Essay

Founding Freedoms on Trial: Speech, Sedition, and Executive Authority

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INTRODUCTION

Within a month of his second term, President Trump justified a major immigration crackdown by invoking a 200-year-old law, the Alien Enemies Act.[1] This invocation surprised both the public and the legal community.[2] The Alien Enemies Act, a relic of the presidency of John Adams, was passed alongside three other laws that restricted immigration and free speech.[3] These four laws are frequently referred to as the "Alien and Sedition Acts."[4] Trump's use of the Alien Enemies Act, while unusual, is certainly not unique. Courts have held the Alien Enemies Act as

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[1] Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 14, 2025).

[2] *See, e.g.*, *Supreme Court Lifts Temporary Block on Trump's Use of Alien Enemies Act to Deport Immigrants, Clears Path to Further Challenges*, ACLU (Apr. 7, 2025), https://www.aclu.org/press-releases/supreme-court-lifts-temporary-block-on-trumps-use-of-alien-enemies-act-to-deport-immigrants-clears-path-to-further-challenges [https://perma.cc/FPB9-TPWH]; Sofia Ferreira Santos, *What is the 1798 Law That Trump Used to Deport Migrants*, BBC (Sept. 3, 2025), https://www.bbc.com/news/articles/cy871w21d3vo [https://perma.cc/AT8L-JGQY]; Ximena Bustillo & Jasmine Garsd, *Judge Boasberg Voices Skepticism Over Use of Alien Enemies Act Deportations*, NPR (Mar. 21, 2025), https://www.npr.org/2025/03/21/nx-s1-5335532/trump-judge-alien-enemies-act [https://perma.cc/68V4-Q2Z4].

[3] *See Alien and Sedition Acts (1798)*, NAT. ARCHIVES, https://www.archives.gov/milestone-documents/alien-and-sedition-acts [https://perma.cc/6JKL-NRP3] (reviewing the text of the laws as well as the history behind their passage).

[4] *Id.*

constitutional, depending on its usage.[5] The other three Alien and Sedition Acts, however, have not fully faced constitutional scrutiny. This paper will primarily focus on the Sedition Act and contemporary arguments about its constitutionality. Specifically, it will argue that the Supreme Court during the 1796–1800 period, the Ellsworth Court, would likely have upheld the law as constitutional, implicating significant augmentations to civil liberties in the modern context.[6]

President Adams weaponized the Sedition Act to chill dissent and jail his political opponents. Although extremely controversial, the Ellsworth Supreme Court never ruled on the statute. If it had, the Court would likely have upheld the law, resulting in a restriction of civil rights and an expansion of presidential power. Ultimately, the Sedition Act faced a sunset clause in 1801, and Congress did not renew it. But the legal debates surrounding its constitutionality shed light on historical arguments for an expansion of executive authority, far surpassing the individual rights protected by the First Amendment. From a civil liberties standpoint, it is fortunate that the Ellsworth Supreme Court did not rule on the Sedition Act. If it had, later case law would likely have diminished protections found in the First Amendment.

This piece will progress in three parts. Part I will review the political and legislative standards of early America. This background provides the understanding of the conditions that led to the passing of the Alien and Sedition Acts. Part II will assess the constitutionality of the Acts, particularly the Sedition Act. This part will focus on the contemporary legal and political arguments from both sides of the dispute. Finally, Part III will review the legal positions of each of the Supreme Court Justices at the time of the presidency of John Adams. Here, the paper will draw from contemporary accounts to determine that the Court overwhelmingly supported the Sedition Act, even though the law facially violates the First Amendment.

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[5] *See* Ludecke v. Watkins, 335 U.S. 160, 171–72 (1948) (determining, as a narrow majority, that the Court should not interrupt the executive's determination of when a war terminates and when war powers expire).

[6] This paper will not explicitly analyze whether the current Supreme Court would uphold the Sedition Act. However, the exploration of the historical arguments may be persuasive in a Court that values originalism.

I. HISTORY OF THE ACT

The Alien and Sedition Acts were a creature of the rising political tensions between America's earliest political parties: the Federalists and the Democratic-Republicans.[7] To understand the significance of the Acts, one must understand the background of the partisan division stemming from the conflict on how the new nation should govern.

A. EARLY POLITICAL DEBATE INFLUENCING POLICY

After ratifying the Constitution, early American political discourse focused primarily on the functionality of the new government.[8] Leaders believed that political factions, at least at this early stage of the country, would lead to turmoil.[9] Members of the Electoral College cemented this sentiment by unanimously voting to select factionless, party-less George Washington as the constitutional republic's first president.[10] John Adams finished in second place, becoming the nation's first vice president.[11] Washington abhorred political parties: "But (much indeed to be regretted!) party disputes are now carried to that length, and truth is so enveloped in mist, and false representation that it is extremely difficult to know through what channel to seek it. This difficulty to one, who is of no party, [and] whose sole wish is to pursue, with undeviating steps a path which would lead this Country to [respectability]."[12]

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[7] TERRI DIANE HALPERIN, THE ALIEN AND SEDITION ACTS OF 1787: TESTING THE CONSTITUTION 12 (2016); MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 72 (2000) ("Republicans attacked the Sedition Act as a flagrant violation of the First Amendment and as a violation of the right to freedom of speech and press possessed by Americans."); Joseph Russomanno, *The Right and the Duty: Jefferson, Sedition and the Birth of the First Amendment's Central Meaning*, 23 COMMC'N L. & POL'Y 49, 68 (2018).

[8] FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 23–24 (1974).

[9] *See* John F. Hoadley, *The Emergence of Political Parties in Congress, 1789-1803*, 74 AM. POL. SCI. REV. 757, 758 (1980) (describing the lack of political parties within the first Congress); THE FEDERALIST NO. 10 (James Madison) (denouncing political factions).

[10] *The Electoral Count for the Presidential Election of 1789*, UNIV. OF VA: WASHINGTON PAPERS, https://washingtonpapers.org/resources/articles/the-electoral-count-for-the-presidential-election-of-1789/ [https://perma.cc/V8TH-DTHR].

[11] *Id.*

[12] Letter from George Washington to Timothy Pickering (July 27, 1795), https://founders.archives.gov/documents/Washington/05-18-02-0299 [https://perma.cc/TWQ6-9MZ8].

Washington selected his cabinet not based on political expedience, but instead, choosing individuals who had the requisite competence and vision for America.[13] He selected a highly ambitious and qualified team: Thomas Jefferson, author of the Declaration of Independence and key diplomat to France, as his secretary of state;[14] Alexander Hamilton, constitutional framer and financial visionary, as his secretary of the treasury;[15] Henry Knox, decorated war hero, as his secretary of war;[16] Edmund Randolph, influential Virginia politician and mentor to John Marshall, as his attorney general.[17]

America's aversion to political parties did not last long, and the shift began inside Washington's own cabinet.[18] The cabinet's uniformity began to crack over views on the extent of federal power.[19] Hamilton supported a stronger federal government, particularly its authority over finance and banking.[20] Hamilton's economic program proposed to assume state debts incurred during the Revolutionary War, to establish a national bank, and to impose tariffs on imports to raise revenue.[21] Jefferson adamantly disagreed.[22] He feared that this system would have been far too overreaching, echoing the power of the English Crown.[23]

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[13] MCDONALD, *supra* note 8 ("Washington scrupulously declined to exploit the opportunity to develop a system of patronage."); *see* R. Gordon Hoxie, *The Cabinet in the American Presidency, 1789-1984*, *in* 14 CAMPAIGN '84 209, 210 (1984).

[14] *See* MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY (1970) (recounting Jefferson's personal and professional highlights during the Washington presidency).

[15] *See* JOHN T. MORSE, THE LIFE OF ALEXANDER HAMILTON (1876) (detailing Hamilton's service in the executive branch).

[16] *See* PETER HUME BROWN, JOHN KNOX: A BIOGRAPHY (1895) (reflecting on Knox's professional life after the Revolutionary War).

[17] ARTHUR ROBB, BIOGRAPHICAL SKETCHES OF THE ATTORNEYS GENERAL (1946).

[18] *See* John Ferling, *How the Rivalry Between Thomas Jefferson and Alexander Hamilton Changed History*, TIME (Feb. 15, 2016), https://time.com/4210440/jefferson-hamilton-excerpt/ [https://perma.cc/5XYF-8FNG] (describing the ideological feud between Jefferson and Hamilton in Washington's cabinet).

