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FEDERAL INTERFERENCE WITH THE FREEDOM OF THE PRESS

At rare intervals in the history of the United States, Congress has passed laws, measures have been proposed, and executive orders have been issued which have more or less directly affected the freedom of the press, guaranteed against abridgment by the second clause of the first amendment to the Federal Constitution.[1] The extent to which this limitation has been ignored is a moot question. On the one hand we have the confident assertion of Von Holst that "the freedom of the press has become a part of the flesh and blood of the American people to such an extent, and is so conditioned by the democratic character of their political and social life, that a successful attack on it, no matter what legal authority it might have on its side, is impossible. Even the gigantic power of slavocracy gave the battle up as hopeless after the first onslaught."[2]

On the other hand, Hannis Taylor in his recent work on the American Constitution remarks that "little need be said as to the clause forbidding Congress to pass any law 'abridging the freedom of the press,' as that clause has been removed from the Constitution, so far as the mails are concerned, by the judgment rendered in 1892, *In Re Rapier.*"[3] And this extreme view may be

[1] "Congress shall make no law * * * abridging the freedom of speech, or of the press." An executive order, deriving its validity from an act of Congress, would, of course, be illegal if abridging the liberty of the press, even though the act itself did not.

[2] Von Holst, Constitutional History of the U. S., II, 127 (1879).

[3] Taylor, The Origin and Growth of the American Constitution, 230 (1911).

said to have received some support from a decision last year by the Supreme Court which upheld the power of Congress to compel newspapers to publish certain information concerning their internal affairs, under penalty, for refusal, of being denied the advantages of the low second-class rates.[4]

This paper will attempt a determination of the correct view as to the inviolability or abrogation of the constitutional guarantee and will therefore consider briefly the incidents in which the freedom of the press has been an issue.

I. ADOPTION AND MEANING OF THE LIMITATION.

In the convention which framed the Federal Constitution, Mr. Pinckney, on August 20, 1787, submitted a number of propositions, among which was a guarantee that "the liberty of the Press shall be inviolably preserved."[5] The propositions were referred to the Committee of Detail. The question again came up for consideration on September 14, when Mr. Pinckney and Mr. Gerry "moved to insert a declaration that the liberty of the Press should be inviolably observed." This motion was lost, Mr. Sherman remarking that "it is unnecessary—The power of Congress does not extend to the Press."[6]

During the discussion of the Constitution by the States, however, the absence of a guarantee of the freedom of the press was constantly adverted to. Speaking in the South Carolina House of Representatives, Mr. C. C. Pinckney said:

"With regard to the liberty of the press, the discussion of that matter was not forgotten by the members of the Convention. It was fully debated, and the impropriety of saying anything about it in the Constitution clearly evinced. The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing, which deserves all the enconiums the gentleman has justly bestowed upon it, is secured by all our state constitutions; and to have it mentioned in our general Constitution would per-

[4] *Lewis Publishing Co. v. Morgan*, 229 U. S. 288 (1913.)

[5] Farrand, Records of the Federal Convention, II, 334, 341.

[6] Farrand, Records, II 617, 618; in Pinckney's plan there was a limitation upon Congress to preserve the freedom of the press. Farrand, III. 599, 609, A motion was made in the convention to appoint a committee to prepare a bill of rights and was unanimously rejected. Farrand, II, 582.

haps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it."[7]

A different theory was advanced by Hamilton, who, answering the objection that the Constitution contained no bill of rights, and treating specifically the absence of any provision safeguarding the press, asked:

"What signifies a declaration that 'the liberty of the press shall be inviolably preserved'? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. * * * * "[8]

A proposal to guarantee the freedom of the press was part of the plan for a Bill of Rights which Madison introduced in Congress on June 8, 1789.[9] Such a federal provision had been suggested by three ratifying conventions and similar limitations were contained in the constitutions of nine of the states.[10] Madison's

[7] Farrand, Records, III, 256; Elliot, Debates, IV, 315, 316. Mr. Pinckney obviously overlooked the possibility that the freedom of the press might incidentally be limited through the exercise by Congress of one of its delegated powers, a possibility which became stronger when the doctrine of implied powers was developed.

[8] The Federalist, No. 84. In a footnote, Hamilton scouts the idea that the liberty of the press may be affected by duties on publications which might be "so high as to amount to a prohibition. * * * We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country." The extent of duties, if levied, "must depend on legislative discretion, regulated by public opinion. * * * It would be quite as significant to declare that the government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained." Newspapers were in fact taxed during the Civil War, and revenue to the amount of $980,089 was raised by this means. Lalor, Encyclopædia of Political Science, (Press) III, 321 (1890). Commenting upon Hamilton's position, Story remarked:

"The want of a bill of rights, then, is not either an unfounded or illusory objection. The real question is not, whether every sort of right or privilege or claim ought to be affirmed in a constitution; but whether such, as in their own nature are of vital importance and peculiarly susceptible of abuse, ought not to receive this solemn sanction." Story, Commentaries, III, 721.

