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## For the Good of the Few: Defending the Freedom of the Press in Post-Revolutionary Virginia

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FOR THE GOOD OF THE FEW:  
DEFENDING THE FREEDOM OF THE PRESS IN  
POST-REVOLUTIONARY VIRGINIA

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A Thesis

Presented to

The Faculty of the Department of History  
The College of William and Mary in Virginia

In Partial Fulfillment

Of the Requirements for the Degree of  
Master of Arts

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by

Emily T. Peterson


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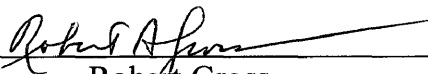
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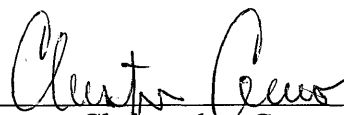
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FOR THE GOOD OF THE FEW:  
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ABSTRACT

This study seeks to illuminate how Americans understood the freedom of the press in the years immediately following Independence. The question at the heart of this inquiry is this: when John Adams and his Federalist Congress passed the Sedition Act of 1798, criminalizing public criticism of the government less than a decade after the ratification of the Bill of Rights, did this action constitute a betrayal of previously defined principles, or an affirmation of the British common law standards, which defined freedom of the press as a liberty from prior restraint, rather than subsequent punishment?

The Commonwealth of Virginia's unique status as the state whose citizens and leaders produced the most impassioned objections to the Sedition Act recommend it as the ideal location for this study.

The first chapter examines the treatises penned by Virginians in response to the Sedition Act, and employs the Republican Synthesis in order to connect their libertarian understanding of freedom of the press to the ideals of the American Revolution. The second chapter demonstrates how these gentlemen politicians put their theories into practice when the Federal Government tried a case of seditious libel in Virginia, and examines how they treated the defendant, a radical émigré journalist named James Thomson Callender, upon his release from prison.

In conclusion, this study asserts that while post-Revolutionary Virginians staunchly defended a libertarian interpretation of the freedom of the press, they did not recognize every voice as equally legitimate within the realm of public opinion; eighteenth-century understandings of the public sphere restricted participation in civic affairs to men of class and letters, inhibiting the free expression of artisan printers and lowly hack writers. In other words, what legal principle opened up (i.e. the unfettered circulation of diverse views in society and politics), social prejudice restricted.

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**FOR THE GOOD OF THE FEW:  
DEFENDING THE FREEDOM OF THE PRESS  
IN POST-REVOLUTIONARY VIRGINIA**

INTRODUCTION:  
DEFINING EARLY AMERICAN PRESS LIBERTY

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

*“Silent enim leges inter arma.”* – Cicero

The law is silent in wartime. The truth of Cicero’s words has resonated throughout the American past. Less than a decade after ratifying the Bill of Rights, the Congress of the United States, anxious about the Quasi-War with France and embroiled in fractious political wars at home, passed the Sedition Act and criminalized public criticism of the government. This measure established a lasting precedent for the restriction of civil liberties during times of national crisis. A litany of examples speaks to this trend, including Woodrow Wilson’s 1918 Emergency Wartime Measures, the Smith Act of 1940, the internment of Japanese-Americans during World War II, and McCarthyism. Even today, in the wake of September 11, Americans are struggling to find an appropriate balance between personal liberties and national security.

How does one account for this repressive pattern in light of America’s ostensible commitment to classical liberalism? When the nation’s founders guaranteed the freedom of the press, did they intend to secure an unqualified liberty, or did they envision a governmental power to restrict expression under extenuating circumstances? In order to answer these important and timely questions, it is instructive to return to first instances. When the Sedition Act became law in 1798, many of the founders were still alive and engaged in the controversy surrounding the measure. The arguments they advanced on

this occasion show that precise definitions of the First Amendment's scope remained elusive during the early national period.

Some understanding of the broad political climate shaping seventeenth- and eighteenth-century England is essential to any analysis of early American law. For the purposes of this study, it will prove instructive to review the emergence of English liberal thought. As western capitalism supplanted the feudal system at the close of the Middle Ages, an emerging class of independent, working men empowered themselves through the adoption of a new social philosophy known as liberalism. Placing an unprecedented degree of faith in the natural goodness of human beings, liberalism recognized man's imperfection, yet held that the welfare of society should be entrusted to those who composed it. Intellectual freedom and the subsequent reign of reason would enable men to govern themselves effectively while engendering the greatest possible opportunity for human growth. Libertarians – adherents of the liberal philosophy – emphasized the limitless capacity of the free, individual conscience, and fought the unnatural stultification that occurred whenever constituted authorities exerted artificial pressure on the individual.<sup>1</sup>

The practical objectives of the liberal philosophy are to achieve a free interplay of social and economic forces, checked only by self-imposed restraints, and to protect liberty from encroachments by the state. As historian George L. Cherry explains, the liberal movement in seventeenth-century England strived toward “the removal of the obstacles to human liberty and the modification of institutions so as to make man free.”

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<sup>1</sup> Edwin R. A. Seligman, ed., *Encyclopedia of the Social Sciences* vol. 9 (New York: the Macmillan Company, 1933), 435-42; Harold J. Laski, *The Rise of European Liberalism: An Essay in Interpretation* (London: Unwin Books, 1962).



Once these obstacles were destroyed, “liberals next sought the erection of bulwarks that would guarantee that the rights of individuals would not be violated.” Such efforts to protect individual freedom from the coercive ambitions of the Crown culminated in the execution of Charles I in 1641, the affirmation of a constitutional monarchy, in which the king ruled at the behest of Parliament, the Glorious Revolution of 1689, and the first English Bill of Rights. On the heels of these monumental achievements, a coherent party of libertarians emerged in the shape of the Real Whigs, a libertarian faction that incorporated Levellers, Diggers, and republicans, all of whom agitated for reforms that transcended the achievements 1689. The most important issues at stake for these men included a strict enforcement of the separation of powers, the extension of English liberties to all mankind, secularized education, the gradual expansion of the franchise, and, of particular importance to the present study, freedom of thought.<sup>2</sup>

As Caroline Robbins attests, freedom of thought was a topic constantly discussed among eighteenth-century libertarians. Focusing initially on issues of religious freedom, Whigs soon extended the notion that laws could not determine the truth of a man’s beliefs to the encompass political opinions as well. Throughout the seventeenth century, radical English Protestants had resisted religious conformity by arguing that although free theological debate would certainly instigate division and disorder, it was the only means through which God’s truth would ultimately emerge and unite the nation. This “truth-will-out” argument neatly paralleled the emerging liberal belief that if men were to

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<sup>2</sup> Geroge L. Cherry, *Early English Liberalism: Its emergence in Parliamentary Action, 1660-1702* (New York: Bookman Associates, 1962), 13; Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Cambridge, Mass.: Harvard University Press, 1961), 3-21.

successfully govern themselves, then open debate and reason must be allowed to prevail. Consequently, eighteenth-century Whigs, notably Thomas Gordon and John Trenchard in *Cato's Letters*, secularized the Protestant argument for free expression. Open political debate, they argued, would ensure a “virtuous Administration” of government as surely as limitless theological debate would reveal God’s truth. Concurrent to the development of the “truth-will out” argument, a relaxation royal licensing codes, which had regulated the print media since the reign of Henry VIII, facilitated the publication of countless political tracts. Henceforth, freedom of expression and of the press would be inextricably wedded to the ideals of libertarian Englishmen.<sup>3</sup>

Admittedly, modern Americans do not subscribe to a single, unproblematic definition of a free press, as contemporary debates over pornography and hate speech readily demonstrate. However, there are a few overarching principles which the majority of citizens understand to be at the heart of their First Amendment Protections. Political Scientist Robert W. T. Martin has delineated these fundamental tenets, which, he argues, define modern free press ideology. First, Americans believe that “comprehensive liberty of political expression – not mere elections – is essential to genuinely democratic government.” Second, and perhaps most important, modern free press ideology concedes that truth does not always prevail in public discourse. Nevertheless, only overt acts against the state should be punishable by law. This policy “permits falsity to do its harm but contends that any attempt to outlaw falsity risks doing even more serious injury to the accuracy and robustness of political discourse,” upon which democracy thrives. Finally,

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<sup>3</sup> Ibid., Robert W. T. Martin, *The Free and Open Press: The Founding of American Democratic Press Liberty, 1640-1800* (New York: New York University Press, 2001), chapter one.

given the fact that published matter is rarely wholly true or false, public opinion is often the deciding factor in public debate, and therefore the “authoritative measure of political legitimacy.” These are the themes that undergird much modern discussion of free press theory and First Amendment jurisprudence. In many unfortunate respects, they represent the American ideal, rather than the reality, but they are precepts to which the majority of modern Americans aspire. This was not the case at the time of the American Revolution, when the libertarian founders of the new Republic fought hard to entrench this unprecedented definition of free expression.

According to the English legal tradition from which the American system emerged, the freedom of the press referred to a guarantee against prior restraint, rather than protection from subsequent punishment. Sir William Blackstone’s *Commentaries on the Laws of England* provided the authoritative definition of English common law. Blackstone explained that “every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.”<sup>4</sup> Thus, Blackstone distinguished between the “liberty” and “licentiousness” of the press; the law afforded writers and publishers considerable freedom of action, but held them responsible for any abuse of that autonomy. This conception of a free press differs significantly from modern American free press ideology, and it is crucial to acknowledge this disparity in order to avoid examining the Sedition Act through a presentist lens. In its earliest manifestation, the freedom of the

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<sup>4</sup> David S. Berkowitz and Samuel E. Thorne, eds., *Sir William Blackstone’s Commentaries on the Laws of England*, 4 vols. (New York, 1978), 4: 152.

press was a strictly limited right, far more restrictive than modern observers might assume. This distinction appears most clearly when one considers the severe constraints placed upon a printer's right to criticize government officials.

Among the most "improper, mischievous, [and] illegal" abuses of the press was seditious libel – the publication of "malicious, scandalous, and slanderous words" intended to damage an official's reputation. According to the long-standing legal principle of *De Scandalis Magnatum*, officials of the realm required honor above suspicion in order to execute their duties properly. Therefore, any attempt to undermine this honor through public criticism was tantamount to an attempt to undermine the stability of the Commonwealth itself. Advanced by Parliament in 1275 during the reign of Edward I, *De Scandalis Magnatum* recognized the potential for words to injure the government. Charles I propelled the concept into heavy usage in his prerogative Court of the Star Chamber, which harshly punished Puritan writers and other nonconformists. When Parliament abolished the Star Chamber in 1642, the common law courts acquired exclusive jurisdiction over libel persecutions, and continued to employ Star Chamber doctrines. Blackstone later confirmed "the honour of peers is so highly tendered by the law, that [to libel them] is much more penal" than to attack the reputation of an ordinary citizen. Furthermore, the Blackstonian principle known as "bad tendency" allowed that "an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen." Hence the publication of a libel against a government official might not be seditious in and of itself, but as such words might inspire a reader to insurrection, they may be treated as such. Ultimately,

English jurists defined the common law crime of seditious libel broadly and regarded it as one of the most heinous abuses of a free press.<sup>5</sup>

Despite the inherent tendency of *De Scandalis Magnatum* to limit public discourse, many early American leaders believed that officers of the newly formed Republic required similar protections from criticism. Others were unwilling to accept a legal principle that was so intimately connected to the politically divisive Star Chamber. These critics retorted sarcastically that if a legislative control over the press was necessary in America because it existed in Britain, then perhaps the tranquility of the nation and the personal safety of the president also required the protection of a standing army, similar to the one that preserved peace and kept the monarch on the throne across the Atlantic.<sup>6</sup> Clearly, the revolutionary break with Great Britain forced Americans to reconsider the applicability of English common law principles such as *De Scandalis Magnatum* to their unique system of government. The conclusions that they ultimately reached have been the focus of contentious scholarly debates, particularly during the past fifty years.

Historians began to write in earnest about the Sedition Act at a very propitious moment in this nation's history. As the United States emerged from World War II and began to face the varied threats of the Cold War, many scholars began to wonder about the relationship between national security and the freedom of political expression.

Zechariah Chafee's *Free Speech in the United States* (1948), John C. Miller's *Crisis in*

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<sup>5</sup> Berkowitz and Thorne, eds., *Blackstone's Commentaries*, 1: 402, 3: 124. For a concise history of the concept of *De Scandalis Magnatum*, see Jeffery A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (New York: Oxford University Press, 1988), 60.

<sup>6</sup> George Hay, *Two Essays on the Liberty of the Press* (1803; reprint New York: Da Capo Press, 1970), 29.

*Freedom* (1951), and James Morton Smith's seminal *Freedom's Fetters* (1956) all pointed to the Sedition Act as a warning about the danger of subordinating liberty to authority. Each of these authors argued that one of the many goals of the Revolution was to "[abolish] the English common law crime of seditious libel," and that late-eighteenth-century Americans understood the First Amendment to have achieved this end.<sup>7</sup> For Chafee, Miller, and Smith, the Bill of Rights ensured a liberty of the press that meant far more than the Blackstonian freedom from prior restraint. Hence, they all envisioned the Sedition Act as a violation of principles solidified during the movement for Independence and the formation of the new national government. These scholars identified this lapse as the first in a historical trend wherein the United States government will "retreat to repression" when faced with national crises. Given the political tensions that permeated mid-twentieth-century America, it is plausible that the ideological climate influenced these scholars' readings of the historical record. Indeed, later scholars have suggested that a present-minded bias inspired these early interpretations.<sup>8</sup>

In 1960 constitutional scholar Leonard Levy published a revisionist interpretation of the Sedition Act that changed the way historians think about the original meanings of the First Amendment. After scouring the records of legislative debates surrounding the ratification of the Constitution and the Bill of Rights, Levy concluded that the evidence suggests "no passion on the part of anyone to grind underfoot the common law of liberty

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<sup>7</sup> Zechariah Chafee, *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1948); John Chester Miller, *Crisis in Freedom: the Alien and Sedition Acts* (Boston: Little, Brown & Co., 1951); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, N.Y.: Cornell University Press, 1956); for quotation, see Smith, *Freedom's Fetters*, 431.

<sup>8</sup> For a comprehensive analysis of the "Jeffersonian bias" of these works, see Mark DeWolfe Howe, review of *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*, by James Morton Smith, *WMQ*, 3d Ser., 4 (1956): 573-76.

of the press.” It was not until John Adams signed the Sedition Act that anyone began to discuss the meaning of a free press in what might be defined as libertarian terms. Furthermore, because opposition to this Federalist measure was so politically expedient for Jeffersonian Republicans, the 1798 debate concerning the First Amendment is “suspect” as “a revelation of prior opinion.” Ultimately, Levy argues that freedom of the press as the founders envisioned it was closer to Blackstone’s definition than to the modern definition of press liberty Americans have come to cherish. This analysis is hardly remarkable, “since the origins and conduct of the American Revolution were unrelated to any hostility to the common law.” However, in asserting these claims, Levy advances an argument that has been challenged by the historiography of the American Revolution that emerged during the late 1960s.<sup>9</sup>

The republican synthesis, advanced by such historians as Bernard Bailyn and Gordon S. Wood, provides a framework for examining the Revolution in the context of a transatlantic political culture. These scholars sought to illuminate the continuity between England’s radical Whigs and American patriots, and to describe the constant struggle between liberty and authority these thinkers saw as the driving force of politics. Indeed, Bailyn’s *Ideological Origins of the American Revolution* counts England’s radical writers and opposition politicians among the primary influences guiding Revolutionary rhetoric,

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<sup>9</sup> Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1960), 233, 237, 247. According to Jeffrey L. Pasley, Levy’s “revisionist interpretation” has now become the “new orthodoxy.” Adherents to Levy’s thesis, called New Libertarians, include Walter Berns, “Freedom of the Press and the Alien and Sedition Laws: A Reappraisal,” in Philip B. Kurland, ed., *1770: Supreme Court Review* (Chicago: University of Chicago Press, 1970), 109-59; Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill, N.C.: University of North Carolina Press, 1986). See also Jeffrey L. Pasley, *The Tyranny of Printers: Newspaper Politics in the Early American Republic* (Charlottesville, Va.: The University Press of Virginia, 2001), 126.

while Wood's *Creation of the American Republic* suggests that the founders initially sought to establish a new nation, or "Christian Sparta," immune to the political corruption that England's Whigs resisted.<sup>10</sup> Contrary to Levy, these scholars find the origins of the Revolution in a transatlantic culture of republican opposition to specific common law practices. While Revolutionary patriots did embrace British legal traditions as a part of their Anglo-American identity, they also joined England's radical Whigs in advocating sweeping changes, such as "alterations in the definition of seditious libel so as to permit full freedom of the press; and the total withdrawal of government control over the practice of religion."<sup>11</sup> Bailyn and Wood track the transmission of these radical demands to American patriots, who incorporated them in a new kind of government. In doing so, these historians provide a broader context for the emergence of free speech ideology than Levy has imagined.

Although the works of Bailyn and Wood give the ideological connection between Britain and America its fullest expression, historians have long recognized the importance of radical Whig principles in the eighteenth-century transatlantic world. Anthony Lincoln's *Some Political and Social Ideas of English Dissent* (1938) and Caroline Robbins's *The Eighteenth-Century Commonwealthman* (1961) emphasize the centrality of British nonconformists' influence on the thoughts and actions of American patriots. Robbins in particular paints a heroic picture of English Whigs spanning three generations. Repeatedly failing to affect parliamentary policy, these men secured their

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<sup>10</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1967), see especially chap. 2, "Sources and Traditions"; Gordon S. Wood, *Creation of the American Republic* (Chapel Hill, N.C.: University of North Carolina Press, 1969), see especially chap. 3, "Moral Reformation."

