments on the rights of the people, is understood to be confined to the executive magistrate. . . . Hence . . . all the ramparts for protecting the rights of the people, such as the magna charta, their bill of rights, etc., are not reared against the parliament, but against the royal prerogative. . . . Under such a government as this, an exemption of the press from previous restraint by licensers appointed by the king, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one, as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative, as well as against executive ambition. . . .

The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States.

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The nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. In the latter, it is a maxim, that the king . . . can do no wrong. . . . In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?

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The practice of America must be entitled to much more respect. In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this footing it yet stands. . . .

. . .

Is then the federal government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libelous attacks which may be made on those who administer it?

The Constitution alone can answer the question. If no such power be expressly delegated, and it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the Constitution, the answer must be, that the federal government is destitute of all such authority.

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Let it be recollected, lastly, that the right of electing members of the government, constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right, depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. It has been seen, that a number of important elections will take place whilst the act is in force . . . . Should there happen, then, as is extremely probable in relation to some or other of the branches of the government, to be competitions between those who are and those who are not, members of the government, what will be the situations of the competitors? Not equal; because the characters of the former will be covered by the "sedition-act" from animadversions exposing them to disrepute among the people; whilst the latter may be exposed to contempt and hatred of the people, without violation of the act. What will be the situation of the people? Not free; because they will be compelled to make their election between competitors, whose pretensions they are not permitted, by the act, equally to examine, to discuss, and to ascertain. And from both situations, will not those in power derive an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it?

Report of the Minority on the Virginia Resolutions[10]

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To contend that there does not exist a power to punish writings coming within the description of this law, would be to assert the inability of our nation to preserve its own peace, and to protect themselves from the attempts of wicked citizens, who, incapable of quiet themselves, are incessantly employed in devising means to disturb the public repose.

Government is instituted and preserved for the general happiness and safety—the people therefore are interested in its preservation, and have a right to adopt measures for its security, as well against secret plots as open hostility. But government cannot be thus secured, if by falsehood and malicious slander, it is to be deprived of the confidence and affection of the people. It is vain to urge that truth will prevail, and that slander, when detected, recoils on the calumniator. The experience of the world, and our own experience, prove that a continued course of defamation will at length sully the fairest reputation, and will throw suspicion on the purest conduct. Although the calumnies of the factious and discontented may not poison the minds of the majority of the citizens, yet they will infect a very considerable number, and prompt them to deeds destructive of the public peace and dangerous to the general safety.

This, the people have a right to prevent: and therefore, in all the nations of the earth, where presses are known, some corrective of their licentiousness has been deemed indispensable. But it is contended that though this may be theoretically true, such is the peculiar structure of our government, that this power has either never been confided to, or has been withdrawn from the legislature of this union.—We will examine these positions. The power of making all laws which shall be necessary and proper for carrying into execution all powers vested by the constitution in the government of the United States, or in any department or officer thereof, is by the concluding clause of the eighth section of the first article, expressly delegated to congress. This clause is admitted to authorize congress to pass any act for the punishment of those who would resist the execution of the laws, because such an act would be incontestably necessary and proper for carrying into execution the powers vested in the government. If it authorizes the punishment of actual resistance, does it not also authorize the punishment of those acts, which are criminal in themselves, and which obviously lead to and prepare resistance? Would it not be strange, if, for the purpose of executing the legitimate powers of the government, a clause like that which has been cited should be so construed as to permit the passage of laws punishing open resistance, and yet to forbid the passage of laws punishing acts which constitute the germ from which resistance springs?

[10] 6 *J. House of Delegates (Va)* (1798–99), 93–95.

That the government must look on, and see preparations for resistance which it shall be unable to control, until they shall break out in open force? This would be an unreasonable and improvident construction of the article under consideration. That continued calumnies against the government have this tendency, is demonstrated by uninterrupted experience. They will, if unrestrained, produce in any society convulsions, which if not totally destructive of, will yet be very injurious to, its prosperity and welfare. . . .

To punish all malicious calumnies against an individual with an intent to defame him, is a wrong on the part of the calumniator, and an injury to the individual, for which the laws afford redress. To write or print these calumnies is such an aggravation of the crime, as to constitute an offence against the government, and the author of the libel is subject to the additional punishment which may be inflicted under an indictment. To publish malicious calumnies against government itself, is a wrong on the part of the calumniator, and an injury to all those who have an interest in the government. Those who have this interest and have sustained the injury, have the natural right to an adequate remedy. The people of the United States have a common interest in their government, and sustain in common the injury which affects that government. The people of the United States therefore have a right to the remedy for that injury, and are substantially the party seeking redress. By the 2d section of the 3d article of the constitution, the judicial power of the United States is extended to controversies to which the United States shall be a party; and by the same article it is extended to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority. What are cases arising under the constitution, as contradistinguished from those which arise under the laws made in pursuance thereof? They must be cases triable by a rule which exists independent of any act of the legislature of the union. That rule is the common or unwritten law which pervades all America, and which declaring libels against government to be a punishable offence, applies itself to and protects any government which the will of the people may establish. The judicial power of the United States, then, being extended to the punishment of libels against the government, as a common law offence, arising under the constitution which create the government, the general clause gives to the legislature of the union the right to make such laws as shall give that power effect.