[9] 1 Annals of Congress, 431 (1789).

[10] Elliott, II, 552; III, 659; Thorpe, Constitutional History, I, 204.

proposal was amended until it provided that "the freedom of speech and of the press * * * * shall not be infringed" and its language was further modified until it took the form in which it became a part of the Constitution.

Concerning the meaning of the amendment at the time of its adoption, there has been little, if any, controversy. Blackstone had announced a generally accepted rule when he had said that the liberty of the press "consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper,, mischievous, or illegal, he must take the consequence of his own temerity. * * * * To punish (as the law does at present) any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of the peace and good order, of government and religion, the only foundations of civil liberty."[11]

Alexander Hamilton, in the celebrated case of *People v. Croswell,* laid down this rule, which has since become a classic:

"The liberty of the press consists, in any idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on the government, on magistrates, or individuals. * * * It is essential to say, not only that the measure is bad and deleterious, but to hold up to the people who is the author, that, in this our free and elective government, he may be removed from the seat of power."[12]

And Story was of the opinion that the guarantee "is neither more nor less, than an expansion of the great doctrine, recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives, and for justifiable ends."[13]

[11] Cooley's Blackstone, Book IV, pp. 151, 152. Lord Kenyon's view was practically the same. He said: "A man may publish anything which twelve of his countrymen think is not blamable, but he ought to be punished if he publishes what is blamable." *Rex v. Cuthill,* 27 St. Trials, 675.

[12] 3 Johns (N. Y.), 337 (1798); Hamilton's Works (Lodge's Edition), VII, 339.

[13] Story, Commentaries, III, 732. To the same effect is Kent, Comm., II, Lec. 24. A different contention, however, seems to have been made by Tucker, Bl. Comm., II, App., Note G, 11-30.

The amendment has never been before the Supreme Court of the United States in such a manner that a comprehensive consideration of its meaning and effect has been given, but in *Patterson v. Colorado*[14] the court incidentally held that "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised by other governments', and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[15]

It seems to have been settled, then, that freedom of the press does not mean license; it applies only to *previous restraints* and that not absolutely. In the civil law of libel, at the time of the adoption of the Constitution, the one publishing had to answer for personal wrongs, and the criminal law could punish for obscene, immoral, blasphemous or seditious writings. To the latter extent, therefore, there could be, and, in fact, were, previous restraints.[16]

II. SEDITIOUS AND ANARCHISTIC PUBLICATIONS.

It was not long before this new limitation figured in the *causes célèbres* of the day as a result of the so-called Sedition Act, passed by Congress on July 14, 1798. This was an outgrowth of the Federalist plan to provide a more adequate army and navy and to check the utterances of the many alien journalists who were free to the point of scurrility in their criticisms of the administration and their approval of the most abhorrent features of the French Revolution. The Act provided for the punishment of any person who printed or uttered "any false, scandalous, and malicious writing, or writings, against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame * * * * or to bring them, or either of them, into

[14] 205 U. S. 458, 462 (1907).

[15] But see Mr. Justice Harlan's dissent, and also *Respublica v. Oswald*, I Dall. 319 (1788). In *U. S. v. Cruikshank*, 92 U. S. 542, 552, (1876), the court held that, "The First Amendment to the Constitution, * * * like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State Governments in respect to their own citizens, but to operate upon the National Government alone. 'The scope and application of these amendments are no longer subjects of discussion here.' They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States." This case affirmed *Barron v. Baltimore*, 7 Pet. 243 (1833).

[16] See Patterson, Liberty of the Press, Speech, and Public Worship, p. 61 *et seq.*, (1880).

contempt or disrepute, or to excite against them, or either of them the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein for opposing or resisting any law of the United States, 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 of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of any nation against the United States, their people or government."[17]

The question of the constitutionality of this act, which never came before the Supreme Court of the United States, but was up held by lower tribunals, has two phases: (1) has the Federal Government the power to punish for seditious utterances? and (2) would such action be an abridgment of the liberty of the press?

The first question, for the purposes of this paper, needs no consideration,[18] for we are concerned simply with an attempt to determine how far Congress could go (conceding its power in the premises) in punishing for sedition and still keep the freedom of the press inviolate. An immediate difficulty which inheres in this problem is that of finding a definition which is satisfactory. The best is probably the following:

[17] 1 Stat. at L. 596.

