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Freedom of Speech and of the Press in the Federalist Period the Sedition Act

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FREEDOM OF SPEECH AND OF THE PRESS IN THE FEDERALIST PERIOD; THE SEDITION ACT.

THE constitutional problem to which the Espionage Act of 1917 gave rise is almost as old as the Government itself. As early as 1798 the constitutional authority of the Government over speech and the press was called into question. The controversy caused by the Sedition Act of that date forms the subject of this paper.

During the Federalist period of our history, the interference of foreign powers in our domestic affairs was an open secret. The French propaganda, which had been carried on since 1793 with the purpose of involving us in the Anglo-French war, and persistent attempts to separate Americans from their Government seemed to necessitate some restrictive measures. Early in 1798, when it seemed that we were on the verge of war with France,[1] libels against the Government had been punished by the courts under the common law.[2] The severity with which this law was administered and the doubts as to the exact provisions of it in regard to libels led to the demand for legislative enactments on that subject, and the Federalist majority in Congress hastily passed the Sedition Act to meet the situation. It reads as follows:

> "If any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the Government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the

[1] See CHANNING, HISTORY OF THE UNITED STATES, Vol. 4, 221.

[2] These prosecutions were probably based on the following utterance of Judge Peters in *U. S. v. Worrall*, 2 Dallas, 384-396:

"The power to punish misdemeanors is originally and strictly a common law power, of which, I think, the United States are possessed. It might have been exercised by Congress in the form of a Legislative Act; but it may also, in my opinion, be enforced in the course of judicial proceeding. Whenever a course aims at the subversion of any Federal institution, or the corruption of its public officers, it is an offence against the well-being of the United States; from its very nature it is cognizable under their authority; and consequently it is within the jurisdiction of this court by virtue of the 11th section of the Judicial Act."

See also Mr. Justice Radcliffe's opinion, WHARTON'S STATE TRIALS, 651; Chief Justice Ellsworth's opinion, Charleston Gazette, May 16, 1799; OPINIONS OF THE ATT'YS. GENERAL, Vol. 1, 52, 71.

An account of these trials is given by F. M. Anderson, "Enforcement of the Alien and Sedition Acts" in Annual Report of the American Historical Association (1912) pp. 118-119.

The doctrine laid down by Judge Peters was rejected by Judge Chase in the *Worrall case*. The effect of this dissent is discussed by C. J. Davies, "Review of Du Ponceaus Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States," NORTH AMERICAN REVIEW, XXI, (1825).

United States, or to intimidate or prevent any person holding a place or office in or under the Government of the United States, from undertaking, performing or executing, his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise, or attempt to procure any insurrection, riot, unlawful assembly or combination, whether such conspiracy, threatening, counsel, advice, or attempt, shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanor, and, on conviction, before any court of the United States, having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars and by imprisonment during a term not less than six months, nor exceeding five years, and further, at the discretion of the Court may be holden to find sureties for his good behavior in such sum, and for such fine, as the said court may direct."

Section II.—"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 wittingly 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 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 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 the United States, their people or the Government, then such persons, 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."

Section III.—"And be it further enacted, 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 trial of the cause, to give in evidence, in his defence, the

truth of the matter charged as a libel. And the jury, who shall try the cause, shall have a right to determine the law and fact, under the direction of the Court, as in other cases."[3]

Section I of the Sedition Act was so clearly reasonable that its passage met with no specific protest, but the other provisions of the Act were not so well received.[4] The brief debates in Congress and

[3] The bill was introduced by Mr. Lloyd, June 26, 1798, ANNALS 5TH CONG., I, 590; reported by Mr. Harper, ANNALS 5TH CONG. II, 2116.

For statement of the law see 1 PET. STAT. AT L., 596, and ANNALS 5TH CONG. III, 3776-3777.

An attempt to strike out the words "by printing or writing" failed by a vote of 48-28.

A motion by Mr. Harper to insert a new section providing that "Nothing in this law shall be construed to extend to abridge the freedom of speech and of the press, as secured by the Constitution of the United States" was withdrawn. Probably such a section would have operated only to throw doubts upon the constitutionality of the act.

Sec. 3 was introduced by Mr. Bayard and Mr. Gallatin, ANNALS 5TH CONG., II, 2177.

For other protective measures adopted at the same session of Congress see: ANNALS 5TH CONG., III, 3739, 3744, 3776-3777.

It should be noted that the Sedition Act was intended to embody all the reforms which had, up to that time, been made in the common law of libels. Sec. 3 shows the influence of Fox's Libel Act and the arguments of Erskine.

[4] Protests were received from Suffolk and Queen counties, N. Y.; County of Eases in N. J.; Phila., York, Mifflin, Dauphin, Washington and Cumberland, Pa.; Amelia, in Va. See ANNALS, 5TH CONG. III, 2985.

Typical of these was the "Address of the Va. Assembly to the People: "Measures can mould governments, and if an uncontrolled power of construction is surrendered to those who administer them, their progress may be easily foreseen and their end easily foretold. A lover of monarchy, who opens the treasuries of corruption by distributing emolument among devoted partisans, may at the same time be approaching his object and deluding the people with professions of republicanism. He may confound monarchy and republicanism, by the art of definition. He may varnish over the dexterity which ambition never fails to display, with the pliancy of language, the seduction of expediency, or the prejudices of the times; and he may come at length to avow that so extensive a territory as the United States can only be governed by the energies of monarchy; that it cannot be defended, except by standing armies; and that it cannot be united except by consolidation.

"Measures have already been adopted which may lead to these consequences. They consist———

"In destroying, by the Sedition Act, the responsibility of public servants and public measures to the people, thus retrograding towards the exploded doctrine that the administrators of the Government are the masters and not the servants of the people, and exposing America, which acquired the honor of taking the lead among nations towards perfecting political principles to the disgrace of returning first to the ancient ignorance and barbarism——

"In restraining the freedom of the press and investing the executive with legislative, executive and judicial powers, over a numerous body of men———" WRITINGS OF JAMES MADISON [Hunt ed.] Vol. VI., pp. 338-339.

That Sec. I was not complained of, See—Report of Committee, ANNALS, 5TH CONG. III, 3987. Madison, himself omits criticism of Section I. See, WRITINGS OF JAMES MADISON [Hunt ed.], VI, 393. These volumes will be referred to hereafter as "Madison's Writings."

the more elaborate arguments of the Virginia legislative committee[5] reveal the following constitutional objections to the Act: 1—That the common law did not form a part of the law of the United States, and an Act declaratory of the common law was not, therefore, necessarily constitutional. 2—That no authority over the press was delegated to the Federal Government. 3—That any power over the press was positively denied to the Government by the First Amendment. Let us consider these points in order.

I.

Was the common law in force in this country as a part of the law of the United States? It would seem that the Congressional Committee on Petitions considered the common law to be in operation, for they contended:

> "That the Act in question cannot be unconstitutional, because it makes nothing penal that was not penal before, and gives no new power to the Court, but is merely declaratory of the common law, and useful for rendering that law more generally known, and more easily understood. This," they said, "cannot be denied, if it be admitted, as it must be, that false, scandalous and malicious libels against the Government of the country, published with intent to do mischief, was punishable by common law. * * * The Act, indeed, is so far from having extended the law and the power of the Court that it has abridged both, and has enlarged instead of abridging the liberty of the press; for at common law, libels against the Government might be punished with fine and imprisonment at the discretion of the Court, whereas the Act limits the fine to two thousand dollars, and imprisonment to two years; and it also allows the party accused to give the truth in evidence for his justification, which by common law, was expressly forbidden."[6]

The foundation for the position of the Committee was, of course, the argument that the common law, not having been abrogated by the Constitution, was still in force.

To this contention, Mr. Madison, in his report as chairman of the Virginia legislature, made the following answer:

> "In the States prior to the Revolution it is certain that the

[5] MADISON'S WRITINGS, VI, 338.

[6] ANNALS 5TH CONG., III, 2989. See also Mr. Harper's speech, ANNALS 5TH CONG., 141, and the reference to this argument in MADISON'S WRITINGS VI, 372.

common law, under different limitations, made a part of the colonial codes. But whether it be understood that the original colonists brought the law with them, or made it their law by adoption, it is equally certain that it was the separate law of each colony within its respective limits, and was unknown to them as a law pervading and operating through the whole as one society.

"It could not possibly be otherwise. The common law was not the same in any two of the colonies; in some the modifications were materially and extensively different. There was no common legislature by which a common will could be expressed in the form of law; nor any common magistracy by which such a law could be carried into practice. The will of each colony, alone and separately, had its organs for these purposes."

"Did then," asks Mr. Madison, "the principles or operation of the great event which made the colonies independent States imply or introduce the common law as a law of the Union?

"The fundamental principle of the Revolution was, that the colonies were co-ordinate members with each other and with Great Britain, of an empire united by a common executive sovereign, but not by a common legislative sovereign * * *

"The assertion by Great Britain of a power to make laws for the other members of the Empire in all cases whatsoever, ended in the discovery that she had a right to make laws for them in no cases whatsoever. Such being the ground of our Revolution, no support nor color can be drawn from it for the doctrine that the common law is binding on these States as one society. The doctrine on the contrary, is evidently repugnant to the fundamental principle of the Revolution."

An examination of the Articles of Confederation, Mr. Madison thinks, will bear out this conclusion.

"In the interval between the commencement of the Revolution and the final ratification of these Articles," he writes, "the nature and extent of the union was determined by the circumstances of the crisis, rather than by any accurate delineation of the general authority. It will not be alleged that the 'common law' could have had any legitimate birth as a law of the United States during that state of things. If it came as such into existence at all the charter of Confederation must have been its parent.