[19] *Id.*

[20] *Id.*

[21] For a more detailed discussion on Hamilton's overhaul of the federal financial structure, see RICHARD SYLLA & DAVID J. COWEN, ALEXANDER HAMILTON ON FINANCE, CREDIT, AND DEBT (2020).

[22] Ferling, *supra* note 18 ("And he detected an intent to secure the sway of the 'financial interest' over Congress and foster the growth of a new moneyed class . . . .").

[23] *Id.* ("[Jefferson feared that] Hamiltonianism would produce in America the same evil cause-and-effect he had witnessed in Europe: monarchy and rigid

Washington attempted to quell the ideological duel but found limited success.[24]

B. EXPANSION OF THE "POLITICAL PARTY"

The internal squabble between Hamilton and Jefferson spread outside the walls of Washington's Cabinet.[25] To rally popular support for his financial reforms, Hamilton began a public campaign to recruit individuals sympathetic to his cause.[26] Jefferson and his political ally, James Madison, engaged in similar public advocacy for their opposing position.[27] These two competing political factions quickly expanded beyond financial reforms.[28] Those supporting Hamilton (or Federalists, as they became called) adopted similar political positions on domestic and foreign issues and often came from similar demographics.[29] They adamantly supported the Washington administration, engaged in foreign trade, and tended to be wealthier.[30] Supporters of Jefferson, known as Democratic-Republicans, tended to be poorer, lived in more rural settings, and dominated the southern states.[31] As these factions spread throughout the country, they created social and financial incentives to join one or the other.[32] Social groups were organized by political parties, and the system of patronage influenced lucrative positions.[33]

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social stratification leading to massive poverty and widespread urban squalor.").

[24] Hoxie, *supra* note 13, at 213–14.

[25] *Id.*

[26] *See* WILLIAM NISBET CHAMBERS, POLITICAL PARTIES IN A NEW NATION 39–40 (1963).

[27] JOHN C. MILLER, THE FEDERALIST ERA 1789–1801 84–99 (1960).

[28] *See id.* at 101 ("While the Federalists and Republicans lacked the appurtenances of present-day political parties, they were true parties in the sense that they acted upon clearly formulated ideas, they had leaders of marked intellectual and political ability, and they aspired to administer the government for the benefit of sections and economic groups.").

[29] *See id.* at 102–03.

[30] *See* MANNING J. DAUER, THE ADAMS FEDERALISTS (1953).

[31] *See id.*

[32] *See id.*; LEONARD D WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 123 (1948).

[33] Those favoring the Democratic-Republicans founded local social groups called "Democratic-Republican Societies." They existed as a grassroots effort to debate political positions and offer a critique of the Federalist government. Individuals from a wide range of economic classes became members, and membership offered social benefits—especially for poorer Americans who could gain standing with more wealthy and powerful members of society. See Matthew Schoenbachler, *Republicanism in the Age of Democratic Revolution: The*

The French revolution and subsequent war between Great Britain and newly republican France marked an inflection point in early American partisan politics.[34] As a party, Federalists generally favored the British.[35] This preference was influenced by the trade relationship between the Federalist-dominated states and Great Britain.[36] Democratic-Republicans, however, remained loyal to France because of the country's aid during the American Revolution.[37] Many southern Democratic-Republicans fought alongside the French in critical battles during the war.[38] In addition, Jefferson had deep personal ties to France.[39]

On January 21, 1793, French revolutionaries officially toppled the French monarchy, killing King Louis XVI, himself a critical ally to the colonies in the war for independence against Great Britain.[40] French revolutionaries killed other pro-American aristocrats as well.[41] This type of political violence reverberated throughout the United States.[42] Many Federalists felt an

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Democratic-Republican Societies of the 1790s, 18 J. EARLY REPUBLIC 237 (1998) for a thorough examination of these groups. Further, partisan loyalty offered financial benefits. Hamilton had the opportunity to offer up to 1,700 positions within the Treasury department, many of which he gave to political allies. George Clinton, Democratic-Republican governor of New York, gave jobs to his political allies within state government. *See* WHITE, *supra* note 32.

[34] *See generally* NOBLE E. CUNNINGHAM, THE JEFFERSONIAN REPUBLICANS IN POWER: PARTY OPERATIONS, 1801–1809 129 (1963); ERIC MCKITRICK AND STANLEY ELKINS, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800 (1993).

[35] *See* CATHERINE LOCKS, ET AL., HISTORY IN THE MAKING: A HISTORY OF THE PEOPLE OF THE UNITED STATES OF AMERICA TO 1877 462 (describing the Federalists' favoring of Britain over France).

[36] MCKITRICK & ELKINS, *supra* note 34, at 406.

[37] David Thorson, *Minister to France*, MONTICELLO (June 13, 2020), https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/minister-france/ [https://perma.cc/P6AD-F9H4] ("Witness to the onset of the French Revolution, Jefferson enthusiastically supported the Marquis de Lafayette and the reform minded aristocrats who hoped France would evolve into a constitutional monarchy. Following the storming of the Bastille, Jefferson became directly involved in revolutionary activity, helping Lafayette draft a declaration of rights and offering his residence for meetings of revolutionary leaders.").

[38] JOHN FERLING, THE ASCENT OF GEORGE WASHINGTON: THE HIDDEN POLITICAL GENIUS OF AN AMERICAN ICON 299–302, 309–11 (2009).

[39] *See* PETERSON, *supra* note 14.

[40] *Execution of the King*, LIBERTÉ, ÉGALITÉ, FRATERNITÉ (Jan. 21, 1793), https://revolution.chnm.org/d/327 [https://perma.cc/QQF6-LJM3].

[41] MCKITRICK & ELKINS, *supra* note 34, at 314–16.

[42] *See, e.g.*, *id.*; Marshall Smelser, *The Federalist Period as an Age of Passion*, 10 AM. Q. 391 (1958); Marshall Smelser, *The Jacobin Phrenzy: Federalism*

economic kinship to pro-American aristocrats murdered by revolutionaries.[43] Many Democratic-Republicans felt an economic kinship to the poor revolutionaries who revolted against wealthy elites.[44] While neither party officially endorsed the French Revolution, Federalists were quick to group together Jefferson's Democratic-Republicans and the violent French revolutionaries.[45] A new French government took over from the monarchy.[46] This France may have had different leaders, but it soon returned to France's favorite pastime: war with the British.[47]

France's revolutionary government terrified European monarchs, leading to a decade long conflict known as the French Revolutionary Wars.[48] In 1792, France launched a pre-emptive attack against Austria.[49] Spain, Portugal, and Great Britain soon joined against the French.[50] During the early stages of the conflict, France sent a diplomatic representative, Edmond-Charles Genêt (known as Citizen Genet), to the United States to enlist America on France's behalf.[51] He spread propaganda and even

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and the Menace of Liberty, Equality and Fraternity, 13 REV. POL. 457, 458 (1951).

[43] *See id.*

[44] *See id.*

[45] *The United States and the French Revolution, 1789–1799*, OFF. HISTORIAN, DEP'T STATE (2017), https://history.state.gov/milestones/1784-1800/french-rev [https://perma.cc/NYV9-389B]; Peter R. Henriques, *1800: America's First Explosive Election*, HISTORYNET (Oct. 26, 2020), https://www.historynet.com/1800-americas-first-explosive-election/ [https://perma.cc/2AQ5-KWCM] (quoting a Federalist editorial writer: "You who are for French notions of government; for the tempestuous sea of anarchy and misrule; for arming the poor against the rich; for fraternizing with the foes of God and man; go to the left and support the leaders, or dupes of the anti-federal junto. But you that are sober, industrious, thriving, and happy, give your votes for those men who mean to preserve the union of the states, the purity and vigor of our excellent constitution, the sacred majesty of the laws, and the holy ordinances of religion").

[46] WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 194 (1989).

[47] *See id.* (describing the launch of the French Revolutionary Wars by the new French revolutionary government).

[48] *Id.*

[49] *See id.*; *Europe During the Revolutionary Years*, BRITANNICA, https://www.britannica.com/event/French-revolutionary-wars/Europe-during-the-Revolutionary-years [https://perma.cc/S3W6-U36K].

