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THE CENSORSHIP OF RADICAL MATERIALS BY THE POST OFFICE

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The mails are the arteries of current intelligence. In its function of transmitting newspapers, the postal service is an intellectual link between each individual and the sources of information and critical opinion. The powerful influence of the press in moulding public opinion and in education has so often been recognized as to demand no repetition here. It is sufficient to observe only that so efficient a means of reaching each individual with such new and vital matter from so many different sources has never been known before the development of the modern newspaper. It follows therefore that the Federal Government, with its wide power over the mails, holds the pulse of the nation in its control.

"The democratic genie is out of the bottle; it cannot be put back." The will of the people, theoretically, is sovereign. The shaping of that will is greatly in the hands of the Federal Government by means of its control of the mails, for it can dictate what political intelligence may be disseminated and what may not. In effect, the dominion is an intellectual one. Assuming that the majority of the people have signified their will through Congress, and that the legislative body has responded by passing certain laws concerning the transmission of matter through the mails, it follows from what has been said concerning current intelligence and the shaping of public opinion, that the opinions of the majority may be forced upon the minority. The stimulus to thought and action which is furnished any nation by a dissenting minority is of the highest importance. Any

power which the majority may have for the restriction of dissent is an exceedingly dangerous weapon and deserves careful examination. The undeniable fact that the assumption of this power has been progressive during the last half-century, so that now it has reached proportions which were scarcely in the minds of the framers of the Constitution, indicates a tendency in the growth of the law which deserves careful consideration.

A study of the language of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech, or of the press," indicates, it would seem, a desire to change the order of a day when the interests of the sovereign power were not identical with those of the governed,[1] to one more in harmony with the ideal of a democratic government. In spirit, if not in so many words, the Amendment expresses an abhorrence of censorship other than that competition which all truth must undergo in the market-place. Judging by the extensive, "the practically plenary power of Congress over the mails,"[2] the pendulum of opinion seems to have completed its arc. The laws that permit of such a powerful Censor are worth consideration, if not to question their wisdom, then at least to contemplate their present extent and to attempt to prophesy their full stature in the future.

I.

The Supreme Court has upheld the power of the Postmaster-General to attack radical periodicals in the following two manners: he may forbid the use of the mails for the issue of the publication which contains the objectionable material; or—and this second power is far more drastic—he may revoke the second-class mailing privileges for all issues of the publication, future as well as present. These two powers, obviously, are distinct: one of them is a complete denial of the use of a Federal agency; the other is simply an increase in price for the use of that agency. They will be discussed separately.

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[1] Hobbes, LEVIATHAN, c. 18. Beard, AMERICAN GOVERNMENT AND POLITICS, makes reference (page 19) to a statute "in the days of Merry King Hal for abolishing diversity of opinion"; 26 Henry VIII Cap. 13 (1535) is apparently a typical statute, making it treason to express an opinion, among other things, which would deprive the King of his dignity.

[2] Mr. Justice Clarke in Milwaukee Pub. Co. v. Burleson (1921) 255 U. S. 407.

The power to exclude radical matter from the mails depends on an Act of Congress, popularly known as the Espionage Act.[3] One section declares,

> Every letter, writing, circular, post-card, print, engraving, newspaper, pamphlet, book or other publication, matter or thing, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States

to be nonmailable. Another section[4] declares any writing in violation of Title 50, Sections 31 to 42 and 191 to 194 (as well as some others not pertinent here) likewise to be nonmailable. The essence of these latter sections is to make unlawful the disclosure of information concerning national defense, and, in time of war, either to make false reports with intent to interfere with the military, or wilfully to cause insubordination, disloyalty, mutiny, refusal of duty, or wilfully to obstruct recruiting or enlistment services to the injury of the service of the United States. An interpretation of these provisions as a whole indicates that there are two large classes of nonmailable matter. In one class, the quality of being nonmailable is dependent solely upon the contents of the material; this is the class provided for by Section 344 and that portion of Section 343 which refers to a disclosure of national defense. Such information, it might be said, is inherently treasonable in character, and it is therefore made nonmailable regardless of any other facts. In the second class, the quality of being nonmailable is dependent upon the content in view of an external condition, that is, whether the nation is or is not at war. The information in this latter class is considered, apparently, to be of such a character that it is dangerous only when the nation is at war. These distinctions are important, for they indicate the greater power exercised in time of war than when the nation is at peace. They indicate that at present, when much of Section 343 has little application, Congress has signified its permission of a greater range of expression and a freer exercise of that critical faculty, which is the theoretical star of democracy. These regulations indicate further, perhaps, that the people have recognized (as did the

[3] 40 Stat. 583 (1917), 18 U. S. C. secs. 343, 344. The Espionage Act was passed June 15, 1917.

[4] 18 U. S. C. sec. 344.

ancient Romans) the inadequacy of the democratic ideal during perilous times, and have yielded to a greater centralization of control.

In the feverish days of war following the passage of this Act, the rational interpretation of it by the Courts was an extremely difficult matter. It is probably fair to say that the judicial business of applying the Act to the cases as they arose was no cool weighing of language, no use of the prophetic vision which should characterize so important and honored a tribunal as the Federal judiciary. One of the first problems to be solved was: what statements are condemned? Language is a subtle device, and is so yielding that many readers may sincerely arrive at different conclusions from the same group of words. Recognizing the extreme flexibility of the medium of language what statements did Congress wish to declare nonmailable?