<sup>11</sup> Bailyn, *Ideological Origins*, 30, 47.



lasting legacy with the independence of their brethren across the Atlantic. “The American constitution employs many of the devices which the Real Whigs vainly besought Englishmen to adopt,” Robbins explains, “and in it must be found their abiding memorial.” According to this point of view, the American Revolution represents the first major victory in a decades-long struggle for political rights that united men across generations and, indeed, across nations. As legal scholar David Rabban elaborates, the American Revolution represented the first significant implementation of radical Whig thought, and thus “became a major event for the *entire* western world.”<sup>12</sup>

However, it was not English radical thought alone that inspired late-eighteenth-century Americans, who were especially sensitive to the geopolitics of their time. International events, notably, the French Revolution and the ensuing wars between Britain and France, inflamed and polarized political opinion throughout the Atlantic world. The outbreak of hostilities between the two European powers in 1793 inspired such vehement reactions in the United States that the enforcement of American neutrality within the jurisdiction of Virginia became one of Governor Henry Lee’s top priorities.<sup>13</sup> Despite President Washington’s parting admonition for Americans to remain detached from European conflicts, the nation’s leading citizens continued to take sides and speculate wildly about plots conceived by their imagined foes. Federalist Congressman Leven Powell feared that the Virginia Assembly’s apparent support of France would

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<sup>12</sup> For a comprehensive historiographical review of English radical thought, see David M. Rabban, “The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History,” *Stanford Law Review*, 37 (1985): 828-829, emphasis added. Anthony Lincoln, *Some Political and Social Ideas of English Dissent, 1763-1800* (Cambridge, England: The University Press, 1938); Robbins, *Eighteenth-Century Commonwealthman*, 3-4.

<sup>13</sup> Thomas E. Templin, “Henry ‘Light Horse Harry’ Lee: A Biography,” PhD dissertation, University of Kentucky, Lexington, 332. Templin identifies neutrality as Lee’s third major concern, ranking behind Indian defense and legal disputes with the Indiana Company.

“induce her to send an Army into our Country under the idea that those whom she calls her party here would join it,” while his Republican colleague, Henry Tazwell, predicted that the Commonwealth’s proclivities would instead inspire “old and new England” to join forces against the South.<sup>14</sup> Given this abundant partisan paranoia, it is difficult to imagine that any degree of political cooperation existed between the citizens of the United States, Britain, and France. Nevertheless the radical Whig tradition continued to provide a political forum wherein like-minded English, French, and American dissidents could come together and share ideas. Eugene Link’s *Democratic-Republican Societies* (1942) and R.R. Palmer’s *The Age of the Democratic Revolution* (1959, 1964) illuminate the ideological trends that linked this network of political societies in America, England, and France beginning in the early 1790s.

Thomas Cooper, whom historian Michael Durey calls “the archetypal radical of his era,” personifies the international cooperation described by Link and Palmer. In his native England, Cooper attacked the slave trade as a form of political tyranny and generally made himself obnoxious to the conservative leadership of Parliament. In 1792, he traveled to France as a delegate from the Manchester Democratic Society, and gained access to the Jacobin Club of Paris through a connection with Robespierre himself. Upon immigrating to the United States in 1799, he undertook the editorship of the *Northumberland Gazette* and levied severe criticism at the Adams administration, earning himself an indictment under the Sedition Act. Cooper’s story underlines the scholarship

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<sup>14</sup> Leven Powell to Burr Powell, 8 January 1800, Powell Family Papers, 1775-1927, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary; Henry Tazwell to Richard Cocke, 29 June 1798, Henry Tazwell Papers, 1795-1798, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary.

of the republican synthesis, demonstrating that the arguments levied against the Sedition Act in 1798 represented the logical amplification of ideas that had begun to circulate over a century earlier, and subsequently grew compelling enough to transcend the fierce enmities that separated most English, French, and American citizens.<sup>15</sup>

The republican synthesis has elucidated a major problem in the historiography of early American civil liberties. Scholars seem disposed to view the 1798 crisis in terms of an unlikely dichotomy: the founders either rejected Blackstonian principles and then betrayed their own ideals (Chafee, Miller, and Smith), or they codified the English common law and then opposed it for political reasons (Levy and the New Libertarians). In reality, the evolution of American law is more gradual than either of these models will allow. Legal principles evolve slowly and take time to become fully enmeshed in the national consciousness. A few recent works of scholarship have advanced our understanding of this fact significantly. J.R. Pole argues that although English common law was the guiding legal force in colonial America, it was “organic” rather than “static,” and Americans interpreted and applied the law differently from one location to the next. Robert W. T. Martin’s *The Free and Open Press* (2001) suggests that the modern concept of democratic press liberty emerged from a dynamic relationship between diverse principles, rather than the singular process of one ideology giving way to another.

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<sup>15</sup> Eugene Link, *Democratic-Republican Societies, 1790-1800* (New York: Columbia University Press, 1942); R. R. Palmer, *The Age of the Democratic Revolution*, 2 vols. (Princeton, N.J.: Princeton University Press, 1970). For Biographical information on Cooper, see James Morton Smith, *Freedom’s Fetters*, 307-33; Francis Wharton, *State Trials of the United States during the Administrations of Washington and Adams*. (1849; reprint, New York: Da Capo Press, 1970), 659-80.

Together, these scholars are forging a more complex understanding of the emergence of free press ideology in early America.<sup>16</sup>

In a 1993 *William and Mary Quarterly* article entitled “Reflections on American Law and the American Revolution,” J.R. Pole reaffirms the existence of a libertarian press tradition long before it achieved its most coherent expression at the end of the eighteenth century. Pole contends that the truest expression of popular sovereignty in colonial America emerged from local juries, rather than deliberative bodies. Ordinary citizens possessed greater access to county courts than to legislatures, which only convened for a few weeks every year. He explains that modern scholars do not truly appreciate the “supplementary agency of representation” that existed in the colonial courts, because they are blinded by the separation of powers doctrine, which was merely “a principle in process of formulation” at the time of the Revolution. Hence, the literature does not recognize the extent to which “the jury’s power to ‘find’ the law could on occasion appear tantamount to a law-making authority.” Most importantly, juries issued their own interpretations of the common law based on “local knowledge and custom.” As Peter Charles Hoffer confirms, “common law was supreme, but it was also... whatever the local jury said it was.” Therefore, community mores and practices frequently changed before the law itself did, creating tensions between legal precedents and nascent customs, and inspiring jurors to honor practice above theory. This is

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<sup>16</sup> Martin, *The Free and Open Press*; J.R. Pole, “Reflections on American Law and the American Revolution,” in *WMQ*, 3d Ser., 50 (1993): 142.

precisely what occurred in eighteenth-century America regarding the common law doctrine of seditious libel, a fact that Levy fatally ignores.<sup>17</sup>

Perhaps the greatest weakness of the New Libertarian interpretation rests in its failure to acknowledge the disparity between theory and practice regarding the freedom of the press. In a 1961 critique of Levy's argument, Merrell Jensen revealed that although the early American press was not free "as a matter of law," published criticism of the government was searing and endemic in late-eighteenth-century America.<sup>18</sup> Reviews echoing Jensen's censure grew so strident that in 1985, Levy expanded and revised his book, confessing that he had erred "in asserting that the American experience with freedom of political expression was as slight as the legal and conceptual understanding was narrow."<sup>19</sup> George Anastaplo highlights the importance of this incongruity by arguing that the enthusiasm with which many respectable Americans libeled George III and John Adams reveals the true nature of early American attitudes regarding freedom of the press. "The offense [of seditious libel] was one that seems to have been committed on the statute books but not by the moral consciousness of the community," Anastaplo writes. "When the better men of the community openly break the law, it is a law which is destined to be replaced, for it is already dying."<sup>20</sup> Hence, Pole's argument that local juries effectively proclaimed common law by applying local

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<sup>17</sup> Pole, "Reflections on American Law," 132, 133, 137, 139; Peter Charles Hoffer, "Custom as Law: A Comment on J.R. Pole's 'Reflections'," in *WMQ*, 3d Ser., 50 (1993): 166.

<sup>18</sup> Merrill Jensen, review of *Legacy of Suppression: Freedom of Speech and Press in Early American History*, by Leonard W. Levy, *Harvard Law Review*, 75 (1961): 457.

<sup>19</sup> Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), x. *Emergence* is an expanded and revised version of *Legacy of Suppression*.

<sup>20</sup> George Anastaplo, review of *Legacy of Suppression: Freedom of Speech and Press in Early American History*, by Leonard W. Levy, *New York University Law Review*, 39 (1964): 738.

standards to legal precedents, reinforced by Levy's critics, reveals that the Sedition Act of 1798 was based on principles that many Americans had already renounced.

Historians Stanley Elkins and Eric McKittrick confirm Pole's analysis of the Sedition Act as a dead letter law in their authoritative analysis of the early national period, *The Age of Federalism* (1993). According to these authors, the "rusty principle" of seditious libel was not only increasingly unpopular with colonial juries, it became "flatly incompatible" with the new American system of government. "Even as a theoretical premise," Elkins and McKittrick explain, seditious libel "had come to have little or no pertinence in the emerging state of political practice in America." As Madison had envisaged in *Federalist No. 10*, factionalism inevitably emerged in the free society established by the Constitution. Because factions could not be stifled without suppressing liberty, a necessarily greater tolerance for open criticism of public officials developed during the last decades of the eighteenth century. It was against this backdrop of increasingly diverse opinions and interests that the Republican Party fashioned itself into a standing opposition, expressly dedicated to the object of challenging incumbent officials. According to Elkins and McKittrick, it was the Federalists' inability to understand the concept of a loyal opposition – dedicated to the nation's best interests but defining those interests differently from the men in power – that caused them to grasp desperately at the archaic principle of seditious libel. In promoting the Sedition Act, they thought they were assaulting the nascent party system while their opponents saw an attack upon basic civil liberties. The most intriguing aspect of Elkins and McKittrick's interpretation is this implication that the Federal Constitution secured the obsolescence of

sedition libel in multiple ways, many of them far less direct than the strictures of the First Amendment.<sup>21</sup>

If Pole, Elkins, and McKittrick have complicated our understanding of free press ideology before 1798, then Robert W. T. Martin accomplishes as much for the centuries following the Sedition Act. In *The Free and Open Press*, Martin emphasizes the development and interplay of two distinct paradigms regarding the role of the press in early American political culture. The first model stresses the importance of a free press as the people's primary defense against government corruption and tyranny. This distinctively republican ideology was accompanied by the more liberal model of an open press, which "stressed the individual right of every man to air his sentiments for all to consider, regardless of his political perspective or the consequences for the people's liberty." Consonance did not always exist between these two disparate lines of thought. During the Revolution, for example, many colonists maintained that a press open to loyalist arguments threatened the people's liberties. Many publishers consequently repressed viewpoints inconsistent with the patriot cause. Hence, Martin argues that American free press ideology is ambivalent and "intrinsically contestable" because it attempts to reconcile social cohesion and individual autonomy, both of which are necessary for democratic legitimacy.

In Martin's estimation, it is counterproductive to the study of press liberty to try and determine when the republican tradition (the free press) ended and the liberal one (the open press) began, as so many scholars have done when debating various aspects of

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<sup>21</sup> Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (New York: Oxford University Press, 1993), 701, 713.

early American political culture. Instead, Martin seeks to identify the moment at which “the distinct, rhetorical power of the terms ‘free’ and ‘open’ were lost as they became largely synonymous.” He ultimately locates this convergence in the post-Revolutionary era, when the proliferation of newspapers made an open press possible even as the norm of journalistic impartiality vanished, and the Sedition Act crisis confirmed that “both an ongoing discourse that represented the diversity of sentiments and a public opinion that acted as the authoritative political standard” were essential to a representative republic. Most importantly, Martin argues that the intellectual fusion of these terms did not eliminate tensions represented by the seemingly incongruous elements of the free and open press, which are still very much alive in modern free press ideology. As Martin attests, “our press liberty tradition continues to exhibit contradictory impulses toward liberation *and* suppression.”<sup>22</sup>

Martin’s observations about the ambivalent nature of American free press ideology have significant implications for the scholarly debate surrounding the Sedition Act. It is futile to quibble over the precise date marking America’s transition from a Blackstonian to a libertarian interpretation of the freedom of the press, Martin tells us, when the idea of a unified and universally accepted definition of the First Amendment is specious to begin with. More than anything, the republican synthesis demonstrates that libertarian interpretations existed *alongside* Blackstonian principles during the revolutionary and early national periods, and strains of thought reflective of both the free and open press survive as conflicting aspects of modern free press ideology. In fact would appear that early American libertarians expressed greater concern for the free press

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<sup>22</sup> Martin, *Free and Open Press*, 2, 4, 11, 123, 126.



aspects of the First Amendment than they did for open press ideologies. If Jeffersonian Americans had truly accepted the full implications of expression that was both free and open, then the repressive trend exemplified by the 1919 Red Scare, Japanese internment camps, and McCarthyism would sully this nation's past. Ultimately, the history of free press ideology in America is the story of discordant principles competing for ascendancy. During times of national crisis – whether precipitated by international war or domestic political upheaval – free press doctrines and the suppression of dissent prevail.

Martin's framework helps explain fundamental issues that have befuddled scholars on both sides of the Sedition Act debate, the most obvious being republican state prosecutions for seditious libel after 1800. The libertarian critics of the Sedition Act genuinely believed in the importance of a free and open press, but when their own power was threatened, their level of commitment to the individual right of *every* man to air his sentiments for all to consider waned. Indeed, it became clear in the days immediately following the Jeffersonian triumph that not all forms of opinion were equally welcome in the civic discourse that the Sedition Act's opponents had defended. In particular, Jefferson and his followers ultimately shunned the radical journalists on whom they had relied to carry their libertarian message to the public in 1798. The explanation for this inconstancy lies in the distinction that early national leaders maintained between two disparate forms of expression: public opinion and popular opinion. This prejudice led Jeffersonians to retrench in terms of open press ideology and fall short of the modern ideal of First Amendment protections, a failing which would be repeated by American leaders for generations to come.

Ultimately, the theory supporting a free and open press was fully developed by 1798, but the universal application of this theory to include all segments of American society was not. It is the dual purpose of this study to demonstrate the consistency with which Jeffersonian Republicans – particularly those residing in Virginia – defended freedom of thought and expression throughout the post-Revolutionary era, and to explain the paradox of their simultaneous contempt for the radical journalists who – more than any other group – gave voice to the theory of democratic press liberty. As the epicenter of the Republican opposition as well as the place where Jefferson himself recruited, patronized, and then abandoned a radical author of libertarian sentiments, the Commonwealth of Virginia provides the logical venue for this investigation. By reviewing the political writings of Virginia’s leading citizens and reexamining the case of James Thomson Callender, this study seeks to prove that Republican understandings of the freedom of the press at the time of the Sedition Act were significantly more advanced than English common law standards, yet still fell short of the modern American standard.

## CHAPTER I

### ‘USHACKLED, UNLIMITED, AND UNDEFINED:’ PRESS LIBERTY IN THE COMMONWEALTH OF VIRGINIA, 1776-1811

*“The freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic government.”*

– Virginia Bill of Rights

Virginia’s unique status as the state whose citizens and leaders produced the most impassioned objections to the Sedition Act make it the ideal setting for examining free press ideology in the early Republic. The passage of the Virginia and Kentucky Resolutions, penned by James Madison and Thomas Jefferson, sent shockwaves throughout the nation, as the remaining states unanimously rejected this radical attempt to override the federal government. Furthermore, Virginians wrote four of the eight political treatises that Levy identifies as the definitive libertarian arguments for an unqualified freedom of the press.<sup>25</sup> Virginia subsequently developed a reputation for its liberal stance on the constitutionality of the Sedition Act and caused many of the measure’s offenders to view the Old Dominion as a safe haven. Fearing prosecution, radical journalists such as John Daly Burk and James Thomson Callender sought refuge within Virginia’s borders. The latter writer became the only man to stand trial under the Sedition Act in the South when Supreme Court Justice Samuel Chase descended upon Richmond for the express purpose of enforcing federal authority in the recalcitrant state. Even then, the people of Virginia rallied in support of Callender, raising a collection for

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<sup>25</sup> These treatises include George Hay, *Essays on the Liberty of the Press*; James Madison “Virginia Resolutions” and *Report on the State of Virginia*, collected in *The Virginia Report of 1799-1800* (1850; reprint New York: Da Capo Press, 1970); and St. George Tucker, “Of the Right of Conscience; and of Freedom of Speech and the Press,” in the Appendix to vol. 1 of *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, 5 vols. (Philadelphia, 1803), hereafter cited as *Tucker’s Blackstone*. See Levy, *Legacy of Suppression*, 260-269.

his legal fees and providing him with the best legal defense the Old Dominion had to offer.<sup>26</sup> Clearly, Virginians were uniquely committed to opposing the sedition measure.

Many historians have attributed the exceptionalism of Virginia's position to the state's political makeup, unjustly claiming that Virginia Republicans only exploited the issue in order to challenge their Federalist opponents. However, it is overly simplistic to reduce the Sedition Act debate to an ancillary argument in a hostile power struggle between rival parties. To be sure, Virginia was home to the leading members of the loyal opposition during John Adams's administration. Thomas Jefferson, James Madison, and James Monroe formed a powerful triumvirate and directed Republican policy on the national level, while their fellow party members dominated the Virginia state legislature. In 1798 when the Sedition Act passed into law, Federalists held only four of the nineteen congressional seats allotted to the Old Dominion.<sup>27</sup> Given the disproportionate balance of political affiliation in this state, it is easy to understand why some have argued that Virginians only opposed the Sedition Act because Adams and his party supported it. The truth was not that simple. It is instructive that only one of the four Federalists representing the state in Congress, Thomas Evans, dared to vote in favor of the Sedition Act.<sup>28</sup>

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<sup>26</sup> For information on John "Daly" Burk and the trial of James Thomson Callender, see Michael Durey, *Transatlantic Radicals and the Early American Republic* (Lawrence, Kans.: University Press of Kansas, 1997), and "*With the Hammer of Truth*": *James Thomson Callender and America's Early National Heroes* (Charlottesville, VA: University of Virginia Press, 1990).

<sup>27</sup> Charles T. Cullen, "Congressional Election Campaign: Editor's Note," in Cullen et al., eds., *The Papers of John Marshall*, 10 vols. to date (Chapel Hill, N.C.: University of North Carolina Press, 1974 - ) 3: 495.

<sup>28</sup> Cullen, "Congressional Election," in Cullen et al., *The Papers of John Marshall*, 3: 495. Indeed, in the House, only four of the forty-four representatives to vote in favor of the law hailed from south of the Potomac.

