NOTES

THE JEFFERSONIAN MYTH IN SUPREME COURT SEDITION JURISPRUDENCE

I. INTRODUCTION

Although many individuals deserve credit as founders of the American constitutional system, Thomas Jefferson often receives special, almost mythical, reverence as an advocate of individual freedoms.[1] In this role as an American folk hero, Jefferson has influenced not only the public perception of the government's proper role and responsibilities,[2] but also the understanding of the American constitutional system promulgated by the United States Supreme Court.[3]

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1. *See, e.g.*, James R. Wiggins, *Jefferson and the Press*, *in* THOMAS JEFFERSON: THE MAN . . . HIS WORLD . . . HIS INFLUENCE 156 (Larry Weymouth ed., 1973) (stating that "Thomas Jefferson believed in freedom of the press more unreservedly than any President of the United States before or since and more completely than any public man in American history, with the possible exception of Associate Justice Hugo Black"); Leonard Levy, *Jefferson as a Civil Libertarian*, *in* THOMAS JEFFERSON: THE MAN . . . HIS WORLD . . . HIS INFLUENCE , *supra*, at 189 [hereinafter Levy, *Civil Libertarian*] (noting that Abraham Lincoln recognized Jefferson's principles as the "definitions and axioms of free society").

2. *See, e.g.*, Benjamin Schwarz, *What Jefferson Helps to Explain*, THE ATLANTIC MONTHLY, Mar. 1997, at 69-72 (discussing Jefferson's role in establishing the "American Creed").

3. Jefferson has had a major influence on American jurisprudence. *Cf.* Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring) (noting that "the views of Alexander Hamilton (a draftsman) [do not] bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution"). Much of Jefferson's influence has been on issues central to his philosophy, including the proper relationship between the States and the central government, *see, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 271 (1983) (Powell, J., dissenting) (arguing that Jefferson's Kentucky Resolutions support the notion that every state may assert its rights against the federal government); Youngstown Sheet & Tubing Co. v. Sawyer, 343 U.S. 579, 638 n.5 (Jackson, J., concurring) (citing a letter from Jefferson to John Breckenridge as evidence that the states' delegation of powers to the federal government should not be increased through the use of implied powers); the importance of education, *see, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (saying that education was the "basis of hope for the perdurance of our democracy" since the time of Jefferson); and First Amendment protection of the individual rights of speech, *see, e.g.*, Kingsley Int'l Picture Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 n.11 (1959), and religion, *see, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 n.28 (1973) (employing Jefferson's metaphor of the wall separating church and state as support for individual religious freedom); Illinois *ex rel.* McCollum v. Board of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 211, 231 (1948) (same); *see also* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 502-03 (1982) (saying that because Jefferson and James Madison played a leading role in the adoption of the First Amendment, their Virginia bill regarding religious freedom should be used to gain a better understanding of the Establishment Clause).

The Supreme Court has also turned to Jefferson's writings to gain insight into numerous other issues, including: the constitutionality of a congressional veto, *see, e.g.*, FERC v. Mississippi, 456 U.S.

Jefferson's myth has enshrined him as a great advocate of individual liberties,[4] but the reality seems to have been a more pragmatic, and consequently a more repressive, figure.[5] This Note examines the tension between the myth and the reality[6] of Jefferson's beliefs regarding seditious political expression, and how the Supreme Court acknowledges this tension while attempting to delineate the permissible scope of government regulation of such speech.[7] In exploring Jefferson's dual nature and the Court's use of both his real and mythical nature as support for its judicial reasoning, this Note will demonstrate that the Court's more absolutist,[8] libertarian[9] members

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742, 794 n.32 (1982) (O'Connor, J., concurring and dissenting) (noting that Jefferson told Madison that he disapproved of a proposed congressional veto); the right of trial by jury, *see, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 n.10 (1979) (Rehnquist, J., dissenting) (citing Jefferson's assertion that trial by jury is the anchor which holds the government to the constitutional principles); and the proper role of women in society, *see e.g.*, Frontiero v. Richardson, 411 U.S. 677, 685 n.13 (1973) (quoting Jefferson's statement that women should be "neither seen nor heard in society's decisionmaking councils").

4. *See infra* notes 20-68 and accompanying text.

5. *See infra* notes 69-109 and accompanying text.

6. *See infra* notes 12-109 and accompanying text. Leonard Levy argues that when discussing Jefferson's beliefs regarding individual liberty, posterity has adopted the "rhetoric for the reality." *See* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 327 (Leonard W. Levy ed., 1966) [hereinafter FROM ZENGER TO JEFFERSON]. I draw on this dualism Levy identifies, using the terms "myth" and "rhetoric" interchangeably.

7. *See infra* notes 110-243 and accompanying text. The Supreme Court has not separated a particular body of law as its "sedition jurisprudence," and the exact boundaries of this area seem somewhat uncertain. Some commentators, for example, have noted similarities between political sedition cases of the 1940s and 1950s and other cases, such as those involving civil rights activists. *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 152 (2d ed. 1994). Guided largely by the scope of Jefferson's writings on free speech, as well as the Court's use of those writings, this Note does not analyze the cases that a broader definition of "sedition" would contain. Rather, it adheres to a narrower definition of sedition, defined by *Black's Law Dictionary* as follows:

> Communication or agreement which has as its objective the stirring up of treason or certain lesser commotions, or the defamation of the government. Sedition is advocating, or with knowledge of its contents knowingly publishing, selling or distributing any document which advocates, or, with knowledge of its purpose, knowingly becoming a member of any organization which advocates the overthrow or reformation of the existing form of government of this state by violence or unlawful means. Any insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquility of the state.

BLACK'S LAW DICTIONARY 1357 (6th ed. 1990); *see also* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1290 (1989) (offering as the first definition of sedition "incitement of discontent or rebellion against a government"). Even this narrow definition of sedition, however, results in some blurring of the distinction of Supreme Court jurisprudence involving the rights of free association and free political expression. *See, e.g.*, Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 937 n.6 (1987) (defining "political speech" broadly to include "expression or association based on current events, controversial viewpoints, and governmental or 'political' issues that are of widespread public interest").

8. "Absolutists" interpret the Free Speech Clause of the First Amendment, that "Congress shall make no law . . . abridging the freedom of speech . . . ," U.S. CONST. amend. I, literally so as to prevent Congress from imposing virtually all restraints on free speech. *See generally* JOHN E. NOWAK

tend to evoke the myth of Jefferson when writing opinions on the First Amendment. However, both these Justices and Justices more willing to permit government restriction on speech recognize the historical Jefferson was quite willing to impose limitations on political expression. In its treatment of Jefferson, the Court demonstrates an intellectual honesty rarely employed in other segments of American society.

Part II of this Note probes the historical figure of Thomas Jefferson to unearth the distinction between the mythical or rhetorical view of Jefferson's position on seditious political expression and the reality of his views. The Note separates the analysis to consider the mythical Jefferson in Part II.A, while investigating the more historically accurate Jefferson in Part II.B. Part III chronologically analyzes the Court's use of Jefferson's writings to develop a standard for reviewing government suppression of political

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& RONALD D. ROTUNDA, NOWAK AND ROTUNDA ON CONSTITUTIONAL LAW § 16.7, at 993-96 (5th ed. 1995) [hereinafter NOWAK & ROTUNDA].

In his article *Absolutism: Unadorned, and Without Apology*, Lyle Denniston provides a more complete and compelling analysis of absolutism. *See* Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351 (1992). Denniston sets forth thirteen pragmatic examples that he advocates an unadorned real-world absolutism should endorse. *See id.* at 353-56. Some of Denniston's pragmatic examples include: "an absolute ban on all forms of post-publication legal accountability," *id.* at 353; "no tort liability for acts of omission or commission in advertising content," *id.* at 354; "no system of prior- or post-publication restraint upon the publication of national security data," *id.* at 355; an end to the "limited public forum" concept because all fora would have to include space for speech or expressive conduct, *see id.*; public support for expression in the arts, professions, and broadcastings that would be granted without regard to content, *see id.*; and complete toleration of free speech and expression at publicly-operated schools, colleges, and universities. *See id.* at 356.

Denniston's principles produce a radical theory of the First Amendment that no Supreme Court Justice has yet adopted. Professor Denniston notes that those Justices who have been most liberal in their understanding of the First Amendment—notably Justices William Brennan, Hugo Black, and William Douglas—have been understood to be absolutist "despite the easily demonstrable fact that every one of them put substantial qualifiers into his interpretation of the First Amendment." *Id.* at 362; *accord* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 351 n.167 (1996) [hereinafter White, *Comes of Age*] (admitting that absolutism has "never been the equivalent of unlimited protection for all speech"). Therefore, this Note will use the term absolutism less forcefully to characterize those opinions where Justices presume speech is almost completely protected and argue government may not impose restraints on political sedition. This seems consistent with a common understanding of the term absolutist. *Accord* White, *Comes of Age*, *supra*, at 351 n.167.

9. Commentators often use "libertarian" to distinguish those writers and Justices who support constitutional protection for free expression. *See, e.g.*, David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1209 (1983) [hereinafter Rabban, *First Amendment*] (discussing the "relatively libertarian" construction of the First Amendment supported by Zechariah Chafee, Ernst Freund, and Learned Hand); LEONARD LEVY, LEGACY OF SUPPRESSION 249-309 (1960) (discussing the emergence of an "American Libertarian Theory"). This usage seems consistent with the commonly understood meaning of the adjective libertarian, often understood as "advocating liberty or conforming to principles of liberty." *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 7, at 826. Thus libertarian is used throughout this Note to indicate a support for greater freedom of expression protected from government limitation.

sedition. Part III shows that in their opinions the more absolutist or libertarian Justices cite Jefferson as support for greater individual freedom, yet even they recognize the real Jefferson might have shown less tolerance for political sedition. Part IV concludes that Jefferson's myth and reality live in the Supreme Court's sedition jurisprudence, and that while ultimately Jefferson's myth serves only to facilitate some Justices' search for unrestricted seditious expression, both the more libertarian and more proscriptive opinions recognize the need to respect Jefferson's views while reviewing government restrictions on political expression.

II. JEFFERSON'S PRINCIPLES ON POLITICAL SEDITION: THE RHETORIC AND THE REALITY

Although Jefferson was not present at the Constitutional Convention,[10] his writings provide a major source of insight into the Framer's "original intent."[11] Using Jefferson's writings to support a particular interpretation of the Constitution, however, sometimes proves dangerous because two Jeffersons exist: one historical, the other mythical and rhetorical.[12] In addition to being the so-called "Philosopher of the Revolution"[13] and the "Champion of Freedom of the Mind,"[14] Jefferson was a real world political figure, a fiery revolutionary,[15] and one of the nation's first presidents.[16] As a

10. Thomas Jefferson was serving as the United States' minister to France during the Convention, and thus did not attend. *See* LINDA R. MONK, THE BILL OF RIGHTS: A USER'S GUIDE 33 (1991). Although not participating in the Convention, Jefferson remained in close communication with his friend and fellow Virginian, James Madison, who kept him informed regarding the events there. *See, e.g.*, Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 218-20 (Helen E. Veit *et al.* eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS]; Letter from James Madison to Thomas Jefferson (Mar. 29, 1789), *in* CREATING THE BILL OF RIGHTS, *supra*, at 225; Letter from James Madison to Thomas Jefferson (May 27, 1789), *in* CREATING THE BILL OF RIGHTS, *supra*, at 240; *see also* CALEB PERRY PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 32-40 (1953).

11. *See* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON x (1994) (providing a list of constitutional provisions and interpretations that reflect Jefferson's influences).

12. For more on this dichotomy, see *supra* note 6.

13. *See* MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 32 (1970).

14. *See* PATTERSON, *supra* note 10, at 179.

15. Among his other tasks during the early days of the American Revolution, Thomas Jefferson helped draft the *Declaration of the Causes and Necessities of Taking Up Arms* for General George Washington to issue. *See* THE FOUNDING FATHERS: THOMAS JEFFERSON, A BIOGRAPHY IN HIS OWN WORDS 54-55 (Joseph L. Gardner ed., 1974) [hereinafter BIOGRAPHY IN HIS OWN WORDS]. In his draft of this declaration, Jefferson included a great deal of incendiary prose, *see id.* at 55, including a promise that the colonists would lay down their weapons "when Hostilities shall cease on the part of the Aggressors, and all danger of their being renewed shall be removed, and not before." *Id.* at 58. Many of Jefferson's more radical pronouncements were removed by John Dickinson, and the

real-world figure, he sometimes faithfully adhered to his political ideals, particularly those concerning the need to separate government from religion.[17] His actions regarding other freedoms, however, demonstrate a divergence between the actual and the philosophic figure.

Jefferson's view on political sedition is one area where his philosophic principles and real-world actions diverge. Therefore, this Note first examines the divide between the rhetorical Jefferson and the myth that rhetoric created—that Jefferson "never at any time suggested any limitation on freedom of the speech or the press"[18]—with the historical, more pragmatic figure who demonstrated a willingness to restrict individual political activity to preserve a strong, functioning government.[19]

A. The Myth of Jefferson and His Views on Sedition

The myth that Jefferson advocated full freedom of expression[20] probably gains force in most Americans' minds from the first impression of Jefferson Americans receive: we first learn of Jefferson himself as an early American revolutionary[21] who helped draft the Declaration of Independence[22] and whose personal motto stated that "rebellion to tyrants is obedience to God."[23]

Continental Congress approved Dickinson's tamed final draft. *See id.* at 55, 58-59; *cf.* 1 DUMAS MALONE, JEFFERSON AND HIS TIME 205-07 (1948) (noting Dickinson "watered down" Jefferson's draft, but also included a number of boastful emedations).