"Here again its pretentions are absolutely destitute of foun-

dation. This instrument does not contain a sentence or syllable that can be tortured into a countenance of the idea that the parties to it were, with respect to the objects of the common law, to form one community. No such law is named, or implied, or alluded to, as being in force, or as brought into force by that compact.

"Thus it appears that not a vestige of this extraordinary doctrine can be found in the origin or progress of American institutions. The evidence against it has, on the contrary, grown stronger at every step, till it has amounted to a formal and positive exclusion by written articles of compact among the parties concerned."[7]

The historical treatment of the subject by Mr. Madison seems to show conclusively that the common law did not form a part of the law of the United States prior to the adoption of the Constitution. If this is true, the assertion by the Federalists that the penalties of the Sedition Act were a mitigation of those of common law is unfounded, unless it can be shown that the common law was adopted by the Constitution. Let us now turn to a consideration of this point.

There are two passages of the Constitution which contain a description of the laws of the United States. The first is found in Art. III, Section 2, and the second in Art. 6, Par. 2. Neither of these passages makes any reference to the common law. The Committee of the Virginia Assembly, therefore, correctly said:

> "If the common law had been understood to be a law of the United States, it is not possible to assign a satisfactory reason why it was not expressed in the enumeration."[8]

Certain it is that the common law was not expressly declared to be a part of the law of the United States, and, if it was adopted at all by that instrument, it must have been by implication.

The clause most relied upon by those who held that the common law was adopted by the Constitution was Art. III, Sec. 2, which provides that "the judicial power shall extend to all cases in law and equity arising under this Constitution, etc." During the debate on the petitions for the repeal of the Sedition Act, Mr. Otis, a defender of the Act, asks:

> "What is intended by 'cases at law and equity arising under

[7] MADISON'S WRITINGS, VI, 373-376. See also Judge Chase's opinion in *U. S.* v. *Worrall*, 2 Dallas; Charles Warren, HISTORY OF THE AMERICAN BAR, 229-239, and notes.

[8] MADISON'S WRITINGS, VI, 378-379. The Virginia Committee, of course, took the position that there were no implied powers. See MADISON'S WRITINGS, VI, 326.

the Constitution,' as distinguished from 'Cases arising under the laws of the United States?' What other law can be contemplated but common law; what sort of equity but that legal discretion which has been executed in England from time immemorial, and is to be learned from books and reports of that country?"[9]

The reply to this question was given by Mr. Madison, as follows:

"It has been asked, what cases distinct from those arising under the laws and treaties of the United States can arise under the Constitution other than those arising under the common law? And it is inferred that the common law is accordingly adopted and recognized by the Constitution. * * * If any color for the inference can be found it must be in the impossibility of finding any other cases in law and equity, within the provisions of the Constitution to satisfy the expression.

"The expression is fully satisfied and its accuracy justified by two descriptions of cases to which the judicial authority is extended, and neither of which implies that the common law is the law of the United States. One of the restrictions comprehends the cases growing out of the restrictions on the legislative power of the states. * * * A second description comprehends suits between citizens and foreigners or citizens of different states or foreign law, but submitted by the Constitution to the judicial power of the United States, the judicial power being in several instances extended beyond the legislative power of the United States."

"To this explanation of the text," continues Mr. Madison, "the following observations may be added.

"The expression 'cases in law and equity' is manifestly confined to cases of civil nature and would exclude cases of criminal jurisdiction. Criminal cases in law and equity, would be a language unknown to the law.

"The succeeding paragraphs of the same section is in harmony with this construction. It is in these words: 'In all cases affecting Ambassadors or other public ministers and consuls, and those in which a State shall be a party the Supreme Court shall have original jurisdiction.' In all the other cases (including cases of law and equity arising under the Constitution) the Supreme Court shall have *appellate* jurisdiction, both as to law and *fact;* with such exceptions and under such regulations as Congress shall make.

[9] ANNALS 5TH CONG., II, 2147.

"This paragraph by expressly giving an appellate jurisdiction in cases of law and equity arising under the Constitution to fact as well as to law, clearly excludes criminal cases when trial by jury is secured, because the fact in such cases is not a subject of appeal.

"Once more, * * * the judicial power of the United States cannot be construed to extend to any suit in law and equity commenced or prosecuted against one of the United States by a citizen of another State, or by citizens or subjects of any foreign power. As it will not be pretended that any criminal proceeding could take place against a State, the terms 'law and equity' must be understood as appropriate to civil in exclusion of criminal cases.

"From these considerations it is evident that this part of the Constitution, even if it could be applied at all to the purpose for which it has been cited, would not include any case whatever of a criminal nature, and consequently would not authorize the inference from it that judicial authority extends to offenses against the common law as offenses arising under the Constitution."[10]

On the main point Mr. Madison's contentions are today well established.[11] No prosecutions can take place in the United States without an express statute on the subject, nor is the common law the measure of the powers of the Federal Government except in those cases where common law terms are used in defining those powers. Our next inquiry must be, therefore, whether the original Constitution gave Congress any power of legislating with respect to the press.

II.

In the first place, it is admitted that no express power over the press was delegated to the Federal Government. Furthermore, it was asserted that the understanding of the members of the Convention was complete on the subject, and that it was never intended that Congress should control the press,[12] an assertion that seems to be partially substantiated by Hamilton's declaration that "no power

[10] MADISON'S WRITINGS, VII, 376-378. Mr. Gallatin thought that "these cases meant only, either such as might arise from any doubtful construction of the constitution * * * or those arising immediately under any specific power given or prohibition enjoined by the Constitution." ANNALS 5TH CONG. II, 2157.

[11] *U. S.* v. *Goodwin*, 7 Cranch. 32. See also Charles Warren, HISTORY OF AMERICAN BAR, 229-239.

[12] Mr. Nicholas of Virginia, ANNALS, 5TH CONG.

was given by which restrictions upon the press could be imposed."[13] But the intention of the Constitution to exclude any special control over the press from the powers of Congress still leaves open the question whether or not Congress can control the press by legislation designed primarily to carry into execution the powers expressly delegated to it.

In attempting to prove that the authority over the press which was exercised by Congress in passing the Sedition Act was within its Constitutional power, it was first argued that the right of self preservation is inherent in every government. Judge Chase puts the case thus:

> "All governments which I have read or heard of punish libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their supreme magistrates, and their legislatures, he effectually saps the foundations of the government * * *"[14]

The same view, somewhat differently expressed, was urged by the Committee on Petitions. While they believed

> "that each of the measures adopted by Congress was susceptible of an analytical justification in the principles of the Constitution and national policy," yet they preferred "to rest their vindication on the true ground of considering them parts of a general system of defense, adapted to a crisis of extraordinary difficulty and danger.
>
> "The Alien and Sedition Act," they continued, "form a part and * * * an essential part, in the precautionary and protective measures, adopted for our security."[15]

The argument of the Committee cannot be validly based on any one clause of the Constitution. So far as any phrases of the Constitution were taken to support their view, it was those which refer to the "defence and general welfare." We may follow the example of the Virginia Legislative Committee, however, in "wasting but little time in the attempt to cover the Act by the preamble to the Constitution, it being contrary to every acknowledged rule of construction to set up this part of an instrument in opposition to the plain meaning expressed in the body of the instrument." The preamble, as Mr. Madison states, "usually contains the general mo-

[13] FEDERALIST 84, [Lodge ed.] 537-538.

[14] *U. S.* v. *Cooper*, WHARTON'S "STATE TRIALS," 670-671.

[15] ANNALS, 5TH CONG., III, 2990-2991. See also *ibid* II, 2146; and *ibid*, 2167. A similar position was taken by the minority of the Virginia Committee. See their report, p. 11 ff., quoted in part in the brief of the Gov't. in the *Debs Case*, pp. 12-16.

tives or reasons for the particular regulations or measures which follow it, and it is always understood to be explained and limited by them. We may also agree that Art. I, Sec. 8, "in its fine and consistent meaning could not enlarge the enumerated powers vested in Congress."[16]

On the other hand the question, raised by Judge Chase, whether the Government of the United States has a self preservative power is not so easily disposed of. Whether or not such a construction was originally put upon the Constitution, the doctrine has been subsequently developed that the power of the Government "includes the rights and duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution;"[17] while in the *Fong Yue Ting Case,* the Court specially recognizes the power of expelling aliens as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."[18]

A strong dissent was voiced in the latter case by Justice Brewer, as follows:

> "It is said that the power here asserted is inherent in sovereignty. This doctrine is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the Courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours is fixed and bounded by a written Constitution."[19]

Nevertheless the majority of the Supreme Court sanctioned the view, earlier advanced by Judge Chase, that the power of self-preservation is inherent in the Government, and that Congress may, in certain cases, pass laws for the preservation of the Government without regard to any express provision of the Constitution from which such power is derived.[20] The question in each case is, accord-

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[16] MADISON'S WRITINGS VI, 382-383.

[17] *In re Neagle* A1889), 135 U. S. 199, 34 L. ed. 71.

[18] *Fong Yue Ting* v. *U. S.* (1892), 149 U. S. 711, 37 L. ed. 912. See also *Kohl* v. *U. S.* (1875), 91 U. S. 367.

[19] 149 U. S. 737, 37 L. ed. 921.

[20] See, however, Justice Brewer's opinion, *Fong Yue Ting Case.* Compare his opinion in *Kansas* v. *Colorado* (1907), 206 U. S. 46.

ing to Justice Gray, "whether the manner in which Congress has exercised this right is consistent with the Constitution."[21] It must be admitted that this test leaves the matter very much in the vague.