[50] *Id.*

[51] Genet attempted to convince President Washington and others in his administration to join the war effort on France's side. GEORGE CLINTON GENET, WASHINGTON, JEFFERSON, AND "CITIZEN" GENET, 1793 (1899). Washington declined, declaring neutrality. *Id.* In a private meeting at Washington's residence, Genet shared his frustration with the president: "I protested to [Washington],

infiltrated local Democratic-Republican societies (local party organizations).[52] France viewed the United States as a strategic ally, hoping to gain permission for an invasion north into British Canada and south into Spanish Louisiana and Spanish Florida.[53] Americans didn't fall for the propaganda. Even Thomas Jefferson, a French sympathizer and Democratic-Republican leader, loathed Citizen Genet.[54] While neither party fully endorsed the conflict, they each began to take sides.[55] Democratic-Republicans strengthened support for France, and Federalists sided with Great Britain and its allies.[56]

The war found its way to the shores of the United States due to naval battles between British warships and American trade ships, forcing the Washington administration to respond.[57] What followed solidified the American political divide. Washington, Hamilton, and John Jay negotiated a treaty with Great Britain to resolve issues that had loomed since the end of the Revolution as well as settling the issues with trade ships.[58] Led by John Jay, the agreement became known as the Jay Treaty.[59]

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that I had received and not given the impulse which served to disturb the government, and that I did not believe it to be anything more than the simultaneous effect of the honesty and up-rightness of the people. . . [he should] consider that by his Proclamation of Neutrality, and the interpretation that had been given to it, he had annulled the most sacred treaties, deprived the French people, at a moment when they were in the greatest need of it for the defence [sic] of their colonies, of the alliance which they considered as property dearly bought . . . ." *Id.* at 25–26.

[52] *See* PHILIP S. FONER & ELIZABETH VANDEPAER, THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790–1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS (1976).

[53] Eugene R. Sheridan, *The Recall of Edmond Charles Genet: A Study in Transatlantic Politics and Diplomacy,* 18 DIPLOMATIC HIST. 463, 468 (1994).

[54] Letter from Thomas Jefferson to James Madison (July 7, 1793), https://founders.archives.gov/documents/Jefferson/01-26-02-0391 [https://perma.cc/F39X-8YLJ] ("Never, in my opinion, was so calamitous an appointment made, as that of the present minister of F[rance] here. Hotheaded, all imagination, no judgment, passionate, disrespectful and even indecent towards the P[resident] in his written as well as verbal communications. . . . He renders my position immensely difficult.").

[55] *See generally* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 (2009).

[56] *See id.* at 161–62.

[57] MCKITRICK & ELKINS, *supra* note 34, at 356, 360; SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (1923).

[58] *See generally* BEMIS, *supra* note 57. *See also* The Jay Treaty, G.B.-U.S. November 19, 1794, https://avalon.law.yale.edu/18th_century/jay.asp [https://perma.cc/93AM-Z6VL].

[59] *Id.*

Federalists favored this treaty.[60] It ended conflicts between northern trade fleets and British warships, marked the formal end of the revolutionary conflict, and drew the country closer to Great Britain.[61] Democratic-Republicans loathed the treaty.[62] Many saw it as an abdication of America's relationship with historical ally France, and it financially harmed southern Democratic-Republicans, who were still owed debts from the British government.[63] Some Democratic-Republicans even argued that the United States should have declared war against Great Britain instead of implementing the conciliatory treaty.[64] The French had already weakened the British, and an attack could be a financial boon to the young country.[65] The conflict over the Jay Treaty and the French war dominated the political space as the Washington administration ended, leading into the 1796 presidential election.[66]

C. THE 1796 PRESIDENTIAL ELECTION AND THE CALCIFICATION OF PARTISAN POLITICS

Combative partisan campaigning marked the beginning of the Adams administration, leading to a crackdown on civil liberties.[67] The 1796 election pit Vice President Adams, the Federalist, against Secretary of State Jefferson, the Democratic-Republican.[68] The election marked the first presidential contest featuring political parties.[69] The campaign largely focused on the French Revolutionary Wars and immigration.[70] The electoral college was not just voting for a new president; it was selecting a political party and a stance between Britain and France. In a close final ballot, Adams came in first with Jefferson in a close second.[71] During this point in history, the Constitution granted the first-place winner the presidency and the second-place winner the vice presidency.[72] Therefore, the bitter rivals were forced to work together.

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[60] *See supra* note 57.

[61] *Id.*

[62] JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS (1993). The British owed debts for freeing the southerners' slaves. *Id.* The Jay Treaty wiped out this debt, creating a stir in the American South and turned southern farmers against the Federalist party. *Id.*

[63] *Id.*

[64] *See* MILLER, *supra* note 27, at 149.

[65] *See id.*

[66] *See* FERLING, *supra* note 38, at 323–28, 338–44 (detailing the transition period after Washington's presidency).

[67] *See* JEFFREY L. PASLEY, THE FIRST PRESIDENTIAL CONTEST: 1796 AND THE FOUNDING OF AMERICAN DEMOCRACY 225 (2016) (describing the negative campaigning tactics).

[68] *Id.* ("A vote for John Adams represented a confirmation or intensification of the pro-British, authoritarian policies of the Washington administration, while a vote for Thomas Jefferson represented a rejection of these supposedly monarchical tendences and a return to the purportedly democratic core ideals of the Revolution.").

[69] Bernard Fa, *Early Party Machinery in the United States: Pennsylvania in the Election of 1796*, 60 PA. MAG. HIST. & BIOGRAPHY 375, 383 (1936).

Adams and Jefferson attempted to work together in their new roles.[73] Though, partisan politics disrupted any chance of a true partnership.[74] Jefferson may have been the vice president, but his true role became the leader of the opposition.[75] Alas, Adams began the job as president of the United States, and he quickly became involved with foreign relations, particularly focusing on the American relationship with France.[76] At the beginning of his presidency, French vessels had been attacking and looting American trade ships.[77] He attempted to reconcile with

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[70] Many immigrants, particularly Irish and French, flocked to the United States as a result of European wars and to avoid persecution by the British. Edward C. Carter, *A "Wild Irishman" Under Every Federalist's Bed: Naturalization in Philadelphia, 1789-1806,* 133 PROC. AM. PHIL. SOC'Y 178 (1989). These immigrants largely supported Federalist politicians due to the party's position favoring the French and disfavoring the British. *Id.* at 179–80.

[71] C. James Taylor, *John Adams: Campaigns and Election,* UVA: MILLER CTR., https://millercenter.org/president/adams/campaigns-and-elections [https://perma.cc/ZJV8-A262] ("In the end, Adams won by a three-vote margin. Although virtually all of Adams's votes came from northern electors (while virtually all of Jefferson's were from southern electors), Adams won largely because of the votes of two southern electors. . . Jefferson received the second largest number of votes, making him the vice president. Thus, the nation would have a President from one party and a vice president from the other party.").

[72] *Id.*; U.S. CONST. art. II, § 1 ("The Person having the greatest Number of Votes shall be the President . . . . In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President."). Eventually, the Constitution was revised, adding a provision to prevent this type of outcome. U.S. CONST. amend. XII.

[73] *See* Ferling, *supra* note 18; Alan Taylor, *Our Feuding Founding Fathers*, N.Y. TIMES (Oct. 17, 2016), https://www.nytimes.com/2016/10/17/opinion/our-feuding-founding-fathers.html [https://perma.cc/4HZD-5W98].

[74] *Id.*

[75] *Id.*

[76] DAVID MCCULLOUGH, JOHN ADAMS 144 (2001).

[77] *See id.*; Thomas Ray, *"Not One Cent for Tribute": The Public Addresses and American Popular Reaction to the XYZ Affair, 1789-1799*, 3 J. EARLY REPUBLIC 389 (1983); John W. Kuehl, *Southern Reaction to the XYZ Affair an Incident in the Emergence of American Nationalism,* 70 REG. KY. HIST. SOC'Y 21 (1972).

France, as Washington did with Great Britain.[78] However, when Adams sent envoys to Paris, he claimed that the French—instead of negotiating in good faith—demanded a bribe.[79] This controversy became known as the XYZ affair.[80] Unlike Washington, Adams did not maintain composure.[81] Adams viewed the XYZ affair, growing political division, and the influx of new immigrants as an attack on America.[82] He and his Federalist Congress swiftly responded by launching a Quasi-War with France and passing a series of laws to silence political rivals and deport immigrants.[83]

The Federalists in Congress passed the Alien and Sedition Acts, a collection of four laws that instituted an aggressive overreach of executive authority: The Naturalization Act of 1798, The Alien Friends Act of 1798, The Alien Enemies Act of 1798, and The Sedition Act of 1798.[84] The Naturalization Act increased the requirements to seek citizenship.[85] The Alien Friends Act of 1798 allowed the president to imprison and deport foreigners.[86] The Alien Enemies Act of 1798 granted the president additional powers to detain foreigners during times of war, invasion, or predatory incursion.[87] The Sedition Act of 1798 criminalized false and/or malicious statements about the federal government, including a penalty of 2–5 years in prison and fines up to $5,000.[88] The Alien Friends Act and Naturalization Act were considered the weaker of the two.[89] While these laws instigated fear in immigrants, they were rarely, if ever, enforced.[90] Instead, the Adams administration focused its enforcement via the Alien Enemies Act and the Sedition Act, leading to significant public backlash.[91]

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[78] *See id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*; *see also* FERLING, *supra* note 38.