16. *See* PETERSON, *supra* note 13, at 654.

17. *See* Levy, *Civil Libertarian*, *supra* note 1, at 190-91 (recounting that Jefferson adhered faithfully to his view regarding the separation between church and state).

18. *See id.* at 185. Levy elaborates on this heroic portrayal of Jefferson: "Jefferson . . . has been historically depicted as our foremost apostle of freedom, the noblest and most libertarian of all, caught for posterity in the mythic stance of swearing eternal hostility to every form of tyranny over the mind of man." *See* FROM ZENGER TO JEFFERSON, *supra* note 6, at 327. In this quotation, Levy's words "swearing eternal hostility to every form of tyranny" allude to the quotation etched inside the dome of the Jefferson Memorial in Washington, D.C. *See id.* at 357.

19. *See, e.g.*, PETERSON, *supra* note 13, at 714-15 (discussing Jefferson's pragmatic response to the Callender libels); *see also infra* notes 89-93 and accompanying text.

20. *See, e.g.*, PATTERSON, *supra* note 10, at 179, 183-85.

21. Long before most Americans seriously considered revolting against English rule, Jefferson had started questioning British authority in the American Colonies and, as a member of the Virginia Burgess, he had sought to circumscribe English power. *See* BIOGRAPHY IN HIS OWN WORDS, *supra* note 15, at 41-42; *see also* MALONE, *supra* note 15, at 169-73, 178-79 (discussing Jefferson's anti-British activities as a member of the Virginia House of Burgess). This dissent from English rule grew stronger in 1774 when, after the Boston Tea Party, Jefferson and other members of the Virginia House of Burgesses elected to "boldly take an unequivocal stand in line with Massachusetts." BIOGRAPHY IN HIS OWN WORDS, *supra* note 15, at 42. Soon Jefferson had been selected as a delegate to the Continental Congress, and took a more central role in formulating the revolutionary philosophy of the colonies. *See id.* at 44-45; MALONE, *supra* note 15, at 196.

22. *See* MALONE, *supra* note 15, at 220.

23. 1 WORKS OF JEFFERSON 677 (Boyd ed., 1955); 16 WORKS OF JEFFERSON, *supra*, at xxxii.

This first impression of Jefferson the revolutionary is reinforced by some of his well-known statements advocating protection of political dissenters, such as: "If there be any among us who would wish to dissolve this Union or to change its Republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it."[24]

Beyond these initial impressions, Jefferson's life provides substantial evidence that he appreciated and supported revolutionaries and the expression of revolutionary or seditious principles. Three instances of revolution in Jefferson's life and his reflections regarding those incidents provide ample support for this aspect of Jefferson's myth. Those three events are: (1) Jefferson's conduct during the American Revolution; (2) his response to Shays's Rebellion and the French Revolution; and (3) his reaction to the Alien and Sedition Acts during the 1800 election.

First, during the American Revolution, Thomas Jefferson served as both a philosophical[25] and political leader[26] of the American colonists. These experiences reinforced the mythical persona of Jefferson as an advocate for permitting seditious expression. As a philosophical leader, Jefferson authored the Declaration of Independence to justify the American Revolution to the world community[27] and to proclaim his beliefs that humans are by nature free and institute government by consent.[28] The English government, Jefferson asserted, violated the terms of this voluntary union between the people and the crown;[29] therefore, the American rebellion was legally justified.[30] Today, these philosophic writings, which formed a foundational theory for the

24. FROM ZENGER TO JEFFERSON, *supra* note 6, at 358.

25. *See generally* MALONE, *supra* note 15, at 169-231.

26. *See id.* at 301-69.

27. *See* Letter from Thomas Jefferson to Henry Lee, 12 WORKS OF THOMAS JEFFERSON 408, 409 (Paul Leicester Ford ed., 1905); *see also* MAYER, *supra* note 11, at 25-26, 37-45. Jefferson wrote his *Summary View of the Rights of British America* for much the same reason, i.e., to provide the full constitutional grounds for the American Revolution. *See id.* at 29.

28. *See* MALONE, *supra* note 15, at 173; *see also* MAYER, *supra* note 11, at 30-32 (describing how Jefferson's belief in the colonists' freedom was based on Whig historical notions that the American colonists, like the Saxons in Britain, had conquered the American continent, and that subsequently through a 1651 charter the Virginia Cavaliers had surrendered some of their freedom and political control to the King).

29. *See* MALONE, *supra* note 15, at 175; MAYER, *supra* note 11, at 32-35, 41.

30. *See* MAYER, *supra* note 11, at 42-43 (describing how Jefferson wrote the *Declaration of Independence* to prove that a "long train of abuses and usurpations" necessitated the revolt to throw off tyranny). Mayer also describes how Jefferson's *Declaration* listed the offenses of the King, including suspending legislation, dissolving assemblies, making judges dependent on the King's will, and keeping standing armies, in terms of crimes recognized under English constitutional law. *See id.* at 43-44.

American Revolution, continue to receive a special reverence.[31]

During the American Revolutionary War, Jefferson also sought to recreate the Commonwealth of Virginia as a model philosophical community established for other colonies to copy.[32] This model community reflected Jefferson's adherence to individual human rights and his strong emphasis on individual education.[33]

As a political leader, Jefferson experienced the treachery of sedition and treason firsthand yet maintained his enthusiasm for the American Revolution. Serving as governor of Virginia, Jefferson narrowly escaped capture twice: first, when British forces under the traitor Benedict Arnold stormed Richmond in January 1781;[34] and second, when forces under the command of General Charles Cornwallis overran Charlottesville six months later.[35] These perilous experiences did not, however, deter Jefferson's revolutionary spirit. In June 1781, after numerous British successes and colonial setbacks, Jefferson spoke with the same conviction he had when he drafted the Declaration of Independence in July 1776. Jefferson boasted of the colonists' military "successes," saying that after more than six years of fighting, the British had won "no more land than would serve for the burial of their soldiers."[36] Jefferson also claimed that victory was inevitable: "[P]eace is not far off.... The English cannot hold out long, because all the world is against them."[37]

In addition to his role as a political and philosophic leader during the American Revolutionary War, Jefferson's role and reactions to two post-Revolutionary War uprisings, the French Revolution and Shays's Rebellion, helped secure the myth of Jefferson as an advocate for revolution and as a protector of rebellious speech. Jefferson served as the American ambassador to France during the French Revolution of 1789[38] and was very enthusiastic regarding the French[39] and their revolution.[40] He assisted the revolutionaries,

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31. *See generally, e.g.*, PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

32. *See* MALONE, *supra* note 15, at 235-40.

33. *See id.*

34. *See* PETERSON, *supra* note 13, at 203.

35. *See* BIOGRAPHY IN HIS OWN WORDS, *supra* note 15, at 104-05. Jefferson seems to have been one of the targets of the British raid, for Lieutenant Colonel Banastre Tarleton later reported to Cornwallis that "the attempt to secure Mr. Jefferson was ineffectual." *See* MALONE, *supra* note 15, at 357.

36. MALONE, *supra* note 15, at 353.

37. *Id.* It deserves note, however, that Jefferson here might have been rallying his audience, not speaking his personal convictions.

38. *See generally* PETERSON, *supra* note 13, at 370-85. Peterson says Jefferson hoped only to be a spectator, but could not completely escape participation in the French Revolution. *See id.* at 370.

39. *See* Merrill D. Peterson, *Thomas Jefferson: A Brief Life*, *in* THOMAS JEFFERSON: THE MAN . .

for example, by giving them advice regarding their *Declaration of the Rights of Man*.[41] He also praised the French Revolution itself, for he believed it would lead to a greater revolution and the eventual liberation of Europe.[42] This enthusiasm for the promise of the French revolutionaries' cause blinded him somewhat to its dangers. Shortly before the Reign of Terror, Jefferson wrote: "Rather than [the French Revolution] fail, I would have seen half the world desolated."[43]

Jefferson's enthusiasm for the French Revolution waned as he witnessed the Reign of Terror; he saw Napoleon's rise to power as ending any chance for the survival of a French democracy.[44] However, Jefferson's enthusiasm for the ill-fated French Revolution would haunt Jefferson later in his political career: during the 1800 election, for example, Jefferson was often attacked for being a Francophile and Jacobin.[45]

Jefferson similarly lauded the American uprising known as the Shays's Rebellion. Jefferson was representing American interests in Paris[46] when Shays's Rebellion—an uprising of Massachusetts' veterans, debtors, and other discontents—erupted in 1786,[47] but he remained well-apprised of the

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. HIS WORLD . . . HIS INFLUENCE, *supra* note 1, at 27 [hereinafter Peterson, *Brief Life*]. According to Peterson, Jefferson considered France an ally and trading partner necessary for the survival of the United States. *See id.*

40. *See* ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 60-61 (1964) (discussing Jefferson's excited letters to Madison regarding the French Revolution); *see also* MAYER, *supra* note 11, at 103 (relating that "[e]ven after the Reign of Terror, Jefferson was extraordinarily tolerant of what he perceived to be the people's efforts to restore their liberties").

41. *See* PATTERSON, *supra* note 10, at 63.

42. *See* Peterson, *Brief Life*, *supra* note 39, at 25-26 (reporting that Jefferson described the French Revolution as "the first chapter in the history of European liberty").

43. Letter from Thomas Jefferson to William Short (Jan. 3, 1793), *in* 25 THE PAPERS OF THOMAS JEFFERSON 14 (John Catanzariti ed. 1992).

44. *See* PETERSON, *supra* note 13, at 628.

45. *See, e.g.*, Fisher Ames, *Laocoon, No. 1*, *reprinted in* THE WORKS OF FISHER AMES 94 (J.T. Kirkland ed., 1809) (calling Jefferson and his followers Jacobins guilty of subversion); *see also* PETERSON, *supra* note 13, at 564, 594-603 (describing the XYZ Affair, public hostility to France, and how this hostility was used to attack Jefferson and his Republican allies during the 1800 election).

46. *See supra* note 38 and accompanying text.

47. *See* CHARLES A. BEARD ET AL., THE BEARD'S NEW BASIC HISTORY OF THE UNITED STATES 124-25 (1968). Under the Massachusetts Constitution drafted by John Adams and put into effect in 1780, creditors could bring suit and take the property of those debtors who could not or did not repay their debts. *See id.* A severe economic downturn following the American Revolution and a huge increase in the number of suits brought for debt caused many Massachusetts residents to become incensed at this practice. *See* RICHARD B. MORRIS, THE FORGING OF THE UNION 260 (1987) (noting there were four thousand suits for debt in Worcester County alone from 1785-1786).

Captain Daniel Shays, a former Revolutionary War soldier, was one of a group of leaders who helped lead a 1786 uprising in Massachusetts. *See* MORRIS, *supra*, at 262. Shays and his colleagues sought to close the courts in the western part of the state with force. *See* BEARD, *supra*, at 125. Their "troops" consisted mainly of discontented veterans, small farmers, mechanics, and respected figures. *See* MORRIS, *supra*, at 262.

unrest through numerous correspondences.[48] Jefferson would later criticize the unsuccessful rebellion[49] because he considered the citizens' resort to violence "absolutely unjustifiable."[50] Yet he did not bristle with outrage over the insurgence as some of his contemporaries did,[51] nor did he lament the resulting violence. Instead, Jefferson's writings stressed the benefits that an uprising might bring. He called Shays's Rebellion "a medicine necessary for the sound health of government."[52] Jefferson wrote that no government should govern a long time without such a rebellion and that similar rebellions serve as a check on governmental authority.[53] Jefferson saw Shays's Rebellion as an example of the need for discontent in a free society.[54] He told James Madison that the best way for a government to avoid violent uprisings was to permit a free press and keep the populace informed.[55] Thus,

48. *See* MAYER, *supra* note 11, at 102 (discussing the correspondences written between Jefferson and Madison regarding the rebellion).

49. When the federal government failed to offer decisive opposition to the uprising, the propertied classes of eastern Massachusetts raised their own army of about 4400 troops under General Benjamin Lincoln. *See* MORRIS, *supra* note 46, at 263. Communications problems then caused Shays, incorrectly believing that he would soon receive reinforcements, to attack a federal armory in Springfield, Massachusetts. *See id.* at 264. The federal artillery halted Shays's assault, and Lincoln's troops arrived to rout the remaining rebel forces. *See id.*.

50. MAYER, supra note 11, at 102.

51. *Cf.* PETERSON, *supra* note 13, at 358 (noting that John Jay became furious over the uprising).

52. MAYER, *supra* note 11, at 102.

53. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* Scales v. United States, 367 U.S. 203, 273-74 (1961). In a second letter regarding Shays's Rebellion, Jefferson further developed his belief that uprisings were beneficial to government and individual liberty. He asserted that the country should have at least one rebellion every twenty years so that the citizens would not become too lethargic—Jefferson considered lethargy the "forerunner of death to public liberty"—and so the rulers would recognize that the citizens had preserved their "spirit of resistance." *See* Letter from Thomas Jefferson to William Smith (Nov. 13, 1787), *reprinted in* 12 WORKS OF JEFFERSON 356-57 (Boyd ed. 1955). "The tree of liberty," Jefferson wrote Smith, "must be refreshed from time to time with the blood of patriots and tyrants. It's natural manure." *Id.* Jefferson felt rebellion was necessary to preserve the liberty of the people, and the deaths involved were only the cost of achieving that necessary end.