[18] The subject has been given very adequate treatment by Mr. Henry Wolfe Bilké in his paper on "The Jurisdiction of the United States over Seditious Libel", 50 American Law Register, 1 (1902). Mr. Bilké says: "The power to punish for seditious libel, it is submitted, results to the United States, first from its inherent right to adopt such measures as are necessary for its self preservation, and, second, from its right to adopt such measures as are necessary to secure its officers in the due administration of their duties." While it is the better view that Congress has no powers inherent in sovereignty (see 1 Willoughby on the Constitution, 66), the Supreme Court apparently rested its decisions in the Chinese Exclusion cases [*sub. nom. Chae Chan Ping v. U. S.*, 130 U. S. 581 (1888), and especially *Fong Yue Ting v. U. S.*, 149 U. S. 698 (1892)] on a contrary theory. These cases furnish the authority for the first conclusion just quoted, while the case of *In Re Neagle*, 135 U. S. 1 (1889) is made the basis for the second reason why it is within the power of the United States to punish sedition. At the time of the passage of the act it had not yet been decided that the Federal Courts possessed no common law criminal jurisdiction. *U. S. v. Hudson & Goodwin*, 7 Cranch 32 (1812). The Federalists maintained that such jurisdiction did exist, and that since sedition was a common law offense, Congress could make it statutory and thus aid the courts in its punishment.

"The essence of seditious libel may be said to be its immediate tendency to stir up general discontent to the pitch of illegal courses, that is to say, to induce people to resort to illegal methods other than those provided by the Constitution, in order to redress the evils which press upon their minds. * * * * Whenever a writing is so framed as to urge strongly the people, and especially the ignorant and turbulent portion of the people, to take some shorter and illegal method, not at a future time, but at once, of attaining the end in view, then it may be said to be a seditious libel. And hence the construction to be put upon the language, unlike the general rule in most other cases, is not what reasonable men would understand by it, but rather what the ignorant and excited people of the day would be likely to do after hearing or reading it. * * * * The utmost certainty attainable is to say, that when a speech or a writing imputes personal corruption or scandalous misconduct or ignorance in such terms as to incite others to get rid of the obnoxious person by other and speedier methods than the ordinary remedies prescribed by law, then to that extent and no further it is a seditious libel * * * any excess in the degree, the adequacy, the justification of the language must always remain to be settled by a jury."[19]

Punishment by Congress, therefore, for utterances coming within the scope of this definition, would not be in violation of the liberty of the press, which phrase, as was pointed out earlier in this paper, merely denies the legislature the right to impose previous restraints and does not require "freedom from censure for criminal matter when published." We may conclude, then, that there was little is any interference with the freedom of the press by the Sedition Act of 1798. The only respect in which the Act might have been declared unconstitutional was on account of its very broad terms, which went farther than the limits of the accepted definition quoted above. In the United States, then, there is no constitutional restriction which will compel the government impotently to remain the subject of attacks upon its stability.[20]

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[19] Patterson (Liberty of the Press, etc., p. 82) gives this definition, after an exhaustive review of the authorities.

[20] The weight of authority supports this view. See Bilké, *op. cit.;* 2 Willioughby on the Constitution, 845; Von Holst (Constitutional History, I, 142) considers this law "unquestionably unconstitutional" and this view is supported by 2 Tucker on the Constitution, 669; Story, (Commentaries, III, 744) declines to express his opinion, but intimates that the Act was

It would seem, however, as if all doubt as to the power of Congress to punish for sedition and anarchy, has not been completely dissipated. As a result of the assassination of President McKinley by an anarchist, Mr. Vest introduced in the Senate on December 4, 1901, a resolution instructing the Judiciary Committee "to inquire and report to the Senate, by bill or otherwise," as to "whether it is necessary and expedient to so amend the Federal Constitution as to empower Congress to prevent by such means as may be deemed necessary the teachings by anarchists of the doctrine that all governments should be destroyed and that to effect this their chief rulers should be assassinated," and directing

"That the committee shall, after due examination and inquiry, recommend to the Senate such amendments to the Federal Constitution or such legislation as may be necessary to prevent the teaching and promulgation of anarchical doctrines in the United States."[21]

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valid. As has been remarked, the lower courts before which the Sedition Act came refused to declare it unconstitutional. See Trial of Matthew Lyon, Wharton's State Trials, 333 (1798); Trial of Thomas Cooper, *Ibid.* 659 (1800) and Trial of James Thompson Callendar, *Ibid.* 688 (1800) and Trial of Anthony Haswell, *Ibid.* 684 (1800). Counsel for the traversers argued that the law was unconstitutional, and in the Callendar case, since Virginia juries had the right to determine the law and the facts, Mr. Wirt urged that, "if the law of Congress under which we are now indicted, be an infraction of the Constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you (the jurors) would violate your oaths." "Take your seat, sir, if you please," broke in Judge Chase, whose conduct during this trial was the basis of one of the charges when he was later impeached by the Senate.