. . .

In a solemn instrument, as is a constitution, words are well weighed and considered before they are adopted. A remarkable diversity of expression is not used, unless it be designed to manifest a difference of intention. Congress is prohibited from making any law RESPECTING a religious establishment, but not from making any law RESPECTING the press. When the power of Congress relative to the press is to be limited, the word RESPECTING is dropped, and Congress is only restrained from the passing any law ABRIDGING its liberty. This difference of expression with respect to religion and the press, manifests a difference of intention with respect to the power of the national legislature over those subjects, both in the person who drew, and in those who adopted this amendment.

. . .

If by freedom of the press is meant a perfect exemption from all punishment for whatever may be published, that freedom never has, and most probably never will exist. It is known to all, that the person who writes or publishes a libel, may be both sued and indicted, and must bear the penalty which the judgment of his country inflicts upon him. It is also known to all that the person who shall libel the government of the state, is for that offence, punishable in the like manner. Yet this liability to punishment for slanderous and malicious publications has never been considered as detracting from the liberty of the press. In fact the liberty of the press is a term which has a definite and appropriate signification, completely understood. It signifies a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community.

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U. S. v. Cooper (C.C.Pa. 1800)

Thomas Cooper was a Jeffersonian critic of the Adams administration. In 1799, he published a pamphlet that asserted,

> *Mr. Adams . . . was hardly in the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace, while the unnecessary violence of official expressions might justly have provoked a war.*

For these expressions, Cooper was indicted under the Sedition Act of 1798. He was convicted, fined $400, and sentenced to prison for six months.

Below are Cooper's address to the trial jury and Justice Samuel Chase's charge to the jury. To what extent did Cooper and Chase dispute the relevant law? To what extent did they dispute the relevant facts? The Sedition Act required the defendant to prove the truth of the matter asserted. Could Cooper have proven that his assertions are true? What criticisms could you make of the Adams administration under the Sedition Act?

THOMAS COOPER

If it were true, as it is not true, that . . . I have been guilty of publishing with the basest motives a foul and infamous libel on the character of the president; of exciting against him the hatred and contempt of the people of this country, by gross and malicious falsehoods—then, indeed, would it be his duty to bring me before this tribunal, it would be yours to convict, and the duty of the court to punish me. But I hope, in the course of this trial, I shall be enabled to prove to your satisfaction, that I have published nothing which truth will not justify. . . . You will observe, gentlemen of the jury, that the law requires it to be proved as a necessary part of the charge, that the passages for which I am indicted should be false and scandalous, and published from malicious motives. . . . Nor does it appear to me that the expression of the act, to bring the president into contempt, can be fulfilled, if the accusation, as in the present instance, related to an examination of his public conduct, and no improper motives are imputed to him. And that I have carefully avoided imputing any impropriety of intention to the president, even in the very paper complained of; that the uniform tenor of my conduct and language has been to attribute honesty of motive even where I have strongly disapproved of the tendency of his measures, I can abundantly show. . . . Gentlemen of the jury, I acknowledge, as freely as any of you can, the necessity of a certain degree of confidence in the executive government of the country. But this confidence ought not to be unlimited, and need not be paid up in advance; let it be earned before it be reposed; let it be claimed by the evidence of benefits conferred, of measures that compel approbation, of conduct irreproachable. It cannot be exacted by the guarded provisions of sedition laws, by attacks on the freedom of the press, by prosecutions, pains and penalties on those who boldly express the truth, or who may honestly and innocently err in their political sentiments. . . . Indiscriminate approbation of the measures of the executive is not only unattacked, but fostered, and received with the utmost avidity; while those who venture to express a sentiment of opposition must do it in fear and trembling, and run the hazard of being dragged like myself before the frowning tribunal, erected by the sedition law. . . . Nor do I see how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed. Electors are bound in conscience to reflect and decide who best deserves their suffrage; but how can they do it, if these prosecutions in terrorem close all the avenues of information, and throw a veil over the grossest misconduct of our periodical rulers? . . .

