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Freedoms of Expression, Political Extremism and Seditious Speech in the United States Supreme Court's Jurisprudence (Part I)

The First Amendment to the Constitution of the United States declares, in seemingly clear and unequivocal language, that "Congress shall make no law […] abridging the freedom of speech".[1] This lack of ambiguousness is very much deceptive. A prevailing majority of legal scholars, judges and constitutional commentators claims that the apparent linguistic absolutism of the clause simply cannot be construed literally. Franklyn Saul Haiman, one of the leading interpreters of the First Amendment, observes that

> neither the United States Supreme Court, which has final power to interpret the Constitution, nor leading scholars who have studied and written authoritatively about the history and status of freedom of speech in America, […] nor the largest and most vocal civil liberties-action organization in the country, the American Civil Liberties Union, […] have ever contended that the phrase "no law" in the First Amendment is to be understood as meaning literally and absolutely "no law".[2]

As another leading First Amendment scholar notes, only somebody who is "undisciplined in the law may be forgiven if he reads the First Amendment in a literal vacuum". In Schwartz's opinion,

> the words of the First Amendment […] cannot be given the absolute effect in law which they have in language. Without the freedoms guaranteed by that Amendment, there would, to be sure, be no free society at all. But the rejection of the one extreme — giving no effect to the Amendment — does not mean that we must embrace the opposite extreme, giving them unlimited effect. The First Amendment freedoms are not ends in themselves, but only means to the end of

[1] *Freedom of Speech Decisions of the United States Supreme Court*, ed. by M. Harrison and S. Gilbert, San Diego 1996, p. 1. The 14th Amendment, adopted in 1868, extended this ban to local and state government.

[2] F.S. Haiman, *Speech and Law in a Free Society*, Chicago-London 1981, p. 3–4.

> a free society. As such, they are qualified by the requirements of the Constitution as an entirety for the maintenance of a free society. The First Amendment freedoms are vital, but their exercise must be compatible with the preservation of other rights essential in a democracy.[3]

All in all, we can conclude that the consensus opinion maintains that absolutist construction of the First Amendment is plainly unreasonable because it would extend the legal protection to every conceivable utterance, including, for instance, child pornography, slander, betrayal of secrets pertaining to national security during the act of espionage, true threat or incitement to commit a crime.[4]

Since the Constitution of the United States remains silent on the question of limitations of free speech, one of the main topics of political-and-legal discourse among commentators, scholars and judges concerns the issue of either conceptual or axiological boundaries of this First Amendment right. One of the crucial areas in that regard refers to the relation between freedom of speech and external or internal security. Thomas I. Emerson correctly notes that "the interest in […] security is concerned with protecting the mechanisms of the democratic process against alteration" by unacceptable methods which (allegedly) include expressing an opinion belonging to one of the categories of speech considered improper in a democratic and liberal society.[5] Such an expression may be placed under a general rubric of "seditious" or "subversive" speech. In simplest terms, seditious speech may be defined as an expression that "encourages opposition to or rebellion against government."[6] The more elaborate definition would encompass the publication of a speech or writing "with intent to bring into hatred or contempt, or excite hostility towards […] government [seditious libel in a strict sense of the phrase — Ł.M.] or with the aim of inducing reform by unlawful means or of promoting class warfare" or of frustrating government's objectives considered vital for national security or internal — not local — peace (subversive speech).[7]

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[3] B. Schwartz, *The Supreme Court. Constitutional Revolution in Retrospect*, New York 1957, p. 232.

[4] Nevertheless, comparatively and generally speaking, the American model of the free speech protection is much closer to the absolutist paradigm than its European equivalent, Ł. Machaj, *Palenie krzyży jako manifestacja konstytucyjnie chronionej wolności słowa? Z badań nad orzecznictwem Sądu Najwyższego Stanów Zjednoczonych*, „Studia nad Faszyzmem i Zbrodniami Hitlerowskimi" 30, 2008, p. 68.

[5] T.I. Emerson, *The System of Freedom of Expression*, New York 1970, p. 98.