In the Lyon case, the court gave this instruction to the jury: "You have nothing whatever to do with the constitutionality or unconstitutionality of the sedition law. * * * Until this law has been declared null and void by a tribunal competent for the purpose, its validity cannot be disputed. Great would be the abuses were the constitutionality of every statute to be submitted to a jury, in each case where the statute is to be applied."

These views, expressed several years before *Marbury v. Madison,* 1 Cranch 137 (1803), are interesting. Some of the utterances of the indicted men hardly seem seditious. Callendar's alleged libel, while virulent, contained no advocacy of rebellion, or use of force, or criticism of government as such. His argument was an amplification of his concluding sentence: "Take your choice, then, between Adams, war and beggary, and Jefferson, peace and competency."

[21] 35 Cong. Rec. Pt. I, p. 131.

The resolution was passed on December 16,[22] and a bill "for the protection of the President of the United States and for other purposes" was agreed to in conference, but failed of passage. It provided (Sec. 7):

"That any person who, within the limits of the United States, or any place subject to the jurisdiction thereof, advocates or teaches the duty * * * * of the unlawful killing or assaulting of" any officer of the United States or foreign government" because of his or their official character * * * * shall be fined not more than $5,000, or imprisoned not less than one nor more than twenty years, or both."

Expressions in debate seemed to show that there was doubt as to the validity of the measure, but it was practically accepted without argument that there was no question of the freedom of the press, which, as the foregoing discussion has attempted to make clear, would not be violated by such a law as the one proposed. If Congress had passed the measure, the courts could not have overthrown it on this ground.

The last attempt by Federal authorities to punish for sedition was made in 1908, when by direction of President Roosevelt, action was begun against the *New York World* and the *Indianapolis News*. The indictments against the *World* and one of its editors charged that articles dealing with the purchase of the Panama rights of the French Company for $40,000,000 were libels upon the Federal Government and individuals and officials named as being interested, and that their purpose was "to stir up disorder against the people."

Copies of the *World* containing the alleged libel had been circulated in the government reservation at West Point, and the indictments were therefore based upon the Act of July 7, 1898,[23] which "instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law." But, continued the Court, there was the "single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the

[22] 35 Cong. Rec. Pt. I, p. 314; Senate Bill, 3653.

[23] 30 Stat. at L., 717.

territory embraced by the reservation remained subject to the jurisdiction of the state."[24]

The Supreme Court therefore approved the action of the lower tribunal quashing the indictment, holding that "adequate means were afforded for punishing the circulation of the libel upon the United States reservation by the State law and in the state courts without the necessity of resorting to the courts of the United States for redress."

Thus ended the final attempt of the Federal Government to punish for sedition.

III. THE PRESS AND THE MAILS.

During 1836 the meaning of the phrase "liberty of the press" and the limitations which it might impose upon the postal regulations which Congress had the power to make, were exhaustively discussed in the United States Senate. The debate was precipitated when President Jackson, in his message of December 2, 1835, asked for legislation to check the incendiary publications with which the Northern abolitionists were flooding the slave states. President Jackson wrote:

"I must also invite your attention to the painful excitement produced in the south, by attempts to circulate, through the mails, inflammatory appeals addressed to the passions of the slaves, in prints, and in various sorts of publications, calculated to stimulate them to insurrection, and to produce all the horrors of a servile war. * * * *

"In leaving the care of other branches of this interesting sub ject to the state authorities, to whom they properly belong, it is nevertheless proper for Congress to take such measures as will prevent the post office department, which was designed to foster an amicable intercourse and correspondence between all members of the confederacy, from being used as an instrument of the opposite character. The general government to which the great trust is confided of preserving inviolate the relations created among the states by the Constitution is especially bound to avoid in its own action anything that may disturb them. I would, therefore, call the special attention of Congress to the subject, and respectfully suggest the propriety of passing such a law as will

[24] *United States v. Press Publishing Company,* 219 U. S. 1 (1911). The laws of New York, 1881, Vol. 3, Ch. 8, Sec. 243, 245, provided for the punishment of criminal libels.

prohibit, under severe penalties, the circulation in the southern states, through the mail, of incendiary publications intended to instigate the slaves to insurrection."[25]

This portion of the President's message was referred to a select committee of which Calhoun was chairman, and its report was made on February 4, 1836.[26] The report is of such interest and importance, considering, practically for the first time, the constitutional questions presented, that it will justify an extended quotation.

"After the most careful and deliberate investigation", said Calhoun, "they [the committee] have been constrained to adopt the conclusions that Congress has not the power to pass such a law; that it would be a violation of one of the most sacred provisions of the Constitution, and subversive of reserved powers essential to the preservation of the domestic institutions of the slaveholding states, and with them, of their peace and security."

