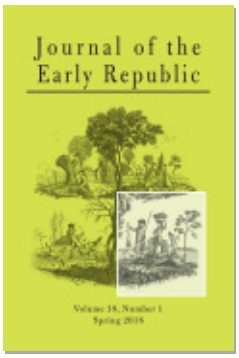
Press and Speech under Assault: The Early Supreme Court Justices, the Sedition Act of 1798, and the Campaign against Dissent by Wendell Bird (review)

Matthew Crow



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National Duties tells important stories in rich archival detail and a friendly prose. It is an indispensable study of government and the economy in the early republic, or, more broadly, of the history of American capitalism.

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Press and Speech under Assault: The Early Supreme Court Justices, the Sedition Act of 1798, and the Campaign against Dissent. By Wendell Bird. (Oxford, UK: Oxford University Press, 2016. Pp. 522. Cloth, $74.00.)

Reviewed by Matthew Crow

Wendell Bird is a legal scholar at Emory University School of Law, he holds a DPhil in legal history from Oxford University and a JD from Yale Law School, and he has produced an exhaustively researched and impressive account of the legal history of seditious libel prosecutions in the era of the Alien and Sedition Acts. Despite the sheer density of the research involved in this comprehensive project, the book is clearly argued and well written. The book seems to be intended for other legal scholars, centered in law schools (the footnotes are long, detailed, and formatted for academic legal citation), but Bird's text wears his incredible erudition on the subject as lightly as one could reasonably expect. Without a doubt, the result must be considered the standard scholarly treatment of the subject, and that is no small achievement.

The main argument of the book is twofold: It suggests that both the British and American jurisprudence of seditious libel at the end of the eighteenth and beginning of the nineteenth centuries was more complex and multifaceted than previously appreciated by scholars, and that Federalist judges in the early years of the U.S. Supreme Court were not in lockstep with the administration of John Adams on the question of their power to criminalize opposition political argument, either in print or

spoken word. In the fourth volume of his *Commentaries on the Laws of England*, published in 1769, the English jurist William Blackstone had tied the freedom of the press to licensing, arguing that while the freedom to publish was relatively sacrosanct and a matter of ancient principle in the common law, that did not mean that upon publication or publicizing such expression was beyond the reach of prosecution. Speech could by and large not be prevented, but it could be punished, again, according to Blackstone, by ancient principle, if it met the criteria of seditious libel. While Blackstone is usually taken to be authoritative and representative on this and many other issues of the law of his time, Bird argues that Blackstone was fabricating a tradition of restrictive free press and speech doctrine in the context of a much more contested legal reality. As discussions surrounding the trial of Peter Zenger in the North American colonies in the 1730s and the later case of English radical John Wilkes clearly demonstrate, Bird argues convincingly, a tradition existed of argument and reflection on the freedom of press and speech as a fundamental characteristic of public liberty. In its emphasis on both the individual rights of expression and the importance of the free exercise of those rights to the broader protection of the public, this tradition was both liberal and republican, terms that once again reveal their limits as much as their usefulness as categories of historical explanation. The argumentative thrust of the book is to suggest that a significant number of federal judges in United States of the late 1790s were at least partial heirs to this tradition, sharing opposition fears of the dangers of restricting political argument and convinced of the necessity of a relatively open sphere of political argument in the immediately post-Revolutionary republic.

The introduction and first three chapters summarize the legal history of seditious libel across the seventeenth and eighteenth centuries, showing Blackstone and the judges such as Lord Mansfield who relied on him to be operating within a conservative framework that was hardly universal but proved deleterious to freedoms of press and speech. The remaining chapters of the book painstakingly reconstruct the history of prosecutions in the United States under the Sedition Act of 1798. Of particular interest to readers of this journal will be Bird's extensive examination of the intellectual history of the early Supreme Court and of the attitudes of the justices toward freedoms of press and speech. Bird breaks new ground in showing the diversity and sophistication of legal theory on the subject in the early years of the Court. He goes on to show that the Federalist judges sitting on the court leading up to and during the

crisis of 1798 and its immediate aftermath did not uniformly accept the constitutionality of the Sedition Act, nor did they uniformly accept the authority of Blackstone's and Mansfield's framework for prosecuting seditious libel. James Wilson gets extensive and much-needed treatment in the latter chapters of the book. His defense of freedoms of press and speech as well as his role as a theorist and, as Bird shows, genuine practitioner of republican law and constitutionalism bring welcome attention to an under-studied figure. Finally, and perhaps most impressively, Bird suggests that that there were possibly as many as twenty-two additional Sedition Act prosecutions, showing the reach of the Act to have extended beyond what previous accounts have assumed, and that both use of and opposition to that reach was more substantive and bipartisan than usually assumed, too.

The book will leave some readers looking for more. Rarely does Bird give us a sense of what anyone who was prosecuted wanted to say or why it would matter to have such arguments said or not said in public, nor does he engage much of the scholarly literature on politics and print culture in the period. Many readers will be familiar with those contexts, but it is jarring nonetheless to read an extended account of disputes over the quintessentially political freedom of speech without much attention to politics. Part of the implication of Bird's argument, one supposes, is that judges like Wilson show us that the law and its oracles were capable of resisting purely partisan impulses, but surely one of the reasons that matters, in the past and present, is that political activity itself is part of what needed and needs to be protected. Boundaries between law and politics were then and are now a matter of important contestation and debate.

MATTHEW CROW is assistant professor of history at Hobart and William Smith Colleges in Geneva, New York. He is author of *Thomas Jefferson, Legal History, and the Art of Recollection* (Cambridge, UK, 2017), and he is currently at work on a project on Herman Melville and the relationships between natural history and natural jurisprudence in early modern law, empire, and political thought.