[84] *Alien and Sedition Acts (1798),* NAT. ARCHIVES, https://www.archives.gov/milestone-documents/alien-and-sedition-acts [https://perma.cc/7MLB-M8P9].

[85] Pub. L. 5–54, 1 Stat. 566, chap. 54.

[86] Pub. L. 5–58, 1 Stat. 570.

[87] Pub. L. 5–65, 1 Stat. 577.

[88] Pub. L. 5–74, 1 Stat. 596.

[89] James Morton Smith, *The Enforcement of the Alien Friends Act of 1798*, 41 MISS. VALLEY HIST. REV. 85 (1954); *see* MILLER, *supra* note 27 (detailing that Adams never actually signed a deportation order under the Alien Friends Act).

[90] *Id.*

The Alien Enemies Act intended to replace the more controversial Alien Friends Act, but it still granted immense authority to the president.[92] Once the United States became involved in a war or under threat of an invasion, the law allowed the president to apprehend, restrain, and deport any immigrant of the target country.[93] This was a much narrower scope than the Alien Friends Act, which permitted the president to deport any immigrant who he deemed to be "dangerous."[94] Although, during the Quasi War with the French, the Alien Enemies Act still created significant power for Adams to arrest and remove Frenchmen and Irishmen who supported the Democratic-Republicans.[95] But much to the surprise of many Federalists, Adams never enforced any deportations under the law—only limited arrests.[96] This restraint was not as generous as the real focus of the oppression: the Sedition Act.

Federalists used the Sedition Act to punish political enemies and chill dissent.[97] The Sedition Act made it illegal to print "false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress of the United States, or the President of the United States."[98] Critically, the language of the law did not protect the Vice President, Democratic-Republican Jefferson.[99] It only protected the

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[91] Marc Lendler*, "Equally Proper at All Times and at All Times Necessary": Civility, Bad Tendency, and the Sedition Act*, 24 J. EARLY REPUBLIC 419 (2004).

[92] *See supra* note 89.

[93] Pub. L. 5–65, 1 Stat. 577 ("That whenever there shall be a declared war between the United States and any foreign nation or government . . . and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.").

[94] Pub. L. 5–58, 1 Stat. 570 ("that [the President] shall judge dangerous to the peace and safety of the United States.").

[95] Muiris MacGiollabhui, *Sons of Exile: The United Irishmen in Transnational Perspective 1791-1827* (Thesis) 99 UC SANTA CRUZ (2019) ("During a period of desperation in 1798 during the Quasi-War with France, the Federalists introduced legislation that muzzled the Republican press.").

[96] *See supra* note 89.

[97] HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM 174 (2012).

[98] Pub. L. 5–74, 1 Stat. 596.

[99] *Id.*

Federalist-controlled Congress and Adams.[100] The Sedition Act was used much more expansively than the modern-day statute criminalizing seditious conspiracy by force.[101] The rarely enforced modern statute does not criminalize speech that criticizes the government; instead, it implicates "'speech' only when it constitutes an agreement to use force against the United States."[102]

The Federalist government frequently enforced the Sedition Act, even against prominent figures.[103] Benjamin Franklin Bache, editor of a Democratic-Republican newspaper, faced charges for calling Adams "blind, bald, crippled, toothless, [and] querulous."[104] Matthew Lyon, a Democratic-Republican congressman was fined $1,000 and sentenced to four months in jail after he accused the Adams administration of "ridiculous pomp, foolish adulation, and selfish avarice."[105] Luther Baldwin, after hearing about a gunshot fired at a parade, was fined $100 for drunkenly stating, "I hope it hit Adams in the [backside]."[106]

Protests erupted across the country over these unjust arrests, and Democratic-Republican leaders mounted political and legal challenges to quash the executive actions.[107] Primarily, Jefferson centered his 1800 presidential campaign around the unpopular Alien and Sedition Acts (although he primarily focused on the Sedition Act).[108] He wrote and spoke on its affront to the First Amendment and the inherent rights of Americans, suggesting that the legislation might drive the country "into revolution and blood."[109] He even led state action to oppose the federal law, authoring a resolution in the Kentucky legislature in an attempt to nullify the federal Sedition Act.[110] Soon after, James Madison penned a similar resolution for the Virginia legislature.[111] Federalists responded to the political attacks launched by the Democratic-Republicans.[112] For example, Federalist publisher William Cobbett accused Democratic-Republican publisher, William Duane, of creating a conspiracy theory that Irish immigrants and freed slaves would lead slave revolts and overturn the order of the country.[113]

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[100] *Id.*

[101] 18 U.S.C § 2384. ("If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy *by force* the Government of the United States, or to levy war against them, or to oppose *by force* the authority thereof, or *by force* to prevent, hinder, or delay the execution of any law of the United States, or *by force* to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.") (emphasis).

[102] United States v. Rahman, 189 F.3d 88, 114 (2d Cir. 1999). In addition, the judges refer to a line of other First Amendment cases that distinguishes between protected expressions of belief and threatened use of force. *Id.*

[103] GILLMAN, GRABER & WHITTINGTON, *supra* note 97, at 174.

[104] Martin Gruber, *Benjamin Franklin Bache,* FREE SPEECH CTR. MIDDLE TENN. STATE UNIV. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/benjamin-franklin-bache/ [https://perma.cc/9KHS-GDQE].

[105] ERIC FONER, GIVE ME LIBERTY! 282–83 (2008); MILLER, *supra* note 27.

[106] MILLER, *supra* note 27; JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 270–74 (1956).

[107] *See, e.g.*, MCCULLOUGH, *supra* note 76, at 556; RICHARD B. BERNSTEIN, THOMAS JEFFERSON (2003); HALPERIN, *supra* note 7

[108] *Id.*

Ultimately, the election 1800 determined the nation's view on the Alien and Sedition Acts: Jefferson won in a landslide.[114] He assumed office and pardoned those who were arrested under the Sedition Act.[115] Congress even paid the remaining fines of those convicted.[116] America chose the political solution to resolve the conflict over the Sedition Act. But if it, instead, attempted to challenge the law at the Supreme Court, history may tell a story of an expanded use of presidential authority and a limited view of freedom of speech.

II. CONTEMPORARY CONSTITUTIONAL ANALYSIS

Although the Alien and Sedition Acts stirred significant controversy, three of the four acts have not been tested by the Supreme Court.[117] If tested at the time, the Supreme Court would likely have found the most divisive law, the Sedition Act, constitutional. This precedent would disrupt our modern understanding of freedom of speech, and it would greatly expand the president's authority to punish his enemies and rush legislation during chaotic times. Functionally, the laws failed to survive long enough to reach a challenge at the nation's highest court.[118] The Alien Friends Act and Sedition Act contained sunset clauses, expiring within two years of passing.[119] And in 1802, Congress repealed the Naturalization Act.[120] Although, the Alien Enemies Act survived sunset clauses, repeal, and scrutiny at the Supreme Court.[121]

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[109] RON CHERNOW, ALEXANDER HAMILTON 573 (2005).

[110] *Id.*

[111] *Id.*

[112] STEPHEN F. KNOTT, ALEXANDER HAMILTON AND THE PERSISTENCE OF MYTH 48 (2002).

[113] Margaret H. McAleer, *In Defense of Civil Society: Irish Radicals in Philadelphia during the 1790s*, 1 EARLY AM. STUD., 176, 187–88 (2003).

[114] SUSAN F. MARTIN, A NATION OF IMMIGRANTS (2021) ("The Alien and Sedition Acts so mobilized opposition to the heavy-handed Federalist policies that Thomas Jefferson's Republican Party was able to establish electoral ascendancy for the next quarter-century.").

[115] BERNARD A. WEISBERGER, AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800 187–193, 201 (2000).

[116] *Id.*; New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[117] The Supreme Court analyzed the Alien Enemies Act in Ludecke v. Watkins, 335 U.S. 160 (1948).