Furthermore, there is evidence that at least one Virginia Congressman lost his seat specifically due to his stance on this issue. In January of 1801, Representative Leven Powell of Leesburg, Virginia, informed his son that the House had recently voted on the continuation of the Sedition Act, which was scheduled to expire that March. “As I was sure that my constituents were not afraid of a law which went to punish Vice and prevent insurrections,” he wrote, “I gave it my hearty concurrence.”<sup>29</sup> The evidence suggests that Powell had gravely misjudged the views of his constituents. On February 20, 1801, a loyal supporter by the name of Thomas Sims wrote to inform Powell that he was losing favor among the electorate. “Your votes for the...continuance of the Sedition Act are the principle [*sic.*] objections stated,” Sims declared. That fall, Powell lost his bid for reelection.<sup>30</sup> Ultimately, the people of Virginia guarded their right of free expression so tenaciously that Federalists who endorsed restrictions did so at their own peril. Opposition to the doctrine of seditious libel was not a partisan issue in the Old Dominion.

On the contrary, sectional loyalties often trumped party divisions when determining an individual’s stance on the Sedition Act. The local autonomy that Pole emphasizes presented an important dilemma for state sovereignty when the federal government attempted to codify and enforce the English common law in 1798. The governments of the various states, having evolved out of the British colonial system, had adopted common law standards when formulating their own directives and codified

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<sup>29</sup> Leven Powell to Burr Powell, 25 January 1801, Powell Family Papers.

<sup>30</sup> Thomas Sims to Leven Powell, 20 February 1801, Powell Family Papers. Powell was replaced by his Democratic-Republican predecessor, Richard Brent, who had represented Virginia’s seventeenth district in the fourth and fifth congresses. The election was very close, but it heralded the end of Federalism in this district of Virginia. See Michael J. Dubin, *United States Congressional Elections, 1788-1997: The Official Results of the 1<sup>st</sup> Through 105<sup>th</sup> Congresses* (Jefferson, N.C.: McFarland & Company, Inc., 1998), 23.

several modifications in order to reflect the changes precipitated by the Revolution. The widespread abolition of entail and primogeniture provides the most conspicuous example of these adaptations.<sup>31</sup> A federal application of the common law such as the Sedition Act brought state and federal jurisdictions into conflict. When the national government enacted legislation intended to enforce the legal principles of England, it inexorably rescinded the various changes adopted at different times by the several state legislatures. Many historians argue that when opponents of the Sedition Act objected that the measure was unconstitutional, they alleged an infraction against the Tenth Amendment as frequently as they referred to a violation of the liberty of the press. This is a compelling claim, but it does not necessarily contradict the assertion that Virginia's particular resistance to the law indicated a more liberal interpretation of the First Amendment.

The Commonwealth of Virginia issued a particularly clamorous defense of the Tenth Amendment in 1798. Consequently, Levy contends that state sovereignty, rather than a genuine desire to protect freedom of speech and the press, was "probably the dominant Virginian concern."<sup>32</sup> The validity of this position is reinforced by Thomas Jefferson's later reflections on the Republican view of the Sedition Act: "while we deny that Congress have a right to controul the freedom of the press," the president wrote in 1804, "we have asserted the right of the states, and their exclusive right to do so."<sup>33</sup>

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<sup>31</sup> For an excellent example of the revolutionary break with common law primogeniture in Virginia, see Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform," in *WMQ*, 3d Ser., 54 (1997): 316.

<sup>32</sup> Levy, *Legacy of Suppression*, 219.

<sup>33</sup> Thomas Jefferson to Abigail Adams, 11 September 1804, in Lester J. Cappon, ed., *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams* (Chapel Hill, N.C.: University of North Carolina Press, 1959), 278-80. Jefferson's later views regarding the freedom and licentiousness of the press have provided a great deal of fodder for historians seeking to undermine his libertarian legacy. However, the statements that Jefferson made during his presidential years

However, it is unnecessary and in fact impossible to divorce Virginia's effort to prevent concurrent jurisdictions over seditious libel from her commitment to a free press. Indeed, Virginians were vigilant about their autonomy within the union because they had come to interpret English common law – particularly regarding the freedom of thought and expression – more liberally than many of their fellow countrymen. They proved more eager to establish legal independence than the citizens of any other state, launching a commission to revise and codify Virginia's laws according to the principles of the Revolution even as the war raged on, and overhauling the judicial system within the first few years of peace.<sup>34</sup> By 1811, the General Court (Virginia's highest judicial body) had nullified the concept of seditious libel in *The Commonwealth v. John Morris, Jr.*, confirming the Commonwealth's libertarian commitment to an open press. In the end, Virginians sought to retain their exclusive right to control public criticism of government officials because they did not wish to exercise any such control at all.

Contrary to Levy's thesis, a libertarian definition of freedom of the press took root in Virginia during the Revolutionary era, and grew to fruition during the Sedition Act crisis. This assertion is echoed by the political literature produced by libertarian Virginians in response to the law's passage. Legal pundits and political theorists such as James Madison, St. George Tucker, and George Hay wrote about the freedom of the

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are - to borrow Levy's phrase - suspect as a revelation of prior opinion. One must consider that by the time Jefferson wrote this letter, he had himself become the victim of a vicious and very personal smear campaign, in which James Thomson Callender first suggested a sexual connection between the master of Monticello and "Dusky Sally" Hemmings. This experience must surely have biased his views. Furthermore, in writing this letter, Jefferson was attempting to repair the very important, yet horribly shattered friendship that he had once maintained with John and Abigail Adams. Historians should be wary of Jefferson's efforts to appease his former friends, who had expressed feelings of personal betrayal at Jefferson's opposition to the Sedition Law and overt support of Adams's calumniators.

<sup>34</sup> Pole, "Reflections on American Law," 123.

press in such a manner as to connect it directly to the practical accomplishments of the Revolution, as well as to the radical Whig tradition and Enlightenment thought that had provided the war's ideological impulse. Furthermore, they argued that Revolutionary documents such as the states' bills of rights and instruments of constitutional ratification codified this new understanding. According to these men, the Sedition Act was in every way a violation of the aims and accomplishments of America's break with England.

As the Father of the Constitution and the primary author of the Bill of Rights, James Madison was uniquely qualified to comment on the original meanings of the First Amendment. His constitutional philosophy clearly posited that a free and open press was essential in a limited and responsible government that invested sovereignty in the people. "In the United States," as opposed to Great Britain, he wrote, "the executive magistrates are not held to be infallible, nor the legislature to be omnipotent; and both being elective, are both responsible." Therefore, American citizens maintained a right and a responsibility publicly to evaluate their elected officials and ensure that they did not overreach their constitutional mandate. This fundamental innovation in the American system of government was secured by the ratification of the Constitution, and it rendered the legal principle of seditious libel obsolete. Madison stressed that if an elected official failed to execute the public trust, then the people must be free to express their sovereignty by bringing this offender into public contempt and disrepute, and this process necessitated mechanisms of free communication among the people. For this reason,



Madison adamantly asserted that the American republic would not survive without a degree of press freedom that transcended English common law restrictions.<sup>35</sup>

Madison's philosophy concerning the necessity of new legal standards for the press in America reached its fullest expression in his Virginia Resolutions and subsequent *Report on the State of Virginia*. In 1798 the Virginia state legislature passed a series of resolutions that declared the sedition law unconstitutional and entreated the rest of the states to join in its nullification of the measure. Almost without exception, Virginia's sister states responded with repugnance, admonishing the Old Dominion for what was commonly perceived as an attempt to undermine the stability of the young nation. In response, James Madison, whose authorship of the Resolutions would remain undisclosed for another quarter of a century, drafted a report designed to justify Virginia's position. The persuasive power of the *Report* was exemplified by the frequency with which subsequent libertarian theorists, such as St. George Tucker and George Hay, adopted Madison's arguments.<sup>36</sup> Leonard Levy claims that "Madison's exposition of 1800 was not a reliable statement of the understanding prevalent at the time of the framing and ratification of the First Amendment," and is therefore inadmissible as evidence of a libertarian definition of a free press existing before 1798. However, Levy fails to recognize that Madison's *Report* reflects a philosophy publicly formulated throughout the revolutionary era, long before Congress approved the Sedition Act.

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<sup>35</sup> Madison, *Virginia Report*, 221-25. See Also, Saul Cornell, *The Other Founders: Anti-Federalists and the Dissenting Tradition in America, 1788-1828* (Chapel Hill, N.C.: University of North Carolina Press, 1999), especially chap. 9; Levy, *Legacy of Suppression*, 273-82; and Jeffrey A. Smith, *Printers and Press Freedom*.

<sup>36</sup> See St. George Tucker, "Of the Right of Conscience," in *Tucker's Blackstone*, 19-20; George Hay, *Essays on the Liberty of the Press*.

One of the most important distinctions advanced by Madison's *Report* concerns the differences between the balance of power in the British and American systems and the consequences of those differences for the press. In the British government, legislators guarded their constituents' rights against the danger of encroachments by the executive magistrate and were therefore "exempt from distrust." As Madison explained, "all the ramparts for protecting the rights of [British] people, such as their magna charta, bill of rights, etc., are not reared against the parliament, but against the royal prerogative." Under such a system, a protection from prior restraint, which traditionally was imposed by the king's licensors, was all that publishers could expect to enjoy. The legislature maintained its right to penalize any behavior that lawmakers determined to be an abuse of the press. Conversely, the United States Constitution recognized that both the executive and the legislative branches of government might violate the rights of the people. In order to protect against this danger, Madison contended that the "security of the freedom of the press requires that it should be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensors, but from the subsequent penalty of laws."<sup>37</sup> Essentially, Madison believed that the framework of government outlined in the Constitution had effectively repudiated the Blackstonian definition of a free press, even if the politicians who ratified the Bill of Rights did not express a libertarian understanding of the First Amendment when they debated its adoption. His position represented a fundamental change in American views

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<sup>37</sup> Madison, *Virginia Report*, 220.

on the liberty of the press that resulted directly from the practical accomplishments of the Revolution.

Madison first began to articulate his theories regarding the unique role of a free press in republican governments in a series of essays that he composed for the *National Gazette* between 1791 and 1792. He intended for these compositions to address the issue of maintaining a democratic republic in a large nation – an unresolved question that he had first addressed in the *Federalist Papers*.<sup>38</sup> In “Public Opinion,” which appeared in the *National Gazette* on December 19, 1791, Madison explained that “the larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited.” Naturally, this situation was “favorable to the authority of the government” and “unfavorable to liberty.”<sup>39</sup> Of course, an adequate expression of public opinion was essential to encourage officers of the government to remain responsible. Madison ultimately asserted that the unrestricted freedom of the press was the only means of ensuring an effective articulation of the will of the citizenry in such an expansive republic. “Whatever facilitates a general intercourse of sentiments” he professed, “as good roads, domestic commerce, a free press, and particularly *a circulation of newspapers through the entire body of the people ... is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too extensive.*”<sup>40</sup> While New England Federalists had long championed popular sovereignty as achieved through legislative debate, juries, and voting, Madison emphasized the

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<sup>38</sup> Cornell, *Anti-Federalists*, chap. 9.

<sup>39</sup> James Madison, “Public Opinion,” December 17, 1791, in Robert A. Rutland, et al., eds., *The Papers of James Madison*, 17 vols. (Chicago: University of Chicago Press, and Charlottesville, Va.: The University Press of Virginia, 1962 - ) 14: 170.

<sup>40</sup> *Ibid.*, emphasis original.

necessity of a vibrant print culture among these other mechanisms of public vigilance. The fact that this argument grew out of the *Federalist Papers* and achieved culmination in the *Report on the State of Virginia* suggests that Madison's response to the Sedition Act indicated a consolidation of the libertarian definition of a free press, rather than the first "major step in the evolution of the meaning of the free speech-and-press clause," as Levy claims.<sup>41</sup> In addition to proposing that the proper exercise of republican government required unfettered freedom of the press, Madison framed his argument in radical Whig ideology, drawing upon the incendiary impulses of the Revolution.

The rhetoric that Madison employed to emphasize the importance of public opinion directly reflected the principles and fears that precipitated the Revolution and prompted the establishment of a new republican government. In a *National Gazette* article published on January 18, 1792, he summarized the inspiration behind the Revolution, and stressed the mechanisms necessary to preserve the accomplishments of that radical movement.

We look back, already with astonishment, at the daring outrages committed by despotism, on the reason and the rights of man; We look forward with joy, to the period, when it shall be despoiled of all its usurpations, and bound forever in the chains, with which it had loaded its miserable victims.

In proportion to the value of this revolution; in proportion to the importance of its instruments [charters, constitutions, and bills of rights], every word of which decides a question of power and liberty; in proportion to the solemnity of acts, proclaiming the will, and authenticated by the seal of the people, the only earthly source of authority, ought to be the vigilance with which

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<sup>41</sup> Levy, *Legacy of Suppression*, 282.

they are guarded by every citizen in private life, and the circumspection with which they are executed by every citizen in public trust.<sup>42</sup>

This essay is crucial to our understanding of the origins of a libertarian theory of the freedom of the press, because it places the importance of private citizens' vigilance over publicly elected officials – as expressed through the public print medium – in the context of the republican synthesis. Madison's desire to secure an open press was directly related to the ideology that fueled the Revolution and his firm commitment to preserve the accomplishments of that conflict. In 1967, Bernard Bailyn argued that the patriots of 1776 viewed their cause as a struggle to protect liberty from the encroaching nature of power. According to the dissenting English tradition, which significantly informed America's Revolutionary leaders, every political struggle resulted from an imbalance between liberty and power. Mankind in general was incapable of resisting the temptations of authority, whose necessary victim was liberty, and governments were therefore prone to corruption and tyranny. As Bailyn attests, "only in Britain – and her colonies – had liberty emerged from its trials intact; only in Britain had the battle repeatedly been won. Yet even in Britain the margin of victory had been narrow, especially in the last bitter struggle with the would-be despots of the house of Stuart." Essentially, the leaders of the American Revolution feared that the British government had grown corrupt and was conspiring to oppress them.<sup>43</sup> As Gordon S. Wood has argued, these patriots consequently believed that they needed to establish a virtuous republic in order to escape the tyrannical fate of so many civilizations throughout

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<sup>42</sup> James Madison, "Charters," January 18, 1792, in Rutland et al., eds., *Papers of James Madison*, 14: 191-92.

<sup>43</sup> Bailyn, *Ideological Origins of the American Revolution*, 79-80.

history.<sup>44</sup> Madison's 1792 essay reveals that these modes of thinking maintained a profound hold on American leaders, even after the Revolution. He celebrates the victory of right and reason over despotism and confirms that the nation's revolutionary documents have finally established an appropriate balance between the dichotomous extremes of power and liberty. Furthermore, he contends that this balance will only be maintained through the vigilance of the people: "How devoutly is it to be wished," he concludes, "that the public opinion of the United States should be enlightened."<sup>45</sup>

Although English Whigs profoundly inspired Madison's commitment to an enlightened public opinion, his influences were more international than previous historians have recognized. Recent scholarship by Colleen A. Sheehan reveals that "the idea of public opinion as a dominant political force did not originate with Madison." Instead French theorists including Condorcet, Moreau, Jacques Necker, Jacques Peuchet, l'abbe Raynal, Turgot, Le Tronse, and others writing about "the reign of public opinion" throughout the 1780s, influenced Madison enough that their ideas and sometimes their exact phraseology appeared in his *National Gazette* essays.<sup>46</sup> In particular, these men conveyed to Madison the crucial distinction between public and popular opinion. Distinguished men of letters inform and maintain the public opinion, which is not easily agitated or altered. Conversely, popular opinion reflects the ephemeral passions of the ignorant and desolate masses. As Sheehan illuminates, these French thinkers taught Madison that public opinion is a "complex and dynamic process of social enlightenment"

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<sup>44</sup> Wood, *Creation of the American Republic*.

<sup>45</sup> James Madison, "Charters," in Rutland, et al., ed.s, *Papers of James Madison*, 14: 191-92.

<sup>46</sup> Colleen A. Sheehan, "Madison and the French Enlightenment: The Authority of Public Opinion," *WMQ*, 3d Ser., 59 (2002): 928, 932-33, n.23.

that “transmits the ideas of men of letters to the common citizens via print.”<sup>47</sup> This exclusive conception of public opinion as the responsibility of the literati ultimately prevailed during the early years of the American republic.