Yet whether we consider that Congress is vested with authority over the press by some special clause of the Constitution or that Congress has an implied power to pass such laws as are necessary for the preservation of the Government, its power undoubtedly must be considered in connection with Art. I, Sec. 8, par. 18 of the Constitution,[22] which provides that "Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The Federalist view of the interpretation of this clause is expressed by Judge Iredell as follows:

> "What is necessary and proper, in regard to any particular subject, cannot before an occasion arises be logically defined; but must depend upon various extensive views of the case, which no human foresight can reach. What is necessary and proper in a time of confusion and general disorder, would not, perhaps, be necessary and proper in a time of tranquility and order. These are considerations of policy, and questions of law, and upon which the legislature is bound to decide according to its real opinion of the necessity and propriety of an act particularly in contemplation. It is, however alleged that the necessity and propriety of passing collateral laws for the support of others, is confined to cases where the powers are delegated, and is not extended to cases which have a reference to general danger only. The words are general. If, therefore, there be anything necessary and proper for carrying into execution any or all of those powers, I presume it is constitutional."[23]

Somewhat more specifically the Committee contended

> "that a law to punish false, scandalous and malicious writings against the Government, with intent to stir up sedition is a law necessary for carrying into effect the powers 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

[21] *Fong Yue Ting* v. *U. S., op cit.*
[22] CONSTITUTION OF U. S., Art. I, Sec 8, par. 18.
[23] *Northampton Insurgents' Case,* WHARTON, STATE TRIALS, 479.

> 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 suppress sedition and yet be void of power to prevent it by punishing those acts which plainly and necessarily tend to it; and because under the general power to make all laws necessary and proper, Congress has passed too many laws for which no express provision can be found in the Constitution, and the constitutionality of which has never been questioned * * *"[24]

A contrary view of the general import of the necessary and proper clause is given by Mr. Madison, who argues that

> "the plain import of this clause is that Congress shall have all the incidental or instrumental power necessary and proper for carrying into execution all the express powers * * *
>
> "It is not," he says, "a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty that the means of carrying into execution those otherwise granted are included in the grant."
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> "When therefore a question arises concerning the constitutionality of a particular power," Mr. Madison continues, "the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an expressed power, and necessary for its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it."[25]

Referring more directly to the argument made by the Committee that the Sedition Law was necessary to enable the Government to carry its power into execution, Mr. Madison continues:

> "Is there any express power for executing which this 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 made 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 the regulation of the press, and a punishment of libels, are exercises of a power

[24] ANNALS 5TH CONG., III, 2988. See also Mr. Otis' Speech, *ibid*, II, 2146.
[25] MADISON'S WRITINGS, VI, 383.

> to suppress insurrections. The most that could be said would be that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections * * * if the power to punish includes a power to prevent, by all the means that have that tendency, such is the relation and influence among the most remote subjects of legislation, that a power over a very few would carry a power over all."[26]

The opinions which we have just reviewed present the Federalist and Republican views respectively of the necessary and proper clause. The discretion of Congress as to the means by which its constitutional powers are to be executed is no longer questioned. Judge Iredell's view of the "necessary and proper" clause, broad as it is, is in substantial accord with Marshall's decision in *McCulloch* v. *Maryland,* where that jurist takes the position that the clause "purports to be an additional power, not a restriction on those already granted." "Let the end be legitimate," he says, "let it be within the scope of the Constitution, and all means which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional."[27]

Also it seems clear, in light of recent judicial decisions, that Mr. Madison's view that legislation must be attached to a particular clause of the Constitution in order to be constitutional, is erroneous. In *Juillard* v. *Greenman* (110 U. S. 421), the Court clearly recognizes that a particular power may be found to be vested in Congress "by a just and fair interpretation of the whole Constitution."

Since Congress, then, is allowed a broad discretion in the choice of means by which its powers are to be carried into execution, and since such legislation may be based upon the whole Constitution rather than upon any specific clause of that instrument, it is not apparent that there is any proof that the press was given special protection by the original Constitution. We may say, therefore, that Congress was not without power to make laws touching the press, unless such legislation was prohibited by some clause in the Constitution.

III.

It is generally contended, however, that a different status was given to the press by the First Amendment, which provides that "Congress shall make no law * * * abridging the freedom of speech

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[26] *Ibid,* 383, 384. See also Mr. Nicholas' remarks. ANNALS 5TH CONG., III, 3004-3005.

[27] 4 WHARTON'S STATE TRIALS 316.

or of the press." Thus Mr. Madison contended that the First Amendment was a positive denial to Congress of any power whatsoever over the press.

> "This," he said, "was demonstrated by the great apprehension expressed by many when the Constitution was under consideration lest the omission of some positive exception, from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn, by construction, within some of the powers vested in Congress, more especially of the power to make all laws necessary and proper for carrying their other powers into execution." "In reply to this objection," continues Mr. Madison, "it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved, that no powers were given beyond those enumerated in the Constitution and such as were fairly incident to them; and the power over the rights in question, and particularly over the press was, neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power would be manifest usurpation."
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> "Is then," asks Mr. Madison, "the Federal Government destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made upon those who administer it?
>
> "The Constitution alone," he says, "can answer the question. If no such power be expressly delegated, and if 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 such authority."[28]

Mr. Madison's argument proves that the members of the convention were agreed that no special authority over the press was granted to Congress by the Constitution; but the answer to the question whether Congress is destitute of all power over the press is inconclusive, for there might be certain cases in which it would be both necessary and proper for Congress to regulate the press. The question, then, remains whether the Amendment amounts to a positive denial to Congress of any power over the press. The controversy on the subject has centered around the meaning of the terms "abridge" and "freedom of the press" respectively.

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[28] MADISON'S WRITINGS, VI, 390-392. See also Mr. Nicholas' speech, ANNALS 5TH CONG. II. 2152. For the events that led to the adoption of the First Amendment, see MADISON'S WRITINGS, VI, 390-391.

(1) The argument by which the Federalists sought to prove that Congress was not forbidden to legislate in regard to the press was stated by the Committee on Petitions as follows:

> "Had the Constitution intended to prohibit Congress from legislating at all on the subject of the press * * *, it would have used the same expression as in that part of the clause which relates to religion and religious tests; whereas the words are wholly different 'Congress,' says the Constitution * * * '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.' Here it is manifest that the Constitution intended to prohibit Congress from legislating at all on the subject 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 any 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. It is evident that they may legislate respecting the press, may pass laws for its regulation, and to punish those who pervert it into an engine of mischief, provided those laws do not abridge its liberty."[29]

Mr. Madison, on the other hand, considered that:

> "Both these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the Government. Any construction, therefore, that would attack the original security for the one must have a like effect for the other.
>
> "Secondly," he continued, "they are both secured by the supplement to the Constitution, being both included in the same amendment, made at the same time, and by the same authority. Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power with respect to the press might be equally applied to the freedom of religion."

Lastly, Mr. Madison argues that,

> "if the words and phrases in the amendment are to be con-

[29] ANNALS 5TH CONG., III. 2990. See also the report of the minority of the Virginia Committee p. 11 ff. This document may be found in the Library of Congress, catalogued "Class E. 327, Book A. 22."

sidered as chosen with a studied discrimination which yields an argument for a power over the press made under the limitations that its freedom be not abridged, the same argument results from the same consideration for a power over the exercise of religion, under the limitation that its freedom be not prohibited.

"For," he says, "if Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only, 'they shall not abridge it,' and it is not said, 'they shall make no law respecting it,' the analogy of reasoning is conclusive that Congress may regulate and even abridge the free exercise of religion, provided they do not prohibit it, because it is said only, 'they shall not prohibit it,' and it is not said that they shall make no law respecting it."[30]

We have already conceded Mr. Madison's point that no express power over the press or religion was delegated to Congress. His other points, however, rest upon the assumption that the amendment was considered to be "a grant or recognition of power." The Committee made no such claim, but admitted that limitations upon the power of Congress were imposed by the amendment. The only question was whether the limitations were the same in regard to religion and the press, and the answer to the question the Committee found in the different terms used with respect to these subjects. That their conclusion was at least partially correct is borne out by Mr. Madison's silence with regard to Section 1 of the Sedition Act, which likewise imposed restrictions upon the press. The conclusion must be that some power over the press can be exercised constitutionally by Congress.

What then was the limit of the Congressional power over the press? The Committee thought a "well-known and universally admitted definition" of the liberty of the press would give the proper answer to the question.

"The liberty of the press," said Mr. Blackstone, "consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published." "Every freeman," he says, "has an undoubted right to lay

[30] MADISON'S WRITINGS, VI, pp. 400-401. Mr. Nicholas argued that the phraseology of the amendment showed that Congress was prohibited from legislating at all on the subject mentioned in the amendment. He accounted for the deficient language by saying that "The writer intended to indulge his copiousness of expression." ANNALS 5TH CONG., III, 3011. See also Gallatin's speech, *ibid.*, II, 2160-2161; Mr. Madison's speech, *ibid.*, 2105.

what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he published what is unlawful, mischievous, or illegal, he must take the consequences of his own temerity. To punish (as the law does at present) any dangerous or offensive writings, which, when published, shall, upon fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of the peace and good order of government and religion, the only foundation of civil liberty.