[6] S. Welch et al., *Understanding American Government*, Boston 2012, p. 422. See also T.G. West, *Free Speech in the American Founding and in Modern Liberalism*, [in:] *Freedom of Speech*, ed. by E.F. Paul, F.D. Miller Jr. & J. Paul, Cambridge 2004, p. 329.

[7] E. Barendt, *Freedom of Speech*, Oxford 1985, p. 153. Those two categories of expression are sometimes merged under one rubric of "seditious libel". Though oftentimes it is in practice extremely difficult, if not downright impossible, to formulate a clear-cut distinction between them, for the purpose of this series we will assume that there is a clear conceptual (and axiological) difference between excessive criticism, harsh judgments or false statements concerning government or its officials and political advocacy (incitement) of violence or revolution. I will also distinguish subversive advocacy (which urges audience to commit unlawful acts against established political

Due to the profile of the journal, this series will mainly focus on the latter category, particularly on the question of extending the First Amendment guarantees to promulgation of totalitarian, revolutionary or extremist doctrines. However, in order to provide a necessary historical background, this article will discuss the history of the Sedition Act of 1798 which criminalized seditious libel in the narrow sense of the term, that is created "a quintessentially political crime"[8] of leveling — allegedly defamatory — criticism against governmental institutions and holders of certain governmental offices.[9]

Before we discuss the relevant legislation, it is worth noting that, as Cass R. Sunstein remarks,

> more than anything else in the Constitution, the First Amendment's protection of free speech and free press symbolizes the American commitment to liberty under law. These […] words have inspired and provoked not only Americans, but also reformers and constitution-makers all over the world.[10]

Our perception of the First Amendment's meaning and sociopolitical role should not, however, fall prey to the mistake of anachronism. David A. Strauss points out that the constitutional free speech provision

> is the most celebrated text in all of American law. With the possible exception of the Fifth Amendment […] no other provision of the Constitution is so widely known to nonlawyers. Many nonlawyers even know some of the language of the First Amendment verbatim […] But the story of the development of the American system of freedom of expression is not a story about the text of the First Amendment. That text was part of the Constitution for a century and a half before the central principles of the American regime of free speech, as we now know it, became established in the law. Nor is it a story about the wisdom of those who drafted the First Amendment […] The central features of the First Amendment law were hammered out mostly over the course of the twentieth century, in fits and starts, in a series of judicial decisions and extrajudicial developments. The story of the emergence of the American constitutional law of free speech is a story of evolution and precedent, trial and error. It is a twentieth century story.[11]

Therefore, while the scope of the right to free speech is currently much wider in the American legal system than in its European counterparts (regarding, for example, libel, "hate speech" or national flag desecration), it would be a mistake to forget that there were periods in the United States' history when even purely

order, see L.C. Bollinger, G.R. Stone, *Dialogue*, [in:] *Eternally Vigilant: Free Speech in the Modern Era*, ed. by L.C. Bollinger & G.R. Stone, Chicago-London 2002, p. 5), which is a form of political speech, from pure criminal solicitation (urging people to commit specific crimes — murder, rape, theft — the penalization of which is independent from any political motives) which does not normally constitute political speech.

[8] R. Post, *Reconciling Theory and Doctrine In First Amendment Jurisprudence*, [in:] *Eternally Vigilant*…, p. 157.

[9] H. Kalven Jr., *A Worthy Tradition: Freedom of Speech In America*, New York 1988, p. 63.

[10] C.R. Sunstein, *Democracy and the Problem of Free Speech*, New York 1995, p. XI.

[11] D.A. Strauss, *Freedom of Speech and the Common-Law Constitution*, [in:] *Eternally Vigilant*…, p. 33.

political expression was subject to suppression, repression, criminalization or censorship simply because of its allegedly dissident, extremist or radical character. Probably the most notorious exemplification of this phenomenon was the passing of the already mentioned Sedition Act by the United States' Congress in 1798. We will clearly see further on that this normative regulation even *prima facie* undermined the very core of the First Amendment, the primary objective of which is not a protection of a purveyor of obscene movies or of a Ku-Klux-Klan member burning a cross before a house belonging to an African American family (even if we assume that they deserve said protection) but rather it is to guarantee the freedom of discussion concerning public affairs, the discussion which includes the right to criticize, laugh at or denounce — even harshly — public officials and their policies.