54. MAYER, *supra* note 11, at 102.

55. Jefferson believed education and information would best induce the people to remain loyal to and peaceful under a government. *See* Letter from Thomas Jefferson to James Madison, *supra* note 53, *in Scales*, 367 U.S. at 273; *see also* MAYER, *supra* note 11, at 170 (commenting that Jefferson believed the best way to prevent "irregular interpositions of the people" was to provide full information through a free press). Jefferson admitted people may not remain adequately informed even with a free flow of information, but he dismisses the resulting violence and deaths as therapeutic and refreshing for the state. *See* Letter to William Smith, *supra* note 53, at 35.

Interestingly, Jefferson did not greet a second American uprising that occurred less than a decade after Shays's Rebellion with similar approval. In 1794, Pennsylvania farmers started the Whiskey Rebellion in protest after Alexander Hamilton taxed their only cash crop. *See* BIOGRAPHY IN HIS OWN WORDS, *supra* note 15, at 254-55. President George Washington sent Hamilton with an army to. suppress this uprising, and Hamilton quickly and decisively did so. *See id.* at 254.

Jefferson gave the participants in the Whiskey Rebellion little sympathy or praise. Serving as Secretary of State, Jefferson himself signed the proclamation against the rebels. *See* Levy, *Civil*

Jefferson's reaction to Shays's Rebellion showed at least a rhetorical commitment to sedition, for he supported revolution as a cleansing and tempering process for government.

The third incident that helped reinforce the mythical image of Jefferson as a protector of seditious speech and an ardent advocate of free expression[56] was his response to the Alien and Sedition Acts. Before the 1800 election, the Federalist Congress and President John Adams, "[b]ent on suppressing their opponents and keeping power if they could,"[57] enacted the Alien and Sedition Acts that, among other things, enhanced the government's power to punish seditious speech.[58] The Federalists then charged, convicted, and

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Libertarian, *supra* note 1, at 205. He also offered no praise for the rebels after Hamilton put down the rebellion. Jefferson instead complained that Washington after the uprising had permitted himself to become "the organ of such an attack on the freedom of discussion," because Washington subsequently agreed to restrict the private political meetings known as "self-created" societies. *See* BIOGRAPHY IN HIS OWN WORDS, *supra* note 15, at 255; *see also* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 122 (1984).

Numerous reasons may explain the different reactions Jefferson had to Shays's Rebellion and the Whiskey Rebellion, so it is difficult to surmise exactly what caused Jefferson to criticize the Pennsylvania farmers after he had commended Shays's Massachusetts colleagues. One reason Jefferson might have praised Shays's Rebellion more is that it produced significant political realignment as Jefferson believed all popular uprisings should do. Moderate forces led by gubernatorial candidate John Hancock, who ran on a program of amnesty for the rebels, took over the Massachusetts government and enacted new laws to ease the burden of debt. *See* MORRIS, *supra* note 47, at 264. Shays's Rebellion also set off a wave of resistance to debt collection throughout the country: in Jefferson's home state of Virginia, for example, the court house and clerk's office were burned in protest of excessive punishments to debtors. *See id.* at 265. The Whiskey Rebellion, meanwhile, stimulated little social or economic change which benefited individual rights or the lower classes. The Rebellion led only to greater repression of self-created political societies. *See* Mayton, *supra* note 55, at 122.

However, many other reasons might explain why Jefferson criticized the Whiskey Rebellion. Jefferson might have chosen to remain silent because of his own role in suppressing the uprising. *Cf.* Levy, *Civil Libertarian*, *supra* note 1, at 205 (noting Jefferson had signed the proclamation against the Whiskey Rebellion). Jefferson also had a deep political rivalry with Hamilton. *Cf.* MAYER, *supra* note 11, at 186-87 (noting Jefferson's political struggle with Hamilton and his disciples). Jefferson might have viewed the military success of his adversary distasteful, or possibly chose to avoid adding to its significance.

56. *See, e.g.*, PATTERSON, *supra* note 10, at 183 (proclaiming "an unfettering of the mind" as Jefferson's "supreme object").

57. BEARD, *supra* note 47, at 165. President Adams defeated Jefferson by only three votes in the 1796 election, and foreign and domestic setbacks made Adams's chances for reelection doubtful. *See id.* The Alien and Sedition Acts were an attempt by Adams and his allies to demonstrate control over the nation, and also to suppress Adam's political opposition. *See id.*

The Alien Acts were ostensibly aimed at a series of allegedly foreign conspiracies, one involving Polish General and hero of the American Revolution Thaddeus Kosciusko. *See* PETERSON, *supra* note 13, at 604. The Sedition Acts, meanwhile, were a more overt attempt by the Federalists to destroy Jefferson and his Republican opposition while claiming to save the country from radicals and demagogues. *See id.* at 607.

58. *See* MAYER, *supra* note 11, at 115-16. The Alien Acts actually refers to three separate acts: (1) the Naturalization Act, raising from five to fourteen years the residency requirement for citizenship; (2) the Alien Enemies Act, empowering the president to fine or banish aliens of enemy

punished several Jeffersonian writers and publishers under the Sedition Act for criticizing President Adams and his administration.[59]

Some Republicans—the faction to which Thomas Jefferson belonged—responded with calls for secession,[60] but Jefferson rejected their call.[61] Instead, he continued to campaign for the presidency and gave a friend in Kentucky proposed resolutions, which declared the Alien and Sedition Acts unconstitutional and therefore void.[62]

According to Jefferson's myth and the modern common understanding, Jefferson opposed the Alien and Sedition Acts because they restrained free speech.[63] This perception of Jefferson's position does not comport with reality,[64] but the propaganda surrounding the 1800 campaign assured that Jefferson and his Republican allies would be remembered for advocating extreme libertarian protections for expression.[65]

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countries during time of war; and (3) the Alien Friends Act, authorizing the president summarily to deport aliens deemed dangerous to the peace and safety of the United States. *See id.*; *see also* PETERSON, *supra* note 13, at 604. The Sedition Act, meanwhile, made it criminal to publish "any false, scandalous and malicious writing" against the government and prohibited a number of similar acts. *See* MAYER, *supra* note 11, at 115-16. The Federalists considered the Alien and Sedition Acts as companion legislation, with the Sedition Acts targeted at "domestic traitors." *See* PETERSON, *supra* note 13, at 606.

59. *See* BEARD, supra note 47, at 166. Twenty-five people were prosecuted and ten convicted under the Sedition Act. *See* JOHN A. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES 170 (1976). Typical cases prosecuted under the Sedition Acts were the case of editor Thomas Cooper, who was sentenced to six months imprisonment and a $400 fine, and the case of editor James Callender, who received a nine month prison term and a $200 fine. *See id.*

Subsequent to his release, James Callender became a major thorn in the side of Thomas Jefferson, *see* PETERSON, *supra* note 13, at 705, and a test of Jefferson's dedication to a free press. *See id.* at 714-15; *see also infra* notes 88-92 (discussing Jefferson's willingness to punish hostile newspapermen such as Callender).

60. *See* MAYER, *supra* note 11, at 116 (indicating John Taylor of Virginia among others responded to the Alien and Sedition Acts by calling upon Virginia and North Carolina to escape the "saddle" of Massachusetts and Connecticut).

61. *See id.* Responding to the secessionists, Jefferson said: "The body of our countrymen is substantially republican through every part of the Union . . . . A little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to it's [sic] true principles." *Id.* at 116.

62. *See id.* Jefferson feared that if he were identified, he would be charged with sedition for writing the Kentucky Resolutions, which were clearly critical of the federal government. *See id.*

63. *See, e.g.*, LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 304 (1985) [hereinafter LEVY, EMERGENCE OF A FREE PRESS] (saying some commentators believe Jefferson's criticism of the Federalists' politically-motivated Alien and Sedition Acts "provided the foundation for the Modern theory of the First Amendment").

64. *See infra* note 74-79 and accompanying text.

65. *See* LEVY, EMERGENCE OF A FREE PRESS, *supra* note 63, at 301. Professor Levy believes that the need to respond forcefully to the pressures created by the Sedition Act caused the Jeffersonians to profess a libertarian theory of free speech so broad that they repudiated common-law seditious libel and advocated unrestrained political expression. *See id.*

Jefferson's own actions reinforced this view. Upon being elected,[66] he allowed the Sedition Act to expire and pardoned all individuals convicted under the Act.[67] The Republican-led House of Representatives then voted to repay all fines collected.[68] The Jeffersonian myth and the belief that Jefferson would tolerate dissenting viewpoints gained considerable ground in these actually ambiguous acts.

In the 1800 election, Jefferson and his associates overcame the obstacles of the Alien and Sedition Acts, won the presidential election and a majority in the Congress, and had their chance to establish the "second American Revolution." These events helped to reinforce Jefferson's mythological status. The premise that Jefferson was both an ardent advocate of individual rights and a champion for free expression was deeply ingrained in the American consciousness due to his role in the American Revolution and his reaction to foreign and domestic uprisings and the domestic oppression of free speech.

B. The Reality: Jefferson's Willingness to Punish Treason and Sedition

History reveals that Jefferson should not be considered an unblemished hero of free expression for he was quite willing to limit speech and punish sedition. A review of three major periods, two of which were described as contributing to the mythical Jefferson (the American Revolutionary period and the events surrounding the Alien and Sedition Acts), demonstrate that Jefferson had less passion for unregulated political speech than many modern libertarians and absolutist Justices might suspect. Historical events reveal Jefferson was a politician who sometimes accepted the need to obey Realpolitik instead of providing absolute protection for free speech.

During the American Revolution, Jefferson served not only as a political and philosophical leader of the colonists, but he also wrote some of the earliest American regulations limiting free expression. Shortly after drafting the Declaration of Independence, Jefferson served as one of five members on the Committee on Spies,[69] which helped the Continental Congress draft a

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66. *See* PETERSON, *supra* note 13, at 641-42. There was, however, one antidemocratic institution which temporarily blocked entry into the "land of Jefferson and Liberty"—the electoral college. *See id.* at 643. The House of Representatives produced an equal number of votes for Thomas Jefferson and his vice-presidential candidate Aaron Burr to serve as president until Jefferson was finally selected over Burr on the thirty-sixth ballot. *See id.* at 649-51.

67. *See* BEARD, *supra* note 47, at 168.

68. *See id.*

69. *See* CHARLES FRANCIS ADAMS, 1 WORKS OF ADAMS 224 (1856). The other four members were John Adams, John Rutledge, James Wilson, and Robert Livingstone. *See id.*

resolution announcing that all individuals residing in the American colonies owed allegiance to the colonists but not to the English.[70] These resolutions indicated that any person giving aid and comfort to the King of Great Britain's forces would be guilty of treason.[71] As the resolution of the Continental Congress had recommended, Jefferson also drafted a Virginia law that dealt with treason.[72] These actions reveal that Jefferson supported penalizing those who committed treason, although he sometimes lamented that treason laws were often applied too broadly.[73]

Jefferson's conduct during the 1800 election and surrounding his opposition to the Alien and Sedition Acts also reveals a reality that differs from the rhetoric. Jefferson's writings indicate he opposed the Alien and Sedition Acts not because, as his myth tells,[74] the Acts restrained political expression, but because the Acts constituted the federal exercise of an undelegated power. In the Kentucky Resolutions, Jefferson wrote that the Acts were void because the federal government had exceeded its delegated powers. The Resolutions declared: "[W]here powers are assumed [by the National 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 . . . to nullify of their own authority all assumptions of

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70. *See* Cramer v. United States, 325 U.S. 1, 9 (1945). The text of the Continental Congress resolution was:

> *Resolved*, That all person abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make [sic] a temporary stay in any of the said colonies, being entitled to protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto:
>
> That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving him or them aid or comfort, are guilty of treason against such colony:
>
> That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be provably attainted of open deed, by people of their condition, of any treasons before described.

5 JOURNALS OF THE CONTINENTAL CONGRESS 475 (1906), *cited in Cramer*, 325 U.S. at 9 n.11.

71. *See id.*

72. *See id.* at 10 n.12.

73. *See* 8 WRITINGS OF THOMAS JEFFERSON 332 (Library ed. 1903), *cited in Cramer*, 325 U.S. at 21 n.28 (lamenting that most treason laws "extend their definitions of treason to acts not really against one's country"). Jefferson made the following complaint against most treason statutes:

> They do not distinguish between acts against the *government*, and acts against the *oppressions of the government*; the latter are virtues; yet they have furnished more victims to the executioner than the former; because real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny, have been the chief martyrs of treason laws in all countries.

Id.

