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IT should be unnecessary to amend the Federal Constitution to accommodate the facilities of government to the needs of society, as those needs develop with the social and scientific advance of civilization. But the trend of legislative effort to reach beyond constitutional limits to satisfy fleeting economic or political expediencies, without regard for the vital distinction between sound and substance, and of courts to seek justification for such excursions, under the benefit of constitutional doubt due "solemn expressions of legislative will," may lead to highly dangerous situations. As this trend is permitted to reach extremes, the erasure of the well-defined lines of demarcation segregating the departments of government, and the approach of totalitarianism, are inevitable.[1]

Particularly forceful is the application of this principle in the case of civil liberties, often too lightly esteemed; the temptation to encroach on these is always greatest in times of stress, when those fundamental rights and privileges should be guarded more zealously than ever against impairment.[2] Over half a century ago, Justice Bradley sounded an oft-cited clarion warning:

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[1] "The habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism." President Washington's Farewell Address on the ninth anniversary of the signing of the Constitution, September 19, 1796.

[2] "In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction." Jeremiah Black, counsel for petitioner in Ex parte Milligan, 4 Wall. (71 U. S.) 2 at 75-76 (1866).

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."[3]

From the reconstruction era until after the close of the World War, the First Amendment, with its guaranty of a free press, underwent just such an encroachment by "slight deviations" as Justice Bradley had in mind, and that eminent jurist himself participated in one of the first missteps.[4]

During the period from 1878 to 1921, legislation curtailing the circulation of certain information, on various pretexts of emergency, expediency and protection of public morals, through a denial of postal facilities and exclusion from the nominal-cost privilege of second-class mail, was uniformly upheld. Each decision apparently extended farther the doctrine of congressional and administrative postal power until what began as "the obnoxious thing in its mildest and least repulsive form," gradually developed into what, in light both of historical background and recent jurisprudence, must now be conceded to have been clear infringement of the freedom of the press.

Had the first legislative attempt to restrict the circulation of the newspaper press through the mails been made recently, and challenged promptly, it seems probable that the effort would have been repelled by a decisive judicial *on ne passe pas* such as that which met the recent attempt of the Louisiana legislature to shackle the freedom of the state's press under color of taxation. This tax was as innocuous, on its surface, as was the federal statute against depositing lottery literature in the mails, under which arose the first judicial challenge to Congres-

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." Hughes, C.J., in DeJonge v. State of Oregon, 299 U. S. 353 at 365, 57 S. Ct. 255 (1937).

[3] Boyd v. United States, 116 U. S. 616 at 635, 6 S. Ct. 524 (1885).

[4] The preparation of the opinion of the Court in the case of In re Rapier, 143 U. S. 110, 12 S. Ct. 374 (1891), had been assigned to Justice Bradley, but he died before completing it, and Chief Justice Fuller wrote the opinion.

sional control over the mails.[5] One is, however, now confronted by a formidable array of authoritative decisions and dicta, which, through "slight deviations," has apparently approved an ever-broadening policy of Congressional and administrative postal exclusion. This has set up a near stare decisis to give judicial sanction to a very real infringement of the liberty of the press.

On the other hand, one may perceive certain factors which, independently of the disfavor in which the principle of stare decisis stands, especially when tending to abridge fundamental civil liberties,[6] indicate that it may not yet be too late to urge against the policy under discussion those "considerations against it that seem . . . never to have been fully weighed."[7] These factors involve, primarily, the marked recent trend, in the decisions of the Supreme Court, to give the widest possible scope to the constitutional prohibitions against impairment of free speech and a free press;[8] a growing general impatience with sumptuary legislation, under which the federal government assumes an over-zealous solicitude for the public morals; and, in the particular situation under discussion, the fact that the Post Office Department has been seeking to extend its power of exclusion so far in recent years that, in the ordinary course of events, a very decided judicial reaction is almost sure to follow.

[5] However, the Court did stress the absence of any effort to tax as follows: "In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our national existence has undertaken to impose a tax like that now in question." Sutherland, J., in Grosjean v. American Press Co., 297 U. S. 233 at 250-251, 56 S. Ct. 444 (1936). As a matter of fact, taxes against newspapers had been upheld in five cases: Thompson v. State, 17 Tex. Crim. 253 (1884); Baldwin v. State, 21 Tex. Crim. 591 (1886); In re Jager, 29 S. C. 438 (1888); Preston v. Finley, (C. C. Tex. 1896) 72 F. 850; City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959 (1898); and for a period of six years during the Civil War, the federal government had levied a tax strikingly similar to that of Louisiana in 1934 [13 Stat. L. 280 (1864)], but its validity was never challenged.

[6] "The importance of the question . . . and the economic conditions that have supervened . . . make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration." Hughes, C. J., in West Coast Hotel Co. v. Parrish, 300 U. S. 379 at 390, 57 S. Ct. 578 (1937), speaking of liberty of contract as regards minimum wage legislation.

[7] Dissenting opinion of Justice Holmes in Leach v. Carlile, 258 U. S. 138 at 140, 42 S. Ct. 227 (1922).

[8] See the opinion of Cardozo, J., in Palko v. Connecticut, (U. S. 1937) 58 S. Ct. 149.

I

The entire situation with reference to exclusion of matter from the mails can perhaps best be approached by outlining the possible interpretations of the postal power of Congress and the possible limitations thereon.

(1) The widest interpretation of the postal power would give Congress absolute discretion and unlimited authority over the mails. This interpretation would justify any and all legal regulations and exclusions. Some dicta supporting such an extreme view are given hereafter, but the view seems clearly unsound. It is impossible to interpret the simple constitutional provision that "The Congress shall have Power . . . To establish Post Offices and post Roads,"[9] as transcending all limitations on Congressional power elsewhere contained in the Constitution.

(2) The narrowest interpretation of the postal power would restrict it exclusively to those matters directly affecting the postal service itself. Under this view Congress could go no farther than to bar from the mails such matter as does not conform to regulations to facilitate the service, or as entails physical danger to postal employees, etc. While there is some historical justification for this view, as will be pointed out later, Congress in its legislation has gone far beyond what might be justified under this narrow interpretation, and the courts have sustained several types of legislation which could not be warranted as intended to promote the efficiency or safety of the postal service itself.

(3) A third interpretation of the postal clause falls between the other two. It is, generally speaking, the interpretation which has finally prevailed. It recognizes that the postal clause confers not only control of the mails for the sake of the postal system itself, but also control in furtherance of the general welfare.[10] The control thus recognized has appropriately been called a national police power.

Turning now from a brief survey of the possible interpretations of the postal clause, it becomes necessary to examine briefly the possible limitations derived from other parts of the Constitution applicable to the Congressional control over the mails. These limitations fall roughly

[9] U. S. Const., art. I, § 8, cl. 7.

[10] The affirmative power of control over the postal system is probably reinforced or augmented by other specific powers of Congress under the Constitution in certain types of cases. Thus Congress can, in time of war, acting under its war powers, exclude from the mails matter which tends to interfere clearly or presently with the military operations of the country. Similarly, the commerce power reinforces the mail provisions of the securities acts, and the Public Utility Holding Company Act.

into two categories. The first arises out of the manner in which the Constitution delegates power to the federal government and reserves all non-delegated powers to the states. This limitation is stated explicitly in the Tenth Amendment. Pushed to its farthest extreme, it would restrict federal control over the mails to that which is necessary for the regulation and safety of the postal system itself, i.e., the second interpretation mentioned above. It would exclude any national police power under the postal clause. Thus, for example, the postal power would be deemed insufficient to justify exclusion of matter offensive to general morals, on the ground that regulation of morals is reserved exclusively to the states.[11] However, the cases have given the postal clause a wider interpretation, and correlatively have failed to recognize the reserved powers of the states as a serious limitation on the postal power. They have, as has already been pointed out, recognized that the federal government may use its control over the mails for the general welfare. The net result has been that the federal control over the mails has become almost unlimited in this respect. It is similar to the federal control over commerce. Probably its exercise would not be held to collide with state power unless it reached the point of dealing with what might be called, somewhat elusively, purely local matters.

The second general type of limitation on the postal power is found in the Bill of Rights.[12] Thus, for example, the national police power as exercised under the postal clause is undoubtedly limited by the due process clause of the Fifth Amendment. Any clearly arbitrary exclusion orders would be invalid; and it seems that a party aggrieved should be entitled to a judicial review of any such order.[13] Similarly, the exercise of the national police power under the postal clause has been held to be limited by the searches and seizures guaranties of the

[11] See CONG. DEBATES, 24th Cong., 1st Sess., p. 1722 (June 8, 1836); Cushman, "National Police Power under the Postal Clause of the Constitution," 4 MINN. L. REV. 402 (1920); Schroeder, "On the Implied Power to Exclude 'Obscene' Ideas from the Mail," 65 CENT. L. J. 177 (1907); Weker, "The Power to Exclude from the Mails," 10 BOST. UNIV. L. REV. 346 (1930); Rogers, "The Extension of Federal Control through the Regulation of the Mails," 27 HARV. L. REV. 27 (1913). Some of the authorities go so far as to suggest that when the states, on ratifying the original Constitution, ceded the postal power to the federal government, they relinquished a correlative portion of their police power with it. The suggestion seems exceedingly far-fetched. See 5 FORDHAM L. REV. 302 (1936); 72 CENT. L. J. 29 (1911).

[12] See Cushman, "National Police Power under the Postal Clause of the Constitution," 4 MINN. L. REV. 402 (1920); 5 FORDHAM L. REV. 302 (1936).

[13] See infra, note 98.

Fourth Amendment.[14] Also it seems probable that the right to trial by jury under the Sixth Amendment imposes some limitations on exclusion procedure. And finally the national police power is unquestionably limited by the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The relation of the postal powers to most of these provisions of the Bill of Rights is not peculiar. These limitations operate on the postal power as they do on all the other powers of the federal government. But the relation of freedom of the press to the postal power is peculiar and interesting. The proper reconciliation of the postal power with the free press clause will form the subject matter of the remainder of this article.

II

The problem of reconciling the postal power and the freedom of the press can best be approached and understood through a review of those phases of the history[15] of freedom of thought, expression and publication which led up to the adoption of the Constitution. This review will be followed by an account of the legislation and of the devious course of pertinent judicial dicta.

Perhaps the first truly significant free-speech trial was that of Socrates, who defied his judges, saying:

> "Men of Athens . . . while I have life and strength I shall never cease from the practice and the teaching of philosophy. . . . If you think that by killing men you can prevent someone from censuring your evil lives, you are mistaken. . . . The easiest and the noblest way is not to be disabling others, but to be improving yourselves."[16]

In 1644, John Milton cried out against the Licensing Act of 1643, promulgated by the Long Parliament after the fall of Laud and the Star Chamber, with his *Areopagitica.* Fifty years after the unlicensed publication of that great plea for the liberty of unlicensed printing, the English licensing statute was permitted to expire by its own limi-

[14] Ex parte Jackson, 96 U. S. 727 (1878).

[15] "Upon this point a page of history is worth a volume of logic." Holmes, J., in New York Trust Co. v. Eisner, 256 U. S. 345 at 349, 41 S. Ct. 506 (1921).

[16] PLATO, APOLOGY OF SOCRATES, XVII et seq; DIALOGUES OF PLATO, Greene ed., 5 ff. (1927). "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." Concurring opinion of Brandeis, J., in Whitney v. People of the State of California, 274 U. S. 357 at 378, 47 S. Ct. 641 (1927).

tation, and it has never been renewed from that day to this.[17] This marks the recognition of one important element in the right to a free press, the absence of licensing and censorship. From this time on, both in England and America, a minimum liberty of press was taken for granted; and this liberty was deemed to involve at least a freedom from licensing and censorship. Whatever else might be involved in the liberty, no English or American authority has ever questioned the fact that freedom from prior restraint, in the form of license or censorship, is included in it.[18]

However, a few years after the licensing act expired, a suddenly emancipated press became particularly vitriolic in its criticism of public figures. Queen Anne sent a message to Parliament suggesting that some adequate remedial measure be found—and applied—at once. In answer to this message a committee on ways and means devised, and a short-sighted Parliament adopted, a peculiarly diabolical scheme which fettered the English press and hampered its growth for a hundred and fifty years.[19] This scheme consisted of a series of heavy taxes on newsprint paper, on advertising, and on the newspaper itself as a finished product.[20] These taxes were accompanied by a provision for the free use of the mails by the taxed newspapers. Indeed, this free mailing privilege was given as the *raison d'être* of the tax.[21] The taxes drove the smaller periodicals, unable to survive such fiscal burdens, into widespread tax evasion, comparable to the result of recent national prohibition in the United States. The more substantial, better-established newspapers of the time, while able to survive, became so restricted in circulation that the mass of the people had no opportunity whatever to keep abreast of matters of public interest.[22]

When one remembers that the outcry against these taxes, even at the time of their original levy in England, was very strong, and that

[17] 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, Holland's ed., 4 (1912); DELOLME, COMMENTARIES ON THE CONSTITUTION OF ENGLAND 318.