However, the most scrutinized law, the Sedition Act, never faced the "unconstitutional" labels that its opposition hurled. Instead, it was challenged in the lower courts, permitting the presiding judges, members of the Supreme Court, to weigh their opinion of the law.[122] If a litigant successfully appealed the case to the highest court, a majority of justices would likely have deemed it constitutional, even though opponents presented strong arguments against it. A constitutional challenge to a statute passed by Congress would not have been unprecedented at this early stage of the nation.[123] Scholars widely hold the Court's opinion in *Marbury v. Madison* in 1803 as the solidification of judicial review, the ability for the courts to examine and invalidate actions by Congress and the executive branch. But Marbury was not the first time that the American justice system permitted a scrutiny of laws under the Constitution.

The American justice system consistently practiced a form of judicial review dating back to revolutionary-era case law.[124] The Supreme Court, organized under Article III of the

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[118] Pub. L. 5–58, 1 Stat. 570 ("That this act shall continue and be in force for and during the term of two years from the passing thereof."); Pub. L. 5–74, 1 Stat. 596 ("That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer.").

[119] *Id.*

[120] Pub. L. 7–28, 2 Stat. 153, chap. 28 ("That all acts heretofore passed respecting naturalization, be, and the same are hereby repealed.").

[121] Ludecke v. Watkins, 335 U.S. 160, 214 (1948) ("I am unwilling to attribute to the Congress any such attempted violation of the constitutional requirement for due process of law.").

[122] *See* WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT 114–200 (2016); Bruce Ragsdale, *The Sedition Act Trials*, *in* FEDERAL TRIALS AND GREAT DEBATES IN UNITED STATES HISTORY (2005), https://www.fjc.gov/sites/default/files/trials/seditionacts.pdf [https://perma.cc/77VH-UVTR].

[123] *See generally* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455.

[124] *Id.* at 473–96 (reviewing early state courts' ability to assess and interpret laws immediately preceding the Constitutional conventions).

Constitution, practiced iterations of judicial review prior to *Marbury*. Prominently, the Supreme Court upheld a federal statute in the 1796 case, *Hylton v. United States*, seven years before *Marbury*.[125] In the case, litigants challenged whether the congressional statute that imposed a tax on individual carriages violated the constitutional provision that states that "direct Taxes shall be apportioned among the several States. . . according to their respective Numbers."[126] Ultimately, the Court upheld the constitutionality of the congressional statute—seven years before *Marbury*. Therefore, if the Court faced a constitutional challenge to the Sedition Act, it would be within its established practice to uphold it.

A. CONSTITUTIONAL FRAMEWORK TO CHALLENGE THE SEDITION ACT

Opponents of the Sedition Act, led by Democratic-Republican leaders Jefferson and Madison, launched a quasi-political, quasi-legal challenge to the legislation based on the structure of the Constitution and protections found in the First Amendment.[127] Instead of appealing convictions to reach the Supreme Court, Jefferson and Madison went directly to state legislatures.[128] They drafted the Kentucky and Virginia Resolutions, passed by their respective state legislatures, arguing for the unconstitutionality of the Alien and Sedition Acts (although primary legal arguments focused on the Sedition Act).[129] Ultimately, these resolutions argued that the federal government abused its power by enacting legislation that it had no authority to do and that the Sedition Act violated tenets of freedom of speech.[130] The resolutions also argued that the legal framework that the federal government violated the compact agreed upon by each of the states when ratifying the Constitution, referred to as the "compact theory."[131]

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[125] 3 U.S. 171 (1796). For a much deeper analysis of the case, see Robert P. Frankel., *Before Marbury: Hylton v. United States and the Origins of Judicial Review,* 28 J. SUP CT. HIST. 1 (2003).

[126] U.S. CONST. art I, § 2, cl. 3.

[127] Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts,* WM. & MARY Q. 565, 567 (2008) ("By the spring of 1799, when Jefferson proclaimed enthusiastically that the 'public sentiment' was 'on the creen' and that 'the materials now bearing on the public mind will infallibly restore it to it's republican soundness,' the clamor had effectively stopped any hopeful Federalist attempt to mobilize the country for war with France.").

[128] *Id.* at 574; *see* Marshall Smelser, *George Washington and the Alien and Sedition Acts,* AM. HIST. REV. 322, 332 (1954).

[129] *See* Resolutions Adopted by the Kentucky General Assembly, November 10, 1798, https://founders.archives.gov/documents/Jefferson/01-30-02-0370-0004 [https://perma.cc/F5W7-8FXV] [hereinafter Kentucky Resolution]; Virginia Resolutions, December 21, 1798, https://founders.archives.gov/documents/Madison/01-17-02-0128 [https://perma.cc/N3U4-5T8K] [hereinafter Virginia Resolution].

The compact theory treats the Constitution as a contract, with each state acting as a signatory. When the federal government oversteps its authority, it violates the compact, permitting individual states—as signers—to declare a breach to "interpose" or nullify the law.[132] Kentucky's legislature debated whether to grant a full endorsement of the theory: Jefferson's initial draft included language that explicitly endorsed the theory that each state could nullify unconstitutional federal laws, but the legislature removed that provision.[133] Although, the legislature passed an updated resolution in 1799 to put back in Jefferson's initial language, deciding to endorse Jefferson's position that the states could engage in this compact theory.[134] Madison and the Virginia legislature took a different approach on the compact theory, making the argument that it was intended as a political statement instead of a truly enforceable legal theory. Reflecting on this dispute, Madison believed that "[t]he authority of the states over the Constitution and its interpretation was collective and could be exercised only in concert through the electoral process or by a quasi-revolutionary act of the people themselves."[135]

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[130] *Id.*

[131] Kentucky Resolution, *supra* note 129 ("That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."); Virginia Resolution, *supra* note 129 ("That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorised [sic] by the grants enumerated in that compact, and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties there-to have the right, and are in duty bound, to interpose for arresting the pro[gress] of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.").

[132] *See* DAVID BENNER, COMPACT OF THE REPUBLIC: THE LEAGUE OF STATES AND THE CONSTITUTION (2014).

[133] *Compare* Thomas Jefferson, Draft of the Kentucky Resolutions of 1798, https://constitution.org/1-Constitution/cons/kent1798.htm [https://perma.cc/B44F-QM2B] ("[W]here powers are assumed [by the federal government] which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact, (casus non fœderis) to nullify of their own authority all assumptions of power by others within their limits."), *with* Kentucky Resolution, *supra* note 129.

[134] *See* Resolutions in the Kentucky General Assembly, December 3, 1799, https://avalon.law.yale.edu/18th_century/kenres.asp [https://perma.cc/25A9-2WSD].

Many states responded to the resolutions, arguing that the judiciary should interpret the constitutionality of laws, not individual states. Delaware and Connecticut flatly disagreed with Virginia's resolution.[136] But other states disagreed with specificity on the compact theory. For example, Vermont's resolution stated: "It belongs not to state legislatures to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the judiciary courts of the Union."[137] Massachusetts, New York, and New Hampshire used substantially similar language.[138]

Kentucky and Virginia responded to the critiques. Kentucky responded quite aggressively, clarifying its position that states should be allowed to nullify.[139] Virginia took a different stance, passing a new resolution titled, "Report of 1800," authored by James Madison.[140] In the report, Madison adamantly defended the initial resolution—but clarified its position in critique of the compact theory.[141] He, again, argued that states should be able to determine that federal laws are unconstitutional, but this determination should carry no legal weight.[142] Instead, states can only express an opinion: "It has been said, that it belongs to the judiciary of the United States, and not the state legislatures, to declare the meaning of the Federal Constitution."[143] The state legislative process could be helpful to organize members of Congress to repeal laws or to organize a constitutional convention.[144] The Supreme Court has consistently rejected the compact theory, instead emphasizing the Constitution as enacted by the people, not individual states.[145]

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[135] James Madison, *Notes on Nullification*, LIBR. CONG. (Dec. 1834); *see* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 718.

[136] Answer of Delaware, February 1, 1799 ("that [the General Assembly] consider the resolutions from the state of Virginia as a very unjustifiable interference with general government and constituted authorities of the United States"); Answer of Connecticut, May 1799 ("[The General Assembly] . . . therefore, decidedly refuse to concur with the legislature of Virginia in promoting any of the objects attempted in the aforesaid resolutions.").

[137] *See* JONATHAN ELLIOT, ANSWERS OF THE SEVERAL STATE LEGISLATURES: STATE OF VERMONT (1907); Frank Maloy Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions*, AM. HIST. REV. 45–63, 225–44 (1899).