When *Masses Publication Co. v. Patten*[5] reached the courts, a month after the passage of the Espionage Act, the problem was attacked by Judge Hand with a degree of clarity which was most unique in those hectic days. This was a suit for an injunction by the Publishing Company against Patten, Postmaster of the City of New York. The July issue of a periodical had been denied the use of the mails because it was alleged to contain nonmailable matter; and the Company sought to restrain the Postmaster from refusing to accept the magazine for the mails. Judge Hand granted the writ. There were presented a number of issues which are not our immediate concern, but on the extent to which language might go in advocating resistance to the draft laws, the Court reached the following conclusion:

> If one stops short of urging upon others that it is their duty to resist the law, one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.

Such an interpretation leaves the door open for wholesome public criticism. It permits the free discussion of the wisdom or oppression of a law. It permits the governed to examine, to

[5] (D. C. S. D. N. Y. 1917) 244 F. 535.

question, and to conclude, if such be the case, that a law is unwise. It permits even a condemnation of a law. But at that point it stops. It forbids the speaker to advise or urge a violation of it. Judge Hand undoubtedly was aware of the implications of such a conclusion. He must have been aware of the fact that he was wisely permitting that intellectual ferment which precedes the repeal of a bad law. To have concluded otherwise would be, in effect, to say, "Yes, you may think and question, so long as you confine your questioning to the unspoken word. Once you formulate into communicable ideas your opinions, you must commend, you may only praise." That is the doctrine of stagnation. It is unfortunate that the Appellate Court reversed Judge Hand on this question.

Another problem of the interpretation of language in the disputed matter was discussed by the lower Court. What is a "wilfully false statement"? At what point does an opinion, however violent in its terms and positive in its assertion, become a false statement of fact? It is obvious that previous adjudications of similar questions in connections with fraud and contract would not necessarily be applicable here. Judge Hand attempted to mark the line of cleavage by saying that a wilfully false statement "properly includes only a statement of fact which the utterer knows to be false." Statements of opinion believed to be true by the speaker "fall within the scope of that right to criticize either by temperate reasoning or indecent invective, which is normally the privilege of the individual in a government dependent upon the free expression of opinion as the ultimate source of authority. The argument may be trivial in substance and violent or perverse in manner, but so long as it is confined to abuse of existing policies or laws, it is impossible to class it as a false statement of facts of the kind in question."[6]

Such was the liberal attitude of Judge Hand. The Espionage

[6] In United States v. Baker (D. C. D. Md. 1917) 247 F. 124, decided July 11, 1917, when the Espionage Act was enforced, but before the Masses case was heard, the following language was used in connection with a conspiracy to induce a violation of the Draft Law: "Every man has a perfect right to any opinion he may see fit to form about any proposed law, or about any law that is on the statute books . . . he may make any argument that commends itself to his reason and judgment against the policy of any particular law . . . And he is not answerable for the wisdom of his arguments. . ."

Act was in the nature of a penal statute. The Judge construed it strictly and left unimpeded as much of the right of free speech as was possible.[7]

The Government took an appeal from the lower Court's decision, and in November of the same year, the Circuit Court of Appeals[8] rendered a decision which reversed the decree of the District Court, and changed the construction of the Espionage Act with reference to nonmailable matter.

Whether a statement actually urged a violation of the law or was merely critical; whether the matter was opinion or wilfully false statement; these questions seem to have been considered not relevant to a correct interpretation of the Act. The question was, the Court said, what was the effect of the language used?

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[7] The following are portions of the more objectionable matters. In an editorial, entitled, "A Question," this was said: "I would like to know how many men and women there are in America who admire self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these men of genuine courage as a 'Round-up of Slackers'? Are there none to whom this picture of the American republic adopting toward its citizens the attitude of a rider toward cattle is appalling? I recall the essays of Emerson, the poems of Walt Whitman, which sounded a call never heard before in the world's literature, for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man. . . I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the state, because they will not do what they do not believe in doing. Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of content in the daily press, and induce the American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new to the world."

A poem, entitled "Tribute," referred to two who had just been convicted for inducing persons not to register under the Conscription Act. It read, in part:

"Emma Goldman and Alexander Berkman
Are in prison tonight,
But they have made themselves elemental forces.
Like the water that climbs down rocks,
Like the wind in the leaves,
Like the gentle night that holds us,
They are working on our destinies,
They are forging the love of nations."

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

> If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavour to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may wilfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistments is a duty or in one's interest, seems to us too plain for controversy. . . "Oratio obliqua has always been preferred by rhetoricians to oratio recta."[9]

The distinction between such an interpretation and that of the District Court is that while the latter examined, grammatically and logically, the material itself to determine whether it was mailable, the Court of Appeals examined the language to determine its probable effect on an audience.[10] This was a step toward the "rule of reason" later enunciated by the Supreme Court, but because it was a half-step, a faulty approach to the wisdom of the Supreme Court rule, it left the law in a dangerous state. For the rules of grammar and the syllogism more nearly approach mathematical precision; they cannot be bent and twisted by a jury, incensed by patriotic speeches, as easily

[9] The Court refers to the case of Regina v. Sharpe (1848) 3 Cox C. C. 288, as a basis for its decision that language short of advice is nevertheless a crime if its effect is to incite the audience to a violation of the law. But in that case the report does not indicate what was the language of the defendant. And it is at least as fair, from a reading of the case, to conclude that actual exhortation was used by the speaker. Furthermore, since the great and obvious restriction on the interpretation of the Espionage Act is the First Amendment to the Constitution, an English case is doubtful authority, at best.