[18] See note 71, infra.

[19] 10 Anne, c. 19 (1711).

[20] See, for example, 60 Geo. III, c. 9 (1819), the preamble to which reads as follows: "Whereas Pamphlets and printed Papers containing Observations upon public Events and Occurrences, tending to excite Hatred and Contempt of the Government and Constitutions of these Realms as by Law established, and also vilifying our holy Religion, have lately been published in great Numbers, and at very small prices; and it is expedient that the same should be restrained."

[21] 1 COLLET, HISTORY OF THE TAXES ON KNOWLEDGE 52-53, 67, 91 (1899).

[22] COLLET, HISTORY OF THE TAXES ON KNOWLEDGE (1899); Stewart, "John Lennox and the *Greenock Newsclout*: A Fight Against the Taxes on Knowledge," 15 SCOT. HIS. REV. 322 (1918).

free use of the mails had to be given as a pretext for the taxes, one readily perceives the significance of these tax restraints and their pertinence to the interpretation of the First Amendment. Indeed, attempted "taxes on knowledge," similar to those adopted in England, and not the attempted taxes on tea, were the spark which set off the American Revolution.

As far as is known, the early colonial press did enjoy the same free, or near-free, postal privilege accorded to English newspapers.[23] But in spite of the efforts of colonial officials to transplant the principles of press control from the mother country to the colonies, the vicious newspaper taxes were never able to get a foothold here. By Parliamentary decree the newspaper taxes were to be extended to the American colonies as of November 1, 1765. Quantities of stamped paper on which the colonial newspapers were to be required to be printed, and which were to be purchased from the stamp office, were sent over from England. On the night of October 31, a mob formed in New York, and violently denounced this attempt at combined taxation without representation and restriction of news dissemination. The mob got out of hand, proceeded to the tax office, seized the stamped paper, and burned it all in a huge Hallowe'en bonfire.[24] Thus ended abruptly, and in its incipiency, the attempt to abridge freedom of the colonial press through taxation. This type of restraint on press freedom must surely have been in the minds of the founders when the First Amendment was adopted. Freedom from censorship was doubtless contemplated, although censorship had not existed in England for nearly a hundred years; but freedom from special newspaper taxes was also an element of the press freedom which was intended to be guaranteed.

As a final historical factor, important in determining the scope of the free press clause, the series of trials in England throughout the eighteenth century for seditious libels on government officials must be remembered. Under the malign influence of Lord Jeffreys, the doctrine was developed "that the greater the truth, the greater the libel."[25] These trials involved particularly the question whether the

[23] DUNIWAY, THE DEVELOPMENT OF THE FREEDOM OF THE PRESS IN MASSACHUSETTS (1906).

[24] BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM 79 (1927). A newspaper account of the seizure of the stamped paper and its burning, with the hanging in effigy of the lieutenant governor, is given in Hugh Gaine's "New York Mercury," printed without a title on November 4, 1765.

[25] 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, Holland's ed., c. 9 (1912). This doctrine was later applied by his American counterpart, Chase, whose disregard

libelous character of publications was to be regarded as a matter of law or a question of fact for the jury. Lord Mansfield and Blackstone accepted the common legal opinion that the character of a publication, as libelous or non-libelous, was to be determined by the court. But juries of the day frequently refused to convict as directed by the court. The struggle culminated in the adoption of Fox's Libel Act.[26] This made the question of seditious libel always a question of fact for the jury; it represented the final step in the establishment in England of the right of fair comment, or, as more commonly expressed, the liberty of speech and of the press.[27]

The *Peter Zenger*[28] case was a similar case of seditious libel tried in 1735 in New York. Zenger was charged with a seditious libel on colonial governor Cosby of New York. He was defended by Andrew Hamilton and acquitted by a jury which disregarded the court's instructions.[29] In view of the notoriety of this case and of the struggle for the right of fair comment in England, there can hardly be a doubt but that the framers of the American free-press clause meant the question whether liberty of the press has been abused to be a jury question and not one to be settled by judicial ruling; a fortiori, they did not mean it to be settled by administrative exclusion order.

Of course, it was recognized, even when the clause was adopted, that liberty of the press is not absolute, but is subject to subsequent punishment for abuse.[30] But the struggle for a free press was represented in this regard by the issue as to the agency which was to pass on the question of abuse. Was it to be the judge? Or was it to be a jury? Liberty of the press meant, to the men who were seeking to establish a free press, that the tribunal for determining questions of abuse was to be a jury. It was not to be a court which established

of the rights of free speech and a free press in trials under the infamous Sedition Act of 1799 so grimly marred our own early constitutional era. 3 BEVERIDGE, LIFE OF JOHN MARSHALL 30-48 (1919).

[26] 32 Geo. III, c. 60. Adopted in 1792, just after ratification of the first ten amendments to the Constitution of the United States. However, the struggle over the point had been going on for years and was well known in this country. The First Amendment was adopted with a full understanding of the point involved.

[27] 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, Holland's ed., 1-18 (1912).

[28] 17 HOW. STATE TRIALS 675 (1735).

[29] "The close relation between the Zenger trial and the prosecutions under George III in England and America is shown by the quotations on reprints of the trial and the dedication of the 1784 London edition to Erskine, as well as by reference to Zenger in the discussions preceding the First Amendment." CHAFEE, FREEDOM OF SPEECH 23 (1920).

[30] Commonwealth v. Blanding, 3 Pick. (20 Mass.) 304 (1825).

definitions of seditious libel any more than it was to be an administrative official who exercised a power of censorship. It is this factor in the history of the struggle for freedom of the press which is unfortunately ignored in the cases, presently to be mentioned, upholding administrative exclusions of various kinds of matter from the mails. This is a point to which frequent recurrence will be made in the subsequent discussion.

In short, the pre-Revolutionary struggles for freedom of the press seem to indicate that at least three factors need to be recognized in determining the scope of the liberty of the press. These factors are an absence of license or censorship, an absence of taxation on newspapers as such, and a right to trial by jury in cases where abuse of freedom is charged. Each of these factors was important in the historic struggle for press freedom and should never be overlooked in construing the First Amendment.

It is an accepted historical fact, which needs no demonstration here, that the Constitution of the United States, as adopted at the Convention at Philadelphia on September 17, 1787, achieved ratification solely on the promise that its amendment to effect inclusion of a bill of rights would be the first order of business of the first Congress to convene thereunder.[31] And for all practical intents and purposes, the first ten amendments are as much a part of the original Constitution as if they had been adopted and ratified simultaneously with the primary instrument.[32] In fact, the only debates attending the adoption and ratification of the bill of rights had to do with form rather than with substance. The real debates over the provisions of the bill of rights attended the ratification of the original Constitution, when the controversy raged over the absence of guaranties of civil liberties.[33]

[31] The preamble to the resolution in Congress, introducing the proposed Bill of Rights, reads: "The conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the Government will best ensure the beneficient ends of its institutions." Reprinted in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 321 (1894). See also Madison, "Report on the Virginia Resolutions of 1798" in 4 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 546 (1836).

[32] 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 303 (1833); STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 213 (1894).

[33] THE FEDERALIST (1787-1788); FORD, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (1888); MCMASTER and STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION (1888).

Sufficiently important to be included in the very first of the proposed amendments was the guaranty against abridgment of the freedom of the press. And yet, strange as it may seem, the controversy over the need for inclusion of that prohibition was particularly heated, and there were eminent and able statesmen of the period who strongly opposed inclusion of a press-freedom clause in the Federal Constitution. The very fact that this opposition was defeated, and the provision inserted in the first article of the bill of rights, is of tremendous significance in view of the reasons given in support of both sides.

The school of political thought for which Alexander Hamilton was principal spokesman contended simply that, because under the provisions of the proposed constitution, Congress had only such powers as were expressly granted to it, there was no power to regulate or control the press, and therefore no need to protect it against Congressional infringement.[34] On the other hand, the philosophical school of thought led by Jefferson and Madison called pointed attention to the broad implied powers[35] granted for the purpose of carrying the expressed powers into effect, and the resultant danger to the press through the exercise of an assumed or implied authority.[36]

[34] THE FEDERALIST, No. LXXXIV (1788). Pinckney, whose proposal in the Convention for inclusion of a guaranty of a free press in the original constitution was defeated, later stated that he had been satisfied that the clause was unnecessary: "To have mentioned it in our general constitution would perhaps furnish an argument hereafter that the General Government had a right to exercise powers not delegated to it." 4 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 302 (1836). See also speech by James Wilson, Oct. 6, 1787, reprinted in FORD, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 155 (1888).

[35] "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U. S. Const., art. 1, § 8, cl. 18.

[36] In 1788, in reply to John Jay, who had published a pamphlet in support of his contention that no bill of rights was necessary in the Constitution, because Congress had thereunder only such rights as were expressly granted, Melancthon Smith, a member of the Convention, wrote: "It may be a strange thing to this author to hear the people of America anxious for the preservation of their rights, but those who understand the principles of true liberty, are no strangers to their importance. The man who supposes the constitution, in any part of it, is like a blank piece of paper, has very erroneous ideas of it. He may be assured every clause has a meaning, and many of them such extensive meaning, as would take a volume to unfold. The suggestion, that the liberty of the press is secure, because it is not in express words spoken of in the constitution, and that the trial by jury is not taken away, because it is not said in so many words and letters it is so, is puerile and unworthy of a man who pretends to reason. We contend, that by the indefinite powers granted to the general government, the liberty of the press may be restricted by duties, etc., and therefore the constitution

In June 1789, while Thomas Jefferson was in Paris, the French Charter of Rights, "solemnly established by the King and Nation" provided that "Printers shall be liable to legal prosecution for printing and publishing false facts, injurious to the party prosecuting; but they shall be under no other restraint." This event is reported to have been the occasion for a letter to Hamilton in which Jefferson said:

> "Very well, I agree with you that the power is not legitimately here, and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as the common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it beyond peradventure that it is not one of the powers granted to the National government."[37]

It must at this point be reiterated and borne in mind that licensing and censorship had been abolished in England nearly a century earlier; also that the agitation against the doctrines of seditious libel had grown so strong in that country as to result in the adoption of Fox's Libel Act[38] a few years later in 1792. Further, almost all the individual state constitutions already contained free-press guaranties. The insistent demand for a free-press provision in the Federal Constitution, therefore, bore no direct relationship to the Blackstonian "previous restraints" doctrine, for restraints were already forbidden in the states. The demand was based primarily on the need to exclude beyond a doubt any implied or assumed power of Congress to shackle the press. Unquestionably the principal vulnerability of the press to attack lay, as it seemed at the time, in the almost unlimited Congressional power

ought to have stipulated for its freedom." FORD, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 113-114 (1888).

[37] The foregoing, as a verbatim quotation from Jefferson, is probably apocryphal. It is given by Hart, "Power of Government over Speech and Press," 29 YALE L. J. 410 at 412 (1920), and reference to it is made by SIEBERT, RIGHTS AND PRIVILEGES OF THE PRESS 2 (1934), but neither gives the citation, and neither has been able to furnish it on inquiry. It may be a paraphrasing of Jefferson's letter to Madison, written from Paris on March 15, 1789, and does convey the same thought. See 3 JEFFERSON, Works, Washington ed., 4 (1853); 5 WRITINGS OF THOMAS JEFFERSON, Ford ed., 80 (1895); 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 535, note 1 (1927).

[38] 32 Geo. III, c. 60 (1792).

of taxation. The danger which lurked in federal control over the mails was not yet apparent. The provision that "The Congress shall have Power . . . To establish Post Offices and Post Roads" [39] was considered to be so innocuous at the time of the adoption of the Constitution that the power received but little mention.[40] But there cannot be a shadow of doubt, in the light of such emphatic historical background, that the First Amendment was intended to qualify the postal power as well as all the other powers of Congress.

