lation.[1171] Objecting to the balancing approach inherent in this test because it "might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so," Justice Kennedy argued instead for a rule of *per se* invalidity.[1172] But compelling interest analysis can still be useful, Justice Kennedy suggested, in determining whether a regulation is content-based or content-neutral; in those cases in which the government tenders "a plausible justification unrelated to the suppression of expression," application of the compelling interest test may help to determine "whether the asserted justification is in fact an accurate description of the purpose and effect of the law." [1173]

Seditious Speech and Seditious Libel.—Opposition to government through speech alone has been subject to punishment throughout much of history under laws proscribing "seditious" utterances. In this country, the Sedition Act of 1798 made criminal, inter alia, malicious writings that defamed, brought into contempt or disrepute, or excited the hatred of the people against the government, the President, or the Congress, or that stirred people to sedition.[1174] In *New York Times Co. v. Sullivan*,[1175] the Court surveyed the controversy surrounding the enactment and enforcement of the Sedition Act and concluded that debate "first crystallized a national awareness of the central meaning of the First Amendment. . . . Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . [That history] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." The "central meaning" discerned by the Court, quoting Madison's comment that in a republican government "the censorial power is in the people over the Government, and not in the Government over the people," is that "[t]he right of free public discussion of the stew-

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[1171] *But see* Burson v. Freeman, 504 U.S. 191 (1992) (state law prohibiting the solicitation of votes and the display or distribution of campaign literature within 100 feet of a polling place upheld as applied to the traditional public forum of streets and sidewalks). The *Burson* plurality phrased the test in terms of whether the law was "necessary" to serve compelling state interests. Id. at 199, 206.

[1172] Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 124–25 (1991) (concurring).

[1173] Burson v. Freeman, 504 U.S. 191, 213 (1992) (concurring).

[1174] Ch. 74, 1 Stat. 596. Note also that the 1918 amendment of the Espionage Act of 1917, ch. 75, 40 Stat. 553, reached "language intended to bring the form of government of the United States . . . or the Constitution . . . or the flag . . . or the uniform of the Army or Navy into contempt, scorn, contumely, or disrepute." *Cf.* Abrams v. United States, 250 U.S. 616 (1919). For a brief history of seditious libel here and in Great Britain, *see* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 19–35, 497–516 (1941).

[1175] 376 U.S. 254, 273–76 (1964). *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).