[10] The case of Jeffersonian Pub. Co. v. West (D. C. S. D. Ga. 1917) 245 F. 585, was decided in August, 1917, without any reference to the Masses case, previously adjudicated in the District Court. (Nor does this decision refer to any other case for that matter.) From the inflamed language of the opinion, rising at times to heights of poetic confusion, it is difficult to see whether any analysis, such as concerned the judges in the Masses case, was attempted. However, the general tendency of the decision seems to be that the effect of the language is the sole criterion of its being nonmailable. The publisher, as in the Masses case, asked for an injunction. The Court denied the writ on the questionable ground that the plaintiff, on account of the nature of the matter published, did not come into court with clean hands. In Gitlow v. Kiely (D. C. S. D. N. Y. 1930) 44 F. (2d) 227, the question was thus presented by counsel and accepted by the Court as presenting the issue: "Can any reasonable man hold that any individual or group of individuals are urged to forcible action by reading of this paper?"

as any unformulated rule which might determine the probable effect of the language on an audience.

The language of the Court, though not expressly considering the question of intent, indicates that the Espionage Act covers only wilful utterances, deliberately planned. It is significant, though certainly not conclusive, that in an action for conspiracy to induce a violation of the Selective Draft Law,[11] a directed verdict was ordered by the Court because the government failed to show beyond a reasonable doubt that the defendants intended to persuade men not to register. Intent, undoubtedly, is a necessary element in a criminal prosecution for a violation of the Espionage Act.[12] Because Section 33, Title 50, makes intent a necessary element of its violation; and because Section 343, Title 18, makes nonmailable such matter as is in violation of the former Section, the logical inference could be that to be nonmailable under this Section, the matter must have been written with the unlawful intention. However, the rules which govern the mailing of obscene matters are otherwise. For, in regard to criminal liability, though knowledge of the nature of the article mailed is a necessary element of the crime,[13] the intent or motive of the defendant is irrelevant.[14] And in determining whether a disputed article is within the prohibition of the statutes forbidding the mailing of obscene material, no reference is necessary to the intention of the person who mails it. Only the effect of the matter need be considered.[15] Whether a court would hold that matter, to be nonmailable under the Espionage Act, must have been written with that intention which is necessary for criminal liability in an academic question, no decisions having been found on that point. It is submitted, however, that judging by the analogy of the cases on obscenity and by the practical

[11] United States v. Baker, above.

[12] United States v. Kraft (C. C. A. 3, 1918) 249 F. 919; but see Abrams v. United States (1919) 250 U. S. 616, 624, for discussion of intent in dissenting opinion by Holmes and Brandeis, JJ.

[13] Price v. United States (1897) 165 U. S. 311; Rosen v. United States (1896) 161 U. S. 29; Konda v. United States (C. C. A. 7, 1908) 166 F. 91.

[14] Knowles v. United States (C. C. A. 8, 1909) 170 F. 409; United States v. Slenker (D. C. W. D. Va. 1887) 32 F. 691.

[15] Lynch v. United States (C. C. A. 7, 1922) 285 F. 162 (pictures of a nude woman); Burton v. United States (C. C. A. 8, 1906) 142 F. 57; United States v. Smith (D. C. E. D. Wis. 1891) 45 F. 476; United States v. Chesman (C. C. E. D. Mo. 1881) 19 F. 497.

aspect of the situation, the criminal intent of the writer ought not be considered in determining the nonmailable quality of disputed matter, though the strict logic of the language of the statutes seems to indicate otherwise.

In March, 1919, the Supreme Court first expressed itself on the Espionage Act. The case of *Schenk v. United States*[16] was a criminal prosecution for a conspiracy to violate the Act. The defendants contended that the language of the circular in question was protected by the First Amendment of the Constitution. It, therefore, became the duty of the Court to state how far the privilege of free speech was protected by the Constitution, and beyond what point it was within the power of Congress to enforce criminal liability for verbal expression. Mr. Justice Holmes delivered the opinion of a unanimous Court; and, on this issue, he said,

> The question in every case is whether the words are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

These sentences contain the boundaries of free speech, as marked out by the Supreme Court. Within these limits—and they are tolerably wide—anything may be said. Beyond that, is the Espionage Act and the power of Congress to provide punishment.

These limitations are complex. They include:

1. A consideration of the words themselves, in view of
2. An extraneous situation of such a nature, that the words will create a danger to bring about
3. The substantive evils which Congress has a right to prevent.[17]

Since the right to perpetual existence is inherent in a sovereignty, the Espionage Act, having for its purpose the success of the United States in the war, falls within the third limitation. A pamphlet urging the overthrow of the present system of edu-

[16] (1919) 249 U. S. 47.

[17] In Schaefer v. United States (1920) 251 U. S. 467, the questions were in fact, held for the jury. Justices Brandeis and Holmes dissented on this issue, and declared that these questions were for the Judge to decide before submitting the facts of the writing to the jury.

cation for example, is beyond that limitation, because education is not the proper business of Congress. Whether the act alleged to be criminal falls within the first two limitations depends in each case upon the words themselves and upon the existing political situation.