IV

The Sedition Law of 1799 was the first Congressional effort to restrict freedom of the press. It was short-lived and fell under the onslaughts of Jefferson and Madison, who called attention to their forecasts of attempted Congressional infringement at the time of their insistence on the adoption of the bill of rights. So deep-seated was the love of the American people for their fundamental liberty of expression, that they voiced their denunciation of those responsible for this first infringement by an overwhelming defeat of the entire Federalist party, and the election of Jefferson to the presidency.

That indirect control of the press through the federal postal power was not considered consonant with the First Amendment to the Constitution seems apparent from a contemporary document emanating from the pen of John Marshall in the spring of 1798, while he was serving as a member of the famous XYZ mission.

On March 18 of that year, Talleyrand, as French Minister of Exterior Relations, had addressed Pinckney, Marshall and Gerry, complaining bitterly of the "invectives and calumnies" of the American newspapers, "against the Republick and against her principles, her magistrates, and her envoys." [41] In a magnificent reply, drafted by Mar-

[39] U. S. Const., art. I, § 8, cl. 7.

[40] Madison dismissed it with the following short statement: "The power of establishing post roads must, in every view, be a harmless power; and may perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States, can be deemed unworthy of the public care." The Federalist, No. XLII (1788). In the New York convention, there was some discussion under the clause, relative to limiting highway repairs to cases in which the states have consented thereto. 2 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 406 (1836). On June 15, 1787, William Paterson of New Jersey proposed to the Convention a clause, under which Congress would be allowed to raise revenue "by a postage on all letters or packages passing through the general post-office." 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 243 (1921).

[41] Talleyrand's letter, and Marshall's reply, are in 2 AMERICAN STATE PAPERS (Foreign Relations) 188 at 190, 191 at 196 (1798-1803).

shall, and bearing all the earmarks of the judicial style which brought him his fame, "The Ministers Plenipotentiary and Envoys Extraordinary from the United States of America to the French Republick" addressed the "Minister of Exterior Relations" in part as follows:

> "The genius of the constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn.[42] However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye; or to punish such calumnies and invectives, otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured. Without doubt this abuse of a valuable privilege is a matter of peculiar regret when it is extended to the Government of a foreign nation. . . . It is a calamity incident to the nature of liberty. . . ."

Surely the friendly relations of the United States to other nations with which it is at peace are as important as the so-called public morals.

[42] In a debate in the Senate in 1836 (see infra), Senator Davis of Massachusetts said: "Now, they know that the press was at all times corrupt; but when they came to decide the question whether the tares should be rooted up, and the wheat along with it, those who had decided in favor of liberty had always decided it was better to put up with a lesser evil than to draw down upon themselves one of such magnitude as must result from the destruction of the press." Paraphrased in CONG. GLOBE, 24th Cong., 1st sess., p. 348 (1936). Madison said: "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." 4 MADISON, WORKS 544, quoted by the Court in Near v. Minnesota, 283 U. S. 697 at 717-718, 51 S. Ct. 625 (1931).

Foreign relations fall more nearly within the constitutional scope of national authority, and are more deserving of strenuous measures of national protection. And yet the father of constitutional exposition in the United States believed the right of the American people to a free press, "forming the bulwark of their liberty," was to be contemplated by the government with such "awful reverence," that no means of correcting its abuses, except by subsequent punishment for libel, could be devised! It never even occurred to Marshall—and if it had, he would most certainly have considered the measure flagrantly unconstitutional—that such "excesses" might be curbed through administrative exclusion from the mails.[43]

The first proposal to restrict the use of the mails by printed matter because of its content was made on the floor of the United States Senate in 1835. The discussion was so full, and those persons participating were of such high legal calibre, that the result must be regarded as of supreme importance in the consideration of the validity of the exercise of Congressional action to exclude publications from the mail on any ground. Northern anti-slavery agitation had become violent and the dissemination of abolitionist literature from the north throughout the south had assumed dangerous proportions. On December 7, President Jackson, on the basis of a communication to him by the Postmaster General under date of August 22, 1835, addressed the Congress on the subject in the following words:[44]

> "I would, therefore, call the special attention of Congress to the subject, and respectfully suggest the propriety of passing such a law as will prohibit, under severe penalties, the circulation in

[43] That Marshall would not conceivably have sanctioned the exercise of implied powers in the postal clause, to the extent to which it has been allowed by the courts since his time, seems certain from his dictum in McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316 at 417 (1819), which he used to illustrate the extremes to which the doctrine of implied powers had already been extended: "Take, for example, the power 'to establish post-offices and post roads.' This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence."

[44] CONG. GLOBE, 24th Cong., 1st sess., p. 10 (1835); S. Journal, p. 31 (Dec. 8, 1835). Debates on the bill proposed in accordance with the President's suggestion are summarized in CONG. GLOBE 164-165, 347-348, 351-354, 539 (1836).

the southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection."

The President's message was received in the Senate with an immediate request by Senator Calhoun that, because of the grave constitutional questions which the proposed legislation involved, beyond the normal scope of the Committee on Post Offices and Post Roads, it be referred to a select committee, and this was done. The report of that committee was submitted on February 4, 1836. The debates which followed at various times during the next several months have been the subject of much discussion. They are so pregnant with significance in the consideration of the subject under discussion that liberty is taken to quote from them at some length below. These debates were considered in one of the leading decisions of the Supreme Court of the United States, *Ex parte Jackson*.[45] But the sound limitations which were delineated in the debates and recognized in this case have been consistently ignored in other decisions.

Calhoun was chairman of the select committee, and drafted its report. Senator from South Carolina, bitter against the abolition activities, he was intensely zealous for enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering. And yet he took his place with his northern colleagues, to denounce the proposal to prohibit circulation of printed matter through the mails by Congressional action. He regarded it as violative of the freedom-of-the-press clause of the First Amendment, particularly in the light of the history of its adoption. The following brief excerpts from the report speak for themselves:

"The committee fully concur with the President . . . as to the evil and its highly dangerous tendency, and the necessity of arresting it. . . .

"After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law. . . .

"In the discussion of this point, the committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads. . . . The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee

[45] 96 U. S. 727 at 733 (1878).

refer to the amended article of the constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President. . . .

"It is well known that great opposition was made to the adoption of the constitution. . . . Among the many objections to its adoption, none were more successfully urged, than the absence in the instrument of those general provisions which experience had shown to be necessary to guard the outworks of liberty; such as the freedom of press and of speech, the rights of conscience, of trial by jury, and others of like character. It was the belief of those jealous and watchful guardians of liberty, who viewed the adoption of the constitution with so much apprehension, that all these sacred barriers, without some positive provision to protect them, would, by the power of construction, be undermined, and prostrated. So strong was this apprehension, that it was impossible to obtain a ratification of the instrument in many of the States, without accompanying it with the recommendation to incorporate in the constitution various articles, as amendments, intended to remove this defect, and guard against the danger apprehended, by placing these important rights beyond the possible encroachment of Congress. One of the most important of these, is that which stands at the head of the list of amended articles, and which, among other things, as has been stated, prohibits the passage of any law abridging the freedom of the press, and which left that important barrier against power under the exclusive authority and control of the States. . . .

"The object of publishing is circulation; and to prohibit circulation is, in effect, to prohibit publication. . . . and the prohibition of one may as effectually suppress such communication as the prohibition of the other, and, of course, would as effectually interfere with the freedom of the press, and be equally unconstitutional. . . .

"From these remarks, it must be apparent that to prohibit publications on one side, and circulation through the mail on the other, of any paper, on account of its religious, moral or political character, rests on the same principle, and that each is equally an abridgement of the freedom of the press, and a violation of the constitution. . . ."[46]

With the report was submitted a proposed bill. Under its terms deputy postmasters at offices where abolitionist literature was mailed

[46] S. Rep. 118, 24th Cong., 1st sess. (1836), pp. 1-4.

were prohibited from forwarding it, when it was addressed to states under whose laws distribution thereof was forbidden. While contending strenuously that such a bill as had been proposed by the President would be invalid as infringing the freedom of the press, Senator Calhoun defended his bill on the ground, primarily, that it merely prohibited postmasters from violating state laws; it was thus simply a measure on the part of the federal government, providing for cooperation with the states, in assisting them in enforcing their own laws.[47]

As a number of Senator Calhoun's colleagues indicated, there was no substantial difference between a bill prohibiting the mailing of abolitionist literature and a bill prohibiting the forwarding of such literature when mailed to a state under whose laws distribution thereof was forbidden, at least in so far as the freedom of the press was concerned. For this reason a majority of Senator Calhoun's select committee failed to concur in the entire report. Senator Calhoun himself must have recognized some inconsistency in his positions, in trying to reconcile his reactions to the situation as a constitutional lawyer of distinction and as an ardent Southern advocate of the doctrine of states' rights.[48]

This attempted reconciliation evidenced itself rather markedly when, during the course of consideration of the matter, the proposed bill was redrafted by way of amendment. Its prohibitions were directed to the postmasters of the states to which proscribed literature was addressed, instead of those in the states of mailing. The obvious purpose was to circumvent a test of the violation of the First Amendment by moving the prohibition as far as possible from the place of original mailing, and into states where sentiment on slavery was so violent that attempts to challenge the law's validity would be highly improbable.

[47] An interesting instance in which the principle for which Calhoun contended has been reversed appears in the terms of a statute adopted by his own neighboring state of North Carolina: "It shall be unlawful for any news agent, news dealer, bookseller, or any other person, firm, or corporation to offer for sale, sell or cause to be circulated within the State of North Carolina any magazine, periodical or other publication which is now or may hereafter be excluded from the United States mails." N. C. Pub. Laws (Ex. Sess. 1924), c. 45. See Wettach, "Restrictions on a Free Press," 4 N. C. L. REV. 24 (1926).

[48] On April 11, 1836, Calhoun made a stirring appeal in behalf of his bill and in justification of his position, closing with the following peroration: "Let it be fixed, let it be riveted in every southern mind, that the laws of the slaveholding States for the protection of their domestic institutions are paramount to the laws of the General Goverment in regulation of commerce and the mail, and that the latter must yield to the former in the event of conflict; and that, if the Government should refuse to

Only one Northern senator of distinction championed the bill; James Buchanan (later President of the United States) asserted vigorously that it would not infringe the freedom of the press. His argument was based on the theory that Congress had the right to protect the country from direct incitements to violence, insurrection and revolution, and that a bill to prohibit the circulation through the mails of literature having that certain effect could not be considered as infringing the freedom of the press:

> "Are we bound by the Constitution of the United States, through our post offices, to circulate publications among the slaves, the direct tendency of which is to incite their passions and arouse them to insurrection? . . . Does it follow, as the gentleman contends, that because we have no power over the press, that therefore we are bound to carry and distribute anything and everything that may proceed from it, even if it should be calculated to stir up insurrection or destroy the Government?"

In principle, Senator Buchanan was simply presaging the language of the Supreme Court of the United States in its decisions to be rendered nearly a century later, in the criminal syndicalism and World War Espionage Act cases. But Senator Buchanan overlooked the simple terms of the bill,[49] which contained nothing limiting its provisions to situations involving such a "clear and present danger" as alone would remove it from the scope of the First Amendment.

Senator Davis of Massachusetts called attention to the fact that there had been both a post office and a press at the time of adoption of the Constitution, "and the provision in the constitution was made in reference to both these known things." He had further fault to find with the proposed bill in that "it imposed on a set of officers a judicial character so odious in its nature, that he apprehended few would be found willing to take the responsibility of accepting the office on such terms."[50]

yield, the States have a right to interpose, and we are safe." 12 ABRIDGMENT OF THE DEBATES OF CONGRESS 758 (1859).

[49] "Be it enacted, etc., That it shall not be lawful for any deputy postmaster, in any State, Territory, or District of the United States, knowingly to deliver to any person whatever, any pamphlet, newspaper, handbill, or other printed paper or pictorial representation, touching the subject of slavery, where, by the laws of the said State, Territory or District, their circulation is prohibited; and any deputy postmaster who shall be guilty thereof shall be forthwith removed from office." Sec. 1. CONG. GLOBE, 24th Cong., 1st sess., p. 430 (1836).

[50] CONG. GLOBE, 24th Cong., 1st sess., p. 331 (1836). Compare the following language of the *Areopagitica:* "It cannot be denied but that he who is made judge to

"The liberty of the press," Senator Davis reminded his colleagues, "was not like the other reserved rights, reserved by implication, but was reserved in express terms; it could not be touched in any manner." Finally in a ringing reply to Senator Buchanan, Senator Davis called attention to the lessons of history, as poignant then as should be the present history of European totalitarian states in our own time:

> "The public morals were said to be in danger; it was necessary to prevent licentiousness, tumult, and sedition; and the public good required that the licentiousness should be restrained. All these were the plausible pretences under which the freedom of the press had been violated in all ages. . . ."

