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Review of Criminal Dissent: Prosecutions under the Alien and Sedition Acts of 1798

Daniel Kanstroom

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would seem to be at odds with either love or companionship. Godbeer's treatment of this marriage should encourage further research into this important family living in troublesome times.

Susan E. Klepp
Temple University

Criminal Dissent: Prosecutions under the Alien and Sedition Acts of 1798. By Wendell Bird (Cambridge, Mass., Harvard University Press, 2020) 560 pp. \$55.00

Specific scholarly interest in the period after the passage of the Alien and Sedition Acts of 1798 and its implications for contemporary controversies has followed a pattern not dissimilar to that of Halley's Comet: It tends to recycle regularly, a few years after a half-century or so of obscurity. There are good reasons for this recurrence, many of which are demonstrated by Bird's recent contribution to the genre.

The episode involved the passage of four laws, a series of contemplated and actual prosecutions and deportations, and a spirited debate including well-known state-based responses led by Thomas Jefferson and James Madison, among others. Though brief—essentially ending with Jefferson's electoral victory in 1800—the period was highly contentious (both politically and personally), ideologically revealing, legally complex, portentous, and arguably relevant to many later controversies.

The period evinces prototypical problems concerning the limits of free speech; the optimal relationship(s) between liberty, order, and democracy (and between legitimate dissent and sedition); recurrent vituperative, political factionalism (inspired by what George Washington called “the baneful effects of the Spirit of Party”); and the appropriate response to alleged foreign intervention in domestic politics. Add to these issues persistent politico-legal questions—only some of which have been resolved by the Supreme Court—about the rights of “aliens” (particularly the so-called “Wild Irish” and French “apostles of sedition”), the extent of federal deportation power, the limits of executive enforcement discretion, the re-emergence of state nullification arguments, and the scope of federal courts' jurisdiction over common law crimes.

The events from 1798 to 1800 have also been regularly mined for historical insights about the ideologies of the Federalists and Jeffersonian Democratic-Republicans and the nascent sectional divisions that ultimately tore the nation apart in bloody fratricide. The Machiavellian machinations, fits of pique, and avenging of grievances—not to mention the hypocrisies of John Adams, Alexander Hamilton, Washington, Timothy Pickering, Jefferson, Madison, et al.—inevitably make for a gripping tale. Fear of looming war and clever, if often nasty, rhetoric evokes a traffic accident on a highway; it is hard not to look despite one's better judgment. But this period also witnessed thoughtful, soaring rhetoric and rousing insights that have inspired civil libertarians for generations.

The major scholarship that preceded Bird's book began with a detailed, short article by Anderson in 1912.¹ Miller, seeing contemporary parallels, wrote the first comprehensive treatment of the period in 1951.² Smith's well-respected 1956 work, *Freedom's Fetters*, has long dominated the field.³ The recent cycle of comprehensive examination began with Slack's 2015 *Liberty's First Crisis*, soon followed by Halperin's solid political history.⁴

The topics and the scholarship around them tend to evoke strong feelings (Chafee once began a book review with the memorably snarky regret, "It is too bad that this is not a better book").⁵ Bird enters boldly, challenging what he asserts is insufficient critical attention to the "newfound popularity" of the Federalists. What (or whom) he means is not entirely clear. Although Lin-Manuel Miranda's contemporary "Hamilton" at once springs to mind, Bird cites scholarship dating back to 1965. Even if some scholars may have downplayed the Alien and Sedition Acts, the Federalists have certainly not been given a complete pass over the years. Bird recognizes the complexity faced by, for example, President John Adams, who faced strong opposition not only from Republicans but also from "High Federalists," such as the still regularly (and appropriately) maligned Pickering.

Bird's book contains much well-known material, as well as newly discovered records and correspondence. His "complete account," which includes nearly double the known number of prosecutions and "planned expulsions," supplements prior work, especially that of Smith. Notwithstanding the book's genuinely important contributions, its coverage of the sedition laws is more extensive and sophisticated than its coverage of laws and practices aimed specifically at "aliens."⁶ Bird's work is generally more cumulative than revelatory, but much of it will be of particular interest to lawyers: details of process, language of indictments, specifics of sentencing, state versus federal issues, etc. Bird has a keen technical eye for aspects of enforcement that others have tended to overlook. The book is well organized, well documented, clearly written, and comprehensive (including a highly detailed appendix of cases).

Bird robustly challenges the "dominant" scholarly view that "the theory of freedom of political expression remained quite narrow until 1798," citing Levy's overstatement that there existed no other definition

1 Frank Maloy Anderson, "The Enforcement of the Alien and Sedition Laws," *Annual Report of the American Historical Association* (1912), 113–127.

2 John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston, 1951).

3 James Morton Smith, *Freedom's Fetters* (Ithaca, 1956). Innumerable monographs, biographies, and partial treatments emerged during the intervening years.

4 Charles Slack's *Liberty's First Crisis* carries the slightly startling subtitle *Adams, Jefferson and the Misfits Who Saved Free Speech* (New York, 2015); Terri Diane Halperin, *The Alien and Sedition Acts of 1798: Testing the Constitution* (Baltimore, 2016).

5 Zechariah Chafee, Jr., Review of *The Battle against Disloyalty* by Nathaniel Weyl, *Harvard Law Review*, LXVI (1953), 547–559.

6 For more on this subject, see Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, Mass., 2007).

of freedom of the press by “anyone anywhere before 1798.”⁷ The book elucidates historical antecedents to the Republicans’ ideological challenges to the Acts, arguing that defendants’ earlier pronouncements “show that long before 1798 there flourished a broad[er] understanding of freedoms of press and speech” (8)—broader, that is, than William Blackstone’s British formula that liberty of the press was largely limited to a prohibition on prior restraint. It did not preclude seditious libel prosecutions—“freedom from censure for criminal matter when published.”

Bird is undoubtedly right that broader understandings always had vied with the Blackstonian model. His highlighting of that position is important, though his assertion that every historian he cites completely concurred with Levy’s overstatement seems a stretch. Statements by Jeffersonian journalist Benjamin Franklin Bache et al. showcase a recognized absence of complete consensus, if not an equally robust counter-tradition that informs our understanding of what the First Amendment meant for the framers.⁸

Bird’s work certainly adds to—and to some extent elaborates and revitalizes—the historical condemnation of the Federalists’ actions from 1798 to 1800. It furthers our understanding of the period’s legal practices through a detailed and sophisticated treatment of criminal prosecutions. Most broadly, it offers useful insights into the complex relationship between law and politics, the historical origins of the First Amendment, and the need for strong, transcendent principles of basic rights.

Daniel Kanstroom
Boston College

Capital in the Nineteenth Century. By Robert E. Gallman and Paul W. Rhode (Chicago, University of Chicago Press, 2019) 381 pp. \$65.00

Lead author Gallman died in 1998, but Rhode, at the urging of Claudia Goldin of the National Bureau of Economic Research (NBER) and Harvard University, was able to put together this book from Gallman’s published works and research files, supplemented by discussions with many prominent economist historians and Gallman’s longtime assistant at the University of North Carolina. The result is a mash-up of economic history and history of economic thought that would have made a valuable contribution if published twenty years ago. Its bibliography, for example, is great, but only for sources published before the start of the third millennium.

7 See Leonard W. Levy, “Liberty and the First Amendment: 1790–1800,” *American Historical Review*, LXVIII (1962), 27.

8 The book does not explicate an interpretive theory (for instance, “originalism”) to be applied to the First Amendment, which is a major question for legal scholars, advocates, and judges.