[138] Answer of Massachusetts, February 9, 1799 ("[T]he construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States."); Answer of New York, March 5, 1799, ("And whereas the judicial power extends expressly to all cases of law and equity arising under the Constitution and the laws of the United States, whereby the interference of the legislatures of the particular states in those cases is manifestly excluded[.]"); Answer of New Hampshire, June 14, 1799 ("That the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government; that the duty of such decision is properly and exclusively confided to the judicial department.").

[139] *See supra* note 134 and accompanying text.

[140] James Madison, *Report of 1800*, CONST. http://www.constitution.org/rf/vr_1799.htm [https://perma.cc/V72N-9S7F].

B. SUBSTANTIVE LEGAL ARGUMENTS ON THE SEDITION ACT

The Kentucky and Virginia Resolutions may have slightly differed on constitutional frameworks, but they were in complete agreement that the Sedition Act violated the First Amendment's free speech protections.[146] Both resolutions relied on a close textual analysis of the First Amendment.[147] The First Amendment itself explicitly states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."[148] The Sedition Act violates this principle: it punishes an individual who "shall write, print, utter or publish. . . any false, scandalous and malicious writing or writings against the government of the United States . . . ."[149] This textual comparison shows the significant discrepancy between the two. Further, the interpretation of the resolutions should hold firm because Madison himself wrote both the Virginia Resolution and the First Amendment, supporting originalist jurisprudence.[150] Regardless, supporters of the Sedition Act argued that the law should still be upheld.[151]

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See*, *e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) ("The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.'"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ("The government proceeds directly from the people; is 'ordained and established' in the name of the people. . . It required not the affirmance, and could not be negatived, by the State Governments."); Texas v. White, 74 U.S. (7 Wall.) 700 (1869) ("The act which consummated [Texas's] admission into the Union was something more than a compact; it was the incorporation of a new member into the political body.").

[146] Kentucky Resolution, *supra* note 129 ("Another and more special provision has been made by one of the amendments to the Constitution which expressly declares, that 'Congress shall make no law respecting an Establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press,' thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."); Virginia Resolution, *supra* note 129 ("That among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having with other states recommended an amendment for that purpose, which amendment was in due time annexed to the Constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shewn to the

Federalist supporters argued that the Sedition Act should be upheld because it aligned with British common law, was necessary due to the exigency of foreign invasion, and protected the president's ability to use the "take care" clause. However, many of these arguments fail to cite provisions from the Constitution. Of the three primary arguments, Massachusetts's invocation of the "take care" clause takes the most serious approach at a constitutional argument.

British common law, as explained by Blackstone's interpretation of libel law, greatly influenced the Federalist reading of the Sedition Act and the First Amendment.[152] British common law understood "freedom of speech" to prohibit the government

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most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.").

[147] *Id.*

[148] U.S. CONST. amend. I.

[149] Pub. L. 5–74, 1 Stat. 596.

[150] *See* James H. Read, *James Madison*, FREE SPEECH CTR. (Aug 5, 2023) https://firstamendment.mtsu.edu/article/james-madison [https://perma.cc/3SB3-GTHE]. *See also* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 59 (2013) ("Chafee. . . argu[ed] that the Framers never meant to codify Blackstone's views. They had seen the way the British crown silenced its critics, he argued, and intended to make such suppression impossible in this country. And when the Federalist Party disregarded that intent, passing the Sedition Act of 1798, two of the most influential founding fathers, Jefferson and Madison, were quick to cry foul.").

[151] *See supra* notes 136–38 and accompanying text.

[152] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769.

from prior restraint.[153] This view, however, permitted punishment based on the nature of the speech.[154] Blackstone explained this view: "But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment."[155]

In its response to the Virginia and Kentucky resolutions, Massachusetts echoed Blackstone's approach to free speech: "The genuine liberty of speech and the press is the liberty to utter and publish the truth; but the constitutional right of the citizen to utter and publish the truth is not to be confounded with the licentiousness, in speaking and writing, that is only employed in propagating falsehood and slander."[156] Massachusetts's position is greatly weakened by the fact that the author of the First Amendment explicitly rebuked this interpretation.[157]

Beyond Blackstone, states raised the argument of exigency for the necessity of the Sedition Act. They believed that the law was necessary, given the seriousness of the conflict in Europe and the mass influx of immigrants.[158] Although, the states failed to explain where the idea of exigency came from. The Constitution does not denote "exigency" as a rationale for suppressing free speech. If anything, this argument cedes significant authority to the executive to restrict civil liberties when politically expedient.

Several states cite this idea of exigency without backing the argument with a constitutional framework.[159] Potentially, they intended this argument as a political response instead of a legal response. Rhode Island's legislature stated, "by the exigency of this occasion, to declare that, in their private opinions, these laws are within the powers delegated to Congress, and promotive of the welfare of the United States."[160] New Hampshire penned a similar response: "that opinion would unreservedly be, that those acts are constitutional, and, in the present critical situation of our country, highly expedient."[161] Connecticut made a stronger standing.[162] It connected the Sedition Act to the constitutionally mandated legislative process.[163] Yet, it still cited this idea of "exigency" as a justification for the law: "That this Assembly views with deep regret, and explicitly disavows, the principles contained in the aforesaid resolutions, and particularly the opposition to the 'Alien and Sedition Acts'—acts which the Constitution authorized, which the exigency of the country rendered necessary, which the constituted authorities have enacted, and which merit the entire approbation of this Assembly."[164]

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[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] Answer of Massachusetts, *supra* note 138.

[157] Read, *supra* note 150.

[158] *See supra* notes 136–38 and accompanying text.

[159] *See id.*

[160] Answer of Rhode Island, February 1799.

Massachusetts concluded its response by including a legitimate Constitutional argument for passing the Sedition Act—the "take care" clause in Article II.[165] The state made the argument that "scandalous misrepresentations of [the President's] measures and motives. . . tend to rob him of the public confidence."[166] As a result, the president would have his authority weakened, making it "impracticable" to "take care that the laws be faithfully executed."[167] This argument cites the Constitution, but if true, would lead to an immense grant of presidential authority. Taken to its extreme, it would permit Congress to pass any law, even those violating the Bill of Rights, in an effort for the president to "take care" of the country. For example, if President Adams thought that French spies were hiding out in people's homes, he could encourage Congress to pass a bill that would allow members of the military to search the homes of citizens without a warrant. After all, the threat of foreign intelligence on American soil could undermine the president's authority! It is unclear if this theory would be popular among the judiciary in the 18th century, but if so, it would significantly change the way that presidential power could have been implemented throughout history.

III. ASSESSING THE JUSTICES' POSITIONS IF THE SEDITION LAW WAS CHALLENGED AT THE SUPREME

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[161] Answer of New Hampshire, *supra* note 138.

[162] Answer of Connecticut, *supra* note 136.

[163] *Id.*

[164] *Id.*

[165] Answer of Massachusetts, *supra* note 138.

[166] *Id.*

[167] *Id.*

COURT

Even though the Supreme Court did not rule on the Sedition Act, it likely would have upheld the law based on the individual members' writings and judicial implementation of the Sedition Act at the appellate level. At the time, Supreme Court Justices spent a significant time leading circuit courts.[168] Many Sedition Act cases rose to these courts.[169] From the results of these cases as well as personal writings of the Justices, nearly every Supreme Court Justice supported the Sedition Act and endorsed the arguments posed by state legislatures in response to the Kentucky and Virginia Resolutions.[170] An exact analysis would be challenging, as the tenure of the Justices shifted throughout the life of the Sedition Act.[171] The Justices that served on the Court, outside of Ellsworth himself, include the following: James Wilson (1789–1798), William Cushing (1790–1810), James Iredell (1790–1799), William Paterson (1793–1806), Samuel Chase (1796–1811), Bushrod Washington (1798–1829), and Alfred Moore (1800–1804).[172] But only six jurists sat on the Supreme Court at a time.[173] While we do not have information on all eight, an analysis of six who served between 1798–1800 leads to the same result: a support of the Sedition Act.

A. THE INDIVIDUAL JUSTICES

Historical records show that a comfortable majority of the Supreme Court Justices supported the Sedition Act as constitutional during the Act's life. Eight Justices served during this time, referred to as the Ellsworth Court, but only six have published information alluding to a position on the Sedition Act. Regardless, only one, Justice James Wilson, would have opposed the constitutionality of the law. Wilson left the Court in 1798, so his position may not have even been heard if the case was decided between 1798-1800. The remainder of this Subsection will review six of the Justices who had public statements on the Sedition Act and/or principles of freedom of speech and the First Amendment.