Henry Clay "considered this bill unconstitutional" and as containing "A principle of a most dangerous and alarming character. . . . He had reached the conclusion that they could not pass any law interfering with the subject in any shape or form whatever. . . . The bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief. . . ."

Finally, the bill was excoriated in scathing terms by the one man whose influence on the early development of constitutional principles remains second only to that of Chief Justice Marshall. Daniel Webster declared that the liberty of the press included "the liberty of printing as well as the liberty of publishing, in all the ordinary modes of

sit upon the birth or death of books, whether they may be wafted into this world or not, had need to be a man above the common measure, both studious, learned, and judicious. . . . If he be of such worth as behooves him, there cannot be a more tedious and unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets. . . . There is no book that is acceptable unless at certain seasons; but to be enjoined the reading of that at all times . . . is an imposition which I cannot believe how he that values time and his own studies, or is but of a sensible nostril should be able to endure. . . . Seeing therefore those who now possess the employment, by all evident signs wish themselves well rid of it, and that no man of worth, none that is not a plain unthrift of his own hours is ever likely to succeed them, except he means to put himself to the salary of a press-corrector, we may easily foresee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remiss, or basely pecuniary. This is what I had to show wherein this order can not conduce to that end, whereof it bears the intention." MILTON, AREOPAGITICA, Hales 2d ed., 28-29 (1878).

"It seems to me perfectly clearly established, that no official yet born on this earth is wise enough or generous enough to separate good ideas from bad ideas, good beliefs from bad beliefs. . . ." LIPPMANN, LEAGUE OF FREE NATIONS ASSN. BULLETIN, March 1920. For a somewhat similar thought, see Jefferson's preamble to the Virginia Act for Establishing Religious Freedom.

publication; and was not the circulation of papers through the mails an ordinary mode of publication?" Further,

> "Against the objects of this bill he had not a word to say; but with constitutional lawyers there was a great difference between the object and the means to carry it into effect. . . . 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."

Other grounds, it is true, were urged against the passage of the bill. But it is safe to say that its defeat on June 8, 1836, by a vote of 25 to 19, was due to the attacks on its constitutionality by the outstanding lawyer-statesmen under whose influence the fundamental principles of American constitutional law were developed; and that most of those who voted in favor of the bill did so primarily for political reasons, engendered by the then crucial slavery problems.

It would be difficult to find more cogent authority than is contained in the foregoing debates in the United States Senate, by men who were already past early childhood when the First Amendment was adopted. They regarded legislation barring abolitionist literature from the mails as an unconstitutional infringement of the freedom of the press, historically and philosophically considered.[51]

V

Twenty years seem to have passed, after the memorable debate of 1836, before the subject again found its way into the governmental record. On March 2, 1857, Postmaster General Campbell wrote to the postmaster at Yazoo, Mississippi, sanctioning his refusal to deliver copies of the *Cincinnati Gazette* containing violent abolitionist propaganda. This was put on the ground that such refusal was necessary,

[51] In 1915, a bill (H. R. 20644, 63d Cong., 3d sess.) was introduced in Congress to deny the use of the mails entirely to any person who, in the opinion of the Postmaster General, "is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libelous character." It was objected that the "bill would invest one man . . . with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular court practice. The punishment which may be inflicted upon a publisher by the Postmaster General under the provisions of this bill is most severe, absolutely depriving him of the privilege of using the United States mails, even for legitimate purposes. . . . Furthermore, this bill makes it possible for the Postmaster General to inflict what is practically a confiscatory penalty for an offense not clearly defined. . . . Under such circumstances as these it is not safe to leave to the decision

and within the scope of his paramount duty, to "suppress insurrection" and to avoid "domestic violence." The action was further justified on the ground that the statute punishing "unlawful detention" of mail, implied the right to exercise a "lawful" detention.[52] On December 5, 1859, Postmaster General Holt addressed a Virginia postmaster to the same general effect.[53]

Very soon after this, began also the exercise of the postal power in the attempted suppression of sedition. On August 16, 1861, shortly after the outbreak of the Civil War, the Circuit Court of the United States for the Southern District of New York received a grand jury report in which, while recognizing "that free governments allow liberty of speech and of the press to their utmost limit," it was recommended that some steps be taken to "subject to indictment and condign punishment" "certain newspapers within this district which are in the frequent practice of encouraging the rebels now in arms against the federal government. . . ."[54]

The matter was called to the attention of Postmaster General Blair. He immediately barred the offending publications from the mail. Shortly thereafter, the House of Representatives instructed its Judiciary Committee,[55]

> "to inquire and report to the House, at an early day, by what authority of Constitution and law, if any, the Postmaster General undertakes to decide what newspapers may, and what shall not, be transmitted through the mails of the United States."

Blair replied at great length to this inquiry, citing as his authority the similar steps taken and justified by his predecessors in office in the case of incendiary abolitionist literature. He said further that over a period of twenty-five years this had occurred and Congress had acquiesced by taking no action to "annul or restrain" the exercise of the power. He even cited the report made in 1835 to President Jackson by his Postmaster General, on which the President had based his troublesome message of that year to Congress. He made no mention,

of one man, after an ex parte investigation, a decision which will involve the freedom of the press. Trial by jury and a penalty inflicted for each specific act is the only safeguard against an arbitrary and tyrannical power." The bill did not pass. HEARINGS BEFORE THE COMMITTEE ON POST OFFICES AND POST ROADS ON EXCLUSION OF CERTAIN PUBLICATIONS FROM THE MAILS, 63rd Cong., 3d sess. (1915), pp. 38, 39.

[52] See also opinion rendered at the same time in support of this view by Attorney General Cushing. Yazoo City Post Office Case, 8 Op. Atty. Gen. 489 (1853-1857).

[53] H. Misc. Doc. 16, 37th Cong., 3d sess. (1863), p. 8.

[54] Quoted ibid., pp. 3-4.

[55] Ibid., p. 1.

however, of the position taken by the Senate on that occasion, in rejecting a bill to authorize the exclusion practice then admittedly being pursued without warrant of law. The offending newspapers, said Blair, were

> "devoting their columns . . . to thwart the efforts made to preserve the integrity of the Union, and to accomplish the results of open treason without incurring its judicial penalties. To await the results of slow judicial prosecution was to allow crime to be consummated with the expectation of subsequent punishment, instead of preventing its accomplishment by prompt and direct interference." [56]

While expressing considerable impatience with the suggestion that his actions in suppressing treasonable literature, calculated to render the military operations of the federal forces ineffective, were unauthorized, he tempered the tone of his reply by "dissenting from" the extremes to which "late administrations" had carried the exercise of the power of exclusion "in time of peace." This constituted "too dangerous a discretion to be exercised or desired by an executive officer attached to the constitutional freedom of the press."

On March 3, 1863, the House Judiciary Committee reported the reply of the Postmaster General, with its approval thereof, although three members of the Committee dissented. In the meantime, ten days after he had written to the House Committee, the Senate adopted a similar resolution, calling on him to explain by what authority "certain papers are excluded from the mails." To this, his patience apparently exhausted, he replied simply that the law by which a postmaster "suppresses the circulation . . . of objectionable printed matter, is, I presume, the law of public safety"; [57] and the whole matter seems to have been dropped.

It is not necessary to decide, or even to discuss at any length in this article, the constitutional status of the abolitionist and Civil War exclusion orders. They are perhaps to be justified as measures taken to meet a clear and present danger to public order. This theory will hardly justify administrative acts done without statutory authority. But the war powers, and the implied powers of acting to preserve the national and state governments against acts which lead directly to insurrection *vi et armis*, would probably warrant the exclusion of incendiary material from the mails in proper situations. In his opinion

[56] Ibid.

[57] S. Doc. 19, 37th Cong., 3d sess. (1863), p. 1.

in *Schenck v. United States*,[58] decided just at the end of the Great War, Justice Holmes has explained this limitation on freedom of expression:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight."

But for the purposes of the instant discussion the abolitionist exclusion orders and the similar orders of the Civil War period are very significant in one respect. They did set a precedent for the exercise of arbitrary administrative power, and they unquestionably tended to encourage the later encroachments through control of the mails on the fundamental civil liberties guaranteed by the First Amendment. Thus, for example, just after the outbreak of the Civil War, on July 24, 1860, Attorney General Black advised the Postmaster General that he was justified in issuing certain fraud orders, even in the absence of Congressional action, and that he might establish regulations under which the delivery of mail was refused to one shown to his satisfaction to be using the mails to further fraudulent schemes.[59] The exclusion of such material certainly could not be placed on the ground of danger to public peace and order.

Moreover, it was just at the end of the Civil War when the movement to exclude a great variety of other undesirable matter from the mails began. In February 1866, Solicitor Ware, of the Post Office Department, wrote to Postmaster General Dennison on the necessity of vesting him with statutory authority to exclude lottery literature from the mails, and to provide punishment for such use of the postal service. This letter was, in due course, transmitted to Congress,[60] which had already, during the preceding year, adopted a statute[61] prohibiting the use of the mails for the transmission of obscene matter.[62] In 1868, the first statute against use of the mails for lottery paraphernalia and literature was adopted.[63]

[58] 249 U. S. 47 at 52, 39 S. Ct. 247 (1919).

[59] Case of Emory & Co., 9 Op. Atty. Gen. 454 (1857-1860).

[60] S. Misc. Doc. 57, 39th Cong., 1st sess. (1866).

[61] 13 Stat. L. 507 (1865).

[62] The Tariff Act of 1842 forbade the importation of obscene literature and pictures. 5 Stat. L. 566, § 28.

[63] 15 Stat. L. 196, § 13 (1868). The first lottery statute was passed in 1827, but

These statutes were followed by agitation for a codification of all the postal laws. On June 8, 1872, such a code, embodying provisions prohibiting and punishing the use of the mails for circulation of various types of matter, was enacted into law.[64]

These statutory provisions in the first place prohibited the mailing of poisonous, explosive, diseased and other matter inherently dangerous to postal employees and the postal service. Next, they made the mailing of obscene matter and literature, and material relative to contraception, a punishable offense. Third, they provided that lottery paraphernalia and advertisements of lotteries should be non-mailable, and that their deposit in the mails should be an offense subjecting the person mailing them to punishment. Finally, the use of the mails to defraud was made criminal, and the Post Office Department was given the right to intercept mail contravening this provision.

Many subsequent additions have been made to this list of non-mailable matter. Under an act of 1888, matter which contains on its envelope anything of a defamatory character is excluded and the deposit thereof in the mails is made a punishable offense.[65] The ban has been extended to liquor advertising and prize fight films.[66] And in its recent securities legislation and the Public Utility Holding Company Act, Congress has prohibited the use of the mails by matter violative of the provisions of these statutes.[67]

It is unnecessary to consider all these statutes in detail. The principal types will be discussed further in connection with the analysis of the decided cases.

VI

At this point—and before considering the decided cases—it seems desirable to bring together in short compass the general principles which should be decisive of the constitutional issues involved in exclusion of matter from the mails. These principles have their source in

it merely provided "That no postmaster, or assistant postmaster, shall act as agent for lottery offices, or, under any color of purchase, or otherwise, vend lottery tickets; nor shall any postmaster receive free of postage, or frank lottery schemes, circulars, or tickets." 4 Stat. L. 238, § 6 (1827).

[64] 17 Stat. L. 283 at 302 (1872).

[65] 25 Stat. L. 496, § 1 (1888).

[66] See Postal Laws and Regulations, § 597 (1932). The bar on liquor advertising was repealed in 1934. 48 Stat. L. 316, repealing 39 Stat. L. 1069 (1917).

[67] Securities Act, 48 Stat. L. 85, § 17 (b) (1933), 15 U. S. C. (1934), § 77q; The Securities Exchange Act, 48 Stat. L. 885, § 5 (1934), 15 U. S. C. (1934), § 78e; and the Public Utility Holding Company Act, 49 Stat. L. 812, § 4 (1935), 15 U. S. C. (Supp. II, 1936), § 79d.

all the pertinent clauses of the Constitution, including especially the First Amendment, its history and connotation.

First, there can be no question of the validity of legislation to exclude matter which, because of its inherent character, may affect injuriously the mail service itself.[68] Whether the exclusion be achieved through a threat of criminal punishment or be made effective by administrative investigation or inspection, the exclusion falls within even the narrowest conception of Congressional control over the mails. Moreover, it hardly seems possible that any such exclusion would seriously impair or interfere with freedom of the press.