It must be observed that this "rule of reason" (so denominated in a later case by Mr. Justice Brandeis) was declared by the Court in a criminal prosecution. Whether it would be applied in a determination of the mailable quality of a writing can be only a matter of inference. Certain it is that the limitation would be at least as great; for the tendency of the courts is to permit a greater freedom of action before delivering a verdict in a criminal proceeding than in, for example, a suit for money damages. Whether the individual is punished criminally or not is an academic question, the effect in either case being equally to deny mail privileges. In either case the question is whether there has been a denial of a civil right or privilege, in itself an unusual punishment; in either case a fundamental constitutional right is to be determined. To allow a wide degree of liberal interpretation, it is submitted, would have ample legal justification.

One more touchstone for the analysis of language was urged on the Court and rejected. The defendants contended, in the same case, that in the absence of proof of the actual effect of the language, the indictment must fail. The Court held otherwise.[18] If the writing, its tendency, and the intent of the defendants are the same, the success of their venture is immaterial. However, the question of whether a writing is nonmailable must be decided, in most cases, before the disputed matter has had an opportunity to affect its readers. The actual effect of a writing, therefore, can hardly have a bearing in determining what is nonmailable matter, except in the case, to be considered later, where the second class mailing privilege is revoked on the strength of past, as well as present, publications.[19]

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[18] This was the holding in previous cases in the Federal courts. Kitchener v. United States (C. C. A. 4, 1918) 255 F. 301; O'Hare v. United States (C. C. A. 8, 1915) 253 F. 538; *contra*, United States v. Hall (D. C. D. Mont. 1918) 248 F. 150.

[19] The Shenck case was followed in Frohwerk v. United States (1919) 249 U. S. 204; Debs v. United States (1919) 249 U. S. 211; Abrams v. United States, above.

A brief recapitulation indicates that statements, true as well as false, advice, opinion, and exhortation, have all been held to be nonmailable. The question depends in part on the existing political situation and in part on the probable effect of the language used. The intent of the writer that the matter have a seditious effect, as well as the actual effect of the writing, is no concern of the Postmaster. The question is one of the creation of a danger to the existence of those rights which Congress may protect. And, acting as it did, after the legislative body had passed the law, and after former decisions had recognized the power of control in Congress, the Supreme Court reached what was probably as liberal an interpretation as was possible. The wisdom of the action of Congress is a totally different matter, as is likewise the Supreme Court's decision concerning second class mailing privileges. But that decision did not concern the definition of nonmailable matter.

II.

Let us assume, then, that the Postmaster, by a judicious application of the language of the Supreme Court, has decided that the matter in question is in violation of the Espionage Act. The matter, therefore, is "nonmailable"; the publication, or, if it is a newspaper, the issue, may not be sent through the mails; and the person responsible is subject to fine and imprisonment. Such is the obvious meaning of the statutes.

> Whoever shall use or attempt to use the mail or Postal Service of the United States for the transmission of any matter declared by sections 343 and 344 of this title to be nonmailable, shall be fined not more than $5,000 or imprisoned not more than five years, or both.[20]

The exclusion from the mails of the particular matter has most often been the result in these cases.

However, that has not been the only result. The Postmaster has exercised a power, compared to which a casual exclusion is so puny as almost to be negligible. The case of *United States ex rel. Milwaukee Social Democratic Publishing Company v.*

[20] 40 Stat. 231 (1917), 18 U. S. C. sec. 345; compare similar provisions in regard to obscenity, 36 Stat. 339 (1911), 18 U. S. C. sec. 334; lottery, 35 Stat. 1129 (1909), 18 U. S. C. sec. 336.

Burleson[21] is one about which it is difficult to write dispassionately. This case, if the writer may be so bold, is the epitome of contrast between a majority opinion which is difficult to stomach, both for its impolicy and illogic, and an admirable dissenting opinion.

In September of 1917, while the United States was at war, an order was issued by the Postmaster revoking the second class mailing privileges of the relator, a Socialist newspaper. The charge was that articles were appearing in relator's paper which were in violation of the Espionage Act, and which rendered it nonmailable. A hearing was had, and on appeal to the Postmaster-General the order was approved. Thereupon a petition for mandamus was filed, asking that the Postmaster-General be compelled to annul his order and restore to the paper the second class privilege. On demurrer and appeal the case reached the Supreme Court. The rule was discharged, and the order of the Postmaster-General affirmed.

Thus did the Court reason: the privilege of second class mail involves an extremely low postage rate, about one-seventh the actual cost for such carriage; this privilege is based on "the historic policy of encouraging by low rates the dissemination of current intelligence." It is a special favor extended to publishers because it is supposed to contribute to public welfare. Because it is a special privilege, it is only for those publications which carry mailable matter, and that is the assumption upon which the privilege is granted ". . . if the newspaper of the relator had become to be so edited that it contained other than mailable matter, plainly it was the intention of Congress that it should no longer be carried as second class matter, and therefore the order to revoke the permit which had been granted to the relator was proper and justified. . ."

The articles complained of began shortly after the war and made a regular appearance. Their attitude was pacific; they denounced war in all its phases—food control; the "rubber-stamp Congress"; the economic bases of war; et cetera. But the Court held that proof that a paper contains matter of this character indicates an intention to publish nonmailable matter. On the basis of a lack of intention to comply with the laws, the

[21] (1919) 255 U. S. 407.

Postmaster may revoke the second class privilege. In this manner, by narrowly limiting its outlook to such steps in the reasoning process which would lead to an affirmation of the Postmaster's order, the Court reached its decision.