"Thus," continues the writer, "the will of the individual is still left free; the abuse only of that free will is the object of legal punishments: neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating or making public of bad sentiments destructive of society is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly vend them as cordials; and to this may be added, that the only plausible argument heretofore made for the restraining the just freedom of the press, that it is necessary to prevent the daily abuse of it, will entirely lose its force when it is shown (by a reasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas, it can never be used to any good one when under the control of the inspection, so true will it be found that to censure the licentiousness is to maintain the liberty of the press."[81]

It seems that Blackstone here lays down two characteristics of the "freedom of the press": exemption from "previous restraints" on all publications and an exemption from "subsequent punishment" for publications which, "upon fair and impartial trial," are

[81] CHASE-BLACKSTONE, 917-918. For a similar construction see *Rex* v. *Cuthill*, 27 State Trials, 775; other cases are cited in ROGERS' POSTAL POWERS OF CONGRESS, pp. 98 ff and Zachariah Chafee, "Freedom of Speech in War Time" 32 HARV. L. REV. 932 ff. For a criticism of Blackstone's definition see THEODORE SCHROEDER, "CONSTITUTIONAL FREE SPEECH DEFINED AND DEFENDED," Chap. VIII, and Chafee, *op. cit.*, 938-941.

The Congressional Committee argued "that the liberty of the press did never extend according to the laws of any state or the United States, or of England, from whence our laws are derived, to the publication of false, scandalous, and malicious writings against the Government, written with intent to do mischief, such publications being unlawful, and punishable in every state; from whence it follows, undeniably, that a law to punish seditious and malicious publications, is not an abridgment of the liberty of the press, for it would be a manifest absurdity to say, that a man's liberty was abridged by punishing him for doing that which he never had a liberty to do." ANNALS 5TH CONG. II, 2989.

adjudged not to be "of a pernicious tendency." If these are the true tests of the freedom of the press, Mr. Harper correctly took the position that "the rational liberty of the press would not be restricted by a well-defined law, provided persons have a fair trial by jury. * * *"[32]

But was the Blackstonian theory accepted at the time of the adoption of the First Amendment? In order to show that it was, Mr. Otis had resort to its meaning in the States. He would demonstrate, he asserted, that

> "although, in several States' constitutions, the liberty of the press and speech were guarded by the most express and unequivocal language, the legislators and judicial departments of those States had adopted the definitions of the English law, and had provided for the punishment of defamatory and seditious libels. Thus, the Bill of Rights of the State of New Hampshire declared 'That liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.' Yet by an act passed in February, 1791, subsequent to the adoption of that Constitution, 'any person of the age of fourteen or upwards, making and publishing a lie or libel tending to the defamation of any person, is liable, on conviction, to a fine,' etc. So, too, the Declaration of Rights prefixed to the Constitution of Massachusetts contained an article to the same effect as that of New Hampshire. Yet in the law establishing the Supreme Court of that State cognizance was given it, among other things, over all offenses and misdemeanors of a public nature, 'tending to a breach of the peace, oppression of the subject, raising of faction, controversy or debate, to any manner of misgovernment'; while, by another law, any person aiding or abetting a lottery by printing or publishing a scheme or account of it, was liable to punishment; by a third, 'if any person, by public or private discourse or conversation, or by any way or means, should dissuade or endeavor to prevent an officer from doing his duty in quelling riots,' he was subject to a heavy penalty. In Pennsylvania they carried matters even further. In their Bill of Rights we find 'that the printing presses shall be free to any person who undertakes to examine the proceedings of the legislature, or any branch

[32] ANNALS 5TH CONG. II, 2102. Mr. Otis thought "that an honest jury was competent to such a discrimination (between liberty and licentiousness), that they could decide upon the falsehood and malice of the intention."—ANNALS 5TH CONG. II, 2149.

of the Government, and no law shall ever be made to restrain the free right thereof.' The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely write, print, or speak on any subject, being responsible for the abuse of that liberty.' Yet in this same Pennsylvania 'a law was made, and we have heard from the best authority was still in force, making it high treason to propose a new Constitution in that State.'"

"If we go to Virginia," Mr. Otis continued, "we shall read in their Constitution 'that the freedom of the press cannot be restrained except in despotic Governments,' but in the act passed December, 1792, it is provided 'that if any person shall, by writing or speaking, endeavor to instigate the people to erect or establish any Government separate or independent of the Government of Virginia, he shall be subject to any punishment, not extending to life or member, which the court may adjudge.' Also they have there an act 'against cursing and swearing, which is merely using the liberty of speech.'"[33]

It has been argued subsequently that Blackstone's definition of freedom of the press had received such judicial sanction that its significance must have been familiar to the members of the legislatures which adopted the amendment. In must have been known, for instance, that Chief Justice Hutchinson, of Massachusetts (1767),[34] and Judge McKean in Pennsylvania (1788)[35] had

[33] ANNALS 5TH CONG. II, 2149. See also COOLEY, CONSTITUTIONAL LIMITATIONS, [7th ed.] 603-604 n.

That Pennsylvania had such a law as Mr. Otis here describes is improbable. Mr. Gallatin specifically denied that the assertion was true. The reference to the Virginia law is also misleading. The law referred to penalized the establishment of a government in Virginia by unconstitutional methods. The law was only a re-enactment of the law of 1785. See HENING, LAWS OF VA., 12, pp. 41-43 and SHEPHERD "LAWS OF VA.", I. p. 187.

[34] Chief Justice Hutchinson had spoken as follows: "High Notions of the Liberty of the Press, I am sensible, have prevailed of late among us; but it is dangerous to meddle with and strike at this Court.

"The Liberty of the Press is doubtless a very great Blessing; but this Liberty means no more than a Freedom for everything to pass from the Press without a License.—That is, you shall not be obliged to obtain a License from any Authority before the Emission of things from the Press. Unlicensed Printing was never thought to mean a Liberty of reviling and caluminating all Ranks and Degrees of Men with impunity, all Authority with ignominy.—To carry this absurd notion of the Liberty of the Press to the length some would have it—to print everything that is Libellous and slanderous—is truly astonishing and of a most dangerous tendency." Quincy Mass. Reports, 244.

[35] *Respublica* v. *Oswald*, 1 Dall. (N.S.) 319, 325. See also trial of Wm. Cabbett, (Pa., 1797) WHARTON'S STATE TRIALS, 322, 323; *People* v. *Croswell*, 3 Johns. Cases, 337-411.

adopted this definition of the liberty of the press. Nor is it evident that such judicial precedents were regarded as overthrown by the First Amendment. Thus, in 1794 and again in 1797, the Attorney General had expressed opinions which were in harmony with them.[36] Also, Blackstone's theory was consistently held by the Federal courts in enforcing the Sedition Act.

The evidence is certainly strong that the First Amendment was designed primarily to prevent the imposition of previous restraint upon the press. How did the opponents of the Sedition Act endeavor to meet it? Madison argued (1) that the practice in the States was not consistent with the Blackstonian theory, (2) that the nature of our Government requires a greater freedom of the press than was allowed in England, and that this freedom could not be enjoyed if the power of the Federal Government were as extensive as that of the English Government under the common law. Let us examine these arguments briefly.

(1) The theory of the freedom of the press drawn by Mr. Madison from the practice in the States was different from that stated by Mr. Otis.

> "In every state, probably, in the Union," he says, "the press has exercised a freedom in canvassing the merits of measures and 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."[37]

(2) Moreover, Mr. Madison argues, the Blackstonian theory is inconsistent with the very nature of our Government.

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[36] 1 OPINIONS OF ATTY. GENERAL, 52, 71.

[37] MADISON'S WRITINGS, VI, 386. See also ANNALS 5TH CONG., II, 2159-2160. The fears aroused by the exercise of such power are reflected in the following: Speech of Mr. Nicholas, ANNALS 5TH CONG., II, 2104; argument of Va. Committee, MADISON'S WRITINGS, VI, 335. See also COOLEY, CONSTITUTIONAL LIMITATIONS, [7th ed.] 603-604.

Mr. Nicholas contended "that there are some acts of the press which Congress ought not to have the power to restrain, and that by the amendment they are prohibited to restrain these acts. Now to justify any acts of Congress, they ought to show the boundary between what is prohibited and what is permitted, and that the act is not within the prohibited class. The Constitution has fixed no such boundary, therefore they can pretend to no power over the press, without claiming the right of defining what is freedom, and what is licentiousness, and that would be to claim a right which would defeat the Constitution; for every Congress would have the same right and the freedom of the press would fluctuate according to the will of the Legislature. This is, therefore, only a new mode of claiming absolute power over the press." ANNALS 5TH CONG., III, 3011. See also his speeches *ibid.*, II, 2140. See also II, 2142. For an intimation as to the proper limit of the Government's power in such cases see *U. S.* v. *Reynolds*, 98 U. S. 145.

> "The nature of governments, elective and limited, and responsible in all their branches," he says, "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, an hereditary and not a responsible magistrate, can do no wrong, and that the legislature, which in two-thirds of its composition is also hereditary and not responsible, can do what it pleases. In limited States the executive magistrates are not held to be infallible nor the legislature to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under such circumstances, that a different degree of freedom in the use of the press should be contemplated?"[38]

Such a freedom Mr. Nicholas also thought could not be secure from the arbitrary interference of the Federal Government if the Blackstonian theory of the freedom of the press was adhered to; for, he says, "it does not at all distinguish between publications of various sorts, but leaves all to the regulation of the law, only forbidding government to interfere until the publication is really made. The definition, if true," he proceeds, "so reduces the effect of the amendment that the power of Congress is left unlimited over the press, and they are merely deprived of one mode of restraint."[39]

It was further contended by Mr. Madison that, in effect, not even one mode of restraint of the press, namely, that the censorship, was denied to Congress, for "a law imposing penalties on printed publications would have similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that laws might not be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."[40]

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[38] MADISON'S WRITINGS VI. 387-388. See also Mr. Nicholas' speech, ANNALS 5TH CONG., III, 3009; 2 STEPHEN'S HISTORY OF CRIMINAL LAW, 300; Henry Schofield, "Freedom of the Press," in 9 PROC. AM. SOCIAL SOC. 70; DE TOCQUEVILLE, DEMOCRACY IN AMERICA, [Reeve Translation] p. 178. *Contra*, see Iredell J. in *Northampton Insurgents Case*, WHARTON'S STATE TRIALS, 477.