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[168] *The Court as an Institution*, SUP. CT., https://www.supremecourt.gov/about/institution.aspx [https://perma.cc/6RGU-UAXE] ("For the first 101 years of the Supreme Court's life—but for a brief period in the early 1800s—the Justices were also required to 'ride circuit,' and hold circuit court twice a year in each judicial district.").

[169] *See* Ragsdale, *supra* note 122.

[170] *See id.*; BIRD, *supra* note 122.

[171] The Sedition Act, if challenged, would have been brought up within the Ellsworth Court, which happened to last the same amount of time as the Adams administration (1796-1800). *Oliver Ellsworth Court (1796-1800),* JUSTIA, https://supreme.justia.com/supreme-court-history/ellsworth-court/ [https://.cc/85N8-BWXU].

[172] *Id.*

[173] *Id.*

1. Oliver Ellsworth: 1796–1800, pro-Sedition Act

Chief Justice Ellsworth strongly supported the Federalist Party and the Sedition Act. As a

northerner and the first senator from Connecticut, Ellsworth built a deep friendship with John Adams and other Federalist leaders.[174] In fact, Ellsworth ran for the presidency during the 1796 elections as a supporter of the Federalist Party.[175] Although he did not win, he could still support the Federalist cause on the bench. As a Justice, he occasionally issued advisory opinions.[176] On December 12, 1798, he wrote an advisory opinion to Timothy Pickering to support the constitutionality of the Sedition Act.[177] In the letter, he supported the view that British common law applied, allowing the Sedition Act to "permit[ ] the truth of a libel to be given in justification."[178] In the same letter, he supported the theory of exigency: "Whereas the increasing danger [and] depravity of the present time require that the law against sedition practices should be restored to its former vigor."[179] These theories supported by Ellsworth would land in a majority opinion if brought to the Supreme Court.

2. William Cushing: 1790–1810, pro-Sedition Act

Justice William Cushing initially supported an expanded form of free speech but eventually endorsed the Sedition Act once he took up the bench.[180] Before joining the Supreme Court, he supported the idea of "freedom to examine public measures," rejecting the Blackstone interpretation of freedom of speech.[181] He viewed sedition in a narrow scope: just actions that promoted a "forcible opposition to government."[182] In a letter to John Adams, Cushing explicitly endorsed the position of Madison and Jefferson: "But the words of our Article [First Amendment], understood according to plain English & common sense—make no such distinction, & must exclude subsequent restraints—as much as, previous restraints."[183]

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[174] *See Oliver Ellsworth*, CONN. SOC'Y SONS AM. REVOLUTION, https://www.sarconnecticut.org/oliver-ellsworth/ [https://perma.cc/7E3B-CHJG]; John R. Vile, *Oliver Ellsworth*, FREE SPEECH CTR (Mar. 18, 2024), https://firstamendment.mtsu.edu/article/oliver-ellsworth/ [https://perma.cc/C4QP-8GT4].

[175] *1796 Electoral College Results*, NAT. ARCHIVES, https://www.archives.gov/electoral-college/1796 [https://perma.cc/VU5R-XHVQ].

[176] William Castro, *Two Advisory Opinions by Chief Justice Oliver Ellswoth*, 6 GREEN BAG 2D 413 (2003), https://ttu-ir.tdl.org/server/api/core/bitstreams/ce99ade7-0580-4ba5-8d52-f177b8e67ecb/content [https://perma.cc/HZZ2-9LH6].

[177] *Id.*

[178] *Id.*

[179] *Id.*

His view changed dramatically after witnessing Shays's Rebellion in 1796 and succumbing to anti-French propaganda.[184] He became increasingly political in favor of the Federalist positions, "strongly implying that Republican expression fell in the category of 'scandalous and malicious falsehoods.'"[185] Cushing's position on the Sedition Act cemented once he began to rule on the matter. He "warned one grand jury that if 'licentiousness' went unpunished it would enable 'the worst men in a community, to overturn the freest government in the world.'"[186] This position appears to endorse the exigency argument.

3. James Wilson: 1789–1798, anti-Sedition Act

Justice Wilson stood alone as the only member of the Court who adamantly opposed the Sedition Act. He interpreted the First Amendment in the same way that Jefferson and Madison expressed: protecting against both prior and subsequent restraints on speech critiquing the government.[187] Wilson spoke about this perspective in legal lectures through his career.[188] He believed that the First Amendment "secured freedom to discuss the subjects that suffered most prosecution (criticism of 'the legislature or any branch of government'), and then repeated the rights to 'speak, write and print' on all subjects as stated in the

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[180] BIRD, *supra* note 122.

[181] *Id.*

[182] *Id.*

[183] Letter from William Cushing to John Adams (Feb. 18, 1789), https://founders.archives.gov/documents/Adams/06-19-02-0272 [https://perma.cc/6RXY-KQQR].

[184] BIRD, *supra* note 122.

[185] *Id.*

[186] Ragsdale, *supra* note 122.

[187] BIRD, *supra* note 122.

[188] *Id.*

1776 constitution."[189] Although, if on the bench during deliberations, he would likely be the sole author of a dissent.

4. James Iredell: 1790–1799, pro-Sedition Act

Justice Iredell supported the Sedition Act and Blackstone's interpretation of freedom of speech. During a public address, Iredell "held that Congress could provide for the punishment of criticism of government in the Sedition Act."[190] He supported this view due to his interpretation of the First Amendment. As a legal scholar, Iredell "had read Blackstone with 'innite [sic] pleasure & improvement."[191] He adopted his view on freedom of speech accordingly.[192] When presiding on a case charged under the Sedition Act, Justice Iredell "told another grand jury that the First Amendment was not intended to protect seditious libel from punishment."[193]

5. William Paterson: 1793–1806, pro-Sedition Act

Justice Paterson supported the Sedition Act, but he did not fully explain his constitutional theory backing his support.[194] While presiding in the U.S. Circuit Court for the District of Vermont, Paterson told the grand jury "that seditious libel was a crime against the people who had elected government officials."[195] The grand jury "publicly thanked Paterson for his remarks and agreed that domestic 'licentiousness' was a greater threat than 'hosts of invading foes.'"[196] Paterson also rejected the litigant's plea to argue against the constitutionality of the Sedition Act.[197]

6. Samuel Chase: 1796–1811, pro-Sedition Act

Justice Samuel Chase strongly supported the Sedition Act and even showed bias against litigants who challenged the law.[198] Chase presided over the trial of James Callender and Thomas Cooper. In both cases, he consistently interrupted the attorneys for the defendant, raised the traditional standards for evidence and other procedural matters, and made legal arguments on behalf of the state.[199] He instructed the jury in the Thomas Cooper trial that "Cooper's statements were 'directly calculated to bring him [John Adams] into contempt with the people' and 'to arouse the people against the President so as to influence their minds against him on the next election.'"[200] In these cases, Justice Chase ultimately decided to favor the British common law approach to freedom of speech, supporting the Sedition Act.[201]

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[189] *Id.*

[190] BIRD, *supra* note 122.

[191] *Id.*

[192] *Id.*

[193] Ragsdale, *supra* note 122.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

B. MOVING THROUGH HISTORY

If the Ellsworth Supreme Court ruled in favor of the Blackstone interpretation, subsequent First Amendment caselaw would likely restrict speech. After the sunset date of the Sedition Act, the Supreme Court did not address the interpretation of the First Amendment's protection of freedom of speech until 1812 in *United States v. Hudson*.[202] In *Hudson*, the federal government secured a conviction against newspaper editors on the count of common law criminal libel for critiquing Congress and President Jefferson.[203] The Court implicitly endorsed the view that the First Amendment protected individuals from government penalty under the charge of seditious libel: "[W]e consider it as having been long since settled in public opinion."[204] The Court did not perform a thorough analysis on free speech. Instead, it surrendered the legal interpretation of the First Amendment to the politically successful interpretation supported by Jefferson and Madison.[205] If the Ellsworth Court cemented Blackstone's approach to the First Amendment, the Court in *Hudson* may have instead followed that precedent, changing the landscape of critical caselaw in the 20th century.

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199. *Id.* These actions eventually led to Chase's impeachment in 1804 once the Democratic-Republicans took power in Congress. *Id.* at 7.

200. *Id.* Chase himself supported Adams and even pressured members of Congress to support Adams in the election of 1800. *Id.* at 30.