The deep influence that French philosophy maintained over early American leaders resonates in Gordon S. Wood’s 1974 article, “The Democratization of Mind in the American Revolution.” Presaging many of the arguments advanced in his 1992 synthesis *The Radicalism of the American Revolution*, Wood writes of a brief time in the early Republic when “ideas and power, intellectualism and politics, came together . . . in a way never again to be duplicated in American history.” National leaders believed in the dissemination of opinion and information, but they restricted this discourse to “gentlemen talking to other gentlemen.” As John Randolph wrote in 1774, “When I mention the public, I mean only to include the rational part of it. The ignorant vulgar are as unfit to judge of the modes, as they are unable to manage the reins of government.” Therefore, Wood contends, the public opinion that Madison championed in the early 1790s was “the intellectual product of limited circles of gentlemen-rulers.” It was the Sedition Act crisis, more than any other event, which undermined this elitist understanding of public truth. As countless ordinary and obscure men took up the pen and presumed to enlighten the people, they personally redefined public opinion as the creation of diverse voices and ideas – none more legitimate than any other. As highly as modern Americans revere such

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<sup>47</sup> Sheehan, “Madison and the French Enlightenment,” 942-43.

egalitarian advancements, this “democratization of the American mind” created “a decline in the intellectual quality of American political life” that Madison mourned.<sup>48</sup>

Indeed, most of the significant scholarship relating to late-eighteenth-century public opinion confirms Wood’s and Sheehan’s rendering of the public sphere as an exclusive milieu. As print historian David D. Hall explains, the Enlightenment ideal known as the “republic of letters,” wherein all learned men actively exchanged knowledge in a mutual attempt to elevate humanity, was theoretically blind to “confessional, political, and national boundaries.” The viability of this republic depended on the circulation of print media and, as Michael Warner confirms in his 1990 study *Letters of the Republic*, the media strove to operate on a principle of negativity, which “potentially legitimated the participation of any class.” In other words, the impersonality of the medium theoretically ensured that individuals could not be excluded from printed discourse on the basis of “personality, faith, class, or other criteria of validity.” In practice, however, few minorities gained access to the public arena. Print consumption remained the bailiwick of propertied, white males, mainly “because the same differentials of gender race and class allocated both citizenship . . . and active literacy.” Hence, as Jurgen Habermas confirms in his seminal *Structural Transformation of the Public Sphere*, the bourgeois public sphere that emerged briefly during the eighteenth century was revolutionary, but restricted to those qualified by property, education, and leisure to engage in public discourse. Of course this top-down conceptualization of public opinion,

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<sup>48</sup> Gordon S. Wood, “The Democratization of Mind in the American Revolution,” in *Leadership in the American Revolution* (Washington, D.C.: Library of Congress, 1974), 64, 71, 83. John Randolph’s *Considerations on the Present State of Virginia* (n.p., 1774) is quoted by Wood on page 67.



deplorable as it may seem by today's standards, did not necessarily negate Madison's libertarian commitment to an open press.<sup>49</sup>

It is important at this juncture to acknowledge the difference between free expression and the formation of public opinion in Madison's political theory. Although Madison championed an open press, which embraced the quantity and diversity of public opinions, his larger expectation was that these various expressions would compete for legitimacy within the public sphere and, in a very Darwinian sense, only the most reasoned sentiments would prevail. Therefore, supporting the freedom of the press, discerning truth and reason within the maelstrom of opinions such freedom engenders, and then shaping informed public opinion and subsequent policies accordingly are separate steps in the larger process of public discourse. To value informed and rational opinions above impassioned public outbursts in and of itself is neither elitist nor exclusionary. The problem is that Madison and his political allies tended to employ undemocratic and elitist criteria – often to their own detriment – in determining who was best able to reason about matters of public concern.<sup>50</sup>

Following the French example, Madison and his colleagues recognized the need to recruit men of sound character and information to act as the engineers of American public opinion. In 1791, when Madison and Jefferson resolved to employ a Republican

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<sup>49</sup> David D. Hall, "Learned Culture in the Eighteenth Century," in Hugh Amory and David D. Hall, eds., *The History of the Book in America, Volume One: The Colonial Book in the Atlantic World* (Worcester, Mass.: Cambridge University Press, 2000), 416; Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, Mass.: Harvard University Press, 1990), 48.

<sup>50</sup> I would like to thank Christopher Grasso, a member of my thesis committee, for highlighting the differences between Madison's support of free expression and his understanding of the formation of public opinion. Professor Grasso suggested the Darwinian reading of *Federalist No. 10* after reading an early draft of this thesis.

man of letters to create and manage an official party organ, they demonstrated disturbingly nativist and elitist tendencies. Jeffrey L. Pasley reports that “not only did they look outside the trade for an editor, they insisted on a man of education and established reputation.”<sup>51</sup> They regarded their crusade to enlighten the people too highly to settle for a conventional party journalist: a stereotypically uneducated, unrefined, artisan printer, who, more often than not, had immigrated to the United States in order to escape prosecution under Britain’s stringent press regulations.<sup>52</sup> Instead, Madison and Jefferson selected Philip Freneau. An eminent American with an established reputation as the “Poet of the Revolution,” Freneau was the safe choice, and he stepped tentatively into the world of publishing when he launched the *National Gazette* at the Vice President’s request. Ironically, the lower class émigré writers rejected as uneducated and unrefined were probably as capable – if not more so – of advancing radical Whig rhetoric. These artisans were experts of their trade who had perfected the art of political journalism while participating in Great Britain’s radical opposition, yet they were precisely the sort of men that Madison and Jefferson deemed unqualified to disseminate public opinion. Despite Madison’s inability to recognize and overcome the elitism of his own philosophy – a flaw which will be addressed at length in the following chapter – he remained among the most ardent advocates, in word and in deed, of the most libertarian definition of a free press that Americans had ever known.

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<sup>51</sup> Pasley, *Tyranny of Printers*, 63.

<sup>52</sup> For information regarding the massive influx of émigré printers into the United States in the early 1790s, see the work of Michael Durey. In particular, “Thomas Paine’s Apostles: Radical Émigrés and the Triumph of Jeffersonian Republicanism,” *WMQ*, 3d Ser., 44 (1987), and *Transatlantic Radicals*.

In an addition to writing essays for the *National Gazette*, Madison acted to defend the importance of free expression by protesting the prosecution of U.S. Representative Samuel Jordan Cabell of Albemarle, Virginia. In 1797 the Circuit Court of Richmond summoned Cabell before a grand jury because he had distributed a circular letter among his constituents that viciously condemned the policies of the Adams administration. Madison joined Thomas Jefferson in drafting a petition to the state legislature that characterized the presentment of the court as “a violation of the fundamental principles of representation . . . an usurpation of power . . . and a subjection of a natural right of speaking and writing freely.”<sup>53</sup> As historians Adrienne Koch and Harry Ammon have argued, Madison and Jefferson viewed the court’s action as a violation of the proper relationship between constituents and their representatives, and consequently became concerned about the opposition’s attempts to silence Republican criticism on the eve of a national election.<sup>54</sup> Considering Madison’s belief that public censure of elected officials sustained the viability of an extended republic, it is easy to understand why the case against Cabell alarmed him. If citizens – whether public or private – could not scrutinize the policies of their leaders, especially as the nation approached a crucial election year, then the integrity of the representative republic would not hold.

Clearly, Federalist maneuvers had already aroused Madison’s concern by the time the Sedition Act passed a year later. As Koch and Ammon demonstrate, the petition of 1797 and the Virginia Resolutions were a part of the same overarching campaign to

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<sup>53</sup> Petition quoted in Adrienne Koch and Harry Ammon, “The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of American Civil Liberties” *WMQ*, 3d Ser., 5 (1948): 153.

<sup>54</sup> *Ibid.*

preserve American civil liberties. In fact, when viewed in conjunction with the *National Gazette* essays, Madison's political tactics in 1797-1800 fit into an even broader progression of political theory than Koch and Ammon have recognized. The Cabell petition, the Virginia Resolutions, and the *Report on the State of Virginia* collectively represent the completion of a theory that began to develop during the Revolution and in its immediate aftermath.

St. George Tucker is yet another Virginian whose philosophy advanced libertarian free press ideology. One of the nation's foremost legal scholars when Congress passed the Sedition Act, Tucker studied law under George Wythe and rose to prominence as one of the Old Dominion's most distinguished judges. Eventually, he succeeded his mentor as professor of law at the College of William and Mary. Tucker's encyclopedic knowledge of English common law earned him a reputation as "the American Blackstone." After Independence, he undertook the awesome task of annotating Blackstone's *Commentaries* to reflect the changes necessitated by the creation of a republican government. This five volume work, entitled *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, would have occupied a prominent place on the bookshelf of every lawyer in the state. Consequently, Tucker exploited the ubiquitous influence of his work by appending to it several politically charged essays. While Tucker's Blackstone did not receive publication until

two years after the sedition law expired, it nevertheless demonstrated a pre-Revolutionary emergence of a libertarian theory of the freedom of the press.<sup>55</sup>

Like Madison, Tucker framed most of his arguments in the same Enlightenment and radical Whig vocabulary that had propelled the Revolution, thereby rooting his philosophy in 1776. This rhetorical style is most apparent in an appendix to his edition of Blackstone, entitled “Of the Right of Conscience; and of the Freedom of Speech and the Press,” which dealt with both freedom of religious expression and freedom of the press. In this essay, Tucker referred to the general right of personal opinion as “one of those absolute rights which man hath received from the immediate gift of his Creator, but which the policy of all governments, from the first institution of society to the foundation of the American republics hath endeavored to restrain in some mode or other.”<sup>56</sup> In this brief statement, Tucker referred to both the inalienable rights of natural law and the radical Whig belief that all governments inevitably tend toward tyranny and oppression. Hence, the jurist addressed two concepts that Bailyn identifies among the driving ideas of

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<sup>55</sup> In an unpublished paper entitled “St. George Tucker, Blackstone’s *Commentaries*, and American Print in the Early National Period,” (College of William and Mary, 1998), Kevin Butterfield observed that Tucker began seeking a publisher for his edition of Blackstone as early as 1794. This discovery might refute Levy’s claim that none of the major libertarian treatises on the liberty of the press appeared before 1798. However, Butterfield admits that “there is no indication that Tucker provided the publisher, William Tatham, with much information beyond a very basic description of the proposed layout of the work.” Indeed, while Tatham mentions reading a “preface,” he most likely reviewed a prospectus for what he later refers to as Tucker’s “contemplated work.” Indeed, there is no evidence that “the notes and appendices . . . were almost all completed” at this juncture, as Butterfield suggests. Furthermore, in February 1798 Tucker composed a “Memo of Proposal to M. L. Weems for Publishing Blackstone’s *Commentaries*,” which outlined his appendices in great detail. The proposal, written five months before the inception of the Sedition Law, does not mention the essay “Of the Right of Conscience,” which ultimately appeared in the appendix to the fourth volume of Tucker’s edition. Therefore, although Tucker attempted to engage five different firms to publish his work between 1794 and 1802, the evidence suggests that Tucker added the essay on freedom of thought and expression after the passage of the Sedition Law. See William Tatham to St. George Tucker, 26 and 30 January 1795, and St. George Tucker, “Memo of Proposal to M. L. Weems for Publishing Blackstone’s *Commentaries*,” 14 February 1798, Tucker-Coleman Papers.

<sup>56</sup> Tucker, “Of the Right of Conscience,” in *Tucker’s Blackstone*, 4: 3.

the Revolution. Furthermore, Tucker asserted that thought and speech represented different manifestations of the same personal opinion and that each required equal protection under the law. As the blessings of the Creator, “they ought . . . to have been wholly exempt from the coercion of human laws in all speculative and doctrinal points whatsoever.”<sup>57</sup> Tucker believed that because these liberties originated from the same source, a legislature that could undermine the liberty of the press could also justify abridging freedom of religion. He was not alone in this fear.

Madison had also expressed concern in his *Report* that any denigration of the freedom of expression might weaken religious freedom. Pointing out that these similar liberties were secured by the same constitutional amendment, Madison explained, “if it be admitted that the extent of the freedom of the press, secured by the amendment, is to be measured by the common law on this subject, the same authority may be resorted to, for the standard which is to fix the extent of ‘freedom of religion.’”<sup>58</sup> As it is completely unreasonable to assume that the founders intended to endorse English common law standards regarding religious practices, it is equally absurd to assert that they meant to codify the Blackstonian definition of a free press when they adopted the First Amendment.<sup>59</sup> Ultimately, the concepts of religious and expressive freedom were closely linked under the umbrella of natural rights philosophy, and libertarian thinkers believed that the instruments created to protect the former from encroachments of power also applied to the latter. If one accepts this argument, then one must necessarily

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<sup>57</sup> *Ibid.*, 12.

<sup>58</sup> Madison, *The Virginia Report*, 229.

<sup>59</sup> James Morton Smith draws on Hay, Madison, and Tucker, among others, to suggest this argument in *Freedom's Fetters*, 429.

acknowledge that Virginians, at least, repudiated the common law view of a free press prior to the passage of the Sedition Act.

The Virginia Act Establishing Religious Freedom, adopted in 1785, rejected the bad tendency test that was essential to determining the criminality of seditious libel. Like Tucker's appendix essay, the act referred to personal opinion in a general sense. "To suffer the civil magistrate to intrude his powers into the *field of opinion*," the act proclaimed, "and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous falacy [*sic.*]." <sup>60</sup> This broad characterization allows one to infer the ideological rejection of the bad tendency test for all forms of conscientious expression, including political opinions. Referring particularly to the statute concerning religious freedom, Leonard Levy admits, "in Virginia . . . there is a basis for the presumption that the common law of criminal libel was meant to be superseded by the protection afforded to the freedoms of religion and the press." However, Levy ultimately rejects this thesis, because "in context, only freedom of religion is provided for and explicitly named." <sup>61</sup> Nevertheless, as previously shown, libertarian theory held that freedom of religious belief was inextricably connected to freedom of speech and of the press. Therefore, Virginians relied upon natural rights philosophy, which had in large part inspired their involvement in the American Revolution, to negate the bad tendency test, and thereby renounce the Blackstonian concept of seditious libel. Furthermore, Enlightenment thought did not provide the only Revolutionary basis for the libertarians' rejection of the bad tendency principle.

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<sup>60</sup> Preamble to the Virginia Act Establishing Religious Freedom quoted in James Morton Smith, *Freedom's Fetters*, 428, emphasis added; see also pages 428-29.

<sup>61</sup> Levy, *Legacy of Suppression*, 189.

St. George Tucker's argument against the Sedition Act arose from an important connection between the English radical Whig tradition and the American Revolution. In order to understand this fact, it is important to recognize that the common law crime of seditious libel did not emerge from legal tradition; rather, Sir Robert Coke introduced it into the corpus of English law as part of a decision handed down by the Court of the Star Chamber in 1606. Charles I's prerogative court constituted one of the royal infringements of elite privileges that inspired radical Englishmen to raise arms against the king during the mid seventeenth century. However, as Jeffrey A. Smith explains, "instead of dying with the Star Chamber in 1641 or with the Glorious Revolution, [the logic of seditious libel] was subsequently held by English authorities as valid, and the precedent was applied in cases involving the growing and increasingly troublesome periodical press."<sup>62</sup> In this sense, the crime of seditious libel represented a remnant of past oppression that the English Civil War had failed to eliminate. It remained entrenched in the body of common law despite the fact that men had died in the effort to abolish the political entity that first condoned it. Furthermore, as Bailyn argues, few of England's Whigs accepted the accomplishments of the Civil War and the Glorious Revolution as a complete defeat of government corruption. They viewed policies such as the prosecution of seditious libel and government interference in the practice of religion as vestiges of an oppressive past, and their radical advocacy for reform inspired the patriots of 1776 to challenge the corrupting force of English tyranny.<sup>63</sup> Therefore, Tucker's libertarian definition of a free press did not develop as an immediate response to

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<sup>62</sup> Jeffrey A. Smith, *Printers and Press Freedom*, 60.

<sup>63</sup> Bailyn, *Ideological Origins of the American Revolution*, 46-7.



the rancorous party struggles of the 1790s. Rather, it reached far back into the English past and addressed the unfinished business of no less than *three* radical revolutions designed to halt the natural encroachment of power upon liberty.

Tucker's frequent references to the Star Chamber Court, which appear in his annotation of Blackstone's *Commentaries* as well the appended essays, reveal his intellectual connection to England's radical Whigs. As a general rule, Tucker only amended Blackstone's text with clinical notations of American variations on the law. However, when the British jurist introduced the concepts of seditious libel and bad tendency, the American inserted an ideological footnote designed for drama and effect. "The general rules laid down by the court of the Star Chamber," Tucker warns his readers, "are either extrajudicial or not maintained . . . . When we consider the source from whence these doctrines have been brought to us, the reasonableness of them ought to be examined before we yield our full assent to *all* of them."<sup>64</sup> In Tucker's mind, the reasonableness of these principles had indeed been examined and ultimately rejected by the first settlers of the American colonies and the patriots of 1776. In his appendix essay, he asserted that the fundamental principle of unrestricted press freedom was:

generated in the American mind, by an abhorrence of the maxims and principles of that government which they had shaken off, and a detestation of the abominable persecutions, and extrajudicial dogmas, of the still odious court of the star-chamber; whose tyrannical proceedings and persecutions, among other motives of the like nature, prompted and impelled our ancestors to fly from the pestilential government of their native country, to seek an asylum here; where they might enjoy, and their prosperity establish, and transmit to all future generations, freedom, unshackled, unlimited, and undefined. That in our time we

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<sup>64</sup> *Tucker's Blackstone*, 4: 150; see note 19.

have vindicated, fought for, and established that freedom by our arms, and made it the solid, and immovable basis and foundation both of the state, and federal government.<sup>65</sup>

Tucker's prose reveals that he was primarily concerned with maintaining the libertarian tradition that originated in the seventeenth century and fueled America's own Revolution. Contrary to Levy's analysis, Tucker rejected the Sedition Act because it represented a recurrence of the oppression that he believed the Revolution had sought to eliminate. This work appeared after 1798 because that was when the recurrence first became apparent, not because the Sedition Act encouraged him to develop a politically expedient definition of the freedom of the press.

Tucker believed that the majority of his countrymen shared his conviction and had declared so through the ratification of the Constitution. Indicating that the instrument of national government secured the unfettered freedom of the press, he asserted that "the people of America have always manifested a most jealous sensibility on the subject of this inestimable right, and have ever regarded it as a fundamental principle in their government, and carefully engrafted it in their Constitution."<sup>66</sup> For Tucker and other libertarian thinkers, the codification of the freedom of the press in the First Amendment was an incontrovertible rejection of the doctrine of seditious libel. However, as Levy questions the validity of this claim, it bears mentioning that not every argument against the constitutionality of the Sedition Act was derived from the Bill of Rights. This fact is

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<sup>65</sup> Tucker, "Of the Right of Conscience," in *Tucker's Blackstone*, 4: 16.

<sup>66</sup> *Ibid.*

best illustrated by the arguments advanced by a promising young attorney by the name of George Hay.

Like St. George Tucker, Hay was one of Virginia's brightest legal minds. Later to serve as Attorney General during the administration of his father-in-law, James Monroe, Hay defended the only man to stand trial for seditious libel in the state of Virginia.<sup>67</sup> His *Essay on the Liberty of the Press*, published in 1799 under the pseudonym Hortentius, earned him a reputation as the nation's most liberal champion of the First Amendment. In most respects, Hay's essay conveyed the same essential arguments involved in the writings of Madison and Tucker to a more general audience. He reiterated the belief that open criticism of public officers was essential in a representative republic, rejected the relevancy of the bad tendency clause, and condemned the Sedition Act for its basis in a defunct system of government that was widely recognized to have sacrificed liberty for power. Most importantly, he questioned how anyone could seek to revive the policies of this rejected government when the leaders of the American Revolution had created political documents specifically designed to prevent this eventuality.<sup>68</sup>

Hay argued that the founding leaders of Virginia had taken steps expressly calculated to check the struggle between the forces of power and liberty. The document submitted to Congress by Virginia's ratifying convention in 1788 expressed the Old Dominion's reservations regarding the national Constitution. Asserting that "the doctrine

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<sup>67</sup> See David Robertson, ed., *The Trial of James Thompson Callender, for Sedition, on Tuesday the Third Day of June, 1800, in the Middle Circuit Court at Richmond, in the District of Virginia* (Petersburg, Va., 1804); James Morton Smith, *Freedom's Fetters*, chap. 15; Durey, *Hammer of Truth*.