In the United States the turn of the 18th century was a period of very intense strife between political factions. It was almost as if the worst predictions of the Founding Fathers regarding the nature of political parties came to fruition. Two antagonistic camps — i. e. the Federalists and the Republicans — which developed at the time remained in constant conflict which often reached a boiling point, sometimes even leading to law-breaking or violence. Both factions disagreed on many issues; their disputes encompassed both domestic (particularly economic and constitutional) and foreign policy. The Federalists, gathered around Alexander Hamilton and John Adams (the President of the United States during the 1797–1801 period), supported bestowing the federal government with significant number of tasks, the centralization of the political system, the broad interpretation of powers enumerated by the Constitution (Article 1, Section 8) and delegated to the U.S. Congress and the strengthening of the executive branch of federal government. Their general objective was to enable the central government to lead more expansive policies than those envisioned by their Republican opponents. The Federalists who mostly represented wealthy industrial and merchant interests from the northern parts of the United States were also in favor of rampant economic protectionism and the establishment of the system of protective tariffs, of giving Congress the exclusive (also with regard to state and local government) right to incur public debt and of creating the central bank which would be solely responsible for the financing of said deficits. In the context of international affairs, the Federalists, displaying vigorously pro-aristocratic inclinations, fervently emphasized the need for normalization of relations between the United States and Britain and for establishing a stable alliance between recent enemies. On the other hand their Republican counterparts, led primarily by James Madison and Thomas Jefferson, were advocates of the decentralized model of government, opted for rigorous limitation of the federal government's powers, proclaimed the obligation to respect rights traditionally belonging to states constituting the new Union and were in favor of the very narrow constitutional interpretation as far as enumerated powers of Congress were concerned. In the matter of international trade the

Republicans, representing mostly the interests of rural and agricultural South, adopted liberal paradigm, unequivocally opposing the ideas of protectionism's advocates. The also rejected the conception of creating a federal central bank; they thought it would be harmful to middle-class taxpayers. In the area of foreign policy the Republicans displayed clearly pro-French sentiments and were ready to enter into a political pact with Paris "sister republic".[12] While for the purposes of this article a more in-depth and detailed description of this political conflict appears unnecessary, it should be added, though, that throughout their rivalry protagonists of both antagonistic parties often did not pull any verbal (and sometimes nonverbal) punches and did not hesitate to accuse their opponents of almost every possible political wickedness and villainy, including committing treasonous actions, disregarding national interest, lacking patriotism or attempting to eradicate civic rights and freedoms.

This dispute seems to have reached its apogee in 1798. The passing of the Sedition Act on the 14th of July was just a legal manifestation (and function) of this more basic socio-political altercation. The voting in Congress predictably went along partisan lines, with the Federalists uniformly supporting the bill and with the members of the Republican faction denouncing and unanimously opposing it. The Federalists had the majority and obviously won. The legislative result of their victory was not very impressive. It would be difficult to consider this regulation — regardless of personal feelings on the substance of the act — an example of *elegantia iuris* or a result of legal erudition of the lawmakers. The statute consisted of barely a few sections. The most relevant fragments have been reprinted in Leon Whipple's book:

> **Section 2** … That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, etc.… any false, scandalous, and malicious writings against the government of the United States, or either House of the Congress… or the President, with intent to defame the said government, (etc.)… or to bring them into contempt or disrepute; or to excite against them… the hatred of the good people of the United States, or to stir up sedition in the United States, or to excite any unlawful combination therein for opposing or resisting any law… or any act of the President of the United States done in pursuance of any such law, or of the powers vested in him by the Constitution… or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of any foreign nation, against the United States, their people, or government, then such person, being thereof convicted before any court in the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years. **Section 3** … That if any person shall be prosecuted under this act, for the writing or publishing of any libel aforesaid, it shall be lawful for the de-

[12] For further information on the said debate see, for example, I. Rusinowa, *Z dziejów amerykańskich partii politycznych*, Warszawa 1994, pp. 16–22; R.P. Sutton, *Federalism*, Westport 2002, pp. 50–53; M.I. *Urofsky*, P. Finkelman, *A March of Liberty: a Constitutional History of the United States*, vol. 1, New York 2002, p. 130 n.

