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"CONGRESS SHALL MAKE NO LAW . . ."^{*}

O. John Rogge†

AT the last term the Supreme Court in a series of cases had before it questions of the meaning and scope of "the sweeping command"¹ of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." The questions which most of these cases presented in one aspect or another concerned the problem of the circumstances, if any, under which speech that has not yet resulted in criminal deeds can constitutionally be punished, restrained or regulated. Five cases involved obscenity statutes. These covered the field, on a federal as well as a state level, in the criminal as well as the civil area. In *Roth v. United States*² the Court sustained the validity of a federal criminal obscenity statute, and in *Alberts v. California*³ a state criminal obscenity statute. The Court in an opinion by Justice Brennan held "that obscenity is not within the area of constitutionally protected speech or press."⁴ Justices Black and Douglas dissented in both cases, and Justice Harlan in the *Roth* case. Justice Douglas in his dissent, in which Justice Black concurred, stated: "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."⁵ Justice Harlan dissented on the ground that the First Amendment's prohibitions placed a greater

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¹ *Abrams v. United States*, 250 U.S. 616 at 631 (1919) (dissenting opinion of Justice Holmes).

² 354 U.S. 476 (1957), affirming (2d Cir. 1956) 237 F. (2d) 796.

³ 354 U.S. 476 (1957), affirming 138 Cal. App. (2d) 909, 292 P. (2d) 90 (1955).

⁴ *Id.* at 485.

⁵ *Id.* at 514.

restriction on federal power than the Fourteenth Amendment's provision, "nor shall any State deprive any person of life, liberty, or property, without due process of law," placed on state power. In *Kingsley Books, Inc. v. Brown*⁶ the Court in a five to four decision upheld a New York statute which provided for civil non-jury injunctive proceedings against obscene publications. Justice Frankfurter delivered the Court's opinion. He did not think that the statute constituted proscribed prior restraint. Justices Douglas and Black thought that it did. Chief Justice Warren in his dissent stated: "It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the Constitution."⁷ Justice Brennan dissented on the ground that "the absence in this New York obscenity statute of a right to jury trial is a fatal defect."⁸ In *Adams Newark Theater Co. v. City of Newark*⁹ the Court on the authority of the preceding three cases in a per curiam decision sustained the validity of a Newark ordinance which forbade stage performers to expose certain parts of their bodies and to use profane, lewd or lascivious language. In the fifth case, *Butler v. Michigan*,¹⁰ the Court unanimously invalidated a state statute which made criminal the general sale or distribution of literature "tending to incite minors." For otherwise, in the words of Justice Frankfurter, the "incidence" of such legislation would be "to reduce the adult population . . . to reading only what is fit for children."¹¹

Six cases involved judgments of conviction under the Smith Act against leaders of the American Communist Party. Two of these cases, *Scales v. United States*¹² and *Lightfoot v. United States*,¹³ arose out of prosecutions against individuals under that provision of the act which makes it a crime to be a member of an organization that advocates the forcible overthrow of the gov-

⁶ 354 U.S. 436 (1957), affirming 1 N.Y. (2d) 177, 134 N.E. (2d) 461 (1956), affirming 208 Misc. 150, 142 N.Y.S. (2d) 735 (1955).

⁷ Id. at 446.

⁸ Id. at 447.

⁹ 354 U.S. 931 (1957), affirming 22 N.J. 472, 126 A. (2d) 340 (1956), reversing 39 N.J. Super. 111, 120 A. (2d) 496 (1956).

¹⁰ 352 U.S. 380 (1957).

¹¹ Id. at 383.

¹² 350 U.S. 992 (1956), granting cert. to (4th Cir. 1955) 227 F. (2d) 581.

¹³ 350 U.S. 992 (1956), granting cert. to (7th Cir. 1956) 228 F. (2d) 861.

ernment, "knowing the purposes thereof."¹⁴ The Court heard arguments in these two cases but restored them to the docket for reargument at the 1957 term.¹⁵ The fact that Justices Brennan and Whittaker were not on the Court when these cases were argued may help to account for this result.

The remaining four of these six cases arose out of conspiracy prosecutions. Three, *Yates v. United States*,¹⁶ *Schneiderman v. United States*,¹⁷ and *Richmond v. United States*,¹⁸ resulted from a judgment of conviction against fourteen persons in the Los Angeles prosecution. The Court reversed, ordering an acquittal as to five of the defendants and a new trial as to the remaining nine. Justice Harlan wrote the Court's opinion. Justices Brennan and Whittaker, who were not members of the Court when these cases were argued, took no part in their consideration or decision. Justices Black and Douglas concurred in part and dissented in part: they would have directed the acquittal of all of the defendants. Justice Clark dissented. One of the grounds of the reversal was the trial judge's refusal to charge, in terms of the trial court's charge in *Dennis v. United States*,¹⁹ that the advocacy of violent overthrow "be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such

¹⁴ 18 U.S.C. (Supp. IV, 1956) §2385.

¹⁵ 353 U.S. 979 (1957). At the 1957 term the Court in each of these two cases announced per curiam: "Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment . . . is reversed. *Jencks v. United States*, 353 U.S. 657." 26 U.S. LAW WEEK 3115 (Oct. 14, 1957).

¹⁶ 354 U.S. 298 (1957), reversing (9th Cir. 1955) 225 F. (2d) 146. Yates further received various contempt sentences for refusal to answer questions put to her on cross-examination. On appeal some of these were reversed and some affirmed. *Yates v. United States*, (9th Cir. 1955) 227 F. (2d) 851, 227 F. (2d) 848, 227 F. (2d) 844. One of those which was affirmed went to the Supreme Court. 350 U.S. 947 (1956), granting cert. to 227 F. (2d) 851. The Court heard argument but restored the case to the calendar along with *Brown v. United States*, 352 U.S. 908 (1956), granting cert. to (6th Cir. 1956) 234 F. (2d) 140 (refusal to answer questions on cross-examination in a denaturalization proceeding) for reargument at the 1957 term. 354 U.S. 907 (1957). At the 1957 term the Court, in a six-to-three decision, sustained the contempt conviction of Yates on one specification but vacated the sentence and remanded the case to the district court for re-sentencing. 78 S. Ct. 128 (1957).

¹⁷ 354 U.S. 298. The petitioner in this case was the same as the one in *Schneiderman v. United States*, 320 U.S. 118 (1943), a denaturalization proceeding, in which the Court in a five-to-three decision, with Justice Murphy writing the majority opinion and Chief Justice Stone the dissenting one, held that the government had not proved by "clear, unequivocal, and convincing evidence" that the Communist Party in the five years before 1927 had advocated the overthrow of our government by force and violence. Wendell L. Willkie, a big business lawyer as well as leader, and Republican presidential candidate in 1940, successfully represented the petitioner.

¹⁸ 354 U.S. 298.

¹⁹ 341 U.S. 494 (1951).

action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.”²⁰ Instead the trial judge charged:

“The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence.”²¹

The Court felt that this instruction defined advocacy too much in terms of the teaching of abstract doctrine rather than incitement to illegal action: “The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court, beginning with *Fox v. Washington* . . . and *Schenck v. United States*. . . .”²² Justices Black and Douglas dissented on the same ground as in the *Dennis* case, that the advocacy provisions of the Smith Act violated the First Amendment. Justice Black, in an opinion in which Justice Douglas joined, wrote: “I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal.”²³ Justice Clark could not draw the distinctions which the Court did between the charge in the *Dennis* case and that in the instant cases: “While there may be some distinctions between the charges, as I view them they are without material difference. I find, as the majority intimates, that the distinctions are too ‘subtle and difficult to grasp.’”²⁴

In the sixth Communist case, *Wellman v. United States*,²⁵

²⁰ Id. at 512.

²¹ 354 U.S. at 314-315.

²² Id. at 318.

²³ Id. at 340.

²⁴ Id. at 350. Subsequently the district court, on the motion of the government, dismissed the indictment as to the nine, and, on its own motion, added a tenth who was not tried with the others because of illness. N.Y. TIMES, Dec. 3, 1957, p. 71:4.

²⁵ 354 U.S. 931 (1957), vacating judgment in (6th Cir. 1955) 227 F. (2d) 757. In a seventh case, *Mesarosh v. United States*, 352 U.S. 1 (1956), reversing (3d Cir. 1955) 223 F. (2d) 449, affirming (W.D. Pa. 1953) 116 F. Supp. 345, involving a judgment of conviction against five persons in the Pittsburgh prosecution, the Court directed the granting of a new trial after the government advised the Court that it had serious reason to

arising out of a conspiracy conviction in Detroit, the Court vacated the judgment of affirmance of the Court of Appeals for the Sixth Circuit, and remanded the case for further consideration in the light of the Court's decision in the *Yates*, *Schneiderman* and *Richmond* cases. Again Justice Clark dissented.