The first article selected for accusation is, that, at the time I allude to, 'he was but in the infancy of political mistake.' . . . [H]ave we advanced so far on the road to despotism in this republican country, that we dare not say our president may be mistaken? Is a plain citizen encircled at once by the mysterious attribute of political infallibility the instant he mounts the presidential chair? . . . I know that in England the king can do no wrong, but I did not know till now that the president of the United States had the same attribute. . . . 'Nor had we yet, under his auspices, been saddled with the expense of a permanent

navy.' Gentlemen, is it true or not that we are saddled with the expense of a permanent navy? Is it necessary that I should enter into a detail of authorities to prove that the sun shines at noon-day? . . . Indeed, if the opinion that fell from the court this morning be accurate, that no man should hazard an assertion but upon sufficient and legal evidence, and if documents from the public offices in proof of notorious facts are required as such evidence, then are the mouths of the people completely shut up on every question of public conduct or public character; but I cannot help thinking it a fair and reasonable position, that a defendant in such a case as this should be permitted to offer to the jury any evidence that appears to him a sufficient ground for his assertion, and let them decide on its credibility.

CIRCUIT JUSTICE CHASE (charging jury).

. . . Thomas Cooper, the traverser, stands charged with having published a false, scandalous and malicious libel against the president of the United States, in his official character as president. There is no civilized country that I know of, that does not punish such offences; and it is necessary to the peace and welfare of this country, that these offences should meet with their proper punishment, since ours is a government founded on the opinions and confidence of the people. The representatives and the president are chosen by the people. It is a government made by themselves; and their officers are chosen by themselves; and, therefore, if any improper law is enacted, the people have it in their power to obtain the repeal of such law, or even of the constitution itself, if found defective, since provision is made for its amendment. Our government, therefore, is really republican; the people are truly represented, since all power is derived from them. It is a government of representation and responsibility. . . . All governments which I have ever read 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: by a clause in that law it is enacted. . . .

It is incumbent on the part of the prosecution to prove two facts: (1) That the traverser did publish the matters contained in the indictment. (2) That he did publish with intent to defame. . . .

First, then, as to the publication. The fact of writing and publishing is clearly proved; nay, in fact, it is not denied. . . . [H]e justifies the publication in all its parts, and declares it to be founded in truth. . . . If there are doubts as to the motives of the traverser, he has removed them; for, though he states in his defence that he does not arraign the motives of the president, yet he has boldly avowed that his own motives in this publication were to censure the conduct of the president, which his conduct, as he thought, deserved. Now, gentlemen, the motives of the president, in his official capacity, are not a subject of inquiry with you. Shall we say to the president, you are not fit for the government of this country? It is no apology for a man to say, that he believes the president to be honest, but that he has done acts which prove him unworthy the confidence of the people, incapable of executing the duties of his high station, and unfit for the important office to which the people have elected him: the motives and intent of the traverser, not of the president, are the subject to be inquired into by you.

Now we will consider this libel as published by the defendant, and observe what were his motives. . . . He . . . goes on to say: 'Nor were we yet saddled with the expense of a permanent navy, nor threatened, under his (the president's) auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace.' Now, gentlemen, if these things were true, can any one doubt what effect they would have on the public mind? If the people believed those things, what would be the consequence? What! the president of the United States saddle us with a permanent navy, encourage a standing army, and borrow money at a large premium? And are we told, too, that this is in time of peace? If you believe this to be true, what opinion can you, gentlemen, form of the president? One observation must strike you, viz.: That these charges are made not only against the president, but against yourselves who elect the house of representatives, for these acts cannot

be done without first having been approved of by congress. Can a navy be built, can an army be raised, or money borrowed, without the consent of congress? The president is further charged for that 'the unnecessary violence of his official expressions might justly have provoked a war.' This is a very serious charge indeed. What, the president, by unnecessary violence, plunge this country into a war! and that a just war? It cannot be-I say, gentlemen, again, if you believe this, what opinion can you form of the president? Certainly the worst you can form: you would certainly consider him totally unfit for the high station which he has so honorably filled, and with such benefit to his country. The traverser states that, under the auspices of the president, 'our credit is so low that we are obliged to borrow money at eight per cent in time of peace.' I cannot suppress my feelings at this gross attack upon the president. Can this be true? Can you believe it? Are we now in time of peace? Is there no war? No hostilities with France? Has she not captured our vessels and plundered us of our property to the amount of millions? Has not the intercourse been prohibited with her? Have we not armed our vessels to defend ourselves, and have we not captured several of her vessels of war? Although no formal declaration of war has been made, is it not notorious that actual hostilities have taken place? And is this, then, a time of peace? The very expense incurred, which rendered a loan necessary, was in consequence of the conduct of France. The traverser, therefore, has published an untruth, knowing it to be an untruth.

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