> fendant… to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury shall have a right to determine the law and the fact, under the direction of the court, as in other case.[13]

It is worth noting that, as far as *mens rea* was concerned, the Act was not clear whether the deeds had to be committed purposefully or just knowingly in order to become crimes. We should also point out that "the defense of truth" was rather illusory because the statute obviously was not aimed just at allegedly false statements of fact but also targeted opinions which are — by definition — not verifiable or falsifiable. Finally, it should be pointed out that the purely partisan character of the legislative measure was evidenced by the fact that the legal protections of the Sedition Act were not extended to the Office of Vice-President of the United States, the position at the time occupied by Thomas Jefferson, the leader of the Republican camp. If we accept that the statute was supposed to serve the Federalists' particular political interests, we will understand the reason for the final section of the statute which declared that the Act would expire on the 3rd of March, 1801. The Federalists clearly perceived the legislation as a double-edged sword which can easily and successfully be used against them if only their Republican antagonists manage to triumph in the next Presidential election (which was to take place in 1800, with the winner assuming the office in 1801) and transform the country's political landscape.

The Congressional debate on the introduction of the analyzed measure was very stormy and passionate. The representatives of the Federalist camp argued that every government must possess a (morally justified) legal right to defend itself against obstruction, insurgency and any and all actions the purpose of which was to undermine the legitimate political authority and to stir up seditious, subversive or pernicious tendencies or feelings in society. The United States' government should not be deprived of this power, the First Amendment notwithstanding. The Federalists claimed that the Constitutional Free Speech Clause only banished prior restraints and — in Blackstonian spirit[14] — that the freedom to speak one's mind under no circumstances precluded the judiciary from subsequently punishing the expression of opinion which violated existing legal rules. Finally, they indicated that the First Amendment cannot be interpreted to protect libelous speech which allegedly undoubtedly remained beyond the Clause's purview.[15] It is hardly a surprise that the Republicans' interpretation of the situation was drastically and diametrically different. A particularly close attention should be paid to arguments put forward by Albert Gallatin, a Congressman from Philadelphia, who questioned the axiological, moral and constitutional legitimacy of

[13] L. Whipple, *The Story of Civil Liberty In the United States*, New York 1927, pp. 22–23.

[14] Blackstone's Commentaries on the Laws of England, book 4th, chapter 11th, http://avalon.law.yale.edu (access: 22.09.2014).

[15] D.P. Curie, *The Constitution in Congress: the Federalist Period 1789–1801*, Chicago 1997, pp. 260–261.

the Sedition Act on the most fundamental and comprehensive level. The starting point of the politician's argumentation was that any laws which radically narrow the scope of Constitutionally guaranteed individual rights and liberties are justifiable only in a truly extraordinary situation. When seditious and subversive tendencies reach such a dramatic level that the abridgement of freedom remains the necessary course of action if the very existence of political community is to be preserved, an introduction of some reasonable limitations of the freedom of speech may be accepted. Gallatin then asked rhetorically:

> Does the situation of the country, at this time, require that any law of this kind should pass? Do there exist such new and alarming symptoms of sedition, as render it necessary to adopt […] any extraordinary measure for the purpose of […] restricting the freedom of speech and of the press?[16]

In his opinion, there was absolutely no supporting evidence for the Federalists' contention that there exists significant "seditious disposition" amongst the people. In a very emotional tone Gallatin observed that