74. *See supra* note 56-68 and accompanying text.

power by others within their limits . . . ."[75] Jefferson's Resolutions then complained that the Federalists' Acts exceeded delegated powers because they gave the power to reduce individuals to outlaws under the "absolute dominion of one man."[76] Under the Acts, Jefferson feared, citizens would be marked as prey for tyranny.[77] Jefferson's Resolutions asked the reader, termed an "honest advocate of conscience," to consider the Alien and Sedition Acts and conclude whether "the Constitution ha[d] not been wise in fixing limits to the government it created."[78] This question focused the reader's attention on Jefferson's central purpose for opposing the Alien and Sedition Acts. Specifically, he believed they were void, not for suppressing individual speech (Jefferson felt states possessed the power to punish seditious speech[79]), but because the federal government had surpassed the powers in the "compact," the Constitution. Jefferson's pardons and the Republican-led Congress's actions to repay all fines may have been based on the notion that the Acts were void for infringing upon state's rights, not because suppression of speech itself was unconstitutional.[80]

Furthermore, Jefferson participated in and encouraged the prosecution of newspapermen for their critical writings. While serving as Adams's Vice President, Jefferson oversaw the Senate's prosecution of one Republican newspaperman. Republican Editor William Duane published the text of a bill the Federalists had proposed that would have given them an unfair opportunity to review state electoral votes and possibly exclude those votes in which they found some irregularity.[81] When the Federalists learned what Duane had done, they prosecuted him twice under the Sedition Act for this conduct, but criminal juries each time acquitted him.[82] Federalist Senators then summoned Duane for trial before the Senate on charges that he had published false, scandalous materials that were libelous against it.[83] When Duane delayed his appearance, the Federalists found him in contempt and demanded a warrant for his arrest.[84]

Presiding over the Senate as Vice President, Jefferson obligingly issued a

75. *Kentucky Resolutions, reprinted in* BIOGRAPHY IN HIS OWN WORDS, *supra* note 15, at 288.
76. *See id.* at 288.
77. *See id.* at 289.
78. *Id.* at 289.
79. *See infra* notes 88-93 and accompanying text.
80. Compare this with the mythical perspective on these actions, discussed *supra* at note 63-68 and accompanying text.
81. *See* PETERSON, *supra* note 13, at 629-30.
82. *See id.* at 629.
83. *See id.*
84. *See id.* at 629-30.

warrant for Duane's arrest.[85] The Senate, however, never prosecuted Duane, and some excuse Jefferson's conduct on the grounds that the Federalists had entrapped him into either issuing the warrant or disobeying the Senate.[86] Other commentators criticize him strongly for not standing on principle and refusing to issue the warrant.[87] Jefferson's choice hardly seems the one a person who has sworn eternal hostility against every form of tyranny would take: Jefferson made the simple, perhaps even the correct choice, but not the heroic one.

Jefferson also accepted and even encouraged using state libel statutes to punish seditious libel. Contrary to his supposed opposition to the Federalists' Alien and Sedition Acts on the grounds they suppressed free speech,[88] Jefferson advocated censuring the Federalists who had published libels against him during the 1800 election.[89] In a letter to Thomas McKean, Jefferson wrote that the Federalists had destroyed the press by their licentiousness, but that state lawsuits would be sufficient to restore to the press its credibility.[90] Jefferson directly advocated using state law to punish sedition: he admitted he "long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses."[91] Jefferson supported some libertarian modifications of common law libel and slander, such as permitting the truth to stand as a defense,[92] but he also believed government-even after passage of the First Amendment-retained the power to punish slander and otherwise to limit speech.[93]

The final incident, and perhaps the most damaging to the myth of

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85. *See id.* at 630.

86. *See id.*

87. *Compare* PETERSON, *supra* note 13, at 629 (noting that Jefferson was entrapped by Federalist maneuvering to issue the arrest warrant against Duane), *with* Levy, *Civil Libertarian*, *supra* note 1, at 205 (criticizing Jefferson for choosing the easy path of lawful obedience to the request for an arrest warrant rather than declaring conscientious objection as liberty and justice required).

88. *See supra* notes 63-68 and accompanying text.

89. *See* Letter from Thomas Jefferson to Thomas McKean (Feb. 19, 1803), *in* FROM ZENGER TO JEFFERSON, *supra* note 6, at 364.

90. *See id.*

91. *Id.; see also* PETERSON, *supra* note 13, at 714-15 (noting Jefferson's willingness to pursue state prosecutions of Federalist newspapermen after the Callender libels).

92. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *in* FROM ZENGER TO JEFFERSON, *supra* note 6, at 368 (describing the state libel laws as those "provided by the State against false and defamatory publication"); *see also id.* at 362-63.

93. *See* Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* FROM ZENGER TO JEFFERSON, *supra* note 6, at 366-67. In this letter Jefferson noted that his belief the Sedition Acts were a nullity did not "remove all restraint from the overwhelming torrent of slander," for the power to restrain slander was "fully possessed by the several State Legislatures. It was reserved to them, & was denied to the General [i.e., Federal] Government, by the Constitution . . . ." *Id.* at 367.

Jefferson as the protector of political dissenters, involved Jefferson's conduct during the treason trial of his former Vice President, Aaron Burr. After Jefferson replaced Burr as his vice presidential candidate for the 1804 re-election campaign, Aaron Burr allegedly contacted the British ambassador to the United States and offered to "effect a separation of the Western part of the United States" for a fee.[94] The British apparently rejected the offer, but Burr nevertheless went forward with preparations to organize a force and seize territory from either the United States or Spanish Mexico.[95] Burr then joined forces with another malcontent, General James Wilkinson, and they assembled a force on Blennerhassett Island in the Ohio River.[96] Unfortunately for Burr, Wilkinson apparently then had second thoughts and informed President Jefferson of the rebellious preparations.[97] Jefferson issued a proclamation calling for the suppression of the conspiracy but did not mention Burr by name.[98] The authorities arrested Burr while he was trying to flee into Spanish Florida, and ultimately Burr stood trial before Chief Justice John Marshall in Virginia.[99]

Although the evidence regarding Burr's guilt was somewhat ambiguous,[100] Jefferson, goaded at least in part by personal vindictiveness against Burr, declared in a special pretrial message to Congress that Burr's guilt had been "placed beyond question."[101] Jefferson further displayed his antipathy toward Burr during the resulting trial.[102] The President provided evidence and legal advice to prosecutors and offered pardons to associates who agreed to testify against Burr.[103] Jefferson lacked evidence of an overt act,[104] but he sought to use any available means, proper or improper, not only to prevent possible damage to the Republic but also to convict Burr for his alleged treason.[105]

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94. *See* GARRATY, *supra* note 59, at 186

95. Burr's exact objectives remain uncertain. *See id.*

96. *See id.*

97. *See id.*

98. *See* BIOGRAPHY IN HIS OWN WORDS, *supra* note 15, at 360.

99. *See* GARRATY, *supra* note 59, at 186; *see also* PETERSON, *supra* note 13, at 841-54.

100. A grand jury in the west states refused to indict Burr for any crimes. *See* Levy, *Civil Libertarian*, *supra* note 1, at 197. Peterson says Burr might simply have been engaged in a swindle of Spain and lacked any intention of actually leading an armed uprising against the United States. *See* PETERSON, *supra* note 13, at 844.

101. *See id.* at 852.

102. *See* GARRATY, *supra* note 59, at 186.

103. *See* PETERSON, *supra* note 13, at 864; GARRATY, *supra* note 59, at 186.

104. *See* GARRATY, *supra* note 59, at 187.

105. Peterson argues America was better served by Marshall's bias than Jefferson's, for it was better to permit a "scoundrel to go free" than to introduce the English concept of "constructive treason," with an expansive definition of "levying war," into American law. *See* PETERSON, *supra* note 13, at 873.

Meanwhile, the presiding judge, Chief Justice John Marshall, demonstrated a similar bias favoring Burr.[106] Under Marshall's influence, the jury acquitted Burr after only twenty-five minutes of deliberation.[107] Jefferson had previously indicated a nation needed periodic rebellions,[108] but he viewed Burr's activities with considerable disdain. Jefferson denounced Burr's acquittal as "equivalent to a proclamation of impunity to every traitorous combination which may be formed to destroy the Union."[109]

Certainly political circumstances made the trial of Aaron Burr unique, yet Jefferson's willingness in the case to use sedition laws to his advantage demonstrates that Jefferson should hardly be accepted as an unblemished hero of political dissension. Reality shows Jefferson was not merely a mythical figure always willing to defend seditious expression; rather, he was a more complex and pragmatic man who would sometimes trample individual rights to achieve important objectives.

III. JEFFERSON'S INFLUENCE ON THE EVOLUTION OF THE SUPREME COURT'S SEDITION JURISPRUDENCE

Scholars sometimes interpret Jefferson's reaction to the Alien and Sedition Acts as the foundation for modern First Amendment free speech jurisprudence,[110] but the Amendment's protections lay relatively dormant for more than one hundred years after the First Amendment was ratified as part of the Bill of Rights.[111] During America's first century, the government

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106. *See* GARRATY, *supra* note 59, at 186; *see also* PETERSON, *supra* note 13, at 865-66. Through the jury instructions, Marshall placed an almost impossible burden of proof on the prosecution. *See id.* at 866. Marshall stipulated that organizing "a military assemblage" was not "a levying of war," and that acting to "advise or procure treason" was not in itself treason. *See* GARRATY, *supra* note 59, at 187. He also instructed that a conviction required testimony of two witnesses to a single treasonous act about the incident they both saw. *See id.* at 186; *see also* PETERSON, *supra* note 13, at 866.

107. *See* GARRATY, *supra* note 59, at 187. Soon after he was acquitted, Burr fled the United States—where he was still wanted for murder or treason in six states—for Europe. *See id.* at 187.

Considering the topic of this Note, it is interesting that in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), Chief Justice Warren Burger mentions the treason trial of Aaron Burr as an example that the problem of juror bias from the media is hardly a new difficulty facing the justice system. *See id.* at 548. Berger appears to praise the efforts of Chief Justice John Marshall to select an unbiased jury. Berger does not, however, mention the allegations regarding Marshall's own bias. *See id.*

108. *See supra* notes 52-55.

109. *See* PETERSON, *supra* note 13, at 872.

110. *See supra* note 63.

111. The First Amendment was ratified on December 15, 1791, when the eleventh state, Virginia, approved the Bill of Rights. *See* NOWAK & ROTUNDA, *supra* note 8, app. A, at 1343 n.2. The Court first directly considered a First Amendment free speech challenge in *Schenck v. United States*, 249 U.S. 47 (1919).

Before World War I, legal academics and some state courts had considered free speech and seditious libel issues. Academics generally encouraged a more libertarian standard for protecting free

enacted some regulations of seditious conduct and expression, most notably the Alien and Sedition Acts of 1798[112] and limitations imposed during the Civil War.[113] The Supreme Court, however, never reviewed the constitutionality of these statutes.[114] Therefore, the Court did not provide significant analysis of First Amendment protections until World War I.[115]

At the outbreak of World War I, Congress, seeking to respond to public criticism and fear that the American war effort might be undermined by radical subversives,[116] passed the Espionage Act of 1917[117] and the Sedition

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speech, see David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 522-24 (1981) [hereinafter Rabban, *Forgotten Years*], but the courts permitted states to punish seditious speech without regard for constitutional protections. *See id.* at 523, 545-47. The Supreme Court of New Jersey, Rabban notes, did provide some protection for free speech in cases dealing with labor unrest. *See id.* at 547.

112. *See* OTIS H. STEPHENS, JR. & JOHN M. SCHEB, II, AMERICAN CONSTITUTIONAL LAW 602 (1993) [hereinafter STEPHENS & SCHEB]. For a discussion of the Alien and Sedition Acts and their consequences, see *supra* notes 56-80 and accompanying text.

113. *See* STEPHENS & SCHEB, *supra* note 112, at 602.

114. *See* Rabban, *Forgotten Years*, *supra* note 111, at 523 (noting that the Court generally ignored First Amendment arguments).

115. *See* STEPHENS & SCHEB, *supra* note 112, at 600; Rabban, *Forgotten Years*, *supra* note 111, at 523 (noting the absence of systematic judicial thought on free expression); *see also* Dennis v. United States, 341 U.S. 494, 503 (1951) (saying that "[n]o important case involving free speech was decided by this Court prior to *Schenck v. United States*," a 1919 decision) (citations omitted); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 396 (1992) [hereinafter White, *Human Dimension*].

A number of earlier U.S. Supreme Court addressed free-speech issues, including *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454 (1907), and *Fox v. Washington*, 236 U.S. 273 (1915). In *Patterson*, the Court rejected a newspaper editor's claim that the protection of "liberty" in the Fourteenth Amendment protected him from a contempt conviction after he published articles and cartoons critical of Colorado judges. *See Patterson*, 205 U.S. at 459. The Court concluded that even if the First Amendment prevented states from infringing on the rights to free speech and a free press, the protections would not extend as far as Patterson advocated. *See id.* at 462; *see also* White, *Human Dimension*, *supra*, at 399-401.

In *Fox v. Washington*, the Court upheld the conviction of a newspaper editor for encouraging the violation of law when he advocated a boycott of prudish business which had prompted the arrest of nudists. *See Fox*, 236 U.S. at 276-77. The Court upheld the constitutionality of the statute after concluding it would only be employed to punish those who encouraged an actual breach of the law. *See id.* at 277; *see also* White, *Human Dimension*, *supra*, at 401-03.

Together, *Patterson* and *Fox* indicate that the First and Fourteenth Amendments imposed few limits on a state's power to regulate speech. *See id.* at 403. These decisions were also considered consistent with the "orthodox view" that the First Amendment sought only to codify British common law, a common law which did not protect speech which was libelous, blasphemous, obscene, indecent, or otherwise harmful to public morals or personal reputation. *See id.* at 398.