<sup>68</sup> Hay, *Essays on the Liberty of the Press*.

of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind,” the convention adopted Whig rhetoric and demanded that the first Congress to assemble under the new Constitution enact “a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People.”<sup>69</sup> The leaders of Virginia, who were certainly not alone in demanding such additional protections, recognized that the new Constitution had not gone far enough in codifying the advances that the Revolution had wrought in the ongoing struggle to find balance between liberty and power. As Hay observed, they knew “that it has frequently happened in the course of human affairs, and may again happen, that the individuals thus selected [to administer the government] may abuse the power entrusted to them.”<sup>70</sup>

Virginians recognized that the best defense against government corruption was to mandate that “the people have a right to freedom of speech, and of writing and publishing their Sentiments,” because “the freedom of the press is one of the greatest bulwarks of liberty.”<sup>71</sup> Indeed, only a press free from all congressional jurisdiction – including both prior restraint and subsequent punishment – would allow open examination of public officials, ensure responsible government, and halt the natural transgressions of power. Virginians clearly viewed the principles eventually enshrined in the First Amendment as an essential component of the Revolution’s Whiggish victory over the corrupting tendencies of government. Therefore, they made their approval of the Constitution

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<sup>69</sup> For Virginia’s Ratifying Document, see Charles C. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), 1028.

<sup>70</sup> Hay, *Essays on the Liberty of the Press*, 5.

<sup>71</sup> Tansill, ed., *Documents Illustrative of the Formation of the Union*, 1030.

contingent upon the adoption of a Bill of Rights, which would act as a binding culmination of the ideological impulses that had led them through the rebellion. In this sense, the Virginia ratifying document confirms the intention of repudiating Blackstone prior to 1798. In Hay's mind, this fact alone should have justified the nullification of the Sedition Act. Nevertheless, he had an even more fundamental Constitutional argument prepared for those Federalists who claimed it did not.

Hay based his rejection of the Sedition Act on three basic tenets found in the main text of the Constitution: all power originally belongs to the people, powers of government are granted by the people, and individuals selected from the mass of people possess no powers not expressly granted. This final point does not apply to state governments, which are considered to be the guardians of their citizens' rights, and are therefore vested with general powers, "except those specifically denied." Conversely, the federal government exists because, in an expansive republic, there are certain areas that state legislatures cannot effectively administer; hence "specific powers only are given." Therefore, in order to determine the constitutionality of a congressional law, one need only ask, "Is the power to pass this law expressly granted to Congress?" In the case of the Sedition Act, the answer was negative, thus voiding the measure.

Furthermore, Hay acknowledged the arguments advanced by Federalist members of Congress that the preamble's Common Defense and General Welfare clause, later echoed in Article I, Section 8, gave Congress province to regulate the press. However, he countered that the preamble shows intention and is not a part of the law, and that Article I, Section 8 is "not a general power to provide for the good of the nation, but a special power of laying and collecting taxes and duties for the purpose of providing for the

general welfare.” Truthfully, the Constitution never grants Congress the power – explicit or implicit – to control the press through subsequent punishment. Therefore, the United States Constitution, through its silence, repudiated Blackstone’s limited definition of the freedom of the press.<sup>72</sup>

Collectively, the treatises of James Madison, St. George Tucker, and George Hay demonstrate that a libertarian definition of freedom of the press was based on Revolutionary principles and grew to fruition during the Sedition Act crisis and in its immediate aftermath. These men expressed a belief in the freedom of the press that was closely related to the radical Whig tradition and the Enlightenment thought that animated the American Revolution. Furthermore, they understood that the radical and innovative nature of the government outlined in and protected by the Constitution and its Bill of Rights created a need to reconsider the traditions and precedents handed down by centuries of English jurists. Indeed, seditious libel was only one of many English common law principles rendered obsolete by the creation of the American republic. Therefore, the Republicans’ reaction to the Sedition Act of 1798 was, above all, an attempt to preserve the practical accomplishments of the American Revolution.

However, as the struggle to control interpretations of the American Revolution constituted one of the most divisive aspects of the late eighteenth century’s partisan wars, it is easy to understand why many scholars have come to characterize the Sedition Act debate in a simplistic manner. Nevertheless, Virginia’s defenders of freedom believed that the unrestricted liberty of the press was a fundamental component for any society that wished to avoid the inevitable slide into corruption and tyranny. At no time was this

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<sup>72</sup> Hay, *Essays on the Liberty of the Press*, 7, 10.

more apparent than when Supreme Court Justice Samuel Chase personally carried the odious sedition law into the Old Dominion.

## CHAPTER II

### THE CAUSE OF THE CONSTITUTION AND THE MARTYRDOM OF JAMES THOMSON CALLENDER

*“True genius is almost always sans-culotte.”* – Henri Gregoire

On the third day of June 1800, James Thomson Callender became the first and only man to be tried for the crime of seditious libel in the state of Virginia or anywhere in the American South. His case is instructive for several reasons. Primarily, among the several publishers indicted under the Sedition Act, Callender alone challenged the constitutionality of the measure as the basis of his defense. His legal team – comprised of the best and brightest litigators the Old Dominion had to offer – was organized by Governor Monroe and Vice President Jefferson, and funded by citizens’ contributions. Furthermore, Jefferson and his acolytes understood that “it is useful to furnish occasions for the flame of public opinion to break out from time to time,” and so they orchestrated Callender’s trial to create a political *coup de theatre* on the eve of an imperative national election. Their Federalist adversaries were no different, viewing the case against Callender as an opportunity to make a show of federal authority in the recalcitrant South. Indeed, the journalist himself had very little relevance to the trial that would decide his fate.<sup>1</sup>

Callender’s marginality in the discussion of his own supposed crime reveals something very important about the state of free press ideology at the end of the eighteenth century. He did not unwittingly fall victim to the machinations of the

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<sup>1</sup> The quote is Jefferson’s, from a letter written to Monroe shortly before Callender’s indictment for seditious libel. Jefferson to Madison, 16 March 1800, Thomas Jefferson Papers, Library of Congress.



politicians he wrote about; in fact, he relished his role as a martyr to the Republican cause. However, the encouragement and patronage he received while writing *The Prospect Before Us*, the object of his indictment, and the very real abandonment he experienced upon incarceration signify that restrictive eighteenth-century definitions of public opinion continued to guide the policy of early American leaders. Callender, a lifelong publicist for the radical Whig tradition, fled Scotland and an indictment of seditious libel in the mid-1790s. Almost immediately, his incendiary articles and pamphlets captured the attention of Thomas Jefferson, who recognized Callender's capacity to inspire discontent with the Adams administration. His convictions and hard-earned experience as a party hack made him an expedient choice as a mouthpiece for the Republican opposition. However, once the Revolution of 1800 passed and the Jeffersonians found themselves safely entrenched, Callender's utility came to an end. He simply did not fit the accepted definition of a gentleman-journalist, whose intellect and refinement could safely guide the enlightened public opinion. Ultimately, Callender's case demonstrates that early Virginians regarded the Sedition Act as a direct violation of their well-developed idea of an open press, although they maintained a very classist and nativist idea about who was best qualified to employ that freedom.

The approval of the Sedition Act was particularly dangerous for James Thomson Callender. When the measure passed, he was writing for the incendiary *Philadelphia Aurora*, whose editor, Benjamin Franklin Bache, already languished in prison under a legally tenuous common law indictment of seditious libel.<sup>2</sup> Many observers, including

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<sup>2</sup> The question of whether or not the federal government possessed the right to enforce common law doctrines remained in doubt until 1812, when the Supreme Court established that every crime against

Thomas Jefferson, believed that Callender was “a principle object of [the law].” Wisely, Callender took steps to ensure his own security. On June 4, 1798, he became a naturalized citizen of the United States, understanding that he could thereby avoid the threat of the Alien Act. Then, declaring, “I cannot think I should be safe in Philadelphia, as soon as I shall be in Richmond,” Callender accepted the invitation of Senator Thomas Stevens Mason to take refuge at his Virginia estate, Raspberry Plains. To Callender, Virginia was a safe haven, where he enjoyed the protection of state Republicans, whose local dominance rendered a federal indictment of seditious libel unlikely. He arrived at Mason’s Loudon County estate in July 1798, feeling defeated and battle-weary.<sup>3</sup>

During his early months in Virginia, Callender expressed a strong aversion to his chosen profession and a feeling that the Philadelphia Republicans had neglected him in his hour of need. “I am entirely sick even of the Republicans,” he declared, “I have been so severely cheated, and so often, that I have the strongest inclination, as well as the best reason, for wishing to shift the scene.” He had suffered many great trials in 1798, including the death of his wife and threats of prosecution, deportation, and assassination. He talked endlessly about establishing himself in a more honorable profession, outside of politics, and dreamed of someday taking his sons back to Scotland. According to Callender’s biographer, Michael Durey, the radical Scotsman “reverted to his customary philosophy of suspicion of all groups, conceding trust to only select individuals.” For

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the United States required a federal statute. Therefore, the Adams administration initiated proceedings against Benjamin Franklin Bache and John Daly Burk before Congress even passed the Sedition Act. See James Morton Smith, *Freedom’s Fetters*, chap. 10.

<sup>3</sup> Jefferson to Monroe, Philadelphia, 7 June 1798, in Paul Leicester Ford, ed., *The Writings of Thomas Jefferson*, 10 vols. (New York: G.P. Putnam’s Sons, 1892-99), 7: 143; Callender to Jefferson, 19 November, 1798, in Worthington Chauncey Ford, ed., “Thomas Jefferson and James Thomson Callender,” *New England Historical and Genealogical Register*, 51 (1896): 331-33.

nearly a year, he lived quietly in the seclusion generously provided by Senator Mason, before slowly regaining his vivacity and will to engage in political turmoil.<sup>4</sup>

When Callender left Loudon County for Richmond in May 1799, he discovered an intricate support network in place among Republican officials and party journalists. Meriwether Jones, a former member of the Virginia House of Delegates and personal friend of Thomas Jefferson, had recently resigned his position on the state Executive Council in order to accept the role of printer to the Commonwealth. Ancillary to his official duties, Jones undertook the editorship of the *Richmond Examiner*, one of the leading Republican newspapers of the time, and welcomed Callender's contributions as a writer. James Lyon, son of the infamous Congressman from Vermont, came to Virginia only after Callender agreed to join him in the publication of the *National Magazine*, an experimental collection of the best Republican articles for regular national distribution. Callender fit easily into this cooperative association of politicians and printers, and moved confidently forward on a project he had conceived sometime during the fall of the previous year.<sup>5</sup>

The decision to write *The Prospect Before Us* had prompted Callender's move from Northern Virginia to Richmond. Late in 1798, he began to feel that the time had come to renew his campaign against the Federalist Party in general and the Sedition Act in particular. He confided in Jefferson his plan to publish a political volume from Richmond, believing that "no judge in this state will, by that time, dare to raise a process

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<sup>4</sup> Callender to Jefferson, 22 September 1798, in W. C. Ford, ed., "Jefferson and Callender," *NEHGR*, 51 (1896): 328-29; Durey, *With the Hammer of Truth*, 110.

<sup>5</sup> For information on Callender's move to Richmond and employment there, see Durey, *With the Hammer of Truth*, 116-17.

of sedition.” He felt certain that the tide was turning in the Republicans’ favor. “By next March,” he reasoned, “the public mind will be much riper than it is at present for the admission of truth.” Callender appreciated that if he paid careful attention to political currents and employed his vitriolic pen at precisely the right moment, he could personally influence the course of public opinion. In this sense, he played as important a role in engineering his trial as the Republicans and Federalists who each wanted to make an example of him in their own way. There is no doubt that when Callender emerged from the solitude of Raspberry Plains that spring, he stepped willingly back into the fray of partisan journalism. The more compelling question is, what aroused a relatively craven man, who twice before had fled the scepter of prosecution and frequently professed an ardent desire to exit politics forever, eagerly to defy the national government?<sup>6</sup>

Of course, there is more than one explanation for Callender’s abnormal degree of confidence. His erroneous conviction that Virginia was beyond the reach of the federal judiciary certainly encouraged his bravado. He also understood that the Federalist Party was undermining its own authority by enforcing the increasingly unpopular Sedition Act. As he wrote to fellow Republican printer William Duane after the publication of *The Prospect Before Us*, “the more violence, the more prosecutions from the treasury, so much the better.” Believing that each new indictment brought the Federalists closer to collapse, Callender grew eager to deal a deathblow to the ruling party. “[The trials] of yourself and [English émigré printer Thomas] Cooper will be of service,” he reminded Duane. “You know the old ecclesiastical observation, that *the blood of the martyrs was*

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<sup>6</sup> Callender to Jefferson, 19 November 1798, in W. C. Ford, ed., “Jefferson and Callender,” *NEHGR*, 51 (1896): 331-33.

*the seed of the church.*” In spite of these noble sentiments, it remains rather unlikely that Callender, a man accustomed to running from the trouble his writing created, would so willingly have made himself vulnerable if he truly believed that the rising Republicans would abandon him to suffer the consequences of his martyrdom. In fact, he informed St. George Tucker from his desolate cell in Richmond Jail that he had been assured that “in the event of a trial and sentence upon that statute [the Sedition Act],” the judges of Virginia “would by their own authority, dismiss the prisoner from jail,” and he later admitted to Madison, “I had no more idea of mean usage than that mountains were to dance a minuet.”<sup>7</sup>

Indeed, Callender’s bluster flowed from a source unrelated to the Federalists’ foreseeable ruin. As Durey explains, the Scotsman’s vigorous return to the political arena had more to do with his very personal correspondence with Thomas Jefferson. On a 1797 sojourn to Philadelphia, the Vice President asked a mutual friend to introduce him to the author of *The Political Progress of Britain*, a piece that Jefferson praised publicly. Their communication flowered significantly after Callender fled to Virginia. Although the majority of their missives originated with the exiled journalist, Jefferson’s few replies exuded what Durey calls “the unqualified impression of the Republican leader’s need of [Callender] to continue the battle against Federalism.” The Vice President reviewed page proofs of *Prospect* as Callender produced them, reminded the writer how important his work was to the cause of liberty, and offered him significant financial support. This endorsement gave Callender a sense of imperviousness that was so uncharacteristic,

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<sup>7</sup> Callender to William Duane, 27 April 1800, in *ibid.*, 451-52; Callender to Tucker, 4 November 1800, Tucker-Coleman Papers; Callender to Madison, 27 April 1801, in W. C. Ford, ed., “Jefferson and Callender,” *NEHGR* 52 (1897): 153-54.

Durey doubts whether Callender would ever have published *The Prospect Before Us* without Jefferson's active mentorship. In later years, Jefferson would adamantly deny that his dealings with Callender ever exceeded gentlemanly charity. He professed to have given Callender "such aids as I could afford, merely as a man of genius suffering under persecution, and not as a writer of our politics." In reality, Jefferson's actions belied such ardent protestations.<sup>8</sup>

Throughout the party wars of the 1790s, Jefferson and his cohorts displayed an indisputable predilection to pay for the pen. A prime example of this habit occurred when Madison and Jefferson implored Philip Freneau to spearhead the *National Gazette* in 1791, simultaneously presenting him with an unsolicited position as a State Department translator. According to then-Secretary of State Jefferson, this salaried post gave "so little to do as not to interfere with any other calling the person may chuse." As an additional perk, Jefferson promised to send Freneau all of the State Department's printing business. The Virginians clearly provided monetary compensation for Freneau's contributions to the Republican cause, demonstrating a policy that remained unchanged on the eve of Callender's ordeal. "We are sensible that this summer is the season for systematic energies and sacrifices," Jefferson wrote to Madison in February 1799. "The engine is the press. Every man must lay his purse and his pen under contribution." Jefferson understood that good publicity fueled the rising wave of popularity which promised to carry the Republicans to national prominence. Not only was he willing to empty his own pockets for a bit of old fashioned media hype, he had no chivalrous

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<sup>8</sup> Durey, *With the Hammer of Truth*, 113, 120; Jefferson to Monroe, 15 July 1802, in W. C. Ford, ed., "Jefferson and Callender," 52 (1897): 157-58; Jefferson to Monroe, 29 May 1801, in *ibid.*, 156-57.

qualms about entreating others to do the same. Indeed, Callender ranked among the many gifted journalists verily employed as advocates of Jefferson's politics.<sup>9</sup>

Although Jefferson later characterized his subscriptions to Callender's works as a "pretext to cover a mere charity," closer examination reveals that the Vice President's contributions were hardly so innocuous. In fact, Jefferson's two largest donations to Callender immediately followed letters in which the journalist expressed an intention to cease his efforts. Settling into the sanctuary of Raspberry Plains, Callender explained, "it is needless, even were it safe, to write anymore. The [Federalist] party are doing their own business as fast as can be." Feeling unnecessarily exposed to danger as an incendiary journalist, Callender implored Jefferson to help him secure employment as a schoolmaster or storekeeper. In response, Jefferson offered sympathy, support, and fifty dollars, gently reminding Callender of his "power to render services to the public liberty." Then, in August 1799 an unruly group calling themselves the Richmond Associators seriously shook Callender's confidence by threatening to riot and drive him out of town. "While I am in danger of being murdered without doors," he told Jefferson, "I do not find within them any particular encouragement to proceed. I shall therefore probably cease from writing." Jefferson again sent his protégé fifty dollars, assuring him that his writing "[could not] fail to produce the best effect" and "inform the thinking part of the nation." Not only are these contributions conspicuous for their appearance whenever Callender's commitment began to wane, they are positively staggering in size. Prior to 1799 Jefferson had never delivered more than sixteen dollars to Callender, with

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<sup>9</sup> Jefferson to Freneau, 28 February 1791, in Julian P. Boyd, et al., eds., *The Papers of Thomas Jefferson*, 29 vols. to date (Princeton, N.J.: Princeton University Press, 1950 - ), 19: 351, cited in Pasley, *Tyranny of Printers*, 65.

his average contribution amounting to about seven dollars. It seems quite clear that the Vice President adroitly employed moral and financial support in order to coax Callender along a path he might not otherwise have followed – a path that led ultimately to Richmond Jail.<sup>10</sup>

The precise nature of Jefferson's design on Callender remains elusive. Certainly he intended the Scotsman's writing to incite the electorate's passions against Adams and the Federalists, and he could not have been ignorant of the fact that an implementation of the Sedition Act within the borders of the Old Dominion would rally countless supporters to the Republican cause. However, there is no evidence that Jefferson explicitly set Callender up to tempt the Federalists' wrath. Unlike Supreme Court Justice Samuel Chase, who publicized his intention to carry a copy of *The Prospect Before Us* into Richmond and use it to "teach the people to distinguish between the liberty and licentiousness of the press," Jefferson and his cohorts did not preordain a victim for the symbolic battle of ideologies that they anticipated and that Callender's trial ultimately became. In fact, they did not begin to regard a local action of seditious libel as a foregone conclusion until well after the publication of Callender's offensive work. Therefore, it would be specious to assume that Jefferson intended to create a political pawn of Callender through dogmatic and fiscal cajolery, although there is no doubt that

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<sup>10</sup> Jefferson to Monroe, 15 July 1802, in W. C. Ford, ed., "Jefferson and Callender," *NEHGR*, 52 (1897): 157-58; Callender to Jefferson, 22 September 1798, in W. C. Ford, ed., "Jefferson and Callender," *NEHGR*, 51 (1896): 328-29; Jefferson to Callender, 11 October 1798, Thomas Jefferson Papers, Library of Congress; Callender to Jefferson, 10 August 1799, in W. C. Ford, ed., "Jefferson and Callender," *NEHGR*, 51 (1896): 445-46; Jefferson to Callender, 6 October 1799, in *ibid.*, 449; for Jefferson's subscriptions to Callender, see the list compiled from the Vice President's notebooks by Paul Leicester Ford in *ibid.*, 324-25.



the Republicans seized the opportunity to do so once Chase's zealous machinations made the journalist's martyrdom possible.<sup>11</sup>

One of the most compelling aspects of Callender's trial is that his defense was almost entirely state-funded. Immediately upon his arrest, Jefferson wrote to Monroe, "I think it essentially just and necessary that Callender be substantially defended."