One case dealt with a state anti-picketing statute: in *International Brotherhood of Teamsters v. Vogt, Inc.*,²⁶ the Court in a five-to-three decision sustained the validity of a Wisconsin statute which prohibited even peaceful picketing when done for organizational purposes. Justice Douglas, in a dissenting opinion in which Chief Justice Warren and Justice Black joined, urged that speech when unconnected with conduct should be wholly free: "I would return to the test enunciated in *Giboney*—that this form of expression can be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which the State can regulate or prohibit."²⁷

Two additional cases involved contempt sentences of witnesses who refused to answer inquiries put to them by governmental authorities, but who did not invoke the protection of the Fifth Amendment's privilege against self-incrimination. In *Watkins v. United States*,²⁸ a labor union organizer admitted communist associations but refused to name names. He acknowledged before a subcommittee of the House Committee on Un-American Activities: "I would like to make it clear that for a period of time from approximately 1942 to 1947 I cooperated with the Communist Party and participated in Communist activities to such a degree that some persons may honestly believe that I was a member of the party."²⁹ Yet he refused to identify former communists, saying: ". . . I do not believe that any law in this country requires me to testify about persons who may in the past

doubt the truthfulness of the testimony of one of its witnesses, Joseph D. Mazzei, who was a paid informer of the government. The solicitor general disclosed this situation to the Court in a motion to remand the case to the trial court for further proceedings. Instead the Court ordered a new trial. The petitioner Mesarosh is also known as Nelson, and was the successful defendant in another case, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), affirming 377 Pa. 58, 104 A. (2d) 133 (1954), reversing 172 Pa. Super. 125, 92 A. (2d) 431 (1952), in which the Court invalidated a Pennsylvania sedition law, and cast doubt on such laws of other states, on the ground that the federal Smith Act pre-empted the field.

²⁶ 354 U.S. 284 (1957), affirming 270 Wis. 315 at 321a, 74 N.W. (2d) 749 (1956).

²⁷ Id. at 297.

²⁸ 354 U.S. 178 (1957), reversing (D.C. Cir. 1956) 233 F. (2d) 681.

²⁹ 354 U.S. at 183.

have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.”³⁰ In *Sweezy v. New Hampshire*³¹ a socialist who lectured at the University of New Hampshire refused to answer the inquiries of the attorney general of New Hampshire about his lecture and about the activities of his wife and others in the formation of the Progressive Party in that state. The legislature of New Hampshire by a joint resolution had designated the attorney general as its agent for the investigation of subversive activities. In both cases the Court upset the sentences. In the *Watkins* case it also directed the dismissal of the indictment. Justice Clark dissented in both cases. Justice Burton joined him in the *Sweezy* case. In that case Justice Frankfurter in a concurring opinion quoted from a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand. One of the quoted paragraphs reads:

“In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—“to follow the argument where it leads.” This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.”³²

These cases call for a re-examination of the circumstances leading to the adoption of the federal bill of rights, the framers’ intent in drafting the First Amendment, its subsequent construc-

³⁰ Id. at 185.

³¹ 354 U.S. 234 (1957), reversing 100 N.H. 103, 121 A. (2d) 783 (1956).

³² 354 U.S. at 262-263. In a third case, *Raley v. Ohio*, 354 U.S. 929 (1957), vacating judgment in 164 Ohio St. 529, 133 N.E. (2d) 104 (1956), a witness refused to answer questions of the Ohio Un-American Activities Committee, but on the basis of the Fifth Amendment. The Court in a per curiam decision remanded the case for further consideration in the light of the *Sweezy* and *Watkins* decisions. At the 1957 term in *Uphaus v. Wyman*, 26 U.S. LAW WEEK 3115 (Oct. 14, 1957), vacating judgment in 100 N.H. 436, 130 A. (2d) 278, the Court remanded the case “for consideration in the light of *Sweezy v. New Hampshire*, 354 U.S. 234.” The petitioner was Willard Uphaus, executive director of the New Hampshire World Fellowship Center, Inc. Subsequently the New Hampshire Supreme Court granted a motion to reinstate its original judgment. 136 A. (2d) 221 (1957).

tion, particularly the development and application of Justice Holmes' clear and present danger test, which he enunciated in *Schenck v. United States*,³³ and the respective areas of federal and state power. It is the position of the writer that, at least so far as Congress is concerned, speech is as free as thought, and that unless and until speech becomes a part of a course of conduct which Congress can restrain or regulate no federal legislative power over it exists. State power, despite the Fourteenth Amendment, may be somewhat more extensive. Certainly the framers of the First Amendment intended that it should be. This article will deal with federal power over speech.

Founders' Assurances on Freedom

The Constitution originally did not have a bill of rights because the delegates to the federal convention which proposed it did not feel that one was necessary. They had assembled in order to meet the need for strengthening the national government. They did not regard individual rights in danger, certainly not from that source. Besides, they thought that the states would protect individual rights. The first recognition of such rights by the Convention was an emendation in the handwriting of John Rutledge of South Carolina to the report of the Committee of Detail. This called for a jury trial in criminal cases in the state where the offense was committed,³⁴ and became article III, section 2, clause 3. In the closing weeks provisions were added against bills of attainder, ex post facto laws, and religious tests for federal office holders, and for the protection of the writ of habeas corpus. These are to be found in article I, sections 9 and 10, and article VI, clause 3. But that was all. Three days before the Convention adjourned Charles Pinkney of South Carolina, whose original draft of a plan for a federal constitution did not contain a bill of rights,³⁵ and Elbridge Gerry of Massachusetts moved to insert a declaration "that the liberty of the Press should be inviolably observed. . . ." Roger Sherman of Connecticut answered: "It is unnecessary—The power of Congress does not extend to the

³³ 249 U.S. 47 (1919).

³⁴ 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 144 (1911). A report written by James Wilson of Pennsylvania and edited by Rutledge contained a similar provision. Id. at 173.

³⁵ See RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 109 (1955).

Press." The record continues: "On the question, it passed in the negative."³⁶

However, the absence of a bill of rights became the strongest objection to the ratification of the Constitution. Its supporters countered with the argument that since the federal government was one of enumerated powers a bill of rights was unnecessary; indeed, it might even be dangerous, for it would furnish some ground for a contention that such an enumeration was exhaustive. The earliest and leading protagonist of this double-barreled position was James Wilson of Pennsylvania. In October 1787, less than a month after the federal convention had adjourned, he stated to a gathering in Philadelphia:

"... for it would have been superfluous and absurd, to have stipulated with a foederal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence. For instance, the liberty of the press, which has been a copious subject of declamation and opposition: what controul can proceed from the foederal government, to shackle or destroy that sacred palladium of national freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation. . . ."³⁷

The next month in the Pennsylvania convention on the ratification of the Constitution he contended:

"... But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers reserved*. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of gov-

³⁶ 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 617-618 (1911); 5 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, rev. ed., 545 (1866).

³⁷ PAMPHLETS ON THE CONSTITUTION, Ford ed., 156 (1888).

ernment reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people."³⁸

The following year Alexander Hamilton of New York in *The Federalist*, No. 84, put Wilson's argument in its best-known form, although the last instalment of this number did not come from the press until after New York, the eleventh state, had ratified the Constitution. Thus this number had little actual effect on the political course of events. Hamilton reasoned:

"I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights."³⁹

Thomas Jefferson, who was then our minister to France, in a letter of December 20, 1787 from Paris, to his friend James Madison, answered Wilson's argument:

"... I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of

³⁸ 2 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 436-437 (1866).

³⁹ At p. 559 (Modern Library ed.).

sophisms for freedom of religion, freedom of the press, protection against standing armies, restrictions against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations. To say, as Mr. Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. . . .⁴⁰

Madison at first espoused Wilson's thesis. In the Virginia convention in June 1788 on the ratification of the Constitution he argued: ". . . Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied that everything omitted is given to the general government? Has not the honorable gentleman [Patrick Henry] himself admitted that an imperfect enumeration is dangerous? . . ."⁴¹

After further debate he took the position that while he was not against amendments he was opposed to a bill of rights:

"Mr. MADISON conceived that what defects might be in the Constitution might be removed by the amendatory mode in itself. As to a solemn declaration of our essential rights, he thought it unnecessary and dangerous—unnecessary, because it was evident that the general government had no power but what was given it, and that the delegation alone warranted the exercise of power; dangerous, because an enumeration which is not complete is not safe. Such an enumeration could not be made, within any compass of time,

⁴⁰ 12 THE PAPERS OF THOMAS JEFFERSON, Boyd ed., 440 (1955). Article II of the Articles of Confederation 1778 provided: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States in Congress assembled."

Editors have taken too many liberties with Jefferson. For example, Saul K. Padover in his THE COMPLETE JEFFERSON (1943) inserts (at 121) after the words "gratis dictum" the comment "the reverse of which might just as well be said."

Hart, "Power of Government Over Speech and Press," 29 YALE L. J. 410 at 412 (1920), attributes to Jefferson an answer to Hamilton which, while it is in accord with the substance of his remarks on a bill of rights in his letters of December 20, 1787 and March 15, 1789 to Madison, is probably spurious. See Deutsch, "Freedom of the Press and of the Mails," 36 MICH. L. REV. 703 at 714, n. 37 (1938). One wonders how many hours researchers have spent vainly trying to track down the authenticity of materials resulting from such attempts to improve on history.

⁴¹ 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 620 (1866).

as would be equal to a general negation, such as his honorable friend (Mr. Wythe) had proposed. He declared that such amendments as seemed, in his judgment, to be without danger, he would readily admit, and that he would be the last to oppose any such amendment as would give satisfaction to any gentleman, unless it were dangerous."⁴²

However, on October 17, 1788 he wrote to Jefferson:

" . . . My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light—1. because I concede that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2 because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. . . . 3 because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. . . ."⁴³

Jefferson in a letter of March 15, 1789 from Paris answered him. As to his second point he countered: "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can." And as to his third, that a bill of rights would furnish a text whereby the state governments "will try all the acts of the federal government." In the beginning of his letter he stated: "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent & kept strictly to their own department merits great confidence for their learning & integrity."⁴⁴

⁴² Id. at 626-627.

⁴³ 5 THE WRITINGS OF JAMES MADISON, Hunt ed., 271-272 (1904).