[39] ANNALS 5TH CONG., III, 3008.

[40] MADISON'S WRITINGS VI, 388.

Mr. Madison's assertion has received authoritative support from Cooley, who says that "their purpose (of the free speech clauses) has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. * * * The evils to be prevented were not the censor-

On both of these points later history has gone far to vindicate Madison's position, but at that time it had little to support it except his own connection with the subject.

The Republicans, however, were not willing to concede that the freedom of speech in the States was the same as its liberty under the National Government. Thus, Mr. Nicholas "had heard it said that the States take cognizance of offenses of this sort (seditious libels)." "But," he asks, "does this give the power to the Federal Government? Because the States declare certain things offenses have the general Government power over like offenses? If so," he said, "it would have a concurrent power with the State Governments, which," he believed, "would be a novel idea."[41]

It seems that Mr. Nicholas misses the point of the Federalist argument. Anyone would agree that the powers of the Federal Government are not, in every case, coextensive with those of the States. In this case the argument that Blackstone's definition was generally accepted was made only in order to show that the First Amendment did not remove the press entirely from congressional control; and such was not intended, whether we adopt Blackstone's definition of the freedom of the press or that of Madison; for neither definition can be so construed as to amount to a complete denial of power to Congress on the subject of the press, under the "necessary and proper" clause

What then is the true limit of the National Government's power over speech and the press? This power being "vested in and derived from the people," and the Government having been "instituted for the benefit of the people,"[42] it follows that the people have a right to suppress such speech as interferes with the carrying out of the purposes for which Government was established. The people, therefore, acting through the Government, may constitutionally penalize such speech as directly interferes with the constitutional exercise of its powers by the Government. Such, it would seem,

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ship of the press merely, but any action of the government by which it might prevent such free and general discussion of public measures as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

It must be remembered, however, that Cooley wrote long after the time of Madison, and his opinion may represent a more liberal view than that which prevailed during the Federalist period. There were, however, in the Federalist period, liberals who took a position similar to Cooley's. See, for example, Gallatin's speeches, ANNALS 5TH CONG., II, 2108, 2162-2163; Mr. Nicholas' speech, *ibid.*, III, 3005-3006; Ebenezer Rhoades Editor Chronicle (BUCKINGHAMS REMINISCENCES, I, 261); Mr. Cooper, *Cooper Case*, WHARTON'S STATE TRIALS, 665; Mr. Madison, MADISON'S WRITINGS, VI, 336-337; *ibid.*, 396-398.

[41] ANNALS 5TH CONG., II, 2143.

[42] ANNALS 1 CONG., I, 451.

is the extent of the Government's power today, which power has been the same ever since the adoption of the original Constitution.[43] In short, the First Amendment amounts only to recognition of rights already existent, and so does not subtract from power previously granted.[44]

IV.

Returning, then, to a direct consideration of the Sedition Act, it would seem that Section II of that act was constitutional, if it did no more than to protect the officers of Government from such false and malicious verbal attacks as might render them incapable of performing their duties as public servants. Again, since the truth could be given in evidence, it would seem that theoretically there was no violation of the freedom of discussion, even according to Madison's definition.

Madison, however, objected to this conclusion as follows:

> "A few reflections," he contended, "will prove that its (the Sedition Act's) baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter con-

[43] G. P. Garrett, "Free Speech and the Espionage Act," in the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol. X, p. 71, takes the position that the constitutional guaranty is "that we shall be secure in freedom to use such speech as does not injure the rest of the community. Interpreted by the Espionage Act," he says, "certain language and certain expressions are, at this time, injurious to the nation and its people. * * * Therefore, they are inhibited."

[44] See *Brushaber* v. *Union Pac. Ry. Co.*, 240 U. S. 1.

Mr. Madison himself seems to think that the power of the Government has never extended to an abridgment of the freedom of the press. See MADISON'S WRITINGS, Vol. VI, 398-400. While Mr. Madison's argument may be criticized on the ground that his definition of the freedom of the press is too broad, yet we may accept the view that the freedom of the press has been the same since the adoption of the Constitution; for the power of the Government has been restricted so that it cannot pass arbitrary laws for the sole purpose of controlling the press. See *Robertson* v. *Baldwin*, 165 U. S. 275-281.

W. R. Vance, "Freedom of Speech and of the Press," 2 MINN. L. REV. 239 (1918), shows that the Amendment was intended to secure the people in the rights which belonged to them under the common law. A similar position is taken by Fred G. Hart in YALE LAW JOURNAL, February, 1920. Neither of these writers, however, contends that by common law the freedom of the press consists *only* in the absence of previous restraint. By the common law certain kinds of utterances were penalized; and, in passing laws to carry its power into execution, Congress cannot go beyond the limits of the common law. It is submitted that Congress is so limited by the "necessary and proper" clause of the Constitution that it has never been able to infringe the common law right of free speech, even had there been no constitutional amendment on the subject.

For a criticism of the idea that the freedom of the press consists *only* in the absence of previous restraint, see MADISON'S WRITINGS, VI, 386-387.

Zachariah Chafee, 32 HARV. L. REV. 959, takes the position that the proper boundaries of free speech are to be determined in every instance by balancing the interests of the individual and the interests of society, (A not very helpful suggestion practically). See also John Chipman Gray, NATURE AND SOURCES OF THE LAW, p. 48 ff.

tained in political writings. In the first place, when simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and exertion in all, of meeting a prosecution from the Government with the full and formal proof necessary in a court of law.

"But in the next place, it must be obvious to the plainest minds that opinions and inferences and conjectural observations are not only in many cases inseparable from facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinion, and inferences, and conjectural observations cannot be subject to that kind of proof which appertains to facts before a court of law.[45]

"Again, it is no less obvious that the intent to defame or bring into contempt, or disrepute, or hatred * * * cannot prevent its pernicious influence on the freedom of the press. For, omitting the inquiry how far the malice of the intent is an inference from the mere publication, it is manifestly impossible to punish the intent to bring those who administer the Government into disrepute or contempt without striking at the right of freely discussing public characters and measures; because those who engage in such discussions must expect and intend to excite those unfavorable sentiments, so far as may be thought to be deserved. To prohibit, therefore, the intent to excite those unfavorable sentiments against those who administer the Government is to prohibit the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which again is equivalent to a protection to those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their character and conduct. * * *[46]

Mr. Madison's argument raises two questions: (1) Did the pro-

[45] MADISON'S WRITINGS, VI. 396. For the connection of this point with the freedom of the press, see the references in note 40, *ante*. That the law does not forbid differences of opinion is held generally by the courts today. See my article in MICHIGAN LAW REVIEW, vol. XVII. p. 655, and note 89. As we shall see in the course of this discussion, the separation of facts and opinions is difficult. Again, the Espionage Act of 1917 illustrates the point. See my article on "Freedom of Speech and of the Press in War Time: The Espionage Act," in MICHIGAN LAW REVIEW, vol. XVII. p. 645, and note 58.

[46] MADISON'S WRITINGS, VI. 396-397.

vision permitting the truth to be given in evidence allow a greater freedom of discussion than was permitted by the common law? (2) Did the provision which made the intent an essential part of the crime permit a greater liberty of speech than the common law, which had made the tendency of the publication the test of criminality? The value of these provisions obviously depended entirely upon the construction given to them by the courts. It is, therefore, to the enforcement of them that we must now turn.

(1) Did the provision permitting the truth to be given in evidence allow a greater freedom of discussion than was permitted under the common law? Theoretically, in these actions a defendant was allowed to give in evidence the truth of the words spoken or written; and if the truth of the statement was proved it would amount to a justification. Had this been really carried out in the enforcement of the act, greater freedom of discussion would undoubtedly have been allowed than under the common law. The value of the provision, however, was greatly lessened by the attitude of the courts, for they required each statement charged to be libelous to be proved *'in toto'* before the truth would amount to a defense. Thus, Judge Chase charged the jury:

> "That the traverser in his defense 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 two, he fails in his defense, for he must prove the whole of his assertions to be true. * * *"[47]

Furthermore, the defendant was required not only to prove every statement *in toto,* but sometimes the court held that a defendant would have to prove an entire charge by a single witness, instead of adducing a witness for each point. Judge Chase, for example, said:

> "That the argument (that one witness could prove a specific point, and another another) suggested convinced his mind that it would be improper to admit the testimony now offered to the court; that to admit evidence to an argumentative establishment of the truth of a minute part of the charge by one witness, and another part by another witness, would be irregular and subversive of every principle of law. * * *"[48]

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[47] *Cooper Case,* WHARTON'S STATE TRIALS, pp. 676-677. See also the *Haskell Case, ibid.,* 686. Judge Peters charged the jury that "unless the justification came up to the offence, it was no defence."

[48] *Callender Case,* WHARTON'S STATE TRIALS, 707. The charge was concurred in by Judge Griffin.