The decision seems open to obvious criticism. Wherein is the logical connection between nonmailable matter and the second class privilege? If the issue contains nonmailable matter, is it not, *and it alone,* excluded from the mails? The decision above seems to indicate that by a payment of the first class rates the matter would become mailable. Such a holding would be absurd. In what manner does a violation of the Espionage Act justify a demand for higher postal rates for all *future* issues of the publication? Did the Court deliberately shut its eyes to the fact that the Postmaster's order shut down the presses of the publication?

All of these questions are considered in the dissenting opinion of Mr. Justice Brandeis, concurred in, in the main, by Mr. Justice Holmes:

> This case presents no legal question peculiar to war. It is important, because what we decide may determine in large measure whether in times of peace our press shall be free.
>
> The denial to a newspaper of entry as second class mail, or the revocation of an entry previously made, does not deny to the paper admission to the mail; nor does it deprive the publisher of any mail facility. It merely deprives him of the very low postal rates, and compels him to pay postage for the same service at the rate called third class, which was, until recently, from eight to fifteen times as high as the second class rate . . . The question presented is: Did Congress confer upon the Postmaster-General authority to deny second class postal rates on that ground [that is, the inclusion of nonmailable matter].
>
> . . . No such authority is granted in terms in the statutes which declare what matter shall be nonmailable. Is there any provision in the postal laws from which the intention of Congress to grant such power may be inferred?

After reviewing the facts in the case,

> It further appears that the Postmaster-General, in the exercise of a supposed discretion, refused to carry at second class mail rates all future issues of the Milwaukee Leader, solely because he believed it systematically violated the Espionage Act in the past. It further appears that the be-

> lief rested partly upon the contents of past issues filed with the return, and partly upon "representations and complaints from sundry good and loyal citizens" whose statements are not incorporated in this record, and which do not appear to have been called to the attention of the publisher of the Milwaukee Leader at the hearing or otherwise. It is this general refusal to accept the paper for transmission at the second class mail rates which is challenged as being without warrant in law.

The first question considered is whether, on the basis of past data, a publication may in the future be excluded from the mails. No such authority is anywhere granted to the Postmaster by Congress. Objectionable matter, deposited in the mails, may be rejected. But that is vastly different from an exclusion extending indefinitely into the future and relating to matter not yet printed.

> If such a power were possessed by the Postmaster-General, he would, in view of the practical finality of his decision, become the universal censor of publications. For a denial of the use of the mails would be for most of them, tantamount to a denial of the right of circulation.

The conclusion, therefore, is that such a future exclusion should be invalid. But the Postmaster did not claim such a power; he asserted that the mails were still open upon the payment of other and higher rates. He contended that the second class mail is a privilege which it is in his discretion to deny.

That contention is the second problem to be considered: has the Postmaster-General the power to deny a publisher the second class rate?

The Mail Classification Act,[22] provides that a newspaper, to be mailable at the second class rates, must be issued at least four times a year, at stated intervals, for the dissemination of information of a public character. Does a violation of the Espionage Act cause a paper to be no longer "regularly issued" or "not published for the dissemination of information of a public character"? Obviously not. The Classification Act is concerned only with rates, not with punishment of crimes, or with the propriety of matter contained. If it is a bad newspaper, the Act

[22] 20 Stat. 359 (1879), 39 U. S. C. sec. 226.

which makes it illegal, and not the Classification Act, provides for the punishment.

The contention that the second class rate is a special privilege may be conceded. But it is not the Postmaster's to bestow. Its beneficiaries are defined by the Classification Act, and Postmaster-General does not have the power to vary its terms.

Again the power of revoking the second class privilege raises a series "of grave constitutional doubts," among which are the deprivation of property, for in effect the presses are rendered mute and useless; denial of due process; administration of unusual punishment (denial of use of the mails); and, chiefly, abridgement of the freedom of the press; for, as was stated in *Ex parte Jackson*,[23] "liberty of circulation is as essential to that freedom [of the press] as liberty of publishing; indeed, without circulation the publication would be of little value." "It is argued," continues Mr. Justice Brandeis, "that although a newspaper is barred from second class mail, liberty of circulation is not denied; because the first and third class mail and also other means of transportation are left open. Constitutional rights should not be frittered away by arguments so technical and unsubstantial."

The remainder of the opinion deals with the impolicy of such an order; the practical creation of an intellectual despot; the imposing of a fine, by increase of postal rates, by an administrative act; and many others.

After such an exhaustive opinion, there is little left to add. The weakness of the logic of the majority opinion is plain. Only one thing more might be shown, and that is the effect of the exercise of this power. It is obvious that if the newspaper in question depends a great deal for its revenue upon circulation outside its own city—and since revenue from advertising is measured by circulation—its presses would be silenced. The payment of higher postal rates for a newspaper, the price of which is measured in pennies, must operate to remove it from the field of competition to make way for other newspapers—those whose editorial policy has the political approval of Congress and the Postal Department. In effect, this most drastic power permits the Postmaster-General to silence a newspaper

[23] (1877) 96 U. S. 722.

and put it out of business, if its editorial policy has led him to believe that it no longer intends to print only mailable matter.

III.

In the statutes regulating nonmailability no distinction is made explicitly between the various classes of mail. Yet there can be no doubt that the sphere intended to be regulated was the vast field of newspapers and periodicals. Still less reason is there to doubt that, whatever the intention of Congress, the field wherein the statutes are most operative is the field of the periodical and newspaper.

It is not beyond the power of Congress to pass a law regulating the content of sealed matter, yet such mail is, for all practical purposes, beyond the reach of the Congressional arm. The same statute which declares certain writings nonmailable[24] recognizes an existing right which impedes the complete operation of that law.