⁴⁴ 5 THE WRITINGS OF THOMAS JEFFERSON, Fed. ed. by Ford, 461-463 (1904).

Madison, under the impact of his correspondence with his friend Jefferson and the general demands for a bill of rights, changed his position, and became the principal draftsman of the first Ten Amendments. After studying the proposals of the various states he prepared his own set of amendments, which he laid before the first Congress in June 1789. In doing so he explained:

"The first of these amendments relates to what may be called a bill of rights. I will own that I never considered this provision so essential to the federal constitution, as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless. . . .

" . . . The people of many States have thought it necessary to raise barriers against power in all forms and departments of Government, and I am inclined to believe, if once bills of rights are established in all the States, as well as the federal constitution, we shall find that although some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency. . . .

"But whatever may be the form which the several States have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. . . .

" . . . It has been said, that in the Federal Government they [declarations of rights] are unnecessary, because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government. I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent; because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested

in the Government of the United States, or in any department or officer thereof; this enables them to fulfil every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper; as well as improper laws could be enacted by the State Legislatures, for fulfilling the more extended objects of those Governments. I will state an instance, which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for the purpose . . . ?"⁴⁵

In other words in certain areas the federal government was either not to act at all, or else to act only in a particular manner. In the instances of freedom of speech and of the press it was not to act at all. During the course of the debates on his proposals he pointed out: ". . . The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government. . . ."⁴⁶

When he submitted his proposals in June he took occasion to meet the argument that bills of rights were ineffective: ". . . It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides this security there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of

⁴⁵ 1 ANNALS OF THE CONGRESS OF THE UNITED STATES, Gales comp., 436-438 (1834). The portions of the ANNALS relating to the First Ten Amendments in the first Congress are reprinted in PATTERSON, THE FORGOTTEN NINTH AMENDMENT 93-217 (1955).

⁴⁶ 1 ANNALS at 738.

this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people's liberty. . . ."⁴⁷ "Here," in the words of Irving Brant, "was not only the doctrine of judicial review but the lusty germ of the Virginia and Kentucky Resolutions. . . ."⁴⁸

Framers' Intent

By the unqualified prohibitions of the First Amendment the framers intended to accomplish a double purpose: they "sought," in the words of Professor Zechariah Chafee, "to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions."⁴⁹ The struggle against censorship, against prior restraint, had been won in England in 1695 when the House of Commons declined to extend the then existing licensing law, which expired in that year. The House of Lords voted for renewal but, when the Commons insisted, acquiesced. One would like to feel that Milton's *Areopagitica* contributed to this result. According to Macaulay, however, the end of licensing was due to the petty grievances involved in enforcing it.⁵⁰

But prosecutions for seditious libel remained. Blackstone explained in his *Commentaries* (1769):

"... The liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To sub-

⁴⁷ Id. at 439.

⁴⁸ BRANT, JAMES MADISON FATHER OF THE CONSTITUTION 267 (1950). All of Jefferson's private letters came by diplomatic pouch, so that his letter of March 15, 1789 probably reached Madison before the latter presented his proposed amendments to the House on June 8, 1789. See Cahn, "The Firstness of the First Amendment," 65 YALE L. J. 464 at 467, n. 12 (1956).

⁴⁹ CHAFEE, FREE SPEECH IN THE UNITED STATES 22 (1941).

⁵⁰ 6 THE HISTORY OF ENGLAND, new ed., 360-373, 7 id. at 168-169 (1897). See also Emerson, "The Doctrine of Prior Restraint," 20 LAW & CONTEM. PROB. 648 at 650-651 (1955). In the colonies licensing came to an end by 1725. See DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS 89, n. 2 (1906).

ject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty . . ."⁵¹

Thus the crown found such prosecutions a fairly good substitute for the old censorship.

Blackstone explained, too, the theory underlying these prosecutions:

" . . . The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law; and, therefore, the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason, it is immaterial, with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally; though, doubtless, the falsehood of it may aggravate its guilt and enhance its punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offense it may be against the public peace; and, therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers . . ."⁵²

⁵¹ Vol. 4 at *151-152.

⁵² 4 id. at *150-151. Coke in *De Libellis Famosis*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 at 251 (1606), explained: "Every libel . . . is made either against a private man, or against a magistrate or public person. *If it be against a private man it deserves a severe punishment*, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood and of great inconvenience: *if it be against a magistrate, or other public person, it is a greater offence*;

Hence arose the explanation in criminal libel prosecutions as distinct from civil suits for libel that "the greater the truth the greater the libel."⁵³

One's position on the crime of seditious libel depended on one's view of the nature of the relationship between those in positions of governmental authority and the people. In England, despite the victory over censorship in 1695, the people generally continued to regard the rulers as their superiors who could not be subjected to any censure that would tend to diminish their authority. The people could not criticize them directly in newspapers or pamphlets, but only through their lawful representatives in parliament, who might be petitioned in an orderly manner.⁵⁴

But the framers of the First Amendment regarded those in positions of governmental authority as the servants of the people. Accordingly the people might find fault with them as they saw fit, as well as discuss freely questions of governmental policy. As Madison explained in the Third Congress, "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."⁵⁵ Under this view the crime

for it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? . . ." Stephen calls this "the nearest approach to a definition of the crime with which I am acquainted." 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 348 (1883). He also comments (at 304) that "even in Coke it would be difficult to find anything less satisfactory."

⁵³ See CHAFEE, FREE SPEECH IN THE UNITED STATES 499-500 (1941); Schofield, "Freedom of the Press in the United States," in 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 510 at 516 (1921).

⁵⁴ See CHAFEE, FREE SPEECH IN THE UNITED STATES 8-22 (1941); 8 HOLDsworth, A HISTORY OF ENGLISH LAW 336-346 (1926); 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 299-300 (1883); SMITH, FREEDOM'S FETTERS 146, 418-421 (1956); Schofield, "Freedom of the Press in the United States," in 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 520-521 (1921).

⁵⁵ ANNALS 934, 3d Cong., 2d sess. (Nov. 27, 1794). See also, e.g., the Virginia Declaration of Rights (1776), written by George Mason, which provided in the second paragraph: "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."

Most of the states had comparable provisions. GA. CONST., preamble (1777); MD. CONST., Declaration of Rights, §1 (1776); MASS. CONST., Declaration of Rights, art. V (1780); N.H. CONST., Bill of Rights, art. VIII (1784); N.C. CONST., Declaration of Rights, §1 (1776); PA. CONST., Declaration of Rights, §4 (1776); S.C. CONST., art. IX, §1 (1790); VT. CONST., Declaration of Rights, ch. 1, §5 (1777), CONST. Declaration of Rights, ch. 1, §6 (1786).

When the Federal Convention of 1787 took up the manner of choosing the chief

of seditious libel was a thing of the past. Sir James Fitzjames Stephen pointed out in his *History of the Criminal Law of England*: "To those who hold this view fully and carry it out to all its consequences there can be no such offense as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offenses, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal."⁵⁶ It was this view which was embodied in the unqualified prohibitions of the First Amendment.

A few years after its adoption when Talleyrand, the French foreign minister, complained to the American envoys Charles Cotesworth Pinckney, John Marshall and Elbridge Gerry about the insults and calumnies in the American press against the French Government, they replied in a memorial drafted by Marshall:

"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. How-

executive, Mason made this point in converse fashion: ". . . Having for his primary object, for the pole star of his political conduct, the preservation of the rights of the people, he held it as an essential point, as the very palladium of Civil liberty, that the great officers of State, and particularly the Executive should at fixed periods return to that mass from which they were at first taken, in order that they may feel & respect those rights & interests, Which are again to be personally valuable to them. . . ." 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 119-120 (1911). Madison in the proposed amendments which he put before the first Congress borrowed from the second paragraph of the Virginia Declaration of Rights. In his first amendment he proposed: "That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people." 1 ANNALS OF CONGRESS 433 (1789).

⁵⁶ Vol. 2 at 300 (1883).

ever 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."⁵⁷

Sedition Act of 1798

In *Dennis v. United States*⁵⁸ Chief Justice Fred M. Vinson, in an opinion in which Justices Reed, Burton, and Minton joined, commented: "No important case involving free speech was decided by this Court prior to *Schenck v. United States*, 249 U.S. 47 (1919)."⁵⁹ However, there were two prior great occasions when the scope of the First Amendment's proscriptions against any law abridging freedom of speech and of the press were thoroughly debated, and a conclusion finally and generally reached against any exceptions: at the time of the Sedition Act of 1798;⁶⁰ and after President Andrew Jackson in December 1835 proposed to Congress the passage of a law which would prohibit the use of the mails for "incendiary publications intended to instigate the slaves to insurrection."⁶¹

The Sedition Act of 1798 was passed during the course of what President John Adams later called "the half War with France."⁶² This act made it a penal offense to publish any false, scandalous and malicious writings against the government, the president or either house of Congress with the intent to bring them into disrepute or stir up hatred against them. However, the act entrusted the determination of criminality to the jury, thus adopting the reform embodied in Fox's Libel Act⁶³ in England, and in addition allowed truth as a defense.

⁵⁷ 2 AMERICAN STATE PAPERS, FOREIGN RELATIONS 191 at 196 (1832). See also 2 BEVERIDGE, THE LIFE OF JOHN MARSHALL 329-330 (1919).

⁵⁸ 341 U.S. 494 (1951).

⁵⁹ Id. at 503.

⁶⁰ 1 STAT. 596, July 14, 1798.

⁶¹ CONG. GLOBE, 24th Cong., 1st sess., p. 10 (1836). See also 3 MESSAGES AND PAPERS OF THE PRESIDENTS, Richardson ed., 147, 176 (1896).