201. *Id.* at 17.

202. 7 Cranch 32, 32 (1812).

203. *Id.* at 32.

204. *Id.* Ironically, the theory of the First Amendment that Jefferson vocally supported later prevented his own prosecutors from securing a conviction against Jefferson's critics. *Id.*

205. *Id.*

The Supreme Court next addressed freedom of speech in 1919 in a reaction to criminal convictions on the Espionage Act of 1917.[206] During World War I, Congress passed the Espionage Act of 1917 out of fears that German immigrants would sabotage American war efforts.[207] President Wilson supported the new law: "If there should be disloyalty [amongst Germans in the United States], it will be dealt with with [sic] a firm hand of stern repression; but, if it lifts its head at all, it will lift it only here and there and without countenance except from a lawless and malignant few."[208]

The Espionage Act restricted speech by making it illegal to "communicate, deliver or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country. . . [a] document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defence [sic]."[209] Further, it penalized anyone who "wilfully [sic] make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war."[210] The federal government enforced this law during the war, leading to a high profile case reaching the Supreme Court in *Schenck v. U.S.*[211]

In *Schenck*, the federal government prosecuted the titular defendant for distributing leaflets that argued against the draft and advocated for eligible men to assert their rights and to oppose the war.[212] This act of speech violated two provisions of the Espionage Act.[213] As a defense, Schenck relied heavily on the First Amendment's protection of speech.[214] In its decision, the Court focused its analysis on its understanding of freedom of speech.[215] First, it explicitly rejected the Blackstone interpretation: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints."[216] Although, the Court still upheld the conviction by permitting a very narrow restriction on speech "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[217] While this limited the full protections offered in *Hudson*, the Court only permitted the federal government to narrowly restrict speech in particular situations.

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[206] Schneck v. United States, 249 U.S. 47 (1919).

[207] *The Espionage Act of 1917*, UNIV. HOUSTON, https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=3904 [https://perma.cc/6RAN-5FVU].

[208] Woodrow Wilson, Joint Address to Congress Leading to a Declaration of War Against Germany (Apr. 2, 1917).

[209] Title 12, § 2, of the Act of June 15, 1917 (Comp. St. 1918, § 10401b).

[210] Espionage Act of June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 217, 219 (Comp. St. 1918, § 10212c).

[211] 249 U.S.C. § 47.

[212] Schenck v. United States, 249 U.S. 47, 50 (1919).

[213] *See supra* notes 209–10.

[214] Schenck v. United States, 249 U.S. 47, 50 (1919).

The Supreme Court revisited its decision from *Schenck* to expand free speech protections after the wave of prosecutions from the Alien Registration Act of 1940 (commonly referred to as the Smith Act). The Smith Act allowed the federal government to prosecute any who "prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so."[218] The Smith Act was a spiritual successor to the Espionage Act.[219] Congress enacted it during World War II in order to stamp out immigrant dissention to war efforts.[220] The federal government continued to prosecute speech after the war, focusing its efforts on prosecuting individuals espousing communist sympathies.[221]

The Supreme Court applied the "clear and present danger" test in the first major Smith Act case, *Dennis v. United States*: "We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent."[222] After this ruling, the federal government pushed the limits of this narrow grant of authority, leading to a tailoring of the "clear and present danger" test in

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[215] *Id.* at 51.

[216] *Id.*

[217] *Id.* at 52.

[218] 18 U.S.C. § 2385 (1940).

[219] Jesse DeLauder, *The Seattle Seven: The Smith Act Trials in Seattle (1952–1958)*, UNIV. WA. (2008), https://depts.washington.edu/labhist/cpproject/SmithAct.shtml#_ednref22 [https://perma.cc/WJF7-ALXK].

[220] *Id.*

[221] *Id.*

[222] Dennis v. United States, 341 U.S. 494, 515 (1951).

Yates v. United States.[223] In *Yates*, the Supreme Court narrowed the Smith Act's restriction on free speech: "That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*."[224] This limited the type of speech that the Supreme Court deemed eligible to be considered a "clear and present danger," making it more difficult for the government to secure a conviction using the Smith Act.

If the Ellsworth Court cemented Blackstone's version of free speech, *Schenck, Dennis,* and *Yates* would have resulted in a significantly stronger restriction on speech. The Court in *Schenck* granted Schenck latitude due to the protection of the First Amendment reaching beyond prior restraint.[225] If instead, the Court viewed freedom of speech as only protecting against prior restraint, Schenck's conviction would have been upheld with a considerably shorter analysis from the Court. Schenck was arrested *after* distributing the leaflets, not before. Similarly, the federal government prosecuted litigants in *Dennis* and *Yates* for speech made prior to arrest and conviction. Under Blackstone, the federal government's actions would be aligned with free speech protection.

In our timeline, the Supreme Court further expanded free speech protections under the First Amendment in *Brandenburg v. Ohio,* overturning the "clear and present danger" test.[226] This case replaced the "clear and present danger" test with an "imminent lawless action" test.[227] The government could only penalize speech if it led to an incitement of imminent lawless action; this distinction narrowed the government's ability to penalize speech by creating the high barrier to prove that lawless action would not just exist but be imminent.[228] A later case, *Hess v. Indiana*, clarified that the imminent lawless action must be directed towards a person or group of persons, otherwise it is a restriction.[229] This greatly narrowed the ability for the government to penalize seditious speech. Like the outcome of previous cases, a Blackstone free speech precedent would remove the necessity of the "imminent lawless action" test. Arrests in *Brandenburg* and *Hess* occurred after the litigant performed the incriminating act of speech. If brought before the Ellsworth Court, the Sedition Act would have truly altered freedom of speech case law.

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[223] 354 U.S. 298 (1957).

[224] *Id.* at 321–22.

[225] *See id.* at 50.

[226] 395 U.S. 444, 448–49 (1969).

[227] *Id.*

[228] *Id.*

[229] 414 U.S. 105, 107 (1973).

Beyond seditious speech, the Blackstone interpretation would impact other types of free speech cases, particularly the ability for a public figure to sue for defamation under *New York Times v. Sullivan*.[230] In the case, Montgomery, Alabama police commissioner L.B. Sullivan sued the New York Times over an article that he claimed made defamatory statements about the treatment of civil rights protectors, including Dr. Martin Luther King Jr.[231] Ultimately, the Court determined that the legitimacy of this claim rested on the interpretation of the First Amendment's protection of freedom of speech.[232] The Court then reviewed a series of cases that wholeheartedly endorsed a very expansive view of free speech; not a view that limited free speech to a prohibition on prior restraint.[233]

Even though these cases primarily applied the First Amendment in a criminal context, the Justices still viewed the Amendment's interpretation as important enough to implement in the civil context. The opinion next directly addressed the public debates over the Sedition Act and Jefferson and Madison's successful public debate on the meaning of free speech.[234] From this understanding, the Court constructed a rule that set an extremely high bar for a public official to successfully win a defamation case: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[235]

Without the success of Jefferson and Madison, the Court would not have come to this conclusion. These grounding historical principles, combined with the facts of *Sullivan*, make it challenging for today's Supreme Court to overturn the precedent. *Sullivan* affirmed that the principles of the First Amendment, even those exclusively discussed in the criminal context, broadly apply to civil law.

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[230] 376 U.S. 254 (1964).

[231] *Id.* at 254.

[232] *Id.* at 269 ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

[233] *Id.* at 269–71.

[234] *Id.*

[235] *Id.* at 279–80.

CONCLUSION

Fortunately, history rejected Blackstone's approach to free speech, a narrow view that would only permit the Court to strike down laws imposing prior restraint on speech. The Ellsworth Court supported this view. If this court had decided a case challenging the Sedition Act, it likely would have adopted the Blackstone approach in First Amendment case law. Therefore, precedent would have led to a narrower application of the First Amendment in subsequent cases, including the Espionage Act cases, the Smith Act cases, and perhaps *NYT v. Sullivan.* As a result, modern courts would be less likely to limit infringement of free speech by the executive, granting an immense degree of power to the president.

The United States would operate very differently if the president had the authority to silence dissenters, as Blackstone's theory of freedom of speech permitted. Hopefully, this paper serves as an exercise in historical analysis. But President Trump has not been afraid to wield power from the Alien and Sedition Acts before. If *any* president—with or without the support of Congress—attempts to do an iteration of the Sedition Act, legal experts need to be ready to mount a challenge, and the people need to take a page from 1800s America and vote accordingly.