> . . . but no person other than an employee of the Dead Letter office, duly authorized thereto, or other person upon a search warrant authorized by law, shall be authorized to open any letter not addressed to himself.

Until the Fourth Amendment shall have been changed or interpreted away to a point even beyond the shadowy existence of the wartime "freedom of speech," the content of sealed matter is, in practice, untouched by the laws of Congress.

> No law of Congress can place in the hands of the officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment to the Constitution.[25]

The effect, therefore, of the Espionage Act, so far as it concerns nonmailable matter, is to establish a censorship over newspapers and periodicals. Insofar as the Act may be interpreted to exclude condemnation of existing laws and to permit only

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[24] 40 Stat. 230 (1917), 18 U. S. C. sec. 343.

[25] *Ex parte* Jackson (1877) 96 U. S. 722; see also Weeks v. United States (1914) 232 U. S. 385; United States v. Jones (D. C. N. D. N. Y. 1916) 230 F. 262.

laudatory criticism, thus far has Congress drafted the press to wage its wars. Thus far has the majority attempted to exercise its intellectual dominion over any dissenting minority.

IV.

Any discussion of the constitutionality of Congressional control of the mails must be either historical or academic, as this question has been repeatedly answered by the United States Supreme Court. A rapid survey of the tendency of the decisions might indicate the limits, if any, of this power.

The Constitutional grant of control is a meager matter of seven words. In enumerating the powers of Congress, there is included the power "to establish Post Offices and post Roads." In 1789 Congress proceeded to act in accordance with this power.[26] No question arose concerning the existence of this power or its extent until 1836, when President Jackson sought to procure the passage of a law excluding inflammatory slave-literature from the mails. Calhoun, chairman of the committee selected to consider the subject, reported that Congress had not the power to enact such a law because it would abridge the freedom of the press. The bill therefore failed.[27]

Following this, however, Congress assumed the power and passed laws excluding obscene matter[28] and matter pertaining to lotteries.[29] In a prosecution for violation of lottery laws, *Ex parte Jackson*, the question first came to the Supreme Court. The defendant contended that the control granted to Congress by the Constitution was a mechanical one, and referred only to the regulation of physical characteristics of mail matter, such as weight, size, and shape. The Court held the Lottery Act not in conflict with the Constitution and valid.

> The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. What should be mailable has varied at different times, changing with the facility of transportation over postroads. . .

[26] 1 Stat. 70; this provided for the establishment of a temporary post office. Ten years later the system was fully established. 1 Stat. 733-741 (1799).

[27] 12 Debates of Congress 704, 754, 771.

[28] 17 Stat. 598 (1873), 18 U. S. C. sec. 512.

[29] 19 Stat. 90 (1876), 18 U. S. C. secs. 334 and 336.

> The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. . .

Thus far the opinion speaks only of mechanical control.

The Court's attention was called to the discussion in President Jackson's time. And to this the Court replied that Calhoun's opinion, that exclusion founded on content would be unconstitutional, was premised on the assumption that Congress would forbid the transmission of such matter by other means; that therefore an exclusion from the mails would amount to a prevention of circulation and an abridgement of the freedom of the press. This Court, however, disagreed with Calhoun on the basic assumption.

> But we do not think that Congress possesses the power to prevent transportation in other ways as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter in the sense in which those terms were used at the time the Constitution was adopted—consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than that its power of prohibition cannot extend.

Thus, the Court leaps over the difficulty presented by the possibility of the abridging of the freedom of the press. Other avenues of transmission are open, it says. Such reasoning, it seems, is a weak evasion of the issue; for the use of other means of transmission, as was seen in later cases, is, so far as any pragmatic test is valid, merely a device of logic rather than a substantial alternative. The real issue in the interpretation of the Constitutional language was: was this control one of mechanical expedition, or might it be used as a means of enforcing a policy which is attractive to Congress, such as the abolition of the lottery? These, the language of the Court leaves unanswered. In fact, however, the decision amounts to an affirmation of the latter alternative; for the holding of the Court relegates to "other means of transmission" such matter of which Congress does not approve; and, as has been stated, this "other means" is hardly more than a judicial phrase.

The seriousness and the importance of the *Jackson* decision with its implication of a complete right of control must have been very obvious. When the case of *In re Rapier*[30] was heard, counsel in extensive briefs pressed upon the Court the contention that the lottery acts amounted to an abridgement of the press.

> The political censorship of the press perished forever in England nearly a century before the American Revolution; no attribute of political sovereignty can be claimed by any American State which at the time of the Revolution was not vested either in the Crown or in Parliament. . . The "freedom of speech or of the press" is protected by the First Amendment subject to all the restraints which the common law imposed upon that freedom at the time of its adoption.[31]

It is unfortunate that the Justice to whom the writing of the opinion was entrusted died before it was transcribed to paper.[32] A very short opinion was rendered, basing the decision chiefly on the *Jackson* case and following it. Although in the opinion the full power of control is recognized to be in Congress, one limitation is apparently imposed—the "legitimate end."

> It is insisted . . . that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true the mail facilities are not required to be furnished for every purpose.

In this paragraph, the Court intimates a limit to the extent of control which might be exercised by Congress. The principal issue in the case, however, was answered by the last quoted sentence, which, it is submitted, merely begs the question and does not give any valid reason. Certainly, it is true that the mails need not be furnished for every conceivable purpose, but whether it must be furnished for the transmission of all infor-

[30] (1892) 143 U. S. 110.