Whether or not Judge Chase was correct in the position he took on this occasion, and there is some justification for his stand, the refusal to admit Colonel Taylor's evidence produced the impression that one could not successfully offer the truth in his defense.[49]

Closely interwoven with the problem of proving the truth of the statements charged as libelous was that of separating facts from opinions. In the words of Mr. Hay, attorney for the defense in the *Callender case,* "* * * the assertion of a fact is the assertion of that which from its nature is susceptible of direct and positive evidence; everything else is opinion."[50] What then was the status of erroneous deductions from fact under the Act?

> "Will you," asks the court in the *Callender case,* "call a man a murderer and a thief, and excuse yourself by saying it is but mere opinion, or that you have heard so? Any falsehood, however palpable and wicked, may be justified by this species of argument. The question here is with what intent the traverser published these charges. Are they false, scandalous and malicious, and published with intent to defame?"[51]

The cases cited seem to show that the value of the clause permitting truth to be given in evidence was largely nullified by the action of the court, and without this clause the Sedition Act was of practically the same force as the common law. As Mr. F. M. Anderson says:

> "* * * By refusing to distinguish between fact and opinion, and by requiring that every allegation be fully proved,

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[49] The refusal to admit Colonel Taylor's testimony in this case was one of the bases of the charges later brought against Chase in the impeachment proceedings.

It is usually stated that the *Zenger Case* (N. Y., 1738) is the leading case on the admissibility of truth in evidence. There is an earlier case, however, in which similar arguments were used. See Mr. Emot's argument in the *Bayard Case,* HOWELL'S STATE TRIALS, vol. XIV, p. 473 (1701-1702).

It is probable that neither case made any immediate change in the practice of the courts. Mr. C. A. Duniway, (FREEDOM OF THE PRESS IN MASSACHUSETTS, p. 113 n,) has this to say about the *Zenger Case.*

"Mr. Andrew Hamilton secured his (Zenger's) acquittal by adroit appeals to the sympathy of the jury, and the result was heralded as a vindication of the rights of mankind and the liberty of the press. In the development of public opinion toward that end, the case was indeed a contributing influence, but it did not secure the freedom of the press even in New York, and it had no effect upon the law and practice of Massachusetts."

For the later development of this idea, see SCHOFIELD, "Freedom of Speech and of the Press," in IX PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY; and Hamilton's argument in *People* v. *Croswell,* 3 Johns. Cas. 337 (1804).

[50] WHARTON'S STATE TRIALS, 693.

[51] *Callender Case,* WHARTON'S STATE TRIALS, 695.

the courts would deprive the provision of all value as a protection for the accused."[52]

(2) The second point raised by Mr. Madison was in regard to the effect of the provision requiring that the malicious *intent* should be proved. The intent was a material element in every offense covered by the act, and, as Judge Chase charged the jury, it "must be plainly manifest"; for if there is no intent to defame, etc., there is no offense created by that law.

> "The intent, of course, is as much a fact as the publication of the statements, and must be proved in the same manner as other facts, and must be proved as stated in the law of Congress."[53]

The fact that the courts took it upon themselves to determine the intent, however, seemed to "reduce the intent to a fiction,"[54] for while they theoretically left the question to the jury, they practically charged them that the malicious intent was present. For example, Judge Chase thus charged the jury:

> "This conduct showed that he intended to dare and defy the Government, and to provoke them, and his subsequent conduct satisfies my mind that such was his disposition. For he justifies the publication in all its parts, and declares it to be formed in truth. It is proved to be his publication. * * * It is your business to consider the intent as coupled with that, and view the whole together."

Later, Judge Chase said, "Take this publication in all its parts, and it is the boldest attempt I have known to poison the minds of the people."[55]

The action of the court in thus assuming the province of the jury justifies the conclusion that "their summing up left nothing for honest jurors to do but to return verdicts of guilty."[56]

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[52] "The Enforcement of the Alien and Sedition Laws," ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION, (1912) p. 126.

[53] WHARTON'S STATE TRIALS, 671. See also *ibid.*, 675.

[54] See Henry Schofield, IX PROC. AMER. SOCIOL. SOC.

[55] *Cooper Case*, WHARTON'S STATE TRIALS, 671.

[56] See Schofield, *op. cit.*

"Lord Mansfield laid down that the common law test to be applied to determine the seditious character of publications was their tendency as makers to create and diffuse among the people an ill opinion of existing public officers, governments, institutions and laws." Schofield, *op cit.* p. 71.

For Judge Mansfield's opinion see *Dean of St. Asaph's Case*, 4 Doug. 73, 172 (1784). See Erskine's argument in the same case.

For an argument against the doctrine of tendency see Furneaux's letter to Blackstone, quoted in *State* v. *Chandler*, 2 Harr. 553-576.

And the same conclusion emerges when we approach the subject from another angle. Section III of the Sedition Act provided, it will be recalled, that "the jury shall be judges of the law and the fact, under the direction of the court, as in other cases."[57] Attempts to elucidate this provision developed two points of view with reference to the true province of the jury in libel cases. The first was "that the jury were always judges of the law as well as the fact in libel as well as in other cases,"[58] and the other that "it is amongst the soundest principles that judges are to determine the law and juries the fact." "It is utterly impossible," said Mr. Bayard, "that unlettered men can be competent to decide justly as to questions of law." He knew of "no criminal case in which the jury exercised such power. "Indeed," he said, "such power would frequently operate against the defendant; for if a jury determine erroneously a man would have no appeal; whereas, when judges decide wrong, appeal can be had by writ of error or by appeal to a superior court."[59]

Whatever view may be taken of the former practice in libel trials, Section III of the Sedition Act intended to lay down a definite rule in future cases. The intention of the act was explained by Mr. Gallatin as follows:

> "It was a principle of common law that a jury in criminal cases were judges not only of the facts but also of the criminality of the fact. Thus, in a trial for murder, a jury, in their verdict, had a right not only to declare the bare fact, to-wit, that A had killed B, but also to decide whether the act of killing was criminal or not, and if criminal to what degree; and it had, therefore, never been disputed that in that case a jury might bring in their verdict of self-defense, manslaughter, or murder. Upon the same principle, it was evident that in cases of libel a jury should have a right not only to decide the bare fact, to-wit, whether the accused per-

[57] 1 PET. STAT. AT L., 596; ANNALS 5TH CONG., III. 3776-3777.

[58] See Mr. Harper's speech, ANNALS 5TH CONG., II. 2135.

[59] Mr. Bayard, *ibid.*, 2136. The confusion on this point was probably due to the fact that Mr. Bayard considered that the provision "put it into the power of the jury to declare that this is an unconstitutional law, instead of leaving it to be determined, where it ought to be determined by the judiciary," while the others considered that the law meant only to give the jury the power to declare "guilty or not guilty," or the power of handing in a special verdict. See Mr. Otis' speech, ANNALS 5TH CONG., II. 2135. See N. Smith's speech (ANNALS 5TH CONG., II. 2135-2136), as proof of the existing confusion of ideas as to the power conferred on the jury by the provision giving them the right to determine "the law and the fact." Mr. Smith thought the provision gave the jury the right to consider the legality of testimony.

son was the author or publisher of a certain writing, but also to decide whether that writing was criminal or not, whether it was libel or no libel. * * *"[60]

In other words, the Sedition Act intended to place libel trials upon the same basis as other trials. It was undoubtedly supposed to embody the reforms which were thought to have been established in

[60] ANNALS 5TH CONG., II. 2137.

Mr. W. Claiborne summarized the situation thus: "In Great Britain, it had heretofore been the practice for the jury, in cases of libel, to find the fact of publication and the courts were left to judge with respect to the law. * * *" That, indeed, was the status which the press had assumed, but Mr. Harper, in the speech he quotes above, had correctly stated the theory. See STEPHEN, HISTORY OF CRIMINAL LAW, II, p. —. See also FORSYTH, HISTORY OF TRIAL BY JURY, p. 229; *Rex* v. *Burdett*, 4 B. and Ald. 131.

The controversy which had arisen in Congress in regard to the province of the jury reflects the prevailing uncertainty of opinion on that subject. Even the courts' decisions were not clear on the point. For example, Chief Justice Jay, in *Brailsford* v. *Georgia*, 3 Dall. 1-4 had thus charged the jury:

"It will not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law it is the province of the court to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court. For, as on the one hand, it is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision."

Two questions, then, present themselves for discussion: (1) What was the common law in regard to the province of the jury? and (2) How did the Sedition Act change the common law.

(1) The theory of the common law in regard to the province of jury is expressed in the maxim "ad questionem juris respondent judices, ad questionem facti respondent juratores," but this theory was never true, if taken exactly. "Its true significance," says Professor Thayer (IV HARV. L. REV. 149), was that:

"In general, issues of fact, and only issues of fact are to be tried by jury: when they are so tried, the jury and not the court are to find the facts, and the court and not the jury is to give the rule of law; the jury are not to refer the evidence to the judge and ask his judgment upon that, but are to find the facts which the evidence tends to establish, and may only ask the court for their judgment upon these * * *"

On the other hand, says Prof. Sunderland (29 YALE LAW JOUR. 255) "there is no evidence to show that the common law required that the jury should have anything to do with matters of law." In fact, the common law maxim was intended primarily to impose restrictions upon the jury, and "any legal controversy could be so conducted that no question of facts affecting the merits of the case could possibly come up for final determination, until the jury had been discharged."

Whatever power the jury possessed to consider the law in a case was exercised by means of the general verdict. According to the theory of the law, even this practice was questionable, for Coke had declared (2 COKE ON LITTLETON, sec. 368):

"Although the juries if they will take upon them the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, or if they do mistake the law, they runne into the danger of an attaint; therefore to find the special matter is the safest way where the case is doubtful."