Calhoun then attempted to draw a close analogy between the measure suggested by Jackson and the Sedition Law. Among the latter's provisions, he said, was one which "inflicted punishment on all persons who should publish any false, scandalous, or malicious writing against the government, with intent to defame the same, or bring it into contempt or disrepute. Assuming this provision to be unconstitutional, as abridging the freedom of the press, *which no one now doubts,* it will not be difficult to show that if, instead of inflicting punishment for publishing, the act had inflicted punishment for circulating through the mails for the same offense, it would have been equally unconstitutional * * * * to prohibit circulation is, in effect, to prevent publication * * * * each is equally an abridgment of the freedom of the press."

"The prohibition of any publication on the ground of its being immoral, irreligious, or intended to excite rebellion or insurrection, would have been equally unconstitutional; and, from parity of reason, the suppression of their circulation through the mail would be no less so."[27]

In conclusion, the report argued that the right "to determine what papers are incendiary" and to prohibit their circulation belonged to the States. The bill which Calhoun introduced was, therefore, framed to fit this view of the situation and made it un-

[25] II Statesman's Manual, 911, 912.

[26] 12 Debates of Congress, 383; Calhoun, Works, V, 191.

[27] Italics in the report are mine.

lawful for any postmaster to receive and put in the mail any publication addressed to a jurisdiction where its circulation was forbidden. It was made a crime to deliver such prohibited mail to any person not "duly authorized * * * * to receive the same" by the local authorities, and there was a further provision that the laws of the United States should not be allowed to protect any postmaster accused of violating the local laws. By this means Calhoun thought to preserve the liberty of the press and hand the matter over to the states for their settlement.[28] The several constitutional questions raised by the bill which then was, and even now would be, considered a dangerous method of dealing with the problem, caused a long drawn out debate.

The proposed law, Webster contended, "conflicted with that provision in the Constitution which prohibited Congress from passing any law to abridge the freedom of speech or of the press. What was the liberty of the press"? he asked. "It was the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication? * * * * Congress might, under this example, be called upon to pass laws to suppress the circulation of political, religious, or any other description of publications which produced excitement in the States." Finally, "Congress had not the power, drawn from the character of the paper, to decide whether it should be carried in the mail or not; for such decision would be a direct abridgment of the freedom of the press."[29]

Clay argued to the same effect, considering the bill uncalled for by public sentiment, unconstitutional, and containing "a principle of a most dangerous and alarming character."[30] Buchanan's views, however, were different.

"It was one thing [he said] not to restrain or punish publications; it was another and an entirely different thing to carry and circulate them after they have been published. The one is merely passive, the other is active. It was one thing to leave our citizens entirely free to print and publish and circulate what they pleased, and it was another thing to call upon us to aid in their circulation. From the prohibition to make any law 'abridging the freedom of speech or of the press', it could never be inferred that we must

[28] 12 Debates of Congress, 383.
[29] 12 Debates, 1721.
[30] 12 Debates, 1728.

provide by law for the circulation through the post office of everything which the press might publish."[31]

Objectional features other than the one which affected the liberty of the press contributed to the result that when the bill came up for final consideration on June 8, 1836, it failed of passage. The courts, therefore, were not called upon to pass upon the constitutional questions involved.[32]

As above indicated, Calhoun assumed the unconstitutionality of the Sedition Act. But if we deny this (and enough has been said to show that, leaving out of consideration the immaterial question of whether Congress has the power to punish for seditious utterances, its exercise would not, in the premises, abridge the freedom of the press) it therefore follows that Congress could punish for incendiary, inflammatory appeals whose object was to incite a portion of the population, the slaves, to take measures to secure their freedom, if the measures urged were the illegal overthrow of constituted authority, and prejudicial to the security of the Federal government, or, in short, seditious. The difficulty in this case was, as Senator Davis of Massachusetts pointed out, that,

"Incendiary matter is anything unfavorable to slavery. The general principle urged by the Senator from Carolina is, that where the States have power to legislate, the United States are bound to carry into execution their laws. They have power to prohibit the circulation of incendiary matter, and therefore Congress ought to aid that power."

But to this "there are insurmountable difficulties. How, and by whom, is this law to be executed? Who is to determine, and in

[31] 12 Debates, 1724.

[32] The bill was in amended form and no longer required that the postmasters know the laws of the places to which the mail they received was directed. It was simply made an offense to deliver a publication where its circulation was forbidden. The analogy between Calhoun's bill and the recent Webb-Kenyon Act is noticeable. The purpose of each is substantially the same, although the method is slightly different. Calhoun's bill furnished positive legislation and attached penalties, while the Webb-Kenyon Act simply excludes from interstate commerce intoxicating liquor intended to be used in violation of the law of the destination, providing no penalties and merely taking from the offender when the State attempts to punish, his hitherto valid defense that the local authority was interfering with interstate commerce. See my paper, 1 California Law Review, 499 (1913).

what manner, whether the Constitution of Massachusetts, which declares that all men are born free and equal, or the Declaration of Independence * * * * touch the subject of slavery or are incendiary? * * * * whoever holds this power may shut up the great channels of inter-communication; may obstruct the great avenues through which intelligence is disseminated."[33]

Nevertheless, as the Supreme Court has often pointed out, the possible abuse of a power does not furnish a valid argument against its existence;[34] and if there had been passed a Federal law directed against the *publication* of incendiary matter, it would have been for the courts to determine whether they were merely expressions of political opinions, or really dangerous and subversive of the general government.