⁶² Letter of September 30, 1805 to Benjamin Rush. OLD FAMILY LETTERS: COPIED FROM THE ORIGINALS FOR ALEXANDER BIDDLE, Series A, 78, 84 (1892).

⁶³ 32 Geo. 3, c. 60 (1792): ". . . on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue . . .

The focal points of the opposition to this act were the Virginia Resolutions, drafted by Madison, and the Kentucky Resolutions, the first of which were drafted by Jefferson and the second of which may have been. The Kentucky Resolutions of 1798 declared that the act "is not law, but is altogether void, and of no force" because it violated the First and Tenth Amendments: the First in "that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."⁶⁴

Kentucky concluded with the resolve "that it does also believe, that, to take from the states all the powers of self-government, and transfer them to a general and consolidated government, without regard to the special government, and reservations solemnly agreed to in that compact, is not for the peace, happiness, or prosperity of these states; and that, therefore, this commonwealth is determined, as it doubts not its co-states are, to submit to undelegated and consequently unlimited powers in no man, or body of men, on earth. . . ."⁶⁵

The Kentucky Resolutions of 1799 added, ". . . That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the state governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence . . . ,"⁶⁶ and suggested as a rightful remedy a nullification by the states.

Madison prepared not only the Virginia Resolutions but also an *Address of the General Assembly to the People of the Commonwealth of Virginia* to accompany those of 1798, and a *Report* which contained a point by point defense of them. He drew up the *Report* because the replies of the various states to the Kentucky and Virginia Resolutions of 1798 were generally unfavorable. In the *Address* he quoted from the reply which Marshall drafted for himself and his fellow envoys to Talleyrand.

and shall not be required or directed, by the court or judge . . . to find the defendant . . . guilty, merely on the proof of the publication by such defendant . . . of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

⁶⁴ 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 541 (1866).

⁶⁵ 4 id. at 542-543.

⁶⁶ 4 id. at 545.

He further explained that steps had already been taken which might lead to a consolidated government, standing armies and even a form of monarchy: ". . . They consist— . . . In destroying, by the sedition act, the responsibility of public servants and public measures to the people, thus retrograding towards the exploded doctrine 'that the administrators of the Government are the masters, and not the servants, of the people,' and exposing America, which acquired the honour of taking the lead among nations towards perfecting political principles, to the disgrace of returning first to ancient ignorance and barbarism."⁶⁷

In the *Report* Madison assailed the two arguments which the Federalists advanced in support of the act: that Congress had power to punish crimes under the common law of England; and that the First Amendment in prohibiting Congress from making any law impairing freedom of the press had created a power to punish the licentiousness of the press. He took the contention that under the express power of Congress to "suppress Insurrections"⁶⁸ one could "imply the power to *prevent* insurrections, by punishing whatever may *lead* or *tend* to them," and in answer suggested that if libels tended to insurrections then the thing to do was to pass and execute laws for the suppression of insurrections:

" . . . But it surely cannot, with the least plausibility, be said, that the regulation of the press, and a punishment of libels, are exercises of a power to suppress insurrections. The most that could be said would be that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.

" . . . for if the power to *suppress insurrections* includes a power to *punish libels*, or if the power to *punish* includes a power to *prevent*, by all the means that may have that *tendency*, such is the relation and influence among the most

⁶⁷ 6 THE WRITINGS OF JAMES MADISON, Hunt ed., 339 (1906). A little over a decade after Madison in his *Report* cut the ground from under the argument that Congress had power to punish crime under the common law of England, the Supreme Court so ruled in a case which involved an indictment for a libel on the President and the Congress. United States v. Hudson, 7 Cranch (11 U.S.) 31 (1812). The Court specifically stated (at 32), "Although this question is brought up now, for the first time, to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case, for many years, has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition."

⁶⁸ U.S. CONST., art. I, §8, cl. 15.

remote subjects of legislation, that a power over a very few would carry with it a power over all. And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers."⁶⁹

He explained at length that the First Amendment's prohibition included not only the Blackstonian concept of previous restraint but subsequent punishment as well: it included any law. In this country the people were the masters, not the government, and hence had a greater freedom of animadversion. Especially in the case of the press the bad had to be taken with the good:

"The freedom of the press under the common law is, in the defenses of the Sedition Act, made to consist in an exemption from all *previous* restraint on printed publications by persons authorized to inspect and prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

"The essential difference between the British Government and the American Constitutions will place this subject in the clearest light.

"In the British Government the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the Legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, etc.—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a Government as this, an

⁶⁹ 6 THE WRITINGS OF JAMES MADISON, Hunt ed., 383-384 (1906); 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 568 (1866).

exemption of the press from previous restraint, by licensers appointed by the King, is all the freedom that can be secured to it.

"In the United States the case is all together different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.

"The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States. . . .

"The nature of governments elective, limited, and responsible in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. . . .

". . . Some degree of abuse is inseparable from the proper use of every thing, 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. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? . . . The article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress of any power whatever on the subject. . . .

"Is, then, the Federal Government, it will be asked, des-

titute of every authority for restraining the licentiousness of the press, and for shielding itself against the libelous attacks which may be made on those who administer it?

"The Constitution alone can answer this question. If no such power be expressly delegated, and if it be not both necessary and proper to carry into execution an express power—above all, if it be expressly forbidden, by a declaratory amendment to the Constitution—the answer must be, that the Federal Government is destitute of all such authority.

". . . The peculiar magnitude of some of the powers necessarily committed to the Federal Government; the peculiar duration required for the functions of some of its departments; the peculiar distance of the seat of its proceedings from the great body of its constituents; and the peculiar difficulty of circulating an adequate knowledge of them through any other channel; will not these considerations, some or other of which produced other exceptions from the powers of ordinary governments, all together, account for the policy of binding the hand of the Federal Government from touching the channel which alone can give efficacy to its responsibility to its constituents, and of leaving those who administer it to a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties?"⁷⁰

On the floor of Congress John Nicholas of Virginia pointed out the fallacy of the bad tendency doctrine and the danger in the position which gave Congress the power to punish other than acts. The occasion was the debate on the report of a select committee on petitions praying for a repeal of the alien and sedition laws. Nicholas cautioned:

"The suggestion on which the authority over the press is founded, is, that seditious writings have a tendency to produce opposition to Government. What has a greater tendency to fit men for insurrection and resistance to Government, than dissolute, immoral habits, at once destroying love of order, and dissipating the fortune which gives an interest in society?

"The doctrine that Congress can punish any act which has a tendency to hinder the execution of the laws, as well as acts which do hinder it, will, therefore, clearly entitle them

⁷⁰ 6 id. (Madison) at 386-390, 392-393; 4 id. (Elliot) at 569-573.

to assume a general guardianship over the morals of the people of the United States."⁷¹

Such a result was of course contrary to anything this country's founders had in mind.

The best contemporary estimate of the Sedition Act of 1798 came from John Taylor of Caroline:

"... The design of substituting political for religious heresy, is visible in the visage of sedition laws. A civil priesthood or government, hunting after political heresy, is an humble imitator of the inquisition, which fines, imprisons, tortures and murders, sometimes mind, at others, body. It affects the same piety, feigned by priestcraft at the burning of an heretic; and its party supplies such exultations, as those exhibited at an auto da fe, by a populace. . . ."⁷²

The Federalists, although they used this act against their opponents, nevertheless lost the election of 1800; but it is impossible to say that the act contributed appreciably to the result. However, the attempt of the Federalists to renew the act in the closing days of the Adams administration failed, and the act expired by its own terms on March 3, 1801. The next day Jefferson declared in his first inaugural address:

"If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undis-

⁷¹ 3 ANNALS OF CONGRESS 3004-3005 (1799). Contemporary views support Professor Henry Schofield's conclusion: "... One of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press. . . . [T]he crime of sedition and liberty of the press as declared in the First Amendment cannot co-exist. . . ." "Freedom of the Press in the United States," in 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 521-522, 536 (1921).

Cooley wrote: "... the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. . . . [T]heir [free speech guarantees] purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., Carrington, 885-886 (1927).

⁷² AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 437 (1950).

turbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. I know, indeed, that some honest men fear that a republican government can not be strong, that this Government is not strong enough; but would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this Government, the world's best hope, may by possibility want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest Government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern. Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question."⁷³

The general opinion, at least until the cold war period, has been that the Sedition Act of 1798 violated the First Amendment. After he became president, Jefferson pardoned all prisoners who were convicted under it and Congress eventually repaid all fines. Justice Holmes in his dissenting opinion in *Abrams v. United States*,⁷⁴ in which Justice Brandeis joined, wrote: ". . . I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed."⁷⁵ President Woodrow Wilson concluded that the act "cut perilously near the root of freedom of speech and of the press."⁷⁶

⁷³ 1 MESSAGES AND PAPERS OF THE PRESIDENTS, Richardson ed., 322 (1897). A select bibliography on the Sedition Act of 1798 will include, in addition to the writings of Madison and Jefferson: BRANT, JAMES MADISON FATHER OF THE CONSTITUTION (1950); KOCH, JEFFERSON AND MADISON (1950); SCHACHNER, THE FOUNDING FATHERS (1954); SMITH, FREEDOM'S FETTERS (1956); Carroll, "Freedom of Speech and of the Press in the Federalist Period; The Sedition Act," 18 MICH. L. REV. 615 (1920); Schofield, "Freedom of the Press in the United States," in 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 510 (1921).

⁷⁴ 250 U.S. 616 (1919).