The fear of punishment in case they mistook the law frequently led juries to request permission to hand in special verdicts, and it was declared in *Dowman's Case* (II 586 C.

England by Fox's Libel Act in 1792.[61] But in practice it failed to accomplish the purpose for which it was enacted, since the judges,

B., 9 Coke, 7, 12) that the practice of rendering special verdicts was in accordance with the common law. Also it was said that statute of Westminster II, Chap. 30, which gave juries a similar privilege, was merely declaratory of the common law.

Finally, should the juries hand in a verdict which was contrary to the law in the case, the court could ignore their verdict.

Thus it appears that the jury had no real part in the determination of questions of law, and, as we shall see, even their right to consider the facts was considerably modified by the power of the court to shape the form of pleading.

With special reference to libel cases, it may be shown that the jury had little to do with the determination of the criminality of a publication. The theory under which their power was curtailed was clearly pointed out by Chief Justice Shaw in *Com. v. Anthes,* 5 Gray, p. 214; "that when the words of the alleged libel are exactly copied, and all the circumstances and incidents which can affect their meaning are stated in the record, inasmuch as the construction and interpretation of language, when thus explained, is for the court, the question of the legal character of such libel * * * would be placed on the record, and, therefore, as a question of law, would be open after verdict on a motion in arrest of judgment."

Under the common law, then, in practice, the jury could determine only the fact of publication and the truth of the innuendos. They might be said to have no function, for the fact of publication was usually admitted, and the meaning of the innuendos was so clear as to be unmistakable.

What changes in the common law were supposed to have been made by the Sedition Act? (1) The jury were given the power (a) to determine the law and (b) to determine the fact; (2) both of these powers were to be exercised under the direction of the court, as in other cases. Let us discuss these points briefly.

(a) What was meant by the provision which allowed the jury to determine the law? Only that the jury should have the right to compare the alleged libel with the law, and to declare whether or not the defendant was guilty of the crime penalized by the Act. In other words, the jury were to determine the criminality of the act. As the jury did not have the general power of pronouncing "guilty" or "not guilty" under the common law, the Sedition Act was supposed to be less severe than the common law of libels.

(b) The right of determining the fact was more important, for, according to the Sedition Act, the *intent* was the most important fact to be considered. The jury had to decide, therefore, whether or not the defendant had published the alleged libel, and, if so, with what intent. But, as we have seen, the court practically determined the *intent,* and charged the jury in such a way as to interfere with their free determination of the matters. While theoretically the right of the jury to pass upon facts was enlarged, actually it was not, and the provision which required the criminal intent to be proved was of no more value to the defendant than the common law doctrine of tendency has been.

The proper function of the court in the cases arising under the Sedition Act was to help the jury reach a decision. The court could properly give the jury instructions as to what the law is upon one supposition or another, and could see that the arguments were confined to the issue. On the other hand, the court was given no power to pass upon the fact of publication, or the intent with which it was made.

[61] An incidental phase of the enforcement of the Sedition Act was the contention that the jury, having been given the right to determine the "law" in libel cases, could pass upon the constitutionality of the Sedition Act. Thus Mr. Wirt, an attorney for the defense in the *Callender Case,* (WHARTON'S STATE TRIALS, 709), presents the following argument:

"In Virginia, an Act of the Assembly having adopted the common law of England, that common law, therefore, possesses in this State all the energy of a legislative act. By an act of Congress, the rules of proceedings in Federal Courts, in the several states

as we have seen, took it upon themselves to instruct the jury as to the intent of the traverser. In the long run, however, this section has proved of the greatest importance; and the vital reforms which it introduces is today a part of the procedural law of every State of the Union.

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are directed to conform to the rules in the States in which such court may be in session; by an act of Congress, it is therefore provided, that the practices of the courts of Virginia shall be observed in this court. To ascertain your power, therefore, as a jury, we have only to refer to the common law of England, which has been adopted in the laws of this State, and which defines the powers of juries in the State courts. By the common law of England, juries possess the power of considering and deciding the law as well as the fact in every case which may come before them. * * * If, then, a jury in a court of the State would have a right to decide the law as well as the fact, so have you. The Federal Constitution is the supreme law of the land; and a right to consider the law is a right to consider the Constitution; if a law of Congress under which we are indicted be an infraction of the Constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you would violate your oath."

Mr. Wirt's argument that the common law was in force in Virginia and that consequently the jury could determine the law in the case, is of little importance. The province of the jury was described in the Sedition Act itself, and whatever special power the jury had was given to it by the terms of the statute.

Mr. Nicholas, in the same case, thought that the jury could declare the law "null and void, if they thought it unconstitutional."

The contrary view is more logical. It is thus stated by Judge Chase in the *Callendar Case* (WHARTON'S STATE TRIALS, 713):

"By this provision I understand that a right is given to the jury to determine what the law is in the case before them; and not to decide whether a statute of the United States * * * is a law or not, or whether it is void, under an opinion that it is unconstitutional, that is, contrary to the Constitution of the United States. I admit that the jury are to compare the statute with the facts proved, and then to determine whether the acts done are prohibited by the law; and whether they amount to the offence described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused. It is one theory to decide what the law is, on the facts proved, and another and very different thing, to determine that the statute produced is no law. To decide what the law is on the facts, is an admission that the law exists. If there be no law in the case, then there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them.

"The existence of the law is a previous inquiry, and the inquiry into facts is altogether unnecessary if there is no law to which the facts can apply. By the right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute * * * is unconstitutional or not. To determine the validity of the statute, the Constitution of the United States must necessarily be resorted to and considered, and its provisions inquired into. It must be determined whether the statute alleged to be void, because contrary to the Constitution, is prohibited by it expressly or by necessary implication. Was it ever intended by the framers of the Constitution, or by the people of America, that it should ever be submitted to an examination of a jury, to decide what restrictions are expressly or impliedly imposed by the national legislature? I cannot possibly believe that Congress intended by the statute, to grant a right to a petit jury to declare a statute void."

Assuming that Congress had intended to give the jury the power of passing upon the constitutionality of the act, Judge Chase said:

"Congress had no authority to vest it in any body whatsoever, because, by the Constitution, the right is expressly granted to the judicial power of the United States,

The final constitutional objection raised by the Republicans was that the Sedition Act contravened the elective principle. The argument is based on two contentions: (1) that free examination of public men and measures is necessary to insure a free election; and (2) that the imprisonment of officers-elect for violation of the Sedition Act constituted an interference with the right of the people to choose freely their representatives to Congress.

Let us now discuss these points briefly:

(1) The necessity for freedom of discussion in regard to public men and measures is pointed out by Ebenezer Rhoades, editor of the *Independent Chronicle,* as follows:

> "The first great principles of civil liberty are that all legislative power proceeds from the people; that they have a right to inquire into the official conduct of their substitutes, the rulers:—to censure public measures when found to be wrong, and to use constitutional means to remove those who violate the confidence reposed in them. These principles require that there should be a public and free examination of the doings of the government. Information on these subjects cannot be generally disseminated but through the medium of newspapers. It is therefore necessary to the existence of civil liberty that these should be open to the writers who discuss freely public manners, and even censure them when faulty."[62]

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and is recognized by Congress by perpetual statute. If the statute should be held void by a jury, it would seem that they could not claim a right to such decision under an act that they themselves consider as mere waste paper."

The view expressed by Judge Chase is undoubtedly correct. It is a well-established principle that the jury cannot pronounce upon the constitutionality of a law of Congress, and his statement in regard to the proper province of the jury is in substantial accord with that expressed by Mr. Gallatin. This theory, had it been carried into effect, would have assigned a larger province to the jury than that which it occupied under the common law.

Judge Chase thought that the state law recognized the power of the judiciary to pass upon the constitutionality of a law. This opinion was based upon *Kemper* v. *Hawkins,* a Virginia case of that period. A similar question came up in other cases. See Iredell J. in *Northampton Insurgents Case,* WHARTON'S STATE TRIALS, 588.

The evils of a system under which the jury could pass upon the constitutionality of an act of Congress are discussed by Judge Chase in the *Callender Case,* WHARTON'S STATE TRIALS, 714. See also Paterson J., *ibid.,* 336.

For further discussion of the province of the jury, see *Com.* v. *Anthes,* 5 Gray, 185-303 (1855).

[62] See BUCKINGHAM, REMINISCENCES, I, 261; Independent Chronicle, May, 1799, quoted in DUMIWAY, FREEDOM OF THE PRESS IN MASS., pp. 145-146 and n. See also the speech of Mr. Nicholas, ANNALS 5TH CONG., II, 2144; and the argument of the Virginia Legislative Committee, MADISON'S WRITINGS, VI, 397-398. The justice of the repression of such information is discussed in MADISON'S WRITINGS, VI, 394-395. For the use of

The same argument was made when the sedition cases came to trial. For example, Mr. Cooper took the position that "the people cannot exercise on rational grounds their elective franchise if perfect freedom of discussion of public characters be not allowed." "Electors," said Mr. Cooper, "are bound in conscience to reflect and decide who best deserves their suffrages; 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?"[63]

The enforcement of the Sedition Act was calculated to strengthen the arguments which we have reviewed. Thus, in the *Cooper case,* the defendant was convicted, although Judge Chase admitted that "his evident design was to arouse the people against the President so as to influence their minds against him on the next election."[64]

(2) The second phase of the subject is presented by the *Lyon case.* The defendant, a Congressman from Vermont, was convicted under the Sedition Act and sentenced to imprisonment. While he

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the above Republican argument as a refutation of the argument of necessity, see Mr. Nicholas' speech, ANNALS 5TH CONG., III, 3006-3007.