Although he vacillated between public intervention and private contribution as the preferred means to this end, he ultimately thought it best to lay the issue before the legislature. "It is become peculiarly their cause," he concluded, "and may furnish them a fine opportunity of shewing their respect to the union and at the same time doing justice in another way to those whom they cannot protect without committing the publick tranquility."<sup>12</sup> At once, Jefferson expressed a sense of responsibility to the man whom he had wheedled into a criminal position and emphasized the political currency that might be gained by mounting a symbolic defense. However, the legislature's involvement became unnecessary when three men of substantial distinction offered Callender their

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<sup>11</sup> An Annapolis lawyer named John Thomson Mason testified at Chase's impeachment trial that the justice had informed him of his intentions regarding Callender while riding the circuit in Maryland during the spring of 1800. When Mason informed Chase that he had not read *The Prospect Before Us*, he responded that a "Mr. Luther had sent a copy to him, and had scored the parts that were libelous, and that he would carry it to Richmond with him as a proper subject for prosecution." He also declared that "before he left Richmond, he would teach the people to distinguish between the liberty and licentiousness of the press," and "that if the commonwealth or its inhabitants were not too depraved to furnish a jury of good and respectable men, he would certainly punish Callender." Chase apparently prearranged the men who would serve as jurors as well, for they were all Federalists, despite the party's minority status in Richmond. When one of the jurors asked to be dismissed, as he had already developed a strong opinion regarding the issue at hand, Chase refused. Furthermore, he rebuffed the defense's attempts to ask potential jurors whether they had formed any opinions with respect to the book called *The Prospect Before Us*. These indiscretions, combined with Chase's general rudeness toward Callender's attorneys, constituted a substantial portion of the indictment of impeachment that the justice later faced. See Samuel H. Smith, ed., *The Trial of Samuel Chase*, 2 vols. (1805; reprint New York: Da Capo Press, 1970), 1: 193. Monroe to Madison, 15 May 1800, and Madison to Monroe, 23 May 1800, in Stanislaus Murray Hamilton, ed., *The Writings of James Monroe*, 7 vols. (New York: G. P. Putnam's Sons, 1898-1903), 388-90.

<sup>12</sup> Paul Leicester Ford, ed., *The Writings of Thomas Jefferson*, 7: 448. Jefferson's observation that the sedition law was particularly the cause of the Virginia State Legislature was undoubtedly a reference to the Virginia Resolutions of 1800, which he and Madison conceived together.

services free of charge. Although these men acted of their own accord, it is impossible to ignore the official state connections that they each maintained; Philip Norborne Nicholas was Virginia's recently appointed Attorney General, William Wirt was Clerk of the House of Delegates, and George Hay was Governor Monroe's son-in-law and the future Attorney General of the United States. In addition, Colonel John Taylor, leader of the Virginia Assembly, raised over one hundred dollars on Callender's behalf, and the Republican members of the House of Delegates raised twice that sum. Meriwether Jones, official printer to the Commonwealth, organized eleven fellow sympathizers to sponsor Callender's prison fees. Thus, the state of Virginia undeniably adopted Callender's cause as its own. Significantly, the legal approach they embraced in the summer of 1800 departed markedly from the tactics employed by every other printer indicted under the sedition law.<sup>13</sup>

The majority of Americans prosecuted for seditious libel on the eve of Jefferson's election formulated their cases within the strict construction of the law. The 1798 measure allowed any person indicted under it to offer the truth of his or her words as a defense. This proviso created a more flexible interpretation of seditious libel than English common law had previously recognized, but it did not necessarily render the law less odious than British precedents, as Levy and the New Libertarians have argued. In fact, as James Morton Smith underlines, the "truth as a defense" clause actually shifted the traditional burden of proof onto the accused, thus confirming the Sedition Act's status as one of the most injudicious measures of the early national period. Nevertheless, when facing a jury, all of the men indicted prior to Callender dutifully argued the veracity of

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<sup>13</sup> See Durey, *The Hammer of Truth*, 130.

their printed claims, accepting this tack as their only hope for acquittal.<sup>14</sup> When Thomas Cooper declared in his April 1800 trial, “I have published nothing which the truth will not justify,” he was repeating a by-then familiar yet futile refrain. Among Callender’s predecessors, only one, Congressman Matthew Lyon of Vermont, dared to suggest that the act of Congress under which the jurors were assembled was “unconstitutional and void.” However, this bold declaration served merely as a preface to his larger argument of truth, and he failed to offer any elaboration on the issue of constitutionality.<sup>15</sup>

In direct contrast to Lyon’s approach, truth as a defense comprised a mere preamble to Callender’s forcible attack on the constitutionality of the Sedition Act. Early in the proceedings, it became evident that Chase would impede the journalist’s lawyers from demonstrating the truth whenever possible. Most significantly, Chase refused to postpone Callender’s trial until the following court term, a move which would have allowed Nicholas, Hay, and Wirt sufficient time to gather the witnesses needed to prove the veracity of all twenty charges contained in the indictment. The precipitateness of the trial was in fact highly irregular. Nicholas later testified at Chase’s impeachment trial, and when asked whether he ever knew of a party coming to trial for a misdemeanor during the same term that the presentment was made, Nicholas replied simply, “Never.” Furthermore, the court quickly dismissed the testimony of those limited witnesses who

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<sup>14</sup> Seven men were indicted for seditious libel before Callender’s trial began in June 1800. Two of them, William Cobbett and John Daly Burke, actually became victims of legally dubious common law indictments, issued by the federal government in anticipation of the Sedition Act’s 1798 passage. Therefore, they did not receive the benefit of a trial by jury. Cobbett did not offer a defense, and Burke’s case was eventually settled out of court. However, Matthew Lyon, Thomas Cooper, Anthony Haswell, William Durrell, and Jedidiah Peck relied on the “truth as a defense” clause if they formulated a defense at all. Durrell did not argue against the charges he faced, and was later pardoned. The proceedings against Peck were ultimately dropped, as New York Federalists feared creating a martyr out of this increasingly popular Ostego Republican. See Wharton, *State Trials*, and James Morton Smith, *Freedom’s Fetters*, 421-22.

<sup>15</sup> Wharton, *State Trials*.

did manage to attend Callender's trial despite inclement weather and short notice. For example, when Nicholas called Colonel John Taylor of Caroline to speak to Callender's charge that President Adams was a professed aristocrat, serviceable to British interests (the twelfth count of the indictment), Chase would not allow his testimony because Taylor could only confirm Adams's vote against the 1798 Sequestration Law, which provided for the seizure of British property in America. "No evidence . . . is admissible that does not go to justify the whole charge," Chase explained. "You must prove both these parts, or you prove nothing." Again, Chase's impeachment trial revealed the atypicality of this prosecution when John Marshall testified that he had never heard such an objection made by the court, "except in this particular case." The justice's curt dismissal of the defense's first and only witness caused Nicholas to take his seat, effectively abandoning all hope of proving the accuracy of Callender's words.<sup>16</sup>

At this juncture in the proceedings, Callender's defense came to an end and his lawyers put the Sedition Act itself on trial. In a highly unorthodox (yet not altogether unexpected) maneuver, William Wirt rose and entreated the jury to implement the power of judicial review. In the years preceding *Marbury v. Madison* (1803), some pundits, including Callender's lawyers, believed that the power to assess and, if necessary, nullify federal law rested in petit juries. Wirt notified Callender's jurors that deciding whether or not they possessed "the right to determine the law as well as the fact" would comprise "a principle part of [their] inquiry." He further informed them that to find a defendant guilty of a crime they considered unconstitutional would be a violation of their oaths.

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<sup>16</sup> Robertson, ed., *Trial of Callender*; Smith, ed., *Trial of Chase*, 1: 191; "Testimony in the Trial of Samuel Chase," in Cullen, et al., eds., *The Papers of John Marshall*, 6:354.

In what proved to be the most levelheaded ruling of the entire trial, Chase hastily silenced Wirt, insisting that federal judges alone possessed the “*proper and competent authority*” to determine the law. Wirt took his seat, exasperated, without fully articulating his position.<sup>17</sup>

Interestingly, the lawyer’s campaign to locate the power of judicial review in petit juries substantiates J.R. Pole’s belief that early American juries maintained a significant degree of freedom to create and interpret the law. The dubious “power of the jury to determine the validity or nullity of the law” was such a crucial part of the Sedition Act debate in Virginia that Chase came into the Commonwealth expecting to face the issue. He carried with him a prepared statement, which decisively rejected Wirt’s argument. “The power to abrogate or make laws nugatory, is equal to the power of making them,” Chase declared, in an argument that Pole mirrors directly. “The evident consequences of this right in juries,” he continued, “will be that a law of congress will be in operation in one state and not in another.” This statement underlines and supports Pole’s observation that distinct regional customs gave rise to divergent applications of the law throughout the colonial era. The lack of legal uniformity that prevailed in early America helps explain why Virginia emerged from the British common law system with an interpretation of the freedom of the press that differed considerably from that professed by any of her sister states. It also provides a broader understanding of the Sedition Act as one of countless growing pains experienced by a collection of polities striving to come together as one. Chase’s rejection of individual juries as interpreters of the law and the Federalists’ larger attempt to promote universal legal standards through federal statutes

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<sup>17</sup> Robertson, ed., *Trial of Callender*, 53, 67.

such as the Sedition Act represent a movement to overcome the tendency toward disunion that divergent readings of the law inspired.

Chase's rejection of Wirt's attempt at jury nullification ensured that Callender would not earn a reprieve on the basis of the Constitution, yet this did not prevent Hay from rising to deliver an impassioned defense of the First Amendment. In Hay's estimation, it was the supposedly liberal "truth as a defense" clause that rendered the sedition law illegitimate. This provision, Hay argued, forced Americans to do what had never been done before, to "draw a line of determination between fact and opinion." Opinions are statements of belief and preference, and are rarely identifiable as either true or false. Therefore, if the government declared its citizens free to express only those observations that they could prove to be absolutely true, then the field of sentiments guarded by the First Amendment would grow so narrow as to render the measure meaningless. What is so fascinating about Hay's argument is that it clearly negates the prevailing scholarly understanding of what the Virginia Republicans meant when they complained that the Sedition Act was unconstitutional. Callender's lawyers were not insisting that seditious libel be prosecuted only at the state level; they were clearly arguing to abolish the legal doctrine altogether. These men stood before the bar, representing Callender and the citizenry of Virginia, because they believed in the "cause of the Constitution," and they defined this cause in terms of the First Amendment. The arguments proffered at Callender's trial evince that, contrary to Levy's allegation, state sovereignty was not the dominant Virginian concern.<sup>18</sup>

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<sup>18</sup>*Trial of Callender*, 59-60; *Petersburg Intelligencer*, 17 June 1800; Levy, *Legacy of Suppression*, 219.

It appears quite evident that Callender mattered to Hay, Wirt, and Nicholas only insofar as he afforded them a public stage upon which to attack the viability of the Sedition Act. Nicholas told the *Petersburg Intelligencer* in June 1800 that “he did not consider himself as simply defending this poor unprotected and friendless foreigner. Through him he defended the liberty of the press.” Hay was far less diplomatic when describing his motives for accepting Callender’s case. At Chase’s trial, when asked to clarify what he meant when he claimed to defend “the cause and not the man,” Hay replied: “It was the cause of the constitution, and I did not mean to defend Callender farther than he was connected with that cause.” Indeed, once Chase had rejected each of the lawyers’ attempts to make a constitutional argument at Callender’s trial, Hay, Wirt, and Nicholas ceremoniously packed up their papers and quitted the courtroom, leaving their client helpless before the bar. This well-choreographed exodus certainly produced the desired dramatic effect, but it also exposed the minimal extent to which Callender’s lawyers concerned themselves with their client’s fate. The “truth as a defense” tactic initially adopted by Nicholas may be explained as a necessary pretense. As the mechanism that allowed Virginia Republicans openly to attack a hated law, Callender required a pantomime defense. However, time, perspective, and Callender’s 1803 death allowed Hay to admit more openly that the Constitution had been his chief, if not only, interest.<sup>19</sup>

There is a troubling irony inherent in the skewed commitment of Callender’s lawyers. In theory, it should be impossible to separate the cause of any individual citizen from the cause of civil liberties. What could motivate a spirited defense of free

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<sup>19</sup> *Petersburg Intelligencer*, 17 June 1800; Smith, ed., *Trial of Chase*, 1:179.

expression, such as that delivered by Hay in 1800, if not the desire to protect men like Callender? The lack of commitment Hay, Wirt, and Nicholas demonstrated toward their client during his trial, combined with the Republican Party's subsequent abandonment of him, suggests that late-eighteenth-century Virginians maintained a very specific view of who should be able to engineer public expression under the protection of their expansive definition of the First Amendment. Callender did not suit most gentleman-politicians' image of a guardian of public opinion. Therefore, while he provided a convenient vehicle through which to fight for the rights of refined journalists who were needed to inform the sovereign people, Callender's own freedom mattered very little to the men who defended him. The libertarian definition of a free press advocated by late-eighteenth-century Virginians applied to party publicists but not party propagandists, and Callender fell into the latter category. A closer examination of the aftermath of the Scotsman's trial and imprisonment will cast this distinction in sharper relief.

