

pears that there emerged in the course of the Jeffersonian counter-attack on the Sedition Act<sup>383</sup> and the use by the Adams Administration of the Act to prosecute its political opponents,<sup>384</sup> something of a libertarian theory of freedom of speech and press,<sup>385</sup> which, however much the Jeffersonians may have departed from it upon assuming power,<sup>386</sup> was to blossom into the theory undergirding Supreme Court First Amendment jurisprudence in modern times. Full acceptance of the theory that the Amendment operates not only to bar most prior restraints of expression but subsequent punishment of

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cess in deflecting the Federalist intention to censure such societies. I. BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800* at 416–20 (1950). “If we advert to the nature of republican government,” Madison told the House, “we shall find that the censorial power is in the people over the government, and not in the government over the people.” 4 *ANNALS OF CONGRESS* 934 (1794). On the other hand, the early Madison, while a member of his county’s committee on public safety, had enthusiastically promoted prosecution of Loyalist speakers and the burning of their pamphlets during the Revolutionary period. 1 *PAPERS OF JAMES MADISON* 147, 161–62, 190–92 (W. Hutchinson & W. Rachal, eds., 1962). There seems little doubt that Jefferson held to the Blackstonian view. Writing to Madison in 1788, he said: “A declaration that the Federal Government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed.” 13 *PAPERS OF THOMAS JEFFERSON* 442 (J. Boyd ed., 1955). Commenting a year later to Madison on his proposed amendment, Jefferson suggested that the free speech-free press clause might read something like: “The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations.” 15 *PAPERS*, *supra*, at 367.

<sup>383</sup> The Act, 1 Stat. 596 (1798), punished anyone who would “write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute.” See J. SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956).

<sup>384</sup> *Id.* at 159 et seq.

<sup>385</sup> L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* ch. 6 (1960); *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964). But compare L. LEVY, *EMERGENCE OF A FREE PRESS* (1985), a revised and enlarged edition of *LEGACY OF EXPRESSION*, in which Professor Levy modifies his earlier views, arguing that while the intention of the Framers to outlaw the crime of seditious libel, in pursuit of a free speech principle, cannot be established and may not have been the goal, there was a tradition of robust and rowdy expression during the period of the framing that contradicts his prior view that a modern theory of free expression did not begin to emerge until the debate over the Alien and Sedition Acts.

<sup>386</sup> L. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963). Thus President Jefferson wrote to Governor McKean of Pennsylvania in 1803: “The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one.” 9 *WORKS OF THOMAS JEFFERSON* 449 (P. Ford ed., 1905).