[63] *Cooper Case,* WHARTON'S STATE TRIALS, 665.

[64] *Cooper Case,* WHARTON'S STATE TRIALS, 671.

Speaking further as to the intent of Cooper, Judge Chase said that his conduct (Cooper's) "showed that he intended to dare and defy the Government, and to provoke them, and his subsequent conduct satisfies my mind that such was his disposition. For he justifies the publication in all its parts, and declares it to be founded in truth * * *" Thus the attempt of the accused to avail himself of the privilege of giving the truth in evidence was used as a proof of his criminal intent. While Judge Chase told the jury that his opinions were not to influence their decision, they undoubtedly did.

The *Cooper Case* arose out of the publication of a letter from Dr. Priestly to President Adams in regard to a vacancy in office. This communication, President Adams had published. As the publication of the letter seemed to imply that the request was improper, Mr. Cooper answered through the public prints, saying:

"Nor do I see any impropriety in making the request of Mr. Adams. At that time he had just entered into office; he was hardly in the infancy of his political mistakes; even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expensive existence 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 times of peace, while the unnecessary violence of official expression might justly have provoked a war. Mr. Adams had not yet projected his embassies to Prussia, Russia and the Sublime Porte, nor had he interfered, as President of the United States, to influence the decision of a court of justice, a stretch of authority which the monarch of Great Britain would have shrunk from, an interference without precedent against law and against mercy. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British court martial, had not yet astonished the republican citizens of this free country: a case too little known, but of which the people ought to be fully apprised before the election, and they shall be." (WHARTON'S STATE TRIALS, 656).

The expressions I have quoted refer entirely to the public conduct of President Adams, and were certainly as temperate as most expressions of political opinion. They would undoubtedly be considered harmless today.

was in prison Lyon was reëlected to Congress from his district, but could not take his seat in the House until after the expiration of his sentence. It has been urged that the temporary absence of Mr. Lyon from the House deprived the people of their right of representation.[65] It seems too clear for argument, however, that if Mr. Lyon was guilty of a crime his imprisonment was not an interference with the right of the people to choose their representatives freely.

The real issue presented in both the *Cooper* and the *Lyon* cases is not whether these prosecutions interfered with the right of election, but whether the Sedition Act itself constituted an infringement of the freedom of speech. The evidence is conclusive that, as enforced in these two cases, the liberty of discussion was reduced to the limits set by the common law of seditious libel.[66]

It would not be just to leave the reader of this paper under the impression that the Republicans approved of the free publication of libels. It was not their wish to protect the libeler from punishment;[67] but the fear of the abuse of the authority on the part of the National Government caused them to desire that prosecutions for

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[65] Lyon was accused of publishing a letter with intent to "bring the President and Government of the United States into contempt, etc." The fact of publication being admitted, Lyon was convicted and sentenced. The withdrawal of Lyon from the House of Representatives, of which he was an active member in opposition to the administration, was of national political importance. It was said that "Lyon's refusal to accept aid to escape, or to sue for pardon, placed the administration in an awkward position so that "the cabinet panted for an excuse to liberate him." By a majority over all his opponents Lyon was re-elected to Congress from his district. Upon his release from prison, Lyon took his seat in the House, in spite of an attempt to impeach him. See WHARTON'S STATE TRIALS, 333-343.

[66] Turning aside from the constitutional questions to which the Sedition Act gave rise, let us consider the Act as it was interpreted by the courts.

We consider first the legal definition of a publication. Since the courts gave no decision on the point, we may adopt the statement of the attorney for the Government in the *Callender Case* as authoritative. "That the direct or indirect circulation or emission of a libel is a publication thereof in law and in fact," said Mr. Nelson, "has never been questioned in a court of law." (*Callender Case*, WHARTON'S STATE TRIALS, 105. According to Judge McKenn, in the *Cabbett Case*, WHARTON, p. 322).

A libel under the common law, was "any writings, pictures or the like, of an immoral or illegal tendency," but as used under the Sedition Act the word implied "a malicious defamation of a national officer, made public by writing or printing, in order to expose him to public hatred, contempt, or ridicule." (See *ante* p. 2, for the definition of the crime penalized by this act.)

As I have previously stated, the intent was an essential fact to be proved; and this, as well as the other facts, have to be proved beyond a reasonable doubt.

The crime, then, penalized by the Second Section of the Sedition Act was the direct or indirect circulation or emission of words or writings which were uttered with the intent to expose any national officer to hatred, contempt or ridicule.

[67] Even Jefferson, in 1803, wrote to Judge McKean suggesting that action be taken against the violent agitation of the Federalists. See WRITINGS OF JEFFERSON, [Ford ed.] vol. —, p. —.

libel should belong exclusively to State courts. Thus, Mr. Madison says:

> "* * * But the laws for the correction of calumny were not defective. Every libelous writing or expression might receive its punishment in State courts, from juries summoned by an officer who does not receive his appointment from the President, and is under no influence to court the pleasure of the Government, whether it injured public officer or private citizen. Nor is there any distinction in the Constitution empowering Congress exclusively to punish calumny directed against an officer of the general Government; so that a construction assuming the power of protecting the reputation of a citizen officer will extend to the case of any other citizen, and open to Congress a right of legislation in every conceivable case which can arise between individuals."[68]

In the last analysis, it is impossible to escape the conclusion that the Republicans were far less actuated in their opposition to the Sedition Act by zeal for the liberty of the press than by jealousy for state rights.

Constitutional Results

It remains now only to summarize the constitutional results reached by the preceding discussion. They may be briefly stated thus:

(1) There is no common law of the United States. Consequently, the fact that under the common law prosecutions for libel could take place does not furnish a basis for the argument that similar prosecutions can take place under the United States Constitution.

(2) No special authority over the press was given to Congress by the Constitution. On the other hand, by virtue of the necessary and proper clause, Congress might exercise such control over the press as was necessary to enable it to carry its powers into execution.

For Jefferson's opinions in regard to the Sedition Act in Jefferson's letters, see [Ford ed.] vol. VII.

[68] MADISON'S WRITINGS, VII, 334-335. See also the address of the Assembly to the people of Virginia, MADISON'S WRITINGS, VI, 353-354; Mr. Macon's opinion, ANNALS 5TH CONG., II, 2151; Mr. Nicholas' opinion, *ibid.*, III, 3014; Mr. Livingston's charge against the Federalists, *ibid.*, II, 2153-2154.

For charges that the Federalists could use the law to perpetuate their power, see, MADISON'S WRITINGS, VI, 393-394 and 338-339; ANNALS 5TH CONG., II, 2163–2164; *ibid.*, II, 2104; *ibid.*, II, 2110.

The Federalists feared that the Republicans were attempting to overthrow the Government. See Mr. Allen's Speech, ANNALS 5TH CONG., II, 2098.

(3) Whatever definition of the terms of the First Amendment may be adopted, it cannot be considered to amount to a positive denial to Congress of any power over the press.

(4) Truly considered, "freedom of the press" seems to imply that the press shall be free to publish such sentiments as do not interfere with the exercise by the Government of its constitutional functions.

(5) The Sedition Act, as it was enforced, was little, if any, less severe than the common law of libels.

(6) Theoretically, a new province was assigned to the jury in libel cases; and although the reforms intended by the act were not established in these cases arising under it, on account of the attitude of the courts, they have since become well established.

Finally, a word should be said as to the impression produced by the Sedition Act. "Charges of unfairness," says Mr. F. M. Anderson, "were numerous. They turned chiefly upon alleged packing of juries, the construction of the law by the courts, and the general deportment of the judges at the trial."[69]

Add to this statement the fact that the accused was usually a Republican, while the Federalists were permitted to libel the Republicans (then out of office), and the fact that the libelers were harshly treated in prison, as men who were suspected of treason, and we can account for the resentment aroused by these few cases.

An exaggerated political importance, perhaps, has been assigned to the Sedition Act by historians.[70] At any rate, some authorities now assert that "it is impossible to trace any connection whatever between the Alien and Sedition laws and the Virginia and Kentucky Resolutions, on the one hand, and the defeat of Adams on the other."[71] Certain it is that a great deal of local resentment was aroused by the enforcement of the act, but it is difficult to show that the election turned upon that alone.

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[69] F. M. Anderson, "Enforcement of Alien and Sedition Laws," ANNUAL REPORT AMER. HIST. ASSOC'N. (1912) p. 125.

[70] See FISKE, CRITICAL PERIOD.

[71] CHANNING, HISTORY OF U. S., vol. IV. p. 232. See also F. M. Anderson, "A Contemporary View of the Virginia and Kentucky Resolutions," in 5 AMER. HIST. REV. 45-225.

After all, there were comparatively few prosecutions under the act. Some "24 or 25 persons were arrested. At least 15, and probably more were indicted. Only 10, and possibly 11, cases came to trial. In 10 cases the accused were pronounced guilty. The eleventh case may have been an acquittal, but the report of it is entirely unconfirmed." F. M. Anderson, "Enforcement of Alien and Sedition Laws," ANN. REP. AMER. HIST. ASSOC'N., 1912, p. 120.

Mr. Anderson has discussed the details of these cases fully and in a scholarly way. I have not thought it necessary to do anything more along the line which he has followed.

The chief importance of the Sedition Act is that it is the last act of its kind that has been passed by the National Government. Yet, as to the status of the press in the future, one is inclined to agree with Hamilton that "its security, whatever fine declarations may be inserted in any Constitution respecting it, must altogether depend upon public opinion and on the general spirit of the people and the government."[72]

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[72] THE FEDERALIST, No. 84, [Lodge ed.] 537-538.