It is a different question, however, which is presented when the power of Congress to exclude from the mails is considered, and the law as laid down by the Supreme Court was foreshadowed in the Senatorial debate when Buchanan declared that "from the prohibition to make any law 'abridging the freedom of speech or of the press" it could never be inferred that we must provide by law for the circulation through the post office of everything the press might publish."

On the face of it, Calhoun's argument that stoppage of circulation through the mails is tantamount to a stoppage of publication is not conclusive.[35] While Congress has no power directly to legislate upon a number of subjects exclusively in the control of the States, such as lotteries, obscene publications, and printing in general, it can say that an instrument of the Federal Government is not to be misused by the circulation of such publications; that the post office is not to be an agent in the promotion of crime, in the dissemination of obscene matter, and that a public institution need not aid incendiaries and anarchists in their endeavors to effect the overthrow of the government itself. The guarantee of the freedom of the press does not take such power from Congress. Nevertheless, to deny Calhoun's argument and accept the

[33] 12 Debates, 1103, 1105.

[34] 1 Willoughby on the Constitution, 19, and authorities there cited.

[35] It would seem that in *Ex Parte Jackson*, 96 U. S. 727 (1878), an explicit denial of Calhoun's proposition was made when the court said: "We do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails", but this would seem to have been inferentially repudiated by the Lottery Case, (*sub. nom. Champion v. Ames*) 188 U. S. 321 (1902).

above statment of the law is not to admit that Federal power over the mails is arbitrary, or that a particular exercise will be sanctioned, no matter what its purpose, intent, or effect.[36]

Although in several instances it has been almost vehemently urged that assailed statutes of Congress abridged the freedom of the press, the Supreme Court has never considered the arguments sufficiently well founded to merit more than a bare denial. In *Ex Parte Jackson,* the court remarked that

"In excluding various articles from the mails the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious to the public morals.

"Nor can any regulation be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulation is essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value."[37]

In the later case of *In Re Rapier,*[38] where the issue was the validity of the Act of 1890,[39] denying the privileges of the post office to newspapers which contained lottery advertisements, the Court was content with a simple affirmation of the Jackson case, in practically identical language, but in a later decision held that Congress may refuse "to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. * * * *

"For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was by the same

[36] In 1857, Attorney General Cushing rendered an opinion in which he held that "a deputy postmaster or other officer of the United States is not required by law to become, knowingly, the enforced agent or instrument of enemies of the public peace, to disseminate, in their behalf, within the limits of any one of the States of the Union printed matter, the design and tendency of which are to promote insurrection in such State." 8 Opinions of the Attorney General, (U. S.) 489.

[37] 96 U. S. 727 (1878).

[38] 143 U. S. 110 (1892).

[39] 26 Stat. at L. 465.

act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court."[40]

But even this moderate exercise of police power over the mails and its justification by the Supreme Court have been objected to. One writer, for instance, argues that "under the pretext of regulating the mails," Congress controls "the psycho-sexual condition of the postal patrons." "The statute," he goes on to say, "furnishes no standard or test by which to differentiate what book is obscene from that which is not."[41]

Such a contention, so far as it is one of *constitutional weakness* in Congress, is plainly invalid, since immoral libels are an offence at the common law, "not because it is either the duty or province of the law to promote religion or morality by any direct means or punishments, but because the line must be drawn between what is and is not the average tone of morality which each person is entitled to expect at the hands of his neighbor as the basis of their mutual dealings."[42] The fallacy of the constitutional argument lies in the fact that the grant of the postal power (to borrow language used by the Supreme Court in a commerce case) "is complete in itself and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."[43]

The statutes against obscene literature and lotteries in the mails apply directly to the *res;* the punitive features may and do operate *in personam,* but the right of individuals to use the mails is not an absolute one; it is the right to be exercised only in morality, and not in immorality. "It is a right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise. * * * * This constitutes the supreme fallacy of the plaintiffs' error. It pervades and vitiates their contentions."[44] Or, as Senator McComas well said:[45]

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[40] *Public Clearing House v. Coyne,* 194 U. S. 497 (1904), but see *Dunlop v. U. S.,* 165 U. S. 486 (1897), and *U. S. v. Popper,* 98 Fed. 423 (1899).

[41] Theodore Schroeder, Free Press Anthology, 171 (1909). See also his "Obscene" Literature and Constitutional Law (1911).

[42] Patterson, Liberty of the Press, etc., 69.