[31] Brief of counsel for petitioner.

[32] The case was heard November 16 and 17, 1891. Justice Bradley died January 22, 1892. Justice Fuller delivered the opinion of the Court.

mation, within the mechanical limitations, that is the question. That the Court answers merely by a restatement of it, both in the above form and later on by saying that Congress may withhold the use of a Federal agency for the purpose of the dissemination of demoralizing matter. Finally, the Court repeated the basis for the *Jackson* decision: other means of transmission.

In *Public Clearing House v. Coyne*,[33] Mr. Justice Brown considered the question at greater length and arrived at the conclusion that the postal system is not an indispensable adjunct to civil government, as is the protection of life, liberty, or property, or the defense of the nation. But it is a public function assumed by Congress and paid for by those using its facilities; it is presumed to return a revenue, and it operates as a popular and efficient method of taxation. Therefore, "the legislative body, in thus establishing a postal service, may annex such conditions to it as it chooses."

It is submitted that the fallacy of such an argument lies in its failure to consider the fact that the postal service is a monopoly; that its function is in every significant aspect that of a public utility;[34] that therefore its controlling body, Congress, should not have the authority "to annex such conditions as it chooses."

The decision follows the lead suggested by the *Rapier* case and speaks of the right in Congress to refuse Federal facilities for the transmission "among its citizens of matter of a character calculated to debauch the public morale," and apparently settles any doubt as to the fact of control by Congress.[35]

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[33] (1904) 194 U. S. 497. This was a bill in equity by the plaintiff against the Postmaster of the City of Chicago, praying for an injunction to restrain him from acting in accord with a fraud order.

[34] 20 Stat. 356 (1879); 35 Stat. 1124 (1909), 18 U. S. C. secs. 304-309 (creating a monopoly and punishing any competitive attempts); United States v. Bromley (1851) 12 How. 88; United States v. Gray (D. C. D. Mass. 1840) Fed. Cas. 15,253; United States v. Adams (D. C. S. D. N. Y. 1843) Fed. Cas. 14,421.

[35] Other cases extending the control before the Espionage Act were Warren v. United States (C. C. A. 8, 1910) 183 F. 718; Lewis Pub. Co. v. Morgan (1913) 229 U. S. 288.

A more nearly logical basis for the Court's holding is to be found in the Attorney General's brief, where he argues that the Congressional power over the mails, granted in the same paragraph with the power to coin money, should be analogous in its scope with the power vested in the comptroller of the currency by the National Bank Act. Kennedy v. Gibson

Lotteries, birth-control literature, obscene material—these had already felt the Congressional arm. Political dissenters were yet untouched. In 1908, President Roosevelt sent a letter to the Senate together with an opinion by the Attorney General, asking for the consideration of a law to prohibit the transmission through the mail of radical material. The opinion stated that the transmission of such matter was not then unlawful, there being no Federal common law. But there was nothing to prevent Congress from passing a law to make it criminal.[36] For some reason the bill failed. But the opinion of the Attorney General was, as it was proved in later cases, correct. The Espionage Act of June 15, 1917 was upheld. In the *Schenk* case and others following it, the Court recognized the principles enunciated in previous decisions. There was no room for escape except by a reversal of them. These principles, it seems, were accepted without question, and are most often left practically without question.

The fact that the power of regulation is in Congress, therefore, is inescapable, as a matter of history. The Courts have declared it to be. Any change must come from the legislative body, and it is extremely unlikely that that body will deprive itself of its power. A change in the document which limits the power of Congress is well nigh impossible. The power is there. There remains only to be considered: what are its limitations, if any?

It must be remembered that no precise declaration of the extent of this power is yet forthcoming. Dicta in cases and discussions by students are indicative, more nearly, of what the limitation should be; at best, they are indication of what they might be, when they are later announced. There is, therefore, an inevitable overlapping of the moral-imperative, *ought,* with dispassionate prophecy.[37] With such qualification and reservation must the discussion be resumed.

(1869) 8 Wall. 498; Casey v. Galli (1876) 94 U. S. 673; United States v. Knox (1879) 102 U. S. 422; Bushnell v. Leland (1897) 164 U. S. 684. The Court, however, reached its decision without a mention of this point.

[36] 32 *Sen. Doc.* No. 426; Chas. J. Bonaparte was the Attorney General. The President was concerned over an Italian newspaper, "La Sociale," which was anarchistic in sentiment, and urged violent action, such as seizing the police stations and wholesale killings by arms.

[37] See, for example, T. Schroeder, *The Constitution and Obscenity Postal*

The Supreme Court early recognized the probability of conflict between Congressional control of the mails and certain fundamental rights guaranteed by the Constitution.[38] The right of privacy of sealed mail has already been discussed. It is probably a correct statement of the law today to say that that right of secrecy of first class mail is superior to the power of Congress over the postal service. And it is unnecessary to expatiate on the extent of that reservation beyond a mention of the fact that it leaves free most private communications. Our attention, therefore, is directed to second class mail—newspapers and periodicals.