> the American Government had heretofore subsisted, it had acquired strength, it had grown on the affection of the people, it had been fully supported without the assistance of laws similar to the bill on the table.[17]

The Congressman also warned against the possibility of the Act's provisions being abused for purely political purposes by unscrupulous administration, which might cause punishments to be meted out just for making inoffensive factual pronouncements which judge happens to — without substantiation — disbelieve, for formulating yet unprovable political predictions which make the ruling group uncomfortable or for expressing not criminal but just erroneous views. In other words, it was a distinct possibility that after the statute's passing no writings or opinions which do not coincide with or counteract the position of a prevailing party would "escape the severity" of the Sedition Act. Gallatin emphasized that in a free society the proper reaction to opposition is not to silence or eliminate its adherents by using instruments of legal coercion but rather to repel it with "the single weapon of argument". The latter is the best way to correct or rectify mistakes; the truth is the best antidote to falsity and error. Therefore, in Gallatin's opinion, the Federalists, by advocating the passage of the legislation, display "their want of confidence in the purity of their own views and motives" evidenced by their fear of subjecting their ideas to open debate. Gallatin's detractions ring very powerful to this day:

> This bill and its supporters suppose, in fact, that whoever dislikes the measures of Administration and of a temporary majority in Congress, and shall, either by speaking or writing, express his disapprobation and his want of confidence in the men now in power, is seditious, is an ene-

[16] Annals of Congress, House of Representatives, 5th Congress, 2nd Session, p. 2107.
[17] Ibid., p. 2109.

> my, not of Administration, but of the Constitution, and is liable to punishment. That principle […] [is] subversive of the principles of the Constitution itself. If you put the press under any restraint in respect to the measures of members of Government; if you thus deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory; and this bill must be considered only as a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.[18]

As Gallatin concluded, always

> laws against writings of this kind have been one of the most powerful engines used by tyrants to prevent the diffusion of knowledge, to throw a veil on their folly or their crimes, to satisfy those mean passions which always denote little minds, and to perpetuate their own tyranny.[19]

His criticism, however, fell on deaf ears — the Sedition Act was approved.

The Republican opposition to the new legislation did not cease after the statute had been passed. The Act was fervently criticized in a Republican press and during political gatherings and demonstrations. Of particular importance are two resolutions adopted by state legislatures of Kentucky and Virginia (which were dominated by the Republicans), authored respectively by Thomas Jefferson and James Madison, two most prominent leaders of this political faction. Even though the principal accusation included in those proclamations concerned the federal government going beyond its Constitutionally mandated powers (the issues of the freedom of speech, its limits and boundaries, possible abuses, etc. belong to states' area of competence), the resolutions also expounded on and glorified the conceptions of a limited government, of individual rights, of republican freedom, of freedom of expression. For instance, the document adopted by Virginia's legislature stated that the Sedition Act should

> produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.

Both resolutions even declared that — in one way or another — states should make full use of their (either Constitutional, according to Madison, or natural, according to Jefferson) right to recognize the Sedition Act as unconstitutional, the bill being — in Madison's words — "the palpable and alarming infraction of the Constitution".[20] It is evident that the Republican criticism of the Sedition Act was principled and motivated not just by political considerations and exigencies but also by the most fundamental presumptions and assumptions of the American model of government.

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[18] Ibid., p. 2110.

[19] Quoted in: R. Walters, *Albert Gallatin: Jeffersonian Financier and Diplomat*, New York 1957, p. 113.

[20] M.D. Peterson, *Thomas Jefferson and the New Nation: a Biography*, London 1975, p. 624; I. Brant, *The Bill of Rights: its Origin and Meaning*, Indianapolis 1965, pp. 276–278.

The political-and-legal reality soon confirmed the accuracy of admonitions given by the opponents of the Sedition Act; its blanket rules very quickly started being evidently used — if not abused — in order to suppress the views of dissenters protesting the Federalists' policies. It appears that the case of Matthew Lyon, Republican Congressman from Vermont, was the most shocking exemplification of the attendant perils of the statute.