Second, some power on the part of Congress to protect the public morals through its control over the mails must also be conceded. As an original matter this power might have been doubtful. But it is now recognized in many cases. The reconciliation of this power with the freedom of the press is the major problem of the present discussion.

Third, the real party in interest in the unrestricted dissemination of information and opinion is the public. It is the people ultimately, and not the press, for whose benefit freedom in the dissemination of information is guaranteed by constitutional fiat. The people are entitled to hear all possible views on matters of public interest and to form their judgments on the basis thereof. The basic concept was well stated by Justice Holmes, dissenting in the *Abrams* case:[69]

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

Fourth, the First Amendment seems to impose greater obstacles to some types of welfare legislation than to others. Basically, the Amendment is founded on a public interest in the free discussion of public questions. In modern terms, the Amendment should protect freedom of publication of matters of politics, business, labor, art, etc. These are fields in which the general progress is important, in which

[68] The intellectual content of written or printed matter, even if obscene and not sealed, could hardly intrigue postal employees to such an extent as to interfere with the efficient operation of the postal service.

[69] Abrams v. United States, 250 U. S. 616 at 630, 40 S. Ct. 17 (1919).

free trade in ideas is essential. Thus, for example, the public interest in the development of art doubtless qualifies and limits at some point the power to exclude matter from the mails as obscene. Against the public interest in excluding obscene matter must be considered the public interest in artistic progress. Where the obscenity can be assumed to be clear, it may be that exclusion is justified. But notions as to the obscenity, like all other notions, differ, and the policy of the First Amendment is to allow ample latitude for a change through discussion. In short, when Congress penalizes certain matter as obscene and bars it from the mails, the bar should not be allowed to extend beyond what is clearly obscene to the mind of the common citizen.[70]

By contrast with the obscenity statutes, the anti-lottery paraphernalia provisions of the postal laws and the prohibitions against the use of the mails in fraudulent schemes, and in advertising liquor sales, seem less open to objection. In regard to paraphernalia of lotteries and frauds, the public interest opposed to control—i.e., the public interest in free discussion or progress—is not obvious. While prophecy is dangerous, it does seem probable that the Supreme Court will finally have to fix the limits of Congressional control at different points with regard to different kinds of legislation.

Fifth, it seems important to remember, in regard to the validity of all this legislation, the important distinction between administrative exclusion and criminal prosecutions. In the light of the history of the struggle for a free press, it is impossible to deny that this liberty meant to the minds of the framers of the Constitution at least a freedom from previous restraints. It meant freedom not only from those types of administrative exclusion from circulation which had up to

[70] The Supreme Court has never passed on the validity of the acts against use of the mails for the transmission of obscene matter, but they were upheld by the Circuit Court of Appeals for the Sixth Circuit in Tyomies Pub. Co. v. United States, (C. C. A. 6th, 1914) 211 F. 385. Similar provisions against radio broadcasts of obscene matter [Radio Act of 1927, 44 Stat. L. 1172, § 29, repealed 48 Stat. L. 1102 (1934)] were upheld by the Circuit Court of Appeals for the Ninth Circuit in Duncan v. United States, (C. C. A. 9th, 1931), 48 F. (2d) 128, cert. den. 283 U. S. 863, 51 S. Ct. 655 (1931). And in Near v. Minnesota, 283 U. S. 697 at 716, 51 S. Ct. 625 (1931), Hughes, C. J., said: "the primary requirements of decency may be enforced against obscene publications." But on February 26, 1878, Congressman Benjamin Franklin Butler of Massachusetts presented to the House, a petition bearing fifty thousand signatures, protesting against the statutes excluding obscene literature from the mails, and asking that the laws be amended in such a way "that they cannot be used to abridge the freedom of the press. . . ." 7 CONG. REC. 1340 (1878).

that time been devised, but also from all such as yet undiscovered forms of restraint as the fertile human mind might in future devise.[71]

Whether the decisions of the Supreme Court will ever take the necessary steps back to sound views on this point or not, the writer is not prepared to guess. But it does seem clear, beyond the peradventure of a doubt, that Congress was never intended to have power to authorize an administrative official such as the Postmaster General to issue fraud orders and the like, to effect exclusion of the press from the use of the mails.[71a] There is a wide difference between penalizing abuses of liberty and an administrative exclusion. For example, one may consider the matter of obscenity. Who is to say what is obscene? What standard is to be used? Is one to assume that "run-of-the-mine" administrative officials are competent to decide? The difficulty of determining what is proper intellectual food for the public is not easy to resolve. The determination of the question at any point is dangerous to liberty of all kinds.[72] The answer, both to the difficulty as to the standard and the problem as to the tribunal, was found by the English protagonists of a free press in submitting the issue of abuse to a jury in a criminal prosecution. This answer, the writer submits, was that intended by the framers of the Federal Constitution. Let Congress, if you please, pass criminal statutes penalizing, within any reasonable limits, the abuses of a free press in the use of the mails, but let the ultimate question whether the liberty has been transcended be submitted to a jury in a criminal prosecution.

[71] "Closely coupled with the license system was the subjection of publications to censorship by prior scrutiny by government officials. By the end of the seventeenth century both types of previous restraint had been abandoned in England, never to be revived. . . . The [American] press has come perilously close to being subjected to this sort of restraint with respect to second-class mail privileges." Caldwell, "Legal Restrictions on the Contents of Broadcast Programs in the United States," REPORT TO THE SECOND INTERNATIONAL CONGRESS ON COMPARATIVE LAW 17 (August 4-10, 1937). With respect to administration of the Espionage Act during the World War, Chafee says: "Every one agreed that freedom of speech meant the absence of previous administrative restraint on political discussion—and the Postmaster General was allowed to establish a whimsical censorship of the political press and maintain it long after the last American soldier had been demobilized." CHAFEE, FREEDOM OF SPEECH 335 (1920).

[71a] In recent years the Post Office Department has gone to the almost unbelievable extreme of ruling that "All copies of a publication printed, *whether circulated through the mails or otherwise, and at whatever rate of postage*, shall be considered in determining whether the circulation conforms to the requirements of the law of second-class matter"! Postal Laws and Regulations, § 527-5(a) (1932).

[72] Schroeder, "On the Implied Power to Exclude 'Obscene' Ideas from the Mail," 65 CENT. L. J. 177 (1907). For an interesting illustration of the extent to

VII

The first adjudication on the relation of the postal power of Congress to the freedom of the press came in 1878, in the decision of the Supreme Court in *Ex parte Jackson.*[73] No question of administrative exclusion was involved, the decision being one on an appeal from a conviction, in a criminal prosecution, for depositing a lottery circular in the mail in violation of the statute. The opinion became the corner stone of later case law, and is of particular importance. While it involved "the obnoxious thing in its mildest and least repulsive form," it was the first of the "slight deviations" which gave to "illegitimate and unconstitutional practices their first footing."[74]

The Court began by calling attention to the fact that "the power possessed by Congress embraces the regulation of the entire postal system of the country," necessarily including the right to govern the physical characteristics of mail matter to conform to the postal facilities, and necessarily involving "the right to determine what shall be excluded." In so far as this statement applies to the physical description of mailable matter, one can have no quarrel with it. But in the very next sentence the Court recognized a national power to control the mails for the general welfare. It declared that the difficulty in applying the power lies in limiting its exercise by the "rights reserved to the people, of far greater importance than the transportation of the mail."

The Court also recognized that the police power over the mails is subject to the limitations of the Bill of Rights to the Constitution, and specifically that the privacy of first class mail is protected against administrative invasion under the color of Congressional authority by "the great principle embodied in the fourth amendment of the Constitution." Since it has never been pretended that the Fourth Amendment expresses any more sacred or inviolable rights than the First, it must be conceded that Congress has no more authority to direct or sanction

which the courts have gone in sanctioning exclusion of "obscene" matter from the mail, see Knowles v. United States, (C. C. A. 8th, 1909) 170 F. 409, in which the court, speaking through Amidon, J., affirmed condemnation of a newspaper, containing an editorial deprecating the social standards which had led an unmarried girl to submit to abortion, resulting in her death, to avoid the shame of bearing an illegitimate child. On the other hand, it has been held that a newspaper containing an accurate report of a judicial proceeding might not be barred as obscene. United States v. Journal Co., (D. C. Va. 1912) 197 F. 415. In 1890, Tolstoi's magnificent "Kreuzer Sonata" was barred from the mails.

[73] 96 U. S. 727 (1878). Quotations from pages 732, 733, 735.

[74] Boyd v. United States, 116 U. S. 616 at 635, 6 S. Ct. 524 (1885), quoted in full at note 3, supra.

an exclusion in violation of the First than a search in violation of the Fourth. Immediately appreciative of this dilemma, Justice Field, as organ of the Court, conceded that liberty of circulation is an integral part of the freedom of the press, and declared that any regulations interfering therewith are to be treated as invalid.

The opinion refers at some length to the record of the debate of 1836, and pays tribute to those who participated therein. But the unequivocal conclusion reached on that occasion by men conceded to have been "alike distinguished as jurists and statesmen," is lightly dismissed as having palpably been based on the assumption that Congress was competent to prohibit the distribution by other means, of matter which it excluded from the mails, in which case "the circulation of the documents would be detroyed, and a fatal blow given to the freedom of the press." "But," said the Court, "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."

One must remember that the mail was originally the only practical medium of newspaper circulation, to such an extent that the taxes on knowledge were sought to be justified by free mailing privileges, transplanted from England to this country to a limited extent even without the taxes; and then retained, in effect, through the second-class mailing privilege.[75] One must remember also that, in the course of time, the mails became strengthened in their position as the only practical modern medium of inexpensive circulation to a large part of the reading public,[76] entitled, under the First Amendment, to information disseminated without restriction by undue governmental burdens. In the light of these facts the suggestion made in this decision, and reiterated in others, that other avenues of circulation remain open to publishers, attains all the pitiful significance of the statement attributed to Marie Antoinette, who, when told that the people had no bread to eat, suggested "Let them eat cake!"

Perhaps it is now too late to undo the damage which has followed

[75] See Report of the Commission on Second-Class Mail Matter, transmitted to Congress by President Taft, February 22, 1912, H. Doc. No. 559, 62d Cong., 2d sess. (1912), p. 56, for a history of the mailing privileges of the press in the United States. Certain publications such as literature in raised characters for the blind [48 Stat. L. 678 (1934), 39 U. S. C. (1934), § 331] are permitted to be mailed free, and others are given special rates. See, for example, 48 Stat. L. 880 (1934), 39 U. S. C. (1934), § 293b, on publications circulated free.

[76] Inquiry develops the fact that subscription rates to modern newspapers are cheaper for delivery by mail than by carrier.

the Court's expression of opinion in *Ex parte Jackson.* But in policy and on history its opinion is without warrant. The opinion of the select committee of the Senate, which reported in 1836 regarding the proposed exclusion of abolitionist literature, seems rather to express the correct view on this point:

> "The object of publishing is circulation; and to prohibit circulation is, in effect, to prohibit publication. . . . and the prohibition of one may as effectually suppress such communication as the prohibition of the other, and, of course, would as effectually interfere with the freedom of the press, and be equally unconstitutional. . . .
>
> "From these remarks, it must be apparent that to prohibit publications on one side, and circulation through the mail on the other, of any paper, on account of its religious, moral or political character, rests on the same principle, and that each is equally an abridgment of the freedom of the press, and a violation of the constitution. . . ."[77]

If the decision of the Court in the *Jackson* case can be justified at all, the ground of decision must be found in the kind of matter excluded from the mails, and not in the fact that exclusion from the mails leaves open other channels of communication and publication.[78] The justification for exclusion, if one exists, must be based on the Congressional power to prohibit circulation of matter injurious to the public welfare and not on a discretion of Congress "to refuse its facilities for distribution." It seems altogether unwarranted to treat the use of the mails as a special privilege, independent of the free-press clause, and one which Congress may withhold or confer, entirely apart from the basic liberties of the Constitution.

The original statute in the postal code of 1872, making lottery material and information non-mailable, had been directed specifically against "illegal" lotteries.[79] In 1876 this provision was amended by deleting the word "illegal,"[80] with the obvious purpose of making the section applicable to the Louisiana State Lottery, sanctioned by state statute and constitutional provision. The same section was again amended, on September 19, 1890,[81] to include newspapers, pamphlets

[77] S. REP. 118, 24th Cong., 1st sess. (1836), p. 3.

[78] The Court itself later disregarded this ground. Champion v. Ames, 188 U. S. 321, 23 S. Ct. 321 (1902).