⁷⁵ Id. at 630. Justice Jackson in his dissenting opinion in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), commented (at 289): ". . . I think today's better opinion regards the enactment as a breach of the First Amendment and certainly Mr. Justice Holmes and Mr. Justice Brandeis thought so."

⁷⁶ 6 A HISTORY OF THE AMERICAN PEOPLE, documentary ed., 39 (1918).

"Incendiary Publications"

The second great occasion which called for a full discussion of the scope of the First Amendment was President Jackson's proposal for barring the use of the mails to what were then called "incendiary publications." The Senate referred President Jackson's proposal to a Special Committee with John C. Calhoun of South Carolina as Chairman and two Southern and two Northern members—the Senate Committee on the Post Office and Post Roads had but one Southern member. The Special Committee, despite its majority of Southern members, despite the vehemence of Northern anti-slavery agitation and the dissemination from the North of a volume of abolitionist literature throughout the South, and despite Calhoun's bitter antagonism to abolitionist literature and his intense desire for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering, reported adversely on President Jackson's proposal on the ground that the First Amendment forbade any such measure. In support of its conclusions the Committee cited Madison's *Report* on the Sedition Act of 1798. The Committee stated:

". . . while they agree . . . as to the evil and its highly dangerous tendency, and the necessity of arresting it, they have not been able to assent to the measure of redress which he recommends.

"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 on the 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, or from the trust 'of preserving' the relation created by the constitution between the States, as supposed by the President. However ingenious or plausible the arguments may be to derive the right from these, or any other sources, they must fall short of their object. 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 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. . . .

"That it was the object of this provision to place the freedom of the press beyond the possible interference of Congress, is a doctrine not now advanced for the first time. It is the ground taken, and so ably sustained by Mr. Madison, in his celebrated report to the Virginia Legislature, in 1799, against the alien and sedition law, and which conclusively settled the principle that Congress has no right, in any form, or in any manner, to interfere with the freedom of the press. The establishment of this principle not only overthrew the sedition act, but was the cause of the great political revolution which, in 1801, brought the republican party, with Mr. Jefferson at its head, into power. . . .

. . . Nothing is more clear than that the admission of the right, on the part of Congress, to determining what papers are incendiary, and as such to prohibit their circulation through the mail, necessarily involves the right to determine what are not incendiary, and to enforce their circulation. . . . It would give Congress, without regard to the prohibition laws of the States, the authority to open the gates to the flood of incendiary publications which are ready to break into those States, and to punish all who dare resist as criminals. Fortunately, Congress has no such right. . . ."⁷⁷

However, Calhoun as chairman prepared a bill which in its first section, as amended, made it unlawful "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 matter or pictorial representation touching the subject of slavery, where, by the laws of the said State, Territory, or District, their circulation is prohibi-

⁷⁷ S. Rep. 118, 24th Cong., 1st sess., 1-5 (1836). The report is also set out in 49 NILES' WEEKLY REGISTER 408 (1836). The committee's observation that the struggle over the Sedition Act of 1798 caused a great political revolution which brought the Republican (Democratic) party into power is an overstatement. Schachner has pointed out:

"Geographical divisions—the South against the North, with the Middle States wavering uneasily in between—were far more potent influences; and had not changed since the preceding election or even the beginning of the nation. These were the same divisions that were to culminate in the great Civil War, and were bottomed on the same essential conflicts. Nor did the Alien and Sedition Acts contribute appreciably to the result—another common claim that must be dismissed. There is no evidence that any votes were shifted from one party to another because of them. Those who opposed the Acts had been Republicans before, and continued to be so. Jefferson had failed of election four years before by a hairsbreadth without their aid and benefit." SCHACHNER, THE FOUNDING FATHERS 549 (1954).

ed; and any deputy postmaster who shall be guilty thereof, shall be forthwith removed from office.”⁷⁸ The Calhoun bill was likewise defeated: the vote against it was 25 to 19.⁷⁹ In opposing Calhoun’s bill Senator John Davis of Massachusetts reminded his colleagues: “The liberty of the press was not like the other reserved rights, reserved by implication, but was reserved in express terms; it could not be touched in any manner.”⁸⁰ He had this further comment, which is even more pertinent today than when it was uttered: “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. . . .”⁸¹

Senator Henry Clay of Kentucky considered this bill “unconstitutional; and if not so, that it contained a principle of a most dangerous and alarming character. . . . After much reflection he had come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever. . . . The States alone had the power, and their power was ample for the purpose. . . . [T]he bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief. . . .”⁸²

Finally Daniel Webster, whose influence on the early development of our constitutional principles was second only to that of Chief Justice Marshall, vehemently attacked the measure. He declared that the freedom of the press included “the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?” Further: “Now 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

⁷⁸ CONG. GLOBE APP., 24th Cong., 1st sess. 437 (1836).

⁷⁹ Id. at 442; 12 CONG. DEBATES, 24th Cong., 1st sess., 1737 (1836).

⁸⁰ CONG. GLOBE, 24th Cong., 1st sess. 299 (1836). During the course of the debates Calhoun pointed out that “if they once acknowledged the power of Congress to suppress the transmission of these incendiary papers directly, and to say what was incendiary, it would be conceding to it to decide what was not incendiary, as they were in their nature correlative rights. . . .” Id. at 298.

⁸¹ CONG. GLOBE APP., 24th Cong., 1st sess., 439 (1836).

⁸² Ibid.

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. He confessed that he was shocked at the doctrine. He looked back to the alien and sedition laws which were so universally condemned throughout the country. . . ."⁸³

Meanwhile the House Committee on the Post Office and Post Roads brought in a bill which took an opposite position to that in Calhoun's bill: the House Committee's bill, as finally enacted, made it a penal offense if any postmaster should "unlawfully detain in his office any letter, package, pamphlet, or newspaper, with intent to prevent the arrival and delivery of the same to the person or persons to whom such letter, package, pamphlet or newspaper may be addressed or directed. . . ."⁸⁴ The House passed the bill in June. The Senate, after defeating Calhoun's bill, accepted the House bill, with a few minor changes; and in July the two houses were brought into agreement. This act in principle prohibited the post office department from censoring the mail: its job was simply that of carrying it. Years later Judge Thurman W. Arnold in the concluding paragraph of his opinion in the *Esquire*⁸⁵ case aptly stated:

"We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds.'"⁸⁶

The Supreme Court in *Ex parte Jackson*⁸⁷ in an opinion by Justice Field, in the course of a review of the proceedings in the Senate on President Jackson's proposal and Calhoun's bill, commented:

" . . . In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman;

⁸³ Id. at 437, 440. These debates are also reported in 12 CONG. DEBATES, 24th Cong., 1st sess., 1722-1737 (1836). For other accounts of this important incident in our history see 6 McMaster, HISTORY OF THE PEOPLE OF THE UNITED STATES 288-291 (1883); Nye, FETTERED FREEDOM 60-65 (1949); Deutsch, "Freedom of the Press and of the Mails," 36 MICH. L. REV. 703 at 717-723 (1938).

⁸⁴ Act of July 2, 1836, §32, 5 Stat. 87.

⁸⁵ *Esquire v. Hannegan*, (D.C. Cir. 1945) 151 F. (2d) 49, affd. sub nom. *Hannegan v. Esquire*, 327 U.S. 146 (1946).

⁸⁶ Id. at 55.

⁸⁷ 96 U.S. 727 (1878).

and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mails, it might also determine what were not incendiary, and enforce their circulation.”⁸⁸

Two days before President Jackson made his proposal the Richmond *Compiler* set forth the First Amendment together with comparable provisions from state constitutions with this introduction: “The following are extracts from the constitutions of the United States and the several states of the union, from which it will be seen that no law can constitutionally be passed for the purpose of restraining the fanatics of the north in their crusade against our rights.”⁸⁹

Thus on two great occasions prior to *Schenck v. United*

⁸⁸ *Id.* at 734.

⁸⁹ 49 NILES' WEEKLY REGISTER 236 (1835). Of course the Southern states by local measures tried to prevent the distribution of abolitionist literature. Nye wrote: “Failure to control the distribution of abolitionist literature by federal legislation did not mean, however, that the mails were thrown open at once to the antislavery presses. Southern States which did not already have laws governing the publication and circulation of ‘incendiary’ matter quickly passed them, and other states strengthened existing legislation. South Carolina depended upon its law of 1820, and Kentucky upon laws passed in 1799 and 1831. North Carolina had passed similar legislation in 1830, Louisiana and Mississippi in 1831, and Alabama in 1832 and 1835. Maryland’s law of 1835 sufficed for a time; Missouri enacted legislation of the usual type in 1837; and Georgia relied upon local legislation. Virginia, in 1836, passed a law requiring postmasters to notify justices of the peace whenever they received ‘incendiary’ publications in their offices; that officer would then judge their offensiveness, burn them publicly if they violated the law, and arrest the addressee if he had subscribed to them with the aim of assisting an abolition society. Throughout the years to 1861 the Southern states reaffirmed and strengthened their laws, adding new interpretations and closing loopholes. . . .”