He was convicted and sentenced to four months imprisonment and a thousand dollars fine for publishing an article which said — rather innocently — that under President Adams' administration "every consideration of the public welfare [was] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice". The criticism — though harsh — was not therefore couched in vulgar, particularly offensive or insulting terms. Lyon's words were certainly not beyond the pale if the First Amendment was to mean anything. We should also observe that the Representative from Vermont could not absolve himself from responsibility by using the defense of truth which was much vaunted by the Federalists. His statements were almost a paradigmatic exemplification of political opinion, not subject to empirical analysis in light of their truthfulness or falsity; under no circumstances and under no construction did they constitute factual discourse. It is also worth pointing out that the judge who presided over the trial instructed the jury to pronounce Lyon not guilty only if they were capable of finding that his expression "could have been uttered with any other intent than that of making odious or contemptible the President and the government, and bringing them both into disrepute".[21] Since this remains one of absolutely natural objectives of any vigorous political polemics, the conviction was all but secured. Other examples of the Sedition Act's employment were also quite outrageous. Journalist John Daly Burk was arrested (later he managed to abscond prison to Virginia, avoiding trial) for an obviously sardonic expression of hope that the French would successfully invade the United States and "put to the guillotine" every "scoundrel in favor of this Government". Thomas Cooper, editor of the Pennsylvania "Gazette", was sentenced to six months in prison and a fine of four hundred dollars for writing and distributing a leaflet in which he derided President Adams' capabilities, accused him of trying to establish a standing army and blamed him for growing debt and economic difficulties. Another journalist James Callender was sentenced to nine months imprisonment and a fine of two hundred dollars for publishing a scathing political pamphlet in which he announced that Adams' policy "has been one continued tempest of malignant passions", and that the President

[21] G.R. Stone et al., *The First Amendment*, New York 1999, pp. 7–8. Although the sentence was carried out, the finale of Lyon's story remains optimistic. While incarcerated, Lyon took part in the election to the House of Representatives. The margin of his victory was unquestionable.

> has never opened his lips, or lifted his pen without threatening and scolding; the grand object of his administration has been to exasperate the rage of contending parties, to calumniate and destroy every man who differs from his opinions.

David Brown, homeless radical whose life mission seemed to be travelling around the country and denouncing Federalist government, was sentenced to an absolutely shocking eighteen months of prison (and a fine of four hundred and fifty dollars) for displaying a placard which pronounced: "No Stamp Act, No Sedition Act, No Alien Bills, No Land Tax, downfall to the Tyrants of America; peace and retirement to the President; Long Live the Vice-President". Anthony Haswell, another journalist of Republican persuasion, editor of the "Vermont Gazette", was sentenced to two months in prison and a fine of two hundred dollars for calling Matthew Lyon's prosecutor (without naming him)

> hard-hearted savage, who has, to the disgrace of Federalism, been elevated to the station where he can satiate his barbarity on the misery of his victims" and for proclaiming that Lyon was incarcerated "by the oppressive hand of usurped power in a loathsome prison.[22]

Last but not least, the case of Luther Baldwin, another Republican activist, also deserves to be mentioned — it certainly was the most absurd and ludicrous one. Baldwin was convicted for saying, while intoxicated, that he did not care if the cannon salute in honor of President Adams would be fired "through [the latter's — Ł.M.] ass".[23] All those cases confirmed the Republicans' fears concerning the availability of vague clauses of the Sedition Act as a weapon used for purely partisan purposes.

Due to the expiration of the Sedition Act (in 1801, as planned), the Supreme Court of the United States did not have an opportunity to ascertain the bill's constitutionality at that time.[24] However, it is worth mentioning that in the 20th century several Justices, when ruling on some of the First Amendment controversies, mentioned the Sedition Act in most unflattering terms. Justice William Brennan wrote that the attack on the statute's validity had "carried the day in the court of history".[25] Justice William O. Douglas called the bill "First Amendment muzzle" and "a regrettable legislative exercise plainly in violation of the First Amendment".[26] Justice Hugo Black declared that the enforcement of the Sedition Act

> constitutes one of the greatest blots on our country's record of freedom. Publishers were sent to jail for writing their own views and for publishing the views of others. The slightest criticism

[22] All those cases are described in more detail by G.R. Stone in *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, New York 2004, pp. 48–64.