[79] 17 Stat. L. 302, § 149 (1872).

[80] 19 Stat. L. 90, § 2 (1876).

[81] 26 Stat. L. 465 (1890).

and other publications containing lottery advertisements and information, among the proscribed material.

This last amendment had a rough legislative voyage. The Louisiana Lottery Company had apparently managed to get along without using the mails itself, but it had enjoyed the advantage of having advertising and information concerning its activities distributed through the newspapers, which had not been deprived of their mailing privileges under existing law. In 1884, the Committee of the Senate on Post Offices and Post Roads had reported favorably[82] a bill to proscribe newspapers and other periodicals containing lottery advertisements, but the bill fell by the wayside.

The same bill was again reported favorably in January, 1886, its policy being justified under *Phalen v. Virginia*,[83] in which Justice Grier, in upholding a state anti-lottery statute against the contention that it impaired the obligation of existing contracts, had decried the lottery evil, and asserted the power of the state to suppress it. While the committee's report denied, on the authority of *Ex parte Jackson*, that the proposed legislation "might tend to induce a line of action which in time would lead to attempts to abridge the freedom of the press, or even to the establishment of a censorship over the press," the purposes of the bill, totally unrelated to the Congressional power "To establish Post Offices and post Roads," were stated with commendable frankness:

> "Newspapers and all other publications containing such matter are to be restricted in their free circulation by being denied the usual and ordinary mail facilities that have been extended to them since the establishment of the postal system and service of the Government. This it is assumed will force them to cease the publication of lottery advertisements and notices, and that with such cessation lotteries will be practically exterminated, even in states where they are at present legalized, and be practically prohibited in all others."[84]

But the bill reported progressed no further toward enactment than had its counterpart of 1883. On June 1, 1886, a similar report[85] was made to the House by its Post-Office Committee, recommending passage of a similar bill on the same grounds, but again no action was taken.

[82] S. REP. 233, 48th Cong., 1st sess. (1884).
[83] 8 How. (49 U. S.) 163 (1850).
[84] S. REP. 11, 49th Cong., 1st sess. (1886), p. 11.
[85] H. REP. 2678, 49th Cong., 1st sess. (1886).

Then, on March 1, 1888, the same committee rendered an adverse report[86] on the same bill, strongly urging its defeat, on the ground that it would be violative of the First Amendment, in recognizing a right in Congress "to declare what shall and what shall not be printed in every newspaper and periodical in the country which is circulated wholly or in part through the mails"; the "inevitable result of such legislation" being "the establishment of a precedent which may be considered in the future an authority for the creation of a censor of the press in all respects"!

While the bill again failed to achieve enactment into law, the sentiment against the lottery in Louisiana, which "stands almost alone in her toleration of the evil,"[87] had grown so strong that the bill was finally passed in 1890, to exclude newspapers and other periodicals containing lottery advertisements and information from the mail.[88]

Immediately following the amendment of September 19, 1890, criminal prosecutions were instituted against John L. Rapier of the *Daily Register* of Mobile, and George W. Dupre of the *Daily States* of New Orleans, for violations of the statute in sending newspapers, containing advertisements and announcements of the Louisiana State Lottery, through the mails. The cases were brought, at once, to the Supreme Court of the United States[89] on writs of habeas corpus.

It was contended, in behalf of the petitioners, that the statute was unconstitutional as violative of the First Amendment, and that the case of *Ex parte Jackson* was not controlling. It was urged, first, that the free-press issue had not been presented by counsel in that case, but had been adjudicated by the Court without argument; and second, that the amendment to the statute in 1890 had, for the first time, included newspapers and other periodicals in the *Index Expurgatorius*, thus creating the first real occasion for raising this point. It was further contended that a distinction must be drawn between crimes *mala in se* and *mala prohibita*; that, while a federal statute excluding from the mails literature containing direct incitements to murder or arson might be upheld, one which proscribed gaming literature could not. This applied especially to a lottery operating under state charter, sought to be barred by a national paternalistic protection of public morals within

[86] H. REP. 787, 50th Cong., 1st sess. (1888).

[87] S. REP. 11, 49th Cong., 1st sess. (1886), p. 11.

[88] 26 Stat. L. 465, § 1 (1890), 18 U. S. C., § 336 (1935).

[89] In re Rapier, In re Dupre, 143 U. S. 110, 12 S. Ct. 374 (1892).

the states, in the face of the prohibition against abridgment of a free press in the Federal Constitution.

The opinion of the Court was written by Chief Justice Fuller, who explained that its preparation had originally been assigned to Justice Bradley, who had since died. This undoubtedly accounts for the fact that the opinion is so short, although the case was apparently presented vigorously, and at considerable length, by able and distinguished counsel.

The decision rests primarily on the case of *Ex parte Jackson*, stated to be "decisive of the question before us . . . and it is a mistake to suppose that the conclusion there expressed was arrived at without deliberate consideration." The contention that the distinction between offences *mala in se* and *mala prohibita* must have a bearing on the point was simply dismissed with the statement that Congress must be left to act as sole judge of "what are within and what without the rule," and as to the manner in which "it will exercise the power it undoubtedly possesses."[90]

And so the second "slight deviation" occurred in a holding by the Supreme Court that the First Amendment did not prohibit Congress from closing the mails to publications, containing information relative to an activity which it considered improper intellectual food for the people of a state, who had themselves, by constitutional provision,[91] specifically sanctioned the activity in question.

Less than a month after the decision of *In Re Rapier*, the Supreme Court again upheld the statute, as against an attack by one charged with having deposited in the mails in Illinois a circular containing a list of lottery prizes, resting its decision on the *Rapier* case.[92]

[90] 143 U. S. 110 at 133-134. The decision was widely criticized as sanctioning both an encroachment on states' rights, and a disregard for the rights of a free press. An article by Hannis Taylor, of counsel for the defendants in the Rapier case, in 155 NORTH AMERICAN REVIEW 694 (Dec. 1892), bitterly criticizes the decision. An anonymous advertisement surrounded by a heavy black border, in the New Orleans Daily City Item of February 2, 1892, read, "IN MEMORIAM—A FREE PRESS—killed by Congress—September 19, 1890." Compare the front page of William Bradford's "Pennsylvania Journal and Weekly Advertiser" for October 31, 1765, the day before the Parliamentary taxes on knowledge were to be extended to the colonial newspapers. The issue for that date appeared in the make-up of a tombstone, with a headline reading, "Adieu to the Liberty of the Press!" A facsimile appears in BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM 79 (1927).

[91] Louisiana Const. of 1879, art. 167; see also, La. Const. of 1864, art. 116.

[92] Horner v. United States, 143 U. S. 207, 12 S. Ct. 407 (1892).

Ten years later the Court handed down an opinion which tended, in a small measure, to reduce the extent of its two former "slight deviations." In a case[93] involving a postal ban against literature of a company which offered to cure disease through mental influences, it conceded the existence of "grave questions of constitutional law," which it declined to decide. It held that, while the opinion of the administrative authorities was entitled to great weight in matters of this character, the effectiveness of the advertised treatments was a matter of opinion, whereas the mail fraud statutes were intended to embrace only cases of "actual fraud"; and the postal authorities were enjoined from enforcing the exclusion statute against the literature in question.

In 1903, after it had heard an original argument and two rearguments of the case, the Supreme Court rendered its decision in *Champion v. Ames*,[94] which involved criminal prosecutions for conspiracy to transport lottery tickets by express in interstate commerce, in violation of an act of 1895.[95] Five judges concurred in upholding the validity of the statute, challenged on the ground that such transportation did not constitute "commerce," as that term was used in the constitutional provision giving Congress the power to regulate commerce among the states; and the majority conceded for the purposes of its opinion that the Congressional regulation there involved, by punishment for violation of the statute, amounted to prohibition of the transportation.

Chief Justice Fuller, writing for the dissenting minority of four, conceded that the case under consideration did not involve "the circulation of advertisements and the question of the abridgment of the freedom of the press," although such circulation was equally condemned by the statute. But he called particular attention to the fact that the exclusion statutes were upheld in the *Jackson* and *Rapier* cases, as against the contention that they abridged the freedom of the press, on the express ground that the Congressional exercise of the power to exclude from the mails could be justified only because other media of circulation had been left open to the excluded matter.

The extent to which the "slight deviations" of the former decisions had become substantial encroachments on constitutional rights, in the necessary effect of the decision in *Champion v. Ames*, upholding the

[93] American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33 (1902).

[94] 188 U. S. 321, 23 S. Ct. 321 (1903).

[95] 28 Stat. L. 963, § 1 (1895), 18 U. S. C., § 387 (1935).

power of Congress to prohibit all interstate transportation of matter deemed by it to be injurious to the public morals, can be appreciated fully only by recurring to the language of the Court in *Ex parte Jackson*:

> "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." [96]

A year later, the Court decided the case of *Public Clearing House v. Coyne*,[97] involving a fraud order issued by the Postmaster General, authorizing the interception and return to the sender of all mail addressed to a company engaged in operating an endless-chain scheme, condemned as a fraudulent lottery. The freedom-of-the-press phase of the question was treated as having been settled in *Ex parte Jackson* and *In re Rapier*; but the Court made further "slight deviations," first, in holding that Congress may empower the Postmaster General to intercept such mail "upon evidence satisfactory to himself," and that "his action will not be reviewed by the court in doubtful cases";[98] and second, in holding that since the postmaster is prohibited, under the Fourth Amendment, from opening mail not addressed to himself, "there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters." What would the framers of the First Amendment, whose adoption was promised as a condition precedent to ratification of the entire constitution, have thought of a previous restraint of this sort![99]

[96] 96 U. S. 727 at 735. By an act of 1897, the transportation of obscene matter in interstate commerce, by express or otherwise, was prohibited. Section 245, Crim. Code, as amended, 18 U. S. C., § 396 (1935). The validity of this statute, as against the free press guaranty of the First Amendment, was upheld by the Circuit Court of Appeals for the Eighth Circuit in Clark v. United States, (C. C. A. 8th, 1914) 211 F. 916.

[97] 194 U. S. 497, 24 S. Ct. 789 (1904).

[98] This principle has been extended to an extreme which seems to go beyond the limits of due process. In Branaman v. Harris, (C. C. Mo. 1911) 189 F. 461 at 466, Van Valkenburgh, J., held that "the only cases in which courts will disturb . . . [a fraud order made by the Postmaster General] are when it is tainted with fraud, absolutely without authority of law, clearly outside of the statute, or perhaps, clearly, palpably, and obviously wrong." To the same effect had been the ruling of Circuit Judge Lurton (Taft,J., concurring) in Enterprise Savings Assn. v. Zumstein, (C. C. A. 6th, 1895) 67 F. 1000, and of Circuit Judge Sanborn in People's United States Bank v. Gibson, (C. C. A. 8th, 1908) 161 F. 286. In a number of decisions the courts have reached the same objective by finding that the plaintiffs came into court with unclean hands. See, for example, Gomez v. Kiely, (D. C. N. Y. 1928) 27 F. (2d) 889.

[99] At first, the statute directed the interception only of registered letters, and the non-payment of postal money orders. By act of March 2, 1895, 28 Stat. L. 963, §

In 1906, Justice Van Devanter, then Circuit Judge, in a case[100] involving a postal fraud order against a fraudulent liquor business, declined to consider the constitutional questions on the ground that they had been settled by the decisions of the Supreme Court discussed above.

By an act of 1888,[101] matter which contains on its envelope anything of a defamatory character was declared to be non-mailable, and the deposit thereof in the mails was made a punishable offense. The validity of this statute was upheld by the United States Circuit Court of Appeals for the Eighth Circuit, as against a contention that it infringed the freedom of the press. Circuit Judge Hook, who wrote the opinion, also assumed that the constitutional question had been settled in the Supreme Court decisions. Judge Hook even went so far as to characterize "the statute under consideration" as "part of a body of legislation which is being gradually enlarged, and which is designed to exclude from the mails, that which tends to debauch the morals of the people . . . or is an apparent, visible attack upon their good names."[102]

Up to this juncture, then, "slight deviations" had brought the state of the law to the point at which an administrative injunction against use of the mails for defamatory matter, without recourse to the courts except for a clear abuse of discretion, would be sanctioned as not violative of the constitutional provision against abridgement of a free press. Carried to its logical, and by no means extreme conclusion, this would authorize a postmaster to exclude from the mails a newspaper if, in his opinion, it reflected unfairly, by editorial comment, on some public official; and to this extent, at least, the doctrine would be a reversion far beyond the press abuses which immediately preceded

3 (1895), 18 U. S. C., § 336 (1935), the provision was extended to include all mail, whether registered or not. In Hoover v. McChesney, (C. C. Ky. 1897) 81 F. 472, Barr, J., held that use of the mails was a right attached to citizenship; that while particular mail known to be of a prohibited character, or all mail of a corporation known to be in a business to whose affairs the mails were closed, might be detained, Congress could not constitutionally authorize the Postmaster General to deny altogether the right to use the mails to a citizen, simply because he had been, or was, guilty of using the mails unlawfully. This distinction was criticized by Putnam, J., in Fairfield Floral Co. v. Bradbury, (C. C. Me. 1898) 89 F. 393; but it was approved, at least to the extent of the holding that use of the mails is a right rather than a privilege, in the dissenting opinion of Brandeis, J., in United States v. Burleson, 255 U. S. 407 at 417, 41 S. Ct. 352 (1921).