The story of Callender's life after 1800 is as infamous as it is brief. Following the departure of his lawyers, the court quickly returned a guilty verdict and imposed a sentence of nine months in prison, accompanied by a two hundred dollar fine. From his dreary cell in Richmond Jail, Callender defiantly composed a second part to *The Prospect Before Us*, which was published while he was still imprisoned, indicating the Sedition Act's complete lack of deterrent effect. When his term came to an end on March 2, 1801, the day before the Sedition Act expired, he emerged from confinement harboring justifiable expectations of patronage, now that Jefferson had achieved the presidency. When denied such aid, Callender turned his pen against his former mentor. As the first journalist to write about Jefferson's liaison with "Dusky Sally" Hemmings, he ignited a



scandal that continues to engage Americans today. Thus earning himself a reputation for blackmail, Callender became an impoverished and inebriated pen-for-hire, frequently writing on behalf of his former political enemies. In July 1803, when he drowned in the shallow waters of the James River, contemporaries regarded his pathetic demise as the deserved comeuppance awaiting one of the most perfidious scandalmongers of a politically rancorous age. Few historians have endeavored to contradict this perception. However, it is unfair to assume that Callender's apparent loss of integrity preceded his acrimonious break with the Republican Party.<sup>20</sup>

The chasm that ultimately developed between Jefferson and Callender emerged immediately after the journalist's trial. Incarceration quickly desensitized Callender to the volatile political climate, which moderated considerably as the election of 1800 drew near. According to Michael Durey, Callender went to prison imagining Jefferson as the radical zealot who had penned the Kentucky Resolutions and revived the "Spirit of '76." However, as the Federalist Party began to crumble inwardly, Republicans realized that the best strategy for the 1800 campaign would be to lie low and let their opponents continue destroying their own credibility. (Jefferson himself was reluctant to abandon his radical inclinations. In late 1800, he entertained a plan to present Congress with a declaration of constitutional principles, which was steeped in the rhetoric of 1776. However, Madison successfully persuaded the candidate to moderate his approach.) This party-wide shift toward the center rendered vitriolic publicists such as Callender unnecessary; yet Callender himself remained committed to the radical principles that had guided him since his youth in Scotland. Even if he had apprehended the party's restraint

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<sup>20</sup> Durey, *Hammer of Truth*, especially chap. 6-7.

from within his isolated cell, it is highly unlikely that he would have ceased to produce extremist tracts. In this sense, it was Callender's political constancy, rather than a mercenary's mentality, that precipitated his defection from the party of Jefferson. His politics were determined by principle, not by faction, and when he emerged from prison in 1801, the Republicans' moderate new policy disenchanted him so severely that he turned his back on the Jeffersonians forever.<sup>21</sup>

Even more painful to Callender than his chosen party's shifting values was the personal abandonment he felt when Jefferson abruptly ended their correspondence. Callender wrote to Jefferson regularly from Richmond Jail, providing him with pages from the second volume of *The Prospect Before Us*, apprising him of conditions in the jail, and assuring him of his own well-being. Initially, Jefferson's failure to respond did not trouble Callender, who understood his mentor's extreme distrust of the post, and assumed that caution had inspired Jefferson's silence. By the fall, however, he confessed some growing anxiety about the situation. "Whether you indeed received my letters, I do not know," he wrote to Jefferson. "I should be much obliged to you for sending me a few lines . . . merely to let me know that the packets have, or have not, reached you." But Callender never received any such assurance. Although he continued sending drafts of his prolific essays to Jefferson, his sponsor's prolonged stillness must have provoked Callender's suspicion. The tenor of the correspondence, which was by this point unilateral, changed markedly after October. Callender's letters became shorter and lost the political musings and personal details that had filled his earlier missives. He grew "afraid of being troublesome" and apologetically referred to his letters as intrusions, as

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<sup>21</sup> Durey, *Hammer of Truth*, 139-40.

though he believed that he had somehow earned Jefferson's ire. Nevertheless, he continued writing to Jefferson, seeming to assume that their political relationship would resume upon his release from prison.<sup>22</sup>

Callender was disabused of this illusion early in 1801, when Jefferson ignored the journalist's request for patronage. Speculations about the sort of press that he could operate and which newspaper he might edit constituted a regular feature of Callender's prison letters. Then, on January 23 he informed Madison of "a berth which I want to apply for to the new President. The income is no great affair...but it would give me the decisive command of several newspapers, besides other accommodations in the printing line." Many historians have deemed Callender's request for official support inappropriate and rightfully denied. However, the Scotsman had every reason to believe that he was entitled to some form of remuneration for his services to the Republican cause. Others, including Philip Freneau and Meriwether Jones, had received official posts that allowed them to work as party publicists; why should Callender, who had suffered in prison for his efforts, be any different? Furthermore, Jefferson had not given Callender any reasonable indication that the financial support he had enjoyed while writing the first section of *The Prospect Before Us* would cease before the publication of the second. Prior to his trial, Callender had been an important operative in the Republican press network; he knew how the system worked, and he thought he understood what kind of support he could expect from the politicians he served. His failure to secure the provision he had anticipated confirmed the fear of betrayal that

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<sup>22</sup> Callender to Jefferson, 11 October 1800, in W. C. Ford, ed., *NEHGR*, 52 (1897): 19-20; Callender to Jefferson, October 1800, in *ibid.*, 20.

Jefferson's disregard had inspired, and his behavior subsequently became suspicious and irrational.<sup>23</sup>

The circumstance that finally destroyed Callender's faith in his former allies was their failure to remit his two hundred dollar fine. Upon Jefferson's ascent to the executive office, he proclaimed that he would "not lose one moment" delivering recompense to the aggrieved journalist. However, David M. Randolph, a treasury official from the preceding administration, had contrived to put the funds beyond Jefferson's reach, and the new president could not fulfill his promise without "laying the whole subject before Congress," which Monroe feared would inspire "specious criticisms" among Jefferson's enemies. Political expediency prevailed, and weeks passed without any progress on the subject of the fine. Callender, already feeling defensive, refused to accept bureaucratic intransigence as an excuse. He believed that the difficulties with the fine were either intended or "the offspring of . . . indifference." Given the many disappointments Callender had suffered at the hands of men he considered to be allies, it is unsurprising that he adopted such a cynical view. This final frustration pushed Callender beyond the grip of reason, and he soon adopted a course of action that would become the primary source of his centuries-long disgrace.<sup>24</sup>

In April 1801 Callender began to threaten Jefferson openly. "President as he is," he wrote to Madison on April 27, 1801, "he may trust me if he pleases, that I am not the man, who is either to be oppressed or plundered with impunity." Callender knew that

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<sup>23</sup> Callender to Madison, 23 January 1801, in *ibid.*, 22-23.

<sup>24</sup> Callender to Madison, 27 April 1801, in *ibid.*, 153-54; Jefferson to Monroe, 26 May 1801, in P. L. Ford, ed., *Writings of Thomas Jefferson*, 8: 57-8; Madison to Monroe, 1 June 1801, in Gaillard Hunt, ed., *The Writings of James Madison*, 9 vols. (New York: G.P. Putnam's Sons, 1900-1910), 6: 420-22.

Jefferson had paid him to vilify Adams in print, even if the new president would not admit as much even to himself. Furthermore, he recognized the political currency that Jefferson's enemies potentially could and eventually did make of this information. "I can keep, what I design to keep, as well as anybody," he advised Madison. "And surely, sir, many syllogisms cannot be necessary to convince Mr. Jefferson that, putting feelings and principles out of the question, it is not proper for him to quarrel with me." In one sense, incredulity inspired Callender to resort to this devious tactic; he could not believe that Jefferson would truly desert him when he had sacrificed so much to "serve the cause." He was probably also responding to an impulse of panic; friendless and out of work, he employed the only leverage he still possessed in an attempt to compensate for the loss of party support he had expected to receive upon his release from prison. Callender clumsily interjected brusque requests for the recently vacated Postmaster of Richmond appointment between each of the threats cited above. It is perfectly reasonable to construe this behavior as blackmail, but it is also important to acknowledge that Callender's actions were not unprovoked.<sup>25</sup>

At one level, the explanation for Callender's expulsion from the inner sanctum of the Republican journalism network is very simple. The obliteration of the Federalist Party, which would never reclaim its former power after the election of 1800, created the need for a completely new form of political comportment. Reconciliation became the

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<sup>25</sup> Callender to Madison, 27 April 1801, in W. C. Ford, ed., "Jefferson and Callender," *NEHGR*, 52 (1897): 153-55. The political importance of a late-eighteenth-century city postmaster, which is today a relatively neutral position, is revealed in Joanne B. Freeman's *Affairs of Honor: National Politics in the New Republic* (New Haven, Conn.: Yale University Press, 2001). In this account, Freeman suggests that because American political culture was propagated by the print media, "the mails were a central vehicle of national governance." Therefore, Callender was requesting an appointment of much greater consequence than modern sensibilities might comprehend. See Freeman, *Affairs of Honor*, 143.

buzzword of the first Jefferson administration. Callender, whose unbridled radicalism prevented him from countenancing the Republican Party's post-electoral moderation, became an outmoded weapon. In fact, continued friendship with the man who had struck such powerful blows against the Federalists could only serve to embarrass Jeffersonians in the new atmosphere of political cordiality. Callender understood this dilemma only too well. "I have gone to such desperate lengths to serve the party," he wrote to Madison, "that I believe your friend [Jefferson] designs to discountenance and sacrifice me, as a kind of scapegoat to political *decorum* as a kind of compromise to federal feelings." Callender's words during this phase of his life are frequently dismissed as the baseless musings of a slighted man, but there is some evidence to substantiate his explanation for his own fall from Jefferson's favor.<sup>26</sup>

A series of letters that passed between Callender, St. George Tucker, and John Marshall in the fall of 1800 demonstrates the political volatility of the journalist's situation. In early November, just as Jefferson's unexpected silence truly began to concern Callender, the prisoner applied to St. George Tucker for intercession. He had somehow fallen under the mistaken impression that Tucker could release him from prison by issuing a writ of *Habeas Corpus*. He would have requested this favor sooner, he informed Tucker, but he "was told that the measure, if successful, would afford an opportunity for misrepresenting the political sentiments of the State and that by such means, it might produce a dangerous impression upon the republican interest at the next election for president." Callender did not indicate precisely who had advised him thus,

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<sup>26</sup> Callender to Madison, 27 April 1801, in W. C. Ford, ed., "Jefferson and Callender," *NEHGR*, 52 (1897): 153-55.

but whoever it was clearly maintained a greater concern for political appearances than for Callender's welfare. For his own part, Callender seemed inclined to agree. His refusal to press his cause precipitously demonstrates the level of his commitment to the Republican faction, as well as the gradual nature of his fall from grace. Tucker's response to Callender's inquiry was brief but sincere. He informed the prisoner that he could not grant the writ and warned that an application to the proper authorities promised "little satisfaction or success." He offered Callender sympathy but no hope.<sup>27</sup>

Without Callender's knowledge, Tucker immediately forwarded the matter to John Marshall, an old acquaintance. Referring to incendiary anti-Adams tracts recently published by Alexander Hamilton and John Fenno, Tucker proffered a delicate observation:

Should it happen that Callender should expiate his offence by a severe imprisonment and no notice be taken of more conspicuous and influential persons under similar or more provoking circumstances it might produce a reflection too painful for repetition to you. I am far from being anxious that Mr. Adams should do a *popular* act, but I should be gratified that he would do a *humane* one.

Tucker's letter implies that the voting public will recognize the hypocrisy of Adams's policy regarding enforcement of the Sedition Act, producing a "painful reflection" (i.e. public disgrace and a diminished electoral return). It also intimates that Tucker may have considered withholding this request on account of the fact that a favorable outcome might enhance Adams's electoral appeal. Marshall responded that Adams did not intend to act

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<sup>27</sup> Callender to Tucker, 4 November 1800, and Tucker to Callender, 6 November 1800, in Tucker-Coleman Papers.

on the issue “‘til the choice of the future President shall be over.” Clearly, Callender’s case remained a political hornets’ nest, and no one wanted to stir it – not even Callender himself – until after the fateful election of 1800. On the surface, the fact that political considerations ranked above Callender’s rights and liberty would seem to confirm the accusation that *real politique*, rather than ideological commitment, motivated Republican resistance to the Sedition Act. However, another explanation for these gentlemen’s limited dedication to their propagandist exists.<sup>28</sup>

On a deeper level, Republican politicians expelled Callender from their intricate and effective journalism network because they never truly believed that he belonged there in the first place. Over the course of their communication on the subject Tucker and Marshall referred repeatedly to Callender’s social inferiority, and the effect that his diminished status should have had on his trial. Marshall agreed with Tucker’s assessment that Hamilton’s libel was “more virulent, more bitter, [and] more injurious” than *The Prospect Before Us* because the Secretary of the Treasury was “worthy of attention and his shaft may stick.” Just as a seditious libel gained force with the increasing station of its object, it flagged with the diminishing status of its author. Indeed, Marshall considered Chase’s prosecution of Callender misguided because the Scotsman’s circumstances placed him “below [the law’s] resentment.” These sentiments echoed the arguments submitted by Callender’s lawyers when asserting that a continuance of the trial posed no threat to Adams:

The reputation of the President of the United States must forever rest on the opinion of a virtuous and intelligent people, and standing on its mighty basis,

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<sup>28</sup> St. George Tucker to John Marshall, 6 November 1800, in Cullen et al., eds., *The Papers of John Marshall*, 6: 4-5; Marshall to Tucker, 18 November 1800, in *ibid.*, 14-15.



could never be effected by the abuse or declamation of an individual, and that individual, an obscure and friendless foreigner.

Callender was not virtuous, intelligent, or American enough to affect the nation's stolid public opinion. He was, however, vitriolic enough to engage the ephemeral popular opinion, which is probably why he appealed to Jefferson.<sup>29</sup>

Joanne B. Freeman's recent monograph, *Affairs of Honor: National Politics in the Early Republic* (2001) helps explain Callender's strictly defined utility. In her account of the paper wars that engaged politicians throughout the 1790s, Freeman explains that a hierarchy of print existed. Gentleman-politicians exchanged public-minded letters, which were framed as personal correspondences but distributed for wider consumption, and political pamphlets, which provided the ideal platform for detailed arguments that appealed to reason. Because reputation and honor were so important to a gentleman's political status, few elite individuals dared to dabble in more popular public forums, such as broadsides and newspapers. Paradoxically, the newspaper's growing status as the most influential of all print media made it impossible for hopeful candidates to ignore the partisan rags that "connect[ed] the extended republic through chains of information," precisely as Madison had intended. As Freeman explains, "a newspaper's wide reach was both its power and its threat. Particularly for a politician, whose reputation was his livelihood, newspaper exposure could do as much damage as good." Therefore, most

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<sup>29</sup> Ibid.; Hay's arguments before the bar were reprinted in the *Petersburg Intelligencer*, 17 June 1800.

gentleman-politicians avoided the threat of dishonor before a wide audience by securing editorial champions to write on their behalf.<sup>30</sup>

Jeffrey L. Pasley advances a similar argument in *The Tyranny of Printers*, which relates how the political rancor of the 1790s obliged printers to abandon their traditionally neutral approach to journalism. For the first time, printers began to function as professional political agents. Like Freeman, Pasley points to the code of political conduct that prevailed as parties emerged in late-eighteenth-century America as the inspiration for the increased agency of newspaper editors. According to classical republican principles, virtuous leaders acted on behalf of their entire constituency, rather than the interests of a specific faction, and they never openly solicited electoral support. Thus, Pasley explains, printers “became indispensable public spokesmen for the new parties and surrogate campaigners for gentlemen candidates who needed to avoid displays of partisanship.” As government officials continued to rely on the press for publicity and reward loyal printers with appointments to office, the news media and the parties merged so completely that newspaper editors often ran for political office. The birth of newspaper-based politics elevated journalists to a higher level of public service and political influence. Nevertheless, as Pasley maintains, this transition occurred “more or less against their will.”<sup>31</sup>

The reasons why many journalists were slow to adapt to the politicization of the editorial profession are complex, and a consideration of the partisan journalists who sustained the political conflicts of eighteenth-century Europe will help illuminate this

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<sup>30</sup> Freeman, *Affairs of Honor*, 123, 125.

<sup>31</sup> Pasley, *Tyranny of Printers*, 22-23, 64.

underexamined issue. The mythology surrounding London's Grub Street, which first emerged during the mid seventeenth century, would have certainly been familiar to late-eighteenth-century Americans. Grub Street once referred to an actual place in London, where impoverished and vice-ridden writers struggled to make a living by the pen. The English Civil War popularized the district by producing a proliferation of political pamphleteers who successfully supported themselves through writing. Grub Street reached its heyday during the late seventeenth and early eighteenth centuries, when gentleman-politicians discovered the utility of employing the hack writers of London's lower sectors in the political wars that divided the nation's elite class. An unholy alliance grew between these men of different worlds wherein gentlemen stooped to associate with contemptible, drinking, carousing, urchins, who tainted the process of public discourse by selling their talents to the highest bidder, regardless of political principle. Eventually, Grub Street attained the status of a metaphor, representing what historian Philip Pinkus calls "an eternal spirit that dwells in the heart of every author whose belly is at odds with his principles, inspiring a happiness greater far by the simple merchandising process of giving the customer what he wants."<sup>32</sup>

It remains unknown precisely how early Americans perceived Grub Street culture, as no scholar has yet undertaken a determined study of this topic. Nevertheless, the interpretive framework advanced by Bernard Bailyn and Gordon Wood once again make speculation possible. As these scholars have suggested, the American Revolution represented a purging process through which patriots sought to separate themselves from

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<sup>32</sup> Philip Pinkus, *Grub Street Stripped Bare: The Scandalous Lives and Pornographic Works of the Original Grub Street Writers* (Hamden, Conn.: Archon Books, 1968), 13.

the political corruption that permeated the British government. The practice of hiring hack writers to levy criticism against political opponents surely ranked among the sources of corruption that Americans deplored. Hence, Federalists and Republicans alike associated hack writers with the disgraceful heritage of the British partisan press, and attempted to maintain their distance from such individuals as long as possible.<sup>33</sup> Indeed, the leading scholarship on French Grub Street culture tends to verify this reading of early Americans' disdain for hired political writers.