For a study of the First Amendment prior to World War I and its early doctrinal background, see Rabban, *Forgotten Years*, *supra* note 111. For a treatment of some of the early Supreme Court decisions exploring the boundaries of First Amendment free speech protection, see Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 EMORY L.J. 59 (1986).

116. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.13, at 1009.

117. Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (1917) (current version at 18

Act of 1918.[118] Soon challenges to these statutes reached the Supreme Court.

In *Schenck v. United States*,[119] the Court, reviewing an Espionage Act conviction, produced its first significant First Amendment[120] analysis of the federal anti-sedition statutes.[121] Justice Oliver Wendell Holmes, writing for a unanimous Court in *Schenck*, adopted a "clear and present danger" standard to determine whether the Constitution permitted the government to adopt restrictions on political expression such as the Espionage Act and the Sedition Act.[122]

The clear and present danger test appeared to impose rigorous limits on the government's power to suppress political expression. Holmes wrote that Congress has the power to regulate or punish speech only when the communication was used "in such circumstances" and was "of such nature" that it created a "clear and present danger" of a "substantial evil" Congress had power to prevent.[123] The requirements that the danger be clear and present and that the evil advocated be "substantial" seemed much greater than those imposed earlier by state courts,[124] which had upheld state statutes punishing speech that merely criticized the status quo and advocated change.[125]

U.S.C. § 2388 (1982)).

118. Ch. 75, 40 Stat. 553 (1918), *repealed by* Act of March 3, 1921, ch. 136, 41 Stat. 1359 (1921); *see* 60 CONG. REC. 293-94, 4207-08 (1921).

119. 249 U.S. 47 (1919). The United States government had convicted Charles Schenck, general secretary of the Socialist Party, and his colleague Elizabeth Baer for violating the Espionage Act after they mailed thousands of antidraft pamphlets to young men. *See id.* at 49-50. These pamphlets urged resistance to the draft on grounds that it violated the Thirteenth Amendment. *See id.* at 50-51.

120. *See* STEPHENS & SCHEB, *supra* note 112, at 602.

121. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.13, at 1009. Nowak and Rotunda emphasize that vocal resistance to American involvement in World War I occurred concurrently with the "Red Scare," a time of great public concern that Socialists, Bolsheviks, anarchists, and other revolutionaries might lead an uprising in America as they had in Russia. *See id.* § 16.13, at 1008; *see also* MCCLOSKEY, *supra* note 7, at 115 (noting that World War I and the Russian Revolution led to an assortment of laws restricting free expression).

122. Commentators have universally named the standard enunciated in *Schenck* the "clear and present danger" test. *See, e.g.*, STEPHENS & SCHEB, *supra* note 112, at 602; NOWAK & ROTUNDA, *supra* note 8, § 16.13, at 1009. Justice Wiley Rutledge later attributed the "first official declaration" of the clear and present danger doctrine to Thomas Jefferson in his Virginia Statute for Establishing Religious Freedom. *See* Everson v. Board of Educ., 330 U.S. 1, 32 n.9 (1947) (Rutledge, J., dissenting).

123. *See Schenck*, 249 U.S. at 52.

124. That is, the state courts with the notable exception of the Supreme Court of New Jersey. *See supra* note 111.

125. Some seditious conduct punished in the state courts under the "bad tendency" test clearly would not satisfy the clear and present danger requirement. For example, John Most was convicted in New York after telling his audience, "I again urge you to arm yourselves, as the day of revolution is not far off; and when it comes, see that you are ready to resist and kill those hirelings of capitalists." People v. Most, 27 N.E. 970, 971 (1891). The New York Court of Appeals affirmed the conviction, saying that no one could foresee the consequences when such words were uttered to a misguided,

The Court's decisions in *Schenck* and its companion cases, *Frohwerk v. United States*[126] and *Debs v. United States,*[127] revealed that the rigorous language of the test was somewhat deceptive in that the Court apparently did not intend to place a high burden on a government seeking to punish seditious expression. The Court in *Schenck* largely disregarded the clear and present danger standard it had just announced;[128] it affirmed Schenck's convictions even though the antidraft pamphlets he had distributed "in form at least confined [themselves] to peaceful measures" and resulted in no disruption of the peace.[129] The Court then applied the clear and present danger standard in two companion cases,[130] *Frohwerk* and *Debs*, and reached similar results. The Justices in both cases unanimously affirmed the defendants' convictions[131] even though the evidence left serious doubts that the defendants' conduct had created a clear and present danger of substantial evil.[132]

After the Supreme Court decided *Schenck* and its companion cases, the Court divided into two factions when deciding the numerous First Amendment sedition cases that resulted from the government's efforts to control Communist groups after World War I. One group, the majority in *United States v. Abrams,*[133] *Gitlow v. New York,*[134] and *Whitney v.*

highly excited crowd. *See id.* at 973. However, as the Court of Appeals admitted, the words suggested the time for action had not yet come, and the prosecution did not show that Most honestly expected and intended a violent response. *See id.* at 972-73. Therefore, the evidence would seem quite insufficient to satisfy the clear and present danger test. *See id.* For a summary of *Most* and other early state sedition prosecutions, see Rabban, *Forgotten Years*, *supra* note 111, at 543-57.

126. 249 U.S. 204 (1919).

127. 249 U.S. 211 (1919).

128. *See* Rabban, *Forgotten Years*, *supra* note 111, at 585. Rabban writes that Holmes referred to the First Amendment briefly in *Schenck*, then relied upon *Schneck* to dismiss free speech arguments in the companion cases of *Frohwerk v. United States*, 249 U.S. 204, 206 (1919), and *Debs v. United States*, 249 U.S. 211, 215 (1919). *See* Rabban, *Forgotten Years*, *supra* note 111, at 585. *Frohwerk* and *Debs* are discussed *infra* at notes 131-32 and accompanying text.

129. *Schenck*, 249 U.S. at 51; *see also* STEPHENS & SCHEB, *supra* note 112, at 602-03.

130. There was a third companion case, *Sugarman v. United States*, 249 U.S. 182 (1919), which the Court dismissed for lack of jurisdiction. For a summary of Justice Brandeis's opinion in *Sugarman*, see White, *Human Dimension*, *supra* note 115, at 413, n.123.

131. *See Debs*, 249 U.S. at 217; *Frohwek*, 249 U.S. at 210.

132. Professor White emphasizes that in neither *Frohwerk* nor *Debs* had the speaker made a serious effort to discourage draftees not to enlist, and that in *Debs* the defendant specifically refrained from urging the draftees not to enlist. *See* White, *Human Dimension*, *supra* note 115, at 416. The Court affirmed both convictions, however, without trying to square the analysis with the clear and present danger test. *See id.* at 416-19.

133. 250 U.S. 616 (1919). In *Abrams*, the Court affirmed the conviction of a group of five Russian emigrants prosecuted under the Espionage Act of 1917. *See id.* The five defendants had distributed pamphlets that criticized President Woodrow Wilson for sending American troops to fight in Soviet Russia and called for a general strike to protest the intervention. *See id.* at 614-22. The Court examined the contents of the controversial pamphlet point by point, *see id.* at 621-22, but then stated it was

California,[135] readopted the common law "bad tendency test."[136] These Justices gave little protection to seditious expression,[137] because the bad tendency test permitted governments to punish speech "inimical to the public welfare"[138] without regard to the effects the seditious expression might have.[139]

Justices Holmes and Brandeis constituted the second faction.[140] They

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unconcerned with the exact character of the language so long as it was clearly "intended to provoke and encourage resistance to the United States in the war." *Id.* at 624. Finding this test was satisfied, the Court affirmed the convictions. *See id.*

134. 268 U.S. 652 (1925). In *Gitlow*, Socialist Benjamin Gitlow was convicted under the New York criminal anarchy statute, mainly because he published a pamphlet that advocated strikes and class action "in any form." *See id.* at 654-55. After determining the Fourteenth Amendment incorporated the Free Speech Clause of the First Amendment to limit state interference with free expression, *see id.* at 666, the Court affirmed the conviction because a state was permitted to "punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means." *Id.* at 667.

135. 274 U.S. 357 (1927). The petitioner had been a member of the Communist Labor Party of California, and was convicted of teaching "criminal syndicalism." *See id.* at 359-60.

136. *See* Rabban, *Forgotten Years*, *supra* note 111, at 591.

137. *See id.*

138. *Gitlow*, 268 U.S. at 667.

139. *See id.* at 669 (concluding that the danger created by an indefinite call for mass strikes and proletarian uprisings was "none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen"); *see also* Rabban, *Forgotten Years*, *supra* note 111, at 591 (describing the majority position on the Court from 1920-1927 as "combining visceral hostility to radical manifestations of free speech with doctrinal reliance on the bad tendency theory"). *Gitlow* provides a particularly stark example that the Court did not consider the possible effects of the utterances when employing the bad tendency test. The indictment alleged publication of the seditious pamphlets and nothing more. *See id.* at 673 (Holmes, J., dissenting). Therefore, the Court was permitting punishment of speech solely for its content.

The Court's failure to mention freedom of speech or the First Amendment after saying that *Schenck* had already determined the Espionage Act was constitutional, *see id.* at 671, further proved that the Court did not care about probable effects of the utterances. The Court seems to feel that, because the Espionage Act was valid and the speech had a tendency to cause lawlessness, no further consideration of constitutional protections was required.

140. Justices Brandeis joined Justice Holmes's dissenting opinions in *Gitlow v. New York*, 268 U.S. 652 (1925), and *United States v. Schwimmer*, 279 U.S. 644 (1929), *overruled by Girouard v. United States*, 328 U.S. 61 (1946). *Schwimmer* technically is not a First Amendment case because the Court ruled the First Amendment did not apply where an alien was denied admission based on her beliefs. *See Schwimmer*, 279 U.S. at 649. Justice Holmes, meanwhile, joined Justice Brandeis's dissenting opinions in *Schaefer v. United States*, 251 U.S. 466 (1920), and *Pierce v. United States*, 252 U.S. 239 (1920), and his concurring opinion in *Whitney v. California*. 274 U.S. 357 (1927). Justices Brandeis and Holmes wrote separate dissenting opinions in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921).

Because of their frequent concurrence, Brandeis' and Holmes' views on free expression are often treated together. *See, e.g*, NOWAK & ROTUNDA, *supra* note 8, § 16.13, at 1008 (where the section title, "[t]he Holmes-Brandeis 'Clear and Present Danger' Test," indicates the close relationship between the two Justices' views on sedition); Rabban, *Forgotten Years*, *supra* note 111, at 591 (noting that, after *United States v. Abrams*, 250 U.S. 616 (1919), Holmes and Brandeis began developing a theory of the First Amendment which provided "meaningful theoretical protection for free speech"). During the 1920s, however, Holmes clearly lagged behind Brandeis in his willingness to permit free expression

advocated using a recharacterized[141] version of *Schenck*'s clear and present danger standard[142] that placed a greater burden on the government to show dangerous might result from the challenged expression, thus providing greater protection for potentially seditious expression.[143] Brandeis and Holmes believed the Constitution permitted some government restraints on an individual's political expression;[144] however, seditious speech was protected by the Constitution so long as it did not create a clear and present danger, or the possibility of "a present conflagration."[145] Less dangerous political criticism, the two Justices claimed, could not be punished by the government. Rather, they believed informed debate in the marketplace of ideas would be sufficient to prevent such less threatening expression from endangering organized government.[146]

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without government control. *See* Rabban, *Modern First Amendment*, *supra* note 9, at 1318-19. For the summary of Brandeis's views on free speech, see *id.* at 1320-45.

141. Rabban writes that Professor Zechariah Chafee originally misread *Schenck* and concluded that Holmes's clear and present danger test had made it impossible to punish speech merely for its bad tendency. *See* Rabban, *Forgotten Years*, *supra* note 111, at 590. According to this account, Justices Holmes and Brandeis later recognized the strategic advantage of adopting this misconstruction and accepted the libertarian meaning Chafee had incorrectly read into the test. *See id.* at 594. They then elevated the clear and present danger standard as a doctrine providing for the constitutional protection for free speech. *See id.*; *see also generally* White, *Human Dimension*, *supra* note 115, at 433-67; Rabban, *Modern First Amendment*, *supra* note 9, at 1294-1303.

In addition to recharacterizing the clear and present danger test, Chafee apparently persuaded Holmes to consider additional doctrinal foundations-including democracy and the search for the truth—and otherwise to rethink the purpose and proper scope of the First Amendment's protection of free expression. *See* White, *Human Dimension*, *supra* note 115, at 426-33.

142. Experts uniformly recognize that Holmes shifted from permitting significant government restriction of free expression in *Schenck* to a more liberal, permissive standard for expression in his dissent in *Abrams*. *See generally* White, *Human Dimension*, *supra* note 115, at 419-27 (discussing critics' response to *Schenck* and its companion cases and the resulting dialogue between Holmes and some of these commentators).

143. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.13, at 1010 (reporting the Court persisted in applying the bad tendency test due to its reluctance to provide defendants with the protection provided by the clear and present danger test).