“In general the Southern interpretation of the federal mails law of 1836 held that state laws, governing the reception and distribution of ‘incendiary’ matter through the post office, were supreme. Virginia’s Attorney General Tucker summarized the Southern view, stating that the federal power over the mails ceased when the mails reached their destination; ‘At that point, the power of the State becomes exclusive. Whether the citizens shall receive the mail matter, is a question exclusively for her determination.’ Since most Southern states had statutes requiring inspection of the mails by the postmaster or local authorities, the federal law was effectively nullified. In the Yazoo case of 1857 United States Attorney General Cushing gave this interpretation official sanction when he ruled that a Mississippi statute forbidding delivery of ‘incendiary’ matter was not in conflict with the federal law of 1836, and that no postmaster was required to deliver materials ‘the design and tendency of which are to promote insurrections.’ Similarly, Postmaster General Holt in 1859 ruled that the Virginia statute of 1836 did not conflict with federal law. To the postmaster at Falls Church, Virginia, he wrote that any postmaster might, after inspection of the mails, withhold delivery of any matter of ‘incendiary character.’ ‘The people of Virginia,’ he said, ‘may not only forbid the in-

*States*⁹⁰ this country's leaders refused to read exceptions into the First Amendment's unqualified prohibitions. On the first occasion, at the time of the Sedition Act of 1798, those leaders included the framers of the first ten amendments. On the second occasion, at the time of President Jackson's proposal of December 1835, those leaders included men who were already past their early childhood when the first ten amendments were adopted. It would be difficult to suggest more authoritative interpretations.

Deeds Not Words

Madison's criticism in his *Report* of the bad tendency doctrine and his suggestion that federal power was limited to acts and could not apply to speech alone, Jefferson had made earlier and in a more direct and even stronger fashion. In his draft of *A Bill for Establishing Religious Freedom*, which he introduced into the Virginia Assembly in 1779, and which passed that body in 1785, he stated: ". . . that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order. . . ."⁹¹

And before Jefferson drafted this bill the Rev. Philip Furneaux, a dissenting divine, in one of a series of famous letters to Blackstone, which were published in book form in London in 1770, and in Philadelphia three years later, had eloquently urged the same approach:

"If it be objected, that when the tendency of principles is unfavourable to the peace and good order of society, as

troduction and dissemination of such documents within their borders, but, if brought there in the mails, they may, by appropriate legal proceedings have them destroyed." NYE, FETTERED FREEDOM 65-66, 68-69 (1949). See also Deutsch, "Freedom of the Press and of the Mails," 36 MICH. L. REV. 703 at 719-725 (1938).

⁹⁰ 249 U.S. 47 (1919).

⁹¹ 2 THE PAPERS OF THOMAS JEFFERSON, Boyd ed., 546 (1950); 12 LAWS OF VIRGINIA 84 at 85 (Hening, 1823).

it may be, it is the magistrate's duty then, and for that reason, to restrain them by penal laws: I reply, that the tendency of principles, though it be *unfavourable*, is not *prejudicial* to society, till it issues in some *overt acts* against the publick peace and order; and when it does, then the magistrate's authority to punish commences; that is, he may punish the *overt acts*, but not the *tendency*, which is not actually hurtful; and, therefore, his penal laws should be directed against *overt acts only*, which are detrimental to the peace and good order of society, let them spring from what principle they will; and not against *principles*, or the *tendency* of principles.

"The distinction between the tendency of principles, and the overt acts arising from them, is, and cannot but be, observed in many cases of a civil *nature*; in order to determine the bounds of the magistrate's power, or at least to limit the exercise of it, in such cases. It would not be difficult to mention customs and manners, as well as principles, which have a tendency unfavourable to society, and which, nevertheless, cannot be restrained by penal laws, except with the total destruction of civil liberty. And here, the magistrate must be contented with pointing his penal laws against the evil overt acts resulting from them. . . . Punishing a man for the *tendency* of his principles, is punishing him *before* he is guilty, for fear he *should be* guilty."⁹²

So, too, had Montesquieu, the oracle of the founding fathers,⁹³ and Jeremy Bentham; although Montesquieu had added a nullifying qualification. Montesquieu in his *L'Esprit des Lois* (1748) in a chapter entitled, "Of Indiscreet Speeches," had written:

"Words do not constitute an overt act. . . . Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal, but when they are annexed to a criminal action: everything is confounded, if words are construed into a capital crime, instead of considering them only as a mark of that crime."⁹⁴

⁹² LETTERS TO THE HONOURABLE MR. JUSTICE BLACKSTONE 53-55 (1770).

⁹³ Of him Madison wrote, in discussing the idea of the separation of powers: "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu." THE FEDERALIST, No. 47, Lodge ed., 300 (1923).

⁹⁴ Bk. 12, c. 12.

Bentham in his *A Fragment on Government* (1776), which was a criticism of Blackstone's exposition in his *Commentaries* on the nature of sovereignty, in explaining the difference between a free and a despotic government, stated that one of the distinguishing circumstances lay in "the security with which malcontents may communicate their sentiments, concert their plans, and practise every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them."⁹⁵

But Montesquieu's exception for the advocacy of violence blurs the workable distinction between speech and criminal deeds, with the double result that the exception not only is difficult of application but also provides the basis for stultifying restrictions on speech. A striking idea is just as moving to action whether stated philosophically in a seminar or shouted from the rostrum. As Justice Holmes admitted in his dissenting opinion in *Gitlow v. New York*,⁹⁶ "Every idea is an incitement."⁹⁷ Besides, in Mark Anthony fashion, the advocacy of an immediate resort to violence may be couched in peaceful and submissive terms. Jefferson and Madison were wise enough not to follow Montesquieu's exception.

The Court, however, in the application of Justice Holmes' clear and present danger test, did make an exception under certain circumstances for the advocacy of violence. As a result the Court found itself at the last term drawing a distinction between the advocacy of the violent overthrow of the government as "a rule or principle of action," proscribed in the charge in *Dennis v. United States*,⁹⁸ and the advocacy of such overthrow as a "necessity" and a "duty," proscribed in the charge in the *Yates, Schneiderman* and *Richmond* cases. The Court itself admitted that such distinctions "are often subtle and difficult to grasp."⁹⁹ Justice Clark found them, and rightly so, "too 'subtle and difficult to grasp.'"¹⁰⁰

Jefferson's classic statement from his draft of *A Bill for Establishing Religious Freedom* did not go wholly unnoticed. Justice Black in his concurring and dissenting opinion in the *Yates*,

⁹⁵ At p. 95, Harrison ed. (1948).

⁹⁶ 268 U.S. 652 (1925).

⁹⁷ *Id.* at 673.

⁹⁸ 341 U.S. 494 (1951).

⁹⁹ 354 U.S. 326.

¹⁰⁰ *Id.* at 350.

Schneiderman and *Richmond* cases, in which Justice Douglas joined, quoted the latter part of it.¹⁰¹ So, too, did Justice Douglas in his dissenting opinion in the *Dennis* case.¹⁰²

The approach of Jefferson and Madison, and of Justices Black and Douglas is a farsighted one. If prevailing social structures provide a fair measure of equal justice, opportunity and freedom for all, speech will not overthrow them. On the other hand, if such structures are arbitrary and unjust, the suppression of speech will not save them. The measures of the czars of Russia left nothing to be desired in the way of suppression. Yet their government came to a violent and bloody end.

Under Madison and Jefferson's and Black and Douglas' view of the First Amendment, the advocacy of the violent overthrow of the government and even a conspiracy to advocate its violent overthrow would be entitled to protection. Under this view the *Dennis* case was wrongly decided. The advocacy provisions of Title I of the Alien Registration Act, 1940,¹⁰³ a title commonly known as the Smith Act after its principal draftsman, Congressman Howard W. Smith of Virginia, under which over 130 leaders of the American Communist Party have been indicted and more than 100 have been convicted and sentenced to prison terms,¹⁰⁴ violate the First Amendment. A fortiori, so does the

¹⁰¹ Id. at 340.

¹⁰² 341 U.S. 494 at 590. Cf. the statement of Chief Justice Warren in his concurring opinion in *Roth v. United States*, 354 U.S. 476 at 495 (1957): "The conduct of the defendant is the central issue, not the obscenity of a book or picture." And his statement in his dissenting opinion in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 at 446 (1957): "It is the conduct of the individual that should be judged, not the quality of art or literature."

¹⁰³ See note 14 supra.

¹⁰⁴ When these cases reached the Supreme Court they fared indifferently. The first three judgments of conviction under the advocacy provisions which came to the Court were sustained. *Dennis v. United States*, 341 U.S. 494 (1951), affirming (2d Cir. 1950) 183 F. (2d) 201; *Frankfeld v. United States*, (4th Cir. 1952) 198 F. (2d) 679, affirming (D.C. Md. 1951) 101 F. Supp. 449, cert. den. 344 U.S. 922 (1953); *United States v. Flynn*, (2d Cir. 1954) 216 F. (2d) 354, cert. den. 348 U.S. 909 (1955). But the next three were reversed. *Mesarosh v. United States*, 352 U.S. 1 (1956), reversing (3d Cir. 1955) 223 F. (2d) 449, affirming (W.D. Pa. 1953) 116 F. Supp. 345; *Yates v. United States*, *Schneiderman v. United States*, *Richmond v. United States*, 354 U.S. 298 (1957), reversing (9th Cir. 1955) 225 F. (2d) 146; *Wellman v. United States*, 354 U.S. 931 (1957), vacating judgment in (6th Cir. 1955) 227 F. (2d) 757. The two membership cases before the Court were docketed for reargument at the 1957 term and then reversed. See note 15 supra. Smith Act conspiracy convictions against American Communists were also pending for review or reconsideration in the Courts of Appeals for the Second, Third, Sixth, Seventh, Ninth and Tenth Circuits. Those in the Second, Third and Tenth Circuits have resulted in reversals. *United States v. Silverman*, (2d Cir. 1957) 248 F. (2d) 671, pet. for cert. filed, 26 U.S. LAW WEEK 3178 (No. 643); *Bary v. United States*, (10th Cir. 1957) 248 F. (2d) 201; *United States v. Kuzma*,

membership provision of the Smith Act. To date, however, at least as to the advocacy provisions, the law has developed to the contrary.