In his influential 1982 monograph, *The Literary Underground of the Old Regime*, Robert Darnton argues that the self-loathing harbored by many unwitting Parisian Grub Street authors translated into one of the most important intellectual origins of the French Revolution. As in the American republic, French society recognized a hierarchy within the writing profession, with a collection of *grand gens de lettres* controlling the diffusion of knowledge from the top-down. Nevertheless, Darnton reports, the population of Grub Street burgeoned during the last years of the Old Regime, when the provincial disciples of Voltaire flocked to Paris in search of glory and wealth. Instead, they found disillusionment. Their humble circumstances prevented them from succeeding in Paris, where “all of the old devices, such as privilege and protection” – which were awarded to men of “sound opinion” and respectable birth – remained as necessary as ability. “Seen from the perspective of Grub Street,” Darnton explains, “the republic of letters was a lie.” Unable to support themselves properly in a saturated market that was blind to talent, these young provincials became political spies, smut-peddlers, and authors of *libelles*. In

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<sup>33</sup> Bailyn, *Ideological Origins of the American Revolution*; Wood, *Creation of the American Republic*.

effect, the Old Regime “violated their moral core and desecrated their youthful visions of serving humanity honorably in Voltaire’s church.” They abhorred what they had become, as well as the regime that had pushed them to it, with a visceral passion that ultimately gave the Jacobin revolution its “authentic voice.” Thus, a deep disdain for hack writers and all they represented contributed to the driving impulses of the French Revolution. In America, as in France, political hacks who wrote for money represented a shameful form of past corruption, and to rely on them as free Americans would be to betray the spirit of the Revolution.<sup>34</sup>

American gentlemen consequently entered the field of partisan journalism with a great deal of hesitancy. They feared potential corruption and the derogatory social stigma attached to hired political writers. Therefore, when John Fenno took it upon himself to create an official government organ, *The Gazette of the United States*, he insisted upon separating his editorial duties from the actual labor of printing. He believed that this approach would salvage his prestige; as a man of letters, toiling for the good of the nation, he would be spared the low reputation accorded to most of the period’s scurrilous printers. Fenno’s vision may have been impractical and idealistic, but it represented perfectly the prevailing conception of public opinion as the province of the literati. In keeping with French philosophy, early national leaders preferred men of sound character and reputation to act as their public representatives, and the editors who pioneered newspaper-based politics wished to separate themselves as much as possible from the conventional image of the party hack, who, in the 1790s, was the object of universal

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<sup>34</sup> Robert Darnton, *The Literary Underground of the Old Regime*, (Cambridge, Mass.: Harvard University Press, 1982), 22, 23, 36, 40. Thanks to my advisor, Robert A. Gross, for suggesting this argument.

contempt. Unfortunately, the greater the distance that these editors placed between themselves and the routine business of journalism, the less adept they proved at successfully managing a newspaper. Consequently, as the election of 1800 drew near and partisan hostilities reached a fevered pitch, party leaders began to seek a more expedient solution to their need for publicity.<sup>35</sup>

Contrary to the accepted philosophy of the time, the dissident printers who poured into the United States from Britain at the end of the eighteenth century proved the most able and willing to act as public spokesmen for the nascent American parties. These men possessed a remarkable talent for the propagation of republican ideology that even the most refined gentleman-politician could not ignore. As Durey reports, nearly one-half of the refugees who entered the United States in the 1790s were involved in journalism and pamphleteering. These men had been raising voices of dissent against constituted authorities in the British Isles for decades, and they came to United States with convictions for which they had already suffered. They ranged from hack writers and newspaper owners to successful media barons. Overall, émigré editors represented “perhaps 15 to 20 percent of all republican printers in this period,” and their influence spanned the entire eastern seaboard, “from Georgia to Massachusetts.” They may not have suited the accepted ideal of the gentleman-printer, but they were masters of their trade, and they could certainly rouse public passions, which was precisely what the Jeffersonians needed in 1798. Thus, the short-term employment of radical émigré propagandists presented a practical solution to the paucity of gentlemen willing to become active party publicists. Ironically, it was their impressive fortitude in the face of

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<sup>35</sup> Pasley, *Tyranny of Printers*, 53.

the Sedition Act that made their displacement possible after 1800, when it should have garnered the respect of the politicians they helped elevate to power.<sup>36</sup>

According to Pasley's argument, the failure of the Sedition Act, more than any other event, facilitated the transition of American journalists from "simple pliers of the printer's trade" to influential political actors. As Pasley contends, "Federalist oppression convinced many printers that there was no place for an honest printer who followed the traditional nonpartisan approach." Consequently, "many of them became political professionals, people for whom writing was a way to make a living out of politics, rather than the other way around." The irony of this situation is that while refugee printers bore the brunt of the "Federalist oppression" that convinced American writers of the need for a partisan press (something that the émigrés had long understood), they received few opportunities to enter the growing field of professional political writers. A closer examination of the experience and politics of the men and women indicted under the 1798 sedition statute will speak to this truth.<sup>37</sup>

In *Freedom's Fetters*, the seminal work on the 1798 Alien and Sedition Acts, James Morton Smith identifies seventeen verifiable indictments for seditious libel between 1798 and 1800. Of these, five were foreign-born radicals working on behalf of the Democratic-Republican Party. This figure is somewhat out of proportion with the overall percentage of republican printers that hailed from the British Isles, a fact that emphasizes the unique contribution of émigrés during the struggle to maintain the freedom of the press. Furthermore, prolific bibliographies distinguished these writers

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<sup>36</sup> Durey, "Thomas Paine's Apostles," 682.

<sup>37</sup> Pasley, 131.

from most of the twelve remaining victims of the Sedition Act; few of the Americans indicted under the law boasted any experience speaking or writing for the Republican cause. Therefore, while every person affected by the Sedition Act certainly endured financial and psychological hardships, it was predominantly the émigré printers whose professional lives suffered damage.<sup>38</sup>

The foreign-born printers indicted under the Sedition Act form a representative group of late-eighteenth-century British radicals. Thomas Cooper hailed from England, John Daly Burk was Irish, Callender emigrated from Scotland, and William Duane was a person of dubious nationality. (Born in colonial New York, Duane returned to Ireland with his family before independence, spent his young adulthood in Calcutta, and then returned to the United States in 1796. Throughout his life he claimed American citizenship, but the law regarded him as a resident alien.) The fifth foreign-born Republican, at whom many claim the Alien and Sedition Acts were specifically aimed, was Matthew Lyon of Vermont. A native of Ireland, Lyon enjoyed a distinguished career in the United States Congress and is therefore not particularly relevant in this study of émigré journalists. However his numerous addresses to constituents, circular letters, and speeches delivered in Congress demonstrated his commitment as a politician to the dissemination of Republican ideology. Despite their disparate backgrounds, each of the

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<sup>38</sup> James Morton Smith, *Freedom's Fetters*, 185. Of the twelve American-born citizens indicted under the sedition law, only half of them ever published works critical of the ruling party. Indeed, most of the Americans brought to trial provide comic examples of the Federalists' overzealous urge to silence all opposition. Three Newark tavern-dwellers were charged for joking about the president's rear end and another two men were charged for erecting a "Jacobin" liberty pole. The sixth and final American-born non-printer indicted under the sedition law actually spent the majority of the 1790s as a Federalist, and did not defect until 1799, in protest to the Alien and Sedition Acts. Of the six American printers who fell victim to the Sedition Law, two died awaiting trial, and three retreated from the field of newspaper journalism, failing to transition into the political professionals Pasley describes. Only one, Anthony Haswell, overcame Federalist oppression to become a political agent. For biographical information on all seventeen individuals see Smith, *Freedom's Fetters* and Durey, *Transatlantic Radicals*.



four British journalists indicted under the Sedition Act shared key biographical traits. Having been driven from their homes once already owing to their commitment to the principles of republicanism, these men had proven their dedication and resilience long before the political wars of the 1790s commenced. Consequently, their militant radicalism withstood the Federalist oppression of 1798-1800.

Thomas Cooper was one of the most fascinating men of any nationality residing in the United States during the early national period. Although he studied law at Oxford and joined the bar upon his father's insistence, Cooper's true passion was for the natural sciences. He attended medical lectures as a hobby while living in London. In addition to practicing law, Cooper traveled to France as an ambassador from a democratic club in England to a sister organization across the Channel, a venture that earned him the animadversion of Edmund Burke and the House of Commons. Cooper's scathing reply to Burke's censure resulted in a threat of prosecution. He consequently retreated to Manchester, from whence he orchestrated an anti-slavery campaign and continued his involvement in the radical Society for Constitutional Information, a group dedicated to the dissemination of radical ideas. During his years in Manchester, Cooper developed a mastery of chemistry and operated a successful textile mill. By the time he decided that he could no longer live in a country that did not protect the freedom of the press, Cooper had established himself as a man of considerable talents, wealth, and property. Upon arriving in America, he began an unofficial practice as a country doctor in order to supplement his income as a printer. His versatility and value gave him a social standing

that was unique among the émigré journalists, and would give him a considerable advantage when the race for patronage began in 1800.<sup>39</sup>

Cooper's American bibliography is as diverse as it is prolific. He wrote treatises on political economy, medical jurisprudence, comparative bankruptcy law, the science of volcanoes, Calvinism, the freedom of the press, and the dying of textiles. He edited a popular edition of the *Institutes of Justinian*, compiled several chemistry texts, and assembled a general household encyclopedia. His commitment to the cause of international republicanism continued with his editions of Dr. Joseph Priestley's and Algernon Sidney Johnston's memoirs. By the time he took control of the Northumberland *Gazette* for ten weeks in 1799, he was an accomplished writer and publisher. Even after surrendering his role as the editor of this publication, Cooper continued to write political essays on behalf of the Jeffersonians and became so active in the months leading up to the 1800 election that the Federalists labeled him one of the top three "Republican scribblers" they wished to silence.<sup>40</sup>

Unlike Cooper, Burk, Callender, and Duane considered publishing to be their sole profession. They were hack writers in the truest sense and possessed the dubious reputations to match. However, their inferior social standing did not diminish their commitment to the cause of Jeffersonian republicanism. Indeed, as Durey has argued, their radicalism remained so militant after the Revolution of 1800 that they alienated themselves from their former party cohorts. As the newly elected Jeffersonians proceeded to conciliate moderate Federalists by separating themselves from the more

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<sup>39</sup> Durey, *Transatlantic Radicals*, 23-5; James Morton Smith, *Freedom's Fetters*, 307-33; Wharton, *State Trials*, 659-80.

<sup>40</sup> *Ibid.*

radical elements of their party, Burke, Callender, and Duane fell victim to their own belligerence and notoriety, which had once sustained the vanguard of republicanism. “Essentially,” Durey claims, “they were all disowned by the republican government.”<sup>41</sup> Although this may be something of an overstatement, it is true that of these émigré journalists, all of whom made significant sacrifices for the republican cause, none developed into professional political editors. Indeed, I would go one step further than Durey and suggest that the degree to which the Republicans disavowed these men was directly proportional to their social standing. Callender was the first to feel the sting of the Republicans’ rejection. However, the fact that he was not the only one to suffer such dismissal suggests that something greater than his desperate and threatening behavior motivated the party to turn its back on him.

Burk and Duane proved slightly more successful than Callender when it came to adapting to republicanism after 1800, although neither of them received the patronage that they each felt they deserved. In June 1801, Burk composed a detailed letter to Jefferson, outlining his service to the Democratic-Republicans in America and requesting a government position with a small stipend. Although Burk’s request was politely declined, he did not go the way of Callender. Burk had achieved some success as a playwright since emigrating and therefore was regarded as a man with some social skills and a gentlemanly manner. This prevented the newly empowered party from rejecting him completely. Burk was occasionally invited to give public orations celebrating the victory of Jeffersonianism, and his *History of the State of Virginia* was widely acclaimed.

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<sup>41</sup> Durey, *Transatlantic Radicals*, 261.

However, his days as a political editor ended long before that profession came to possess a significant degree of actual power.<sup>42</sup>

Duane also met with disappointment when he applied to Jefferson for assistance in his endeavor to create a national newspaper in Washington City. The new president had already persuaded a young editor named Samuel Harrison Smith to establish an official party voice in the capitol. Jefferson had met Smith in Philadelphia, where the latter man's father served as Master of the Freemasons, while both men served as officers in the American Philosophical Society. According to Durey, Smith appealed to Jefferson specifically because he was "young, moderate, flexible in his republicanism, and untainted by the press campaigns of the years of opposition."<sup>43</sup> Essentially, the battle-proven Duane was passed over for someone potentially less capable and assuredly less controversial. Hence, Duane offers the perfect example of a man who was denied entry to the political editorial profession because he was not, like Smith, "a native..., a gentleman, and a scholar."<sup>44</sup> Replicating his recruitment of Freneau some years earlier, Jefferson gravitated toward a man who was in every way different from the competent journalists who had served him so well during his party's most desperate days.

It is impossible to ignore the fact that native-born victims of the Sedition Act did not receive such harsh treatment from the Jefferson administration. As Noble E. Cunningham reveals in his 1963 study *Jeffersonian Republicans in Power*, printers who had supported the party cause throughout the 1790s expected to receive help after 1800,

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<sup>42</sup> Durey, *Transatlantic Radicals*; James Morton Smith, *Freedom's Fetters*, 204-20.

<sup>43</sup> Durey, *Transatlantic Radicals*, 265

<sup>44</sup> Noble E. Cunningham, Jr., *The Jeffersonian Republicans in Power: Party Operations, 1801-1809*. (Chapel Hill, N.C.: University of North Carolina Press, 1963), 258-61.

usually in the form of government printing contracts. Cunningham identifies a party policy of rewarding loyal printers, particularly those who suffered under the Sedition Act, but he does not recognize that this was not a universal policy. While men like Callender, Burke, and Duane were left to fend for themselves, Jefferson went out of his way to accommodate their native-born counterparts. Abijah Adams, an editor of the Boston *Independent Chronicle* who had spent a mere thirty days in jail for violation of the Sedition Act, wrote to Massachusetts Republican Congressman Joseph B. Varnum requesting a federal printing contract before the House had even decided the presidential election. Varnum passed the request on to Jefferson, who granted it immediately. Even more revealing is the case of Anthony Haswell, the native-born publisher of the *Vermont Gazette* who spent two months in prison after attacking Federalist congressional candidates in print. When Haswell wrote to Jefferson regarding his inability to retain the business of federal officers in local posts, the president replied, “this evil will be remedied.” Alluding directly to Haswell’s sacrifices to the cause, Jefferson continued:

Your press having been in the habit of inculcating the genuine principles of our constitution, and your sufferings for those principles, *entitle you to any favors in your line which the public servants can give you*; and those who do not give them act against their duty. Should you continue in the business you will have the publication of the laws in your state, and probably whatever else of business any of the offices within your state can give.”<sup>45</sup>

What accounts for the ease with which Adams and Haswell received recognition for their efforts, while Callender, Duane, and Burke fell out of favor? If Jefferson himself believed that two months in prison entitled Haswell to “any favors” the government

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<sup>45</sup> Jefferson to Haswell, 11 September 1801, cited in Cunningham, 248, emphasis added.

might be able to offer, then why did Callender's nine months not garner him similar rewards? Under these circumstances, the argument that Republicans maintained a classist and nativist bias when deciding who should speak on their behalf appears plausible, if not thoroughly tested.

Ultimately, it was Cooper alone among the émigré victims of the Sedition Act who received the benefit of political patronage. This is hardly surprising, given his superior social status as an accomplished man of letters who had employed himself as a lawyer and a doctor, as well as a printer. Instead of being alienated by the Republican Party after the Revolution of 1800, Cooper developed an intense intellectual correspondence with the new president. He felt close enough to Jefferson to remind him upon his election "how easy it is to govern too much, and how prone the best rulers are, from the best principles, to overact their part."<sup>46</sup> Despite his continuing intimacy with the ascendant party, Cooper, like his fellow émigrés, did not become a professional political editor, even though he alone acquired access to the field. Paradoxically, the very social status that made his foreignness irrelevant in the eyes of those in power rendered the idea of working as a professional political editor repugnant to him. Why would Cooper continue as a printer when the Governor of Pennsylvania offered him the president judgeship of a judicial district? Thus, without exception, the radical émigré journalists who powered the Jeffersonian media machine failed to develop into the political professionals Pasley has described.

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<sup>46</sup> Thomas Cooper to Thomas Jefferson, 25 October 1802, quoted in Durey, *Transatlantic Radicals*, 261.

Ultimately, a very select cadre of printers enjoyed the benefits of the forward thinking interpretation of the freedom of the press that distinguished Virginians from other citizens of the early republic. Several factors conspired to exclude deserving and experienced journalists from the full blessings of liberty. Primarily, the influence of French philosophy over the minds and theories of political leaders such as James Madison resulted in a predetermined prejudice against any political scribbler who did not meet certain status requirements. The crucial importance of public opinion in a government where the people are sovereign made it very unlikely that anyone would seriously challenge the prevailing conception of the refined gentleman as the guardian of public opinion. Furthermore, the precepts of political propriety during the late eighteenth century hindered radical émigrés; editors represented the public face of genteel statesmen who could not campaign on their own behalf, and the newsmen's social standing and comportment reflected directly on the reputations of the parties and candidates they represented. Therefore, it was only natural for party leaders to recruit educated, native-born men of class to direct their media campaigns. The result was a sort of practical dissonance between the dogmatic ideal and the achieved reality of the law, a phenomenon all too familiar in American history.

## CONCLUSION

Virginia Republicans maintained a consistently libertarian interpretation of the freedom of the press throughout the post-Revolutionary period. Their spirited opposition to the Sedition Act of 1798 cannot be explained by their political affiliation alone. Rather, they drew on their knowledge that free debate about public affairs was an everyday fact of colonial life, as well their steadfast adherence to the radical Whig tradition, which provided intellectual continuity between the English Civil War, the American Revolution, and the Revolution of 1800. As libertarian interpreters of press freedom, Virginians sought to protect the print media through which sovereign Americans stayed informed about public affairs and exercised vigilance over their elected officials. However, they did not recognize every voice as equally legitimate within the realm of public opinion; eighteenth-century understandings of the public sphere restricted participation in civic affairs to men of class and letters, inhibiting the free expression of artisan printers and lowly hack writers.

From a certain point of view, Leonard Levy is correct to suggest that the extenuating circumstances drove Republicans to adopt a more democratic stance on press liberty in 1798. Their desperate effort to promulgate a libertarian interpretation of the freedom of the press obliged them to rely on radical hack writers. These émigré journalists boasted long experience as opposition writers in Britain and possessed the advantage of non-gentlemanly status, which allowed them to dabble in the plebian yet effective newspaper medium. In this sense, an impulsive act of political expediency did indeed bring Americans closer than they ever had been to the modern definition of press



liberty. Sadly, this full realization of the First Amendment's democratic potential was short-lived. Virginia Republicans deemed radical émigré printers useful for political purposes, but unworthy of social equality and long-term partnership. Once the election of 1800 secured the triumph of Jeffersonianism, Republicans continued to advocate unfettered freedom of the press for the elite publicists who promulgated public opinion, but denied essential patronage to the propagandists who dealt in popular sentiment, thereby preventing their former allies from enjoying the unqualified liberty that they had helped defend. In this sense, then, even the Virginians who argued so boldly for a libertarian definition of the freedom of the press compromised their principles during times of national crisis, and fell short of the modern American ideal.

Jefferson and his cohorts would not be the last American leaders to retrench open press ideologies when faced with extenuating circumstances. Conscientious Americans are painfully aware of this fact today, as the nation moves toward war in Iraq and the administration of George W. Bush becomes increasingly obstinate about entertaining conflicting opinions. However, perhaps it is the very flexibility of our ambivalent press tradition that makes such retrenchment possible; would Americans stand for such repressive measures if they were not confident in the knowledge that future peace would bring an attendant devolution of expressive freedom? In the end, the only consistent tradition of press freedom in the American past is one of constant ebb and flow.

## APPENDIX

### The Sedition Act of 1798

*An Act, in addition to the act, entitled “An act for the punishment of certain crimes against the United States.”*

**Section 1.** *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That 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 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; or 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 time, as the said court may direct.

**Sec. 2** *And be it further enacted,* That if any person shall write, print, utter or publish, shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous, and malicious writing or writings against the government of the United States, or the President of the United States, or either house of the Congress of the United States, with the intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers vested in him 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 government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

**Sec. 3** *And be it further enacted and declared,* That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give evidence in his defense, the

truth of the matter contained in the publication charged as a libel. And the jury, who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

**Sec. 4** *And be it further enacted*, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer: *Provided*, that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offense against the law, during the time it shall be in force.

Approved. July 14, 1798

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