[43] *Hoke v. U. S.,* 227 U. S. 308 (1913), upholding the so-called Mann White Slave Act (36 Stat. at L. 825).

[44] *Hoke v. U. S., supra.*

[45] Speech in the Senate, Dec. 5, 1901 (35 Cong. Rec. 143).

"It was never intended or supposed that this first amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[46]

Certain it now is, that under the decisions of the Supreme Court, Congress has the power to exclude from the mails "such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages."[47] This is the rule as it stands at present; but it may well be that the Supreme Court has not yet laid down definite limits to Congressional power.

The question of anarchistic publications and the post office was raised in March, 1908, when President Roosevelt wrote to Attorney-General Bonaparte:[48]

"By my direction the Postmaster General is to exclude *La Questione Sociale* of Paterson, N. J., from the mails, and it will not be admitted to the mails unless by order of the court, or unless you advise me that it must be admitted."[49]

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[46] Special exception is taken by Mr. Hannis Taylor to the doctrines of the Rapier case. He says: "The Act against the circulation of immoral literature, which was not drawn in a paroxysm of excitement, exhausts the entire constitutional authority over the intellectual contents of documents passing through the mails that Congress can exercise." And referring to the exclusion of lottery tickets and advertisements: "This newborn heresy—created to meet a special emergency—will be utterly repudiated by the American people the moment when the despotic and irresponsible power over opinion with which the fiat of the Supreme Court has armed Congress, is applied, as it surely will be, to some subject which will arouse and quicken the public conscience." North American Review, December, 1892.

[47] *Public Clearing House v. Coyne, supra.*

[48] 60th Congress, 1st Session, Senate Doc. 426.

[49] The paper in question was undoubtedly anarchistic in its tendencies and certain of its sentiments were seditious libels. One editorial, for instance, contained the following:

"Dynamite will help us to win. Two or three of us can defy a regiment of soldiers without fear. * * * Show no sympathy for any soldiers, even if they be sons of the people. As soon as we get hold of the police station it is our victory. The thing is to kill the entire force. * * * We must get into the armory; and in case we cannot, then we will blow it down with dynamite. * * * We must set fire to three or four houses in different locations * * * and then start a fire in the center of the city."

In reply to the President's letter, Secretary Bonaparte wrote:

"I am obliged to report that I can find no express provision of law directing the exclusion of such matter from the mails, or rendering its deposit in the mails an offense against the United States"; but "I have the honor to advise you that it is clearly and fully *within the power of Congress* to exclude from the mails publications" such as *La Questione Sociale,* "and to make the use, or attempted use, of the mails for the transmission of such writings a crime against the United States."

What Congress thought of anarchy, Mr. Bonaparte said, was shown by the Act of March 7, 1907,[50] excluding and providing for the deportation of anarchists, and the Attorney-General made this implied expression of legislative opinion (even though in 1903 Congress had expressly refused to pass a law directed against anarchistic publications) a sufficient basis to legalize the action of the President and exclude newspapers which advanced the opinions quoted. The Attorney-General's opinion concluded:

"In the absence of any express provisions of law or binding adjudication on this precise point, * * * * I advise you that, in my opinion, the Postmaster General will be justified in excluding from the mails *any issue* of any periodical, otherwise entitled to the privileges of second class mail matter, which shall contain any article constituting a seditious libel and counseling such crimes as murder, arson, riot, and treason."

Such action, the opinion said, would be perfectly safe, since "it is well settled that at common law the owner of a libelous picture or placard or document of any kind is entitled to no damages for its destruction in so far at least as its value may depend on its unlawful significance." Hence the Federal statutes which provide punishment for postmasters who may "unlawfully detain" or "improperly detain" mailable matter would not operate.[51]

As a matter of fact, the newspaper was excluded for reasons other than its contents, but President Roosevelt transmitted the Attorney-General's opinion to Congress and in a special message said:

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[50] 34 Stat. at L. 908.

[51] R. S. Secs. 3890, 5471. But is this illustration on all fours with the question of illegally excluding *La Questione Sociale?* Mr. Bonaparte mentions the fact that while the article "constitutes a seditious libel, and its publication, in my opinion, is undoubtedly a crime at common law" it is not an "offense against the United States in the absence of some Federal Statute making it one." *U. S. v. Hudson & Goodwin,* 7 Cranch, 32 (1812).

"Under this opinion I hold that the existing statutes give the President the power to prohibit the Postmaster General from being used as an instrument in the commission of crime; that is, to prohibit the use of the mails for the advocacy of murder, arson, and treason; and I shall act upon such construction. Unquestionably, however, there should be further legislation by Congress in this matter. When compared with the suppression of anarchy, every other question sinks into insignificance."