Picketing

As a further result of failing to apply the workable distinction between speech and conduct the Court in picketing cases made an error in the opposite direction to that in the Smith Act cases: it treated conduct—for picketing is conduct—as protected under certain circumstances by the First Amendment, since it also involved speech. But picketing, even if peaceful, constitutes more than speech, as the Court itself recognized at the last term in *International Brotherhood of Teamsters v. Vogt, Inc.*¹⁰⁵ Justice Frankfurter in the Court's opinion quoted with approval this language from the concurring opinion of Justice Douglas in *Bakery Drivers Local v. Wohl*:¹⁰⁶ "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas that are being disseminated."¹⁰⁷ Picket lines involve a concert of action in the same fashion as do combinations in restraint of trade or to fix prices. Their primary purpose is not the dissemination of ideas but to bring about certain action on the part of employers. It takes considerable courage in today's world for many people to cross a picket line. There are valid reasons for the protection of peaceful picketing, but it is submitted that the First, or the First and the Fourteenth Amendments, are not among them. To base the protection of peaceful picketing on the First Amendment not only confuses the issues that are involved in the controversies between employers and employees, but also blurs the distinction that should be drawn between speech and conduct. Because of such confusion the Court in the last two decades in picketing cases, from *Senn v. Tile Layers Union*¹⁰⁸ to *International Brotherhood of Team-*

(3d Cir. 1957) 26 U.S. LAW WEEK 2240 (Nov. 13, 1957). In the Silverman case, the court directed the dismissal of the indictment. In the Dennis, Frankfeld and Flynn cases a total of 28 defendants served prison terms.

¹⁰⁵ 354 U.S. 284 (1957).

¹⁰⁶ 315 U.S. 769 at 776 (1942).

¹⁰⁷ 354 U.S. at 289.

¹⁰⁸ 301 U.S. 468 (1937).

sters v. Vogt, Inc.,¹⁰⁹ has, to use the language of Justice Douglas in his dissenting opinion in the latter case, "come full circle."¹¹⁰

The confusion began in *Thornhill v. Alabama*,¹¹¹ where the Court in an opinion by Justice Murphy identified peaceful picketing with freedom of speech and stated broadly: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."¹¹² Previously the Court had ruled, in *Truax v. Corrigan*,¹¹³ a five-to-four decision, with the Court's opinion by Chief Justice Taft, that an Arizona statute for the protection of peaceful picketing violated the equal protection clause of the Fourteenth Amendment; and, in *Senn v. Tile Layers Protective Union*,¹¹⁴ another five-to-four decision, with Justice Brandeis writing the Court's opinion, that a comparable Wisconsin statute did not fall afoul either of that or the due process clause of the Fourteenth Amendment. After the *Thornhill* case the Court in *American Federation of Labor v. Swing*¹¹⁵ held an injunction against peaceful organizational picketing, based on Illinois' common law policy against picketing, to be unconstitutional, saying: "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."¹¹⁶ But in the *Vogt* case at the last term the Court reached the opposite result with reference to another comparable Wisconsin statute. As Justice Douglas pointed out in his dissenting opinion in the latter case, the "factual record" in the *Swing* case cannot be distinguished from that in the *Vogt* case.¹¹⁷ In both cases the Court's opinion was by Justice Frankfurter.

What happened was that the Court began to retreat from the *Thornhill* and *Swing* opinions at the very next term after the latter decision. In *Carpenters Union v. Ritter's Cafe*¹¹⁸ the Court held that Texas could enjoin as a violation of its antitrust law picketing by unions of a restaurant to bring pressure on its owner

¹⁰⁹ 354 U.S. 284 (1957).

¹¹⁰ *Id.* at 295.

¹¹¹ 310 U.S. 88 (1940).

¹¹² *Id.* at 102.

¹¹³ 257 U.S. 312 (1921).

¹¹⁴ 301 U.S. 468 (1937).

¹¹⁵ 312 U.S. 321 (1941).

¹¹⁶ *Id.* at 326.

¹¹⁷ 354 U.S. 284 at 295-296.

¹¹⁸ 315 U.S. 722 (1942).

with respect to the use of non-union labor by a contractor of the restaurant owner in the construction of a building having nothing to do with the restaurant. There followed in rather rapid succession, among others, *Giboney v. Empire Storage & Ice Co.*,¹¹⁹ *Teamsters Union v. Hanke*¹²⁰ and *Plumbers Union v. Graham*.¹²¹ In the *Giboney* case the Court held that Missouri could enjoin picketing by a union, seeking to organize peddlers, of a wholesale dealer to induce it to refrain from selling to nonunion peddlers. In the *Hanke* case the Court decided that the State of Washington could enjoin the picketing of a business, conducted by the owners themselves without employees, in order to secure compliance with a demand to become a union shop. In the *Graham* case it held that Virginia could enjoin, as a violation of its right to work law, picketing which announced that nonunion men were employed on a building job. Then came the *Vogt* case. Justice Douglas stated in his dissenting opinion: "Today, the Court signs the formal surrender. State courts and state legislatures cannot fashion blanket prohibitions on all picketing. But, for practical purposes, the situation now is as it was when *Senn v. Tile Layers Union* . . . was decided. State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."¹²² This is as the law ought to be. Much of the intermediate confusion could have been avoided had the First Amendment through the Fourteenth not been made the basis for the decisions in the *Thornhill* and *Swing* cases.¹²³

Early State Power

In addition to blurring the distinction between speech and conduct by restricting the limits of the First Amendment in the field of speech by the application of Justice Holmes' clear and

¹¹⁹ 336 U.S. 490 (1949).

¹²⁰ 339 U.S. 470 (1950).

¹²¹ 345 U.S. 192 (1953).

¹²² 354 U.S. 284 at 297.

¹²³ For discussions pro and con on the point see Teller, "Picketing and Free Speech," 56 HARV. L. REV. 180 (1942); Dodd, "Picketing and Free Speech: A Dissent," 56 HARV. L. REV. 513 (1943); Teller, "Picketing and Free Speech: A Reply," 56 HARV. L. REV. 532 (1943); Jaffe, "In Defense of the Supreme Court's Picketing Doctrine," 41 MICH. L. REV. 1037 (1943). See also FREUND, ON UNDERSTANDING THE SUPREME COURT 18 (1949) ("Picketing is indeed a hybrid, comprising elements of persuasion, information, and publicity together with elements of non-verbal conduct, economic pressure and signals for action.").

present danger test, on the one hand, and extending it to include certain conduct in the picketing cases, on the other, the Court complicated the free speech picture still further by holding at the last term in four of a series of five cases that so-called obscene utterances did not fall within the protection of the First Amendment at all.¹²⁴ The basis for such an interpretation was this: "The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes."¹²⁵

But the difficulty with the Court's stand is that the framers of the First Amendment, as their opposition to the Sedition Act of 1798 emphasized, intended the states to have certain powers over speech which they expressly sought to deny to the federal government. Specifically they took the position that the states and not the federal government had jurisdiction over the offense of seditious libel. They would have taken the same position with reference to the offenses of blasphemy and profanity, and, later still, obscenity—the first reported decision in this country sustaining a conviction for obscenity did not occur until 1815,¹²⁶

¹²⁴ Roth v. United States, Alberts v. California, 354 U.S. 476 (1957); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Adams Newark Theater Co. v. Newark, 354 U.S. 931 (1957).

¹²⁵ Roth v. United States, 354 U.S. 476 at 482 (1957).

¹²⁶ Commonwealth v. Sharpless, 2 S. & R. (Pa.) 91 (1815). As late as 1795 an edition of Hawkins read: "And it seems, that a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law, as I have heard agreed in the court of king's bench. . ." 2 HAWKINS, PLEAS OF THE CROWN, Leach ed., 130. See also Roth v. United States, 354 U.S. 476 at 508 (1957) (dissenting opinion of Justice Douglas); GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 99 (1956); Alpert, "Judicial Censorship of Obscene Literature," 52 HARV. L. REV. 40 at 47 (1938); Grant and Angoff, "Massachusetts and Censorship," 10 BOST. UNIV. L. REV. 36 at 52 (1930); Lockhart and McClure, "Literature, the Law of Obscenity, and the Constitution," 38 MINN. L. REV. 295 at 324, n. 200 (1954); note, 52 MICH. L. REV. 575 at 576 (1954).

Likewise the first state legislation on the subject did not begin to appear until 1821. Conn. Stat. Laws 165 (1821).

But the Court in the Roth case stated: "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." 354 U.S. 476 at 483 (1957). In support of this statement the Court cited the Sharpless case, *supra*, and Knowles v. State, 3 Day (Conn.) 103 (1808), and Commonwealth v. Holmes, 17 Mass. 336 (1821), as well as the statute of Connecticut of 1821 and one of New Jersey of 1798, among others. Knowles was charged with exhibiting an indecent and unseemly picture "representing a horrid and unnatural monster," but on appeal his conviction was reversed. Also, the New Jersey statute to which the Court

more than a quarter of a century after the first Congress proposed the first ten amendments. A consideration of the intent of the founders of this country with reference to state power over speech will underscore the fact that they intended the federal government to have no power in this area.