The one great limitation on Congressional control, besides the Fourth Amendment, considered above, is the freedom of the press. One of the earliest significant cases to reach the Supreme Court was *Patterson v. Colorado*.[39] The defendant had published a cartoon, with intent to embarrass the State Court in its functions, and was committed for contempt. An appeal based on the right of free speech and criticism was taken; the United States Supreme Court affirmed the judgment of the State Court. The decision stated that the object of the First Amendment was "to prevent all such previous restraints upon publication as had been practiced by other governments"; and it was not intended to prevent "the subsequent punishment of such as may be deemed contrary to public welfare." It is significant to note that two Justices dissented on the ground that the decision was contrary to the First Amendment. The effect of the opinion was to announce a positive limitation upon the right of publication. It was no longer possible to vindicate printed matter merely by pointing to the First Amendment. The opinion, however, is a little difficult to understand. It professes to permit publication, *subject to punishment*. The publisher, in other

Laws (1907) 69 ALBANY L. J., 334, where it is urged that the grant of power over the postal service must be interpreted to be that power which the Colonies exercised over the mails at the time the grant was made, as well as other meritorious contentions which do not deny Congressional power but seek to limit it materially. Unfortunately, as later laws and decisions proved, the writer's prophecies missed widely.

[38] *Ex parte* Jackson, above; Publishing Co. v. Coyne, above.

[39] (1907) 205 U. S. 454. Decision based on Com. v. Blanding (1825) 3 Pick. 304; Respublica v. Oswald (Pa. 1788) 1 Dall. 319. Followed in United States v. Toledo Newspaper Co. (D. C. N. D. Ohio 1915) 220 F. 458.

words, has a right to break the laws and submit to the subsequent fine or imprisonment. The distinction made, it seems, is one as to the time when the governmental pressure shall be brought to bear upon the writer or publisher. Previously, implies the opinion of the Court, the utterance was strangled before it was heard. Now the speaker is punished afterward. Just what advantage it may be to the publisher to be impaled on the latter horn, as contrasted with the former, is difficult to understand. But, however that may be, the freedom of the press received a severe blow which made more nearly inevitable the later decisions in regard to the postal service.

Once the unimpeded right of expression was declared to be subject to legislative control, the foundation was laid for great abridgement—legal fiction to the contrary notwithstanding. The point at which the postal service is concerned in the life of a newspaper is in its circulation. It is significant to note that the earlier cases have declared that a denial of the use of the mails is not an interference with circulation; the necessary implication being that if it were, such a denial would be unconstitutional.[40] In the later cases, especially clearly in the dissenting opinion of the *Milwaukee Pub. Co. v. Burleson* case, it is made obvious beyond question that the denial of the use of the mails is an abridgement of the freedom of the press, but that it is justified.[41] By these two methods, aparently directly contrary, the validity of exclusion legislation has been upheld.[42] It must be observed that the later cases indicate a healthier attitude, for they recognize that the exclusion does amount to an abridgement and must therefore be justified. There is no evasive verbalism, no fiction based on phrases. It *is* an abridgement of the freedom

[40] *Ex parte* Jackson, *In re* Rapier; Masses Publication Co. v. Patten; Gitlow v. Kiely, above.

[41] Publishing Co. v. Coyne, above, and criminal cases under Espionage Act discussed above. The power of exclusion was declared to be in Congress with the limitations then announced.

[42] The following are various instances where the power of exclusion was applied: Tyomies Pub. Co. v. United States (C. C. A. 6, 1914) 211 F. 385 (obscenity); United States v. Journal Co. (D. C. E. D. Va. 1912) 197 F. 415 (obscenity); Branaman v. Harris (C. C. W. D. Mo. 1911) 189 F. 461 (fraud); Lewis Pub. Co. v. Wyman (C. C. E. D. Mo. 1907) 152 F. 787 (failure to comply with registry requirements of the post office); Horner v. United States (1892) 143 U. S. 207; Horner v. United States (1892) 143 U. S. 570; Harmon v. United States (C. C. D. Kan. 1891) 50 F. 921.

of the press, therefore it must have some strong justification—a conclusion which would not be at all necessary if the Court declared that "other means of transmission" were available.

How far, then, may this exclusion be carried? Certain it is that Congress may use this power to further any other of its functions. That was the principle recognized in the definition given by the *Schenck* case—"those rights which Congress has power to protect." For example, there are certain questions which are recognized to be questions of policy and the Courts may declare them to be a concern of Congress—as for example, the army or navy; but a *yes* or *no* attitude on that question is beyond the reach of the Courts and is the province of the legislative body. In other words, it seems fairly certain that Congress would be upheld in drafting the mails as a weapon for its use in the accomplishing of its rightful duties. But what of the lottery and obscenity exclusions? Is morality the province of the federal legislature? Whatever the answer to that question, the Supreme Court has upheld the Congressional assumption of that power.

If there is any limitation discernible at all, it must be one of spirit, rather than of definitive language.

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are Constitutional.[43]

This great principle of interpretation has already found application in cases concerning the postal service. In the *Rapier* case, the Supreme Court intimated that the power could not be arbitrarily exercised. There must be some relation between the means employed and the legitimate end. In the *Schenck* case, the holding was that the control over the postal service could be applied to such matters as are within the power of Congress to protect. But may not this principle be invoked to prevent any further control, such as is manifested by the obscenity and lottery acts? Whether or not these latter acts are wise or beneficial is beside the point; and, for the time, that question must be eschewed in order to prevent a clouding of the real issue: does

[43] McCulloch v. Maryland (1819) 4 Wheat. 316.

Congress have the right to use its exclusion power to further matters which are beyond its scope? This is not a problem of obscenity, lotteries, or radical material; this is a question of permitting a practically unlimited federal control or curbing it. Nor is it exclusively a question of the *wisdom* of permitting federal control, but rather one of stirring an awareness of its existence and probable growth in the future.