A requirement that speech had to create a clear and present danger for the Constitution to permit regulation probably would have had a drastic impact on the power of government to punish seditious expression: Brandeis and Holmes dissented in most free speech cases—except *Whitney v. California*, 274 U.S. 357 (1927), where the two Justices concurred in an opinion which "read like a dissent," NOWAK & ROTUNDA, *supra* note 8, § 16.13, at 1011—during this period and advocated reversing the convictions. For a list of the First Amendment cases in which Brandeis and Holmes joined each other's opinions, see *supra* note 141.

144. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 627 (1919) (proving that Holmes did not doubt that "the United States constitutionally [could] punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent"); Gitlow v. New York, 268 U.S. 652, 673 (1925) (asserting that "if the publication of this document had been . . . an attempt to induce an uprising against government at once. . .[, the] object would have been one with which the law might deal").

145. *Gitlow*, 268 U.S. at 673.

146. *See Abrams*, 250 U.S. at 630.

To support the premise that critical political speech should receive constitutional protection, Justice Brandeis in *Whitney v. California*[147] for the first time in a published Supreme Court decision opinion consulted the philosophic writings of Thomas Jefferson for support. Brandeis cited two of Jefferson's writings that supported the premise that the government could not suppress mere speech that did not create a clear and present danger. The first text, one of Jefferson's many correspondences, supported Brandeis's argument that the market place of ideas would sufficiently protect organized government against most seditious speech. Brandeis quoted Jefferson, "We have nothing to fear from the demoralizing reasonings of some, *if others are left free to demonstrate their errors* and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge."[148]

The second of Jefferson's texts Brandeis quoted supported the general right of people to criticize the government. Brandeis quoted the inaugural address Jefferson gave after successfully weathering the Alien and Sedition Acts and other impediments to win the 1800 presidential election. The quotation reads, "If there are any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[149] These two quotations reflect Jefferson's mythical persona: both advocate permitting seditious speech so long as it does not constitute criminal action. Brandeis's opinion in *Whitney* uses Jefferson's mythical persona in support of a libertarian permissiveness of seditious political expression. In selecting those two passages to quote, Brandeis did not address Jefferson's conduct that contradicted these sentiments, nor did he admit that Jefferson had also written a number of other texts in which he recognized the government's power to punish political dissension. For Brandeis, the mythical Jefferson was sufficient and supported his argument that seditious expression should be protected.

Although the use of Jefferson's writings in *Whitney* probably had little effect on the majority, Holmes and Brandeis ultimately persuaded their colleagues on the Court to abandon the bad tendency test for the recharacterized clear and present danger test. In 1937, as World War II loomed on the horizon, the Court in *Herndon v. Lowry*[150] rejected the bad

147. 274 U.S. 357 (1927).

148. Letter from Thomas Jefferson to Elijah Boardman (July 3, 1801), *cited in* Whitney v. California, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J. concurring) (emphasis added).

149. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *cited in Whitney*, 274 U.S. at 375.

150. 301 U.S. 242 (1937). Herndon had been arrested for distributing materials, soliciting

tendency test as a "dragnet" whose excessive breadth violated the First Amendment.[151] In its place, the Court selected the more libertarian clear and present danger test advocated by Brandeis and Holmes.[152]

After *Herndon*, the Court employed the clear and present danger test until World War II ended. The Court also adopted the presumption that government regulation of speech was constitutionally invalid.[153] The government could overcome this presumption only by demonstrating the limitation placed on individual liberty had an "appropriate relation" to public safety.[154] Declaring that a "function of free speech under our system of government is to invite dispute" and that opinions are "often provocative and challenging,"[155] the Court employed this more libertarian standard even to

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members, and holding meetings for the Communist Party. *See id.* at 245-46. The Court reversed his conviction, finding the statute unconstitutionally overbroad: as "construed and applied," the statute did not "furnish a sufficiently ascertainable standard of guilt," and thus would permit a conviction where the speaker's seditious comments might lead to the use of force only "in the distant future." *See id.* at 261-62.

Although *Herndon* is the first case after *Schenck v. United States*, 249 U.S. 47 (1919), in which the Court employs the clear and present danger test, the Court's move toward adoption of the standard did not involve a sudden shift. Rather, a number of earlier opinions indicated dissatisfaction with the common-law bad tendency test. *See, e.g.*,. De Jonge v. Oregon, 299 U.S. 353, 366 (1937) (invalidating the defendant's arrest for criminal syndicalism after he passed out literature advocating unlawful action at an otherwise peaceful, lawful assembly); *see also* JOSEPH J. HEMMER, JR., THE SUPREME COURT AND THE FIRST AMENDMENT 15 (1986) (saying the *De Jonge* holding indicated more than just a tendency toward criminal action would be necessary for advocacy to be punished).

Perhaps for this reason, the *Herndon* decision was not considered a watershed decision on political expression by some commentators. Professor Edward Corwin claimed the role the clear and present danger standard played in the *Herndon* decision was "minor and quite dispensable." *See* Edward S. Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325, 343 (1952). Professor Chafee, meanwhile, felt the Supreme Court should have rejected Herndon's Free Speech claim to prevent potential race warfare. *See* Rabban, *Modern First Amendment*, *supra* note 9, at 1347 n.879. (Herndon had been soliciting blacks and whites to join the Communists in Altanta, and many of his pamphlets encouraged black self-determination. *See Herndon*, 301 U.S. at 245, 250-52.) Neither professor indicated that *Herndon* signaled a new era in First Amendment jurisprudence.

151. *See Herndon*, 301 U.S. at 263.

152. *See supra* notes 122-23 and 141-46 and accompanying text.

153. *See Herndon*, 301 U.S. at 258. The state has sometimes been able to offer reasons sufficient to justify abridging the rights of an individual to discuss or criticize government action, particularly in the context of contempt cases. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.13, at 1012-13. Yet, even where the state has identified sufficient reasons to abridge the rights of free expression, the Court has been reluctant to find the communications created sufficient threat of a "substantive evil" of such seriousness and imminence to justify prohibition. *See, e.g.*, Bridges v. California, 314 U.S. 252, 263, 270 (1941) (recognizing the power of a court to hold newspaper publishers in contempt for discussing pending cases, but finding Bridges's criticism of pending court cases was not likely to cause substantial harm).

154. *See Herndon*, 301 U.S. at 258.

155. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949). Although *Terminiello* employed the clear and present danger standard, the case did not involve political sedition. Rather, Chicago police had arrested the defendant for disorderly conduct after his supporters had clashed with protestors outside a Christian Veterans of America meeting. *See id.* at 2-3.

protect individual rights of free expression in contexts other than political sedition throughout World War II.[156]

During this "clear and present danger period" of Supreme Court sedition jurisprudence, Justice Black employed the writings of Thomas Jefferson in two opinions he authored for the Court. Although neither dealt directly with seditious expression, both are free speech cases in which the "absolutist" Black turned to the mythical Jefferson to support broader protections for free expression. The first opinion, *Bridges v. California*,[157] analyzed whether the Constitution permitted a newspaper to be punished for contempt after publishing an opinion regarding unresolved litigation.[158] Justice Black quoted Jefferson for the proposition that although newspapers are sometimes used for "putrid" purposes, they should remain unregulated because the end of a free press would lead to the loss of American liberty.[159] Like Brandeis in *Whitney*, Black considers Jefferson's mythical persona. After all, as noted earlier, one method the historical Jefferson suggested to cure the ailments of the press after the 1800 election was to use state law prosecution of the papers. Jefferson the historical figure apparently preferred to punish and thereby cleanse newspapers rather than to unconditionally protect freedom of speech.[160]

Justice Black cited almost identical language from Jefferson in *Martin v. City of Struthers*[161] to support giving First Amendment protections broad scope so that "vigorous enlightenment" might surpass "slothful ignorance."[162] In *City of Struthers*, the Court reversed the conviction of a Jehovah's Witness for knocking on doors or ringing doorbells to deliver religious literature door-to-door in violation of a city ordinance. Again the opinion was not concerned directly with the punishment of sectitious expression, but again Justice Black quoted Jefferson's writings for the premise, "The only freedom of security of all is in a free press . . . . The agitation it produces must be submitted to."[163]

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156. *See* NOWAK & ROTUNDA, *supra* note 8, at 1012-13 & n.32. The Court employed the clear and present danger test to uphold free expression in cases involving breach of the peace, *see, e.g.*, Terminiello, 337 U.S. at 4; contempt of court, *see e.g.*, *Pennekamp v. Florida*, 328 U.S. 331 (1946); nonviolent picketing, *see Thornhill v. Alabama*, 310 U.S. 88 (1940); and soliciting potential union members, *see Thomas v. Collins*, 323 U.S. 516 (1945). *See also generally* Rabban, *Modern First Amendment Doctrine*, *supra* note 9, at 1347-48.

157. 314 U.S. 252 (1941).

158. *See id.* at 259.

159. *See id.* at 271 & n.16.

160. *See supra* note 91 and accompanying text.

161. 319 U.S. 141 (1943).

162. *See id.* at 143.

163. *Id.* at 143 n.3 (citation omitted).

Bridges and *City of Struthers* are both unusual free expression cases to include citations from Jefferson's writings. Jefferson's mythical writings are normally used by Justices in a minority opinion to encourage fellow members on the Court to impose greater limits on the government's power to regulate seditious speech. Furthermore, the Justices often admit that Jefferson's words are aspirational, and that the real Jefferson was not an unfailing friend of free speech. In *Bridges* and *City of Struthers*, however, Jefferson's rhetorical writings were used in majority opinions, without any indication that Black was aware that the historical Jefferson was not an advocate of unrestrained expression.

As World War II ended and the Cold War began, the Supreme Court again turned away from the clear and present danger standard in search of a rule that would permit greater governmental regulation of seditious speech.[164] A number of Justices, most often Justices Black, Douglas, and Jackson, debated the merits of such a shift in part by citing to the writings and actions of Thomas Jefferson. In this period, the citations became more frequent, and the Justices revealed their awareness that Thomas Jefferson's actions often did not comport with his libertarian rhetoric.

The first post war standard, labeled the "clear and probable danger rule,"[165] or sometimes treated merely as a rephrasing of the old clear and present danger test,[166] was employed in only one case and by a plurality of four Justices. In that case, *Dennis v. United States*,[167] the plurality opinion adopted the clear and present danger doctrine but made two alterations.[168]

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164. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.14, at 1013. Changes in the court's membership probably also affected the court's decisions. Justices Frank Murphy and Wiley Rutledge, both strong advocates of the clear and present danger test, left the court, and their replacements were Justices more inclined to permit the government to restrict an individual's rights to free expression. *See* STEPHENS & SCHEB, *supra* note 112, at 606.

165. *See* STEPHENS & SCHEB, *supra* note 112, at 607.

166. *See* Rabban, *Modern First Amendment*, *supra* note 9, at 1349. The fluctuations regarding the name of the *Dennis* test seems very appropriate: the plurality in *Dennis* complained that Justices Brandeis and Holmes never envisioned that their shorthand phrase would be "crystallized into a rigid rule to be applied inflexibly without regard to the circumstances," and opposed placing themselves in a similar "semantic straightjacket." Dennis v. United States, 341 U.S. 494, 508 (1951).

167. 341 U.S. 494. In *Dennis*, the petitioners, leaders of the Communist Party of the United States, challenged their conviction for conspiracy under the Smith Act, 18 U.S.C. §§ 10, 11 (1946). *See id.* at 495. The prosecution claimed the defendants had organized to advocate "the overthrow or destruction of the Government of the United States." *Id.* at 494. They were being prosecuted, however, for "their activities in organizing and furthering the purposes of the Communist Party of the United States." STEPHENS & SCHEB, *supra* note 112, at 607. The Court in *Dennis* affirmed the convictions, but failed to produce a majority opinion. *See Dennis*, 341 U.S. at 517.; *see also* NOWAK & ROTUNDA, *supra* note 8, § 16.14, at 1013.

168. For a slightly different interpretation of the modification made by the plurality opinion, see NOWAK & ROTUNDA, *supra* note 8, § 16.14, at 1014-15.

First, the Court substituted "probability" for "remoteness" of the danger.[169] Second, it said the gravity of the danger should be a factor when determining if the governmental regulation was constitutional.[170] Employing this test, the plurality upheld the constitutionality[171] of major antisubversive legislation, the Smith Act,[172] and the conviction of a Communist Party officer for conspiracy in violation of that act.[173]

Sparring in concurring and dissenting opinions, Justices Felix Frankfurter and William Douglas in part used the writings of Thomas Jefferson to support their respective viewpoints in *Dennis*. Justice Frankfurter advocated judicial restraint and looked to the Framers for support that the First Amendment was not to be read as an absolute bar on governmental regulation of free speech. Frankfurter first rejected that the plain word alone should govern interpretation of the Amendment; he looked to the writings of the Framers because "[t]he language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience

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169. *See Dennis*, 341 U.S. at 510 (endorsing by Chief Judge Learned Hand's wording of the test, which considered the probability of the danger); *see also* Rabban, *Modern First Amendment*, *supra* note 9, at 1349. Judge Hand had enunciated his test as follows: "In each case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis*, 341 U.S. at 510 (quoting *United States v. Dennis*, 183 F.2d 201, 202 (2d Cir. 1950)). Nowak and Rotunda attack the clear and probable danger standard for providing very little protection for radical political doctrines: political forces always consider radical, dissident theories dangerous to the political order. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.14, at 1014. Thus, they agree with other commentators that *Dennis* essentially employed "the remote bad tendency test dressed in modern style." *Id.* (internal quotations omitted).