The Attorney-General, in his opinion, it may be remarked, did not mention the freedom of the press, and this question was not involved. From what has already been said, it follows that there is no question of the competency of Congress to pass legislation designed to deny the mails to anarchistic publications. But the Attorney-General's argument as to the power of the President was not well founded; it granted to an administrative officer arbitrary discretion based on no explicit or implied legislative authority, and sanctioned the exercise of this power on the ground that no legal redress could be had. It is, however, simply a question of whether the action of the President was *ultra vires,* not whether it was an abridgment of the freedom of the press.[52]

The latest question of the freedom of the press was considered by the Supreme Court last year when it sustained the so-called "newspaper publicity law." This required publications entered as second-class matter (with a few exceptions) to furnish the post office department with, and publish semi-annually, a sworn statement of their editors and owners, in addition to marking as an advertisement anything for the publication of which compensation is received. Newspapers are also required to print their circulation figures.[53]

The law was vigorously assailed as being *ultra vires,* as denying due process of law and abridging the freedom of the press.

[52] In *U. S. ex rel. Turner v. Williams,* 194 U. S. 279 (1904), the Supreme Court held that the provisions of the immigration act of 1903 (32 Stat. at L. 1213) for the exclusion and deportation of alien anarchists did not violate any constitutional limitations, and that the freedom of the press was not involved.

"If the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent, * * * in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, as applicable to any alien who is opposed to all organized government."

[53] 37 Stat. at L. 553, Ch. 389.

The Supreme Court, however, sustained the statute, by a narrow line of reasoning. The opinion showed that in order to receive "entry" as second-class matter and get the benefit of the low rates, the publication must answer a number of questions, concerning ownership, editorial supervision, circulation, sample copies, and advertising discrimination. The Court considered the newspaper law as simply laying down new conditions, compliance with which would enable the publishers to continue "to enjoy great privileges and advantages at the public expense." The Court said:

"This being true, the attack on the provision in question as a violation of the Constitution because infringing the freedom of the press and depriving of property without due process of law, rests only upon the illegality of the conditions which the provision exacts in return for the right to enjoy the privileges and advantages of the second-class mail classification. The question, therefore, is only this: Are the conditions which were exacted incidental to the power exerted of conferring on the publishers of newspapers, periodicals, etc., the privileges of the second-class classification, or are they so beyond the scope of the exercise of that power as to cause the conditions to be repugnant to the Constitution? We say this is the question, since necessarily if the power exists to legislate by discriminating in favor of publishers, the right to exercise that power carries with it the authority to do those things which are incidental to the power itself, or which are plainly necessary to make effective the principal authority when exerted."[54]

Whether this reasoning seems convincing or not, it must nevertheless be conceded that legislation to the same effect, not based upon the power of Congress over the mails would be unconstitutional, and that in this case, Congress has been permitted to do by indirection what it has not the power directly to accomplish. The step is a short one to requiring, for a continuance of the low second-class rates, that newspapers print, or refrain from printing, reading matter of a specified character. The decision, however, lends no support to the belief that if this indirect regulation is carried further, or if there is a real interference with the freedom of the press, the Supreme Court will not intervene.[55]

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[54] *Lewis Publishing Co. v. Morgan*, 229 U. S. 288 (1913).

[55] For a more extended discussion of this question, see my paper, 27 Harvard Law Review, 27 (Nov. 1913).

IV. CONCLUSIONS.

Such are the constitutional incidents in which the liberty of the press has figured, and this review comes to the conclusion, that in no case has it been abridged. The executive order of President Roosevelt to exclude *La Questione Sociale* from the mails was *ultra vires,* but, as Attorney-General Bonaparte cleverly pointed out, the injured parties had slight chance of a remedy at law. Certain it is that the paper in question was so seditious that under a state statute publication could have been stopped, and that an Act of Congress, forbidding such periodicals the privilege of the mails, would not have been in violation of the First Amendment.

The decisions of the Supreme Court which have been quoted lead to no conclusion other than that any attempt on the part of Congress to place a previous restraint upon the press, or even to deny it postal facilities, for no discernible reason, would receive a judicial veto. The exclusion of obscene matter, lottery tickets, and other writings inimical to the public morals, has been clearly within the power of Congress, and legislation forbidding seditious and anarchistic publications, or banning them from the mails, would be constitutional.

It is true that the recent newspaper publicity law, strictly speaking, is a *previous restraint,* but the Supreme Court considered it as merely laying down additional and valid conditions upon compliance with which, periodical publications would be permitted to continue to enjoy the great and exclusive advantages of second-class privileges,—a satisfactory, if not conclusive basis for the decision.

Neither reason nor precedent justifies the view, eloquently urged by counsel in this case, that Congress by the law exercises "a govermental control over newspaper publishers and dictates to them what shall not be published and the manner, form and time of publishing." On the contrary, that great "palladium of liberty"—the freedom of the press—seems to be in no danger of demolition through Congressional action.

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