[23] B.A. Weisberger, *America Afire: Jefferson, Adams and the First Contested Election*, New York 2011.

[24] It is of course entirely possible that the Supreme Court of the 1800 would not have questioned the bill's constitutionality, its composition being dominated by the Federalists.

[25] New York Times Co. v. Sullivan, 376 U.S. 254, 276.

[26] Gertz v. Robert Welch, 418 U. S. 323, 356–357.

> of Government or policies of government officials was enough to cause biased federal prosecutors to put the machinery of Government to work to crush and imprison the critic. Rumors which filled the air pointed the finger of suspicion at good men and bad men alike, sometimes causing the social ostracism of people who loved their free country with a deathless devotion. Members of the Jeffersonian Party were picked out as special targets so that they could be illustrious examples of what could happen to people who failed to sing paeans of praise for current federal officials and their policies […] Carpenters, preachers, lawyers, and many others furnished grist for the prosecutor's biased political activities in the "administration of justice" […] All the governmental activities set out above designed to suppress the freedom of American citizens to think their own views and speak their own thoughts and read their own selections, and even more, occurred under the 1798 Sedition Act.[27]

After his victory in the next Presidential election Thomas Jefferson pardoned all persons convicted under the Act; the new Republican Congress sought to recompense the fines paid by the statute's victims[28]. Nevertheless, we must avoid an easy temptation of perceiving this political-and-legal dispute between two rivaling factions in clear black-and-white terms. Any easy dichotomous distinction between liberty-loving Republicans and repressive Federalists is spurious. As Werhan points out,

> after the Republican takeover in the "Revolution of 1800", Republican prosecutors in the states, with the knowing acquiescence of President Jefferson, used state laws against seditious libel to silence their Federalist opponents.[29]

Even Jefferson himself wrote in one of his letters, justifying repressions against Federalist newspapers, that his opponents

> having failed in destroying the freedom of the press by their gag law seem to have attempted it in an opposite form, that is by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of credit. And the fact is that so abandoned are the tory presses in this particular that even the least informed of the people have learned that nothing in a newspaper is to be believed. This is a dangerous state of things and the press ought to be restored to its credibility if possible.[30]

Such moral-and-political relativism is another proof and reminder how dangerous regulations like the Sedition Act are to the freedom of speech.

The conclusion to the story of the Sedition Act is optimistic. It has been unequivocally condemned by future generations of commentators (usually in most radical terms). A number of typical opinions is worth mentioning. According to Richard M. Perloff, the Sedition Act constituted "one of the biggest travesties of

[27] Communist Party v. Control Board, 367 U.S. 1, pp. 155–158.

[28] K. Werhan, *Freedom of Speech: a Reference Guide to the United States Constitution*, Westport 2004, p. 14.

[29] Ibid.

[30] M.D. Peterson, op. cit., p. 715.

American press history", aimed at maintaining the Federalists' hold on power.[31] Norman L. Rosenberg argues that the bill was simply the ruling establishment's legal answer to political criticism and an attempt to "use systematic criminal libel prosecutions as a part of political conflict". This "flimsy legal tool" was therefore used as an instrument of solving social-and-political conflicts and became entangled with brutally partisan and ideological struggle.[32] Joseph M. Lynch is convinced that the intentions of the Sedition Act's creators and enforcers was straightforward — "to suppress political criticism of Administration". The practical effect of the regulation was to "immunize incompetent, corrupt, or despotic public officials from criticism and maintain them in office", hence perpetuating bad governance. As a consequence, the American political model worsened significantly, if not for long.[33] Other authors indicate that even though the motivations of the Act's legislators did not necessarily have to be contemptible (at least some of them might have been persuaded to support the legislation due to objective, rational and morally legitimate — even if we think it unfounded — dread of possible negative consequences of unfettered political discussion to the quality of public life and to American unity, and not due to strictly partisan considerations), in reality the Act did not achieve any of such desirable objectives and was in fact self-defeating, eroding away and undermining already existing significant consensus among public actors.[34] Edward G. Hudon emphasizes the obvious truth that freedom of speech necessarily and in fact *ex definitione* implies the protection of opinions which remain "unrestrained or even in bad taste […] the political arena has never been a proper setting for the thin skinned or the over sensitive". That was the reason why the Sedition Act undermined the very core values lying at the foundations of the First Amendment, restricting free public discussion of political issues.[35] As Charles A. Beard sums up, the legislation, due to its broad, loose and imprecise language,