170. *See* 341 U.S. at 509 (noting that overthrow of the government was "a substantial enough interest" to warrant governmental regulation); *see also* Rabban, *Modern First Amendment*, *supra* note 9, at 1349.

171. *See* 341 U.S. at 515-17.

172. 54 Stat. 671, 18 U.S.C. §§ 10, 11 (1946 ed.) (current version at 18 U.S.C. § 2385). The challenged provisions make it unlawful for any person:

> 2(a)(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
>
> (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display 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;
>
> (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.
>
> 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title.

Id.

173. *See Dennis*, 341 U.S. at 516-17.

illumined by the presuppositions of those who employed them."[174] In the resulting review of relevant texts, Frankfurter found many indications in the Framers' writings that the First Amendment was not a "self-defining and self-enforcing"[175] absolutist rule. One source supporting this conclusion was a letter from Thomas Jefferson to Abigail Adams in which Jefferson emphasized that his opposition to the Sedition Act of 1798 was not due to its restriction on speech, but the fact that Congress had enacted such a restriction in violation of the powers the Constitution delegated to it.[176] Quoting Jefferson, Frankfurter maintained that a restraint on seditious speech was not unconstitutional, but rather

> [i]t was reserved to [the states], and was denied to the general government, by the constitution according to our construction of it. While we deny that Congress have a right to controul [sic] the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.[177]

In this quote, Frankfurter found support that Jefferson would not read the First Amendment as an absolutist. This and other evidence supported Frankfurter's conclusion that the legislature should be permitted to determine the bounds of the First Amendment and to punish unacceptable political expression.[178]

In his dissenting opinion, Justice Douglas also drew upon the writings of Jefferson, but Douglas used more rhetorical quotations more than those employed by Frankfurter in support of his argument that the First Amendment would permit the government to intervene only when the dangerous speech actually led to sedition. Douglas complained that the conduct for which the defendants had been convicted was simply teaching the doctrines of Marxism-Leninism.[179] Douglas then sought support for the notion that this teaching could not be punished. "The First Amendment reflects the philosophy of Jefferson," Douglas wrote, "'that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.'"[180]

174. *Id.* at 523.

175. *Id.*

176. *See id.* at 521-22.

177. *See id.* at 522 n.4 (quoting Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804)). Justice Frankfurter advanced similar arguments in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), when he correctly identified that Jeffersonian opposition to federal sedition prosecutions was "largely fear of federal usurpation of state power over the subject." *Id.* at 266.

178. *See Dennis*, 341 U.S. at 539-40.

179. *See id.* at 581-82.

180. *See id.* at 590.

Douglas used Jefferson's writings to support a highly libertarian view of the First Amendment: sedition speech may only be punished when the principles lead to action. Frankfurter had answered this argument with the language of Jefferson himself, and showed that Jefferson felt it proper for government (albeit state government) to impose limitations on citizens' seditious speech.[181] Both sides indicated the importance of looking to the Framers, and in particular to the writings of Jefferson himself, to determine the scope of protection the First Amendment provides to seditious conduct.

While neither Justice Frankfurter nor Justice Douglas could persuade the other that Jefferson and the other Framers decisively favored their position, the Court itself soon voiced discomfort with the test set forth in the *Dennis* plurality. The grave and probable danger test formulated in *Dennis* failed to have lasting influence,[182] and the Court subsequently clarified the constitutional scope of the Smith Act with regard to both advocacy and membership in subversive organizations.[183] These requirements limited the scope of the Smith Act,[184] and permitted the majority of those indicted under the Act to avoid imprisonment.[185]

In free association cases, meanwhile, the Court moved toward a balancing test: it weighed public interests against private interests in the association to determine if the government could regulate potentially subversive conduct.[186] In *American Communications Ass'n v. Douds*,[187] for example, the Court cited

181. *See supra* notes 176-77 and accompanying text.

182. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.14, at 1015 (saying the Court in *Yates v. United States*, 354 U.S. 298 (1957), retreated from the broad doctrine of *Dennis*) (footnotes omitted).

183. Although the Court established the constitutionality of the Smith Act in *Dennis*, it indicated that in some applications the Act might violate the Constitution. *See Dennis*, 341 U.S. at 516-17. The Court later reviewed a series of individual Smith-Act convictions, and in these cases severely restricted the reach of the Act. *See, e.g.*, Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); *see generally* NOWAK AND ROTUNDA, *supra* note 8, § 16.14, at 1013-16. The Constitution, the Court in *Yates* held, permitted the government to punish seditious speech, but only when the speech constituted advocacy—not mere discussion—of illegal conduct. *See Yates*, 354 U.S. at 321. The Court also limited the ability of the government to punish membership in a subversive organization. For a conviction to be constitutional, the government had to prove the defendant was an "active," not merely a nominal, member, and that the defendant had specific intent to further the criminal purposes of the organization. *See Scales*, 367 U.S. at 254-55.

184. *See* Mayton, supra note 55, at 135.

185. *See* HEMMER, *supra* note 150, at 17 (noting that after *Noto* the government discontinued prosecutions under the membership clause). Out of those indicted under the Smith Act 29 served jail terms. *See id.* at 16. Only one of these individuals, Janius Scales, served time under the membership clause of the Smith Act. *See id.* at 17.

186. *See* STEPHENS & SCHEB, *supra* note 112, at 608.

187. 339 U.S. 382 (1950). *American Communications Ass'n* upheld registration provisions that required all labor organization officers to file a statement that they were not members of the Communist Party and did not believe in or support Communist principles. *See* 339 U.S. at 445; *see also* 29 U.S.C. § 159(h) (1947) (repealed by Act of Sept. 14, 1959).

the clear and present danger test but essentially ignored it,[188] showed at least some deference to Congress's determination[189] and engaged in a balancing of competing interests.[190] The Court concluded that the congressional determination of threatened harm to interstate commerce and the possible detriment to public safety outweighed the value of individual liberties that might be restricted.[191] Therefore, the Court upheld the prohibition against Communists serving as labor union officers[192] without fully confronting the free expression issues underlying the case.[193]

Two members of the Court writing separately in *American Communications Ass'n* used Jefferson to support their arguments. Writing in dissent, Justice Black admitted "alien ideologies" such as Communism create an apparent danger for society. Nevertheless, Black sought to reassure the Court and the reader that the political system could survive such disparate, seditious voices.[194] One source for reassuring words was the First Inaugural Address given by Thomas Jefferson. Black quoted the same language used by Justice Brandeis in *Whitney* that those who wish to "dissolve this Union" should be permitted to stand as "monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[195] Although Jefferson had been quite willing to ignore individual rights when faced with the sedition of Aaron Burr,[196] Black used Jefferson's words regarding political dissenters to calm the Court and the public's outcry for suppression of the Communist threat possibly facing the nation.

Concurring in part and dissenting in part, Justice Jackson took issue with Black's arguments that the Communists should be treated as just another "alien ideology," and that Jefferson would advocate tolerance of their seditious activities. Black indicated the perceived threat Communist

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188. *See American Communications Ass'n*, 339 U.S. at 395-96.

189. *See id.* at 400 (emphasizing that Congress, not the courts, had primary responsibility to regulate interstate commerce).

190. *See id.* at 400-12. The Court employed a balancing test more openly in *Barenblatt v. United States*, 360 U.S. 109 (1959). In *Barenblatt*, the Court admitted, "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a *balancing* by the courts of the competing private and public interests at stake in the particular circumstances shown." *Id.* at 126 (emphasis added).

191. *See American Communications Ass'n*, 339 U.S. at 411-12.

192. *See id.* at 406.

193. *See, e.g.*, *id.* at 411-12. By emphasizing that the regulations focused on a commercial activity, namely strikes, and ignoring that the section of the National Labor Relations Act at issue, 29 U.S.C. § 159(h) (1940), dealt with elections, the Court in *American Communication Ass'n* avoided resolving whether the government could prohibit people from leading labor organizations because of their affiliation with the Communist party. *See id.*

194. *See American Communications Ass'n*, 339 U.S. at 452-53.

195. *Id.* at 452-53 & n.11 (quoting Thomas Jefferson, First Inaugural Address (Mar. 4, 1801)).

196. *See supra* notes 100-09 and accompanying text.

sympathizers posed was similar to the threat Federalists must have seen when viewing Jefferson's Republicans or the British must have seen when viewing the American Founders. Jackson complained, however, that comparing attacks on the Communists with attacks on Jefferson was "sacrilegious" because Jefferson's revolutionary activities were so different in "character and motives."[197] Jackson conceded that Jefferson and many other "Americans of undoubted patriotism" had uttered ardent, extravagant statements to support revolution,[198] and he supported this assertion with writings from Jefferson and other founders saying an unjust government should be overthrown.[199] Jackson refused to restrict people's thoughts about revolutions, and he justified this conclusion by saying Jefferson also felt people's thoughts should be free from government control.[200]

Jackson then drew a line, which he claimed Jefferson would also support, delineating government regulation of sedition—the line passed betweeen seditious thought (which could not be regulated) and seditious action (which was subject to government regulation, despite the First Amendment). Jackson wrote:

> Quotations of similar statements [about revolting against unjust governments] could be multiplied indefinitely. Of course, these quotations are out of their context and out of their times. And despite their abstract theories about revolt, it should also be noted that Adams, Jefferson, Lincoln and Grant were uncompromising in putting down any show of rebellion toward the Government they headed.[201]

Jackson, like Justice Frankfurter before him,[202] recognized a difference between the rhetorical and real Jefferson: although Jefferson might advocate

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197. *See American Communications Ass'n*, 339 U.S. at 428 n.4.

198. *Id.* at 439-40.

199. In a footnote supporting the passage cited at note 198, Jackson canvassed quotes he had found in MENCKEN, A NEW DICTIONARY OF QUOTATIONS, under the rubric "Revolution." *See id.* at 440-41 n.12. Two passages are from Jefferson. The first is a section of the Declaration of Independence:

> Whenever any government becomes destructive of these ends [life, liberty, and the pursuit of happiness] it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *cited in American Communications Ass'n*, 339 U.S. at 440 n.12. The second is a letter from Thomas Jefferson to William Smith, asking, "What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms." Letter from Thomas Jefferson to William Smith (Nov. 13, 1787), *cited in American Communications Ass'n*, 339 U.S. at 440 n.12.

200. *See id.* at 441-42.

201. *Id.* at 442 n.12.

202. *See supra* notes 173-77 and accompanying text.

freedom of thought and expression, Jackson knew Jefferson was uncompromising in putting down rebellion. Therefore, although Jackson realized that both he and Justice Black could quote Jefferson's writings for indications he supported unregulated political expression and even recognized a "right to revolt," Jackson recognized Jefferson possessed a realistic strain that would allow the subjugation of individual rights to maintain order.

Dissenting in subsequent Supreme Court opinions, Justices Black and Douglas extended Jackson's principle that the government should not be able to regulate or prevent subversive thinking, and supported their position with Jefferson's writing. In *In re Anastaplo*,[203] the Illinois State Bar denied the petitioner admission to the bar after he stated that one of the principles of the United States Constitution was "the right of the people to alter or to abolish" any government that became destructive to the pursuit of life, liberty, and happiness.[204] Black argued the Constitution should protect the petitioner's viewpoint because such beliefs were common in some of America's Founders, those individuals Jackson called "Americans of undoubted patriotism." Black described the historical roots of these beliefs as follows:

> [T]he men who founded this country and wrote our Bill of Rights were strangers neither to a belief in the 'right of revolution' nor to the urgency of the need to be free from the control of government with regard to political beliefs and associations. Thomas Jefferson was not disclaiming a belief in the 'right of revolution' when he wrote the Declaration of Independence. . . .[205]

Black used Jefferson's writings which appeared to support revolution, particularly the *Summary Views of the Rights of British America*,[206] the *Declaration of Independence*,[207] and letters praising Shays's Rebellion,[208] to argue that the Court was incorrect in refusing to protect Anastaplo's seditious thoughts. Black complained that the Court's opinion would permit states to reject bar applicants who "believe[d] in the Declaration of Independence as strongly as Anastaplo" and were willing to sacrifice their careers for those

203. 366 U.S. 82 (1961).

204. *See id.* at 99. The Illinois State Bar said Anastaplo had been denied admission after refusing to answer questions regarding whether he was a member of the Communist Party. *See id.* at 100-02. Anastaplo claimed it was because of his political views regarding the right to resist tyrannical government. *See id.* at 95.

205. *Id.* at 112-13.

206. *See supra* note 27.

207. *See supra* notes 27-30 and accompanying text.

208. See *supra* notes 52-55 and accompanying text.

beliefs.[209] Black did not address, however, the harsh, swift measures Jefferson used to prevent uprising during Jefferson's own presidency, particularly the one led by Aaron Burr. Again, Justice Black seemed willing to rely solely on the rhetorical Jefferson in hopes of advancing his position.