[100] Harris v. Rosenberger, (C. C. A. 8th, 1906) 145 F. 449, cert. den. 203 U. S. 591, 27 S. Ct. 778 (1906).

[101] 25 Stat. L. 496, § 1 (1888), 18 U. S. C., § 335 (1935).

[102] Warren v. United States, (C. C. A. 8th, 1910) 183 F. 718 at 721.

the adoption of the First Amendment, into the dark eras of sixteenth and seventeenth century censorship.[103]

In 1912, the postal statutes under which newspapers and periodicals are admitted to the second-class mail at nominal mailing costs, was amended[104] to extend the requirements with relation to publication of ownership, circulation and indebtedness, and to require that advertising matter be labeled as such. The statute was immediately attacked as an infringement of the freedom of the press, and the resulting litigation gave rise to the decision, by the Supreme Court, in 1913, of the case of *Lewis Publishing Co. v. Morgan.*[105]

The rebellion in England against restrictions on the freedom of the press was based, in no inconsiderable degree, on the imposition of similar requirements on British publishers.[106] The framers of the American Constitution were familiar with this phase of the struggle also. But the requirements in question may perhaps be justified on the ground that they aid rather than restrict the intelligent discussion of public questions. The public interest in a free press does not necessarily run counter to requirements which mean that adequate information is to be furnished on the basis of which the public can value the accuracy and bias of opinions published in newspapers.

However, the Court did not rely on this point. So well entrenched by this time had become the principle that use of the mails is a privilege to which Congress may attach practically any conditions it sees fit, that the Court, speaking through Chief Justice White, treated these new far-reaching requirements as "concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense."[107] The line of reasoning is significant chiefly as it has been applied to justify other postal regulations which do interfere with freedom of the press.

The doctrine of Congressional power to regulate the mails through exclusion statutes had so often been stated that, by 1916, even Justice Holmes, who was to be the first to break away from it a few years later, when decisions on the First Amendment began to develop more fully, fell into line with his colleagues. True, up to that time, he had written, or concurred in, the opinions of the Court, but, with the ex-

[103] See note 71, supra.

[104] 37 Stat. L. 539, § 2 (1912), 39 U. S. C., § 233 (1935).

[105] 229 U. S. 288, 33 S. Ct. 867 (1913).

[106] 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, Holland's ed., c. 9 et seq. (1912).

[107] 229 U. S. 288 at 316.

ception of *Lewis Publishing Co. v. Morgan*, the opinions handed down during his tenure had involved primarily the formal physical requirements of mail matter, and not its intellectual content.[108] But in *Badders v. United States*,[109] he said that "whatever the limits" to the Congressional power to regulate the mails, "it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not," and cited the previous decisions of the Court as his authority. The case simply involved a criminal prosecution for using the mails to defraud, and can be justified as against the guaranties of the First Amendment—if at all—only on the ground that the Court was not considering a previous restraint by exclusion or interception.

On the day following the decision of *Badders v. United States*, the Circuit Court of Appeals for the First Circuit handed down its opinion in *Post Publishing Co. v. Murray*,[110] requiring the Boston Postmaster to rescind his order denying use of the mails to the *Boston Post*, which had been proscribed under the lottery statute on orders from Washington. The *Post* offered nominal prizes to women shoppers who could identify their pictures in the newspaper, the heads of the persons photographed having been cut from the pictures before they were printed.

The decision turned on the finding that the prize offer under consideration was not a lottery or gift enterprise within the meaning of the statute, because contestants were not required to part with any consideration to participate. The opinion would be of no significance in the instant discussion, were it not for the fact that the court seemed to be struggling out of the morass of prior decisions, by applying "a literal construction" to the statute which provides for an "exercise of executive power . . . highly arbitrary in its character" since "Congress and the courts are cautious about placing restrictions upon the liberty of press publications."[111]

So much has been written and said about the case of *Masses Publishing Co. v. Patten*,[112] that little can be added here. The case was the first to arise under the provisions of the Espionage Act prohibiting the use

[108] Smith v. Hitchcock, 226 U. S. 53, 33 S. Ct. 6 (1912); Houghton v. Payne, 194 U. S. 88, 24 S. Ct. 590 (1904); Smith v. Payne, 194 U. S. 104, 24 S. Ct. 595 (1904); Bates v. Payne, 194 U. S. 106, 24 S. Ct. 595 (1904).

[109] 240 U. S. 391 at 393, 36 S. Ct. 367 (1916).

[110] (C. C. A. 1st, 1916) 230 F. 773.

[111] 230 F. 773 at 776.

[112] (C. C. A. 2d, 1917) 246 F. 24.

of the mails by publications containing matter tending to obstruct the successful prosecution of the war. The exclusion of *The Masses* from the mails might have been justified if its publication had constituted a real threat to public safety, that is, if it created "a clear and present danger" of bringing about "the substantive evils that Congress has a right to prevent."[113] But the contents of *The Masses*, to which objection was taken, were so harmless on their face that they were little likely to have any appreciable effect on the military operations of the country. In the clear, tranquil light of 1938, one must concede that, even in the hectic beginnings of war hysteria, the decision of Judge Hand in the district court[114] would never have been reversed, and the publication would never have been barred from the mails, had not again the cumulative effect of prior "slight deviations"—cited at length in the opinion in justification of the circuit court's conclusion—warranted this otherwise incomprehensible encroachment.

But at last came a gleam of light in the apparently hopeless Stygian darkness in which the courts had seemed to have lost their way. True, it was only a gleam, a single remark in a dissent by Justice Brandeis in one of the wartime sedition cases.[115] It had no direct relationship to any exercise of the postal power of Congress; it involved a criminal prosecution for the publication of false reports in a German newspaper, alleged to have been printed for the purpose, and with the tendency of impeding the military operations of the United States during the World War, in violation of Title 12 of the Espionage Act. The language of Justice Brandeis, which supplied this gleam of hope for a renascence of the fundamental concept of press liberty as guaranteed by the First Amendment, was contained in a single sentence in the body of his dissent:

> "To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities."[116]

And Justice Holmes, who had concurred in the opinion in *Lewis Publishing Co. v. Morgan*, and had written the opinion in *Badders v. United States*, concurred in this dissent!

[113] Schenck v. United States, 249 U. S. 47 at 52, 39 S. Ct. 247 (1919).
[114] Masses Publishing Co. v. Patten, (D. C. N. Y. 1917) 244 F. 535.
[115] Schaefer v. United States, 251 U. S. 466, 40 S. Ct. 259 (1920).
[116] 251 U. S. 466 at 494.

The gleam of light contained in these dissents by Justices Brandeis and Holmes in 1920, failed, however, of fruition into a majority opinion upholding the First Amendment, when the next opportunity came. During the following year, the Supreme Court had to pass directly on the question under discussion. In the case of *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*,[117] Postmaster General Burleson had revoked the second-class mailing permit of the *Milwaukee Leader* on the ground that it had been guilty of continuous violations of the Espionage Act. Its publisher brought action to compel restoration of the permit by mandamus, resting its case, in part, on the invalidity of the statute in so far as it authorized any order "destructive of the rights of a free press."

In the majority opinion written by Justice McKenna, it is recognized that the low second-class mail rates are justified, on historical grounds, to effect an inexpensive "dissemination of current intelligence"; but the majority falls back into the prime error of *Lewis Publishing Co. v. Morgan*, in referring to the second-class mail as "a frank extension of special favors to publishers."

The opinion upholds the action of the Postmaster General on the basis of the prior decisions. In the face of war-time exigencies, "it was reasonable to conclude that" the newspaper "would continue its disloyal publications"; that "whatever injury the relator suffered was the result of its own choice"; and that "it was open to the relator to mend its ways . . . and then to apply anew for the second-class mailing privilege."[118] The Court even suggests a doubt as to the right of the publication to invoke the protection of the "Constitution which we shall find it vehemently denouncing"; although it seems hard to understand why one should not have the absolute right to denounce many provisions of the Constitution and agitate for their repeal or amendment, under those other provisions of the same instrument which, in terms, guarantee that specific right.

[117] 255 U. S. 407, 41 S. Ct. 352 (1921).

[118] 258 U. S. 407 at 416. "After Mr. Burleson had suppressed the August number of the Masses, he refused to admit the September or any future issues to the second-class mailing privilege, even if absolutely free from any objectionable passages, on the ground that since the magazine had skipped a number, viz., the July number, it was no longer a periodical, since it was not regularly issued! He took the same position as to Berger's Milwaukee Leader, and in both instances the courts sustained him, thus confirming his right to drive a newspaper or magazine out of existence for one violation as determined by him." CHAFEE, FREEDOM OF SPEECH 107 (1920). See also Wettach, "Restrictions on a Free Press," 4 N. C. L. REV. 24 (1926).

But if the gleam of hope of the dissent in *Schaefer v. United States* had not yet ripened into law, it had at least solidified a brilliant campaign against further encroachment on fundamental liberties by "slight deviations." Again Justices Brandeis and Holmes dissented, in opinions which seem based on incontrovertible logic. Their views may, it is believed in the light of more recent free-press decisions, very probably form the basis of a majority opinion when the Court again has occasion to consider the questions involved.[119]

Justice Brandeis points out at once that the questions involved were not peculiar to war; and that the alleged power of the Postmaster General is the same whether an exclusion order is based on the provisions of the Espionage Act, or on the statutes denouncing frauds, defamation, obscenity or lotteries with relation to the mails.

It must be noted at the outset, that while Justice Brandeis denied strenuously the right of the Postmaster General to enter any general order closing the mails for the future to any person for any reason, he concedes the existence of the right "to exclude from the mail specific matter which he deems of the kind declared by Congress to be unmailable"; and to that extent the dissent fails to give to the First Amendment the full effect recognized in later decisions in analogous, if different, situations. But Justice Brandeis does submit that the second-class privilege is granted to all newspapers, and that newspapers do not lose their character as such by violating "wholly different provisions of law."

He insists that since "denial of the use of the mails" is for most newspapers "tantamount to a denial of circulation," the power sought to be exercised by the Postmaster General would constitute him, "in view of the practical finality of his decisions . . . the universal censor of publications." The point raised so forcibly in the debate of 1836 to the effect that denial of the use of the mails is effective denial of publication,[120] was at last given judicial recognition. Said Justice Brandeis, in support of his statement that "Congress may not, through its postal police power, put limitations upon the freedom of the press which

[119] Of the members of the Supreme Court when the Milwaukee Leader case was decided, only Justices Brandeis and McReynolds remain on that bench as this is written.

[120] In Ex parte Jackson, itself, the concession that other means of transportation must be left open to matter excluded from the mails, was based on the court's own statement that "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." 96 U. S. 727 at 733 (1878).

if directly attempted, would be unconstitutional," after calling attention to the language of *Ex parte Jackson*:

> "It is argued that, although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. . . . The government might, of course, decline altogether to distribute newspapers, or it might decline to carry any at less than the cost of the service, and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression. . . .
>
> "The contention that, because the rates are noncompensatory, use of the second-class mail is not a right but a privilege which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitious makes clearer its position as a right; for it is paid for by taxation." [121]

Justice Holmes concurred in the views expressed by Justice Brandeis. Particularly interesting and significant was his expressly confessed, and now almost complete, conversion to the doctrine that at least a general exclusion from the mails is violative of the First Amendment to the Constitution:

> "At first it seemed to me that if a publisher should announce in terms that he proposed to print treason, and should demand a second-class rate, it must be that the Postmaster General would have authority to refuse it. But reflection has convinced me that I was wrong." [122]

He had inclined toward the view that Congress could authorize administrative exclusion of specific objectionable matter from the mail, although denying the existence of the right as to a general order to exclude; but he was at least equally emphatic as to an infringement of a free press through deprivation of use of the mails:

[121] 255 U. S. 407 at 430-431, 433.
[122] 255 U. S. 407 at 436.