> penalized everyone who passed severe strictures upon the Government of the United States. In fact, this measure gave to Federalist judges, prosecutors, and executive officials the authority to arrest, fine, and imprison any of their political foes who were especially objectionable to them.[36]

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[31] R.M. Perloff, *Political Communication: Politics, Press, and Public in America*, Mahwah 1998, p. 18.

[32] N.L. Rosenberg, *Protecting the Best Men: an Interpretive History of the Law of Libel*, Chapel Hill 1986, pp. 259, 265.

[33] J.M. Lynch, *Negotiating the Constitution: the Earliest Debates over Original Intent*, Ithaca 1990, pp. 220–221.

[34] See S. Elkins, E. McKitrick, *The Age of Federalism: the Early American Republic, 1788–1800*, New York 1995, p. 593.

[35] E.G. Hudon, *Freedom of Speech and Press in America*, Washington 1963, p. 53.

[36] Ch.A. Beard, *The Great American Tradition*, [in:] *Selected Writings on Censorship of Speech and the Press*, compiled by L.T. Beman, New York 1930, p. 31.

The words of Keith Werhan seem indicative of the general sentiment among future generations of constitutional lawyers or historians: by enacting the Sedition Act "the founding generation failed the first, crucial test [quotation marks omitted — Ł.M.] of the Bill of Rights".[37]

The lesson of the Sedition Act did not go unheeded, though it took longer than 150 years for the U. S. Supreme Court to speak authoritatively on the matter of seditious libel. In 1964, as a result of the already quoted *New York Times v. Sullivan* case, all regulations — be it federal or local — penalizing this kind of speech were for all practical purposes declared as violating the First Amendment. Libel of public officials has been narrowly construed as false statement of fact (thus excluding opinions) expressed with actual malice (a statement must be made with knowledge of its falsity or with reckless disregard of whether it was true or false). In light of the decision the purpose of libel law pertaining to public officials is to prevent actual damages to someone's reputation and not to act prophylactically against sedition. Seditiously libelous speech has therefore generally become constitutionally protected. The First Amendment status of the second category of seditious expression, i.e. of subversive speech, will be discussed in next parts of this series.

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[37] K. Werhan, op. cit., p. 31.

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FREEDOMS OF EXPRESSION, POLITICAL EXTREMISM AND SEDITIOUS SPEECH IN THE UNITED STATES SUPREME COURT'S JURISPRUDENCE (PART I)

Summary

The article is the first part of a monothematic cycle devoted to the case law of the Supreme Court of the United States concerning the scope of constitutional protection of seditious and politically extremist speech under the First Amendment to the United States Constitution. The author discusses the historical origins of the problem in question, focusing particularly on the decisions and

practical application of the so-called Sedition Act of 1798, a regulation which drastically restricted the freedom of public debate by *de facto* criminalising speech that was critical of the government. Although the normative act in question has never been the subject of the Supreme Court's rulings, it was unequivocally condemned in the *obiter dicta* to several statements of reasons behind the Supreme Court's opinions and is commonly deemed unconstitutional in the doctrine.

Keywords: freedom of speech, political extremism, The Supreme Court of the United States, the First Amendment, seditious speech, the Sedition Act.

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