Dissenting in *Scales v. United States*,[210] another case involving a conviction under the Smith Act for membership in a subversive organization, Justice Douglas also used Jefferson's writings to support his argument that the First Amendment prevented government from regulating or suppressing thoughts. Douglas quoted the writings of James Madison and Thomas Jefferson and offered as Jefferson's formula for society not the punishment of unorthodox views but rather education and enlightenment of the masses.[211] Douglas frequently cited Jefferson's letter to Madison regarding Shays's Rebellion to support this position.[212] The notion that education and enlightenment, rather than punishment, should control the growth of potentially dangerous beliefs represented to Douglas "the only philosophy consistent with the First Amendment" and the writings of the Founders.[213] When the government can punish on the basis of a person's thoughts, as Douglas felt had occurred when Scales had been convicted merely for belonging to the Communist Party, Douglas bemoaned that the Court was sacrificing the ideals of the First Amendment for an "alien, totalitarian philosophy."[214]

Justices Black and Douglas emphasized the rhetorical writings of Jefferson much more than his historical persona as they sought to move the Court toward permitting greater constitutional protection for potentially seditious activities. Sometimes the Justices emphasized Jefferson's distinction that the government could punish only actions, not merely thoughts or expressions. Justice Douglas, dissenting in *W.E.B. DuBois Clubs of America v. Clark*,[215] quoted Jefferson's Bill for Establishing Religious

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209. *Anastraplo*, 366 U.S. at 112.

210. 367 U.S. 203 (1961).

211. *See id.* at 270-73 (Douglas, J., dissenting).

212. *See id.* at 273-74. In *Gibson v. Florida Legislative Investigation Committee*, Justice Douglas synthesized Jefferson's views on religious freedom and political expression and asserted that the government could investigate an individual's or group's faith or ideology only when the belief or expression moved into the realm of action inimical to society. *See* 372 U.S. 539, 573 (1963). Douglas concluded, "It was [Jefferson's] view that in the Free Society men's ideas and beliefs, their speech and advocacy are no proper concern of government. Only when they become brigaded with action can government move against them." *Id.* at 573.

213. *Scales*, 367 U.S. at 274.

214. *Id.* at 274.

215. 389 U.S. 309 (1967). In *W.E.B. DuBois Clubs*, the Court held it lacked jurisdiction to consider a First Amendment challenge to a provision in the Internal Security Act of 1950 that required all "Communist-front organizations" to register with the Attorney General. *See id.* at 309-10 & n.1.

Freedom for the premise, "[T]he opinions of men are not the object of civil government, nor under its jurisdiction . . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts . . . ."[216]

At other times, however, the Justices seemed to push Jefferson into more of an absolutist position than many of his writings and deeds would support. Dissenting from the Court's upholding of a Massachusetts loyalty oath for state hospital employees, Justice Douglas asserted the oath was unconstitutional whether the First Amendment was read "restrictively or *literally as Jefferson would have read it*."[217] Douglas did not provide a citation or support for the assertion that Jefferson would have read the language of the Amendment literally, so that "no law" meant "no law," although Douglas did earlier allude to Jefferson's belief that such loyalty oaths are "used to shackle the mind."[218]

Douglas provided more support for his claims that Jefferson would join in absolutist positions in *CBS v. Democratic National Convention*.[219] In *CBS*, Douglas argued that Jefferson sought to promote a free press, even if it exerted a powerful and harmful influence on the public mind.[220] Douglas indicated that Jefferson believed that the language "no law" in the First Amendment was "total and complete" because of Jefferson's opposition to the Alien and Sedition Acts.[221] Douglas's support for this assertion, however, consisted of Jefferson's writings that "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. . . . [T]herefore the [Sedition Act] . . . , which does abridge the freedom of the press, is not law, but is altogether void, and of no force."[222] Douglas's rationale for this absolute bar seems quite distinct from

The Court held that the petitioners had not exhausted their administrative remedies; therefore, the Court did not reach the merits of the case. *See id.* at 313. Justices Douglas and Black considered the provision facially void and therefore would have exercised jurisdiction to invalidate the registration requirement. *See id.* at 313 (Douglas, J., dissenting).

216. *Id.* at 314-15 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* THE JEFFERSON CYCLOPEDIA 976 (1900)).

217. *See* Cole v. Richardson, 405 U.S. 676, 691 (1972) (Douglas, J., dissenting).

218. *Id.* at 688. "Shackle the mind" may be an allusion to the quote inside the Jefferson Memorial that Jefferson said he had sworn "eternal hostility against every form of tyranny over the mind of man." *See* FROM ZENGER TO JEFFERSON, *supra* note 6, at 357.

219. 412 U.S. 94 (1973). *CBS v. Democratic National Committee* deals with the mass media, and thus involves a somewhat distinct form of constitutional analysis. *See id.* at 101; *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 846-49, 958-61 (1997). However, these distinctions are not relevant to the discussion in this paper.

220. *See CBS*, 412 U.S. at 153 (Douglas, J., concurring).

221. *See id.* at 156-57.

222. *See id.* at 157 (citing 4 J. ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 541 (1876)).

Jefferson's reasoning. Douglas emphasized the need for a press free from almost any government regulation, while Jefferson was willing to permit the states to exercise some control over the content of the press.[223] Through this quote, Jefferson sought only to express his opinion that the federal courts, but not the state courts, lacked jurisdiction to punish libel or heresy.[224]

While Justices Douglas and Black often used Jefferson's rhetoric in support of their view that the First Amendment should be seen as an absolute bar on government regulation of seditious speech, they often admitted that the Amendment's limitations may not reach to state government action. In *Barenblatt v. United States*,[225] the Court upheld the conviction of a graduate student who refused to answer questions from a congressional committee regarding his alleged membership in the Communist Party.[226] Justice Black dissented, in part arguing the government should not have the ability to allow any group of ideas and political aims to be driven "from the ballot and from the battlefield for men's minds."[227] Noting that Jefferson and his followers were another minority group that was portrayed as criminal by their opponents, Black argued the First Amendment protected such groups and their ideas from federal restrictions.[228] Yet Black also admitted some uncertainty existed regarding the limitations imposed on the states by the First Amendment.[229] Black's concession of uncertainty regarding what constraints the First Amendment imposed on the states seems consistent with the real Jefferson.[230] Although Jefferson refused to allow federal regulations

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223. *See supra* note 90-91 and accompanying text.

224. *See supra* notes 74-79 and accompanying text.

225. 360 U.S. 109 (1959).

226. *See id.* at 134.

227. *See id.* at 150 (Black, J., dissenting). In a case with very similar facts to *Barenblatt*, Justice Black repeated Justice Brandeis's citation of Jefferson's Inaugural Address—one of the most common rhetorical pieces cited—to support his position the Court should not permit Congress to punish individuals who before a congressional committee refuse to answer questions regarding membership in the Communist Party. *See* Wilkinson v. United States, 365 U.S. 399, 422-23 (1961) (Black, J., dissenting).

228. *See Barrenblatt*, 360 U.S. at 150-51. In *Konigsberg v. State Bar*, Justice Black drew a similar comparison between attempts to suppress Jefferson and his followers with attempts to prohibit unpopular speech. *See* Konigsberg v. State Bar, 366 U.S. 36, 65-66 & n.23 (1961) (Black, J., dissenting) (drawing a parallel between the Federalist passage of the Alien and Sedition Acts and the possible dangers of the group libel recognized in *Beauharnais v. Illinois*, 343 U.S. 250 (1952)).

229. *See Barrenblatt*, 360 U.S. at 151. Justice Black writes:

> *Whatever the States were left free to do*, the First Amendment sought to leave Congress devoid of any kind or quality of power to direct any type of national laws against the freedom of individuals to think what they please, advocate whatever policy they choose, and join with others to bring about the social, religious, political and governmental changes which seem best to them.

Id. (emphasis added).

230. Justice Douglas recognized a similar limitation on Jefferson's beliefs in *CBS v. Democratic National* Convention, 412 U.S. 94, 156 (1973). There Justice Douglas admitted uncertainty regarding

of free expression, he said state prosecutions for sedition and libel were not only permissible but were a potential tool for cleansing the Federalist press.[231]

By the middle of the 1960s, the Court resumed its shift toward greater protection of free expression from governmental regulation,[232] and this willingness to protect political dissent and subversive expression remains today.[233] In 1964, Justice Brennan finally declared the Alien and Sedition Acts (which had been permitted to expire more than one hundred and fifty years earlier[234]) unconstitutional,[235] not because they constituted federal infringement into an area of state control as Jefferson believed,[236] but because the limitations imposed on criticism of the government were inconsistent with the First Amendment protection of freedom of expression.[237]

In 1969, the Court adopted the "imminent lawless action"[238] or *Brandenburg* test[239] which remains the principal test for seditious speech today.[240] The *Brandenburg* test permits the government to proscribe advocacy of violence or lawlessness only where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[241] This test, the most permissive test announced regarding an individual's right to express subversive views,[242] seeks to

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the applicability of the Fist Amendment to the states. *See id.*

231. *See supra* notes 88-93.

232. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.15, at 1016-19; *see also* STEPHENS & SCHEB, *supra* note 112, at 608.

233. *See* STEPHENS & SCHEB, *supra* note 112, at 609.

234. *See supra* note 67 and accompanying text.

235. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1964).

236. *See supra* notes 75-80 and accompanying text.

237. *See Sullivan*, 376 U.S. at 276.

238. *See* STEPHENS & SCHEB, *supra* note 112, at 608.

239. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.15, at 1017-18.

240. *See* Rabban, *supra* note 9, at 1303; *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989) (saying that the *Brandenberg* test applies only to speech that incites others to imminent lawless or violent action).

241. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). *Brandenberg* reversed the conviction of a Ku Klux Klan leader who had allegedly engaged in televised speech regarding racial strife and a Klan march on Congress. *See id.* at 445-46 & n.1.

Subsequent to the *Brandenberg* decision, the Court further refined the test by requiring that the inciteful language be directed toward some person or group, so it might objectively be considered to advocate imminent lawlessness. *See* Hess v. Indiana, 414 U.S. 105, 108-09 (1973). Synthesizing the contributions from *Hess* with the original *Brandenberg* test, Professors Nowak and Rotunda summarized the modern test in three requirements: "(1) the speaker *subjectively intended* incitement; (2) in context, the words used were *likely to produce* imminent, lawless action; and (3) the words used by the speaker *objectively encouraged* and urged incitement." NOWAK & ROTUNDA, *supra* note 8, § 16.15, at 1018.

242. *See* STEPHENS & SCHEB, *supra* note 112, at 609 (saying the *Brandenberg* test "reaffirmed

prevent only that advocacy which might cause unthinking lawlessness before reasonable debate may show the error of the words.[243]

This new test, and a decrease in the number of First Amendment cases dealing with political sedition, largely marked the end of the use of Jefferson's writings to support arguments in First Amendment political expression cases. One interesting opinion by Justice Rehnquist, however, demonstrates that even Jefferson's rhetoric may sometimes permit government to impose some limits on political expression. In *Ollman v. Evans*,[244] a case examining the proper boundary between First Amendment protection and civil liability for defamation, Rehnquist attributed to Jefferson what appears to be an absolutist principle: that there is no such thing as a false idea.[245] Rehnquist made clear, however, that Jefferson would protect only political ideas, and that the Constitution permitted litigation over the factual question at issue in *Ollman* to determine its falsity.[246] Rehnquist grasped Jefferson's real position on sedition, which Rehnquist indicated was consistent with the common law.[247] Some Justices, particularly when allowing greater governmental restrictions on seditious expression, seem capable of properly reflecting the real, complex persona of Thomas Jefferson and his views on free speech through examples from his writings.

V. CONCLUSION

The tension that exists between the mythical and real persona of Thomas Jefferson regarding government regulation of seditious speech pulls on the Justices of the United States Supreme Court as they seek to define the proper boundary for First Amendment protection of seditious speech. Libertarian Justices such as Brandeis, Black, and Douglas often found in Jefferson an

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and expanded the old clear and present danger test as articulated by Justices Holmes and Brandeis").

243. *See* NOWAK & ROTUNDA, *supra* note 8, § 16.15, at 1018.

244. 471 U.S. 1127 (1985) (Rehnquist, J., dissenting from denial of certiorari).

245. *Id.* at 1129. Rehnquist was interpreting the Court's statement in *Gertz v. Robert Welch, Inc.*, that "[u]nder the First Amendment, there is no such thing as a false idea" because "we depend for its correction . . . on the competition with other ideas." 418 U.S. 323, 339-40 (1974). Rehnquist argued that this premise was "an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false 'idea' in the political sense . . . ." *Ollman*, 471 U.S. at 1129. Rehnquist then proceeded to evaluate the utterance under common-law libel, which he implied was consistent with Jefferson's views. *See id.* at 1130 (noting that if one "draws back for a moment, and considers the passage in context and in the light both of the First Amendment and the history of common-law libel," that person would conclude the utterances were not protected by the First Amendment).

246. *See Ollman*, 471 U.S. at 1130 (saying the author could be required to defend his statement that Ollman was an activist without academic status).

247. *See supra* note 245.

American hero to support their view that political expression should receive broad constitutional protection, both because such protection was required by the Constitution and because permitting dissension nurtured and preserved our democracy.

Both they and Justices more willing to permit government regulation of seditious expression, however, often reflect an awareness that the real Jefferson would be more accepting of governmental regulation of speech. These Justices offer a portrayal of Jefferson much closer to the historical reality: Jefferson as he was, yet perhaps not what he would have preferred to be. Yet certainly, as the Court continues to explore the boundaries of First Amendment protection of free expression, it will again turn to the writings of Thomas Jefferson: as Abraham Lincoln said, "The principles of Jefferson are the definition and axioms of a free society."[248]

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248. *See* PATTERSON, *supra* note 10, at 45.