"The United States may give up the postoffice when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . . . To refuse the second-class rate to a newspaper is to make its circulation impossible. . . ."[123]

Three months after the decision in the case of the *Milwaukee Leader*, the Court of Appeals for the District of Columbia denied a similar application of the *New York Call* for mandamus to compel the Postmaster General to reinstate its second-class mailing permit, revoked in November, 1917, for violation of the Espionage Act. The application to reinstate was made in January, 1919, two months after the signing of the Armistice.[124] The court based its decision on the *Milwaukee Leader* case, although the Postmaster General, in recognition of the fact that the war was over, based his refusal of reinstatement on the provisions of the Criminal Code[125] making matter "tending to incite arson, murder or assassination" non-mailable.

Attention was called by the court to the fact that the *Call*, far from conforming to the requirement laid down by the Supreme Court in the *Leader* case, had announced that it had "not changed its policy one bit since it was barred from the mails, and is not going to change." However, the quotations from the *Call*, cited as evidence of incitement to arson, murder and assassination, hardly seem to go that far, even under the most strained construction thereof, but simply evidence an over-exuberant zeal for social revolution. Apparently having forgotten the rather emphatic language of the Declaration of Independence,[126] the Court went so far as to hold the *Call* to have been guilty of seeking "destruction of society" by arson, murder and assassination, in

[123] 255 U. S. 407 at 437.

[124] Burleson v. United States ex rel. Workingmen's Co-operative Pub. Assn., (D. C. App. 1921) 274 F. 749, dismissed per stipulation, 260 U. S. 757, 43 S. Ct. 246 (1923).

[125] 36 Stat. L. 1327, § 2 (1911), 18 U. S. C., § 334 (1935).

[126] As far as is known, neither Mr. Burleson, nor any of his vigilant predecessors or successors, ever deemed it necessary to the security of the nation to exclude the Declaration of Independence from the mails, although that document contains the following: "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it. . . . But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." Almost the same problem was posed in the debate of 1836, when it was asked whether, under the proposed bill to bar anti-slavery literature from the mails, that would include the Declaration of Independence which declared "that all men are created equal."

expressing its approval of the Russian Revolution. That revolution took place four years before the decision: it had resulted, as the Court said, in "the overthrow of the laws of morality which had obtained since the dawn of civilization"! The dogmatic assumptions in this opinion, as regards dangerous tendencies, are relevant to the instant discussion only as they illustrate the way in which long reiterated "slight deviations" become encroachments; they lead even trained judicial minds into extremes in the application of statutes of a highly arbitrary character, if not of extremely doubtful validity, in relation to the fundamental civil liberties guaranteed by the First Amendment.[127]

A year after the decisions in the *Leader* and *Call* cases, the Supreme Court upheld, in *Leach v. Carlile*,[128] a fraud order issued by a postmaster at Chicago, against a vendor of cure-all pills, directing the interception of his mail. He made the contention that the efficacy of the pills was a matter of opinion, as in *American School of Magnetic Healing v. McAnnulty*.[129] But the Court held that they were so far from being the panacea claimed for them in their advertising as to constitute a clear fraud on the public.

The question of the First Amendment was not raised. The majority of the Court, speaking through Justice Clarke, reiterated the principle that the decision of the Postmaster General in such cases will not be reviewed unless "palpably wrong and therefore arbitrary." The Court thus aggravates the deprivation of rights under the First Amendment (in addition to those under the Fifth and Sixth), by denying even a judicial hearing except in the most extreme cases.

But again Justices Holmes and Brandeis sprang to the defense of civil liberty. The dissent by Justice Holmes is prefaced with the statement that although the authority of the prior "slight deviations" had by that time almost reached stare decisis, so that "it may be almost too late to expect a contrary decision . . . there are considerations against it that seem to me never to have been fully weighed and that I think it my duty to state."

Justice Holmes then proceeds to demonstrate his complete conversion to the principle that abridgment of the use of the mails is

[127] For a similar ruling by Judge Speer of the Southern District of Georgia, in a flowery opinion on the glories of American war ideals, see Jeffersonian Pub. Co. v. West, (D. C. Ga. 1917) 245 F. 585. Among the excerpts from the condemned publication is one in which men are advised to await the opinion of the Supreme Court on the validity of the conscription act, before enlisting to avoid conscription.

[128] 258 U. S. 138, 42 S. Ct. 227 (1922).

[129] 187 U. S. 94, 23 S. Ct. 33 (1902).

abridgment of free speech and a free press, and to criticize *Ex parte Jackson*, on which he had, only six years earlier, relied as authority in his own opinion in *Badders v. United States*. He declared that leaving open other media of distribution "would not get rid of the difficulty to my mind, because the practical dependence of the public upon the post office would remain."

He then sums up, in the following clear and logical statement, the whole situation involved in the proposition that use of the mails has become so important and integral a factor in the communication of ideas, that free speech and press are necessarily, logically and inevitably abridged when use of the mails, or the second-class privilege, is withdrawn because of the ethical content of matter otherwise mailable:

> "The decisions thus far have gone largely if not wholly on the ground that if the Government chose to offer a means of transportation which it was not bound to offer it could choose what it would transport; which is well enough when neither law nor the habit that the Government's action has generated has made that means the only one. But when habit and law combine to exclude every other it seems to me that the First Amendment in terms forbids such control of the post as was exercised here. I think it abridged freedom of speech. . . ."[130]

Nothing more was added to the case law on the point under discussion until 1930. In that year the Circuit Court of Appeals for the Second Circuit granted relief[131] against an order of the New York postmaster who had refused to accept, for transmission through the mail, pamphlets containing pleas for the release of Tom Mooney, convicted in connection with the San Francisco bombing of 1916. The pamphlets were denied transmission not because of their contents but because of allegedly libellous matter on the envelopes, to the effect that the conviction had been obtained on perjured testimony.[132]

The decision was based on the obvious fact that the printed matter on the envelopes was not defamatory. But the court apparently felt itself constrained to keep the devious, smoky trail of the torch intact with the dictum that "There can be no doubt that the United States may prohibit the carriage by mail of such things as it pleases."

[130] 258 U. S. 138 at 141.

[131] American Civil Liberties Union v. Kiely, (C. C. A. 2d, 1930) 40 F. (2d) 451 at 452.

[132] Mail matter whose envelope or wrapper contains defamatory statements is made non-mailable by section 212 of the Criminal Code. 18 U. S. C., § 335 (1935).

A few months later, Judge Woolsey of the United States District Court of New York went even further, by way of dicta in his opinion[133] affirming the action of the New York postmaster in excluding the *Revolutionary Age* from the second-class mailing privilege for advocacy of overthrow of the government by force. Judge Woolsey could have stopped with the statement that the publication could have avoided the exclusion order by declaring that it would seek its ends "by constitutional methods and without force." Instead, under the influence of the "slight deviations" of the prior decisions, he felt called upon to deliver himself of such wholly superfluous and extreme observations as that "the use of the mails is a privilege accorded by the government," and that "it is well settled that the freedom of the press is not interfered with except by suppression of a newspaper before publication."

In 1931 came the most important decision rendered since adoption of the First Amendment, in the case of *Near v. Minnesota*.[134] The opinion was written by Chief Justice Hughes. It was held that a state statute providing for suppression by injunction, as a nuisance, of any publication found to be habitually defamatory, scandalous and malicious, was unconstitutional as violative of the Fourteenth Amendment, and that the latter Amendment contained, as against state action, the same guarantee of a free press as was protected against federal infringement under the First. And the Court was careful to point out that the guaranty was not confined to previous restraints.

Swept away at last were all quibbles as to the scope of the First Amendment. If the right to print defamation, even habitually, cannot be made subject to previous legislative, executive or judicial restraint, publication can clearly not be restrained by administrative denial of mail facilities, tantamount to denial of circulation and just as essential to the freedom of the press as liberty of publishing.

On the assumption, therefore, that liberty of publishing includes liberty of circulating, and that this liberty is infringed by an abridgment of the right to use the mails, the principle of *Near v. Minnesota* must be held to be at least equally applicable to the act of Congress allowing mail to be barred which carries defamatory matter on its envelope or wrapper. A state legislature may not, as against the provisions of the Fourteenth Amendment, authorize a previous restraint

[133] Gitlow v. Kiely, (D. C. N. Y. 1930) 44 F. (2d) 227, affd. (C. C. A. 2d, 1931) 49 F. (2d) 1076, cert. den. 284 U. S. 648, 52 S. Ct. 29 (1931).

[134] 283 U. S. 697, 51 S. Ct. 625 (1931).

on the utterance or publication of defamation. This holds true even though the state retains the right to provide for subsequent punishment of defamation in a criminal proceeding. On like reasoning Congress may not, as against the provisions of the First Amendment, authorize a previous restraint of publication through the mails, even though Congress may provide for subsequent punishment of abuse of the right to use the postal service.[135]

How far these principles would nullify other exclusion statutes need not be decided in detail herein. The considerations which should apply have already been mentioned.[136] Freedom of the press is guaranteed in order to insure a free exchange of ideas regarding matters of public interest. The circulation of mail matter such as lottery tickets, containing nothing in the nature of the expression of an idea, might be subject to restraint, while the circulation of a newspaper which discussed public issues, even in very doubtful ways, may not be subjected to prior restraint. And possibly the public interest in art is not as weighty as the public interest in free discussion of matters of government and business policy. On this ground it might be easier for the Court to uphold exclusions of obscene matter than matters in these other fields. In short, administrative exclusion orders should not be upheld except so far as they are warranted by the clear and present danger doctrine; or possibly so far as there is no apparent public interest in free discussion, as in a formal use of words containing no expression of an idea; or so far as the publication of obscene matters transgresses "the primary requirements of decency."[137]

However, except in the reservations in the early decisions, and in the dissenting opinions of Justices Holmes and Brandeis in the later cases, no direct adjudication of the proposition that denial of the right to use the mails is a restraint on publication has been made. To this extent, a complete return to the sound constitutional principle from the cumulative effect of over half a century of "slight deviations" has not yet been accomplished.

This latter principle did receive a great deal of indirect support from the unanimous decision of the Supreme Court in 1936 in *Grosjean v. American Press Co.*[138] There it was held that a state tax on

[135] "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false." Holmes, J., in Patterson v. Colorado, 205 U. S. 454 at 462, 27 S. Ct. 556 (1907).

[136] See discussion under VI, supra.

[137] Near v. Minnesota, 283 U. S. 697 at 716, 51 S. Ct. 625 (1931).

[138] 297 U. S. 233 at 249, 56 S. Ct. 444 (1936) (italics the writer's).

newspaper advertising, historically considered, was invalid as an infringement of the freedom of the press; that the concept of freedom embodied in the First Amendment to the Constitution of the United States was intended "to preclude the national government . . . from adopting any form of previous restraint upon printed publications *or their circulation.*"

As has already been pointed out, it is not a far cry from the taxes denounced in this decision to the restraints on the right to use the mails. The newspaper taxes in England were based on the free use, by the taxed newspapers, of the English mails. This free use was carried over into America without the taxes, and then perpetuated, in effect, in the second-class mailing privilege. The privilege is supported here by taxation of all the people,[139] and is justified by the interest of all the people in an unfettered press.

It is hoped and believed that the effect of *Grosjean v. American Press Co.* will be to solidify into authoritative decision, at some early propitious occasion, the historical data, the early scattered dicta, and the recent strong dissents, to the effect that abridgment of the use of the mails or of the second-class mailing privilege is abridgment of a free press. If indirect governmental control over the press, through control of the mails, with all of the evils whose portents are indelibly written on the pages of nearly five centuries of the history of printing, is to be averted, full advantage must be taken, at the earliest possible opportunity, of the gains already made toward a return to a proper concept of the fundamental civil liberties of the First Amendment. "For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."[140]

[139] "The fact that it [second-class mailing privilege] is largely gratuitious makes clearer its position as a right; for it is paid for by taxation." Dissent of Brandeis, J., in United States v. Burleson, 255 U. S. 407 at 433, 41 S. Ct. 352 (1921); "A citizen of the United States as such has a right . . . to have the benefit of the postal laws." COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 4th ed., 322 (1931).

[140] Dissenting opinion of Sutherland, J., in Associated Press v. National Labor Relations Board, 301 U. S. 103 at 141, 57 S. Ct. 650 (1937).