First, however, some qualifying observations about the Court's statement are in order. The ten states to which the majority opinion refers are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, Vermont and Virginia. These reduce to nine as of the date when the first Congress proposed the first ten amendments (September 25, 1789); for the cited constitution of one of them, Delaware, dates from 1792.¹²⁷ In the second place these state constitutional provisions were not always in as sweeping terms as the First Amendment. For example, the Vermont constitution of 1786 expressly identified freedom of speech and of the press with discussions of "the transactions of government."¹²⁸ In the third place these state constitutional provisions at times contained exceptions. The Pennsylvania constitution of 1790 and the Delaware constitution of 1792 had exceptions for seditious libel, that of South Carolina of 1790 for licentiousness, and that of Maryland of 1776 for immorality. The Pennsylvania constitution of 1790 provided that in seditious libel prosecutions truth was to be a defense and "the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."¹²⁹ The South Carolina constitution of 1790 in providing for religious freedom expressly stated: "That the liberty of con-

ferred is not in point. It prohibited stage performances but did not deal with obscenity. New Jersey Laws 331-332 (Paterson, 1800). It would thus seem that the Court's statement is somewhat too broad.

However, an act of 1711 of the colony of Massachusetts Bay made it an offense to write, print or publish "any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship. . . ." Acts and Laws of Massachusetts Bay 219 at 222 (1714). On the basis of this act the Court, in the Roth case, concluded: "Thus, profanity and obscenity were related offenses." 354 U.S. 476 at 483 (1957). One will have to concede the validity of this conclusion. The attitude which excluded blasphemy from free speech guarantees would deal similarly with obscenity when that offense developed.

¹²⁷ 354 U.S. 476 at 482, n. 10 (1957).

¹²⁸ C. I, §15. The Court referred to the declaration of rights in the Vermont constitution of 1777, c. I, §14, which did not contain this restricting identification.

¹²⁹ Art. IX, §7. The Delaware constitution of 1792 contained a similar provision. Art. I, §5.

Again, in the case of Pennsylvania, the Court referred to the declaration of rights in an earlier constitution, that of 1776, art. 12, which again was more broadly drawn.

science thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."¹³⁰ The Maryland declaration of rights of 1776 had this exception: ". . . unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality. . . ."¹³¹ By way of contrast the First Amendment provided without qualification: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

In the fourth place the states did not always observe their own constitutional provisions. As Madison pointed out when he submitted his proposed amendments to the first Congress in June 1789: ". . . there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated. . . ."¹³²

However, the main difficulty with the Court's action in sustaining the validity of a federal obscenity statute lies in the fact that the framers of the First Amendment intended that whatever governmental power existed over utterances was to reside in the states rather than the federal government. The proceedings of the first Congress on the first ten amendments show this; the opposition to the Sedition Act of 1798 stressed it; and the defeat of President Jackson's proposal for barring "incendiary publications" from the mails reaffirmed the point.

One of Madison's proposed amendments provided: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."¹³³ This proposed amendment came from Madison alone. No state convention asked for it. In offering it he explained: ". . . it is proper that every Government should be disarmed of powers which trench upon those particular rights. I know, in some of the State constitutions, the power of the Government is controlled by such a declaration; but others are not. I cannot see any reason against

¹³⁰ Art. VIII, §1.

¹³¹ Art. XXXIII. Of the remaining five there were two whose constitutions provided that freedom of the press was to remain inviolate. GA. CONST., art. LXI (1777), art. IV, §3 (1789); N.H. CONST., art. I, §22 (1784). The remaining three provided that the liberty of the press was not to be restrained. MASS. CONST., Declaration of Rights, art. XVI (1780); N.C. CONST. Declaration of Rights, art. XV (1776); VA. CONST., Declaration of Rights, §12 (1776).

¹³² 1 ANNALS OF CONG., Gales comp., 439 (1834).

¹³³ Id. at 435.

obtaining even a double security on those points; and nothing can give a more sincere proof of the attachment of those who oppose this constitution to these great and important rights than to see them join in obtaining the security I have now proposed; because it must be admitted, on all hands, that the State Governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against."¹³⁴

The House sent Madison's proposals to a special committee of which he was one of the members. The special committee revised this proposal to read: "No State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases."¹³⁵

Representative Thomas Tucker of South Carolina objected to it: "This is offered, I presume, as an amendment to the constitution of the United States, but it goes only to the alterations of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words."

But: "MR. MADISON conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people."¹³⁶

Madison won out in the House. After a further minor revision this proposal went to the Senate in this form: "No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."¹³⁷ But in the Senate the position which Tucker took in the House won out, and this proposal was rejected.

The national debate on the Sedition Act of 1798 underlined the point that the states had a certain amount of power

¹³⁴ Id. at 441.

¹³⁵ See id. at 755.

¹³⁶ Ibid.

¹³⁷ 5 DOCUMENTARY HISTORY OF THE CONSTITUTION 193, 197 (Dept. of State 1905).

over utterances which was denied the federal government. In the debates in Congress Nicholas of Virginia, Nathaniel Macon of North Carolina and Edward Livingston of New York all drew a distinction between state and federal power. Nicholas: ". . . He had heard it said that all the States take cognizance of offenses of this sort. But does that give the power to the General Government? Because the States declare certain things offences, have the General Government power over the like offences? If so, it would have a concurrent power with all the State Governments, which, he believed, would be a novel idea. Indeed, he was utterly at a loss to find any ground upon which to found a law of this kind. He was confident there was none."¹³⁸

Macon: ". . . He thought this subject of the liberty of the press was sacred, and ought to be left where the Constitution had left it. The States have complete power on the subject, and when Congress legislates, it ought to have confidence in the States, as the States ought also to have confidence in Congress, or our Government is gone. . . ."¹³⁹

Livingston: ". . . Every man's character is protected by law, and every man who shall publish a libel on any part of the Government, is liable to punishment. Not, said Mr. L., by laws which we ourselves have made, but by laws passed by the several States. And is not this most proper? . . ."¹⁴⁰

Madison took the same position in his *Address* and subsequent *Report* on the Virginia Resolutions of 1798. In his *Address* he stated: ". . . But the laws for the correction of calumny were not defective. Every libellous writing or expression might receive its punishment in the State courts. . . ."¹⁴¹ In his *Report* he added that labelled federal officials had to seek redress "under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties."¹⁴²

A few months before his second inauguration Jefferson wrote to Mrs. John (Abigail) Adams, the wife of his political opponent in the presidential campaign of 1800:

" . . . Nor does the opinion of the unconstitutionality, & consequent nullity of that law [Sedition Act of 1798], re-

¹³⁸ ANNALS OF CONG. 2142, 5th Cong., 2d sess. (1798).

¹³⁹ Id. at 2152.

¹⁴⁰ Id. at 2153.

¹⁴¹ 6 THE WRITINGS OF JAMES MADISON, Hunt ed., 334 (1906).

¹⁴² Id. at 393; 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 2d ed., 573 (1881).

move all restraint from the overwhelming torrent of slander, which is confounding all vice and virtue, all truth and falsehood, in the U.S. The power to do that is fully possessed by the several State Legislatures. It was reserved to them, & was denied to the General Government, by the Constitution, according to our construction of it. While we deny that Congress have a right to control the freedom of the press, we have ever asserted, the right of the States, and their exclusive right, to do so."¹⁴³

In his second inaugural he took occasion to restate his position: "During this course of administration and in order to disturb it, the artillery of the press has been levelled against us, charged with whatsoever its licentiousness could devise or dare. These abuses of an institution so important to freedom and science, are deeply to be regretted, inasmuch as they tend to lessen its usefulness, and to sap its safety; they might, indeed, have been corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation; but public duties more urgent press on the time of public servants, and the offenders have therefore been left to find their punishment in the public indignation."¹⁴⁴

The defeat of President Jackson's proposal demonstrated once again that the only power that existed over utterances, as such, resided in the states. In the words of Clay, "The States alone had the power, and their power was ample for the purpose."¹⁴⁵

There is an additional consideration: the framers of the First Amendment, in order to make doubly certain that the federal government did not have or exercise any powers other than those which the Constitution either expressly or by implication delegated to it, provided in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Madison had originally proposed: "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States re-

¹⁴³ Letter of Sept. 11, 1804. 10 THE WORKS OF THOMAS JEFFERSON, Fed. ed. by Ford, 89-90 n. (1905). A decade and a half earlier he had written Madison from Paris: ". . . A declaration that the federal government will never restrain the presses from printing any thing they please, will not take away the liability of the printers for false facts printed. . . ." 13 THE PAPERS OF THOMAS JEFFERSON, Boyd ed., 440, 442 (1956).

¹⁴⁴ 10 THE WORKS OF THOMAS JEFFERSON, Fed. ed. by Ford, 133-134 (1905).

¹⁴⁵ CONG. GLOBE APP., 24th Cong., 1st sess., 439 (1836).

spectively."¹⁴⁶ As revised this became the Tenth Amendment. An effort was twice made, once by Tucker¹⁴⁷ and again by Gerry,¹⁴⁸ to carry the idea embodied in this amendment still further by inserting the word "expressly" before the word "delegated." This was the way it had been in the Articles of Confederation.¹⁴⁹ Madison opposed Tucker's proposal "because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae."¹⁵⁰ Madison's view prevailed. However, in the area covered by the First Amendment the Tenth Amendment meant that whatever power there was over utterances, as such, resided, not in the federal government, but in the states or in the people. Nevertheless the law as enunciated by the Supreme Court developed otherwise.

[To be concluded.]

¹⁴⁶ 1 ANNALS OF CONG., Gales comp., 436 (1834).

¹⁴⁷ Id. at 761.

¹⁴⁸ Id. at 767.

¹⁴⁹ Art. II, quoted in note 40 supra.

¹⁵⁰ 1 ANNALS OF CONG., Gales comp., 761 (1834).